THE INDIAN EVIDENCE ACT

VOLUME 2

PART III

PRODUCTION AND EFFECT OF EVIDENCE

CHAPTER VII

OF THE BURDEN OF PROOF

[1]**S. 101. Burden of proof.**—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations

(*a*) *A* desires a court to give judgment that *B* shall be punished for a crime which *A* says *B* has commited.

A must prove that *B* has committed the crime.

(*b*) *A* desires a court to give judgment that he is entitled to certain land in the possession of *B*, by reason of facts which he asserts, and which *B* denies to be true.

A must prove the existence of those facts.

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COMMENTARY

Principle and Scope.—This section is based on the rule, *ie incumbit probatio qui dicit, non qui negat*—the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof. "It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons." [*per* LORD MAUGHAM in *Constantine Line v. I S Corpn*, (1941) 2 All ER 165, 179]. This rule is derived from the Roman law, and is supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative [Hals 3rd Ed Vol 15 para 488].

In determining who alleges the affirmative, the *substance* of the allegation in the pleading should be looked at and not the *form*. In *Soward v. Leggat*, 7 C&P 613 LORD ABINGER, said:—

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1. In Ceylon "CHAPTER IX".

"Looking at these things according to common sense, we should consider what is the substantive facts to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it. In many cases a party, by little difference in the drawing of his pleading, might make it either affirmative or negative, as he pleased. The plaintiff here says, 'You did not repair'; he might have said, 'You let the house become dilapidated.' I shall endeavour by my own view to arrive at the substance of the issue, and I think in the present case that the plaintiff's counsel should begin".

The rule that the burden rests on the person who makes the affirmative allegation is not always a true test. There are many exceptions to the proposition. The burden is also on the person who has a negative assertion to make, *eg* a promisee alleging non-performance of contract. The burden of proof does not depend upon the form of the proposition but the burden of proving a claim or defence is on the party who asserts it. Stephen's statement of the rule in Art 93 is the same as in para 1 of the section with the substitution of "do or do not exist" for "exist". Generally, the party in whom rests the onus of proving any of the issues has the right to begin. (As to this see s 135 *post*). S 102 provides a test regarding the question on whom does the burden of proof lie, *viz* that the burden lies on the person who would fail if no evidence were given on either side. Whenever the law places a burden of proof upon a party a presumption operates against it. Hence, burdens of proof and presumptions have to be considered together. Their function is decisive only in cases where there is paucity of evidence on either side or the evidence given by the two sides is equibalanced. Neither a burden of proof nor a rebuttable presumption can be used for excluding evidence [*Rishikesh v. S*, A 1970 A 51 FB *per* BEG, J].

There are however *exceptions* to the general rule as to the burden of proof (in ss 101 and 102) or rather the burden of adducing evidence: (*1*) When a *rebuttable presumption of law* (*ante* s 4) exists in favour of a party, the onus is on the other side to rebut it. Thus, evidence need not be given in the first instance that there was consideration for a bill of exchange or *hundi* or that a person is a holder in due course, (see s 118 Negotiable Instruments Act). The burden of proving the death of a person is on the person who affirms it (s 107); but if such person proves that he has not been heard of for seven years, the burden of proving that he is alive is on the other side (s 108). The burden of proving that the case of an accused comes within the exceptions in the criminal law is on him (s 105). As to other special cases see ss 109-13. In some cases *presumption of a fact also shifts* the onus on the other side (see s 114). (2) When any fact is especially within the knowledge of any person, the burden of proving it is on him (see s 106). In some cases the burden of proof is cast by statute on particular parties (ss 103, 105).

Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a man who is alive was born requires no proof. The *onus*, is not on the person making the assertion, because it is self-evident that he had been born. But to assert that he had been born on a certain date, if the date is material, requires proof; the *onus* is on the person making the assertion [*Robins v. National Trust & Co. Ltd*, 1927 AC 515 : 101 IC 903]. In a civil action, however, the burden of proof may be varied by agreement of the parties [*Levy v. Assecurazioni Generali*, 1940 AC 791 : 1940, 3 All ER 427].

A Party Asserting the Affirmative Must Prove it.—It has been stated earlier that the ordinary rule is that the burden is upon the person making the affirmative allegation. Onus of proof is not discharged by showing facts consistent with the case of both parties [*Gopinath v. Ajharrul*, A 1927 P 225]. A person who asserts the existence of a fact must prove that such a fact exists [*Chung Jee Kong Construction v. Chiang Wan Tan*, Civil Appeal No 12-02-96-11 dt. 9.10.1996 (Kuching HC)]. Person who alleges a fact must prove it [*Perwira Affin Bank Bhd v. Lorrain Esme Osman*, (1996) 4 Malayan LJ 656 (Kuala Lumpur HC)]. Where

under an Act, certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that liability has been incurred, to prove that the things prescribed by the Act have been actually done [*Ashannullah v. Trilochun*, 13 C 197]. A probate case is not singular as regards the application of the general principles of proof contained in ss 3 and 101 [*per* WOODROFFE J, *Gopessur v. Bissessar*, 16 CWN 265 : 39 C 245]. Where it is admitted that there was a transfer of some kind to the person in possession by the former admitted owner, the burden of proving the nature of the transfer is on the person whose success depends upon the substantiation of the case set up by him [*Kashiboi v. Laduram*, 8 NLR 185 (6 BLR 144 **refd** to)]. Where defendant's original possession was permissive he must prove when and how possessions became adverse [*Triveni v. Swaroopchand*, A 1974 Raj 232; see also *Paramjit Singh v. State of Punjab*, (1998) Cri LJ 2600 (P&H)] here the motive set up by the prosecution was not proved, oral evidence was different from medical version and there being no other legal evidence, the burden of proof was not discharged.

Where the issue was whether the document in question was genuine or sham or bogus, the party who alleged it to be bogus had to prove nothing till the party relying upon the document established its genuineness. *Subhra Mukherjee v. Bharat Coking Coal Ltd.*, AIR 2000 SC 1203.

Proof of Negative.—The general rule of evidence is that, if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove the title [*Poolin Behari v. Watson & Co*, 9 WR 190, 192; *Moshuq v. Hurunnissa*, A 1929 O 204]. "In some of the cases the allegation, negative in form was made by the plaintiff, in others by way of defence; they all illustrate the rule that where a claim or defence rests upon a negative allegation, the one asserting such claim or defence is not relieved of the *onus probandi* by reason of the form of the allegation or the inconvenience of proving a negative. But in such cases a less amount of proof than is usually required may avail. Such evidence as renders the existence of negative probable, may change the burden to the other party" [Jones s 180]. When a negative fact has to be proved, a plaintiff can be expected to do nothing more than to substantiate his allegations *prima facie* [*Krishnaswami v. Secy of State*, A 1943 M 15]. In *Abrath v. N E Ry Co*, 11 QBD 440, 457, BOWEN LJ, said: "Now in an action for malicious prosecution, the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable and probable cause for instituting it. In one sense that is the assertion of a negative, and we have been pressed with the proposition that, when a negative is to be made out, the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of a plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms "negative and affirmative" are, after all, relative, and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative, according to the definition adopted in meaning the duty which is neglected". See *Hem Ch v. Matilal*, 60 C 1253 : 37 CWN 174. In a criminal trial for providing public entertainment without a licence the burden lies on the accused to prove validity of licence. There is no burden on the prosecution to prove that there was no licence [*Tan Khee Wan Iris v. Public Prosecutor*, (1995) 2 Singapore LR 63 (Singapore HC)]. See also *Public Prosecutor v. Kum Chee Cheong*, (1994) 1 Singapore LR 231.

Environment cases.—The onus of proof is on the person who wants to change the *status quo*. This is particularly so in environment cases. It must be shown that there is no risk of harm to environment or human health according to a "reasonable person" test. The result is that if insufficient evidence is presented by him, the presumption should operate in favour of environmental protection. *Andhra Pradesh Pollution Control Board v. M.V. Nayadu*, AIR 1999 SC 812.

General Principles Regulating the Burden of Proof. [See *post* under s 104].

S. 102. On whom burden of proof lies.—The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations

(*a*) *A* sues *B* for land of which *B* is in possession, and which, as *A* asserts, was left to *A* by the will of *C*, *B's* father.

If no evidence were given on either side, *B* would be entitled to retain his possession.

Therefore the burden of proof is on *A*.

(*b*) *A* sues *B* for money due on a bond.

The execution of the bond is admitted, but *B* says that it was obtained by fraud, which *A* denies.

If no evidence were given on either side, *A* would succeed as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on *B*.

SYNOPSIS

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COMMENTARY

Principle and Scope.—The section embodies a test for ascertaining on which side the burden of proof lies. It means that when the burden of proof lies on a party, that party must fail if he does not discharge the burden by giving evidence [*Radhamohon v. Kamaldhari*, A 1936 P 243]. In order to determine on which of two litigants the burden of proof lies, the following test was suggested by ALDERSON B, in *Amos v. Hughes*, 1835, 1 M & R 464, *viz* "*Which party would be successful if no evidence at all were given.*" This test was applied by the learned Baron in subsequent cases [*Belcher v. M'Intosh*, 8 C & P 720; *Ridgway v. Ewbank*, 2 M & R 217; *Geach v. Ingall*, 14 M & W 100]; and it has been adopted by other judges at *nisi prius* [*Osborne v. Thompson*, 2 M & R 254] and frequently recognised by higher tribunals [*Barry v. Butlin*, 2 Moo PCC 484]. As however, the question of the burden of proof may present itself at any moment during a trial, the rule ought in strict accuracy to be expressed, "*which party would be successful if no evidence at all, or no more evidence, as the case may be, were given*" [*Baker v. Batt*, 2 Moo PCC 317, 319; Best s 268].

The best tests for ascertaining on whom the burden of proof lies, are, to consider *first* which party would succeed if no evidence were given on either side; and *secondly*, what would be the effect of striking out of the record the allegation to be proved. The *onus* lies on whichever party would fail, if either of these steps were pursued [*Mills v. Barber*, 1 M & W 427]. For instance, if in an action brought by a landlord against his tenant, the breach of contract assigned be that the premises were *not* kept in repair and this allegation be traversed by the statement of defence, the plaintiff must prove his negative averment [*Soward v. Leggat*, 7 C & P 613; Tay s 365]. A criminal case is a proceeding within s 102 [*Parbhoo v. R*, A 1941 A 402, 408].

The burden rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were adduced by either side. In other words, it rests, before any evidence whatever is given, upon the party who has the burden of proof on the pleadings, *ie* who asserts the affirmative of the issue (see s 101); and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given if no further evidence was adduced by either side [*Abrath.v. N E Rly Co*, 11 QBD 440, 456; *Wakelin v. L & S W Rly Co*, 1 QB 189n]. The rule, in this sense, applies not only to matters which are the subject of express allegation in the pleadings but also to those that relate merely to the admissibility of evidence or to the construction of documents. Thus a party desiring to adduce a hearsay statement [*R v. Thomson*, 2 QB 12 CCR], or secondary evidence of a lost deed [Steph Dig Art 97] must first establish the conditions necessary to its reception, and if a document is ambiguous, the party tendering it has the burden of showing that his interpretation thereof is correct [*Falck v. Williams*, 1900 AC 176, 181; Hals 3rd Ed Vol 15 para 492; Phip 11th Ed p 43]. As to exceptions to the general rule of burden of proof see *ante* under s 101.

The question of *onus* of proof has greater force in an original trial, where the question is which party is to begin. But where the trial has ended, and where the plaintiff has let in evidence on his own behalf the contention that the *onus* was wrongly thrown loses all its force in an appeal. The question of *onus* becomes important and material in appeal only where the evidence is evenly balanced and conflicting; where that is the case that party must fail, on whom the *onus* lay in the first instance [*Bandu Subrao v. Jambu*, 12 Bom LR 801 (v. *post* s 104)]. If a mortgagor alleges that the mortgage was void under the Punjab Alienation of Land Act as mortgagee was not a member of an agricultural tribe, the burden is on the plaintiff to prove that mortgagee was not a Rajput [*Shib Narain v. Badhawa*, 38 PLR 427]. The burden of proof that a statutory provision was not followed is on the party alleging it [*S v. Shiva*, A 1960 P 162; *Lalu Sah v. Sat Narain*, A 1962 P 182].

Burden of Proof and *Onus Probandi*.— The strict meaning of the term *onus probandi*, is this that if no evidence is given by the party on whom the burden is cast, the issue must be found against him [*per* PARKE B, in *Barry v. Butlin*, 2 Moo PCC 480]. The terms "burden of proof" and "*onus probandi*" are sometimes confused. Where issues have been framed and the preliminary examination of the parties has taken place the case rests at a certain point at which if no further evidence is led one party has to lose. On that party is the "*onus probandi*", sometimes called "right to begin". Where, however, all evidence on both sides has been recorded, a second state is reached and this is where the point of view of the judge comes in and it is necessary to find where is the burden of proof. To determine this it is necessary to ascertain with precision upon what proposition of fact or law the parties were at variance [*Mg Pe v. Chettyar Firm*, 145 IC 413 : A 1933 R 211]. Order 18, Rules 1 and 2 provide that the plaintiff has right to begin and shall produce his evidence in support of the issues which he is bound to prove. Thereafter other party shall produce his evidence. The right to begin follows *onus probandi* as provided by Sections 101 to 114. [*Debudutta Pal v. Indumati Pal*, 1996 AIHC 499 (Ori)]. The question of *onus probandi* is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led, for then the party on whom the onus lies to prove a fact must fail. Where, however, evidence has been led by the contesting parties, abstract considerations of onus are out of place and truth or otherwise must always be adjudged on the evidence led by the parties [*Devadattam v. Union*, A 1964 SC 880]. See *post* s 135: "*Right to begin*". Where the evidence is entirely in the hands of the defendant it cannot be decided on an abstract principle of onus of proof [*Small Town &c v. Bhuria*, A 1953 Pu 94].

Meaning of Burden of Proof.—The phrase "*burden of proof*" is not defined in the Act. It has two distinct and frequently confused meanings: (*1*) The burden of proof as a matter of law and pleading—the burden, as it has been called of *establishing a case*. This burden rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings, or their equivalent, and it is settled as a question of law, remaining *unchanged* under any circumstances whatever. This rule is embodied in s 101. (2) The burden of proof as a matter of *adducing evidence*. The burden of proof in this sense is always unstable and may shift constantly, thoughout the trial, according as one scale of evidence or the other preponderates [*Pickup v. Thames Ins Co*, 3 QBD 594, 600; *Wakelin v. L&S W Rly Co.*, 12 App Cas 41, 45: *R v. Stoddart*, 25 TLR 612—Phip 11th Ed p 43 : Hals 3rd Ed Vol 15 para 489; *Radhakrishun v. Jagsahu*, 47 MLJ 329 : 80 IC 791 PC; *Lakshmanna v. Venkateswarlu*, 76 IA 202 : 1949, 2 MLJ 500 : A 1949 PC 278; *Nagayya v. Chenganna*, A 1957 AP 264; *Narayan v. Gopal*, A 1960 SC 100, 105; *Kundan v. Custodian &c*, A 1961 SC 1316; *Rangamannar v. S*, A 1966 AP 121; *Rishikesh v. S*, A 1970 A 51 FB—*per* BEG, J]. The distinction between burden of proof as a matter of law and pleading and as a matter of adducing evidence, is essential [*Nanji & Co v. Jatashankar*, A 1961 SC 1474]. Though the form of issue may cast the burden on the defendant, the form could not affect the burden of proof on the pleadings which is on the plaintiff [*Parukutty v. S*, A 1962 K 93]. The first meaning is called by Wigmore as "Risk of Non-Persuasion" (Wig s 2485).

According to Thayer, the phrase "burden of proof" is used in three ways: "(*i*) to indicate the duty of bringing forward argument or evidence in support of a proposition at the beginning or later; (*ii*) to make that of establishing a proposition as against all counter argument or evidence; (*iii*) an indiscriminate use in which it may mean either or both of the others (Thayer Prel Tr on Ev p 355). An essential distinction between burden of proof and onus of proof is that the burden of proof never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence [*Raghavamma v. Chenchamma*, A 1964 SC 136; see next heading]. As to the meaning of the words "burden of proof" in s 102 and "burden of proving" in s 105, see *Parbhoo v. R*, 1941 All 843 : A 1941 A 402.

Doubts have been expressed though as to "whether it is strictly correct to use the expression burden of proof" within the meaning of the burden of adducing evidence "as there is a risk of it being confused with the formal burden of proof but it is a familiar and convenient usage" [*per* LORD PEARSON in *Henderson v. Jenkins*, (1969) 3 All ER 756, 766 HL]. In a recent case from Ceylon also, LORD DEVLIN giving the Privy Council judgment thought it "confusing" and "misleading" to call the evidential burden "a burden of proof" as it could be "discharged by the production of evidence that falls short of proof." "At any rate in the law of Ceylon, where the mode of proof is clearly spelt out, (it is the same as in India) it is impossible to suppose that there can be more than one kind of burden of proof." He cogently pointed out that proof "can only be as it is dealt with in s 3". [*Jayasena v. R*, A (1970) 1 All ER 219, 222].

The accused was charged with possessing cocaine. In his defence, he claimed that the substance in question was excluded from the prohibition because cocaine in the substance was less than 0.1 per cent. The prosecution relied on the evidence of a forensic scientist, to the effect that the substance found in the defendant's possession 'appeared to contain cocaine of a high purity'. It was held that the onus was on the prosecution not only to prove possession of the controlled drug, but also to exclude

the possibility that the substance fell within the exception. As a matter of common sense, it was obvious that 'high purity' denoted something quite different from a 0.1 per cent concentration. The case highlighted the need for absolute precision in a forensic analyst's report [*R v. Jones (Keith)*, (1997) Times, 24 April (CA). The court considered *R v. Hunt (Richard)*, (1987) 1 All ER 1, HL].

Shifting of Burden.—Burden of proof in the second sense above (*ie* the duty of adducing evidence) is contained in s 102. It lies at first on that party who would be unsuccessful if no evidence at all were given on either side. This being the test, this burden of proof cannot remain constant but must shift as soon as he produces evidence which *prima facie* gives rise to a presumption in his favour. It may again shift back on him if the rebutting evidence produced by his opponent preponderates. This being the position, "the question as to *onus* of proof is only a rule for deciding on whom the obligation rests of going further, if he wishes to win" (Jones s 176). "As the proceedings go on, the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favour" (Steph Art 95, see *post* s 104). "The second kind of burden *does have* this characteristic referred to as a '*shifting*'. It is the same kind of duty for both parties, but it may rest at one time upon one party and at another time upon the other. Moreover, neither party can ascertain absolutely beforehand at what time it will come upon him or cease to be upon him, or by what evidence it will be removed or created, except so far as a presumption has by a rule of law been laid down as determined the effect attached to certain facts" [Wig s 2489].

As a case proceeds the *onus* must shift from time to time. But the judge should not be blind to the facts established before him [*Yellappa v. Tippanna*, 56 IA 13 : 53 B 213 : 33 CWN 238 : 144 IC 13]. In most cases the burden of proof is divided according as each party has one or more of the issues cast on him. The party on whom the burden of proof lies in the first instance, may shift it to the other by proving facts giving rise to a presumption in his favour [*Monmohan v. Mathura*, 7 C 225; *Punjab N Bank v. Dinanath*, A 1944 L 276]. The elementary rule in s 101 is inflexible and must apply to all cases. S 102 makes it clear that the initial *onus* is always on the plaintiff and if he discharges that *onus* and makes out a case which entitles him to relief, the *onus* shifts on to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same [*Basiruddin v. Sahebulla*, 32 CWN 160].

It is not always easy to determine at what particular point the *onus* shifts from the plaintiff to the defendant and then again from the defendant to the plaintiff and then once again from the latter to the former and so on; the more so in contested proceedings as evidence gradually continues to be adduced, but at the conclusion of the trial when the issues come to be judged it has to be seen, whether the initial *onus* which s 101 casts on the plaintiff has been discharged, or not [*Basiruddin v. Shahebulla*, 32 CWN 160]. It would be wholly wrong to allow the burden of proof to be shifted by a redundant averment in the pleading or by an incautious acceptance of an issue framed upon that averment. The court ought to consider whether the burden lies in law [*Ghansamdas v. Gulab*, 50 M 927 : A 1927 M 1054]. The evidence required to shift the burden need not necessarily be direct evidence *ie* oral or documentary evidence or admissions of opposite party; it may comprise circumstantial evidence or presumptions of law or fact [*Kundan v. Custodian &c*, A 1961 SC 1316]. The amount of evidence required to shift the burden of proof depends on the circumstances of each case [*Cassumbhoy v. Ahmedbhoy*, 12 B 280].

The power of a legislature to regulate the allocation of burden of proof in the courts is undisputed. It is open to it to impose the burden of proving one fact upon one party and to shift the onus of subsequently proving another fact upon the other party. It does this by including the fact to be proved by one party in an exception and the fact to be proved by the other party in a proviso—case law ref [*Kishan Chand v. Ram Babu*, A 1965 A 67 FB]. A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leaving evidence. [*Sodhi Transport Co v. State of U.P.*, A 1986 SC 1099, 1106 (1986) 2 SCC 486].

Test of Onus in the Case of "Shifting".—There is an essential distinction between the "burden of proof" as a matter of law and pleading and as a matter of adducing evidence. The burden in the first sense is always constant but the burden in the sense of adducing evidence shifts from time to time having regard to the evidence adduced or the presumption of fact or law raised in favour of one or the other [*Ajit Pd v. Nandini*, A 1975 Or 184]. If the *prima facie* case is not rebutted by cogent evidence and remains unanswered or the answer given does not create serious doubt in the mind of the court, then the burden of proof on the pleadings should be deemed to have been discharged [*Mg Hmoot v. Offl Receiver*, 14 R 704 : A 1937 R 276; see also *Bhola v. Bhagwat*, 13 CPLR 159; *Gangadin v. Bahoram*, A 1937 N 230]. The true test of onus in the case of "shifting" has been thus put by LORD HANWORTH MR:—

> "It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on the one side or the other, and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence." [*Stoney v. Eastbourne R D Council*, (1927) 1 Ch 367, 397]. This test was applied in *Nirmal v. Sant*, 16 P 622 : A 1937 P 562.

[*See notes under s 104 and as to the burden of proof in various cases, see post*].

S. 103. Burden of proof as to particular fact.—The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations

[1](*a*) *A* prosecutes *B* for theft, and wishes the court to believe that *B* admitted the theft to *C*. *A* must prove the admission.

B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it.

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1. *Sic*. in the Act as published in the Gazette of India, 1872. Pt IV, p 1, there is no illustration (*b*).
In Ceylon "(a)" omitted.

COMMENTARY

This section amplifies the general rule in s 101 that the burden of proof lies on the person who asserts the affirmative of the issue. It lays down that if a person wishes the court to believe in the existence of a particular fact, the *onus* of proving that fact is on him, unless the burden of proving it is cast by any law on any particular person. Thus in a case of theft or receiving stolen property, though the main burden of proof is throughout on the prosecution, yet if the accused sets up a case that he innocently purchased the property from the market or a particular person, he must prove it. Under s 44 of the Cr P Code the public are bound to give information of the commission of certain offences and the burden of proving reasonable excuse is by statute cast on the person who fails to give information. Onus of proving lawful excuse has been cast upon the accused by various statutes, *eg* s 25, Theft Act 1968 &c. For a list, see Taylor s 372: Phip 11th Ed para 102. In some civil proceedings also the burden of proof has been shifted by statute (see ss 11(2) & 12, Civil Evidence Act 1968; *Wauchope v. Mordecai*, (1970) 1 All ER 417).

Norton explains the distinction between ss 101 and 103 thus: By s 101 the party has to prove the *whole* of the facts which he alleges, to entitle him to judgment when the burden of the proof is on him. S 103 provides for the proof of some one particular fact. The illustration sufficiently points the meaning. The whole of the facts, however, numerous and complicated, which go to make up the prisoner's guilt, must be proved by the prosecution. If the prisoner wishes to prove a particular fact, his *alibi*, for instance, he must prove it. If the prosecution wishes to prove the case, not by independent oral testimony, but by the isolated fact of the prisoner's admission, or if he wishes to throw that in as an additional fact, he must prove it, (Nort pp 289-90). S 105 is an application of the rule in this section.

In probate cases the burden of proving the testamentary capacity of the testator, and that he was of sound mind, lies upon the party propounding the will [see *post* ss 101-104 under "*Wills*"]. A person claiming the benefit of s 14 Limitation Act has the onus to prove that he acted in good faith in instituting earlier proceedings [*Kasikanda v. Saravana*, 1941 Mad 347 (A 1941 M 319; *Madhavrao v. Ram Kr*, A 1958 SC 767]. An accused, setting up *alibi* has the burden on him [*Satya Vir v. S*, A 1958 A 746]. A party admitting receipt of consideration in a document has the burden on him to prove by cogent evidence that the statement in the document is false [*Mania v. Dy Director*, A 1971 A 151]. Where the plaintiff entrusted to the defendant launderers certain clothes which the defendant failed to return to the plaintiff on the ground that the clothes were destroyed in fire, it was for the defendant to prove that he had taken due and proper care of the goods but the same were destroyed by fire which did not take place due to any negligence on the part of the defendant [*Deboo (R.S.) v. M.V. Hindlekar*, A 1995 Bom 68, 73]. Where the oral partition was admitted but the defendant claimed that the disputed strip of land was left in common the onus lies on the defendant to prove that the said item was left in common [*Perumal Gounder (S.) v. Karuppa Gounder*, 1998 AIHC 1040 Mad].

The judge in stating to the jury that under s 103 the *onus* may be said to lie on the accused to show that the deed, in respect of which he was charged with forgery, was genuine, was held to have taken an erroneous view of the law and misdirected the jury [*Sadhu Sheik v. R*, 4 CWN 576].

Where the earlier and subsequent statements of a witness (wife's statements against her husband in this case) were contradictory, the earlier statements could not be disregarded unless the subsequent ones are proved to be true [*K K Sharma v. State of Rajasthan*, (1998) Cri LJ 2609 (Raj)].

Where a person claimed a preferential allotment of plots under certain rules, it was held that the burden of proving the entitlement to preferential allotment was on him. The facts supporting his entitlement must be specifically within his knowledge. *Jalandhar Improvement Trust v. Sampuran Singh*, AIR 1999 SC 1347.

§ *See notes under s 104 and as to the burden of proof in various cases see post.*

S. 104. Burden of proving fact[1] to be proved to make evidence admissible.—The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations

(*a*) *A* wishes to prove a dying declaration by *B*. *A* must prove *B's* death.

(*b*) *A* wishes to prove, by secondary evidence, the contents of a lost document. *A* must prove that the document has been lost.

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1. In Ceylon after "fact" the word "necessary" inserted.

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COMMENTARY

This is a roundabout way of saying that no one shall be entitled to give evidence of any fact without first showing that he is legally entitled to do so. When, in order to render some evidence admissible it is necessary to prove some fact, the burden of proving that fact is on the person who wants to give that evidence. The illustrations sufficiently explain the meaning of the section. See para 2 of s 136 *post*, which should be read with this section. *Illus* (*b*) to s 136 is similar to *illus* (*b*) of this section. See notes under ss 101-103 *ante*. Ss 101-104 should be read together.

[*Ref as to the law in ss 101-104; Tay ss 364-77; Phip 8th Ed pp 27-35; Steph Arts 93-97A; Best 11th Ed ss 255-77 and pp 298-301; Powell 9th Ed pp 150-66; Wigmore ss 2483-93; Jones ss 176-98; Ros N P 95-96; Gulson's Proof ss 509-13; Greenleaf ss 74-81; Hals 3rd Ed Vol 15 paras 488-93*].

SECTIONS 101—104

General Principles Regulating the Burden of Proof.—It is incumbent on each party to discharge the burden of proof, which rests upon him [*Baijnath v. Raghunath*, 12 CLR 186 PC]. A lease deed contained a clause that consent to alteration shall not be unreasonably or arbitrarily withheld. In an action by lessor for alterations by lessee without consent he is to prove that alterations were made without consent and lessee is to prove that consent was unreasonably or arbitrarily withheld [*Peter v. East India &c*, A 1976 C 182 (*Kamalaranjan v. Baijnath*, 53 CWN 329 **rel** on)]. The man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not the want of right or weakness of proof in his adversary [*Midland Ry Co v. Bromley*, 17 CB 372; *Doe d Welsh v. Langfield*, 16 M & W 497]. A party on whom the *onus* of proof lies, must in order to succeed, establish at least a *prima facie* case. He cannot on failure to do so, take advantage of the weakness, real or apparent, of his adversary's case [*Rajani v. Gour*, 35 C 1051 : 12 CWN 761 : 7 CLJ 586, 588; see *Lakhan v. Takim*, 28 CWN 1033; *U Ba Saing v. Lakshmanan*, A 1936 R 170; *State of West Bengal v. Subimal Kumar Mondal*, A 1982 Cal 251, 252; *Bonam Venugopal Rao v. Tawala Veerabadra Rao*, A 1989 NOC 178 (Andh Pra) : (1989) 1 Andh LT 91]. The failure of the defendants to make out their defence, will not entitle the plaintiffs, if they have failed to make out their title, to succeed in the suit. Any laches of a defendant will not absolve the plaintiff from fully proving his case [*Arumugam v. Perriayannan*, 25 WR 81 PC; see also *Haji Khan v. Baldeo*, 24 A 90; *Lakshan v. Takim*, 28 CWN 1033 : 80 IC 357]. Law does not recognise the principle of giving the benefit of doubt to a party on whom the burden of proof lies [*Thacker v. Bhulam*, 94 IC 158 (L)]. Where plaintiff fails to discharge his burden of proof, the suit should be dismissed at once and it would not be proper to call for the defence evidence and decide adversely to the defendant on an inference from such evidence [*Seth Manik v. Bijoy Singh*, 25 CWN 409 PC : 62 IC 356]. Where the evidence is conflicting, the party on whom the onus lies does not necessarily fail as in the case where no evidence is led on either side [*Badrinath v. Baijnath*, A 1930 P 134].

When the issue raised in substance is whether plaintiff's or defendant's story is true, it is possible that neither of them may be true. The question then arises which of the two alternatives of the issue is the really material one. Usually the really material

one is the first of the issue—Is the plaintiff's case true? If the defendant's defence is a plea in confession and avoidance, *viz* a plea which admits that the plaintiff's story is true but avoids it, then if the defendant fails to prove his case, the plaintiff may recover. But if the defence is substantially an argumentative traverse of the truth of the plaintiff's story, not admitting that one word of it is true and setting up certain things perfectly inconsistent with it, the second alternative of the issues ought to be rejected and the truth of the plaintiff's story becomes the real question. If the plaintiff then does not prove the affirmative of his issue, the consequence is that he must fail, and the defendant may say, "It is wholly immaterial whether I prove my case or not; you have not proved yours" [*Chandranath v. Ramjai*, 6 BLR 303, 307 : 15 WR 7 PC]. The maxim that plaintiff must succeed on the strength of his own title and not on the weakness of his adversary's is not of universal application. Thus, where a receiver attached certain property as belonging to an insolvent and his wife filed an objection, the burden of proof is on the receiver [*Khazano v. Banwari*, 19 ALJ 496 : 63 IC 519].

When defendant under an erroneous impression that the burden of proving a certain fact is in the first instance upon him, produces evidence, he does not lose his right to insist in the appellate court upon the onus being laid on the right party [*Md Tahir v. Raghubar*, 8 ALJ 736]. When the *onus* is on the defendant, but the plaintiff takes upon himself to prove it, he cannot subsequently say that defendant did not discharge the *onus* [*Sajan v. Joti*, 10 IC 223; *Jatunath v. Raman*, 4 LLJ 426]. A party accepting the burden of proof cannot be allowed to complain in appeal [*Bishambhar v. Telu*, A 1934 L 1019]. If it is not the grievance of any party that the defective burden of proof has caused a prejudice in the matter of leading evidence, it would be duty of the court even at the appellate stage to correct the error of wrongly thrown burden on the aggrieved party [*Faujmal v. Nathulal*, A 1965 Raj 115]. A party alleging a fact, which is neither denied nor expressly admitted, is not bound to prove [*Dhan v. Balmukand*, 101 PWR 1942 : 16 IC 122]. Wrong placing of onus is immaterial if no party is prejudiced thereby [*Hem Ch v. Amiyabala*, 52 C 121 : 84 IC 693]. Where by issues framed before trial the *onus* is thrown by judge on a particular side and when the party accepting the *onus* proceeded to trial and got an adverse finding, he cannot say in appeal that the *onus* was wrongly thrown upon him [*Ruthna v. Veerbhadra*, 25 MLJ 281; *Sitaram v. Haidar*, 17 OC 134; *Makund v. Bahopi*, 3 A 824]. There is no difference between corporations and individuals, so far as the rule of burden of proof goes [*Lachminarain v. Ch of Ranchi Mun*, 1 FLJ 168].

The question whether the *onus* of proof has been rightly placed upon a party is one of law but the question whether such *onus* although rightly placed upon a party has been discharged or not by the evidence is a question of fact only [*J K Cotton &c v. Commr of I T*, A 1967 A 513 (*Wali Md v. Md Bakshi*, A 1930 PC 91 **folld**)]. Where a murder was alleged in a civil case, the standard of proof to be applied is that applicable to civil cases [*Francisco v. Diedrick*, The Times, April 3, 1998].

The *onus* is on the appellant to show that the decision is erroneous and not on the respondent [*Nabakishore v. Upendra*, 35 CLJ 116, 120 PC : 42 MLJ 253 : 26 CWN 322]; See *ante*, s 5 "*Civil appeal*" and *post* "*Appeal*".

It has been seen that burden of proof may be shifted by rebuttable presumption of law (*ante* s 101), but burden of proof may also be shifted by evidence raising a *prima facie* case. The burden of proof is shifted by those presumptions of law which are rebuttable; by presumptions of fact of the stronger kind; and by every species of evidence strong enough to establish a *prima facie* case against a party. When a presumption is in favour of the party who asserts the negative, it only affords an

additional reason for casting the burden of proof on his adversary; it is when a presumption is in favour of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative (Best, s 273). The burden of proof may be shifted on the other side by proof of facts giving rise to a presumption in the party's favour [*Monomohan v. Mathura*, 7 C 225]. Where owing to particular circumstances, the *onus* is on the plaintiff, slight evidence may suffice to discharge the *onus* and shift it to the other side. "Slight evidence" means evidence which does not go the whole length of proving a particular fact, but which suggests it. But slightness of evidence must not be confounded with suspicious evidence or falseness of evidence [*Hur Dyal v. Roy Kristo*, 24 WR 107]. As to the shifting of the burden of proof during the course of the trial and the amount of evidence required so to shift the *onus* on the opposite side, see *Hem Ch v. Kali Prosunna*, 30 IA 177 : 30 C 1033 : 8 CWN 1; *Rameshwar v. Bharat*, 4 CWN 18: *Sarioo v. Deodar*, 105 IC 410 : A 1927 O 499. As to shifting of *onus*, see *ante*, s 102.

Burden lies on the person, who claims that the institution in question is a private temple and not a public temple, to prove the same [*Kanteisuni Thakurani Bije Rampur Kaitha v. Babudhar Rout*, A 1995 Ori 197, 198]. Onus to prove the plea that the marriage was prohibited by law is on the person who seeks to rebut the presumption of validity of marriage arising from long cohabitation. [*Nirmala v. Rukminibai*, A 1994 Kant 247, 255]. Where the tenant pleads that the suit premises was not vacated by him, the onus would be on him. [*Hardit Singh Chadha v. Jagtar Singh Grover*, A 1994 Del 189, 198]. Where the defendant admitted his signature on the voucher, the burden of proving that the voucher was signed in blank and/or that amount was towards profits is on the defendant [*Rewachand Ladharam Ramchandani v. Naraindas B. Kanuga*, A 1992 Bom 434, 439]. It is for the plaintiff to establish his own case. He has to stand or fall on the basis of evidence led by him. Merely because the defendant does not establish his case, plaintiff does not automatically succeed [*Nirakar Das v. Gourhari Das*, A 1995 Ori 270, 273]. When a citizen lays challenge to a restriction/prohibition on the exercise of a fundamental right under Article 19(1)(g), the onus of proving its reasonability to the satisfaction of the court has upon the State or the authority concerned. [*Bhagwan Dass v. M.C.D.*, A 1995 Del 17, 20]. In a disciplinary enquiry against an employee there is no such thing as an absolute burden of proof, always lying upon the department. The burden of proof depends upon the nature of explanation and the nature of charges. In a given case burden may be shifted to the delinquent employee, depending upon his explanation. [*Orissa Mining Corpn. v. Ananda Chandra Pristy*, A 1997 SC 2274].

Burden is on the person who impeaches the law as violative of constitutional guarantee to show that the particular provision is infirm for all or any of the reasons stated by him. [*Amrit Banaspati Co. Ltd. v. Union of India*, A 1995 SC 1340, 1343]. It is not a sound practice for those desiring to rely upon a certain state of facts to withhold from the court, the best evidence which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. [*Habeeb Khan v. Valasula Devi*, A 1997 AP 53, 62]. In cases involving the ground of default in payment of rent [as contemplated under Section 20(2)(a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972] the onus to show payment lies on the tenant. Mere oral testimony is not sufficient in this connection for discharging this heavy onus. [*Raghubir Prasad v. Rajendra Kumar Gurudev*, A 1993 All 326, 329].

Where the defendant pleaded bar of limitation and the plaintiffs were conscious of their belated action, it was for them to show that the suit was within time notwithstanding the defendant's assertion in written statement that it was barred by time.

Even when the burden of proof is an plaintiff who asserts a right, having regard to the circumstances of each case, the onus may also shift to the defendant. But that is not to say that no duty is cast upon the plaintiff even to show that he acquired knowledge of the defendant's action very late. [*Triro v. Dev Raj*, A 1993 J&K 14, 15]. Though the detenus had based their case solely on the fact that the contents of the telegrams sent on their behalf were not taken into consideration by the detaining authority; but there was nothing on record to show that before the detention orders were passed any other communication was sent to the detaining authority or to the police, confirming the contents of the telegram. Any material received by the detaining authority in the shape of telegrams could not be taken into consideration by him in the absence of any subsequent communication confirming the same. [*Distt. Magistrate v. G Jothishankar*, A 1993 SC 2633, 2635 : 1993 Cri LJ 3677]. The burden of proof is on the caveator to show on a balance of probabilities why the caveat should not be removed [*Estate of Teo Quee Kee, Re* (1997) 3 Singapore LR 1030 (Singapore HC)]. In an application for removal of caveat the burden is on the caveator to prove caveatable interest [*Raju (J.) v. Kwong Yik Bank Bhd*, (1994) 2 Malayan LJ 408 (SC Malaysia)].

Whether a specific piece of evidence is sufficient for discharging the burden of proof is a question primarily concerned with the weight to be given to it and is not a question of law [*Gadian v. Veerappa*, 26 IC 899]. The raising of presumption necessary to shift the burden of proof is entirely with the court of fact, and it is not open to the High Court to direct how to vary the burden of proof in the progress of the trial of the case [*Nagaraja v. Secy of S*, 28 IC 723 (13 M 394 **follD**)].

Objections propounding riddles which cannot be answered by merely looking at the maps or reading the statement which appears in the record if sufficient to discharge onus? [see *Secy of S v. Jatindra*, 51 IA 241 : 51 C 802 : 29 CWN 1].

The established principle of criminal law is that it is the burden of the prosecution to establish the guilt; it being optional to the accused to lead such evidence as is deemed necessary by him to support his evidence. As against this Section 16 of the Orissa Special Courts Act (22 of 1992) places the burden on the accused during the trial to prove that he had not acquired the property by means of the offence to establish which he shall have to first prove that he had not committed the offence. [*Kishore Chand Patel v. State*, A 1993 Ori 259, 292]. Where a criminal complaint was made against the respondent alleging unauthorised construction of a house on land belonging to the appellant Development Authority, it was for the complainant to prove beyond reasonable doubt that : (1) the land belonged to the appellant; and (2) that the respondent himself had made the construction. It is a settled position of law that in a criminal case the burden of proof lies on the person who sets up the criminal machinery in motion *i.e* on the prosecution by way of complaint or otherwise, unless the burden of proof is excluded specifically by law. [*Special Development Area, Chitrakut v. Pooranlal*, 1997 Cri LJ 3484, 3485 (MP)].

Burden of proof squarely rests upon the prosecution in criminal trial. Examination of defence witness before examining the prosecution evidence is improper [*State of Rajasthan v. Sher Singh*, 1994 Cri LJ 904, 908 (Raj)]. Unlike the duty cast on the prosecution where proof has got to be beyond reasonable doubt, in the case of the accused, he has got to establish through a preponderance of probabilities that the evidence produced is acceptable to the court. Even in corruption cases, the presumption of innocence does not disappear nor does the basic principle of criminal law that if plausible explanation is put forward by the accused which fits in with the facts and circumstances of the cases that the court is duty

bound to accept that explanation. [*N.P. Lothikar v. C.B.I.*, 1993 Cri LJ 2051, 2067 (Bom)]. The accused persons are under no obligation to substantiate their defence version. They are simply to come forward with a probable and plausible version which fits in with the circumstances of a particular case. [*Gurucharan Singh v. State*, 1993 Cri LJ 1622, 1627 (Del)]. The burden of proof is heavy on the prosecution. The prosecution cannot take advantage of the weaknesses of the defence or cannot take advantage of the inconsistent stand taken by the accused from time to time. The prosecution must stand on its own legs basing on the evidence that has been let in by it. [*M.S. Reddy v. State Inspector of Police*, 1993 Cri LJ 558 (AP)]. Even if it is assumed that the accused made false statement under Section 313 Cr PC, the law is well settled that the falsity of the defence cannot take place of proof of facts which the prosecution has to establish in order to succeed. A false plea may be considered as an additional circumstance if other circumstances proved and established point out the guilt of the accused. [*Tanviben Pankaj Kumar Devetia v. State of Gujrat*, 1997 (2) Crimes 109, 134 (SC)].

On a charge of theft or receiving stolen property, recent possession of the stolen goods by the accused raised a presumption against him, unless he can account for his possession. The presumption is rebuttable. When recent possession of stolen property is proved, it is for the accused to satisfy the judge how he came into possession of it. As to this, see s. 114 *illus* (*a*) and notes thereto.

When Onus Does or Does Not Determine the Matter.—"In conducting any inquiry the determining tribunal, be it judge or jury, will often find that the *onus* is sometimes on the side of one contending party, sometimes on the side of the other, or, as it is often expressed, that in certain circumstances the *onus* shifts. But *onus* as determining factor of the whole case can only arise if the tribunal finds the evidence *pro* and *con* so evenly balanced that it can come to no sure conclusion. Then the *onus* will determine the matter. But if the tribunal, after hearing and weighing the evidence comes to a determinate conclusion, the *onus* has nothing to do with it, and need not be further considered" [*per* LORD DUNEDIN in *Robins v. National Trust & Co Ltd*, 1927 AC 515, 520 : 101 IC 903 (**relied** on in *Harmes v. Hinkson*, A 1946 PC 156 : 1946, 2 MLJ 156; *Lakshmanna v. Venkateswarlu*, A 1949 PC 278 : 76 IA 202; *Durga v. Ghanshiam*, A 1948 PC 210; *Huyton &c U D C v. Hunter*, (1955) 2 All ER 398, 401; see *Pratul v. Purna*, A 1938 C 284 : 66 CLJ 324]. The doctrine of *onus probandi* applies to a situation in which the mind of the judge determining the suit is left in doubt as to the point on which side the balance should fall in forming a conclusion [*Yellappa v. Tippanna*, 56 IA 13 : 33 CWN 238 : 56 MLJ 287; *Laksmanna v. Venkateswarlu, sup*; *Narayan v. Gopal*, A 1960 SC 100, 105; *Chandan v. Aminchand*, A 1960 Pu 500].

When Burden of Proof Becomes Immaterial.—Where the parties have led all the evidence and relevant facts are before the court and all that remains for decision is what inference is to be drawn from them, the question of burden of proof is not pertinent [*Seturatnam v. Venkatachella*, A 1920 PC 67 : 47 IA 76 : 25 CWN 485 : 43 M, 567; *Nand v. Gopal*, A 1940, PC 93 : 72 CLJ 263; *Catholicos v. Avira*, A 1959, SC 31; *Parasnath v. Mohani*, A 1959 SC 1204; *Narayan v. Gopal*, A 1960 SC 100; *Sachindra v. Nilima*, A 1970 C 38, 71; see also *Girwar v. Dau Dayal*, A 1935 A 509; *Badridas v. Meghraj*, A 1967 C 25]. But it matters a great deal upon whom the burden is placed when the question has to be considered as to who has proved his case [*Chockalingan v. Subramania*, A 1940 R 170 **relying** on *Offl Assignee v. Khoo Saw*, 1931 AC 67 : 128 IC 662]. Where the plaintiff was not present at the time of execution of certain deeds, it was not possible for him to give any positive evidence as regards due execution of those deeds. In such circumstances parties having full knowledge of the respective cases having led evidence, the question of burden became academic and insignificant. [*Kartick Prasad Gorai v. Neami Prasad Gorai*, A 1998 Cal 278, 282]. When all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on the point of *onus* of proof becomes immaterial. The question of *onus*

becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it [*Sime Darmy & Co v. Official Assignee*, A 1928 PC 77 : 107 IC 233: 54 MLJ 337 [(*vid* judgment of LORD DUNEDIN in *Robins v. National Trust & Co Ltd*, 1927 AC 515, 520 *supra*)]. When the entire evidence is once before the court, the debate as to onus of proof is purely academical [*Chiddambara v. Veerama*, A 1922 PC 292: 49 IA 286: 27 27 CWN 245: 45 M 586; *Md Aslâm v. Feroze*, 37 CWN 71: 11 P 882 PC; *Debendra v. Nagendra*, 60 C 1158; *Abdul Shukoor v. Arji Papa*, A 1963 SC 1150: *Sachindra v. Nilima*, A 1970 SC 38, 71; *Dalim v Nandarani*, A 1970 C 292, A 1981 SC 2085, 2094 : (1981)1 SCR 899: (1981) 1 SCC 80, *Mahadev Missir v. Basudex Missir*, A 1981 Cal 9, 11, *Wali Asghar v. Dist Judge Shahjanpur*, A 1983 All (NOC) 173, *Babban v. Shiv Nath*, A 1986 All 185, 188: 1986 All CJ 130, *Lachman Singh v. State*, 1990 Cri LJ (NOC) 78 (Cal), *Rahunathi v. Raju Ramappa Shetty*, A 1991 SC 1040, 1041] except in a rare case where the considerations are evenly balanced [*Abdul Shukoor v. Arji Papa, sup*]. This must be more so at the appellate stage [*Sundhanya v. Gour*, 27 CWN 134: 35 CLJ 473]. The question of onus becomes immaterial in second appeal [*Chaudhury v. Co.*, I PLT 640].

Where each party has adduced evidence tending respectively to prove and dis-prove a fact in issue, in such cases the importance of the incidence of burden of proof disappears almost entirely [*Gadian v. Veerappa*, 28 MLJ 92; *Akhil v. I G N & R Co*, 21 CLJ 565; *Anantarama v. Yusuffi*, 31 MLJ 133; *In re Kintadu*, 1912 MWN 902: 15 IC 457; *Basuddin v. Mokima*, 22 CWN 709; *Banamali v. Talua*, 5 PLJ 151; *Sukna v. Karu*, 5 PLJ 87, *Krishna v. Nagendrabala*, 34 CLJ 333; *Satis Ch v. Kalidasi*, 34 CLJ 529; *Nibaran v. Nirupama*, 34 CLJ 563; *I G N & Rly v. E I Ry Co*, 47 C 1027: 33 CLJ 72; *Abinash v. Majub Ali*, 36 CLJ 196; *Iswar v. Jogendra*, A 1927 C 126; *Sati Pd v. Gobinda*, 33 CWN 227]. When both parties have adduced their evidence, the burden of proof loses its importance [*Rebti Devi v. Ram Dutt*, A 1998 SC 310; *Nirmala v. Rukminibai*, A 1994 Kant 247, 250]. Once the parties have led the evidence in support of their respective cases the doctrine of burden of proof loses its importance and merely it remains a question of academic interest. [*Gangamma v. Krishnappa*, 1996 AIHC 264, 266 (Kart)].

The rule of law that where parties have led evidence on a particular issue, the wrong allocation of the *onus* does not entitle the party on whom such burden of proof is subsequently placed to claim a remand is not inflexible. There may be cases where the person on whom the burden lay gave evidence which on the face of it, is of no value and the other party did not consider it necessary to produce the whole of the evidence which he could produce to rebut the allegation [*Jagadish v. Mukand*, 109 IC 331: A 1928 L 763]. When the courts below have wrongly thrown the *onus* on the defendant of proving that the properties he claimed were his own instead of placing it on the plaintiff, the question of fact found is not binding upon an appellate court [*Peddi Reddi v. Panem*; 56 IA 6: 52 M 83: 31 Bom LR 264: 33 CWN 233: 49 CLJ 98 PC: A 1929 PC 13].

Although the protection given to a 'pardanashin' woman as regards execution of a deed is not available to an illiterate man who has sufficient experience of dealing with property, in case of a deed executed by such a person, the fact that the contents of the deed were read over and explained to the executant must be proved by the person who wants to take advantage of such deeds. [*Kartick Prasad Gorai v. Neami Prasad Gorai*, A 1998 Cal 278, 282].

APPLICATION OF THE RULE REGARDING BURDEN OF PROOF IN VARIOUS CASES:

Abatement.—Where a tenant claims abatement of rent on account of diluvion and the landlord admits or it is proved that some diluvion has taken place, the *onus* is upon the tenant to prove the extent of the diluvion and the corresponding abatement claimed [*Arun Ch v. Bhagaban*, A 1931 C 537 FB (*Kristo Das v. Adbul Karim*, 62 IC 474: 25 CWN 328 **Overruled**)].

Accident.—For damages for death caused by explosion in a carriage, the burden of proof of want of reasonable care and diligence on the part of the railway, is on the plaintiff (*E I Ry Co v. Kally Dass*, 28 IA 144: 28 C 401: 5 CWN 449]. In the case of an accident, *prima facie* the railway company is guilty of negligence and it must satisfy the court that it took all such steps as skilful, prudent and farsighted persons under the circumstances would have taken to avoid the accident [*Jewanram v. E I R*, 51 C 861, see *Skinner v. L & B Rly*, 5 Ex 787; *Flannery v. W & L Rly*, IR 11 Cl 30 and Tay s 188]. The burden of proving the allegation of negligence rests on the plaintiff. It is not for the defendant to excuse himself by proving that either the accident was inevitable or that there was no negligence on his part [*Ng Aik Kian v. Sia Loh Sia*, Civil Suit No 23-226-1992 dt. 31.3.1997 (Johore Bahru HC)]. Where in a motor accident case the evidence of both the plaintiff and the defendants is disbelieved, the plaintiff's claim must fail [*Krishna Murthey v. Law Lye Chua*, (1992) 1 CLJ 684 (Alor Star HC)]. Where under a contract a vehicle is hired out with its driver to another person, to make the hirer liable for damages under Fatal Accidents Act the plaintiff has to establish that the hirer had a right not only to give direction as to what the driver of the vehicle had to perform, but also had the right to control how he should drive the vehicle [*Govt of India v. Jeevraj*, A 1970 Mya 13]. In an accident case, the burden of proving that the accident was due to a mechanical defect is on the owner and the onus has to be discharged by showing that all necessary care and caution had been taken to keep the vehicle in a perfect condition and no possible visual defect could be seen in the vehicle. [*Mewa Devi v. Prakash Rajinder Paul*, A 1990 Him Pra 53, 55]. While making a claim for compensation in respect of a train accident, the burden of proof is on the claimant to prove that he is a *bona fide* passenger. [*Smt Sudha Srivastava v. Claims Commr Allahabad*, A 1985 All 52 (DB)].

Accounts.—When a claim is on a signed distinct statement of account by the defendant acknowledging liability, it is for him to rebut the *prima facie* case against him [*Elies v. Jarawar*, 24 WR 202]. In a suit by the principal against his agent for account, if plaintiff establishes agency and liability to render accounts defendant must prove his receipts and disbursements [*Raghunath v. Ganapathi*, 27 A 374; see also *Ram Das v. Bhagwat*, 1 ALJ 347]. The onus is on the plaintiff to prove that each item was actually realised by the agent and that it was not paid to his credit [*Sasisekhareswar v. Hajiranissa*, 28 CLJ 492: 47 IC 371; *Tulsiram v. Karm*, 36 PLR 1912: 13 IC 955]. Mode of proof in a suit against the legal representatives of the accounting party [*Panmal v. Omraomal*, A 1953 C 244]. For the burden of proof in a suit by some parties of a dissolved partnership business against the remainder for an account of the partnership business, see *Tirukumaresan v. Subbaraya Chetti*, 20 M 113. Every presumption is made against a person suppressing account books [see s 114 *illus* (*g*)].

Acknowledgment.—If a person who has *prima facie* no business to make an acknowledgment under s 18 Limitation Act, 1963, makes it, the burden is on him to prove why it was made. But if the acknowledgment is alleged to bind other persons, the persons so alleging, should prove some sort of agency or authority on the part of the maker of acknowledgment [*Malladi v. Tondepu*, 80 IC 940: A 1925 M 134]. Where a plaint is on its face barred and plaintiff pleads that it is within time on account of acknowledgment he must prove it [*Collr of Jaunpore v. Jamma*, 44 A 360; *Abdul v. Bhajan*, 53 A 963]. If a document of acknowledgment of debt does not refer to the particular debt in suit, the presumption in the absence of any other debt proved to exist, is that the debt acknowledged is the debt under consideration and the *onus* of proving the contrary rests on the person disputing the debt [*Jogeshur v. Bir Ram*, 60 IC 189: 23 OC 176].

Once acknowledgment of paternity is established, *onus* shifts on those who deny marriage [*Habibur v. Altaf*, 48 C 956 PC].

Adoption.—[See *Post*, "*Hindu Law*"].

Adverse Possession and Limitation.—In actions for ejectment when defendants are admittedly in possession, and a *fortiori* where they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiffs to prove their own title. The *onus* is thrown upon them to prove possession prior to the time when they were admittedly dispossessed, and at some time within 12 years before the commencement of the suit, and it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed [*Mohima v. Mahesh*, 16 IA 23: 16 C 473 (**folld** in *Hemanta v. Jagadindra*, 10 CWN 630 PC: 16 MLJ 272). See also *Jafar Husain v. Mushuq Ali*, 14 A 193: 12 AWN 55; *Mazhar Hussain v. Behari*, 28 A 760: 3 ALJ 567; *Sundar v. Sarasvati*, 17 IC 518; *Inayat Husen v. Ali Husen*, 20 A 182 : 18 AWN 19; *Mirza Shamsher v. Kunja*, 12 CWN 273: 7 CLJ 414; 3 MLT 212; 27 B 43; 4 Bom LR 721; 5 Bom LR 225; *Faki Abdulla v. Babaji Bangaji*, 14 B 458; *Gopal v. Nilmony*, 10 C 374; *Bhootnath v. Kedar*, 9 C 125; *Sitaram v. Shiridhar*, 16 B 343. *Kalooram v. Mangilal*, A 1984 Madh Pra 147, 151].

In cases falling under Art 142[2] Limitation Act, the plaintiff must at the outset show possession within 12 years and cannot rest merely on a proof of title; while in case falling under Art 144[3] the plaintiff may rest content with proof of title only in the first instance and the burden lies on the defendants to show that they have had a possession inconsistent with the title of the plaintiff for more than 12 years before suit [*Faki Abdulla v. Babaji Bangaji, sup*) (5 A 1 PC: 16 C 473 PC **expld**); *Hardut v. Ujir*, 48 CLJ 364]. Where a plaintiff is suing for possession on the basis of dispossession art 142[2] Limitation Act applies and the burden lies on him to show that the date of his dispossession or discontinuance of possession was within 12 years of the suit, while if the suit is for possession of immovable property not specially provided for in any other article then art 144[3] would apply and on proof of title the plaintiff's suit cannot be dismissed until the defendant further establishes his adverse possession for more than 12 years [*Qadir Bux v. Ramchand*, A 1970 A 289 FB; *Joti Dadw-Navale v. Manukabai Kashinath Mohite*, A 1988 Bombay 348, 350 : (1987) 3 Bom Cr 252]. Where the plaintiff proves merely his possession within 12 years of the suit, such evidence is not sufficient to throw upon the defendant the burden of proving his title to the land [*Debi Churn v. Issur Ch*, 9 C 39: 11 CLR 342: see also *Moro Desai v. Rām Ch*, 6 B 508. But see *Mohabeeer v. M*, 7 C 591: 9 CLR 164; *Brojo Sunder v. Koylash*, 11 CLR 133 where evidence of possession was held sufficient to call upon the defendant to prove his title]. A tenant-in-common pleading ouster must establish that the denial of other co-owners' right in the properties was sufficiently notorious and open and he continued to enjoy the properties in repudiation of the right of the other co-tenants with their knowledge for the statutory period under Art 144[3] [*Sinnaraj v. Ramayee*, A 1969 M 96—case laws ref].

In the case of a grant of surface rights, the lessor remains in the eye of the law in possession of the sub-soil. Once title is admitted or proved to be in the *zemindari* he will be presumed to continue in possession until adverse possession in the trespasser established, and that whether the trespasser is the grantee of the surface rights or a stranger [*Bhupendra v. Rajeshwar*, 58 IA 228: 59 C 80: 61 MLJ 632: 36 CWN 870].

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2. See now Arts 64 and 65 of Limitation Act 36 of 1963.
3. See now Art 65 of Limitation Act 36 of 1963.

The true meaning of *Nageshwar v. Bengal Coal Co*, 35 CWN 265 PC: 53 CLJ 487 is not opposed to this decision.

Ordinarily title carries with it the presumption or possession and the burden lies on the person who claims title by adverse possession to prove his case [*Bitola v. Ram Charan*, A 1978 A 555; (*Radhamoni v. Collr*, 27 C 943 PC; *Alla Rakhi v. Shah Md*, A 1934 PC 77; *P Lakshmi v. L Lakshmi*, A 1957 SC 314 rel on)]. The burden to prove the claim of acquisition of title by adverse possession of the property is always on the person claiming that title. [*Trilochan Dandsena v. State*, A 1995 Ori 239 (FB), 241]. Where the plaintiff has established his title to land, the burden of proving that the plaintiff has lost that title by adverse possesion of the defendant is on the defendant [*Radha Govind v. Inglis*, 7 CLR 364 PC; *Nyamtullah v. Nand Valad*, 13 B 242; *Nawab Bahadur v. Gopinath*, 13 CLJ 625; see also *Karan Singh v. Baker Ali*, 9 IA 99: 5 1, *Ramadhar v. Danglawa*, A 1982 All (NOC) 265, *Jatiram Gharami v. Atul Krishna Dar Kuri*, A 1988 Cal 79, 81, 82]. As to what constitutes adverse possession, see *Secy of S v. Debendra*, 61 IA 78: 38 CWN 285.

Nothing is better settled than that the *onus* of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession; and it would be contrary to all legal principles to permit a squatter to put the owner to a negative proof that the possession of the squatter was not long enough to fulfil all legal conditions [*Secy of S v. Chellikani Rama*, 43 IA 192: 20 CWN 1311: 39 M 617; *Faqr v. Prag*, A 1928 O 246].

When land has been shown to be permanently or temporarily incapable of actual enjoyment in the usual modes, a presumption in favour of continuance of possession may arise until the contrary is proved, but such presumption is not conclusive [*Md Ali v. Abdul Gunny*, 9 C 744: 12 CLR 57; *Thakur v. Bhogeraj*, 27 C 25].

Adverse Possession of Limited Interest.—Possession of twelve years under the statute operates to create a limited interest of tenancy [*Probhabati v. Taibatanessa*, 19 CLJ 62; *Jnanada v. Jilapi*, 53 IC 184; *Ujir Ali v. Shadhai*, 53 CLJ 182]. Where defendant sets up a title by adverse possession only to a limited interest, which even if completed would not extinguish the plaintiff's title, the *onus* is on the defendant [*Hemanta v. Midnapore Z Co Ltd*, 45 CWN 782].

In a suit for declaration and possession of property, if the defendant pleaded limitation by adverse possession, the burden is on the defendant to prove the date from which he has been in possession. [*Poovanigowda v. Vasantha*, A 1992 Kant 254, 256].

Agent.—Where plaintiff alleges that a contract was entered into by defendant's duly authorised agent, the burden of proving the authority of the agent, is on the plaintiff [*Ardeshir v. Sassoon*, 55 IA 360: 52 B 597: 32 CWN 953: 48 CLJ 451; *Ramanathan v. Bank of Bengal*, 7 Bur LT 126: 23 IC 516].

Alibi.—Burden of proving *alibi* lies on the accused [*Daya Nand v. State of U P*, 1996 Cri LJ 3975, 3976 (All)].

Alienation.—[See "*Guardian and Ward*" and "*Hindu Law*"]. In regard to the alienations prior to 24.1.1971 the burden of proof remained under the general law and was not affected by A P Act 1 of 1972 or 13 of 1973 dealing with prohibition of alienation. [*Meria Venkata Rao v. State of A P*, A 1994 SC 471].

Alluvion amd Diluvion: [Chur, Jungle and Hilly lands].—On proof of title and possession till diluviation by the plaintiff, in a suit for dispossessed alluvial lands diluviated more than 12 years before suit, the burden of proving reformation more

than 12 years before suit and adverse possession during the period was held to be shifted to the defendant [*Monomohan v. Mathura*, 7 C 225: 8 CLR 126; see *Md Ali v. Khaja Abdul*, 9 C 744 FB; 12 CLR 257; *Mohiny v. Krishna*; 9 C 802: 12 CLR 337; *Secy of State v. Krishnamony*, 29 IA 504: 29 C 518: 6 CWN 617; *Basanata v. Secy of State*, 44 IA 104: 44 C 858: 32 MLJ 505: 21 CWN 642; *Ganga v. Ashutosh*, 23 C 863]. Cases of diluviated land or jungle or waste lands are no exception to the general rule that a plaintiff who is dispossessed and brings a suit for recovery of possession must show that he was in possession within 12 years of date of suit. Possession till diluvion and that the land remained under water or the existence of a subsisting title raises presumption in favour of possession [*Panchanan v. Basanta*, 30 CWN 497; see *Sures v. Shitikanta*, 28 CWN 637: 51 C 669].

If the condition of the disputed property be such that it does not admit of actual occupation such as jungle and hilly land, possession must be presumed to be with rightful owner [*Mirza Shamsher v. Kunja*, 12 CWN 273: 3 MLT 212 (9 C 744: 19 C 660 PC **relied** on). See also *Secy of S v. Verayan*, 9 M 175]. Possession of jungle lands is *prima facie* with the person whose title is established [*Priyanath v. Mahendra*, 16 CWN 367].

In a suit for recovery of possession of *chur* lands which commenced forming more than 12 years before the suit, the *onus*, is on the plaintiff to prove that any portion of the *chur* was formed within 12 years of the suit [*Guru Das v. Basanta*, 14 CWN 317: 11 CLJ 373]. See also the case under "*Adverse possession and Limitation*", *ante*.

In a suit for possession of waste, unculturable and *chur* lands, wher the defendant sets up the plea of limitation and adverse possession, the burden of proving possession and dispossession depends upon the facts and circumstances of each particular case, as will appear from the cases noted below:

In a suit for possession of lands formerly uncultivable, but subsequently brought under cultivation, the doctrine of constructive possession applies only in favour of a rightful owner, and must not be extended in favour of a wrong-doer-whose possession must be confined to lands of which he is actually in ppssession [*Mahim v. Pramoda*, 24 C 256: 1 CWN 304]. For the rule as to burden of proof with regard to cultivable land, jungle or unculturable lands and *chur* lands, see *Md Ibrahim v. Morrison*, 5 C 36.

In a suit to recover possession of alluvial lands on the ground that they were reformataions on the site in plaintiff's permanently settled estates, or were secretions to their estates, plaintiffs ought to establish what lands were included within their estates at the time of the Decennial Settlement in 1798 on which the Permanent Settlement of 1793 was based [*Secy of State v. Kalika*, 15 CLJ 281]. With regard to the *onus* of alluvial, reformed and accreted lands after diluvion, see the following cases: *Mowta Kumaree v. Mutty*, 25 WR 129, which was a suit for possession of accreted lands and the *onus* was thrown upon the plaintiff. In *Girija Kant v. Hurish*, 19 WR 114 PC which was a suit for possession of alluvial lands, the burden of proof was held to be upon the plaintiff. In *Rajendra v. Lalljee*, 20 WR 427 PC the *onus* was thrown upon the plaintiffs to prove gradual accretion. See also *Gokool v. David*, 23 WR and *Aukhil v. Delwar*, 6 CLR 93, where the evidence to be given and the *onus* of proof in cases of re-formed *chur* lands were discussed. In *Runjit v. Kilburn & Co*, 4 CLR 390, which was a suit for possession or re-formed lands upon the old site after diluvion, the *onus* of proving was held to be upon the plaintiff. In *Kally Churn v. Secy of State*, 6 C 725: 8 CLR 90 which was a suit for possession of re-formed lands after diluvion, the *onus* was held to be upon the dispossessor. See *Mohiny v. Krishna*, 9 C 802: 12 CLR 337; which was a suit for possession of land covered with water for

more than 12 years, and where the plaintiff proved that he exercised acts of ownership by letting out the *julkar* to tenants, the *onus* was thrown upon the defendant. See also *Monomohan v. Mathura*, 7 C 225: 8 CLR 126.

In *Ganga v. Ashutosh*, 23 C 863 which was a suit for possession of lands as reformation on the site of the plaintiff's villages, and the defence was that the land were not reformation but accretion to the defendant's village; and as it was found that the lands were part of the plaintiff's villages, the *onus* was held to lie on the defendant to prove adverse possession. Mere submergence of land does not amount to dispossession [*Ramapati v. Ramani*, 34 CWN 722 PC: 59 MLJ 208: A 1930 PC 198]. As to 'dispossession' from alluvial land and burden of proof, see *Basanta v. Secy of State*, 21 CWN 642 PC: 44 C 858.

Appeal.—It is well settled that the burden of proving that the judgment appealed from is wrong rests upon the appellant, and that he does not discharge that *onus* by merely showing that there is an equal possibility of the judgment in favour for one party or the other being correct [*Kalyan v. Ahmed*, 38 CWN 1157 PC; *Nabakishore v. Upendra*, 26 CWN 332 PC]. A party accepting in the trial court *onus* of proof but failing to discharge it, cannot contend in appeal that the *onus* was wrongly placed on his [*Gaurishanker v. Magharam*, A 1974 Raj 238]. In appeals under s 116A of the Representation of the People Act, the court should normally attach importance to the findings of fact recorded by the tribunal when the said findings rest solely on the appreciation of oral evidence [*Baru Ram v. Prasanni*, A 1955 SC 244; *Sarju v. Jawaleshwari*, 1950 SCR 781: A 1951 SC 120]. For appeals civil and criminal, see *ante* s 5: "*Civil Appeals*" "*Criminal Appeal*".

Appointment and Promotion.—Unless classification of employees for purpose of appointment or promotion is *prima facie* unjust, onus lies on the party attacking classification to show that it is unreasonable and violative of art 16 of Constitution [*Govind v. Chief Controller &c*, A 1967 SC 839 (*Banarsidas v. S*, A 1956 SC 520: 1956 SCR 357; *All India Station Masters' &c v. General Manager &c*, A 1960 SC 384: 1960, 2 SCR 311; *General Manager &c v. Rangachari*, A 1962 SC 36: 1962, 2 SCR 586 **follď**)].

Appropriation.—Where the debtor alleged appropriation to be made in a particular way, the burden is on him to prove the same [*Radhakishun v. Hiralal*, 31 CWN 566: 52 MLJ 715: A 1927 PC 50].

Arbitration.—The *onus* is on the person who asserts that consent of one of the parties to an arbitration was obtained by threats or through undue influence [*Purvatha v. Jayavera*, 4 WR 31 PC. See also *Zemindar of Ramnad v. Zemindar of Yettrapooram*, 7 MIA 441]. In a suit brought in contravention of an agreement to refer to arbitration, the burden is on the plaintiff to show why the matter should not be referred to arbitration [*Volkart Bros v. Fateh*, 61 IC 322].

Arrest of Judgment-Debtor.—In an application for arrest in execution of a money-decree the burden of proving that defendant has present means to pay but is unwilling to pay lies on the creditor [*Jaswalla v. Amulya*, A 1940 A 494; *Jogesh v. Tinkari*, A 1942 P 242; *Atta Karim v. Bibi Habiba*, A 1951 P 355].

Attachment.—The *onus* of proof is on the person who alleges the non-observance of the formalities necessary for attachment [*Ram Krishna v. Sarfunessa*, 6 C 129 PC]. Plaintiff alleging alienation by debtor during attachment is bound to prove his allegation and the *onus* is not discharged by showing that the attachment was made some years previous to the alienation [*Toolsee v. Brojo Mohun*, 9 WR 332]. In the case of attachment of movables if the garnishee disputes his liability alleging that the

judgment-debtor has no right, title or interest in the property in question or the property was not liable to be attached, the onus to prove that the property not in possession of the judgment-debtor is liable to be attached is on the decree-holder [*Vali Ram v. Smt Satwanti Kaur*, A 1984 Del 90, 93].

Award.—A party objecting to an award on any ground has the burden of proving it [*Gobind v. Bhirgnath*, 46 A 886: 82 IC 16].

Bailment.—Where goods are delivered to the bailee in a sound condition and are lost or not returned or are returned in a damaged state, the law presumes negligence and casts upon the bailee the burden to show that loss is due to causes consistent with due care on his part [*Kushkanta v. Chandrakanta*, 28 CWN 104; see *Munnalal v. E I R*, 82 IC 772 (A); *Mg Po v. Mg Tha*, 1 Bur LJ 132]. In bailment the *onus* of proving that there is no negligence is on the bailee [*Brooks Wharf v. Goodman*, 1937, 1 KB 534; *Trustees, Madras Port v. Home Ins Co Ld*, A 1970 M 48]. "Where the bailor has sustained the general burden of proof by showing that the bailee returned the goods in a damaged condition and gives no explanation of their injury, the burden is then upon the bailee to bring forward evidence showing that he has used due care" [*Cummins v. Wood*, 44 III 416; Jones s 186]. In a suit for damages to plaintiff's goods entrusted for carriage by defendant's ship, it is for defendant to prove "perils of the sea." If a *prima facie* case is made out, plaintiff can rebut by proof of the defendant's negligence [*Esuf Ali v. Thaha Vimal*, 47 M 610]. See *post* "*Carrier*" and s 114 under "*Negligence*".

Benami **Transactions.**—When plaintiff sues for possession of land, and defendant alleges that plaintiff purchased it *benami* for him the *onus* is on the plaintiff to establish a *prima facie* case [*Hari Ram v. Raj Kumar*, 8 C 759]. Where a plaintiff claims land as purchaser in good faith from a *benamdar* who has been registered as owner, the burden of proof lies on him [*Rutto v. Bajrang*, 13 CLR 280 PC]. *Onus* to prove that the ostensible owner is only a *benamidar* lies upon the party who set up *benami* [*Mirza Mahboob Baig v. D.V. Narasimha Reddy*, 1996 AIHC 3070, 3074 (AP)].

The habit of holding land *benami* is inveterate in India, but that does not justify the courts in making every presumption against apparent ownership [*Buzlar v. Shamsoonissa*, 11 MIA 551: 8 WR 3]. As *benami* is very familiar in India even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose [*Uma Pd v. Gandharp*, 14 IA 127: 15 C 20; *Md Mahub v. Bharat*, 23 CWN 321 PC; *Tirthamayi v. Atikulla*, 98 IC 129: A 1927 C 130]. Where the plea of *benami* transaction refers to a type of sham transaction such as there was no sale at all, the party pleading *benami* has to establish that there was absolutely no consideration for the sale [*Keshab v. Madhab*, A 1970 A & N 75 **following** *Sree Meenakshi Mills Ld v. CIT*, A 1957 SC 49 where the meaning of '*benami*' is explained; *Raj Allar Das v. Maripada Das*, A 1985 Cal 2, 11]. The burden of substantiating *benami* is a difficult one to discharge, but still the person alleging that property conveyed to another belonged to him must prove his allegation and prove it beyond reasonable doubt [*Po Kin v. Shein*, 31 CWN 252 PC: 4 R 418: 96 IC 141; *M S M Shikkadar v. Abdul Majeed*, A 1975 M 95; *Ram Narayan Dubey v. State of Bihar*, A 1989 NOC 65 (Pat)]. This burden has to be discharged by adducing legal evidence of a definite character [*Krishnand v. S*, A 1977 SC 796]. One test is the source whence the consideration came and also who actually has enjoyed the benefit [*Union v. Moksh Builders*, A 1977 SC 409], and also the intention of the parties [*Ponnuswamy v. Narayanan*, A 1977 M 19].

The burden of proof is on the person, who seeks to give a purchase a different meaning and complexion from what it bears on its face; that is, who maintains that the apparent state of things is not the real state of things [*Ramabai v. Ram Ch*, 7 BLR 293; *Sukhimoni v. Mohendra*, 13 WR 14 PC; *Faez Buksh v. Fakiruddin*, 14 MIA 234; *Sreeman v. Gopal*, 11 MIA 28: 7 WR 10; *Waziruddin v. Lala Deoki*, 6 CLJ 472]. The burden of proving *benami* is on the person who alleges it [*Surasaibalini v. Phanindra*, A 1965 SC 1364; *P B Reddy v. S*, A 1969 SC 655; *Seth Manik v. Bijoy*, 62 IC 358: 25 CWN 409 PC; *Mahidditta v. Mrs Nicholson*, 19 IC 770; *Vaithinatha v. V*, 29 IC 970; *Hakim Maulvi v. Bharat*, 63 IC 54: 23 CWN 321 PC; *Vyricheria v. Dasiraj*, 57 IC 689; *Syed Ismail v. Hamidi*, 2 Pat LT 658; *Arab Ali v. Mahamed*, 35 CLJ 554 PC: 61 IC 44; *Jasodalal v. Balaram*, 35 CLJ 589; *Promode v. Madan*, 36 CLJ 396; *Tuka Mia v. Nabin*, 65 IC 101; *Ma Khatun v. Ma Bi*, A 1933 R 393; *Gangadara v. Subramania*, A 1949 FC 88]. As to burden of proof in cases of *benami transactions*, see also the following cases: [*Ruknadowla v. Hardwaree Mull*, 5 BLR 578; *Azimut v. Hurdwaree*, 14 WR 14: 13 MIA 395 (refd to in 39 CLJ 141); *Chandra Nath v. Ramjay*, 6 BLR 303 PC: 15 WR 7 PC; *Golluck Ch v. Bhaghat*, 11 CLR 106; *Naginbhai v. Abdulla*, 6 B 717; *Sarifan v. Dilwar*, A 1975 C 211]. The burden cannot be shifted to the other side merely because the plea of *benami* was taken only as an alternate plea [*Bhupendrakumar R Parikh v. M K Lakshmi*, A 1990 Mad 46, 59]. The burden of proof in an *ism furzi* transaction, is in the first place upon the person who claims against the tenor of the document [*Suleiman v. Mehndi Begum*, 25 IA 15: 25 C 473: 2 CWN 186; refd to in 29 B 305. See also *Satyamoni v. Bhagbatty*, 1 CIR 466; *Bank of Bengal v. Lucas*, 81 IC 471: A 1924 C 578].

Though in cases of alleged *benami*, there may be grounds of suspicion, yet court's decision must not rest upon suspicion but upon legal grounds established by legal testimony. The determination of the question must depend not merely upon direct oral evidence, but also upon circumstances such as the source of purchase-money, the possession of the disputed property, the custody of the title-deeds, the adequacy of consideration and the like facts [*Abdul Lalif v. Abdul Huq*, 28 CWN 62: 81 IC 667; *Minakumari v. Bejoy*, 44 IA 27: 32 MLJ 425: 19 Bom LR 424: 44 C 662: 21 CWN 585; *Ramapati v. Hanuman*, 76 IC 1049 (P); *Bhubanmohini v. Kumudbala*, 28 CWN 131: *Imambandi v. Kumlesswari*, 13 IA 160: 14 C 109; *Ramnarain v. Md Hadi*, 26 IA 38: 26 C 277; *Dalip v. Chowdhurani*, 35 IA 104: 30 A 258; *Arumugham v. Ilango*, A 1969 M 252]. Source from which purchase money came is material factor but not conclusive to establish *benami* [*Surasaibalini v. Phanindra*, A 1965 SC 1364].

There is no presumption in Hindu law that transaction standing in the name of the wife is the husband's transaction and the *onus* lies on the other side to make out that the transaction was *benami* [*Manoda v. Md*, 2 CWN 367; *Ratanchand v. Deochand*, A 1946, B 157]. In the case of acquisition of property in the name of a female member of the family the person who asserts that it is a joint family property, has to prove the same [*Bankesh Tewary v. Ramanuj*, A 1985 Pat (NOC) 244: 1985 Pat LJR 480]. In *Sanjivaraya v. Balambika*, 17 MLJ 339, it has been held that in the circumstances of this case, and in accordance with s 106 of the Act, the *onus* lay upon the wife that the purchase-money was supplied by her and that the properties had been in her enjoyment. In *Motivahu v. Purshotam*, 6 Bom LR 975 it has been held that according to the law as prevailing in the Bombay Presidency, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit. See also *Soleman v. Mehndi*, 25 IA 15: 25 C 473 PC: 2 CWN 186. Where a deed of sale by husband is in a Hindu wife's favour, she is presumed to be the owner, and the *onus* is on the person who asserts that real owner is the husband [*Dhan v. Balmukund*, 131 PLR 1912. See s 114 Under "*Hindu Law—joint family*"].

When a purchase is made by a Hindu or a Mahomedan in the name of his son, the presumption is in favour of its being a *benami* purchase; there is no presumption of an advancement and it lies upon the party in whose name it was purchased to prove that he is solely entitled to the legal and beneficial interest in the estate [*Naginbhai v. Abdulla*, 6 B 717. See also *Gopee Kristo v. Gunga*, 6 MIA 53; *Azimut v. Hurdwaree*, 5 BLR 578: 14 WR 14 PC: 13 MIA 395; *Ahmed Ali v. Aftuf Fatima*, 13 WR PC 1: 13 MIA 232; *Rajaram v. Mahta*, 187 PLR 1912]. A deposit made by a person of his money in the joint names of himself and his wife on condition that it is payable to either or survivor or a deposit in the name of his wife alone does not constitute a gift by him to his wife. In such a case, the onus of proof to establish the intention to benefit the transferee is on the transferee himself [*P Narayan Menon v. P Bhagerathi Amma*, A 1985 Ker 14, 16 (DB)]. See *post* s 114 under "*Advancement*".

Bengal Money Lender's Act.—Whereas under the Usurious Loans Act the borrower has the *onus* on him to prove that the interest was harsh and unconscionable, the reverse is the case under Bengal Money Lender's Act (7 of 1933) and the creditor has to show that the interest charged is not excessive [*Mrinalini v. Harilal*, 63 CLJ 117].

Bills of Exchange, etc.—Where a *hundi* is not presented for payment and the drawer withdraws the money after many days, the burden is heavy on the payee to prove that drawer did not suffer any loss [*Bhiki Mal v. Raghubir*, 88 IC 915: 23 ALJ 861].

Bond, etc.—[See also "*Consideration*", *post*]. In a suit on a bond the primary burden is on the plaintiff. He must prove execution and consideration. But once he proves, or it is admitted that the signature or thumb mark is defendant's then the presumption arises and the burden shifts to the defendant. He can either prove fraud &c or that the presumption under s 114 cannot on the facts fairly arise. If he succeeds in doing so, the burden shifts back to the plaintiff [*Udebhan v. Vithoba*, 1939 Nag 160: A 1939 N 78].

When defendant admitting execution denies receipt of consideration or a part of it, the *onus* is upon him to show that the recital as to the receipt of consideration is not true [*Fulli Bibee v. Bussiruddi*, 4 BLR 54 FB: 12 WR 25 FB; *Rajeswari v. Rai Balkishen*, 14 IA 142: 9 A 713; *Gorakh v. Vithal*, 11 B 455; see also *Raghunath v. Luchmee Narain*, 10 WR 407; *Sevaram v. Samu*, 1 MHC 447; *Manick v. Ram Das*, 1 BLR AC 92: 10 WR 132; *Ali Khan v. Indar Pd*, 23 C 950; *Rajeswari v. Rai Balkishen*, 9 A 713 PC; *Makund v. Bahori*, 3 A 824; *Mahabir v. Bishan*, 27 A 71; *Kuruful v. Raj Kali*, 17 WR 439; *Devalata v. Ganesh*, 4 B 295; *Krishna v. Nagendrabala*, 34 CLJ 333; *Babbu v. Sitaram*, 36 A 478; *Chirag v. Bhagwan*, 100 PR 1915; *Kali Charan v. Amar*, 41 IC 44; *Anant v. B N Bank*, 56 IC 638; *Mangali v. Bidha*, A 1923 L 404; *Jiwanram v. Jhanda*, 92 IC 346]. The cases above do not govern cases to which the Dekhan Agriculturists Relief Act (17 of 1879) applies [*Maloji v. Vithu*, 9 B 520].

Where in a suit on a pronote, defendant while denying thumb-impression pleads that he had put it on a blank paper intended for a *Kabuliat*, the burden is on him to prove how the documents bearing his impression came into existence [*Sahadeo v. Pulswar*, A 1930 P 598].

Where a defendant had admitted receipt of consideration before a registering officer, the *onus* was upon him to disprove the receipt [*Ali Khan v. Inder Pd*, 23 IA 92: 23 C 950]. In a bond suit, the plaintiff's case rested entirely upon the bond and the defendant's acknowledgment therein that Rs. 8,000 was received in cash. At the

trial the defendants proved the acknowledgment to be fictitious and that only a part of the money had been actually advanced—*Held* that the *onus* was upon the plaintiff to prove in some other way the advance which he alleged [*Lala Lakhi v. Sayed Haldar*, 4 CWN 82].

As to burden of proof of a consideration where the parties stand in the position of active confidence within the meaning of s 111, see *Thakur Das v. Jairaj*, 31 IA 46: 26 A 130: 8 CWN 509 and other cases cited there.

Where in a suit by the endorsee for a *hundi* against his immediate endorser, the defendant pleads want of consideration, the *onus* is on him to prove the plea [*Govindram v. Mantora*, 1 CLR 429]. Where a bond showed on its face endorsements of the payment of instalments and defendant pleaded limitation saying that no instalment had been paid within the period of limitation, the defendant ought to adduce evidence to show that no instalment within the limitation period was paid [*Radha Prasad v. Bhajan Rai*, 7 A 677]. Where there are two endorsements on a pronote as to same payment but with different dates, it is for the plaintiff to prove the date saving limitation [*Rowther v. Mg San*, A 1927 R 255].

The *onus* of a proving want of consideration is on the party alleging it, but where the man is weak in intellect and hard of hearing, the *onus* is mitigated and the court may demand reliable evidence of the opposite party [*Lal Bahadur v. Zalim*, 27 IC 518]. In an ordinary case defendant pleading satisfaction must prove it. But where the mortgagor was a weak man leading a most immoral life, it was *held* that the plaintiffs were to prove that the mortgages had not been satisfied [*Rai v. Bhaiyalal*, 58 IC 13: 24 CWN 769 PC].

When in answer to a suit on a mortgaged-deed defendant pleads discharge and produces the deed with endorsement of payment, the *onus* is on the plaintiff to show that defendant got it by dishonest means and that the endorsement was either forged or unauthorised [*Chaudhuri Md v. Sri Mandir*, 39 IA 184: 34 A 511: 17 CWN 49; *Madan v. Etawari*, 36 IC 562]. this burden is one which shifts as the evidence develops [*Kundan v. Begam-un-nisa*, 47 IC 337: 22 CWN 937 PC. See *illus* (*i*) s 114 *post* and notes thereto].

Lost Bond—In a suit upon a lost bond, if execution is denied, it is sufficient if execution is proved and it is not necessary to prove loss. But if the defendant pleads payment or part payment, plaintiff must prove loss [*Beni Madho v. Ramlakhan*, 81 IC 570 (O)]. Where in a suit on a mortgage bond alleged to be lost, the defendant denies execution, his alternative plea of payment does not amount to admission of the mortgage sufficient to relieve the plaintiff from proving the loss and to entitle him to sue upon a copy [*Md Zafar v. Zahur*, 97 IC 82: 24 ALJ 964]. The plaintiff in a suit on a bond for money accounted for not producing it by alleging that the defendant had stolen it. The defendant admitting the execution of the bond pleaded payment—*held* that the defendant was bound to begin and prove payment either by the production of the bond or other evidence or both [*Chuni Kuar v. Udai Ram*, 6 A 73: 3 AWN 221. See also *Savijiban v. Patlu*, 8 BHC 139].

Boundary Disputes.—On questions of boundary, specially where the dividing line in dispute runs through waste lands which have not been the subject of definite possession the rule as to the burden of proving the affirmative is not applicable. The litigants are in the position of counter-claimants, and both parties are bound to do what they can to aid the court in ascertaining the true line [*Lukhee Narain v. Jadu Nath*, 21 C 504 PC; *Gajhoo v. Kotwar*, 11 CWN 230; *Manindra v. Saradindu*, 27 CLJ 599; *Radha Kr v. Matiyar*, 65 IC 743]. Where a plaintiff sued to recover a

quantity of land by rectification of boundaries fixed by some survey which he alleged to be erroneous, the *onus* of proof that the award was erroneous was on the party impeaching it [*Leelanund v. Mohendra*, 13 MIA 57: 13 WR 7; see also *Leelanund v. Lachmanu*, 10 CLR 169: 3 WR 19 PC]. In a dispute regarding the directions of a boundary, which one of the parties has demolished, if the other party proves the general direction, the *onus* of proof that the direction is wrongly stated, if it be so, lies on the former, who removed the boundary [*Jadu Nath v. Kally Kristo*, 25 WR 524].

The Judicial Committee wholly rejected the contention that where there was a dispute as to the external boundaries of a permanently settled *zemindari* which happened to be traversed by a navigable river of variable course, the burden of showing the exact boundaries of that course in 1773 was on the *zemindar* [*Haradas v. Secy of State*, 43 IC 361: 26 CLJ 590 PC].

Carrier.—The burden of proof of absence of negligence is upon the common carrier on the theory that the loss or damage to the goods is *prima facie* proof of a negligence [*Akhil v. I G N & R Co*, 21 CLJ 565: 29 IC 260: *I G N & Ry Co v. E I Ry Co*, 47 C 1027; *T Muddu v. Union*, A 1972 My 164]. S 9 Carriers Act, 1865 relieves the plaintiff of proving negligence [*Mooljee Sikka & Co v. Narharsingh*, A 1959 MP 351; *Banwari Lal Podar v. Transport Corporation*, A 1989 Pat 303, 309; *Assam Bengal Roadways Ltd. v. Union of India*, A 1988 Kar 157, 161]. Common carrier—*onus* of proof, see *Dekhari Tea Co v. A B R*, 23 CWN 998. In a suit for damages sustained by the wrecking of a train, where the Railway pleaded malicious removal of rails by unknown persons, the *onus* of proving that plaintiff's injuries were not due to the negligence of company was on them [*E I R Co v. Kirkwood*, 48 C 757 PC: 67 IC 921]. When a defendant is called upon to prove that he was not negligent, he has to prove that he took reasonable care [*I G N Rly Co Ld v. E A Co Ld*, A 1921 C 315: 33 CLJ 72].

See *post*, "*Damages*", "*Railway Cases*".

Civil P Code: [Cases under].—In a civil suit, there is no burden cast on any party similar to the one in criminal prosecutions which requires the prosecution in all fairness to produce even evidence against its case [*Ramchandra v. Shankar*, A 1968 B 388]. Where one suit was brought in respect of plaintiff's proprietary interest in a certain land, and another suit in respect of a leasehold interest in that land, the *onus* was on the defendant to show that the matters were the same and Or 2 r 2 was a bar [*Upendra Lal v. Secy of State*, 20 C 716; **follld** in *Abdul Qadir v. Imam Din*, 102 IC 31 (L)].

The burden of satisfying that a consent decree ought to be set aside on the ground of fraud rests on the plaintiff [*Sudhirendra v. Ranendra*, 51 CLJ 364: A 1930, C 539].

In a suit to set aside a sale for arrears of revenue, the *onus* of proving irregularity and illegality in the service of notice is upon the person who seeks to have the sale set aside [*Sheoruttum v. Net Lall*, 30 C 1: 6 CWN 688]. So in a suit for confirmation of a sale held in execution of decree, the *onus* lies on the defendant to prove that there was material irregularity in publishing and conducting it [*Bandi Bibi v. Kalika*, 9 A 602; *Shib Singh v. Mukat Singh*, 18 A 437].

In a suit on a foreign judgment, the *onus* is on the defendant to prove that he did not submit to the foreign jurisdiction [*Ramanathan v. Lakhshmanan*, 24 MLT 244].

Claim Cases.—In a claim preferred by a third party under Or 21, r 58 C P Code, it is for the claimant to begin and he must prove that the property belonged to him

and was in his possession [*Nga Tha Yah v. Burn*, 2 BLR 91 FB : 1 WR 8 FB]. But if he shows, in proof of title, that a deed of sale has been executed in his favour by the judgment debtors, that consideration had passed and possession had been given to him, this is sufficient to shift the onus on the defendant [*Digambari v. Beni Madhub*, 15 WR 155].

In a suit under Or 21, r 63 [now r 58(5)], C P Code, 1908, the burden of proof is heavy on the plaintiff suing for a declaration that the document on which the order of the executing court was passed was sham and fictitious [*Parasnath v. Mohani*, A 1959 SC 1204; see *Ram Nath v. Brindaban*, 18 A 369; *Nanhijan v. Kuram*, 30 A 321: 5 ALJ 601; *Ganesh Atmaram v. Santai*, 12 B 270; *Rudra Prasad v. Benode Ram*, 3 BLR 71 note: 10 WR 321; *Mohima v. Nurruddin*, 3 BLR 70: 11 WR 422; *Tuleseemony v. Peary Mohun*, 25 WR 79; *Raj Kishore v. Ram Surbo*, 11 WR 454; *Adam Isujhbhai v. Jamnadas*, 17 B 94; *Narayan v. Bhioraj*, 2 NLR 87; *Nambiar v. Sundrabai*, 14 IC 813; *Jamahar v. Askaran*, 22 CLJ 27; *Nachiappa v. Chinniah*, 36 IC 794; *Ali Bai v. Bhai*, 2 Lah LJ 198; *Narak v. Magoo*, 22 CLJ 380; *Ram Chand v. Fazal*, A 1929 L 455; *Mahadeo v. Ram Pd*, 8 P 89: A 1929, P 579]. The burden of proof is on the party seeking to establish his right to attach, even when his opponent's claim has been dismissed for non-prosecution [*Gilla v. Monohar*, 7 P 777]. In a suit under Or 21, r 63 the intial burden is on the plaintiff to show that the property is not liable to attachment. The plaintiff discharges this burden by showing a transfer in his favour. But if the circumstances are such that a reasonable inference of fraud can be drawn, there would doubtless be a burden on the plaintiff to rebut the inference by showing that the transaction was *bona fide* [*Amarnath v. Dwarka*, A 1945 A 42: 1944 ALJ 371 (*Md Ali v. Bismillah*, A 1930 PC 255; *Ghansam v. Uma Pd*, A 1919 PC 6: 17 ALJ 410 **relied** on)].

Consent.—In a charge of indecent assault, the defence was consent. The *onus* of negativing consent was on the prosecution [*R v. Donovan*, 1934, 2 KB 498: 50 TLR 566. The burden of proof where consent is in issue has been explained in this case].

Consideration.—[See also "*Bond*," "*Execution*" *and* "*Recitals*"]. Consideration in a pronote is to be presumed and the burden to prove that there was no consideration is upon the executant [*Shanmuga v. Chidambaram*, A 1938, PC 123, *Ram Rajaram v. Dhruba Charan Jena*, A 1982 Ori 264, 265; *T A Umapathy v. T A Masilamani*, A 1987 Mad 156, 160]. Once the defendant adduces evidence to the satisfaction of the court that on a preponderance of probabilities there is no consideration in the manner pleaded in the plaint or suit notice or the plaintiff's evidence, the burden shifts to the plaintiff and the presumption disappears [*G Vasu v. Syed Yasceen Sifuddin*, A 1987 AP 139, 146, 147 (FB): (1987) 1 An LT 1]. Where the consideration stated in a sale-deed is a pronote and the note is produced by the purchaser, the burden of proving that there was no consideration as the debt had already been satisfied is on the person who alleges it [*Annamalai v. Ramanathan*, 51 CWN 850 PC: A 1947 PC 98]. If a party says that no consideration passed for a document, he should disclose his source of knowledge [*Sushil Kr Maity v. Sandhyarani Maity*, A 1986 Cal 27, 29]. The onus as to whether there was consideration or whether the full consideration stated in a mortgage bond passed, is wholly on the mortgagor [*Bhagwan v. Bishambhar*, A 1940 PC 114: 72 CLJ 440]. Where defendant admits execution but denies receipt of consideration and also that he owed any money to or received any money from the plaintiffs, the *onus* lies heavily on the defendant [*Seth Maganmal v. Darbarilal*, 107 IC 113: A 1929 PC 39 : 54 MLJ 208: 47 CLJ 222]. The position may be somewhat different when a third party comes forward to deny consideration. Where fraud and collusion are definitely alleged by a third party, the evidence produced by the party who is a beneficiary under the document has to be scrutinised most carefully. There

should not be any undue stretching of the doctrine of *onus probandi* in such cases [*Kaluram v. Raghupat*, A 1953 P 240; *Yellappa v. Tippanna*, A 1929 PC 8].

The usual presumption of consideration (upon admission of execution) cannot however be drawn in the case of documents executed by ignorant and illiterate persons [*Udebhan v. Vithoba*, 1939 Nag 160 (*Omanhene v. O*, A 1937 PC 274 relied on)]. Where defendant only admitted that he put his signature or thumb mark on some other document, the onus of proving execution is on the plaintiff [*Chulhai v. Kuldip*, A 1931 P 266: 134 IC 632]. When execution is proved by the evidence of a finger-print expert, the burden of proving want of consideration is on the executant [*Ganga v. Molar*, A 1935 L 147].

It is established practice in cases of contract, to require satisfactory proof of actual receipt of consideration and a contract under seal does not, in India, import that there was a sufficient consideration for the agreement [*Raja Sahib v. Budhu*, 2 BLR 111 PC]. An admission by a mortgagor or vendor of receipt of consideration before registrar casts the burden on the mortgagor or vendor to disprove the admission [*Govindappa v. Sonlal*, 109 IC 149 (N); *Rahmat v. Zabita*, 29 PWR 1917; *Thanneru v. Subbamma*, 1921 MWN 747; *Gangaram v. Rulla*, 2 L 249]. Vendor admitting receipt of consideration in the sale-deed has a heavy burden to prove non-receipt of it [*Johnstone v. Gopal*, 12 L 456: A 1931 L 419: *Chandra v. Narpat*, 34 IA 27: 29 A 184 PC folld].

Once the document is proved or admitted, the presumption under s 118 N I Act applies [*Rishikesh v. Brij*, 1914 OWN 613; *Raghunath v. Naghuttu*, 1941 OWN 1161]. The presumption under s 118 is not in respect of the consideration mentioned in the instrument, but in favour of there being any consideration which is a valid consideration in law. The mere fact that the consideration is found to be untrue and another consideration is set up does not rebut the presumption, and the burden still lies on the defendant to prove that there was no consideration [*Tar Md v. Tyeb*, A 1949 B 257; *Ramani v. Suriya*, A 1943 C 22: 46 CWN 340—CONTRA: *Zohra v. Rajan*, A 1915 L 86: 48 PR 1915; *Sundar v. Khusi*, A 1927 L 864; *Krishna & Co v. Bhagat Ram*, A 1968 Pu 552]. Where in a handnote endorsement portion below the stamp and upto the date is written in the pen of defendants but the body portion is not in their pen presumption arises that under s 18 N I Act it was made or drawn for consideration and the burden lies on defendants to rebut it [*Bhogwati v. Pahil*, A 1969 P 215].

Pronotes were executed in quick succession by a young man of extravagant habits —*onus* is on plaintiff to prove consideration [*Subramania*, 29 MLJ 236; *Moti Gulab v. Md Mehdi*, 20 B 367; *Singar v. Bisdeo*, A 1930 A 568]. In suits on pronotes or bonds relating to dealings between professional money-lenders and expectant heirs or persons who had just emerged from minority, the *onus* to prove that consideration passed lies on the creditor [*Vyas v. Vyas*, 25 B 367]. But when debtors or majors are literate and claimed to be businessmen, the *onus* of proving want of consideration is on them [*Din Md v. Badri*, A 1930 M 65].

[See also *ante*, "*Bond*" and notes to s 92 proviso 1].

Constitution.—Socio-economic bio-data of challenged legislation must be produced by litigants explaining 'how', 'why' and 'why not' of each clause [*Ganga Sugar Corpn v. S*, A 1980 SC 286].

Contract.—The *onus* is on the party who contends that a contract is governed by special and not by general rules of law [*Tej Chand v. Sreekant*, 3 MIA 361: 6 WR 48 PC]. In a suit for specific performance of contract for sale of land, it is for the sub-

sequent purchaser to show that he is *bona fide* purchaser for value without notice [*Hem Ch v. Amiyabala*, 40 CLJ 184: 52 C 121; *Murat v. Pheku*, A 1928 P 587; *Ameshwar Singh v. Mari Narayan Singh*, A 1984 Pat 277, 279]. But the *onus* of such a negative issue is ordinarily discharged by a denial and by negative evidence [*Lekh v. Dwarka*, 113 IC 140 (L)].

A contracting party alleging that the agreement is opposed to public policy is to prove those special circumstances which will invalidate the contract [*Bakshi v. Nadu*, 1 CLJ 261; *Gopal v. Babu*, A 1928 N 273; *Sonba v. Ganesha*, 9 NLR 182].

The party who alleges that a contract is conditional on the happening of a contingency must prove the existence of such a condition [*Ganeshi v. Sahai*, A 1927 L 481: 105 IC 265]. In order to make a broker liable on the ground of want of authority, the *onus* is upon the plaintiff to affirmatively prove such want of authority [*Bisseswar v. Smidt*, 10 CWN 14]. Where an agreement is challenged on the ground of its being a restraint of trade the onus is upon the party supporting contract to show that restraint is reasonably necessary to protect his interest. Once, this onus is discharged, the onus of showing that restraint is nevertheless injurious to the public is upon the party attacking the contract [*Niranjan v. Century Spg & Mfg Co Ld*, A 1967 SC 1098].

Where the defendant failed to produce any way leave agreement the defence that there was already an existing wayleave in the affected portion of the land of the plaintiff could not stand [*Dolomite Industrial Park Sdn Bhd v. Tenaga Nasional Bhd*, Code No 22-105-1990 dt. 5.6.1997 (Kaula Lumpur HC)].

Contribution.—In a suit to recover the amount of excess payments of Government revenue made by the plaintiffs on account of their co-sharers to save the estate from sale, the *onus* was on them to prove their shares and amount of revenue payable on them [*Aghoree v. Ramalee*, WR (1864) 309].

Where plaintiff set up a *prima facie* case by alleging joint decree passed against defendant and himself and that amount was paid by plaintiff solely, the *onus* is upon the defendant to have stated and proved that the debt was a transaction in an undissolved partnership [*Gadlavellaru v. Vellathambi*, (1912) MWN 384 (32 M 203 **folld**)]. In a suit for contribution by one judgment-debtor against others, it is for the defendant who contended that he was not liable to pay the full share to prove it [*Maula Baksh v. Karim*, 95 IC 1007: A 1926 L 553].

Copyright.—When complainant produces his certificate of registration and the book published at that time, the *onus* lies on the defence [*R v. Sheocharan*, A 1931 A 353].

Criminal Cases. [Main Burden of Proof Never Shifts In Spite of Statutory Presumption].—The *onus* of proving everything essential to the establishment of the charge against the accused lies upon the prosecution, as every man is presumed to be innocent [*Kharsed Kazi v. R*, 8 CLR 542; *R v. Ahmed*, 11 WR Cr 26; *Ayyanger v. A*, 4 M 393; *Ramasami v. Lokananda*, 9 M 387; *R v. Balkrishna*, 17 B 573; *R v. Haradhan*, 19 C 380; *Debi Singh v. R*, 28 C 399: 5 CWN 413; *Panchanan v. R*, 23 CWN 693; *Kesar v. R*, 4 PLJ 74 FB: 49 IC 481; *Hathem v. R*, 24 CWN 619; *Sushil v. R*, 51 IC 449; *State of Punjab v. Rattan Chand*, 1984 Cri LJ NOC 153 (Pun-Har) (DB)]. The *onus* of proving the guilt beyond reasonable doubt never changes; it always rests on the prosecution [*Baidyanath v. S*, A 1968 SC 1393; *S L Goswami v. S*, A 1972 SC 716; *R v. Schama*, 86 LJKB 396; *Woolmington v. D P P*, 1935 AC 462; *Mancini v. D P P*, 1941, 3 All ER 272; *Raghunath v. R*, 21 PLT 1021; *R v. Satyacharan*, 52 C 223; *Wauchope v. R*, 58 CLJ 405: 61 C 168; *Benoyendra v. R*, 63

C 929; *Sarat v. R*, 65 CLJ 83; *R v. Damapala*, 14 R 66: A 1937 R 83 FB; *Krishnadayal v. R*, A 1946 A 227; *Jagmal v. R*, A 1948 A 211; *Jullundur Municipality v. Romesh*, A 1970 P&H 137; *Rameshwar v. State of UP*, 1984 Cri LJ NOC 203 (All), even though the defence is palpably false [*Tikka v. S*, A 1974 SC 155; *Ramaswami v. Rangaswami*, A 1937 M 968; *Jadu v. R*, 185 IC 162]. The prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. The weakness of the defence can only be called as additional link to aid the prosecution. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court [*Sharad Birdhicchand Sarda v. State of Maharashtra*, A 1984 SC 1622, 1655 (SC), 1984 Cri LJ 1738; *Rajendra Singh v. State of UP*, 1984 Cri LJ 1164, 1167: 1984 All Cri R 509 (All); *Haji Mohamed Iqbal Ahmed v. State of Karnataka*, 1990 Cri LJ (NOC) 179 (Kant)].

The standard of proof about Alibi is same as is on the prosecution to establish its case. Even if, a doubt is raised in the mind of the court that the accused may have been present or may not have been present at the time of the occurrence, then the accused is entitled to the benefit of doubt. [*Jagarnath Giri v. State of Bihar*, 1992 Crl LJ 648, 657 (Pat)]. The accused merely has to cast a reasonable doubt in the prosecution case to be acquitted [*Mohamed Radhi Bin Yaakob v. Public Prosecutor*, (1991) 3 Malayan LJ 169 (Malaysia SC)]. When the defence version competes in probability with that of the prosecution, omission to explain the grievous injury on the chest of the accused assumes much greater importance. [*Brij Nandan Raj v. State of Bihar*, 1992 Crl LJ 942, 947 (Pat)], defence version may even be false, because a falsely instituted prosecution may compel the accused to adopt a false defence. So prosecution cannot derive any advantage from the falsity or other infirmities of the defence version, so long as it does not discharge its initial burden of proving its case beyond all reasonable doubt [*Md. Alimuddin v. State of Assam*, 1992 CrLJ 3287, 3292 (Gau)], or no evidence in defence is produced, the silence of the accused being of no consequence [*Bishan v. S*, A 1975 SC 573], nor shifted merely because the accused sets up a plea of private defence [*Ashokan v. State of Kerala*, 1982 Cri LJ 173, 178 (Ker)]. Consequently it is misdirection to draw the jury's attention to the fact that the accused had failed to give any explanation of the facts adduced in evidence against him, particularly when the attention of the accused was not specifically drawn to those facts during his examination [*Benoyendra v. R*, 63 C 929: 40 CWN 432; see also *Seneviratne v. R*, 41 CWN 65, 79 PC]. It is an erroneous view of the law and a misdirection to state to the jury that under s 103 the onus may be said to lie on the accused [*Sadhu Shk v. R*, 4 CWN 567]. The law was lucidly restated thus by VISCOUNT SANKEY, LC in the case of *Woolmington v. Dir of Public Prosns*, 1935 AC 462:—

> "Throughout the web of the English criminal law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of, and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention the prosecution has not made out the case, and the prisoner is entitled to acquittal." (As to exceptions, see *post* ss 105, 106).

It has been pointed out in several cases that the law laid down in the above House of Lords case is also the law in India [*R v. Damapala*, 14 R 666: A 1937 R 83 FB; *Charku v. S*, A 1960 AP 153]. In criminal cases the main burden, *ie* of proving the guilt of the accused beyond reasonable doubt always rests on the prosecution and never shifts even though any statute provides for the drawing of some presumption

against the accused in certain cases; [see *post* notes to s 105 and s 114(*a*)]. But if the accused wants to rely on a particular fact for discrediting a prosecution witness, that fact must be adequately brought out in cross-examination of the prosecution witness [*Dinkar v. S*, A 1970 B 438]. In *Jayasena v. R*, 1970, I All ER 219, the Privy Council has, however, held that *Woolmington's* case has no application in Ceylon and is of no help in the construction of this statute as it embodies the law before *Woolminton v. DPP*, (see *post* p 912). The first part of sec. 5(*1*)(*e*) of the Prevention of Corruption Act casts a burden on the prosecution and the second part on the accused. The words "for which the public servant is unable to satisfactorily account" imply that the burden is on such public servant to account for the sources for the acquisition of disproportionate assets. [*State of Maharashtra v. Wasudeo Ramchandra Kaidalwar*, A 1981 SC 1186, 1189 (DB), 1981 Cri LJ 884]. In respect of scuffle regarding possession of disputed land, the burden of proof is on the prosecution that deceased was in possession of the land [*Halou Biswas v. State of Assam*, 1982 Cri LJ NOC 28 (Gau)]. The burden of proving every ingredient of a corrupt practice is on the person who sets up corrupt practice. The *onus* is not discharged on the proof of mere preponderance of probability and every ingredient of a corrupt practice must be established beyond reasonable doubt by evidence which is clear and unambiguous [*Mrs Habiba Kidwai v. Begum Khursheed Kidwai*, A 1985 Delhi (NOC) 44]. When the eye-witnesses have not actually seen who had fired at the deceased, the prosecution has not proved its case [*Santokh Singh v. State of Madhya Pradesh*, 1988 Cri LJ 1583, 1587 (MP)]. Merely because benefit of doubt was given to some of the accused where natural corroboration in the testimony of PWs 1 to 5 was wanting, does not mean that their evidence should be rejected in its entirety and all the accused should be acquitted [*Pattad Amarappa v. State of Karnataka*, A 1989 SC 2004, 2015: 1989 Cri LJ 2167].

Once a measure which is not verified and sealed is recovered from the business premises of the accused, the burden is on the accused to prove that such measures were not actually in use [*Asst. Inspector of Labour II Circle v. S Radhakrishnan*, 1989 Cri LJ 1161, 1163 (Mad)]. The burden is on the prosecution to prove that the time when the accused was passing the note he knew that it was a forged note. The mere possession of forged currency note does not shift the burden to the accused to prove his innocent possession of the forged note [*Madanlal Sarma v. The State*, 1990 Cri LJ 215, 216 (Cal)]. In a case where special provision of s. 299 Cr P C is invoked, it is the bounden duty of the prosecution to strictly satisfy the Court that the person who is put up for trial subsequently is not only the absconding accused but is the accused who committed the crime and there is no doubt about his identity and of his being implicated in the crime to prove which evidence had been recorded earlier. [*Malkan Singh v. State of Madhya Pradesh*, 1990 Cri LJ 2763, 2766 (MP)]. In a case in which the evidence is of a circumstantial nature the facts and circumstances from which the conclusion of guilt is said to be drawn by the prosecution must be fully established beyond all reasonable doubt and the facts and the circumstances so established should not only be consistent with the guilt of the accused but also they must entirely be incompatible with the innocence of the accused and must exclude every reasonable hypothesis consistent with his innocence [*S D Soni v. State of Gujarat*, A 1991 SC 917, 920].

The burden of proving guilty intention lies upon the prosecution, where the intent is expressly stated as part of the definition of crime [*Bal Mukund v. Ghansam*, 22 C 391]. The burden of proving intention or knowledge is on prosecution and the burden is not on the accused of showing absence of knowledge [*Charku v. S*, A 1960 AP 153]. The effect of the introduction of the word "*knowingly*" in a penal enactment is to throw the

burden of proof on the prosecution [*R v. Fisher*, 14 M 359]. When the accused is found inside the house of the complainant at midnight and the evidence is clear that he was not there with the consent or at the invitation of the complainant, the *onus* is on the accused to show that his intention was under the circumstances innocent [*S v. Ishri*, 22 A 46]. Even if the explanation tendered by the accused is not plausible the burden on him to negate the prosecution case will always stand discharged, if the effect of the material brought on the record, in its totality, renders the existence of fact presumed, improbable [*State v. Satishchand*, 1987 Cri LJ 1205, 1211 (1986) 2 Crimes 102 (Delhi)]. In a food adulteration case, it is for the accused to adduce proof or rely on other material to show that the fall in standard is solely due to natural causes and beyond the control of human agency [*Kimti Lal v. State of Haryana*, 1984 Cri LJ 690, 691: 1984 Chand Cri C 86 (HC) (P&H)]. *Onus* is on accused to substantiate plea of *alibi* and make it reasonably probable [*S v. Sughar*, A 1978 SC 191: *Chandrika v. S*, A 1972 SC 109; *State of Haryana v. Sher Singh*, A 1981 SC 1021, 1023 : 1981 Cri LJ 714; *Balwan v. State*, 1989 Cri LJ 2475, 2481 (Del) (DB).

It is the duty of the Public Prosecutor to call every witness who can throw any light on the enquiry whether they support the prosecution theory or the defence theory. His duty is to represent not the police but the Crown [*Brahamdeo v. R*, 1920 Pat HCC 24: 54 IC 241. See 8 C 121: 42 C 828, 829; *Nga Lu v. R*, A 1933 R 378]. It is the duty of the prosecution to explain the injuries on the accused [*Anam Pradhan v. The State*, 1982 Cri LJ 1585, 1599 (Ori)]. Evidence led in by one accused which is against the interest of the co-accused does not relieve the prosecution of the burden of proving their case [*J D Aggarwal v. State*, 1983 Cri LJ NOC 155 (Del) (1983) 1 Crimes 1083]. Omission to examine a witness which only amounts to duplication will not vitiate the prosecution case [*Radhakisan V S Parashar v. State*, 1988 Cri LJ 17, 20: (1987) 2 Crimes 51 (Bom)]. It is no part of the prosecutor's duty to try by hook or crook to obtain conviction. And it is the duty of the court sternly to discountenance such methods which are but a travesty of justice [*Wauchope v. R*, 61 C 168: 58 CLJ 405; *Nga Aung v. R*, 14 R 45; *Shwe Pru v. R*, A 1941 R 209; *Shk Abdul v. R*, A 1925 C 887: 85 IC 830]. If the prosecuting counsel knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call the witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court such evidence. If the prosecuting counsel knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish [*per* DENNING MR, and to the same effect by DIPLOCK LJ, in *Dallison v. Caffery*, 1962, 2 All ER 610, 618, 622; see also *R v. Bryant*, 31 Ch App Rep 146]. See *post*, notes to s 114, *illus* (*g*): "*Same: Criminal Cases*".

In a trial under s 193 PC the mere fact that the witness made statements in the court contrary to those made earlier to the police during investigation in the absence of anything to show that those earlier statements were true and must be true, will not in any way shift the burden of proof to the accused [*Ganduri, In re*, A 1965 AP 402]. When the prosecution has proved the guilt beyond reasonable doubt it need not explain the injuries sustained by the accused [*Prithvi Nath Pandey v. State of U P*, 1994 Cri LJ 3623, 3631 (All)].

Where death is alleged to be due to injuries caused by a lethal weapon, it is the duty of the prosecution to prove by expert evidence that it was likely or at least possible to have been caused with such weapon [*Mohinder v. S*, A 1953 SC 415].

Merely because prosecution proves that car left road or met with accident there can be no presumption of rash and negligent driving requiring accused to prove that

he was not driving vehicle in rash and negligent manner [*Natarajan, In re*, A 1966 M 357]. The burden on the prosecution includes the burden of proving the mental state of the accused wherever intention or knowledge forms one of the ingredients of the offence. [*Dadasaheb Bapusaheb Naik v. State of Maharashtra*, 1982 Cri LJ 856, 867: 1982 Cri. LR (MH) 247 (Bom)].

***Res ipsa loquiture* not applicable to criminal cases.**—In an Australian case, a person was found lying injured near the motor vehicle that he had been driving. The vehicle had left a near by road on the wrong side and had been found in a damaged condition. He was charged with the offence of having driven without due care and convicted. Allowing the appeal against his conviction the court said that the civil doctrine of *res ipsa loquiture* has no application in the criminal law and that the mere happening of an accident does not give rise to a presumption of driving without due care. *Waldie v. Cook*, (1988) 91 ELR 413.

[See notes to s 114 *post*, under "*Innocence*", "*Intention and Knowledge*"].

Customs.—There is no such thing as "general customary law" and a party relying upon any custom, must prove it [*Samon v. Sahu*, A 1935 L 93; *Abid Ali v. Secy of S*, A 1951 N 327]. A party has to plead in specific terms customs on which he relies and prove it [*Kochan v. Mathevan*, A 1971 SC 1398; *Munshi v. R Malsingh*, A 1977 SC 2002]. It is for a party who alleged a custom to prove it. This rule is to be strictly adhered to even in cases where the custom alleged is neither unique nor unknown [*Chandar Raj Kunwar*, 31 CWN 417 PC]. If a person sets up a special or family custom as overriding the general law of the land or at variance with the law of the community to which he belongs, it is incumbent upon him to prove such custom [*Natukher v. Chowdhury Chintamun*, 29 WR 247; *Hirbai v. Gorbi*, 12 BHC 394; *Raja Mohendra v. Jokha*, 19 WR 211; *Thakur Jitnath v. Loknath*, 19 WR 239; *Rahimat v. Hirbai*, 3 B 34; *Gopal v. Hanmmunt*, 3 B 273; *Adrishappa v. Gurushidappa*, 4 B 494: *Gossain Rambharti v. Surajbharti*, 5 B 682; *Cassumbhoy v. Ahmedbhoy*, 13 B 534 on **appeal** from 12 B 289; *Dharani v. Sisuram*, 39 CLJ 100; *Ramnarain v. Harnarayan*, 76 IC 585; *Bhima v. Fakir*, A 1948 N 155]. So also when a special custom inconsistent with the ordinary law of inheritance is set up [*Abdul Hossain v. Habibullah*, 18 PR 1906; *Radho v. Harnam*, 99 PR 1907: 167 PLR 1908; *Nur Nishan v. Fazal*, A 1949 L 198; *Bai Baijee v. Santok*, 20 B 53].

Onus of proving family local custom restricting alienation of impartible estate is upon the person who alleges it [*Dhalbhum Case*, 54 IA 289: 31 CWN 943; *Kali Prasanna v. Nagendra*, 44 CWN 873]. Custom of succession to property situate in India at variance with the *lex loci* must be proved by the person setting it up [*Badom v. Suraj*, 28 A 458]. The burden of proving that the *vatandar joshi* of a village is not entitled to officiate and take fees in the families of any particular caste, lies upon the person asserting exemption [*Rajavalad v. Krishnabhat*, 3 B 232]. Where a party alleges a *raj* to be indivisible, and he is, as heir, entitled to succeed to the whole, the *onus* of proof is on him [*Girdharee v. Koolahul*, 6 WR 1 PC]. The *onus* of proving that the custom of primogeniture, in a particular family, governs the succession to their property, is on those who claim to succeed in that right [*Gururadhwaja v. Saparundhwaja*, 23 A 37 PC; *Shyamanund Das v. Rama Kanta Das*, 32 C 6. **Referred** to in *Bhuiya Sarut v. Akshoy*, 13 CLJ 305]. Custom as to devolution of mohuntship from *Guru* to seniormost *chela* must be proved by the *chela* [*Bhagwan v. Girija*, A 1972 SC 874]. The *onus* of proving a local usage regulating the rights to lands, the subject of alluvion and diluvion, lies upon the person who asserts it [*Rai Manick v. Madho Ram*, 13 MIA 1]. The initial *onus* to show that the general custom in Punjab in favour of the daughter's succession to the self-acquired property of her

father has been varied by a special custom excluding the daughter must be on the collaterals [*Kehar v. Chanan*, A 1968 SC 806 (*Salig Ram v. Maya Devi*, A 1955 SC 266: 1955, 1 SCR 1191 **folld**)].

If the existence of custom has been proved for a long period, the *onus* lies on the person seeking to disprove the custom to demonstrate its impossibility [*Mahamaya v. Haridas*, 19 CWN 208: 20 CLJ 183]. If a custom of adopting a married male having children in the community of '*Khateeka*' is proved to prevail for a period of 20 to 30 years, it follows that it was ancient, certain and reasonable and it is for the other side who challenges its existence to lead evidence to the contrary [*Behrulal v. Chattra*, A 1981 Raj (NOC) 187].

When a custom is recognised and affirmed in a series of decisions, it becomes incorporated in the general law and the *onus* of proof no longer lies on those who assert it. Thus, except in Madras and Punjab, the *onus* would lie upon those who deny the custom of adoption by a sonless Jain widow without prior authority of husband [*Premraj v. Chand Kanwar*, 74 IA 253: A 1948 PC 60: 1947, 2 MLJ 516].

[As to Customs, see s 13 *ante*].

Damages for Defamation and Maiicious Prosecution.—In a suit for damages for defamation of character, the plaintiff must start his case by showing that he was not guilty of the offence charged [*Mahendra v. Surborokhya*, 11 WR 534]. In a defamation suit, if the occasion is privileged, the *onus* is on the plaintiff to show actual malice [*Robertson v. Mrs Murray*, 30 IC 930]. In an action for damages for malicious prosecution, the plaintiff has to prove absence of reasonable and probable cause, and malice on defendant's part and that he was innocent of the charge [*Pestonji v. Queen Ins Co*, 25 B 332 PC; 4 CWN 781; *Balbhaddar v. Badrri Sah*, A 1926 PC 46: 1 Luck, 215; *Braja Sundar v. Bamdeb*, A 1944 PC 1: 24 PLT 395; *Harish v. Nishi Kanto*, 28 C 591: 6 CWN 159; *Ramayya v. Sivayya*, 24 M 549; *Madhu Lal v. Sahi Pande*, 27 C 532; *Syama Churn v. Jhatoo*, 6 CWN 298: *Raghavendra v. Kashinath*, 19 B 717; *Raj Jung v. Rai Gudar*, 1 CWN 537; *Jadubar v. Seo Saran*, 21 A 26; *Mohunt Gour v. Hayagrib*, 6 BLR 371 : 14 WR 425: *Ganesh v. Mugneeram*, 11 BLR 321 PC : 17 WR 282 PC; *Girdhar v. Jagannath*, 10 BHC 182; *Bhim Sen v. Sitaram*, 24 A 363; *Nurkhan v. Jiwan*, A 1927 L 120; *U Soe v. Mg Ngwe*, 5 R 705; *Corea v. Peiris*, 14 CWN 86; *Gadigi v. Marwadi*, 20 MLT 303; *Abdul Shakur v. Lipton & Co.*, 72 IC 411: *Shk Much v. Horomul*, 17 CWN 434; *Vijainath v. Damodar*, A 1971 A 109]. The *onus* is not on the defendant to show that there was reasonable and probable cause, but on the plaintiff to prove its absence [*Vaidinadier v. Krishnaswami*, 36 M 375]. Where the accusation against the plaintiff was in respect of an offence based on the personal knowledge of the defendant and the trial ended in an acquittal the presumption will be that there was no reasonable and probable cause for the accusation [*Pendekanti v. Bysani*, A 1969 AP 61; *Gobind v. Upendra*, A 1960 Or 29; *Taharat v. Abdul*, A 1938 P 529; *Sah Chaturbhuj v. Sah Mauji*, A 1938 A 537; *Jogendra v. Lingaraj*, A 1970 Or 91].

Damages Against a Defaulting Witness.—In a suit for damages against a defaulting witness, the *onus* is on the plaintiff to prove that he was damaged by the non-attendance of the witness [*Dwarka v. Anando*, 5 WR SCC Ref 18].

Damages: [Other Cases].—When plaintiff sued for damages for slander on defendant's stating in a police enquiry that he was a man of bad character it lay upon the defendant to prove that the occasion was privileged. Defendants having proved qualified privilege, it was for the plaintiff to establish malice [*Maung Lu v. Maung Po*, 20 IC 290]. Injury caused by fall of electric fan—Burden of proof in action for

damages for negligence rests on the plaintiff [*Blanche v. Mongini Bros*, 19 Bom LR 778]. In a suit for damages for illegal seizure of cattle, defendant is to prove that the seizure was legal [*Madhorao v. Abdul*, 44 IC 241].

Debtor and Creditor.—The burden of proving the plea of payment and discharge is upon the person who raises the plea [*Peary Lal v. Ram Jewan*, 1 WR 264; *Kunja v. Mathura*, 1 WR 155; *Meherunnissa v. Abdul Gunee*, 17 WR 509; *Barada v. Jatindra*, 49 CLJ 560]. If a debtor pleads payment to another person, it is for him to prove that the other person had or had not been held out to the debtor by the creditor as having authority to receive payment [*Md Khaleef v. Lyonnaises*, 53 IA 84: 31 CWN 1 : 94 IC 767: 28 Bom LR 1391].

When a defendant admits having received a sum of money, the burden of proving that it was advanced as a loan is on the plaintiff [*Bihari v. Chandu*, A 1939, L 386]. Under S. 7 of the Karnataka Debt Relief Act (25 of 1976) the burden of establishing that a person is a 'debtor' is initially on the claimant [*T S Kotagi v. Tahsildar Gadag*, A 1985 Kant 265, 270]. The *onus* of proving the protection under the Debt Relief Act is on the debtor and the creditor could be called upon to prove the contrary only when this initial burden is discharged by the debtor [*Ouseph Joseph v. Kochunny Moosa*, A 1984 NOC 34 (Ker) : 1983 Ker LT 867]. In the case of beneficial legislation, the burden is on the creditor to prove that the debtor has not established, *prima facie*, his entitlement for the benefits of the Act [*Narayani Amma v. Kochu Pillai*, A 1987 Kerala 170, 176 : (1987) 1 Ker LT 184].

Declaration of Title, etc. [See also "*Adverse Possession and Limitation*"].—In a suit for declaration of title, plaintiff must establish his title affirmatively and must prove that he is in possession as owner [*Rassonada v. Sitharama*, 2 MHC 171]. When a plaintiff asks for a declaratory decree confirming his title, he must prove his title, and cannot have a decree on the mere ground that he is in possession and that the defendants have proved no better little [*Jolok v. Gurwar*, 2 WR 167.—CONTRA: *Md Hasan v. Hamid*, 50 IC 431]. In a suit for confirmation of possession of certain lands sold in execution of a decree as *Lakheraj*, the *onus* was on the plaintiff to prove his title, notwithstanding the defendant's admission that the lands in question were within the boundaries of the plaintiff's *zemindari* [*Pursudh v. Biseswar*, 7 WR 148]. Where in a suit for declaration of title or possession, the defendant in possession says that the plaintiff is his *benamdar*, it does not shift the burden of proof. Plaintiff is to prove that defendant is not owner [*Lal Md v. Aijuddi*, 57 IC 972]. In a suit for declaration that the property is *waqf*, the *onus* is on the person asserting it [*Rahim v. Chamman*, 55 IC 210].

Deeds [Suit to Set Aside or Enforce].—A document executed in favour of defendant was registered although the plaintiff denied execution and alleged it to be a forgery. In a suit by the plaintiff to have the document cancelled the burden of proving execution and genuineness is upon the defendant [*Mohima v. Jugal*, 7 C 739: 9 CLR 471]. As to the *onus* of proof in suits for cancellation of deeds and the circumstances under which it is shifted, see *Anandappa v. Totappa*, 33 IC 441. The burden of proving that, deeds duly executed and registered, were not real transactions, lies on the party alleging the same [*Sham Chand v. Protap*, 24 IA 186: 25 C 78: 1 CWN 594. See "*Benami Transactions*" *ante*].

In a suit by settlor to set aside his deed on the ground that defendant got it by undue influence, the *onus* was on the defendant, to show that the settlor understood the effect of the settlement [*Bai Manigavri v. Narandas*, 15 B 549]. In a suit to set aside a deed, to which the plaintiff has been a party, the *onus* lies on him to make out a case for setting aside, on equitable grounds, a deed duly executed for a valuable

consideration [*Ashidhai v. Abdulla*, 8 Bom LR 652: 31 B 271]. Where execution of a document is admitted, the *onus* is on the executant to prove that he did not understand the terms even if he is an illiterate person [*Chandu v. Mahmud*, 97 IC 71: A 1926 O 545].

Where a person sues to have a bond purporting to have been executed by him adjudged forgery, the *onus* is in strict sense of the term on the defendant, inasmuch as he would fail if no evidence were given on either side [*Mahadeo v. Vithoba*, 18 IC 853: 9 NLR 8]. Where a court finds that a registered deed of sale is forged, no question of burden of proof arises [*Badri v. Kodo*, 28 IC 138].

See also *post*: "*Execution of Document.*" As to *onus* of proof of execution of deeds by *pardanashin* women, see s. 111, *post*.

Deara Proceedings.—As to *onus* of proving violation of statutory requirements with regard to proceedings under s 6 of Act 9 of 1847, see *Secy of State v. Jatindra*, 51 IA 241: 51 C 802: 47 MLJ 48 : 29 CWN 1.

Death.—Plaintiff alleging that certain person died before another giving him certain rights to property is bound to prove the fact [*Rangappa v. Rangaswami*, 88 IC 249; A 1925 M 1005 (see *post*, notes to ss 107, 108)].

Default.—Where under a decree defendant was to pay instalment 'through court' and plaintiff executed for default, it was for the defendants to prove that they were not in default [*Bishan v. Mahbub*, A 1948 PC 17].

Domicile.—The person, who attacks a settlement on the ground of nationality, must show conclusively that the nationality of the settler was foreign, and if he succeeds in doing so, the *onus* is then shifted upon the person supporting the settlement to show that the settler had acquired a fresh domicile in India [*Bonnaud v. Charrial*, 32 C 631]. The law leans very strongly in favour of the retention of domicile of origin. It cannot be lightly shed. A person alleging that a man has acquired a domicile of choice must prove that that man had that intention [*Carolina v. Daminio*, 18 Bom LR 715: 36 IC 227; *Jones v. Jones*, 79 IC 719 (R); *Rodriques v. State*, A 1956 B 501. See *In re Kara Deniz*, 27 CWN 557: 25 Bom LR 116: 70 IC 156 PC]. The *onus* of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost [*Kedar v. Narain*, A 1966 SC 160]. In a divorce case, the entire burden of proving that the petitioner had changed his domicile lies on him [*Linton v. Guderiam*, 56 C 530: A 1929 C 599; *Finch v. F*, A 1943 L 260].

Easement.—The right to restrain another from exercising ordinary proprietary rights over his own land is on the nature of an easement different from the ordinary rights of owners of land; the burden of proof would therefore be upon the party alleging such right [*Hari Mohon v. Kissen*, 11 C 52]. Plaintiff claiming the removal of certain outlets made by defendant in an aqueduct, on the ground that he is entitled to exclusive use of the water has to make good the title he alleged [*Omaet v. Kishen*, 15 WR 85]. Where the right to have a way or water-course over certain land is disputed by the owner thereof, the possession of the easement by an order of the magistrate in favour of the person claiming the right, will not be sufficient to relieve the latter from the *onus* of proving the claim in a subsequent suit by owner to establish his right to the exclusive use of the land [*Obhoy v. Lukhy Monee*, 2 CLR 555 (*Puchai v. Abed*, 21 WR 140 **dissented** from). See also *Hari Ram Bhikari*, 15 WR 20]. In a suit to establish a right of way, it would not be right to draw here the same inference from user that would be proper and legitimate in a case arising in England. Under s 26 of the Limitation Act (s 25 of Act 36 of 1963) the *onus* is upon

the plaintiff to prove that the user was right [*Khoda Bux v. Shk Tazaddin*, 8 GWN 359, *Kunjammal v. Rathnam*, A 1922 M 5; *Lambodar v. Remesh*, A 1958 Or 248; *Rameshur v. Nut Behari*, 16 IC 66; see however *Nazir Husain v. Aulad*, A 1926 p 460]. When defendant claims easement in an ejectment suit the *onus* is on him [*Dunichand v. Nizamuddin*, 26 PLR 301]. So also, when defendant sets up easement in a suit for injunction [*Bijaram v.Brijlal*, A 1925 L 297].

Easements Act.—The *onus*, to prove that a licence under s 60 (*b*) Easement Act is restricted to the life of the licensee is on him who asserts it [*Rahimbax v. Samsu*, A 1951 N 215].

Ejectment.—A plaintiff suing in ejectment can only succeed on the strength of his own title. There is no obligation on the defendant to prove possible defects in that title [*Jagadish v. Said Ahmad*, 50 CWN 447 PC; *Moran Mar v. Mar Poulose*, A 1954 SC 526; *Chakicherla v. Atmakuru*, A 1973 AP 149]. In an ejectment suit, the defendant though a trespasser, is entitled to require the plaintiff to prove that he has a superior title [*Kalu v. Barsu*, 19 B 803]. In a suit to eject defendant who is admittedly in possession, the *onus* is on the plaintiff to prove not only a title but that he had been dispossessed or had discontinued to be in possession within twelve years immediately preceding the suit [*Dharani v. Gobarali*, 17 CWN 389 PC : 25 MLJ 95]. In an ejectment suit plaintiff must prove his title; but when produces a title-deed which *prima facie* proves his title [*Sukira v. Viraswami*, 23 IC 815] or starts with a presumption in his favour [*Golapmani v. Kalicharan*, 16 IC 17] the *onus* shifts to defendant. In an ejectment suit plaintiff must strictly prove his title [*Ram Ch v. Vinayak*, 41 IA 290: 42 C 384: 18 CWN 1154: 27 MLJ 333]. If he fails to prove his title, the fact that he was once in possession within 12 years does not throw the *onus* on defendant to prove title [*Bapuji v. Bhagwant*, 42 B 347]. In an ejectment suit even though the defendant has no title he can still put the plaintiff to proof of his title [*Venkatasubbā v. Goteti*, A 1928 M 840]. Where in a suit for ejectment against trespasser the plaintiff proves his title and the defendant sets up plea of tenancy unless he can prove tenancy he will be liable to ejectment [*Chandrabai v. Nanji*, A 1971 B 115 (*Rammonee v. Aleemoodeen*, 20 WR 374 **follo**)]. plaintiff to proof of his title [*Venkatasubba v. Goteti*, A 1928 M 840].

In an ejectment suit by the landlord against the tenant who sets up a defence of permanent tenancy, the *onus* of proving that he has such rights is on the tenant [*Nainapillai v. Ramanathan*, 51 IA 83 : 47 M 337: 28 CWN 809 (*Secy of S v. Luchmeswar*, 16 IA 6 : 16 C 223; *Seturatnam v. Venkatachala*, 47 IA 76: 43 M 567 **relied** on); see *Khetter v. Dinendra*, 3 CWN 203; *Ismail v. Aghore*, 7 CWN 734; *Subramania v. Onnappa*, 39 MLJ 629; *Nilratan v. Ismail*, 32 CWN 51, 61; *Jnanendra v. Nasia*, 39 CLJ 526: *Manmatha v. Rajeswar*, 32 CWN 184; *Kamal v. Nanda*, 56 C 738; *Hafiz v. Shk Dargahan*, A 1939 P 448]. A question arose in some cases whether the case of *Nainapillai, sup*, was in conflict with the earlier PC decision in *Chidambara v. Veerama*, 49 LA 286: 45 M 586 (See *Zemindar of P v. Ramayya*, A 1927 M 10 : 51 MLJ 510; *Ayyangars v. Periakaruppa*, A 1929 M 617) and it was pointed out in *Zemindar of P v. Ramayya, sup*, that there was no inconsistency if the word "tenant" is taken to mean "tenant of lands belonging to the landlord". Agreeing with this view and explaining the true meaning of *Nainapillai v. Ramanathan, sup*, it has been held by the PC that in an ejectment suit the burden is on the plaintiff to show his title to immediate possession, *ie*, the right to eject, before the *onus* is shifted to the defendant to prove a right of permanent occupancy; but where it is admitted or proved that the tenant has been let into possession by the landlord who is absolute owner, the burden is on the tenant to prove that he has a right of occupancy [*Lakshmanna v. Venkateswarlu*, A 1949 PC 278: 76 IA 202;

relied on in *Sunkavilli v. Goli*, A 1962 SC 342. To the same effect are the earlier decisions in *Basiruddin v. Sahebdulla*, 32 CWN 160; *Jagannatha v. Ramanatha*, 1938 MWN 1284; *Lakshmana v. Ellinganaickenpatty*, A 1938 M 576].

In an ejectment suit tenant in possession claiming part performance of an agreement of 'contract to transfer' the premises and plaintiff-purchaser claiming advantage of s 53A *proviso* of T P Act, the burden of proving that plaintiff had no notice of 'contract to transfer' lies on him [*Ramkrishna v. Mahadei*, A 1965 P 467]. The burden of proof whether the purpose of the lease was a manufacturing purpose would be on the tenant. [*Idandas v. Anant Ramchandre Phadke*, A 1982 SC 127, 128 : 1982 Mah CJ 328 : (1982) 1 SCC 27]. It is for the tenant to prove the fact of implied surrender of tenancy and the positive fact of creation of a new tenancy, particularly when the registered lease was subsisting. [*Sankar Lal Narayan Prasad v. Satya Narayan Berlia*, A 1987 Calcutta 221, 225 (DB) : (1986) 2 Cal H N 115]. The burden of proof lies on the party alleging that a licence cannot be revoked except by notice. [*Sri Upendra Mandal v. Sri Brajahari Mandal*, A 1991 Gauhati (Noc) 107]. Once the initial burden on the plaintiff that the defendant was permitted to occupy the accommodation in dispute, as a licencee, is discharged by the evidence on the side of the plaintiff, the burden shifts to the defendant to prove his tenancy. [*Turab Ghori v. Smt. Laxmi Agarwal*, A 1984 All 180, 182 : 1984 All CJ 107].

In a suit for eviction on the ground of sub-letting if transfer of possession is proved the *onus* shifts on the tenant to make out that transfer of possession cannot be attributed to sub-letting or assignment [*Phoolchand v. Girraj*, A 1977 Raj 38; *Hem Raj v. Basta Singh*, A 1987 H P 9, 11 : 1986 Sim LC 22; *Kishan v. Banarsi Dass*, A 1990 Punj 160, 163]. When the sub-tenant pleaded that the sub-tenancy was without the written consent of the landlord, in a suit by the tenant for the rent from the sub-tenant, it is the duty of the sub-tenant to lead evidence either by summoning the rent note from the owner or by producing him in the witness-box to prove the non-existence of a fact. [*Banarsi Dass v. Smt. Shakuntala*, A 1989 Del 184, 187 (DB)].

The initial burden to prove the ground of eviction is on the landlord and not on the tenant. [*Chander Kishore Sharma v. Smt Kampa Wati*, A 1984 Del 14, 18]. In an eviction proceeding, the defence of the tenants is that they tendered the rent and the landlord refused to receive the same. In such a case, the *onus* was entirely on the tenants to prove that they made such tender validly and within time and the same was refused. [*P S Nirash v. Smt Mintok Dolma Kazini*, A 1984 Sikkim 1, 3 : (1983) 2 Rent C J 304]. In an eviction petition, it is for the landlord to prove the fact of non-availability of non-residential alternative premises in the town. [*Jernail Singh v. Kanhaiyalal*, A 1986 Madh Pra 53, 56]. In a proceeding for eviction, the landlord has to prove the various ingredients except the '*bonafide*' nature of the requirement entitling him to the relief of eviction. [*Jain Transport Co. v. Sakinabai*, A 1990 Madh Pra 106].

In a suit to eject from a land on the allegation that it is not included within his holding, the *onus* is on the plaintiff to prove that it is outside the land demised to the tenant [*Narendra v. Shk Emaman*, 51 IC 785]. See *Nabin v. Tirthabashi*, 56 IC 180 where it has been held that the *onus* is on the defendant to prove that the land was included in the tenancy. Plaintiff landlord claimed the lands as his *zerait* lands and defendants claimed them to be part of their *rayati* holding. The burden of proof depended upon the relative situation of the land in controversy and the admitted land of the tenancy [*Azmat v. Bishun*, 25 CWN 650: 29 CLJ 607]. If plaintiff establishes his title which *prima facie* entitles him to possession, it is on the defendant to identify the land which he claims as his *rayati* land [*Bihaiyan v. Dilwar*, 52 IC 701; *Bhaiyon v. Khawas*, (1920) Pat HCC 39].

[see cases *ante*: "*Adverse Possession and Limitation*"].

Election Cases.—The burden of proving that the election is liable to be set aside for corrupt practice is heavily on the applicant [*Jagdev v. Pratap*, A 1965 S 183; *Bhanu v. Mohanlal*, A 1971 SC 2025; *Amolak v. Bhagwandas*, A 1977 SC 8151. The main *onus* on petitioner under s 123(*4*) Representation of People Act is to show that a statement of fact which the candidate either believed to be false or did not believe to be true in relation to his personal character or conduct was published by the candidate or his agent or by any other person with their consent. Once that is proved the burden shifts to the candidate to show what his belief was [*Kumara v. Brijmohan*, A 1967 SC 808; *Jagjit v. Giani*, A 1966 SC 778]. In challenging that the candidate does not belong to a particular scheduled caste but belongs to another caste the *onus* is on the petitioner to show to which particular caste the candidate belongs [*Laxman v. Kattimani*, A 1968 SC 929 (*Abhoy Pada v. Sudhir*, A 1967 SC 115; *Basavalingappa v. Munichinnappa*, A 1965 SC 1269; *Bhaiyalal v. Harikishan*, A 1965 SC 1557 **folld**].

The onus is on the petitioner to prove corrupt practice beyond reasonable doubt by evidence which is clear, equivocal and unambiguous [*Gurdial Singh v. K.S. Balakrishnan*, (1993) 2 CLJ 75 (Johore Bahru HC)].

Employer and Employee.—In a claim for wages for overtime work the burden of proof lies on the employee to establish his case. Though adverse inference may be drawn against the employer for non-maintenance of documents and records under Minimum Wages Act burden does not lie on the employer to show that the employee did not work overtime [*Munpl Borough v. Gundawan*, A 1965 Mys 317].

Enhancement of Rent.—The burden is on the landlord of proving that he is entitled to enhance the rent [*Birendra v. Ali Ahmad*, 39 CLJ 605 (*Bama Soondery v. Radhika*, 13 MIA 248, 268 **folld**)]. It is for the plaintiff to start his case by proving that the existing rate was below the customary rate payable by persons holding similar tenures in the vicinity, or that it was not fair and equitable, before the *onus* can be shifted to defendant to prove that the existing rent was fair and equitable [*Hem Ch v. Kali*, 26 C 832; *Hills v. Jendar*, 1 WR 3; *Golam Ali v. Gopal Lal*, 1 WR 56; *Sameera Khatoon v. Gopal Lal*, 1 WR 58; *Bakranath v. Binoderam*, 1 BLR 25 FB: 10 WR 33 FB]. In a suit for enhancement of rent on the ground that the defendant holds lands or on the ground of alteration of area of the tenant's holding, the plaintiff must show that the defendant has been paying rent for a quantity, less than the area included within his holding [*Ahmed Hossein v. Bundee*, 15 WR 91; *Surja Kanta v. Baneswar*, 24 C 251].

Where the defendant pleads that certain plots were *lakheraj* and thereforce not liable to pay rent, the *onus* was upon the plaintiff to prove that the land was *mal* or rent paying [*Sridhar v. Baja Nath*, 2 BLR 211: 14 WR 286 note; *Manmohan v. Sree Ram*, 14 WR 285. But see *Satto Ch v. Tarinee*, 3 WR 178; *Nehal Ch v. Huree Pd*, 8 WR 183; *Newaj Bundopadhya v. Kali Prosanna*, 6 C 543: 8 CLR 6]. Where defendant pleads that a parcel of it is *debutter* land, the property of another party, the *onus* lies on the plaintiff to prove that the land is *mal* [*Prem Chand v. Brojo Nath*, 10 WR 205].

Endorsement.—The *onus* of proving that transaction recited in the endorsement on the bond which was witnessed by the Registrar was untrue, is on the party who denies the truth of the statement contained in that endorsement [*Nawab Mirza v. Indor Pd*, 23 IA 92: 23 C 950 (**relied** on in *Nathuni v. Musst Lachhminia*, A 1939 P 108)].

Escheat.—Where the Government claims as an *escheat*, property admittedly in possession of the party claiming as heir, the burden of proof is on the Government to

show that the last proprietor died without heirs [*Giridhari v. Govt of Bengal*, 10 WR 31 PC; 1 BLR 44].

Estoppel.—The *onus* of proving falls upon the person setting up the estoppel [*Birendra v. Baikuntha*, 46 IC 444; *Mitrasen v. Janaki*, 51 IA 326: 46 A 728, 732 PC (see *post*, notes to s 115)].

Execution of Document.—Where an illiterate alleged to have executed a document for Rs. 3,000 denies execution but admits executing a document believed to be for Rs. 440, the *onus* is on the plaintiff [*Mg Ba v. Mg Po*, 11 IC 916]. In the case of documents executed by ignorant and illiterate persons who are likely to be dominated by the will of others, the usual presumption arising under s 114 cannot be drawn [*Udebhan v. Vithoba*, A 1939 N 78: 1938 NLJ (*Omanhene v. O*, A 1937 PC 274 relied on)]. In execution of document by illiterate person *onus* to prove that it was properly explained and interpreted to the executant is on the party relying on the document [*Rameshwar v. V T Elaiya*, A 1972 M 336; *Manohar v. Rajeshwar*, A 1977 A 36; *Brundaben Misra v. Iswar Swain*, A 1983 Ori 172, 176; *Bibi Jaibunnisa v. Abdul Ghafoor*, A 1984 Pat 257, 260; *Smt Mallo v. Smt Bakhtawari*, A 1985 All 160, 161; *Rankanidhi Sabu v. Nandakishore Sahu*, A 1990 Ori 64, 68; *Chaitan Charan Parida v. Maheswar Parida*, A 1991 Ori 125, 130]. Though normally the law will not be favourably inclined towards and protect 'literate persons of full capacity', if they raise the plea of *non est factum*, the law would protect even such persons if they prove that they are 'persons who have been tricked into signing the document'. It is for the defendant to prove that the document which he purported to execute (by signing blank papers) was of fundamentally different nature from the document which he believed he was signing. [*Syed Abdul Hassan v. Razik Hyssein*, A 1987 Bom. 60, 64]. When the executant of a gift deed was an old man with feeble health and weak eyesight and was unlettered and he filed a suit to set aside the gift deed, the burden shifts to the defendant to prove that the gift deed was executed voluntarily. [*Ajmer Singh v. Atma Singh*, A 1985 P&H 315, 317].

In the case of document executed by a lady, the court is to get satisfied that the deed was actually executed by the lady or by some other person duly authorised by her with full understanding of what she was about to do and that she had full knowledge of the nature and effect of the transaction entered into. [*Sri Siya Ram v. Smt Lilavati*, A 1990 All 75, 76]. In the case of execution of a gift deed by an old lady who had paralytic stroke at the time of execution and who died within 6 months thereafter, the donee has to prove the absence of undue influence. [*Ragnini Amma Janki Amma v. C V Krishnan Nair*, A 1985 Ker (NOC) 101); [*Lallan Singh v. Dulhin Chandamani Devi*, A 1985 Pat (NOC) 33: 1984 Pat L J R 622]. The initial burden of proving execution when it is denied is upon the person alleging execution. But if nothing else is known than the mere fact that the document is admitted to bear a certain signature and that it comes from proper custody, it ought to raise the presumption that it was signed with the intention of execution [*Dalchand v. Hasanbai*, A 1938 N 152]. Proof or admission of signature in a document is *prima facie* proof that the contents are attributable to his authorship [*Alapati v. Kasiviswanadham*, A 1957 AP 584]. Proof of execution of a document is not proof of the truth of the contents of the document. The truth of the facts stated in the document if denied is to be proved by admissible evidence. [*Achutham Pillai v. Marikar (Motors) Ltd*, A 1983 Ker 81, 83].

An admission by defendant regarding signature or thumb-mark does not amount to admission of execution of document as to shift the *onus* of proof on the defendant.

This is specially so when the defendant pleads that he signed a blank document [*Pirbhudayal v. Tularam*, 20 ALJ 672: A 1922 A 401; *Rajeshwar v. Kishun*, A 1933 O 394; *Mammad v. M*, A 1957 Ker 63; *Ethiraju v. K R Chinnikrishnan*, A 1975 M 333; *Rampragas v. Gajendra*, A 1976 P 92 (*Sahdeo v. Fulesar*, A 1930 P 598; impliedly overruled by *Ram Lakhan v. Gog Singh*, A 1931 P 219 and *Chullhai v. Kuldip*, A 1931 P 266)]. See however *Jogesh v. Ram Ch*, A 1950 P 370. In a case it has been held that where finger impression is admitted but it is pleaded that it was affixed on a blank paper, the *onus* is on the defence to explain how the document came into existence [*Sahdeo v. Fulesar*, A 1930 P 598; *Jagmohan v. Mendhai*, A 1932 A 164; *Shaha v. Dulah*, A 1939 R 334; *Lakshmamma v. Jayaram*, A 1952 Mys 114; *Dalchand v. Hassanbi*, A 1938 N 152]. In another case it has been held that where defendant admits thumb-impression but pleads that it was taken on blank paper the plaintiff cannot be deemed to have discharged his *onus* by merely proving the identity of the thumb-impression but it must be further proved that it was given on the document after it had been written out and completed. It would appear from the above and other cases that there is a conflict of opinion as to the burden of proof when a person admits his signature on a document but sets up the defence that he signed it blank. When a person signs a document he ordinarily does so with a view to execute it. When, therefore, a person signing a document pleads that he signed it blank, he relies on an exceptional circumstance and so the burden of proof must rest on him [*Verma v. Gehrilal*, A 1962 Raj 231 (cases **refd** to)]. The fact that defendant's thumb-impression appears is a strong piece of evidence and in the majority of cases very slight evidence would be necessary [*Ram Lakhan v. Gog Singh*, A 1931 P 219 (A 1922 A 401; 5 R 527 **follld**); see also *Chullhai v. Kuldip*, A 1931 P 226]. If the thumb-mark is proved to be that of a party, the burden of non payment shifts to him [*Ramji v. Devi*, A 1934 L 542].

Where a person ignorant of English affixes his mark to a document written in English, the *onus* to prove that the document was explained and interpreted to him so as to make him understand its true import is on the party relying on the document [*Omanhene v. O*, A 1937 PC 274; 170 IC 423]. A relying on a letter written in *Urdu* and signed by *B* who is illiterate and does not know *Urdu* script, in *Mundi—B's* admission of signature does not amount to execution of document and burden is on *A* to prove that document was properly explained to *B* [*Surajbhan v. Hari*, A 1976 D 70]. The *onus* that a document duly executed and registered was antedated lies on the person alleging it [*Krishnamurti v. R*, 85 IC 882: 49 MLJ 252]. When a document is alleged to have been materially altered, the person who is in the custody of the document subsequent to its execution, should there be any alteration has to discharge the burden of establishing that it is not altered. [*Jayantilal Goel v. Smt Zubeda Khanum*, A 1986 AP 126 : (1985) 2 AP LJ (HC) 50 (DB)].

[See also *ante*, "*Deeds*." As to deeds by *Pardanashin Woman*, see s 111].

Fraud.—It has been the practice in countries where the English system of law operates, in civil cases, to require a high standard of proof in cases where fraud is alleged [*Nederlandsche Handel-Maatschappij v. Koh Kim Guan*, 1959 Malayan LJ 173 (Singapore HC); *Sumitomo Bank Ltd v. Kartika Ratna Thahir*, (1993) 1 Singapore LR 735 (Singapore HC)]. Fraud in civil case must be proved beyond reasonable doubt [*Tan Ah Chim v. Ooi Bee Tat*, (1993) 3 Malayan LJ 633 (Penang HC); *Lau Hee Teah v. Hargill Engineering Sdn Bhd*, (1980) 1 Malayan LJ 145 (Ipoh FC)] rather than by a mere preponderance of probability [*Boonsom Boonyanit v. Adorna Properties Sdn Bhd*, (1995) 2 Malayan LJ 863 (Penang HC); *Abdul Rahim Bin Aki v. Krubong Industrial Park (Melaka) Sdn Bhd*, (1995) 2 Malayan LJ 130 (Malacca HC)]. General allegation is not sufficient [*Dato' Toh Kian Chuan v. Swee*

Construction and Transport Co., (1996) Malayan LJ 730 (Johor Bahru HC)]. Fact that the price of the transaction is below the market value does not by itself mean fraud [*Pinganak Layang v. Jee Shik Chuong*, (1991) 2 Malayan LJ 422 (Kuching HC)].

Where fraud is alleged in a claim under insurance policy the insurer must prove beyond reasonable doubt that insured's claim was fraudulent [*Ong Choon Lin Syarikat Federal Motor Trading v. New Zealand Insurance Co Ltd.*, (1991) 1 CLJ 601 (Ipoh HC)]. A person who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation because the defendant has himself told an untrue story [*Md Goldb v. Md Sulliman*, 21 C 612, 621; see 18 CWN 681; *Sabitri v. Savi*, 12 P 359; see also *Prannath v. Khagendra*, 12 CWN 155n and *Abdul Huq v. Abdul Hafiz*, 14 CWN 695; *Parbati v. Jagannath*, 36 IC 596]. It is a general rule that fraud cannot be presumed from mere circumstances or suspicion and the burden of proving the charge of fraud, collusion, misrepresentation and undue influence lies upon the person who seeks to impeach the validity of any transaction on these grounds [*Achunath v. Kishen Pd*, WR (1864) 37; *Sikher v. Dulputty*, 5 C 363: 5 CLR 374; *Kubeerun v. Suffibun*, 24 WR 388; *Raj Narain v. Rawshun*, 22 WR 124; *Kubeeruddin v. Judgal*, 25 WR, 133; *Monsura v. Ram Rucha*, 3 BLR 108: 11 WR 482]. There is no ritualistic formula nor a cut and dried test to lay down as to how a charge of undue influence can be proved. While insisting on standard of strict proof, the court should not extend or stretch this doctrine to such an extreme extent as to make it well-nigh impossible to prove an allegation of corrupt practice, [*Ram Suran v. Thakur Munneshwar*, A 1985 SC 24, 26; *Smt Takei Devi v. Smt Rama Dogra*, A 1984 HP 11, 14]. The rule does not apply when a fiduciary or confidential relationship subsists between the parties (see s. 111 *post*).

Where a suit is barred on the face of it, and a person relies on s 17 Limitation Act, 1963, he must establish that there has been fraud and that by means of such fraud he has been kept away from the knowledge of his right to sue or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. It is not sufficient to show that plaintiff had some clues and hints which if vigorously and actually followed up might have led to a complete knowledge of fraud [*Biman v. Pramatha*, 49 C 88: 36 CLJ 295; see also 48 C 119; 18 CWN 1266; 3 PLT 501; 27 CLJ 528; *Ramizaddin, v. Naimaddi*, 56 CLJ 570]. When property has been obtained by a person by fraud, it is for him to show that the person injured by his fraud has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit [*Rahimbhoy v. Habibbhoy*, 20 IA 1: 17 B 341]. If fraud is established against a party deriving benefit therefrom it is for him to show that the continuing effects of fraud which was perpetrated have been removed [*Beas v. Khedu*, A 1930 P 58: 123 IC 637; *Mahabir v. Rambahadur*, A 1923 P 435; *Thakur v. Jhaman*, A 1924 P 496].

Good Faith.—On an application to set aside the transfer by an insolvent of his property under s 55 of the Presy T I Act, the *onus* of proving that the transfer was not in good faith and for valuable consideration lies on the official assignee [*Offl A of the Estate of Tuan*, 1931 AC 67; *Offl Receiver v. Chettyar Firm*, 9 R 170; *Pope v. Offl Assignee*, 12 R 105; *Offl Assignee v. Fatima*, 14 R, 105. In the last mentioned case it has been observed that the law places an unreasonable and well-nigh impossible burden on the official asignee]. If the official assignee proves that the transfer was made within two years of the insolvency and also that it was made either not *bona fide* or without valuable consideration, he is entitled to obtain an order setting aside

the transfer [*Official Assignee v. Subala*, 14 R 190]. See *post*, "*Insolvency*". As to burden of proving good faith in transactions between persons where a fiduciary or confidential relationship subsists, see *post* s. 111.

Guardian and Ward.—The question on whom *onus* of proof lies in suits by an infant to recover property improperly alienated, is one not capable of a general or inflexible answer. Whether the *onus* is shifted in a particular case is a question of fact [*Krishna v. Aiyasami*, 27 MLJ 138: 24 IC 426]. When a guardian sells with the permission of the court under s 31 of Guardian & Wards Act, the *onus* is on the minor to show that the sale was improper [*Nallaka v. Rugam*, 45 M 429: 65 IC 964]. Where a minor seeks to set aside a decree obtained against his guardian *ad litem* on the ground of collusion and negligence, the *onus* of proof is on the minor [*Balabhadra v. Madhyanapu*, A 1937 M 846]. When the validity of a sale is questioned on the ground of minority, the plaintiff is to establish by *prima facie* evidence that the contract was valid [*Bachcha v. Hasan*, 66 IC 814].

Hiba-bil-ewaz.—The burden of establishing hiba-bil-ewaz is on him who relies on it [*Khajooroonnissa v. Rowshan Jehan*, 2 C 184 PC; *Chaudhri Mehdi v. Md Hasan*, 28 A 439 PC].

Hindu Law: [Adoption].—A plaintiff suing to set aside an adoption and for declaration of its invalidity is bound to prove that the adoption is invalid or never took place [*Brojo Kishore v. Sree Nath*, 9 WR 453; *Hurdyal v. Rajkristo*, 24 WR 107; *Gooroo Pr v. Nil Madhab*, 21 WR 84; *Asharfi v. Rupchand*, 30 A 197; *Kasi v. Radhika*, A 1943 P 68; *Kusum v. Satya*, 30 C 99: 7 CWN 784; *Kanumalapudi v. Imadisetti*, 11 IC 334]. When the fact of adoption has been acquiesced in by members of the adopting family for a very long time, one of such members challenging it has to disprove adoption [*Ramakrishna v. Tirunayana*, 55 M 40; *Rajendra v. Jogendra*, 14 MIA 67; *Debi Pd v. Tribeni*, A 1970 SC 1286]. As regards the burden and standard of proof when an adoption which took place long ago is challenged, see *Voleti v. Kesaparagada*, A 1969 SC 1359 and *Srikanchumarthi v. Kanchumarthi*, A 1925 PC 201. Where the adoption was made under a will, the *onus* was thrown upon the adopted son to prove the validity of the adoption [*Tarini v. Saroda*, 3 BLR 145: 11 WR 468]. As adoption results in changing the course of succession, very grave and serious *onus* rests upon such person who seeks to displace the natural succession by alleging adoption. [*Arjun Banchhor v. Buchi Banchhar*, A 1995 Ori 32, 34].

Where the plaintiff sued to recover property of his adoptive father alleging adoption 20 years ago, and the defendants denied the adoption, the burden of proving the alleged adoption rests upon the plaintiff [*Lal Kunwar v. Cheranji*, 37 IA 1: 37 A 104: 14 CWN 285]. In the case of an adoption by a widow of immature age, the *onus* is on the plaintiff to show that it was made with the free consent of the girl [*Ghanshamdas v. Laxmbibai*, 24 Bom LR 726].

The general rule is that a party seeking to change the usual course of inheritance on the alleged ground of an adoption must prove the allegation [*Harihar v. Bajang*, 41 CWN 1126 PC; *Raghavamma v. Chenchamma*, A 1964 SC 130]. A very grave and serious *onus* rests upon a person who seeks to displace the natural succession of property by the act of adoption [*Dal Bahadur v. Bijay Bahadur*, 52 A 1 PC: 34 CWN 369: 58 MLJ 446; *Chandra v. Sissendi Estate*, 76 IA 17; *Muthaswami v. Chidambara*, A 1949 PC 18; *Kishorilal v. Chaltibai*, A 1959 SC 504; *Daulatram v. Harish*, A 1972 SC 2446; *Laxman v. Anusuyabai*, A 1976 B 264; *Balak v. Nanu*, A 1930 L 579; *Dy Commr v. Chandra*, A 1947 O 180 FB; see *Padmalav v. Fakira*, A 1931 PC 84; *Madhusudan Das v. Narayani Bai*, A 1983 SC 114, 119]. But in cases of ancient adoption during lapse of long years (in this case 36 years) a variety of

transactions of open life and conduct having taken place, the initial burden necessarily shifts to the challenger of its validity [*Gouranga v. Bhaga*, A 1976 Or 47; *Motilal v. Sardar*, A 1976 Raj 40]. Though the *onus* of proving an adoption is on the person setting it up, very slight evidence may be sufficient when the alleged adopted son has been treated as such for a long series of years [*Kailash v. Bijay*, 36 CLJ 434]. Burden of proving validity of adoption of a non-agnate in the presence of near agnates lies upon the person setting it up [*Bur Singh v. Dalip*, 76 IC 256]. Where the question is whether a family is governed by Hindu law or by customs which do not allow an adopted son to inherit, the *onus* is on the defendant, who relied upon it, to prove that the adoption was lawful [*Fanindra v. Rajeshwar*, 11 C 463 PC].

Hindu Law: [Alienation by Manager or Guardian].—The power of a manager of an infant heir to charge the estate is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. The question as to the *onus* of proof in such cases is one not capable of a general and inflexible answer, but the presumption proper to be made will vary according to circumstances. The lender is bound to inquire into the necessity for the charge, and to satisfy himself that the manager is acting for the benefit of the estate. But if he does so inquire and acts honestly, the existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and he is not bound to see the application of the money [*Hanooman Pd v. Munraj*, 6 MIA 393: 18 WR 81 note]. The principle laid down in the case, was applied to the alienation of property by the *de facto* manager of a Hindu endowment [*Sheo Shankar v. Ram Shewak*, 24 C 77].

When a person after attaining majority, questions any sale of his property by his guardian during his minority; the burden lies on the person who upholds the purchase not only to show that either the guardian had the power to sell, or that the purchaser reasonably supposed he had such power, but, further, that the whole transaction, was *bona fide* [*Roop Narain v. Gangadhar*, 9 WR 297; *Annamalay v. Na U Ma*, 17 C 990].

Where an alienation by a manager is challenged by the heir on coming of age, the burden of proving existence of circumstances justifying the alienation or necessity lies on the transferee [*Gaya Pd v. Raghunath*, 8 ALJ 1022 (31 A 176 FB follD)]. The burden of proof lies upon the person who alleges that the debt was contracted for immoral purpose [*Mannalal v. Karu*, 39 CLJ 256 PC].

Where a son sues to set aside alienation by father, he who asserts that it was made for an antecedent debt or for a beneficial purpose or for legal necessity is bound to prove it [*Krishnaranjan v. Doraswamy*, A 1966 K 305; *Seetharam v. Balkrishna*, 26 MLJ 604; *Raghunathachari v. Arayamunthai*, 34 IC 617]. It is incumbent on those who support a mortgage by the manager of a joint family to show necessity for borrowing [*Nawab Nazir v. Rao Raghunath*, 41 A 571 PC : 23 CWN 700; *Mannalal v. Karu*, 56 IC 766 PC; *Kalikananda v. Shivananda*, 63 IC 625; *Vithal Yeshwant v. Shivappa*, 72 IC 659; *Radharam v. Amar*, 4 L 208. The *onus* is shifted back on to the sons or those who wish to repudiate a mortgage by the manager, though the initial *onus* is on the creditor to prove necessity [*Pearee v. Sunder*, 44 A 756: 20 ALJ 658].

Hindu Law: [Alienation by Shebait of Debutter Property].—The power of *shebaits* to incur debts is to be measured by the existing necessity for incurring them, the authority of the *Shebait* being in this respect analogous to that of a manager of an infant heir [*Prosunno v. Golap*, 14 BLR 450 PC: 23 WR 253 PC (**affirming** 11 BLR 332: 20 WR 86); *Abhiram v. Shyama Ch*, 14 CWN 1 PC]. A plaintiff who seeks to set aside an alienation of lands on the ground that they are *debutter*, must give clear

and strong evidence of the endowment. The mere fact that the rents of a particular *mehal* have been applied for a considerable period to the worship of an idol is not sufficient proof that the *mehal* is *debutter*. The position of a *shebait* or manager of *debutter* is analogous to that of a manager of an infant heir under the Hindu Law [*Doorganath v. Ram Ch*, 2 C 341 PC].

Hindu Law: [Alienation by Hindu Window or Daughter].—In case of alienation by a Hindu widow, the *onus* of proving the legal necessity for the alienation rests with the alienee [*Chutter Dharee Hurcoomaree*, 1 Ind Iur OS 99; *Nund Kumar v. Gunga Pd*, 10 WR 94; *Harkishen v. Kashi*, 42 IA 64: 19 CWN 370: 42 C 876; *Ramesh v. Sashi*, 23 CWN 1026: 30 CLJ 556; *Nabakishore v. Upendra*, 26 CWN 322 P: 35 CLJ 116: 65 IC 305: *Meenambal v. Aburummal*, A 1930 M 638]. And the same is the case in a suit by a son to annul an alienation of ancestral property by the father [*Jugal Narain v. Lala Ram*, 2 WR 292; *Jeebunnissa v. Umul*, 18 WR 151: *Ramdhone v. Ishani*, 2 WR 123: *Collr of Masulipatam v. Cavaly*, 8 MIA 500, 529: 2 IA 61 PC and 11 MIA 619; 10 WR 47 PC; *Govind v. Sham Lal*, WR (1864) 153; *Dhondo Ram v. Bal Krishna*, 8 B 190; *Lakshman v. Dadhabai*, 11 B 609; *Rangibhai v. Vinayak*, 11 B 666; *Md Shamsool v. Shewukram*, 22 WR 409; *Bhagdat v. Debi Dayal*, 35 IA 48: 18 MLJ 100: 35 C 420: 12 CWN 393]. The *onus* of supporting a sale from a Hindu widow is on the purchaser [*Lalla Brij v. Indur*, 18 CWN 649 PC: 36 A 187: 26 MLJ 442].

In transactions such as the alienation by a Hindu widow of her estate of inheritance, any creditor seeking to enforce a charge on such estate is bound to show the nature of the transaction and to show that in advancing money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognized necessities [*Kameshwar v. Ram Bahadur*, 6 C 843 PC: 8 CLR 361; *Ray Radha v. Nauratan*, 6 CLJ 490; *Panda Pulty v. P*, 17 MLT 393]. The burden of proving the necessity for a mortgage by a Hindu widow rests on the mortgagee where that necessity is disputed by the next heir [*Rao Karun v. Md Fyaz*, 10 BLR 1 : 14 MIA 176; *Maheshar v. Ratan*, 23 IA 57: 23 C 766; *Sham Sundar v. Achan*, 25 IA 183: 21 A 71: 2 CWN 729; *Jagsahu v. Rai Radha*, 5 PLJ 287. This is even so though the absence of legal necessity is not pleaded by the reversioner [*Kondama v. Kondaswamy*, 39 CLJ 194 PC].

As to the duty of the alienee to make inquiries about the existence of legal necessity and as to the extent of burden of proof which lies upon him, see *Soorendra v. Nundun*, 21 WR 196; *Sheoraj v. Nuckchedee*, 14 WR 72; *Ghansham v. Badiya Lall*, 24 A 547; *Janhabi v. Bullibhadra*, 15 CWN 793; *Raveneshwar v. Chandi*, 38 C 721. A recital in a bond is not sufficient evidence of legal necessity [*Sankar Lal v. Jadubans*, 9 WR 285; *Rajlakhi v. Gokul Ch*; 3 BLR 5 7PC : 12 WR 47: 13 MIA 209; *Ramesh v. Sashi Bhusan*, 23 CWN 1025].

Hindu Law: [Conversion].—Hindu belonging to Adi Dravida caste converted to christianity. Burden lies on him to prove that on recoversion he again became member of the old caste [*Rajagopal v. Arumugam*, A 1969 SC 101]. No ceremony of purification is prerequisite of Hinduisation. In case it is established that the parties of non-Hindu origin *eg* aboriginals have been Hinduised *prima facie* they are governed by the rules of Hindu Law and the burden of proving that the old customs still exist is on the party setting it up [*Langa v. Jaba*, A 1971 P 185].

Hindu Law: [Inheritance, Reversioner, Succession].—When a person claimed property as *shebait* and the right of succession is not governed by the ordinary rule of Hindu law, the burden of proof lies upon him to prove the special rule of succession on which he relies [*Janoki v. Gopal*, 9 C 766: 13 CLR 30].

The presumption of Hindu law is against disqualification, and the burden of proof of disqualification lies on the person who seeks to exclude another, who would be an heir, should no cause of exclusion be established [*Helan Dassi v. Doorga*, 4 CLJ 323; *Karali Ashutosh*, 27 CWN 959: 50 C 604]. It is incumbent on a plaintiff seeking to succeed as reversioner to prove affirmatively the particular relationship put forward; but those who claim that their kinship is nearer must prove it [*Rama Rao v. Kuttiya*, 40 M 654: 34 IC 294; *Sarvabhotla v. Kanala*, A 1939 M 446]. There is no presumption from the mere fact that a *Mohant* is an ascetic that the property in his possession is not his personal property. The burden is on the plaintiff to establish that he as the successor to the *Mohant* is entitled to sue for recovery of money lent by the late *Mohant* from the funds of the *math* [*Radhaballav Math v. Fakir*, A 1965 Or 221].

Hindu Law: Joint-family [Self-acquisition and Presumption].—See *post* s 114: "*Hindu Law: Joint Family*"). The original status of all Hindu families must be presumed to be joint and undivided. The normal presumption of jointness of a Hindu family is weakened by the conduct of the parties namely cultivation of some lands separately and construction of houses by the members of the family without specific allotment of lands. [*Janki Ram v. Amir Chand Ram*, A 1984 Pat 191, 194]. The *onus probandi* is on those who put forward claims on the basis of separation and self-acquisition [*Bilash v. Bhawanee*, WR (1864) 1; *Prannath v. Kashinath*, WR (1864) 169; *Beer Narain v. Teen Cowree*, 1 WR 316; *Nilmony v. Gunga*, 1 WR 334; *Moonye v. Loman*, WR 288; *Katama v. Raja of Shivaganga*, 9 MIA 539: 2 WR 31; *Dharum v. Raj Mahishee*, 5 WR 145; *Lukhan Ch v. Modhoo Mookhee*, 5 WR 278; *Sree Nath v. Monmohini*, 6 WR 35; *Bai Mancha v. Naratamdas*, 6 BHC 1; *Sheo Rutton v. Gour*, 7 WR 449; *Radha Raman v. Phoolkoomaree*, 10 WR 28; *Gobinda Nath v. Gobinda Ch*, 10 WR 393; *Dharoo v. Court of Wards*, 11 WR 336; *Koonj Beharee v. Gayadeen*, 11 WR 361; *Pearee Lal v. Bukhoree*, 12 WR 124; *Brojonath v. Sree Gopal*, 12 WR 468; *Shushee Mohun v. Aukhil*, 25 WR 232; *Drobomoyee v. Jarachand*, 18 WR 459; *Babbo Lall v. Tumabuksh*, 22 WR 116; *Bhugobutty v. Domun*, 24 WR 365; *Sadar v. Bhopat*, 10 IC 125]. When parties have been proved to be members of a joint Hindu family, the *onus* of proving subsequent separation is on the party alleging it [*Deonarain v. Agyan*, 31 CWN 533 PC: 10 IC 249].

The presumption of Hindu law in a joint undivided family is that the whole property of the family is joint estate, and the *onus* lies upon a party claiming any part of such property as his separate estate [*Gopee Kristo v. Ganga*, 6 MIA 53; *Smt Ramkunwarbai v. Ranbabu*, A 1985 Madh Pra 73, 78 : 1984 Jab LJ 745]. The presumption is that all acquisitions made while a family is joint are made from the joint funds, and the burden is upon the person who alleges that any property is self-acquired [*Ramphul v. Deo Narain*, 8 C 517: 10 CLR 489; *Shib Pd v. Gunga Monee*, 16 WR 291; *Pran Kristo v. Bhageeruthe*, 20 WR 158; *Jugodumba v. Rohinee*, 23 WR 522; *Kanhia v. Debi Das*, 22 A 141; *Pratap v. Surat*, 25 CWN 544; *Rajangam v. R*, 69 IC 123 PC. But see *Balaram Bhaskarji v. Ram Ch*, 22 B 922; *Obhai v. Gobinda*, 9 C 237; *Ram Ghulam v. Ram Behary*, 18 A 90; *Vinayak v. Datta*, 25 B 367 where it was held that the *onus* was upon the plaintiff, to prove that the property was joint family property].

The presumption of law, that while a Hindu family remains joint, all property including acquisitions made in the name of individual members, is joint property does not apply to a joint family governed by the Dayabhaga. Where certain property was acquired in the name of one of several brothers during the lifetime of their father and was in the possession of that brother, the burden of proof rests upon the party who asserts that the property in reality belongs to the father [*Saroda v. Mahaunda*, 31 C 448. **Follo** in *Gobinda v. Radha Kristo*, 31 A 477: 6 ALJ 591].

There is no presumption that a Hindu family is possessed of property. The party alleging that property held by an individual member of joint family is family property, must show that the family was possessed of some nucleus of joint property with the aid of which the property in question could be acquired. If this is shown, only then, the *onus* shifts to the party alleging self-acquisition [A 1927 M 38; *Sankaranarayana v. Tangaratna*, A 1930 M 662; *Ram Kishan v. Tunda*, 33 A 677; *Vedamallai v. Subramania*, A 1923 M 262; *Ethirajulu v. Govindajulu*, 32 IC 12 FB; *Shrinivas v. Narayan*, A 1954 SC 379; *Tribeni v. Rampujan*, A 1970 P 13; *Suresh Pradad Gupta v. Basudeo Pradad Gupta*, A 1990 Pat 198, 200]. Where there was nucleus of ancestral property and the family lived in one house the *onus* is on the party setting up a separate estate [*Lal Bahadur v. Kanhya*, 11 CWN 417 PC: 29 A 244; see also *Anandrao v. Vasantrao*, 11 CWN 478 PC : 5 CLJ 338: 17 MLJ 184; *Ganpat v. Balmakund*, 18 CLJ 548; *Subba Naidu v. Venkataratna*, 26 MLJ 508; *Akkaraju v. A*, 27 MLJ 677; *Nanilal v. Nutbehari*, 38 CWN 861]. Where property is acquired by one member and there was no pre-existing nucleus of ancestral property, the presumption is that it is separate property and the burden of proving that it was thrown into common stock is on the person who asserts this [*Ethirajulu v. Govindrajulu, sup*; *Viswasundara v. Pallamaraju*, A 1933 M 418].

When once it is admitted that a member separated, there is no presumption that the rest of the coparceners continued to be joint. If any one claims relief of a contrary assertion, the burden would be on him to prove it [*Balabun v. Rukhmabai*, 30 C 725 PC; *Bhagwati v. Dulhin*, A 1952 SC 72; *Raghavamma v. Chenchamma*, A 1964 SC 136]. Separation of one member involves the separation of all. An agreement among the remaining members to remain united or to reunite must be proved like any other fact [*Balabun v. Rukhmabai*, 30 C 725, 736 PC: 7 CWN 642]. Burden of proving reunion, is upon the person who sets up a reunion [*Alamelumangatha v. Namberumal*, 23 IC 824; *Nandlal v. Bhagwati*, 46 IC 529; *Nenha v. Parbhu*, 75 IC 508 (P); *Baboolal v. Dhira*, 81 IC 591 (N); *Babu v. Offl A*, 57 M 931: 61 IA 257]. As to what is "reunion" see *Basanta v. Jogendra*, 33 C 371. The *onus* lay on the person who claims that the business was started with the joint family funds to prove so [*Munesh Kumar Agnihotri v. Lalji Prasad Gupta*, A 1989 All 202, 206: 1988 All LJ 823].

A Hindu son governed by the Mitakshara law is liable to pay the debts of his father even if they are not incurred for legal necessity or for benefit of the estate provided they are not illegal. The burden of proving that there is a debt and that it is illegal lies upon the son [*Sitaram v. Radha Bai*, A 1968 SC 534].

[See also notes to s 114 *post*, under "*Hindu law—Joint family*"].

Hindu Law: [Stridhan and Accretion].—There is no presumption of law that property acquired by a Hindu widow after husband's death forms part of her husband's estate. The question from what source the purchase-money came is one of fact, and it is for the plaintiff to start his case with proofs sufficient to shift the *onus* [*Dakhina v. Jagadiswar*, 2 CWN 197].

The *onus* is on the party who alleges accretion by Hindu widow to her estate, that the property was acquired with that intention [*Jamuna v. Rampadarath*, A 1937 P 619; *Raja of Ramnad v. Sundara*, A 1918 PC 156].

Impartible Estate.—Where there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the custom different from the ordinary law of inheritance according to which the estate is to be held by a single member, and, as such, not liable to partition [*Martand v. Malhar*, 55 C 403: 55 IA 45; A 1928 PC 10]. It is incumbent upon a claimant to an impartible estate to

establish only notional jointness with the burden on the opposite party to show a definite renunciation of their right to succession [*Collr v. Ramsundar*, 61 IA 286: 38 CWN 110].

Income-tax.—Where an assessee states that he has no income from a certain source and officers of the income-tax department disbelieve him, it is for them to prove that he has such income and not for him to prove the contrary. Any assessment based on the inability of the assessee to prove his negative statement and on general assumption only is bad and should be cancelled [*In re Bishnupriya*, 50 C 907: A 1924 C 337; see *Naidu v. I-T Officer*, A 1956 N 157]. It is not that no burden ever lies on the income-tax department. When an assessee denies receipt from a certain source and makes out a *prima facie* case, the burden is on the department to disprove or avoid it [*Naidu v. I-T Officer, sup* (cases reviewed); *Suwalal v. Commr I-T*, A 1949 N 249]. Where property stands in the name of assessee's wife, it is for the department to prove that she is a *benamdar* [*Sovaram v. Commr of I-T*, A 1945 P 79]. Burden is on the taxpayer to show that the assessment was excessive and erroneous [*Thai Hwa Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri*, 1996 CSLR III 255 (Melaka HC)].

When the assessee fails to prove the source and the nature of a certain amount received in the accounting year, the authorities are entitled to presume that the receipts are of an income nature. The burden of proof is on the assessee [*Ganguly v. Commr I-T*, A 1954 P 51; *Munna Lal v. Commr I-T*, A 1957 N 73; see *Jadunandan v. Commr*, A 1949 P 215; *Madappa v. Commr*, A 1949 M 246; *Variety Hall v. CIT*, A 1971 AP 184; *CIT v. G M Chinna*, A 1959 AP 668]. It is for the Income-tax department to prove that the funds contributed by the different coparceners to the partnership came out of the funds of the assessee's undivided family [*Mangi Lal v. Commr I-T*, A 1955 P 366]. Where assessee claims that the income from agricultural activities did not belong to HUF but to its members individually burden rests on the Dept to prove that it belonged to HUF [*Anil v. CIT*, A 1976 SC 772]. It is for the Revenue in the first instance to establish that particular receipt is income liable to tax but burden shifts on to assessee when sufficient evidence either direct or circumstantial is disclosed by Revenue [*Commr I T v. Best & Co Ld*, A 1966 SC 1325].

Where a credit entry of deposit made by wife of assessee appeared in account books to firm source from which money was acquired by wife need not be proved by assessee. The burden shifts on to Department to prove that entry was not true [*Tolaram v. C of I T*, A 1968 A & N 1]. In penalty proceedings under s 28(*1*)(*c*) of the I T Act, 1922 the burden lies on the Department to prove by evidence that there was income and that the assessee concealed the particular income or deliberately furnished inaccurate particulars [*CIT v. Anwar Ali*, A 1968 C 345; on appeal A 1970 SC 1782; *Bhajuram v. C of I T*, A 1970 Or 38: *CIT v. Gokuldas*, A 1959 B 96].

Assessee relying on a recital in a deed has to establish the truth of it and the taxing authorities are entitled to look into surrounding circumstances [*CIT v. Durga Pd*, A 1971 SC 2434]. Deceased withdrawing from Bank Rs. 62,317 a short time before death. Accountable, person showed cash balance of only Rs. 10,216 and stated that amount withdrawn had been spent by deceased on his treatment but produced no evidence—*Held* that even if there was any initial burden upon the Revenue, the burden shifted upon the accountable person to prove how much was spent on treatment and addition back of Rs. 35,000 was justified (*Anant v. Controller of E D*, A 1967 C 629).

The burden is on the Revenue to show that the income is liable to tax under the statute but the onus of proving that particular class of income is exempt from taxation, however, lies on assessee [*Nizam's R E Trust v. Commr I T*, A 1966 SC 1007]. Where a doubt arises on the facts whether the tax-payer is entitled to exemption from taxation under a certain statutory provision, the burden lies upon him to establish that exemption [*Commr I T v. Chugandas & Co*, A 1965 SC 568 (*Commr I T v. Ramakrishna*, A 1959 SC 239 **reld** on)].

When assessee claims exemption under s 10(2)(*xv*) I T Act, the *onus* is on him [*Lakshmiratan C Mills v. Commr I T*, A 1969 SC 917; *Commr I T v. Calcutta &c*, A 1951 SC 108]. As to income from an undisclosed source, the burden is on the assessee as it is within his special knowledge [*D C Auddy v. Commr I-T*, A 1956 C 295].

Industrial Disputes.—In disputes related to workmen's demand for bonus under Payment of Bonus Act the onus is on the company which has necessary information to explain from its accounts and other data that a certain sum was not available for rehabilitation cost [*National E Industries v. Workmen*, A 1968 SC 538]. The burden of proof that the amount of depreciation claimed by the company is correct in accordance with Income Tax Act is on the company. Mere production of auditor's certificate is not conclusive [*Metal Box Co v. Workmen*, A 1969 SC 612].

Insanity.—The burden of proof of legal insanity is on the accused [*Meh Ram v. State*, 1994 Cri LJ 1897, 1900 (Raj)]. There being a presumption in favour of sanity, the person relying upon unsoundness of mind must prove it sufficiently [*Md Yakub v. Abdul*, A 1923 P 187: *Kanhaiya Lal v. Har Singh*, A 1944 N 232; *Indar v. Parmeshwardhari*, A 1957 P 491; *Naresh v. S*, A 1971 Tri 16]. Though the accused did not adduce any evidence to prove his insanity, he can take advantage of the evidence adduced by the prosecution and may raise a reasonable doubt in the mind of the court that at the time of committing the act, he was insane. [*Nivrutli Dhondiba Shinde v. State of Maharashtra*, 1985 Cri LJ 449, 452 : 1985 Cri LR (Mah) 40: (1984) 86 Bom LR 462 (Bom) (DB)]. See notes to s. 105 *post*.

Insolvency. [See "*Good faith*"].—In proceedings under s 53, Prov Insolvency Act (5 of 1920), the burden of proving that a document executed by an insolvent was in fraud of creditors lay on the party asserting it [*Chinno Meera v. C*, 36 IC 906 (19 A 76 **folld**)]. When the official assignee in bankruptcy seeks to establish that a transfer by debtor is void as a fraudulent preference, the *onus* is on the assignee—he has to show that the case is within the statute [*Sime Darby Co v. Offl Assignee*, 47 CLJ 339: 54 MLJ 337: A 1928 PC 77; *Kasi Iyer v. Offl Receiver*, A 1929 M 821]. The *onus* is on the claimant who alleges as against the official receiver, a specific pledge or charge over the property of the insolvent [*Tejpal v. Offl Receiver*, 32 CWN 1146: 111 IC 240: 48 CLJ 415 PC]. In proceedings under s 53 Prov Insolvency Act the burden of proof is on the receiver in the first instance [*Munnu Lal v. Banerjee*, 1938 All 801]. The *onus* is on the transferee to show that the transaction was in good faith and for consideration [*Nilmoni v. Basanta*, 19 CWN 865; *Basiruddin v. Mokima*, 22 CWN 709; *Ananto v. Yusoof*, 31 MLJ 133: 36 IC 903; *Offl Assignee v. Sambanda*, 43 M 739; *Offl Assignee v. Annapuranammal*, 20 IC 901; *Mahammad Habibullah v. Mustag*, 14 ALJ 1183; *In re Seehase*, 22 CWN 335]. The *onus* of proving want of good faith in a transferee is on the creditor who impugns the transaction. But where fraud on the part of the creditor is established the burden of proving that the transferee fall within the exception is upon him and in order to succeed, the transferee must establish that he

was not a party to the design of the transferor and that he did not share the intention with which the transfer has been effected but that he took the sale honestly believing that the transfer was in the ordinary and normal course of business [*Basavegowda v. Narayanaswami*, A 1986 Kant 225, 228: (1985) 2 Kant LJ 389].

Insurance.—The burden is on the insurer to show that the policy is not subsisting or that there has been a breach of such a condition which relieves the insurer from liability. Provisions of Act and Rules under which the insurance is effected do not displace these general principles [*Union v. Sohanlal*, A 1971 SC 432]. The burden is on the insurer to prove the allegation of non-disclosure of a material fact and that the non-disclosure was fraudulent [*Azizah bte Abdullah v. Arab-Malaysian Eagles Sdn Bhd*, (1996) 5 Malayan LJ 569 (Kuala Lumpur HC)]. The burden of proving the fact which excludes the liability of the insurer to pay compensation lies on the insurer alone and no one else [*United India Insurance Co. Ltd. v. O. Jameela Beevi*, A 1991 Ker 380, 384]. Where the vehicle was transferred prior to the accident, it is for the insurer to plead and prove that the insured failed to make application for transfer of insurance certificate. [*Oriental Ins. Co Ltd. v. Joshy*, 1996 AIHC 1150 (Kel HC)] The burden is on the insurance company to prove that the breach of the terms of contract has been committed by the other party to the contract. *Narainva v. Alfredo*, A 1985 SC 1281. This decision was followed by M P High Court in *Karan Singh v. Manohar Lal*, 1989 ACJ 177 and by Madras High Court in *New India Assurance Co. Ltd. v. C.B. Shankar*, 1986 ACJ 821. Where the insurer took the plea that the driver had no valid licence on the date of the accident *onus* lies on it prove the same. If the drivers fails to appear before the court in spite of summons adverse inference can be drawn *U.I. Insurance Co. Ltd. Kurnod v. M.T. Ramakaa*, A 1994 AP 320.

Interest.—When excessive interest is apparently established, any facts that tend to show that such excess does not render the contract harsh and unconscionable should be proved by the lender. The *onus* is on him [*Bonwang v. Banga*, 20 CWN 408 (1906 AC 461 **folld**)]. See now the Usurious Loans Act, s 3 *Expln* under which excessive interest may of itself be sufficient evidence that a transaction was substantially unfair and the burden is thrown on the other side.

In all questions of *onus*, a certain amount of evidence might cause the *onus* to shift, and that evidence on the lender's part that the money could not, in the circumstances, have been raised at less interest would suffice to shift the *onus* so that if the defendant led no evidence to controvert that statement, the lender's would prevail, but that when there was no evidence and it was evident on the face of the document that the interest charged was far in excess of commercial rates, then undoubtedly the lender had not discharged his task [*Radha Kishen v. Jag Sahu*, 47 MLJ 329: 80 IC 791: 29 CWN 293 PC]. Compound interest is another matter. The burden is on the creditor of proving an agreement to pay compound interest [*Radhakishun v. Hiralal*, A 1927 PC 50: 31 CWN 566: 52 MLJ 715: 29 Bom LR 791 PC]. It is on the debtor to prove that the stipulation as to interest found its way into the bond without his consent [*Kewal v. Allah*, A 1925 L 64].

Jurisdiction.—It is for the party, who seeks to oust the jurisdiction of a civil court to establish his contention [*Abdul Waheed v. Bhawani*, A 1966 SC 1718; *Vedagiri L N S Temple v. Induru*, A 1967 SC 781; *District B v. Kannuswami*, 35 IC 121 (39 M 21 refd to); *Ramji v. Mangal*, 2 L 302: 65 IC 256; *Ali Md v. Hakim*, A 1928 L 121 FB]. The *onus* of showing that a party is entitled to bring a suit in the Special Revenue Court lies on him [*Medai v. Karuppayi*, A 1928 M 375: 106 IC 505]. Where a document of transfer states a *mauza* to be in a particular district and is registered

accordingly, the burden of proving that the Registrar had no jurisdiction is on the party who alleges the *mauza* to be in another district [*Sitanath v. Monoranjan*, A 1939 C 148 : 68 CLJ 293].

Landlord and Tenant.—[See, "*Ejectment*", "*Enhancement of Rent*", "*Occupancy —Permanency*"]. The mere fact that a tenant some time ago executed a *kabuliat* for a limited period at a particular rate of rent is not sufficient in itself to throw upon the defendant the entire burden of proving what the present rent is [*Mokunda v. Arpon Ali*, 2 CWN 47]. Where the person claiming to be the tenant produced certified copy of the admission given by the landlord, burden lay on the landlord to disprove the admission. No adverse inference can be drawn against the tenant on ground that he did not summon the deponent. [*Danu Genu Bendale v. Arvinda Dhondu Talekar*, A 1994 SC 1303, 1304].

Where in a suit for rent of a particular year, the defendant pleaded payment and the landlord admitting the receipt of the money contended that the payments were in respect of arrears of previous years, the defendant was bound to prove that they were in respect of the year in question [*Syefun v. Rudder*, 7 C 582]. Where the case of the defendant was that he was in possession of the disputed property as a tenant the burden is upon him to establish the said relationship between him and the plaintiff [*Hanuman Dutt Bajpai v. Budha Singh*, 1998 AIHC 25 (Delhi)].

The burden of proving that the tenancy is one which carries a fixed rent or rent at a fixed rate is on the tenant [*Prodyot v. Hirendra*, 62 CLJ 551]. In a suit for arrears or rent, when the defendant pleads remission, the burden of proving such remission lies upon him [*Bunwari v. Furlong*, 9 WR 239].

The mere fact that the defendants hold some lands as tenants under the plaintiff, is not sufficient to throw upon the plaintiff the burden of showing that in respect of any other land which is not contiguous to the admitted holding of the defendants, they have no right as tenants. The burden of proof in a case like this is upon the defendants [*Sheodeni v. Chowdhury*, 12 CLJ 376; see also *Ram Monee v. Aleemoodeen*, 20 WR 374; *Raj Kishen v. Pearce*, 20 WR 421]. If in the circumstnaces above the land in dispute does not lie contiguous to any lands of the admitted tenancy, the *onus* is on the defendant to prove that it is a part thereof [*Debendra v. Jhumur*, 43 CLJ 387]. The *onus* to prove that particular land is private land and not ryoti land under Madras Estates Land Act is on the land-holder [*Chidambaram v. Santanaramaswami*, A 1968 SC 1005].

Lakheraj and Rent-free Land.—[See *post* "*Rent-free or Mal*"].

Land Acquisition.—Where a public body seeks to acquire, under the Land Acquisition Act, any portion of a bloc of buildings which is structurally connected with the main bloc, the *onus* is on that body to show that the portion is not "reasonably required for the full and unimpaired use of the house" [*Venkataratnam v. Collr of Godavari*, 27 M 350]. In a proceeding for apportionment under the Land Acquisition Act, the burden of proof is on the *zemindar* to make out his claim and show as to the value of a particular contingency to him [*Satis Chunder v. Jatindra Nath*, 7 CLJ 284]. The *onus* of proving the value of the land lies upon the claimant [*Swaranjan v. Secy of S*, 11 IC 62]. When land is acquired and rival claims are made in respect of the compensation, the *prima facie* title to the money is with the party who was in sole and exclusive possession at the time of acquisition and the *onus probandi* is on the party claiming that he has a superior title to such money [*Akue v. Ababio*, 47 CLJ 337 PC; see *Chundee v. Bidhoo*, 10 WR 48; *Mahtap v. Bengal Coal Co*, 10 WR 391]. Where the Collector has not complied with cl (*d*) of s 19(*1*) of L A

Act and his award does not disclose anything beyond acceptance of valuation by the village officer, the burden on the claimant is negligible [*S v. Mariamma*, A 1969 K 265 (*Harish v. Secy of S*, 11 CWN 875; *Padamji v. Dy Collr*, A 1915 M 272 reld on)]. The burden to *prima facie* establish the charge of discrimination or arbitrary exercise of power by the Collector while granting compensation in land acquisition proceedings is on the person who asserts it [*Uttam Singh v. State of Punjab*, 1998 AIHC 547, 553 (P&H)].

Land grabbing.—The initial burden to show that certain parties are land grabbers is on the complainant who should adduce evidence to establish that *prima facie* the said parties are land grabbers [*Bahaggan Bai v. Mandal Revenue Officer*, 1998 AIHC 317, 318 (AP)].

Legal Necessity.—Burden of proving legal necessity lies on the alienee [*Fani v. Chuni*, 62 CLJ 390; *Offl R v. Kishan*, A 1936 L 98; *Bhagwan v. Bishambar*, A 1940 PC 14: 72 CLJ 400; *Dhobani v. Lingaraj*, A 1971 Or 224; *Keluni v. Kanhei*, A 1972 Or 28; *Gadigeyya v. Vishnu*, A 1973 My 207; *Jogendra v. Offl Rec*, A 1975 C 389]. In a suit on mortgage executed by father *onus* of proof of legal necessity is on the mortgagee [*Bhagwan v. Bhishan*, A 1974 P&H 7 (*Faqirchand v. Harnam*, A 1967 SC 727 folld)]. A plea in general terms as to a mortgage bond being illegal and without consideration and necessity opens the defence that there was no legal necessity to borrow at a high rate of interest and the *onus* is on the lender to prove that the necessity included borrowing on such terms. A certain amount of evidence may cause the *onus* to shift [*Radha Kishan v. Jag Sahu*, 80 IC 791 PC]. Proof of legal necessity by alienee is not necessary when specific plea as to want of necessity is not raised [*Pandurang v. Annaji*, A 1971 SC 2228. See *ante* under "*Alienation by Hindu Widow or Daughter*"].

Legitimacy.—If a child is in possession of fillation acknowledged by the parents and has repute in society the *onus* is upon the person who challenges legitimacy to prove that the child is illegitimate [*Surendra v. S*, A 1979 C 3]. In a question of paternity of child in a case of prenuptial pregnancy of wife nature of *onus* on husband to prove that the child was not his discussed [*Nisith v. Aniali*, A 1968 C 105]. When a person's paternity is admitted the fact that he is an illegitimate child has to be proved by the party who pleads that fact. [*Hoovayya Kanthappa Shetty v. Renuka S Shetty*, A 1984 Bom 229, 231].

Limitation.—The burden of proving that a payment would enlarge that time under the statute is on the person who claims the benefit of such payment [*Barada v. Jatindra*, 49 CLJ 560]. Defendant pleading limitation is to establish facts that lead to support the plea [*Padhum v. Tribeni*, A 1934 P 44]. The burden of bringing his case within s 14 Lim Act is on the plaintiff [*Madhavrao v. Ram Kr*, A 1958 SC 767]. In an application for setting aside *ex parte* decree under Or 9, r 13 CPC the *onus* is on the defendant to show that he had knowledge of the decree within 30 days of the application. If the defendant produces some evidence to show that application is within time the plaintiff is to rebut the evidence [*Pannalal v. Murari*, A 1967 SC 1384].

See *ante*: "*Acknowledgment*".

Lunacy.—Once lunacy is established the burden is on the person who alleges execution during lucid interval [*Subramanya v. Lakshminarasamma*, A 1958 AP 22: *Seshamma v. Padmanava*, 40 M 660; *Madan Gopal v. Vinayak*, A 1941. N 251]. When a party pleads that a particular person was an congenital idiot, the congenital, idiocy is to be exclusively established by him and there is burden cast on the other

side to establish from which particular age that person began to show signs of idiocy and for which specific supervening circumstance [*Smt. K Kusuma Kumari v. Grandhi Surya Bhaghawan*, A 1982 AP 163, 170]. A lunatic was let out on parole and when he was on parole he executed a power-of-attorney. In the absence of any order of discharge under s. 34 of the Lunacy Act, the person who relies on the power-of-attorney has to establish by way of sufficient evidence that the executant was capable of understanding the meaning of Power-of-Attorney and of forming a rational judgment as to its effect upon his interest in view of the provisions of S. 12 of the Contract Act [*Mrs Claro Auraro Branganea v. Mrs Sylvia Angela Aluares*, A 1985 Bom 372, 381]. To invalidate marriage burden is on the plaintiff to prove luncacy but if permanent unsoundness of mind is proved the burden of showing that the marriage took place during a lucid interval is on the defendant [*Kartick v. Manjurani*, A 1973 C 545].

Maintenance.—In a suit for maintenance, in the first instance plaintiff is to establish that she falls within the class entitled to maintenance. When this is done, the burden shifts to the defendant to show why she is not entitled to it. When he does so by proving that she is or was unchaste, the burden then shifts back to the plaintiff to show that she has reformed in order that she may be entitled to starving maintenance [*Zali v. Gopalia*, A 1946 N 375 (*Jeeva v. Ranganath*, A 1939 M 788 and *Kuppammal v. Thangamuthu*, A 1944 M 426 **relied** on)]. The husband has to prove that the wife is able to maintain herself [*Banshi Lal v. Smt. Magni Bai*, 1983 Cri. LJ NOC 75 (Raj): 1981 Raj LW 477]. The plaintiff in a suit for maintenance is not supposed to prove a thing which is impossible for the plaintiff to prove especially when the facts regarding the income are within the special knowledge of the husband [*Maganbhai Chhotubhai Patel v. Maniben*, A 1985 Guj 187, 199 : 1985(1) 26 Guj LR 374].

Mala Fide.—The burden of establishing *mala fide* is very heavy on the person who alleges it [*P Rajappa v. S*, A 1974 SC 555; *Jwala v. S*, A 1976 P 158; *Kharavela v. State of Orissa*, A 1985 Ori 153, 158: (1985) 1 Ori Law Review 345].

Malicious prosecution.—See *ante* "*Damages for Defamation and Malicious Prosecution*".

Marriage.—It is for the person who says that a marriage took place to bring forward satisfactory evidence in support of the alleged marriage [*Amiad Ali v. Nawab Ali*, 5 CLJ 1 PC: 17 MLJ 56: 2 Bom LR 264]. It is well established that when a marriage has been performed due performance of necessary ceremonies will be presumed and one who challenges the marriage will have to rebut the presumption and establish by evidence invalidity of the marriage [*Linga v. Ajodhya*, A 1974 Or 107 (*Mouji v. Chandrabati*, 38 IA 122 **rel** on)]. Where a marriage has been performed, it is incumbent on him who challenges the legality of the marriage to establish by evidence that the form of marriage is invalid in some respect or the other [*Harmohan v. Kamala*, A 1979 Or 51 (*Linga v. Ajodhya*, A 1974 Or 107 **rel** on)]. When an acknowledgment by father is proved, the *onus* is on those who deny a marriage to prove that there was no marriage at all [*Mohabat v. Md Ibrahim*, 56 IA 201: 33 CWN 645; *Habibur v. Altaf*, 48 IA 114: 48 C 856]. Where it is proved that a man and woman are living together as a married couple for a long time, the burden is on the person who denies the marriage to prove that it did not take place [*Mg Kyi v. Ma Shwe*, A 1930 R 341; *Ningu Vithu Bamane v. Sadashiv Ningh Bamane*, A 1987 Bom 27, 31 : 1986 Mah LJ 186]. Party asserting that rules, rites, ceremonies and customs of marriage were not observed is to prove not only their omission but also that they are indispensable to the validity of the marriage [*Tlili v. Jones*, 56 A 428].

As to validity of marriage challenged on the ground of insanity and evidence as to repute of marriage, see *Moujilal v. Chandrabati*, 38 IA 122: 13 Bom LR 534 : 21 MLJ 933: 15 CWN 790: 38 C 700]. Party alleging dissolution of marriage must prove it [*Ghulam v. Khizar*, A 1929 L 6]. Burden of proving cruelty lies on petitioner [*Narayan v. Sucheta*, A 1975 SC 1534]. The burden of proving desertion—the factum as well as the animus deserendi—is on the petitioner and he or she has to establish beyond reasonable doubt the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause [*Dharan Dev Malik v. Smt Raj Rani*, A 1984 Del 389, 394].

The burden of proof in divorce proceedings is as in a civil code and not as in a criminal case. It should be proof by preponderance of probability and not beyond reasonable doubt. Graver the charge made, the greater should be the degree of proof that is required to satisfy the court [*P Nirmala v. R Anthony Ray*, A 1985 Kant 47 mx, 49(SB)]. When the husband asserts that the wife had withdrawn from his society without any reasonably excuse, the burden of proof is on him. After he leads some evidence, the initial burden will be shifted to the opponent who shall have to establish that the withdrawal from the society of another was for reasonable excuse, which again may be rebutted by the petitioner. The explanation to s 9 of the Amendment Act, 1976 of Hindu Marriage Act does not make any change in this position of law [*Smt Jyothi Pai v. P N Pratap Kumar Pai*, A 1987 Kant 25, 25: (1986) 1 Kant LJ 422]. It is futile to expect the wife-plaintiff to prove her story by independent evidence that she was severely assaulted and was driven out of the house to which the only witness would be the members of the family of the defendant-husband [*Kamini Sahuani v. Purna Chandra Sahoo*, A 1987 Ori 134, 137]. The charge of adultery or illicit connection made against the spouse is a serious matter and it must rest on evidence of unimpeachable character. Apart from the interested testimony of the wife and her father there must be some independent witness [*Smt Aruna Jalan v. Capt (New Major) Ramesh Chand Jalan*, A 1988 All 239, 242: (1988) 2 Hindu LR 497].

[See notes to s 112, *post*. As to presumption of marriage, see s 114, *post*].

Material impairment.—The burden of proof of material impairment to the value or utility of the building by the tenant is on the landlord seeking eviction of the tenant. [*Ratanlal Bansilal v. Kishorilal Goenka*, A 1993 Cal. 144, 181].

Mesne Profits.—The burden of proving the profits *actually received* is under s 106 on the person who received them; but the burden of proving the profits that the person in occupation *might have received* is on the person who claims them [*Ramakka v. Negasam*, 47 M 800; A 1925 M 145; *Haji Sait v. Md Samsuddin*, 92 IC 139 (M); *Harendra v. Haripada*, A 1939 C 387: *Ram Kishun v. Abu*, A 1943 P 69; *Kollynath v. Shew Bux*, A 1950 C 87: *Narayana v. Trustees*, A 1959 AP 64; see *Dhanarajagerji v. Parthasarathy*, 1933 MWN 825]. It lies upon the defendants who were in possession as wrong-doers to show what were the sums realised as rent during the time of their possession [*Brojendra v. Madhab*, 8 C 343; see also *Dinobundhoo v. Keshab*, 3 WR Mis 25]. In a suit for mesne profits, as in other cases, it is incumbent on the plaintiff to establish not only the existence of his right, but also the extent of it [*Ishan Ch v. Ainuddin*, 5 CWN 720].

It is for the person out of possession to prove what profits the man in possession of property made out of it. As soon as plaintiff gives some *prima facie* evidence that the profits were somewhere about the sum alleged, the burden shifts to the defendant [*Jailal v. Lal Fateh*, 75 IC 826; *Gopala v. Ramkrishna*, 50 IC 930; *Narayana v. Trustees, sup*].

Minority.—Where a deed is executed by one who alleges himself to be a major at the time of the execution, a heavy burden rests upon him or his representative when a plea of minority is set up [*Sadiq Ali v. Jaikishori*, 30 Bom LR 1346: 55 MLJ 88: 32 CWN 874: A 1928 PC 152]. When a person pleads minority, the *onus* is on him to prove his plea [*Nilmani v. Zuhurunnisa*, 8 WR 371; *Chyet Narain v. Bunwaree*, 23 WR 395; *Virupakshappa v. Shiddappa*, 26 B 109; *Jodi Bibi v. Vajiar*, 26 IC 407; *Sobhanmul v. Bachal*, 9 SLR 214: 34 IC 890; *Thakur v. Narayan*, 58 IC 196; *Kandhai v. Md Alum*, 63 IC 525; *Dharan v. Harbans*, A 1922 L 75; *Narain v. Chiranji*, 79 IC 945; *Jagannath v. Abdullah*, 45 C 909: 45 IA 92: 22 CWN 891: 35 MLJ 46: *Kandhai v. Debi*, 87 IC 778 (A); *Surja v. Jyoti*, 47 A 493: 87 IC 445; *Naima v. Basant*, A 1934 A 406 FB]. The contrary view in *Gayadin v. Dubari*, 6 ALJ 693: 2 IC 839 and *Kanhaya v. Girdhari*, 9 ALJ 103: 13 IC 956 can no longer be treated as good law.

Miscellaneous.—Once, it is shown that the article is an article of human food; then if the party charged says it was not intended for human consumption, the *onus* of proving this will be on that party under s 418(2) of Calcutta Municipal Act [*Gangadhar v. Corpn of Calcutta*, 1938, 1 Cal 558].

Where a witness deposes receipt of a letter written by *S*, the burden is on the other side to prove that it was not written by *S* or written in collusion with witness [*Bishwanath v. Sachhidananda*, A 1971 SC 1949]. Burden to prove restrictions on right to carry on trade or business are reasonable is on the supporter of the legislation [*Bhola v. S*, A 1972 P 412].

Misrepresentation.—If any one takes a plea that a deed executed by him was vitiated by misrepresentation the *onus* is upon him to establish the plea [*Kuppuswami v. Arumugam*, A 1967 SC 1395].

Money.—Money is presumed to belong to one in whose name it stands and the person claiming it as his own must prove the fact [*Chattra v. Mohan*, A 1931 P 144].

Mortgage.—In a suit for redemption, the mortgage-deed having been lost, the *onus* lay upon the mortgagor to prove that the term did not expire [*Kishen Dutt v. Narendra*, 3 IA 85].

In a suit for redemption, the plaintiff was to prove the existence of the subsisting mortgage, which he is entitled to redeem [*Musafir Rai v. Lagan*, 2 ALJ 62; *Hay v. Rafiddin*, 12 ALJ 769; *Shadeo v. Lachmina*, 14 ALJ 615]. The plaintiff sued for redemption alleging that the lands had been mortgaged to defendant's ancestors about 45 years before suit. The defendants who were in possession, denied the mortgage,—*held* that the plaintiff must in the first instance prove the specific mortgage as alleged in the plaint [*Bala v. Shiva*, 27 B 271]. Where in a redemption suit plaintiff fails to prove the mortgage in question, he cannot succeed upon the mere fact that defendant admits that he is a mortgagee of the land [*Salikram v. Ramanand*, 3 OC 173; *Niamat v. Dy Commr*, 25 IC 816; *Jogiwan v. Gujraj*, 80 IC 543 (O)]. In a suit for redemption, on the ground that the debt has been satisfied with interest, the *onus* is on the plaintiff [*Shah Makhan v. Srikrishna*, 2 BLR 44 PC : 11 WR 19]. In taking an account on a mortgage in a suit for redemption where the mortgagee had been in possession, it lies upon him to prove what is due from the mortgagor in respect of the principal and interest [*Ganga Mulick v. Bayaji*, 6 B 669].

A plaintiff in possession under an usufructuary mortgage, and suing for the balance due, is bound to prove that he has not realized the amount due under the conditions of the lease from the usufruct [*Chuttar Dharee v. Sureer*, 1 WR 28; see

Pran Kishore v. Chundee, 19 WR 249]. Where execution of mortgage was denied but was compulsorily registered and defendant again denied execution in a suit on the bond, the *onus* is on the plaintiff [*Pallikandi v. Matancheri*, 1917 MWN 789. Where both parties relied only on one mortgage and the only question is whether it is subsisting, the *onus* is on the defendant [*Madhavan v. Lakshmana*, 44 IC 447]. Where once a mortgage has been admitted, the *onus* is on the mortgagee to show that the mortgage has been extinguished by subsequent sale [*Wali Md v. Baksh*, A 1930 PC 91 : 51 CLJ 518 : 59 MLJ 53 : 11 L 199]. Mortgaged property not in existence—*onus* is on the defendants to disprove the existence of the plot [*Sudhir v. Syed Abdulla*, 22 CWN 894]. When a sub-mortgage in respect of a sub-mortgage created by the mortgages asserted that the mortgagor had notice of the sub-mortgage, the burden of proof is on him to prove that the mortgagor had notice of the sub-mortgage [*Krishnan Assari Velayudhan Assari v. Paramaswaran Pillai Madhavan Pillai*, A 1989 Ker 163, 166].

[See *ante*: "*Bond*"].

Negligence.—In a claim for damages *onus* of proof of negligence is on plaintiff and where facts and circumstances make out a clear case of negligence, it is for the defendant to prove otherwise [*Subhash v. Ramsingh*, A 1972 D 189]. In the case of fire from sparks of a running engine, it is not for the injured party to prove negligence. The *onus* is on the Railway Co, to prove that necessary precaution had been taken [*Secy of S v. Dwarka*, 100 IC 640 : A 1927 A 349]. As to proof of negligence in a moment of peril and emergency, see *Dwarkanath v. R S N Co*, 27 CLJ 615 PC. In a damage suit by a bus-passenger for an injury on account of a collision between the bus and a lorry, the burden did not lie on the plaintiff to prove affirmatively to the exclusion of the driver of the bus that the driver of the lorry alone was negligent [*Andhra T Co v. Muthuswamy*, A 1956 M 464; *Palghat C T Co v. Narayanan*, A 1939 M 261]. The burden of proving negligence as cause of the accident, lies on the party who alleges it. But that party can take advantage of presumption which may be available to him, to lighten that burden. Even in an action in torts, if the defendant gives a reasonable explanation, equally consistent with the presence as well as with the absence of negligence, the burden of proving that the defendant was negligent still remains with the plaintiff [*Syad Akbar v. S*, A 1979 SC 1848]. Where the deceased died due to electrocution by coming into contact with a live wire which snapped and which was lying either on the ground or on the fence nearby, the burden lies on the Electricity Board to prove that they had taken all care to maintain the electric lines properly and to prevent the occurrence of such accidents [*Hotukuri Bheemavva v. A.P.S.E.B.*, 1998 AIHC 1279 (AP)]. Where the defendant pleads that the contract under which the claim is made by the plaintiff is hit by s 23 of the Contract Act as a contract forbidden by law, in so far as no licence has been taken for the business carried on under the agreement, the burden is on him to prove very satisfactorily that the said agreement is forbidden by law and the business carried on under the agreement required a licence under a valid law [*Janardhanan v. Sreedharan*, A 1985 Ker 199, 201 : 1985 Ker LT 207].

"In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of fact which raises a *prima facie*

inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the *prima facie* inference. In the situation there is said to be an evidential burden of proof resting on the defendants" [*per* LORD PEARSON in *Henderson v. Henry Jenkins*, 1969, 3 All ER 756, 766 HL]. The burden on the defendants to reout the inference of negligence raised by the maxim *res ipsa loquitur* cannot be discharged merely by showing that there had been a latent defect not discoverable by the exercise of reasonable care in inspection and maintenance; there is further duty on them to exercise reasonable care when they first bought the article [*Pearce v. Round Oak*, 1969, 3 All ER 680 CA; *Henderson v. Henry Jenkins, sup*].

The doctrine of *res ipsa loquitur* only means that an accident by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes, and in such a case the mere fact of the accident would be *prima facie* evidence of such negligence. The burden of proof would be on the defendant to explain and to show that the accident occurred without any fault on his part [*MPSRT Corpn v. Sudhakar*, A 1968 MP 47 (*Cole v. De Trafford*, 1918, 2 KB 523; *Halli Well v. Venables*, 1930 All ER 284 rel on; *Hanuman v. Usharani*, A 1978 P&H 177].

Where the guarantor took the plea that the hypothecated goods were not insured and were lost due to the negligence of the creditor bank though *onus* is on the guarantor to prove negligence the creditor bank being a statutory body should have revealed all documents to satisfy the court that it has taken all possible steps to discharge its obligation both under fact and law *Gopal Chandra Bagaria v. State Bank of India*, A 1994 Ori 329, 331. Where the evidence is that the vehicle did not go in the usual manner and went off the road and dashed against a tree, the doctrine *res ipsa* loquitur is attracted and the burden shifts on the other party *i.e.* the driver [*Sumati Debnath v. Sunil Kumar Sen*, A 1994 Gau 59, 62].

The burden of proving negligence is on the plaintiff but the burden of proving contributory negligence is on the defendant [*Wakelin v. L & S W Ry*, 12 App Cas 41; *Gokul v. Nand*, 1939, AC 106]. Although in an action in negligence the onus of proof normally rested on the plaintiff, in a case where a general duty of care arose and there was a failure to take a recognised precaution and the failure was followed by the very damage which that precaution was designed to prevent, the burden of proof lay on the defendant to show, first, that he was not in breach of any duty and, second if he failed to prove that he had not been in breach of duty that the damage suffered by the plaintiff did not result from the breach [*Clark v. Machlenna*, (1983) All ER 416]. "The fact of contributory negligence, sufficient in law to defeat a plaintiff is regarded as a part of the defendant's burden; like so many other instances of that burden, however, this is in reality a question of pleading. Yet, the second burden, or duty of producing evidence may be shifted by facts which raise a presumption of negligence" [Wig s 2507]. In order to discharge the burden of proof of contributory negligence it is not necessary for the defendant to give evidence because it can be inferred from evidence adduced by plaintiff or from the primary facts so found by the court on a balance of probabilities [*Krishna Goods &c v. Union*, A 1980 D 92 (*Wakelin v. L & S W Rly, sup* ref)].

Negotiable Instruments Act.—[See *ante*: "*Consideration*"].

Notice.—In a suit to cancel a sale for arrears of revenue, the *onus* of showing that there has been an irregularity and illegality in the preparation and serving or posting of notice, rests on the person seeking to have the sale set aside [*Sheoratan v. Net Lal*,

30 C 1, p 11 : 6 CWN 688; see also *Shk Md v. Jadu Nundan*, 10 CWN 137]. But in a suit to set aside a sale of *Putni* taluk on the ground of non-service of notice under Reg 8 of 1819 the *onus* of proving service lies upon the *zeminder* [*Durga Churn v. Syed Nazimuddin*, 21 WR 397; *Ashmutulla v. Hurri Churn*, 17 C 478; *Hurro Dyal v. Md Gazi*, 19 C 699; *Prem Chand v. Suraj Ranjan*, 1 CLJ 102n].

A person applying for revocation of a probate need not prove that no notice was served on him and that he had no knowledge of the probate proceedings; the burden of proving such knowledge lies on the person alleging it [*Prem Chand v. Surendra*, 9 CWN 190].

An entry in the order-sheet that notice has been served is not conclusive. A person denying service must start his case [*Bindubasini v. Kesab*, 21 CWN 945]. Where notice is served by fixing it on judgment debtor's house, the burden is on the person relying on the notice to show proper service [*Nemai v. Secy of S*, 45 C 496]. Where there is an affidavit of peon of service of notice in a sale under Act 11 of 1859, the party impugning must prove that there was no notice [*Krishna v. P D Co*, A 1928 C 722].

Notices sent by regd post to lessees on addresses as in lease-deed—Effective service must be presumed—Onus shifts on lessees to prove non-service of notices [*Bhusan v. Bengal Coal Co*, A 1966 C 63]. Once the defendant admits receipt of notice under s 80 CPC the onus of the plaintiff to prove that he has given requisite notice shifts to the defendant and the defendant cannot challenge validity of the notice without production [*Mast Ram v. Dy Commr*, A 1968 A 321 (*Krishna v. Union*, A 1960 C 264 rel on)]. It is incumbent for the plaintiff to make averments in the plaint and prove the fact that notice as required under section 76 of the H.P. Co-operative Societies Act (1968) had been duly served upon the Registrar [*Jawali Harijan Co-operative Agricultural Society v. Maghu*, A 1992 HP 34, 36].

[As to presumption of service of notice, see notes to s 114, *illus* (*e*), *post*].

Occupancy—Permanency.—If in a suit by the landlord to eject, the tenant pleads a permanent right of occupancy, the *onus* of proving is on him and proof of long occupation at a fixed rent does not satisfy that *onus* [*Naina Pillai v. Ramanathan*, 51 IA 83 : 46 MLJ 546 : 47 M 337 : 28 CWN 809; *Secy v. Luchmeswar*, 16 C 223 PC; *Seturatnam v. Venkatachela*, 43 M 567 PC; *Bandaru v. Dungala*, 79 IC 845 (M); *Bangshi v. Ratan*, 92 IC 961 (C); *Manmatha v. Rajeswar*, 32 CWN 184; *Gopala v. Juvappa*, A 1931 M 577]. See *ante*: "*Ejectment*".

***Pardanashin* Women.**—When it is denied that the lady is no *pardanashin* the *onus* is on the plaintiff to prove that the lady was in fact *pardanashin*. Meaning of *pardanashin* stated [*Andhi v. Rajeshwari*, A 1972 P 325. See *post*, s 111]. If the plaintiff is an illiterate or *pardanashin* lady and alleges fraud but fails to establish fraud, the defendant must establish that the plaintiff executed the document after the document was read over and explained to her and after she understood the contents thereof *Kishore Ray Thakur Bije v. Basanti Kumar Das*, A 1994 Ori 113, 116. When an illiterate person executes some document then the person in whose favour the document is executed must prove that the document has been executed by the said person. Protection available to a *pardanashin* lady is equally available to an illiterate person [*Ramdeo v. Dulari*, A 1996 All 253, 256]. Disabilities which make the protection necessary may arise from other causes as well such as oldage, infirmities, ignorance, mental deficiency, inexperience etc. [*Parasnath Rai v. Tilesara Kaur*, 1965 ALJ 1080].

Partition.—In a suit for partition of joint family property where the defendant pleads prior partition, the *onus* is on him to prove the alleged partition [*Gooroo Pershad v. Kalee Pd*, 5 WR 121; *Pillani v. P*, 28 IC 217; *Sidramappa v. Mahadevi*, A 1971 My 145; *Mohendra Rout v. Mahonadi Dei*, A 1985 Ori (NOC) 60 (DB)]. When a coparcener in his suit for injunction took a plea of partial partition there is no presumption that the partition was complete, and he has to prove that there was no complete partition [*Diwakar Prasad Dubey v. Prabhakar Prasad Dubey*, A 1985 All 133, 135 : 1984 All CJ 647]. A person suing to stay a partition directed by the Collector on the ground that a private partition has already been come to, must prove the prior private partition [*Kalup Nath v. Lala Ram*, 16 C 117]. When a partition is admitted or proved, any one alleging that some property in the exclusive possession of a member is still joint, must prove it [*Dwarka v. Kedar*, A 1951 P 445; *Shankar v. Laxmibai*, A 1956 B 271; *Ramnagina v. Harihar*, A 1966 P 179]. The onus to prove pre-requisites of s 36(*6*) Madras Aliyasanthana Act is upon the party who alleges outright partition [*Gummanna v. Nagaveniamma*, A 1967 SC 1595].

Partnership.—Burden lies heavily upon one who claims to be interested as a partner [*James v. Ghulam*, A 1949 PC 151]. If one of the partners of a business purchased the property in his name, the burden is heavily upon the person who claims that such a purchase was for the benefit of all the partners. [*K.R. Sathyanarayana v. R.K. Venkoba Rao*, A 1998 Mad 276, 279].

Possession.—In a suit for possession of land the plaintiff has to prove that the land lay within his holding and for the defendants to prove that it lay outside [*Satiprasad v. Gobinda*, 33 CWN 227 : A 1929 C 325 (*Shamasundari v. Raj Beharee*, 3 CWN 763 not apprd)]. When defendant is in possession by virtue of an order under s 145 Cr P Code, the *onus* is on the plaintiff to show that the person in possession had no right to possess [*Manindra v. Saradindu*, 23 CWN 593]. While the initial *onus* of proving sub-letting or transfer of the lease holding is upon the landlord yet once the court is satisfied that there has been a transfer of possession, the *onus* may shift and within whose special knowledge the facts explaining the manner in which such possession has been transfer lie, may have to bear the burden thereafter. Thus when once the parting of possession is proved, the burden shifts on to the tenant to show that the alleged sub-tenant is in occupation not as a sub-tenant but only as a licensee or as a person in permissive occupation. The initial *onus* to prove the ground of eviction thus rests on the landlord. [*Gur Dayal Khanna v. Malti Devi*, A 1993 All 90, 93]. When in plaintiffs' suit claiming possession as owners of the property in question and for a perpetual injunction against the defendants restraining them from interfering with the plaintiffs' possession but the defendants disputed the claim and instead claimed possession, the burden of proof lay on the plaintiff's to prove their case and they cannot be given any benefit to the plaintiffs for the weakness of the defence case. [*Ram Bhajan v. Abdul Rehman*, A 1997 All 17, 19]. Where an inference is raised that parting of possession of the demised premises by the tenant in favour of another person was for a valid consideration, the burden would be upon the tenant or the sub-tenant, as the case may be, to prove that parting of possession—both legal and physical—by the tenant in favour of that other person was without any valid consideration. [*Dudabhai v. Sulochanaben Gopaldas Kothari*, A 1995 Guj 68, 73].

Where there is no dispute as to the identity of the subjects let, but the tenant denies that he ever got possession of the subjects, it is for the landlord to prove that he has discharged his obligation to put the tenant in possession before he can enforce the tenant's obligation to pay rent. Where, however, the tenant has already paid rent under the lease or where the tenant claims that certain subjects, of which he did not get possession, are within the subjects let, which the landlord denies, the *onus* would primarily be on the tenant [*Jogesh v. Emdad*, 59 IA 29 : 59 C 1012 : 62 MLJ 336 : 34 Bom LR 481 : 36 CWN 221].

[See *ante* "*Adverse possession and Limitation*"; "*Ejectment*", and s 110, *post*].

Pre-emption.—In a suit to enforce the right of pre-emption, in which the plaintiff impugns the correctness of the price stated in the sale-deed, although the burden of proof *prima facie* is on him to show that the property has been sold below the stated price, yet a very slight evidence is sufficient to establish his case; and then it rests on the defendants (vendor and vendee) to prove by cogent evidence that the stated price is the correct one [*Bhagwan v. Mahabeer*, 5 A 184 (**folld** in *Tawakkul v. Lachman*, 6 A 344; and in *Sheo Pargash v. Dhanraj*, 9 A 225); *Abid Ali v. Har Pd*, A 1929 O 486; see also *Abdul Majid v. Amolak*, 29 A 618 : 9 A 471; *Makhan v. Jahan*, 16 ALJ 533]. It is for the plaintiff to show in the first instance that the consideration set forth in the deed is fictitious [*Sakalraj v. Udit*, 14 IC 158]. Where a right of pre-emption is based upon custom, it is for the defendant to show that a custom proved to have once existed had come to an end [*Brija Nandan v. Kunwari*, 3 ALJ 561. See also *Savak v. Gija Pande*, 2 ALJ 6 : 1905 AWN 16]. The *onus lies* on the plaintiff to prove the custom of pre-emption [*Ahmad v. Digambar*, 16 IC 361].

Press Act.—In a prosecution under s 13 Press Act (25 of 1867), it is for the prosecution to establish that the press was one which required a declaration and it must be proved that it was in workable order [*Benoy v. R*, 57 C 460 : 34 CWN 143 : A 1929 C 635].

Prevention of Corruption Act.—The burden of proof under s 4(*1*) of Prevention of Corruption Act will be satisfied by the accused by establishment of his case by a preponderance of probability as in civil proceedings. It is not necessary that he should establish his case by the test of proof beyond a reasonable doubt. [*Jhingam v. S*, A 1966 SC 1762 (*Woolmington v. D P P*, 1935 AC 462 and *Harbhajan v. S*, A 1966 SC 97 **reld** on): *Mahesh v. S*, A 1974 SC 713; *Trilok v. S*, A 1977 SC 666; *Narasimham v. S*, A 1969 AP 271]. The presumption cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is true [*Dhanvantrai v. S*, A 1964 SC 575; see *S v. Pravinchandra*, A 1968 G 17; *S v. Madhavbhai*, A 1964 G 206].

Where the accused were charged with criminal conspiracy to commit criminal mis-appropriation under s 5 of Prevention of Corruption Act on allegation of dishonest and fraudulent misappropriation or conversion to their own use of some bags of wheat released from the ship, it is no doubt true that the onus on the prosecution is of a negative character but such negative onus is capable of being discharged by appropriate circumstantial evidence [*Hargun v. S*, A 1970 SC 1514].

Prevention of Food Adulteration Act.—In a prosecution under s 16 of the Act it is always open to the accused to plead that the article concerned was never sold as food or meant for human consumption but the *onus* lies heavily on accused in proof thereof [*Corpn of Calcutta v. United Oil Mills*, A 1968 C 342].

Preventive Detention.—Burden lies on the petitioner to prove that detention under D I Rules is *mala fide* [*Ghasi Ram v. S*, A 1966 Raj 247; *Gajanan v. S*, A 1967 B 96 (*Basanta v. E*, A 1945 FC 18 **folld**)].

Prostitution.—In suit by prostitutes after notice by Municipality to vacate, it is for the plaintiffs to prove that they are not public prostitutes [*Munpl Comm v. Mt Allah*, A 1927 L 358; *Motijan v. Munpl Comm*, A 1926 L 461].

Railways Cases.—As regards burden of proof, S 76 Railways Act does no more than take away from the plaintiff a burden which in any case lies upon the defendant

under s 106 Evidence Act. It is for the defendant to place all the materials before the court and if defendant fails to do this, the plaintiff may ask the court to presume that if produced the materials would have gone against the defendant [*Secy of S v. Ramdhan*, 37 CWN 1109]. S 76 Railways Act does not increase the *onus* of proof laid upon the Railway Co. by s 151 Contract Act [*Lakhi Chand v. G I P R*, 37 B 1]. In the case of a claim against the Railway on account of loss, destruction, deterioration or damage, the onus is on the Railways to show that no loss, destruction, deterioration or damage had taken place not only during the period of transit, but also during the subsequent period of transit but seven days after the termination of transit [*Raman & Co v. Union of India*, A 1985 Mad 37, 39 : (1984) 97 MLW 520].

When the Railway pleads loss due to looting by riotous mob, it is for them to place all necessary materials for a proper inference [*G G in Council v. Mahabir*, A 1952 A 891 FB (*Dwarka v. R S N Co*, A 1917 PC 17 **relied** on)].

The *onus* lies on the person seeking to charge the Railway Co with damages for loss of goods, to show that the case comes within the proviso in the risk note [*Shoobarat v. B N W Ry*, 16 CWN 766]. Damages being presumptive evidence of negligence, once evidence is led to prove negligence, burden shifts on the Railways to rebut the presumption [*B N R v. Moolji & Co*, 49 CLJ 551 : A 1929 C 654].

When goods have not been delivered at the place of destination, plaintiff need not prove how the loss occurred; the *onus* is upon the bailee to prove the circumstances which exonerate him from liability for loss [*Surendra v. Secy of S*, 21 CWN 1125 : 25 CLJ 37].

Where goods were consigned under risk-note Form H, the *onus* lay on the consignor of bringing the case within the proviso mentioned in the contract [*E I R v Nathmal*, 39 A 418; *B B C I R v. Dayaram*, 23 Bom LR 583; *Albuquerque & Sons v. S I R Co*, 43 MLJ 90 : 68 IC 269]. Where goods are consigned under risk-note H, *onus* lies on the person suing to show wilful neglect [*S I R Co v. M S P Bros*, A 1932 M 545]. Plaintiff having proved a *prima facie* case the *onus* is on the Railway to offer reasonable explanation to escape liability [*C I S & W Co v. G I P Ry*, 24 Bom LR 272; 67 IC 162]. In the case of damages caused by the sparks of an engine, the *onus* is initially on the Railway to prove that precaution was taken to protect adjoining property, from fire [*Secy of S v. Dwarka*, A 1927 A 349 : 100 IC 640].

Goods covered by risk-note Form B—Plaintiff must prove that the loss or theft was due to the wilful neglect of the Railway [*E I R v. Kanak*, 22 CWN 622; *B B & C I Ry v. Ranchhod Lal*, 43 B 769; *Jamnadhar v. Bur R Ltd*, 13 Bur LT 190; *B B & C I Ry v. Sarkarchand*, 24 Bom LR 787 : 68 IC 534; *Sheobarat v. B N W R Co*, 15 CWN 766; *Smith Lad v. G W Rly*, (1922) AC 178; *E I R v Shib Prosad*, 78 IC 449 (C); *E I R v. Sriram*, 46 A 125; *Madras & S M Ry v. Krishnaswami*, 79 IC 137 (M); *Ganesh v. E I R*, 80 IC 426 (C); *Madras & S M Ry v. Gundapu*, 85 IC 1003 (M)]. Before 1924 the words in risk-note were "wilful neglect." The word in the new risk-note *A* and *B* is "misconduct" and it makes the company liable for mismanagement in the absence of proof that damage was caused by circumstances over which the company had no control [*B N Ry v. Moolji & Co*, 49 CLJ 551 : A 1929 C 664]. Under risk-note B the burden lies in the first instance upon the Railway to prove loss contemplated by the first part of the note, and when this is done the *onus* is shifted upon the bailor to show wilful neglect [*G I P R Co v. Jitonram*, 72 IC 440]. Under the revised risk-note B, if the obligation on the part of the railway company to disclose the nature of their dealings with the consignment while under their control has been discharged and the evidence given by the railway company does not lead to a fair inference of misconduct, the proviso will cease to operate and the consignor will be relegated to his

original burden of proof of misconduct [*Surat Cotton &c v. Secy of S*, 64 IA 176 : A 1937 PC 152 : 41 CWN 837]. It is only when negligence or misconduct cannot fairly be inferred from the disclosure made by railways under s 74-D Railways Act followed by evidence at the trial the burden of proving negligence or misconduct shifts to the consignor [*Union v. Brijlal*, A 1969 SC 817]. See *Union v. Mahadeolal*, A 1965 SC 1755 : 1965, 3 SCR 145].

Where loss is caused by conduct, the burden lies on the plaintiff to prove misconduct and not for the Railway to disprove it—Distinction between negligence and misconduct [*Ralliaram v. G G in Council*, A 1946 C 249 : 48 CWN 554; *Gov-Genl v. Visheswar*, A 1947 P 84; *Gov-Genl v. Amilal*, A 1947 P 81]. Under the old risk-note *B*, the onus was always upon the owner to prove that the injury to the goods was caused by the misconduct of the servants of the railway company. By the elimination of the risk-notes and by reason of the new section 74A of the Railways Act the *onus* would be upon the railway except in a case where the goods are carried at owner's risk. Under s 74A, only in two contingencies is the *onus* cast on the plaintiff to prove negligence or misconduct of the railway administration when goods are sent at owner's risk—(*i*) defective condition of the goods making them liable to deterioration; (*ii*) defective packing of the goods leading to damage [*Manickam v. Union*, A 1960 M 149]. After amendment in 1961 when consignment was sent at owner's risk under s 74(*3*) burden shifted to the plaintiff to prove that loss was due to negligence or misconduct on part of Railway Administration [*Union v. Rajasthan Supplying Agencies*, A 1968 AP 327]. In consignment under s 77-C Railways Act sent in defective packing the burden is on the consignor to prove that loss was due to mismanagement or negligence on part of railway [*Kesrimal v. Union*, A 1968 MP 199]. Burden of proof under s 78A Railways Act is on plaintiff to establish that loss occurred during transit of wagon on delivering railway [*Union v. Firm Munnalal*, A 1971 MP 131].

In a consignment under risk-note Form A, the *onus* lay on the plaintiff to prove that the shortage was due to pilferage by railway servants [*Firm of P v. B N W R Co*, 65 IC 583]. In risk-note A the entire *onus* to prove misconduct lies on the plaintiff [*Gov-Genl v. Bishundayal*, A 1948 P 48; *Pyara Lal v. Gov-Genl*, A 1957 A 21]. If there is a complaint of short delivery, weight-wise, the burden rests squarely on the plaintiff to place acceptable and convincing evidence of the actual weight of the goods shipped [*Nippon Yeesen Kaisha Ltd v. Union of India*, A 1987 Mad 12, 14 : (1986) 99 Mad LW 366].

As to *onus* of proof when railway company are in the position of bailees, see *Gadodia v. G I P R*, 46 A 161. As to the meaning of "loss" in risk-note B and the *onus* of proof see *E I R v. Jogpat*, 28 CWN 1001 : 79 IC 126.

[See *ante*, "*Carrier*"].

Recital in a Deed or Other Instrument.—[See also *ante*, "*Consideration*"]. Recital in a document may be taken as evidence, but cannot be treated as an admission that would shift the *onus* of proof [*Koneri v. Kumarapudayan*, (1913) MWN 924]. Recitals of payment contained in a deed would under certain circumstances amount to admission under s 17 and are therefore relevant not only against the parties but also against their representatives in interest [*Godian v. Veerappa*, 28 MLJ 92, see *Srinivasdas v. Meherbai*, 44 IA 36 : 21 CWN 558 : 41 B 300]. Recitals cannot by themselves be accepted as evidence sufficient to establish the facts recited: but with regard to old documents where independent evidence is not available, recital consistent with the probabilities of the case cannot be lightly set aside [*Banga v. Jagat*, 21 CWN 225, 229 : 43 IA 249; *Iswar v. Protapmal*, A 1951 SC 214; *Haren-*

dra v. Haripada, A 1939 C 387; *Rames v. Sashi*, 23 CWN 1025]. Mere denial of receipt of consideration acknowledged in the recital is not sufficient to cast the *onus* on the vendee [*Rampal v. Suba*, 4 Pat LJ 17]. If execution is proved, recital is *prima facie* proof of passing of consideration against heirs or purchasers from executant [*Kaghavendra v. Venkatasami*, A 1930 M 251]. Recitals in mortgages or deeds of sale with regard to the existence of necessity for alienation have never been treated as evidence by themselves of the fact. There must be evidence *aliunde* [*Brij v. Indar*, 18 CWN 649 PC : 36 A 187; *Chandra v. Upendra*, 37 CLJ 319; see *Manokarini v. Haripada*, 19 CWN 718 PC; *Vajonji v. Chandra Bibi*, 37 A 369 : 22 CLJ 180; *Secy Cant Committee v. Satish*, 57 IA 339 : 58 C 858]. A sale-deed recited that it was "true and correct" and was signed by a *pardanashin* lady. In a suit by her for cancellation of the deed on the ground of fraud, the burden was upon her to establish that the recitals were untrue [*Banshiram v. Panchanani*, 29 CWN 638 : 35 IC 284]. The *onus* of proving incorrectness of recitals is on the executant [*Ramdei v. Chandraballi*, 44 IC 399].

Where a long time has elapsed between the deed and the suit, the recital of legal necessity in a deed by a Hindu widow cannot be disregarded [*Nandalal v. Jagat*, 44 C 186 PC : 21 CWN 225; see also *Chitamanibhatla v. Wadhwan*, 43 M 541 : 47 IA 6; *Ravaneshwar v. Chandi*, 43 C 417 PC; *Chandrakishore v. Upendra*, 37 CLJ 319; *Peary v. Sundar*, 44 A 756; *Upendra v. Gurupada*, 34 CWN 405; *Ram Nayak v. Rup Kali*, A 1934 A 557]. Where a document contains an admission or recital of payment of consideration, the *onus* is upon the executant to prove that he did not receive consideration. No distinction can be drawn between such admission in a registered deed and an unregistered deed [*Ramchand v. Chhunun*, 6 L 470 : 88 IC 301 : A 1925 L 371 FB].

See "*Bond*," *ante* and s 115 *post*, under "*Estoppel by Recital*".

Record of Rights.—The burden of proving that entries are incorrect lies on the person alleging it [*Srinath v. Pratap*, 82 IC 879 PC; *Sheo Pershad v. Jhaman*, A 1925 P 498; *Parmeshwar v. Sureba*, A 1925 P 530. See also 34 CLJ 133 : 61 IC 420; 34 IC 505]. It lies on the person who seeks to rebut the statutory presumption, to adduce strong evidence [*Rajani v. Secy of State*, 46 C 90 PC]. Where Records of Rights shows that plaintiff is in possession, the defendant cannot be heard to say that the burden of proving that he is in possession lies on the plaintiff [*Sheopujan v. Kesho Pd*, 76 IC 347 : 2 P 919]. The party challenging it must adduce in evidence, in order to rebut the presumption, matters other than what happened during the proceedings before the revenue officer before the final publication [*Lakhinath v. Nabadwip*, 31 CWN 192].

Rent-free or Mal.—As to the various classes of *lakheraj* or revenue-free grants of land, see Field Ev pp 323-24. Meaning of *lakheraj* [*Keshwar v. Sheo Pd*, 18 CLJ 166]. Once the landlord has proved that the land which is sought to be held rent-free lies within his regularly assessed estate or *mehal*, the *onus* is shifted [*Jagdeo v. Baldeo*, 27 CWN 325 : 49 IA 399 : 2 P 38; *Abdul Barri v. Hrishikesh*, 49 CLJ 546; *Harendra v. Amal*, 65 CLJ 474; *Kameshwar v. Shk Sakhawat*, A 1937 P 96]. The Privy Council case was explained in a later decision to mean that the *zemindar* must prove that the land lies within his regularly assessed estate or *mehal* and that it was not sufficient to show merely that it lay within the ambit of his *zemindari*. It must be shown that it formed part of the *mal* assets at the time of the Decennial Settlement [*Sashi Bhusan v. Kazi Abdullah*, 28 CWN 143]. This interpretation was accepted in *Makhan v. Rupchand*, 51 CLJ 41 : A 1930 C 164]. Where land is claimed rent-free as per entry in the record of rights, once the landlord has proved that such land *lies*

within his regularly assessed estate the *onus* is shifted on the claimant [*Lachuman v. Kamakshya*, A 1921 P 224]. In a boundary question between a *lakheraj* and *mal* land, there is no presumption any way, the *onus* is on the plaintiff to prove his case [*Beer Ch v. Ramgutty*, 8 WR 209; see *Gangamala v. Madhab*, 10 WR 413]. When the Record of Rights and the *chitta* definitely establish the relationship of landlord and tenant, the *onus* to show that the land is held rent-free lies on the person alleging it [*Jyoti v Kumud*, A 1939 C 638 : 69 CLJ 381].

Resumption and Assessment.—In suits for resumption under Reg 19 to 1793 s 10, the *onus* is upon the plaintiff to prove a *prima facie* case. The mere fact of the lands falling within the ambit of his estate does not show that the lands are *mal* and rent paying [*Harihar v. Madhab*, 8 BLR 566 PC : 20 WR 459 (**folld** in *Shk Milan v. Mahomed*, 10 CWN 434); *Sonatun v. Abdul Farar*, 8 BLR Sup Vol 109; *Bisnath v. Radha Churn*, 20 WR 465; *Arfunnessa v. Peary*, 1 C 379 : 25 WR 509; *Md Akhir v. Reilly*, 24 WR 447; *Abhoy v. Kally*, 5 C 949 : 6 CLR 260; *Koylash v. Gocoolmony*, 8 C 230 : 10 CLR 41; *Bacharam v. Peary*, 9 C 813 : 12 CLR 475; *Narendra v. Bishen*, 12 C 182 (**relied** on in *Holodhar v. Ramendra*, 14 IC 90). But see *Akbar Ali v. Bhyea Lal Jha*, 6 C 666 : 7 CLR 497; **approved** in *Sashi Bhusan v. Md Matadin*, 4 CLJ 548; *Ramsoonder v. Ramessur*, 8 WR 454]. It cannot be assumed that land of private person was taken over by Govt in Poona Cantonment area. Evidence relating to terms on which land is resumable must come forth [*Phiroze v. H C Vashishtha*, A 1980 B 9].

In a suit for recovery of possession of land as reformation *in situ* appertaining to permanently settled estate, the *onus* is on the plaintiff to prove that the lands were included in his estate and assessed at the time of the Permanent Settlement [*Secy of State v. Wajed Ali*, 34 CLJ 141 PC; *Benode v. Secy of State*, 34 CWN 1113]. Rennel's map showing state of land between 1764-73 indicated Kaliganga and Dhulia as large navigable rivers—*Held* that it lay on the plaintiff who sued for a declaration that lands recently the beds of these rivers but now dry were included within their permanently settled estates, to prove their allegation that at the date of the Permanent Settlement they were narrow channels [*Prafulla v. Secy of State*, 24 CWN 639 and 809 : 31 CLJ 320].

In a suit by an auction purchaser to assess rent on land claimed as valid *lakheraj*, the *onus* is on the ryot to prove that the land has been held as *lakheraj* [*Sham Lal v. Sekunder Khan*, 3 WR 182; *Forbes v. Mean Jan*, 3 WR 99; *Heeramoni v. Lokenath*, 2 WR 135; *Nabo Lal v. Narain*, 5 WR 191]. The burden of proof lies upon the Crown to establish that the land now attempted to be assessed is "*added*" land, that is, not included in the original assessment [*Sree Nath v. Secy of State*, 36 CLJ 345 : 50 C 276]. The burden of proving that the added land is included within the permanently settled estate is on the person who alleges and the civil court has jurisdiction to give relief and will not omit to do so. If he fails to prove it, then the revenue law will bind him [*Saudamini v. Secy of State*, 50 C 822 : 38 CLJ 47; *Srigobinda v. Secy of State*, A 1937 C 574]. In resumption suit, the burden of proof is on the grantor [*Chandrappa v. Bhima*, 20 Bom LR 779; *Mathoor v. Manukuriri*, 72 IC 627 (28 B 305 **distd**)].

Sales Tax.—Where a contract for service or for execution of work involves transfer of contractor's goods the burden of proving that the transfer constituted taxable sale is on the taxing authorities. Assessee packed redried tobacco received from customer for redrying and delivered to him. A consolidated charge was made for redrying and packing. The burden of proving that transfer of packing materials constituted taxable sale lies upon the taxing authorities and the burden is not dischar-

ged by merely showing that property in goods which belonged to the assessee stood transferred to customer. [*Govt v. Guntur Tobaccos*, A 1965 SC 1396 (A 1961 AP 520 FB **affirmed**; case-law discussed)]. The burden rests on the assessee to establish, when he files an appeal before small causes court, that the rateable value has not been properly fixed by the commissioner. [*Municipal Corpn., Ahmedabad v. Oriental F&G. Insurance Co. Ltd.*, A 1994 Guj 167].

Specific Performance.—After an agreement by defendant No. 1 in favour of the plaintiff to sell certain properties, he sold them to defendant No. 4. In a suit for specific performance by the plaintiff, the burden of proof primarily lay on the transferee (having regard to ss 103 and 106) to bring himself within the exception to s 27(*b*) S R Act (s 19(*b*) of Act 47 of 1963) and to establish payment of money, his good faith and absence of notice of the original contract [*Bhupnarain v. Gokul*, 61 IA 115 : A 1934 PC 68 : 38 CWN 393; *Basiruddin v. Gurudarshan*, A 1970 P 304; *Harendra v. Nanda*, A 1933 C 98; see also *Shankerlal v. New Mafussil Co Ld*, A 1946 PC 97 : 73 IA 98]. *Onus* to prove the exception carved out in section 19(*b*) of S.R. Act is on the subsequent purchaser [*Murlidhar Bapuji Valve v. Yallappa Lalu Chaugule*, A 1994 Bom 358, 369].

Stoppage in Transitu.—In a conflict between plaintiff as seller claiming the right of *stoppage in transitu* and the defendant as second buyer claiming as assignee of the railway receipt—*held* that the *onus* was upon the defendant to prove that he acted in good faith and gave valuable consideration and that it was not for the plaintiff to prove the contrary [*Rash Behari v. Narain*, 50 C 399].

Sub-tenancy.—The burden of proving sub-tenancy lies on the plaintiff-landlord [*Dibyeddu Bhowmik v. Jogesh Chandra Wath*, 1996 AIHC 557, 559 (Guj)].

Tenancy.—See "*Landlord and Tenant*", "*Ejectment*", "*Enhancement of rent*", "*Occupancy—Permanency*".

Trade Mark.—In an action for infringement of Trade Mark the initial burden of showing that the defendant's mark is likely to deceive or cause confusion lies on plaintiff. Some resemblance being found to exist between the two marks the *onus* shifts on the defendant to show that the two marks are so dissimilar that there is no reasonable probability of any considerable section of the public being deceived [*J & P Coats Ld v. Gurcharan*, A 1969 Pu 290].

Transferability of Holding.—The *onus* of proof of transferability of an occupancy right is upon the person who alleges it to be transferable [*Shankarpatti v. Saifulla*, 18 WR 507; *Kripamayi v. Doorga*, 15 C 89 (14 C 382 **dissented** from); *Madhu Sudan v. Kamani*, 9 CWN 895]. Where the usage of transferability is set up by the tenant it is necessary to prove its existence on the estate of the landlord or in the neighbourhood [*Palakdhari v. Manners*, 23 C 179; *Peari Mohan v. Jotekumar*, 11 CWN 83; *Ramhari v. Jabbar Ali*, 6 CWN 861; *Ganesh Dass v. Ram Pratap*, 5 CWN clxxv; *Dinonath v. Nabin*, 6 CWN 181]. Tenant who claims transferability of agricultural land is to prove it [*Manmatha v. Anath Bandhu*, 23 CWN 201]. S 27 Sonthal Parganas Settlement Regulation, 1872 having laid down prohibition against transfer of *raiyati* land the burden lies on the person setting up invalidity of transfer to show that it was *raiyati* land [*Ram Krishto v. Dhankisto*, A 1969 SC 204].

The burden of proving recognition of transfer is on the transferee [*Bhonulal v. Vincent*, 3 Pat LT 653. As to scope of *gomastha's authority*, see however *Suduman v. Behari*, 15 CWN 953 : 64 IC 462 and other cases cited under s 106 *post*].

Trust.—It is for those who attack the administration of the trustees to show that there was misfeasance [*Rathnasabhapathy v. Ammakannammal*, A 1930 M 78]. Whether trustee is plaintiff or defendant, the burden is always on him to establish the items of account.

The *onus* is heavily upon the trustee to show by clearest evidence the legitimacy of his personal acquisition [*Srinivasachariar v. Evalappa*, 49 IA 237 : A 1922 PC 325; *Narayan v. Gopal*, A 1960 SC 100]. Where a suit is brought by the *cestui que trust* against the legal representative of a trustee, the burden is on the plaintiff to establish what was the surplus in the hands of the trustee [*Srish Ch v. Supravat*, A 1940 C 337 : 1940, 1 Cal 372]. Where trust property is mortgaged for raising a loan for making repairs and adding constructions, the *onus* of proof of necessity is on the mortgagee [*Dalim v. Nandarani*, A 1970 C 292]. Properties of the suit being for a long time in possession of respondent. Mahant claiming as his personal properties the *onus* was on the appellant to prove that they were held on trust for public purposes of a religious or charitable character. Adverse inference cannot be drawn for failure of the Mahant to produce deeds gifting the properties [*Bihar State Board &c v. Biseshwar*, 1971, 1 SCC 574 : A 1971 SC 205 (*Parmanand v. Nihar*, 65 IA 252 : A 1938 PC 195 **rel** on)].

Undue influence.—In case of alleged execution of sale deed in respect of land by a tribal woman in favour of her relative, the respondent, though the initial *onus* to prove undue influence was on the woman, but the *onus*, in the facts and circumstances of the case, was discharged. It was the respondent who had obtained the sale deed in his favour quite a some time back by a registered sale deed, which saw the light at a later stage of the trial. From a certified copy thereof it was evident that no consideration passed at the time of the sale. Nobody from the registration office was examined to explain the sale. No evidence was led by the respondent to discharge the *onus* that the sale deed was executed under no undue influence, even though the vendor was old, blind, illiterate and tribal woman totally at the mercy of the respondent, with whom she was living till her death. [*Sethani v. Bhana*, A 1993 SC 956].

Unlawful Association.—Where a person is charged with having been a member of an association declared unlawful, it is for the prosecution to prove that he continued to be a member [*R v. Shripad*, 55 B 484; *R v. Dharmanand*, A 1931 B 203].

Value of Land.—Where annual value has been raised by the Corporation on the ground that there has been rise in the rental value or land value, the Corporation is to lead evidence [*Lalchand v. Corpn of Calcutta*, A 1953 C 428; **explained** in *Corpn of Calcutta v. Nanigopal*, A 1956 C 269].

Vendor and Purchaser.—Ordinarily the vendor must prove that goods were measured and there was no shortage. But where the buyer said that he would check and intimate and never suggested shortage, it would be imporper to throw the burden on the vendor [*Doraiswami v. Subbanna*, A 1927 M 880]. Where the seller avers that sale was for credit and the buyer pleads cash purchase, *onus* of proving payment is on latter [*Rasu v. Khattara*, 2 R 202 : 82 IC 658].

Waiver.—The burden of proving a waiver is on the person who relies on the waiver [*Dhanukdhari v. Nathima*, 11 CWN 848 : 6 CLJ 62]. See further s 115 : "*Waiver and Estoppel*" *post*.

Wakf.—In a suit to remove the *mutwali*, it is for the plaintiff to prove misapplication of income by showing the intention of the founder [*Sible v. S*, A 1943 A 74].

Wills.—The law has been thus stated in two well-known cases: "These rules are two; first, that the *onus probandi* lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased" [*Barry v. Butlin*, 1938, 2 Moo PC 480, 482 : 46 RR 123 (**relied** on and **explained** in *Harmes v. Hinkson*, A 1946 PC 156 : 50 CWN 895) and *Tyrrel v. Painton*, 1894 PD 151 : 10 LT 458. See *Suryanarayana v. Suramma*, A 1947 PC 169; *Bai Gangabai v. Bhagwan*, 29 B 530 PC : 9 CWN 769: *Gomtibai v. Kanchhedilal*, A 1949 PC 272]. "Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases, if there is no suggestion to the contrary, any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question, then at once the *onus* lies on those propounding the will to affirm positively the testamentary capacity. Moreover, if a will is only proved in common and not in solemn form, the same rule applies even though the action is to attack a probate which has been granted long ago. These propositions will be found to be settled by *Barry v. Butlin* (*ante*); *Cross v. Cross*, 10 LT 70 : 33 LJP 49 and *Tyrrall v. Painton*," (*ante*)—*per* LORD DUNEDIN, in *Robins v. National Trust Co Ltd*, 101 IC 903 PC : 1927 AC 515; see *Jatindra v. Raj Lakshmi*, 57 CLJ 8; *Kameswara v. Suryaprakasa*, A 1962 AP 178]. A propounder of the will has to prove its due and valid execution and if there are any suspicious circumstances he must remove them from the mind of the court—Facts to be considered on the question of due execution of will [*Venkatachala v. Thimmajamma*, A 1959 SC 443].

Tyrrell v. Painton (supra), was followed in *Paul v. Thompson*, 59 IC 535 : 13 Bur LT 80; *Rangayya v. Sheshappa*, 101 IC 416 : A 1927 B 228 and distinguished in *Motibai v. Jamsetjee*, 29 CWN 45 PC. The rule in *Tyrrell v. Painton, supra*, applies only when surrounding circumstances excite suspicion, but it is not applicable to a case where the question is simply which set of witness should be believed [*Shama Charan v. Khettromoni*, 27 C 521 PC : 5 CWN 501; *Lila v. Bejoy*, 41 CLJ 300]. The rule in *Barry v. Butlin, ante*; *Fulton v. Andrew*, 7 HL 448 and *Brown v. Fisher*, 63 LT 465, is not confined to the single case in which a will is prepared by or on the instruction of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the court, and whenever such circumstances exist, it is for the propounder to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and that it is only when this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence etc.—*per* LINDLEY LJ, in *Tyrrel v. Painton*, *ante* [*Saratkumari v. Sakhichand*, 8 P 382 PC : 56 IA 62 : A 1929 PC 45; see *Mallava v. Tipava*, A 1930 B 539 : 32 Bom LR 1289]. The burden of proving due execution is always on the propounder, and it is not lessened by the fact that the propounder is a stranger to the family and attesting witnesses are men of the opposite camp [*Kedar v. Rajkumar*, A 1939 C 674 : 69 CLJ 394].

The *onus* of proving testamentary capacity of a testator is on those who propound the will and evidence held to discharge that obligation is not displaced by mere proof of serious illness and general intemperance [*Bur Singh v. Uttam*, 15 CWN 177 PC : 38 C 355 : 21 MLJ 100; see *Indar v. Onkar*, 141 PLR 1911; *Murad Bibi v. Khadim*,

114 PWR 1911; *Surendra v. Ranee Dassi*, 24 CWN 860 PC : 47 C 1043; *Shankar v. Dhan Debi*, A 1933 L 53]. It is for those who propound the will to prove affirmatively that the testator knew and approved the contents of the will; and it is only where this is done, the *onus* is thrown upon those who oppose the will to prove fraud or undue influence of whatever they rely on to displace the case proving the will [*Lacho Bibi v. Gopi Narain*, 23 A 472; see also *Bur Singh v. Uttam, sup*; *Sunmugraroya v. Manika*, 32 M 400 : 10 CLJ 276 PC; *Sukh Dei v. Kedar Nath*, 23 A 405 : 3 CWN 895; *Prasannamayi v. Baikuntha*, 25 CWN 779 : 34 CLJ 384; *Sarojini v. Haridas*, 26 CWN 113; *Motibai v. Jamsetjee*, 29 CWN 45 PC 80 IC 777; *Lila v. Bejoy*, 41 CLJ 300].

Onus of proof that testator was major when he made the will and was competent to execute it is on the person relying on will [*Kalidindi v. Chintalapati*, A 1968 SC 947 (*Gnanaprakasam v. Parasakthy*, A 1941 M 179 **apprd**)]. Merely because a will is registered its genuineness cannot be presumed. Registration of a will does not change the *onus* of proof from its propounder to the challenger. [*Vattakam Purath Parambil Ananda Bhai v. Kanaka Bhai*, A 1995 Ker 208, 209].

The propounder of a will should prove to the satisfaction of the court beyond all possible doubt that the will was executed by the alleged testator and that it was executed in accordance with the law and that the testator at the time of execution was in a fit state of mind and body to execute the will and so fully appreciated what he was doing as to the disposition of the property [*Padma Priya v. Dharam Das*, 15 CWN 728; *Baikuntha v. Prasannamoyee*, 27 CWN 797 PC : 72 IC 286; *Mattigunta v. Kantam*, A 1977 AP 348; *Alok Kumar Aich v. Asoke Kumar Aich*, A 1982 Cal 599, 602; *Shri Ram v. Smt Kasturi Devi*, A 1984 All 66, 68; *Shantilal v. Mohanlal*, A 1986 J & K 61, 62 : 1986 Kash LJ 64]. It is not permissible to consider *aliunde* the terms of the will, to consider whether the terms are generous or not, to consider whether the relations have been cut off altogether or not, and then to consider the due execution of the will and hold that the *onus* had not been fully discharged [*Shyam Sundari v. Kamal*, 57 CLJ 246].

If the propounder is the principal beneficiary and has taken a leading part in giving instructions for the execution of the will, the *onus* is heavy on him to prove that the testator approved of the will [*Vellaswamy v. Sivaraman*, 57 IA 96 : 34 CWN 206 : 121 IC 230]. If the plaintiff alleges that the executor of a will was a Hindu, he has to prove it. If he fails to do so, he cannot abandon his own case and turn round to adopt that of the defendant that the executor of the will got converted to Christianity [*Parvin Kumar v. P Rajeswaran*, A 1988 Mad 132, 137 : (1987) 100 Mad LW 895]. When a will is proved by producing the registration copy, the burden of proving that the will has been revoked is on the persons who take that plea [*Koman Nambiar v. Thozhukkar Thekkethi Puth En Veettil Ithuli Appissis*, A 1990 (NOC) 163 (Ker)].

When dealing with the case of a will of a *pardanashin* lady, a particular and peculiar *onus* rests upon those who come forward to support the document, to show that the executant thoroughly understood what she was doing and was fully acquainted with the terms of the document she was executing [*Khasmehal v. Adm Genl of Bengal*, 5 CWN 505; *Surendra v. Jnanendra*, 55 CLJ 189]. As to deeds by *pardanashin* women, see s 111 *post*.

The burden of proving knowledge and approval is always on the person propounding the will, though formal proof may suffice when no dispute is raised. The *onus* of proof may be increased by circumstances such as unbounded confidence in the drawer of the will, extreme debility in the testator, &c. [*Balkrishan v. Gopikabai*, 7 Bom LR 175, see also 7 Bom LR 92]. When once it is proved that a will has been

executed by a person of competent understanding, the burden of proving that it was executed under undue influence rests on the party alleging this [*Craig v. Lamoreux*, 1920 AC 349 : A 1919 PC 132; *Harmes v. Hinkson, sup*; *Gomtibai v. Kanchhedilal*, A 1949 PC 272; *Nabagopal v. Sarala*, 57 CLJ 71]. The qualified admission of a party regarding the signature of a testator does not shift the burden of proving the non-execution of the will to him [*Kesho v. Vital*, 98 IC 468 : 8 NLJ 123].

When the essential condition of the English rule: "if a will traced to the possession of the deceased and last seen there is not forthcoming on his death", has not been established, the presumption of destruction by the testator does not apply [*Babulal v. Baijnath*, A 1946 P 24 : 24 P 395]. As to the presumption of destruction of the will by the testator when it is not forthcoming at the time or after his death, although it is shown to have been in the possession of the testator before his death, see *Anwar Hossein v. Secy of State*, 31 C 885 : 8 CWN 821; *Shib Sabitri v. Collr of Meerut*, 29 A 82; *Kedar Nath v. Sarojini*, 3 CWN 517; *Harilal v. Sarat*, 43 CWN 824; *Satya v. Ashutosh*, A 1953 C 657; *Devicharan v. Durga*, A 1967 D 128. In a suit by legal heirs of a person for a declaration that a will disinheriting natural heirs was a forgery, the *onus* lies on the defendant to prove that it was the will of the deceased [*Bindeshri v. Mt Baisakha*, 24 CWN 674 PC : 61 IC 431]. A man may act foolishly or even heartlessly in making a will, but if he acts with a full comprehension of his acts, court will not interfere [*Motibai v. Jamsetjee*, 29 CWN 45 PC : 80 IC 777]. When a person sued for revocation of probate on the grounds that (*i*) citations were not served on him and that (*ii*) the will was a forgery, if the first issue is decided in favour of the plaintiff, the *onus* of proof of the second issue as to whether the will was forged or genuine is on the defendant [*Ramanandi v. Kalawati*, 55 IA 18 : 107 IC 14 : A 1928 PC 2 : 47 CLJ 171].

In the case of wills, it is desirable that all witnesses capable of being called should be examined [*Surendra v. Ranee Dassi*, 24 CWN 860 PC. See also *Bankim v. Matangini*, 24 CWN 626 PC]. Slight discrepancy in the evidence of attesting witnesses as to the time of execution does not matter, especially when they were giving evidence 8 or 9 years after execution. Mere fact that attesting witnesses were chance witnesses is no ground for disbelieving them [*Sashikumar v. Subodh Kumar*, A 1964 SC 529].

—Oral Will.—When a party relies on a nuncupative will it is incumbent on him in so uncertain a foundation of spoken words, to allege as well as to prove with the utmost precision the words on which the party relies and every circumstances of time and place [*Beerpertap v. Rajender*, 12 MIA 1: 9 WR 15; *Venkatrao v. Namdeo*, 58 IA 362: A 1931 PC 285; *Mahabir v. Mustafa*, A 1937 PC 174: 168 IC 418; *Balak v. Nanu*, A 1930 L 579; *Ganesh v. Hazari*, A 1942 A 201 FB; *Pralhad v. Damodar*, A 1958 B 79].

Workmen's Compensation Act.—The employer must prove exemption from claiming compensation under s 11(*6*) [*Ashutosh v. Gouripore C, Ltd*, 31 CWN 286: 100 IC 441]. In a case of compensation for death of an employee, the *onus* to prove wilful disobedience is on the employer [*Urmila v. Tata I S Co*, A 1928 P 508]. Burden is upon workman to prove that accident arose out of as well as in course of employment [*Vishram v. Dadabhoy*, A 1942 B 175]. When he proves injury by accident in the course of employment, claim for compensation is established. It is then for the employer to prove the existence of circumstances which negative payment of compensation [*Sukhai v. H C Jute Mills*, A 1957 C 601].

If a plaintiff challenges the official act of a *Tahsildar* or challenges that the procedure followed by the Tahsildar was not in accordance with law, the burden is on

the plaintiff to call for necessary records, making the Tahsildar a party to the suit and show that the procedure followed by him is violated either because there was no notice or because he has violated fundamental principles of natural justice [*Ramakrishna Ganapayya Hegde v. Lakasiminarayana Timmayya Hegde*, A 1984 Kant 45, 48 : (1983) 2 Kant LJ 409]. A tank was leased by the Municipality. In a suit to restrain the Municipal Council from interfering with the possession of the lessee, the burden of proof is on the lessee to prove that the tank belonged to the Government and was transferred to the Council only for pisciculture and management [*B.B. Patnaik v. N.A.C. Aska*, A 1984 NOC 41 : (1983) 56 Cut LT 356 (Ori)]. When a person claims his social status as backward class *viz* Koppula Velma caste, the burden is on him to establish that he in fact belongs to that caste [*N Bhuvaneshwar Rao v. Principal*, A 1986 AP 196, 199 : (1986) 2 APLJ (HC) 183]. The burden of proof that the patient who died later due to non-performance of an operation, refused to give his consent for the operation is on the Doctor who treated the patient [*Dr T T Thomas v. Smt Elisa*, A 1987 Ker 52, 56 (DB): 1986 Ker LT 1026]. Where it is shown that the market was stable and there were no fluctuations in the prices between the date of the preliminary notification and the date of subsequent transaction, the transaction could also be relied upon to ascertain the market value. The burden of establishing that there was no upward surge in the prices would be squarely on the party relying on such subsequent transaction [*Administrator of Genl of W B v. Coller of Varanasi*, A 1988 SC 943, 948].

When a person who is in possession of certain documents does not produce them, an adverse inference can be drawn notwithstanding that *onus* of proof does not lie on him and such party cannot rely on the abstract doctrine of *onus* of proof [*Smt Niranjan Kaur v. New Delhi Hotels Ltd*, A 1988 D 332, 340]. Under the Orissa Rice and Paddy Control Order once a person is deemed to act as a dealer, he is to prove to the contrary [*J P Agarawala v. State of Orissa*, 1990 Cri LJ 1193, 1198 (Ori)]. When articles are not purchased in sealed packages and not sold as such the burden of proving the identity of the article of food purchased and later sold in the same state is very heavy on the accused [*S D Nagdeve v. Sudhakar Raghunath Burange*, 1990 Cri LJ 2542, 2455 (Bom)]. In a suit by a purchaser from a co-owner of the property, the plaintiff has to prove that the vendor had title to the property. When even the sale-deed which forms the basis of the title is not produced, he cannot succeed [*Smt Lalita James v. Ajit Kumar*, A 1991 MP 15, 17].

S. 105. Burden of proving that case of accused comes within exceptions.—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the [1][Indian] Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations

(*a*) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

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1. In Pakistan and Burma "Pakistan" and "Burma" substituted respectively. In ceylon, "Indian" omitted.

The burden of proof is on *A*.

(*b*) *A*, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on *A*.

(*c*) Section [2][325] of the [3][Indian] Penal Code provides that whoever, except in the case provided for by section [4][335], voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section [2][325].

The burden of proving the circumstances bringing the case under section [335][4] lies on *A*.

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COMMENTARY

Principle and Scope.—This section by placing the *onus* of proving any exception in a penal statute on the accused forms an exception to the ordinary rule in criminal cases. There being a presumption of innocence in favour of the accused, as a general rule the *onus* of proving his guilt (unless otherwise provided in statute) lies on the prosecution, even though proof of negative is involved (see Tay 371). Thus in rape case the prosecution is to prove non-consent by the woman [*R v. Bradley*, 4 Cr App 225; *R v. Horn*, 7 Cr App R 200]. The prosecution is bound to negative any exception favourable to the defendant which is engrafted in the statutory definition of the offence, though not one contained in a separate clause [*Roberts v. Humphreys*, LR 8 QB 483; *R v. James*, 1902, 1 KB 540; *R v. Audley*, 1907, 1 KB 383; Phip 11th Ed p 57]. If, however, the facts proved raise a rebuttable presumption of law against him, the burden is shifted; thus on an indictment for manslaughter by negligent driving, proof of killing, which is presumed to be unlawful throws on the prisoner the *onus* of showing proper care [*R v. Cavendish*, IR 8 CL 178; *R v. Elliott*, 16 Cox 710;

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2. In Ceylon "316" substituted.
3. In Pakistan and Burma "Pakistan" and "Burma" substituted respectively. In ceylon, "Indian" omitted.
4. In Ceylon "326" substituted.

Arch Cr Pleadings, 22nd Ed 748]. (See *ante* s 101). The necessity of giving *prima facie* evidence on the part of the prosecution having been found, in the great majority of cases, not only useless but highly inconvenient, the legislature has in many instances interfered, sometimes by re-describing the offence, and omitting all mention of the negative matter, but generally by expressly enacting that the burden of proving *authority, consent, lawful excuse*, and the like should lie on the *defendant*. In such cases, the defendant by the express language of the statutes relating to them is bound to protect himself, by showing the existence of some lawful authority or excuse [Tay s 372]. It is only after the prosecution so discharges its initial traditional burden establishing the complicity of the accused, that the question whether or not the accused had acted in the exercise of his right of private defence, arises [*Yogendra v. S*, A 1980 SC 660 (*Dahyabhai v. S*, A 1964 SC 1563 **folld**)].

Nature of Burden on Accused to Prove Exceptions in any Penal Statute [The Prosecution Has Still the Major Burden of Proving Guilt Beyond Reasonable Doubt].—In criminal cases the *onus* of proving everything essential to the establishment of the charge against the accused lies upon prosecution; that *onus* never changes. This follows from the cardinal principle that the accused is presumed to be innocent until his guilt is established by the prosecution. S 105 is an important qualification of this general rule and is an application of the rule in s 103. It relieves the prosecution of the necessity of proving the absence of facts which might bring the case within a general or special exception, or exemption, or *proviso* under the Penal Code or other criminal law. Under s 105 when an accused person wishes to rely on *any* exception in the penal law, it is incumbent on him to prove the existence of circumstances which would show, that any of the special or general exceptions would take his case out of criminal liability.

The traditional rule that it is for prosecution to prove the offence beyond reasonable doubt applies in all criminal cases except where any particular statute prescribes otherwise. The legal presumption created in section 105 with the words "the court shall presume the absence of such circumstances" is not intended to displace the aforesaid traditional burden of the prosecution. This presumption helps the court to determine on whom is the burden to prove facts necessary to attract the exception and an accused can discharge the burden by 'preponderance of probabilities' unlike the prosecution. But there is no presumption than an accused is the aggressor in every case of homicide. If there is any reasonable doubt, even from prosecution evidence, that the aggressor in the occurrence was not the accused but would have been the deceased party, then benefits of that reasonable doubt has to be extended to the accused, no matter he did not adduce any evidence in that direction. [*Periasami v. State of T.N.*, 1997 Cri LJ 219 (SC)].

In a criminal case, the *onus* of proving everything assented to the establishment of a charge against the accused lies solely upon prosecution, and that *onus* still remains unchanged. This follows from the cardinal principle that the accused is presumed to be innocent, until his guilt is established by the prosecution. Section 105 of the Indian Evidence Act is an important qualification of this general rule and is an application of the rule in S. 103 which relieves the prosecution of the burden and necessity of proving the absence of facts which might bring the case within a general or special exception, or exempted, or proviso under the Penal Code or other Criminal Law. Under S. 105 of Indian Evidence Act, when an accused person wishes to rely on any exception in the Penal Law, it is incumbent on him to prove the existence of circumstances, which would show, that any of the special or general exceptions would take his case out of criminal liability. The section involves both (i) a presumption; and (ii) a rule as to the burden of proof following it. The court shall

presume the non existence of circumstances bringing the case within an exception and the accused person, who relies on its existence, has to prove the same as the burden of proof is cast on him. The section has clarified the position, by placing on exception (special or general) on the same footing, in the sense of the same required to be proved by the accused; but it does not, mean that he must plead it specially or specifically or lead evidence. If it is apparent from the record, whether produced by the prosecution or the defence, that the general exception would apply, then the presumption is removed and it is open to the court to consider whether the evidence proves to the satisfaction of the court that the accused comes within the exception where the evidence adduced fails to satisfy the court of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted, if upon consideration of the evidence of both sides, the court is left in a state of reasonable doubt as to whether the accused is or not entitled to the benefit of the exception pleaded. [*Raja Rajakkannu v. State*, 1995 (4) Crimes 69, 73 (Mad)].

If it is borne in the evidence or record whether produced by prosecution or by the defence to prove that the general exception (Exceptions First and Ninth to sections 499 IPC in this case) would apply, then the presumption of the absence of such circumstances under section 105 is removed and it is open to the court to consider whether the evidence on record proves that the accused come within the exception or not. One need not plead or lead evidence. [*C.B. Solanki v. Srikanta Parashar*, 1997 Cri LJ 3050, 3054, 3055 (Kant)]. A rule of burden of proof is prescribed under section 105 that the burden is on the accused to prove the existence of circumstances bringing the case within any of the exceptions "and the court shall presume the absence of such circumstances". The said rule does not whittle down the axiomatic rule of burden (indicated in section 101) that the prosecution must prove that the accused has committed the offence charged against them. [*Periasami v. State of T.N.*, 1997 CrLJ 219, 222 (SC)]. Where a fire broke out from two shops due to melting of metal wires, insulation materials etc. when main switch of the shops had not been put off and it was found that both the shops were run and managed by petitioner 1/A-1 and the electricity connection was taken to the shop of A-1 from the shop of petitioner 2/A-2, though the electricity connection stood in the name of petitioner 2, who had handed over possession of his shops to petitioner 1 and shifted elsewhere, it was clear that at the material time petitioner 2 was not running his shop and therefore he was not liable for the incident of fire. However, there was a strong suspicion against petitioner 1, who was admittedly in possession of the shop. Thus a presumption can be raised against petitioner 1. In this context section 105 would became relevant. Of course, the preseumption which would arise under this section could be rebutted by the accused, by preponderance of probability. [*Usman v. State*, 1997 Cri LJ 2457, 2460, 2461 (Mad)].

The section involves both (1) a presumption and (2) a rule as to the burden of proof following it. The court shall presume the non-existence of circumstances bringing the case within an exception and the accused person who relies on its existence, has the burden of proof cast upon him (see *Dahyabhai v. S*, A 1964 SC 1563). The section has clarified the position by placing *all* exceptions (special or general) on the same footing. General exceptions are those applicable to all crimes and are stated in Ch IV, IP Code. Special exceptions are exceptions restricted to a particular crime. Both general and special exceptions are points to be proved by the accused. But this does not mean that he must plead it specially or lead evidence. If it is apparent from the evidence on the record whether produced by the prosecution or the defence, that the general exception would apply, then the presumption is removed and it is open to the court to consider whether the evidence proves to the satisfaction of the court that

the accused comes within the exception [*Anandi v. R*, 45 A 329: 74 IC 689: 24 Cri LJ 225]. Although the principle of the exception in this section to the general rule has been recognised by statute, its validity has sometimes been challenged [see *Doe d Bridger v. Whitehead*, 8 Ad & EI 571, 576, *per* LORD DENMAN, CJ,: *Elkin v. Janson*, 13 M & W 655, 662, *per* ALDERSON B]. This section applies only to criminal prosecutions for defamation and not to civil suits for damages [*Ma Myo v. Maung Mg*, 84 IC 977:-A 1925 R 15: 2 R 333].

In s 105 the phrase "burden of proof" is used in the sense of introducing evidence *ante* s 102). The duty of the accused is to introduce such evidence as will displace the presumption of the absence of circumstances bringing his case within an exception and will suffice to satisfy the court that such circumstances may have existed. The burden of the issue as to the non-existence of such circumstances is then shifted to the prosecution, which has still to discharge the major burden of proving the guilt of the accused beyond reasonable doubt. The principles laid down in *Woolmington v. D P P*, 1935 AC 462 (*ante* ss 101-4: "*Criminal cases*") and also in the later case of *Mancini v. D P P*, 1942 AC 1: 1941, 3 All ER 272 form a valuable guide to the correct interpretations of s 105 and is of binding authority in this country [*R v. Damapala*, 14 R 666: 1937 R 83 FB; see *Balbir v. S*, A 1959 Pu 332]. So, in spite of the presumption under s 4 Prevention of Corruption Act, 1947, the main burden of proof to establish acceptance or agreement to accept bribe still remains on the prosecution [*Mitra v. S*, A 1951 C 524: 86 CLJ 14]. So, before the presumption under s 4 can be raised the prosecution must prove not merely the passing of the money into accused's hand, but also that he "accepted" or "agreed to accept" as gratification [*S v. Minaketan*, A 1952 Or 267, *per* PANIGRAHI, J]; see *ante*: *Prevention of Corruption Act*.

In an appeal from Ceylon the Privy Council disapproving *R v. Dampala*, *sup* and *Parbhoo v. R*, A 1941 A 843 FB but approving *R v. Chandrasekera* (a decision of Supreme Court of Ceylon, 1942 NLR 97] held that according to Ceylon Evidence Ordinance (which is analogous to Indian Evidence Act) where the mode of proof is clearly spelt out, it is impossible to suppose that there can be more than one kind of burden of proof or that the burden imposed by s 105 can be anything less than proof in accordance with s 3 (see *ante*, s 102). Even if there were any ambiguity in the language of ss 3 and 105 it could not be resolved by the decision in *Woolmington v. DPP, sup*. That decision in 1935 changed the old English common law stated in Foster's Crown Law in 1762. The common law is changed by application and is shaped as much by the way in which it is practised as by judicial dicta. The common law is malleable to an extent that a Code is not. Ceylon Evidence Ordinance embodied the old English Criminal Law and cannot be construed in the light of a decision that has changed the common law of England [*Jayasena v. R*, 1970, 1 All ER 219]. The points are well taken and to prevent such a construction an amendment would be very much in order.

Relying upon *Damapala's* case, *sup* it has been held that the burden of proving the existence of circumstances bringing the case within the exception pleaded is no doubt cast on the accused by s 105, but this does not in any way absolve the prosecution of the burden laid on it by s 102. So where the evidence adduced fails to satisfy the court of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if upon a consideration of the evidence on both sides, the court is left in a state of reasonable doubt as to whether the accused is or not entitled to the benefit of the exception pleaded [*Parbhoo v. R*, 1941 All 843 FB: A 1941 A 402 (*Parbhoo's case* was again considered by a Full Bench and the court by a majority of 7 to 2 declared the decision to

be still good law, *Rishikesh v. S*, A 1970 A 51 FB); *Nanavati v. S*, A 1962 SC 605, 618; *Brindaban v. A*, A 1964 P 138; *S v. Sidhnath*, A 1959 A 233; *Raghunath v. R*, A 1941 P 175: *Shewaram v. R*, 1940 Kar 249: *Gulab v. R*, A 1941 L 333: *Hasan Din v. R*, 44 PLR 544: *Waroo v. R*, A 1948 S 40; *Saraswati v. R*, A 1949 A 412: *Halia v. R*, A 1949 N 163; *Md Saddiq v. R*, A 1949 L 85; *Kamala v. S*, A 1955 P 209: *Sarwan v. S*, A 1954 Pepsu 160; see also *R v. Wauchope*, 61 C 168; *Lakshmanan v. L*, A 1964 M 418; *R v. Narayan*, A 1948 P 294; *Chandrasekhara v. Karthikeyan*, A 1964 K 277 and that s 106 cannot be used to support a conviction unless the offence is convincingly proved [*Brijbehari v. R*, A 1941 P 539].

Since the cases of *Woolmington v. D P P*, 1935 AC 462 and *Mancini v. D P P*, 1941, 3 All ER 272, it is clear that where accused is charged with murder and the evidence discloses a possible defence of self-defence or of provocation, the burden of proving the accused's guilt remains throughout on the prosecution and it is not at any time on the accused to establish either defence. The rule permits of no exception, save only in the case of insanity which is not strictly a defence [*Chau Kau v. R*, 1955, 1All ER 266 PC; *R v. Lobell*, 1957, 1All ER 734]. The burden which rests on the accused to prove that any of the general exceptions are attracted does not absolve the prosecution from discharging its initial burden. The evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence. Unlike in a civil case, it is open to the court to find in favour of an accused on a plea not taken up by him from the evidence of the witnesses examined and the circumstances of the case [*S v. Ramswarup*, A 1974 SC 1570 (cases referred)]. That the onus always remains on the prosecution does not mean that the prosecution must give evidence in chief to rebut a suggestion of self-defence before that issue is raised, or, indeed, need give any evidence on the subject at all. If on the whole of the evidence the jury are left in doubt, they should find the accused not guilty [*R v. Lobell, sup*]. Relying on *Carr-Briant's* case it has been held that if an accused pleads right of private defence, it is sufficient if he makes out a *prima facie* case [*Narayan Raut v. R*, A 1948 P 294: see also *Sodeman v. R, ante*].

CONTRA.—Only in a Bombay case has it been held that once the prosecution has established that the accused committed the act, the accused must under s 105 prove the existence of circumstance bringing his case within any exception, *eg*, the right of private defence; if he does not prove that, then the act established by the prosecution stands. There is no question of the jury being left in reasonable doubt of the guilt of the accused. If there is any such doubt, then the prosecution has failed and no question of self defence arises at all. Section 105 is so specifically and clearly enacted that it is impossible to adopt the English principle that if the jury is left in reasonable doubt even after the accused's explanation has been rejected there must be an acquittal, unless the prosecution has itself failed to prove its own part of the case in the first instance [*Govt v. Sakur*, A 1947 B 38 SB: 48 Bom LR 616 (**folld** in *S v. Har Pd*, A 1952 B 184: *S v. Bhima*, A 1956 Sau 77; *Jadeja v. S*, A 1952 Sau 3); but see *R v. Basangouda*, 1941. Bom 315; *Bhimsen v. The State*, 1982 Cri LJ NOC 201 : 1982 Srinagar LJ 256 (J&K)]. Falsity of defence by itself cannot help the complainant or prove the case of prosecution; [*Daungarshi v. Deviprasad Omprakash Bajoria*, 1985 Cri LJ 1943, 1947 (Bom)].

The Supreme Court has made it clear that even if the evidence is not sufficient to discharge the burden under s 105 it may raise a reasonable doubt as regards the one or other of the necessary ingredients of the offence itself in which case the accused would be entitled to be acquitted [*Dahyabhai v. S*, A 1964 SC 1563; *Bhikari v. S*, A 1966 SC 1; **apprd** in *Jayasena v. R*, 1970, 1 All ER 219]. While the prosecution is required to prove the case beyond reasonable doubt, the accused can discharge the

onus by establishing a mere preponderance of probability [*Partap v. S*, A 1976 SC 960; *Mohan v. S*, A 1975 SC 2161; *Yogendra v. S*, A 1980 SC 660]. For quantum of proof see *Public Prosecutor v. Lee Poh Chye*, (1997) 4 Malayan LJ 578 (Penang HC). This is very different from saying that the prosecution must also establish the sanity of the accused at the time of the commission of the offence despite what has been expressly provided for in s 105 [*Bhikari v. S, sup*]. Even if he fails to prove definitely the existence of circumstances claiming the exception, the accused can still claim to be governed by the general principles that an accused is presumed to be innocent unless proved to be guilty and that the benefit of doubt should be given to him [*Daulat v. R*, A 1947 L 244]. The test is not whether the accused has proved beyond reasonable doubt that he comes within the exception, but whether a reasonable doubt is thrown on the guilt of the accused [*Hasan Din v. R*, 44 PLR 554]. Law treats the onus as discharged if the accused succeeds in proving by a preponderance of probability. The onus on the accused may well be compared to the onus on a party in civil proceedings [*Harbhanjan v. S*, A 1966 SC 97]. It has how-ever been held that the principle of acquittal in case of doubt does not apply when the accused completely fails to establish the plea set up [*Bodhan v. R*, A 1948 A 223]. In every case the bare word of accused is not sufficient to prove an exception [*Jairam v. S*, A 1959 B 463].

The principle of these cases is that where the burden of proving anything is on the accused, this burden is less than what is required when the burden is on the prosecution. As observed in *R v. Carr-Briant*, 1943, 2 All ER 156 : 1943 KB 607:—

> "In any case where either by statute or at common law, some matter is presumed against an accused 'unless the contrary is proved' the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."

"In accord with this principle it was held in *Ashiruddin v. R*, A 1949 C 182 : 53 CWN 237 that the standard of proof required from the accused was not the standard required from the prosecution. In another case it was held that the burden is not higher than that which rests on the parties in civil cases [*Sodeman v. R*, 1936, 2 All ER 1138]. The rule in *Carr-Briant's* case was applied in *Chang Chung v. R*, A 1945 C 363: 49 CWN 229; *Narayan Raut v. R*, A 1948, P 294; *Mitra v. S*, A 1951, C 524; *Yusuf v. S*, 58 CWN 279: A 1954 C 258; *Panchu Kurmi v. S*, A 1956 C 268; *S v. Chakradhar*, A 1964 Or 262; *Padia v. S*, A 1966 Or 199. Following *Carr-Briant's* case *sup*, it has been held the burden of proof on the accused of the defence of diminished responsibility under the English Homicide Act 1957 was not as heavy as the burden of proof on the prosecution and was the burden of showing a preponderance of probability [*R v. Dunbar*, 1957, 2 All ER 737]. In this country the Supreme Court has laid down that the accused will have discharged the burden if he satisfies the standard of a prudent man (see s 3) [*Dahyabhai v. S*, A 1964 SC 1563]. It is further well established that a person faced with imminent peril of life and limb of himself or another, is not expected to weight in "golden scales" the precise force needed to repel the danger. Even if he at the heat of the moment carries his defence a little further what would be necessary when calculated with precision and exactitude by a calm and unruffled mind, the law makes due allowance for it [*Md Ramzani v. S*, A 1980 SC 134]. The accused pleaded an exception *viz* right of private defence. They adduced defence evidence and proved the infliction of injuries on them by the complainant party in

the course of the occurrence. So the obligatory initial presumption against them is removed and their plea appears to be reasonably true. [*Vijayee Singh v. State of U.P.*, 1990 Cri LJ 1510, 1531 (SC)].

It may be pointed out that this controversy as to whether the burden under this section is that of merely adducing evidence or that of proof in accordance with s 3 is perhaps of very little practical effect as the accused in any case must have raised a reasonable doubt in the mind of the judge as to one or the other of the requirements for the offence long before he gets anywhere near proof of the exception.

As instances of special exceptions, take the five exceptions in s 300 I P Code, in which culpable homicide is not murder, and the ten exceptions to defamation (s 499 I P Code). *Illus* (*c*) refers to special exceptions. In the application of the rule in s 105 there is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition and a case in which it is not so included [*R v. Dayabhai*, A 1941 B 273: 195 IC 825; *Prov of Bihar v. Bhim*, A 1947 P 284]. Where in a fight between two parties it is doubtful which party is to blame, either party cannot be convicted by reference to s 105 [*Gopi Krishna v. R*, A 1943 O 171].

When any clause of a section of a statute has been declared void, no *onus* is cast on the accused to prove that his case falls under that part which has been declared unenforceable. When accused is charged under s 66(*b*) Bombay Prohibition Act, 1949 the burden is on the prosecution to establish that what the accused consumed was prohibited liquor and not for the accused [*Behram v. S*, 1955, 1 SCR 613: A 1955 SC 123: 1955 SCJ 73: 57 Bom LR 575].

Whether Section Has Introduced Changes in Previous Law.—Under ss 235, 236 and 247 of the old Cr P Code (Act 25 of 1861), the prosecution was relieved of proving the absence of circumstances which—might bring a case under the *general* exceptions but was not relieved of proving the absence of circumstances which might bring it under the special exceptions. So far, then, as the special exceptions are concerned, this section has effected an alteration in the law, [see Field, p. 357; Cunn p. 220]. But this view was not accepted in a case where it has been said there are several cases both in English and Indian case-law, which satisfy that in enacting s 105, the legislature laid down no new principle, but put in a crisp and rigid form that which was before generally acted upon [*R v. Wazid*, 32 A 451, 456].

The placing on the accused the *onus* of proving that his case falls within all the exceptions in the penal law, is not innovation. It is in accordance with the law prevailing in England, where the legislature has in many cases relieved the prosecutor from his original *onus* by throwing the proof of authority, consent and lawful excuse on the accused. For examples see S 25 Theft Act 1968 and other examples in Taylor S 372 and Phipson 11th Ed para 102. The Summary Jurisdiction Act 1879 (42 & 43 Vic c 49) dispenses with proof by informants or complainants of "any exception, exemption, proviso, excuse, or qualification" which would be in favour of defendant.

The Burden of Proving That the Case of Accused Comes Within any Exception Lies Upon Him. [Accused May Avail of the Prosecution Evidence Even if the Plea of any Exception is not Set Up].—Since the passing of the Act, it is incumbent on the accused to prove the existence, if any, of circumstances which bring the offence charged within the general or special provisions contained in any part of the Penal Code or in any law defining such offence [*In re Shibo Pd*, 4 C 124: 3 CLR 122; *R v. Niaz Ali*, 1905 AWN 2; *Nag Bashin v. R*, A 1933 R 142; *Ghulam v. R*, 1937 Lah 726; *Rameshwar v. R*, A 1935 O 281; *Omkarlal v. State of M.P.*, 1987

Cri LJ 1289, 1291 : 1986 Cur Cri LJ (MP) 167 (MP)]. But the burden is only undertaken by the accused if the prosecution case establishes that in the absence of such a plea he would be guilty of the offence charged [*Chacko v. S*, A 1964 K 22 (*Narain v. S*; 1963, 1 Cri LJ 730 **reld** on): *Ram Kanwar v. S*, A 1970 PU 301]. The burden is upon the accused to prove that he was of unsound mind at the time of commission of offence and as such, incapable of knowing what he was doing was either wrong or contrary to law [*Oyami v. S*, A 1974 SC 216 (*Dahyabhai v. S*, A 1964 SC 1563 and *Bhikari v. S*, A 1966 SC 1 **folld**)]. An accused person can, without calling defence evidence in support of the plea of self defence, rely on the evidence led by the prosecution [*Rajnikant v. S*, 1970, 2 SCC 866]. The accused may discharge the burden by establishing a mere preponderance of probability by producing all the relevant evidence-oral, documentary or circumstantial before the Court. The accused is also entitled to an acquittal if the material on record raise a reasonable doubt [*Dulal Nayek v. State*, 1987 Cri LJ 1562, 1565 (Cal) (DB) : (1987) 2 Crimes 342; *Karali Bauri v. Subhas Das Musib*, 1983 Cri LJ 1474, 1478 (Cal) (DB) : (1983) 2 Crimes 626]. It has already been discussed that this burden on the accused is less than what is required when the burden is on the prosecution (*ante*). The failure of the accused to prove the credibility of his explanation may, in given cases, turn the scales against him [*State of Punjab v. Rattan Chand*, 1984 Cri LJ NOC 153 (Punj-Har) (DB)].

Where provisos are engrafted on main parts of the penal sections to the effect that under certain conditions the offences mentioned in the penal portions would not be deemed to have been committed, the *onus* in regard to such provisos is on the accused [*Rameshwar v. R*, A 1936 A 86; *Nishikanta v. Corpn of Calcutta*, A 1953 C 401].

Some cases held that under s 105 the plea of an exception (*eg* right of private defence), must be set up and supported by evidence. The law does not admit of justification by putting forward a hypothetical case; it must be proof of actual facts [*In re Jumsheer*, 1 CLR 62, 65; see also *Abdul Sattar v. R*, A 1949 D 51, 52]. So, where the right of private defence is not at all pleaded, but accused raises other pleas not consistent with such a defence he could not on appeal, set up a case of right of private defence founded on the evidence at his trial, and the court cannot raise such a plea on his behalf [*R v. Timmal*, 21 A 122: see also *R v. Prag Dutt*, 20 A 459, 463].

A different view was taken where the lower appellate court though holding that the complainants were themselves aggressors and the accused had merely exercised the right of private defence did not set aside the conviction on the ground that the plea of private defence was not set up in the magistrate's court. This argument was held untenable and the High Court observed:—

> "It is true that s 105 of the Evidence Act placed on the accused the burden of proving that in any criminal trial, they acted within their legal rights in the exercise of the right of private defence of property, still this burden can be discharged by the evidence of the witnesses for the prosecution as well as by the evidence for the defence on such a plea being set up; and the accused are clearly entitled to claim an acquittal if, on the evidence for the prosecution, it is shown that they have committed no offence" [*In re Kali Churn*, 11 CLR 232].

So, when the accused was convicted of murder in spite of the judge's finding that there was sudden and grave provocation on the ground that the accused did not plead provocation—*Held* that it was wrong; that s 105 says nothing about pleas but places the burden of proof in certain circumstances on an accused. But if the prosecution has already performed that task for him, it is clearly not necessary for

him to do it all over again. For a court to say that a fact is not proved, which it confidently believes to exist, is to stultify itself and to go contrary to the definition of proof in s 3 [*Mangal v. R*, 81 IC 901: A 1925 N 37]. When it appears from the prosecution evidence itself that the act falls within an exception, the accused will be clearly relieved of the burden under s 105 [*In re Kannegati*, A 1938 M 656: 1938, 1 MLJ 670; *Babulal v. S*, A 1960 A 223; *Bala Pd v. S*, A 1961 MP 241; see also *Mitter v. S*, A 1966 P 464; *Nila Saikia v. State of Assam*, 1985 Cri LJ NOC 99 (Gauh); *Kothi Subbaramaiah v. State of AP*, 1984 Cri LJ NOC 186 : 1984 AP LJ (HC) 343 (AP) (DB)]. Even in cases in which the accused has pleaded no particular exception, it is the duty of the judge to point out to the jury such facts in the evidence as might justify the view that his case is covered by one or other exception [*R v. Hassan Abdul*, A 1944 B 274 FB; *S v. Rambai*, A 1953 N 211].

The right of self-defence need not be specifically pleaded [*Govindan v. S*, A 1960 K 258; *In re Ningappa*, A 1960 K 294; *S v. Jagdish*, A 1966 A 244; *Kuti v. R*, A 1930 C 442]. Even when plea of total denial of the offence is taken by the accused it is open for them to raise alternative plea of right of private defence, if the same can be proved on the strength of prosecution evidence [*Ramchandra v. S*, A 1969 B 20; *R v. Hasan Abdul*, A 1944 B 374 FB: *Janki Mahato v. R*, A 1933 P 568]. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. In the case of general exceptions, special exception, provisos contained in the Penal Code or in any law defining the offence, the court, after due consideration of the evidence, if satisfied would state, in the first instance, as to which exception the accused is entitled to, then see whether he would be entitled for a complete acquittal or would be liable for a lesser offence [*Vijayee Singh v. State of U.P.*, A 1990 SC 1459, 1478].

The argument that it is solely for the accused to prove the benefit of the exceptions seems to overlook the general principle that the accused may benefit by the prosecution evidence [*Mir Alam v. R*, 69 IC 454; *Bhaddoo v. R*, A 1936 N 119; *Shewaram v. R*, A 1939 S 209]. Where no particular exception is pleaded by the accused; it is nevertheless the duty of the court under s 105 to draw the attention of the jury to any particular exception that may be applicable [*R v. Shk Hasan*, A 1944 B 274: 46 Bom LR 566; *Subodh Tewari v. State of Assam*, 1988 Cri LJ 223, 226 : (1987) 1 Crimes 791 (Gau) (DB)].

The meaning of "proof" in s 3 is not affected by the incidence of the burden of proof. When evidence has been given in support of an exception, the burden of proof is discharged if the evidence is believed and the jury has only to decide the question of fact on the evidence. S 105 is applicable in such case [*Md Yunus v. R*, 50 C 318]. Although the burden of proving the exception is on the accused, it does not follow that the circumstances together with the accused's statement cannot be sufficient to establish the exception [*Mangalia v. R*, A 1927 A 119 : 98 IC 707]. Defence is not barred where there is no proof as to infancy and immaturity of understanding of accused [*R v. Ali Raza*, 28 OC 69 : 84 IC 454].

In *R v. Wazid*, 32 A 451; 7 ALJ 438, 455 the Court observed:—"While we agree with what was laid down in *R v. Timmal (supra)* we also hold that circumstances which would bring the case of an accused person within any of the general exception in the I P Code, can and may be proved from the evidence given for the prosecution or to be found elewhere in the record."

If the report of any enquiry or investigation supports the accused's plea based on an exception, *eg* self-defence, it is open to the magistrate to accept the plea and dismiss the complaint [*Vadilal v. Dattatraya*, A 1960 SC 1113].

It would appear from the cases above that the preponderance of authority is in favour of the law taken in Calcutta *In re Kali Churn*, 11 CLR 232 *ante*, and that view is undoubtedly the correct one. There is nothing in law to warrant the proposition that an exception should be specifically pleaded or that there must be some evidence on the accused's side to prove that his case comes within the exception. The conclu-sion may be drawn from the evidence in the case although it might be on the prosecution side. It ought not to matter from which quarter the evidence came. If on the facts proved it is found that the accused did not commit any offence, or the court is left in reasonable doubt of his guilt, he cannot certainly be convicted merely because he failed to plead any exception or was unable to give any evidence on his side (*ante*).

It has been further held that if it is clear, from the cross-examination that a plea of private right of defence could have been put forward, a charge to the jury calling upon them not to consider the plea as it was not set up by the defence, is misdirection [*Kali & Ors v. R*, 51 CLJ 339 : A 1930 C 442]. So, the law does not prevent a man on a charge of murder from setting up the defence in the alternative, *viz* either that he was not present at the occurrence or that he was acting in the exercise of the right of private defence [*Yusuf v. R*, 40 A 284 : 44 IC 675; see also *Faudi v. R*, 5 PLJ 64; *R v. Upendra*, 19 CWN 653 FB; *Afiruddi v. R*, 23 CWN 833]. A plea of self-defence is inconsistent with the plea of *alibi*. However, it on the materials on record the plea of private defence could be made out, the accused can have its benefit [*S v. Raju Shetty*, A 1961 Mys 74]. When the proved facts show that the deceased and the accused were friends and that the pistol in the accused's hands might have gone off acciden-tally, the accused is entitled to the benefit of doubt even though no plea of accident was raised. It is wholly incorrect to say that the burden of proving that the firing was accidental is on the accused. It is for the prosecution to prove intention to kill or knowledge [*Md Saddiq v. R*, A 1949 L 85]. The guilt must be determined on the strength of prosecution evidence alone, but where the accused puts forward a plea that the offence was committed in circumstances that excused or mitigated it, the prosecution can show that no such circumstances exist. With the rejection of the defence version the duty of prosecution does not end and they have still to prove the guilt of murder—that *onus* never shifts [*Bhag v. R*, A 1940 L 54]; see *post*, "*Distinction When Burden is on Prosecution or Accused.*"

Where an accused person in his statement under S. 313, CrPC raised the defence of unsoundness of mind but the circumstances indicated that he acted under grave and sudden provocation, it was held that the accused could not be denied the benefit of the defence of *Exception* 1 to S. 300 of IPC. *State of U.P. v. Lakhmi*, AIR 1998 SC 1007 : 1998 Cri LJ 1411.

When attack on the opposite party is admitted, it is for the attackers to prove that they were justified in killing and injuring [*Md Khan v. R*, A 1949 L 128]. When accused is found to have killed another, the *onus* is on him to justify the killing. It is, however, open to him to ask the court to examine the evidence and ascertain for itself whether it is consistent with a plea of self-defence [*Ambika v. S*, A 1961 A 38]. When one man kills another, the *onus* is on him to show circumstances, which justify his doing so. If the act was done in the exercise of the right of private defence it still lies on him to show that he did not exceed that right [*Assiruddin Ahmed v. R*, 8 CWN 714; *In re Sabbigadu*, 1940, 2 MLJ 1018]. *K* started attacking *A* with stick—*A* then stabbed *K* with knife causing grievous injury to *K's* heart resulting in death of *K*—*held* that *A* acted in exercise of his right of private defence but exceeded that right by stabbing *K* in heart, and *A* was guilty of offence under s 304 PC first part and not of murder under s 302 PC [*Rafiq v. S*, A 1979 SC 1179]. In the vast majority of cases the accused persons are usually the only persons who could appear as witnesses in support of the plea of self-defence. The court must therefore be prepared to take their statements into consideration where the prosecution evidence is wholly unreliable [*Gulab v. R*, A 1941 L 333]. When a person charged with murder, pleaded loss of self-control by the use of abusive language towards him, the burden proving it is upon him [*R v. Devji Govindji*,

20 B 215, 223]. So, where an accused person charged with murder pleads unsoundness of mind, the burden of proving that he is exempted from criminal responsibility by reason of unsoundness of mind is upon him [*R v. Kedar*, 23 C 604, 607; *Onkar v. R*, A 1935 O 143; *Deorao v. R*, A 1946 N 321; *Baswantrao v. R*, A 1949 N 66; see *post* p 917]. Distinction between legal and medical insanity [*Basantrao v. R, sup*]. Accused relying on s 197 Cr P Code as a bar to prosecution has to prove all facts which bring into play that exceptional provision [*S v. Hifzul*, A 1952 N 12].

Where an ignorant *kabiraj* caused the death of a patient by surgical operation for curing piles and claimed the benefit of s 88 of the I P Code, it was for him to show that he acted in good faith [*Sukarao v. R*, 14 C 566]. See also *R v. Phanindra*, 35 C 945, where a printer of a newspaper was charged under s 124A I P Code for seditious articles in the journal. Where a person charged with having in his possession a large quantity of liquor, pleads that he purchased it for his private use and not for sale, the burden of proving such special exception lies on him, under s 105 or s 106 [*R v. Mg Pwa*, 5 LBR 52 FB]. In a murder case it is for the accused to show that he is protected by one of the *provisos* to s 300 I P Code [*Garib v. F*, 17 ALJ 985: 53 IC 495: *Piare v. R*, 17 ALJ 866].

A bullock tied up in the owner's house was missing the next morning. Three days later the accused who promised to return the bullock for a sum of money and who was paid the money, took the owner to a spot in a jungle where the bullock was tied up and he was convicted under s 215 I P Code. It was a fair inference from the facts that the animal was stolen or misappropriated and under s 105 the burden of proving that the accused had used all means in their power to bring about the apprehension and conviction of the offender is upon the accused [*R v. Yusuf Mia*, 1938 All 681].

Burden of Proving Good Faith in a Charge of Defamation.—As to definition of good faith, see s 52 I P Code. The burden of proving good faith in a charge of defamation, and that he is entitled to plead Exception 8 to s 499 I P Code lies on the accused [*R v. Dhondu*, 102 IC 511 : 29 Bom LR 713; *R v. Balkrishna*, 17 B 573, 579. See also *R v. Dhum Singh*, 6 A 220, 222; *R v. Girja Sankar*, 15 B 286; *R v. Slater*, 15 B 351; *Ramasami v. Kokananda*, 9 M 387, 391; *Surajmal v. Ramnath*, A 1928 N 58; *U San v. U Hla*, A 1931 R 83; *McDonnell v. R*, 3 R 524; *Satish v. Ramadayal*, 48 C 488 (SB); *Baburao Shankarrao Chavan v. Shaikh Priban Baban Pahelwan*, 1984 Cri LJ 350, 356 : (1984) 1 Bom CR 194 (Bom)]. When the statement as *per se* defamatory, the burden is on the defendant to prove that the allegations were substantially true [*Murlidhar v. Naraindas*, A 1929 S 172]. In a defamation case, where once the complainant has proved that the accused has made *prima facie* defamatory imputation, it rests with the accused to show that he is justified in doing so [*Abdul Razak v. Gauri*, 4 PWR (1910) Cr : 5 IC 714: 11 Cri LJ 205; *Harbhajan v. S*, A 1961 Pu 215]. The burden on the accused being less onerous than that of the prosecution, if in a defamation case it appears to the court that one of the exceptions to s 499 PC may possibly apply, the accused may be held to have discharged the burden [*Chaitan v. Raghunath*, A 1959 Or 141; *Kuttysankaran v. Kumaran*, A 1965 K 161]. If a witness while giving evidence makes a statement concerning any person which amounts to defamation, he may be protected under s 499 I P Code, in respect of such statement and it lies upon him to show that the statement which he has made falls within the exceptions mentioned in s 499 I P Code or that he is protected by the *proviso* to s 132 [*R v. Ganga Pd*, 29 A 685. As to how far statements to a witness are privileged, see s 132 *post*].

—Criminal Breach of Trust.—It is not for the accused to prove honest dealings with the money entrusted with him, but for the prosecution to prove the reverse.

When accused gives an explanation and establishes a *prima facie* case, he must be acquitted [*Saraswati v. R*, A 1949 A 413]. On a charge under s 409 I P Code (criminal misappropriation) it is not necessary for the prosecution to prove in what manner the money in question has actually been disposed of by the accused. If it is shown that the money entrusted to the accused was not accounted for nor returned by him in accordance with his duty, if unspent, it lies on the accused to prove his defence [*R v. Kadir*, 33 A 249]. But mere failure or omission to return a receipt book with which a *patwari* is entrusted is not sufficient to constitute an offence under s 409 PC. Prosecution has to go further and show that the accused dishonestly misappropriated or converted the receipt book to his own use or dishonestly used or disposed of it [*Sardar Singh v. S*, A 1977 SC 1766].

—Case Under S 80 I P Code.—When an accused pleads an exception within s 80 there is a presumption against him and it is for him to rebut it. Omission of the judge to refer to this statutory presumption and to explain the legal ingredients of s 80 to the jury vitiates their verdict [*Nanavati v. S*, A 1962 SC 605].

—Case Under s 83 I P Code.—There should be a specific finding that the child had attained sufficient maturity of understanding to judge of the nature and consequences of the act done within s 83 [*R v. Makimuddin*, 27 C 133. *In re Marimuthu*, 9 Cri LJ 392: 1 IC 807]; but it is not necessary for the prosecution to lead positive evidence to show the fact and the finding can be arrived at on a consideration of the circumstances of the case [*R v. Begarayi*, 6 M 373; *Abdul Sattar v. R*, A 1949 L 51]. A child cannot be debarred from the defence allowed under s 105 because of his ignorance of court procedure [*R v. Ali Raza*, 26 Cri LJ 310].

Case Under S 84 I P Code. [Insanity].—The burden that the mental condition of the accused was at the crucial point of time such as is described by s 84 PC is on him [*S v. Ahmadulla*, A 1961 SC 998; *Bhikari v. S*, A 1966 SC 1; *In re Govindaswami*, A 1965 M 283; *Kannakunnummal v. S*, A 1967 K 92; *Kuttappan v. State of Kerala*, (1986) Cri LJ 271, 274 (Ker) (DB) : (1986) 1 Crimes 155]. There is however some divergence of opinion as to when can the burden on the accused is said to have been discharged. Some Nagpur cases held that burden of proving insanity being strictly on the accused he is not entitled to any benefit of doubt about sanity [*Baswantrao v. R*, A 1949 N 66; *Ramhitram v. S*, A 1956 N 187; see also *S v. Koli Jeram*, A 1955 Sau 105; *S v. Chhotela*, A 1959 MP 203; *Barelal v. S*, A 1960 MP 102]. The Nagpur High Court, however, took a different view in *Holia v. R*, A 1949 N 163 following *Parbhoo v. R*, and *R v. Damapala ante*, and the same view was taken in *Waroo v. R*, A 1948 S 40. The Patna High Court agreeing with them held that the defence has only to demolish the presumption under s 105 that he was not then of sound mind and not to prove beyond reasonable doubt the opposite of that presumption. So, when it is doubtful or when it cannot be positively held that the prisoner was not of unsound mind, the onus has been discharged [*Kamla v. S*, A 1955 P 209; see *Choteylal v. S*, A 1956 Bho 57; *Nital v. S*, A 1957 Or 168]. It is not enough for the defence to rely upon a mere possibility that the accused may have been of unsound mind at the crucial time [*Etwa v. S*, A 1961 P 355].

The evidence ought to be sufficient for a categorical finding that at the crucial time the accused was so unsound in mind as to be incapable of knowing what he was doing was wrong or contrary to law [*S v. Durgacharan*, A 1963 Or 33]. The evidence showed that not only prior to the occurrence as also sometimes after it but also, on the day of, occurrence the accused had shown symptoms of insanity. This is sufficient to show that he might have been under a spell of madness when he shot an arrow at his father. [*Vehhab Sahoo v. State*, 1989 Cri LJ 168, 171 :

(1988) 2 Crimes 938 (Ori)]. When there is no satisfactory evidence about the previous history of the mental state of the accused *i.e.* antecedents or other queer behaviour, or to show the subsequent conduct to show insanity and that the accused was incapable of knowing the nature of his action that what he was doing was wrong or contrary to law, he is not entitled to claim exemption. [*Bhansingh v. State of Madhya Pradesh*, 1990 Cri LJ 1861, 1867 (MP)].

Plea of insanity has to be proved on the basis of preponderance of probabilities. The accused is not required to establish his plea beyond reasonable doubt [*Shan-karan v. State*, 1994 Cri LJ 1173, 1178 (Ker)]. Section 84, Indian Penal Code provides an exception to the general rule contained in the Penal Code where the plea of the accused is unsoundness of mind which incapacitated his faculties to know the nature of his acts or what he was doing was either wrong or contrary to law. This being an exception attracts S. 105 of the Evidence Act, which lays down the burden of proving the existence of the circumstances to bring the case within the said presumption and continue to presume the absence of the exceptional circumstances. However, S. 105 of the Evidence Act must be read along with the definition of the expression "shall presume" in S. 4 of the Evidence Act, and the combined reading of both the sections bring in for that the Court shall record the absence of the exceptional circumstances as proved, unless after considering the matters before it, the Court believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the case, would act upon the circumstances did exist. The presumption that such circumstances must be put forward by the accused. The material must be sufficient at least to make a reasonable person to believe the existence of the said circumstances probable and to act upon them. The materials may be oral evidence, documentary evidence, presumptions, admissions or may stem from the prosecution evidence [*Khuraijam Samai Singh v. State of Manipur*, 1997 Cri LJ 1461 (Gau)]. When an accused raises a plea come under S. 84 I.P.C. it being in the nature of an exception the burden of proof is on him to establish the same as per S. 105 of the Evidence Act. Every person is presumed to know the law, and the natural consequence of his act; and as per S. 105 of the Evidence Act court shall presume the absence of the exemption. In such circumstance in discharging as burden the prosecution need prove the base facts and can rely upon the normal presumption; prosecution is not bound to show that the accused at the relevant time was not insane [*Kuzhiyaramadiyit Madharan v. State*, 1994 Cri LJ 450, 453 (Ker)]

Disagreeing with *Parbhoo v. R, sup*, it has been held that the creation of reasonable doubt is not enough. The burden of bringing his case within the exception is on the accused, but it is not so onerous as the burden on the prosecution to prove that the accused committed the act. A finding that there was a probability of the accused being legally insane entitles an acquittal [*Kashiram v. S*, A 1957 MB 104]. The burden is on the defence to establish insanity. It is not absolutely necessary that the defence must put forward specifically a contention of insanity. The materials placed before the court may be sometimes be sufficient to discharge the burden. However, it may raise a reasonable doubt in the mind of the court [*Parapuza Thamban Alias Jaceb v. State of Kerala*, 1989 Cri LJ 1372, 1376 (Ker)].

The better view seems to be represented in the cases which are based on the principle that the burden on the accused is less than what is required when the burden is on the prosecution. In *Sodeman v. R*, 1936, 2 All ER 1138 VISCOUNT HAILSHAM observed: "the burden in a case in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests on the plaintiff or defendant in civil proceeding". Civil cases are decided on a preponderance of probability (*ante* p 31). See *R v. Dunbar*, 1958, 1 QB 36; *Sarka v. S*, A 1969 Or 102.

The Supreme Court held that the doctrine of burden of proof in the context of the plea of sanity may be stated thus: (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite *mens rea* and the burden rests on the prosecution from beginning to end. (2) There is a rebuttable presumption that the accused was not insane when he committed the crime in the sense laid down in s 84 PC; the accused may rebut it by placing all relevant evidence, but the burden is no higher than that rests upon a party to civil proceedings. (3) Even if the accused fails to establish conclusively that he was insane at the time of commission, the evidence placed by him or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including *mens rea* and then the court would be entitled to acquit on the ground that the burden on the prosecution was not discharged [*Dahyabhai v. S*, A 1964 SC 1563 (*Nanavati v. S*, 1962 Supp 1, SCR 567 **reld** on; *Ramhitram v. S*, A 1956 N 187 *sup* **overruled**)].

An insane person is *prima facie* incompetent to plead insanity. Though the burden is on the accused to prove exception, it is well-accepted that even if he lets in no evidence, his case can be spelled out from the circumstances [*Chami v. S*, A 1960 K 241].

Private Defence.—The onus which rests on an accused person under S 105, Evidence Act to establish his plea of private defence, is not as onerous as the unshifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged beyond reasonable doubt. It is further established that a person faced with imminent peril of life and limb of himself or another is not expected to weigh in 'golden scales' the precise force needed to repel the danger. Even if he at the heat of the moment carries his defence a little further than that would be necessary when calculated with precision and exactitude by a calm and unruffled mind, the law makes due allowance for it. [*Asraf & Ors. v. State of Rajasthan*, 1995 (2) Crimes 254, 256 (Raj)]. Burden of the accused to prove his case of private defence is not as onerous as that of the prosecution. The accused is required to discharge his burden by preponderance of probability [*Valummel Thommachan v. State*, 1994 Cri LJ 1738, 1740 (Ker)].

—Miscellaneous.—In a prosecution under the W Bengal Food Grain (Movement Control) Order 1957, the burden of proving that the accused is not a *bona fide* resident of the area is on the prosecution [*Anil v. S*, A 1953 C 408]. In a prosecution under s 3 of the W Bengal Undesirable Advertisements (Control) Act 1948, the *onus* is on the prosecution to prove facts which would establish the charge by repelling the application of exceptions which were no part of the law defining the offence [*Nibaran v. S*, 60 CWN 392: A 1956 C 90]. S 486 I P Code casts an *onus* upon the accused to prove the circumstances set out in the section [*Dasarath v. S*, A 1956 C 260]. In a prosecution under s 451(*1*)(*a*) of the Calcutta Municipal Act the onus of proving the existence of circumstances bringing the case under the proviso to the section is upon the owner [*Supdt of Rem of L A v. Iswar*, A 1960 C 170].

"The Court Shall Presume the Absence of Such Circumstances".—S 105, in using the words "*shall presume the absence of such circumstances*" requires the court to regard such absence as proved unless and until it is disproved or in other words their presence is proved (see s 4). S 105 constitutes a departure from the ordinary rule that the *onus* of proving the guilt lies on the prosecution and makes it obligatory upon the courts to presume the absence of such circumstances as may bring the accused within some general or special legal exception, unless, and until their existence is shown by the accused or is admitted by the prosecution itself.

The burden of proving the existence of circumstances bringing a case within any exception is upon the accused and the court shall presume the absence of such circumstances [*R v. Chandan*, 8 IC 259; *Kakar v. R*, 81 IC 717 : A 1924 L 733; *R v. Prag Dutt*, 20 A 459; *Dahyabhai v. S*, A 1964 SC 1563; *In re Ram Badan Choubey*, 1982 Cri LJ 1960, 1963 : (1983) 87 Cal WN 15 (Cal)]. The court has to regard the absence of grave and sudden provocation as proved until the contrary is proved by the accused on whom the *onus* lies [*R v. Upendra*, 19 CWN 653; *Pasadi Verabbayi v. State of Andhra Pradesh*, 1984 Cri LJ 440, 445 : (1983) 2 APLJ (HC) 270 (AP) (DB)].

If a man strikes another on the head with a stick, when he is asleep, and fractures his skull, knowledge of likelihood of causing death must be presumed [*R v. Shk Chootye*, 4 WR Cr 45]. The intention of the accused should be inferred from his act, but not solely from the consequences of that act; that the result of cutting a man on the head with a heavy chopper being generally death, the accused must be taken to have known that that is the natural consequence of such an act, and he must, therefore, be presumed to have intended to cause death [*Po Tu v. R*, 4 LBR 306].

Distinction When Burden is on Prosecution or Accused.—When the burden of the issue is on the prosecution, *eg* the *onus* of proving guilt, it must prove it beyond a reasonable doubt. It rests throughout on the prosecution and that *onus* never changes [*R v. Schama*, 1914 Cr App 45 *ante* and *post*; *R v. Satya Charan*, 52 C 223]. The burden on the accused to prove his case is not as onerous as that on the prosecution. He has to only prove his case on a preponderance of probabilities as contemplated under section 105 [*Babu Bhika Jadhar v. State*, 1996 Cri LJ 3952, 3955 (Bom)]. When, however, the burden of an issue is upon the accused he only has to satisfy the standard of a "prudent man" [*Dahyabhai v. S*, A 1964 SC 1563]. He is not in general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeeds in proving a *prima facie* case, for then the burden of such issue is shifted to the prosecution which has still to discharge its original *onus* which never shifts *ie* that of establishing, on the whole case, guilt beyond a reasonable doubt [*Mancini v. D P P*, (1941), 3 All ER 272; *Woolmington v. D P P, sup*; *R v. Stoddart*, 25 TLR 612; *R v. Schama, sup*; *R v. Ward*, (1915) 3 KB 696 (see *ante*). Thus, on a charge of possessing house-breaking implements without lawful excuse, proof of such excuse being upon the accused, the latter proved that he was a bricklayer, which made his possession *prima facie* lawful. At the trial, however, the judge directed that the burden was still on the accused to negative a felonious intent. On appeal it was held that this direction was wrong, and that when a *prima facie* excuse had been shown, it was for the prosecution to rebut and not for the accused to establish an innocent intent [*R v. Ward, sup*; *R v. Schama, sup*—Phip 8th Ed p 321]. The burden of proof of general exception is on the accused person. Such burden can be discharged by showing preponderance of probability. *Bhupendra Singh A Chudasama v. State of Gujarat*, AIR 1997 SC 3790 : 1998 Cri LJ 57.

S. 106. Burden of proving fact especially within knowledge[1]—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations.

(*a*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

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1. In Ceylon "of any person" added after "knowledge".

(*b*) *A* is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

SYNOPSIS

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COMMENTARY

Principle and Scope.—This section like the preceding one, states an exception to the general rule laid down in s 101, that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue. S 106 is not intended to relieve any person of that duty or burden. It says that when a fact to be proved (whether affirmative or negative) is peculiarly within the knowledge of a party, it is for him to prove it. It embodies the rule stated in Taylor, s 379 thus:—"The second exception [to the above named general rule] is thus, that where the subject-matter of the allegation *lies peculiarly within the knowledge* of one of the parties, the party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour [*Dickson v. Evans*, 6 TR 60; *R v. Turner*, 5 M & Sel 206]. Thus, when an action for penalties was brought, under an old statute against a person for practising as an apothecary without a certificate, the plaintiff would, independent of this exception, have been bound to prove the want of a certificate, for first, though the allegation was in a negative form, its proof was essential to the plaintiff's case; and next, the law might fairly presume that the defendant would not transgress the provision of a statute; still, as the defendant was peculiarly cognisant of the fact, whether or not he had obtained a certificate, and, if he had obtained one, could have no difficulty in producing it, the law, which is founded on general convenience, compelled him to do so" [*Apoth Co v. Bentley*, 1824 Ry & M 159].

This section applies only to *parties* to the suit [*Mahabir v. Rohini*, 37 CWN 657; A 1933 PC 87 : 142 IC 220]. It cannot apply when the fact is such as to be capable of being known also by persons other than the parties [*Razic v. J S Chouhan*, A 1975 SC 667]. In certain criminal statues the burden of proving matters of defence which may be supposed to be peculiarly within his knowledge has been expressly thrown upon the accused. But as pointed out by the Judicial Committee the rules does not cast on the accused the burden of proving that no offence was committed. The true meaning of s 106 in its application to criminal cases has been explained in this case [*Seneviratne v. R*, 1936, 3 All ER 36 : 41 CWN 65 : A 1936 PC 289 : see *post*:

"*Applicability of the Section to Criminal Cases*"]. S 106 refers to cases where the defence of the accused depends on his proving a fact especially within his knowledge and of nobody else [*Rambharose v. R*, A 1936 A 833]; it cannot apply when the fact is such as to be capable of being known also by persons other than the accused [*Lachman v. R*, A 1949 C 235]. Illus (*b*) has obvious reference to a very special type of case, *viz.*, to offences under ss 112 and 113 Railways Act [*Sambhu v. S*, A 1956 SC 404].

Where the incident of murder had taken place inside the house of the accused at a time when the accused persons alone were present, they alone knew what exactly had happended. It is true that Section 106 cannot be used to shift the *onus* of proving the offence from the prosecution to the accused, but where there is satisfactory evidence fastens or conclusively fixes the liability for the death on the in mates of the house present there at the relevant time, in the absence of any other explanation the only possible inference would be that all the accused inmates participated in the crime. If any one of them claims contrary under Section 106 the burden of proving that fact would be upon him since that is within his special knowledge. [*Rajammal v. State*, 1993 Cri LJ 3029 (Mad); see also *Shambho Nath v. State of Ajmer*, A 1956 SC 104 : 1956 Cri LJ 794]. Burden is on the prosecution to prove the case beyond reasonable doubt. But once the prosecution is found to have shown that the accused were guilty of persistent conduct of cruelty qua the deceased spread over years. The fact which were in the personal knowledge of the accused who were present in the house on that fateful night could have been revealed by them to disprove the prosecution case. This burden under Section 106 of the Indian Evidence Act should have been discharged by them. [*Balram Prasad Agarwal v. State of Bihar & Ors.*, 1997 (1) Crimes 10, 17 (SC)].

If some occurrence happens inside the residential portion of the accused, wherein he was also available, at or about the time of the incident, he is bound to offer his version as to how the occurrence had taken place. The only other person who can speak about the occurrence will be the deceased and now that she is dead, if at all, the accused and the accused alone can offer an explanation. Section 106 of the Evidence Act states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. It is true that this section cannot be used, so as to shift the onus of proving the offence, from the prosecution to the accused. However, in the present case, there is satisfactory evidence, which fastens or conclusively fixes the liability, for the death of Gandhimathi, on the inmate of the house, present therein at the relevant time. So, in the absence of any other explanation, the only possible inference is that the accused had participated in the act. If he claims contrary, under Section 106 of the Evidence Act, the burden of proving that fact is upon him, since that is within his special knowledge. *Shunmugasundaram v. State*, 1997 Cri LJ 499 (507) (Mad) (DB).

It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a *prima facie* case, that the question arises of considering facts of which the burden of proof may be upon the accused. [*Nagireddi Siva & Chanti & another v. State of A P*, 1992 (1) Crimes 409, 414]. See also *Sawal Das v. State of Bihar*, A 1974 SC 778]. Merely because the accused has given false information as regards the cause of death no inference can be drawn that the accused had committed murder. *Nagireddi Siva & Chanti & another v. State of A P*, 1992 (1) Crimes 409]. Where four murders took place in the house of the accused and the accused tried to commit suicide in his house, section 106 makes it obligatory for the accused to explain as to how all this happened. These facts were in the special knowledge of the accused. [*Namdeo Satyagonda Patel v. State of Maharashtra*, 1994 Cri LJ 3493, 3499 (Bom)].

This exception equally prevails in all civil or criminal proceedings instituted against parties for doing acts, which they are not permitted to do unless duly qualified; as for selling liquors, sporting, exercising a trade or profession, and the like (*R v. Turner, sup* and cases). So, in an action for penalties against the proprietor of a theatre, for performing dramatic pieces without the written consent of the author, the *onus* of proving such consent lies on the defendant [*Morton v. Copeland*, 100 RR 823; Tay 377]. It also applies to election cases [*Razic v. J S Chouhan*, A 1975 SC 667]. Failure of the prosecution to produce the evidence of facts especially within the knowledge of its officials is fatal to the prosecution case [*Public Prosecutor v. Kum Chee Cheong*, (1992) 2 Singapore LR 126 (Singapore HC)].

S 106 does not in terms apply to a proceeding under the Sea or Land Customs Act [*Ambalal v. Union*, A 1961 SC 264]. The section does not contemplate that the accused should prove his case with the same strictness and rigour as the prosecution. It is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by sec. 5 of the Act. [*Sadasiva Vena v. State*, 1983 Cri LJ 521, 523 (Ori)]. Before the burden is shifted to the accused, the prosecution has to establish strong *prima facie* case. Thereafter if the accused fails to account for, or if the accused gives explanation, the failure to account for or the explanation given by the accused shall be considered by the court for its final verdict. [*Gopal Chandra Das v. State of Assam*, 1988 Cri LJ 481, 482 (Gauh)].

***Prima facie* Evidence of Especial Knowledge Necessary Before Onus is Cast.** —The authorities do not appear to be agreed as to the extent of the general rule that where a particular fact is peculiarly within the knowledge of the opposite party, the burden of proving it lies upon him. In *Elkin v. Janson*, 13 M&W 655, 662, ALDERSON B doubted whether the rule of exception was not too strongly stated and observed that it was "right as to the *weight* of evidence, but there should be some evidence to start it, in order to cast the onus on the other side." (For other cases and a discussion, see Best ss 274, 275, 276). This observation was referred to in *Poolin v. Watson & Co*, 9 WR 190, 192. In *Girdhar Hari v. Kalikant*, (1869) 11 WR 501 : 3 BLR 161, MARKBY J, doubted the correctness of the rule of exception and criticised the law stated in Taylor s 376-A (now s 376). In *Abrath v. North E Ry*, 11 QBD 440, 457, BOWEN LJ, said: "It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff has not gone the length of contending that in *all* those cases the burden of proof shifts. I think that a proposition of that kind cannot be maintained, and that the exception supposed to be found amongst cases relating to the game laws may be explained on special grounds".

As stated by Phipson, "in the absence of statutory provision, the better opinion seems to be that, in general, some *prima facie* evidence must be given by the complainant in order to cast the burden on his adversary" (Phip 8th Ed p 34). This is undoubtedly the most practical or reasonable way of applying the section and it has also been held here that before an accused person can be required to prove the matter within his especial knowledge, there must at least be some *prima facie* evidence against him [*Raghubar v. R*, A 1944 P 308; *R v. Santa*, 1945 Lah 137 FB: A 1944 L 339 *post*]. When applying the section, the following statement of the rule in Steph Dig Art 96(*d*) may be followed as a correct guide: "In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge, with respect to the fact to be proved, which may be possessed by the parties respectively". This was approved in *R v. Kakelo*, (1923) 2 KB 793, 795: 39 TLR 671.

[*Ref Tay ss 376, 377; Phip 8th Ed pp 34-35; Best ss 274-77; Steph Art 96; Russel on Cr, 1995-97; Greenleaf s 79; Wig s 2486*].

Facts Especially Within the Knowledge of Any Person.—The knowledge must be in the nature of something peculiar [*Lachminarain v. Chairman of R M*, 1 PLJ 168; *Poolin v. Watson & Co, sup*]. "Especially" means facts that are pre-eminently or exceptionally within one's knowledge [*Shambhu v. S*, 1956 SCR 199 : A 1956 SC 404]. When negligence is charged against a public body although the burden is on the plaintiff, yet it does not preclude the burden of proving particular fact being on the defendant [*Ramdas v. Sukkur*, A 1940 S 254]. The mesne profit which a person *actually receives* is a matter within the peculiar knowledge of that person and he is to prove it. But the burden of proving the profits that *might have been received* with ordinary diligence is on the person who claims them [*Ramakka v. Negasam*, 47 M 800; **relied** on in *Haji Sait v. Md Samsuddin*, A 1925 M 297 : 92 IC 139; *Kallynath v. Shew Bux*, A 1950 C 87; *Shk Salama v. Shk Md*, A 1961 AP 428]. In proceedings for appraisement of crops when the landlord falsifies accounts in order to claim a large amount, the onus is on him to prove the actual yield. If the landlord has not made any estimate, the onus will be on tenants as persons with the special means of knowledge [*Bhuneshwari v. Sukhdeo*, A 1925 P 505 : 85 IC 566].

Where property is entrusted to servant, if he fails to return or to account, or gives an account which is shown to be false and incredible, it may be inferred under ss 106 and 114 that he has criminally misappropriated it [*Sona Meah v. R*, 84 IC 331: A 1925 R 47]. If the failure by servant to account for property is due to an accidental loss, then the facts being within his knowledge, it is for him to explain the loss [*Krishan v. Union*, A 1959 SC 1390]. Where a party fails to give the fullest information about the relationship existing between him and another, court may draw presumption unfavourable to the party [*Mg Pein v. Ma The*, 2 R 549 : 84 IC 1009]. Party having a personal knowledge of certain facts has a duty to appear as a witness [*Mahomed v. Delhi Motor Works*, 139 IC 712] and if he does not go to the witness-box there is a strong presumption against him [*Daulat v. Hardhiyan*, 138 IC 502; *post*, s 114]. In a passing off action it is the defendant's duty to produce account books showing the quantities of infringed goods manufactured or sold as the matter is within his special knowledge [*Bhagwan v. Watkins-Mayor*, A 1956 Pu 17]. It is common place that the amount of an insurance policy would be within the exclusive knowledge of the insurer and the insured [*National Ins Co v. Narendra*, A 1980 A 397]. The Court will be justified in raising adverse inference that the defendant is in possession of the documents regarding his income and has not produced the same, because it was within his knowledge that if the same are produced, they will help the case of the plaintiff. [*Maganbhai Chhotubhai Patel v. Maniben*, A 1985 Guj 187, 200 : 1985 (1) 26 Guj LR 374].

In a suit against a *zemindar* to reverse the sale of a putni taluk held under Reg 8 of 1819, on the ground of non-service of notice, the *onus* of proving service lies on the defendant, because the fact is especially within his knowledge [*Durgacharan v. Syed Najimuddin*, 21 WR 397; *Maharaja of Burdwan v. Tara Sundari*, 9 C 619 PC; *Md Zamer v. Abdul Hakim*, 12 C 67; *Hurro Dyal v. Md Gazi*, 19 C 699].

The plaintiff who was formerly *patnidar* of the village sued for possession of certain land as *lakheraj*, from defendant, who had become *patnidar* by purchase at a sale held under Reg 8 of 1819—*Held* that the *onus* was upon the plaintiff to show that the land was *lakheraj*, because by reason of his having been formerly *patnidar* of the village he had special means of knowledge [*Nabo Kishen v. Promothanath*, 5 WR 148]. Where in a dispute between zemindar and his tenant, the latter who held land

of considerable extent under the former alleged that one or two plots occupied by him were held under a different title, it was held that the *onus* was upon the tenant to prove a matter which was peculiarly within his knowledge [*Ram Kumar v. Bejay*, 7 WR 535]. Where a suit was brought by the representative, of a deceased person, who was killed in an accident, while travelling in train, the *onus* of proving that there was no negligence on the part of the company lies on such company [*Mad Ry Co v. Rati Lal*, 4 MLT 251 (*G W Ry Co of Canada v. Braid*, 1 Moo PC Cases, New series **folld**.)].

Initially *onus* of proof of profits earned lies on person accountable for *mesne* profits [*Rattanlal v. Girdhari*, A 1977 D 11]. When the plaintiff alleged defendant had failed to collect the full rents by exercise of due diligence, the plaintiff must prove the negligence and mere production by him of the *jumabundi* or rent roll is not sufficient to shift the burden of proof on to the shoulders of the defendant [*Md Inayat v. Karamatulla*, 12 A 301 FB; *Ram Padarnath v. Ganga*, A 1927 O 90 : 99 IC 185]. In a suit for pre-emption where the plaintiff's allegation was that certain land had been sold for less than that stated in the sale-deed, the burden of proving the allegation lay upon him. Very slight evidence is ordinarily sufficient to establish *prima facie* case in his favour, and where such case is established, it rests on the defendants, vendor and vendee, to prove that the price was larger than that stated by the pre-emptor [*Bhagwan v. Mahavir*, 5 A 184, (13 IA 85 **applied**); see also *Tawakul v. Lackman*, 5 A 344. The burden of proof would not be thrown on the defendant in respect of the facts which are within the special knowledge of the plaintiff. [*Indore Municipal Corporation v. Caltex (India) Ltd*, A 1991 SC 454, 455]. See notes to ss 101-104 under "*pre-emption*", *ante*].

The question as to the authority of the *gomastha* to bind the landlord by his act or omission should be decided on the particular facts, as in every other case, about the scope of the authority of an agent to bind principal. The burden of proof in the first instance is upon the landlord to show the precise scope of the authority he had conferred upon his agent, as this is a matter peculiarly within his knowledge [*Suduman v. Behari*, 15 CWN 953 : 10 IC 456; *Madon v. Priyanath*, 64 IC 362 (C); *Motihari Concern Ltd. v. Lachmi*, 35 IC 81; *Bruce v. Mg Kyaw*, 45 IC 822; *Srikishen v. Jeohasi*, 45 IC 294 (P)]. If the *gomastha* is held out as having only a limited authority, the party dealing with him should ascertain the extent of his authority [*Janki v. Thakur*, 2 Pat LJ 231]. As to the ordinary presumption relating to the duties of a *gomastha*, see *Johurmal v. Keramatullah*, 45 IC 196; *Manmatha v. Rajeswar*, 32 CWN 184. If the landlord alleges that his agents had no authority to consent to the division of a holding, the *onus* lies on him [*Akshoy v. Eadatulla*, 64 IC 883 (25 C 631 **folld**)]. Where agent was authorised to take delivery of goods and sell at any price he chose, the burden of proving any specific limitation of the implied authority of the agent lay on the principal [*Ishaq v. Madanlal*, A 1965 A 34]. In a suit for ejectment on the ground of sub-letting tenant is to prove nature of relationship between him and occupier [*Ziaul v. Pannalal*, A 1972 MP 209; *Rajkumar v. Harbanslal*, A 1978 P&H 186]. In a suit for ejectment under W B Premises Tenancy Act on ground of sub-letting *onus* to prove sub-tenancies were pre-Act lies on defendant [*Binani Properties v. G A Hossein*, A 1967 C 390]. In a suit under Slum Areas (Improvement and Clearance) Act, 1956 tenant is to establish positively that he has no sufficient means for securing alternative accommodation [*Mandi v. P S Varshneya*, A 1977 D 71; *Rajinder v. H C Arora*, A 1974 D 221]. Where the question is of authorization by the managing committee to institute a suit on its behalf, proof of the minutes of the meeting constituting such authorisation is sufficient to discharge any burden under s 106 [*Sunder & Others v. Managing Committee*, A 1938 PC 73]. When defendant Co

wants to prove that its Manager and Director had no authority to borrow money it is for the Co to prove from its books of minutes and resolutions that no authority was given to Manager and Director to borrow any money [*Srikishan v. Mondal Bros & Co (P) Ld*, A 1967 C 75].

On an appeal against conviction of an offence of displaying an advertisement without the consent of the local authority, contrary to the Town and Country Planning Act 1990 (UK) and the Town and Country Planning (Control of Advertisements) Regulations 1992 (UK), it has been held that although, where it is an offence to do an act without lawful authority, a defendant claiming to have such authority has the burden of proving it, because the facts concerning the existence of such authority are peculiarly within that defendant's knowledge. Even though it has been established that the burden of proof rests with the defendant, he is not entitled to have the matter remitted to the Crown Court to give him the opportunity to adduce evidence to discharge that burden, because he has been aware of the true position as regards the burden of proof when he has previously had the opportunity to adduce such evidence, but chose not to do so [*R v. O'Brien*, (1997) 74 P&CR 264 (QBD)].

Where the defendant intermixes his articles with those of plaintiff the burden of proving the proportion of intermixture is on him [*Sitaran v. Iswari*, A 1934 P 492]. Defendant Company ought to prove non-ascertainment of goods relating to the delivery order [*Anglo-Indian J M Co v. Omademull*, 38 C 127]. Where in a suit brought to question the legality of a tax imposed on plaintiff under s 85 Bengal Municipal Act, the defendant municipality did not disclose facts justifying the basis of the assessment, the presumption under s 106 applied and the plaintiff must be taken to have made out his case [*Deb Narain v. Chairman of B M*, 17 CWN 1230].

When at the time of the previous assessment deduction of a certain amount was allowed by the Corporation to valuing the premises and that deduction is disallowed at the next assessment, the *onus* is on the Corporation to show what the deduction was for as it was within the special knowledge of an officer of the Corporation [*Samarendra v. Corpn of Calcutta*, 55 CWN 145].

The burden of proving that a particular income has its origin in capital source lies upon the assessee as it is within his peculiar knowledge [*Raghava v. Kota*, A 1937 AP 926; see *Har Pd v. Commr IT*, A 1957 A 746].

It is for the husband to disclose his income and if he does not specifically deny the amount alleged by the wife to be his income, the wife's allegation about the income has to be accepted. [*Chitra Sengupta v. Dhruba Jyoti Sengupta*, A 1988 Cal 98, 102 (DB) : (1987) 1 Cal HN 450 : 92 CWN 54].

Whether a person has a licence to sell wholesale is a fact peculiarly within his own knowledge [*R v. Oliver*, 1943, 2 All ER 800]. So also whether a person had permission from the Reserve Bank to import gold into India [*Kshetranath v. Collr*, A 1959 C 356]. Where gold with foreign markings is seized from accused, he has to explain the special fact within his knowledge as to how he came into possession of it [*Neithanga v. Asst Collr*, A 1963 Man 1]. Where a person obtains steel under a permit for a specific purpose and does not utilize it for that purpose, he cannot escape conviction merely because the prosecution could not show what happened to the steel. The accused had special knowledge [*S v. Ramaswami*, A 1952 M 162]. In respect of purchase and sale of agricultural produce through the Market Committees, the licensees are primarily middlemen between the producers and the further purchasers. The licensees alone would have special knowledge about the dealings made by them first with the producers and then in re-sale with the next purchasers. They also

would have the necessary record and the data on the point whether the market fee had been realised or not from the buyers. So the burden of proof is on the licensees to prove whether the market fee has been collected or not in respect of a particular transaction. [*Walaiti Ram Mahabir Parahad v. State of Punjab*, A 1984 Punj & Har 120, 123, 125].

The fact that a Mahomedan girl below the age of 15 has attained puberty is a fact within her special knowledge [*Helalonnessa v. Khoudakar*, 53 IC 94]. Where a party propounds in instrument the presumption under s 106 is against him [*Tahilram v. Blackwell*, 6 SLR 228 (9 MIA 1 refd to)]. In the case of a contract, the party pleading minority must prove it [*Jodhi Bibi v. Vajiar*, 26 IC 407 (24 MLJ 517, 512 : 26 B 109 folld)]. See *ante* ss 101-104, "*Minority*".

Where in a suit for dismissal of servant misconduct is pleaded, the circumstances justifying dismissal are within the special knowledge of the defendant [*D'Cruz v. Secy of S*, 40 CWN 865, 868; *Ramesh v. Jain College*, A 1957 P 145—CONTRA: *S v. Shiva*, A 1960 P 162]. When a carrier fails to book goods given to him and they are lost, he is in especial knowledge [*In re Vellai*, A 1952 M 322].

In proceedings under Land Acquisition Act initial burden to show existence of urgency is on Govt and when that is discharged owner has to show that urgency does not exist [*Biharilal v. Union*, A 1979 D 84 (*Narayan v. S*, A 1977 SC 183 folld)].

In a case under Prevention of Corruption Act, 1947 is the prosecution proves acceptance by accused of amount which is not legal remuneration in any form or of any kind, the presumption must be raised and the accused must establish that the amount was not accepted by him as a motive or reward which he can do by preponderance of probability [*Mahesh v. S*, A 1974 SC 771 (*V D Jhingan v. S*, A 1966 SC 1762 folld)].

In a proceeding under s 167(8) Sea Customs Act (now s 111 Customs Act, 1962) to which the provisions of s 178-A Sea Customs Act (now s 123 Customs Act, 1962) do not in terms apply or have not been extended by notification under sub-s (2), the provisions of Evidence Act and Cr P Code do not in terms govern the *onus* of proof. The initial *onus* on the dept of proving that the goods are smuggled can be sufficiently discharged if it adduces only so much of evidence, circumstantial or direct, as is sufficient to raise a presumption with regard to the existence of facts sought to be proved. The burden is then cast on the person concerned to establish or explain the facts [*Collr v. D Bhoormull*, A 1974 SC 859]. When a person arrested with nine gold bars said that he had agreed with one *P* who had just met him by chance to carry them for delivery at Delhi for Rs. 100/-, the burden of proving innocent receipt of gold lay upon him under s 106 [*Labhchand v. S*, A 1976 SC 182].

In an election case as there is no provision is the Representation of the People Act for shifting the burden of proof, the case should be approached as if it was of a criminal nature, though on certain matters the burden of proof may shift under s 106 [*Hari Pd v. Bhanuganga*, A 1964 Or 8 (*Gangi Reddi v. Anjaneya*, 1960, 22 Elec LR 261 (SC) reld on)].

What a lost parcel contained is within the special knowledge of the sender and so when damages are claimed against a Railway, it is for him to prove that it did not contain any of the excepted articles in the second schedule [*Secy of S v. Gopalmal*, 58 C 989]. Where a bailee returns in a damaged condition an article which was left with him in a sound condition, it lies upon the bailee to account for its damage and thus to show that it has not been caused by his negligence [*Shields v. Wilkinson*, 9 A 398]. The general rule is that the person who alleges negligence must prove it. In an

action against a bailee for loss of property bailed to him if loss of property is *prima facie* evidence of negligence, then the burden of proving that loss was not due to negligence lies upon the bailee under s. 106. But where no *prima facie* inference of negligence can be drawn, s 106 however casts a duty on the bailee to give a reasonable explanation how the accident occurred [*Ponnappa v. Thenadhi*, A 1937 M 411]. In a suit against a bailee for not taking care and saving goods from loss, *eg* fire, the bailee should under s 106 call all the material witnesses who were present at the time of the loss but that section does not discharge the plaintiff from proving want of diligence or negligence on the part of the bailee. The company is to lay all materials before the court, but the plaintiff is to satisfy that the true inference from those materials is want of due care, skill and nerve [*Dwarka v. River S N Co*, A 1917 PC 173 : 27 CLJ 615; see *National S Stores v. G-G in Council*, A 1948 S 26]. The burden of proving that the bailee has exercised ordinary care must generally be upon the bailee, the reason being that he has special knowledge of the facts [*Secy of S v. Afzal*, 56 IC 714 : 20 OC 96].

When part of the goods are lost in transit, the Railway Co could have special knowledge as to the manner of loss [*Qudir v. G-G in Council*, A 1951 A 438; *Jugalkishore v. Murugan*, A 1973 M 331]. Since the facts as to how the loss or damage occurred are within the special knowledge of the Railway, it is supposed to give evidence as to how the goods were dealt with in the course of transit and, that it took as much care as a man of ordinary prudence [*Union v. Delhi C & G M Co*, A 1964 Pu 147; *Union v. Sri Ram*, A 1965 A 246; *Union v. Ratilal*, A 1971 C 515; *Union v. Mannalal*, A 1971 MP 131]. In a suit for compensation for loss of part of goods, the loss was found to have occurred on 3-9-42 when the remaining goods were delivered—*Held* that the presumption was that the loss occurred on that date and not earlier. The fact being specially within the knowledge of the Railway, the burden was on them to prove the date of loss [*Sitaram v. G-G in Council*, A 1947 N 224; *Jainarain v. G-G in Council*, A 1951 C 462]. Where goods are solely under the control of the bailee, the fact as to the time when loss, destruction or deterioration occurred is a matter specially within his knowledge [*Secy of S v. Kesho*, A 1932 A 584]. The duty of showing how the consignment was dealt with during transit is on the Railway as a matter within its special knowledge [*Indian Trade &c v. Union*, A 1957 C 190; *Asaram v. Union*, A 1957 N 59; *Assam Bengal Roadways Ltd. v. Union of India*, A 1988 Karn 157, 161].

In a suit for damges caused by sparks from an engine, the initial onus is on the railways to prove that precaution was taken to protect the adjoining property as nobody but the railway would be in a position to show what precaution was taken [*Secy of S v. Dwarka*, 100 IC 640 : 25 ALJ 336]. In a suit for damages caused to the plaintiff by fire started on the 1st defendant's premises by 2nd defendant, it was alleged that the 2nd defendant was the servant of the 1st defendant. The relationship between the two defendants was one peculiarly within the knowledge of the 1st defendant [*Mg Pein v. Ma The*, 2 R 549 : A 1925 R 143]. In a suit for damages for loss of life due to collapse of a building, the *onus* is on the persons responsible for its maintenance to show that it was kept in a proper condition, since they are the only persons who can reveal the true state of affairs [*Munpl Corp v. Sobhag*, A 1950 Pu 300]. Where it is proved that thefts occurred on different dates, the presumption is that stolen property passed from the hands of the thief to receiver on different dates also. The burden is then shifted from the Crown to the accused to prove that he received it at one time only, in a case where the accused is charged separately of offences of receiving stolen property [*Ghulamo v. R*, 96 IC 120 (L)].

Where money is missing from a safe, whether the person having the key locked it or not is within his special knowledge [*Union v. Kundan*, A 1957 A 363].

In a suit by an auction purchaser to annul an alleged incumbrance, the *onus* is in the first place on the plaintiff to show that the interest is an 'incumbrance', but when this is established the *onus shifts*. The existence of a 'protected interest' within s 160 B T Act as a right of occupancy, is a matter specially within the knowledge of the person claiming it and the *onus* is on him [*Harimoni v. Moti Sheikh*, 16 CWN 779]. As to the shifting of burden of proof in such cases, see *Nityanand v. Banshi*, 3 CWN 341. See also *Somir v. Mohabharat*, 16 CWN 777. A dealer who claims exemption from payment of sales tax has the burden on him [*Burhanpur T Mills Ld v. S*, A 1962 MP 225].

In liquidation proceedings against a Director or an officer of a Bank, the material facts are within the special knowledge of the persons against whom the application is made [*Vastulal v. Offl Liq*, A 1962 Raj 118]. Where plaintiff's shares are wrongfully sold by the Director of a company, the innocent state of the defendant purchaser is within his special knowledge [*Judah v. Ramapada*, A 1959 C 715].

In an action for infringement of patent on the allegation that the defendants' medicinal product is prepared according to the plaintiff's registered patent the burden of proving the process by which defendants' product is manufactured would be on defendants since that is fact within their special knowledge [*F H & B Corpn v. Unichem Laboratories*, A 1969 B 255].

As the facts relating to the pregnancy of a woman and the birth of her child are within her knowledge, the burden lies on her to prove them [*Nand v. Gopal*, A 1940 PC 93 : 72 CLJ 263].

In a suit by contractor for work done when Govt cancelled contract due to breach by contractor it was Govt's duty to prove date of cancellation to the knowledge of contractor for limitation [*Ghulam Hassan v. S*, A 1976 J&K 93]. In a suit for money for work done under agreement entered with sub-divisional controller of Food and Supplies the *onus* is upon the Government to prove that the controller had no authority to act on behalf of Govt [*Raipada v. S*, A 1977 C 7]. Where seizure of gold biscuits was not in accordance with ss 135(*b*) and 123 of Customs Act, presumption under ss 106 and 114 held could be availed of in special facts of the case [*Shah Gulam v. S*, A 1980 SC 793].

As to other cases relating to burden of proof see notes ss 101-104, *ante*.

Facts Specially Within the Knowledge of an Authority Forming an Opinion in Issuing a Notification.—The original or stable *onus* laid down by s 101 or 1 102 cannot be shifted by the use of s 106, although the particular *onus* of proving facts and circumstances lying specially within the knowledge of the official who formed the opinion resulted in the notification issued rests upon that official. The recital, if not defective, may obviate the need to look further. But there may be circumstances which impel the court to look beyond it, and at that stage, s 106 can be invoked by the party assailing the order or notification [*Narayan v. S*, A 1977 SC 183].

Facts Not Within Especial Knowledge.—Date of a child's birth or death is not a fact specially within the knowledge of the father. It is within the knowledge of any one who was present at the birth or death [*Dalganjan v. Parsidh*, 11 IC 202]. The mere fact that a doctor was alone with a woman in a room where abortion took place does not require him to prove that he did not perform illegal operation [*R v. Attygale*, 1936 AC 338 : 71 MLJ 321 : A 1936 PC 169]. The mere fact that the third-party

making deposit in a firm happens to be the wife of the assessee does not *ipso facto* make the assessee come into the knowledge of the source of the money. In the absence of specific proof it cannot be assumed that the assessee has the knowledge in question. [*Tolaram v. Commr of IT*, A 1968 A&N 1].

The location of the villages in the different Thanas cannot be regarded as a matter within the exclusive knowledge of Govt and has to be proved by reliable maps [*Ramkishore v. Union*, A 1966 SC 644].

The exact date of an oral mortgage is a fact not peculiarly within the knowledge of the mortgagee [***Mehilal** v. Soni*, A 1929 A 209]. It does not follow that an assistant manager of a press must have knowledge of every bit of job printing at the press [*Chellam v. R*, A 1928 R 276]. The *onus* of proving that the defendant had knowledge of the plaintiff's rights in the registered designs in dispute or that the defendant applied or caused to be applied such designs to the articles sold by him lies on the plaintiff. S 106 has no application [*Calico Printing Assen v. Mukherjee*, 40 CWN 938].

Applicability of the Section to Criminal Cases.—The Judicial Committee have definitely laid down that s 106 does not cast any burden on an accused person to prove that no crime was committed by proving facts lying specially within his knowledge. The section does not warrant a direction to the jury, that if anything is unexplained which the jury think the accused could explain, they not only may but must find guilty [*Seneviratne v. R*, 1936, 3 All ER 36 : A 1936 PC 289 : 41 CWN 65. This authoritative pronouncement on the true meaning of s 106 will it is hoped dispel the unfounded notion that if anything which may be within the especial knowledge of the accused remains unexplained by him there can be an inference of guilt. S 106 cannot by any implication be utilised to cast on the accused the burden of proving his innocence]. Relying on this case it has been held that the section can never be used to shift the *onus* of establishing an essential fact on the accused, *eg* it is not for the accused to show how he came to possess certain shares which were sold by him and which it was alleged were stolen shares [*Matilal v. R*, A 1949 C 586; see *S v. Prafulla*, A 1964 Or 46]. S 106 does not cast any burden upon the accused, but when he throws no light at all upon facts which ought to be especially within his knowledge, and which could support any theory or hypothesis compatible with his innocence, the court can also consider his failure to adduce any explanation in consonance with the principle in *Deonandan v. S*, A 1955 SC 801 [*In re Naina Md*, A 1960 M 218].

It is well known that matriculation certificate is a public document within the meaning of Section 35 of the Evidence Act. When an opportunity was given to the petitioners to produce the matriculation certificate by the collector, and that fact is not denied but the certificate was not produced, the obvious interence will be adverse against the petitioners [*Deakinaudan Singh v. State Bihar*, 1997 AIHC 1431, 1432 (Pat)]. Since the driver was the best person to say as to how the accident occured, he should be presumed to have the special means of knowledge regarding the cause of the accident even from the principle to be borrowed from Section 106 [*Talasila Sandhya v. A.P. SRTC*, 1997 AIHC 1680, 1682 (AP)]. Where substandard Maida was found in grocery shop of the accused, burden of proving the plea that it was kept not for human consumption but for pasting purpose lies on the accused [*State v. Arunachalam*, 1992 Cri LJ 3930, 3931 (Mad)]. Burden of proof regarding payment of rent lies on the tenant [*Sukhanand v. IV Addl. Distt. Judge Bulandshahr*, A 1994 All 59, 61]. In any suit against a common carrier, it is the carrier who must prove absence or negligence, because all the facts relating thereto are in his special

knowledge. Section 106 will apply to such case [*National Insurance Co. Ltd. v. Om Prakash Poddar*, A 1993 Cal 26, 27]. While the initial *onus* to prove the ground of eviction of tenant rests on the landlord, the facts which are in the special knowledge of the tenant must be proved by tenant and the tenant cannot take advantage of the onus of proof to withhold the best evidence in his possession or power to satisfy the court with regard to the correctness of the case set up by him [*Gur Dayal Khanna v. Malti Devi*, A 1993 All 90].

S 106 is certainly not intended to relieve the prosecution of its burden of proof. It is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. If knowledge of certain facts is as much available to the prosecution on exercise of due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused [*Sambhu v. S*, A 1956 SC 404 : 1956 SCR 99 : 1956 Cri LJ 794; *Ambalal v. Union*, A 1961 SC 264; *Narayanan v. Ex Officer*, A 1965 K 73; *Jethalal v. S*, A 1968 G 163]. In a prosecution under the Prevention of Corruption Act, the affairs of an accused person are specially within his knowledge [*Swami v. S*, A 1960 SC 7; *State of Maharashtra v. Wasudeo Ramchandra Kaidalwar*, A 1981 SC 1186, 1190 (DB) : 1981 Cri LJ 884]. When the prosecution alleges that the accused does not have the academic credentials which he openly pretended to have, the burden of proving that he, in fact, possesses such degrees is on the accused [*State of Kerala v. Dr. C.K. Bharathan*, 1989 Cri LJ 2025, 2026 : (1989) 1 Ker LT 695]. The aid of S 106 can be taken in a criminal trial only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a *prima facie* case. [*Mohammad Hussain v. State of Bihar*, 1987 Cri LJ 1391, 1395 : 1986 Pat LJR (HC) 868 (Pat)].

The fundamental principles of criminal jurisprudence and of natural justice must apply to prosecutions for violation of Custom Laws. The burden is on the customs authorities and they have to bring home the guilt of the person alleged to have committed a particular offence [*Ambalal v. Union*, A 1961 SC 264; *Mangala Pd v. Manerikar*, A 1965 C 507]. The burden is not discharged by merely holding that the petitioner has failed to prove *bona fide* purchase of the goods [*Hiralal v. Collr*, A 1962 As 39].

In a prosecution under Bombay Prohibition Act mere raising of presumption about consumption of liquor by accused on the basis of a report by Chemical Analyser would not absolve the prosecution from the obligation to prove consumption of alcohol within prohibited area by resorting to s 106 or s 114 [*Chhaganji v. S*, A 1970 G 131]. It is for the prosecution to prove that the accused drank liquor within jurisdiction and not for accused to prove that he drank outside jurisdiction [*S v. Pranjivan*, A 1952 Sau 35].

The onus of proving the guilt of an accused rests on the prosecution and is not shifted by reason of s 106. It is not until a *prima facie* case is established by the prosecution by proof of (1) conscious possession or actual control and (2) *mens rea* or guilty *knowledge*, that the onus shifts on the accused [*R v. Santa Singh*, 1945 Lah 137 FB : A 1944 L 339; *Daulat v. R*, A 1947 L 244; *Raghubar v. R*, A 1944 P 308 *ante*; *S v. Amir Hasan*, A 1951 P 638; *S v. Narendra*, 87 CLJ 58; *In re Wahib*, A 1961 M 162]. The burden of proving a plea specifically set up by an accused certainly lies upon him; but neither s 103 nor s 106 can absolve the prosecution from discharging its general or primary burden of proving its case beyond reasonable doubt. It is only when prosecution has made out a *prima facie*

case the question arises of considering facts of which burden of proof may lie upon the accused [*Sawal v. S*, A 1974 SC 778 (*Gurcharan v. S*, A 1956 SC 460 **ref**)]. The burden of proving *alibi* undoubtedly lies on the accused; but even so the burden of proving the case against the accused is on the prosecution irrespective of whether or not the accused made out a plausible defence [*Gurucharan v. S*, A 1956 SC 460 : 1956 CrLJ 827]. The prosecution admitted the position that the accused was insane at the time of the occurrence and continued with its case with the backdrop. In such cases in order to bring home an offence against the accused the burden is on the prosecution to establish that the accused had feigned madness [*Abdul Latif v. State of Assam*, 1981 Cri LJ 1205, 1208 (Gauh)]. Court has to find plea of insanity from the materials on record [*Kumar Sunilal Deb v. State of Assam*, 1982 Cri LJ NOC 29 (Gauh)]. S. 6 I.P.C. carves out or stands in the nature of a proviso to section 106 and imposes an obligation on the court as well to consider the cases of exceptions on its own in so far as it relates to burden of proving legal insanity as the essential element of 'special knowledge' envisaged in s. 106. [*Patras Mardi v. State of Assam*, 1982 Cri LJ NOC 7 (Gauh)].

S 106 is not a proviso to the rule that the burden of proving the guilt is on the prosecution but on the contrary the section is subject to that rule [*Shewaram v. R*, A 1939 S 209; *Beeswarajaswami, In re*, A 1967 Mys 210]. So it has been held that s 106 would not absolve the prosecution from the duty of proving that a crime was committed even though it is established that the accused had special knowledge on the point, the deceased being the wife of the accused [*Kanakasabai v. R*, 50 LW 452 : 1939 MWN 883]. When there is no other corroborating evidence, the mere fact that the accused and the deceased were last seen together is not sufficient to convict the accused. [*Trilochan Parika v. State*, 1989 Cri LJ NOC 168 (DB) (Ori) : (1988) 2 Orissa LR 603]. In an explosion in a licensed fire works factory 4 minors died. S 106 does not absolve the prosecution from proving that the 4 minors were engaged or taking part in the manufacture of fire works [*Md Usman v. S*, A 1968 SC 1273]. Merely because an incriminating article is found in a house occupied by a number of persons, the onus cannot be thrown under s 106 upon them to establish their innocence [*R v. Santa Singh, sup*; *Sahendra v. R*, A 1948 P 222]. If any explanation that the accused chooses to give is not proved beyond doubt, he cannot claim to be innocent; but even so, if his explanation shows any reasonable doubt on the prosecution story he would be entitled to an acquittal not because he proves the facts and circumstances referred to, for instance in ss 105 and 106, but because the prosecution has failed to establish his guilt beyond reasonable doubt [*Raghunath v. R*, 21 PLT 1021; see *Hadu v. S*, A 1951 Or 53].

A girl was killed by a lorry carrying a large number of persons. The accused had taken out the lorry in the morning and brought it back in the evening. *Held* that the burden as to who was driving the lorry at the time of the accident was not on accused [*Lachman v. R*, A 1949 C 235]. The observations in this case, however, which suggest that s 106 may affect the onus should be ignored (see cases above and *Matilal v. R*, A 1949 C 586). The fact whether the vehicle involved in an accident was wrongly described as a truck in the proposal form and that was known to the Insurance agent, the non-production of the agent by the Insurance company will lead to an adverse inference. [*Oriental Fire & General Insurance Co. Ltd. v. Smt Sushila Sondhi*, A 1984 NOC 100 (P&H); *Mrs. Kela Devi v. Ram Chand*, A 1986 Del 403, 405].

Even if the fact within special knowledge of the prosecution be a negative one, it is for them to prove it [*Narain v. R*, A 1952 A 621].

If the prosecution has established that the character and circumstances of an act suggest that it was done with a particular intention, then under the *illus* (*a*) it may be assumed that he has that intention unless he proves the contrary [*Jainlal v. R*, 21 P 667 : A 1943 P 82]. If the circumstances are such that they inevitably lead to the conclusion that the accused had formed a design for committing dacoity, then illus (*a*) makes it quite clear that it is for them to prove that the intention was different [*S v. Dhanpat*, A 1950 P 582]. *Illus* (*a*) merely shows that if a man's conduct points to a certain intention it is for him to show that he acted with some other intention. The cases in 22 C 164; 23 M 152; 22 C 391 and 23 A 124 (*infra*) will clearly explain the illustration and the application of this section in criminal cases. Where a prostitute had brought minor girls with the intention of bringing them up as prostitutes it was incumbent on her to prove that she did not intend so to employ them before they were sixteen [*Dy Legal Rem v. Karuna*, 22 C 164; *Khettramani v. R*, 35 CLJ 451; see also *R v. Paper*, 23 M 159, 163; 12 M 273; 18 A 24]. Where persons were arrested at about midnight secretly carrying arms—*Held* that the object for which they were carrying guns and swords concealed, being a fact specially within their knowledge, the burden of proving that their intention was not to commit dacoity was upon them [*R v. Bholu*, 23 A 124; *S v. Randhir*, A 1959 A 727; See also *Balmukund v. Ghanasamram*, 22 C 391, 400, which was a case of lurking house-trespass by night and it was held that the *onus* of proving his intention was on the accused].

Where in proceedings by the Crown, the act charged is lawful if the defendant had a licence, but otherwise unlawful, the prosecution has not to establish the absence of such licence [*R v. Me Nichol*, 11 OR 659 (Can)]. When a statute provides that a person shall not do a certain thing unless he has a licence, the onus is on the defendant to prove that he has a licence as it is a fact peculiarly within his own knolwedge [*R v. Oliver*, (1943) 2 All ER 800]. So, on a charge of driving without licence the onus to prove that defendant had a licence is on him [*Join v. Humphreys*, (1955) 1 All ER 793]. In a prosecution under s 291(2) Calcutta Municipal Act it is for the accused to show that the persons employed were licensed plumbers and if their names are not disclosed, the presumption is against [*Chatterji v. Dinesh*, A 1948 A 581]. In a prosecution under s 19(*1*) Prevention of Food Adulteration Act the fact constituting a *bona fide* belief that the food exposed to sale was not adulterated lie within the special knowledge of the vendor pleading the belief and its burden would be upon him [*Muncpl Board v. Dhian Singh*, A 1967 A 491 (*Mangaldas v. S*, A 1966 SC 128 rel on)]. When levy cement is seized from the accused, the burden is on the accused to prove his plea that it was purchased in open market [*Padmanabha Padhi v. State of Orissa*, 1989 Cri LJ (NOC) 83 (Ori) : (1989) 1 Crimes 84].

An accused is always entitled to hold his tongue; but if he is in a position to explain the only alternative theory to his guilt, the absence of explanation must be taken into account [*Smith v. R*, 43 IC 605 : 19 CrLJ 189]. Where in a case under s 409 Penal Code the accused pleaded that the money was paid to a person who accepted it on behalf of the complainant, it was for him to prove the fact [*Nilambar v. S*, A 1957 A 381].

As to presumption of "*Innocence*" and "*Intention*," see notes to s 114 under those heads.

Alteration of Instruments.—Alteration of documents, the effect of such alteration and the burden of proving alterations, are subjects which do not find place in the Evidence Act. They have been elaborately dealt with in Taylor's Evidence (ss 1819-38), and Whitely Stokes in Anglo-Indian Codes Vol II, p 911 says that the Act should have laid down some rules on the subject. The subject is an important one,

and when there are no distinct rules of evidence on the subject in the Act, the courts are to be guided according to the rules laid down in judicial decisions based upon principles of justice and equity.

Without fraud or wrong a document cannot be materially altered after execution [*Doe v. Catormore*, 16 QB 745]. The general rule in English law is that a party having custody or control of a document produced in evidence must explain the alteration [*Clifford v. Parker*, 2 M&G 909] and that any *material* alteration in such document renders it altogether void unless made with the privity of the parties affected by it *Master v. Miller*, 1791, 1 Sm LC 12th Ed 803; *Rudd v. Bowler*, (1912) 2 Ch 60; *Pigot's case*, 1614, 11 Co Rep 27]. The rule enunciated in one of the earliest cases (*Pigot's case, ante*) was that any alteration by the obligee renders the deed void, though it be immaterial. This doctrine prevailed for some time but ultimately the rule became that immaterial alteration does not vitiate the instrument.

When the instrument, on its production, appears to have been altered, it is a general rule, that the party offering it in evidence must explain this appearance, if he be called upon by the issue raised and if the instrument be not admitted by his opponent under notice; because as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion [*Henman v. Dickson*, 5 Bing 183; *Clifford v. Parker*, 10 LJCP 227; Tay s 1819]. Any material alteration in a written instrument, whether made by a party or a stranger, is fatal to its validity [*Suffell v. Bank of England*, 9 QBD 555], provided it were made after its execution and without the privity of the party to be affected by it, and perhaps, also, with the additional proviso, that the alteration was made while the instrument was in the possession, or at least under the control of the party seeking to enforce it [*Davidson v. Cooper*, 13 M & W 343; Tay s 1820]. In *Davidson's case* it has been recognised that every material alteration of an instrument, *even by a stranger, and without the privity of either party* avoids the instrument and the doctrine has been held to apply in all cases, *where the altered instrument is relied on as the foundation of right sought to be enforced* [*Crookewit v. Fletcher*, 26 LJ Ex 153; Tay s 1827]. It is not, however, on every occasion of a party tendering an instrument in evidence, that he is bound to explain any material alteration that appears upon its face; but only in those occasions, when he is seeking to enforce it, or claiming an interest under it [Tay s 1824]. As to alterations by a stranger to the deed and without the privity of either party, see Tay ss 1827-29. At least with respect to letters and ancient documents, the mere fact of their being in a mutilated or imperfect state will not render them inadmissible provided that a sufficient portion of the instrument remains to explain its general nature and effect, and it can be shown that it is produced in the same state in which it was actually found, though its value as evidence may be affected [*Lord Trimlestown v. Kemmis*, 9 C & F 749, 763; Tay s 1838].

[*Ref Tay ss 1819-38; Steph Art 89; 1 Sm LC 11th Ed 800-09; Phip 8th Ed p 519; Ros NP, 654-56; Nort Deeds 26-42; Jones (Civil), ss 557-66*].

Material Alteration Makes the Whole Deed Void.—When the alteration appears to have been contemporaneously with the document, or if it is made at some subsequent period with the privity of the parties charged and there is no fraud or infringement or evasion of the stamp laws, it does not affect the validity of the instrument, if the alteration is not material [*In re Howgate & Osborn's Contract*, (1902) 1 Ch 451; *Perring v. Home*, 4 Bing 28; *Suffel v. Bank of England*, 9 QBD 555; *Isam Md v. Bai Fatima*, 10 B 487]. The law is not otherwise in India. A party who has the custody of an instrument made for his benefit is bound to preserve it in its

original state, and any material alteration of it will vitiate the instrument, if not done with the consent of the other party [*Gogun v. Dhuronidhur*, 7 C 616 : 9 CLR 257 (**folld** in 10 CWN 788 : 33 C 812); 35 PLR 1901]. The English rule that a material alteration of a deed makes it altogether void was applied and adopted in many Indian cases [*Gogun v. Dhuronidhur, sup*; *Parbati v. Amarendra*, 53 C 418, 428; *Gour v. Prasanna*, 33 C 812; *Christacharlu v. Karibasayya*, 9 M 399 FB; *Mangal v. Shankar*, 25 A 580; *Subramania v. Krishna*, 23 M 137; *Pachkodi v. Krishnaji*, A 1947 N 145 and cases cited *post*]. The rule is summarised thus in Halsbury, 3rd Ed Vol 11 para 599:

> "If an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void. The avoidance, however, is not *ab initio*, or so as to nullify any conveyancing effect which the deed has already had; but only operates as from the time of such alteration, and so as to prevent the person, who had made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound, thereby, who did not consent to the alteration, any obligation, covenant, or promise thereby undertaken or made".

The above rule was quoted by the Judicial Committee declaring that it applies equally in India [*Nathu v. Gomti*, 67 IA 318 : 1940 All 625. For a statement of the law as to material alteration, see *Gour v. Prasanna*, 33 C 812, 816-17 : 10 CWN 788].

A material alteration makes the deed altogether void and plaintiff is not entitled to any decree even though a portion of the claim is admitted. To the same effect are the decisions in *Atmaram v. Umedram*, 25 B 616 : 3 Bom LR 213; *Ramaswamy v. Bhavani*, 3 MHC 347; *Sonajee v. Uttam*, 12 CPLR 33; *Govindasami v. Kuppusami*, 12 M 239; *Bilaso v. Jhabba*, 1885 AWN 269; *Babulal v. Jadunath*, 33 IC 417 (P); *Isac Md v. Bai Fatima*, 10 B 487; *Ganga v. Taja*, 23 IC 596 : 70 PLR 1914; *Pandurang v. Kishan*, 74 IC 20 : A 1923 N 295; *Ganga v. Motiram*, A 1922 N 191; *Kanhaya v. Sitaram*, 81 IC 847 : 20 NLR 76; *Sundar v. Mahadeo*, 87 IC 796 (A); *Madan Pillai v. Authinarayana*, 87 IC 48 : A 1935 M 929; *Dula Meah v. Abdul Rahim*, 28 CWN 70; *Shq Diljan v. Makbul*, 107 IC 475 (C); *Sheo Nayak v. Baban*, A 1937 A 439; *Ram Autar v. Baldeo*, 11 P 782; *Laduram v. Bansidhar*, 16 P 527 : A 1937 P 572; *Parbati v. Amarendra*, 53 C 418, 428 (dictum of PAGE, J, that *Master v. Miller* is part of the law in India); *Surendra v. Krishna*, 43 CWN 191; *Surendra v. Asutosh*, A 1939 C 180; *Janardan v. Prandhan*, A 1940 P 245. Material alteration whether by the plaintiff, or stranger makes the whole deed void [*Hardwar v. Hari*, A 1943 A 24; *Gour v. Prasanna, sup*]. It is void to this extent that the party responsible for the alteration cannot enforce the instrument against the other party; but the latter can enforce it against the former if he can prove the original form of the instrument. The avoidance operates as from the time of alteration [*Bahadurmull v. Nagarmull*, 45 CWN 795].

When in a suit on a balance of account, it was altered by addition of "with interest", the claim even for the principal amount should be dismissed [*Nihal Chand v. Lakhan*, 103 PR 1883 (**folld** in 91 PR 1900)]. When a bond has been fraudulently altered by a plaintiff after execution and registration, (*1*) by the insertion of a proviso that on default of a payment of any instalment, the whole sum shall become due; (2) by alteration of rate of interest from 6 per cent to 12 per cent, the plaintiff's suit on the bond must be dismissed. The principle of the decision in *Master v. Miller*, 1 Sm

LC 796 is a rule of equity and good conscience and applies to the moffusil [*Christacharlu v. Karibasayya*, 9 M 399 FB (**folld in 12 M 239**)]. Where plaintiff made a material alteration in the date of a contract, he cannot be allowed to take advantage of his fraud and cannot recover the amount due thereon [*Chitturi v. Baduramayya*, (1915) MWN 150 : 28 IC 57]. Where plaintiff altered principal as well as interest on a pronote, the court would not grant a decree even for the sum admitted by the defendant [*Barumal v. Dwarka*, 25 IC 667 (A)].

Where a bond for Rs. 15 is found to be altered to Rs. 25 and the plaintiff sues on the altered bond, he cannot recover on it at all—not also on the original debt; that having once brought the suit on the bond, plaintiff cannot make out an independent contract and that *Master v. Miller*, is undoubted law in India [*Dulu Meah v. Abdul Rahim*, 28 CWN 70. "Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not even admissible in evidence (Evidence Act, s. 91)"—*per* RANKIN, J, in *ibid*]. The contrary opinion in *Khosal v. Amiruddin*, 68 IC 33 cannot be regarded as good law. It was cited in *Dula Meah's* case but was laid aside with the remark that the defendant was not represented at the hearing. It was also pointed out by PAGE J, in *Parbati v. Amarendra*, 53 C 418, 428 that *Master v. Miller* is part of the law in India; see also *Janardan v. Pradhan*, A 1940 P 245. In another later case in Calcutta it has also been held that where a deed is materially altered, *e.g.*, a pronote of Rs. 5 to Rs. 10, there can be no decree even for Rs. 5 [*Shk Diljan v. Makbul*, 107 IC 475]. As to whether a suit lies in such a case on an independent contract, see s. 91 (*ante*). When an aditional signature is forged on a pronote, no claim can be brought even against the real executant [*Satyanarain v. Sital*, A 1934 R 345].

Defendants executed a mortgage bond in respect of Rs. 15,000 in favour of plaintiff who interpolated a provision for compound interest before registration without the knowledge of the defendants. It was held that the plaintiff could not recover on the bound on account of the material alteration, but as there were admissions in the bond as to defendant's liability and the parties agreed that the bond should be taken as *security* for the pre-existing debt of Rs. 15,000, the admission might be referred to as evidence of general debt and that plaintiff could on the fats recover on the original consideration in the suit as framed [*Parbati v. Amarendra*, 53 C 418 (see *ante* 91). This case contains an exhaustive discussions on the subject of material alteration]. The rule that no decree can be passed on a document materially altered has no application where the obligation does not arise under the altered instrument and the instrument is produced merely as a piece of evidence, *eg*, a written acknowledgment [*Tapiram v. Jugal*, 92 IC 305: A 1926 N 209].

Alteration to be Pleaded.—To establish variation in a written contract, it must be distinctly pleaded and proved when and how it took place [*Pearee Mohun v. Brojo Mohun*, 21 WR 36]. When defendant has notice of alteration of an instrument, which is the foundation for the action, he should raise the issue by pleading whether the alteration is material and the instrument has become void [*Gour v. Prasanna*, 10 CWN 788: 3 CLJ 363].

Burden of Proof of Alteration.—When an instrument has been materially altered, the law casts a very heavy *onus* on the plaintiff to explain the alteration and to show when it was made [*Kanhaya v. Sitaram*, 81 IC 487: A 1924 N 240; *Narayan Pd v. Ghanshyam*, A ,1961, MP 62; *Ramasamy v. Bhavani*, 3 MHC 247]. In an ordinary case, the party who presents an instrument which is an essential part of his case, in an apparently altered and suspicious state, must fail, from the mere infirmity of doubtful complexion of his proof, unless he can satisfactorily explain the existing

state of the document, But this wholesome rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. [*Khoob v. Moodnarain*, 9 MIA 1: 1 WR 36 PC: 1 Sar 813]. The *onus* is on the person making the alteration to show that the alteration is not material [*Namdev v. Swadeshi V M Ltd*, A 1926 B 49].

As to the party on whom the burden of proof lies in case of alteration of documents see:—*Gogun v. Dhuronidhur*, 7 C 616; *Mohesh v. Kamini Kumar*, 12 C 313; *Sitaram v. Daji Devji*, 7 B 418; *Kali Kumar v. Ganga Narain*, 10 WR 250; *Christacharlu v. Karibasayya*, 9 M 399; *Govindasami v. Kuppasami*, 12 M 239; *Paramma v. Ramchandra*, 7 M 302; *Isac Md v. Bai Fatima*, 10 B 487; *Mangal v. Sankar*, 25 A 580 FB.

Defendant admitted that he signed a pronote of Rs. 300, but alleged that it was altered to Rs. 1,300. Burden of proving the loan of Rs. 1,300 is on the plaintiff [*Hoe Moh v. Seedat*, A 1927 R 319]. The rule does not apply to documents which are not the foundation of the plaintiff's claim [*Atmaram v. Unadram*, 25 B 616; see however, *Syed Golam v. Miyabhai*, 29 B 128; *Harendra v. Uma Churn*, 9 CWN 695]. The burden lies upon the purchaser of equity of redemption to establish that a clause for compound interest was an alteration made subsequent to the execution of the instrument and without knowledge and consent of executant [*Achhutanand v. Ram Nath*, 18 CLJ 354]. When executant admits or has proved against him his signature, but defendant asserts that he did not sign the note in the condition in which it is filed, the burden is on him [*Shaha v. Dulah*, A 1939 R 334].

The presumption under English law is that any alteration, erasure or interlineation appearing upon the face of a deed, in the absence of evidence to the contrary, have been made before the execution of the deed. As to presumption, see *post*, § 114 under "*Documents*".

The law on the subject has been thus stated in Halsbury's Laws of England, 3rd Ed Vol 11 para 598:—"A writing proposed to be executed as a deed may be altered by erasure or interlineation or any other way before it is so executed; and any alteration so made before execution does not affect the validity of the deed".

Material Alteration.—In *Davidson v. Cooper*, 13 M&W 343, LORD DENHAM said:—

> "A party who has the custody of an instrument made for the benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part."

See also *Bank of Hindusthan v. Smith*, 36 LJCP 241. The principle is similar to that of intentional destruction of a document, in which the party is debarred from giving any evidence of its contents. "An alteration is said to be material, when—if it had been made with the consent of the party charged, it would have affected his interest of varied obligations in any way whatever" [Steph Art 89]. "A material alteration is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed" [Hals 3rd Ed. Vol 11. para 599].

Very slight changes in the instrument may be material, and prevents its use as evidence or as the foundation of any claim [Jones, s 569]. Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is a material alteration and it will invalidate the instrument against all persons not consenting to the charges [*Achhutanand v. Ram Nath*, 18 CLJ 354: 21 IC 79; *Lakshmammal v. Narasimha-raghava*, 38 M 746: 25 MLJ 572; *Krishna v. Nagendrabala*, 34 CLJ 333; *Abdul Hossein v. Goolam*, 30 B 304; *Gour v. Prasanna*, 33 C 812. Many cases discussed in the last mentioned case]. The test of material alteration is not necessarily whether the pecuniary liability has been increased by the change; it is of no consequence whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. The important question is whether the integrity and identity of the contract have been changed. Alteration in interest is material alteration [*Gour Ch v. Prasanna*, 33 C 812; *Godla v. Narisamulu*, 3 R 227: 89 IC 657; *Madan v. Athinarayana*, A 1925 M 929]. The principle with respect to negotiable instruments regarding alteration applies equally to other instruments [see *post* "*Alterations in Negotiable Instruments.*"].

The mere fact that the material change sought to be made was in relation to a penal clause in the instruments which could not be enforced even if unaltered, could not make any difference [*Oodeychand v. Bhaskar*, 6 B 371].

The following are material alterations:—Alteration in interest [*Godla v. Narisamulu; Madan v. Authinarayana, sup*]. Addition of "with interest" [*Nihal v. Lakhan*, 103 PR 1883]. Addition of interest in a pronote without interest [*Sundar v. Mahadeo*, 87 IC 796: A 1925 A 282]. Addition of "December" after the period fixed in a contract for despatch [*Bahadurmull v. Nagarmull*, 45 CWN 795]. Alteration of date of bond with fraudulent object [*Govindasami v. Kuppusami*, 12 M 239; *Kader v. Gamad*, 1 Bur LJ 244; *Tahilram v. Blackwell*, 19 IC 616: 6 SLR 228: *Balmukund v. Parshotam*, A 1939 L 548; *Karam v. Narain*, 91 PR 100; *Hardwar v. Hari*, A 1943 A 24]. Alternation in date and of certain words (by making holes in documents) is not always a material alteration, irrespective of its effect upon the rights, liabilities or the legal position of the parties [*Nathu v. Gomti*, 67 IA 318: 45 CWN 29: 1940 All 625]. Addition of a contracting party or alteration of date of payment of money, or of consideration of its payment [*Mohesh v. Kamini*, 12 C 313]. A fraudulent attestation, material or otherwise, vitiates the deed wholly [*Kali Kumar v. Ganga*, 10 WR 250; *Re Howgate*, 1902, 1 Ch 451]. Addition of a false attesting signature in a bond even though the law does not require attestation [*Sitaram v. Daji*, 7 B 418—CONTRA: *Mahesh v. Kamini*, 12 C 313; 1 MLJ 388; 15 B 44; 15 M 70].

Addition of a name as an executant [*Karam v. Narain*, 35 PLR 1901: 91 PR 1900; *Satya v. Sital*, A 1934 R 345]. Addition of a clause for compound interest [*Achhutanand v. Ramnath*, 18 CLJ 354—CONRTA: *Nau Nihal v. Mangal*, A 1934 L 543]. Alteration of endorsement of payment of Rs. 1,500 on a bond into Rs. 100. The bond could not be made the basis of a suit for recovery of balance [*Bilaso v. Jhabba*, 1885 AWN 269]. Insertion of a false date on a pronote to save bar of limitation [*Namdev v. Swadeshi V M Ltd.*, 28 Bom LR 944: A 1926 B 491] or the striking out the name of a creditor in order to extend limitation [*Pachkodi v. Krishnaji*, A 1947 N 145]. Addition of two attesting witnesses subsequent to the execution of an unstamped pronote in order to convert it into a bond, invalidates the instrument and destroys the right of action [*Mangal v. Jaswant*, A 1930 959: 130 IC 522].

As to the test for determining material alterations and its effect, see *Gour Ch v. Prasanna*, 33 C 812: 10 CWN 788; *Basiruddin v. Suraj Kumar*, 12 CWN 716; *Ganga Ram v. Chandan*, 4 A 62; *Oodey Chand v. Bhaskar*, 6 B 371; *Subramania v. Krishna*, 23 M 137. A material alteration fraudulently made by a stranger while the deed is in possession of a party does not disentitle the party from relying upon it [*Kanchan v. Hari Pd*, A 1951 N 379].

A material alteration, however, does not render the document void for all purposes, and the documents may be used as proof of some right or title created by or resulting from its having been executed [*Ramasamy v. Bhavani*, 3 MHC 247; *Tahilrum v. Blackwell*, 19 IC 616 (S)]. It can be used for proving a collateral fact [*Hutchins v. Scott*, 2 M & W 809; *Ward v. Lumley*, 29 LJ Ex 322; *Agri Cattle Ins Co v. Fitzgerald*, 16 QB 432]. In *Ld Falmouth v. Roberts*, 9 M & W 472, PARKE B said: "The rule of law applies where the obligation is by reason of the instrument; here the obligation is by reason of the parol contract of the parties, quite independent of the subscription of that paper, and arising from the occupation of land upon all the terms of that instrument which are applicable to a tenancy from year to year, as to which an alteration in the terms of years is wholly immaterial". In *Hutchins v. Scott, supra*, LORD ABINGER Said: "I do not think, when the case is rightly understood that the question arises, whether an alteration even by the plaintiff ought to avoid agreement..... It may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact".

It has been held in older decisions in America that if the alteration be made fraudulently it makes little difference whether it be a material or immaterial part, for in either case the person has transgressed the rule for the prevention of fraud, and having fraudulently destroyed the identity of the instrument, he must accept all the consequences [*First Nat Bank v. Wolff*, 79 California 69; *Hunt v. Gray*, 10 Am Rep 232]. This view is thus expressed by LORD KENYON: "No man shall be permitted to take the chance of committing a fraud without running risk of losing by the event when he is detected". The later and better rule is that when an alteration is wholly immaterial and in no way changes the liability of the parties, it is also immaterial with what intent such alteration in the fact was made. An immaterial alteration is not made material simply by a fraudulent intent. The motive for the act cannot be enquired into; unless the act itself affects materially the rights of the parties [*Vogle v. Ripper*, 85 Am Dec 298 and other cases in Jones s 558]. Several decisions here are in accordance with the later view.

Immaterial Alteration.—The insertion of such words as the law would supply, or such as are altogether inoperative, or such as are necessary to correct an obvious error [*Black v. Gompertz*, 86 BR 860], will not constitute a material alteration, even though made without consent [Tay s 1823]. Immaterial alteration in a completed document does not vitiate the instrument, *e.g.* when it serves only to state explicitly what is already implied in the document [*Tikamdas v. Ganga*, 11 BHC 203]. Material alteration made with the consent of parties would not vitiate when no question arises of evasion of the stamp laws [*Isac Md v. Bai Fatima*, 10 B 487]. When a clause in a document reserving a claim under a former *kachat* was interpolated, it did not vitiate the contract sued upon. The fraudulent alteration must be relevant to the transaction sought to be enforced and should not relate to a matter foreign to it [*Govindasami v. Kuppusami*, 3 MLJ 266; see *Ede v. Kanto*, 3 C 220].

A letter of guarantee was given by *A* after the loan had already been given by the bank to the principal debtor *S*. The bank sued *A* upon this letter of guarantee. *A* raised the contention that as there was a material alteration of the letter of guarantee,

he was not liable. *Held* that the defence was inapplicable as the document was not altered while in possession of the bank or its agent, but was altered by *S* who was at that time acting as the agent of *A* (*Anirudhan v. Thomco's Bank*, A 1963 SC 745 [*Hong Kong & SB Corpn v. Lo Lee Shi*, 1928 AC 181 **relied** on)].

An alteration in good faith to carry out the original intention of the parties does not vitiate the instrument [*Ananda v. A*, 35 IC 182: 25 CLJ 155; *Krishna v. Nagendrabala*, 34 CLJ 333: 25 CWN 942: 66 IC 694; *Surendra v. Ashutosh*, A 1939 C 180]. Thus, a document partially blank when signed and afterwards filled up with words already agreed upon, was held binding [*Ahed Hossein v. Lalla Ramsaran*, 11 WR 216]. Interpolation of survey number after execution and attestation of mortgage bond is not material alteration [*Krishna v. Ponnappa*, 97 IC 676: A 1926 M 1060].

Where a pronote contains provisions as to interest and the rate is also mentioned, the interpolation of "with interest" is not material alteration [*Tulsiram v. Ramsaran*, 49 MLJ 132: 27 Bom LR 777: 86 IC 551 PC: 29 CWN 965]. Alteration by addition of names of attesting witnesses to a document not required by law to be attested is not a material alteration [*Mohesh v. Kamini*, 12 C 313 (**folld** in *Wazeerali v. Suryanarayana*, 1 MLJ 388); *Venkatesh v. Babu Subroya*, 15 B 44; *Ramayyar v. Shanmugam*, 15 M 70—CONTRA: *Sitaram v. Daji*, 7 B 418]. Alterations of date of execution by mortgagor with consent of mortgagee after four months, in order to effect registration is not material alteration [*Gopal v. Surendra*, 16 CWN 585]. When the date was altered every time the acceptor of a bill was given fresh time, the entry as to date was a mere memorandum and it was not a material alteration [*Cox & Co v. Pestonji*, 50 B 656: 28 Bom LR 1264]. Alteration in a written acknowledgment, which is intended to save the bar of limitation and not to give a right of action, does not vitiate the document [*Atmaram v. Umedrum*, 25 B 616: 3 Bom LR 213].

In a suit for a certain amount, defendant had acknowledged liability for it by signing his name in plaintiff's book over an eight annas stamp. The indebtedness was admitted to defendant; but it was found that there was an interpolation as to payment of a very small sum as interest after defendant had signed—*Held* that there was no suit upon any altered instrument. The acknowledgment had not been altered and the entry was only put in as an acknowledgment of defendant's liability [*Harendra v. Umacharam*, 9 CWN 695]. When a document containing terms of a contract was materially altered by the plaintiff and the payment of advance was acknowledged on the same piece of paper by the defendant—*held* on breach of contract by defendant that though plaintiff cannot recover damages, he is entitled to recover advance under s 65 of the Contract Act [*Kandregula v. Surayya*, 43 M 703: 55 IC 697: 38 MLJ 256]. Where a bond being signed by some of the intending executants, the addition of the signature of others is not such a material alteration as to vitiate it against him who did execute it [*Ram Ch v. Ruprao*, 64 IC 726 (N)]. A document is not void by the mere addition of an executant's name. A suit not based on a materially altered document which is tendered as evidence of a pre-existing debt, will not fail owing to its alteration [*Babulal v. Jadunath*, 33 IC 417 (P)].

Because a man alters a figure in a document it is no forgery, nor is a document materially altered because there is something in a different ink to the rest of the document [*Bichay v. Behari*, 43 IC 488: 11 Bur LT 1]. Alteration of figures for the year in a pronote is only correction of a clerical error [*In re Jajodia Cotton Mills Ltd*, 31 CWN 683]. Affixing of stamp to a previous entry by debtor is not material alteration [*Fateh v. Surja*, A 1939 L 486; *Beliram v. Bhagwan*, 40 PLR 1901].

No Amendment in Case of Alteration.—When a suit is brought upon a document fraudulently altered, no court ought to allow an amendment to enable the plaintiff to succeed upon it in its original state [*Gogun v. Dhuronidhur*, 7 C 616 (**follld** in 9 M 399 FB); *Christacharlu v. Karibasayya*, 9 M 399; *Harichand v. Govind*, 28 CWN 73: *Alderson v. Langdale*, 1 LJKB 273]. Even if plaintiff were permitted to amend the plaint and to sue upon the bond in its original form with the altered provisions expunged, it would not avail him, for in circumstances such as those obtaining in this case the law will not allow the bond to be admitted in evidence for the purpose of enforcing the provisions thereof, or being used as the foundation of a cause of action [*per* PAGE J, in *Parbati v. Amarendra*, 53 C 418, 429: 96 IC 97]. Where alteration is innocent and the plaint is also based on the original cause of action, amendment may be allowed [*Ravjibhai v. Ranchhod*, A 1930 B 66: 126 IC 865].

Alteration and Independent Cause of Action.—Where there is no cause of action apart from the admissible document such as in *Shk Akbar v. Shk Khan*, 7 C 256, the whole claim fails. Where the alteration is fraudulent, the court will not allow plaintiff to fall back on the original cause of action if any. But when the alteration, though material is innocent and the plaint is based on the original cause of action as well as on the altered document, the claim, if properly proved can be allowed in the original cause of action [*Ravjibhai v. Ranchhod*, A 1930 B 66: 126 IC 865. See s 91 *ante*].

Alteration in Negotiable Instruments.—As to bills of exchange, *hundis*, etc., s 87 of the Negotiable I Act enacts that "any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made to carry out the common intention of the original parties; and any such alteration, if made by an indorsee, discharges an indorser from all liability to him in respect of the consideration thereof". See also ss 88, 89. These provisions in the N I Act are somewhat similar to s 6 of the Bills of Exchange Act (44 & 45 Vic c 61). Clause (2) of that section says that "in particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place payment without the acceptor's assent". Any alteration in negotiable securities, as to the date [*Outhwaite v. Luntley*, 16 RR 771], amount or time of payment [*Bowman v. Nichol*, 5 TR 537]; the addition of a claim for a specific rate of interest [*Warrington v. Early*, 96 RR 789]; the insertion of words to limit or vary the consideration as originally expressed [*Knill v. Williams*, 10 RR 349]; the introduction of a place for payment, though the acceptance still remains a general acceptance [*Macintosh v. Haydon*, 27 RR 757]; the substitution of one place for another [*Tidmarsh v. Grover*, 14 RR 563]; the converting a joint into a joint and several, responsibility [*Perring v. Hone*, 4 Bing 28]; the affixing an additional maker's name to a joint and several note after it has issued [*Gardner v. Walsh*, 103 RR 377]; or, it seems, the cutting off the signature of one of several co-promisors in joint and several note [*Mason v. Bradley*, 63 RR 678];—will, at common law, as against any party not consenting thereto, invalidate the instrument, even in the hands of an innocent holder [Tay s 1822]. Alteration of place (converting an inland bill into a foreign bill) is material alteration [*Koch v. Dicks*, A (1933) 1 KB 307].

The fact that an alteration does not ultimately involve any change in the rights and liabilities of the parties is not very germane to the consideration of the question whether it amounts to a material alteration within s 87, N I Act [*Subramania v. Porathana*, A 1942 M 709(2)]. It has however been held that s 87 would only apply to cases of fraudulent alteration by a party and to cases where due to his negligence it becomes possible for a stranger to make the alteration [*Gouro Ch v. Krishna*, A 1941

M 383: 1941 Mad 295]. An alteration in the number of a Bank of England note avoids the note [*Suffell v. Bank of England*, 9 QBD 555]. As to meaning of material alteration see *Lakshmammal v. Narasimha*, 38 M 746. Addition of a new maker is doubtless a material alteration. But where a pronote is signed by two persons as makers, and whose names are also mentioned in the body of the note, the adding of a third person's name as a maker is not a material alteration [*Ma Kin v. Adagappa*, UBR 1902-03 Civil, N I 1]. Alteration of date is material alteration [*Kader v. Gamad*, 1 Bur LJ 244; *Namdev v. Swadeshi V. M Ltd*, 28 Bom LR 944]. But insertion in a pronote after execution of a date entered in the counterfoil and inadvertently omitted is not material [*San Pe v. Mg Kyan*, LBR 1903-04 Vol II, 324]. Alteration in *hundi* reducing the period of payment is material [1 L 262: 55 IC 610]. Alteration of due date on the face of bill is material, but alteration of the marginal note as to due date does not affect the bill [***Pestonji & Co v. Cox & Co***, 55 IA 353: 49 CLJ 32 PC: 113 IC 124 (*Cox & Co v. Pestonji & Co*, 50 B 656 **affirmed**; *International Banking Cor v. Pestonji & Co*, 49 B 351 **overruled**)]. Principle of s 87 applies only to instruments negotiable within s 13 [20 IC 1008: 13 ALJ 563]. Alteration of name of payee so as to make him an altogether different person is material alteration under s 87 N I Act [*Kamal v. Nizamuddin*, 20 ALJ 987]. A forged endorsement of receipt of amount due is not a material alteration [***Chandrakutti v. Kunhi***, A 1936 M 616]. As to the effect of additions upon a pronote by way of memorandum of record of the terms or by way of fresh agreement or by way of alteration of instrument in material aspect, see *Johurmal v. Chettyar Firm*, 14 R 29. When a pronote becomes void on account of material alteration s 65 Contract Act cannot be invoked [*Rangaswami v. Doraiswami*, A 1957 M 715]. When defendant admits receipt of certain amount, but pleads that the instrument is void on account of material alteration, the plea does not amount to an admission of claim to such amount [*Narayan Pd v. Ghanshyam*, A 1961 MP 62].

S. 107. Burden of proving death of person known to have been alive within thirty years.—When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

S. 108. Burden of proving that person is alive who has not been heard of for seven years.—[1][Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [5][shifted to] the person who affirms it.

SYNOPSIS

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Same: [Presumption of Life and Death] ...	1556	S. 107 and Divorce ...	1561
Presumption of Survivorship [Commorientes] ...	1557		

1. Substituted for "When" and "on" respectively, by s. 9 IE Act (Am) Act 18 of 1872.

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Ss. 107 and 108 Supersede the Rules in Hindu and Mahomedan Law ...	1561	Disappearance But Without Proof of Lapse of Seven Years. [Presumption of Death in Such Cases] ...	1562
When is Presumption Not Applicable ...	1562		

COMMENTARY

Principle and Scope.—These two sections and s 109 are founded on the presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence either direct or circumstantial. Taylor says: "Other presumptions are founded on the experienced *continuance*, on immutability, for a longer or shorter period of human affairs. When, therefore, the existence, of a person, or personal relation, or a state of things, is once established by proof, the law presumes, that the person, relation or state of things continues to exist till the contrary is shown, or till a different presumption is raised, from the nature of the subject in question" [Tay s 196]. The principle of the continuance of things in the state in which they have once existed, has been embodied in s 114, *illus* (*d*).

The principle discernible from a combined effect of in Sections 107 and 108 provisions has been summarised in the book, Sir John Woodroffe and Amir Ali's 'Law of Evidence,' 15th Edn. (1991) at pages 672-673 thus :

"The principle of Section 107 is that when once a state of things is shown to exist, there is in law a presumption of its continuance for a period for which such state of things ordinarily lasts. This section is merely a deduction from this presumption. If a person is shown to have been alive within thirty years of the date on which the question whether he is alive or dead arises, there is a presumption of his being alive, and the burden of proving that he is dead lies on him who asserts that he is dead. But this presumption is rebutted, if it is shown that he has not been heard of for seven years by those who if he had been alive, would naturally have heard of him; and, on such proof being given the burden of proving that he is still alive, is, under Section 108, upon those who assert that he is alive. The presumption under Section 108 is as to the fact of death at the time the question was raised and not at any particular antecedent time. There is no presumption also to the cause and circumstances of the death.

Section 107 deals with the presumption of continuation of life, whereas Section 108 deals with the presumption of death. Section 108 enacts a proviso to Section 107 by specifying that when a person was continuously absent for seven years and he was not heard by his friends and neighbours he may be presumed to have died and the burden of proving that he is alive shifts on the person that he is alive. The presumption of continuance of life under Section 107 ceases at the expiration of seven years from the period when the person in question was last heard of. The presumption under Section 107 will apply when the question is whether a person was alive or dead and not where the question is whether the person was alive or dead on a particular date."

The Judicial Committee of the Privy Council, in the leading case *Lal Chand Marwari v. Mahant Ramrup Gir*, A 1926 PC 9, stated the law authoritatively thus :

"There is only one presumption, and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. *There is no presumption at all as to when he died.* That, like any other fact, is a matter of proof.....

Now, upon this question there is, their Lordship are satisfied, no difference between the law of India as declared in the Evidence Act and the Law of England (*Rango Balaji v. Mudiyeppa*) and searching for an explanation of this very persistent heresy, their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from *In re Phene's Trusts run as follows* :

> 'If a person has not been heard of for seven years, there is a presumption of law that he is dead : but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.'
>
> Following these words, *it is constantly assumed*—not perhaps unnaturally—that where the period of disappearance exceeds seven years, *death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This, of course, is not so.* The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, *it described the period of disappearance as one 'of not less than seven years'.*"

In *Halsbury's Laws of England*, 4th Edn., Vol. 17, page 85, paras 115 and 116 the law is stated thus :

> "115. *Presumptions of life and death.*—There is generally no presumption of law by which the fact that a person was alive or dead on a given date can be established, but the question must be decided on the facts of the particular case.
>
> Certain exceptions to this general rule are provided by statute, and, in addition, where there is no acceptable affirmative evidence that a person was alive at sometime during a continuous period of seven years or more and it is proved that there are persons who would be likely to have heard of him over that period, that those persons have not heard of him, and that all due inquiries have been made appropriate to the circumstances, there arises a rebuttable presumption of law that he died sometime within that period.
>
> 116. *Proof of life or death at a particular time.*—He who asserts that a person was alive on a given date, or dead on that date, must prove the fact by evidence, since there is no presumption of continuance of life, and, generally, no presumption of death at a particular time. Where there is insufficient evidence in support of the fact alleged, the party bearing the burden of proof will fail.....
>
> The question of whether a person was alive or dead at a given date will be decided on all the evidence available at the date of the hearing." [*Jayalakshmi Ammal (N) v. R. Gopala Pathar,* A 1995 SC 995].

S 107 deals with the *presumption of continuance of life* and s 108 deals with the *presumption of death.* If, when a person's existence is in question, he is shown to have been living at a given time within 30 years and there is nothing to suggest the probability of his death, the continuance of life will be presumed, and the person who asserts the contrary has the burden to prove it. This is embodied in s 107. "In numerous instances the courts have refused, in the absence of proof to assume the

death of persons proved to have been alive at some former time even after a long interval had passed, holding that in such cases the burden of proof rests with those who assert the death [*In re Tindall's Trustee*, 30 Beav 151; *Surjit v. Jhujhar*, A 1980 P&H 274]. Thus where a witness gave his deposition in 1682, the court held in 1732 that, in the absence of any proof to the contrary, the continuance of life would be presumed; and the court rejected the deposition [*Benson v. Olive*, 2 Str 820]. But the court ought not to assume that which in view of the usual duration of human life is practically impossible" [*Spring v. Moale*, 92 Am Dec 698; Jones s 60; see Tay s 200].

In view of the above presumption of continuance of life, it was thought necessary to provide for the counter-presumption where a person's death would seem more likely from the nature and circumstances of the case than the continuance of life. So it has been ruled that where a person is continually absent from home for a period of seven years, unheard of by persons (if any) who would have naturally received intelligence from him, he is presumed to be dead [*Ramrati v. Dwarika*, A 1967 SC 1134; *Pat Sharpe v. Dwijendra*, 68 CWN 654] and the burden of proving that he is alive is shifted to the person who affirms that he is not dead. It is a rebuttable presumption. The presumption is embodied in s 108 which is a proviso to s 107. S 108 does not require that the court should hold the person dead at the expiration of the seven years therein indicated, but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it [*Narayan Bhagwant v. Srinivas*, 8 Bom LR 226; *Gopal v. Manaji*, 47 B 451]. S 108 is an exception to s 107. If a case comes within the four corners of s 108, it is taken out of s 107 [*Shankarappa v. Shivarudrappa*, A 1963 Mys 115]. The period of 7 years was inserted in the old statute of Charles II, concerning leases for lives, and it has since been adopted by analogy, in other cases (Tay s 200). The person relying on such presumption must prove reasonable inquiries [*Chipchase v. C*, (1939) 3 All ER 895].

Both s 107 and its proviso s 108 are based on the English law upon the question. The presumption of continuance of life (in s 107) is also made under the English law though no statutory period of 30 years has been fixed. The presumption of life will continue there for a period exceeding half a century (see Tay ss 198-200).

The period of seven years appears to be unduly long in view of the conditions of the present time relating to swift and easy means of communication and of inquiry. In certain cases, *eg* distribution of an absentee's estate, payment of insurance money to the beneficiary, remarriage and avoidance of bigamy &c the rigid application of the seven years' rule of thumb may create considerable hardship. If a person leaves by an aircraft which does not arrive at its destination long after it was due and there is no trace of it on account of a crash somewhere on a mountain or into the sea, should not his death be presumed before the end of seven years because his body was not found? Even if his life was spared by some fortuitous circumstance, he could have communicated the fact to his relations or friends within a few days. In such and other special cases, the law should allow presumption of death before the lapse of seven years and courts should be invested with such a discretion (see *post*: "*Disappearance but without proof of lapse of seven years*").

It should be remembered that the presumption extends merely to the *fact* of death at the expiration of seven years; but not to the *time* of death at any particular period, *ie* there is no presumption that the death took place after the end of the period of seven years or at any other particular time within that period. A person asserting that death occurred at any particular time must prove it like any other fact (*post*). The mere fact that a person has not been heard of for seven years does not raise the presumption of death where the circumstances are such that it is not likely that he

would or could have communicated with his home even if he were alive. The presumption arises only when he has not been heard of by those "who would have naturally heard of him had he been alive". Thus, in the case of a wife who gave her age as 35 and it appeared that her husband was alive 30 years ago, s 108 does not apply and the burden of proof of his death was on her as a wife who left her husband and is in keeping of another is not one of the persons who would naturally hear from him, if he were alive [*Kamtabai v. Umabai*, 117 IC 209: A 1929 N 127]. In *Bowden v. Henderson*, 2 Sm & G 360, SIR JOHN STUART VC, said:

> "The principle on which the court presumes the death of a person of whom no tidings have been received for a long period of time, is this—that if he were living, he would probably have communicated with some of his friends and relatives. It is a conclusion which the court draws from the probabilities of the case. It is quite clear, therefore, that, when no such probability exists, the presumption cannot arise".

It is erroneous to seek to apply both s 107 and s 108 to one and the same case, in the same way as a person cannot at the same time both be alive and dead. S 108 comes as a proviso to s 107. To a case where the proviso is attracted, s 107 can have no application [*Sarojini v. Sivabandan*, A 1956 T-C 129].

Same: [Presumption of Life and Death].—There is a presumption in favour or continuance of human life [*Tani v. Rikhiram*, 1 L 554; *Wilson v. Hodges*, 2 East 312]. This presumption of continuance is not of law but of fact. Though there is no presumption of law as to the continuance of life, an inference of *fact* might legitimately be drawn that a person alive and in health at a certain time was alive a short time after [*Lapsley v. Grierson*, 1 HLC 498; *R v. Lumley*, LR 1 CCR 196]. This doctrine was further extended and proof that *A* was alive in a certain years being held evidence that *A* was alive eleven [*R v. Willshire*, 6 QBD 336] and seventeen years later [*R v. Jones*, 15 Cox 284; Phip 11th Ed p 130]. There is no presumption of law as to the continuance of life, but each case must be determined on its own facts [*Macdarmaid v. Att-Genl*, (1950) P 218].

Under Section 108, it is for the person who claims that the person who is believed to be dead is alive, to prove the same [*Naga Laxmi v. Thirugnan Sambandam di as Gnamam*, A 1995 Mad 120]. There is no presumption under seciton 108 that a person died on a particular date or on expiry of seven years [*Jaya Lakshmi Ammai v. R. Gopala Pathar*, A 1995 SC 995, 999]. (1) Oridinarily a person unheard of for the statutory period shall be presumed to be dead on expiry of seven years and not earlier. (2) Section 108 of Indian Evidence Act, 1872 is not exhaustive. It is permissible for the court to raise a suitable presumption regarding date of presumed death depending upon the attendant circumstances and other reliable material on record. In other words, no rule of universal applicability can be spelt out regarding presumed date of death. [*Subhash Chandra Wadekar v. Union of India*, A 1993 Bom 64]. Where a person was in the company of his wife and children on 10-2-1992 and had not been heard since then but seven years had not elapsed, it cannot be presumed that he was dead, merely on account of the fact that he was kidnapped on the said date [*Chanda Devi v. Shrinath Sharma*, A 1993 Pat 105, 106].

The rule in s 108 being a *rule of evidence*, it has superseded the Hindu and the Hanafi laws as to the time for presumption of death [see *Mazhar v. Budh*, 7 A 297; *Ponduri v. Jaladhi*, 43 MLJ 725: 71 IC 305]. Section does not prevent the court from finding on circumstantial evidence that the death of a person occurred before the expiry of seven years from the date of disappearance [*Osman Bin Bachit, Re*, (1997) 4 Malayan LJ 445 (Melaka HC)]. There is no presumption as to the time of death

[*Osman Bin Bachit, Re,* (1997) 4 Malayan LJ 445 (Melaka HC)]. There is no presumption of law as continuance of life [*Gun Soon Thin, Re,* (1997) 2 Malayan LJ 351 (Johor Bahru HC)]. Substitution of representative on the basis of presumption of plaintiff's death under s 108 [*Jyotirmoy v. Biswanath*, 53 CWN 713]. No suit lies for a declaration that a person not having been heard of for over 7 years was to be deemed to be dead [*Freemantle v. F*, 52 Bom LR 641].

Presumption of civil death or fictional death under s 108 tantamounts to physical death in the eye of law for giving the widow a right of suit [*Parikhit v. Champa*, A 1967 Or 70]. The only presumption under this section is that a person is dead, if he has not been heard of for seven years and this presumption only arises when a question is raised in a court etc., as to whether a person is alive or dead. Such a presumption can earliest be drawn when a dispute is brought in a Court or proceedings [*Smt Mathru v. Smt Rami*, A 1986 Him Pra 6, 8: ILR (1985) Him Pra 193]. This section is only a rule of procedure to be followed when the question arises before a court whether a person is alive or dead. The Revenue officials cannot issue certificates of death or widowhood based on such presumption [*N Prem Ananthi v. Tahsildar, Coimbatore*, A 1989 Mad 248, 251].

[*Ref Tay ss 196, 198-201; Best ss 408, 409; Phip 8th Ed pp 98, 664; Powell, 9th Ed pp 411, 412; Jones ss 60-63; Wig ss 2531-32; Hals 3rd Ed Vol 15 paras 623-626*].

Presumption of Survivorship [Commorientes].—Connected with the subject of presumption as to continuance of human life is the presumption as to survivorship which may assume considerable importance with regard to devolution of property when two or more persons meet their death in a common calamity or disaster, known as *commorientes* (*e.g.* ship-wreck, train-collision, air-crash, earthquake, conflagration, battle, bomb explosion &c). "The living succeed to the dead" and in cases like these rights of succession (testate and intestate) depend on the survivance of one person by the other. Direct proof as to who survived the other or others is almost impossible in commorientes. To meet the difficulty, in Roman law and in French law (Code Napoleon, Arts 720-22) as also in some other foreign Codes, recourse is had to artificial presumption of survivorship resulting from strength, age and sex. The presumption is based on what LORD MACMILLAN called "biological considerations" (in *Hickman v. Peacy*, (1945) 2 All ER 215, 221 *post*), *ie* the stronger struggled longer against death than his companion. For instance, a male would struggle longer against death than a female, a grown up son than his aged father, a person of mature age than one under puberty. The English Common law did not recognise any presumption of this kind, but treated it as a question of fact to be determined by evidence and a person asserting that *A* survived *B* has the burden of proof on him (*Wing v. Angrave*, (1860) 8 HLC 183: 30 LJ Ch 65; *Re Phene's Trusts*, 1870, 5 App Ch 139; *In re Benyon*, 1901 P 141: 84 LT 271; *In re Roby*, 1913 P 6; see Tay ss 202, 203; Best s 410; Steph Art 99). In *Wing v. Underwood*, 4 De GM & G 633, the LORD CHANCELLOR said: "We may guess or imagine, or fancy; but the law of England requires evidence". No two persons can die *co instanti* (*In re Fisher*, (1915) 1 Ch 302. As to this, see the discussion in *Hickman v. Peacy, sup*).

In *Wing v. Angrave, sup* it was held that if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined, the onus of proof being on the person asserting the affirmative. The American law appears to be the same as in England *Young W C Home v. French*, 187 US 401; *St John v. Andrews Institute*, 191 NY 254; *Newell v. Nichols*, 75 NY 78: *Cowman v. Royers*, 73 Mary 403]. The laws in different countries were reviewed in *Hilden-*

brandt v. Ames. 66 S W 128 (see also Wig 2532; Jones s 64)]. The result is that in the absence of proof showing the order of death, the fiction is adopted that they died at one and the same time and succession and distribution take the same course as if death had been simultaneous.

In order to remedy this unsatisfactory state of law which may result in the State getting the entire property of a man by escheat, it has been enacted by s 184 of the Law of Property Act, 1925 (c 20) that: "In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court) for all purposes affecting title to property, be presumed to have occurred in order of seniority and accordingly the younger shall be deemed to have survived the elder". See also s 209(2), *ibid.* "Subject to any order of the court" means that the presumption is rebuttable. Where husband and wife were found dead as the result of a bomb dropped during an air raid the evidence was insufficient to rebut the statutory presumption [*Lindop v. Reynold*, (1942) 2 All ER 46]. The question arose whether the statutory presumption is limited to cases in which the court finds that deaths took place consecutively, but it is uncertain as to which death took place first; or it applies if the circumstances are such as to justify an inference that all of them did simultaneously. The House of Lords decided in favour of the latter holding that where two persons perish in a common calamity and there is no evidence as to who died first, it is necessarily left uncertain whether they died consecutively or simultaneously. In such cases the death shall be presumed to have occurred in the order of seniority and the younger shall be deemed to have survived the elder [*Hickman v. Peacy, sup* (1944) 1 All ER 81 CA **reversed**)]. As to the degree of evidence needed to remove the presumption under the English Act, see *Bate v. Bate*, (1947) 2 All ER 418.

In India there was no presumption of survivorship arising from age or sex, nor was there any legislative enactment sanctioning it before the Hindu Succession Act, 1956. In Oudh it was held that when two brothers died in a fire, there is no presumption that the younger survived the elder [*Neksi v. Jwala*, A 1934 O 101: 9 Luck 461]. So also in Sind where mother and father died in earthquake [*Gopibai v. Chuhormal*, A 1939 S 234]. In a Bombay case it was observed that where the evidence is evenly balanced, the probabilities are that the younger survived the elder [*Yeknath v. Laxmibai*, 47 B 37, 41: A 1922 B 347; see *Monorama v. Rama*, A 1957 M 269. This is not on account of any presumption of survivorship, but the ordinary presumption arising out of the comparative strength or energy of the persons may be considered along with the other facts connected with their death]. In Calcutta it has been held (**relying** on *Wing v. Angrave*, *ante*) that the question to be disposed of is one of fact. Where evidence of survivorship is lacking or evidence establishes a perfect equipoise, the determining factor should be the rule regarding the burden of proof [*Digendra v. Kuti Mia*, A 1944 C 132: 77 CLJ 209]. In the absence of evidence as to who died first, there is no presumption of survivorship. The burden is on the person who asserts the affirmative [*Agha Mir v. Mir Mudasir*, 71 IA 171: 49 CWN 52: A 1944 PC 100]. The question is purely one of evidence.

In the case of simultaneous death s 21 of the Hindu Succession Act 1956, now provides for the application of the presumption until the contrary is proved that the younger survived the elder. It should not therefore apply to succession of property of persons other than Hindus. Presumption under s 21 is that testator being elder died first. S 21 is retrospective and also applies to testamentary succession [*In re Mathabir*, A 1963 Pu 66].

Nature of Presumption of Life and Death. [No Presumption as to Time or Date of Death].— At what time within the period of 7 years, a person has died is not a matter of presumption, but of evidence and the onus of proving that the death took place at any particular time within 7 years lies upon the person who claims a right to the establishment of which that fact is essential [*Hemant Kishore v. Brij Raj Kishore*, A 1998 All 328, 330]. If a person is not heard of for seven years there is a presumption of the *fact* of death at the expiration of seven years, but the exact *time* of death is not a matter of presumption but of evidence and the *onus* of proving that death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is no presumption that death took place at the close of seven years. [*Lalchand v. Ramrup*, 42 TLR 159: 159 IA 24: A 1926 PC 9: 30 CWN 721: 50 MLJ 289: 5 P 312; *Appula v. Venkateswara*, A 1971 K 85 FB; *Rajula v. Suka*, A 1972 MP 57; *Ishari v. Gahia*, A 1975 P & H 222; *In re Beniamin*, 1902, 1 Ch 723; *Md Sharif v. Bande Ali*, 34 A 36 FB; *In re Ganesh*, 54 C 601: A 1926 C 1056; *Fateh v. Ahmed*, A 1927 L 284: 100 IC 833; *Jang v. Gudri*, A 1932 A 365; *Ramkali v. Narayan*, A 1934 O 298 FB; *Bishnu v. Sheogobind*, A 1935 O 448; *Vithabai v. Malhar*, 1938 Bom 155: A 1938 B 228; *Thakur v. Md*, A 1944 N 266; *Dharup v. Gobind*, 8 A 614; *Banaveerama v. Gungala*, 23 MLJ 443; *Poona Loori v. Shelakapathi*, 23 MLJ 295; *Basharat v. Najib*, 38 PR 1918; *Mairaj v. Abdul*, 43 A 673; *Gopal v. Manaji*, 47 B 451: 25 Bom LR 134; *Rekhab v. Sheobai*, 45 A 466; *Ramrup v. Lal Chand*, 1 P 475: 67 IC 401; *Hanumanulu v. Dachchama*, 14 MLJ 464; *Parsoo v. Munna*, 13 NLR 16; *Veeramma v. Chenna*, 37 M 440; *Deshrani v. Thakur*, A 1927 N 104; *Jiwan v. Kuar*, A 1930 A 427; *Harnam v. Ratna*, A 194 Pu 267; *Sarojini v. Sivanandan*, A 1956 T-C 129 (all cases reviewed); *Venkateswarlu v. Bapayya*, A 1957 AP 380; *In re Seshi Ammal*, A 1958 P 463; *Sarju v. Panchananda*, A 1959 As 15; *Mukunda v. Subarna*, A 1962 Or 3; *Narayan v. Velayathan*, A 1963 M 385; *Re Phene's Trusts*, LR 5 Ch A 139; *Re Lewes's Trusts*, LR 6 Ch A 356; *Re Rhodes*, 36 Ch D 586; *Karthyayani v. Raman*, A 1969 K 213; *Venkata v. Gullapali*, A 1964 AP 826; *Tadepalli v. Kantheli*, A 1970 AP 246, *R Gopala Pathar v. N Jayalakshmi Ammal*, A 1984 Mad 340, 344: (1983) 97 MLW 313]. These and other cases appear to have accepted the principle laid down *In re Phene's Trusts, sup.* In *Lalchand v. Ramrup, sup*, the Privy Council observed that "upon this question there is, their Lordships are satisfied, no difference between the law in India as declared in the Evidence Act and the law of England". The same view has been expressed in other cases (see *Dharup v. Gobind; Rekhab v. Sheobai; Gopal v. Manaji; Harnam v. Ratna sup* and *Punjab v. Nathu, infra*; *Sarojini v. Sivanandan*, A 1956 T-C 129]. As to the English law on the point, see Hals 3rd Ed Vol 15 paras 623 and 624.

So when a person is not heard of for seven years there is a presumption of his death, and the cause of action accrues to the plaintiffs, but it is incumbent on them to show that death occurred within three years of suit [*Punjab v. Nathu*, A 1931 L 582 FB; *Munsha v. Gurdit*, A 1965 Pu 80], or that it was brought within twelve years from the actual death [*Jayawant v. Rama Ch*, 40 B 239; *Mehar v. Sakhi*, A 1931 L 865] as there is no presumption of date of death. The presumption of his being alive does not continue to the last moment of the seven years he was last heard of. The precise time of death must be established by evidence of some sort [*Nepean v. Doe d Knight*, 2 M & W 894. In this case LORD DENHAM said: "Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances"]. Similarly there is no presumption as to the *date* of death [*Rango Balaji v. Mudiyeppa*, 23 B 296]. But independently of s 108 a court may draw an inference as to the time of death of a person who has not been heard of long [*Badal v. Saraswati*, 103 IC 329: A 1927 A 687]. It is incumbent on the person who alleges that the person was dead at some antecedent time, to prove that fact by evidence [*Fani Bhusan v. Surja Kanta*, 35 C 25: 11 CWN 883; see also *Srinath v. Probodh*, 11 CLJ 580, 585].

It has however been held in some cases that when a person is not heard of for 7 years and no specific date of death can be proved, the earliest date to which death can be presumed can only be the date on which the suit was filed. It cannot have a further retrospective effect [*Jeshankar v. Bai Divali*, 22 Bom LR 771: A 1920 B 85 (**folld** in *Md Chiragh v Abdul*, 64 IC 468); *Ponduri v. Jaladhi*, 43 MLJ 725; *Wali Md v. Gaman*, A 1944 Pesh 29; *Narki v. Phekia*, 37 C 103: 14 CWN 341; *Chandicharan v. Bhagyadhar*, A 1976 C 356; *Harnand v. Commr*, A 1972 P&H 14; see.....*Ch v. Keshav*, 82 IC 27: A 1923 B 208; *Mahadeo v. Har Buksh*, 4 OWN 1077; *Ramanna v. Appayya*, 1956 Andhra WR 137; *Huseinny v. LIC*, A 1965 M 440; *Narbada v. Ramdayal*, A 1968 Raj 48, *Surjit v. Jhujhar*, A 1980 P&H 274]. It has been observed in *Narki v. Phekia, sup* referring to the leading case of *In re Phene's Trusts*, LR 5 Ch App 139, that the English law is otherwise; but in the later case of *Lalchand v. Ramrup*, 30 CWN 731 *sup*, the Privy Council pointed out that the English and Indian laws on the question were the same. That being so the cases advancing the view that the earliest date on which death can be presumed is the date on which the suit was filed, cannot be regarded as good law.

In some other cases, however, it has been held that s 108 raises a presumption of a death at the end of continuous absence of 7 years and not at the time the question is raised or the suit is instituted. The party on whom the burden of proving the life of the absentee lies, cannot get rid of that burden by admitting the absentee's death at some subsequent time [*Akbari v. Bashir*, 8 IC 55(A)—all cases reviewed]. Similarly a person may be treated as dead after the expiry of seven years from the date he was last heard of and the party relying on the presumption is entitled to succeed if no evidence is offered by the opponents as to the death [*Bai Naichen v. Achama*, 41 MLJ 295: A 1921 M 285 (6 LW 633 **not folld**)]. A person who was jointly entitled to the properties in the will along with the testator had not been heard of since 1892, *ie* for 25 years, prior to the institution of the suit—*Held* (**following** *Rust v. Baker*, 59 ER 176 and 41 MLJ 295) that at the end of 7 years, *ie* 1899 the presumption of death arose [S A No 55 of 1922 (47 MLJ 23 *note*)]. So in some cases it has been held if there are not sufficient facts to show that death occurred at any time before the lapse of seven years, the person may be presumed to have died at the expiration of seven years. But the weight of authority appears to be in favour of the proposition that there is no presumption as to the time of death [v cases cited *ante*].

S 108 is not exhaustive. The court may, in the circumstances of each case, make a presumption even regarding the time of death [*Ram Singh v. Board of Rev*, A 1964 A 310]. Where the material time was the date of adoption, *viz* 15-8-1955 and it was established that the person to whom adoption was made was not heard of by his relations for 7 years prior to 15-8-1955, then the presumption under s 108 would be that he was dead on or before 15-8-55 [*Shankarappa v. Shivarudrappa*, A 1963 Mys 115 (*Jeshankar v. Bai Divali, sup*, *Panjab v. Natha, sup* &c **not folld**)]. The presumption is not rigid and may be proved before lapse of 7 years from "proof of special circumstances", *e.g.*, if the deceased person has been exposed to specific perils of death [*Iswar Dasabhuja &c v. Kanchanbala*, A 1977 C 473 (*In re Ganesh*, A 1926 C 1056 **rel** on)].

Where a person whose life is insured has not been heard of for seven years, those who have effected the insurance are, at the end of that period entitled to have it paid [*Williame v. Scottish Widow's Fund*, 188; 4 TR 489].

A, the son of *H*, Mohamedan, disappeared as a mendicant in 1870, and was not either seen or heard of since then; *H* died in 1884; a claim was set up by *C*, the son of *A*, to share in the estate of *H*; it was held that under s 108, the *onus* was upon *C* to

prove that his father *A* had survived his grandfather *H* [*Moolla Cassim v. Moolla Abdul*, 23 IA 177: 33 C 173: 10 CWN 33: 15 MLJ 317]. Where certain persons contended that they were the representatives of *P*, a person unheard of for 15 years who was a descendant of *V*, and who, if he had survived *T*, the last female owner, would have been a reversioner of *V*, and that in consequence they were entitled to a share in *V*'s property, *held* that the *onus* of proving that *P* survived *T* lay upon them [*Thiagaraja v. Kandasami*, 6 MLT 153: 19 MLJ 502: 2 IC 977]. Where the near relatives deposed that they had not heard of the person for seven years, the presumption should be drawn [*Kahan v. Jawandi*, A 1923 L 174].

The mother of a Hindu minor applied to be appointed guardian of the property of her minor son in the beginning of 1908. The minor was alive in December 1907, but was then kidnapped, and there was nothing to show what had become of him. *Held* that it was wrong in presuming that the minor was dead, the mother should be appointed guardian [*Tripathi v. Patrapi*, 1 IC 465].

In one case the court refused to presume death from unexplained absence under suspicious circumstances after 20 years (*Re Lidderdale*, 57 Sol Jol 3). With regard to the cause of death, accident rather than suicide will be presumed [*Harvey v. Ocean Co*, 1905, 2 Ir R 1, CA—Phip 11th Ed p 919].

If a person is not heard of for 40 years, the burden of proving that he is alive is on the party alleging it [*Tirthapathi v. Ranjit*, A 1931 O 40].

The ordinary presumption in human nature is that the elder man dies first [*Gopal Ch v. Padmapani*, 18 IC 914]. There is however no such presumption in the case of commorientes (see *ante* p 934]. Independently of sec. 108, the court is entitled to draw inference of death and presume the death of a person under sec. 114, if circumstances and evidence justify such an inference. [*Vareed v. Sukumari*, A 1988 NOC 76 (Ker): (1988) 1 Ker L T 45].

As to presumption of death without issue, see s 114 *under* "*Issue—Celibacy*".

S 107 and Divorce.—The presumption under s 107 does not apply to petition for declaration of nullity of reason of ss 7 and 10(*4*) Divorce Act [*Greenwood v. G*, A 1946 M 65: 1946 Mad 416].

Under s 27(*h*) of the Special Marriage Act 1954, and s 13 (vii) of the Hindu Marriage Act 1955, if a person has not been heard of as being alive for seven years or more by those who would naturally have heard of it has that person been alive, it is a ground for divorce. In England s 14(*3*) of the Matrimonial Causes Act 1965 contains a similar provision and a decree for dissolution is granted to a spouse when the other has not been heard of as being alive for the past 7 years [See *Thompson v. T*, 1956, 1 All ER 603].

Ss 107 and 108 Supersede the Rules in Hindu and Mahomedan Law.—According to Hindu law 12 years must have elapsed before an absent person of whom nothing has been heard of during this period is presumed to be dead [*Junmejoy v. Keshub*, 2 BLR 134; *Guru Das v. Mati Lal*, 6 BLR AP 16]. According to Hanafi law it is 90 years [*Rukbi Bibi v. Rahat Bibi*, 7 NWP 191].

The rules contained in ss 107 and 108 establish a uniform rule for Hindus and Mahomedans. The question whether a man is alive or dead is one simply of *evidence* and has no immediate connection with the devolution of property under Hindu and Mahomedan laws, and its determination should follow that rules of evidence contained in the Evidence Act. See the following cases [*Parameshwar v. Bisheswar*, 1 A 53 FB; *Hussan Ali v. Meherban*, 2 A 625; *Dhonda v. Ganesh*, 11 B 433; *Balayya*

v. Kistnappa, 11 M 448; *Dharup Nath v. Gobind*, 8 A 614; *Muzahar Ali v. Budh Singh*, 7 A 297 (**follld** in *Rev. Yusuf Ali v. Ayub*, 11 ALJ 355); *Azizul v. Md Faruq*, 9 Luck 401. See also *Moolla Cassim v. Moolla Abdul*, 33 C 173: 10 CWN 33 PC; *Mairaj v. Abdul*, 19 ALJ 713: 63 IC 296; *Ponduri v. Jaladhi*, 71 IC 305(M)].

When is Presumption Not Applicable.—When a person absconds from justice in order to evade trial on a charge of murder, the presumption in s 108 does not apply, as he would not naturally communicate with his relations [*East Punjab v. Bachan*, A 1957 Pu 316].

Disappearance But Without Proof of Lapse of Seven Years. [Presumption of Death in Such Cases].—If a man's death cannot be yet legally presumed, he is civilly alive. BUCKNIL J, suggested the following procedure to be adopted when one has to face an unexplained disappearance of the person about whose death nothing is known:—(*i*) The court may be applied to upon affidavit stating the circumstances to presume his death; and (*ii*) in the event of the court not finding the circumstances sufficient to justify such a presumption, the court can and should appoint a person to look after the affairs of the person who has disappeared until his return or until his death can be properly presumed [*Gobind v. Jugdip*, 4 P 378: 86 IC 358: A 1925 P 369]. An adoption deed was not allowed to be challenged just only one year after the same was executed, the presumption of death being not applicable [*Baru v. Tej Pal*, A 1998 All 230].

The presumption as to death is not rigid or conclusive and death may be presumed from absence before the lapse of seven years from proof of special circumstances tending to show that the death occurred at an earlier period [*N W Mut L Ins Co v. Stevens*, 71 Fed 258]. For example, the presumption may be indulged in case the person in question embarked on a vessel which was not heard of and which was long overdue, enquiries having been made at ports of departure and destination [*Tisdale v. Conn Mut L Ins Co*, 26 Lowa 170]; and where within the time the absentee was known to be in a desperate state of health [*Alexander v. A*, 36 App Cas (DC) 78], or where he was of grossly intemperate habit when last heard of [*Stourvenel v. Stephens*, 2 Daly (NY) 319]. The same rule applies where one's habits, character, domestic relations [*Tisdale v. Conn Mut L Ins Co, ante*] or necessities [*In re Beasney*, LR 7 Eq 498] would have made it certain that, if alive within that period, he would have returned to or communicated with persons at his place of residence of domicile [*Marden v. City of Boston*, 155 Mass 359; Jones s 63].

The practice is not uniform in defining the precise point, or combination of facts, at which the burden of producing evidence shifts to the opponent; one view is that the presumption may arise before the end of seven years if the disappeared person has been exposed to 'specific peril' of death. But the general presumption is unquestioned (Wig 3rd Ed s 2531a)].

[1]S. 109. Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.—When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

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1. In Ceylon the marginal note is:—"Burden of proof as to partnership, tenancy and agency".

COMMENTARY

Principle and Scope.—This section is also founded on the presumption of *continuance* or immutability, for a longer or shorter period, of human affairs, *ie* when the existence of personal relation or a state of things, is once proved, the law presumes that the relation or state of things continues to exist till the contrary is shown or till some other presumption is raised [*Cf* s 114 *illus* (*d*)]. It is based on the principle that when once a certain state of things or relationship is shown to exist, there is a presumption of its continuance, *eg* a partnership, agency tenancy or other similar relation, once shown to exist, is presumed to continue till it is proved to have dissolved or terminated. The burden of proof is on the person, who affirms that the state of things has ceased to exist. In *Abboy v. Harinath*, 8 C 72, GARTH CJ, said: "This is a principle upon which the courts and the legislature have generally thought it right to act, as in cases of presumption and in presuming that a tenancy or partnership or other state of things continues until the contrary is proved". This section refers only to *three* kinds of relationship; (*i*) partnership, (*ii*) landlord and tenant, and (*iii*) principal and agent; but the principle being of universal application has been applied to other cases (see *Abhoy v. Harinath, supra* and case *post*). So under the Hindu law a family once joint is presumed to retain that character till division is shown [See *Cheetha v. Baboo Miheen*, 11 MIA 369, 380 and cases noted under s 114]. S 114 illus (*d*) also refers to the presumption existing in favour of continuance or immutability and see notes under that section.

A partnership, agency, tenancy, or other similar relation, once shown to exist, is presumed to continue, till it is proved to have been dissolved, and, therefore, where a partnership was admitted to have been in existence in 1816, it was, in the absence of all evidence to the contrary, presumed to be still continuing in 1838 [*Clark v. Alexander*, 66 RR 844]. So, when a business is carried on by partners after the expiration of the term limited by the articles, the law *prima facie* presumes that such of the provisions of these articles, as are not inconsistent with a partnership at will, still continue to apply; however difficult it may be, in some cases, to determine what provisions fall within this category [*Cox v. Willoughby*, 49 LJ Ch 237; Tay s 196]. The presumption of continuance of terms of a partnership entered into for a fixed term is recognised in s 256 of the Contract Act. The words "have been acting as such" would be applicable even if there is only single instance proved [*Narasayya v. Veerayya*, 40 LW 810].

The presumption will however weaken with remoteness of time, and only prevails till the contrary is shown, or a different presumption arises from the nature of the case. Moreover the continuance of *unlawful* conditions will not generally be presumed [*Price v. Worwood*, 4 H & N 512, 514; Phip 11th Ed p 130].

[*Ref Tay s 196; Best s 405; Phip 11th Ed p 129*].

Continuance of Relation or State of things Once Shown to Exist.—Where private partition was admitted, and it was acted upon for several years, the *onus* was upon the plaintiffs who seek to disturb this existing state of things, to show that the arrangement under the private partition had determined [*Abhoy v. Hari Nath*, 8 C 72: 10 CLR 81].

It is not an inflexible rule of law that when two principals appoint an agent in some matter in which they are jointly interested, the death of one terminates the authority of the agent not merely as regards the deceased but also as regards the remaining principal [*In re Sital Pd*, 21 CWN 620; see *Ponnuswami v. Chidambaram*, 35 MLJ 294]. On the death of one of the several principals, the agency continues at

least under the surviving principals, unless the principals were joint principals and not joint and several and unless the power given to the attorney was not joint and several. Where in such a case the agent takes up the position that the entire agency has terminated, the *onus* lies on him under s 109 to prove by producing the power of attorney or by secondary evidence that the principals were joint principals [*Manindra v. Haripada*, 41 CWN 27]. When there is an admission of relationship of principal and agent the burden of proving cessation of such relationship is on the party alleging it [*Hira v. Md Ali*, A 1935 L 49].

Where it is proved that the person in possession before the defendant was a tenant, it is for the defendant to show when the relationship ceased and possession became adverse [*Chavali v. Tulluru*, 28 MLJ 361: 27 IC 804]. Relationship of landlord and tenant continues until it is proved to have ceased [*Devalraju v. Md Jaffer*, 36 M 53; *Dayaram v. Sirumal*, A 1938 S 16]. The mere non-payment of rent, though for several years, is not sufficient to show that the relationship has ceased; and the tenant is bound to prove by some affirmative proof that such relationship has ceased [*Rungo Lal v. Abdul Gaffoor*, 4 C 314, 3 CLR 119; *Mohan v. Meer Shamsul*, 21 WR 5; *Parbatti v. Ram Chand*, 3 CLR 576; *Ogra Manto v. Mohesh*, 4 CLR 40; *Tiru Churana v. Sangudien*, 3 M 118; *Dattatraya v. Sridhar*, 17 B 736; 26 B 410; *Rameshur v. Dalpin*, 7 CLJ 202; *Bama Churn v. Adm Genl*, 6 CLJ 72]. Where there is one year's lease but the tenant continues to hold, he must be presumed to have renewed it for another year under s 109 [*Vellatappa v. Mg Po*, 39 IC 125]. When two persons set up rival claims to the tenancy of the same land under the same landlord, and one of them admitted the previous tenancy of the other but pleaded his relinquishment, the *onus* was upon him to prove the relinquishment alleged by him [*Kishen v. Hookoom*, WR (1864) 47]. When former tenancy is admitted but subsequent purchase is pleaded, the burden of proving the latter is on him [*Mi Kyan v. Mi Ein*, 33 IC 600]. When presumption arising from entry in *jamabandi* as tenant is not rebutted by purchaser, the tenant is entitled to pre-empt [*Harish v. Ghisa*, A 1981 SC 695]. Where the entire evidence is discussed and the case decided or merits without regard to the question as to on whom the onus of proof had been placed that the tenant had voluntarily handed over vacant physical possession of the premises in question, the question of *onus* becomes immaterial [*Industrial and Mining Equipment Co Pvt Ltd, Delhi v. ML Kanodia*, A 1986 Del 36, 39].

As to tenants holding over on the same terms, see s 116 of the T P Act, 4 of 1882 and s 51 of the B T Act, 8 of 1885. When a tenant holds over after expiration of his lease, he does so on the terms of the lease, on the same rent and on the same stipulation as are mentioned in the lease [*Kishori v. Adm Gnl*, 2 CWN 303; *Inayatullah v. Illah Buksh*, WR (1864) Act X 42; *Jamaut Ali v. Chattardhari*, 16 WR 185; *Sheo Shahat v. Bichan Singh*, 22 WR 31; *Tara Churn v. Amir Mandal*, 22 WR 394; *Altab Bibi v. Jugal Mondal*, 25 WR 234; *Beni Pd v. Raj Kumar*, 6 CWN 589; *Jagesh Ch v. Lal Jan*, 9 CWN cviii; *Md Ali v. Nimar*, A 1973 Gau 80. See also *Baijnath v. Raghunath*, 15 CWN 496; *Admr Genl v. Asraf*, 29 C 227]. There is however no scope for the presumption where there is a written lease setting forth the term [*Atul v. Zahed*, 72 CLJ 132]. As to the meaning of "*holding over*" see *Ratanlal v. Farshi*, 34 C 396; *Safar Ali v. Abdul*, 47 CLJ 27]. When a tenant holds over after the expiration of the terms of a previous tenancy, it is considered to be a new tenancy [*Udoy v. Md Ali*, 65 IC 589].

As to partnership, see Indian Partnership Act 9 of 1932. As to principal and agent see ss 182-238 of the Indian Contract Act 9 of 1872.

Where a partnership is found to have been in existence up to within a few months of a transaction entered into by one of the partners, the burden of proving dissolution before the transaction lies on the person who seeks to escape liability as a partner [*Jowala v. Uttam*, 76 IC 553; A 1923 L 585; see *Allah Bux v. Ratan*, A 1958 A 829]. When the plaintiff's definite case is that the partnership was dissolved on a certain date, the burden of proof is upon him. This is so not because of s 109, but of the rule that the plaintiff has to establish his case. Therefore defendants need not establish that the dissolution was much earlier unless and until the plaintiff discharged his burden by adducing *prima facie* evidence [*Liladhar v. Holkarmal*, A 1959 B 528].

S. 110. Burden of proof as to ownership.—When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

SYNOPSIS

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COMMENTARY

Principle and Scope.—This section embodies the well-known principle that possession is *prima facie* proof of ownership. Possession of property, movable or immovable, affords *prima facie* presumption of ownership, as men generally own the property they possess. Possession is good title against any one who cannot prove a better. This notion has come down from the earliest times, and is to be found in the Roman law. Under the Roman law a person wrongfully dispossessed of property could recover it by an *interdictum de vi* by proving possession. The policy of the law is to allow a person in possession of property to continue his possession until a rival claimant proves his title thereto. It is with the object of preventing persons from committing breaches of the peace by taking the law into their own hands, however good their title may be, that s 6 of the Specific Relief Act has been enacted. Other provisions in penal laws, *eg* s 145 Cr P Code, ss 154, 158 I P Code, have the same object.

The rule that possession is presumptive proof of ownership applies both to movable, and immovable property but its application to real property is more important. In an old case, a chimney sweeper's boy having found a jewel took to a jeweller for appraising its value, but the latter refused to return it. In an action

for trove, it was held that the possession of the boy was some evidence of ownership, good against all the world except the true owner and that mere possession entitled him to sue the wrong-doer [*Armory v. Delamirie*, 1721, 1 Str 506; *Sutton v. Buck*, 2 Taunt 302, 309; *Jafferies v. G W Ry*, 5 E & B 802]. When therefore a person is in open, independent and peaceable possession of any kind of property, the presumption of ownership is highly in his favour, and under s 110 the burden of proving that he is not the owner is on the person who affirms that he is not the owner. Possession includes both prior and present possession and the strength of the presumption increases with the length of enjoyment and absence of interruption or disturbance. In some cases the presumption gives place to ownership and becomes absolute after possession for statutory periods. Possession has two-fold value; it is evidence of ownership and is itself the foundation of a right to possession [*Hari Khandu v. Dhondi Natha*, 8 Bom LR 96]. Before the presumption of title from long possession can be called in aid, the possession must have been long and continuous. Spasmodic and interrupted possession by persons who do not claim through one another will not do, nor will it do if it is known that plaintiff entered as a trespasser [*Janefal Mosque v. Prove Govt*, A 1944 N 311]. One of the grounds for the presumption is that it is in accord with the general priciples of law to suppose, until the contrary is shown, that possession is lawful rather than unlawful.

The presumption under s 110 would apply only if two conditions are satisfied: (*1*) that the possession of the plaintiff is not *prima facie* wrongful and (2) that the title of the defendant is not proved [*Secy of S v. Chimanlal*, 1942 Bom 357: A 1942 B 161]. Once the initial title of another person is established, s 110 no longer applies and the possessor must prove that title has somehow or other been terminated [*U P Govt v. CMT Assn Ltd.*, A 1948 O 54]. As stated by STORY J, "Presumptions of this character are adopted from the general infirmity of human nature, the difficulty of preserving the muniments of title and the public of supporting long and uninterrupted possession" [*Rickard v. Williams*, 7 Wheat, (US) 109; Jones s 74]. The presumption of title from lawful possession is a rebuttable presumption and like all other rebuttable presumptions must yield to proof.

A distinction must be made between the rule of evidence embodied in s 110 and the principle on which the concept of possessory title is based. Possession constitutes by itself a limited title to the property, a title which is good against all except the rightful owner. This title has all the features of an estate in land. Like any other estate it can be transferred *inter vivos* or by a testamentary disposition and can also be acquired by inheritance [*Mariumbi v. Vithoba*, A 1970 B 405; *Gobind v. Mohun*, 24 A 157; see also *Pahelwan v. Ran Bharasi*, 27 A 169; *Shrigopal v. Ayesha Begam*, 29 A 52: 3 ALJ 775]. S 110 applies even in a case to which the Government is a party. S 41(*1*) of the Berar Land Revenue Code is not meant to lay down a rule as to burden of proof at variance with s 110 [*Govind v. Secy of S*, A 1935 N 163]. S 110 does not apply to a case in which a person sues for recovery of possession under s 9[1] of the S R Act, for under the latter section no question to title is involved, and all that the plaintiff has to prove is prior possession within six months and dispossession from immovable property by defendant. S 9[1], S R Act does not control 110 which provides that possession is *prima facie* proof of title while s 9[1] has no concern whatever with title. The former restores possession to a person even as against a true owner, but the latter will not avail a possessor against the true owner [*Sambhaseo v. Mahadeo*, 10 NLR 188]. A

1. See now s 6 of Specific Relief Act 47 of 1963.

person who has omitted to sue under s 9[1] when first dispossessed can, after the summary relief under that section is barred by limitation, rely on a regular suit for ejectment under s 110 [*Haradhan v. Iswar Das*, 2 PLJ 61].

Presumption of Title From Possession.—The word 'possession' contemplated by 110 is to be understood as opposed to juridical possession [*Mi Ein Kin v. Nga La*, UBR, (1905) Ev 7]. Though s. 110 recognises a presumption that person in possession also has a good title, there is no corresponding section that the person with title should be presumed to be in possession. The presumption can only come under s 114. Presumption that person having title has also possession can properly be made in the case of jungle or waste land where there is no proof or very little proof of acts of ownership on either side [*Kashinath v. Ganesh*, A 1923 B 361]. The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, as for instance in the case of waste lands. It can be invoked also when nothing is known about possession one way or the other. The ordinary presumption that the owner is in possession then applies [*Shankarsa v. Punamchand*, A 1937 N 129; see *Bindhyachal v. Ram Gharib*, 57 A 278 FB]. The maxim "possession follows title" does not mean that because a man has title to some land, therefore, necessarily he is in possession of it. It really means that if at any time a man with title was in possession of property, the law allows the presumption that possession continued [*Hardut v. Ujir*, 48 CLJ 364]. Upon a grant of surface rights, the lessor remains in the eye of law in possession of the subsoil. It may be constructive possession and that is in one sense nothing more than the right to take physical possession. But the doctrine that "possession follows title" is well established. So when lands are submerged, constructive possession is with true owner [*Bhupendra v. Rajeshwar*, 58 IA 228: 59 C 80: 61 MLJ 632: 35 CWN 870]. Once the identity of a person from whose possession property under Section 102 Cr PC is seized is known it should be delivered to him without resorting to the procedure prescribed under section 457(2) Cr PC inasmuch as there is presumption under Section 110 that he is owner of such property [*Kashulal v. State of Rajasthan*, 1996 Cri LJ 740, 742 (Raj)].

The strength of presumption arising from possession of any kind is materially increased by the length of the time of enjoyment, and the absence of interruption or disturbance from others who supposing it illegal, were interested in putting an end of it. The rule is, that where the facts show the long continued exercise of right, the court is bound to presume a legal origin, if such be possible, in favour of the right [Best s 366].

This presumption in favour of the person in possession, is an imperative presumption, that is to say, the court is bound to regard the ownership of the possessor as proved, unless and until it is disproved. But the plaintiff by the very form of his suit, in a suit to recover possession, assumes that the defendant is in possession, otherwise his suit would be wrongly framed; he provides, therefore, his enemy with a strong weapon of defence, and the position of the defendant is strengthened by the presumption in his favour. The plaintiff, however, can sometime use this section as an instrument of attack. For if he can show that he was himself recently in possession, there is nothing to prevent his claiming for himself the benefit of this presumption [Markby, pp 84, 85]. To s 110 as to the burden of proof of ownership, a clause should be added, showing that the rule does not apply where the possession has been obtained by force or fraud. [Whitely Stokes, Anglo-Indian Code, Vol II, p 835].

[*Ref Tay s 123; Best s 366; Jones ss 74, 75; Wig s 2515*].

Possession and Presumption of Title.—A person shown to be in possession of property should be presumed to be owner of it [*Hari Chintaman v. Moro*, 11 B 99]. Possession is evidence of title and gives a good title against a wrong-doer; but a person who has not had possession, cannot, without proof of title, turn others out of possession even though that they may have no title; for possession is a good title against any one who cannot prove a better [*Clarke v. Brindabun*, Marsh 75: WRFB 20: 1 Ind Jur OS 97: 1 Hay 137]. When a person makes a costly building on a land and remains in possession for a considerable time, the presumption is that he had a right to build on it in preference to one who is the ostensible owner [*Zindaram v. Ramrup*, A 1935 p 231]. Possession is evidence of title, and if a plaintiff proves that he had possession and that the possession had been forcibly disturbed by defendant, he makes out a *prima facie* title which it is for the defendant to rebut [*Ayesha Bibee v. Kanhye*, 12 WR 146; *Kalee Ch v. Adoo Shaikh*, 9 WR 602]. Person in lawful possession need not prove his title in a suit for injunction against a trespasser [*Fakirbhai v. Maganlal*, 1951 Bom 425]. The mere fact that the defendant claimed rent could not defeat the presumption of title arising in plaintiff's favour from the fact that plaintiff had possession when the suit was instituted [*Champat v. Joti*, A 1934 L 324]. Possession need not be long in order to be some evidence of title [*Puran v. Pratap*, 9 WR 120]. Evidence of possession and enjoyment for a series of years is of itself, if unanswered, cogent evidence of title [*Bagram v. Collr of Bhullooa*, WR (1864) 243; *Collr of Barielly v. Ghuseeram*, 1 Agra 260; *Rung Lal v. Rughoobir*, 9 WR 169; *Dinobundhoo v. Court of Wards*, 11 WR 347; *Ramrudee v. Dessai*, 17 WR 8 PC; *Haidar Khan v. Secy of State*; 35 IA 195: 36 C 1: 12 CWN 1095: 18 MLJ 549].

The man in possession starts with a presumption of title in his favour, and the maxim, *presumitur retro* applies, and it is, therefore, for the other side to show, not only that the former's possession is not evidence of his title, but that the latter has a superior title [*Bhagwan v. Secy of S*, 10 Bom LR 571; *Maung Tha v. Palaneappa*, 13 Bur LT 205]. Clear and conclusive proof of possession is sufficient to eject a trespasser [*Chandi v. Narsingh*, 39 IC 26].

Possession is evidence of title, and is primarily exclusive. In every case a person who has been out of possession for more than 12 years must make out some *prima facie* title, and some agreement or acknowledgment of that title [*Ram Ch v. Narayan*, 11 B 216; *Tatya v. Anarji*, 11 B 220 note; *Vithoba v. Narayan*, 11 B 221 note].

To recover possession, a plaintiff must show a better right in himself to possession than is in the defendant. He may, within the period prescribed by the Limitation Act, show that, in a case where he is dispossessed, either by establishing title or by showing a prior legal possession entitling him to be restored to the same. Possession, according to s 110 of the Evidence Act is *prima facie* proof of ownership, it is so, because it is as it has been described, the sum of acts of ownership. [Pollock and Wright on Possession]. This obviously applies both to prior and present possession. Possession has twofold value; it is evidence of ownership, and is itself the foundation of a right to possession [*Per* JENKINS CJ, *Hari Khandu v. Dhondi*, 8 Bom LR 96]. A person in possession of property ought to be presumed to be in lawful possession until the contrary be shown. Beyond this, possession is only evidence to be taken conjointly with other evidence to establish or impugn a title [*Selam Sheikh v. Baido Nath*, 3 BLR 312: 12 WR 217]. Defendant being found to have been in possession even prior to execution of the gift deed, the onus to prove that defendant though in possession was not the owner was on plaintiff [*Bairagi v. Uday*, A 1965 Or 201].

Possession is evidence of title against a defendant who not being the true owner has unlawfully seized it [*Dadabhai v. Sub-Collr of Broach*, 7 BHC 85, 87]. In India

the title of possession must prevail until a better title is shown to the contrary [*Podda Venkatappa v. Aroovála*, 6 WR 13: 2 MIA 504; *Wise v. Brajendra*, 18 WR 91 PC; *Neelagara v. Kinnahat*, 17 IC 167; *Vythilinga v. Ponnusami*, A 41 MLJ 78]. If in a suit for possession on the allegation of forcible dispossession, plaintiff fails to prove trespass on the part of the defendant, a possession on the part of one party, which is not shown to have commenced in wrong, can only be disturbed by distinct proof of a superior title in another party [*Arumugam v. Perriyanman*, 25 WR 81 PC].

Presumption of title from possession can arise only where facts disclose no title in any party [*Nair Service Society v. Alexander*, A 1968 SC 1165]. A person in possession with a bad title is entitled to remain in possession until another person can disclose a better title [*Gopee Nath v. Dyanidhee*, 7 WR 485; *Soodukhini v. Raj Mohan*, 11 WR 350; *Sindha v. Dhama*, 67 IC 948]. When a plaintiff's evidence fails to show title in him, but does not show title in another, the plaintiff may recover upon his possession against a defendant wrong-doer [*Doe D Kullammal v. Kuppu*, 1 MHC 85].

In a suit for declaration of title against the Secretary of State, the plaintiff proved possession for 40 years and defendant failed to establish his title or any possession within 60 years—*Held* that the plaintiff's possession raises presumption of ownership and throws the burden of proof upon the defendant [*Krishna v. Secy of S*, 33 M 173]. Evidence of tethering cattle, storing grass and erection of hedges to certain plots did not establish anything beyond undisturbed user for a certain period. Such kind of possession was not sufficient to throw the burden of proof on Government under s 110 [*Suraji v. Secy of S*, A 1937 B 193: 39 Bom LR 216]. In a suit for declaration by a person in possession of land that he is owner, the *onus* of proving that he is not the owner is on the defendant [*Nizamdin v. Naranian*, 103 IC 36: A 1927 L 841]. Under s 110 the presumption is that a woman has power to dispose of all property which was in her possession at the time of death [*Raj Bachan v. Thakurjee*, 4 OWN 1179]. It is well settled that when the property stands in the name of a person, the presumption is that, he is the owner of the property and anybody disputing his ownership must prove the same [*Sailendra v. Ena*, A 1973 C 128]. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant in order to displace this apparent title and to establish a beneficial title in himself, to show by satisfactory evidence that the funds out of which the disputed property was purchased, were his own funds [*Pulyampatti v. Kuppier*, 9 CWN 89 PC].

A decree under s 9[1] of S R Act proves possession and possession is evidence of title. It cannot therefore be said that such a decree is no evidence of title [*Kailash v. Jogendra*, 15 CLJ 1]. An unregistered lease is admissible to show the possession of landlord and tenant and would under s 110 tend to show ownership [*Annaji v. Laxman*, 75 IC 622: A 1924 N 199]. A decree-holder sued to establish that certain property was the property of *W*, his judgment-debtor, such property being claimed by *A* as his. On his proving that for five years and more, *W* had been in possession of such property as ostensible owner, it rested with *A* to prove his title [*Mathura v. Mitchell*, 4 A 206]. Where a person is alleged to be in possession, not as owner of the full proprietary right, but as a mortgagee, the burden of proof of such qualified ownership lies on the party asserting it. Such case falls within the scope of s 110 [*Sheoruttongir v. Doorga*, 6 NWP 36]. Where plaintiff sought to recover possession of certain lands, alleging dispossession by the defendants who pleaded that at an

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1. See now s 6 of Specific Relief Act 47 of 1963.

auction sale the plaintiff had bought the lands *benami* for them, the burden of proving a *prima facie* case that the land belonged to the plaintiff was on him [*Hari Ram v. Raj Kumar*, 8 C 759]. In a suit to recover possession on proof that the plaintiff had been dispossessed by a *benamdar*, in whose favour a conveyance had been executed by the plaintiff's father—*Held* that the presumption arising from the defendant's recent and unexplained possession being rebutted by the plaintiff's prior continuous and peaceful possession, the defendant must show affirmatively that his title was a valid one [*Mohesh v. Barada*, 2 BLR 274: 11 WR 185].

In a suit by *A* to recover immovable property in the possession of *B* and his predecessors, whose title had been unchallenged for 44 years, on the ground that the estate was mortgaged only by *A's* ancestors, and that *B* and those claiming under him were only usufructuary mortgagees in possession—*Held* that the *onus* was on *A* who could only succeed on the strength of his own title and not by reason of the weakness of *B's* title [*Sivaji Vijaya v. Chinna Napana*, 1 MIA 151]. According to s 110, possession is *prima facie* evidence of a complete title; any one who would oust the possessor must establish a right to do so; and possession unexplained, held for 12 years, would according to *Sambhubai v. Shivaldas*, 4 B 89, itself constitute a complete title not qualified by an assertion of the holder that he purchased from this or that person. The defendant's possession was *prima facie* evidence of a complete title and the plaintiff who alleged that the defendant was merely a mortgagee was bound to prove his own right as mortgagor, clearly and undefeasibly [*Ram Ch v. Balaji Bhanrao*, 9 B 137; *Ramchand v. Bhanamal*, 71 PR 1900]. See also *Ratan Kuar v. Jivan Singh*, 1 A 194 FB; where it has been held that in a suit for redemption of properties in the possession of the defendant who sets up a sale, the burden of proving the mortgage is on the plaintiff; see *Rallaram v. Feroz*, 77 IC 903. In *Parmanund v. Sahib Ali*, 11 A 438, it has been held that in a suit for possession after redemption, the nature of which presupposes that the possession of the defendant or his predecessor was lawful, the plaintiff must show the title upon which he relies, and, therefore, a title subsisting at the date of suit. In this connection see *Nura Bibee v. Jagat Narain*, 8 A 295.

Where lands sought to be recovered are admitted by the plaintiff to be contiguous to defendants' holding or where they have come to defendants' possession by encroachment, the *onus* is on plaintiff to show that the lands are outside defendant's holding [*Gopini v. Lokenath*, 11 IC 696]. In a suit for possession by a person who has been declared to be out of possession under the Land Registration Act (7 of 1876 BC), the plaintiff must make out a *prima facie* case [*Mudun v. Bhaggomanto*, 8 C 923, But see *Omrunnissa v. Diwan*, 10 C 350. On this point see also *Ram Bhusan v. Jebli Mahto*, 8 C 853, explained in *Saraswati v. Dhanpat*, 9 C 431: 12 CLR 12; *Raj Narain v. Shamanundo*, 26 C 845; *Shyama Sundari v. Md Zarip*, 9 CLJ 91; *Umatul v. Kulsoom*, 12 CWN 16: 8 CLJ 245: 35 C 120]. A person seeking to oust another out of the possession of property to which the latter has already succeeded and in whose favour mutation of names has also been effected, is bound to prove that his right is superior to that of his adversary under s 110 [*Nasibul Nissa v. Mansur Ali*, 120 PWR 1909: 4 IC 965].

In a suit for possession and for establishment of title against parties in possession under an award of criminal authorities, the *onus* is on the plaintiffs [*Moheshur v. Ramapat*, WR FB 7: 1 Ind Jur OS 35; *Ram Ruttan v. Furookoonnissa*, 4 MIA 233; *Puthuhma v. Makachi*, 4 MHCR 478; *Kalee Narain v. Anunda Mayee*, 21 WR 79; *Rajessuree v. Brindabutty*, 7 WR 212; *Luchman v. Maharanee of Burdwan*, 17 WR 181; *Hari Ram v. Bhikaree Roy*, 25 WR 20; *Hurro Sundaree v. Sanatan Das*, 25 WR 464; *Dinomoni v. Brajomohini*, 29 C 187 PC: 6 CWN 386; *Barada v. Chandra*, 12

MIA 145: 11 WR 1: 2 BLR 1]. Where the plaintiff proved undisturbed and peaceful possession for 11 years, and the defendant was proved not to have been in possession before the magistrate's order, the plaintiff was entitled to a decree on the strength of his previous possession, which he had against all but the true owner [*Shama Charan v. Surja*, 6 IC 806]. Where both the parties fail to prove their title to the property, then the party who proves to have had possession of it prior to initiation of proceeding under s 145 Cr PC must succeed [*Bhagwan v. Gaya*, A 1967 P 254]. The doctrine that possession follows title has no application where plaintiff has to prove possession at a particular point of time [*Kolikanand v. Biprodas*, 19 CWN 18].

Madras Land Encroachment Act.—The title of Government being statutorily declared under s 2 of the Act, the rule of presumption under s 110 is not brought into play. But there is nothing to prevent long possession being relied upon as evidence of a grant made by the original owner [*Pothukutchi v. Secy of S*, A 1938 M 193].

Nature and Evidence of Possession.—Ownership and possession are two juristic conceptions and in every transfer of ownership from one person to another by act of parties, a transfer of possession is not necessary [*Md Talib v. Inayat*, 33 A 683:8 ALJ 746]. Not mere physical contact but mere possibility of the person dealing with a property exclusively as he likes, constitutes possession [*R v. Lallu*, 43 B 550: 50 IC 999; *Bahadur v. Naina*, 14 PR 1915: 23 IC 35]. Meaning of possession is not equal to actual user [*Rakhal v. Durga*, 26 CWN 724]. Lawful possession means possession which has been got neither by force nor fraud [*Azizulhak v. Mariyan*, 17 OC 157: 24 IC 45]. A mere user which has not ripened by prescription will not give rise to any right upon which an action can be founded unless some kind of possessory title exists in plaintiff's favour [*Kapniah v. Sithay*, 41 MLJ 490: 70 IC 367]. As to whether presumption of ownership of a well from long possession can be rebutted by user by public, see *Hemraj v. Allahdino*, A 1935 S 133. Possession is a legal expression and can be proved in many ways. A man can be in possession by cultivating himself or through his tenants [*Sheopujan v. Sohbat*, 36 IC 427: 14 ALJ 1066]. Possession by receipt of rents is a possession known to and respected by law [*Cheria Kunhi v. Malikaimmal*, 53 IC 771: 37 MLJ 544].

When a witness says that a party is in possession, that, in point of law is admissible evidence of the fact that such party was in possession (*Per* MITTER J). A bare statement of a witness that *A*, was in possession unaccompanied by any information as to his means of knowledge, or as to the materials upon which he came to that conclusion, would be, even if it were admissible in law, evidence of a most unsatisfactory character. If the word 'possession' is understood in the sense of actual occupation—a fact directly cognizable by the senses—, there can be no doubt that the statement would be admissible, but if the word is to be understood in the sense of what is called in legal phraseology constructive possession, the witness must be considered to have been speaking not of a fact directly within his knowledge but of a conclusion based upon facts although the knowledge of those facts might have been actually derived from sensation, the primary source of our knowledge [*Maniram v. Debicharan*, 4 BLR, FB 97: 13 WR 42 (follld in *Vithu Govinda v. Ramji Essuji*, 8 Bom LR 19)]. A mere statement by a witness to the effect that the party is in possession is no evidence of possession. The evidence produced on the point must give the various acts of ownership which go to constitute possession, so that the court might arrive at its own conclusion [*Ishan Ch v. Ram Lochun*, 9 WR 79; *Jagabandhu v. Dinabandhu*, 11 WR 136].

Possession is a question which from its nature seems to be very easily determinable; but in practice it is found to be one of the most difficult issues to decide

(*Per* WHITE J) [*Jibuntinath v. Shibnath*, 8 C 819, 824: 10 CIR 537]. Vague and general statements are of very little value as evidence of possession. The court remarked: "The testimony of all the witnesses is general in the extreme. They speak of the 'disputed land.' They say that they saw plaintiffs 'in possession.' They say they saw them 'collecting rents.' All these statements are general. And to persons who have had any experience in the mofussil, and who know how easy it is to bring any number of witnesses into court who will readily give general testimony of this nature, the absolute worthlessness of such evidence requires no demonstration" [*Joytara v. Md Mobarak*, 8 C 975, 983, 948: 11 CLR 399]; see also *Allyat Chinaman v. Jaggat*, 5 WR 242].

Entry of name of ancestor in Government books for a long time and payment of Government assessment in respect of certain villages though may not be evidence of title is very strong evidence of possession [*Devaji v. Godadhai*, 11 WR 35 PC: 2 BLR 85 PC]. The Collector's books are intended only for purpose of revenue; they are evidence neither of title nor possession [*Pandurang v. Anant*, 5 Bom LR 956; *Khavar v. Rukha*, 6 Bom LR 983]. Possession of receipts for Government revenue is no proof or, at best, a very weak proof of possession of property [*Lallee v. Amrit*, 17 WR 490]. Land revenue receipts do not *ipso facto* prove actual possession of land [*Chandrakanta v. Hem*, A 1979 Gau 55]. A decree for rent is no proof of actual possession [*Abdool Ali v. Abdul Rahman*, 21 WR 429]. An order as to mutation of names is not sufficient evidence of the actual period of possession [*Amir Ali v. Karim Ali*, 9 IC 456]. A decree in a land registration proceeding does not prove the decree-holder's possession. It proves that the Collector held that he had a right to possession [*Seba Das v. Niroda*, 63 IC 602 (C)]. Where the question was whether the vendor of a house had possession within 12 years of suit, occasional visits and use of the house were held ample evidence of possessions, unless it was shown that he had come to the house in the capacity of a visitor [*Ununtoram v. Brojo*, 11 WR 136].

Possession Varies According to Nature of Property. [Waste Lands, Diluviated Lands, Jungle Lands etc].—Acts indicative of possession must vary according to the nature of property over which possession is exercised. In the case of *bil* or waste lands, the cutting of grass or the grazing of cattle are the ordinary acts by which possession is asserted [*Wali Ahmed v. Tota*, 31 C 397]. But another case held that jungle land or waste land is incapable of possession in such a way as to be capable of dispossession and the possession must in such a case be deemed to continue with the rightful owner. The cutting of wild grass on jungle land is not an act of possession or dispossession of any party [*Nanda Kumar v. Emded*, 44 CLJ 265: A 1927 C 49; *Bije v. Shib*, A 1936 L 669]. The possession which the plaintiff has to prove in the case of waste or jungle land, must be adequate in continuity, in publicity and in extent to show that it was possession adverse to the competitor. There is a special difficulty in establishing this in the case of uncultivated jungle land which produces nothing beyond self-grown trees and a seasonal crop of wild grass [*Jhandad v. Abdul*, 34 CWN 1101: 59 MLJ 399: A 1930 PC 281; *Radhamoni v. Collr of Khulna*, 27 IA 936: 27 C 943: 4 CWN 597; *Kuthali v. Peringati*, 44 M 883 PC: 48 IA 395]. Possession does not necessarily mean the same thing as actual user. Where land is shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances that that state naturally would, and probably did, continue, till within 12 years before suit, it may properly be presumed that it did so continue and that the previous possession continued also, till the contrary is proved. Such a presumption is not conclusive [*Md Ali v. Khaja, Abdul*, 9 C 744 FB: 12 CLR 257].

Where lands emerge from a *bil*, the possession of the owner is presumed to continue, until the contrary is shown, when such lands remain *patit* or waste, whether it be

culturable or unculturable [*Mohini v. Promotha*, 24 C 256: 1 CWN 304]. As to possession of *bil* land, see *Barada v. Chandra*, 12 MIA 145: 11 WR 1. In the case of waste lands covering a very small area, possession may be presumed to follow title [*Bhagwan v. Dayal*, 16 IC 623 (C)].

When the question relates to the occupation of comparatively waste or waste land, the smallest indication of occupation must be taken hold of in determining any matter with regard to it [*Nathukhee v. Chowdhri*, 20 WR 247, 249; *Mohim v. Hurro*, 3 C 768]. In the case of waste lands, possession can be presumed to follow title [*Mohesh v. Hemendra*, 46 CLJ 575]. In the case of lands full of jungle and incapable of occupation until quite recently, possession must follow title in the absence of possession by anybody other than the rightful owner [*Tarakeshwar v. Satis*, A 1930 C 411: 51 CLJ 297]. In the case of waste, jungle, and diluviated lands evidence of possession is not the same as in the case of a house or cultivated field. In the case of jungle or waste lands, if plaintiff proves his title there is a presumption in his favour that possession follows title inasmuch as possession of such lands cannot be expected to be proved by acts of actual user and enjoyment. But if he puts forward cases of effective possession and asserts that he exercised acts of ownership and adduces evidence in support of it, then he cannot turn round and rely upon the presumption of possession because the case set up by him is inconsistent with any such presumption [*Rakhal v. Durga*, 26 CWN 724: A 1922 C 557: 67 IC 637; *Sevugan v. Koovanna*, A 1931 M 282: 60 MLJ 430; *Nandlal v. Lahri*, 111 IC 582 (L)]. In the case of jungle lands where there is no proof of exercise of acts of ownership on either side, possession must be presumed to have continued with the rightful owner [*Leelanund v. Basheeroonissa*, 16 WR 102]. The person entitled to property is presumed to be in possession of jungle lands all along [*Jagadindra v. Hemanta*, 15 CWN 887 PC: 14 CLJ 319: 13 Bom LR 806]. As to alluvial lands, diluviated lands, *chur*, jungle lands, &c see *ante*, notes under ss 101-104, "*Alluvion and Diluvion*", p 881.

Possession in fact is manifested by the exercise of such exclusive control as the object is capable of. It need not always be complete or immediate visible control; in the case of wild uncleared land payment of taxes may be sufficient evidence of possession, as being the only practicable act of dominion [*Kirby v. Cowderoy*, 1912 AC 599 (Pollock & Mulla's Contract, 7th Ed p 654)]. In the case of vacant site, possession follows title and the party alleging title must prove ownership by adverse possession [*Chain v. Gopi*, 134 PLR 1916]. Where a land is unoccupied the possession must be deemed to be with person having lawful title thereto [*Pramatha v. Kishore*, 21 CWN 304: 25 CLJ 133]. If a land is such over which nobody can exercise possession, possession would ordinarily follow title [*Lala Giri v. Jugal*, A 1922 P 503; see also *Moocheeram v. Bissambhar*, 24 WR 410]. Where neither party has had complete possession over a disputed land, the possession in the eyes of law must be with the rightful owner [*Secy of S v. Kalika*, 15 CLJ 281: 14 IC 609].

Owing to inaccessibility of minerals in the earth, it is not possible to take actual physical possession at once of the whole mineral field. In the case of mines there is no presumption in law that the possession of a part of the seam infers possession of the whole seam. In such case adverse possession will be strictly limited to what has been actually possessed [*Nageshwar v. Bengal Coal Co*, 58 IA 29: 10 P 407: A 1931 PC 18: 35 CWN 265; *Bhupendra v. Rajeshwar*, 35 CWN 670 PC].

Possession or Control Over a Portion of Property.—For the purpose of going into possession of land, it is not necessary to walk over the whole of it; but it is enough where the lands are connected geographically to go on to one piece of the land in the name of the whole [*Hanmanta v. Mir Ajmoodin*, 6 Bom LR 1104]. Evi-

dence of possession of certain specific property is treated as evidence of possession as regards appendage of such property, though no definite acts of possession were proved as regards the appendage. So the possession of a garden imports the possession of the garden wall [*Iqbal v. Nand Kishore*, 24 A 294]. In the case of a claim arising out of transport of goods through a ship, the bill of lading mentions that *A* consigned the goods to self or to its agent at Calcutta. *A* thereby retained the possession and reserved the right of disposal of the goods till the completion of the voyage. In such circumstances, the burden of proving that *A* is not the owner of the goods is on the opposite party [*Great India Trading Co (P) Ltd v. Angus Co Ltd*, A 1983 Cal 408, 411; *Great India Trading Co (P) Ltd v. Nowrangrai Ramniwas*, A 1983 Cal 237, 239].

To prove ownership of an unenclosed piece of land, acts of ownership in one part may be presumed to be acts of ownership over the whole, unless there are circumstances rebutting that presumption. Evidence may be given of act done in other parts, provided that there is a common character of locality as would raise an inference that the place in dispute belonged to the plaintiff if the other part did [*Vithaldas v. Secy of S*, 26 B 410, 416: 4 Bom LR 28]. Exercise of acts of ownership over various portions of a forest land is evidence of possession of the whole tract [*Siva Subramanya v. Secy of S*, 9 M 285]. If a person without title acquires possession of part of land and proceeds to mark out the area on the entire land which he intends to possess, he will be presumed to be in possession of the entire area though he has physical control over only a portion [*Tikait v. Nawab*, 80 IC 544 (P); see also *Vithaldas v. Secy of S*, 26 B 410, 417; *Ramzan v. Fakir*, 82 IC 861 (S)]. With regard to land lying within defined boundaries, it is to be assumed that the acts of possession upon one part of the land shows possession of the person in respect of the whole land [*Clark v. Elphintone*, LR 6 AC 164 HL]. Acts of control or enjoyment in one part of land are relevant to show possession of the whole [*Jones v. Williams*, 1837, 2 M & W 326]. But in questions of disputed ownership of land, occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area, unless it can be reasonably attributed to a right to the whole area. The portions so occupied may be so numerous that they practically cover the whole area; or the occupation of a portion may be reasonably attributed to a right of ownership in a larger area. But that larger area must be defined; in other words it must be attributable to an existing boundary [*Omanene v. Chief Obeng*, 151 IC 948: A 1934 PC 185].

As a general rule possession of part is in law possession of the whole, if the whole is otherwise vacant. But constructive possession of this kind can only be presumed when there is a claim based upon title [*Maheshwar v. Pratap*, 2 IC 63: 12 OC 58]. But possession or part occupation of a wrong-doer of a portion of the land cannot be held to be constructive possession of the whole, so as to enable him to obtain thereby a title by limitation [*Wali Ahmed v. Tota, sup*; *Mohim v. Promotho*, 24 C 256: see also *Secy of S v. Krishnamoni*, 29 C 518 PC: 6 CWN 217]. Possession of part is constructive possession of the whole which is an incident of ownership resulting from title. This doctrine does not apply where the occupant depends on ground of possession only without proving title [*Pramatha v. Meik*, 56 IC 184: 5 PLJ 373]. Possession by a trespasser is confined to the land actually occupied by him [*Maheshwar v. Pratap*, 2 IC 63]. Where a tenant is in possession of land adjacent to other lands, admittedly under his cultivation and pays rent for the whole area, it is presumed to be a part of his holding [*Kashinath v. Durga*, 1 PLJ 604].

Presumption of Title When Evidence of Possession is Conflicting.—"If there are two persons in a field each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual

possession, I answer, the person who has the title is in actual possession" [*Per* MAULE J, in *Jones v. Chapman*, 1847, 2 Ex 821]. Where evidence of possession is conflicting and not conclusive on either side, the presumption that possession goes with the title must prevail [*Dharma v. Hur Pd*, 12 C 38; *Kasturi v. Raj Kumar*, 8 CWN 876, 880; *Raj Kumar v. Gobind*, 19 C 661, 666 PC; *Md Bassir v. Kareem Bux*, 11 WR 268; *Durga v. Konchai*, 5 CLJ 71, 79; *Sundara v. Gobinda*, 32 M 528; *Bidhumukhi v. Jitendra*, 10 CLJ.527, 536; *Panchanan v. Basanta*, 30 CWN 497: A 1925 C 1230; *Nand Lal v. Lahri*, 111 IC 533]. This presumption ought not to be applied in a case where actual and not mere constructive possession is pleaded [*Hardut v. Ujir*, 48 CLJ 364: A 1928 C 765]. When the evidence of possession is found to be of equal weight on both sides, the presumption is that possession goes with the title [*Runjeet v. Goburdhan*, 20 WR 25 PC (**folld** in *Nawab Bahadur v. Gopinath*, 12 CLJ 625, 633; *Ganapati v. Raghunath*, 33 B 712; *Matuk v. Tian*, 2 P 1); *Promode v. Madan*, 27 CWN 305: 70 IC 555; *Lala Singh v. Latif*, 21 CLJ 480: 28 IC 477]. The presumption that possession goes with title is not limited to particular kinds of cases where proof of actual possession is impossible on account of the nature of land such as boundary, forest or submerged land. It applies to all kinds of land and where the plaintiff proved his title but not any act of possession and the defendant did not prove possession except at some intervals within 12 years of suit, the presumption that possession follows title will come into play [*Thiruvanchan v. Kunjipillai*, A 1970 K 310 (*Runjeet v. Goburdhan, sup*; *Kashibai v. Sudha*, A 1958 SC 434 **reld** on)]. But where the evidence is equally unworthy of reliance on both sides, no such presumption can be made [*Lala Singh v. Latif; Promode v. Madan; Thakur v. Bhograj, sup*]. A presumption of origin in some lawful title is available only where no actual proof of title is forthcoming [*Thirulakshmi v. Spl Tahsildar*, A 1974 M 182].

"If there are two persons in a field, each asserting that the field is his and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, the answer is, the person who has the title is in actual possession and the other person is a trespasser" [*Per* LORD SELBORNE in *Lowes v. Telford*, (1876) 1 AC 423 quoted in *Vithaldas v. Secy of S, ante*]. In the absence of proof by the plaintiffs that the land was of their ownership and in the absence of proof that it was of anybody else's ownership apart from the plaintiffs, the only alternative is that the land must belong to Government when there is a statutory presumption in favour of Government [*Secy of S v. Chimanlal*, 1942 Bom 357]. As to application of the presumption that possession follows title, in the case of conflicting evidence or where the property is incapable of effective possession, see *Venkata Somayajulu v. Satyanarayana*, A 1927 M 509 *post*.

Where there is no evidence of plaintiff as to dispossession or where the evidence is valueless, the plaintiff cannot make out his case by merely proving that he had antecedent title and possession [*Shiva Pd v. Hira Singh*, 6 PLJ 478 FB; (**expld** in *Matuk v. Tian*, 2 P 1); *Ram Yad v. Pankuer*, A 1958 P 562]. If no one can prove possession, the court must hold that possession is with the rightful owner [*Nanda v. Emdad*, A 1927 C 49]. [See *post*, notes to s 114 *illus* (*d*)].

Whether Possessory title Under S 110 Can be Relied on in a Suit For Possession Other Than a Suit For Possession Under S 6 S R Act.—If a person is dispossessed of immovable property otherwise than in due course of law, he has got a summary remedy under s 9[1] of the S R Act, and the sole point for determination in such a suit is whether plaintiff was in possession within six months previous to the suit [*Raj Krishna v. Muktaram*, 12 CLJ 605; *Jnan Ch v. Lochh*, 13 IC 451] and

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1. See now s 6 of Specific Relief Act 47 of 1963.

possession will be restored to him if he can prove such previous possession. The defeated party may then bring a suit for declaration of title and recovery of possession. The *onus* of proving everything is on the plaintiff and the defendant need not prove his title and his possession cannot be disturbed unless plaintiff gives proof of a better title [*Moenoodeen v. Girish*, 7 WR 230; *Jaggunnath v. Mahomed Mokeem*, 17 WR 161; *Sarbo Mohan v. Surut*, 16 WR 34; see also *Bullabee v. Doorjodhan*, 7 WR 89; *Ram Ch v. Brojonath*, 3 BLR Ap 109]. Some earlier cases held that if defendant in such a suit pleaded limitation, the plaintiff could not in defence set up the possession which having been obtained otherwise than in due course of law, he held before the suit under s 9[1] [see *Golam Nubee v. Bissonath*, 12 WR 9; *Prem Chand v. Huree*, 22 WR 259; *Tara Banu v. Abdul Gaffur*, 12 CLJ 486]. These three cases were not *followed* in *Mamtazuddin v. Barkatulla*, 2 CLJ 1 and *Pratap v. Durga*, 9 CWN 1061. In *Pratap v. Durga*, (*approving Bandu v. Naba*, 15 B 238) it has been held that the possession of a true owner whether such possession is taken forcibly or not must be considered as rightful possession in law. *Bandu v. Naba, sup* has been referred to and explained in *Rajkrishna v. Muktaram*, 12 CLJ 605.

Authorities were not agreed as to whether a person dispossessed of immovable property and bringing a regular suit for establishment of title and recovery of possession without availing himself of the special remedy in s 6 S R Act within six months, can rely on his possession as *prima facie* evidence of title. The point had been thus put by Pollock by an illustration: "*A* alleging that he had been in quiet and undisturbed possession of certain land for elevent years and six months and that he was forcibly ousted from possession by *B* who had never any title to the land at all, sues *B*, eight months after the date of dispossession for possession. *A* has no title to the land at all, but it is proved that he had been in possession as alleged. *B* also has no title of any kind to the land. Is *A* entitled to a decree?"

In some Calcutta cases the view was taken that prior possession of plaintiff is *prima facie* evidence of title against wrong-doer and entitled him to a decree unless defendant could show a better title [see *Fazlar v. Raj Ch*, 5 CWN 234; *Mohabeer v. M*, 7 C 591; *Brojo Sundar v. Koylash*, 11 CLR 133; *Daljee Sahoo v. Shk Tumuzooddeen*, 10 WR 102; *Shama Soonduree v. Coll, of Maldah*, 12 WR 164; *Nagore Monee v. Smith*, 23 WR 291; *Ayesha Bibee v. Kanhye*, 12 WR 146]. But later decisions held that mere previous possession for any period short of the statutory period of 12 years will not entitle a plaintiff to a decree for recovery of possession in a suit brought more than six months after dispossession, even if the defendant could not establish any title to the disputed land [see *Kawa Manjhi v. Khowas Nussio*, 5 CLR 278, 282—*Per* PRINSEP J; *Debi Churan v. Issur*, 9 C 39: 11 CLR 342; *Shama Churan v. Abdul Kubeer*, 3 CWN 158; *Eratanza v. Bany Mistri*, 9 C 130; *Purmeshur v. Brojolal*, 17 C 256; *Nisha Chand v. Kanchiram*, 26 C 579: 3 CWN 568; *Satyendra v. Lalif*, 21 C 118; *Ganendro v. Mahendra*, 42 IC 884 (C); *Ram Ch v. Ramanmani*, 20 CWN 773; *Manik v. Bari*, 13 CLJ 649; *Kiran v. Prasanna*, 61 C 419, see also *Aminuddin v. Md Jamal*, 15 B 685; 35 B 499].

In a suit to recover certain plots of land as reformation after diluviation and under a title by prescription, the Judicial Committee appears to have taken a similar view [*Wise v. Ameerunnissa*, 7 IA 73: 6 CLR 249 PC] and some of the decisions noted above seem to have been influenced by the view expressed in *Wise v. Ameerunnissa, sup*. For instance, in *Debi Churan v. Issur, sup* O'KINEALY J, said: "The same question was before their Lordships of the Privy Council in the case of *Wise v.*

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1. See now s 6 of Specific Relief Act 47 of 1963.

Ameerunnissa, and their Lordships held that land to which a plaintiff is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under s 15 of Act 14 of 1859 (now s 9[1] S R Act) which must be brought within six months of the time of dispossession." See also the judgment in *Nisha Chand v. Kanchiram, sup*. It has been pointed out in *Satish v. Madan*, 35 CWN 114: A 1931 C 483 that the decision in *Nisha Chand* and similar other cases is based on a misapprehension of the judgment in *Wise v. Ameerunnissa, ante*.

The principle of possessory title was however recognised by the Judicial Committee in a later case. In a suit where plaintiff got possession by purchase of property and had such possession when the suit was brought and the defendant who disturbed the possession had no title, the Privy Council held that lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser. Where the plaintiff was in possession when he brought his suit against the defendant and sued only for a declaration and an injunction, their Lordships said that, if the plaintiff could under s 9[1] S R Act recover possession as against a dispossessor who could show a title, it is certainly right that he should be able against a person who has no title and is a mere wrong-doer, to obtain a declaration as owner and an injunction to restrain the wrong-doer from interfering with his possession [*Ismail Ariff v. Md Ghouse*, 20 IA 99: 20 C 834, (**folld** in *Gangaram v. Secy of S*, 20 B 798). This Privy Council case was distinguished and explained in *Nisha Chand v. Kanchiram, sup* in which it was held that mere previous possession is not enough except in a suit under s 9[1]. It was observed: "But though that was so in the case of a plaintiff who was in possession and had, therefore, a possibility open to him of being restored to possession upon mere proof of possession, by instituting a suit under s 9[1] S R Act upon being dispossessed, it does not follow that it should be so in the case of a plaintiff who has been in possession, and allowed more than six months to elapse after his dispossession and therefore lost the possibility of recovering possession by a suit under s 9[1] upon mere proof of previous possession"]. The recognition of the principle of possessory title is also to be found in another Privy Council case. On the death of their husband, his two widows took possession of the estate left by him. The deceased had before his death, adopted a boy, to whom also he bequeathed his property by will. The boy, however, died soon after the testator—*Held* that notwithstanding any preferable title that might exist in others through the deceased boy, the widows had a possessory title [*Sundar v. Parbati*, 12 A 51 PC].

A person in possession of property on being dispossessed by another without any better title is entitled to sue for recovery of possession on his possessory title alone independently of s 9[1] S R Act [*Wali Ahmed v. Ajudhia*, 13 A 537 (*Davison v. Gent*, 1857, 26 LJ Ex 122; *Asher v. Whitlock*, (1865) 35 LJQB 17 **relied** on); *Ramdayal v. Saraswati*, 49 A 191: A 1927 A 526; see also *Umrao v. Ramji*, 36 A 51: 11 ALJ 1012: 22 IC 602; *Abdul Hamid v. Surbuland*, 78 PR 1902; *Karim v. Gauhar*, 75 IC 837 (L)]. Where a person's original entry had an ostensible lawful basis, and he is forcibly dispossessed by a person who is a trespasser, the person dispossessed can call in aid s 110 and would be entitled to a decree for possession without being called upon to negative the defect of his title [*Lilki v. Amar*, A 1936 P 602]. A person in possession for over twelve years without title is entitled to maintain a suit for ejectment of one who has dispossessed him and who has no title [*Atmaram v. Balaji*, 77 IC 307: 25 Bom LR 1032].

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1. See now s 6 of Specific Relief Act 47 of 1963.

In various other cases also decided in the different High Courts it has been held that a person omitting to sue under s 9[1] S R Act can rely on his possessory title under s 110 in a regular ejectment suit on the ground that a person in peaceable possession without title has a good title against the whole world except the true owner [see *Premraj v. Narain*, 6 B 218; *Krishnarao v. Vasudev*, 8 B 371; *Harikhandu v. Dhondi*, 8 Bom LR 96; *Hanmantrav v. Secy of S*, 25 B 287; *Mustapha v. Santha*, 23 M 179; *Narayan v. Dharmachar*, 26 M 514; *Krishan Iyer v. Secy of S*, 33 M 173; *Kalyan v. Alakam*, 15 IC 613; *Sundar v. Parbati*, 12 A 51, 56 PC; *Lachho v. Har Sahai*, 12 A 46; *Ramkumud v. Pranhari*, 12 OC 129; *Rampal v. Mustafa*, 9 OC 273; *Nanda Ram v. Naibad*, 12 CPLR 59, 62; *Gangaji v. Dhan*, 11 NLR 31; *Wa Thav v. Pe Hlaw*, 3 LBR 27; *Gangaram v. Secy of S*, 20 B 798; *Bhagwan v. Secy of S*, 10 Bom LR 571; *Gobinda v. Mohan*, 24 A 157; *Pahlwan v. Ram Bharose*, 27 A 169: 1 ALJ 625; *Srigopal v. Ayesha*, 29 A 52: 3 ALJ 755; *Baluran v. Banka Behari*, 3 ALJ 424; *Najaf v. Girdharia*, 32 IC 395—*per* WALSH J; *Kapniah v. Sithay*, 70 IC 367 : 41 MLJ 490; *Unni Mohidin v. Pocker*, 60 IC 109 : A 1921 M 317; *Subbaya v. Md Mustapha*, 40 IC 50 : 32 MLJ 85; *Nallagondappedda v. Aslupalee*, 31 IC 55 : 18 MLT 343; *Ramalinga v. Anthony*, A 1934 M 274; *Chandi v. Narsingh*, 39 IC 26; *Sheikh Mirza v. Abdul Gani*, 4 Pat LW 130 : 43 IC 338; *Sahodra v. Gobardhan*, 2 PLJ 280 : 39 IC 458; *Haradhan v. Iswar*, 38 IC 297 : 2 PLJ 61; *Ajoodhya v. Awadh Behari*, 57 IC 320 (P); *Sidhu v. Dhanna*, 2 LLJ 271 : 67 IC 948; *Amarchand v. Ram Rakh*, 3 LLJ 402; *Abdul Hamid v. Sarbuland*, 78 PR 1902 : 137 PLR 1902 (CONTRA: *Prem Singh v. Mokand*, 22 PLR 1912 : 13 IC 2); *Dia Prakash v. Bhana*, A 1936 L 241; *Maung Te v Mg Oh*, 29 IC 894 : 8 LBR 165; *Maung Naw v. Ma Shwe*, 30 IC 772 FB : 8 LBR 277; *Ma Saw v. Mg Shwe*, 1 Bur LJ 165 : 70 IC 99; *Sit Chauk v. Manu Miah*, 104 IC 361 : A 1927 R 234; *Ma Pwa v. Ma Pan*, A 1927 R 203 : 5 R 154; *Ma Ba v. Mg Po*, A 1936 R 314; *Bezmir v. Rustum*, 54 IC 398; *Ganesh v. Dasso*, A 1927 A 669 : 103 IC 428 : 25 ALJ 857; *Bodha v. Ashloke*, 5 P 765 : A 1927 P 1; *Ramdayal v. Saraswati*, 49 A 191 : A 1927 A 526; *Jawahir v. Jagannath*, 100 IC 315; *Pannalal v. Bhaiyalal*, A 1937 N 281].

Same: It would appear from the above that although most of the earlier decisions in Calcutta held that previous possession is *prima facie* evidence of title against a wrong-doer and entitled the plaintiff to succeed on proof of peaceable possession unless defendant could show a better title, a contrary view prevailed in the later decisions of the same court (except in a few cases), *viz* that mere previous possession for any period short of the statutory period of twelve years will not entitle a plaintiff to recover possession except in a suit under s 9[1] S R Act; his only remedy is to bring a suit under that section. But the other High Courts are of the opinion that s 9[1] is in no way inconsistent with the position that as against a wrong-doer, prior possession of plaintiff in an action for ejectment is sufficient title, even if the suit be brought more than six months after the dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and possession are in a third person. This view is not inconsistent with the English law on the subject. The English doctrine of possessory title is of considerable antiquity and is now firmly established. In *Asher v. Whitlock*, (1865) 3 LJQB 17, COCKBURN CJ, said: "I take it as clearly established the possession is good against all the world except the person who can show a good title, and it would be mischievous to change the established dictum on the simple ground that possession is good title against all but the true owner". This doctrine was approved in *Perry v. Clissold*, where their Lordships said: "It cannot be disputed that a person in possession of land in the assumed character of

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1. See now s 6 of Specific Relief Act 47 of 1963.

owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner" *Perry v. Clissold*, 1907 AC 73, 79 : 95 LT 890]. See also *Glenwood L C Ltd v. Phillips*, 1904 AC 405, 510 where it has been held that "it is a well-established principle in English law that possession is good against a wrong-doer and the latter cannot set up a *jus teritii* unless he claims under it." *Asher v. Whitelock*, *ante* was relied on in *Sundar v. Parbati*, 12 A 51 PC and *Wali Ahmed v. Ajudhia*, 31 A 537 FB and *Perry v. Clissold*, *ante* was followed in *Chandi v. Narsingh*, 39 IC 26. All the other High Courts have recognised this doctrine of possessory title.

The decisions in Calcutta as pointed out earlier are not unanimous, but some later decisions have leaned towards the view in Bombay, Madras and Allahabad. In *Shama Charan v. Surja Kanta*, 15 CWN 163, JENKINS CJ, doubting *Nisha Chand v. Kanchiram*, 26 C 579 expressed himself in favour of the view in the other High Courts. See also *Banka Behary v. Raj Ch*, 14 CWN 141. A decree based on possessory title is *prima facie* evidence of title as against a stranger [JENKINS CJ & CHATTERJI J—*Kailash v. Gajendra*, 15 CLJ 1 : 13 IC 407]. Defendant denied the title and possession of plaintiff. Plaintiff proved his possession for a number of years and payment of rent to the admitted landlord but failed to prove the specific title on which he based his claim—*Held* that plaintiff was entitled to recover possession [*Adhar v. Dibakar*, 41 C 394; see also *Shivaram v. Sadhu*, 59 B 240]. Peaceable possession of land though unexplained entitles one to recover possession by ejecting a trespasser [*Satish v. Madan*, 35 CWN 114 : 53 CLJ 414]. In *Manik Boral v. Ram Charan*, 13 CLJ 649 p 652, MOOKERJI J, said: "There has been much divergence of judicial opinion on this subject as appears from the decisions in 26 M 514; 33 M 173, which accord with the view indicated in 25 B 287 and 5 Bom LR 264, while the most recent case in the court, 15 CWN 163, seems to show an inclination in favour of the Bombay view. The question is by no means free from difficulty and we reserve our opinion on it, involving as it does an examination of the true effect of the Judicial Committee in *Sundar v. Parbati*, 12 A 51."

The view taken by the other High Courts unanimously, is undoubtedly the sounder one and a departure would unsettle a long established principle. S 9[1] S R Act is an enabling section and gives a summary and speedy remedy. If it is held that s 9[1] is a bar to the setting up of a long possessory title unless a suit is brought within six months of dispossession, it would be the case of a privilege taking away an established right. As pointed out in a Madras case possession is under the Indian as under the English law, good title against all but the true owner. S 9[1] is in no way inconsistent with the position that as against the wrong-doer, prior possession of the plaintiff in an action for ejectment is sufficient title, even if the suit be brought more than six months after the dispossession is complained of and the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. The only effect of s 9[1] of S R Act is that a person who has been dispossessed otherwise than in due course of law and who brings a summary suit within the prescribed time is entitled to be reinstated even if the defendant by whom he was dispossessed be the true owner or a person authorised by or claiming under him. But a decree passed in such a suit will not have the force of *res judicata* on the ground of title [*Narayana v. Dharmachar*, 26 M 514 dissenting from 26 C 579]. In *Wali Ahmed v. Ajudhia*, 21 A 537 FB EDGE CJ, said: "S 91 does not suggest for a moment that a man who has a possessory title should be compelled to bring his suit under that section or not at all and STRAIGHT J, in the same case, observed: "I cannot

1. See now s 6 of Specific Relief Act 47 of 1963.

hold or allow that the course of authority in India has ever been to the effect that s 9[1] debars a person who has not brought his suit within six months of the dispossession from giving evidence of his possession in support of his title." In *Mahabeer v. M*, 7 C 591, GARTH CJ, said: "I am aware that there is some difference of opinion in the court upon the point and that some learned judges considered, that the remedy by a possessory action, which is now provided by s 9[1] S R Act, and which was formerly given by the Limitation Act, has the effect of doing away with the English rule, that possession is *prima facie* evidence of title. I do not see why that should be. The rule seems to me to be a very wise and convenient rule and I should be sorry to see it abolished." In some of the Calcutta cases noted above a passage in *Wise v. Ameerunnissa*, 6 CLR 249 PC was **relied** upon as supporting the **contrary** view; but it has been pointed out in several cases that "the passage should be read in conjunction with the finding that the defendants in that suit were entitled to the land under their settlement with the Government to whom it belonged. Under these circumstances the plaintiff could not recover on the strength of previous possession except in a suit under s 9[1] of the S R Act" [*Per* CHAMIER CJ, in *Sahodra v. Gobardhan*, 39 IC 458, 459]. Similar are the observation of SARGENT CJ, in *Krishnarao v. Vasudeb*, 8 B 371 p 376 and SUBRAMANIA J, in *Mustafa Saheb v. Santha*, 23 M 176 as to the true effect of *Wise v. Ameeroonissa*, *ante*: Pollock is also in favour of the above opinion regarding possessory title: "It is submitted that the correct view is the one taken by the Bombay, Allahabad and Madras High Courts in accordance with the English doctrine as now settled, and that the present section (s 9[1] S R Act) cannot be held to take away any remedy available to a party on the strength of his previous possession" [Pollock & Mulla's Contract, 7th Ed p 659].

In a later Calcutta case it has been held following *Sundar v. Parbati*, 12 A 51 PC that possession lawfully obtained in the sense that it was not procured by force or fraud but peaceably, no one interested opposing, is entitled to be maintained against all comers except such as could plead a preferential title [*Gouribala v. Probhas*, 45 CLJ 126]. The Supreme Court has recently held that a regular suit based on prior possession without proof of title is maintainable against a person having no title to the property [*Nair Services &c v. Alexander*, A 1968 SC 1165 : 1968, 3 SCR 163 (*Mustafa Saheb v. Santha, sup* apprd)]. Prior possession of the plaintiff, in an action of ejectment, is sufficient title and that the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person [*Somnath v. Paju*, A 1970 SC 846; (*Ismail Ariff v. Md Gouse*, 20 IA 99 **apprd**; *Nisha Chand v. Kanchiram*, 26 C 579 **overruled**)]. A suit on possessory title must be distinguished from a suit filed under s 6 S R Act, 1963 within 6 months of dispossession. The latter type of suit cannot be resisted on the ground of title, so that the suit can be maintained even against the true owner if he has dispossessed the plaintiff otherwise than in due course of law. A suit on possessory title, on the other hand, can be filed within 12 years of dispossession (art 64 Limitation Act 1963) and the plaintiff can maintain it against any person who does not have a better title [*Mariumbi v. Vithoba*, A 1970 B 405; *Atra v. Ramswarup*, A 1972 P 186].

In an ejectment suit based on title the plaintiff must prove his title and possession within 12 years prior to the suit. Where the title is found to be neither in the plaintiff nor in the defendant, but it is found that plaintiff had possession from 1893 to 1902 while the defendant came into possession only in 1908, *held* that plaintiff is entitled to succeed on the strength of his possessory title [*Adhinarayana v. Krishna*, (1912) MWN 707 : 15 IC 97; see *Navadwipendra v. Madhusudan*, 18 CWN 473]. When

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1. See now s 6 of Specific Relief Act 47 of 1963.

defendant has not title at all, plaintiff is entitled to succeed on the strength of his possessory title [*Ashgar v. Pal Ahir*, 34 A 538]. It is now settled law that a *benamdar* may sue for possession of property [*Gurnaryan v. Sheolal*, 46 C 566 PC]. In a suit on possessory title, plaintiff must prove more than what is necessary in a suit under s 9[1] S R Act [*Tirath Ram v. Kahan Devi*, 1 L 588 : 60 IC 101].

The limits to the doctrine of possessory title were pointed out in a case and it was observed that the presumption that possession follows title is not one which the court is bound to make in favour of the plaintiff. Thus in a suit for ejectment it is for the plaintiff to make out satisfactorily that he was in possession within twelve years before suit and the dispossession was within the period, the first exception being where the court is unable to make up its mind one way or other on account of the conflicting evidence in the case, in which case the court may rely upon the presumption as to possession and decide in favour of the plaintiff, and the second exception being where the property is such that the plaintiff cannot prove effective possession for twelve years, such as an open site, jungle land or a vast waste; if the evidence is not satisfactory on both sides the court may draw the presumption in favour of the plaintiff and give him a decree [*Venkata Somayajulu v. Satyanarayana*, 101 IC 813 : A 1927 M 509 : 25 LW 603]. When a person who has lost possession sues to recover it, he cannot rest upon his prior possesssion alone, unless it was such as to amount to *prima facie* evidence to title. For both title and possession have to be proved in such a case. If the plaintiff's title is disproved, he cannot succeed on the basis of his possession only [*Gobindbhai v. Dayabhai*, A 1936 B 201].

Presumption of Title From Possession By One Co-owner.—Possession or occupation of property by one co-sharer does not constitute adverse possession against the other co-sharer [*Ujalbi Bibi v. Uma Kanto*, 9 CWN 32 : 31 C 970; *Baroda v. Annoda*, 3 CWN 774; *Jagjivan Das v. Bai Amba*, 25 B 362; *Gangadhar v. Parashram*, 29 B 300 : 7 Bom LR 252; *Amrita v. Shridhar*, 33 B 317 : 11 Bom LR 51; *Jogendra v. Baladeb*, 35 C 961 : 12 CWN 127 : 6 CLJ 735; *Anandrao Gunpatrao v. Vasant Rao*, 1 CWN 478 PC : 5 CLJ 338 : 17 MLJ 184 : 9 Bom LR 506; *Vaidyanatha v. Aiyasamy*, 32 M 191 : 19 MLJ 94 : 5 MLT 49; *Haji v. Gohna*, 39 PLR 1906]. In dealing with the question of possession between brothers and sisters in Indian families, slight evidence of enjoyment of income is sufficient [*Inayat v. Ali Hussain*, 20 A 182].

As to when possession of a co-owner is adverse to the other, see *Balaram v. Shyamacharan*, 24 CWN 1057 : 33 CLJ 344; *Joynarain v. Suchitrya*, 33 CLJ 592; *Jagannath v. Chandi*, 26 CWN 65 : 34 CLJ 432; *Kailash v. Bijay*, 36 CLJ 434; *Joynarain v. Srikanta*, 26 CWN 306; *Arabali v. Md Ali*, 35 CLJ 554 PC : 57 IC 444; *Chaitanya v. Sandhayamani*, 64 IC 773; *Jogendra v. Rajendra*, 26 CWN 890; *Hansraj v. Maulu*, 63 IC 881; *Sheikh Sachuni v. Shaikh Basir*, 64 IC 613; *Kuldip v. Ram Sewak*, 67 IC 795; *Ayenessa v. Shk Insuf*, 16 CWN 849.

See notes to s 114 under "*Co-owner*".

S. 111. Proof of good faith in transactions where one party is in relation of active confidence.—Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

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1. See now s 6 of Specific Relief Act 47 of 1963.

Illustrations

(*a*) The good faith of a sale by a client to [1][an attorney] is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the [2][attorney].

(*b*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

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COMMENTARY

Principle and Scope.—As between persons dealing on a footing of complete equality there is no presumption against good faith. The law presumes *prima facie* in favour of deeds duly executed. So, ordinarily a person who challenges the validity of a transaction on the ground of fraud, undue influence, &c and charges his opponent with bad faith has the burden of proof on him (s 101). There is an exception to this rule where a fiduciary or confidential relationship subsists between the contracting parties, *eg* guardian and ward, trustee and *cestui que trust*, parent and child, physician and patient, preceptor and disciple &c. The rule also applies to parents, executors, administrators, trustees, &c who take any benefit in respect of any property entrusted to their care. Where on account of the existence of such relationship one of them is in a position to exert undue influence or "dominion" over the other and takes any benefit from him, the burden of proving the good faith of the transaction is thrown

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1. In Ceylon "a proctor" substituted.
2. In Ceylon "proctor" substituted.

upon the dominant party *ie* the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the *onus* is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position and that no information which should have been communicated has been withheld.

"Fiduciary relationships are of many types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of infinite trust in him" [*per* MOULTON LJ, in *Re Coomber*, 1911, 1 Ch D 723 p 728]. The rule of equity which prohibits a man who fills a position of a fiduciary character, from taking a benefit from the person towards whom he stands, in such a relation, stands upon a motive of general public policy, irrespective of the peculiar circumstances of the case. The rule is founded on considerations as to the difficulty which must, from the condition of the parties, generally exist of obtaining positive evidence as to the fairness of transactions which are peculiarly open to fraud and undue influence. The policy of the rule is to shut the door against temptation [Kerr on Fraud p 140].

Burden of Proving Good Faith Where One Party is in a Position of Active Confidence or in a Position to Dominate the Will of Another.—Where a fiduciary relation existed, the courts of Equity have invariably placed the burden of sustaining the transaction upon the party benefitted by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. This principle has been embodied in this section [*Sital Pd v. Parbhulal*, 10 A 535; see also *Mannu v. Umadat*, 12 A 523]. The principle is of universal application, and must not be regarded as a technical rule of English law [*Demerara B C v. Louisa Hubbard*, 1923 AC 673 PC]. "The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed" [*per* LORD KINGSDOWN in *Smith v. Kay*, 1859, 7 HLC 750, 779]. In cases like these, undue influence is presumed to have existed until the contrary is proved [*Pushong v. Moonia*, 10 WR 128; *Satis Ch v. Kalidasi*, 34 CLJ 529; *Nibaran v. Nirupama*, 34 CLJ 563]. After the fiduciary relation has terminated completely, the parties may deal with each other on the same terms as strangers. The *illustrations* mentioned only two instances, that of lawyer and client and of father and child, but the rule in this section applies to all other cases where persons stand in confidential relation and where predominating influence exists, *eg* trustee and *cestui que trust*, guardian and ward, husband and wife, spiritual adviser and disciple, *purdanashin* women, &c, &c (see *post*).

It is well-established that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits conferred on them by those others unless they can show to the satisfaction of the court that they had competent and independent advice in conferring the benefits [*per* TURNER LJ, in *Roads v. Bate*, 1 CH 252, 257; *per* JENKINS CJ, in *Raghunathji v. Varjiwandas*, 8 Bom LR 525, 535]. The donee must show (and the *onus* is on him) that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equal to emancipation [*per* FARWELL J, in *Powell v. P*, 1 CH 243, 245]. Where there is a "relation of confidentiality" between the parties and the appellant who was in a position to dominate the will of a *pardanashin* lady had a deed in his favour which was on the face of it clearly harsh and unconscionable, it is essential for the party

benefitted to excuse themselves from what would otherwise be the necessary implication arising on those facts [*Thakurji v. Ram Dei*, A 1930 PC 139 : 51 CLJ 414 : 59 MLJ 14]. The principle on which the court acts in relieving against transactions on the ground of inequality of footing between the parties is not confined to cases where a fiduciary relation can be shown to exist, but extents to all the varieties of relations in which dominions may be exercised by one man over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed [*Huguenin v. Baseley*, 14 Ves 273, 286; Kerr p 182]. If it is established by evidence that the defendant was in a position to dominate his will and that the transaction was unconscionable burden of proof of absence of undue influence rests upon the defendant [*Ballo v. Parasram*, A 1972 HP 33]. In the absence of any direct or circumstantial evidence that the executant lady had understood nature and contents of the agreement due execution of document cannot be said to be proved [*Kuma Dei v. Md. Abdul Latif*, A 1994 Ori 111, 113].

S 16 Contract Act provides for the cases in which one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage. In s 16(2)(*a*) "standing in a fiduciary relation to other" is given as an example of a person who is in a position to dominate the will of another. S 16(*3*) supplements this section so far as contracts are concerned and should be read with it. It says that when such person enters into a contract with that other "and the transaction appears on the face of it or on the evidence adduced to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other." It is further laid down that "nothing in this sub-section shall affect the provisions of s 111 of the Evidence Act." Under s 111, whenever the good faith of a transaction between persons, one of whom stands to the other in a position of active confidence, (*eg*, guardian, trustee, parent, agent, &c) is in question, there is a presumption against the deed and the burden of proving good faith is on the person who holds the position. But under s 16(*3*) Contract Act the burden of proof is thrown on the person who is in a dominating position, only when the transaction appears on the face of it, or on the evidence adduced to be unconscionable. This condition must be satisfied, otherwise, it must be proved that the dominating position was actually used to the detriment of the other person (see *Poosathurai v. Kannappa*, 47 IA 1 : 43 M 546 PC *post*).

Whenever any person (not being a person for whom the donor is under a moral duty to make provision, as for instance a child advanced by his parents) by donation derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the courts so far presume against the validity of the instrument, as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, over-reaching, undue influence, or unconscionable advantage [1 Story Eq ss 308-23]. For example, if a deed of gift, or other disposition of property, except a will, be made in favour of a solicitor, or the relation of a solicitor, by a client, of a medical attendant by a patient, or a person by one of his congregation, of a "spiritual medium" by one of his dupes, of a trustee by a beneficiary, of an executor by a legatee, of a guardian by a ward, of a parent by a child, of an agent by a principal, or of a shrewd man of business by an infirm ignorant old woman, the court will regard the matter with jealous suspicion, and will either set aside the instrument as conclusively void, or will throw upon the person benefitted the burden of establishing beyond all reasonable doubt the perfect fairness and honesty of the entire transaction [Tay s 151].

[Ref Tay ss 150-53; Step Art 79A; Phip 8th Ed p 30; Powell 9th Ed p 162; Jones ss 190-91; 425; Wig s 2503; s 16, Contract Act, Kerr's Fraud 4th Ed 146-182; Pollock's Contract Act 7th Ed pp 88-106; Pollock's Fraud pp 63-80].

Exception to the Rule. [Wills].—*(1)* In England testamentary dispositions are excepted from the presumption of undue influence which arises in cases of non-testamentary disposition between parties standing in fiduciary or confidential relationship [Tay s 151; *Parfitt v. Lawless*, 1872 LR 2 P & D 462; *Ashwell v. Lomi*, 1850 LR 2 P & D 477; *Craig v. Lamoureux*, 1920 AC 349] and in the case of wills the burden of proving undue influence is on the person who alleges it [*Boyse v. Russborough*, 1857, 6 HLC 2, 49]. S 111 does not on the face of it appear to make any exception in favour of wills, but the conditions under which a will is void in India (v s 61 Succession Act) being the same as in England it may be asked whether the same rule should not also apply here. The same influence which secures a benefit under a gift or contract *inter vivos*, may be exercised in getting a benefit under a will, and in this view there seems to exist no principle on which an exception can be made in favour of wills. But as s 111 speaks of "a transaction between *parties*" which implies bilateral documents, whereas a will is an unilateral document by which property is disposed of by a person, thus interpreted, an exception may be created in favour of wills. The burden of proving testamentary capacity and execution is upon the proponent [v *ante* p 908]. When the person benefitted by the will is found to be in a position of active confidence towards the testator, there does not appear to be any reason why the general rule of presumption of undue influence should not arise.

> "When once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it" [*per* LORD CRANWORTH in *Boyce v. Russborough, sup*; see also *Craig v. Lamoreux, sup*; **folld** in *Naresh v. Paresh*, A 1955 SC 362].

In *Boyse v. Russborough, ante* LORD CRANWORTH further said:—

> "In order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis. The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. But the principle must not be carried too far. When a jury sees that at or near the time when the will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by the will, as to them, he was not a free agent but was acting under undue control, the circumstances may be fairly such as to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also, the same undue influence was exercised."

Undue influence in order to defeat a will must amount to coercion, fraud or duress [*Boyce v. Russborough, sup*; *Barry v. Butlin*, 2 Moore PC 480; **relied** on in *Gomtibai v. Kanchhedilal*, A 1949 PC 272].

In *Venkataramier v. Krishnammal*, 52 MLJ 20 : A 1927 M 259, it has been said that "there is a difference between the case of wills and cases of contracts or gifts or settlement deeds as regards the burden of proof. In the case of wills, it is for the person who impeaches the will as having been executed under influence to set up and prove it. But in the case of gifts, or settlements where the donee or the settlee is

shown to have been a person in real or apparent authority or in a fiduciary relationship to the donor or settlor or where the donor or settlor's mental capacity was temporarily or permanently affected by reason of age, illness or mental or bodily distress, the onus is upon the donee or settlee to prove that the gift or settlement was not brought about by undue influence." In a Calcutta case it has been observed that s 111 applies to wills [*Nandalal v. Dasarathi*, 61 CLJ 304]. It appears that in America the general rule applies also in the case of wills. "When the person who drafts a will or participates in procuring its provisions from the testator also occupies a relationship of special confidence towards him and would not be a beneficiary in the absence of the will, and is specially benefited by its terms, the general rule is that a presumption of undue influence will arise and the "burden of proof will be on him to show that the will was executed freely and without his influence" [*Bancroft v. Otis*, 24 Am St Rep 904; *In re Nutt's Estate*, 185 Pac 493; Jones s 191; see also Wig s 2503].

S 61 of the Indian Succession Act, (39 of 25) which is also applicable to Hindus (s 57 *ibid*) runs thus:—"A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator is void." Although undue influence is not expressly mentioned in s 61, yet the words "such importunity as takes away the free agency of the testator," no doubt include "undue influence." The words, "undue influence" mean whatever influence constrains a person to do what is against his will and what he would not do if left to himself. In other words, "any improper or wrongful constraint, machination, or urgency of persuasion, whereby the will of a person is overpowered, and he is induced to do or forbear from any act which he would not do, or would do if left to act freely." The words "good faith of a transaction" mean perfect fairness and honesty of the entire transaction, that is, the absence of anything approaching imposition, deception, undue influence or unconscionable advantage.

(2) In England there is another exception and the rule does not apply to the relationship of husband and wife, and consequently there is no presumption that a voluntary deed executed by a wife in favour of her husband is invalid. The *onus* lies on the party who impugns the transaction and not on the party who supports it [*Nedby v. N*, 5 De G & S 377; *Barron v. Willis*, 1899, 2 Ch 578; *Howes v. Bishop*, (1908) 2 KB 390; Kerr's Fraud 190]. See also *Bank of Montreal v. Stuart*, 1911 AC 120; *Talbot v. Von Boris*, (1911) 1 KB 854. In civil cases, the relation of husband and wife raises no presumption of *law* as to material coercion [*Brown v. A G*, 1898 AC 237; Phip 11th Ed p 54]. A mortgage by a wife to secure her husband's debts is not void merely because she had no independent advice [*Bank of Africa v. Cohen*, (1909) 2 Ch 135]. But "the court will have more jealousy over such a transaction [*Griby v. Cox*, 1 Ves Sen 517], and will set it aside if there is pressure, want of knowledge, concealment, or misrepresentation [*Price v. P*, 1 DM & G 308; *Turnbull v. Duval*, 1902 AC 429—Kerr's Fraud p 190].

Where S 111 Does not apply.—S 111 has no application except as between parties to the transaction itself. It does not apply where the sole dispute on the pleading is not one of *bona fides* of a transaction but one of what is the real nature of the transaction itself (*eg* whether it was sale or a mortgage by way of conditional sale). When a question which is entirely outside one of good faith and the transaction is impugned from another angle altogether, merely because a sale takes place between a solicitor and client or between persons who have some other analogous relationship, it does not mean that the method of impugning it should be different or the things to prove should in any way be varied [*Ma Phaw v. Dutt*, A 1938 R 412].

"Position".—The principle on which courts set aside transaction on the ground of undue influence applies to cases where a lawful relation existed between the parties. So, where a woman had while living in adultery with a married man, assigned some of her property to secure a debt owing by her paramour, and afterwards applied to set aside the assignment on the ground of undue influence, the court would not, from the mere existence of the relation, presume undue influence and it was held that the rule in question was only applicable when some *lawful relation* existed between the parties [*Hargreave v. Everard*, 6 Ir Ch R 278. See however *Coulson v. Allison*, 2 D F & J 521]. There is nothing however in s 111 to indicate or to suggest that some lawful relation should exist between the parties. Thus, it has been held that the rule is not restricted to cases where strictly or technically fiduciary relationship is established. The rule applies to all variety of relations in which the court is satisfied that the possibility of exercise of dominion and influence exist, that is, the relation of active confidence justifying the raising of the presumption of undue influence. The relation of paramour and mistress may be included in such cases if the party obtaining the benefit is in a position to dominate and influence the will of the other [*Shivgangawa v. Basangouda*, A 1938 B 304 : 176 IC 145].

"Active Confidence".—The words '*active confidence*' indicate that the relationship between the parties must be such that one is bound to protect the interests of the other [Markby, p 86]. "But I venture to think that they do not go quite far enough to be an adequate expression of law, unless the words "active confidence" are to receive a larger meaning than they would naturally convey to any reader, whether a layman or a lawyer, not familiar with this class of cases" [*Pollock's* p 65. See also *Thakur Das v. Jairaj*, 31 IA 46 : 26 A 130 : 8 CWN 569]. The words "active confidence" should, in order that the law may be really protective, receive a wider interpretation [*Benoy v. Santi*, 40 CWN 45 : 62 CLJ 99]. "Given a position of general and habitual influence, its exercise in the particular case is presumed. But, again, this habitual influence may itself be presumed to exist as a natural consequence of the condition of the parties, though it be not actually proved that the one habitually acted as if under the dominion of the other. There are many relations of common occurrence in life from which 'the court presumes confidence put' in the general course of affairs 'and influence exerted,' in the particular transaction complained of [*Smith v. Kay*, 7 HLC 750, 779]. Persons may therefore not only be proved by direct evidence of conduct, but presumed by reason of standing in any of these suspected relations, as they may be called, to be a position of commanding influence over those from whom they take a benefit. In either case they are called upon to rebut the presumption that the particular benefit was procured by the exertion of that influence and was not given with due freedom and deliberation. They must 'take upon themselves the whole proof that the thing is righteous'. A stringent rule of evidence is imposed as safeguards against evasion of the substantive law" [Pollock on Contract, p 581].

"Where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it; it will not be considered as determined whilst the influence derived from it can reasonably be supposed to remain [*Rhodes v. Bate*, LR 1 Ch 252, 260]. Where the influence has its inception in the legal authority of a parent or a guardian, it is presumed to continue for sometime after the termination of the legal authority, until there is what be called a complete "emancipation," so that a free and unfettered judgment may be formed independent of any sort of control [*Archer v. Hudson*, 7 Beav 55]. It is obvious that without this extension, the rule would be practically meaningless" [Pollock's Contract, p 587]. Active confidence must be established [*Ramkrishna v. Naraina*, 11 LW 112]. An experienced person who acts as *mukhtear* to another just

come of age stands in a position of active confidence [*Surat v. Baldeo*, 8 NLR 150]. If a woman is literate and of considerable intellectual capacity and habits, the court will not be inclined to presume that the party having dealings with her stood in a position of active confidence to her [*Satya Narain v. Nanki*, A 1968 A 224].

Undue influence.—'Undue influence' has been defined in s 16 Contract Act (9 of 1872). The main ingredients are that one of the parties should be in a position to dominate the will of another and should use that position to obtain an unfair advantage over the other. There may be an infinite variety of relation enabling a person to dominate the will of another. As laid down in s 16(2) such a relation may arise (*a*) where a person holds a real or apparent authority over another or where he stands in a fiduciary relation, or (*b*) where he makes a contract with a person whose mental capacity is affected by age, illness or mental or bodily distress. The doctrine of undue influence and its scope were fully considered in *Allcard v. Skinner*, 36 CD 145, where a lady entered a sisterhood and after giving large sums of money to the lady superior while a member, left the sisterhood and some years after brought an action for the return of her property. In this case LINDLEY LJ, observed (at p 181): "As no court has ever attempted to define fraud, so no court has ever attempted to define undue influence, which includes one of its many varieties." Pollock says: "It is impossible to find plain and clear-cut categories for transactions which are often obscure and complicated, and sometimes purposely made so. Practically the most important thing to bear in mind is that persons in authority, or holding confidential employments such as that of a spiritual, medical, or legal adviser, are called on to act with good faith and more than good faith in the matter of accepting any benefit (beyond ordinary professional remuneration for professional work done) from those who are under their authority or guidance. In fact, their honourable prudent course is to insist on the other party taking independent advice" [Pollock's Contract Act, 7th Ed p 92]. As to undue influence, see *Powell v. Powell*, (1904) 1 Ch D 243; *Re Coombers*, (1911) 1 Ch 724.

In *Allcard v. Skinner*, 36 CD 145, 182, LINDLEY LJ, explained the principle thus:—

> "The principle must be examined. What, then, is the principle? Is it, that it is right and expedient to save person from the consequences of their own folly, or is it right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded on the second of these two principles. Courts of equity have never set aside gifts on the ground of folly, imprudence, or want of foresight on the part of the donors. The courts have always repudiated any such jurisdiction. *Huguenin v. Baseley* (*ante*) is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back their property which they foolishly made away with.....On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws."

In *Allcard v. Skinner, ante* (p 171) COTTON LJ, said:—

> "These decisions may be divided into two classes: first, where the court has been satisfied that the gift was a result of influence expressly used by the donee for the purpose; secondly, where the relations between the donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor.....The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of

cases, the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom from being abused."

The influence is to be inferred from the special relationship between the parties, quite apart from proof of actual fraud or unfair advantage. In English law a special relationship of confidence does not exist between parent and child, notwithstanding that the child is actually of age at the time the transaction takes place. These principles are equally applicable to a case under s 16 Contract Act [*Marium Bibi v. Cassim Ebrahim*, A 1939 R 276 (conveyance by daughters to father and executor)].

"But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,—these are all legitimate and may be fairly pressed on a testator. On the other hand pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made" [*per* LORD PENZANCE in *Hall v. Hall*, (1858) 1 P & D 481-482; **folld** in *Naresh v. Paresh*, A 1955 SC 363 : 1955 SCR 1035].

S 16(*3*) Contract Act deals with three matters. In the *first place* the relation between the parties to each other must be such that one is in a position to dominate the will of the other. Once this is substantiated the *second stage* has been reached, *viz.*, whether the contract has been induced by undue influence. Upon the determination of this issue a *third point* emerges which is that of *onus probandi*. If the transaction appears to be unconscionable, the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. Error is almost sure to arise if the order of these propositions be changed. It is only when the borrower proves that the other party was in a position to dominate her will that the question arises whether the position has been used to obtain an unfair advantage [*Raghunath v. Sarju*, 51 IA 101 : 28 CWN 834 : 46 MLJ 610 : 3 P 279; see *Ganga Pd v. Jang Bahadur*, 167 IC 424 : A 1937 O 254]. Sub-s (*1*) of S 16 lays down the principle in general terms. By sub-s (2) a presumption of undue influence shall be deemed to arise if the conditions set out therein are fulfilled. Sub-s (*3*) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence. The reason for the rule in sub-3 (*3*) is that a person who has obtained an advantage over another by dominating his will, may also remain in a position to suppress the requisite evidence in support of the plea of undue influence—S 16 analysed [*Ladli Pd v. Karnal Distillery Co*, A 1963 SC 1279].

Plaintiffs old, infirm, weak and having no one to look after them executed a deed of gift believing it to be a deed of will in favour of defendant-plaintiff's brother's grandson helping them at time of plaintiff's illness—*Held* burden lay on defendant to prove that deed was not induced by undue influence [*Debi Pd v. Chhoteylal*, A 1966 A 438 (*Allcard v. Skinner, sup*; Halsbury, Vol 15 para 491 **ref**)].

Where a brother who has just come of age enters into a mortgage at the instance of and for the benefit of his elder brothers who were his guardians, undue influence may be fairly presumed [*Ahmad v. Ibrahim*, 1939 MWN 976]. Mere taking the advice of the father of the person to whom a woman proposed to leave her property is no evidence of undue influence. Undue influence does not mean the exercise of advice by a close friend or relative. It means the domination of a weak mind by a stronger mind to an extent which causes the behaviour of the weaker person to assume an

unnatural character [*Rambali v. Kishori*, 169 IC 976 : A 1937 P 362]. A person is in a position to dominate the will of another where he holds a real or apparent authority over the other specially in the case in which the other person is one whose mental capacity is affected by reason of age, illness or bodily or mental distress [*Abdul Rauff v. Aymona Bibi*, A 1937 C 492].

Points For Determination on Question of Undue Influence.—In *Md Baksh v. Hosseini*, 15 IA 81 : 15 C 684, LORD MACNAGHTEN laid down the following points for determination on question of undue influence:—

(*1*) Whether the transaction was a righteous transaction, *ie* whether it was a thing which a right minded person might be expected to do.

(2) Whether it was improvident, that is to say, whether it showed so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing.

(*3*) Whether it was a matter requiring a legal adviser.

(*4*) Whether the intention of making the gift originated with the donor.

Cases That Come Within the "Active Confidence" Rule.—In *Md Baksh v. Hosseini*, transactions which are challenged on the ground that one party stood to the other in a position of active confidence, two points have to be distinctly kept in view.

(*1*) In one class of cases the transaction is by a person who by reason of his or her illiteracy or some such cause, has not the usual means of fully understanding the nature and effect of what he or she is doing; and in this category are included transaction by persons such as *pardanashin ladies* (see *post* p 962).

(2) In another class of cases, the transaction is in favour of a person who by reason of some fiduciary position that he holds in relation to the one who makes the transfer to his own disadvantage, is under a special liability to establish the good faith of the bargain.

In the first of the two classes of cases independent advice is not essential, but the burden of proof is capable of being discharged in other ways. This also is the position as regards the second class of cases [*Benoy v. Santi*, 40 CWN 45 : 62 CLJ 99; see *post* p 964: "*Independent Advice Not Essential*".

Presumption of Undue Influence Against a Person in Position of Active Confidence.—When a woman of great age who had to depend entirely for food, clothes and management of her estate upon her nephew executed a gift in favour of the latter, the relations were sufficient to raise the presumption of influence over her and the burden was on the donee that the act was spontaneous [*Inchenoriah v. Shk Allie*, 1927 AC 127 : 98 LJPC 1 : 52 IA 342 : 33 CWN 205: 56 MLJ 349: A 1929 PC 3]. Where donor was hundred years old and donee was intimate with him and lending him money and stripped himself of all his property, donee was in a position to dominate the will of the donor [*Safdar Ali v. Nur Md*, A 1930 S 25]. Where the three defendants who were sisters executed a pronote in favour of the plaintiff (first defendant's husband) for services rendered in the management of their joint estate, it appeared from the circumstances that the eldest sister was in a position to influence her younger sisters and the *onus* of proving good faith of the transaction was on the plaintiff [*Palanivelu v. Neelavathi*, 41 CWN 677: 167 IC 5: A 1937 PC 50].

It would certainly be not true to say that there is a presumption in every case where a wife confers a benefit on her husband without consideration. Equally it is not necessary in order to establish the presumption that the parties should stand in some

particular relationship to each other. The presumption no doubt can be more easily established and indeed may be assumed in such cases as transactions between parent and infant child, solicitor and client or spiritual adviser and penitent, but it will arise in any case in which the facts show that the circumstances are such that influence can fairly be inferred (*Bank of Montreal v. Stuart*, 1991 AC 120 relied on). Further, when a third party who benefits by a transaction has notice of the facts which raise the presumption, he is in no better position than the person who exercised the influence (*Lancashire Loans Ltd v. Blake*, 1934, 1 KB 390; *Badiatannessa v. Ambika*, 18 CWN 1133 relied on). An illiterate wife mortgaged all her properties for the benefit of her husband who was in management—*Held* that the presumption of undue influence did arise [*Tungabai v. Yeshvant*, 49 CWN 55: A 1945 PC 8: 1944, 2 MLJ 350].

Inadequacy of consideration in conjunction with the circumstances of the indebtedness and ignorance of the vendor are facts from which a court may infer the exercise of undue influence [*Bhimbai v. Yeswantrao*, 25 B 126; see *Kokilchand v. Banbahadur*, A 1926 P 539: 96 IC 468]. Undue influence was presumed to have been exerted in the following cases [*Ram Pd v. Phulpati*, 7 WR 99; *Wajid Khan v. Ewaz Ali*, 18 C 545 PC; *Poma Dongra v. Gillespie*, 31 B 348: 9 Bom LR 143]. S 111 applies to the question of good faith arising under s 96 of the Indian Trusts Act, II of 1882 [*Hasanali v. Esmailji*, 9 Bom LR 606]. The fact that the debtors are illiterate, a class which is given special privilege in the matter of land alienation, that the plaintiff is a money-lender and landlord and is a terrorising influence, may shift the burden on the plaintiff [*Vithoba v. Bhangi*, A 1928 N 322]. Helpless condition of borrower may bring in undue influence [*Harnam v. Rajaram*, 148 PLR 1911 (31 A 386 PC follid)]. When parties are not on equal footing and borrower puts his signature without realising the real nature of the transaction and renews the documents on still more exorbitant terms, it is sufficient to—make out a *prima facie* case of undue influence [*Chatring v. Whitchurch*, 32 B 208]. Mere fact of need of money does not put a money-lender in a position to dominate the borrower's will [*Barkatunnissa v. Devi*, 31 CWN 693 PC: 101 IC 29: A 1927 PC 84; *Sundar v. Rai Sham*, 34 C 150].

When Presumption of Undue Influence Does Not Arise.—In the absence of any fiduciary relation or special confidence in another, it lies on him, who alleges fraud, to prove it [*Boo Jinatboo v. Sha Nagar*, 11 B 78, 83]. The relation between the parties must be such as to suggest a special influence or control. The mere relation of a daughter to mother in itself suggests nothing in the way of special influence or control [*Ismail Mussajee v. Hafiz Boo*, 33 IA 86 : 33 C 733 : 10 CWN 570: 16 MLJ 166]. To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it, is erroneous. That merely proves influence. But more than mere influence must be established so as to render it in the language of law 'undue'. It must be established that a person in a position of domination has used the position to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid [*Poosathurai v. Kannappa*, 47 IA 1: 43 M 546 : 22 Bom LR 538; *Fayyazud-din v. Kutub-uddin*, A 1929 L 309: 116 IC 899]. In the absence of such proof, the rule regarding burden of proof has no operation [*Abdul Majid v. Beni Din*, 171 IC 605]. The law says that (*i*) not only the defendant *must have dominant position, but* (*ii*) he *must use it* [*Amjadennessa v. Rahim Buksh*, 42 C 286]. The burden of proving undue influence is not discharged merely by showing that a beneficiary under a will had the power unduly to overbear the will of the testator. It must be shown that in the particular case, the power was exercised [*per* VISCOUNT HALDANE in *Craig v. Lamoureux*, 1920 AC 349].

A court of equity will not set aside a contract, merely because it flows from moral, not legal obligations, unless it was proved that the defendant was forced, tricked or misled into it by the plaintiff by means of fraud, using that word not merely in the restricted sense of actual deceit, but in the larger sense of an unconscientious use of power arising out of certain circumstances and conditions, and showing that the defendant being victimised by the plaintiff's unfair and improper conduct was unable to understand what he was doing [*Ganesh v. Vishnu*, 32 B 37: 9 Bom LR 1164]. Where vendor had been living separately and was not under the vendee's influence, s 111 does not apply [*Jailal v. Sheochand*, 85 IC 293: A 1925 L 123].

Undue influence was not presumed to have been exercised in the following cases [*Dhanipal v. Muneshar*, 33 IA 118 : 28 A 570: 10 CWN 849: 16 MLJ 292; *Ganga Buksh v. Jagat Bahadur*, 23 C 15 PC (where the deed of gift was held to be valid in the absence of any evidence of undue influence); *Md Baksh v. Hosseini Bibi*, 15 IA 81 : 15 C 684 (in which a Mahomedan widow sued to set aside a deed of gift alleging influence); *Ladli Pd v. Karnal Distiliery*, A 1963 SC 1279 *ante*].

The relationship itself does not necessarily preclude the making of the gift; but the burden lies on the donee to show that there was no influence as to the source of the gift. But he can discharge the burden incumbent on him by showing that the relationship notwithstanding, the donor knew completely what he was doing and acted of his own complete free will. With certain kinds of fiduciary relations, such as that of a solicitor taking a gift from his client, that is, obviously, much more difficult to establish than in others where the duty is less definite, courts of equity have therefore exercised a certain freedom in their decisions as to where and how the principle must be applied [*Daing Binte v. Chalak Binte*, 103 IC 239 : A 1927 PC 148].

Where a party to a contract is weak but has ample protection and independent advice and the other party is not shown to have taken any undue advantage of his weakness, the court will not protect him [*Ram Sundar v. Kali*, 104 IC 527 : A 1927 C 889; *Narayana v. Narasimha*, A 1965 K 189]. Fiduciary relationship is not exhausted by the few well known patterns of relationship. The principle should be extended to cases where there is proof of a person dependent, by virtue of his physical or mental infirmity or disability on another party and the circumstances have been proved to show that the other party, taking advantage of such position, has secured a deed or instrument for his own benefit [*Daya Shankar v. Smt. Bachi*, 1982 All 376, 379].

Person Standing in a Fiduciary Relation to another or in a Position of Active Confidence.—Attorney, Pleader or Legal Adviser and Client.—Where an attorney advanced money to his client on the security of mortgages, part of which went towards payment of a large sum the client owed for costs upon settlement of accounts between them, it was held that the client was entitled to re-open the accounts and to have the bills of costs taxed [*Monohar v. Romanath*, 3 C 473. Distinguished in *Shamuldhone v. Susila Bala*, 36 C 493: 12 CWN 1102, where it has been held that to prove "good faith" of a transaction in which one party stands in a fiduciary relationship to the other, it is certainly not necessary to prove that all the accounts on which the contract is based are correct, unless sufficient grounds of suspicion exist; or the bills are *prima facie* shown to be extortionate].

In the absence of competent independent advice, a transaction between solicitor and client, or in a confidential relationship of a similar character, cannot be upheld, unless the person claiming to enforce the contract can prove affirmatively that the person standing in such confidential position has disclosed all information in his

possession and can further show that the transaction itself was fair. If the solicitor has fulfilled all the duties attached in his confidential relationship, the fact that he subsequently made a considerable profit on the transaction, will not render it void and unenforceable, but, in the absence of such evidence, a purchaser from the solicitor is not entitled to a decree for specific-performance [*Demerara B Co v. Louisa Hubbard*, 1923 AC 673 PC]. A pleader stands in a position to dominate the will of his client and the *onus* is on him to show that his client's consent to the appropriation of the money towards his fees was not due to undue influence [*In re Vishindas*, 5 SLR 222: 15 IC 785]. Where a pleader with a view to invest his money persuaded his client to execute a mortgage in favour of his son, there is a presumption against the deed [*Rajmohan v. Nisar*, 164 IC 945]. In the circumstances of the case, a mortgage in favour of mortgagor's pleader's son was held not to be in favour of one who stood in a position of active confidence [*Nisar v. Mohan*, 67 IA 431 : A 1940 PC 204]. Where a *mooktear* employed to conduct certain suits alleged a gift to him by his client, a Hindu widow, the *onus* was upon the *mooktear* to show that the gift was made advisedly [*Ram Pd v. Phoolpatte*, 7 WR 99]. Where a person acting as a general legal adviser, enters into a contract with his client in respect of the subject of litigation, undue influence is presumed until the contrary is proved and the purchaser is bound to show that all the terms and conditions of the contract are fair, adequate and reasonable [*Pushong v. Moonia*, 1 BLR 95: 10 WR 128. See also *Kamini v. Kali*, 12 C 225, where a *mooktear* of a *pardanashin* woman lent money at an exorbitant rate of interest]. Duty of pleaders in purchasing their clients' property at court sales pointed out [*Aghore Nath v. Ram Churan*, 23 C 805; *Subharayuda v. Kottaya*, 15 M 389].

A mortgage between solicitor and client should not ordinarily be scrutinised with the same jealousy as gift from client or purchase or sale at under-value [*Nisar v. Mohan*, 67 IA 431: A 1940 PC 204]. An attorney acting for both sides in a transaction, places himself in a very false position—Duty pointed out [*Kamini v. Krishna*, 16 CWN 649]. When a legal adviser to a *pardanashin* woman acting the part of a money-lender to her, procured the execution by her of a mortgage to secure its repayment, the transaction should be examined with closer scrutiny and the court should insist more sternly on the mortgagee supporting the heavy *onus* of showing that the transaction was fully understood by her and was a fair and honest one [*Mahabir v. Taj Begam*, 19 CWN 162 PC: 27 MLJ 13: 23 IC 642]. While the relation of pleader and client continues, the former cannot acquire a beneficial interest in or title to the subject matter of the litigation antagonistic to the client [*Nagendra v. Debendra*, 22 CWN 491]. A pleader appearing in one or two cases cannot be said to be the permanent pleader of his client, and in a sale-transaction in favour of the pleader's father, the burden of proving good faith ought not to be thrown on the pleader. The case would be quite different if he happens to be the permanent pleader of the other side [*Ram Sumran v. Sarjoo*, A 1929 O 67 : 5 OWN 1062]. Purchase of a decree before execution without the knowledge of the judgment-debtors by the person who had acted as their pleader in the suit *benami* in the name of his wife and a purchase of properties in partial execution of the decree in the name of the wife with leave obtained on her behalf, but the real purchaser being also the pleader—*Held* that the pleader was to reconvey both the decree and the properties to the judgment-debtors although he had ceased to be their pleader [*Nagendrabala v. Dinanath*, 29 CWN 491: 51 IA 24: A 1924 PC 34].

Gift by a person to his lawyer's wife originating as a token of gratitude, the transaction bearing the stamp of righteousness and naturalness too, and far from

being an improvident act, by which he was certainly not landed in penury was held spontaneous and valid [*Bireshwar v. Ashalata*, A 1969 C 111—case laws rev].

It is exceedingly uncommon for pleaders to take the responsibility of entering into a compromise on the strength of the clause relating to the power to compromise in the *Vakalatnama*, the more so in cases where illiterate *pardanashin* ladies are concerned. Those who assert that this was the position have got to discharge an exceedingly heavy burden and the least that could be expected of them is that they should examine the pleader himself [*Hirday v. Nirada*, A 1928 C 334: 108 IC 44].

—Agent and Principal etc.—If the donee stood in a position of active confidence to the donor, the law throws the burden of proving the good faith of the transaction on the donee. If an agent can clearly show that gift was made in his favour by a principal who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld [*Phul Chand v. Lakkhu*, 25 A 358: 23 AWN 70]. In the case of an old and illiterate woman who had made a grant in favour of her confidential agent, every *onus* was upon the person filling a fiduciary character towards another, of showing conclusively that he has acted honestly and *bona fide*, without influencing the donor, who has acted independently of him [*Wajid Khan v. Ewaz Ali Khan*, 18 C 545 PC. See also *Pushong v. Moonia*, 10 WR 128; *Thakurdin v. Ali Hossain*, 13 BLR 427: 21 WR 340; *Crose v. Amrita Moye*, 4 BLR 1]. The fact that for some time before the execution of a deed the defendant had managed the property of the plaintiff, is not sufficient to bring the case within the scope of s 111 [*Ashidabai v. Abdulla*, 31 B 271: 8 Bom LR 652, 659].

The mere fact that the mortgagee was a money-lender and that the mortgage was executed for funds advanced during a litigation on behalf of the mortgagor, is not sufficient to create such a relation of active confidence as to throw the burden of proof of good faith on the mortgagee [*Thakurdas v. Jairaj*, 31 IA 46 : 26 A 130: 8 CWN 569; *Ganga Baksh v. Jagat*, 22 IA 153 : 23 C 15]. For the case of confidential manager, see *Mahadevi v. Neelamani*, 20 M 269, 273.

If a trustee or agent confuses property which he holds in a fiduciary character with his own property, the *onus* lies heavily on him to prove the extent of his property [*Burugapalli v. Nandigram*, 10 IC 57: 10 MLT 313].

—Employer and Manager.—According to the circumstances of a case an inference may be drawn that a general agent and manager is in a position to dominate the employer's will even if the latter is an astute person. Such a person stands in a position of active confidence [*Sant v. Ali Raza*, A 1946 O 129].

—Guardian and Ward—Parent and Child.—The equitable doctrine of undue influence applies to cases, in which the position of the donor to the donee has been such that it has been the duty of the donee (father) to advise the donor (son), or even to manage his property for him. In such cases the court throws upon the donee the burden of proving that he has not abused his position and of proving that the gift made to him has not been brought about by any undue influence on his part. It is necessary to show that the donor had independent advice, and was removed from the influence of the donee, when the gift to him was made [*Lakshmidas v. Roop Laul*, 30 M 169 FB: 17 MLJ 19. On this point see *Wright v. Vanderplank*, 25 LJCh 753; *Bainbrigge v. Browne*, 18 Ch D 188; *Hartopp v. H*, 25 LJ Ch 471; *Dimsdale v. Dimsdale*, 25 LJ Ch 806; *Bury v. Oppenheim*, 26 Beav 594; *Davies v. Davies*, 141 RR 260; *Potts v. Surr*, 34 Beav 543: *Turner v. Collins*, 41 LJ Ch 558 (CA); *De Witte v. Addison*, 80 LT 207 (CA) [Tay s 151]. Where impugned deed was executed by plaintiff soon after attaining majority in favour of his maternal uncle (defendant) who

was acting as *de facto* guardian during minority burden of proving good faith lies on defendant [*Pannalal v. Dilip*, A 1977 C 297].

Husband and Wife.—In a suit by a Mahomedan woman to recover her real and personal property, the defence of the husband was that his wife sold the property to him—*Held* that from the relation subsisting between the parties, the onus was upon the husband to establish that the transaction was a *bona fide* sale and that he gave full value for the properties [*Buzioor Rahim v. Shamsoonnissa*, 11 MIA 551. See also *Abdul Ali v. Karrimunnissa*, 9 WR 153; *Hakim Md v. Nojeban*, 20 A 447; *Dwarka v. Nasir*, 78 IC 850: 11 OLJ 219. On this point see *King v. Anderson*, Ir R 8 Eq 147]. An illiterate wife having mortgaged all properties for the benefit of her husband who was in management, the presumption of undue influence did arise [*Tungabai v. Yeshvant*, A 1945 PC 8 *ante*]. Where the vendor had been living separately and was outside the vendee's influence, the rule does not apply [*Jailal v. Sheochand*, 85 IC 293: A 1925 L 123]. Under Mahomedan law a gift by a wife to husband does not require strict proof of its being of a voluntary nature [*Abdul Rahim v. Md Nurdin*, 23 IC 457]. In England the rule does not apply to the relationship of husband and wife (*ante*).

—**Spiritual Adviser and Disciple.**—Plaintiff having made a gift of his entire property to the *guru* or spiritual adviser to secure benefits to his soul repudiated the deed and sued for its cancellation—*Held* that having regard to the fiduciary relation, the improvidence of the gift, the absurdity of the reason alleged for it, the burden rested upon the defendant to show that the transaction was made without undue influence and good faith [*Mannu v. Umadat*, 12 A 523]. On this point see *Nottidge v. Prince*, 29 LJ Ch 857, *Huguenin v. Baseley*, 14 Ves 273; *Lyon v. Home*, LR 6 Eq 655. A highly improvident gift by a *paradanashin* lady in favour of her priest was set aside on the ground of undue influence, &c [*Kamini v. Krishna*, 16 CWN 649].

—**Physician and Patient.**—The rule as to confidential or fiduciary relation applies to transactions between a medical attendant and a patient [*Mitchell v. Homfray*, 50 LJQB 460; *Dent v. Bennett*, 4 Myl & Cr 269].

Transactions with *Pardanashin* Women.—In this country, the position of women is such that a strict observation of this rule is urgently required, and the courts would act rightly in throwing the burden of proving the good faith of the transaction between the parties, on the party who has been in the fiduciary position. A *pardanashin* woman is entitled to receive in the courts the same protection which the courts of Chancery in England always extend to the weak, ignorant and infirm, and to those who, for any other reasons, are specially to be imposed upon by the exertion of undue influence over them. The undue influence is presumed to have been exerted unless the contrary is shown. [*Roopnarain v. Gangadhar*, 9 WR 297; *Kanye Lal v. Kaminee*, 1 BLR 311]. The *onus* is on the party who sets up and relies on a deed executed by a *pardanashin* lady to satisfy the court that it had been explained to and understood by her either before the execution or after it under circumstances which established adoption of it with full knowledge and comprehension [*Farid-un-nissa v. Mukhtar*, 52 IA 342: 30 CWN 337; **relied** on in *Kharbuja v. Jangbahadur*, A 1963 SC 1203]. Apart from the question of good faith in such transactions, it should be remembered that when a person not knowing a language (in this case English) has affixed his or her mark to a document written in that language, the *onus* to prove that the document was explained and interpreted so as to make the person understand its true import is on the party relying upon it [*Omanhene v. O*, A 1937 PC 274].

In numerous cases involving transfers by *pardanashin* women, the principle embodied in this section has been applied and it has been repeatedly laid down that

when dealing with the disposition of property by a *pardanashin woman* (Hindu or Mahomedan) it is incumbent on the person who is interested in upholding the transaction to show that its terms are fair and equitable, that it was explained to her and that she knew and thoroughly understood the meaning and effect of the instrument she was executing [*Bazloor v. Shamsoonissa*, 11 MIA 551; *Azeezoonissa v. Baquor*, 10 BLR 205; *Asmutoonissa v. Alla Hafiz*, 8 WR 548; *Panna Lal v. Bama Sundari*, 6 BLR 732; *Deo Kuar v. Man Kuar*, 17 A 1; *Khas Mehal v. Adm Genl*, 5 CWN 505; *Greesh Ch v. Bhagobatty*, 13 MIA 419: 14 WR 7; *Keshub v. Radharaman*, 17 CWN 991; *Bhagwati v. Choli*, 2 Lah LJ 689; *Md Ali v. Ramzan*, 24 CWN 977 PC; *Sriram v. Nandkishore*, 85 IC 169: A 1925 L 196; *Hasanali v. Rupulla*, 27 Bom LR 184: 86 IC 886; *Mathura v. Siddique*, A 1939 N 159; *Sheo Parsan v. Narsing*, 55 CLJ 323 PC; *Kalvan v. Ahmaduddin*, 38 CWN 1157 PC; *Kharbuja v. Jangbahadur*, A 1963 SC 1203; *Mustt Jebeda Khatun v. Sulaiman Khan*, A 1986 Gau 71, 79 : (1986) 1 Gau LR 147]. Same also in the case of illiterate lady [*Guljan v. Naziruddin*, A 1975 Gau 31]. Where a mortgage was executed by a *parda* woman stricken with paralysis, the burden is heavy on the mortgagee to prove that she executed it with a full comprehension of her position [*Chandrani v. Lala Sheo*, A 1931 O 146]. In the case of a mortgage, the burden is on the mortgagee to prove that the document was fully read over and explained to the *pardanashin women* [*Mayurbhanj S Bank v. Bhabatosh*, A 1961 Or 178]. Where a person claims under a deed executed by a *parda* lady living apart from her relatives who would under ordinary circumstances help her with counsel and specially where the person profiting by the transaction occupied a position of confidence, the burden is on him to show that the transaction was a real and *bona fide* one and fully understood by the lady [*Thakoor Din v. Nawab Syed*, 21 WR 340: 13 BLR 427 PC].

The strongest and most satisfactory proof ought to be given by persons who claim under sale or gift from *pardanashin* ladies that the transaction was a real and *bona fide* one and fully understood by the executants [*Mirza Sajjad v. Wazir Ali*, 39 IA 156: 34 A 455: 16 CWN 889; *Kumawati v. Digbijai*, 48 IA 381: 43 A 525; *Sarat Kumari v. Amulyadhan*, 37 CLJ 501 : 71 IC 633]. If the transferee depends on a specific covenant entered in it to establish his title, the burden is heavy on him to prove that the document was read over and explained to her and that she understood it. But in other cases the presumption under s 55 T P Act overrides the burden [*Md Siddiq v. Md Nuh*, 52 A 604: A 1930 A 771]. A person setting up a deed of compromise executed by a *pardanashin* lady must satisfy that it had been explained to her, that she understood the same and that disinterested and competent persons with a fair understanding of the whole matter advised her to enter into it [*Anandapriya v. Bijoy*, A 1926 C 643: 91 IC 705; *Dhiraj v. Chandrika*, 91 IC 1050: 13 OLJ 210]. In a transaction entered into by a *pardanashin* lady in favour of her managing agent, every *onus* is upon the agent to show conclusively that the transaction was honest and *bona fide* and that the lady had some independent advice [*Walid Khan v. Ewaz Ali*, 18 LA 144: 18 C 545; *Sri Kishan v. Kashmiro*, 20 CWN 957: 31 MLJ 362: A 1926 PC 172: 34 IC 47; *Afsar Begum v. Md Yusuf*, A 1931 O 103].

In the case of deeds and powers executed by *pardanashin* ladies, it is requisite that those who rely on them should satisfy the court that the deeds were explained to them and that they understood their conditions and effects [*Sudisht v. Sheobarat*, 7 C 245 PC; *Shambati v. Jogo Bibi*, 29 IA 127: 29 C 749: 6 CWN 682; *Samsuddin v. Abdul Hussain*, 31 B 165: 8 Bom LR 781; *Sururijugur v. Baroda Kant*, 11 CLJ 563, 575; *Bindu Bashini v. Giridhari*, 12 CLJ 115; *Alik Jan v. Rambaran*, 12 CLJ 357; *Marian Bibi v. Sakina*, 14 A 8; *Ashgar Ali v. Delroos*, 3 C 324 PC; *Md Baksh v.*

Hosseini Bibi, 15 C 684 PC; *Behari v. Habiba Bibi*, 8 A 267; *Achhan v. Thakur*, 17 A 125; *Tikaram v. Dy Commr of Barabanki*, 26 IA 97: 26 C 707: 3 CWN 573; *Annada v. Bhuban*, 28 IA 71: 28 C 546: 5 CWN 489; *Ram Ratan v. Nandu*, 19 IA 1: 19 C 249; *Kishori Lal v. Chuni Lal*, 9 CLJ 172; *Saratkumari v. Amulyadhan*, 27 CWN 629; *Aisha Bibi v. Mahfuz-un-nissa*, 46 A 310; *Md Ibrahim v. Marian*, A 1929 P 410; *Parasnath v. Mewa Kunwar*, A 1930 A 561; *Khatejan v. Haji Md*, A 1936 C 721].

Though there may not be "a clear understanding of each detail of a matter which may be greatly involved in legal technicalities," "the proper and necessary test" to be applied is a finding "that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as explained to her, that nothing was concealed, and that there was no undue influence or misrepresentation" [*per* LORD BUCKMASTER, *Suniti v. Dharasundari*, 46 IA 272, 278: 47 C 175: 24 CWN 297, 301]. In *Farid-un-nissa v. Mukhtar, post*, the Privy Council stated the requirement as being "that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it.". What is to be made clear is that her execution is not merely a mechanical act but a conscious act [*Nathusa v. Md Siddique*, A 1939 N 159; *Vinayak v. Md Hanif*, A 1954 N 11]. These tests were restated and applied in *Hem Ch v. Sudharani*, 67 IA 309: 1940, 2 Cal 436: 45 CWN 253 and *Bank of Khulna v. Jyoti*, 67 IA 377: 45 CWN 259; see *Karunamoyee v. Mayamoyee*, A 1948 C 84; *Satyadeo v. Chanderjoti*, A 1966 P 110. The legal position in respect of documents executed by *pardanashin* women and the burden of proof in such transactions has been clearly summarised in *Abbasunnisa v. Nisar Fatma*, A 1946 A 121 (relied on in *Fatima Bibi v. Anwar Fatima*, 1954 ALJ 488, 491; *Gopinath v. Satish*, A 1964 A 53)]. The rule of special protection to a *pardanashin*, old and illeterate woman should be applied in the light of the facts of each case instead of inflexibly in each and every case [*Kulsumunnisa v. Ahmadi*, A 1972 A 219].

A word by word translation is inadequate. A clear statement of the general effect of the deed is necessary and by way of comparison suggestion as to the possibility of making other arrangements for managing her affairs without parting with her rights and her control [*Bholanath v. Bhutnath*, 40 CLJ 393, 426]. Merely reading out document to the executant, even in a language in which she understands, does not amount to explaining her [*Man Singh v. Nowlakhbati*, 2 P 607]. It must further be proved that it was explained to her and that she really understood the nature and effect of the transaction [*Kalyan v. Ahmaduddin*, 38 CWN 1157 : A 1934 PC 208; *Heeralal v. Manashamoyee*, 38 CWN 438; *Bishan Devi v. Jagat*, A 1937 L 353]. But it is not necessary in all cases to show that at the time the document was executed the explanation was then given. It is unnecessary to explain when she is already well aware of the contents of the document [*Thirathman v. Gujeswari*, 96 IC 571 : A 1926 P 529]. Each case depends on its circumstances [*Md Sadin v. Masih Bibi*, A 1930 P 452: 9 P 417].

A party who comes to set aside a contract under which there has been possession and enjoyment is in a very different position from a person who comes into court to enforce a deed. In the former case the burden of establishing at least a good *prima facie* title to the relief sought by the plaintiff lies on the plaintiff. In the case of *pardanashin* lady, the *quantum* of evidence which would be required from the plaintiff would be the same as that required from any other plaintiff seeking to avoid the deliberate act, but that some *prima facie* evidence is necessary, even in the case of a—*pardanashin* lady, is a proposition which cannot be disputed [*Kalee Pd v. Raja Sahib*, 12 MIA 282: 12 WR 6]. So, if a *parda* lady comes to court with specific allegations of fraud, it lies upon her to make out a *prima facie* case. But if a

transferee from her comes into court to enforce a deed by her the burden is on him to prove fairness of transaction and independent advice [*Md Shafi v. Kulsum*, 79 IC 260 (L)]. When a transaction entered into by a *pardanashin* lady is found to be one between parties on equal terms, the question whether it should be set aside as inequitable would depend on circumstances at the time when it was made and not upon subsequent events [*Purna Ch v. Sarojini*, 60 CLJ 25].

Whole Document Must Be Understood.—It is sufficient if the general result of the transaction is clearly understood and it is not necessary that details involving legal technicalities should be comprehended (see *Suniti v. Dharasundari, sup*). When the lady has understood the bargain substantially, it is good and good as a whole. But if a feature of the transaction affecting in a high degree the expediency of entering into the bargain is not understood by her (as in this case that she was making herself personally responsible for the mortgage money) the bargain does not bind her at all and cannot be enforced as to certain portions of it, while rejecting others [*Hem Ch v. Sudharani*, 67 IA 309: 1940, 2 Cal 436]. Where a *pardanashin* lady was found to have understood the effect of a document except one of the terms, she was held not bound by the document [*Mohini v. Bikram*, 44 CWN 793]. The question is whether the *whole document*, as it was, was her mental or conscious act. Accordingly when it is found that she was not aware of or did not understand a part of the transaction, the other part (as in this case the mortgage of some of the properties) cannot be severed and held to be operative. The document must fail as a whole [*Bank of Khulna v. Jyoti*, 67 IA 377: 45 CWN 259].

—When Does Question of Undue Influence Arise.—If those founding on the deed fail to show that the grantor intelligently understood the deed, that is an end of the matter. The question of undue influence can arise only when they have established the grantor's intelligent understanding of the deed. Accordingly it is not correct to say that in the absence of proof of undue influence, ignorance of the contents of deed is not sufficient to invalidate a deed against a *pardanashin lady* [*Bank of Khulna v. Jyoti*, 67 IA 377: 45 CWN 259]. Even if intelligent understanding of the deed is established, a question of undue influence may still arise. Such influence may be direct and expressly used by the donee for the purpose, or the relation between the donor and the donee may be such as to raise the presumption of undue influence [*Karunamoyee v. Mayamoyee*, A 1948 C 84].

Independent Advice Not Essential.—In the case of an illiterate *pardanashin* lady, the authorities show that independent legal advice, though desirable, is not itself essential. The possession or absence of independent advice is the fact to be taken in consideration and well weighed on a review of the whole of the circumstances and if upon such a review which includes the nature of the thing done and the training and habit of mind of the grantor, as well as the proximate circumstance of effecting the execution, the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand [*Kali Baksh v. Ram Gopal*, 41 IA 23: 18 CWN 282: 12 ALJ 115: 26 MLJ 121; *Sabitri v. Savi*, 12 P 259]. After all, advice, if given, might have been bad advice, or the settlor might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it. If the settlor really understands and means to make the transfer, it is not required that some one should have tried to persuade her to the contrary. The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions or the unfamiliarity of the subject-matter are all reasons for requiring an increased amount and efficiency of explanation. So, if a deed, as presented for

execution, differs substantially either by way of addition or of omission, from the scheme and details which the intending settlor has previously laid down, the discrepancy ought to be clearly pointed out and its nature and effect should be fully described, unless which must be rare, the difference is so obvious that even a person of the executant's position must perceive and appreciate it for herself. If the description and explanation have been partial or erroneous, or have not been given at all, the question will then arise, as it arises where there has been no independent legal advice, whether, if proper information had been given, it would have affected the executant in completing the deed. On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the executant, subsequently made, that she had not understood what she was doing is not conclusive [*Farid-un-nissa v. Mukhtar*, 52 IA 342: 47 A 703: 30 CWN 337: 49 MLJ 758; *Kundan v. Musharaffi*, 63 IA 326: 40 CWN 1093: see *Benoy v. Santi*, 40 CWN 45]. The rule enunciated in *Kali Baksh v. Ramgopal* and *Farid-ud-nissa's case ante*, that the donee is bound to discharge the onus of showing that the donor really understood and intended to execute the deed, but it was not necessary to prove independent advice, was reaffirmed in *Sikandar v. Zulfikar*, 42 CWN 332: A 1938 PC 38.

"It is not sufficient that the donor should have an independent adviser unless he acts on his advice. If this were not so, the same influence that produced the desire to make the settlement would produce disregard of the advice to refrain from executing it and so defeat the rule" [*per* FARWELL J, in *Powell*, 1 CR 243 : 82 LT 84]. Independent legal advice is not the only way in which the presumption of undue influence can be rebutted; nor does the fact that independent legal advice was given rebut the presumption, unless it is shown that the advice was taken [*Inchenoriah v. Shaik Allie*, 1929 AC 127: 52 IA 342; A 1929 PC 3: 33 CWN 205]. The duty of persons taking transfers from *pardanashin* ladies and the manner in which *onus* of transferee is discharged has also been pointed out in *Barkatunnissa v. Debi*, 31 CWN 693: 101 IC 29: A 1927 PC 84. It should be remembered that while it is important to maintain the principles of law laid down for the protection of *pardanashin* ladies in respect of disposing of property, it is also important not to "transmute such a legal protection into a legal disability." Thus where the execution of a deed was not questioned and the disposition was a natural one which the lady would have every motive to make and it was further proved that she knew and approved of what was being done the transaction was upheld [*Ruhulla v. Hassanali*, 32 CWN 929: A 1928 PC 303: 110 IC 260].

As to what is independent advice, see *Satis Ch v. Kalidasi*, 34 CLJ 520; *Nibaran v. Nirupama*, 34 CLJ 563. As to proof of independent advice and its scope, see *Kali Baksh v. Ramgopal*, 18 CWN 282 PC: 26 MLJ 121; *Keshab v. Radharaman*, 17 CWN 991; *Abdul Rahaman v. Md Nurdin*, 23 IC 547; *Mariam Bibi v. Shaikh*, 28 CLJ 306; *Kailash v. Latifunnessa*, 51 IC 556; *Hira Bibi v. Ramdhan*, 6 Pat LJ 465; *Motilal v. E M and Co*, 25 CWN 265 PC: 47 IA 265: 61 IC 486. If the terms are intricate they must have been adequately explained and her degree of intelligence will be a material factor, but independent legal advice is not in itself essential [*Ramanamma v. Viranna*, 35 CWN 633: 61 MLJ 94: A 1931 PC 100]. If she understood the transaction and acted as a free agent, mere absence of independent advice will not detract from the validity of the transaction [*Iftikhar v. Sikandar*, A 1934 A 179; *Suresh v. Maharani*, A 1936 C 378; *Zohra v. Mahboob*, A 1943 M 677; *Faizuddin v. Kutubuddin*, A 1929 L 309; *Parasram v. Mewa Kunwar*, A 1930 A 561]. The rule as to independent advice is not inflexible. Where a lady who was technically a *pardanashin* but in fact had full capacity of understanding business transactions executed a deed of gift in favour of her son-in-law and placed him in possession of the properties and understood the full nature and effect

of the transaction, there was no undue influence. Even if she had not taken independent advice, the document would not be invalidated unless it be shown that independent advice would have in any way affected the execution of the document [*Ram Sumran v. Gobind*, 5 P 646: A 1926 P 582].

Where a lady made a highly improvident gift to her priest, the *onus* is on the defendant to prove the entire *bona fides* of the transaction. It is not enough to show that the document has been read and explained by an attorney [*Kamini v. Krishna*, 39 C 933: 16 CWN 649]. Where agreement for reference to arbitration and its legal consequences were not fully explained, the award though registered was not held binding on a *pardanashin lady* [*Beni Din v. Ram Naresh*, A 1929 A 824]. As to the principles by which the courts are to be guided in dealing with transactions by *pardanashin* ladies as applicable to the case of a compromise on behalf of a lady by agent, *eg* counsel, see *Tarubala v. Sourendra*, 29 CWN 597 : 41 CLJ 213. *K* a widow came under the influence of *F* a brother of her husband who managed her properties. *F* got up a sham arbitration proceeding which resulted in an award by which *K* received only a share of the property of her husband—*Held* that *F* stood to her in a fiduciary character and the trust was betrayed [*Sri Krishna v. Kashmiro*, 20 CWN 957: 31 MLJ 362: A 1916 PC 172: 34 IC 37]. A *pardanashin* lady having a money-lending business had a manager to transact her business. Full authority is presumed and she cannot repudiate contracts by the manager to suit her convenience [*Baiju v. Dhapi*, 58 IC 310: 1 Pat LT 578].

Summary of Law.—The result of the many decisions appears to be that in the case of deeds and powers executed by *pardanashin* women, (Hindu or Mahomedan), it is requisite that those who rely upon them should satisfy the court that they had been explained to and *fully* understood by those who executed them. The court should be careful to see that deeds taken from *pardanashin* women have been fairly taken and that the party executing them has been a free agent and has been duly informed of what she was about to do. The court when dealing with a deed alleged to have been executed by a *paradanashin* woman, must before it gives effect to it, satisfy itself upon the evidence—

(*1*) that she is really a *pardanashin* woman who lives in complete seclusion and has little or no commerce with the outside world;

(*2*) that the deed was actually executed by her or by some person duly authorized by her with a full understanding of what she was about to do;

(*3*) that she had full knowledge of and understood the nature and effect of *all* the transactions into which she is said to have entered; a mere reading or translation is not sufficient. The disposition must be substantially understood and nothing must be concealed and it must be found that she had sufficient intelligence to understand the important and relevant matters, though there may not be "a clear understanding of each detail of a matter which may be greatly involved in legal technicalities" (*Suniti v. Dharasundari, ante*);

(*4*) that she had independent and disinterested advice in the matter; but independent advice is not in itself essential. After all, the advice, if given might have been bad advice, or she might have disregarded it. Independent advice is not the only way in which the presumption of undue influence can be rebutted;

(*5*) that she understood the *whole* document. If it is found that she was not aware of or did not understand a part of the transaction, the document must fail as a whole [See *Nibaran v. Nirupama*, 26 CWN 517: 34 CLJ 563; *Mariam Bibi v. Shaikh*, 28 CLJ 306; *Farid-un-nisa v. Mukhtar*, 52 IA 342: A 1925 PC 204: 47 A 703; *Inchen-*

oriah v. Shk Allie, 1929 AC 127: 33 CWN 205; *Kali Baksh v. Ramgopal*, 41 IA 23: 36 A 81; *Kharbuja v. Jangbahadur*, A 1963 SC 1203; *Wajid Khan v. Ewaz Ali*, 18 IA 144: 18 CWN 545; *Suniti v. Dharasundari*, 46 IA 272: A 1919 PC 24; *Benoy v. Santi*, 40 CWN 45; *Sikandar Begum v. Zulfikar*, 42 CWN 332 PC; *Hem Ch v. Sudharani*, 45 CWN 253 PC; *Bank of Khulna v. Jyoti*, 67 IA 377: 45 CWN 259; *Sunder Kuar v. Shah Uday*, A 1944 A 42 and other cases cited *ante*].

These principles fall broadly into two groups, *viz firstly*, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence and, *secondly*, cases where the person was an absolute stranger and dealt with her at arm's length. In the former class of cases the court will act with great caution and will presume confidence put and influence exercised; in the latter class of cases the court will require the confidence and influence to be proved intrinsically. The fairness of the bargain is the crucial test [*Satis Ch v. Kalidasi*, 34 CLJ 529; *Nibaran v. Nirupama*, 34 CLJ 563; *Mariam Bibi v. Shaikh*, 28 CLJ 306; *Krishna v. Nagendrabala*, 34 CLJ 333; *Bindubashini v. Giridhari Lal*, 12 CLJ 115, 121; *Sabitri v. Savi*, 12 P 359]. In dealing with transactions by a *pardanashin* woman the degree of her intelligence is one of the material factors to be considered. The court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to be of business habits, to have been literate and to have possessed a capacity to judge for himself [*Nibaran v. Nirupama*, 26 CWN 517, 523; *Krishna v. Nagendrabala*, 25 CWN 942, 951; *Hodges v. Delhi & London Bank*, 27 IA 168 : 5 CWN 1 and other cases *post*]. See *Tungabai v. Yeshvait*, A 1945 PC 8 *ante*.

—Applicability of the Rule to Women Not Strictly *Pardanashin*.—The rule above applies only to strictly *pardanashin* women. Women who live in complete seclusion and do not appear in public according to the customs and manners of their country and who on account of their ignorance or want of contact with outside world have not the capacity of understanding business transactions and are incapable of managing their own affairs are alone entitled to the protection of the court. In *Bazloor v. Shamsoonnissa*, 11 MIA 551, a *pardanashin* woman has been described as a woman of rank, who lives in seclusion, shut in the *zenana* having no communication except from behind the *parda*, or screen with any male persons save a few privileged relations or dependants. [See also *Sajjad v. Wazir*, 34 A 455 PC: 39 IA 156; *Kamawati v. Digbijai*, 46 IA 381: 43 A 525; *Faizuddin v. Kutubuddin*, 10 L 761: *Davindar v. Lachmi*, A 1930 L 985; *Nathuram v. Dhan Devi*, A 1933 L 451; *Karunamayee v. Mayamoyee*, A 1948 C 84]. A *pardanashin* woman need not necessarily be a woman of rank. If on account of the rules and customs of society she has to keep herself within the *zenana* and to live a life of seclusion without any contact with the outside world, she is a *pardanashin* woman. It has been held that in order to entitle a woman to the special care with which the courts regard the disposition of a *pardanashin* woman it is not enough that she lives in some degree of seclusion [*Shk Ismail v. Amir Bibi*, 4 Bom LR 146; see *Barkhurdar v. Sat Behari*, 36 PLR 371].

It must, therefore, be remembered that the doctrine applies only to the case of execution of document by a *pardanashin* lady strictly so called. If a lady is not *pardanashin* or though *pardanashin*, is literate and of considerable intellectual capacity and business habits, the court will not be inclined to interfere with a deed which has been *prima facie* properly executed by her, or to interfere with transactions to which her consent has been deliberately given; for instances of this doctrine, it is sufficient to refer to the cases of *Badi Bibi v. Sami Pillai*, 18 M 257; *Khatija v.*

Ismail, 12 M 380; *Md Buksh v. Hosseni*, 15 C 684 PC; *Behari v. Md Hasan*, 63 IC 574; *Krishna v. Nagendrabala*, 34 CLJ 333; *Md Lai v. Ramzan*, 14 LW 710 PC: 47 C 175; *Sriram v. Nandkishore*, 5 L 465; *Taizuddin v. Kutubuddin*, 10 L 761: A 1929 I 309; *Mariam Bibi v. Shk Md*, 28 CLJ 306; *Ghulam Zuhra v. Habla Begum*, A 1985 J&K 22, 24 : 1984 Srinagar LJ 367; *Narayan Mishra v. Champa Dibyer*, A 1986 Ori 53, 56 : (1985) 2 Orissa LR 417].

A woman whose position in life is quite humble and who goes about freely though hiding her face in public is not a *pardanashin* in the strict sense of the word [*Hukam v. Saligram*, A 1935 L 184]. A woman who has no objection to communicate, when necessary, in matters of business with men other than members of her family, who fixes rents with tenants and collects rents, goes to court and gives evidence, and who attends at the registrar's office in person to acknowledge her deeds for registration, cannot be regarded as *pardanashin* [*Ismail Mussaji v. Hafiz Boo*, 33 IA 86: 33 C 773: 10 CWN 570: 8 Bom LR 379: 16 MLJ 166]. In another case before the judicial Committee it was pointed out that the principles which are applied to transaction of a certain well-known and easily ascertained class of women, cannot be extended as a matter of course, to those women of another class who may be described by the term *quasi-pardanashin*, LORD HOBHOUSE observed: "It is abundantly clear that Mrs Hodges was not a *pardanashin*. The term *quasi-pardanashin* seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the *pardanashin* class, is yet so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her and the same amount of protection which the law gives to *pardanashins* must be extended to her. The contention is a novel one, and their Lordships are not favourably impressed by it. As to a certain well-known and easily ascertained class of women, well-known rules of law are established, with the wisdom of which we are not now concerned; outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute" [*Hodges v. Delhi & London Bank Ltd*, 27 IA 168: 23 A 137, 145: 5 CWN 1 : 10 MLJ 279: 2 Bom LR 967. See the observation of MOOKERJEE J, in *Alik Jan v. Ram Baran*, 12 CLJ 357, 365].

The question whether a lady is *pardanashin* is one of fact. When the assertion that a lady is *pardanashin* is challenged, evidence may be produced not only in support of the allegation, but also that even if she was outside that class, the circumstances were such that the person dealing with her was bound to take special precautions and to prove that he had done so [*Bank of Khulna v. Jyoti*, 67 IA 377: 45 CWN 259: A 1940 PC 147]. Where a *pardanashin* lady embarked on scheme of house building for profit, any contract by her with an agent for supervision of such building must be treated from the point of view of an ordinary employer [*Nagendra v. N*, 43 CLJ 479: 97 IC 260; see *Panna v. Chiman*, A 1947 L 54].

The rule regarding transaction by *pardanashin* ladies applies equally to illiterate and ignorant women though not *pardanashin*. The object of the rule of law is to protect the weak and helpless and it should not be restricted to a particular class of community [*Chainta v. Bhalku*, A 1930 C 591: 51 CLJ 465]. Protection available to a *pardanashin* lady is also available to an illiterate lady [*Upendra Mahanto v. Champer*, 1996 AIHC 3449, 3451 (Ori)(HC)]. Even where it is not proved that the donor was a *parda* woman in the strict sense, still s 111 applies when it is proved that the transferee is in the active confidence of the transferor [*Vithal v. Narayan*, A 1931 N 69].

*S. 111-A. **Presumptions as to certain offences.**—(1) Where a person is accused of having committed any offence specified in sub-section (2), in—

(a) any area declared to be a disturbed area under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order, or

(b) any area in which there has been, over a period of more than one month, extensive disturbance of the public peace, and it is shown that such person had been at a place in such area at a time when firearms or explosives were used at or from that place to attack or resist the members of any armed forces or the forces charged with the maintenance of public order acting in the discharge of their duties, it shall be presumed, unless the contrary is shown, that such person had committed such offence.

(2) The offences referred to in sub-section (1) are the following, namely:—

(a) an offence under Section 121, Section 121A, Section 122 or Section 123 of the Indian Penal Code,

(b) criminal consipiracy or attempt to commit, or abetment of, an offence under Section 122 or Section 123 of the Indian Penal Code.

S. 112. Birth during marriage conclusive proof of legitimacy.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that [1][he] is the legitimate son of that man, unless it can be shown that [2][the parties to the marriage] had no access to [3][each other] at any time when [1][he] could have been begotten[4].

SYNOPSIS

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* Inserted by the The Terrorist Affected Areas (Special Courts) Act, 1984, w.e.f. 14-7-1984.

1. In Ceylon "such person" substituted.
2. "that man" substituted.
3. "the mother," substituted.
4. "or that he was impotent" added after "begotten".

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COMMENTARY

Principle and Scope.—The law presumes strongly in favour of legitimacy of off-spring, as it is birth that determines the status of a person. This section embodies the rule of law that a child born during the continuance of a valid marriage or during two hundred and eighty days (*ie* within the period of gestation) after its dissolution shall be *conclusive* proof that it is legitimate, unless it is proved by clear and strong evidence that the husband and wife did not or could not (*eg* for absence, want of opportunity, illness, impotency, &c) have any access at any time when the child could have been begotten. Formerly, if it appeared that the husband was "within the four seas" at any time during the pregnancy of the wife, there was a conclusive presumption of legitimacy; but the rule could not survive in England and by gradual relaxation the present rule has come into existence. When a child is born in lawful wedlock, the law presumes that the married couple had sexual intercourse between themselves. The principle underlying the rule appears to be that on ground of public policy it is undesirable to enquire into the paternity of a child whose parents "have access" to each other. There is no reference to conception in the first part of the section. The presumption of legitimacy arises from birth in wedlock and not from conception, unless, as laid down in the latter part of the section, non-access can be proved. The presumption is therefore rebuttable but only by very strong and clear proof of non-access. Where strong protection is provided for the lawfully constituted family and to the progeny born out of a lawfully solemnized marriage, the rebuttal of the presumption of legitimacy of such progency can be done only by equally strong reliable and unimpeachable evidence. [*Miss Vanessa Frnandas v. Francisco Frnandas*, A 1986 Bom 89, 100 : 1985 Mah LJ 788].

Section 112 is based on the well known maxim *pater est quem nuptioe* demonstrant (he is the father whom the marriages indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid and that every

person is ligitimate. Marriage on affiliation may be presumed, the law in general presuming against vice and immorality.

It is rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderence of evidence, and not by a mere balance of probabilities [*Goutam Kundu v. State of W.B.*, A 1993 SC 2295, 2301 : 1993 Cri LJ 3233].

This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existance or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation".

The effect of this section is this : there is a presumption and a very strong one though a rebuttable one, conclusive proof means as laid down under section 4 of the Evidence Act.

From the above discussion it emerges:

(1) that courts in India cannot order blood test as a matter of course;

(2) Wherever applications are made for such prayers in order to have roving enquiry, the prayers for blood test cannot be entertained;

(3) There must be a strong *prima facie* case in that the husband must establish non-access in order to dispel the presumption arising under Sec. 112 of the Evidence Act;

(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman;

(5) No one can compelled to give sample of blood for analysis.

"The marriage state being the chief foundation on which the superstructure of society rests, presumption of the marriage arising from cohabitation of spouses is very strong presumption. Where a man and a woman had lived together as man and wife, the law will presume, until the contrary is proved, that they were living together by virtue of a legal marriage and not in concubinage. The presumption of law is the strongest of legal presumptions and is not lightly to be repelled by mere balance of probabilities and the evidence repelling that presumption must be strong, distinct and satisfactory. Every intendment is made in favour of marriage de facto and the more distant, the date of the marriage the more readily is the presumption drawn, based upon cohabitation and repute.

The presumption still exists, even when there is no positive evidence of any marriage having taken place". [See *Rajagopal Pillai v. Pakkianm Ammal*, (1968) 2 Mad LJ 411. See also *Sarangapani v. Varadhan*, A 1995 Mad 188; See also *S.P.S. Balasubramanyam v. Suruttayan*, A 1997 SC 756 and *Vanajakshamma v. P. Gopala Krishna*, A 1970 Mys 307 : 1970 Cri LJ 1584].

S 112 refers to point of *time of birth* as the deciding factor and not to the time of conception; the latter point of time has to be considered only to see whether the husband had not access to the mother [*Palani v. Sethu*, 47 M 706: 81 IC 456 (*Nicholas v. Asphar*, 24 C 216, 222 **dissented** from)]. Birth during continuance of marriage is conclusive proof of legitimacy unless non-access at the time he could have been begotten is proved [*Khan v. Natha*, 90 IC 123: A 1925 L 414; *Clifford v. C*, 45 CWN 249]. Whenever a child is born in lawful wedlock, there is a conclusive

presumption of legitimacy, unless it is proved by very reliable evidence (*eg* divorce, long and continued separation, illness rendering sexual intercourse impossible, etc) that the parties had not or could not have any access. When sexual intercourse between husband and wife is proved, there is presumption of legitimacy, even though the wife might have been living in adultery with another. Under such circumstance, evidence of her sexual intercourse with others cannot be given [see *Morris v. Davies; Cope v. C, post*].

S 112 has no application when maternity is in dispute and not paternity [*Nand v. Gopal*, A 1940 PC 93: 1940 Kar 235: 72 CLJ 263]. A question was raised whether s 112 applies only to cases in which the continuance of the marriage is established positively or directly, or whether it can be brought into effect by proof of the marriage and by the consequent presumption that the relationship continued [*Cf* s 114 *ill (d)*]; but as the question was not directly involved, the general question was not considered. It was however observed that it cannot be assumed that the continuance of the marriage requires for the purposes of s 112 to be shown in any special manner. Upon proof of a marriage on a certain date, the court may under s 4 either regard as proved the subsistence of the marriage on a subsequent date unless and until it should be disproved or else in its discretion call for its proof [*Ismail v. Momin*, A 1941 PC 11: 193 IC 209 (**relied** on in *Chandu v. Khatemonnessa*, A 1943 C 76]. Presumption under s 112 can be drawn by any court civil, criminal or revenue [*Jambapuram v. J*, A 1950 M 394]. The section is as much applicable to the off-spring of a marriage between Hindus as it is to children of spouses professing other faiths [*Boramma v. Dharmuppa*, A 1969 My 17]. S 112 applies to all persons including Mahodemans [*A G Ramchandran v. Shamsunnissa*, A 1977 M 182 (*Sibt Md v. Hameed*, A 1926 A 589; *Sampatia v. Mir Mahboob*, A 1936 A 528 **rel** on)]. Mere fact that the parties were residing separately in close proximity of distance is not sufficient to prove non-access [*Satya Devi v. Brij Lal*, 1996 AIHC 5006]. If the people, especially the relatives, treat and acknowledge a person (appellant) as the ligitimate son of his father by forging a bond of matrimony, it is a strong piece of evidence to hold that that person (appellant) is a legitimate offspring of his father [*K. Govinda Raju v. K. Munniswami Gounder*, A 1997 SC 10, 11].

Presumption of Legitimacy From Birth During Marriage.—The section follows the English law in adopting date of birth and not date of conception as the test of legitimacy [*Pal Singh v. Jagir*, 7 L 369]. The Hindu law appears to be the same [*Oolagappa v. Collr of T*, 21 WR 38: 14 BLR 115 PC]. Under the Mahomedan law legitimacy is determined by the date of conception [*Md Allahabad v. Md Ismail*, 10 A 289]. The section assumes the existence of a legal marriage and says that birth during continuance of a valid marriage is *conclusive proof of legitimacy*. As to 'conclusive proof', see s 4 *ante*. The words 'conclusive proof' are to be found in ss 41, 112, 113. A child born on the 17th August 1920 to *D* a woman who was married to *L* on the 7th April 1920, was legitimate as the presumption is quite irrespective of the fact whether the mother was married or not at the time of conception. The determining factor is birth during marriage [*Thandi v. Jagannath*, A 1937 L 784].

Continuous cohabitation of a man and a woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage [*M. Shanmugha Udayar v. Sivanandam*, A 1994 Mad 123, 136]. From a close reading of decisions in *C.R. Venkatachari v. Marie*, A 1926 Mad 1130; *Prasad Gareri v. Kesari*, A 1941 Pat 444; *Mohámmed v. Sulekha*, 1981 Cri LJ NOC 40 (Ker) and *Thakur Prasad v. Godavari Devi*, A 1951 Pat 514, what emerges is, where the question at issue was whether a certain person was father of a child, the mere statement of the mother, without corroboration, asserting his paternity cannot be accepted as the

conclusive proof, and that the corroborative evidence should be that, at or about the relevant time when the child was conceived the said person was frequenting the woman and that he had opportunity of access to her [*Oona Gowri v. Oona Rajeswari*, 1996 Cri LJ 1158, 1159 (AP)]. Sections 112 and 114 give rise to presumption against concubinage and permit raising of presumption of legitimacy of children born during the period of continuous cohabitation [*S. Ajarma Bi v. S. Khurshid Begum*, A 1996 SC 1663, 1664].

The presumption of legitimacy is a rebuttable presumption of law (*post* p 971), and the only way of displacing it, is to show, as pointed out in the latter part of the section, that the parties to the marriage had no access to each other at the time when the child was begotten and no other exception is allowed. That is, it must be proved that access was impossible on account of impotency, serious illness, absence, &c or by very convincing evidence that though opportunity existed, there was no sexual intercourse during the period when the child must have been begotten. As to what is "access" and "non-access" see *post*. It has been held in many cases that the presumption is not lightly to be repelled. The evidence to rebut it, must be so "strong, distinct, clear, satisfactory and conclusive" as to lead to the irresistible conclusion that the child is not the offspring of the husband. The presumption cannot be displaced by mere balance of probabilities or by circumstances creating doubt [see *Morris v. Davies*, 5 Cl & F 163, 244—*per* LORD LYNDHURST; *Gaskil v. G*, 1921 P 425, 433—*per* LORD BIRKENHEAD; *Burnaby v. Baillie*, 42 Ch D 282; *Langham v. Thomson*, 91 LT 680; *George v. Thyer*, 1904, 1 Ch 456; *Howes v. Draeger*, 23 Ch D 173; *Aylesford Peerage Case*, 11 App Cas 1; *Bala Dutt v. Indra*, A 1980 (NOC) 136 (A)]. Husband and wife living apart in the same village long before birth of a child. Unless absence of access is established presumption of legitimacy cannot be displaced [*Perumal v. Ponnuswami*, A 1971 SC 2532 (*Venkateswarlu v. Venkatanarayana*, A 1954 SC 176; *Ammathayee v. Kumaresan*, A 1967 SC 569 **rel** on)]. Where legitimacy and marriage are admitted, the presumption is not to be applied to any particular form of marriage so as to create a particular status of the child [*Molapo v. Thabo*, 111 IC 193: A 1928 PC 276].

The law in certain cases recognises a conclusive presumption in favour of *legitimacy*. Thus, where the husband and wife have co-habited together, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is shown to have been, at the same time, guilty of infidelity [*Cope v. C*, 5 C & P 604; *Morris v. Davies*, 3 C & P 215 &c]; and even where the parents are living separate, a strong presumption of legitimacy still arises, which can only be rebutted, either by proving a divorce or a judicial separation, or by cogent and almost irresistible proof of non-access in a sexual sense [*Saye and Sele Peer*, 1848, 1 HLC 507; *Hargrave v. H*, 9 Beav 552 &c]. The fact that a woman is living in notorious adultery, though of course it amounts to very strong evidence, is not, in itself quite sufficient to repel this presumption [*R v. Mansfield*, 1841, 1 QB 444, 450. In this case LORD DENMAN questions the authority of *Cope v. C, sup.* See *Howes v. Draeger*, 1883, 23 Ch D 173]. Nothing except evidence that the husband did not have intercourse at the period of conception, can prove to be illegitimate a child born in wedlock. If the husband could, from the circumstances of time, place and health, have had antenuptial intercourse with his wife, and there be no evidence that he did not have such intercourse, he must be considered the father of the child [*Gordon v. G*, 1903 P 141: 72 LJP 33]; even though it can be proved that the wife had sexual intercourse with any number of other men at or about the time when the child must have been begotten. But where the parents have been either divorced or judicially separated, their children born during the separation are *prima facie* illegitimate

[*St George v. St Margaret*, 1 Salk 123; *Hetherington v. H*, 12 PD 112. In such cases non-access is presumed: Tay s 106].

[*Ref Tay s 106; Best s 351; Steph Art 98; Phip 8th Ed pp 663-664; Wig ss 154, 2527; Jones ss 93-97; Hals; 3rd Ed Vol 15 para 629*].

Blood grouping test.—By blood group tests of the concerned adults and the child it may be possible in certain cases to say that a particular person is not the biological father of the child. Such test by itself cannot say with certainty that a particular person is the biological father. Where however one of the two men must be the father and by blood tests one of them is excluded if the tests answer in that way, in that case it may be held that the other man is the biological father of the child. Section 112 is clear enough that once the husband is shown to have had access to the wife at any time when the conception could have taken place, the scope of adducing rebuttal evidence becomes non-available. The contending party cannot be permitted to say that he will rebut the conclusive presumption of law regarding paternity by proving directly by blood test that the husband is not the biological father of the child which will virtually be an abrogation of the existing provision of section 112. [*Tushar Roy v. Sukla Roy*, (1992) crimes 1014, 1016, 1018 (Cal)].

In two English decisions reported in *Re L*, (1968) 1 All ER 20 and *B.R.B. v. J.B.*, (1968) 2 All ER 1023 blood test of child was permitted for determing paternity. The decision of the Court of Appeal in *Re L*, (1968) 1 All ER 20 (*supra*) that blood test can be directed if it serves the best interests of the child however was applicable to cases where exercise of the custodial jurisdiction of High Court was concerned. LORD DENNING, M.R. was however of the opinion that blood test could be ordered also in a paternity issue or in any proceedings where it is in the best interests of the child to have its paternity settled one way or the other. The learned Judge was also of the view that even in a petition for divorce on ground of adultery, blood test on the child could be ordered. On the other hand in the same decision WILLMER, L.J. expressed his reservation about the opinion of LORD DENNING, M.R. regarding blood test in proceedings other than in custodial jurisdiction, in the following language at page 34:

> "Since preparing this judgment I have had the advantage of reading the judgment which has not been delivered by LORD DENNING, M.R. Having regard to what has been said by him. I think it right to add two further observations. First, I confine my judgment with regard to the Court's power to order a test of a child's blood to cases arising, as this case does, within the court's custodial jurisdiction. I am not, as at present advised, prepared to hold that such a power exists in a paternity issue, and still less on a petition for divorce on the ground of adultery. So to hold would in my judgment be contrary to the decision of this court in *W v. W* (No. 4)."

LORD DENNING stated thus

> "but they can say positively that a given man cannot be the father, because the blood groups of his and the child are so different."

DAVOES, L.J. who was also a party to the said decision concurred with the above reservation of WILLMER, L.J. However in the latter decision in *B.R.B. v. J.B.* (*supra*) it was held that a judge of the High Court can order a blood test on a paternity issue or indeed on any other issue. LORD DENNING M.R. concluded thus:

> "The conclusion of the whole matter is that a judge of the High Court has power to order a blood test whenever it is in the best interests of the child".

Therefore in English law blood test may be permitted in cases of disputed paternity only when it is in the best interests of the child to do so. In England the matter has since been covered by legislation and section 20 of the Family Law Reforms Act, 1969 provides that in civil proceedings in which paternity of any person falls for determination, the court may give a direction for the use of blood tests. Section 23 of the said Act authorises the Court to draw such inference as appears proper in the circumstances when the person concerned does not comply with the direction of the court for blood test.

Even before these statutory provisions came into force in England. Lord Denning, M.R. expressed his views in the matter in *Re LL.* (*supra*) as well as in *B.R.B. v. J.B.* (*supra*) in the following language:

> "If an adult unreasonably refuses to have a blood test, or to allow a child to have one, I think that it is open to the court in any civil proceedings (no matter whether it be a paternity issue or an affiliation summons, or a custody proceedings) to take his refusal as evidence against him, and may draw an inference therefrom adverse to him. This is simply common sense".

DIPLOCK, L.J. however, as it seems, had some reservation in the matter and this is how the learned judge expressed the same in *B.R.B. v. J.B.* (*supra*) at page 1027.

> "I reserve may views about the evidential inferences to be drawn by the refusal of anyone to take a blood test. As LORD DENNING, M.R. said in *Re L.* (ii), that is a matter of common sense, and I would prefer to leave it to common sense".

As regards United States the law as stated in Forensic Sciences edited by *Cyril H. Wecht* is as under:

> "Parentage testing is the major (but not the exclusive) involvement of forensic serology in civil cases. The majority of disputed parentage cases involve disputed paternity, although an occasional disputed maternity, or baby mix-up case does arise, and can be solved using the tools of forensic serology described in this chapter. Blood typing has been used to help resolve paternity cases since the mid-1920's. According to Lattes, there were 3,000 cases tested in Berlin in 1924, and Schiff and Boyd said that the first case went to court in Berlin in 1924. Ottenberg, in this country published paternity exclusion tables in 1921, as did Dyke in England in 1922. It took somewhat longer to satisfy the courts, both in Europe and in this country, that parentage exclusions based upon blood grouping were completely valid. Wiener said that he had obtained an exclusion in a paternity case in this country which reached the courts early in 1933. In January of 1934, Justice Steinbrink of the New York Supreme Court in Brooklyn ordered that blood tests be performed in a disputed paternity action, using as precedent a decision by the Italian Supreme Court of Cassation, but his order was reversed upon appeal. Soon afterward, however, laws were passed in a number of states providing the courts with statutory authority to order blood testing in disputed paternity cases.
>
> Paternity testing has developed somewhat more slowly in the United States than in certain of the European countries, but today the differences in the number of systems employed, and judicial acceptance of the results, are not longer that great. A number of authorities have recently reviewed the subject of paternity testing in some detail, and in some cases have summarized the results of large number of cases that they have investigated. Walker points out the failure to exclude a man, even at the 95 per cent level of paternity exclusion

does not mean that the alleged father is proven to be biologic father, because absolute proof of paternity cannot be established by any known blood test available. Although this fact is well known and appreciated by workers in the field of blood grouping and by attorneys active in this area, is not generally understood by the lay public. However, blood group serology, using proven genetic marker systems, represents the most accurate scientific information concerning paternity and is so recognized in the United States, as well as in a number of countries abroad."

The Science of Serology is not yet that perfect as can definitely say that certain person is the biological father of a child. It can only exclude some person from paternity, and that too not in hundred per cent cases. Even an innocent person, if per chance he is not so excluded by reason of the imperfection of the science, will fall within the category of possible father, that itself may expose him to a speculative suspicion baked by the imperfect science. In Indian social conditions that itself may prove to be social stigma for which even an innocent person may feel shy or embarrassed to submit to Serological test. To attribute paternity on the basis of inference from refusal in such circumstances will be simply grotesque [*Tushar Roy v. Sukla Roy*, 1992 (3) Crimes 1014]. Imperfection of science on this subject was also considered by a Division Bench of the Calcutta High Court in refusing blood test in a decision reported in *Leelabati v. Kashinath*, 73 CWN 19.

LORD DENNING, M.R. in *Re L*, (*supra*) took note of the new situation which would justify reconsideration of the presumption of legitimacy. His Lordship at page 23 of the said decision observed thus:

> "Moreover, there is not nearly the same stigma on illegitimacy as there used to be. It can be, and often is, cured by subsequent marriage of the parents. Even when the parents do not marry, the penalties on the child have been largely removed. The sins of the father are no longer visited on the children. In this new situation I think that we are at liberty to reconsider the presumption of legitimacy. I am prepared to hold that it can be rebutted on the balance of probabilities".

"This new situations" is yet to arrive in the Indian scene. The stigma on illegitimacy is yet as dark here as ever. Illegitimacy, as far as I am aware, cannot be cured in India by subsequent marriage of the parents. In India while it may not be difficult to find childless parents who are eager or agreeable to adopt a legitimate child of known parentage, it is indeed extremely difficult to find out a childless couple agreable, far less eager, to accept a child of illegitimate birth or of unknown parentage as their own child by adoption. The phychology of such reluctance, if no abhorrence, is embedded in the traditional outlook and attitude of the Indian mind towards illegitimacy which as a matter of fact, notwithstanding a few noticable exceptions, is still prevalent and prominent is this country, good or bad whatever may it be [*Tushar Roy v. Sukla Roy* (*supra*)].

In India there is no special statute governing this. Neither the Cr PC nor the Evidence Act empowers the court to direct such a test to be made. In *Polavarapu Venkateswaralu v. Polavarapu Subbayya*, (1951) 1 Mad LJ 580 it was laid down that if the parties are unwilling to offer their blood for a test the court cannot force them to do so.

In Taylor's Principles and Practice of Medical Jurisprudence, Vol. 2, it is stated

> "In *Wilson v. Wilson*, Lancet 1942 I 570, evidence was given that the husband's group was OM, that the wife's was BM and that the child's bas ABN.

The Court held that the husband was not the father of the child, and granted a decree for nullity."

In the text books on Medical Jurisprudence and Toxicology by Modi, (8th Edition), at page 94, reference is made to a case decided by a Criminal Court at Mercara in June, 1941, in which the paternity and maternity of the child being under dispute, the Court resorted to the results of the blood grouping test.

In *Hargovind soni v. Ram Dulari*, A 1986 MP 57 it was laid down:

"The blood grouping test is a perfect test to determine questions of disputed paternity of a child and can be relied upon by Courts as a circumstantial evidence. But no person can be compelled to give a sample of blood for blood grouping test against his will and no adverse inference can be drawn against him for this refusal."

Blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by courts as a circumstantial evidence which ultimately excludes a certain individual as a father of the child. However, it requires to be carefully noted no person can be compelled to give sample of blood for analysis against her will and no adverse inference can be drawn against her for this refusal [*Goutam Kundu v. State of W.B.*, A 1993 SC 2295 : 1993 Cri LJ 3233 : 1993 (2) Crimes 481, 485].

In *Raghunath v. Shardabai*, A 1986 Bom 388 it was observed that blood grouping test have their limitation, they cannot possibly establish paternity, they can only indicate its possibilities.

Discussing the evidentiary value of blood tests for determining paternity, Rayden on Divorce, 1983 Vol I at page 1054 says:

"Medical Science is able to analyse the blood of individuals into definite groups: and by examining the blood of a given man and a child to determine whether the man could or could not be the father. Blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father. It is obviously the latter aspect that proves most valuable in determining paternity, that is, the exclusion aspect, for once it is determined that a man could not be the father, he is thereby automatically excluded from consideration of paternity. When a man is not the father of a child, it has been said that there is at least a 70 per cent chance that if blood tests are taken they will show positively he is not the father, and in some cases the chance is even higher : between two given men who have had sexual intercourse with the mother at the time of conception, both of whom undergo blood tests, it has likewise been said that there is a 80 per cent chance that the tests will show that one of them is not the father with the irresistible inference that the other is the father.

The position which emerges on reference to these authoritative texts is that depending on the type of litigation, samples of blood, when subjected to skilled scientific examination, can sometimes supply helpful evidence on various issues, to exclude a particular parentage set up in the case. But the consideration remains that the party asserting the claim to have a child and the rival set up parents put to blood test must establish his right so to do. The court exercise protective jurisdiction on behalf of an infant. In my considered opinion it would be unjust and not fair either to direct a test for a collateral reason to assist a litigant in his or her claim. The child cannot be allowed to suffer because of his

incapacity; the aim is to ensure that he gets his rights. If in a case the court has reason to believe that the application for blood test is of a fishing nature or designed for some ulterior motive, it would be justified in not acceding to such a prayer."

In *Goutam Kundu v. State of W.B.*, A 1993 SC 2295 : 1993 Cri LJ 3233 : 1993 (2) Crimes 481. The Supreme Court summarised the law as under:

(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertaind.

(3) There must be a strong *prima facie* case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.

(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.

Having regard to the Indian legal and social background the time is not yet ripe for a meaningful judicial activism so as to throw away over-board the judicial interpretation which section 112 of the Evidence Act has consistently received so long and to take recourse to any over-jealous interpretation by causing extreme violence to the language of the said section so as to virtually abrogate the same. Neither the language of section 112 of the Evidence Act nor the interpretation it has consistently received throughout, nor even the consideration of welfare of the children in disputed cases of paternity in general, demands or permits blood test as exploratory or investigation experiment for determining paternity [*Tushar Roy v. Sukla Roy*, (1993) 3 Crimes 1014, 1023].

It is however to be mentioned that the view expressed by Calcutta High Court in *Tushar Roy's* case about the desirability or permissibility of introducing blood test right now are confined for obvious reasons, to the question of determination of paternity of a child born or conceived during wedlock. The question whether blood test should be resorted to for determining the paternity of a child who was not-born or conceived during wedlock, does not fall within the scope of section 112 of the Evidence Act and different considerations may arise in such cases. Similarly, where maternity is in dispute, say, where replacement of a child soon after its birth in a hospital is suspected and each of the two married ladies Mrs. X and Mrs. Y claims it as her child, blood tests of both the couples may be of help in resolving the dispute about maternity. In such a situation section 112 of the Evidence Act will not come into play because here the basic question is to which of the two ladies the child was born and the section, by its own terms, does not apply where the maternity of the child is not certain. [See also *Swati Lodha v. State of Rajasthan*, 1991 Cri LJ 939 (Raj) and *Bharti Raj v. Sumesh Sachdeo*, A 1986 All 259].

"Valid Marriage".—The presumption under S. 112 can be drawn only if the child is born during the continuance of a valid marriage. Concealment of pregnancy at the time of marriage renders the marriage invalid. Hence s. 112 would not be applicable to such marriage [*Sabu (P.V.) v. Mariakutty*, A 1998 Ker 86]. There is no presumption in favour of legitimacy without laying the foundation for it, *viz* that a valid marriage took place [*Kanhaya v. Ram Del*, A 1944 O 162] and further the continuance of that marriage must be there.

"Had No Access to Each Other." [Mode of Proof].—'Access' and 'non-access' mean presence or absence of opportunity for sexual intercourse. Existence of opportunity for sexual intercourse does not mean merely physical presence at the necessary time, *eg* residence at the house or place. Access or non-access must be taken in the sexual sense. There must also be capability of enforcing marriage relation. Access therefore may be impossible not only when the husband is away during the period when the child could have been begotten, but also on account of impotency, incompetency (*eg* under the age of puberty, natural infirmity, malformation, illness, &c), length of time elapsed since the death of the husband [see *R v. Luffe*, 8 East 202, 207] &c. So, a husband may be present and yet there may be non-access.

As to non-access, what is allowed to be proved is non-access by husband, and not proof that other men had sexual intercourse with the woman. If it is shown that the husband cohabited with the wife, or from circumstances of time, place and health that they could have had intercourse at the necessary time, the presumption will not be repelled by evidence that the wife had also intercourse with other men. In *Gordon v. G, sup*, the President said:—

> "The law says that what has to be proved is that the husband did not have intercourse which might have led to the birth of the child. It does not allow the fact that another person had intercourse with the wife to be a material consideration. That is, I think, a proposition of the utmost importance in such cases as this. It was recognised in the opinion of the judges who were called in to assist the House of Lords in *Bansbury Peerage Case*, 1811 IS & S 153, 159".

> In *Cope v. C*, [1 M & R 269], ALDERSON B, in summing up said: "If once you are satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by being shown that other men had also sexual intercourse with the woman. The law will not, under such circumstances, allow a balance of the evidence as to who is most likely to have been the father" [Thayer's Cases, p 57]. See also *Morris v. Davies*, 3 C & P 215.

Proof that husband and wife slept together is said to afford an irresistible inference of sexual intercourse [*Legge v. Edmonds*, 25 LJ Ch 125]. So, where they lodge in the same house having frequent opportunity for sexual intercourse [*Shuman v. Shuman*, 83 Wis 250]. The following language illustrates the strength of the presumption where access is shown: "If it were proved that the wife slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate" [SIR JOHN LEACH in *Bury v. Phillpot*, 2 Myl & K 349, cited in Jones s 94].

The mere fact that they are living separately in two different houses is insufficient to prove non-access. [*Dhedu v. Malhanbai*, A 1966 MP 252]. Non-access had to be proved like any other physical fact and may be established both by direct and circumstantial evidence of an unambiguous character. An entry in the birth register containing the name of the mother only does not warrant the inference that the child is not legitimate [*Manicka v. Ammakannu*, A 1942 M 129: 201 IC 39]. Family custom that husband and wife will have no coitus unless particular ceremony is performed—Ceremony not performed but husband and wife living under same roof for months together—non-access not proved [*Dhedu v. Malhanbai, sup*].

"Access" and "Non-access".—"Access" and "non-access" mean no more than existence or non-existence of opportunities for marital intercourse [*Venkateswarlu v. Venkatanarayana*, A 1954 SC 176: 1954 SCR 424; *Karapaya v. Mayandi*, 12 R

243: 13 CWN 427 PC; *Krishnappa v. Venkatappa*, A 1943 M 632; *Maina v. Deorao*, 1942 Nag 383; *Hanumantha Rao v. Ramachandrayya*, A 1944 M 376; *Vira Reddy v. Kistamma*, A 1969 M 235]. The law was not correctly stated in some cases where "access" was held to mean actual cohabitation or sexual intercourse (see *Jagannatha v. Chinnaswami*, 55 M 243: 61 MLJ 878; *Samuel v. Annamàlai*, 149 IC 100: 66 MLJ 279; *Umar-uddin v. Ghulam*, A 1935 L 628). Though there might have been oportunity, if husband can prove that there was no actual cohabitation, "non-access" is established [*Kasi Ammal v. Ramasami*, A 1949 M 881; *Pandoiya v. Puli*, 1 Mad HCR 478, *Hargovind Soni v. Ramdulari*, A 1986 Madh Pra 57, 61, 62: 1986 MPLJ 105].

The requirement of the section for rebutting the conclusive presumption is not to show "non-access" exactly "at the time when the child was begotten", but the requirement is still more onerous and pervasive so much so that the contending party will have to show non-access "at any time" when the child "could have been begotten" which means non-access not at any particular moment but during the whole span of the time when the conception according to the ordinary course of nature possibly could have taken place [*Tushar Roy v. Sukla Roy*, (1992) 3 Crimes 1014, 1016]. This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation." [*Goutam Kundu v. State of W.B.*, A 1993 SC 2295 : 1993 Cri LJ 3233 : 1993 (2) Crimes 481, 487].

The word "non-access" would include futility or incapability of access on account of impotency, want of virility through immature age, or other physical incompetency [see *Rozario v. Ingles*, 18 B 468]. Impotency is equivalent to non-access [*Naga Tun v. Mi Chon*, 26 IC 996]. The modified version of s 112 in Ceylon includes impotency. As to what is impotency, see Shelford on Marriage (1841) p 202 and *Birendra v. Hemlata*, 24 CWN 914. Having regard to the terms of s 112, it was suggested in a case that it may be doubted whether on an issue of legitimacy evidence of impotence is not admissible, but the Privy Council did not consider it necessary to pronounce any opinion. [*Krishnayya v. Mahipathi*, 40 CWN 12 PC].

"Access" means *effective* access and therefore physical incapacity to procreate is non-access. Where non-access on account of immature age is alleged, it would be necessary to prove *firstly*, the precise age of the husband at the date of conception, and *secondly*, to negative the possibility of premature virility at that age owing to precocious development. Without such proof, non-access based on the alleged incapacity of the husband cannot be made out [*Bhagwan v. Mahesh*, 40 CWN 360 PC: 159 IC 325: 69 MLJ 868]. Incapacity to procreate at 13 cannot safely be inferred from the sole fact that Lyon's Medical Jurisprudence accepts as applicable to India Taylor's statement with reference to England where climatic conditions are different, that 14 is the earliest age. Much depends on whether the case presented on either side as reconcilable with the established customs and usages of Hindus as regards child marriage [*Bhagwan v. Mahesh, sup*].

The evidence that though opportunity existed nevertheless there was in fact no sexual intercourse and the child is not the offspring of the husband must be very strong (see *ante* "*Principle and Scope*"). If the husband has had access, adultery on the 'wife's part will not justify a finding of illegitimacy [*Nga Tun v. Mi Chon*, 26 IC 996]. Non-access must be proved by cogent evidence. In this case several occasional denials by the father as to legitimacy of the son were disregarded [*Bhagawat v. Narainjan*, 39 IC 29: 56 PWR 1917]. The section requires proof that the parties had

no access to each other; not that there was no possibility of access [*Saroo Mali v. Yeshwant*, A 1934 N 124].

Non-access may be established not only by a positive or direct evidence but also by circumstantial evidence, though as the presumption of legitimacy is highly favoured by law, proof of non-access must be clear and satisfactory [*Venkateswarlu v. Venkatanarayana*, A 1954 SC 176: 1954 SCR 424: *Vira Reddi v. Kistamma*, A 1969 M 235]. Non-access may be proved by means of such legal evidence as is admissible in every other case, in which it is necessary to prove a physical fact. It may be proved by showing that the husband was impotent or that he and his wife had never met in such circumstances as would admit of sexual intercourse [*Rozario v. Ingles*, 18 B 468]. A finding that the husband, after marriage, remained outside for long periods and that on his return denied the paternity of the child born to his wife is not sufficient for the purpose of s 112. It is necessary to prove non-access during the period [*Hidayat v. Md Ali*, A 1937 L 266]. All along during the relevant period the husband was living at Delhi which is far away from the village where the wife was residing and the only time during the relevant period when he visited that village to attend a marriage he was given beating by the wife and her relations. These facts are enough to discharge the onus which lay on the husband to prove that he had no access to his wife. [*Ramshishnan Singh v. Smt. Savitri Devi*, A 1982 Delhi 458, 460]. The places when the husband and the wife lived separately are not far away. So it is for the husband to prove that he had no access to the wife at any time when the child could have been begotten. [*Azad Kumari v. Satya Prakash*, A 1983 All 435, 440].

"The question is to be treated as one of fact and like every other question of fact, when you are answering a presumption it may be answered by any evidence that is appropriate to the issue" [*per* LORD HAISBURY in *Poulett Peerage*, 1903 AC 393, 395]. Non-access will be presumed after divorce or judicial separation or an order authorising the parties to live apart [*Hetherington v. H*, 12 PD 112; *Andrews v. A*, 1924 P 255]. In England the husband or wife could not give evidence of non-access or access tending to bastardise or legitimise a child conceived and born during wedlock. The rule has been declared to be not applicable in India in several jurisdictions. It has however been abrogated in England. See *post*: "*Evidence of Parents to Prove Access or Non-access &c*".

A maintenance order (which did not contain a provision that the wife was no longer bound to cohabit with her husband) is not sufficient to rebut the legal presumption of access of the husband and of the legitimacy of the child born during marriage [*Bowen v. Norman*, 1938, 1 KB 689]. An order under s 488 (now s 125) Cr P Code practically puts an end to the continuance of a valid marriage. If a child is born while the order is in force, the *onus* is shifted on to the wife to prove access [*Ma Mya v. Ma Shwe*, 46 IC 620].A child was born during the pendency of a petition for maintenance. In the absence of evidence about non-excess, a presumption has to be drawn. [*Smt. Urmila Devi v. Sessions Judge*, 1981 Cri LJ NOC 89 (All-LB)].

Spinster or Widow.—The case of a married woman stands on different footing from that of a spinster or widow who may be living as mistress of somebody. For such a mistress it may be open to prove that the real father of the child born during the period of concubinage is different from her paramour. The presumption which would naturally arise in respect of paternity of the child of the paramour is capable of being rebutted [*Maina v. Deorao*, 1942 Nag 383: A 1942 N 96].

"Conclusive Proof". [Presumption of Legitimacy is Rebuttable].—The presumption is conclusive and can only be displaced by proof of "non-access" at the relevant time [*Venkateswarlu v. Venkatanarayana*, A 1954 SC 176; *Thimmakka v.*

Bangappa, A 1977 Knt 115, *Prem Singh v. Smt Dilla Devi*, A 1984 All 129, 130: 1983 All WC 952]. Under s 112 the presumption of legitimacy is conclusive even if birth takes place so soon after marriage that the child must have been begotten before it [*Umra v. Muhammed*, 79 PR 1907; see *R v. Luffe*, 8 East 210; *Re Parsons*, 18 LT 704; *Poulett Peerage*, *sup*]. In such a case the marriage in spite of the fact of pregnancy, is considered as an acknowledgment that the child to be born is the husband's. In *R v. Lufie, sup*, LORD ELLENBOROUGH said:

> "The marriage of the parties is the criterion adopted by the law in the case of ante-nuptial generation ascertaining the actual parentage of the child. For this purpose, it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage".

A woman married a person in September 1903; the marriage was dissolved in May 1904 and she married again in June 1904. A son born to her in September 1904 during the continuance of her marriage with the second husband. It appeared that the latter had access to her during the first marriage—*Held* that the son was legitimate [*Palani v. Sethu*, 47 M 706: A 1924 M 677; *Sethu v. Palani*, 49 M 553: A 1926 M 628]. The presumption is rebuttable. So, where such a woman had admittedly lived for years together with another person, and they both had admitted and asserted such children to have been born of them,—*held* that the above presumption must be regarded as having been completely rebutted [*Bahadur v. Viru*, 28 PR 1906]. As to the validity of marriage and legitimacy challenged on the ground of insanity of husband, see *Moujilal v. Chandrabati*, 38 C 700.

A was wife of *S*. In April 1897 *S* brought a complaint against *J* under s 498 I P Code which was dismissed on 7th April 1897. On the 15th July 1897 *S* brought a suit against *J* and obtained as *ex parte* decree on 15th January 1898 for custody of his wife. On 24th May 1898. *A* gave birth to a child at her parent's village and subsequently returned to *S* and she and the child lived with *S* till his death—*held*, illegitimacy could not be positively inferred merely from the litigation. Non-access must be shown conclusively [*Dalipa v. Rala*, 49 PLR 1914: 22 IC 409].

Where divorce in the sense of legal dissolution of marriage has not taken place, a child born must be taken to be born during the continuance of valid marriage [*Kaniappan v. Kullammal*, A 1930 M 1914].

There may be presumption of legitimacy on the ground of likeness between father and son [*Slingsley v. S*, 19 CWN 103n. See *Bagot v. B; Burnaby v. Baillie*, cited *ante* under s 9; "*Question of paternity*"].

—Presumption How Rebutted.—There has been much controversy on the point whether, in order to rebut the presumption the proof should show that it is impossible or merely improbable that the husband should be the father of the child. But the rule seems now well established in England and America that the non-access need not be shown beyond any possible doubt. The presumption of legitimacy is so highly favoured, however, that the proof of non-access should be clear and satisfactory [*Wright v. Hicks*, 60 Am Dec 687]. And when access, that is, an oppotrunity for sexual intercourse is shown, the presumption of legitimacy is very strong indeed [*Plowes v. Bossey*, 31 LJ Ch 681], though not conclusive; it still being a question for trial whether such intercourse has actually taken place [*R v. Inhabitants of Mansfield*, 1 QB 444; Jones s 94].

The rule in s 112 has been thus stated by Stephen: "..... unless it can be shown, either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of birth

and the physical condition of the husband, or that the circumstances of their access (if any) were such as to render it *highly improbable* that sexual intercouse took place between them when it occurred" [Steph Art 98]. The presumption can yield only to positive proof of non-access at the relevant time [*Venkateswarlu v. Venkatanarayana*, A 1954 SC 176: 1954 SCR 424; *Jagannath v. Chinnaswami*, 61 MLJ 878]. As LORD LYNDHURST, said:—

> "..... that presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive" [*Morris v. Davies*, 1837, 5 Cl & F 163, 265].

The rebuttable presumption that a child conceived during wedlock is legitimate continues to operate after decree *nisi*; it involves a presumption both as to the date of conception and as to paternity where both are in issue, so that where the relevant period of time lies between decree *nisi* and decree absolute the presumption operates in favour of the date of conception being before decree absolute and of the husband being the father [*Knowles v. K*, 1962, 1 All ER 659].

It must be demonstrated to the satisfaction of the court (*ie* beyond reasonable doubt) that at the time of conception there was no access in fact by the husband to the wife in the sexual sense. See *Sivadasan v. Govindan*, 1985 Cri LJ 1553, 1557: (1985) Ker LT 338 (Ker). The word 'begotten' used in s 112 means 'conceived' and not 'born'. The emphasis on birth during wedlock as against conception is there for the reason that as a general rule it is the birth after marriage which confers legitimacy on a child as against 'Conception' which is only exceptional circumstances when at that point of time there had been no access between the two spouses. [*Madan Lal v. Smt Sudesh Kumari*, A 1988 Del 93, 99: (1988) 93 Pun LR 1]. As to the *onus* to be discharged in proving non-access, see judgment of LUXMOORE J, in *Re Bromage*, 1935 Ch 605. Proof *per se* that the woman was living with paramour is not evidence of non-access by husband [*Sane v. Sonavene & Co*, A 1946 B 110: 47 Bom LR 832]. When once access or intercourse by the husband is proved, no evidence will be allowed to show that the child is not the child of the husband, that is to say, the presumption to be drawn becomes an irrebuttable one [*Sivakami v. Koolayandi*, A 1934 M 318].

The presumption under s 112 would stand rebutted if it is shown that the husband had severed all physical relations with the wife. Where a registered maintenance deed executed records a clear agreement to live apart, the mere fact that the marital status subsisted will not let the presumption remain undiluted and in all its pristine force and vigour [*Thimmakku v. B Rangappa*, A 1977 Knt 115]. Though it is evident, that the husband has undergone vasectomy operation, in the absence of any reliable material to show that such operation was successful, we cannot find, despite the presumption under sec. 112, that the child born to his wife during wedlock is not born to him. [*Chandramathi v. Pazhetti Balan*, A 1982 Ker 68, 71, *Chirutha Kutty v. Subramaniam*, A 1987 Ker 5, 7 (DB): 1986 Ker LJ 744].

Whether the presumption has been rebutted by proper evidence that such access did not take place as by the laws of nature is necessary for the man to be in fact the father of the child, is essentially a question of fact. See the following cases in which the presumption was held rebutted [*Sivakami v. Koolayandi*, A 1934 M 318; *Samuel v. Annamalai*, A 1934 M 310; *Jagannatha v. Chinnaswami*, 61 MLJ 878]. When a husband being driven away from his house by his wife's paramour goes elsewhere and the wife is kept by the latter as his concubine, he may well be held to be the father of children since born to her though the marriage is not dissolved [*Sreenivasan*

v. Kirubal, A 1957 M 160]. Where a woman being driven out by her husband within a few days of marriage on ground of concealed pregnancy gives birth to a child four months later, there is no presumption under s 112 [*Abdul Rahimankutty v. Aysha*, A 1960 K 101]. Though it may be proved that a person was born before the *rukhsati* and the conduct of the parents was such as to throw doubts on his legitimacy, it is not sufficient to rebut the presumption under s 112. Non-access must be proved [*Massoma v. Reza*, 17 Luck 416: 1941 OWN 1285]. See *ante* P 969: "*Had No Access to Each Other*".

The rule that in divorce cases the court usually does not decide merely on the admission in pleadings is a rule of prudence and not a requirement of law. Where there is no room for collusion, there is no reason why admissions of parties should not be treated as evidence just as in other civil proceedings under s 58 and Or 8, r 5 C P Code [*Mahendra v. Sushila*, A 1965 SC 364].

Burden of Proof.—The burden of proving that the divorce of the plaintiff's mother took place at a time which disentitles him from relying on the section, lies on the defendant. If the defendant is unable to show that fact, then a strong presumption in favour of the plaintiff arises and can only be displaced by proof of want of access [*Bhima v. Dhulappa*, 7 Bom LR 95]. *Bhima's case* was referred to in a case before the Judicial Committee but as the decision in the instant case did not depend upon any question as to burden of proof, no opinion was expressed on the point [*Ismail v. Momin*, A 1941 PC 11: 193 IC 209]. Once valid marriage is proved, it is unnecessary for the party alleging legitimacy to establish affirmatively that the child is legitimate [*Narayana v. Bhargavi*, A 1927 M 361: 52 MLJ 118]. The burden of showing that the parties to a marriage had no access to each other when the child could have been begotten is on the person who challenges its legitimacy [*Karapaya v. Mayandi*, 12 R 243 PC: 38 CWN 427; *Manicka v. Ammakanu*, A 1942 M 129; *Mohindar v. Narindar*, A 1960 Pu 169]. The burden of proving non-access lies upon him who disputes the paternity of a child and the serious illness of the husband duirng the period in which the child must have been begotten was held not sufficient to rebut the presumption [*Narendra v. Ram Gobind*, 29 C 114; 6 CWN 146 PC. See also *Trilok Nath v. Lachmin Kumari*, 30 IA 152: 25 A 403: 7 CWN 617].

D the wife of *B* living at her mother's house used to visit *B* constantly at his house, the *onus* lay on *B* to prove non-access and the fact that he believed *D* to be guilty of infidelity and produced witnesses, did not discharge the *onus* [*Chigurupati v. C*, 10 IC 389: 1911 MWN 312]. When two persons live as husband and wife, any one alleging illegitimacy to a child born of them must prove it; but when it is admitted that the woman was the wife of another person and was turned out by him on account of adultery, the burden is shifted on the other side [*Pancham v. Hazari*, 19 IC 635]. Where plaintiff claims property as son of *B* and his wife *D* and defendant asserts that plaintiff is son of *S*, the *onus* is on the plaintiff to show that *D* gave birth to him or to any other child before invoking the presumption under s 112 [*Rao Nar Singh v. Beti Mahalakshmi*, 44 A 470; 65 IC 902]. Where a plaintiff claims to be the son of any person by his lawfully married wife, and the defendant denies that the wife even gave birth to the child and sets up that the plaintiff was the son of a woman other than the lawfully married wife, the *onus* is upon the person who claims to show that the lawfully wedded wife gave birth to him before invoking the presumption in s 112 [*Kanhaiya v. Ram Dei*, A 1944 O 162].

Where a person admits the paternity of the opposite party but contends that he is illegitimate, the presumption being in favour of legitimacy, the *onus* of proving illegitimacy is on the party alleging it [*Dularey v. Suraj*, 43 IC 478 4 OLJ 556].

Burden of proving illegitimacy is on the person interested in making out the illegitimacy [*Aparbal v. Narpat*, 1 OLJ 89: 23 IC 872 (1905 AWN 214 **folld**); *Mahabub v. Taj Khan*, 26 IC 969]. Where plaintiff's paternity and maternity are both challenged, the burden is initially on the plaintiff to prove maternity and as soon as he shows that and proves acknowledgment by parents for a long period, the paternity follows and cannot be challenged in the absence of clear proof of non-access [*Krishna Rao v. Sardar Rajahmundra*, 102 IC 713: A 1927 M 732]. Presumption as to paternity is applicable only to offspring of a married couple. There is no presumption of paternity in the case of illegitimate children. A person claiming as an illegitimate son, must establish his alleged paternity like any other question of disputed relationship [*Gopalasami v. Arunachellam*, 27 M 32].

"Or Within Two Hundred and Eighty Days etc".—A person claiming to be the son of a deceased person must prove that he was born within 280 days after the death of the father. Serious illness of the husband during the period within which the child must have been begotten which terminated fatally shortly afterwards, was held not sufficient to rebut the presumption [*Narendra v. Ram Govind*, 29 IA 17: 29 C 111: 6 CWN 146; *Melappa v. Guramma*, A 1956 B 129; see also *Bhima v. Dhulappa*, 7 Bom LR 95]. Child born 223 days after husband's death was found legitimate [*Triloke v. Lachmin*, 7 CWN 617 PC]. A woman remarried after her husband's death, and the second husband was presumed to be the father of a child born 279 days after the first husband' death [*Pal Singh v. Jagir*, 7 L 368: A 1926 L 529].

In the case of a child born some 365 days after the last period at which it could have been begotten by the husband, though such period of gestation might not perhaps be absolutely beyond the bounds of possibility, yet the child's legitimacy was negatived for two reasons: (*i*) the mother bore no children during ten years of married life and (*ii*) she was immoral [*Tikum v. Dhan Kunwar*, 24 A 445]. Following this case it has been held that the period of gestation may be as long as 308 days [*Melappa v. Guramma*, A 1956 B 129].

Although the bare fact that the wife gave birth to a child 330 or 333 days after the date of last access to her throws very considerable doubt on her fidelity, the court is bound to presume legitimacy unless it is proved by other evidence that it could not have been begotten by the husband [*P v. P*, 77 PR 1911]. Child born 419 days after dissolution of marriage [*Rahim v. Chiragh*, A 1930 L 97], or 970 days, after husband's death [*Tirkangauda v. Shivappa*, A 1944 B 40] must be held to be illegitimate. It may be regarded as proved that the period of gestation may be 296 days and most authorities agree that it may be also long as 330 days. The period fixed by this section is 280 days. When it has been proved that no matrimonial intercourse took place after a particular date which was 333 or 334 days prior to the birth of a child,—*held* that there was no access by the husband at any time during which the child could have been begotten [*Howe v. H*, 38 M 466 FB: 25 MLJ 594].

Birth of a child within 18 days after dissolution of marriage is conclusive proof of legitimacy, unless dispelled by proof of non-access [*Janamma v. Kuttappa*, A 1959 K 366].

The contention was that an alienation by a Hindu father was made after the defendant was conceived and at a time when he had acquired an interest in the property—*Held*, that the presumption is that a child born within 280 days after possibility of access is legitimate. It is not that such a child was conceived 280 days before his birth. The burden is on the defendant to prove that he was conceived before the alienation [*Sri Datta v. Gatham*, 27 MLJ 580]. Where a boy was born about 7 months after the marriage and it was not disputed that the parties had no

opportunity of access, the child was held to be legitimate [*Mahbub v. Taj Khan*, 26 IC 969]. From the fact that the child had been born is about 7 months' time after the marriage it cannot be concluded that the child should have been conceived even before the consumption of marriage. [*Smt Dukhtar Jahan v. Mohamd Farooq*, 1987 Cri LJ 849: A 1987 SC 1049, 1051: (1987) 1 Crimes 245]. Perhaps the most remarkable case of short gestation is that of a wife who gave birth to a child on Feb 10, 1936 and it was common ground that the earliest possible date on which marital intercourse could have taken place was 174 days before the birth, *ie* Aug 10, 1935 when the husband returned to England—*Held* that the medical evidence being that a seven months 'or 196 days' child might be viable, a notional period of gestation of 196 days might actually be a period of 174 days. There was no ground for holding that the child was illegitimate [*Clarke v. C*, 1939 KB (P) 228]. The birth of a child on the 240th day after sexual intercourse is not unnatural [*Rangaswamy v. Nagamma*, A 1973 My 178].

In the section the possible duration of pregnancy has been fixed at 280 days or nine months and ten days. But actually the period of gestation may be more and in several cases there is birth outside nature. Further, although fertilization generally takes place at the time of coitus, there may be some interval between insemination (*ie* coitus) and fertilization when the sperm during its journey meets the ovum. In *Gaskill v. G*, 1921 P 425, 427, the medical evidence was that such interval may be as long as 21 days and in *Hadlum v H*, 1949 P 197 CA it was 17 days. A child born 346 days after coitus was held legitimate [*Wood v. W*, 1947 P 103] and so also in the case of a birth 349 days after last opportunity of coitus. The medical evidence was that it was scientifically possible though highly improbable [*Hadlum v. H, sup*]. Child born 305 or 330 days after last opportunity for coitus is the child of the husband [*Dhedu v. Malhanbai*, A 1966 MP 252]. The period of gestation of 313 days cannot be said to be unreasonable nor even the period of 343 days counting from the date when admittedly there was sexual intercourse [*Maganlal v. Bai Dahi*, A 1971 G 33]. In another case, however, a child born 340 days after the last possible date of intercourse was held not to be legitimate in the light of modern gynaecological knowledge [*M-T v. M-T*, 1949 P 331]. In a later case a child born 360 days after the last possible date of coitus was held to be illegitimate—Standard of proof necessary [*Preston-Jones v. P-J*, 1951, 1 All ER 124: 1951 AC 391]. The usual period of gestation from the first date of the coitus is between 265 and 270 days and delivery is expected in about 280 days from the first day of the menstruation period prior to a woman conceiving a child. Normal child born after normal delivery 171 days after first coitus between wife and husband. Normally it should be held that child was not of the husband [*Mahendra v. Sushila*, A 1965 SC 364].

In considering the legitimacy of a posthumous child born after the period of 280 days, the court cannot disregard cases where the courts refused to declare against legitimacy of the child where the period that elapsed between the last coitus and the birth of the child was more than the normal period. Something more than mere delay in delivery is required to negative legitimacy [*Uttamrao v. Sitaram*, A 1963 B 165]. Value of medical evidence of period of gestation of over 345 days [*Rama Krishnayya v. Achutha*, 1952, 2 MLJ 515].

Proceedings Under s 125 Cr P Code.—Presumption of legitimacy would also arise in an application under s 488 (now s 125) Cr P Code [*Raghavan v. Gourikutty*, A 1960 K 119]. In proceedings under s 488 (now s 125) Cr P Code all admission of paternity of an illegitimate child by the alleged putative father are irrelevant in view of the clear wording of s 112, if the applicant mother fails to prove that she and her husband had no access at the time when the child could have been begotten [*Rajbai*

v. Nathar, 1941, 2 MLJ 693: 1941 MWN 1937; *Raghavan v. Gouri Kutty, sup*]. Child born during pendency of suit for maintenance—Earlier proceeding by wife for restitution amicably settled—Pendency of suit could not prove non-access and right of maintenance held not forfeited on ground of unchastity [*Boramma v. Dharmappa*, A 1969 Mys 17].

Where the petitioner claimed maintenance under section 125 Cr P.C. for her minor illegitimate child from the respondent on ground that the respondent had sexual relation with the petitioner as a result of which the child was born but the respondent totally denied the same, it would not be safe to accept the evidence of the petitioner mother of the child without proper corroboration when paternity of the child was in dispute [*Chaya v. K.G. Channappa Gowda*, 1993 Cri LJ 767, 771 Ker].

When the wife was pregnant when she had left her husband's home and there was no evidence to show that she had any illicit relations with anyone and a female child was born during pendency of her petition for maintenance, it was held that her daughter would also be entitled to maintenance [*Alpana v. Mohanlal*, 1993 Cri LJ 1008, 1010, 1011].

Presumption of Legitimacy from Filiation.—Apart from s 112 where a child establishes the possession of filiation, *ie* his parentage has been acknowledged by his parents and accepted by habits and repute, a presumption of legitimacy should be made [*Kishen v. Sadhu*, A 1933 L 520 (*Mohabbat v. Md Ibrahim*, 56 IA 201: A 1929 PC 135: 10 L 725 **follD**)]. Where a child establishes the possession of filiation which is the acknowledgment of the parents, and habits and repute, everything must be presumed in his favour [*Krishna v. Sardar Rajahmundry*, A 1927 M 733: 102 IC 713].

S 12 Civil Evidence Act, 1968 makes an extension in the case of civil proceedings in England by providing that a person adjudged to be the father of a child in affiliation proceedings would be deemed to be such unless the contrary is proved whether or not he had offered a defence in that case and whether or not he is a party in this proceeding.

Mahomedan and Hindu Law. [Acknowledgment].—S 112 proceeds upon adopting the period of birth, as distinguished from conception, as the turning point of legitimacy but under the Mahomedan law, questions of legitimacy are referred to the date of the conception of the child and not the period of his birth [*Md Allahabad v. Md Ismail*, 10 A 289]. According to Mahomedan law a child born in wedlock is presumed legitimate [*Jeswant Singh v. Jet Singh Jee*, 6 WR, PC 46: 3 MIA 245]. Where a Mahomedan child was born during the continuance of a valid marriage but its birth was within six months it was legitimate [*Sibt Md v. Hameed*, 96 IC 582: 48 A 625]. The Hindu law is the same as the English law. Under the Hindu law, it is not necessary, in order to render a child legitimate, that the procreation as well as the birth should take place after the marriage [*Oolagappa v. Collr of T*, 14 BLR 115 PC: 21 WR 38]. According to Mahomedan law the presumption of legitimacy from marriage follows the bed and whilst the marriage lasts the child of the woman is taken to be the husband's child; but this presumption follows the bed and is not antedated by relation. An ante-nuptial child is illegitimate [*Ashrufooddowlah v. Hyder*, 11 MLR 94].

The rule in Mahomedan law as a condition of legitimacy [*Ashrufooddowlah v. Hyder, sup*] therefore clashes with the rule in this section. If the rule is considered as merely a rule of evidence, which it seems to be, it may be safely said that it has superseded the rule of Mahomedan law. But if the rule is taken as a substantive law

of marriage or parentage regulating inheritance, it cannot be said to have superseded the rule of Mahomedan law.

There is a presumption against the legitimacy of a child born within less than six months after the marriage of the mother. This presumption in so far as it fixes the period of six months might be considered as a rule of evidence and as such it would be repealed by this Act. But the principle requiring that the child should be procreated after the date of marriage is apparently a rule of substantive law and therefore is not affected by this section. It is no more a mere rule of evidence or procedure than is the English doctrine which allows legitimacy to all children born to the woman after marriage [Cunn p 231].

Where the point for decision is one of evidence (*eg* paternity) only, the case would be governed by s 112 and not by the personal law of the parties [*Nga Tun v. Mi Chon*, 26 IC 996]. It has been held that it is absurd to say that s 112 has no application to marriages under the Hindu law. In the absence of evidence of non-access, the child must be deemed to be legitimate even though the wife was living apart and leading an unchaste life [*Krishnappa v. Venkatappa*, A 1943 M 632]. Rule as to legitimacy is a rule of procedure and is applicable to Mahomedan law [*Hajira v. Amina*, 73 IC 983]. Rule of gestation in Mahomedan law is a rule of evidence and the courts are not bound by the Mahomedan law in this respect [*Rahim v. Chiragh*, A 1930 L 97; see also *Waras v. Ali Baksh*, 76 PR 1891]. S 112 applies to all classes of persons in this country and no exception is made in favour of Mahomedans [*Sampatia v. Mir Mahbood*, A 1936 A 528]. It has been held in Oudh that s 112 cannot be applicable to a marriage which is neither void *ab initio* (*batil*) nor absolutely void but is *fasid, ie* irregular, inasmuch as s 112 is based on a division of marriage into valid and invalid and cannot be applicable to Mahomedan law which divides marriage into three categories (*batil, fasid* and valid). In any case, if s 112 is applicable the word 'valid' should be construed as 'flawless' so that the presumption would not apply to *fasid* marriages [*Kaniza v. Hasan*, 92 IC 82: A 1926 O 231]. •

A child born 280 days after divorce or death of her husband but less than six months after her re-marriage with the second husband is to be considered legitimate under s 112—Period of *iddat* for a Mahomedan woman is three months from the date of divorce or death of her husband [*Nurul Hossein v. Md Hassan*, 107 PWR 1910: 78 PR 1910: 146 PLR 1910]. A child begotten by *zina* cannot be made legitimate by marriage of its parents before birth, as s 112 is inapplicable to Mahomedans. The marriage of a Mahomedan with a non-Muslim woman is merely irregular and not *batil* and their children are legitimate [*Zakirali v. Sograbi*, 15 NLR 1: IC 883].

Where the question was whether the appellant, a Mahomedan, was to be regarded as the legitimate son of his father—*Held*, that prolonged cohabitation might give rise to a presumption of marriage, but that presumption was not necessarily strong and did not apply in a case where the mother, before she was brought to the father's house, was a prostitute, there being no evidence of marriage between the parents of the appellant [*Ghazanfar Ali v. Kaniz Fatema*, 37 IA 105: 32 A 345: 14 CWN 690: 20 MLJ 579; *Rafiuddin v. Zubedabai*, A 1968 Mys 155]. Mere continued cohabitation under circumstances offering no obstacle to marriage, and subsequent birth, is not sufficient to raise a presumption of marriage and legitimacy. The cohabitation must be as man and wife and there must be a treatment tantamount to acknowledgment of the fact of marriage and the legitimacy of the children [*Masitunnissa v. Jathani*, 26 A 295].

On a question of the legitimacy of the children of a marriage the validity of which was question on the grounds, *first*, that the forms and ceremonies necessary to

constitute a valid marriage had not been gone through on the occasion, and *second*, that the husband was by reason of insantity, incompetent to enter into a marriage, it appeared that the married couple were recognized by all persons concerned as man and wife and so described in important documents and on important occasions; that their daughters were respectably married as would be natural in the case of legitimates children—*held* that these facts following upon a ceremony of marriage which undoubtedly took place, afforded an extremely strong presumption in favour of the marriage and the legitimacy of its offspring, and that to matters of form and ceremony the established presumption in favour of marriage undoubtedly applied [*Mouji Lal v. Chandrabati*, 38 IA 122: 21 MLJ 933: 13 Bom LR 534: 38 700: 15 CWN 790].

A Mahomedan child born out of wedlock becomes legitimate by acknowledgment [*Bibi Nujeboonnissa v. Bibi Zumeran*, 11 WR 425]. Acknowledgment is a part of the Mahomedan substantive law. Evidence of acknowledgment must be clear and reliable [see *Imammandi v. Mostasuddi*, 45 IA 73: CWN 50: A 1918 PC 11: 20 Bom LR 1022: 45 C 878; *Md Allahabad v. Md Ismail*, 10 A 289; *Fadilutunnessa v. Kamarunnessa*, 9 CWN 352; *Khajah Hidayat v. Rai Jan*, 3 MIA 295; *Ashufooddowlah v. Hyder*, 11 MIA 94; *Abdul Razak v. Aga Md*, 21 C 666]. But in cases where the question to be determined is whether there has been a marriage something more than mere acknowledgment of paternity is required. Where no marriage is shown to exist or where the concubine is not a slave concubine, mere admission of paternity is not enough proof of legitimacy. Once however a marriage is established, an acknowledgment of paternity is enough [*Fatma v. Admnr-Genl*, 1949, 2 MLJ 484: A 1949 PC 254].

The effect of acknowledgment of paternity may be a matter of substantive Mahomedan law, but the effect of an admission of marriage under s 17 as proof of such marriage is a question governed by the Evidence Act [*Hakima v. Jiandi*, A 1927 S 209]. As to difference between legitimacy and legitimation by acknowledgment, see *Syed Habibar v. Altaf Ali*, 48 IA 114: 26 CWN 81: 48 C 856: 40 MLJ 510: 19 ALJ 414. Acknowledgment of parentage has no reference to cases in which the illegitimacy of the child is proved and established [*Md Sadiq v. Md Hassan*, A 1943 L 225]. Acknowledgment may be evidence of legal marriage in certain circumstances, but it does not legitimise any person where a marriage between his parents cannot be in the circumstances presumed [*Rahmat v. Harbhajan*, A 1946 L 450]. In eastern U.P. it is well known that when a girl remains for the purposes of Gauna Ceremony and no Bidai had taken place at the time of marriage, she had no access with her husband during the marriage as contemplated by the word "access". [*Raj Rangi v. Deputy Director of Consolidation Azamgarh*, 1982 All 335, 336].

Evidence of Parents to Prove Access or Non-access During Marriage in Legitimacy or Bastardy Proceedings.—Access or non-access *before* marriage may be proved by the testimony of the husband or wife [*Poulett Peerage Case*, 1903 AC 393, 395]. In a husband's petition for declaring his marriage void under s 7(*1*) of the Matrimonial Causes Act, 1937, (now S 9 Matrimonial Causes Act, 1965) on the ground of birth of a child four days after marriage, his evidence of non-access before marriage is admissible [*Jackson v. J*, 1939 All ER 471]. But the policy of English law until 1949 was that neither the testimony, nor the declarations out of court of parents were admissible to prove access or non-access *during* marriage for bastardising a child [*Guardians of N v. Tomkinson*, 4 CPD 343; *Aylesford Peerage*, 1885, 11 App Cas 1, 9; *Poulett Peerage, sup*; Tayor ss 960-51; Phipson, 8th Ed p 185, Best s 586] and the rule was firmly established in *Russell v. R*, 1924 AC 687; see *Ettenfield v. E*, 1940, 1 All ER 293.

The rule which was of great antiquity being found to be inconvenient was abolished by the Law Reform (Miscellaneous Provisions) Act, 1949, 12, 13 & 14 Geo 6 c 100 s 7. S 45(*1*) Matrimonial Causes Act, 1965, the statute in force provides that "Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period". The section as amended by s 16(*4*) Civil Evidence Act, 1968 makes them compellable to give such evidence if required. Not only the direct evidence of husband or wife (to prove absence of marital intercourse) but the declarations (oral or written) of any spouse to another person are also admissible under this section [see *Jemon v. Wynne*, 1952, 1 All ER 1228 CA].

The rule above had no application to adultery or divorce proceedings where evidence of husabnd or wife, relating to access or non-access was admissible [see 1869 Evidence Amendment Act ss 3, 6 (now s 43(2) Matrimonial Causes Act, 1965 which as repealed by s 16(5) Civil Evidence Act, 1968 makes the witness compellable to answer questions even if they tend to show that he committed adultery); See also s 52 Divorce Act, 4 of 1869].

The Evidence Act does not contain any rule like the former English law under which parents could not by their declarations bastardise the issues born after marriage [*Bal Kamala v. Babu Bhai*, A 1926 B 348: 28 Bom LR 607]. There is nothing however in s 112 to show that parents cannot testify as to access or non-access, on question of legitimacy or illegitimacy of their children [*Rozario v. Ingles*, 18 B 468]. The effect of ss 118 and 120 is to make the husband or wife a witness for all purposes and he or she is competent to prove non-access and the consequent illegitimacy of the child [*Howe v. H*, 25 MLJ 594 FB: 38 M 466. The last two cases were decided before the decision in *Russell v. R, sup*]. The same view has been agreed to in later Madras cases holding that *Russell's case* only established the pre-existing common law in England. But under s 120 the husband or wife is a competent witness for all purposes [*Hanumantha v. Ramchandrayya*, A 1944 M 376: 1944, 1 MLJ 285; *Kasi Ammal v. Ramasami*, A 1949 M 881]. In Allahabad also, it has been held that the rule in *Russell v. R*, is not applicable to India in suits for divorce [*Doutre v. D*, 1939 All 573: A 1939 A 523; *King v. K*, A 1945 A 190: 1945 ALJ 162]. The same view has been taken in Bomaby [*Sane v. Sonavene & Co*, A 1946 B 110; *Bai Kamala v. Babu Bhai, sup*], though there is also contrary opinion [*Premchand v. Bai Gulal*, A 1927 B 594: 50 B 1026].

In Calcutta it has been held that the wording of s 112 in no way conflicts with the rule in *Russell v. R*, which forbade evidence of either spouse to bastardize or legitimize a child born in wedlock. The rule is applicable not only to case in which the legitimacy of the child is directly in issue, but also to proceedings instituted for divorce in consequence of adultery [*Sweeney v. S*, 62 C 1080: 39 CWN 1047; see also *Chamarette v. C*, A 1937 L 176]. A later case held that the English rule applies to divorce proceedings under the Indian Divorce Act, but it does not apply to proceedings for maintenance under s 488 Cr P Code [*Shyam v. Saibalini*, 50 CWN 916: A 1947 C 183].

The cases cited above show that though there are opinions both ways, the preponderance is in favour of the affirmative opinion. There does not appear to exist any ban on such evidence of any spouse under the Evidence Act, but the negative opinion seems to be based on the interpretation of s 7 of the Divorce Act which says that the courts shall give relief on "principles and rules" which "are as nearly as may be conformable, to the principle and rules on which the court for Divorce and Matrimonial Causes in England for the time being acts and gives relief". This

consideration however, does not arise in proceedings not under the Divorce Act, and further the English common law rule itself being now superseded by statute (see above) the negative opinion can no longer hold. It has since been held by the Supreme Court that the rule referred to above does not apply to legitimacy proceedings in India [*Venkateswarlu v. Venkatanarayana*, A 1954 SC 176: 1954 SCR 424; *Mohindra v. Narinidar*, A 1960 Pu 169; *Vira Reddy v. Kistamma*, A 1969 M 235].

It is *prima facie* improper to accept without corroboration the mere statement on oath of the mother who asserts paternity. Entry in the municipal register on the representation of the mother is not independent corroboration. Evidence of opportunities of access at the time of conception is corroboration [*Vedantachari v. Marie*, 97 IC 359: A 1926 M 1130]. The evidence of the mother with regard to the paternity of her illegitimate child must be corroborated by independent evidence [*Parmeswaran v. Janaki*, A 1972 K 80]. On a question of legitimacy of the daughter of *K* and *R*, the respondent relied upon a statement made by *R* on a certain occasion admitting that she was the concubine and not the married wife of *K*—*held* that the statement of *R* was admissible under s 32(*3*) and (*5*) [*Parbati v. Maharaj*, 10 IC 188].

Presumption of Marriage.—See notes to s 114 *post*, "*Marriage*".

S. *113. Proof of cession of territory.—A notification in the [1][Official Gazette] that any portion of British territory has [2][before the commencement of Part III of the Government of India Act, 1935] been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

COMMENTARY

S 113 was an attempt, for political reasons, to exclude inquiry, by courts of justice into the validity of the acts of the Government. But it has been decided by the Privy Council [*Damodar v. Deoram*, 1 B 367 PC], that the Indian legislature had no power to do this, and the section is, therefore, a dead letter [MARKBY p 87; Cunn p 232]. In that case it was observed (p 461 *ibid*):—"The Governor-General in Council being precluded by the Act 24 and 25 Vic c 67 s 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects could not, by any Legislative Act purporting to make a notification in a Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession". The question has now become academic as there is no longer any British territory" or "Native State" in India. The section is hardly of any use now in its present form. In British India advantage was taken of s 113 in cases of cessions of Native States, Prince or Ruler. It is now obsolete but is still borne on our statute [*Maganbhai v. Union*, A 1969 SC 783]. The meaning of a general statement in a proclamation or a treaty that existing rights would be recognised is that the Government will recognize such rights

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* In Burma this section has been omitted (A.O. 1937).

In Ceylon this section has been substituted by another s 113 which runs thus:—

"113. It shall be an irrebuttable presumption of the law that a boy under the age of twelve years is incapable of committing rape".

1. Substituted by A.O. 1937.
2. Inserted by A.O. 1937. Part II of G I Act, 1935 came into force on the 1st April 1937.

as upon investigation it finds existed. The Government does not thereby renounce its right to recognise only such titles as it considers should be recognized nor confer upon the municipal courts any power to adjudicate in the matter [*Govindrao v. State of M.P*, A 1982 SC 1201, 1209 (1982) 2 SCC 414].

On account of the incompetency of the Indian legislature to legislate on the sovereignty of the Crown over its Indian territories, the section has not achieved its intended object. The section being inoperative, in spite of any notification in the Gazette, it is not conclusive proof of any cession of territory and the court must find out for itself, like any other fact, whether in fact and law any territory has been ceded. In *Lachmi v. Pratap*, A 1 (following *Domodar v. Deoram, sup*), it was held that the Crown is competent to cede territory in its Indian dominions to a foreign prince or a feudatory chief without the intervention of Parliament. See also *Hem Chand v. Azam Sakarlal*, 1906 AC 212. As to the Governor-General in Conuncil's power to legislate, see *Alter Caufran v. Govt of Bombay*, 18 B 636. Whitley Stokes is of opinion that this section should be repealed as *ultra vires* (Anglo-Indian Codes, Vol II, P 835). Under s 57 Cl (*10*) the courts are to take judicial notice of the territories under the Government of India.

As to what amounts to cession of sovereign, see *Lachmi v. Partap, sup*. As to effect of cession of territory and as to whether rights under former sovereign subsist, see *Secy of S v. Rajbai*, 42 IA 229: A 1915 PC 59: 19 CWN 1087: 39 B 625. Once cession is admitted the *onus* is cast on the claimants to show acts of acknowledgment, which give them the right they wish to be declared. It is not necessary for the Government to take the plea of Act of State [*Nayakvajesingi v. Secy of S*, 51 IA 357: A 1924 PC 216: 48 B 613: 29 CWN 317].

S. *113-A. Presumption as to abetment of suicide by a married woman.—When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.—For the purposes of this section, 'cruelty' shall have the same meaning as in sec. 498A of the Indian Penal Code (45 of 1860).

COMMENTARY

Statement of Objects and Reasons.—Section 113A was inserted by Criminal Law (Second Amendment) Act 46 of 1983. The Statement of Objects and Reasons of the said Act provides:

> "The increasing number of dowry deaths is a matter of serious concern. The extent of the evil has been commented upon by the Joint Committee of the Houses to examine the work of the Dowry Prohibition Act, 1961. Cases of cruelty by the husband and relatives of the husband which culminate in suicide

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* Inserted by the Criminal Law (2nd Amendment) Act, 1983 (Act 46 of 1983) w.e.f. 26-12-1983.

by, or murder of the helpless woman concerned, constitute only a small fraction of the cases involving such cruelty. It is, therefore, proposed to amend the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by their in-laws".

Scope.—This amendment of the criminal law and the rule of procedure was necessitated to meet the social challenge to save the married women from being ill-treated or forced to commit suicide by the husband or relatives of the husband generally in order to coerce her to fetch more dowry or on her refusal to do so kill herself keeping in view that the maltreatment of a married woman is usually confined within the four-walls of her matrimonial home which in most of the cases are located far away from the home of her parents and there is no likelihood of availability of any evidence.

The words "having regard to all the circumstances of the case", give wide powers to the court to appraise the evidence and come to the conclusion whether there was some other extraneous cause for a woman to commit suicide within a period of seven years from the date of marriage [*Krishan Lal v. Union of India*, 1994 Cri LJ 3472, 3478, 1480].

Constitutional validity.—It cannot be said that section 113A has introduced invidious classification qua the treatment of a married woman by her husband or relatives of her husband *vis-a-vis* the other offenders. On the other hand, such women form a class apart than the one which married more than seven years earlier to the commission of such offence because with the passage of time after marriage and birth of children there are remote chances of treating a married woman with cruelty by her husband or his relatives. Thus, the classification is reasonable and has close nexus with the object sought to be achieved *i.e.* eradiction of the evil of dowry in the Indian social set up and to ensure that the married women live with dignity at their matrimonial home [*Krishan Lal v. Union of India*, 1994 Cri LJ 3472, 3479. See also *Poluvarapu Satyanarayana v. Poluvarapu Soundaryavalli*, (1987) 3 Crimes 471].

Presumption of abetment of suicide.—Presumption of abetment of suicide can be drawn only when the prosecution has discharged the initial *onus* of proving cruelty [*Basappa Dattu Hegade v. State of Karnataka*, 1994 Cri LJ 1602, 1603 (Kant)]. The court should not mechanically resort to a strait-jacket approach in applying the provisions of section 113A of the Evidence Act for raising a presumption of abetment of suicide. It may not be a correct approach in all circumstances that as 'no other earthly reason' for commission of suicide was forthcoming before the Court (in the absence of any probe at all into that aspect), therefore, by reason of cruelty a presumption of abetment of suicide should be drawn against the husband and the in-laws. The Court in having recourse to the presumption under section 113A of the Evidence Act must be circumspect. The legislative mandate of that section is that where a woman commits suicide within seven years of marriage and it is shown that her husband or any relative of her husband had subjected her to cruelty as the terms has been defined in seciton 498A, I.P.C. the Court may presume, having regard to all the other circumstances of the case that such suicide had been abetted by such person. It is evident that the legislature was extremely careful in drafting the provisions of section 113A of the Evidence Act. Had it been the intention of the legislature that the Court should in all cases jump upon a conclusion as a rule that there has been abetment of suicide simply because suicide has been committed by the woman within seven years of marriage and she was subjected to cruelty, the legislature would not have used such flexible expression as "the Court

may presume, having regard to all the other circumstances of the case, that such suicide had been abetted" [*Samir Samanta v. State*, 1993 Cri LJ 134 (Cal)].

Where the marriage was more than seven years old the presumption under S. 113-A was not available. There was no evidence of any act of cruelty also and, therefore, abetment of suicide could not be inferred [*Chhagan v. State of MP*, 1998 Cri LJ 2179 (MP)]. The court relied upon the decision in *State of Punjab v. Iqbal Singh*, A 1991 SC 1532 : 1991 Cri LJ 1897, where also the marriage was seven years old but there was evidence of cruelty and therefore IPC provisions relating to abetment were attracted. In *State of MP v. Geetabai*, 1998 Cri LJ 2724 (MP), though the suicide was within seven years of marriage. The FIR did not mention that there was physical torture from the side of the in laws, the presumption under S. 113-A was not attracted.

For raising a presumption under s. 113A it must first be shown that the woman had committed suicide [*Suresh Raghunath Kochare and Anr. v. State of Maharashtra & Anr.* 1993 (2) Crimes 545, 550 (Bom); See Also *Ayyala Rambabu v. State of A.P.*, 1993 (2) Crimes 562]. Presumption under seciton 113A referes to one of the three ingredients of abetment as defined in seciton 107 IPC *i.e.* instigation, conspiracy and intentional aiding of the act. Where conduct of the accused indicated that he did not want her to die even though he might have treated her cruelly earlier, it cannot be presumed that he abetted the suicide of the deceased in the sense that he cannot be regarded as having instigated her to commit suicide by reason of cruel treatment meted out by him. The accused was, held liable to be convicted under section 498A and under section 306 IPC [*Sangala Yagha Soee v. State of A.P.*, 1996 Cri LJ 1249, 1252. See also *State of W.B. v. Orilal Jaiswal*, 1994 Cri LJ 2104]. In order to raise a presumption under section 113A the facts and circumstances should be such as can reasonably sustain a presumption about the existence of a nexus of cause and effect between the cruelty and suicide [*Samir Samanta & Anr. v. State of W.B.*, 1992 (1) Crimes 851, 859]. In the absence of any evidence to show that the deceased was being harassed within the meaning of Explanation (b) of section 498A IPC presumption under section 13A cannot be raised [*State of H.P. v. Nikku Ram*, A 1996 SC 67, 69].

The presumption as to abetment of suicide arises where the woman has been subjected to cruelty by her husband and his relations. [*Smt. Shyama Devi v. State of West Bengal*, 1987 Cri LJ 1163, 1171 (Cal) (DB), *Ashok Kumar v. State of Punjab*, 1987 Cri LJ, 1412, 1415: (1986) 13 Cri LT 298 (P&H), *Virender Bhatti v. State*, 1989 Cri LJ (NOC) 196: 1989 Rajdhani LR 265]. The legal presumption provided under this provision clearly includes the past instances of cruelty spread over a period of seven years from the date of the marriage of the victim. [*Vasanta v. State of Maharashtra*, 1987 Cri LJ 901, 906: 1987 Mah LJ 111 (Bom). The presumption is drawable if there is evidence of the husband having subjected to cruelty of the kind defined in Sec. 498-A. [*Ramesh Kumar v. State of Punjab*, 1986 Cri LJ 2087, 2090 (P&H), *Jagdish Chander v. State of Haryana*, 1988 Cri LJ 1048 (P&H), *P. Bikshapathi v. State of A.P*, 1989 Cri LJ 1186, 1197: (1988) 2 An LT 946, *C Veerudu v. State of A P*, 1989 Cri LJ NOC 52 (A P) : (1988) 3 Crimes 549].

Under the circumstance mentioned in and in view of the fiction created by s. 113A of the Evidence Act a husband or his relative can be said to have abetted the commission of suicide by the wife, under the particular circumstances of that case. This fiction has obviously been created looking to a very peculiar, particular and special circumstances in which a wife is placed in her husbands house in the Indian Society. Nevertheless, the said fiction will obviously not apply in other cases where there is no such relationship. In such other cases, an alleged cruel behaviour may be a cause for commission of suicide but it cannot be equated with abetment, which

requires a positive step to be taken by a person to induce the commission of the abetted offence [*Vedprakash v. State*, 1995 Cri LJ 893, 896 (MP)].

In absence of anything in the letter of the deceased even remotely suggesting harassment meted out to her on account of any unlawful demand, the cruelty of which presumption has to be drawn under seciton 113A and which cruelty has been defined in section 498A IPC, in so far as at least clause (b) of the said section is concerned, it would not be there at all [*State of Haryana v. Suresh Kumar*, 1993 Cri LJ 1400, 1403 (P&H)]. Where in the letter written by the deceased to her sister six days before her death there was not a word which might even remotely suggest harassment meted out to her on account of any unlawful demand, presumption under section 113A cannot be drawn [*State of Haryana v. Suresh Kumar*, 1993 Cri LJ 1400, 1403 (P&H)]. Where the deceased in her dying declaration stated that she poured kerosene on herself and lighted a match stick on account of the ill-treatment and beating by her husband the court can draw a presumption under section 113A [*Kishan Bahadur v. State of A.P.*, 1994 Cri LJ 1418, 1420]. Where the deceased was either burnt to death or committed suicide with 14 months of her marriage a *prima facie* presumption of dowry death can be raised [*Shri Om Prakash Gupta v. Sh. Mukesh and Anr.*, 1993 (1) Crimes 960, 963 (Del)]. If there in harassment resulting in suicide the court is competent to take the aid of section 113A [*Kollipaka Srinivasa Rao v. State of A.P.*, 1992 (1) Crimes 1128, 1129]. Inordinate delay in examination of a witness raises grave suspicion on genuineness of the case *Babulu Kundu v. State of Orissa*, 1994 (3) Crimes 390 (Ori)].

Presumption is Rebuttable.—The presumption under this section is rebuttable [*Prem Das v. State of H.P.*, 1996 Cri LJ 951, 961 (HP)]. The presumption available to be raised under section 113A is rebuttable and such presumption can be raised where it is proved that the wife committed suicide within a period of seven years from the date of her marriage and that her husband and such relative of her husband had subjected her to cruelty. In this case, admittedly, the suicide of the deceased took place within seven years from the date of her marriage with the accused. But, in view of my aforesaid discussion cruelty had not been meted out to the deceased either by the accused or any of his relative, within the meaning of s. 498-A, I.P.C. That being so, the aforesaid legal presumption is not available to the prosecution. The Court in having recourse to the legal presumption must be circumspect. It is evident that the Parliament was extremely careful in drafting the provisions of the said Section *i.e.* s. 113-A. Had it been the intention of the legislature that the court should in all cases jump upon a conclusion as a rule that there has been abetment of suicide simply because suicide has been committed by the woman within seven years of marriage and she has been subjected to cruelty, the Parliament would not have used such flexible expression as "the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband....." The expression used is 'may presume' and not that rigid as 'shall presume'. In view of s. 4 of the Evidence Act, the import of the expression 'may presume' is that the Court may either regard the fact in question is proved, unless and until it is disproved, or may call for proof of it. In s. 113-A of the Evidence Act, the Parliament in its wisdom did not leave it at that by using the expression 'may presume' alone, but has supplemented the same by using the further expression "having regard to all the other circumstances of the case" which casts a positive responsibility on the court to take into consideration all the other circumstances of the case also, namely the circumstances which may be there besides the two basic circumstances metnioned in the section itself which are suicide within seven years of marriage and proof of cruelty, in deciding whether the presumption of abetment of suicide should be drawn

in a particular case from the proof of cruelty which itself is separately punishable under S. 498A I.P.C. [*Nilakantha Pati v. State of Orissa*, 1995 Cri LJ 2472 Vol. 3].

Cruelty—Standard of proof.—In a criminal trial the degree of proof is stricter than what is required in a civil proceedings. In a criminal trial however intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubts and the requirement of proof cannot lie in the realm of surmises and conjectures. The requirement of proof beyond reasonable doubt does not stand altered even after the introduction of section 498-A of the Penal Code and Section 113-A of Evidence Act. Although, the court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials placed on record. The doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject-matter [*State of W.B. v. Orilal Jaiswal*, 1994 SC 1418, 1430 : 1994 Cri LJ 2104]. LORD DENNING in *Bater v. Bater*, (1950) 2 All ER 458, 459 has observed that the doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject matter. In *Gurbachan Singh v. Satpal Singh*, A 1980 SC 209, it was ruled out that the conscience of the court can never be bound by any rule but that itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law. The court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the court that a victim committing suicide was hyper sensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty [*State of W.B. v. Orilal Jaiswal*, A 1994 SC 1418, 1430 : 1994 Cri LJ 2104].

S. *113-B Presumption as to dowry death.—When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

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* Insereted by Act No. 43 of 1986, sec 12.

Explanation.—For the purposes of this section, "dowry death" shall have the same meaning as in sec. 304B of the Indian Penal Code.

COMMENTARY

Constitutional validity of sections 113B and 113A.—Under section 113A of the Indian Evidence Act, *onus* is shifted on the accused to dislodge the presumption of having committed abetment of suicide by a married woman. Similarly, the provisions of section 113B although mandatory in nature, simply enjoin upon the Court to draw such presumption of dowry death on proof of circumstances mentioned therein and amounts to shifting the *onus* on the accused to show that she was not treated with cruelty by her husband soon before her death. It is for the accused to exercise his option whether to appear as a witness through a written request to the trial Court as provided under section 315 of the Code of Criminal Procedure. It is note-worthy that clause (b) to proviso to section 315 of the Code of Criminal Procedure clearly provides that his failure to give evidence shall not be made the subject to any comment by any of the parties or the Court to give rise to any presumption against himself or any person charged together with him at the same trial. These safeguards are also available to the accused facing trial on a charge of dowry death or abetment of suicide. Consequently these provisions cannot be said to be *ultra vires* of the provisions of Article 14 or Article 21 and Article 20(3) of the Constitution of India as the accused can lead some other evidence rather than stepping himself into a witness-box to dislodge such presumption. By no stretch of imagination, it can be said that the discretion of the Court to appraise evidence has been taken away [*Krishan Lal v. Union of India*, 1994 Cri LJ 3472, 3482 (P&H)].

A Division Bench of Rajasthan High Court in Gurditta Singh v. State of Rajasthan, 1992 Cri LJ 309 while dealing with the provisions of section 304B IPC and section 113B of the Evidence Act observed that there are sufficent in-built safeguards for the accused in these provisions itself before raising a presumption for dowry death or holding the accused guilty of such offence because the Courts are to scrutinise the evidence carefully as cases are not rare in which occasionally there is demand and then the atmosphere becomes claim and quite and then again there is demand. The Division Bench also sounded a note of caution by observing that the Courts should be vigilant to scrutinise the evidence regarding the harassment and torture carefully if the witnesses are relatives of the deceased and the relations between them and her in-laws are strained for any reason whatsoever it might be.

Presumption as to Dowry Death when can be raised.—The necessity for insertion of section 113B of the Evidence Act as also section 304B, IPC has been amply analysed in the Law Commission of India in its 91st Report dated 10th August, 1983 on "Dowry deaths and Law Reform". Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry related deaths, legislature thought it wise to insert a provision relating to presumption of dowry death, on proof of certain essentials. It is in this background presumptive section 113B in the Act has been inserted. As per the definition of "dowry death" in section 304B, IPC and the wording in the presumptive section 113B of the Act, one of the essential ingredients, amongst others, in both the provisions is that the concerned woman must have been (soon before her death) subjected to cruelty or harassment (for or in connection with the demand of dowry). Presumption under section 113B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the Court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on the proof of the following essentials:—

(1) The question before the Court must be whether the accused has committted the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under section 304-B, IPC.)

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

A conjoint reading of section 113B of the Act and section 304B, IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the "death occurring otherwise than in normal circumstances.". The expression "soon before" is very relevant where section 113B of the Act and section 304B IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. "Soon before" is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period soon before the occurrence. It would be hazardous to indicate any fixed period. The importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under section 113B of the Act. The expression "soon before her death" used in the substantive section 304B, IPC and section 113B of the Act is pregnant with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to expression "soon after" used in section 114, Illustration (a) of the Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods "soon after" the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term "soon before" is left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before"would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowery demand and the concerned death. if the alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence [*Keshab Chandra Panda v. State*, 1995 Cri LJ 174 (Ori)].

S. 113B of the Evidence Act creates a presumption of dowry death, when the question before the court is whether the person has caused dowry death of a woman and it is proved by evidence that soon before her death such woman had been subjected to by such person to cruelty or harassment in connection with demand for dowry. In order to raise the presumption of dowry death, it would appear that the prosecution must show that soon before her death the woman had been subjected to cruelty or harassment in connection with any demand for dowary. In other words, only when the prosecution proves by cogent evidence that soon before her death, the lady was subjected to cruelty or harassment for or in any connection with any demand for dowry can there be a presumption that the death is a dowry death [*State of Kerala v. Rajayyan*, 1995 (1) Crimes 596, 601 (Ker)]. In the absence of basic element of demand of dowry presumption under this section cannot be raised [*Ranganathan v. Veerapandian*, 1996 Cri LJ 540, 546 (Mad)].

It is imprative, for invoking the presumption under section 113B, to prove that "soon before her death" she was subjected to such cruelty or harassment. Where the prosecution could only prove that there was presisting dispute between the two sides regarding the dowry paid or to be paid, both in kind and in cash, and on account of the failure to meet the demand for dowry, the wife was taken by her parents to their house about one and a half years before her death and further that an attempt was made to patch up between the two sides for which a panchayat was held in which it was resolved that she would go back to the nuptial home pursuant to which she was taken by the husband in his house about 10-15 days prior to the occurrence, but there was nothing on record to show that she was either treated with cruelty or harassed with the demand for dowry during the period between her having been taken to the parental home and her death, it is not permissible to take recourse to the legal presumption under section 113B. That rule of evidence is prescribed in law to obviate the prosecution of the difficulty to further prove that the offence was prepetrated by the husband, as then it would be the burden of the accused to rebut the presumption [*Sham Lal v. State of Haryana*, A 1997 SC 1830 : 1997 Cri LJ 1927, 1929]. In the absence of proof that the marriage of the deceased took place within seven years of her death no legal presumption under s. 113B can be drawn [*Devinder v. State of Haryana*, 1994 Cri LJ 1679, 1681 (P&H)].

Section 113B of the Evidence Act creates a presumption of dowry death, when the question before the court is whether the person caused dowry death of a woman and it is proved by evidence that soon before her death such woman has been subjected to by such person to cruelty or harassment in connection with demand for dowry. In order to raise the presumption of dowry death it would appear that the prosecution must show that soon before her death, the woman had been subjcted to cruelty or harassment in connection with any demand for dowry. In other words, only when the prosecution proves by cogent evidence that soon before the death the lady was subjected to cruelty or harassment for or in connection with any demand for dowry, can there be a presumption that the death is a 'dowry death'. Under s. 113B all the four essential ingredients of s. 304B of IPC will have to be substantiated. S. 113B states that the court can presume the death of a lady to be dowry death when it is established that soon before death she had been subjected to cruelty or harassment for or in connection with any demand for dowry. Therefore it is clear that the prosecution can convass for a conviction only if prosectuion proves beyond reasonable doubt that the lady was subjected to cruelty or harassments in connection with demand for dowry soon prior to her death. S. 113B does not absolve the prosecution of its burden in establishing the above fact by cogent evidence [*State of Kerala v. Rajayyan*, 1995 Cri LJ 989, 992].

For dowry death, section 304B IPC and section 113B of the Evidence Act have been introduced with a view to coroborating the increasing menace of dowry deaths. However, these provisions canot be pressed into play where the offence of dowry death has not been proved beyond reasonable doubt [*Sant Gopal v. State of U.P.*, 1995 Cri LJ 312, 329]. Irrespective of the fact whether the accused has any direct connection with the death or not shall be presumed to have committed dowry death provided the other requirments of the section are satisfied [*Hem Chand v. State of Haryana*, A 1995 SC 120 : 1994 (3) Crimes 608, 610]. Where the prosecution failed to prove by means of congent and reliable evidence that the death of the deceased was caused within 7 years of her marriage and that there was harassment to the deceased and demand for dowry and there was no evidence on record to show that the accused either abetted or incited the deceased for committing suicide, section 113B was not attracted [*Ratanlal v. State of M.P.*, 1993 Cri LJ 3723, 3730]. Where

what the prosectuion achieved in proving at the most was that there was persisting dispute between the two sides regarding the dowry paid or to be paid, both in kind and in cash and on account of the failure to meet the demand for dowry, the deceased was taken by there parents to their house about one and a half years before her death and further that an attempt was made to patch up between the two sides for which a panchayat was held in which it was resolved that she would go back to the nuptial home pursuant to which she was taken by the husband to his house which happened about 10-15 days prior to the occurrence in the case and there was nothing on record to show that she was either treated with cruelty or harassed with the demand for dowry during the period between her having been taken to her parential home and her tragic end. It is not permissible to take recourse to the legal presumption envisaged in s. 113B [*Sham Lal v. State of Haryana*, A 1997 SC 1838 : 1997 (1) Crimes 245, 247, 248].

Where the death of the wife was concurrently found to be unnatural *viz.*, by strangulation, and there was demand for dowry and also there was cruelty on the part of the husband the presumption under section 113B had been rightly drawn [*Hemchand v. State of Haryana*, A 1995 SC 120, 121 : 1994 (4) Crimes 608]. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case the presumption operates. "Soon before" is a relative term and no fixed period can be inicated in that regard [*Babaji Charan Barik v. State*, 1994 Cri LJ 684, 688 (Ori)(HC)]. Where the prosecution palpably failed to discharge its initial burden to prove that the decesased was subjected to cruetly or harassment by the accused persons in connection with any demand for dowry soon before her death, the prosecution evidence being vague, incomplete, inconsistent and unworthy of credence, one of the basic ingredients for constituting the offence of dowry death was missing and as such section 113B cannot be invoked [*Bhakhar Ram v. State of Rajasthan*, 1995 Cri LJ 1345, 1354 (Raj)]. It is impreative for invoking legal presumption under section 113B, to prove that soon before the death of the woman, she was subjected to cruelty and harassment. In the absence of any such evidence it is nt permissible to invoke section 113B. That rule of evidence is prescribed in law to obviate the prosecution of the difficulty to further prove that the offence was prepetrated by the husband, as then it would be the burden of the accused to rebut the presumption [*Sham Lal v. State of Haryana*, A 1997 Sc 1873, 1875 : 1997 Cri LJ 1927].

In view of the compelling nature of the presumption drawable under section 113B, the applicability of this section is always to be confined to the cases covered by section 304B IPC. The applicability of section 113B is limited to cases. When the question is whether a person has committed dowry death of a woman That too requires proof of two further facts. Firstly it is shown that soon before her death such a woman had been subjected by such person to 'cruelty' or 'harassment' and secondly, that the cruelty of her husband was for or in connection with any demand for dowry. If these two facts are established by evidence the presumption under section 113 B as to commission of the offence under section 304B IPC would be attracted straightway [*Bhoora Singh v. State*, 1993 Cri LJ 2636, 2640 (All)]. Even without any injuries on the body of a woman she can be harassed. When there is evidence of harassment, the burden of proof cannot be shifted upon the prosecution [*G.M. Natrajan v. State*, 1995 Cri LJ 2728, 2732 (Mad)]. Where there is ample evidence to show that soon before her death, the woman had been subjected to cruelty and harassment in connection with demand of dowry the court may presume that the dowry death was caused by the accused [*P.P. Rao v. State of A.P.*, 1994 Cri LJ 2632, 2638].

If the deceased died on account of hanging, the death occurred otherwise than under normal circumstances. Even if she had committed suicide by hanging, still the

death comes within the scope of sec. 304-B I.P.C., if it is shown that she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand for dowry [***Public Prosecutor, High Court, A.P, HYD v. Tota Basava Punnaiah***, 1989 Cri LJ, 2330: 1989 A.P.L. LJ 320 (DB)]. The circumstantial evidence showed that the wife was compelled to take the extreme step of committing suicide as the accused persons had subjected her to cruelty by constant taunts, maltreatment and also by alleging that she has been carrying an illegitimate child. Since the suicide was committed within 7 years after the marriage the court may presume that such suicide had been abetted by the husband and her relations. [*Gurbachan Singh v. Satpal Singh*, 1990 Cri LJ 562, 571 (SC)]. The parents and the brother of the victim girl were not informed of the death and the accused hurriedly cremated the dead body. So the presumption under this section is attracted [*Shanti v. State of Haryana*, 1991 Cri LJ 1713, 1716 (SC)]. The parents of the deceased girl did not give any incident given out by the deceased regarding the harassment for dowry. On the other hand a neighbour gave evidence about the cordial relationship between the girl and her husband till the last. So presumption under this section cannot be drawn [*State of Kerala v. Mohanam Pillai*, 1991 Cri LJ NOC 15 (Ker)]. The necessary ingredient to be proved is that soon before her death, the deceased wife was subjected to cruelty or harassment in connection with the demand of dowry [*Guruditta Singh v. State of Rajasthan*, 1992 Cri LJ 309, 318 (Raj)].

'Shall presume' [Proximity test].—Although the legislature has used the expression "shall presume" in section 113B instead of "may presume", having regard to all the other circumstances of the case as in section 113A, yet even in section 113B the proximate test has been assigned as a definite role for determining whether it is a fit case for invoking the compelling presumption or that is called the presumption of law as envisaged in that section [*Samit Sumanta & Anr. v. State of W.B.*, 1992 (1) Crimes 851, 859 (W.B.)].

Although the legislature has used the expression 'shall resume in seciton 113B instead of "may presume" having regard to all the other circumstances of the case" as in section 113A of the Act, yet even in section 113B the proximity test has been assigned a definite role for determining whether it is a fit case for invoking the compelling presumption or what is called the presumption of law as envisaged in that section. The expression "and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with any demand for dowry", as used in section 113B is pregnant with the idea of a proximity test. The cruelty or harassment must have been committed soon before her death. This reflects the insignia of proximity test. The question as to what length of time will answer the requirement of the words, "soon before", may of course depend upon the facts and circumstances of a case. But the legislative intent is clear that even the compelling presumption of section 113B of the Evidence Act is confined only to cases where proximity of time by itself lends a safe assurance about the existence of a proximate relation between torture over dowry demand and unnatural death as cause and effect. There is no reason to suppose that section 113A, the language of which is rather all-embracing excludes proximity test even when such test is projected by the facts and circumstances of the case.

From the discussion made above it is evident that in deciding whether the permissive presumption or the presumption of fact as envisaged in Section 113A of the Evidence Act should be invoked in any particular case the Court will have to be circumspect and will have to consider all the attending facts and circumstances of the case [*Samir Sumanta v. State*, 1993 Cri LJ 134, 140].

S. *114. Court may presume existence of certain facts.—The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case.

Illustrations

The Court may presume—

(*a*) that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(*b*) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;

[1](*c*) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

(*d*) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence;

(*e*) that judicial and official acts have been regularly performed;

(*f*) that the common course of business had been followed in particular cases;

(*g*) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(*h*) that, if a man refuses to answer questions which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(*i*) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:—

as to *illustration* (*a*)—a shopkeeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

as to *illustration* (*b*)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. *B*, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of *A* and himself:

as to *illustration* (*b*)—a crime is committed by several persons. *A*, *B* and *C*, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating *D*, and the accouts corroborate each other in such a manner as to render previous concert highly improbable:

[2]as to *illustration* (*c*)—*A*, the drawer of a bill of exchange, was a man of business. *B*, the acceptor was a young and ignorant person, completely under *A's* influence:

as to *illustration* (*d*)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course:

as to *illustration* (*e*)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances:

as to *illustration* (*f*)—the question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances:

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* In Burma this section has been omitted (A.O. 1937).

1. In Ceylon this para has been omitted and the remaining paras have been designated (*c*), (*d*), (*e*), (*f*), (*g*) and (*h*) respectively.
2. In Ceylon this para has been omitted and tha paras relating to illus (*d*), (*e*), (*f*), (*g*), (*h*), (*i*) should be read as relating to (*c*), (*d*), (*e*), (*f*), (*g*), (*h*) respectively.

as to *illustration* (*g*)—a man refuses to produce a document which would bear on a contract of small importance on which he is used, but which might also injure the feelings and reputation of his family:

as to *illustration* (*h*)—a man refuses to answer a question which he is not compelled by law to answer, but the anwer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked:

as to *illustration* (*i*)—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

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COMMENTARY

Principle and Scope.—The subject of presumption and its various divisions have been briefly dealt with before (*ante* s 4). "A presumption may be defined to be an inference as to the existence of one fact from the existence of some other fact founded upon a previous experience of their connection" [Russ Cr Vol I, 6th Ed p 114]. Broadly speaking, there are two classes of presumption, *viz* (*1*) presumptions of fact; (*2*) presumptions of law. The latter is divided into (*a*) rebuttable presumptions of law and (*b*) irrebuttable or conclusive presumptions of law. Presumptions of fact are nothing more than logical inference of the existence of one fact drawn from other proved or known facts without the help of any artificial rules of law and they are always rebuttable. The raising of such inferences is optional with the judge or jury. It may or may not be drawn. The legal consequence of drawing a presumption is to cast on the opponent the duty of producing contrary evidence. "A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth." [*per* HOLMES J, in *Greer v. U S*, 245 USR 559; Thayer p 31]. "They (presumptions of fact) are in truth but mere arguments of which the major premise is not a rule of law; they belong equally to any and every subject-matter; and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural force and efficiency in generating belief or conviction in the mind, as derived with those connections, which are shown by experience, irrespective of any legal relations. They differ from presumption of law in this essential respect, that while those are reduced to fixed rules, and constitutes a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever" [Greenleaf, s 44].

Presumptions of law are inference or propositions which derive their force or artificial effect from law and must be drawn. Strictly speaking they are rules or indisputable propositions of law, *eg* the rule that nothing is an offence which is done by a child under seven (s 82 I P Code) is a part of the criminal law; or that a female under a certain age is incapable of giving consent to sexual intercourse. In strictness, there cannot be such a thing as a 'conclusive presumption'. "Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case, and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence" [Wig s 2492]. The modern tendency is to regard *all* presumptions, including, irrebuttable presumptions of law as rebuttable. The so-called irrebuttable or conclusive presumptions of law are properly speaking substantive propositions of law and do not come within the rules of evidence. "The peculiar effect of a presumption 'of law' is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the

opponent *does* offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule" [Wig s 2491].

Same: [Existence of Certain Facts May be Presumed from Common Course of Natural Events etc].—By s 2 of this Act (now repealed by s 2 of the Repealing Act, 1 of 1938: see *ante* s 2), all English rules of evidence as to presumptions were repealed and at the same time some of those rules have been embodied in ss 79 to 90, 107 and 112; but objections having been taken at the time of the introduction of the Bill, that it was defective in its treatment of the subject of presumptions, this general clauses (s 114) was inserted to cover cases not coming within the matters of special enactment. It crystallises the principle of ordinary common sense. Sir James Stephen, in introducing the Bill, said:—

> "The effect of this provision is to make it perfectly clear that courts of justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no particular rules whatever on the subject. The illustrations given are for the most part, cases of what in English law are called presumptions of law; artificial rules as to the effect of evidence by which the court is bound to guide its decision, subject however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section (114) in question [*v Proceedings in Council, Gazette of India*, 30th March 1872, *Supplement*, pp 234-35].

Whenever the law places a burden of proof upon a party a presumption operates against it [*Rishikesh v. S*, A 1970 A 51 FB. Ss 104 to 113 make special provisions relating to burden of proof according to the nature of presumptions that may be drawn from the rules embodied in them. In these cases the law requires that the presumptions mentioned are to be drawn and directs that the burden shall lie on such party and no option is left to the court. But, besides those presumptions, there is a very large number of presumptions that may be drawn from the common course of natural events, human conduct, the results of our experience of the world, probabilities and improbabilities of a fact, &c, &c. They are logical inference drawn from given facts and are discretionary. The word used is "*may*." The judge *may* draw a particular presumption (*post* p 983: "*May Presume*") from existing or known facts and thus throw the burden of proof in the first instance on the party against whom it is drawn. No obligation is attached to them like presumptions of law which are compulsorily drawn, but whenever it appears to the judge that the common course of business or the invariable sequence of events found in nature, renders it probable that a thing would happen, he is at liberty to draw a presumption. The discretion to be exercised must of course be judicial and not arbitrary. S 114 deals with such presumptions and the illustrations to the section are instances of only a few of the numerous presumptions that are constantly drawn. Their number is countless. The illustrations are not statements of law qualified only by particular exceptions. They are merely instances of the application of certain maxims out of many possible instances [*Govinda v. R*, 69 IC 257].

The illustrations are not intended to lay down rules of law which are exhaustive. They are merely examples and other presumptions of a similar kind may be drawn [*Chheda v. R*, A 1944 A 281; *Chavadappa v. R*, A 1945 B 292; *Chimma v. S*, A 1961 Raj 35]. The *illustrations* are nothing but illustrations and it is always open to a court to go back to the main section and consider whether it applies to any given set of facts [*Debi Pd v. R*, A 1947 A 191 FB; *Rustom v. R*, 24 IC 146 : 15 Cri LJ 410]. S 114 includes, but is not limited to the presumption of regularity [*Haridas v. Manmatha*, A 1936 C 1]. No presumption can be made in favour of that which offends

legal principles, *eg* there is no presumption that a tenancy by a *shebait* is permanent tenancy for that would be breach of duty of a *shebait* [*Nainapillai v. Ramanathan*, 51 IA 83 : A 1924 PC 65 : 47 M 337 : 28 CWN 809]. The presumption under s 114 relates to the existence of certain facts and not their probative value [*Nandkumar v. Emdad*, 44 CLJ 265]. It may be presumed that in the common course of natural events, hemp can catch fire even without any misconduct on the part of the Railway [*Domn v. Gobardhandas*, A 1952 C 384].

"Perhaps the most important rule as to presumptions is that they must be based upon facts and not upon inferences or upon other presumptions. 'No presumption can with safety be drawn from a presumtion' [*U S v. Ross*, 92 US 281]. The fact presumed should have direct relation with the fact from which the presumption is drawn; but when the facts are established from which presumptions may be legi-timately drawn, it is the province of the jury to deduce the presumption or inference of fact [*Ham v. Barrett*, 28 Mo 388]. If the connection is too remote or uncertain, it is the duty of the court to exclude either the testimony from which the presumption is sought to be deduced or to instruct the jury that the evidence affords no proper foundation for any presumption [*Manning v. Ins Co*, 100 US 693]. If however the facts are clearly established, forming a proper basis for a presumption of law, the jury has no right to disregard the presumption which the law raises. The presumption in such case is one deriving its force from the law and not merely from processes or reasoning" [*Graves v. Colwell*, 90 III 612; Jones s 104].

Where the fact, giving rise to a presumption under s 114, is undisputed, and no explanation negativing the presumption is offered, the court is justified in laying the *onus* proper where, but for the presumption, the *onus* could not be laid. But, where explanation negativing the presumption is forthcoming, the court is not in a position to draw the presumption until it has heard the evidence in support of the explanation, and therefore, must ignore the presumption for the purpose of determining where the *onus* proper lies, on the principle "when conflicting evidence on a point covered by a presumption of law is to be gone into, the presumption of law is *functus officio* as a presumption of law" [*Pakkoo v. Dayali*, 1 NLR 169]. Where the law provides that a presumption arises under circum-stances, that presumption must arise independently of whether there is any corroboration or not [*Chandra v. Sheikh*, 52 IC 480]. The effect of s 114 is to make it perfectly clear that courts of justice are to use their own common sense and experience in judging the effect of particular facts and they are to be subjected to no technical rules whatever on the subject [*Sarat v. R*, A 1934 C 719 FB]. S 114 is wide enough to raise a presumption not only with regard to oral evidence, but also with regard to documentary evidence [*East India T Co v. Badat & Co*, A 1959 B 414].

[*Ref Tay ss 70, 104-216; Phip 8th Ed pp 661-67; Hals 3rd Ed Vol 15 paras 514-16, 628-30; Best ss 296-471; Steph Arts 85-89, 98-101; Jones ss 9-57; Wig ss 2490-540; Ros N P, 33-34; Ros Cr Ev 14-22; Powell 10th Ed pp 331-61; Thayer Pr Tr on Ev 313-52, 539-76; Lawson's Presumptive Evidence*].

A presumption can be drawn only from a given set of facts and not from other presumptions. Acting on this principle the Supreme Court said that the designated court was not justified in drawing the presumption of a conspiracy to commit murder because the statements of the witnesses did not afford any factual foundation for the presumption. *Suresh Budharmal Kalani v. State of Maharashtra*, AIR 1998 SC 3258 : (1998) 7 SCC 337.

Conflicting Presumptions.—Conflicting presumptions, however, neutralise each other and leave the case at large to be determined solely on the evidence given [Phip 8th Ed p 32; **refd** to in *Nanilal v. Nutbehari*, 38 CWN 861]. Wigmore is of opinion that presumptions do not really conflict. The evidentiary facts, free from any rule of law as to the duty of producing evidence, may tend to the opposite inference, which may be said to conflict. But the rule of law which prescribes this duty of production either is or is not at a given time upon a given party. There may be successive shiftings of the duty, by means of presumption successively invoked by each: but it is not the one presumption that overturns, the other, for the mere introduction of suffi-

cient evidence would have the same effect in stopping the operation of the presumption as a rule of law. This shifting of the duty of production of evidence, by reason of the successive invocation of different presumptions, may create a complicated situation difficult to work out; but it can more properly be spoken of as a case of successive presumptions than of conflicting presumptions; and the ultimate key to the situation is very often found by ascertaining the incidence of the burden of proof in the other sense, *ie* the ultimate risk of non-persuasion [Wig s 2493].

Presumption and Inference.—The distinction between a mere inference and a presumption of fact is that a presumption of fact is an inference drawn under s 114. A presumption of fact would also include anything that in English law would rank as presumption of law [*Sitaram v. Nanku*, 25 ALJ 833 : A 1928 A 16]. In a case for negligence, the plaintiff sued for injuries received while at work in the defendant's leather board mill. That a dangerous condition existed was beyond question and there was no direct evidence as to how long the defective condition had existed. POWERS J, said: "..... the defendant quotes from the opinion in *Martyn v. Curtis*, 67 Vt 263, the statement taken from Lawson on Presumptive Evidence, that 'a presumption is not retrospective' the force of the argument being that the fact that the plank was unstable at the time of the accident did not warrant a presumption that it was so before. With this presumption we quite agree. But we must be cautious in our use of language. A presumption and an inference are not the same thing. A 'presumption' is a deduction which the law requires a trier to make; an 'inference' is a deduction which the trier may or may not make according to his own conclusions. A presumption is mandatory; an inference, permissible, I Jones Ev s 9 a (8); *Cogdell v. Wilmington & W R Co*, 132 NC 852. An inference may be and often is retroactive; that is to say a trier may from present conditions infer a previous fact" [*Cross v. P F Leather Co*, 90 VR 397; Thaver's Cases p 27].

Distinction Between Presumption and Legal Fiction.—A legal fiction is one which is not an actual reality but which the law requires the court to accept it as a reality. It is nothing but a presumption of the existence of a state of affairs which in actual reality is non-existent. A presumption gives rise to a legal fiction. In case of a rebuttable presumption unless the contrary is established, a fictitious state of affairs is presumed to exist as if it is an actual reality [*Ambalal v. Mangalbhai*, A 1978 G 208].

"May Presume."—[See *ante* s 4].

The words "may presume" leave it to the court to make or not make the presumption, according to the circumstances of the case [*R v. Shibnath*, A 1943 FC 75 : 1944 FCR 1; *Bhutnath v. R*, 35 CWN 291 : A 1931 C 617; *Keshabdeo v. R*, A 1945 C 93]. The word used is 'may' and not 'shall'. The note to illus (*g*) shows the circumstances in which the presumption should not be drawn. It indicates that in applying the presumption regard should be had to the facts and circumstances of each case [*Agurchand v. Deochand*, A 1960 AP 101]. The presumption is optional. The court is not bound to make it and the counter *illus* (*e*) itself indicates a case in which the court would not draw it [*Jawai v. R*, A 1942 L 214; *Jagadish v. Biseswar*, A 1941 P 536]. Where presumption has itself to establish the validity of an order, the court cannot be asked to presume its validity as an official act [*R v. Bhiku*, A 1950 B 1330]. Where plaintiff proves identity of defendant's thumb-impression on pronote but defendant pleads that it was taken on blank paper, the court is not in every case bound to raise a presumption of due execution [*Ram Lakhan v. Gog Singh*, A 1931 P 219].

Presumption Rebuttable.—Presumption under s 114 which the court may or may not make is only rebuttable presumption even when made [*R v. Shibnath*, 48 CWN 1 FR; *Krishna Murthy v. Abdul*, A 1965 My 128].

"Common Course of Natural Events, Human Conduct and Public and Private Business."—The illustrations refer to the presumptions relating to innocence [see *illus* (*a*), (*b*), (*g*), (*h*) and ss 133, 148] regularity [see *illus* (*e*), (*f*), (*i*) and ss 79-90 ss 16, 88] and continuity [see *illus* (*d*) and s 109]. As to course of business in public and private office, see s 16 *ante* p 176. As to statements and entries in the ordinary course of business, see s 32(2) *ante*. Period of gestation, continuance of life (see ss 112, 107, 108) &c are matters relating to common course of natural events. The course of conduct which s 114 calls 'common' can be only that which is most common in the experience of the judge who has to decide the point [*Secy of S v. Nandlal*, A 1928 N 52]. Evidence of conduct of animal is covered by the "course of natural events" [*Ram Bharosey v. S*, A 1952 A 481].

Section 114 of the Evidence Act empowers the Court to presume existence of certain facts. It provides that the Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. The term "common course" qualifies not only natural events but it also qualifies human conduct and public and private business as used in S. 114 of the Evidence Act. All inferences except those which have been drawn under any other provisions have to be drawn by the Court under S. 114 read with S. 3 of the Evidence Act. Since the Court trying the case does not have any personal knowledge about the facts in dispute all that it can do is either to act upon the account of disputed facts given by a person who had the personal knowledge about the same or to act upon the expert evidence relevant under S. 45 of the Evidence Act or to draw a presumption under S. 114 of the Evidence Act. Where the account of the disputed facts given by a witness who has personal knowledge about that fact is acted upon by the Court, the Court need not to draw the inference under Sec. 114 of the Evidence Act. It may act on the testimony of the witness who has personal knowledge about the fact in issue. Where the Court acts upon the evidence given by an expert it is the opinion given by the expert which may be made the basis of the judgment to be delivered by the Court, subject, of course, to the condition that the evidence of the witness who gives evidence about the disputed facts and the evidence of the expert is otherwise trustworthy. The third mode of arriving at a finding is to draw an inference under S. 114 of the Evidence Act and for the application of the third mode of arriving at a decision as provided under S. 114 of the Evidence Act it is necessary that the common course of natural events, human conduct and public and private business in so far as it is relevant to the facts in issue in a particular case must be established. The common course of natural events, human conduct and public and private business has its origin in the habit of man or other beings irrespective of the fact whether such habit is on account of the operation of law of nature or on account of the operation of law made by man or it is a habit developed on account of tradition or convention or is a result of volitional act of the individual. The characteristic of such common course is that in a given set of circumstances if certain event occurs or certain act or omission is performed by the individual or by large group of persons. In human society some times the common course of human conduct is determined by the manner in which an individual or group of individuals is treated by the State and its various functionaries or by the fellow beings or by the manner in which a certain conduct is rewarded or is punished or otherwise treated indifferently. Under S. 114 of the Evidence Act the Court is not supposed to legislate as to the manner in which the human beings should conduct themselves in a given set of circumstances because the power given by S. 114 of the Evidence Act is only in respect of inferences which has to be drawn by the Court. Section 114 of the Evidence Act does not authorise the Court to legislate in any manner. If this limitation of the power given by S. 114 of the

Evidence Act is kept in view, before a common course of conduct is used for the purpose of arriving at a decision, it is necessary that such common course of conduct must be established. The alleged course of conduct unless established cannot be made use of by the Court for the purpose of arriving at decision under S. 114 of the Evidence Act. [*State of Rajasthan v. Bhera*, 1997 CrLJ 1237 (Raj)].

***ILLUSTRATION* (a): [Recent Possession of Stolen Property].**—This illustration is taken from Taylor s 140 which is as follows: The possession of stolen property recently after the commission of a theft, is *prima facie* evidence that the possessor was either the thief, or the receiver, according to the other circumstances of the case [*R v. Langmead*, 9 Cox CC 464; *Bipin Bihari Sahu v. State of Orissa*, 1986 Cri LJ 406,-407 : (1985) 60 Cut LT 375]: and this presumption, when unexeplained [*R v. Exall*, 4 F & F 922; *Virumal v. S*, A 1974 SC 334; *Baiju v. S*, A 1978 SC 522], either by direct evidence, or by the character and habits of the possessor, or otherwise, is usually regarded by the jury as conclusive. The question as to what amounts to recent possession, varies according as the stolen article is or not calculated to pass readily from hand to hand. Thus, when two ends of woollen cloth in an unfinished state consisting, of about twenty yards each, were found in the possession of the prisoner two months after they had been stolen, PATTERSON J, held that the prisoner should explain how he came by the property [*R v. Patridge*, 7 C & P 511]. But, where the only evidence against a prisoner was, that certain tools had been traced in his possession three months after their loss. PARKE J, directed an acquittal [*R v. Adams*, 3 C & P 600]: and MAULE J, pursued a similar course on an indictment for horse stealing, where it appears that the horse was not discovered in the custody of the accused until after six months from the date of robbery [*R v. Cooper*, 3 C & K 318; *R v. Harris*, 8 Cox C 333]. So, where goods, lost sixteen months before, were found in the prisoner's house, and no other evidence was adduced against him, he was not called upon for his defence [*R v.* —1826, 2 C & P 459]. Indeed, the finding of stolen property in the *house* of the accused, provided there were other inmates capable of committing the larceny will of *itself* be insufficient to prove *his possession*, however recently the theft may have been effected; though, if coupled with other suspicious circumstances, it may fully warrant the prisoner's conviction, even though the propery be not found in his house until after his apprehension [*R v. Watson*, 2 Stark 139; Tay s 140]. The presumption from recent possession of stolen property is an optional presumption of fact, and it is open to the court to convict an accused by using the presumption where the circumstances indicate that no other reasonable hypothesis except the guilty knowledge of the accused is open to the prosecution [*Karnal v. S*, A 1976 SC 1097]. Scope of drawing presumption under Ills (a) stated [*Baiju v. S*, A 1978 SC 522; *Mohanlal v. Ajit*, A 1978 SC 1183].

In *Tulsiram v. State*, A 1954 SC 1 the Supreme Court observed that the presumption permitted to be drawn under Section 114. Illustration (a) has to be read along with the important time factor. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months had expired in the interval, the presumption cannot be permitted to be drawn having regard to the circumstances of the case. In the case of *Gulab Chand v. State of M.P.*, A 1995 SC 1598 it was established that immediately on the next day of the murder, the accused had sold some of the ornaments belonging to the deceased and within 3-4 days, the recovery of the said stolen articles was made from his house, at the instance of the accused. Such close proximity of the recovery, which is an 'important time factor', should not be lost sight of in deciding the case. From the fact that the accused was not affluent enough to possess the said ornaments and from the nature of the evidence and from the recovery of the said articles from

his possession and his dealing with the ornaments of the deceased immediately after the murder and robbery, a reasonable inference of the commission of the said offence can be drawn against the accused. In no plausible explanation for lawful possession of the ornaments immediately after the murder having been given by the accused, it was held that murder and robbery had been proved to have been integral parts of the same transaction and therefore, a presumption arising under Illustration (a) of section 114 was that not only the accused committed the murder of the deceased but also committed robbery of her ornaments [*Gulab Chand v. State of M.P.*, A 1995 SC 1598]. Factors to be taken into consideration for raising, a presumption under s. 114 (a) has been indicated by the Supreme Court in *Deivendran (A.) v. State of T.N.*, 1998 Cri LJ 814 (SC).

Though in some given cases the presumption under Illustration of section 114(a) is further extended to the extent by holding the person in possession of stolen goods soon after the theft also committed the offence of murder in a case of murder to commit robbery. But where were no such circumstances to connect of the accused with the offence of murder, the only presumption that could be drawn by the application of section 114(a) would be to the extent of holding them guilty under section 411 IPC and that is to say that they had not explained the possession of the stolen property [*Union Territory of Goa v. Boaventura D'Souza*, A 1992 SC 1199, 1201 : 1993 Cri LJ 181]. If recovery of ornaments of the deceased at the instance of the accused is proved but thre is no evidence to connect him with the murder or robbery he may be convicted under s. 411 IPC [*Public Prosecutor v. Yerra Arjuna*, 1998 Cri LJ 179 (AP)]. Recovery of watch belonging to the deceased at the instance of the accused does not connect him with the murder. However, he can be punished under S. 411 IPC for being in possession of stolen property [*Surjit Singh v. State of Punjab*, A 1994 SC 110, 112 : 1993 Cri LJ 3901]. Where the looted property was recovered from the possession of the accused for which he did not give any explanation it can be presumed that he dishonestly received the said property and kept the same in his possession knowing that it was a stolen property [*Ram Karan v. State of Rajasthan*, 1996 Cri LJ 3521, 3529 (Raj)].

Where stolen articles were found in possession of the accused soon after commission of the dacoity it can be presumed that the accused were dacoits. But this is only a circumstantial evidence which corroborates the testimony of direct witnesses [*State of Karnataka v. Rajan*, 1994 Cri LJ 1042 (Kant)]. Where the silver kadiya belonging to the deceased was recovered from the possession of the accused the only legitimate presumption that can be drawn is that the accused knew that the said Kadiya was stolen but no knowledge can be attributed that he was knowing that the same was stolen in dacoity [*Udai Lal v. State of Rajasthan*, 1994 Cri LJ 509, 511]. The circumstance of recovery of watch of the deceased at the instance of the accused cannot connect the accused with the offence of murder by invoking illustrations to section 114. At the most the can be convicted for being in possession of stolen property [*Surjit Singh v. State of Punjab*, A 1994 SC 110 : 1993 Cri LJ 3901, 3903]. When it was not the case of the prosecution that the accused was in the company of the deceased or was last seen or was seen near the place of incident at the time of murder, in absence of any other circumstance, it was not possible to raise a presumption by invoking illustration to section 114 on the basis of recovery of articles of the deceased on the pointing out of the accused that the accused was the person who committed the murder [*Ram Charan v. State of U.P.*, 1997 Cri LJ 3198, 3200 (All)]. Mere recovery of some jewelleries belonging to the informant after 2 months of the incident is not sufficient to convict the accused for murder. They can be convicted under s. 411 IPC [*Deivendran (A.) v. State of T.N.*, 1998 Cri LJ 814 (SC)]. Where in a case of murder and robbery stolen articles were recovered from the possession of the accused soon after the crime and no explanation was offered by the accused, it was held that the presumption of guilt arose under the section. *Ronny v. State of Maharashtra*, AIR 1998 SC 1251 : (1998) 3 SCC 625.

The presumption permissible has to be read along with the important time factor. But if several months expire in the interval, it may not be permitted to be drawn [*Tulsiram v. S*, A 1954 SC 1]. The presumption does not contravene art 21 of the Constitution [*S v. Prakash*, A 1956 Pu 224].

In the United States, the general trend is to repudiate any rule of presumption in the strict sense. "..... The first practical difficulty in the way of making it a presumption of law is the impossibility of inventing a rule by which to determine whether the possession is recent or not" [*per* DOE J, in *S v. Hodge*, 50 NH 510]. "If no rule of presumption is to be accepted, specific limitations are hardly of any consequence, for the sufficiency of the evidence to go to the jury will usually depend on the variant circumstances of each case. But the following considerations have been emphasised from the point of view of a definite rule: (*a*) The possession must be *unexplained* by any innocent origin: (*b*) the possession must be fairly *recent*; (*c*) and the possession must be *exclusive*. Furthermore, if there is any rule at all, it is generally conceded to apply also on a charge of *knowing receipt* of stolen goods, and of *burglary* or the like" [Wig s 2513].

[*Ref Tay ss 140-42, 127-127C; Best ss 210-14; Phip 6th Ed p 138; Wig ss 1143, 1777, 1781, 2513*].

—Nature and Extent of Presumption. [Main Burden of Proof Not Shifted].— The presumption does not arise unless ownership of the articles, theft and recent possession are established by the prosecution [*In re Dhyani*, A 1947 P 205; *Amar v. R*, A 1940 Pu 315]. It is not, however, for the accused to prove honest dealing with the property, but for the prosecution to prove the reverse [*R v. Lewis*, 14 Cr App R 33; *Bhutnath v. R*, 35 CWN 291] and if an explanation be given which the jury think may be true, though they are not convinced that it is, they must acquit, for *the main burden of proof* (*ie* of establishing guilt beyond reasonable doubt) *rests throughout upon the prosecution*, and in this case will not have been discharged [*R v. Schama*, (1914) 84 LIKB 396 : 11 Cr App R 45; *R v. Norris*, 86 LIKB 810 : *R v. Gripberg*, 33 TLR 428: Phip 8th Ed p 33].

Before a presumption under s 114(*a*) can arise, it must be proved that the goods found in possession of the accused have been stolen. It would be hazardous to presume that because a property is stolen, the carrier or the transporter had the necessary knowledge that it was stolen property [*Jogendra Singh v. State*, 1991 Cri LJ 2331, 2333 (Ori)]. No inference can be drawn in the absence of proof that the property found in possession of another had earlier been stolen [*Smt. Sabitri Sharma v. State of Ori*, 1987 Cri LJ 956, 957 : (1987) 1 Crimes 687 (Ori); *Aniradha Agasti v. State*, 1985 Cri LJ NOC 7 : (1984) 1 Crimes 909 (Ori)]. It is a serious misdirection to say that "when it is proved or *may be reasonably presumed* that the property in question is stolen property, the *burden of proof is shifted*, and the possessor is bound to show that he came by it honestly, and if he fails to do so, the presumption is that he is the thief or the receiver according to circumstances." No such presumption will arise when it may be reasonably presumed that the property in question is stolen property. The *onus* on prosecution to prove guilt never changes [*R v. Satya Charan*, 52 C 223 (*R v. Schama, sup* **folld**): *Hori v. R*, 56 A 250 : A 1933 A 893; *Laloo v. R*, A 1942 P 439 : 198 IC 400]. In a number of cases the direction of the court on the nature of presumption that may be drawn under s 114 *illus* (*a*) has been found to be faulty and misleading. It is therefore well to reproduce the direction of LORD READING LCJ, (with which BRAY, AVORY, LUSH and ATKIN JJ, concurred) in the leading case of *R v. Schama, sup*:—

> "Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods

had been recently stolen, the jury may be told that they may, not that they must, in the absence of any reasonable explanation find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not: that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal because the Crown has not discharged the *onus* of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. *That onus never changes*; it always rests on the prosecution. That is the law; the court is not pronouncing new law, but is merely restating it, and it is hoped that this restatement may be of assistance to those who preside at the trial of such cases."

Schama's case was followed in *R v. Gripberg*, (1917) 33 TLR 428; see also *R v. Hapworth*, (1955) 2 All ER 918. Where the only evidence is possession of property recently stolen, the jury should be directed that they may infer guilty knowledge (*a*) if the prisoner offers no explanation, or (*b*) if they are satisfied that the explanation is untrue; but if the explanation leaves the jury in doubt, the verdict should be not guilty [*R v. Aves*, (1950) 2 All ER 330 CCA].

A direction to the jury that if an explanation is given by the accused "which although you do not think to be true, you think might possibly be true, then he is entitled to be acquitted", is unduly favourable. The proper direction would be that "If the prisoner's account raises a doubt in your minds, then of course, you ought not to say that the case has been proved to your satisfaction" [*R v. Garth*, (1948) 1 All ER 773].

It is a misdirection to say: "They (the prosecution) have got to prove the important thing that at the time he received them, or had them in his possession, he knew they were stolen", as the critical moment was the *time of receipt*. To suggest that it was enough for the prosecution to prove that the accused came to know that the goods had been stolen at any time during which he was in possession is wrong [*R v. Tennet*, (1939) 1 All ER 86]. It is also a misdirection to say that if stolen property is found in possession of a person soon after the theft, you may presume him to be either the thief or a receiver *unless he accounts for possession*. The *onus* on prosecution never changes [*Kabatulla v. R*, 53 C 157; *Bhutnath v. R*, A 1931 C 613 : 35 CWN 291]. *Schama's case, sup* was expressly approved in *Istahar v. R*, 62 C 956; *Hatem v. R*, 24 CWN 619; *Fateh Md v. R*, A 1948 L 80; *In re Boddu*, A 1957 AP 482; see also *R v. Hori, sup*; *In re Dasan*, A 1950 M 778]. Upon a review of the cases, the following propositions have been collected for the application of *illus* (*a*):—

(*1*) Under *illus* (*a*) the court may, but is not bound to draw the presumption. But in any case the *onus* of proof does not shift—it is still on the prosecution.

(2) It is not the law that if the accused fails to account for his possession of the goods said to be stolen, he must be convicted, even if the other proved facts do not predicate guilt.

(*3*) If the explanation given may reasonably be true although the jury may not be convinced that it is true, the accused is entitled to an acquittal. Or if the explanation is not inherently improbable or palpably false and the court or the jury find it to be reasonably true, the adverse persumption shall be deemed to have been rebutted.

(*4*) The words "reasonably true" means that the explanation must be sufficient to cast a doubt on the guilt of the accused.

(*5*) The accused is not required to prove his explanation by adducing substantive evidence. In many cases it may be impossible for him to do so.

(*6*) Quaere. The accused need not even give any explanation unless he is asked to account for his possession [*Keshabdeo v. R*, (1944) 1 Cal 595 : A 1945 C 93 and *Jagannath v. R*, A 1945 A 19 : 1944 ALJ 445].

As to the last proposition, it has been held in a case that the presumption cannot be drawn on the ground of accused's failure to account for his possession of stolen goods unless he is first asked to account for such possession. Where, therefore, the jury are told that they can make the presumption if they do not believe the statement of the accused to be true, it is a misdirection. Even if the jury are not inclined to believe the statement of the accused, still if they think that his statement might be reasonably true, they are not entitled to make the presumption [*Surendra v. R*, 40 CWN 1090]. To take the view that the accused having given no explanation regarding his knowledge of the place from which the ornaments were taken out, it must be presumed that he must have kept them at a certain place is not the correct way of approaching the case [*Trimbak v. S*, A 1954 SC 39].

Any sort of explanation would not be acceptable. It must be reasonable [*Pulpil v. S*, A 1955 A 696]. The question which arises for consideration is whether the explanation given is inherently or palpably false or such as to cast a reasonable doubt as to the guilt of the accused [*Gangaraju v. S*, A 1950 M 778; *Bharadwaj v. S*, A 1952 C 616; *In re Sheikh*, A 1957 AP 1006]. It is for the jury to consider whether the explanation given is reasonably true [*Gfeller v. R*, A 1943 PC 221]. Before raising the presumption the court or the jury is entitled to consider the explanation of the accused in defence [*Nand v. R*, A 1941 O 618]. The burden is not on the accused to establish beyond reasonable doubt that his explanation is true. Even if it might possibly be true though the jury are not convinced that it is true, he is entitled to an acquittal [*Bama Jena v. S*, A 1958 Or 106]. The question of the application of the presumption does not arise when an accused has given a satisfactory account of his possession [*Rajendra v. R*, A 1937 P 191; *Meghu v. R*, A 1942 P 439(1)]. When there is no explanation and prosecution does not prove guilt, there can be no conviction on presumption [*In re Dasan*, A 1950 M 778]. It is not necessary to rely on the presumption if the facts do not warrant it [*R v. Saifal*, A 1937 L 227]. There is no presumption against a person who is found in company of one in possession of stolen property [*Rameshwari v. R*, A 1942 P 250]. No presumption can be drawn when the accused found in possession is born deaf and dumb [*In re Bhupatiraju*, A 1946 M 60].

In the absence of reliable evidence connecting accused with theft mere possession of stolen goods would not justify the inference that the theft was committed by the accused [*S v. Madanlal*, A 1967 P 63]. The fact that the accused is found in possession of a handkerchief and does not account for it, is no doubt suspicious and nothing more and the prosecution is not relieved from proving that the handkerchief was stolen and the accused received it dishonestly [*R v. Burke*, 6 A 224, 227; *Bharos v. R*, 81 IC 558 : A 1924 A 192; *R v. Mg Gyi*, 1 R 520. See *R v. Bhajo Hari*, 19 WR Cr 37]. Presumption from possession soon after theft is not that he is a receiver knowing it to be stolen but he has stolen it. The former inference is to be drawn from other circumstances [*Mahabir v. S*, A 1951 P 296]. When a key is stolen, the possession of a false key does not place any *onus* as to how he came by it [*Dito v. R*, A 1931 S 134]. *Illus* (*a*) does not entitle the court to presume the knowledge of dacoity or dacoits which is required for a conviction under s 412 I P Code, but only to presume that a man in possession of stolen goods soon after theft, is either the thief or has received the goods knowing them to be stolen. The question whether the court will make any presumption under *illus* (*a*) is irrelevant upon a consideration of the provisions of ss 236 and 237 I P Code [*Istahar v. R*, 62 C 956]. In this case it has been pointed out that the law as stated in paragraph at p 11 of *Meher v. R*, 59 C 8 is

inaccurate and misleading. In order to sustain a conviction under s 412 I P Code mere possession of stolen goods is not sufficient. There must be some evidence to show that the accused knew or had reason to believe that the property was stolen in the course of a dacoity [*Surendra v. R*, 41 CWN 639; *Narayan v. R*, A 1947 N 57; *Ramsamuj v. R*, A 1949 A 245].

The mere fact that an accused points out a place where stolen property is concealed does not give rise to any presumption or justify his conviction for receiving stolen property, still less of the offence of theft or dacoity. But if such property is produced from the house of the accused the presumption arises [*Shivputra v. R*, A 1930 B 244 : 32 Bom LR 574; *Harilal v. S*, A 1953 A 572]. The presumption is not a presumption as to the fact of possession, but the presumption of guilt which arises, under the rule of common sense, embodied in s 114, from the accused not accounting for his possession of stolen goods of which he is proved to be in possession soon after the theft [*R v. Hari Maniram*, 7 Bom LR 887, 893; *Bharos v. R*, 81 IC 588 : 21 ALJ 836].

Possession of stolen property immediately after it has been stolen, affords a strong presumption [*State of Orissa v. Nankuri*, 1986 Cri LJ 439, 441 (Ori)]. But, under ordinary circumstances, possession of stolen property eleven months after the theft, even if accompanied by a failure to give an account as to how the possession was acquired or by a false account, or by accounts which are contradictory, or by a concealment of the property, would raise, not a violent or strong presumption, but a probable presumption only, and where such possession is not a recent one, the presumption is so slight, that the person in whose possession the property is, ought not to be called upon to explain how his possession was acquired [*Ina Sheik v. R*, 11 C 160; *Suchit v. R*, A 1931 P 85. See *Yamin v. R*, A 1924 A 701; *In re Ram Jay*, 25 WR Cr 10; *R v. Shurffooddin*, 13 WR Cr 26; *R v. Ali Husain*, 23 A 306 (property stolen from a railway van, was found in an adjoining van in which four coolies were travelling) and also *R v. Purmessur*, 23 WR Cr 16; *R v. Moti Jolha*, 5 WR Cr 66. Where a stolen bullock is recovered from accused a little less than a year after theft, presumption cannot be drawn against him [*Shangara v. S*, A 1964 Pu 400]. Where a barrel of gun stolen in dacoity was recovered after a period of 8 months and no explanation was given for its possession presumption was drawn [*Alisher v. S*, A 1974 SC 1830]. When the gun was recovered 20 days after the occurrence no presumption can be drawn that the accused used the gun at the time of occurrence [*Bhullen v. State*, 1981 Cri LJ NOC 93 : 1981 All Cri R 208]. Where within 17 days of house-breaking and theft a large number of stolen articles were recovered from accused's house, from his person and from a lonely spot in a graveyard in pursuance of his disclosure statement drawing of presumption was justified [*Ayodhya v. S*, A 1972 SC 2501].

It is only when the accused cannot be connected with the crime of dacoity except by reason of possession of fruits of the crime that the presumption of commission of the crime may be raised. It all depends upon the circumstances under which the discovery of the fruits of the crime are made with a particular accused. In this case 20 persons looted large quantity of cloth when being carried in cart. Immediately afterwards searches were made and the goods were found with various persons who were prosecuted as offenders and they have been presumed to be involved in the dacoity itself [*Shivappa v. S*, A 1971 SC 196]. As to retaining stolen property with dishonest intention. see *Eshan v. R*, 21 C 328, 336; *Sudhakar v. Dayanidhi*, A 1965 Or 114; *S v. Udaya*, A 1965 Or 123]. In the absence of any explanation the presumption arises even though the stolen property is produced as a result of pressure or inducement by the police [*Shera v. R*, A 1943 L 5 : 203 IC 62].

What is possession.—A person hiding a thing is in possession of it.[*In re Kirukku*, A 1958 M 384]. Possession as an element of crime must relate to conscious possession or actual control and to *mens rea* or guilty knowledge. These elements must be proved [*R v. Senta*, A 1945 L 137 FB; *S v. Amir Hasan*, A 1951 P 638; *S v. Narendra*, 87 CLJ 58; *Rajalingam v. R*, A 1934 R 80]. Though *illus* (*a*) expressly refers to dishonest receipt, a presumption about dishonest retention of stolen property may equally be made [*Bama Jena v. S*, A 1958 Or 106 (*Ishan v. R*, 21 C 328 **reld** on)].

Possession Must Be Exclusive.—No presumption can be founded on the fact that the property is found in a house occupied by the accused and also by other persons. The possibility that some other person may have placed the article where it is found, must in any case detract from the weight of the presumption. To raise the presumption legitimately, the possession must be actual or exclusive possession of the accused [*R v. Malhari*, 6 B 731, 733; *In re Md Ali*, 4 MLT 415; *R v. Santa*, 26 L 137; *S v. Amir Hasan*, A 1951 P 648; *S v. Kaushalya*, A 1965 Or 38; see Tay s 140 **quoted**, *ante*]. Exclusiveness of possession or access is material [*R v. Berger*, 84 LJKB 541; *R v. Watson*, WN 1916 p 139; Phip 6th Ed p 138]. "A claim made to the goods is not evidence of possession or receiving. It is unnecessary to prove a manual possession of the goods by the prisoner; it is sufficient that they were under the absolute control, or that he is in joint possession with the thief. Goods which are in the hands of an innocent agent or bailee of the accused are in the constructive possession of the latter" [Hals 3rd Ed Vol 10, para 1568 p 811]. So, stolen utensils taken out from a public stream by the accused alone when others failed may be held to be in his possession [*Motilal v. S*, A 1959 P 54]. Mere physical relation arising from the possession of the object is insufficient to amount to possession which connotes control over the object possessed. The possession should be *exclusive* [*Rajalingam v. R*, A 1934 R 80 : 149 IC 31].

Where property is recovered from joint family house in the occupation of several members, there can be no presumption without evidence that the place of recovery was in the exclusive possession of the accused [see *Sangam v. R*, 15 A 129; *Sohan v. R*, A 1930, L 91; *Gopinath v. S*, A 1957 Or 287]. In a prosecution under s 52 Post Office Act, proof that postal articles were found in almirah of house where accused lived jointly with father and of which key was furnished by father is sufficient to infer exclusive possession by accused [*Radhakrishan v. S*, A 1963 SC 822]. Where there is no evidence as to which portion of the house was occupied by the accused and which portion by the father and other members of the family, the article recovered cannot be said to be in possession of accused [*Punia v. R*, A 1946 P 169 : 24 P 646]. But where stolen goods were found in the house inhabited by a joint Hindu family, composed of father, son and grandson, and the circumstances were such that it was very improbable that such property could possibly have been placed whether it was found wihout the connivance of some or all of the members of the family—*Held* that in the above circumstances, the conviction of the managing member (son) under s 411 I P Code was proper [*R v. Budh Lal*, 29 A 598; see *Mahabir v. S*, A 1951 P 296]. Merely because the alleged articles were recovered from the land of the accused does not lead to conclusive proof that he was in possession of those articles [*Abdul Rashid v. State of U.P.*, 1991 Cri LJ 3065, 3069 (All)].

A jar, containing stolen *ghee*, was found in a wagon in which five railway porters and a policeman in charge were travelling and the only evidence was that *ghee* was stolen from tins loaded on the same train—*Held*, that possession would be imputed to the porters. Possession must be exclusive and recent [*Mataro v. R*, 111 IC 732 : A 1929 S 9]. The mere finding of property alleged to be stolen property, in the workshop premises of an accused person, where the accused does not ordinarily

reside, is not legally sufficient to infer his guilty knowledge [*In re Meer Yar Ali*, 13 WR Cr 70]. "The mere fact that the stolen articles were kept concealed in a jungle adjacent to the house of the accused is not sufficient to fix him with the act of the concealment. The court cannot overlook the fact that other persons had as much access to the jungle as the prisoner or anybody else" [MITTER & JACKSON JJ, in *R v. Bishoo Manji*, 9 WR Cr 16; see *Trimbak v. S*, A 1954 SC 39 : 1954 CrLJ 335]. "The finding of the property in a shed which belongs to appellant but is situate above a mile from his house, is an ambiguous circumstance, as other people besides the prisoner had access to the place [JARDINE J, in *R v. Krishnabhat*, 10 B 319]. To constitute the offence of receiving stolen property, there must be some evidence that some person other than the prisoner, had possession of the goods before the prisoner got possession of the same; otherwise possession of them is only proof of stealing [*Ishan Muchi v. R*, 15 C 511, 514; **approved** in 15 A 317; **dissented** from in 1 LBR (1900) 39 where it has been held that in view of the plain terms of illustration (*a*) to this section the decision in 15 C 511 was open to question, and that the question as to which of the two presumptions indicated in the illustration should be drawn must depend upon the facts of each particular case]. Where *A* asks *B* to receive properties to be brought by *C*, there is no presumption that the properties would be stolen [*In re Md Ali*, 4 MLT 415].

Where stolen property is produced without making any incriminating statement from a place which is not exclusively occupied by the accused or which is of the ownership of another person, a good deal depends upon whether the production was accompanied by information given by the accused in custody as would be admissible under s 27. But the production of the property itself would not necessarily prove his possession. It would at the most show that he had knowledge where the property was kept or concealed. Mere knowledge that stolen property is lying hidden somewhere is not an incriminating circumstance for the offence of theft or receiving stolen property and such knowledge cannot by itself raise a presumption of possession [*R v. Chavadappa*, A 1945 B 292 : 47 Bom LR 63; *Kachanji v. S*, A 1969 G 100].

—Possession Must Be Fairly Recent.—No fixed time-limit can be laid down to determine whether possession is recent or otherwise. But every case must be judged on its own facts [*R v. Ekabbar*, 94 IC 361 : A 1926 C 925; *Aziz v. R*, 1932 MWN 862; *R v. Mavji*, A 1941 B 325]. What amounts to recent possession sufficient to justify the presumption varies according as the stolen article is, or is not, calculated to readily pass from hand to hand [*Necha v. R*, A 1928 N 213]. Ten weeks are not too long to attract the presumption [*Baliram v. R*, A 1945 N 1]. In *R v. Cockin*, (1836) 2 Lewin CC 235, where two sacks were found in defendant's possession about twenty days after they had been missed, COLERIDGE, J, said to the jury:

> "If I was now to lose my watch and in a few minutes it was to be found on the person of one of you, it would afford the strongest ground for presuming that you had stolen it; but if a month hence it were to be found in your possession, the presumption of your having stolen it would be greatly weakened, because stolen property usually passes through many hands.....It is useless to call such a presumption a presumption of law. Call it what we may, it is a presumption of fact."

If several months have passed or if the accused is able to give an apparently reasonable explanation, the presumption will not arise [*Giyan v. R*, A 1937 A 47 : 1936 ALJ 1158]. Possession of stolen property cannot safely be treated as evidence of theft, except where the date of theft is so recent as to make it presume, in the absence of

explanation, that the person in whose possession the property is found, must have obtained the possession by stealing. If any considerable time (more than a year) has elapsed between the date of theft and the date when the property is found in the possession of the accused, then no presumption of guilt ought to be found on that possession alone [*R v. Purmessur*, 23 WR Cr 16, see *Ina Sheikh v. R*, 11 C 160 (*ante*); thirteen days [*R v. Mavji*, A 1941 B 225]; six months [*Jaganarain v. R*, A 1935 C 680]; eight months [*Reoti v. R*, A 1933, A 461]; nine months [*Phul v. R*, A 1937, L 246]; ninteen months [*Nagli v. R*, 95 IC 471; two and half years [*Imamuddin v. R*, A 1933 P 112]; twelve years [*Mangal v. R*, 96 IC 650]. Possession of currency notes alleged to have been stolen some months previously and at a place far away from where they were found raises no presumption [*Alia v. R*, 91 IC 544 : A 1926 L 272].

Possession of stolen articles of a very common description (jewellery of a very ordinary type) six months after the dacoity would not be sufficient to call upon the accused to explain his possession [*R v. Sughar*, 29 A 138 : 3 ALJ 808]. So, in a case where ornaments were found 2½ years after theft [*Chottey v. R*, 85 IC 722 : A 1925 A 220], or a bicycle found one year after theft [*R v. Doodnath*, A 1946 S 153]. Cloths which any cloth merchant might stock and sell are incapable of identification [*Wasal v. R*, A 1925 L 495]. Though Burmese coins cannot be absolutely identified, they are sufficiently uncommon now to cast upon an accused in possession of them and identified as stolen, the *onus* of proving that he came by them honestly [*Maung Lay v. R*, 77 IC 429 : 1 R 609]. Possession of stolen jewellery three weeks after theft leads to the natural inference that the accused dishonestly received the stolen property, unless he could show how he obtained possession of the same [*Sen Raya v. Public Pro*, 3 MLT 30 : 7 Cri LJ 30]. Recovery of gold bangles and *saglas* four months after theft was considered recent as such articles are not calculated to pass readily from hand to hand [*Amar v. R*, A 1949 Pu 315]. Conviction for dishonest possession of stolen property (a copper vessel), discovered seven months after its loss is had, as the onus is on the prosecution to prove *guilty* knowledge, and the failure of accused to account for his possession does not relieve the prosecution of the burden [*In re Bhami Laxman*, 8 MLT 418]. Where there is a long lapse of time, the *onus* of proving innocent possession should not be cast on the accused [*Narain v. R*, A 1928 L 687 : 108 IC 912; *Mangaya v. R*, 32 IC 660]. Possession of a missing animal 7 months after its loss is not recent possession [*Suchit v. R*, A 1931 P 85].

Lapse of time is an important factor.—The importance varies with circumstances and depends on the frequency with which the property is likely to have changed hands [*Smith v. R*, 43 IC 605 : 19 CrLJ 189]. In a case more than three months were considered insufficient to raise the presumption [*Joeenullah v. R*, 22 CWN 597]. So, five months [*Hariram v. R*, 62 IC 867] and forty days [*Ramhit v. R*, 20 ALJ 178]. Though usually a court is not justified in drawing the presumption from possession which is not shown to have commenced until nearly two years after the theft, it is entitled to ask the possessor to disclose the name of the person from whom he got the articles and on a refusal, to draw unfavourable inference [*Ram Pd v. R*, 81 IC 443 : A 1924 R 256]. The jury should be told that the stolen goods must be possessed soon after the theft or that they must have been recently stolen [*Hatem v. R*, 24 CWN 619 : 56 IC 849].

Prosecution under s 411 I P Code being of a peculiar nature differing from an ordinary case, in respect of the number of accused involved, and the extent of time covered by their operations, there can be no definite rule of limitation barring responsibility for stolen goods. Presumption was made in the case of possession after six months [*Amdumiyan v. R*, A 1937 N 17 FB]. In a charge under s 411, an

important factor is the value of the property alleged to have been stolen [*per* WALSH J; *Mahboob v. R*, 56 IC 856 : 21 Cri LJ 552].

Presumption Applies Also to Other Offences, *eg* Murder, Robbery etc.—This presumption, which in all cases is one of *fact* rather than law, is occasionally so strong as to render unnecessary any direct proof of what is called *corpus delicti* [Tay s 141]. The presumption is not confined to cases of theft, but applies to all crimes, even the most penal. Thus, on an indictment for arson, proof that property, which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, has been held to raise a probable presumption that he was present and concerned in the offence [*R v. Rickman*, 2 East PC 1035]. A like inference has been raised in the case of murder accompanied by robbery [Will Cri Ev 61], in the case of burglary [*R v. Gould*, 9 C & P 364; *R v. Exall*, 4 F & F 922], and in the case of the possession of a quantity of counterfeit money [*R v. Fuller*, 1816 R & R 308; *R v. Jarvis*, 25 LJ MC 30; Tay s 142].

The illustrations to s 114 are not exhaustive. *Illus* (*a*) meets the facts of simple theft and possession of stolen goods soon after the theft. From the fact of recovery of the stolen articles from the accused and some of the ornaments were pledged by the accused on the next day after the crime, an inference of guilt can be drawn against the accused [*Himangshu Pahari v. State*, (1986) Cri LJ 622, 631 (DB) (Cal)]. If it is to be extended to other kinds of stolen property, *eg* property in respect of which criminal breach of trust has been committed or property stolen in a dacoity, the presumption will have to be adapted to the particular circumstances of the case [*R v. Chavadappa*, A 1945 B 292; *In re Cherukuri*, A 1945 M 208 : 1945, 1 MLJ 202—CONTRA: *In re Venkataswami*, A 1944 M 26 : 1943 MLJ 334]. Presumption can be made when article stolen in a dacoity is found in possession of a dacoity [*Moktarli v. R*, 40 CWN 392 : A 1945 C 421; *Kammo v. The State*, (1983) 1 Chand LR (Cri) 660 : 1983 Cri LJ 694, 704 (Raj) (DB); *Jang Singh v. State of Rajasthan*, 1984 Cri LJ 1135, 1139 : 1984 Raj LR 19 (Raj); *Lachhman Ram v. State of Orissa*, A 1985 SC 486, 488 : 1985 Cri LJ 753; *Bijuli v. State*, 1985 Cri LJ 1977, 1979 (Ori)]. Though the stolen articles were recovered from the accused very soon after the dacoity had taken place, no presumption can be drawn that the accused was involved in the dacoity. [*Amar Singh v. State of Madhya Pradesh*, A 1982 (SC) 129 : 1982 Cri LJ 610]. Proximity of time gap between the commission of dacoity and recovery of looted articles is the essence to draw the inference. If the recovery was two days after the dacoity the presumption cannot be drawn [*Babulal Musahar v. State of Bihar*, 1990 Cri LJ (NOC) 65 (Pat)]. In a robbery case when there is evidence to show that the persons robbed have left the country and are not available to give evidence, no adverse inference can be drawn on account of non-examination of that witness [*Yog Raj v. The State*, 1990 Cri LJ (NOC) 80 (Del)]. Possession of useless clothes with the accused will not raise any presumption that they took part in the dacoity since they would not have satisfied in receiving such useless clothes as their share of the booty if they had participated in the dacoity [*Oudh Ram v. The State*, 1991 Cri LJ 1656, 1662 (Del)].

In cases in which murder and robbery form parts of one transaction, recent and unexplained possession of stolen property, while it would be presumptive evidence on a charge of robbery, would similarly be evidence on a charge of murder [*R v. Sami*, 13 M 426; *Pub Pros v. Cherreddi*, 21 MLJ 1071; *In re Nainamalai*, 14 LW 418 : A 1929 M 679; *R v. Shk Niamatulla*, 17 CWN 1077; *Ramasarup v. R*, 9 P 606 : A 1939 P 513; *R v. Sheoshankar*, A 1954 P 109; *R v. Chintamoni*, A 1930 C 379; *R v. Mayadhar*, A 1939 P 577; *Ram Pd v. R*, A 1949 N 277; *In re Kalia Perumal*, A 1954 M 1088; *In re Guli*, A 1950 M 309; *In re Madugula*, A 1937 AP 611; *R v. Har Piari*,

A 1926 A 737; *R v. Kanhaiya*, A 1930 A 481; *Bhagwan v. R*, A 1929 O 190; *Imamuddin v. R*, A 1934 O 388; *Ramji v. R*, A 1918 N 67; *Jamunia v. R*, A 1936 N 200; *Tulsiram v. S*, A 1954 SC 1; *Mohanlal v. S*, A 1958 Raj 388; *Dasu Paikarni v. S*, A 1966 Or 130; *Rajanikant v. S*, A 1967 Goa 21 FB; see *Wasim Khan v. S*, A 1956 SC 400 : 1956 SCR 191 where *R v. Niamatulla; R v. Sami, R v. Chintamoni* and *Ram Pd v. R, sup* were cited with approval. See also Tay s 140; *Mynathil Mathai v. State of Kerala*, 1983 Cri LJ NOC 25 Ker (DB) : (1983) 1 Crimes 429; *Gopalan v. State of Kerala*, 1985 Cri LJ NOC 3 : 1984 Ker LT 774 (Ker) (DB); *State of Orissa v. Bishnu Charan Muduli*, 1985 Cri LJ 1573, 1586 (Ori) (DB); *Bhopa Sara Bharwad v. State of Gujarat*, (1986) Cri LJ 518, 520 (DB) (Guj) : 1984 Cri LR (Guj) 526].

In a case of murder and robbery, the question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according to the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles, like gold ornaments and costly silk sarees, were such as were not likely to pass readily from hand to had, the period of one year that elapsed between the occurrence and the arrest of the accused cannot be said to be too long particularly when the accused had been absconding during that period [*Earabhadrappa v. State of Karnataka*, A 1983 SC 446, 451 : 1983 Cri LJ 846 (SC)]. When the accused were found to be in possession of the ornaments of the deceased and they and the deceased were last seen together, a presumption can be raised against them [*Ram Gopal v. State of Himachal Pradesh*, 1983 Cri LJ NOC 10 (Him Pra) : 1982 Sim LC 225]. The accused were arrested immediately after the dacoity and murder from near the place of incident. Country made pistols and gun were recovered from him. Though they are residents of Uttar Pradesh, they did not give proper explanation for their presence in Madhya Pradesh and they did not explain their possession of the stolen articles. So an inference could be drawn that these accused had committed the murder and dacoity [*Shivsahai Singh v. State of M.P.*, 1985 Cri LJ 730, 732 : (1984) 1 Crimes 933 (MP) (DB)].

Mere possession by an accused of articles which were on the person or custody of a murdered man without any explanation cannot lead to an inference that he took part in the murder or was a party to it [*In re Singaram*, A 1954 M 152; *Basangouda v. R*, A 1941 B 139; *Bhika Gober v. R*, A 1943 B 458; *Jani Shah v. S*, A 1958 AP 273; *Sobha v. S*, A 1959 MP 125—CONTRA: *Narayana v. R*, A 1933 M 223]. Two oxen were the subject matter of theft. It was not known whether they were removed from the possession of the deceased when he was alive. If they were removed after the death of the deceased there cannot be any offence [*Guman v. State of M.P.*, 1989 Cri LJ 1425, 1427 (MP)]. The Supreme Court has also held that no hard and fast rule can be laid down as to the inference to be drawn from a certain circumstance. Where the only evidence agianst the accused is unexplained recovery of property belonging to a murderd person, it is not safe to infer that the person in possession is the murderer. The only inference that can be raised is that he is either the thief or the receiver of stolen property [*Sanwat Khan v. S*, A 1956 SC 54 : 1956 CrLJ 147; *S v. Shankar*, A 1952 A 776; *Vali Isa Md v. S*, A 1963 G 135; *Sheonath v. S*, A 1970 SC 535].

Mere unexplained possession of stolen property cannot lead to conviction for murder but if there is other evidence on record, jury may find the circumstantial evidence [*Sogaimuthu v. R*, 50 M 274; see also *Gauns v. R*, 7 L 56]. When the question arises whether the presumption of the graver offence or the lesser offence is to be drawn, it is for the prosecution to establish the graver presumption [*R v. Mayadhar*, 18 P 450 : A 1939 P 577; see *Yamir v. R*, A 1924 A 701]. Such presumption alone would not justify knowledge of the atrocious nature of dacoity [*Asimuddin v. R*, 32 CLJ 19].

ILLUSTRATION (b): [Presumption that Accomplice is Unworthy of Credit].—An accomplice is a competent witness against an accused person, and although his evidence is strictly admissible and a conviction is not illegal merely because it is based on accomplice evidence (s 133), it is a settled rule of practice not to convict a person on such evidence except under very rare and exceptional circumstances. Usually, substantial corroboration is required. Judges should warn the jury that it is highly dangerous to convict on such evidence alone and in their discretion they usually advise the jury not to act upon such testimony, although the jury may disregard the advice and legally convict on it. S 114 *illus* (*b*) points out that the court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. The rule of practice is that it is prudent to look for corroboration of the evidence of an accomplice by other independent evidence. This rule of practice is based on human experience and is incorporated in illustration (*b*) [*Sheikh Zakir v. State of Bihar*, A 1983 SC 911, 914 : 1983 Cri LJ 1285; *Sewa Ram Nagial v. Union of India*, 1983 Cri LJ 1788, 1793 (J&K) (DB) : 1983 Kash LJ 279; *Godrej Soap Ltd v. State*, 1991 Cri LJ 859, 866 (MP)]. The law in s 114 *illus* (*b*) and s 133 is the same and the subject has been fully treated in the notes to s 133. Statement of a prosecutrix in a rape case does not require corroboration [*Zameer Ahmed v. State*, 1996 Cri LJ 2354, 2357 (Del)]. Section 114 Illustration (b) incorporates a rule of caution to which the courts should have regard [*Niranjan Singh v. State of Punjab*, A 1996 SC 3254 : 1996 Cri LJ 2506 : 1996 (2) Crimes 251, 256]. Where the accused acting in consort offered bribe to a Minister for a favour but the Minister informed the Anti Corruption Bureau and the accused persons were arrested in a trap, it was an unusual case in which the demand or request to do the illegal act emanated from the members of the public *viz.*, the accused persons and the public servant *viz.* the Minister had complained about the illegality. In such a case as a witness, the quality of evidence of the Minister as also his general integrity being of a high order, conviction can be based even on his uncorroborated evidence [*C.R. Mehta v. State of Maharashtra*, 1993 Cri LJ 2863 (Bom)]. See also *State of T.N. v. Suresh*, AIR 1998 SC 1044 : (1998) 2 SCC 372, where the court restated the principle of caution but found on facts that the testimony of the accomplice in the case was not bereft of reassuring circumstances.

ILLUSTRATION (c): [Presumption as to Bills of Exchange].—The grounds upon which this presumption is based are thus stated: Although in the case of contracts not under seal, a consideration must in general be averred and proved, *bills of exchange* and promissory notes enjoy the privilege of being presumed, *prima facie*, to be founded on valuable consideration. The law raises this presumption in favour of these instruments, partly, because it is important to preserve their negotiability intact, and partly, because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves and the deliberate mode in which they are executed [Tay s 148, quoted from Story on Bills, ss 16, 178]. Similar and other presumptions with regard to negotiable instruments have been specially embodied in ss 118-22 of N I Act (26 of 1881). The initial presumption of consideration arising under s 118 N I Act can be rebutted even by circumstantial evidnece [*Singar v. Basdeo*, A 1930 A 568 : 124 IC 717]. The presumption in s 118 *ibid* is in terms enacted in s 114 Evidence Act and leave it to the court to apply it or not according to circumstances [*Narayan v. Venkatappa*, A 1937 M 182]. Even where s 118 is not applicable presumption can be made in terms of ills (*c*) [*Shrikishan v. Bhanwarlal*, A 1974 Raj 96 (rel on *Narayan v. Venkatappa, sup* approved in *Official Receiver v. Abdul Shakoor*, A 1965 SC 920]. *Illus* (*c*) is a general provision. It is not affected by the special rules of evidence in s 118 N I Act [*Offl Rec v. Abdool Shakur*, A 1965 SC 920].

Under s 114, *illus* (*c*) the court has a discretion to make the presumption or not, whereas under s 118 N I Act the court is bound to start with the presumption; but once the presumption is made there is no difference between the two cases, in the

manner of displacing the presumption or disproving the presumed fact. Neither section justifies any presumption as to the quantum of consideration as distinguished from the mere existence of consideration [*Narasamma v. Veeraraju*, 58 M 841; see *Chandan v. Aminchand*, A 1960 Pu 500]. The presumption raised by s 118 *ibid* may be rebutted and the burden shifted back to the plaintiff [*Jagmohan v. Mendhai*, 20 B 367; *Shaha v. Dulah*, A 1939 R 334]. Non-production of relevant account books admitted to be in possession of plaintiff may rebut the presumption under s 118 [*Kundan v. Custodian &c*, A 1961 SC 1316]. In this case the observation of VARADACHARIAR J, in *Narayana v. Venkatappaya*, 1937 Mad 299, 311 : A 1937 M 182 in the matter of rebuttal of the presumption under s 118 of the N I Act was **approved**]. The presumption under s 118 N I Act is that the instrument is supported by some consideration. There is no presumption as to the quantum of consideration. A recital in the instrument as to the passing of consideration is *prima facie* evidence of such consideration [*Narasamma v. Veeraraju, sup*; *Raghava v. Sundaram*, 1958, 2 And WR 570; *Thirumalai v. Subbaraja*, A 1962 M 219]. In a suit on a pronote against the undivided sons of a Hindu promisor governed by the Mitakshara, the presumption permissible is under the general law, *viz* s 114 Evidence Act and not s 118 N I Act [*Anumolu v. Ghattaraju*, 1937 Mad 299].

Professional money-lenders, sued a young man recently come of age to recover certain loans on promissory notes. The defendant, who under the will of his father, was entitled to a large property, but had not yet come into possession of it, was of an extravagant and reckless character. He pleaded as to part of the consideration for the notes that he did not receive it, and as to further part, the consideration was immoral. In dealing with the case, the court laid down the following propositions, not as rules of law, but as guides in considering the evidence in such a case:—

1. That upon the above facts the ordinary presumption that a negotiable instrument has been executed for value received was so much weakened that the defendant's allegation that he had not received full consideration was sufficient to shift the burden of proof and to throw upon the money-lenders (the plaintiff) the obligation of satisfying the court that they had paid the consideration in full. That is the practical effect of illustration (*c*) to s. 114.

2. Where the plaintiff in answer to such a defence affirmed that he had paid the consideration in full, and was corroborated by his books and witnesses, the *onus* of proof was again shifted over upon the defendant.

3. The burden of proof thus thrown upon the defendant could only be met by a perfectly truthful and harmonious statement which the court felt able to rely upon with confidence. In the absence of this the ordinary presumption laid down in s 118 of the N I Act must, prevail, *viz* until the contrary is proved, the presumption should be made that every negotiable instrument was made for consideration [*Moti Gulab v. Md Mehdi*, 20 B 267].

The explanation to *illus* (*c*) merely sounds a warning that the rule laid down in that illustration was not intended in any way to override the general provision of law that a contract entered into under undue influence was bad [*Bannu v. Munshi*, A 1935 L 599].

The mere fact that the drawer and acceptor of a bill, are partners does not give rise to the presumption that they are partners in respect of the drawing of the bill, or that the bill was drawn by one of them on behalf of both [*Jambu v. Sundararaja*, 26 M 239]. An endorsee from the payee of a *hundi* is presumed, until the contrary is proved to have been a holder in due course, *ie* for consideration [*Sakharam v. Gulab*,

16 Bom LR 743; *Madhoram v. Nanda*, 1 L 429: 58 IC 982]. A holder under a forged endorsement is not a holder in due course [*Banku v. Secy of S*, 36 C 239]. Where a negotiable instrument was obtained from the maker for an unlawful consideration, the burden is on the holder to prove that he became such in due course [*Ramdas v. Lalchand*, 101 IC 325: A 1927 L 371]. See *post* s 117 under "*Estoppel in regard to Negotiable Instruments.*" The presumption under s 118 N I Act would not necessarily apply to a criminal trial, *eg* perjury [*Sakhawat v. R*, 18 ALJ 1151].

ILLUSTRATION (d): [Presumption of Existence From Previous and Subsequent Existence].—This illustration is founded on the presumption in favour of *continuance* or immutability. It is a very general presumption founded on the experience of human affairs, that persons, states of mind or things once proved to have existed previously or subsequently in a particular state are to be understood as persisting in continuing in that state until the contrary is established by evidence either direct or circumstantial. The presumption of *continuity* is founded on analogous inference (see s 109). "I am to presume a thing always in the state in which it is found, unless I have evidence that at some previous time it was in different state" [*per* BEST J. in *R v. Burdett*, 4 B & Ald 95, 124]. The ordinary legal presumption is that things remain in their original state [*Jariutool Butool v. Hoseini Begum*, 11 MIA 194]. "When the existence of a person, or a personal relation, or a state of things is once established by proof, the law presumes that the person, relation or state of things continues to exist as before till the contrary is shown, or till a different presumption is raised from the nature of the subject in question" [Tay s 196; Best s 405].

Presumption should not be made against but in favour of the existing state of things [*Secy of S v. Jyoti*, 53 IA 100: 53 C 533: 30 CWN 745 : A 1926 PC 41]. States of mind, persons, or things, at a given time may in some cases be proved by showing their previous or subsequent existence in the same state, there being a probability that certain conditions and relationships continue. The presumption of continuance which is one of *fact* and not of law, will, however weaken with remoteness of time, and only prevails till the contrary is shown, or a different presumption arises from the nature of the case. Moreover, the continuance of *unlawful* conditions will not generally be presumed [*Price v. Worwood*, 4 H & N 512, 514—Phip 11th Ed p 130]. The drawing of such presumption results in casting the burden of proof on the party against whom the presumption is raised. If a thing or a state of things is shown to exist and the space of time for which it has existed is such that there is a probability that there has been no alteration in its conditions, the burden is on the opposite party to show that it has ceased to exist. The presumptions as to life and death, have been dealt with in ss 107, 108. Those sections are particular applications of the general presumption of continuance referred to in this illustration.

When the books of account show a transaction of a certain kind, the basis of a finding that real transaction was of a different character must be some evidence. Mere refusal to believe the books is not sufficient to find a transaction of a different kind. The presumption under s 114 *illus* (*d*) cannot in such a case supply the want of evidence and furnish the basis for a finding that the trasanction was the same in character as the transaction of the previous years [*Commrs of I T v. Bombay Trust Corpn*, 63 IA 408: 41 CWN 33]. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed [*Banarsi v. S*, A 1955 A 33].

The limits of time within which inference of continuance possesses sufficient probative force to be relevant, must obviously vary with each case—always strong-

est in the beginning, the inference steadily diminishes in force with the lapse of time at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference. To put the matter shortly, it will be inferred that a given set of fact or facts whose existence at a particular time is once established, continues to exist as long as such facts usually exist [*Secy of S v. Upendra*, 36 CLJ 336: 71 IC 849; *Soundamini v. Secy of S*, 38 CLJ 47].

"When the existence of an object, condition, quality, or tendency at a given time is in issue, the *prior existence* of it is in human experience some indication of its probable persistence or continuance at a later period. The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand. That a soap-bubble was in existence half-an-hour ago affords no inference at all that it is in existence now; that Mt Everest was in existence ten years ago is strong evidence that it exists yet; whether the fact of a tree's existence a year ago will indicate its continued existence today will vary according to the nature of the condition of life in the region. So far, then, as the *interval of time* is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control..... The precedents show the principle applied to all manner of subjects,—to the condition of a highway, or of a bridge, or of a railway track, station, or roadbed, or of a stream, or of premises, without or within, or of machinery or apparatus, or of a stock of goods, or of sundry articles, or of the condition of a human body or of an animal" [Wig s 437; see the cases cited there].

There are numerous other presumptions of this class, *eg* presumption of continuance of possession with the person in whom there is title [See *Md Ali v. Khaja Abdul*, 9 C 744: 12 CLR 275; *Raj Kumar v. Gobind*, 19 IA 140: 19 C 660; *Watson & Co v. Govt*, 3 WR 73; *Nilanand v. Basirannissa*, 16 WR 102; *Mohini v. Krishna*, 9 C 802: 12 CLR 337; *Mittrojit v. Radha*, 23 WR 368; *Kallysharan v. Secy of S*, 6 C 725: 8 CLR 90; *Monmohan v. Mathura*, 7 C 225: 8 CLR 126; *Radha Gobind v. Inglis*, 7 CLR 364 PC and several other cases cited in notes under ss 101-104]; continuance of possession of waste, jungle and *chur* lands (see cases noted under s 110, *ante*]; continuance of private partition [*Abhoy v. Harinath*, 8 C 72]; continuance of debts, obligations &c until discharged [*Jackson v. Irvin*, 2 Camp 50; Best s 406]; sanity [*Sutton v. Saddler*, 26 LJCP 284]; insanity [*Banks v. Goodfellow*, LR 5 QB 549, 570]; domicile, residence [*Sourdis v. Keyser*, 18 TLR 416; *Lauderdane Peerage*, 10 App Cas 692; *Bell v. Kennedy*, LR 3 HL 307]; continuance of relationship of landlord and tenant, principal and agent, partners (see s 109 *ante*); adulterous connection [*Turton v. Turton*, 3 Hagg Ecc 338]. Coconut, arecanut, jack, rubber, mango trees and pepper vine in existence in 1936-37 will be presumed to be in existence in 1930-40 [*Alexander v. Nair Service Society*, A 1966 K 286]. A person once proved to be profligate is presumed to continue as such during the lifetime until rebutted [*Shahul v. Allah*, 9 CLR 196: 34 IC 504]. If it is proved that a woman was unmarried at a certain date, the presumption is that she continues so until proved to have married [*Indi v. Jaimal*, A 1927 L 48: 98 IC 887]. Presumptions founded on the continuance of existence of human affairs, objects, conditions &c are so numerous that they cannot be exhausted by examples. Reference may be made to Tay ss 196-204; Best ss 403-410; Wig ss 437-440.

Where the evidence of possession is conflicting it may be presumed that possession follows the title [*ante* s 110]. The ordinary presumption of law is that possession

goes with the title unless there is clear evidence to the contrary. The presumption arises in the following cases: (*1*) Where the evidence is equally strong on both sides, the presumption of law may according to the circumstances of each case be regarded and turn the scale. (*2*) Where there is no evidence of possession on either side the presumption should prevail. (*3*) So also, where the evidence is unsatisfactory on both sides: provided always that the evidence does not negative the presumption [*Bhikhad v. Upendra*, 4 PLJ 463: 51 IC 301 (see also *ante*)]. In a case a presumption was raised by proof of previous possession of means, that a prisoner was at the time of a person's death, possessed of sufficient means to have provided the person with food and medicine [*R v. Jones*, 19 Cox 678].

A previous rent decree is conclusive as to the relationship of landlord and tenant. S 114 *illus* (*d*) does not compel but certainly permits the court to make a presumption as to continuance of the state of things [*Hiranmay v. Ramjan*, 20 CWN 48; *Shk Ahmed v. Sultan*, 71 CLJ 100]. There is no presumption that a person in possession in one year should be presumed to be in possession in any earlier year. Possession once proved is presumed to continue. The presumption is not retrospective [*Purshottam v. Dulichand*, 5 IC 196. See however, the next heading].

—Subsequent Existence.—Similar considerations affect the use of *subsequent existence* as evidence of existence at the time in issue. Here the disturbing contingency is that some circumstance operating in the interval may have been the source of the subsequent existence, and the propriety of the inference will depend on the likelihood of such intervening circumstances having occurred and been the true origin [Wig s 437]. The probability of continuance may also operate retrospectively. Thus, the fact that an adult person was alive at a given date would be conclusive that he was alive at a prior date. So, proof of official character at a certain time is evidence of official character within a reasonable time before [*Doe v. Young*, 8 QB 63]. The fact that a ship has, shortly before sailing, and without visible cause, become unseaworthy, is evidence that she was unseaworthy at the time of sailing [*Pickup v. Thames Ins Co*, 3 QBD 594; *Ajum v. Union Ins Co*, 1901 AC 362]. So, a letter received unsealed was inferred to have been so posted [*R v. Burdett*, 4 B & Ald 95, 124—Phip 11th Ed p 131].

—Presuming Backwards.—S 114 does not go so far as to enable the court to presume that the present state of things existed in the past without any proof from the party who is required to satisfy the court on the point [*B N Rly v. Moolji Sicka*, A 1930 C 815]. In appropriate cases an inference of the continuity of a thing or state of things backwards may be drawn under this section though on this point there is no separate illustration [*Ambika v. Ram Ekbal*, A 1966 SC 605; *Kesava v. Thomas*, A 1969 K 21]. In case of plea of adverse possession extension of presumption has to be for a reasonably proximate period and a period of 12 years cannot be considered to be a reasonably proximate period backwards [*Chandrasekhar v. Shidagirappa*, A 1971 My 339; *Ambika v. Ramekbal, sup* **explained**)]. The presumption of continuance may operate retrospectively [see *Anangamaniari v. Tripura Sundari*, 14 IA 101, 110].

ILLUSTRATION (e): [Performance of Judicial and Official Acts].—The rule embodied in this illustration is a particular application of the maxim "*omnia praesumuntur rite esse acta*", *ie* all acts are presumed to have been rightly and regularly done. This presumption is chiefly applied to judicial and official acts. The presumption under s 88 is another presumption in favour of regularity of acts. As to presumption from regular course of business, see s 16. Presumptions of this nature with regard to documents, are to be found in ss 79-86. Under s 57(7), judicial notice is to

be taken of holding of offices if the fact of appointment is notified in official gazettes. Stephen states the rule thus: "Where any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with" [Steph Art 101]. The ordinary rule is *omnia praesumuntur rite at solenniter esse acta donec probetur in contrarium*, everything is presumed to be rightly and duly performed until the contrary is shown [Broom—Legal Maxims, 1939 Ed, p 642 **quoted** in *Harpal v. Union Territory*, A 1978 P&H 68 FB]. The matters of judicial record are unquestionable inasmuch as they are not open to doubt [*Shahnaz Shaharyari v. Vijay Y. Gawande*, A 1995 Bom 30, 38].

Presumption under Section 114 will came into aid to the party if the party proves the fact that the judicial or official act has been in effect done or performed. Performance of the act—Whether judicial or official will have to be proved first and if it is proved, then the presumption arises that the said act was performed in accordance with law. Without proving the fact of the act having been performed, the party cannot ask the court to raise that presumption. Where the respondent had not been examined to prove that the property was actually attached before the judgment was passed by the court, he cannot rely on the presumption under section 114 in support of his contention that the attachment was in fact effected in pursuance of the order of attachment before the said judgment [*Vijaya College Trust v. Kumta Co. Op. Arecnut Sales Society Ltd.*, A 1995 Kant 35, 41]. The basis of persumption is that normally courts of justice uphold official and judicial and other acts rather than render then inoperative. The presumption arises wholly on grounds of public policy [*Kailash Chand Gaggar v. State of Assam*, 1993 (2) Crimes 700, 702 (Gau)]. In cases where the exercise of statutory power is subject to the fulfilment of a condition then the recital about the said condition having been fulfilled in the order raises a presumption about the fulfilment of the said condition, and the burden is on the person who challenges the validity of the order to show that the said condition was not fulfilled. In a case, where the order does not contain a recital about the condition being fulfilled, the burden to prove that the condition was fulfilled would be on the authority passing the order if the validity of the order is challenged on the ground that the said condition is not fulfilled [*State of Haryana v. Hari Ram Yadav*, A 1994 SC 1262]. Reference in this context may be made to the decision of the Supreme Court in *Swadeshi Cotton Mills Co. Ltd. v. State of U.P.*, (1961) 2 LLJ 419 : A 1961 SC 1381 wherein it has been observed:

> "The validity of the order therefore does not depend upon the recital of the formation of the opinion in the order but upon the actual formation of the opinion and the making of the order in consequence. It would therefore follow that if by inadvertence or otherwise the recital of the formation of the opinion is not mentioned in the preamble to the order the defect can be remedied by showing by other evidence in proceedings where challenge is made to the validity of the order, that in fact the order was made after such opinion had been formed and was thus a valid exercise of the power conferred by the law. The only exception to this course would be where the statute requires that there should be a recital in the order itself before it can be validly made.
>
> We cannot accept the extreme argument of Shri Aggarwala that the mere fact that the order thas been passed is sufficient to raise the presumption that conditions precedent have been satisfied, even though there is no recital in the order to the effect. Such a presumption in our opinion can only be raised when there is a recital in the order to the effect. In the absence of such recital if the order is challenged on the ground that in fact there was no satisfaction, the authority passing the order will have to satisfy the court by other means that the

conditions precedent were satisfied before the order was passed. We are eqully not impressed by Shri Pathak's argument that if the recital is not there, the public or courts and tribunals will not know that the order was validly passed and therefore it is necessary that there must be a recital on the face of the order in such a case before it can be held to be legal. The presumption as to the regularity of public acts would apply in such a case; but as soon as the order is challenged and it is said that it was passed without the conditions precedent being satisfied the burden would be on the authority to satisfy by other means (in the absence of recital in the order itself) that the conditions precedent had been complied with."

This presumption is also applied in many cases to the acts of private persons. The foundation for the rule is that every person whether in his private or official character, does his duty and unless the contrary is proved, it is presumed that all things are rightly and regularly done. So, it is presumed that in the transaction of affairs or business, the persons employed have followed the usual and customary modes of discharge of duties, *eg* presumption of execution of documents on the dates they bear; presumption of signature of maker before the witnesses signed; presumption of due execution and attestation of a document not produced after notice (s 89); presumption of due delivery of a letter when posting is proved; certain presumptions with regard to negotiable instruments &c.

"The presumption of performance of official duty and regularity of proceedings is more often mentioned than enforced; and its scope as a real presumption is indefinite and hardly capable of reduction to rules. It may be said that most of the instances of its application are found attended by several conditions; first, that the matter is more or less in the past, and incapable of easily procured evidence; secondly, that it involves a mere formality, or detail of required procedure, in the routine of a litigation or of a public officer's action; next that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent an unwholesome uncertainty; and finally, that the circumstances of the particular case add some element of probability" [Wig s 2534]. There is a presumption that every person whether in his private or official character does his duty and unless the contrary is proved, it is presumed that all things are rightly and regularly done. This presumption applies with greater force to official acts [*Zeenat v. Prince of Wales &c*, A 1971 P 43]. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. Judgments cannot be treated as mere counters in the game of litigation. We are bound to accept the statement of the Judges recorded in their judgments, as to what transpired in Court. The statement of the judges cannot be allowed to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be last word on the subject [*State of Maharashtra v. Ramdas Shrinivas Nayak*, A 1982 SC 1249, 1251 : 1982 Cri LJ 1581].

Where a statement appears in the judgment of a court that a particular thing happened or did not happen before it, it ought not ordinarily be permitted to be challenged by a party, unless, of course, both the parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous [*State of Orissa v. Orissa Oil Industries Ltd.*, A 1982 Ori 245, 249]. A party may resile from a concession on the ground that it was made on a wrong appreciation of the law or fact and had led to gross injustice and the appellate court may permit him in rare and appropriate cases. But he may not be permitted to call in question the very fact of making the concession recorded in the judgment [*Raghava Warier v. Sarojini Warier*, 1989 Cri LJ 2464, 2467 (Ker)]. Where the question was whether a particular mining

area was within the forest area and the petitioner failed to produce any evidence on the matter, the presumption prevailed that the official report was regular and correct [*Kamal Singh v. State of UP*, A 1998 All 220].

"*Regularly performed*" means performed with due regard to procedure [*Jagdeo v. Bulaki*, 68 IC 226]. 'Regularly performed' means performed in accordance with form and procedure [*Ramakrishna Ganapayya Hegde v. Lakasiminarayanan Timmayya Hegde*, A 1984 Kant 45, 48 : (1983) 2 Kant LJ 409]. There is no presumption that the official act has been regularly performed when the act itself is shown on the fact of it to be unauthorised or not legal [*SH Surat Singh v. Municipal Corporation of Delhi*, A 1989 Del 51, 59]. It cannot imply that the officer or the judge had authority to perform an act which is ordinarily within his competence [*Venkataramana v. Kannan*, A 1963 K 9]. *Illus* (*e*) is not exhaustive; and the general language of the section applies to all acts and proceedings which might be presumed to have been done in the usual course of business [*Laxmipathaya v. Ramchandra*, 31 MLJ 311 : 35 IC 421]. The presumption is rebuttable [*Niharendu v. Porter*, 1944, 1 Cal 489: A 1945 C 107]. It can only be overturned by exceptionally strong evidence [*Sheodarshan v. Assessar*, 5 OLJ 179: 46 IC 52]. The presumption in favour of official acts is destroyed when it is established that the investigating officers have not acted in a straightforward manner and have clearly made false statements in court [*Inder v. R*, A 1936 L 409]. A report of the Forensic Science Laboratory indicating that the two cartridges found about five Karains from the body of the deceased, had been fired through the right barrel of a gun and according to evidence this shot was fired by another accused and so these two cartridges could not have been fired by the accused. This report was filed in the court only two days after trial started without notice to the defence. If this report had been filed earlier it would have demolished the prosecution case against the accused [*Harchand Singh v. State of Punjab*, A 1981 SC 925, 926 : 1981 Cri LJ 466]. In the absence of proof to the contrary, credit should be given to the police officers who have acted, *prima facie*, within the limits of their authority, for having done so with the honesty [*Hokhete Sema v. Kaito*, A 1982 Gau (HOC) 113].

Where the assessee filed voluntary returns before the end of four years from the end of relevant assessment year and I.T.O levied interest up to the date of the filing of the returns it must be presumed that the I.T.O had extended the time of filing the returns after satisfying himself that it was a case for extension of time. The presumption was founded in the principle that an officer entrusted with a judicial or *quasi*-judicial duty must be presumed to have discharged his duties in a proper and *bona fide* manner [*Commr of Income Tax A P v. M Chandra Sekhar*, A 1985 SC 114, 117 (DB)]. The presumption that official acts must have been properly performed is not weakened by the moderator's sheet wherein the marks of each candidate are mentioned taking it from the original answer book [*Kadiwala Bharatkumar v. Shri Chauhan*, A 1988 Guj 6, 8 (DB) : (1987) (2) 28 Guj LR 839].

Scope and Application of Illustration (e).—If an authority who has jurisdiction to deal with the matter passes an order which is illegal, the same cannot be treated void. The order would be presumed to be valid unless rebutted [*Trilochan Singh v. Commr. of Land Rewards & Settlement Orissa*, 1996 AIHC 3428 (Ori)]. The proviso to Article 316 provides that one half of the members of the State Public Service Commission, as nearly as may be, shall be those who have held office as laid down therein. Where there was no material to show that appointment of respondent as a member was against the said proviso, nor was there anything in the averments as to under what category the other members belonged at the relevant time, nor was any clear averment as to whether the petitioner came under one category or the other, the

appointment of the respondent cannot be said to be against the said proviso on the basis of the averments in the petition [*Jai Shanker Prasad v. State of Bihar*, A 1993 Pat 22, 28]. Where the application for admission to an educational institution was duly processed and scrutinised and thereafter it passed through the sub-committee which recommended the case of the petitioner-candidate for admission after attaining its full satisfaction regarding the eligibility of the petitioner and thereafter the Dean only on being fully satisfied allowed the petitioner to be admitted in the course, *the maxim omnia praesumuntur rite it dowee probetur in contrarium solenniter esse acta i.e.*, all the acts are presumed to have been done rightly and regularly, applies. When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises in favour of the performance of the acts. An execution of an [*Lumbini Baruah v. Cotton College, Guwahati*, A 1997 Gau 87]. Where the certified copy of sale-deed taken from the volume book maintained in the office of the Sub-Registrar bearing the seal of the Sub-Registrar and also the certificate that it was copied and compared and the scribe who wrote the original was also examined, the correctness of such certified copy has to be presumed [*Sukumar Roy v. Rabindra Chandra Roy*, A 1994 Gau 67, 70].

Where the detaining authority did not file any counter-affidavit and the records were also not made available for perusal of the court nor given to the detenu when he demanded, it has to be presumed that due course of law has not been followed while depriving liberty of the detenu [*Mohd. Ramzandar v. State*, 1996 Cri LJ 1029, 1030 (J&K)]. Endorsement by peon of Land Acquisition Collector's office that he affixed a copy of the notification at conspicuous place in the locality raises a presumption under Illustration (e) [*Ajay Krishan Singhal v. Union of India*, A 1996 SC 2677, 2681]. In interpreting the constitution neither motives nor bad faith nor abuse of power be presumed. Section 114(e) raises statutory presumption that official acts have been regularly performed [*S.R. Bommai v. Union of India*, A 1994 SC 1918, 2030]. When the appointment of a teacher to LT grade is governed by statutory regulations and is an official act a presumption of regularity attaches to the official act [*Naseem Bano v. State of U.P.*, A 1993 SC 2592, 2596]. The Local (Health) Authority is a public official. The act of the Local (Health) Authority in despatching a copy of its report of analysis of a food article with necessary intimation or information is an official act. When the act has been shown to have been performed, it is open to the court in its discretion to draw the presumption that the act has been performed regularly. If there is acceptable evidence to show that the Local (Health Authority) has forwarded the document, by virtue of Illustration (e) to section 114, the court may presume that it was forwarded regularly, *i.e.* as required in section 13(2) of the Prevention of Food Adulteration Act, 1954 and Rule 9-A of the Rules [*Ratanlal Agarwala v. State of Assam*, 1993 Cri LJ 2747, 2757 (Gauh)]. There is presumption in favour of official activities. In the absence of anything on record to hold that the record of the enquiry under s. 5-A of the Land Acquisition Act was not forwarded to the State Government, it cannot be presumed that the record had not been forwarded along with the report under s. 5-A of the said Act. [*Lokesh Chandra v. State*, 1998 AIHC 3387, 3390 (Raj)].

Where the application for setting aside the *exparte* order is silent either that the address of the defendant as given in the suit was not his address or that the issue of newspaper in which the summon was published was not served on the said address, presumption under s. 114 is not rebutted [*EMESS Advertising Service v. Hindustan Times Ltd.*, A 1998 Delhi 14]. The presumption is that all judicial and official acts have been properly done; but before the presumption can arise it must be proved that the official or judicial act was done. Not that there is any presumption of the acts themselves being done [see *Walvekar v. R*, 53 C 718; *Narendra v. Jogi Hari*, 32 C 1107; *Purushottam v. R*, A 1946 B 492: *S v. Aziz*, A 1956 B 680; *Muruzappa v. Thirumalai*, A 1948 M 191 and cases cited *post*].

Once the prosecution shows that regular entries were made in public document the legal presumption would be that official acts must have been duly performed [*Sonelal v.*

S, A 1978 SC 1142]. The party relying upon the presumption, should at least show that the order on the face of it is regular and is in conformity with the provisions of the statute [***Collr of Customs v. Digvijay***, A 1961 SC 1549: (1962) 1 SCR 896]. An official letter from the Home Dept stating that the Governor has been pleased to grant sanction to prosecute certain persons raises a presumption that the official act was regularly performed [*Tulsiram v. S*, A 1963 SC 666]. Order of State Government communicated by telegram containing clear averment as to the existence of the order although neither expressed in the name of the Governor nor properly authenticated by proper authority must be presumed to have been validly passed [*Barada v. Board of Rev*, A 1967 A 22 (*Chitralekha v. S*, A 1964 SC 1823 **folld**)]. When the file relating to sanction to prosecute had been put up before the Minister, containing a self-explanatory note, whereupon he appended his signatures, it is presumed that he had applied his mind thereto, and thereafter as a token of accord put his signatures thereon [*State of Punjab v. Bhim Sain*, 1985 Cri LJ 1602, 1603: (1985) 12 Cri LT 146 (P&H)].

Where an officer was placed under suspension as per the order of Chief Secretary conveyed by a wireless message a presumption was raised that the official act was regularly performed [*Saila Behari v. S*, A 1966 Or 150]. When a contract is purported to be signed by Dy Secretary of Govt who was ostensibly authorised to sign contracts on behalf of Govt the contract is presumed to be duly executed and the burden is on the Govt to show that the Dy Secretary was not duly authorised to execute the contract [*S v. R B Ojha*, A 1977 P 258]. There is no presumption that just because an official of a department of the Central Government files an affidavit deposing to certain facts, which are not known to him personally the affidavit is true [*Union of India v. Cavalier Shipping Company*, A 1990 Mad 312, 313]. Where the Government order specified certain societies as co-operative society for the purpose of s. 74C of the Gujarat Co-operative Societies Act, 1962 on the basis of financial position and share capital but the said order included the name of the petitioner within the ambit of 'any other society or class of society' it can be presumed that the Government had considered the financial position and share capital of the petitioner [*Kodinar Taluka Co-operative Banking Union Ltd. v. State of Gujarat*, 1998 AIHC 2377, 2379 (Guj)].

There is no room for drawing a presumption under Section 114, illustration (e) [*Saiyad Mohd. Saiyad Umar v. State of Gujarat*, 1995 Cri LJ 2662, 2664 (SC)]. Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Obliges the officer concerned to inform the person to be searched of his right to demand that search be conducted in the presence of a Gazetted Officer or a Magistrate.

Having regard to the object for which the provisions of Section 50, have been introduced into the NDPC Act and when the language thereof obliges the officer concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or Magistrate [*Saiyad Mohd. Saiyad Umar v. State of Gujarat*, 1995 Cri LJ 2662, 2664 (SC)]. When the Government accorded sanction for prosecution under seciton 6(1)(b) of the Prevention of Corruption Act, 1947, seciton 114(e) of Evidence Act raises a presumption that the official acts have been regularly performed [*M.S. Reddy v. State of Inspector ACB Nellore*, 1993 Cri LJ 558, 572 (AP)].

This presumption is optional and one of fact. It can be displaced by circumstances indicating that the power lodged in an authority or official has not been exercised in accordance with the law [*Narayan v. S*, A 1977 SC 183]. The presumption is only optional. The court is not bound to make it and the counter illustration itself indicates a case in which the court would not draw it [*Jawai v. R*, A 1942 L 214]. The presumption is not to be drawn as a matter of course in the case of judicial acts of a special

or contingent jurisdiction [*Venkataramana v. Kannan*, A 1963 K 9]. The presumption "*omnia praesumuntur &c*" applies to procedure only, and there can be no presumption that the court will always be correct in its decision on points of law or that it will raise and decide the necessary issues in every case [*Chowdhury v. Jafar*, 24 IC 739]. A person asserting that a judgment is irregular because no evidence was given must prove it, as there is a presumption under s 114 [*Shk Abdul v. Md Din*, A 1943 C 42]. Where an appellate judgment is silent on a point specifically mentioned in the grounds of appeal, the presumption is that it was given up [*Abdul v. Thakar*, 68 IC 740]. There is a presumption that the acts of a court have been regularly carried out [*Baijnath v. Sri Bhagwan*, 96 IC 591: A 1926 A 691; *Janardan v. Arakhit*, A 1967 Or 150]. There is no impropriety in referring a thing as having been done when that thing is required to be done by a section in statute [*Brindaban v. G I P R*, 96 IC 1039: 24 ALJ 825].

In the case of mandatory provisions of the processual law, in the absence of any evidence to the contrary, the court would presume that all rules and legal forms were complied with. But where the provisions are only enabling such a presumption does not arise [*Sona Chalam v. Kunaravelu*, A 1928 M 77 FB]. The regular performance of official acts does not imply that the representation made must be correct [*Jagdeo v. Bulaki*, 63 IC 226: 1921 Pat HCC 243]. Where there is nothing to show that the Rules or Notifications were not placed before Parliament, the court is entitled to presume that official acts have been regularly performed [*Brajendra v. Union*, A 1961 C 217].

Before any presumption under *illus* (*e*) can attach to an order under the D I Rules, it must be shown to be on the face of it regular and to conform to the provisions of the rule under which it purports to have been made [*R v. Shibnath*, 48 CWN 1 FR: A 1943 FC 75]. Where the validity of the order itself has to be established by the prosecution (*eg* satisfaction of the issuing authority before its promulgation), the court cannot be asked to presume its validity merely by production of the order [*R v. Bhiku*, 52 Bom LR 223; *R v. Abdul Majid*, 51 Bom LR 568]. In an order under Preventive Detention Act satisfaction of detaining authority is presumed unless rebutted by detinue [*Parkash v. Union*, A 1965 Pu 270—case law discussed]. The detaining authority must be presumed to have sent a report to the Govt after making the order of detention as required under J & K Preventive Detention Act when there is no averment to the contrary [*Ghulam Mustafa v. S*, A 1971 J&K 1 FB]. Whenever *mala fide* or abuse of power is alleged in respect of an official act, the presumption is that officials discharge their duties honestly and in accordance with law, and this presumption is heightened in the case of the conduct of high officials occupying superior and responsible positions in contradistinction to minor or petty officials [*Bhupinder v. S*, A 1968 Pu 406].

If an official act is proved to have been done, it will be presumed to have been regularly done. But where under an Act certain preliminary things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. Search warrants are always open to very serious objections and the presumption of regular performance of official and judicial acts does not do away with the necessity of proof of compliance of the preliminaries required by law, *viz* information on oath &c [*Walvekar v. R*, 20 CWN 713: 53 C 718]. In *Walvekar's case* the warrant was not in proper form. When the warrant is in proper form, the court may draw a presumption that formalities have been complied with [*Rangalal v. R*, 1937, 1 Cal 610: 41 CWN 123]. It is desirable that a warrant under a particular statute should show on its face that the conditions precedent required have been complied with; but even if it is not so, there is a presumption that the officer issuing the warrant has performed his duty correctly [*R v. Vallibhai*, A 1933 B 79: 141 IC 346; *In re Peraya*, A 1946 M 465; *R v. Savalram*, A

1948 B 156]. The court may presume that a warrant issued under s 88 (now s 83) Cr P Code was issued after a proclamation had already been issued under s 87 (now s 82) Cr P Code [*R v. Shib Charan*, A 1938 All 220]. **Following** *Walvekar's case, sup* it has been held that where a Govt order under an Act did not recite that it was of the opinion that it was necessary to pass that order for the purposes of the Act, there is no presumption under *illus* (*e*) that Govt had formed such an opinion [*Swadeshi Cotton &c v. State IT*, A 1956 A 689]. In Govt service resignation cannot be deemed to have been accepted verbally [*Natabar v. BDO*, A 1976 Or 68].

As to the meaning of the illustration it was held in a case that, if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence, and the proof of which is essential to the plaintiff's case. The mere fact that the Collector had made the transfer, does not raise any presumption that the land was *chowkidari chakran* land and that the Collector acted within the statute. S 114 has no application to such a case [*per* WOODROFFE J, in *Narendra v. Jogi Hari*, 32 C 1107: 2 CLJ 107—CONTRA: *per* PARGITER J. The principle of *Narendra's case* underlies the decisions in *Kumari v. Rajkumar*, A 1934 R 207; *Jagarnath v. R*, 24 P 29; *Purushottam v. R*, A 1946 B 492; *Murugappa v. Thirumalai*, A 1948 M 191. *Narendra v. Jogi Hari, ante* was **distinguished** in *Gokhai v. Behari*, 17 CWN 565 and **follld** in *Hitnarain v. Rambarai*, A 1928 P 439; *Munpl Council v. Simhadri*, A 1955 AP 107]. The presumption, therefore, is as to regularity of official acts done and not that of the acts themselves being done. If, for instance, a notification is issued under the powers given by law, the presumption is that it was regularly published. But there is no presumption that it was issued according to the terms of the section which empowers it [*Purushottam v. R, sup*; see *Hiralal v. Jagatpati*, A 1928 P 600; *Ram Rambijaya v. Krishna*, A 1939 P 364]; or in the absence of any evidence as to the affixture of the order of attachment on the property, there can be no presumption of affixture [*Murugappa v. Thirumalai*, A 1948 M 191]. It has however been held that where there is no positive evidence that attachment was not effected in accordance with law, the presumption under s 114 *illus* (*e*) cannot be ignored [*Kiernander v. Beni*, A 1931 C 763: 58 C 598]. Where the return of service of process issued under Or 21 r 22 shows that the process has been duly served there is a presumption that the official act of serving the process was rightly carried out [*Galstaun v. Syed Md*, 36 CWN 242].

In some cases it has been held that an entry in the order-sheet of service of notice raises no presumption and it is no proof of service [see *Mir Tapurah v. Gopi*, 7 CLJ 251; *Radhey v. Ajodhya*, 7 CLJ 262; *Nabadwip v. Dol*, 11 IC 472; *Syed Mohiuddin v. Pirthichand*, 19 CWN 1159; *Prafulla v. Sital*, 22 CWN 788; *Karali v. Probodh*, A 1950 C 513; *Hitnarain v. Rambarai*, A 1928 P 459—CONTRA: *Parmeshwar v. Nand*, 11 P 1; *Manindra v. Gopi*, 45 CWN 44 *infra*; *Sachitanandan v. Janak*, A 1958 P 577; *Ahmedur v. Braja*, 3 DR 82]. But in a case relating to service of notice under ss 12 and 13 B T Act, the Judicial Committee observed: "But apart from this their Lordships have no hesitation in presuming, in the absence of evidence to the contrary, that the procedure laid down by ss 12 and 13 of the Act was duly followed, and that the proper statutory notice was given of the previous incumbrances and execution sales" [*Jitendra v. Monmohan*, 58 C 301, 309: 57 IA 214: 34 CWN 821. In view of this pronouncement, it was observed in *Sasi Sekhar v. Bir Bikram*, 35 CWN 1239 that the correctness of previous decisions such as *Narendra v. Jogi Hari, &c, ante* may have to be considered]. Identical observations were made by the Judicial Committee in a subsequent case: "Their Lordships are of opinion that there is evidence that the land was attached, and that in the absence of any evidence to the contrary, it ought to be presumed that all

necessary formalities were complied with [*Md Akbar v. Musharaf*, 61 IA 371, 374: 39 CWN 89, 15 L 836]. The view in *Jitendra v. Monmohan*, *ante* was relied upon in *Narendra v. Hirendra*, 1938, 2 Cal 266.

An order directing that notification be published coupled with the record of a further order that "all the service return received after duly served," entitled the court to presume that the publication was made regularly and in due conformity with the provisions of the statute, as the latter order shows that the publication was in fact made [*Manindra v. Gopi*, 45 CWN 44: A 1941 C 353]. Many of the cases were considered in a subsequent case and it was held that an entry of service of notice in the order-sheet would be an item of evidence under s 35 of fact of service. The sufficiency or otherwise of the evidence depends on the circumstances of each case. The entry itself raises no presumption, but when fact of service of notice is proved there would be a presumption of regularity of service [*Gaibandha Loan Office v. Saiyadunnessa*, 1943, 1 Cal 22: A 1943 C 108 (relied on in *Aswini v. Karamat*, A 1948 C 165)]. Where it did not appear from the order-sheet that any notice of attachment was at all issued, there can be no presumption that the subsequent formalities were observed [*Sitanath v. Saroda*, 65 CLJ 330]. Where a statute directs a document to be filed and the certificate is stated on the face of it to have been filed, the filing is sufficiently proved and recourse to *illus* (*e*) is unnecessary [*Durga v. Secy of S*, 49 CWN 334: A 1945 PC 62].

From the mere fact that the warrant for arrest bore the signature of the *sheristadar*, it cannot be presumed that *sheristadar* had been duly appointed to sign warrants. Evidence of the fact of appointment is necessary [*Dy Legal Rem v. Mir Sarwar Jan*, 6 CWN 845]; but another case held that the mere fact that a warrant was signed by a *sheristadar* did not make it invalid and it lay on the accused to prove that he had no authority to sign [*Khidir v. R*, 3 CLJ 636]. Where a *sheristadar* signs a warrant "by order", the presumption that he is appointed by the court to sign processes as required by Or 21, r 24(2) is applicable [*Giridhar v. Harish*, 73 IC 328: 27 CWN 1042]. When a *sheristadar* signs an order for a Collector, he is presumed to have acted for the Collector unless the contrary is proved [*Sudarsanacharyulu v. Kotimarra*, A 1928 M 205]. It is presumed that a warrant once signed and issued remains actually in existence until such time it is known to have been destroyed [*R v. Kalu*, A 1933 L 159].

Where an objection is raised that the vice-chairman of a municipality had no power to issue notice to owners of dangerous buildings to remove or repair them, it is for those who allege that he had such powers, to prove the allegation. A mere presumption under s 114 that official acts have been rightly done cannot dispose of the objection [*Harendra v. Ch of Birnagar Mun*, 1 CLJ 51]. The presumption cannot supply deficiency in the proof [*Ch Hughly Mun v. Keshab*, 56 CLJ 583].

Where once the making of an order under a statute has been proved, there may well be a presumption that it was duly promulgated as required by Rule [*Srinivas Mall v. R*, 51 CWN 900: A 1947 PC 135: see *R v. Shibnath*, *sup*; *S v. Fazal*, A 1968 MP 138]. Where there is a notification in the Gazette fixing date of election, there is a presumption that the act of publication was done in accordance with the rules [*Venkata v. Padmanabha*, A 1927 M 980]. Once the publication of an order (in the Gazette) is proved, the mode of publication should be presumed to have been considered sufficient by the authority concerned [*Mahadeo v. R*, A 1946 P 1; *Raj v. R*, A 1947 A 105; see *In re Nimmagaddar*, A 1946 M 44]. Where a person was convicted for breach of certain municipal bye-laws the presumption would be that such bye-laws were not illegal. It would lie upon the accused to object to the validity of such bye-laws [*R v. Ram Ch*, 19 A 493, 496]. In *Munply of Sholapur v. Sholapur Spinning Co*, 20 B 732, it was held that

in the absence of evidence to the contrary, the courts will presume that a Municipality has adopted the regular procedure. See, however, the following cases, where it has been held that, where under an Act, certain things were required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred, to prove that the things prescribed by the Act have been actually done. No presumption can be made in favour of the things prescribed by the Act having been done. It cannot be presumed under s 114 that the notice provided by s 52 of the Road Cess Act (9 of 1800 BC) was duly published [*Ashanulla v. Trilochun*, 13 C 107 (**folld** in *Jagarnath v. R*, A 1945 P 307: 24 P 29)] or that a particular chapter of Municipal Act was extended to a municipality by an order [*Khurshid v. Raniganj Muny*, 36 CWN 823; see also *Rash Behari v. Pitambari*, 15 C 237 and *Pitambar v. Rahmat*, CWN 137: 2 CLJ 325].

In the case of a sale for arrears of revenue, the notices were served in the ordinary way through the officers of the Revenue Court, and the presumption would arise in respect to the service of such notices until the contrary is proved by the person challenging it [*Sheo Ruttan v. Net Lall*, 30 C 1: 6 CWN 688. **Folld** in *Shk Md v. Jadunandan*, 10 CWN 137: 2 CLJ 325].

Where a person purchased a property from judgment-debtor after attachment and sued the auction purchaser of the same property, it did not lie on the defendant to prove due service of attachment order, but it must be presumed that a necessary official act has been duly performed [*Abdul Ghafur v. Akram*, 46 A 741]. In the absence of evidence it cannot be presumed that a copy of prohibitory order under Or 21, r 54(*1*) must have been affixed in the office of the Collector [*Hiralal v. Jagatpati*, 111 IC 797: A 1928 P 600]. When an attachment is proved, in the absence of any evidence to the contrary it ought to be presumed that it was validly made with all formalities [*Arjun v. R*, A 1935 A 436; *Bankuar v. Richhpal*, A 1935 L 169].

A court can presume due service of processes under s 114 *illus* (*e*) [see *Golam Abid v. Toolseeram*, 9 C 861 : 12 CLR 411; *Bhoobunessury v. Jadabendra*, 9 C 869]. The proceedings of a public officer must be presumed to be regular; and if they took place long ago (20 years previously), it is not just to require proof of such circumstances as due service of notice [*Arman v. Bama Sundari*, 25 WR 62]. Having regard to the due performance of official acts, it ought to be presumed, in the absence of any evidence to the contrary, that an *istahar*, which was directed by the Commissioner to the Collector for publication, was duly published [*Prasanna v. Secy of S*, 3 CWN 695]. But in *Hemlata v. Shreedhone*, 3 C 771, it has been held that it is quite competent for a civil court to question the validity of the proceedings of the Collector and to examine them to see that they were legal and regular. The civil court was not at liberty to make any presumption in favour of their legality or correctness.

If there is an order under s 61 *Chaukidari* Act (6 of 1870 BC) the presumption under *illus* (*e*) would arise [*Baikuntha v. Bidhu*, 9 IC 322]. When the order-sheet records that the party served has appeared in court, it is conclusive evidence of service of notice [*Birendrajit v. Renupada*, 40 CWN 465]. Where an attachment by court was alleged to be without authority on the ground that no copy of the decree was transmitted, it was held that the presumption as to the regularity of the procedure would prevail [*Saroda v. Luchmiput*, 10 BLR 214 PC]. Absence of the certificate of legal publication is not sufficient to show that there was no publication. A presumption should be made of the regularity of the proceedings of an officer conducting *batwara* proceedings [*Janki v. Kristo Nath*, 13 CWN 93].

The court cannot presume either under s 80 or s 114 *illus* (*e*) that the deposition of a medical witness sought to be admitted under s 509 (now s 291) Cr P Code was

taken and attested in the presence of the accused [*Kachali v. R*, 18 C 129; see also *R v. Riding*, 9 A 720; *R v. Pohp Sing*, 10 A 174]. Where a committing magistrate writes that cross-examination is reserved, there is a presumption that accused was given opportunity [*R v. Mahrab*, A 1930 S 54].

The assumption on which all rules of law are founded is that the constituted tribunals are fairly competent to carry them out [*Gopee Nath v. Anandmoyee*, 8 WR 167]. Where jurisdiction of Settlement Officer has not been questioned, it must be presumed that he acted regularly and within his jurisdiction [*Balgobind v. Rai Behari*, 66 IC 471: 3 PLT 617]. All things done before a registering officer in his official capacity and verified by his signature will be presumed to be done duly and in order [*Ganga Moye v. Troiluckhya*, 33 IA 60: 33 C 537]. Registration under s 23-A Registration Act raises a presumption that representation was made within proper time [*Sudarsana v. Seetharamamma*, 1933 MWN 1148]. When a document purporting to be a power of attorney and to have been executed and authenticated by a notary public is produced before a court, it may fairly presume under s 114 that the notary public satisfied himself of the identity of the executant [*In re Mylne*, 33 C 625: 9 CWN 986; *Jaswant v. Jugraj*, A 1971 SC 701. For presumption as to powers-of-attorney, see s 85].

Entries in General diary under s 72 Cr PC are presumed to be correct [*Sadhu v. S*, A 1978 SC 1506]. The first parcha of the case diary is alleged to have been sent from the police station on 16-3-77 but it was signed by the circle Inspector on 22-3-77. The mere fact that it was seen by the Inspector on 22-3-77 cannot raise any presumption of the fact that it had not been sent from the police station on the date and at the time when it purports to have been sent [*Tundo v. State*, 1990 Cri LJ 868, 875 (All): 1989 All LJ 492]. The entries in the Collector's books are presumed to be correct under s 114 having regard to *illus* (*e*) and (*f*) [*Md Solaiman v. Birendra*, 50 IA 247: 50 C 243: 27 CWN 749; *Sri Radha v. Girija*, 35 CWN 912]. There is always a presumption of correctness of revenue records [*Imam Din v. Said Bibi*, A 1949 PC 87]. The entries in *Fard Abpashi* are presumed to be correct and one, challenging them is to rebut [*Tahzibunnisa v. Syed Azizur*, A 1980 P 89]. Where there is a mutation entry, all formalities must be presumed to have been complied with [*Rajkumari v. Co-operative Ins*, A 1951 Pu 126]. A *Wajib-ul-urz* contained an entry about a mortgage which was certified by a mortgagee and an agent of other mortgagees. The presumption is that the settlement court must have satisfied itself about the authority of the agent [*Gangaram v. Lachman*, A 1924 A 176]. Certified copy of a registered document can be accepted as correct copy under s 114 (*e*) [*Rabindra v. Santosh*, A 1975 C 381].

Upon proof of the notification in s 6(2) Bengal Cr Law Am Act, 1930 under s 78 Evidence Act there is a presumption that the Government had formed the opinion requisite under that section and it is not necessary to call any witness to prove it [*Ananta v. R*, 62 C 104]. It must be presumed that all official acts have been duly performed, and s 114 amply supplies all omissions in the method of communication of the sanction to the prosecuting officer and the magistrate [*Apurba Krishna v. R*, 35 C 141, 152: 7 CLJ 49; *Pub Pros v. Mulugu*, A 1957 AP 987]. Court should not presume that the documents referred to in the order of sanction by the Governor-General were the documents in question and that they were duly forwarded by the Governor-General and reached the complainant through the usual channel unless there be any indication on the face of the questioned document to show that they were the annexures to the order of sanction [*Diwan v. R*, A 1935 N 90]. Where it is alleged in the complaint that necessary sanction has been given and it is not challenged in the trial court, the appellate court will presume the giving of sanction [*Hukumal v. R*, A 1947 S 79].

The record of service of sale proclamation having been destroyed by fire, the burden of disproving the *prima facie* presumption that official acts were rightly carried out lies on the opponent [*Madhusudan v. Chandrabati*, 21 CWN 897: 42 IC 527 PC]. The presumption is that all proceedings taken by court in execution are in proper form and a person challenging the legality of a warrant must prove it [*In re Ramaraja*, 99 IC 33 (M)]. Where the report states that symbolical possession was delivered, there is a presumption as to formalities having been complied with [*Chajju v. Kirpa*, 132 IC 181]. When a process issued during execution is accepted by the court as having been duly served, there is a presumption that it has been served in the manner provided by law [*Piara v. Sohawa*, 109 IC 561: A 1928 L 910].

Irregularity is not to be presumed, but a party alleging it may prove it. The date of a decision is not conclusive evidence of the date on which it was legally pronounced. Under this section each case must be decided according to its peculiar circumstances [*Gopal v. Krishna*, 3 Bom LR 420; see also *Mahipal v. Lakshman*, 24 B 406: 2 Bom LR 228]. The maxim of law which must be followed in the absence of evidence is that it must be assumed that everything which ought to have been done was done by the court [*Narain v. Gowbai*, 37 B 415]. Mere statement of a party without any affidavit cannot be preferred to a fact recorded by Magistrate in his order [*Nailini v. Kiranrani*, A 1965 P 442 (*Union v. Varma*, A 1957 SC 882; *Madhusudan v. Chandrawati*, A 1917 PC 30 **rel** on)].

There is a presumption that oath was duly administered to a witness, even if there is no record of the fact [*R v. Syed Ahmed*, 35 A 575; *Jogendra v. S*, A 1968 P 74]. In the absence of any evidence to the contrary, the court may presume that a deposition was read out as required by law [*R v. Jagat*, 28 PR Cr 1918: 47 IC 872]. When a decree is passed on a compromise assented to by a pleader, it must be assumed that the court satisfied itself that the pleader had authority to compromise [*Niaz v. Begam*, 38 PLR 467].

Publication of notice under cls (*b*) (*c*) of 64 A of Bengal Court of Wards Act having been proved and it being proved that cl (*a*) had been complied with in part, court should presume publication of notice [*Barrow v. Gaya Prasad*, 9 ALJ 588 : 15 IC 729]. The endorsement made by the village officer to the effect that public notice of the substance of the declaration under sec 6(*1*) of the Land Acquisition Act was given in the locality on a specified date is entitled to the protection of the presumption under sec. 114 [*Balakrishna Pillai v. State of Kerala*, A 1992 Ker 136, 139]. The presumption is that the public purpose for eviction under U P Land (Eviction and Recovery of Damages) Act, 1959 was duly specified in the notice [*Jai Dutt v. S*, A 1979 SC 1303].

Though presumption of correctness does not apply to survey papers until final publication, but the presumption arising from the circumstances that official duties are taken to have been regularly performed applies [*Rasdhari v. Nand*, A 1933 P 468].

Correctness of an official enforcement by a registering officer must be presumed [*Baijnath v. Jamal Bros*, 51 C 354 PC: 2 R 99: 28 CWN 1029]. When a document is accepted by the sub-registrar as duly presented there is a presumption of due presentation [*Md Chiragh v. Fatta*, A 1934 L 452]. A presumption of accuracy arises after the account filed by a guardian has been accepted by court [*Gopal v. Sarju*, 44 IC 599: 21 OC 74].

The presumption under s 114 is hardly sufficient to satisfy that such precautions have been taken as to render an identification truly valuable [*Kallu v. R*, 67 IC 721 : 23 Cri LJ 449]. Where there is nothing to indicate that the court had not satisfied itself of the

service of summons, it must be presumed that the court was so satisfied [*Harnarain v. Nandkeshwar*, 71 IC 572: A 1923 P 406; *Amar v. Rala*, A 1927 L 506].

Where court before making complaint omits to record finding that it is expedient in interests of justice to enquire into offence it is not permissible to draw presumption that court had formed opinion regarding expediency to enquire into matter, even if court making complaint may be court before whom offence was committed [*Nimmakayala v. S*, A 1970 AP 119 (*Lalbehari v. S*, A 1962 A 251 **dissent**)]. Where an applicant is attempting to rebut the presumption, it is not for the court itself to give assistance to the other side [*Sohagbati v. Surendra*, 44 IC 661: 4 Pat LW 296]. Where under s 20 Punjab Pre-emption Act (I of 1913) the court orders notice to be placed on file, there is a presumption that all official acts were duly performed [*Amar v. Rala*, 102 IC 12: A 1927 L 506]. A clear recital in the notification under s 36(*1*) of Motor Vehicles Act by the Governor of a State, that it has been issued with the approval of the Central Government, should be presumed to be correct till the contrary is established [*Ghevarchand v. S*, A 1965 Raj 175]. Once a Gazette notification embodying the declaration under s 3(*1*) of U P Roadside Law Control Act, 1945 is produced before the court the presumption can legitimately be drawn that all the procedure required by law to be followed has in fact been followed [*Khurkhur v. S*, A 1970 A 198 FB].

Deputy Commissioner on behalf of Court of Wards granted lease in perpetuity of Ghatwali land validity of which was not questioned for 80 years and the lessee was in possession all these years. Although there is nothing in the Act 5 of 1859 that the DC can grant lease on behalf of Court of Wards the presumption that the lease has been regularly done arises [*Pratap v. Manmohan*, A 1966 SC 1931].

Under Prevention of Food Adulteration Act and Rules a public analyst who caused a sample sent by a food inspector to be analysed and furnished a report in Form III, must be presumed to have compared the seal on the container and the outer cover with the specimen impression received by him before the analysis was made [*Subbayyan v. S*, A 1968 K 330; *S v. Chhotekhan*, A 1970 MP 29 FB (*K K Pookunju v. K K Ramakrishna*, 1969 KLT 50 (SC) **follld**)]. The report of the Public Analyst which is admissible in evidence without examination of the Public Analyst would normally show that the relevant rules have been complied with and that analysis had been done only after the necessary verification of the container in accordance with the rules [*Food Inspector Palghat Municipality v. The Piraviri Co-operative Milk Supply Society Ltd.*, 1984 Cri LJ 225, 235 : 1983 KP LJ 579 (Ker)]. It cannot be laid down as a general proposition of law that if once the Public Analyst issues a report regarding the result of the analysis, it may also be presumed that the Public Analyst or the person authorised by him has discharged his duties in compliance with the Rules, [*Food Inspector Corporation of the City, Mangalore v. A G Suvarna*, 1985 Cri LJ 709, 719 : ILR (1984) 2 Kant 752 (DB) (Kant); *State of Haryana v. Ishe Dass*, 1985 Cri LJ 1061, 1069 : (1985) 87 Pun LR 341 (P&H) (FB); *Revta v. State*, 1987 Cri LJ 1967, 1970 (MP) : 1987 Cr LR (MP) 77]. From the notification empowering the Municipal Commissioner to act as Local Health Authority for the purpose of launching a prosecution under the Prevention of Food Adulteration Act, it has to be presumed that he had the authority to act in that official capacity [*Food Inspector v. V Velayudhan*, 1987 Cri LJ 1137, 1140 : 1987 Ker LJ 436 : (1987) 1 Ker LT 722 (Ker) (DB)]. If there is nothing on record to show that the concerned authority sanctioning the prosecution in a Food Adulteration case could not and did not apply its mind before according sanction, a presumption that the concerned authority applied its mind has to be made. If however the materials on record show or reasonably suggest that the relevant materials were not and could not be placed, such a presumption

might not operate [*Ashim Kumar Dutta v. State of West Bengal*, 1989 Cri LJ 1797, 1799 (Cal) (DB)]. Presumption under sec. 114 in favour of compliance with the requirement of the rules is permissible [*Kambeshkumra Babulal Patel v. State of Gujarat*, 1982 Cri LJ 754, 761 : (1981) 22 Guj LR 404 (Guj)]. In the face of clear statement of the Food Inspector that he has taken the proceedings of taking sample and sealing accordance to Rules, a presumption can be drawn that the bottles were dry and clean [*Nagar Parishad Alwar v. Ganga Lahiri*, 1982 Cri LJ 2325, 2328 (1982) Raj LW 432; *State of Assam v. Purammal Agarwalla*, 1985 Cri LJ 46, 49 : (1984) 2 Gauh LRGI (Gauh) (DB); *Food Inspector, Tellicherry Municipality v. P. Abdulla Haji*, (1986) Cri LJ (Ker) 1 : 1985 Ker LT 781; *Nirmal Kumar v. State*, 1987 Cri LJ 46, 51 : 1986 Jab LJ 750 (MP)]. When the procedure to be adopted in a Food Adulteration case is not followed presumption under sec. 114 (e) cannot be drawn [*State of Rajasthan v. Mohan Lal*, 1989 Cri LJ NOC 179 (Raj) 2 RAJ LW 104].

The superior court may in its discretion presume that the official act of despatching the sample to the Director of Central Food Laboratory has been performed regularly, that is after taking all such steps and precautions as are required to be taken under S. 13(2B) of the Prevention of Food Adulteration Act (37 of 1954), it is desirable that a record of the steps taken is maintained but failure to maintain such record cannot stand in the way of the aforesaid presumption being drawn. [*Mathukutty v. State of Kerala*, A 1988 Kerala 60, 69 : 1987 Ker LJ 1355 (FB)]. In a Food Adulteration case, in case the accused fails to produce his sample and the third sample cannot be sent for any reason or is not found worth analysis because of any leakage or otherwise, no adverse inference can be drawn against the accused for his inability or reluctance to produce the sample given to him [*State of Rajasthan v. Gopal Krishnan*, 1984 Cri LJ 311 314 : (1983) 2 Crimes 950 (Raj)].

Audit notes prepared under s 17 of Co-operative Societies Act, 1912 cannot be presumed to be correct firstly because the audit notes cannot be equated with judicial and official acts and secondly because s 114 does not raise a presumption regarding correctness of contents of documents [*Banta v. Anjuman Imdad &c*, A 1970 P&H 203]. The confidential report by the medical examiner of Life Insurance Corpn will have to be accepted as true, as it is to be presumed that the reports were submitted after a thorough and careful examination of the proposers unless it is shown by the Corpn that either the medical examiner made a false record or that the proposer made a fraudulent suppression of his illness [*LIC v. Bhogadi*, A 1971 AP 41].

When the affidavit was sworn before oath commissioner in Pakistan, the presumption of official act under Evidence Act does not apply [*Ghulam Md v. Badshah*, A 1970 J&K 159].

Statement of happennings in court recorded by the judge can be changed only if the judge says he incorrectly recorded or if both parties agree that it is incorrect [*Deo nandan v. Ramdeyal*, A 1971 P 102 (*Bank of Bihar v. Mahabir*, A 1964 SC 377 **follo**)].

Where a Government officer exercises his discretion, he does so in his official capacity and there is a presumption under s 114(*e*) [*Parpia v. Chamarbagwalla*, A 1949 B 109].

ILLUSTRATION (f): [Presumption From Common Course of Business].—This illustration should be read with s 16 (*ante*) which says that 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. The words "course of business" are also to be found in s 32(2) and as to its meaning, see *ante* pp 175, 365. The common course of business must first be proved or admitted, and then

the court may presume under this section, that it has been followed in particular cases [*W I Ins Co v. Asima*, A 1942 C 412]. Court entitled to rely on presumption afforded by s 114(*b*) that the practice of insurance company of preparing and attaching copy of marine premium debit note to copy of policy kept in office records was always followed [*Hira v. S*, A 1971 SC 44]. The course of business in s 16 and this section applies to course of business in public as well as private offices, *eg* offices of merchants, solicitors, attorneys, railways & c, where business is conducted with regularity and due observance of fixed rules. General practice observed in public or private offices should be distinguished from the personal habits of individuals. If the expression "common course of public and private business" was meant to include the dealings of a private individual apart from his avocation or business different language would have been used [*per* CANDY J, in *Ningawa v. Bharmappa*, 23 B 63, 66]. The post office affords a well-known example of business in public office.

Section 114 of the Evidence Act, which raises a rebuttal presumption, comes into operation where a letter is properly directed and is proved to have been put into the post office or delivered to the postman. The presumption is stronger where the letter is sent by registered post and there is a signed acknowledgement. In case where the addressee makes a statement on oath that the letter was not tendered, the presumption stands rebutted. Further it must be proved that the letter was properly addressed and directed [*Dhirubhai Hirachand Ambani & Anr. v. Tulsi Bhayana*, 1995 (4) Crimes 207, 217 (Ori)]. Since service of notice of application for maintenance under section 125 Cr PC by registered post is illegal, the question as to whether any presumption can be drawn under section 114 (Illustrations) that the notice had reached to the husband would not arise for consideration. As service of notice of application under section 125 Cr PC by registered post is illegal (under section 67 Cr PC it has to be served by process server or officer of the court), the question as to whether the notice actually reached the person concerned or any presumption can be drawn with reference to section 114 (Illustrations) that notice had reached him, would not arise for consideration at all [*U.P. Shivanna v. Bhadramma*, 1993 Cri LJ 418, 420 (Kar)]. Where the defendants neither pleaded nor adduced any evidence to prove that the amounts mentioned in the book of accounts of defendant firm showing amount due to both the plaintiffs and the defendants as false entries and do not reflect the correct state of facts and figures, the accounts of the defendant firm, which are maintained in the ordinary course of business, must be accepted, as correct and binding on the parties concerned [*Vaiyapuri Mudaliar & Sons v. Sri Aronodhaya Textiles Erode*, A 1996 Mad 19, 27]. From the very fact that the letters bear the post marks of the place of posting and the place of destination the court can draw the inference that in the normal course they were posted and received by the addressees. In the absence of anything indicating that such letters were either not posted or concocted the presumption under s. 114(f) comes into play [*Vandavasi Karthikeya v. S. Kamalanna*, A 1994 AP 102, 112]. When a notice [under Section 9(3) of the Land Acquisition Act] was sent by registered AD to trustees at their residential address and the postal authorities received back the acknowledgement duly signed, a presumption arises that the notice was duly tendered [*Shashikant Sadashiv Bagwe v. State of Maharashtra*, A 1995 Bom 172, 178]. A certificate of posting is easy to procure and does not inspire confidence [*Gadhak Y.K. v. Balasaheb Vikhe Patil*, A 1994 SC 678, 703]. When registered A.D. letter was refused by the addressee, a presumption arises that the letter was served upon the addresse [*Ilias S.K. v. State of W.B.*, 1997 AIHC 1055, 1057 (Cal)]. Presumption of service of notice is not rebutted by mere denial of signature on the acknowledgement [*Shashi Singh v. Sukh Swarup Kapoor*, 1996 AIHC 3013, 3016 (All)]. Where the tenant stated on oath that when the notice was allegedly 'refused' by her, she was not in the town and her statement is corroborated

by another lady, the presumption of service of notice is rebutted [*Hajrabi Abdul Gani v. Abdul Latif Azizulla*, A 1996 Bom 192].

The presumption of service would arise only if the notice is sent under a registered cover and not otherwise [*Union of India v. Punjab State Co-operative Supply And Marketing Federation Ltd. Chandigarh*, A 1984 P&H 41, 43]. Registration postal receipt along with a copy of notice bearing correct address raises a presumption in the absence of return of the notice that it was duly received by the addressee [*Ayisabeevi v. Aboobacker*, A 1971 K 231; *Jagat v. Battu*, A 1976 D 111; *Anil Kumar v. Nanak Chandra*, A 1990 SC 1215, 1216]. There is always a presumption under law that, in case any letter or publication like the newspaper is forwarded under postal certificate on a correct address, publication or letter has reached the addressee unless it is received back with a report that the addressee does not reside at the given address [*Smt Jagdish Kaur v. Sh Rabinder Singh Mathoda*, A 1991 Del 50, 52]. It will be possible to presume that the letter containing the notice which was correctly addressed and sent under registered post duly reached the disputed premises for being tendered to the addressee and since the addressee was not available it came back unserved to the sender [*Miss Dennis v. Calcutta Vyapar Pratisthan Ltd*, A 1991 Cal 152, 156].

Existence of acknowledgments in respect of registered letters raises a presumption of delivery, but if the evidence of addressee that it was not delivered is believed by the court, the presumption is rebutted [*Radhakishan v. S*, A 1963 SC 822]. It cannot be contended that to draw a presumption, imputing knowledge of the contents of the notice, the sealed envelope must be opened and read by the addressee or when the addressee happens to be an illiterate person the contents should be read over to him by the postman or someone else. Such things do not occur when the addressee is determined to decline to accept the sealed envelope [*Harchand Singh v. Shiv Ram*, A 1981 SC 1284, 1288]. Where the defendant categorically denied the receipt of any envelope and also to have signed the acknowledgments, the presumption was rebuttable [*Munshiram v. Shankuntala*, A 1978 J&K 31; *Meno Ranjan Dasgupta v. Suchitra Ganguly*, A 1989 Cal 14, 18 (DB); *Green View Radio Service v. Laxmibai Ramji*, A 1990 SC 2156, 2157].

The presumption of service of notice is rebutted by the clear statement of the defendant on oath and by the plaintiff not having produced any further evidence that the notice was actually taken to the house of the defendant for service [*Ram Rati v. Fakira*, A 1988 All 75, 79 : (1988) WC 268]. When the defendant was not cross-examined on that point, it is for the plaintiff to produce the postman in evidence to rebut the evidence of the defendant [*Guru Bachan Singh v. Dharm Samai Society*, A 1981 All 208, 210]. Where the notice was served under registered cover with A.D. and under certificate of posting which was served at the address mentioned by the defendant himself presumption of due service is attracted [*Ramesh Kumar Mittal v. Probal Kumar*, 1998 AIHC 1260 (Cal)]. Where the notice was sent by registered post at correct address a presumption with regard to service of the notice can be raised. If somebody received the registered notice on behalf of the defendant firm it cannot be said that the defendant had not been properly served [*Chander Kanta Singhal v. Kapadia Exports*, 1998 AIHC 153 (Delhi)]. If a letter has been posted at the correct address it will be presumed to have been served [*Rais Ahmad v. Special/Additional District Judge, Lucknow*, 1998 AIHC 728 (All). See also *Dharam Vir v. Ram Chandra*, 1998 AIHC 786 (All)]. Bare denial but no reliable evidence is not sufficient to rebut the presumption [*Pakharsingh v. Kishan Singh*, A 1974 Raj 112].

When the acknowledgement due of a registered post shows that somebody had received it on behalf of the defendant, unless the defendant suggests that it was not

received on his behalf it has to presumed that the notice was delivered to the defendant [*O N Tikku v. Dr Karan Singh*, A 1989 J&K 25, 27]. The presumption under s 114 is one of fact and not of law and when defendant pledges his oath that the cover was never tendered to him, the presumption of regularity of official business cannot be treated as conclusive [*Gobinda v. Dwarka*, 20 CLJ 455: 19 CWN 489; *Ram August v. Bindeshwari*, A 1972 P 142]. Letter correctly addressed and proved to have been posted and not returned by the DLO must be presumed to have reached its destination [*Aburubammal v. Offl Assignee*, 47 M 215: 45 MLJ 817; *Gobinda v. Dwarka, sup*], in proper time [*Madanlal v. Union*, A 1968 Or 234 (*Harihar v. Ramsashi*, A 1918 PC 102 **rel** on)]. On proof of the facts that a letter properly containing the particular document is proved to have been put into the post office, it is presumed that the letter sent through the post office reached the addressee. This presumption is not confined to the presumption of that letter being posted merely but extends to its receipt by the addressee at its destination and at the proper time according to the regular course of business of the post office [*Kirloskar Bros. Ltd v. Engineering Machinery Mart*, A 1982 MP 75, 79].

The presumption does not arise unless there is proof of actual posting [*Hulas v. Allahabad Bank*, A 1958 C 644; *Eranna v. Setty & Co*, A 1960 AP 331; *Revanna v. Mallappa*, A 1965 My 258; *J McGaffin v. LTC*, A 1978 C 123: *Surajmall v. Kalinga Iron Works*, A 1979 Or 126]. When a V P parcel is delivered to the Post Office there is a presumption that the article was duly delivered to the addressee and payment received by the Post Office [*Union v. Ram Gopal*, A 1960 A 672]. S 27 Genl Clauses Act, 1897 and s 16 should be considered on the subject of presumption of delivery from posting of letters. [See *Achamma v. Fairman*, A 1970 My 77]. Presumptions under s 27 Genl Clauses Act, 1897 and s 114(*f*) are independent of each other [*Omparkash v. A K Shroff*, A 1976 D 39]. Although to a letter sent under certificate of posting the presumption under s 27 Genl Cls Act does not apply the presumption under s 114(*f*) applies [*Jitendra v. Bijoy*, A 1976 C 478; *Shashi v. Dharam*, A 1981 D 169].

Distinction between presumption of law under s 27 Genl Clauses Act, 1897 and presumption of fact under s 114 explained [*Gangaram v. Phulwati*, A 1970 A 446 FB]. The postal peon's endorsement "refused" on a registered letter falls within the 'common course of business' and is presumptive evidence of service. Where addressee refuses to accept registered letter presumption of due or proper service arises and knowledge of contents of letter is imputed to addressee [*Harcharan v. Shivran*, A 1981 SC 1284 (*Vaman v. Khanderao* **overruled** and *Gangaram v. Phulwati*, A 1964 A 4467B; *Fannilal v. Chironja*, 1072 ALJ 449 **apprd**)]. A presumption of correctness of the postal endorsement of refusal can be drawn with the aid of sections 16 and 114 [*Budha v. Bdariya*, A 1981 MP 76, 80]. The evidence regarding refusal of notice must be very clear and convincing, the reason being that there are very drastic consequences of such deemed service of notice [*Oza Kumbhan Naran Ala v. Meta Nanala Jethabhai*, A 1988 Guj 5, 6 (1987) 1 Guj L H 274]. Where a registered post is returned with an endorsement 'Refused' the Court is entitled to hold unless the contrary is proved that the endorsement 'Refused' was made by the peon himself, that it was correctly made [*Srikant Jain v. B K Plastic Industries*, A 1986 Cal 29, 30].

The fact that the letter came back does not in itself rebut the presumption that it was tendered [*Balbhadar v. Commr I T*, A 1957 Pu 284 (cases reviewed: *Asaram v. Revi*, A 1966 A 519; *Gangaram v. Phulwati, sup*; see also *ante* s 16, where the question has been discussed]. When the notices sent to a party are received back unserved on an alleged refusal by the addressee, they must be presumed to have been served [*Jagdish Singh v. Natthu Singh*, A 1992 SC 1604, 1606]. The certificate of

posting raises a presumption that the letter was posted and reached destination unless contrary is proved [*Hemangini v. Sarnalatika*, A 1940 C 227; *Dhanapati v. Corpn*, 55 CWN 751; *Meghji Ld v. Oomen*, A 1963 K 306; *Sukumar v. Naresh*, A 1968 C 49; *Achamma v. Fairman, sup*; *Kanaklata v. Amal*, A 1970 C 328; *Dineshwar v. Manorama*, A 1978 P 256; *Amrutlal Weljibhai Rathod v. Vishwasrao Deorao Patil*, A 1989 Bom 410, 415]. Certificate of posting raises presumption about posting but raises no presumption as to receipt by addressee [*B L Shrivastava v. M M L Shridhar*, A 1975 MP 21]. Where the certificate of posting did not indicate whether the article posted was an envelope, inland letter or post card and there was no direct evidence that the original letter was actually put in an envelope and posted under certificate of posting, the court cannot draw presumption about receipt of that letter [*Surajmal v. Kalinga Iron Works*, A 1979 Or 126 (*J McGaffin v. LIC*, A 1978 C 123 and *Ayisabeevi v. Aboobacker*, A 1971 K 135 **rel** on)].

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 produces only the copy of certificate of posting to draw a presumption but did not produce the copy of the letter sent by him, the presumption need not be drawn [*Mst L M S Ummu Saleema v. B B Gujaral*, A 1981 SC 1191, 1194 (DB) : 1981 Cri LJ 889]. The mere fact of the receipt of a letter raises no presumption that it was despatched by the person on whose behalf it purports to have been written [*Habib v. Fitz & Co*, 89 IC 22: 23 ALJ 961]. Acknowledgment of registered letter signed by some one raises a presumption that it was received on behalf of addressee [*Hazaribagh Municipality v. Fulchand*, A 1966 P 434; "*Mohinder v. P N Bank*, A 1981 D 106"]. There may be a presumption of service of notice by denial of endorsement by the postman to that effect been without producing the postman. Such presumption is not conclusive but rebuttable. If such a presumption has been rebutted the burden again shifts upon the plaintiff to prove by his further evidence the service of the notice upon the tenant [*Rama Devi v. Ram Prakash*, A 1985 All 17, 18 : 1984-2 All Rent Cus 374]. Registered notice was received by some person on behalf of the firm. In the proceeding except one partner no other partner appeared and he did not disclose the names of the employees of the firm. So presumption of due service of notice arises [*Nahan Foundry Ltd v. Puri Agro Industrial Corpn, Jullundar City*, A 1984 (NOC) 89 : ILR (1983) MP 345]. A mere endorsement of refusal on the returned registered envelope without being substantiated by evidence of peon raises a statutory rebuttable presumption of refusal [*Memon v. Bhaiya*, A 1975 G 54 FB; *Kanneganti v. P Ranga Rao*, A 1972 AP 73 (*Bapayya v. Venkataratnam*, A 1953 M 884 **rel** on); *Saeed Ahmed v. Syed Qumar*, A 1973 A 24; *Nirmala v. Provat*, 52 CWN 659; *Trailakyanath v. Provabati*, A 1974 C 261; *Ramautar v. Savitri*, A 1976 A 515; *M P Swami v. Mangaram*, A 1979 Or 11; *Rajaram v. Ganpatlal*, A 1973 MP 268 (Money order)].

It is not always necessary to produce the postman. Where a postman endorsed letter refused by addressee, his inability to identify him after a lapse of time does not lose effect [*Ram Shree v. Khadija*, A 1981 A 5]. When an application to set aside *ex parte* decree is filed on the ground of non-service of summon, the decree cannot be set aside on the mere fact that the postal peon was not examined [*Gowri Sankar Dutta v. Sujan Singh Chandak*, A 1985 Cal (NOC) 9]. A denial of service may be found to be incorrect from party's own admission or conduct [*Puwada v. Chidamana*, A 1976 SC 869]. Where postman was informed by the brother of the addressee that he was out of station and refused to supply his address the endorsement of refusal is wholly illegal [*Shamim v. Azizul*, A 1974 A 354]. In absence of proof that endorse-

ment was manipulated with connivance of postal authorities endorsement should be presumed to be true and that the envelope was refused with ulterior motive [*Pudi v. Johnson*, A 1976 AP 243]. Endorsement of refusal by peon on a particular day would raise the presumption of correctness in respect of the date also [*Shyamnarayan, v. Raghunath*, A 1977 P 155]. Where a money order is remitted for delivery to an addressee residing in the same town, the court should presume, in the absence of any evidence to the contrary that it was tendered in the ordinary course within 10 days [*Mahabir v. Anant Ram*, A 1966 A 214].

If the landlord on oath says that he did not refuse to receive the rent sent by Money Order, the endorsement 'refused' on the said Money Order could not by itself and without evidence of the postal peon lead to any presumption that the same was tendered to the addressee and was refused by him [*P S Nirash v. Smt Mintok Dolama Kazini*, A 1984 Sikkim 1, 3 : (1983) 2 Rent CJ 304]. Where rent was remitted by M O about a week before the crucial date presumption as to its tender within time will arise [*Parmeshwari v. Abrar*, A 1971 A 22]. As soon as the tenant handed over the amount to the post office to be remitted by money order, he was discharged of his obligation in that respect [*Bhikhalal v. Munnalal*, A 1974 A 366 FB]. When a person has got more than one address a notice sent to anyone of the addresses under registered post may be presumed in law to have been validly served on him. But there must be evidence that person had more than one address and that the notice was sent to the correct address [*Amisur Rahman v. Sukhdeo*, A 1984 Pat 245, 247]. The presumption under s. 114 could not be available to the landlady, when the acknowledgment due containing the endorsement of refusal is not on record [*Smt Sushila Devi v. Manohar Lal*, A 1985 All 178, 179 : (1985) 1 Rent C J 122]. The plaintiff had issued a notice asserting herself to be the wife of the defendant. The defendant did not send any reply. His contention that the plaintiff was mischievously trying to foist herself on the defendant as a wife affords added need and justification for a reply. From the non-issue of a reply, an adverse inference can be drawn against the defendant [*Shankerappa v. Sushilabai*, A 1984 Kant 112, 116].

The court has a machinery for giving effect to its order, and it may be presumed that its subordinate staff performs its duty of carrying out the order of the court [*Bhairab v. Laxmi*, A 1924 N 385]. An application may be presumed to have been made if the facts justify the presumption [*Mulchand v. Jamanbi*, 89 IC 228 : 227 Bom LR 671]. Where name of accused is printed on the title page of a book, he may be presumed to be the author if there is any evidence to show that he had no namesake or that his name could not have been adopted by any other person [*Ranjit v. R*, 88 IC 356: 26 PLR 403]. Merely because a person was a member of an unlawful association he cannot be presumed to have continued as a member after it was declared unlawful [*R v. Shripad*, 55 B 484]. This illustration leaves to the discretion of the court to presume that a common course of business has been followed, but the court is not bound to presume it [*Ramdas v. Official Liquidator*, 9 A 366]. There is a presumption that ordinary business acts are normally carried out [*P I & S Bank v. Gian Chand*, A 1941 L 345]. Presumption of delivery of letter may be drawn from entry in peon book [*Sailabala v. Tapassier*, A 1952 C 455]. Entries in the despatch register of orders do not raise presumption of service of order on addressee [*Kallawwa v. Tamanna*, A 1977 Knt 45, (*Skilbeck v. Garbett*, (1845) 7 QB 846; *Benarasi v. New India &c*, A 1959 P 540; *Bank of Bihar v. Tata Scob &c*, A 1960 C 475 rel on)]. When a draft is sent by post the presumption would be that there was implied request to send it by post and act of posting would amount to delivery of the draft (in this case draft was sent to payee at a distance of 38 miles) [*Tukaram v. Belgaum Bank*, A 1976 B 185]. When a document contains the word "Register" with the number and page of a book in which the docu-

ment is copied the presumption is raised that the registration was complete [*Ramdayal v. Bhanwarlal*, A 1973 Raj 173 FB].

Compliance of formalities to be performed for attachment under Or 21, r 54 can be presumed if attachment is actually proved by Amin's report or otherwise [*Ramesan v. Kunhipatu*, A 1977 K 119 FB]. As to presumptions drawn from the usual course of men's private business, see *Mun of Sholapur v. S S Co*, 20 B 723. A power of attorney was executed in Yugoslavia which was authenticated by a Judge, court of that country and thereafter through the foreign officer of Yugoslavia Government whose signatures are attested by the official of the Indian Embassy the power of attorney was received by the plaintiff and filed in the suit. When the common course of business is followed, the Court is entitled to presume the existence of the said document [*Rudnap Export-Import v. Eastern Associates Co*, A 1984 Del 20, 24].

ILLUSTRATION (g): [Presumption From Withholding Available Evidence].— This illustration refers to the presumption raised from wilful withholding of evidence and from spoliation, *ie* destruction, mutilation or suppression or fabrication of evidence. The suppression or destruction of useful evidence naturally leads to the inference that the evidence if produced would go against the party who withholds it. The rule is contained in the well-known maxim: *omnia praesumuntur contra spoliatorem*. If a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted [*Williamson v. Rover Cycle Co*, 1901, 2 IR 619]. Adverse inference can be drawn only if there is withholding of evidence and not merely on account of failure to obtain evidence [*Srichand v. S*, A 1967 SCC 450]. "The mere withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available, gives rise to a presumption against the party. It is a presumption less violent than that which attends the fabrication of testimony or the suppression of documents in which other parties have a legal interest; but the courts recognise and act upon the natural inference that the evidence is held back under such circumstances because it would be unfavourable" [*Kirby v. Tallmadge*, 160 US 379; Jones s 19]. If a party in possession of the best evidence which would throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that onus of proof does not lie on him. [*National Insurance Co. Ltd. v. Kusum Devi Mishra*, 1998 AIHC 3751, 3753].

There is no duty cast on the accused to call any evidence and no adverse inference can be drawn if he chooses not to offer evidence [*Abu Bakar v. R*, 1963 Malayan LJ 288 (Singapore HC); *Goh Ah Yew v. P.P.*, 1949 Malayan LJ 150 (CA Federation of Malaya); *Illian v. P.P.*, (1988) 1 Malayan LJ 421 (SC Kuala Lumpur)]. Calling of witnesses is a matter for the discretion of the prosecution and the prosecution need not call every witness from whom a statement has been taken. However this discretion must be exercised fairly [*Mohamed Kassim v. R*, 1956 Malayan LJ 212 (Penang HC); *Khoon Chye Hin v. P.P.*, 1961 Malayan LJ 105 (Ipoh CA); *Wong See Har v. P.P.*, (1968) 1 Malayan LJ 32 (Kuala Lumpur HC); *P.P. v. Teh Cheng Poh*, (1980) 1 Malayan LJ 251 (Penang HC); *Muharam v. P.P.*, (1981) 1 Malayan LJ 222 (Kota Kinabahe FC); *Abdullah Zawawi v. P.P.*, (1985) 2 Malayan LJ 16 (SC Kuala Lumpur); *Samsudin v. P.P.*, 1962 Malayan LJ 405 (Kuala Lumpur CA)].

Where the attesting witness was husband of the plaintiff wife and it was established that they were living together but in spite of warrant having been issued by the court the husband did not come to the witness-box a presumption can be drawn against the plaintiff for her husband not coming forward to appear in the witness-box, who was a vital witness for the controvercy involved in the suits [*Shayama Devi v. Premvati*, A 1996 All 57, 63]. Where the assessee deliberately avoided to produce authenticated tax books before the authorities an adverse inference can be drawn against him [*Kailash Talkies v. State*, A 1996 Raj 30, 36]. Non-examination of a wit-

ness by one of the consenting parties would not amount withholding of evidence [*P. Veeraswami Naidu v. Pushpammal*, A 1996 Mad 131, 136]. Where the insurer was directed to produce the policy but which particular policy or register was required to be produced had not been mentioned in the order, non-production of all the policies and registers cannot be considered as an adverse circumstance against the insurance company [*National Insurance Co. Ltd. v. Anand and Ananda Charan Reddy*, A 1996 Ori 52, 54]. Where there is no evidence on record to show that anyone of the nearly houses had witnessed the occurrence, no adverse presumption for non-examination of independent witness of the locality could be drawn [*Sat Pal v. State of Punjab*, A 1996 SC 204 : 1996 Cri LJ 406, 407]. Where the insurance company pleaded strict liability but failed to produce original policy or office copy as well as documentary evidence, the presumption against the insurance company can be raised [*Krishan Lal v. Mohd. Din*, A 1994 Del 10, 21].

Where the chance prints were lifted and sent to the Finger Print Expert but his report was not filed by the prosecution it can be inferred that those chance prints did not tally with the family prints of the accused [*Ram Karan v. State of Rajasthan*, 1996 Cri LJ 3521, 3527 (Raj)]. Where the family members of the deceased vendor pleaded that the land in question was allotted by the Government not to the deceased alone but for welfare of deceased's family but the vendee failed to produce patta and allotment order to show on what condition allotment was made, an adverse inference can be drawn against the vendee [*Jyotirindra Bhattacharjee v. Sona Bala Bore*, A 1994 Gau 99, 103 (Gau)]. Where the defendant in his petition under section 34 of the Arbitration Act expressed his readiness and willingness to get the arbitration agreement enforced, even if for that purpose the defendant has not entered the witness-box, no adverse inference can be drawn against him [*Om Prakash v. Devi Raj*, A 1995 P&H 349, 351]. Where Bank had successfully shown the dues of the bank on the basis documentary as well as oral evidence whereas the defendants to made a half hearted plea in written statement, led weak testimony of witnesses, suppressed the evidence of material witnesses and failed to produce the most important documentary evidence of the books of account of the defendant firm, it would be sufficient to raise an adverse inference against the defendant firm [*Shivam Construction Co. v. Vijaya Bank, Ahmedabad*, A 1997 Guj 24, 34].

Where compromise petition had not been brought in evidence in the matrimonial suit by the husband, it raised a presumption that the production of the compromise petition in evidence had been with held by the husband because its production would have disclosed an adverse state of affairs [*Tapan Kumar v. Jyotsna*, A 1997 Cal 134, 142]. Where there are allegation and counter allegations of parties accusing each other as impotant and impotency is sought to be established and proved by a party to the matrimonial litigation, refusal by one of the parties to undergo medical examination has it own situation in the consequence of inference. Factually the situation gets much more fortified if the other party subsmits to such medical examination and clears it with flying colours. In such a situation the court is within its powers to consider the conduct of the party refusing to submit to the medical examination, to draw an adverse inference out of the situation [*George Philip v. Saly Elias T*, A 1995 Kart 289, 291].

Keeping records of account away from a court of law, more so when such records are sought by the court, is against the principles of public justice and the court can draw an adverse presumption against the party not producing the record which is the best evidence [*L.P. Naithani v. Allahabad Telephones*, A 1998 All 191, 193]. Where the record does not show that there were other independent witnesses available and

yet withheld by the prosecution from being examined, no adverse inference can be drawn [*Kasam Abdulla Hafiz v. State of Maharashtra*, A 1998 SC 1451].

Railway's failure to disclose facts as will rebut claimant's evidence of damage and Railway's negligence would result in presumption under s 114(*g*) [*Union v. Khalilur*, A 1971 C 347]. In a collision between bus and car, the car driver dies. On contention by owner of bus that accident occurred due to rash and negligent driving by the car driver, non-examination of the driver of the bus and in the absence of any explanation for it adverse inference is to be drawn against bus owner [*Hira v. Bhaba*, A 1977 Gau 31 FB].

Another very important and rather favourite maxim is "*omnia praesumantur contra spoliatorem*," a maxim resting partly on natural equity, but much strengthened by the artificial policy of law. The leading case on the subject is that of *Armory v. Delamirie*, 1 Star 505 (*post*). The most useful application of this principle is where there has been any forensic malpractice, by eloigning, suppressing, defacing, destroying or fabricating documents, or other instruments of evidence, or introducing in legal proceedings any species of the *crimen falsi*. This not only raises a presumption that the documents of evidence eloigned, suppressed, &c would, if produced, militate against the party suppressing &c but procures more ready admission to the evidence of the opposite party. "If," says HOLT LCJ, "a man destroys a thing that is designed to be evidence against himself, a small matter will supply it" [Anon 1 L Raym 731]. This rule is evidently based on the principle that no one shall be allowed to take advantage of his own wrong [Best ss 411, 412]. However, salutary, and in general equitable, it has been made the subject of very fair and legitimate doubt whether the maxim "*omnia praesumantur contra spoliatorem*" has not occasionally been carried too far [see Best s 414].

The mere *fabrication of evidence* does not of itself furnish any presumption of *law* against the innocence of the party, but is a matter to be dealt with by the jury. Innocent persons, under the influence of terror from the danger of this situation, have been sometimes led to the simulation of exculpatory facts; of which there are several instances in the books [see 3 Inst 232; Wills Cir Ev 126]. The mere non-production of deeds or papers, upon notice, has no other *legal effect* in general than to admit the other party to prove their contents by parol, and as against the party refusing to produce them, to raise a *prima facie* presumption that they have been properly stamped [Tay s 117]. See s 89 Evidence Act.

Other facts of the same kind are the common cases of obligation, effacing, or otherwise removing marks of ownership or identity from plate, linen, or other articles of property, or of stains of blood, or other matter from the person or dress of the accused, or the alteration of an article so as to make it difficult to identify it, or the suggestion or insinuation of false, groundless or deceptive hypothesis, or explanation in order to neutralise or account for adverse facts or appearances. Another fact is the attempt to prevent *post-mortem* examination by premature internment of human remains [Wills Cir Ev pp 133, 134]. Where the concerned officer of the Government failed to produce original document for a long time, adverse inference can be drawn against the Government [*State of Rajasthan v. Rikhab Das Jain*, A 1994 Raj 114].

[*Ref Best ss 411-15; Tay s 117; Wills Cir Ev s 5 p 97 et seq and s 7 p 128 et seq Russ Cr Vol 2, 7th Ed pp 1308, 1402, 2062; Jones ss 19, 20.*]

—Non-production After Notice.—As to non-production of documents after notice to produce, see ss 65, 66. As to presumption of due execution, attestation &c of documents not produced, see s 89. As to inability to use as evidence documents whose production is refused, see s 164.

—Non-production of Available Evidence.—It was held in an earlier Privy-Council case that it is open to a litigant to refrain from producing any documents that he considers irrelevant. If the other litigant is dissatisfied, it is for him to apply for an affidavit of documents and obtain production and inspection. If he fails to do so, neither he nor the court at his suggestion is entitled to draw any inference as to the contents of any such documents [*Bilas v. Desraj*, 42 IA 202: 37 A 557: 19 CWN 1207: A 1915 PC 96; see also *Gordhan v. Anand*, 42 A 247; *Premraj v. Nathmal*, 1936 142: A 1936 N 130; *Ghela v. Mangtulal*, 154 IC 48 (P); *Chandra v. Ram Ch*, 24 P 541; *Bihar Agents Ld v. Union*, A 1960 P 111]. In a later PC case LORD SHAW, however, observed that "a practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the courts the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit, it is, in their Lordship's opinion an inversion of sound practice for those desiring to rely upon a state of facts to withhold from the court the written evidence in their possession which would throw light upon the proposition" [*Murugesam v. Gnana*, 44 IA 98: 40 M 402, 408: A 1917 PC 6; the observation was reiterated in *Rameshwar v. Bajit*, A 1929 PC 95, 99: 114 iC 592; *Hiralal v. Badkulal*, A 1953 SC 225 : 1953 SCR 758 and *Kundan v. Custodian &c*, A 1961 SC 1316; see also *Srinivasa v. Venkatavarada*, 38 IA 129: 15 CWN 741; *Mahabir v. Ramanadhwaj*, A 1933 PC 87 : 64 MLJ 413 and the observation by LORD BLANESBURGH in *Rameshwar v. Bajit*, A 1929 PC 95. The conflict of views in the two PC cases cited *ante*, was noticed in *Nathu v. Phool Chand*, A 1955 VP 6; *Ridhikaran v. F M C Co Ld*, A 1955 Or 60 and *Brojogopal v. Kalipada*, A 1960 C 92 but an attempt was made to explain away the observation in *Bilas v. Desraj, sup* as having been made in a different context]. The observation of LORD SHAW was **approved** by the Supreme Court in *Hiralal v. Badkulal*, A 1953 SC 225 where the defendants relied on the abstract doctrine of the burden of proof and urged that it was no part of their duty to produce their books unless called upon to do so.

The question was fully considered in another case in which the PC case of *Murugesam v. Gnana, sup* was followed in preference to *Bilas v. Desraj, sup* [*Gopal Krishnaji v. Md Haji*, A 1968 SC 1413; *Agurchand v. Deochand*, A 1960 AP 101; see also *Devji v. Mohanlal*, A 1960 P 223; *Sri Ram v. Dukha*, A 1966 Or 66; *Hazaribagh Municipality v. Fulchand*, A 1966 P 434]. Party in order to get benefit of presumption must adduce some evidence which enables the court to draw presumption in its favour [*Johnson And Philips Ltd. v. Amiya Kumar Seal*, A 1984 NOC Cal 304]. When evidence is in the custody of a party and there is an obligation on that party to produce the same, non-production of that evidence can very well justify the court to raise an adverse inference even though such evidence had not been specifically called for by the opposite party [*Himjit Construction v. Tarun Sarkar*, A 1985 Cal 200, 202 (DB)].

Even when the burden of proof does not lie on a party, the court can draw an adverse inference if he withholds important documents in his possession throwing light on the fact in question [*Guraswami v. Gopalaswami*, 42 M 629; *Chan Wan v. Chettyar*, A 1941 R 108; *Bahadur v. Girdhari*, 1942 Nag 543; *Shankar v. Kamla*, A 1947 N 129]. Although the burden of proving corrupt practice is entirely and exclusively on a petitioner in an election petition it does not absolve the respondent of his responsibility to assist the court by producing the best evidence available and that on his failure to do so the court may draw such inference against him as may appear to be just and reasonable [*Hushonkhan v. Nijalingappa*, A 1968 Mys 18]. When relevant documents admitted to have been in existence are not placed before the court by party concerned,

an adverse inference has to be drawn [*Raghavamma v. Chenchamma*, A 1964 SC 136]. In order to entitle the court to draw inference unfavourable to a party, the court must be satisfied that the evidence was in existence and could be produced [*Mahabir v. Rohini*, 37 CWN 657, 662: A 1933 PC 87; *Ramayya v. Lakshminarayana*, 61 IA 177 : 38 CWN 669: A 1934 PC 84; *Devidas v. Shrishailappa*, A 1961 SC 1277: 1961, 3 SCR 896; *Chandradeo v. Sheo*, A 1977 A 319].

Where a party suppresses evidence, no conclusion in his favour can be drawn on the ground of paucity of evidence [*Gangada v. Subramania*, A 1949 FC 88]. When a party files an affidavit that the documents in question were not and never had been in his possession or under his control and the opposite party takes no further steps, no adverse inference can be drawn from their non-production [*Ramanathan v. Viswanathan*, A 1941 PC 43: 193 IC 657]. Plaintiff filed only some documents. Although existence of other documents was admitted by witnesses of plaintiff defendant did not call upon the plaintiff to produce them. Held no adverse inference can be drawn against plaintiff for such non-production but court can take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the defendant's case [*Srinivas v. Surjanarayan*, A 1967 SC 256].

Adverse inference may be drawn from withholding material documents by a party in possession of them [*Atyam v. Pechitti*, A 1966 SC 629; *Baljit v. S*, A 1976 SC 2273; *Ramdas Oil Mills v. Union*, A 1977 SC 638; *Srinivasa v. Venkatavarda*, 38 IA 129 : 34 M 257: 13 Bom LR 520 : 15 CWN 741; *Srish Ch v. Rakhalananda*, 68 IA 34: 1941, 1 Cal 468; *Raghunath v. Hoti Lall*, 1 ALJ 121; *Pillai v. Dangali*, A 1942 R 52; *Rangabati v. United Bank*, A 1961 P 158; *Devidas v. Shrishailappa, sup*; see *Beni Pd v. Goburdhan*, 6 CWN 823] though *onus* of proof was on the opposite party [*Gopal Krishnaji v. Md Harji*, A 1968 SC 1413; *Virendra v. Jogjiwan*, A 1974 SC 1957; *Peter v. East India &c*, A 1976 C 182], or for non-production of an important witness even if the other side was not called upon to produce such evidence [*G G in Council v. Ranglal*, A 1948 P 237; *Irudayam v. Salayath*, A 1973 M 421]. When defendant Government deliberately failed to produce in spite of order, reports and documents kept by the Government, an adverse inference that defendant was negligent in the management of the canal arose [*S v. Modern Cultivation*, A 1965 SC 17].

Where tops of document containing title of register appeared to be deliberately torn inference adverse to defendant could reasonably be drawn from surrounding circumstances [*Goswami v. Shah*, A 1970 SC 2025]. Where employer denying that workers were employed overtime, does not produce the overtime-book, the presumption is against him [*Chunder & Co v. Ram Asis*, A 1953 C 336]. Where a person claiming right of way, did not put in evidence his title deeds, the court may make a presumption unfavourable to him [*Wuntzler v. Sharpe*, 15 A 270, 289; see also *Vinayak v. Collr of Bombay*, 26 B 339, 351]. Non-production of documents (receipt of filing of nomination paper) by election petitioner was a circumstance against him [*Harjit v. S Umrao*, A 1980 SC 701].

Adverse inference may be drawn for non-production of best evidence [*Khushalbhai v. Mohamadhussain*, A 1981 SC 977]. *Public Prosecutor v. Ong Boon Kek*, (1991) 3 CLJ 1744 (Kuala Lumpur HC); *Ng Ngat Siang v. Arab Malaysian Finance Bhd*, (1988) 3 Malayan LJ 319 (Kuala Lumpur HC); *Baharom v. Public Prosecutor*, 1960 Malayan LJ 249 (Johore Bahru CA); *Gurbachan Singh v. Public Prosecutor*, (1966) 2 Malayan LJ 125 (Alor Star HC); *Public Prosecutor v. Teh Cheng Poh*, (1980) 1 Malayan LJ 251 (Penang HC); *Ng See Hin v. Lim Ah Hooi*, 1950 Malayan LJ 280 (CA Federation of Malaya); *Choo Chang Teik v. Public Prosecutor*, (1991) 3 Malayan LJ 423 (SC Malaysia); *Abdullah Bin Karim v. Ahmad Bin Abdullah*, (1991) 2 CLJ 1490 (Johore

Bahru HC). Presumption as to adverse inference for non-production of available evidence is always optional and one of fact depending upon whole set of facts and not obligatory [*Indira v. Rajnarain*, A 1975 SC 2299; *Harnath v. Dhanoo*, A 1975 C 98]. The presumption is not obligatory, because notwithstanding intentional non-production, other circumstances may be present upon which such intentional non-production may be justifiable on some reasonable grounds. But where no other cause is apparent or proved, the court will be entitled to rely on such presumption [*Shiva Pd v. Prayag*, 61 C 711]. The nature of the fact required to be proved and its importance in the controversy; the usual and commonly recognised mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned have all to be taken into account. And it is only when all these matters have been duly considered that an adverse inference can be drawn [*Krishna v. Kayastha Pathshala*, A 1966 A 570]. If a party in whose possession best evidence is available and despite Court's direction it fails to produce the same or despite the demand from the other side it refuses to produce the same, the Court will be well within its jurisdiction to conclude that had such evidence been produced it would have gone against the person who had suppressed it and an adverse inference could be drawn against that person [*Govind Laxman Solapurkar v. Dattatraya Damodar Kelkar*, A 1991 All 226, 227]. Non-production of deed raises a presumption that there is some endorsement on it which the plaintiff does not like [*Zafar v. Zahur*, 97 IC 82: 24 ALJ 964].

Where in a suit to recover land, plaintiff did not produce the original title deed an appellate court might draw a presumption against him [*Harendra v. Durga*, 62 IC 697]. Non-production of collection papers by tenants in a suit for enhancement of rent—The court may act on the presumption [*Hem Ch v. Kali Pr*, 30 IA 177: 30 C 1033: 8 CWN 1]. Where three important documents of the defendants were said to have been burnt, but this fact was not proved, their non-production raised adverse presumption [*Ram Pd v. Raghunandan*, 7 A 738]. No adverse presumption can be made from non-production of title deeds in response to a fishing application by the other party [*Someshwari v. Maheshwari*, 10 P 630].

No adverse inference can be drawn if the witness is won over by the opposite party [*Saudagar Singh v. State of Haryana*, 1998 Cri LJ 62 (SC)]. Adverse inference under S. 114 Illustration (g) can be drawn if a party fails to disclose facts which are within his special knowledge [*Alexandros Dryron S.A. v. Owners and Parties interested in the Vessel*, A 1998 Cal 142, 149]. When the court refuses to accept certain documents as having been produced too late, the party opposing the production cannot ask the court to draw an adverse inference for non-production [*Sevugan v. Srimathu*, A 1940 M 273]. No adverse inference was drawn where certain witnesses whose statements were recorded under S. 162, CrPC were not produced. Their statements were not likely to be against the prosecution. *Nishar Ahmed Fajmohmed Kaji v. State of Gujarat*, (1998) 9 SCC 23. Where the witnesses produced were independent and had seen the incident with their own eyes, no weakness could be found with the prosecution case only because some other persons belonging to the locality had also seen the incident and were not called. *State of Bihar v. Ram Padarth Singh*, AIR 1998 SC 2606; *Surendra Narain v. State of U.P.*, AIR 1998 SC 192 : 1998 Cri LJ 359; *Sheelam Ramesh v. State of A.P.*, AIR 2000 SC 118. No adverse presumption was drawn where the doctor who made the post-mortem report was not called. The case was a clear one of homicide. *State of U.P. v. Lakhmi*, (1998) SC 1007 : 1998 Cri LJ 1411.

In a suit to recover the value of plundered property, the highest value should be presumed unless the defendants produced the property and showed it to be not of the value stated by the plaintiff [*Soondar Monee v. Bhoobun*, 11 WR 536]. So in the case of wrongful conversion of property, it will be presumed to be the best of the description of its kind if not produced [*Daropadi v. Sada Kuar*, 39 PLR 1914: 22 IC 242]. The same principle is laid down in an old case where the plaintiff a boy having found a jewel gave it to a jeweller, the

defendant, to enquire about its value, who took out the jewel and on the plaintiff's refusing to accept a small sum as price, returned the empty socket. In an action for recovering damages, it was held by PRATT, CJ, that unless the defendant produced the jewel, it must be presumed to be of the first water and the measure of damages must be the value of the jewel that would fit the socket [*Armory v. Delamirie*, 1 Sm LC 153]. Where a wine merchant sued for value of liquor sold and the only evidence was that some bottles of liquor were delivered to the defendant, it was held that the presumption was that the bottles contained the cheapest liquors [*Clunnes v. Pezzy*, 1 Camp 8].

Where it was considered that the evidence of certain witnesses if given would throw no light on the case, no adverse inference would be drawn if such evidence was not forthcoming [*Sambanthamurthi (T.S.) v. Dason Anthony*, Suit No F 370/84 dt. 14.5.1997 (Kuala Lumpur HC)]. Suppression of existence an agreement attracts the presumption envisaged under Illustration (g) of s. 114 [*Arab-Malaysian Finance Bhd v. Aik Soon Auto Sdn Bhd*, Civil Suit No D3-22-1278-92 dt. 1.3.1996 (Kuala Lumpur HC)].

Where the Crown withholds relevant documents in the possession, the court must not hesitate to draw an inference adverse to it [*Secy of S v. Upendra*, 36 CLJ 336; *Sreenath v. Secy of S*, 36 CLJ 345: 50 C 276; *Samandar v. S*, A 1968 Pu 72]. Non-production by railway company of reports as to how the consignment was dealt with in transit attracts the presumption under cl (*g*) [*G-G in Council v. Jesraj*, A 1950 As 175]. Where a consignment by railway risk is damaged by fire, Railway not showing that all reasonable care of goods was taken, presumption under s 114(*g*) applies [*Union v. Rajendra Mills*, A 1971 M 53]. Where there is a breach by the railway of the obligation to make full disclosure the court may more readily infer misconduct on the part of the railway or its servants or more readily presume under s 114(*g*) against the railway [*Union v. Mahadeolal*, A 1965 SC 1755]. On a question whether de-ceased was a regular worker, non-production of rolls of employees goes against the employer [*Jagannadham v. Padmabati*, A 1962 Or 7]. Non-production of a book in which an entry of ceremony of adoption was entered raises a suspicion [*Diwakar v. Chandan*, 44 C 201: A 1916 PC 81 : 21 CWN 314]. Non-production of account books when they would throw much light raises adverse presumption [*Jag Pd v. Singari*, 29 CWN 941 PC: A 1925 PC 93(2) : 27 Bom LR 760: 86 IC 122; *Kanshi v. Shankar*, A 1928 L 397; *Rachpal v. Bhagwandas*, A 1948 P 251].

In a suit for recovery of money for sale of goods, the defendant contended that the purchase was made not from the plaintiff but another Firm. The non-production of the account book by the defendant to prove this fact will lead to draw an adverse inference against him [*Khushalbhai Mahijibhan Patel v. A. Firm of Mohamadhussain Rahinbux*, A 1981 SC 917, 980]. When in a petition for alimony, the husband withholds important documents in the shape of account books of the joint family business which will disclose his share in the income from business, an adverse inference can be drawn [*Dharamichand v. Smt Sabha Devi*, A 1987 Raj 159, 162 : (1987) 1 Raj LR 481]. If the account books and the correspondence between the plaintiff and the defendant are not produced by the defendant, an adverse inference could be drawn that if they are produced they would have proved that the 2nd defendant was in the employment of the 1st defendant, though the 1st defendant was not called upon to produce those documents. [*Smt Miranjan Kaur v. New Delhi Hotels Ltd*, A 1988 Del 332, 340]. In a suit for recovery of money due on a hundi, the defendant contended that it was executed to accommodate the plaintiff and no consideration passed. The non-production of the accounts by the defendant leads to the presumption that if he had produced the account books, an entry for the loan given by the plaintiff would have been found in those account books [*Gulab Chand v. Satya Vrat*, A 1983 All 54, 58]. Failure to produce account books by a party whose business it is to produce, in spite of an order for discovery, gives rise to a presumption unfavourable to the party [*Motilal v. Kundanlal*, 25 CLJ 581: 19 Bom LR 471: 21 CWN 929: A 1917 PC 1: *Murugesam v. Manikavasaka*, 44 IA 98: 21 CWN 761: A 1917 PC 6; *Guruswami v. Gopalaswami*, 42 M 629; *Venkatasubba v. Ramanathan*, A 1937 M 816; *Smt Indira Kaur v. Shri Sheo Lal Kapor*, A 1988 SC 1074, 1081]. Mere admission of existence of account books raises no presumption from non-production unless they were called for and refused to be produced [*Bans Narain v. Chandrani*, A 1944 A 130; *Kishan v. Puransa*, A 1928 N 119: 106 IC 305].

Where plaintiff's case was that partnership has been dissolved, but he failed to produce account books, presumption is against him [*Firm Jowala v. Uttam*, 76 IC 553 (L)]. But where a party refuses to produce his documents though ordered by the court, whatever suspicion may be cast upon his conduct by this refusal, it cannot alter conclusions which really turn upon the construction of documents which are before the court [*Ahmed Khan v. Ali Ebrahim*, 52 IA 379: 30 CWN 506: A 1925 PC 267: 6 L 502]. Where accounts in possession showing expenses are not produced and other evidence is given of the fact, the court may presume that expenses were exaggerated; but simply because of the non-production of accounts it cannot be concluded that no expenses were incurred [*Sajjad v. Md Saiyid*, A 1934 A 71]. The inference from a non-production of accounts can only be drawn in the light of the other circumstances appearing in the case [*Sundanam v. Somasundaram*, A 1937 M 436]. It is impossible to say that account books would be preserved for forty years. One would rather imagine that after the lapse of a decade or two they would not be preserved [*Ganeshi v. Bhagwan*, 1936 AWR 547]. Presumption from non-production of very old documents is not so strong as there is possibility of their being lost [*Ramji v. Mihim*, 71, IC 654].

Where in a case under s 408 I P Code the accused's contention was that the dates between the first and the last breach of trust exceeded one year, failure to produce complainant's account book raised a presumption in favour of the defence [*Deonarain v. R*, A 1934 P 132]. If a defendant either suppresses his accounts or has falsified them the court will presume everything most unfavourable to him consistent with the established facts [*Chidambaram v. Ayyappa*, A 1935 M 152]. Where in a suit for damages for infringement of copyright, the defendant fails to produce the account books even after notice, the presumption is that all the copies of the book had been sold [*Educational Book Depot v. Rabindra*, A 1933 A 474].

When plaintiffs had an account book which was relied on by the defendants and plaintiffs did not produce it in spite of demands, there was a presumption that the entries were against the plaintiffs [*Mathuri v. Gurcharan*, 16 IC 25; *Lalta v. Majidunnissa*, 25 IC 749; *Padmraj v. Gopikishen*, 56 IC 129]. Defendant not producing accounts—court can draw inference that if produced they would go against defendant [*Goswami v. Shah*, A 1970 SC 2025]. As to non-production of collection paper, see *Raghunath v. Hardayal*, 56 IC 751. In an account suit, non-production of account-books by the party having custody of them justified the presumption under s 114 illus (*g*) that they would be unfavourable [*Debendra v. Narendra*, 24 CWN 110: 30 CLJ 417]. So when a party takes out of court account books filed by him and offers no explanation for such action [*Ranada v. Swarnamoyee*, 44 CWN 114]. Non-production of account books in an enquiry as to the truth or otherwise of the allegations of assessee is governed by illustration (*g*) and (*h*) [*Sankaralinga v. Commr of I T*, A 1930 M 209]. Non-production of account-books and papers in a case of *benami* purchase, does not raise any presumption that the evidence if produced would damage his case [*Bilas v. Desraj*, 42 IA 202 : 19 CWN 1207: 17 Bom LR 1006: 37 A 557]. The presumption indicated in s 114(*g*) arising from non-production of evidence (accounts) cannot displace the contrary inference supported by adequate evidence [*Damisetti v. D*, 63 IC 740: A 1920 PC 84: 13 MLW 293]. Party did not produce accounts though said accounts were kept. No attempt was made by the opposite party to call for accounts—*Held* no adverse inference can be drawn for non-production of accounts [*Ramrati v. Dwarika*, A 1967 SC 1134; *George v. Ollukaran*, A 1975 K 163; *Siddheswar v. Bhabasundari*, A 1978 C 4]. In a suit for money due on sale of goods the court is justified in not drawing an adverse inference from non-production of account books when bill books are found to be

genuine [*Kandaswami v. Theagaraja*, A 1968 M 203 (*Jermiah, In re*, A 1957 AP 611; *Asiatic Steam Navigation Co Ld v. Jethalal*, A 1959 C 475 **rel** on)]. An adoptin deed was not allowed to be challenged just only on th epresumptin erated by the fact that the priest (pundit) who prosided over the ceremony was not examined. *Baru v. Tej Pal*, A 1998 All 230.

The dispute is regarding the payment alleged to have been made by the mortgagor to the mortgagee and an endorsement made at the back of the mortgage. The mere fact that the mortgagee did not produce the original document is not sufficient to justify a presumption under s 114 *illus (g)* [*Nabi Rasool v. Mohd. Maqshood*, 1982 All 503, 506]. In a suit for maintenance, the husband has stated that the wife has let out a plot and is in receipt of Rs. 500/- p.m. as rent. The husband who could have without difficulty brought to the notice of the court some evidence in that behalf if the rental arrangement was true. In the absence of any such evidence, the wife's version has to be accepted [*S Radhakumari v. K M K Nair*, A 1983 Ker 139, 144]. Withholding original documents casts a reflection on the varacity of the case of the party relying on the document [*Bhagwati v. State of UP*, 1983 CrLJ NOC 216 (All)]. A notification was issued by the State Government declaring that the depot of Lipton Ltd as a shop. But the relevant materials which were taken into consideration to arrive at the conclusion that the depot is a shop were not placed before the court. When such materials are not placed a presumption has to be drawn against the State Government [*Lipton (India) Ltd v. State of West Bengal*, A 1984 Cal 109, 117 : (1984) 1 Cal WN 6].

A presumption of fact for the non-production of a register is also a question of fact and not a question of law [*Harbans Singh Saluja v. Building Tribunal Corporation of Calcutta*, A 1985 Cal 168, 169 : 1984-2 Cal HN 160]. When a party specifically mentions about issue of a memo by the State Government to the Accountant-General which is to his advantage, the State Government is bound to produce the same. If it is not produced, an adverse inference can be drawn [*State of Madhya Pradesh v. Saradarmal*, A 1987 MP 156, 159]. Non-production of the insurance policy has always been held to be a circumstance to draw adverse inference against the insurer [*G Krishna Rao v. Chalasani Pooranchandra*, A 1987 Ori 18, 19 : (1986) 1 Ori LR 554]. An adverse inference could only be drawn against person who does not produce or offer to produce the documents in his possession [*Banarsi Dass v. Smt. Shakuntala*, A 1989 Del 184, 193 (DB)]. Non-production of a M.O. Coupon by a landlord who is a rustic woman cannot lead to any adverse inference against her [*Kondamuri Anasuyamma v. Dist Judge W.G. Dist of Eluru*, A 1991 AP 47]. If the order of the Dy Commissioner, Gram Panchayat on the first enquiry on the question of Embezzlement by the person concerned has been withheld, an adverse inference has to be drawn that the first enquiry report is in favour of the person concerned and the second enquiry ordered by the Director of Panchayats has to be quashed [*Mewa Singh Sarpanch, Gram Panchayat Chhatar Block Uchana v. Secretary Development, Govt of Haryana*, A 1991 P&H 23, 24].

In a case filed by husband for judicial separation on the ground of desertion by wife, where her story that she left with the consent of husband's parents was rejected, it was not incumbent for him to examine his mother [*Lachman v. Meera*, A 1964 SC 40]. Where the evidence on record was sufficient in itself to support the case of the prosecution, it was held that the failure to examine still another witness could not affect the credibility of the prosecution case. *Rajendra Kumar v. State of U.P.*, (1998) 9 SCC 343. Where the prosecution after examining the injured witnesses dropped the others, the court said that it could not be inferred that the prosecution had an oblique motive in doing so. The court reasserted that such a point would not be raised for the first time at the stage of appeal to the Supreme Court. *Chacko v. State of Kerala*, AIR 1998 SC 2350 : 1998 Cri LJ 3281.

—Presumption Arising From a Party Not Going Into the Witness Box.— Presumptions are necessarily made against parties who having a knowledge of the

facts in dispute will not subject themselves to examination, when a *prima facie* case is made against them, and when by their own evidence, they might have answered it [*Nawab Syed v. Amanee*, 19 WR 149 PC pp 150-51. See also *Sabbaji v. Shidappa*, 26 B 392 in which the circular order of the Bombay High Court dated 31st September, 1900 was referred]. The Judicial Committee observed: ".....Under such circumstances it is impossible to overlook the significance attaching to the refusal of the respondents and their son Jot Singh to enter the witness-box. It raises a presumption against them" [*Durga v. Mathura*, 15 CWN 717, 721-22 10 IC 963 PC].

It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case [*Gurbakhsh v. Gurdial*, A 1927 PC 230 : 32 CWN 119. (In this case the question was whether a woman had given birth to a posthumous son to inherit her husband's property. She avoided a challenge to undergo medical examination on her husband's death to find out advanced pregnancy and disappeared into a foreign State whence she emerged after a long time with a male child. She was present in court during the progress of the suit but did not go to the witness box); *Martand v. Radhabai*, A 1931 B 97: 32 Bom LR 925; *Allahditta v. Mt Bhagan*, A 1930 L 401; *Kripa v. Ajaipal*, A 1930 L 1; *Bishan v. Gurbaksh*, A 1934 L 63; *Puran v. Kartar*, A 1934 L 398; *Devji v. Karsandas*, A 1954 P 280; *Arjun v. Virendranath*, A 1971 A 29; *Bhagwan v. Bhisan*, A 1974 P&H 7; *Ramji v. Mauni*, A 1978 P 48]. A *prima facie* case is made out when the plaintiff makes a distinct charge against the defendant from the witness-box and leads evidence in support. The fact that the defendant does not come himself nor calls any witness to contradict the evidence shows that the facts alleged cannot be denied. What was *prima facie* against the defendant becomes conclusive by failure to deny [*Pranballav v. Tulsibala*, A 1958 C 713: 63 CWN 258; *Gulla v. Narsingh*, A 1970 MP 225].

The presumption cannot be avoided by the plea that a party is pardanashin [*Md Abbas v. Abdul*, 1937 OWN 1022; *Subratan v. Shabbir*, A 1940 O 266]. The presumption does not apply when the plaintiff examines his trusted employee who knows all the facts and circumstances of the case and does not examine himself [*Md Safique v. Union*, A 1963 C 399; *Snow White &c Sohanlal*, A 1964 C 209; *Bijoy v. Lahori*, A 1973 C 465]. But when a party to a suit is a public institution the failure of a trustee to go into the witness box to explain his admission of a fact or personal conduct cannot be allowed to prejudice the case materially [*Balak v. Nanu*, A 1930 L 579]. It cannot be laid down as a very general proposition that if the landlord does not examine himself an adverse inference has to be necessarily drawn. Ordinarily a person for whom there is need for getting the suit premises vacated, should appear as a witness and make himself available for cross-examination [*Ramavatar Kailash Chand & Co v. Smt Suraj Bai*, A 1987 Raj 16, 18 : 1986 Raj LW 523]. The mere production of a copy of the birth entry would not, as a matter of law, connect the entry with the plaintiff. It was obligatory on the part of the plaintiffs to prove by legal and positive evidence that the birth entries relate to them. When they do not go into the witness box an adverse inference has to be drawn against them [*Sarwan Singh v. Ashok Kumar*, A 1983 Punj 366, 368, 369].

Where a party to a suit states his case on oath but refuses to appear in the witness box and offer himself to be cross-examined, a presumption would arise that the case set up by him might not be true. *Vidhyadhar v. Manikrao*, AIR 1999 SC 1441. An adverse inference must be drawn against the defendant who does not present himself for cross-examination and refuses to enter the witness-box to refute allegations made against him or to support his pleadings. *Bhai C. Patel v. Harihar Behera*, AIR 1999 SC 1341.

—Witness Refusing to Depose.—Where witness refuses to enter box and challenges the other party to ask the court to draw adverse inference against him, the court should infer that he would have proved what the other party wanted to have proved [*Parasu v. Challuru*, A 1943 M 641].

—Presumption From Not Calling Witnesses Acquainted With Facts and Keeping the Adversary Out of Possession of Evidence.—Everything is to be pre-sumed against a party who keeps his adversary out of the possession of evidence by taking means of retaining the evidence in his own custody. A similar presumption may also arise when a party does not call witnesses who are within his reach and are acquainted with the facts of the case [*Thulia v. S*, A 1973 SC 501; *Virendra v. Jagjiwan*, A 1974 SC 1957; *Sooriah v. Cotaghery*, 2 MIA 113, 125; *U Po v. Edward*, A 1934 R 139; *Trailakhya v. Kenaram*, 61 CLJ 551]. When a party failed to call as his witness the principal person involved and who was in a position to give first hand account of the matter in controversy and who could have refuted on oath the allegation on the other side, it is legitimate to draw an adverse inference [*Seth Maganmal v. Daibarilal*, 47 CLJ 222: 54 MLJ 208: A 1928 PC 39; *Bajranglal v. Sitaram*, A 1949 C 457]. Court may draw adverse inference against a party who being in a position to adduce better evidence deliberately abstain from doing so [*Murugesa v. Gnana*, 44 IA 98: 40 M 402; *Gopal Krishnaji v. Md Haji*, A 1968 SC 1413; *Gurusami v. Gopalaswami*, 42 M 629; *Narayana v. Venkatapayya*, A 1937 M 182; *Ridhikaran v. French Motor Car Co*, A 1955 Or 60; *Pranballav v. Tulsibala*, A 1958 C 713; *Deonath v. S*, A 1967 B 1].

Non-production of material witness would not introduce infirmity where the prosecution case is based entirely on documentary evidence [*Baliram v. S*, A 1973 SC 506]. Persons omitting, to produce their best available evidence cannot take advantage of the abstract doctrine of onus of proof [*Md Hussain v. Secy of S*, A 1939 L 330; *Rameshwar v. Bajit*, A 1929 PC 95; *Bahadur v. Girdhari*, A 1942 N 39]. Adverse inference can be drawn against plaintiff in a suit by members of a joint Hindu family to set aside compromise entered into by manager who himself was a party to the compromise, when the manager though material witness was not examined [*Manu v. Lata*, A 1965 Or 13]. In a suit for declaration of title, the vendor of the plaintiff is a material witness and the non-examination of that witness will lead to an adverse inference [*Dukhiram Dey v. Mrityunjay Prasad*, A 1982 Cal 294, 298]. The non-examination of the plaintiff's father to give evidence on the question of the plaintiff's date of birth will lead to an adverse inference being drawn against the plaintiff. [*Enuga Lakshmamma v. Vennapusa Chinna Malla Reddy*, A 1985 SC 658 : 1985 II SCC 100, 101]. The presumption under s 118 Negotiable Instruments Act, even though mandatory, may stand rebutted under certain circumstances even by a contrary, though permissive presumption under s 114 *illustration (g)* of the Evidence Act arising out of deliberate withholding of material evidence [*Sahney Motor Corpn v. Sova Mukherjee*, A 1988 Cal 59, 61 (DB)].

In an election case when there is no *onus* on the successful candidate to prove particular facts non-examination of particular person to controvert facts alleged by petitioner's witnesses could not draw adverse inference [*Motilal v. Chandra*, A 1975 SC 1178]. In an election dispute, the opponent is election agent had published a hand-bill making false but serious allegations touching the personal character and conduct of a candidate. Though the name of a press appeared in the hand-bill, a denial was published by the press. The relevant materials if called from the press would have been the best evidence to provide the link. When the aggrieved party did not take any effective steps to cause production of those relevant materials, an adverse inference has to be drawn [*A Younus Kunju v. R S Unni*, A 1984 SC 960, 961].

Under a clause in risk-note B, the railway is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession. The goods were stolen from a running train. Failure of the railway to produce an important witness like the guard entitled the court to presume under *illus (g)* that his evidence if produced would have been unfavourable to the company [*Surat Cotton &c, & W Mills Ltd v. Secy. of S*, 64 IA 176: 1937 Bom 375: 41 CWN 837]. So in a suit for non-delivery of jute when the defence is destruction in transit by fire, the withholding by defendants of documentary and oral evidence as to their dealing with jute during their possession and that wagon containing plaintiff's jute was on fire, attracts the presumption under this section [*Raigarh &c Ltd v. Commrs &c*, A 1947 C 98].

When the plaintiff declined to examine his witness when they appeared, the inference is that they would have deposed to a state of facts exactly that set up in the defendant's answer [*Nilmony v. Ramamoograh*, 7 WR 29]. Even if the material witness who should have been called, is employed as an advocate of one of the parties, the opponent is entitled to ask the court to draw adverse inference [*Weston v. Peary*, 40 C 898: 18 CWN 185]. A material witness, by whose hands the plaintiff alleged the jewellery (the subject matter of the claim) had been sent to the defendants for deposit and who was a relative of the defendants and had been a servant of the plaintiff but had previously to the suit left her (plaintiff's) service, was summoned by the defendants, whose conduct suggested that they are going to make her their witness—*Held* that it was not unnatural that the plaintiff should, as she did, leave it to the defendants to call her [*Durga Kunwar v. Mathura*, 15 CWN 717 PC]. No adverse inference can be drawn against a party for not examining all the witnesses mentioned by it [*Kulsumunnisa v. Ahmadi*, A 1972 A 219]. No inference should be drawn against a party for not producing a material witness where the question of the absence of such witness was not raised at the trial [*Banwari v. Mohesh*, 45 IA 284: 41 A 63: 24 CWN 577]. A party asking the court to draw adverse inference against the other party for non-examination of a witness must, whether the proceeding be a civil or a criminal one, lay the foundation for it by eliciting evidence which would show that the witness in question was available at the time of the hearing [*Jagadishprasad v. S*, A 1970 B 166]. When the driver of the car involved in an accident case disappeared and the claimant belonged to another district and is also handicapped, no adverse inference can be drawn from the non-production of the driver as a witness [*Kundan Bala v. State of U.P.*, A 1983 All 409, 411; *National Insurance Company Ltd v. Durdadshya Kumar Samal*, A 1988 Ori 229, 230 : 1988 ACJ 540].

In a case of an accident involving a tractor, the tractor admittedly belonged to *A* and it was established from evidence that it was being driven by *B*. When no witness was examined to contest the claim of the heirs of the deceased, it has to be presumed that the tractor was being driven by *B* for and on behalf of *A* [*Amt Kara v. Prem Singh*, A 1984 Punj 425]. When a Motor Accidents Claims Tribunal is confronted with the vexed controversy of apportioning blame, amongst the two vehicles involved in the accident, it is clearly the duty of both parties to place before it the best evidence available. A party may refrain from doing so, but only on peril of an adverse inference being drawn against it [*Smt Bhagwani Devi v. Krishna Kumar Saini*, A 1985 P&H 347, 348]. In a motor accident case, the burden is heavy upon the owner of the vehicle to bring on record material showing that he had taken all due care, as a prudent employer to ensure that it was entrusting the bus to be driven by a person who was capable in all respects to do so [*Rachna v. Himachal Road Transport Corp.*, A 1991 HP 73, 80]. The principle of the *Res Ipsa Loquitur* means that an accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes and in such a case the mere fact of accident is *prima facie* evidence of negligence [*Khedut Oil Cake Industries v. Union of India*, A 1988 Del 88, 91 : (1987) 32 DLT 297]. After a Commissioner was appointed to examine a witness in an election petition, the witness was suspended and transferred to a distant place. When the opposite party is not obliged to explain why that witness was suspended or transferred, no adverse inference could be drawn against him [*Brij Mohan v. Mangeram*, A 1985 SC 887, 889].

Non-examination of I.O.—Non-examination of I.O. does not *per se* vitiate the trial [*Bihari Pd v. State*, A 1996 SC 2905 : 1996 Cri LJ 1653, 1659]. Non-examination of the I.O. is fatal to the prosecution where the prosecution witness gave contradictory statements in the court from the statements recorded by the I.O. [*Harku*

v. State of Rajasthan, 1994 Cri LJ 2141, 2146]. In *J.K. Devariya v. The State of Coog*, A 1956 Mys 51 : (1956 Cri LJ 904), a single Bench of Mysore High Court held that the accused is entitled to know from the investigating officer what witnesses have been examined by him during the course of investigation and whether the witnesses examined in the Court were examined by him or not and what story they gave and whether the same is consistent with the evidence produced in the Court. The Court further held that in this case the non-examination of the investigating officer is a serious omission on the part of the prosecution.

In *Harnam Singh v. State*, 1982 Cri LJ 1818 two witnesses were confornted with their earlier statement recorded during the investigation by the Investigating Officer and the Investigating Officer was not examined. The Single Bench of Allahabad High Court held that as the statements of the witnesses were recorded by the Investigating Officer during the investigation, it was, therefore, necessary on the part of the prosecution to have examined the Investigating Officer. By not examining the Investigating Officer concerned, the prosecution has clearly prejudiced the case of the appellant in as much as they have denied the opportunity of proving the statement of those two witnesses to prove whether the same were made by them or not.

In *Bhopal Singh v. The State of Rajasthan*, 1989 (I) RLR 492, a single Bench of the Rajasthan High Court has taken the view that the Investigating Officer is a very important witness and if he is not examined and does not prove the case, the entire case of the prosecution falls on this ground. The learned single Judge of this Court held that had the Investigating Officer been examined, there could be chances for the accused to show that the entire prosecution story was a concocted one. He could be put to cross-examination and some material aspect could have come out from his evidence and the non-examination of the Investigating Officer is fatal to the prosecution case which goes to the root of the case.

In *Harku v. State of Rajasthan*, 1994 Cri LJ 2141, 2146, the Division Bench did not subscribe to the view taken by the Single Judge in *Bhopal Singh's* case that in all the cases the non-examination of the Investigating Officer is fatal to the prosecution case even where the witnesses produced during the trial have admitted their statement made by them and they have not been confronted by their earlier statements.

In *Channan Singh v. State of Rajasthan*, 1992 Cri LR (Raj) 332 (DB) the Investigating Officer, who conducted the investigation and filed the challan was not examined by the prosecution in the Court to explain the infirmity put to the witnesses in the cross-examination regarding lodging of the report by the informant and delay in reaching the First Information Report to the Court, which was held to be a serious infirmity which remained unexplained and which resulted in raising a suspicion regarding the institution of the report at the time and the date when it was shown to be registered.

Two young men were convicted of causing grievous bodily harm with intent following a fight in a nightclub. At the beginning of the trial, the prosecution told the defence that they would not be calling one witness in particular, who was a friend of the defendants. The defendants' counsel asked the judge to order the prosecution to tender the witness. The judge invited the prosecution to tender the witness but declined to order him to appear. It was held that the counsel for the prosecution was not obliged to offer a witness upon whom the Crown did not rely merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown did rely. The Crown's obligation was to make such witnesses available to the defence so that the defence could call them if it wished to. In the present case, the judge's decisions not to overrule the decision of prosecuting counsel and not to call

the witness himself were well within his discretion, and the present court would have decided similarly. There was no reason to suppose that the defendants' conviction was unsafe by reason of those decisions of the judge or otherwise [*R v. Brown (Matthew); R v. Brown (Daniel),* (1997) 1 Cr App R 112 (CA). The court **followed** *R v. Russell-Jones* (1995)1 Cr App R 538, CA.

Criminal Cases.—The rule referred to in *illustration (g)* applies to both civil and criminal cases, but its application to criminal cases must be attended with great caution. "Whatever weight may be legitimately attached to this presumption in civil cases, great care must be taken in criminal cases, where life or liberty are at stake, not to attribute to spoliation, or similar acts, any force to which they are not entitled. Undoubtedly, the suppression or fabrication of evidence by a party accused of a crime is always a *circumstance*, frequently a more powerful one, to prove his guilt; but many instances have occurred of innocent persons—alarmed at a body of evidence against them which, although false or inconclusive, they felt themselves unable to refute—having recourse to the suppression or destruction of criminative, and even to the fabrication of exculpatory testimony" [Best 11th Ed s 415]. A remarkable instance of this is to be found at p 401 *ibid.*

Where the accused was apprehended from a public thoroughfare, non-examination of any independent public witness would not lead to any adverse inference when there was no suggestion given to the witness examined by the prosecution that at the relevant time, the members of the public were present at the spot and it was a case of sudden apprehension without any independent public witness [*Kaka Singh v. State of Haryana*, A 1995 SC 1948, 1949 : 1995 Cri LJ 3234]. The prosecution is not required to keep back witnesses only because they are likely to go against the prosecution [*Jaspal Singh & Ors. v. State (Del Admn.),* 1994 (1) Crimes 126]. Non production of material witness who developed chance finger prints raises a strong presumption against the prosecution [*Raju Ram v. State of Rajasthan*, 1994 Cri LJ 2348, 2355]. Where the material produced by the prosecution is itself sufficient, section 114(g) cannot come to the assistance of the accused [*State of Maharashtra v. Jethmal Himatmal Jain*, 1994 Cri LJ 2613, 2623 (Bom)]. Non-examination of a witness who arrived at the spot after the incident and could not have thrown any light on actual happening in inconsequential [*Ram Kumar v. State of Haryana*, A 1996 SC 3185 : 1996 Cri LJ 2441, 2445]. Non-Examination of a witness who arrived at the spot after the incident and could not have thrown any light on actual happening is inconsequential. [*Ram Kumar v. State of Haryana*, A 1996 SC 3185 : 1996 Cri LJ 2441, 2445]. Non-examination of a witness who had been cited by the prosecution would result in an adverse inference being drawn and may in some cases result in prejudice to the defence. But where the witness, who merely recovered the body from the will, is not such an important witness whose non-examinations could be said to have caused any prejudice to the accused [*Tej Prakash v. State of Haryana*, 1996 Cri LJ 394, 399]. Where the allegation of the complainant that the accused cancelled the marriage for non fulfilment of dowry demand was based on a letter written by the accused failure to produce such letter invites adverse presumption against the complainant that had he produced the letter, the same would have belied his evidence [*S. Gopal Reddy v. State of A.P.*, A 1996 SC 2184 : 1996 Cri LJ 3237, 3245].

Adverse inference against the prosecution can only be drawn if it withholds certain evidence and not merely on account of failure to obtain certain evidence [*Poon Yuen Chung v. Public Prosecutor*, Cri Appeal No 60 of 1993 dt. 21.2.1994 (Singapore CA)]. Failure of the prosecution to call material witness will attract the adverse presumption under section 114 (g) [*Tan Puan Chee v. Public Prosecutor*, (1981) 2

Malayan LJ 282 (Kuala Lumpur HC)]. Failure to produce FIR would raise the presumption of s. 114 (g) [*Public Prosecutor v. Abdul Razak*, (1991) 1 Malayan LJ 105 (Kuala Lumpur HC)]. The prosecution is not relieved of the adverse presumption by merely making available a witness to the defence, only in cases when they are unable to establish a *prima facie* case [*Jazuli Bin Mohsin v. Public Prosecutor*, (1990) 2 Malayan LJ 190 (Malacca HC)]. Where the tap-recording was not produced and no reason was given by the prosecution why it was not produced, an adverse inference should be drawn [*Dato Yap Peng v. Public Prosecutor*, (1993) 1 Malayan LJ 387 (Kuala Lumpur HC)]. The application of 'adverse inference' does not mean that all the evidence of the prosecution witness must be destroyed [*Pendakwa Raya v. Lee Chee Chong*, Cri Trial No 58-3-92 dt. 1.6.1995 (Ipoh HC)]. If a witness is deliberately obstructed an adverse presumption can be raised [*Wong Chong Chow v. Pan-Malaysian Cement Works Bhd*, (1980) 2 Malayan LJ 75 (Kuala Lumpur FC)].

Merely because a material witness was not examined by the prosecution a criminal court is not to lean to draw the adverse inference that if he was examined he would have given a contrary version. The Illustration *(g)* of section 114 is only a permissible inference and not a necessary inference. Unless there are other circumstances also to facilitate the drawing of an adverse inference, it should not be a mechanical process to draw the adverse inference merely on the strength of non-examination of a witness even if it is material witness [*Harpal Singh v. Devindra Singh*, A 1997 SC 2914, 2919 : 1997 Cri LJ 3561. See also *State of Karnataka v. Moin Patel*, 1996 A SCW 1411]. Where it was alleged that the prosecutrix was raped in the same room where her husband was sleeping, failure to examine her husband before court to corroborate her evidence was fatal to the case of the prosecution and in any event adverse inference can be drawn [*Vijayan v. State*, 1993 Cri LJ 2364, 2373 (Mad)]. Where the evidence of independent witnesses clearly proves the fact of negligence on the part of the driver of the lorry-oil tanker non-examination of the driver of the car (with whom the oil tanker collided) is of no consequence [*T.M. Musuriparabil v. M.V. Narasimha Rao*, 1996 AIHC 732, 734 (AP)]. Merely because a person, who would have been a material witness, was not examined by the prosecution, a criminal court is not lean to draw the adverse inference that if he was examined he would have given a contrary version. The Illustration (g) in section 114 is only a permissible inference and not a necessary inference. Unless there are other circumstances also to facilitate the drawing of an adverse inference it should not be a mechanical process to draw the adverse inference merely on the strength of non-examination of a witness even if it is material witness [*Harpal Singh v. Devinder Singh*, A 1997 SC 2914 : 1997 Cri LJ 3561].

In case of challenge to order of preventive detention, it is the first and foremost duty of the detenu and his counsel to bring on record all the relevant documents including the detention order which are in their possession and where such documents, are deliberately withheld by them from the court, a strong presumption is available to the court that the pleas taken on the basis of such documents are either unfounded or taken for the sake of it [*Ghulam Muhammad Wani v. State of J&K*, 1997 AIHC 1227].

In criminal cases also an adverse inference will be drawn, if the prosecution does not call witnesses, who are able to prove the connection of the accused with the offence charged and to give information; but no such unfavourable inference will be drawn under similar circumstances, against the accused. It is the *prima facie* duty of the prosecution to call all the witnesses who must be able to give important information in connexion with the transaction in question [*Sawal v. S*, A 1974 SC 778; *R v. Dhunno Kazi*, 8 C 121 : 10 CLR 151 (**discussed and explained** in *Ram Ranjan v. R*,

42 C 422); *R v. Tulla*,.7 A 904; *R v. Zauar Hossein*, 20 A 155; *R v. Ram Sahal*, 10 C 1070; *Ma Htaway v. R*, 86 IC 475 : A 1925 B 205; *Taj v. R*, 15 L 407; *Nga Aung v. R*, 14 R 45; *Nga Kan v. R*, A 1937 R 139; *Keshwar v. R*, 58 IC 247; *Ramjit v. R*, 2 P 309. See also *Hurry Churn v. R*, 10 C 140 : 13 CLR 428, where it was held that it was entirely open to the defence to adduce no evidence at all]. Where evidence of interested eye-witnesses suffered from various infirmities and independent witnesses were not examined for corroboration adverse inference would be drawn [*Bir Singh v. S*, A 1978 SC 59]. Where evidence of two eye-witnesses was found to be absolutely credit-worthy and truthful there would be no adverse inference for mere non-examination of some of the eye-witnesses mentioned in FIR [*Pal Singh v. S*, A 1979 SC 1116; *Ibrahim Kutty v. State of Kerala*, 1984 Cri LJ 221, 225 : 1983 Ker LJ 655 (Ker) (DB); *Dulal Chandra Ghosh v. The State*, 1988 Cri LJ 1835, 1843 (Cal); *Khazan Singh v. State of Punjab*, 1989 Cri LJ 1555, 1557 (Punj); *Mohammed v. State of Karnatak*, 1991 Cri LJ NOC 14 (Kant)]. Non-examination of some prosecution witnesses who might have given a further description of how things happened would not justify the conclusion that the omission was on oblique motive [*Dalmia v. Delhi Admn*, A 1962 SC 1821]. Where the plaintiff had actually examined some eye-witnesses to the occurrence which had taken place in a thickly populated area in order to draw an inference adverse against the plaintiff for having failed to examine more witnesses it has to be established that there was competent evidence which was deliberately withheld [*S v. Ram Ajodhya*, A 1965 C 348]. The fact that the statement of a witness was recorded 2 days after the incident cannot give rise to any inference that the presence of this witness at the spot was unnatural or improbable especially when the name of this witness was disclosed in the first information report [*Narpatsingh v. State of Rajasthan*, 1990 Cri LJ 2720, 2725 (Raj)].

Mere expectation of his evidence being inconsistent with prosecution story is no justification for not examining him [*Hector v. R*, A 1937, A 182], or the fact that the witness turned hostile in the committing court [*Sarfaraz v. R*, A 1941 O 599], or the possibility or even probability of the eye witness being untrue in some respects [*R v. Gayaddin*, 1941 OWN 101]. As to the duty of a Public Prosecutor in regard to a witness who has in his opinion committed perjury by giving hostile evidence in the lower court, see *In re Guruswami*, A 1941 M 765. The fact that certain persons are mentioned in the first information report as witnesses does not, in itself make it necessary for the prosecution to call any of them. Nor does it give rise to presumption under s 114(g). The only witnesses the prosecution need call are those who know the facts and are able and willing to give truthful evidence relevant to the charge [*Girish Ch v. R*, 58 C 1335: see also *Nafar v. R*, 36 CWN 1038]. It is absurd to expect prosecution to call witnesses who will speak against their case. If the prosecution find that a number of witnesses who were present are truthful witnesses and would not support their case they ought to withdraw the prosecution forthwith. If on the other hand they come to the conclusion that they are not truthful witnesses, there is no obligation for the prosecution to call them. On the other hand if the defence comes to the conclusion that the witnesses are witnesses of truth who ought to have been called, then it is their duty to call them [*Bhuban v. R*, 37 CWN 1098 : A 1933 C 600; *In re Muthaya*, A 1927 M 475 : 100 IC 53].

Merely because the complainant and a witness belong to the same *patti* does not mean that they are related to each other [*Sarupchand v. State of Punjab*, A 1987 SC 1441 : 1987 Cri LJ 1180]. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix in a rape case, it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. But if a prosecutrix is an adult and of full understanding the

Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy [*State of Maharashtra v. Chandra Prakash Kewal Chand*, A 1990 SC 658, 665]. In view of s 114A of the prosecutrix states in her evidence that she did not consent to the sexual intercourse, the onus to prove consent lies on the accused [*Nawabkhan v. State*, 1990 Cri LJ 1179, 1181 (MP)].

Where the prosecution has reason to believe that the inmates of accused's house if examined would not tell the truth, that is sufficient cause for omitting to call them [*R v. Balaram*, 49 C 358]. The prosecution cannot be forced to put forward a witness on whose evidence reliance cannot be placed. It is sufficient if the prosecution makes such witness to be present in court, so that the defence may call him if they like [*R v. Kali Prosunna*, 14 C 245 (approved in *R v. Staton & Flynn*, 14 A 521 : 12 AWN 110, and **referred** to in *R v. Durga*, 16 A 84 FB : 14 AWN 7); see *Nga Aung v. R*, 14 R 45; *Brahmaya v. R*, A 1938 R 442].

In *Ramranjan v. R*, 42 C 422 it was broadly laid down that it is undoubtedly the duty of the prosecution in a capital case to place before the court all available eye—witnesses irrespective of their evidence being favourable or unfavourable. It will appear from the above cases that there was not unanimity of judicial opinion on the point. The matter may now be regarded as settled by the Judicial Committee who have held (disapproving, *Ramranjan v. R, ante*) that although witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether the effect of their testimony is for or against the prosecution case, still speaking generally the prosecution is not bound to call all available eye witnesses irrespective of consideration of number and of reliability. Only confusion can result if the prosecution does so under a supposed obligation to call all such witnesses and then proceeds to discredit them by cross-examination [*Seneviratne v. R*, 41 CWN 65 : A 1936 PC 289; **relied** on in *Habeeb Md v. S*, A 1954 SC 51]. In a later case also it has been ruled that there is no obligation on the prosecution to examine all the witnesses whose names were on the information, but who were not called. The prosecution has a discretion as to what witnesses should be called, and the court will not interfere unless it is shown that the prosecution has been influenced by some oblique motive [*Adel Md v. Att-Genl of Palestine*, 1944 AC 156; 1944, 2 All ER 139 : A 1945 PC 42 : 1944 ALJ 466 (**relied** on in *Malak v. R*, A 1946 PC 16 : 50 CWN 145); *Bakhshish v. S*, A 1957 SC 904 : 1958 SCR 409; *Narain v. S*, A 1959 SC 484; *Masalti v. S*, A 1965 SC 202; *S v. Bhola*, A 1969 Raj 219; *State of Maharashtra v. Vithal Pandurang Bhagat*, 1985 Cri LJ 664, 677 (Bom) (DB); *Gaganand Maganlal Mehta v. State of Gujrat*, 1987 Cri LJ 374, 383 : 1983 Guj LH 479 (Guj) (DB)]. The earlier decisions on the point should therefore be considered in the light of the principles laid down by the Judicial Committee. [See *R v. Kasamalli*, 1942 Bom 384; *Ramdeo v. R*, 21 P 258 : A 1942 P 481 and *post* s 135: *"Examination of Witnesses in Criminal Cases"*].

The duty of the prosecutor is to assist the court in reaching a proper conclusion. It is open to the prosecutor not to examine witnesses who in his opinion have not witnessed the incident, but he should never adopt the device of keeping back eye witnesses only because their evidence is likely to go against the prosecution. Where a large number of persons have witnessed the incident, it is open to him to make a selection which must, however, be fair and honest and not with a view to suppress inconvenient witnesses. Therefore, if it is shown that persons who had witnessed the incident have been deliberately kept back, the court may draw an adverse inference and in a proper case record such failure as constituting a serious infirmity in the proof of the prosecution case [*Karnesh v. S*, A 1968 SC 1402 (*Darya v. S*, A 1965 SC 328; *Habeeb Md v. S*, A 1954 SC 51 **rel** on)].

Where certain witnesses of the occurrence are not called, the prosecution ought to give explanation, and if the explanation is unsatisfactory there would be presumption against the prosecution [*Dhirendra v. S*, A 1952 C 621]. Dropping of a witness is not material when that witness in his statement to the police had implicated two accused persons who were acquitted [*Gurmaj Singh v. State of Punjab*, 1992 Cri LJ 293, 297 (SC)]. Where prosecution fails to produce an important witness, the court is justified in making the presumption that if he were produced his evidence would not be favourable to the prosecution [*R v. Amolak*, 51 IC 979 : 20 CrLJ 519; *Jogi Raut v. R*, 105 IC 234 (P); *Taj Md v. R*, A 1928 L 125; *Krishna v. R*, A 1929 P 65; *Ong Boon v. R*, A 1937 R 280; *Tul Mohan Ram v. State*, 1981 CriLJ NOC 223 (Del); *State of Orissa v. Ramesh Chandra Mahapatra*, 1983 Cri LJ NOC 191 (Ori) : (1983) 56 Cut LT 60; *Bhanda Gardh v. State of Assam*, 1984 Cri LJ 217, 220 (Gauh); *Atma Ram v. State of U.P.*, 1984 Cri LJ NOC 95 : 1984 UP Cri R 85 (All); *Dhaneswar Phykan v. State of Assam*, 1984 Cri LJ NOC 161 (Gauh) (DB); *Jul Bahadur Rai v. Dawa Tshering Lepcha*, A 1986 Sikkim 18, 21]. But before such adverse inference can be drawn, it must be proved to the Court that material witnesses had actually seen the occurrence, but had been deliberately withheld from the witness box by the prosecution. [*Pattad Amarappa v. State of Karnataka*, A 1989 SC 2004, 2012 : 1989 Cri LJ 2167] and the jury should be directed that such a presumption may arise [*Hachuni v. R*, 34 CWN 390]. If witnesses are not deliberately withheld or unfairly kept back and reasonable explanation is given by the prosecution for non-examination of material witness no doubt is thrown on the prosecution case [*Dalbir v. S*, A 1977 SC 472; *Kandak Nami Babu v. State of Orissa*, 1982 Cri LJ NOC 135 (Ori); *Moirangthem Tomba Singh v. State of Manipur*, 1984 Cri LJ 536, 540 (Gauh) (DB); *Dambarudhar Mahanta v. State*, 1984 Cri LJ NOC 67 : 1983 Cur LR (Cri) 321 (Ori)]. The real test will be whether there was any conscious attempt to suppress facts from court by not tendering a particular piece of evidence. [*Dasari v. State of Kerala*, 1987 Cri LJ 180, 187 : 1986 Ker LT 598 (Ker) (DB)].

Some of the persons who were named in the First information Report as eye-witnesses were not examined. But when it appeared that there is a faction in the village and consequently other persons were not forthcoming to give evidence, no adverse inference could be drawn against the prosecution from the non-examination of other persons mentioned in the First Information Report. [*Ram Avatar Rai v. State of U.P.*, A 1985 SC 880, 882 : 1985 Cri LJ 902: 1985 All LJ 241]. When the accused was apprehended on the spot by the victim and others the non-examination of some of the witnesses is not material. [*Lakhvinder Singh v. State*, 1988 Cri LJ 319, 320 (Del)]. The omission in not telling the jury that they may draw an inference unfavourable to the prosecution from non-production of material witnesses at the trial, is a misdirection [*Tenaram v. R*, 33 CLJ 180 : 61 IC 1003; see *Yusuf Mia v. R*, A 1938 P 579; *Dasrath v. R*, 34 C 325]. If a party wishes to avoid the presumption, he should exhaust every means to procure the attendance of the witness [*Jogendra v. Kurpal*, 49 C 345 : 35 CLJ 175]. Where a necessary witness mysteriously disappears, the court may properly draw an inference adverse to the prosecution [*Indar v. R*, A 1931 L 408 : 132 IC 185]. Where the necessary steps to trace out and to examine a material witness had been taken and the witness could not be traced, no adverse inference can be drawn for non-examination of that witness. [*Ramchandra Pradhan v. The State*, 1982 Cri LJ NOC 153 (Ori)]. When a prosecution witness deposes that he had received a letter containing alleged threat of murder given to the deceased and that it was in possession of the police but the prosecution did not produce the letter in court then the reasonable inference would be that the letter did not contain such a threat and its production would falsify the witness to that extent [*Ramdas v. S*, A 1977 SC 1164]. In case of failure or omission to preserve the solution used for the

experiment as regards detection of Phenolphthalein powder on the person or clothes of the accused or anything that he has touched, it is open to the court to raise an adverse inference depending upon the facts and circumstances of each case [*Rameshchandra v. S*, A 1980 G 1 FB].

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 affect the probative value of the evidence of other prosecution witnesses. [*Allauddin Mian v. Sharit Mian*, A 1989 SC 1456, 1463 : 1989 Cri LJ 1466]. Non-examination of the most material witness to prove the defence version is the strongest possible circumstance to discredit the defence version [*Gajendra v. S*, A 1975 SC 1703]. Mere presentation of an application that a witness had been won over was not conclusive. In such a case the witness should be produced for cross-examination by the accused which would elicit correct facts [*S v. Jaggo*, A 1971 SC 1586]. Delay in test indentification parade will not lead to any inference if evidence regarding identification is otherwise acceptable. [*State v. Pravakarbehera*, 1991 Cri LJ 745, 746 (Ori)]. When it is not shown or suggested that the accused were earlier brought before the court with his face muffled, the refusal of the accused to participate in the test identification parade will not lead to any adverse inference being drawn that if he had participated in the test identification parade he would have been identified by the witnesses. [*Latan Yadav v. State (Delhi Admn.)*, 1985 Cri LJ 484, 487 : (1984) 2 Crimes 226 (Del)]. When it is alleged that the accused refused to participate in the test identification parade, an adverse inference can be drawn only if the Magistrate is examined to prove such refusal. [*Rajinder Kumar v. State*, 1983 Cri LJ NOC 3 (Del) : (1983) 23 DLT 42]. If a party refuses to submit to blood test, the court may infer that some impediment existed which pointed towards the implication of the accused. [*Miss Swatimlodha v. State of Rajasthan*, 1991 Cri LJ 939, 949 (Raj)]. When the defence did not put any question to the prosecution witnesses that they had made any contradictory statement before the Investigating Officer it could not be said that the non-examination of the Investigating Officer was fatal. [*Fahim Husain v. State of U.P.*, 1984 Cri LJ NOC 154 : 1984 All Cri C 312 (All); *Basant Singh v. State of Bihar*, 1985 Cri LJ 1406, 1410 : (1985) BBCJ (HC) 147 (Pat) (DB)].

The evidence of an Inspector of Police who only assisted the Dy Supt of Police in the investigation was dispensed with. When some comment was made on his non-examination, the prosecution offerred him for cross-examination by the accused. But the defence counsel said that he did not want to cross-examine. After this it is not open to the accused to comment upon the so-called failure of the prosecution to examine that Inspector. [*State of Gujarat v. Raghunathan Vamanrao Baxi*, A 1985 SC 1092, 1095 : 1985 Cri LJ 1357]. In a case under Narcotic Drugs and Psychotropic Substances Act, the two Inspectors who lead the raiding party were withheld. But since those two Inspectors would have proved some facts which have been sought to be proved by three other witnesses, no adverse inference can be drawn on account the withholding these two witnesses. [*Waisuddin v. State*, 1991 Cri LJ 134, 136 (Delhi)]. No adverse inference could be drawn against the prosecution for non-examination of witnesses who have been gained over by the accused. [*Sadek Sk. v. The State*, 1984 Cri LJ 29, 31 (Cal) (DB)]. When the defence never questioned the prosecution statement that a witness was won over by the accused, no adverse inference can be drawn on account of non-examination of a witness. [*Gurmej Singh v. State of Punjab*, A 1992 SC 214, 218]. When the materials seized from the house of the accused are not commonly available in the market, a presumption that the possession was unlawful can be made [*Rasamando Bindhani v. State of Orissa*, A 1992 Cri LJ 121, 122 (Ori)].

When the defence contended that the FIR produced in court is something different from the original FIR, the court directed the Sub Inspector to produce the FIR Book. The non-production of the FIR book, and General Diary will show that if they had been produced, it would have dispelled the suspicion. [*Sevi v. State of Tamil Nadu*, A 1981 SC 1230 : 1232 : 1981 Cri LJ 736]. Absence of production of the shirt of the accused containing a dot of blood and also the knife recovered on the confession of the accused leads to an adverse inference against the prosecution. [*Jagan Nath v. State of Himachal Pradesh*, 1982 Cri LJ 2289, 2292 : (1982) 9 Cri LT 225 (HP)]. When the prosecution witnesses have given evidence of seeing a lantern burning in the room where the murder took place, the absence of the wick and chimney when the lantern was produced in Court, the obvious inference will be that the chimney would have been broken and the wick lost when the lantern was kept in the property room of the Court. [*State of U.P. v. Chet Ram*, A 1989 SC 1543, 1550 : 1989 Cri LJ 1785]. In the case of criminal breach of trust by the employee of State Road Transport Corporation the prosecution has failed to eliminate the various alternative possibilities which may account for the alleged shortage. The prosecution failed to produce the audit report and an adverse inference has to be drawn. [*Jitendra Nath Bore v. State*, 1991 Cri LJ 922, 932 (Cal)]. The accused pleaded insanity when he committed the murders. It is the bounden duty of the prosecution to lead evidence as regards the mental state of the accused for proving the requisite *mens rea*. No evidence was let in on that aspect. The evidennce which could have thrown light has been kept back and so an adverse inference has to be drawn. [*Ramilaben v. State of Gujarat*, 1991 Cri LJ 2219, 2224 (Guj)]. When the report of the Magistrate who accompanied the trap party was not produced an adverse inference has to be drawn. [*Balaram Singh v. State of Orissa*, 1984 Cri LJ NOC 21 : (1983) 56 Cut LT 372].

—Presumption From Suppression, Destruction or Fabrication of Evidence.— Where a person is proved to have suppressed any species of evidence, or to have defeated or destroyed any written instrument, a presumption will arise that if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of the circumstances. So where a vessel was seized on suspicion of having a greater quantity of salt on hoard than was allowed by its permit, and immediately afterwards a number of men boarded the boat, and with the assistance of the agent of the owner threw a considerable quantity of salt overboard, a presumption arises that there was an excess of salt on board, at the time of the seizure, beyond the amount allowed by the permit [*Framji Harmasji v. Com of Customs*, 7 BHC 89].

A similar presumption will arise from destruction of a document by a party. Where the Collector had destroyed the document that purported to be a copy of a *sanad* such as the plaintiff petitioned the *mamlatdar* to search for—*Held* that it was not competent for the defendant to say that the document was not such a one as could legally be admitted in evidence, and that the case came within the rule *omina praesumuntur spoliatarem* [*Ardeshir v. Collr of Surat*, 3 BHCR 116]. The presumption applies only if the deed is in possession of a party and has been wilfully suppressed [*Ramji v. Mihin*, 71 IC 645]. Where a party suppresses a document, the court is bound to make every presumption, consistent with facts against the party [*Kalikanand v. Shivanandan*, 63 IC 625]. Where a will is suppressed by a person who is in a position to produce it, it may be presumed that the will would be unfavourable to that person [*Pechett v. Veerapragada*, 16 IC 815]. Where in a mortgage suit, the defendant pleads discharge and the document is found to be tampered with and is in possession of the mortgagor and the mortgagee is unable to account for the mortgagor's possession, there is a presumption of discharge [*Habib*

Md v. Mutha, 16 IC 439]. An attempt to fabricate evidence of *alibi* is a strong piece of evidence against the accused [*Majhi v. R*, 86 IC 344 : A 1925 L 323; see however *Tabri v. R*, 84 IC 937 : A 1925 L 42]. It would be clearly wrong to tell the jury that if they were of opinion that alibi was not established it would raise a presumption against the accused of complicity in the crime [*R v. Taribulla*, 25 CWN 682]. When the initial FIR was suppressed and a later FIR was filed after delay an adverse inference can be drawn. [*Narayan Behera v. State*, 1985 Cri LJ NOC 50 : (1984) 2 Crimes 59 (Ori)]. When the timings mentioned in the FIR have been changed, it throws doubt on the investigation. [*Satya Narain v. State*, 1985 Cri LJ 966 : 1985 All Cri R 178 (All) (DB)]. The fact that the First Informcation Report sent to Court does not contain the Magistrate's endorsement regarding the time of its receipts does not lead to any adverse inference when the Head Constable has given evidence that the special report was despatched to the Magistrate at a particular time through a constable and that the General Diary contains an entry to that effect. [*Subash v. State of U.P.*, A 1987 SC 1222, 1225 : 1987 Cri LJ 991]. When the defendant deliberately suppressed the account books, the court is entitled to draw adverse inference. [*A.S. Duraisami Chettiar Sons v. S. Rathnaswami Gounder*, A 1992 Mad 132, 135].

ILLUSTRATION (H): [Refusal to Answer].—The court may presume that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given would be unfavourable to him. As to questions which one is not compelled to answer by law see ss 121-129. Refusal to answer a question is generally a legitimate ground of unfavourable inference against the person who may answer the question. As a witness's refusal to answer and the court's power to draw inference from such refusal, see s 148(4) *post* which is the same as this illustration. They should be read together. An accused cannot defeat the ends of justice by merely refusing to answer question. The court may draw reasonable inferences from his refusal under s 342 Cr P Code and s 114 *illus (h)* [*Sher Jang v. R*, A 1931 L 178]. As to whether silence of accused amounts to admission see *ante* s 8: "*Silent acquiescence when amounts to admission*". As to examination of witnesses by police, see ss 161, 175 Cr P Code.

The refusal of witness to answer substantially a proper and material interrogatory is sometimes held ground for suppressing the deposition [*Harris v. Miller*, 30 Ala 221]. But a contrary rule has been declared by high authority on the ground that a party should not be punished for the misconduct of its witness, but that the witness, in such cases, should be punished for contempt of court [*Keller v. Goodrich Co*, 10 Am St Rep 88]. While the refusal to answer or the evasion of a question in answers may be so gross as to indicate the corruption of the witness and to justify the suppression of the entire deposition, this practice should not be resorted to, unless the perversity or wilfulness of the witness is manifest, although those answers which are evasive or not responsive may be stricken out [*Trowbridge v. Sickler*, 54 Wis 306; Jones 689]. In case of acquisition of fisheries in certain land it was expressly declared under section 6 of the Land Acquisition Act that the acquisition was for the public purpose of reclamation of salt take Area. It was found that which reclaiming the tank fisheries for public purpose, some of the displaced fishermen on the other lakes were sought to be rehabilitated in the lake in question by enabling them to catch the fish to earn livelihood. It was held that it would not be inconsistant with the declaration conclusiveness of which had been attached by operation of section 6(3) of Land Acquisition Act which was also consistent with Section 114(4) of Evidence Act [*Mrinalini Roy Ratna Prova Mondal v. State of W.B.*, A 1997 SC 2244].

ILLUSTRATION (I): [Documents in the Hands of Obligor].—There is a natural presumption that a person discharging his debt will generally protect himself

by securing the document creating the liability. So when a bond is produced by the obligor, the presumption is that it has been satisfied. When a bill of exchange is produced by the acceptor the presumption is that it has been paid [see s 81 N I Act and *Shearman v. Fleming*, 5 BLR 619]. Since in the ordinary course of dealing, securities are delivered to the debtor when paid or discharged, possession by the debtor, of the evidence of a debt, as a note, bond, bill or draft, raises the presumption of payment, and so when a person produces an order upon himself signed by another for the delivery of certain articles, the presumption is that such articles have been delivered [*Kincaid v. K*, 8 Humph (Tenu) 17; *Jones s* 70].

The *obligor's possession of the instrument* after maturity is usually said to raise a presumption of payment; but there are various limitations laid down, in particular, concerning the obligor's opportunity of surreptitious access to the obligee's papers [Wig s 2518]. The circumstances in each case, however, must determine, for the party offering the evidence must be one who would naturally have received the instrument from the party now seeking for payment. *Counter-explanations* may be shown by circumstances explaining the possession otherwise, as where the debtor has access to the place of custody of the instrument [Wig s 156]. When a maker had access to payee's papers as members of the family there is no presumption [*Grimes v. Hillary*, 1894, 150 Ill 141, 149]. Where a negotiable instrument is not endorsed, there is no presumption [*Roy v. Duff*, 1915, 170 Ia 319]. Possession of a note by a joint promisor is not presumptive of sole payment by him [*Bates v. Cain's Estate*, 1898, 40 All 30 cited Wig s 2518].

The production of a receipt for money is presumptive evidence of payment, but it is not conclusive and the opponent may furnish explanation or give rebutting evidence [*Udey v. Hari*, A 1930 L 443; see *Sitaram v. Nanka*, 50 A 145]. The presumption has much less force when raised between the debtor and the purchaser of the debt than when raised between the original creditor and debtor [*Bhanji v. Govind*, A 1933 N 379].

Where satisfaction is pleaded and the bond is in the hands of the obligor, who was not shown to have stolen it, the right presumption is that the obligation has been discharged [*Ganesh v. Khetoo*, 22 WR 265, 266; *Binayak v. Dinker*, 20 IC 308; *Ramkumar v. Ramnath*, A 1942 M 315; see *Rangappa v. Syed Imamuddin*, A 1934 N 29]. The presumption is subject to the qualification that the circusmtances that bond may have been stolen are to be considered [*Kali Parsad v. Narayan*, 104 IC 488]. Where the mortgagor produces the deed with endorsement of payment by mortgagee, the onus is on the plaintiff to prove that it was got by dishonest means and the endorsement was a forgery. The presumption under s 114 cannot be set aside by suspicion or speculative theory [*Chaudhuri Md v. Sri Mandir*, 39 IA 184 : 34 A 511 : 17 CWN 49]. Where defendant produced the bond and the plaintiff alleged theft of it, the fact of possession of title deeds by the plaintiff (which defendants had deposited at the time of mortgage) considerably weakened the presumption in defendant's favour [*Alwar v. Kothandopani*, 46 CLJ 292 PC : 105 IC 263 : 29 Bom LR 1388 : A 1927 PC 261]. Where the court believes the mortgagee's evidence that the debt has not been paid, there is no room for the application of the presumption [*Balkesia v. Mahant*, A 1937 P 9].

Where defendant produced the bond which had no endorsement and pleaded discharge, it was held that it did not follow that the production shifted the burden on plaintiff [*In re Para Thurunji*, 1915 MWN 638 : 30 IC 258; *Jagannath v. Amira*, A 1931 L 299]. This view does not appear to be entirely correct as the presumption in favour of the obligor necessarily throws the burden of rebutting it on the plaintiff by

proof that the document went into defendant's possession by dishonest means or if it contains any endorsement, that it was a forgery (see *Chaudhuri Md v. Sri Mandir*, 17 CWN 49 PC *sup*).

Both on general grounds and by reason of s 114 the burden is one which shifts easily as the evidence is developed [*Kundan Lal v. Begummunnissa*, 46 IA 33 : 46 C 663 : 21 Bom LR 605 : 36 MLJ 429 : 22 CWN 937]. The admission by the defendant of the drawing of the *hundi* for value received, laid on him the burden of proving payment, and that though the possession by the defendant of the *hundi* was a circumstance in his favour, yet as it did not in itself amount to proof of payment, the *onus probandi* was not thereby shifted to the plaintiff [*Abdul Karim v. Manji*, 1 B 295].

When the instrument of a debt and security for that debt are found in the hands of the debtor, the *prima facie* presumption is that the debt has been discharged. But there may be other circumstances to rebut the presumption [*Bhoy Hong Kong v. Ramanathan*, 29 IA 43 : 29 C 334 : 4 Bom LR 378 : 6 CWN 401; *Ramnath v. Raggha*, 68 IC 892; *Sara Upadhaya v. Firm*, A 1983 R 61]. The general presumption of payment of a bond, arising from its possession by the obligor, has much less force when raised between the debtor and the purchaser of the debt at a execution sale, than when raised between the original creditor and the debtor [*Debendra v. Roop Lall*, 12 C 546]. The fact that the original documents evidencing the grant remain in the hands of the grantees, gives rise to the presumption, especially after the lapse of a great period of time, that the grant remains in force [*Chokalingam v. Mayanandi*, 19 M 485]. In a suit upon a money-bond alleged to have been stolen by the defendant, the defendant admitting execution, pleaded payment—*Held* that the onus was on the defendant to prove payment either by the production of the bond or by other evidence [*Chuni Kuar v. Uddal Ram*, 6 A 73 (follld in *Jagannath v. Kamta*, 32 IC 349 and *Dhian Singh v. Gurdit*, 6 L 297 : 89 IC 234). See also *Ram Coomar v. Ram Sahaye*, 11 WR 151]. As to the presumption that a will which cannot be found has been revoked, see *Anwar v. Secy of S*, 31 C 885].

Illustrations Are Not Exhaustive.—The illustrations are not exhaustive. Nine of the most familiar illustrations are given by way of example. Numerous other presumptions may be drawn from the ordinary course of human conduct, natural events and our experience of the world. Some of them are noted below:—

Accounts.—Court may in proper cases raise a presumption of genuineness of old accounts coming from proper custody even though unsigned [*Dogar v. Sunam*, A 1944 L 58]. Presumption of accuracy attaching to Balance Sheet and Profit and Loss account is not applicable to auditor's certificate [*Metal Box Co v. Workmen*, A 1969 SC 612]. In the absence of evidence to show that reserves were non-existent or they were being utilised for purpose other than business of company the presumption is that they were being utilised as working capital of company [*Azam Jahi Mills Ld v. Workmen*, A 1967 SC 1222]. See *ante* p 1003. A plaintiff, who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration, should produce the said account books. If the account books are not produced a presumption can be drawn against him. *L Arumugam v. Chennagiri N. Govindaraj Shetty*, A 1992 K 347, 352. Where the evidence showed that the tenant was keeping accounts but he failed to produce the accounts of the business grant of permission for eviction on ground of the tenant having sufficient means by

drawing adverse inference against the tenant is not improper [*Prem Sagar v. Vijay Kumar Rajput*, 1998 AIHC 161 (Delhi)].

Accidental Death.—On being established that a person died of a cause such as drowning or a fall from a great height, presumption against violence or suicide must be raised in the absence of any evidence of rebuttal [*Rajanibai v. New India Ass Co*, A 1956 B 633]. In a suit against the Municipal Corporation of Delhi for damages on account of death of the plaintiff's son by electrocution by coming in contact with live naked wire connected with the pole, about which complaints had earlier been made, the defendants having failed to produce material docments *viz.* complaint register of hanging wire being separately maintained by the Delhi Electricity Supply Undertaking and the original complaint lodged by the plaintiff, an adverse inference can be drawn against the defendants [*Asa Ram v. M.C.D.*, A 1995 Del 164].

Advancement.—Owing to the widespread and persistent practice of making *benami* transfers for no obvious reason or apparent purpose, the presumption of advancement in English law when a person purchased property in the name of another in whom he is interested, does not arise in India whether the parties be Hindus or Mahomedans [*Azmut v. Aftuf Fatma*, 13 MIA 232, 247; *Azmut v. Hurdwaree*, 13 MIA 395; *Gopee Kristo v. Gunga Pd*, 6 MIA 53; *Kerwick v. K*, 47 IA 275 : 48 C 260; *Guran v. Ram*, 55 IA 944; *Naginbai v. Abdulla*, 6 B 717; *Nga Tin v. Nga Twe*, 9 Bur LT 95; *Ghulam v. Teja*, 73 PR 1918; *Rahiman v. Khatoon*, 35 IC 569; *Abdul v. Ma Kye*, 8 Bur LT 87; *Bhuban v. Kumudbala*, 28 CWN 131 : 89 CLJ 141; *Mollaya Padayachi v. Krishnaswami*, 85 IC 855 (M); *Salimunnisa v. Rugya*, A 1931 A 307; *Dharwar Bank Ltd v. Md Hayat*, A 1931 B 269; *Johnstone v. Gopal*, 12 L 546 : A 1931 L 419; *Sahdeo v. Usman*, A 1939 P 462; *Chandi v. Kali*, A 1949 A 733]. It does not also apply to Indian Christians [*Palani v. Natarajan*, A 1942 M 503]. Deposit by a Hindu of money in a bank in the joint names of himself and wife payable to either or survivor does not constitute gift. There is no presumption of advancement [*Sambhu v. Pushkar*, 49 CWN 27 : A 1945 PC 10].

Once it is proved that the consideration was provided by a person other than the transferee the *onus* is on the transferee to show that it was intended for the benefit of the transferee [*A Rangaswami v. A Subramania*, A 1975 M 141 (*Chitalu v. Saphur*, A 1938 M 8 **rel** on)]. A purchase of property in the name of a man's mistress raises no presumption of advancement. Her possession of the title deeds was of no importance as the deed was made out in her name [*Bilas v. Desraj*, 42 IA 202 : 19 CWN 1207 : 37 A 557]. Where the transaction relating to the advancement takes place between persons born in India of British parents residing practically all their lives in India, the rules of law applicable in England are applicable to it when tried in India, [*Kerwick v. K, sup*]. Presumption of advancement applies to persons of mixed European and Asiatic descent in the absence of any widespread practice of *benami* [*Sargon v. S*, A 1933 N 337].

[See notes to ss 101-104 *ante*, under *"Benami Transactions"*].

Agriculture.—In a claim for compensation for diminution in value of land due to placing of electric lines through the lands the court can presume that agriculatural operation in a reasonably profitable manner can be carried on in the affected land except growing tall trees. The burden is on the claimant to rebut the said presumption [*Arya Autherjanan v. Kerala State Electricity Board*, 1996 Ker 309, 318].

Attestation.—Attestation by itself neither creates estoppel nor implies consent. It does not involve knowledge of the contents of the deed or affect him with notice of its provisions [*Banga Ch v. Jagatkishore*, 43 IA 249 : 21 CWN 225, 231 : 44 C 186 :

31 MLJ 563 : 18 Bom LR 868; *Lakhpati v. Rambodh*, 37 A 350]. Where a testator made his son append their signatures to a will, although the position of the signatures created a presumption that they had been attached as attesting witnesses, it is capable of being rebutted by parol evidence [*Shiam v. Jagganath*, 47 CLJ 101 PC]. Where a man signs after another attestor, the presumption is that he signed as an attestor [*Veerappudayan v. Muthu*, 24 MLJ 534 : 19 IC 589; *Ayyesami v. Kylasam*, 26 IC 409]. See further, *post* notes to s 115 under "*Estoppel by Attestation and Consent.*"

Benami.—A purchase by an Indian husband of property in India in the name of his wife, unless otherwise explained is presumed to be a *benami* transaction [*Sura Lakshmiah v. Kothandarama*, 52 IA 286 : 29 CWN 1013 : 48 M 605 : 27 Bom LR 1076 : 42 CLJ 8 PC; see "*Advancement*" *ante* and notes to ss 101-104 under "*Benami transactions*", *ante*]. Distinguishing *Sura Lakshmiah's case* it has been held that a purchase by husband in the name of wife with his own funds with the object that it should belong to her and should not be within his reach, is not *benami* [*Thirumal v. Pichai*, A 1948 M 349 : 1948, 1 MLJ 364]. The case of benami between husband and wife cannot be put on a different footing from any other *benami* transactions. Where a portion of the residential house is occupied by both the husband and wife and the remaining portion by tenants who attorn to the wife it would be difficult, if not improbable, to raise the presumption that the house in dispute is in the possession only of the husband [*Auto Sales v. Sushila*, A 1966 A 278]. Where there is a clear picture as to source of passing of consideration in a transaction, long and continued possession though an important element for consideration does not raise any presumption of *benami* [*Biswanath v. Balai*, A 1973 C 345 (*Durgacharan v. Kharda Co*, A 1916 C 367 folld)]. The presumption of *benami* nature of the transaction can be rebutted if there is evidence to the effect that the other person purchased the properties with his own money, that he did not express any intention to the effect that the benamidars should be the real owners of the properties that the real purchaser has asserted his title and possession. [*Govinda Nath Mukherjee v. Souman Mukherjee*, A 1988 Cal 375, 385 (DB)]. There is a presumption that the person who pays the money is the real owner and not the person in whose name the property is purchased. [*Bhramar Pradhan v. Govinda Mahapatra*, A 1983 Ori 36, 39].

Birth.—In the case of a young woman giving birth to her first child entirely unattended, their is no presumption that it was born alive [*Hasan Pari v. R*, A 1941 Pesh 22]. Birth and death registers being public documents, presumption of correctness attaches to entries in them and heavy onus lies on the party wanting to dispute the presumption [*Bishwanath v. Dulhin*, A 1968 P 481; *Gopichand v. Bedamo*, A 1966 P 231; *Bujhawan v. Shyama*, A 1964 P 301]. The mere filing of a copy of the entry in the birth register does not prove *ipso facto* that the entry relates to or proves the birth of the person concerned; evidence has to be introduced to connect that entry with the person whose date of birth has to be established and that of the identity of the person under the entry must be established by other evidence. [*Laxmibai v. Thoroeppa*, A 1982 Kant 248, 250].

Celibacy.—[See *post*: "*Issue*"].

Child-bearing Age.—With respect to the period of life at which the possibility of having issue, without miraculous agency becomes in women extinct, no right presumption has been fixed by the law; but courts of equity, in directing the distribution of trust funds, have been in the habit of assuming that females, after arriving at the age of fifty three, are in general past child-bearing [*Haynes v. H*, 35 LJ Ch 303; Tay s 105. See also *Re Hocking*, 1898, 2 Ch 567 CA]. The question whether a woman is past the age of child-bearing depends on the peculiar circumstances of

each case [see *In re Thornhill*, 1904 WN 112 CA]. *In Re White* 1901, 1 Ch 570 the inference was drawn in the case of a female just over 56. In *Re Sumner*, 22 WR 639 and in *Re Millner*, LR 14 Eq 245 a woman was presumed to be barren at the age of 49 years and 9 months as she had been married for twenty-six years; and had never had a child. But in *Croxton v. May*, 9 Ch D 388 CA the inference was not drawn in the case of a woman just over 54 but who was married only three years.

"There is in the law of real property a rule by which, for the purpose of dealing with estates of remainder and the like a woman past some limit of age (usually fifty years or more), is regarded as *incapable of bearing children*, or before that age will not be considered as incapable; it is often spoken of as a conclusive presumption; but no fixed age is taken as the standard [Wig s 2528]. In England s 2 Perpetuities and Accumulations Act, 1964 enacts that in the law relating to the rule against perpetuities there will be a rebuttable presumption that a female can have a child at the age of twelve years or over, but not under that age or over the age of fifty-five and a male can have a child at the age of fourteen years or over, but not under that age. Women are commonly believed to be incapable of bearing child after menopause. But Dr. Marie C Stopes points out that the idea is mistaken. "This is proved by the fact that even after the menstruation has ceased a woman may become pregnant and bear a child, *ie* her menstruation has ceased, but the ovulation from the ovary has not." [Stope's Change of Life in Men and Women, 2nd Ed p 23]. In *Richards v. Safe Deposit & T Co*, 1903, 97 Md 608 (Am) [cited Wig s 2528]. Incapacity of child-bearing was not allowed to be investigated on the ground that "it would be exceedingly unsafe to permit property-rights to depend upon so precarious a basis."

There is no similar presumption with regard to the power of procreation of a man of any age. In *P v. N*, 31 LJ 690, NORTH, J, declined to presume that a man over 72 was past the possibility of issue or even to hear medical testimony on the point. This rule does not apply where the court is determining the rights of parties in law [*Re Whichelow*, 1954, 1 WLR 820; *Re Deloitte*, 1926, 1 Ch 56; Phip 11th Ed p 918]. In Stopes's book (*ibid* pp 73-74) instances of remarkably virile men of ages between 81-120 are given.

Conduct of witness.—Where a young girl aged 19 years was the eye-witness of murder of her father and brother, it was at that time not unlikely for her first to apprise her relations of the same and seek their help at that hour of distress and merely because she had not gone to the police station accompanic by the sarpanch of the village, as the High Court felt she should have done, it ought not to have been made a ground for drawing adverse conclusion against her conduct. Which clearly normal and natural [*State of Punjab v. Surja Ram*, A 1995 SC 2413, 2415, 2416].

Consideration.—In the case of documents executed by illiterate or ignorant persons likely to be dominated by others, the usual presumption under s 114 cannot be drawn [*Udebhan v. Vithoba*, A 1939 N 78]. It is very doubtful whether, in the case of registered sale deeds, a presumption could be drawn that the prices mentioned in the deeds were the prices actually paid having regard to the common course of human conduct and business, for it is notorious that parties often show a lower price in order to save stamp duty and registration charges if for nothing else [*S v. Mariamma*, A 1969 K 265]. Despite the failure of the plaintiff to establish that consideration passed in cash for the promissory note, he may get a decree on the basis of admission or evidence placed on record from the other side provided the same establishes that there was some other kind of consideration in lieu of which the

promissory note could be executed. [*Bishambar Dayal v. Vishwanth Agarwal*, A 1985 All 12, 15]. See *ante* notes to ss 101-104 under: "*Consideration*".

Co-owner's Possession.—Possession of one co-owner is in law presumed to be the possession of all co-owners. It does not constitute adverse possession unless it is established by unambiguous evidence that there has been a disclaimer of the latter's title by open assertion of a hostile title by the former or express ouster or repudiation of title, to the knowledge of the latter. Mere non-participation of profits and exclusive possession is not conclusive [See, *Corea v. Appuhami*, (1912) App Cas 230; *Muttu v. Brito*, (1918) App Cas 985; *Ahmed Raza v. Ramlal*, 37 A 203; *Bhaiji v. Hajimiya*, 14 Bom LR 314; *Syed Tajuddin v. Shk Ali*, 18 IC 388; *Suraj Bibi v. Tarap*, 26 IC 788; *Biseswar v. Bhagabati*, 24 CLJ 38; *Hidayat v. Khadar*, 30 IC 586; 21 CLJ 192; 35 C 961, 966; 12 CWN 126; 6 CLJ 646; 6 CLJ 735; *Jaineswar v. Satish*, 23 IC 562; *Chundar v. Tundi*, 21 IC 88; *Akbar v. Tabu*, 45 PR 1914; *Kumud v. Jogendra*, 18 CWN 609; *Kulada v. Sadhu*, 20 CLJ 32; *Muthukrishna v. Sankara*, 27 MLJ 600; *Giri Appaya v. Giri Kristamma*, 24 IC 436; *Ponnaswamy v. Permaye*, 16 MLT 530 : 20 MLJ 288; *Ketabdi v. Tola Bibi*, 38 IC 187; *Hardit v. Gurmukh*, 28 CLJ 437 PC : 20 Bom LR 1064 : 64 PR 1918; *Ahmuddin v. Amiruddin*, 44 IC 216; *Chintamani v. Hriday*, 29 CLJ 241; *Haidar v. Chand*, 50 IC 691; *Gobinda v. Upendra*, 23 CWN 977; *Lachmi v. Radha*, 51 IC 77; *Debendra v. Narendra*, 23 CWN 900; *Hari Pru v. Mi Aung*, 12 Bur LT 129; *Balaram v. Shama Charan*, 24 CWN 1057 : 33 CLJ 344; *Chandbhai v. Hasanbhai*, 46 B 213 : Bom LR 1033; *Joynarain v. Suchitraya*, 33 CLJ 592 : 26 CWN 206; *Jagannath v. Chandi*, 25 CWN 65 : 34 CLJ 432; *Shivalingappa v. Satyava*, 23 Bom LR 697; *Kailash v. Bijoy*, 36 CLJ 434; *Arab Ali v. Md Ali*, 43 MLJ 104 : 67 IC 444 : 24 Bom LR 951 : 35 CLJ 554 : A 1922 PC 84; *Jogendra v. Rajendra*, 26 CWN 890; *Shk Sachuni v. Shq Basir*, 64 IC 613; *Kuldip v. Rameswak*, 67 IC 796; *Jagdish v. Talyab*, 61 C 377; *Nirmal v. Mahitosh*, 40 CWN 777. See *Hardit v. Gurmukh*, 20 Bom LR 1064 : 47 IC 626 : 28 CLJ 437 : A 1918 PC 1; *Kuda v. Madan*, 51 CLJ 424 : 125 IC 739; *P Lakshmi Reddy v. L Lakshmi Reddy*, A 1957 SC 314; *Kunjamma v. Kasim*, A 1969 K 293 FB]. It cannot be presumed that price paid by the purchaser was more than what has been mentioned in the sale-deed [*Tata Chemicals Ltd., Bombay v. Sadhu Singh*, A 1994 All 66, 76]. It must be presumed that in relation to a business premises, when the tenant parts with the physical and legal possession in favour of somebody else, albeit his own brother, that parting must be for a valid consideration [*Dadabhai v. Sulochanaben Gopaldas Kothari*, A 1995 Guj 68, 73].

When the claimant co-owner has not been in participation of rents and profits for a very long time, there is a presumption of ouster [*Ramlakhan v. Bhaira Chatu*, 117 IC 636 : A 1929 P 624 (*Varda Pillai v. Jeevarthnammal*, 43 M 244 : A 1919 PC 44; *Sailaja v. Risheecase*, 51 C 135 **refd** to); *Velliyothummel v. Nadukandy*, A 1969 AP 222—case law discussed]. In 46 IA 285 : 43 M 244 *sup.* LORD CAVE pointed out the limits of the rule as defined in *Culley v. Doe*, 1840, 11 Ad & E 1008 thus: "Generally speaking one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the possession of the other, and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the judge will direct the jury to take into consideration whether they will presume that there has been an ouster." In the case of co-owners, mutation in the name of one co-owner would only raise a presumption of possession. [*Brajalal Singha v. Bhanumati Devi*, A 1985 Gau (NOC) 206].

Criminal Cases.—[See *ante*, notes to ss 101-104 under "*Criminal Cases*"]. No inference can be drawn against the accused from non-disclosure of defence in the preliminary enquiry [*Kumar v. R*, 102 IC 899 : A 1927 P 292]. In a murder case inferences to be drawn for non-explanation by prosecution of injuries sustained by accused stated [*Lakshmi v. S*, A 1976 SC 2263]. Even if the prosecution witnesses failed to explain the minor injuries found upon the person of the accused, no adverse inference can be drawn against the prosecution. [*Man Singh v. State of M.P.*, 1987 Cri LJ 6, 93, 695 : (1986) Cri LR (MP) 165; *Harbhajan v. State of M.P.*, 1989 Cri LJ 2205, 2209 : 1989 Jab LJ 217 (MP)]. When the injuries on the person of the accused are very serious and servere and not superficial and the injuries were caused at the time of occurrence, non-explanation of these injuries will lead to an adverse inference against the prosecution. [*Anam Pradhan v. The State*, 1982 Cri LJ 1585, 1599 (Ori)]. See also *Jagdish v. S*, A 1979 SC 1010 as to when obligation on prosecution to explain injuries on accused arises. Where a grown-up girl of 18 submits herself to be carried away and raped without protesting, the presumption is of consent [*Nathu v. R*, A 1931 L 401]. It is clear from cl (*b*) of proviso to s 342A [now s 315(*1*)] Cr PC, that no presumption can be drawn against an accused for not examining himself [*Baidyanath v. S*, A 1968 SC 1393]. Where the accused has no explanation for possession of godown keys nor for his presence at the weigh bridge s 114 enabled the court to presume existence of probable facts and guilt of the accused [*Tukaram v. S*, A 1974 SC 514]. Certificate granted by Film Censor Board does not bar criminal court's jurisdiction to try for exhibition of cinema film constituting offences under ss 292, 293 PC [*Rajkapoor v. S*, A 1980 SC 258]. When the pistol recovered was not in working condition, in the absence of any evidence, no inference could be drawn that the pistol could be put in working condition by effecting some repairs. [*Narayan v. The State*, 1982 Cri LJ NOC 140 : (1982) 21 DLT 256 (Del)]. See *ante*: "*Criminal Cases*" under *illus (g)*.

Cruelty.—It can be presumed under section 114 of the Evidence Act that the cruel treatment meted out to the deceased by the accused earlier had continued unabated till the very last when she was forced to commit suicide on that fateful night. Such a presumption of continuance of cruel treatment which is established on record necessarily points an accusing finger at the accused such presumption under 114 of Evidence Act has remained unrebutted on record [*Balram Prasad Agrawal v. State of Bihar & Ors*, A 1997 SC 1902 : 1997 Cri LJ 1640 : (1997) (1) Crimes 10, 21]. Where the evidence showed that the deceased's married life in the household of the accused had undergone rough weather all throughout, that she was ill treated both for not bringing dowry amount to the satisfaction of the accused and also for not giving birth to children, that the deceased's husband (accused No. 1) also was contemplating to remarry another woman, that the deceased had earlier tried to commit suicide but was saved by neighbours and that even after birth of two sons ill treatment of the deceased and quarrels with her continued till the fateful night when she committed suicide, it can be safely presumed under section 114 that the cruel treatment meted out to the deceased by the accused earlier had continued unabated till the very last when she was forced to commit suicide [*Balram Prasad Agrawal v. State of Bihar*, A 1997 SC 1830 : 1997 Cri LJ 1640, 1647].

Customs.—The entries in the *Riwaj-i-am* are entitled to an initial presumption in favour of their correctness but the presumption will be considerably weakened if it adversely affects the rights of the females who have no opportunity of appearing before revenue authorities [*Kehar v. Chanan*, A 1968 SC 806]. Under the Aliya-santhana system of law, where a gift or disposition is made in favour of all the members of a Kavaru, the law presumes that it is a gift or disposition in favour of that

Kavaru and that the named persons will inherit the properties with the incidents of Aliyasanthana law or Marmakkathayam law [*K. Babu Rao v. Datta Rao*, A 1992 Kant 290, 291].

Date of Execution.—[See *post*, "*Document*" and "*Execution*"].

Delay in Enforcing Rights.—If the plaintiff was in a position to sue before and the long delay in bringing the suit has prejudiced the defendant and has occasioned loss of evidence by death or otherwise, a strong presumption may arise against the plaintiff unless good cause is shown [*Rajendra v. Jogendra*, 14 MIA 67 : 15 WR 41 : *Juggernath v. Syed Sha*, 14 BLR 386; *Brijraj v. Basant*, A 1929 A 561; *Shamchand v. Kishore*, 14 MIA 595, 600; *Musst Bibee v. Shk Hamid*, 10 BLR 45, 54. See however *Ummesalma v. Amjad*, 66 IC 448]. Where a money-lender allowed a debt to remain outstanding for a very long period without some document or security and without demand, the presumption is that it has been paid off [*Narain v. Durga*, 54 IC 95 : 22 OC 335]. Applicant was discharged from hospital on 11-7-62 and filed application for compensation under Motor Vehicles Act on 15-10-62 with prayer for condonation of delay on ground that discharge from hospital was for want of accommodation. *Held* delay could be condoned as there was no presumption that when person was discharged from hospital there was no necessity for detaining him any further in hospital, when it was common knowledge that patients were discharged before complete recovery for want of accommodation [*Gopalaswami v. Navalgaria*, A 1967 M 403]. Delay does not necessarily spell unveracity [*Narotam v. S*, A 1978 SC 1542]. As the plaintiff immediately on learning the infringing activity of the defendant started acting first by filing complaint before the Magistrate and bringing the suit, the plaintiff is not guilty of delay, acquiescence and laches, [*Pidilite Industries Pvt Ltd. v. Mittes Corporation*, A 1989 Del 157, 162].

Death.—Where among certain relations, the evidence as to who died first is quite evenly balanced, the presumption is that younger survived the elder [*Kulkarani v. Laxmibai*, A 1922 B 347; see *Gopal v. Padmapani*, 18 IC 814. As to *Survivorship—Commorientes*, see notes to ss 107, 108 *ante* p 934. As to presumption of life and death and survivorship see also ss 107, 108 *ante*.

Discretion.—It will be normally presumed that a discretion vested in a Government functionary has been exercised fairly [*Ravindra v. S*, A 1961 A 361].

Dishonesty.—It is presumed that a man acted honestly [*Hirachand v. Temple*, 1911, 2 KB 330, 339; *In re Tarun*, 62 C 114, 118]. It cannot be assumed that a party lacked honesty [*Chandanmull v. Campbell & Co*, House of Lords decisions reported in 25 CWN 707*n*, 714*n*, referred to in *Uttamchand v. Mahmood*, 23 CWN 704, 708].

Documents. [Date, Execution etc.].—See *post*: "*Execution*" and as to execution, see s 67 *ante* p 639 *et seq*]. There is a *prima facie* presumption that all documents were executed on the day they bear date [*Anderson v. Westrn*, 6 Bing NC 296; *Potez v. Glossop*, 2 Ex 191: *Malpas v. Clements*, 19 LJQB 435; *Mina Kumari v. Bijoy*, 21 CWN 585 : 44 C 662 : 44 IA 72 : 19 Bom LR 424 : 32 MLJ 425; *Paroshotam v. Nazir*, 84 IC 846]. The presumption applies also in the case of letters [*Goodtitle v. Milburn*, 2 M & W 853; *Hunt v. Massey*, 5 B & Ad 902]. The presumption is not conclusive and may be rebutted. Where fraud or collusion is suspected the presumption does not apply [*Hoare v. Coryton*, 4 Taunt 560; *Wright v. Lainson*, 2 M & W 739] and independent evidence may be asked for [*Wilton v. Webster*, 7 C & P 195]. Where there was a postscript without date fixing the rate of interest on a *ruqqa*, the presumption is that the two portions were written on the same date [*Om Prakash v. Abdul*, A 1929 L 511]. There is also a presumption that a document was executed

at the place it shows [*Kirmany v. Aga Ali*, 109 IC 170 : A 1928 M 919]. If more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to give effect to the object for which they were executed [Steph Dig 815; *Taylor v. Horde*, 1 Burr 106]. That is, it may be presumed that persons who are presumed to know the law, performed that act first which was necessary to give validity to the other but the presumption cannot be drawn in all cases. Presumption that a document is antedated cannot be raised against a person producing it on failure by the petition-writer to produce register required to be maintained by him [*Mohanlal v. Anandibai*, A 1971 SC 2177].

Where signature of a deed has been proved and the attestation clause is in the usual form, sealing and delivery may be presumed [Tay s 149]. Where a document requiring a stamp is lost, or not produced upon notice, it will, in the absence of evidence to the contrary, be presumed to have been duly stamped; but where it is shown to have been unstamped, it will be presumed to have so continued until the contrary is proved [*Closmadeuc v. Carrel*, 18 CB 36; *Marine Investment Co v. Haviside*, LR 5 HL 624; *Henry & Constable (Brewers) v. IRC*, 1961, 1 WLR 1504; Phip 11th Ed p 736]. See *ante* s 89 (p 725) as to presumption as to due execution &c of documents not produced.

The production of a bond with a certificate of due registration endorsed thereon raises a strong presumption in favour of due registration [*Ram Ch v. Farzand*, 34 A 253]. *Q* sued *C* to redeem a mortgage on payment of Rs. 115 alleging that the payment of the rest would be proved by endorsements on the bond if produced. C stated that the bond was lost, but could not prove loss—*Held* that under s 114 the presumption could not be pushed to the extent that the bond if produced would have proved that only Rs. 115 remained due [*Quadrat v. Chunni*, 13 IC 60].

As to presumption of due execution when all witnesses are dead, see *ante* s 69.

Duty.—All persons are presumed to have duly discharged any obligation imposed upon them either by unwritten or written law. Thus, the judgments of courts of competent jurisdiction are presumed to be well-founded, and their record to be correctly made: judges and jurors are presumed to do nothing causelessly or maliciously. So oral evidence is not receivable of what the accused or the witnesses said when before the committing magistrate, unless there be positive proof that what they did say was not taken down in writing [Best s 348]. Every man shall be presumed to act in obedience to his duty until the contrary appears [*Ram Parson v. Shk Kalab*, 36 IC 100]. On this principle the possession of a co-owner is presumed to be on behalf of all [*Balaram v. Shamacharan*, 24 CWN 1057].

Easement.—Defendants constructed an underground drain 14 ft from the outlet of certain springs in which plaintiff enjoyed a right of easement. From the proximity the court was entitled to presume that there was a direct channel between the top of the drain and outlet [*Babaji v. Appa*, 77 IC 131]. User from time immemorial of the water of a tank through certain openings and channels, for irrigating lands raises a presumption that the enjoyment had an origin conferrring a right to the use of the water [*Madhub Das v. Jogesh Ch*, 30 C 281]. The uninterrupted enjoyment of light for 20 years acquiesced in by the owner of the servient tenement raises a presumpting of right which, in the absence of any evidence to rebut, ought to be acted upon. Such presumption is one of law, and not of fact [*Bagram v. Khetranath*, 3 BLR 18; see also *Bhuban v. Elhott*, 6 BLR 85, on **appeal** 12 BLR 406; 19 WR 194 PC]. Where there has been a long and uninterrupted use for a long series of years, the law will presume that the user has been as of right and that it had a lawful origin [*Saminatha v. Velu*, 35 IC 749; *Ram Ch v. Venkatrao*, 16 NLR 76 : 54 IC 936; *Rambhai v. Vallabhai*, 45 B

1027; *Piare v. Ishaq*, 95 IC 269 (L); see however *Meser v. Hafizuddi*, 13 CLJ 316 and *Shk Khoda v. Shk Tajuddin*, 8 CWN 359]. Prescriptive rights are founded on the presumption of a grant from long continued uninterrupted user and enjoyment as of right [*Chunder Jaleah v. Ramchurn*, 15 WR 215, see also *Gooroo Pershad v. Bykunto*, 6 WR 82]. An implied grant of way can be presumed on a severance of two tenements belonging at one time to the same person [*Augrahit v. Nabtannessa*, 29 CLJ 51].

Election.—When in the election petition alleging corrupt practice of exeecssive expenditure there was no evidence on record to lead on inference that it was the respondent's money which was used for publication of advertisements, no responsibility can be fastened on the respondent in respect of the expenditure incurred in connection with those advertisements [*Gajananam Krishnaji Bapat v. Dattaji Raghabaji Megha*, A 1995 SC 2284, 2312].

Encroachment by Tenant.—The true presumption as to encroachment made by a tenant, during his tenancy, upon the adjoining lands of the landlord, is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant, so long as the original holding continues, and afterwards for the benefit of the landlord, unless it clearly appears by some act done at the time the tenant made the encroachment for his own benefit [*Guru Das v. Issur*, 22 WR 246. The same principle was applied in *Naddiar v. Mea Jan*, 10 C 820, which was **followed** in 13 CWN 698].

Entries in Forwarding Note.—The Forwarding Note executed under section 64 of the Railways Act, 1989 by the person entrusting goods to Railway Administration for carriage, is an original contract, one side of which is to be filled by the consignor and the other is to be filled up by the Railways Administration. In absence of affidavit of the loading clerk of the railway, a presumption may be drawn that the entries made in the Forwarding Note were correct [*Union of India v. Roop Narayan*, A 1997 Raj 123].

Evidence. [Gaps in].—Presumptions are permissible to fill in gaps in evidence obliterated by the passage of time [*Deonarain v. Kamta*, A 1937 N 43], *eg* on a question of legal necessity [*Bhojraj v. Sitaram*, 40 CWN 257 : A 1936 PC 60].

Execution.—It is a rule of general application that documents regular on their face are presumed to have been properly executed and to have undergone all formalities essential to their validity [*Clements v. Machebonef*, 92 US 418]. Thus it will be presumed that the maker of an instrument executed it before the witness signed [*Hughes v. Debnam*, 35 NC 127] and that a document purporting to be witnesses was witnessed at the time of its execution [*Pringle v. Dunn*, 19 Am Rep 772; Jones s 50]. Where attesting witnesses are dead there is a natural presumption that they signed before the executant [*Radhanath v. Nagendra*, 53 CLJ 586]. Certificate of registration is *prima facie* proof of execution in absence of other evidence [*Irudayam v. Salayath*, A 1973 M 421]. A document is presumed to be executed on the day mentioned in it as the date of execution [*Puthiyapurayil v. V Khalid*, A 1974 K 121]. That a document is registered does not raise presumption that Registrar must have read it out to executant [*Chinnamma v. Devanga Sangha*, A 1973 My 338, (*Purnima v. Khagendra*, A 1962 SC 567 **folld**)].

Faisal Patti.—Preparation of faisal patti by the Tehsildar in an official act and a presumption would attach to it under Illustration (e) of the same having been regularly performed [*Pabbathi Reddy Sudarshan Reddy v. Dabhathi Reddy Sashire Khamma*, A 1996 AP 300, 303].

False explanation [Criminal case].—Where the accused in his examination under section 313 Cr. PC had not offered any plausible explanation as to how and what for he was present at the spot of incident of the odd hours and in reply to questions, he merely denied and thereby gave a false answer, his presence at the spot leads to an irresistible inference that though he was not the assailant, he was one of the participants in the mission with the other accused persons. [*Prem v. State of Maharashtra*, 1983 Cri LJ 1608, 1613].

Finger print.—It is more doubtful if a presumption under s 114 can arise merely because a person's finger prints were found upon stolen property [Tara v. R, A 1941 C 479].

Fraud.—It is a general rule that fraud cannot be presumed and the presumption of innocence or good faith is constantly applied in civil cases. [See *post "Good faith"* and ss 101-104 *ante*: *"Fraud"*]. In the ordinary transactions of life, fairness and honesty are presumed and conveyances, sales and contracts generally are presumed to have been made in good faith until the contrary appears [*Gregg v. Sayre*, 8 Pet 244]. But from this it is not to be understood that fraud cannot be inferred from circumstantial evidence, as it is by evidence of this character that the charge must often be and indeed generally is, established [*Kaine v. Weigley*, 22 Pa St 179]. In a case of withdrawal of money from Bank by using forged signature, if there is evidence that the signatures are forged and that the withdrawal form was in the possession of the accused who presented it in the Bank and obtained money therefrom and pocketed the same, an inference can be drawn against the accused. [*Bank of India v. Yetari Maredi Shankar Rao*, A 1987 SC 821 : 1987 Cri LJ 722].

Gambling.—Under s 47 Calcutta Police Act, if gambling instruments are found in a house ordered to be searched, the presumption is that it is a gaming house. The presumption does not apply where search is of any other place [*Ah Fung v. R*, 34 CWN 197]. S 6 of the Gambling Act (2 of 1867 BC) raises a presumption that a house in which such articles or instruments are found is a common gaming house [*Amrit v. R*, 5 CWN 503]. All the persons present in a common gaming house, may naturally be supposed to be members of the gaming party. But in dealing with a public place, the presumption regarding any one found present (unless something further is proved against him) is that he is an innocent passer-by [*Ramjanak v. R*, A 1937 P 276]. Presumption under Bombay Prevention of Gaming Act [*R v. Nathalal*, 1939 Bom 434].

Good Faith.—The normal presumption is that of good faith and not of bad faith [*Jambudas v. Income T Commr*, 104 IC 336]. When a pleader is charged with defamation in respect of words spoken to or written while performing his duty as a pleader, the court ought to presume good faith, unless there is satisfactory evidence of actual malice, and unless there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose [*Upendra Nath v. R*, 36 C 375 : 13 CWN 340 (**folld** in 41 C 514); *Banerji v. R*, 46 CLJ 227].

Grant.—In India the word "grant" has not the technical English meaning of a conveyance at common law and in the absence of express evidence there is no presumption that a permanent grant of land includes minerals under it [*Sashi Bhusan v. Jyoti P*, 44 IA 46 : 32 MLJ 245 : 21 CWN 377 : 44 C 585; *Harinarain v. Sriram*, 37 IA 136 : 20 MLJ 569 : 37 C 723 : 14 CWN 746; *Durga Pd v. Brajanath*, 39 IA 133 : 23 MLJ 26 : 39 C 696 : 16 CWN 482. See *Girdhari v. Megh Lal*, 45 C 87 : 22 CWN 201 : 44 IA 286 : 22 MLJ 356; *Pramatha v. Meik*, 5 Pat LJ 273]. The same rule applies if the tenure granted is rent-free [*Raghunath v. Durga Pd*, 46 IA 158 : 21 Bom LR 895 : 36 MLJ 690 : 47 C 95 : 23 CWN 914]. Where the grant does not

expressly mention the river-bed which depends upon the tidality or navigability of the river at the relevant points the presumption is that the river-bed belongs to the Govt and not to the owner of the abutting villages [*Yarlagada v. S*, A 1973 AP 281]. As regards a grant of land described as bounded by a non-navigable river the *onus* of showing that the grant did not cover the bed *ad medium filium acquae* is on the grantor. The presumption may be strong or weak according to circumstances [*Venkata v. Secy of S*, 41 M 840 FB; see *Secy of S v. Bijoy Chand*, 22 CWN 872]. A grant for maintenance *prima facie ceases* with the life of the grantor and is resumable on the death of the grantee. But this presumption is rebuttable, and where it is proved that a grant has been enjoyed by successive generations, the inference may justly be drawn that the original grant was intended to be a grant in perpetuity [*Ram Ch v. Jogendra*, 4 CLJ 399].

The gist of the principle upon which a lost grant is presumed is that the state of affairs is otherwise unexplained [*Kashinath v. Murari*, 31 CLJ 501; *Banwari v. Rashbehary*, 50 IC 933]. "Where there has been long continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin, if such legal origin was possible, and a Court will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title" [*per* LORD HERSCHELL in *Phillips v. Halliday*, 1891 AC 228 p 231. See also *Harris v. Earl of Chesterfield*, 1911 AC 623; *General E Co v. Beaver*, 1914, 3 KBD 918 p 926]. The presumption of an origin in some lawful title, is one which is not merely a branch of the law of evidence. It is resorted to because of the failure of actual evidence [*Md Muzaffaralmusavi v. Bibi Jabeda*, 57 IA 125 : 34 CWN 462 : A 1930 PC 103; *Satyanarayan v. Venkatapayya*, A 1953 SC 195 : 1953 SCR 1001]. As to when the presumption of a lost grant may or may not be made, see *Monohar v. Charu*, A 1955 SC 228 : 1955 SCR 1168].

As to presumption of a lost grant, see *Maharani Raj Roop v. Syed Abdul*, 7 IA 240 p 247 : 6 C 394; *Srinath v. Dinabandhu*, 41 IA 221, 227 : 18 CWN 1217; *Abdul Hakim v. Elahi*, 29 CWN 138. A presumption of lost grant cannot be made in favour of a fluctuating and unascertained body of persons such as the inhabitants of a particular village [*Asrabullah v. Kiamatulla*, 41 CWN 503 : 1937, 2 Cal 86; *Brajasundar v. Mani*, A 1951 SC 247]. It is only in case of long possession under the claim of a definite right that the question of presumption of a lost grant arises [*Kiran v. Srinath*, A 1927 C 210 : 31 CWN 135; *Mahendra v. Bhabendra*, A 1937 P 53]. Although long possession may raise a presumption of a grant which has been lost, there can be no presumption that the Crown by some lost grant deprived itself of the prerogative power to tax the property [*Kamala Vahooji v. Collr of Bombay*, 41 CWN 1194 : A 1937 PC 271]. A grant maintenance is *prima facie* intended to be for life time [*Md Ali v. Shujat*, 46 IC 913]: Where maintenance grant is not forthcoming permanent grant may be presumed from payment for successive generations [*Sugutur v. S*, 43 IC 654]. In a case where the word *Kaim* was used and there were other circumstances a grant for maintenance was construed as perpetual [*Rajlakhi v. Sarola*, 56 IC 803]. A *jagir* must be taken *prima facie* to be an estate for life [*Ram Narayan v. Ram Saran*, 46 IA 88 : 36 MLJ 344 : 17 ALJ 398 : 46 C 683 : 20 CWN 866].

There is no presumption that an *inam grant* of a village is *prima facie* a grant of land revenue only as distinguished from the land itself [*Upadrashta v. Devi Seetharamudu*, 43 M 166 PC : A 1919 PC 111 : 23 CWN 129]. There is no presumption that the grant of an *inam* conveyed only the *melwaram* [*Suryanarayana v. Patanna*, 41 M 1012 : A 1918 PC 169; *Lakshmanna v. Venkateswarlu*, A 1949 PC 278; *Sunkavilli v. Goli*, A 1962 SC 342; *Subramania v. Onnappa*, 39 MLJ 629]; but

each case must be decided on its own acts [*Upadarshta v. Devi Seetharamudu, sup*]. There is no presumption that both the *warams* were granted or only that *melwaram* was granted [*Chidambaram v. Veerama*, 45 M 586 PC : 68 IC 538 (44 M 588 disapproved)]. A term will not be presumed in a grant or contract unless the court is driven to the conclusion that the parties must have intended it [*Tiruneelakandam v. Raja of Ramnad*, 43 MLJ 158].

Hindu Law. [Adoption].—The doctrine of Hindu law that a "permission is to be presumed in the absence of prohibition" (Dattaka Chandrika, s 1 verse 32), relates to a giver and not to a receiver, in adoption [*Tarini v. Saroda*, 3 BLR 145 : 14 WR 468]. In an adoption acquiesced in for 33 years, consent to give away the adopted son was presumed [*Anandray v. Ganesh*, 7 BHCR 33]. If the alleged adoptee behaved and had been treated over a long course of years as adopted son, authority to adopt may be presumed from established facts, conduct &c [*Prem Devi v. Sambhunath*, 42 A 382 : 76 IC 601] and in such a case it must also be presumed that all the necessary ceremonies were duly performed at the time of adoption [*Lala Achal v. Karim Hussain*, 32 IA 113 : 27 A 271; *Kailas v. Bejoy*, 36 CLJ 434 : A 1923 C 18; *Jagannath v. Chandni*, 26 CWN 65 : 34 CLJ 432; *Roshan v. Samar*, A 1937 L 626 : 19 L 173]. In cases of old adoption a presumption of validity is naturally drawn from the status of the adopted son in the adopting family and its recognition for a number of years [*Motilal v. Safdar*, A 1976 Raj 40 (*Nandkishore v. Brijbehari*, A 1955 Raj 65; *Binda v. Lalita*, A 1936 PC 304; *Seetharama v. Kanchumurthi*, A 1925 PC 201; *Rajendra v. Jogendra*, 14 MIA 67; *Kailash v. Bejoy*, A 1923 C 18 rel on)]. See also *post* s 115 under "*Estoppels in cases of Adoption*".

Where an adoption had been continuously recognised for a series of years and the party adopted was in possession of the property in dispute, it was held that the court might well dispense with formal proof of the performance of ceremonies [*Sabo Bewah v. Nahagun Maite*, 2 BLR Ap 51 : 11 WR 380. See also *Chowdhury v. Brojosundar*, 18 WR 77 and *Tincowree v. Denonath*, WR 1864, 155; *Rajendra v. Jogendra*, 14 MIA 67; see *Neelawa v. Gurshidappa*, A 1937 B 169]. Where adoptee was recognised by every member of the family for 50 years as the adopted son of deceased husband a strong presumption arises in favour of validity of adoption by widow [*Voleti v. Kesaparagada*, A 1969 SC 1359]. The presumption of validity of adoption can be raised when adoption has taken place long back and the adopted son has been recognised to be such by the family concerned. But where the question of invalidity is based on admitted relationship of the adoptor with the mother of the adopted son and when it can be found that the son, who has been adopted, could not have been adopted in law, then the question of raising of presumption does not arise. [*Damodar Lal v. Lalli Lal*, A 1985 Raj 55, 63]. In the case of converts to Mahomedanism, the ordinary presumption is that the law of adoption has been abandoned [*Bai Machhibhai v. Bai Hirbai*, 35 B 264 : 13 Bom LR 251]. Under section 16 of the Hindu Adoptions and Maintenance Act, if the adoption is evidenced by a document in writing and registered and signed by the person who adopts the child and also by the person who gives the child in adoption, a presumption has to be drawn that the adoption was made in compliance with the provisions of the Act. This presumption is a rebuttable presumption. [*Ram Jagat v. Smt Kanchandei*, A 1984 All 44, 46]. A registered adoption deed raises a presumption of valid adoption. This presumption is rebuttable, no doubt, but not by mere conjectures or discrepencies in evidence of little or no consequence. [*Karan Chand v. Baljit*, A 1990 Punj 220, 222].

Hindu Law. [Joint family].—A Hindu family will be presumed to be joint unless the contrary is established [*State Bank v. Arvindan*, A 1971 SC 996]. The original status of all Hindu families must be presumed to be joint and undivided [*Bipro Pd v. Kena*, 5

WR 82; *Nund Ram v. Chootoo*, 1 Agra 255; *Gane Bhim v. Kane Bhim*, 4 BHCR 169; *Inder Commer v. Doolal Ch*, 18 WR 258; *Neelkisto v. Beer Ch*, 12 MIA 523]; but if one of the co-parceners separated and had his share partitioned there is no presumption that rest of the co-parceners continued to be joint. It would then be question of fact in each case and the burden would be on him who claims relief on the assertion of the existence of a particular state of things [*Bal Kr v. Ram Kr*, 58 IA 220 : A 1931 PC 154; *Jatti v. Banwari*, A 1923 PC 136 : 4 L 350; *Baladax v. Rukhmabai*, 30 IA 130 : 30 C 725; *Bhagwati v. Dulhin*, A 1952 SC 72]. There may be presumption that there is a Hindu Joint Family but there can be no presumption that the joint family possesses joint family properties. [*Kuppalu Obul Reddy v. Bonala Venkata Narayana Reddy*, A 1984 SC 1171, 1176]. But if the family is no longer joint, there is no presumption as to the date on which separation was effected [*Dhauntal v. Ramlal*, 75 IC 227]. Once it is found that the father of the defendant and the father of the plaintiff hailed from a common ancestor, the presumption would be that the plot in question devolved upon both the branches [*Chet Singh v. Shashi Shankar Pathak*, A 1993 All 168, 170].

Where it is known or admitted, that some at least of the property of a joint family has come down to them, the presumption is that the whole property is ancestral, and any member alleging that it is not, will have to prove the self-acquisition [*Karsandas v. Gangabai*, 32 B 479 : 10 Bom LR 184]. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon any one asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish that it was acquired, without the aid of the family property [*Mudigowda v. Ramchandra*, A 1969 SC 1076; *Appalaswami v. Suryanarayanamurti*, A 1947 PC 189 : 52 CWN 505; *Srinivas v. Narayan*, A 1954 SC 379; *Mallappa v. Yellappagonda*, A 1959 SC 906].

Where the family is joint and there is a nucleus of ancestral property from which the property may be acquired the presumption is that property acquired by any member is joint property [*Lal Bahadur v. Kanhya Lal*, 34 IA 65 : 29 A 244 : 11 CWN 417 : 17 MLJ 228; *Amrit v. Mukund*, 53 IC 866 PC : A 1919 PC 91; *Parmanand v. Sheocharan*, 2 L 69; *Pratap v. Sarat*, 25 CWN 544; *Sashi v. Chandra*, 35 CLJ 348; *Parimal v. Surendra*, 44 CWN 892; *Johnstone v. Gopal*, A 1931 L 419; *Achuthan v. Chinammu*, A 1966 SC 411]. When a joint family is found to have nucleus sufficient to make impugned acquisition, a presumption arises that acquisitions in the names of persons managing family properties are family acquisitions [*Baikuntha v. Sashi*, A 1972 SC 2531]. But the mere existence of nucleus of ancestral property will not raise the presumption that subsequent acquired properties of a member are joint family properties. To shift the burden it must be proved that the nucleus was such as taking into consideration the surrounding circumstances could have led to subsequent acquisitions with its help. The presumption is against blending and it is only natural to keep self-acquired properties separate [*Vythinatha v. Varadaraja*, A 1938 M 841 : 1938 Mad 696; *Darshan v. Parbhu*, A 1946 A 67; *Govind v. Godubai*, A 1946 B 439; *Prem v. Bittam*, A 1954 A 143]. It should also be established that the nucleus was available to the acquirer [*Amrita v. Surath*, 46 CWN 239 : A 1942 C 553; *Babubhai v. Ujamlal*, 1937 Bom 108; *Sankaranarayana v. Tangaratna*, A 1930 M 662; *Vythinatha v. Varadaraja, sup*; *Venkataramaya v. Seshamma*, 1937 Mad 1012]. In the case of a property acquired in the name of the karnavan there is a strong presumption that it is a tarwad property and the pre-sumption holds good unless and until rebutted by acceptable evidence [*Achuthan v. Chinnammu*, A 1966 SC 411].

The mere fact that a person carrying on business is a member of joint family does not by itself raise any presumption that it is joint family business. It must be proved that the business is ancestral or had grown from the nucleus of joint family property [*Vadilal v. Khusal*, 27 B 157; *Dolumal v. Parmeshari*, A 1940 S 74; *Annamalai v. Subramanian*, A 1929 PC 1; *Venkataramayya v. Seshamma*, 1937 Mad 1012]. So, the mere fact that proprietors of several firms are members of a Hindu family, does not necessarily raise presumption that the business of these firms is a joint business [*Hem Singh v. Narain*, A 1929 L 722]. Merely because a person allowed his son and grandson to run their separate businesses in certain rooms for valuable consideration, there is no presumption that there was parting with possession for valuable consideration. [*Sumitra Singh v. Nahar Singh*, A 1984 Cal 145, 149 : (1984) 1 Cal WN 175]. Presumption commonly made in regard to the acquisition of property by a member of a joint family applies when the members are joint in "food, worship and estate." But where the members admittedly dwell and mess in separate establishment there is no presumption of acquisition for joint family [*Ram Singh v. Sitaram*, A 1931 N 57].

Where there is no pre-existing nucleus the presumption is that acquisition by a member in his separate property [*Ethirajulu v. Govindarajulu*, 32 C 12 FB]. Because it is true that there can be no joint ancestral family property without a previous nucleus of joint family property, it is not true that there cannot be joint family property without a pre-existing nucleus [*Karsondas v. Gangabai*, 32 B 479, 492; *Pragda v. P*, A 1937 M 29]. There was evidence to show independent source of income for a person to purchase a property. If so in spite of existence of nucleus, there is no presumption that this property is the joint family property. [*Major Pran Natha Kaushik v. Rajinder Natha Kaushik*, A 1986 Del 121, 124]. Even in the case of joint Hindu family there is no presumption that it possesses joint property or any property at all. That has to be shown by affirmative evidence [*Nisar v. Mohan*, 67 IA 431 : A 1940 PC 204; *Tulsidas v. Premji*, 13 B 61; *Brundaban Padhan v. Krishna Padhan*, A 1985 Ori (NOC) 243 (DB)]. The presumption of law that, while a Hindu family remains joint, all property including acquisition made in the name of individual members, is joint property, does not apply to the case of a joint family governed by the *Dayabhaga* [*Saroda v. Mahananda*, 31 C 448; **folld** in *Gobinda v. Radha Kristo*, 31 A 477 : 6 ALJ 591. See *Vinayak Narasimha v. Dutto*, 25 B 367; *Nibaran v. Sashi*, 60 IC 729].

There is no presumption in favour of blending [*Narayanaswami v. Ratnasabhapathy*, A 1938 M 136; *Govind v. Godubai*, A 1946 B 439]. Blending of private earnings with receipts and payments of joint family property in one account book shows an intention to make them joint property; but it is not conclusive [*Suraj v. Ratan*, 21 CWN 1065 : A 1917 PC 12 : 40 A 159 : 33 MLJ 180]. The normal condition of Hindu family being joint, it must be presumed to remain joint unless some proof of subsequent separation is given [*Shiu Golam v. Baran*, 1 BLR 164 : 10 WR 19; *Ramdayal v. Ullim*, 46 IC 255; *Thakur v. Ganesha*, 47 IA 57 : 18 ALJ 532 : 42 A 168 : 38 MLJ 521]. If a person is once shown to be a member of a joint family, the presumption under s 114(*d*) is that he never separated unless the contrary is proved [*Suka v. Rakhi*, 57 IC 339].

When a property is purchased in the name of a member of a joint Hindu Family, the presumption is that it is purchased with money derived from joint funds [*Banee Madhab v. Soodha Madhab*, 2 Hay 333; *Anund v. Lamb*, 1 Marsh 169 : 1 Hay 374; *Nuronath v. Goda Kolita*, 20 WR 342; *Hait Singh v. Dabee*, 2 NWP 308; *Taruk v. Jodeshur*, 11 BLR 193 : 19 WR 178; *Kundan v. Shanker*, 35 A 564; *Muthan v. Praniakoti*, 31 IC 18; *Gopal v. Jawand*, 49 IC 1007]. In the case of a purchase by a son of undivided interest from his father, the legal presumption would be that the purchase was made with the joint fund [*Narayan v. Anaja*, 5 B 130].

The presumption of Hindu law is that every family is joint, and all property possessed by the family is joint [*Moolji v. Gokuldas*, 8 B 154]. When commensality is admitted the mere use of one brother's name in documents relating to property, affords no presumption of such brother being the sole proprietor [*Kishen v. Janokee*, WRFB 3 : Marsh 1 : Hay 20; *Dula v. Toofani*, 1 WR 307]. Management of property by one brother, does not destroy the presumption of property being joint [*Pran Kishen v. Mathura*, 5 WR 11 PC : 10 MIA 403]. The entry of the name of one member of a joint family in revenue records is not sufficient to rebut the presumption as to property being Joint. [*Beharee v. Madho Pd*, 6 WR 69; *Ranjeet v. Madud Ali*, 3 Agra 222; *Shibo Soondary v. Rakhal Das*, 1 WR 38; *Monmohinee v. Soodhamonee*, 3 WR 31; *Gour Ch v. Greesh*, 7 WR 120; *Cheeta v. Miheen*, 11 MIA 369; *Umritnath v. Gowree Nath*, 6 BLR 232 PC : 15 WR 10].

There is no presumption that a loan contracted by the manager of a joint Hindu family has been contracted for a family purpose [*Soiru Padmanabha v. Narayanrao*, 18 B 520]. In the absence of proof of separation the presumption is that each branch of a family whose original stock has been divided remained joint amongst themselves [*Bata Kristo v. Chintamoni*, 12 C 262]. Where a property is acquired by a lady whose husband is a member of a joint family for her own benefit, there is no presumption that it is joint family property [*Shivanarain v. Phuljharia*, 52 IC 402]. Where a member in whose name the property stands had no separate funds at the time of its purchase, the presumption is clear that it was joint family property [*Parbati v. Baikuntha*, 18 CWN 428 PC : 16 Bom LR 101 : 12 ALJ 79 : 26 MLJ 248]. An ancient grant in the name of one member is presumed to be joint family property [*Durga v. Sobha*, 34 IC 827]. Property acquired under a grant from Government is self-acquired unless it is merely the restoration of a confiscated grant intended for the family [*Sasibala v. Chandra*, 56 IC 937].

The mere fact that a brother takes a lively interest in the business carried on by another brother is not sufficient for the presumption that it is a joint family business. There is no presumption that a business carried on by one who is the member of a joint family is the joint family business. [*Faqir Chand v. Saligram*, A 1931 L 429]. Where a member has received special training for a profession or for service, there is an initial presumption that he received his training at the expense of the joint family property [*Gokul v. Hukam*, 154 PLR 1916 : 34 IC 714 (on **appeal** 2 L 40 PC : 25 CWN 534). See now the Hindu Gains of Learning Act, 30 of 1930]. The presumption is that a bond in the name of the manager of a joint Mitakshara family is joint family property [*Bandhu v. Chitaman*, 28 CWN 406; *Krishnanand v. Rajaram*, 44 A 393]. No presumption could be drawn from mere relationship of father and son or from joint living and joint messing that the sons were in permissive possession of the half portion. It will be disastrous to hold that because the parent or progeny of the tenant lives or carries on business in the tenanted premises, one must presume that there is some kind of parting with possession, [*Chander Kishore Sharma v. Smt Kampa Wati*, A 1984 Del 14, 17].

[See notes to ss 101-104 *ante* under "*Hindu law—Joint family*"].

Hindu Law. [Property in the Name of Female Member].—There is no presumption that a property standing in the name of a female member of the joint family is joint family property [*Dewan Runbijoy v. Indrapal*, 26 IA 226 : 4 CWN 1 : 2 Bom LR 1 : 26 C 871; *Dharanikant v. Krishna*, 13 C 818 PC (reversing, *Chowdharani v. Tariny*, 8 C 545); *Thakro v. Ganga*, 10 A 197 PC. See also *Durga Pd v. Prankrishna*, 3 PLW 341; *Pratap v. Sarat*, 25 CWN 544 : 33 CLJ 201; *Offl Ass v. Natesa*, A 1927 M 194 : 89 IC 660; *Bhubanmohini v. Kumudbala*, 28 CWN 131; *Sadayappa v.*

Raghava, 63 IC 220]. There is no presumption that a family because it is joint possessed joint property the presumption arising out of existence of sufficient nucleus is not applicable in the case of acquisition in the names of female members of a joint family. [*Mohendra Rout v. Mahonadi Dei*, A 1985 Orissa (NOC) 60 (DB)]. In the case of a joint family governed by the Bengal school the general presumption is that property standing in the name of wives, daughters-in-law or sons belongs to them unless the contrary is shown [*Surendra v. Bhupendra*, 45 CWN 177]. There is no presumption that a property in the widow's hands is part of her husband's estate. Even if it is purchased out of the saving from her husband's estate, that does not necessarily make it an accretion, for a Hindu widow has an absolute right to the income and is not bound to save. She can add it to the estate or keep it separate as her own [*Sitaji v. Bijendra*, A 1954 SC 601]. See "*Advancement*".

Hindu Law. [Joint Tenancy].—The presumption of joint tenancy is unknown to Hindu Law except in the case of joint property of an undivided Hindu family governed by the Mitakshara law which under the law passes by survivorship [*Bapu Rani v. Rajendra*, 60 IA 95 : 37 CWN 464; *Bai Diwali v. Patel*, 26 B 445].

Hindu Customs. [Persons Adopting].—When parties who are not Hindus, reside in a Hindu country, and adopting the customs of Hindus, have lived as Hindu families do, joint in food and estate, they will be governed by the Hindu law of co-parcenary, and the legal presumption applicable to the position of a joint Hindu family will be applied to them [*Rup Chand v. Latu*, 3 CLR 97 (9 MIA 195 **follld**)].

Hindu Law. [Migration and Customs].—Where an ancient family custom is shown to have existed among Hindus, the presumption is in favour of the continuance of that custom, even though the family have migrated [*Surendra v. Hiramon*, 10 WR 35 PC : 1 BLR 26; *Prithee v. Sheo Sundaree*, 8 WR 261].

When a Hindu family migrates from one part of the country when the *Mitakshara* Law prevails, to another where the *Dayabhaga* law is the prevailing authority, the presumption is that it carries with it the laws and customs prevailing in the part wherefrom it has migrated [*Parbati v. Jagadish*, 29 C 433 PC: 6 CWN 490 PC; *Saroda v. Umakant*, 50 C 370; *Basanta v. Ramsankar*, 59 C 859: 55 CLJ 205; *Chandrakanta v. Rammohini*, A 1956 C 577; *Madhai v. Sabi*; A 1973 P 160 (Cases discussed)]. This presumption however is rebuttable by proof that the family has adopted the law and usages of the place to which it has migrated [*Pitambar v. Nishikanta*, 24 CWN 215: 31 CLJ 52; *Jugal v. Jasodan*, A 1928 L 212; *Suganchand v. Manjibai*, A 1942 B 185]. The *onus* to prove this would lie on the party alleging it [*Chandrachoor v. Bibhuti*, 23 P 763: A 1945 P 211]. In the absence of all evidence to the contrary, a Hindu must be considered to be governed by the *Mitakshara* law where it prevails [*Jugo Bundhoo v. Kurum Singh*, 22 WR 341; *Ram Bromo v. Kamini Soondary*, 6 WR 295; *Koomud v. Setta Kanth*, WR FB 75]. There is no initial presumption that a Hindu resident of the Midnapore district is governed by the *Mitakshara* law [*Sukdev v. Mritunjoy*, 43 CWN 395].

The owners of lands which are transferred by Government from one district to another having a different law of succession, cannot be presumed to change their observances with their districts, the presumption being against such changes [*Prithee v. Court of Wards*, 22 WR 341]. A Brahmin is presumed to be governed by his personal law and if he allges a custom contrary to it, he is bound to prove it [*Harbans v. Atra*, 53 IC 858]. If nothing is known about a man but his place of residence it will be presumed that his personal law is the law which prevails in that place [*Balwant v. Bajirao*, 47 IA 213: 48 C 30: 25 CWN 243: 39 MLJ 166]. A presumption can be raised that the panchas, appointed in a family dispute, were most conversant with the matter at issue

which includes the customery law of inheritance in respect of the Ho Community. [*Ganga Ho v. State of Bihar*, A 1988 Patna 287, 290: 1987 BBCJ (HC) 551].

Hindu Law. [Endowment].—The presumption is that the object of an endowment by Hindu for the worship of idols is to preserve the *sheba* in the family, rather than to confer benefit on an individual; but if there are in the deed of gift no words denoting an intention of the donor that the gift should belong to the family, that presumption will not arise [*Chandra Nath v. Govind and Collr of Moorshidabad v. Shibessuri*, 11 BLR 86 PC: 18 WR 211, 226].

Hindu Widow. [Acquisition by].—The acquirer of property presumably intends to retain dominion over it, and in the case of Hindu widow, the presumption is none the less, and she will be presumed, in the absence of any indication of her intention to the contrary, to have absolute power of disposal over property acquired from the income of her husband's property [*Akkanna v. Venkayya*, 25 M 351. See also *Isri Dut v. Hansbati*, 10 IA 150: 10 C 324: 13 CLR 418; *Sheo Lochun v. Saheb*, 14 IA 63: 14 C 387; *Girish Ch v. Broughton*, 14 C 861; *Soudamini v. Adm Genl*, 20 C 433 PC; *Nabakishore v. Upendra*, 26 CWN 322 PC: 65 IC 305; *Rama Krishna v. Rukmavathi*, 11 LW 112; *Ram Jankiji v. Jagadamba*, 43 A 375; *Keshav v. Maruti*, 23 Bom LR 803; *Zemindar of Bhadrachalam v. Venkatdri*, 43 MLJ 486]. See *Sitaji v. Bijendra*, A 1954 SC 601 *ante*.

Honesty.—[See *ante*, "*Dishonesty*"].

Illegality.—The law presumes against illegality and the burden of proving illegality is as a fact on the party asserting it [*Hire P Furng Co v. Richens*, (1888) 20 QBD 387; *Mills v. Dunham*, (1891) 1 Ch 576 p 589; *Paper Sales Ltd v. Chokhani*, A 1946 B 429: 48 Bom LR 274]. There is presumption of lawfulness of every consideration [*Narayan v. laxman*, 80 IC 885 (N)].

Infant.—Conclusive presumptions of law are also made with respect to infants. Thus, an infant under seven is conclusively presumed to be incapable of committing any felony, or, indeed, any indictable offence, for want of discretion; and under fourteen a male infant is presumed incapable, on the ground of impotency, of committing a rape as a principal in the first degree, or being guilty of the offence of carnal knowledge of a girl under thirteen (though he may be convicted of a criminal assault upon her), or of committing an assault with intent to commit rape. So, a female under thirteen is incapable of consenting to sexual intercourse, and to have carnal knowledge of her is a felony; while an attempt to have such knowledge is a misdemeanour; and under the age of thirteen her consent to an act of indecency cannot be set up as a defence to a charge of assault. An unmarried girl under eighteen cannot consent to be abducted in order that a man may have a carnal knowledge of her, and to abduct such a girl for such a purpose is a misdemeanour [Tay ss 104-105]. (See now ss 5, 6, 19 Sexual offences Act, 1956).

Nothing is an offence which is done by a child under seven (s 82 I P Code). In England the age has been increased to ten (s 16, Children and Young Persons Act, 1963). In India the age of consent is 16. Under the Mahomendan law puberty is presumed on completion of fifteen years. If a girl under 15 pleads puberty, the onus is on her [53 IC 94]. A child between 7 and 12 years of age cannot be held guilty of an offence with respect to any act, unless it is shown that the child has attained sufficient maturity of understanding to judge of the nature and consequences of that act [*In re Marimuthu*, 5 MLT 296: 9 CLJ 392].

Inflation.—Inflation resulting in rise of prices gradually, fall in the purchasing of the currency and consequent deprivations of various kind to persons whose income is

limited are facts, of which judicial notice can be taken under s. 114 [*Dhan Raj v. Kishni*, 1998 Cri LJ 1312 (Raj)].

Innocence.—Every one is presumed to be innocent until the contrary is established. The presumption of innocence applies to acts of commission as well as omission. The presumption is applicable both in criminal and civil proceedings, although the chief application of the presumption of innocence is in the domain of criminal law. The presumption of innocence signifies no more than this that the commission of a crime must be proved beyond all reasonable doubts, in other words, as Thayer points out [Ev at Common Law, p 588) the "whole doctrine when drawn out is, *first*, that a person who is charged with a crime must be *proved guilty*, that according to the ordinary rule of procedure and of legal reasoning *presumitur pro reo ie neganti*, so that the accused stands innocent until he is proved guilty; and second, that this proof of guilt must displace all reasonable doubt" [*Amritalal v. R*, 10 CWN 676, 690: 42 C 957: see *R v. Kangal* 41 C 601, 616], see the rule stated in *Woolmington v. D P P*, 1935 AC 462 (*ante*, notes to ss 101-104 under "*Criminal cases*").

The presumption of innocence is another form of the rule about the burden of proof that the prosecution must prove the guilt of the accused beyond reasonable doubt. Presumption of innocence is no evidence *per se*. No presumption is evidence: it is a rule about production of evidence [*Com v. De Francesco*, 1924, 142 NR 749; Thayer p 48; Wig s 2511; Tay s 112]. In civil actions fraud will not be presumed and it must be clearly and specially proved. As to the burden of proof in criminal cases resulting from the presumption of innocence see notes to ss 101-104, *ante*, (under "*Criminal Cases*").

There is a presumption against crime and misconduct and the more heinous and improbable a crime is, the greater of necessity is the force of the evidence required to overcome such presumption. The application of the presumption was considered in this case [*Weston v. Peary*, 40 C 898 p 917: 18 CWN 185]. Where there is a conflict between presumption of innocence and any other presumption, the presumption of innocence prevails. The strength of this presumption varies according to the seriousness of the charge. It has been said that "the greater the crime, the stronger is the proof required for conviction" (HUDA J) [*Ashraf v. R*, 21 CWN 1152, 1160].

So strong is the presumption of *innocence*, that even when guilt can be established only by proving negative, that negative must, in most cases to which no special statute is applicable, be proved, though the general rule of law devolves the burden of proof on the party alleging the affirmative [Tay s 113].

Though the general presumption of law is in favour of innocence, yet, as men seldom do unlawful acts with innocent intentions, the law presumes that every act, which in itself is unlawful, has been wrongfully intended, till the contrary appears. LORD MANSFIELD has, in clear language, pointed out the distinction between those cases where a criminal intent must be *proved*, and those where it will be *presumed*:— "Where an act, in itself *indifferent*, if done with a particular intent, becomes criminal, there the intent must be proved and found, but where the act is in itself *unlawful*, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent" [*R v. Woodfall*, 1770, 5 Burr 2667. See also *R v. Harvey*, 2 B & C 257; *R v. Wallace*, 3 Ir CLR 38; and *B v. Creevey*, 1 M & S 273; Tay s 118]. See *ante*, notes to ss 101-104 under "*Criminal cases*".

There are certain other presumptions which should be noticed in connection with this subject: (*1*) Presumption against misconduct; (2) presumption against illegality; (*3*) presumption against fraud and covin; (*4*) presumption of the discharge of duty;

(*5*) presumption against vice and immorality; (*6*) presumption against wrongful or tortous conduct; (*7*) presumption against irreligion; (*8*) presumption against truth of testimony, &c, &c. For these and other presumptions, see Best ss 334, 345-352. Where the policy produced by the insurer does not show the extent of liability of the owner an adverse inference against the owner can be drawn [*New India Assurance Co. Ltd. v. Subhash Chandra Patra*, A 1994 Ori 236, 239].

Intention and Knowledge.—it is conclusively presumed that every sane person, above the age of fourteen, is acquinted with the criminal, as well as the civil, the common as well as the statute law of land. In like manner, a sane man of the age of discretion is conclusively presumed to contemplate the natural and probable consequences of his own acts, and therefore the intent to kill is conclusively inferred from the deliberate violent use of a deadly weapon [1 Russ C & M 940; *R v. Dixon*, 3 M & S 15; Tay s 80]. Such presumption is however now regarded as sometimes conclusive and sometimes rebuttable [*R v. Beard*, 1920 AC 479; *R v. Meade*, 1909, 1 KB 895; Phip 6th Ed p 677]. Intention is not capable of direct proof as fact. It is to be gathered from surrounding circumstances and conduct of accused [*Hayati v. S*, A 1967 Goa 11 FB].

The presumption that a party intends the natural consequences of his acts, also extends equally to his civil responsibilities. Thus, in an action for libel, where the judge left it to the jury to say whether the defendant intended to injure the plaintiff, it was held that the direction was wrong, inasmuch as if the tendency of the libel was injurious to the plaintiff, the defendant must be taken to have intended the consequences of his own act [*Haire v. Wilson*, 9 B & C 643]. So, the wilful neglect of a defendant to plead within the time appointed by law, is taken conclusively against him, as a confession of the plaintiff's right of action [RSC 1883 O 27, r 2 *et seq*; Tay s 83].

Limits as to applicability of the maxim that every man is presumed to know the law [*Kally Doss v. EIR*, 2 CWN 609].

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. Nobo Kristo*, 8 WR Cr 87]. Where a woman of about 21 years of age administered *dhatura* to some members of her family, it was presumed that she knew that the administration of *dhatura* was likely to cause death, although she might not have administered it with that intention [*R v. Tulsha*, 20 A 143]. Similar presumption was also made in a case where *dhatura* was administered with the usual object of facilitating robbery, but in such quantity that the person to whom it was administered died in the course of a few hours [*R v. Gutali*, 31 A 148: 6 ALJ 129].

Violent and determined attack by a number of persons, regardless of the consequences, on another, causing other injuries and severe rupture of a healthy spleen warranted the inference that the acts were done with the intention of causing death or such injuries as the offenders knew to be likely to cause death [*Elem Molla v. R*, 37 C 317]. Where a stranger effects an entry, in the middle of the night, into the sleeping apartments of women and who, when attempt is made to capture him, uses great violence in the efforts to make good his escape, the court ought to presume that the entry was effected with such intent as is provided by s 411 I P Code [*Kailash v. R*, 16 C 659. Followed in *Balmakund v. Ghansam*, 22 C 391 and *Premanundo v. Brindaban*, 22 C 994. See also 127 PR 1905: 2 Cri LJ 279: 29 A 46: 3 ALJ 652: 4 CrLJ 921: 54 PLR 1907: 12 PR 1906: 23 A 124. See however, 4 CLJ 109, 170]. Common intention can always be presumed from proved circumstances, but the pre-

sumption is subject to some restriction as other presumptions; it must not take the form of a bare surmise or conjecture or suspicion. There must be data from which it can be inferred and the presumption in favour of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case. [*Santosh v. State of Kerala*, 1991 Cri LJ 570, 584 (Ker)].

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; but 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 the result [*R v. Lakshman*, 26 B 588; see *Virsa v. S*, A 1958 SC 465; *Anda v. S*, A 1966 SC 148; *Harjinder v. Delhi Administration*, A 1968 SC 867; *Ram Kumar v. S*, A 1970 Raj 60]. In suits for damages for malicious prosecution malice may be presumed from the absence of a reasonable and probable cause [*Bisho Nath v. Ramdhone*, 11 WR 42; *Ganga Pershad v. Ramphul*, 20 WR 177; *Rai Jung v. Rai Guddar*, 1 CWN 537; *Srinath v. Rali*, 10 CWN 253; *Jamnadas v. Chunilal*, 45 B 227. But a different view seems to have been taken in *Shama Bibee v. Ch of Baranagar Munply*, 12 CLJ 410, where all the cases on the point have been referred to and discussed].

In actions of defamation, though it should appear that the defendant was not actuated by ill-will against the plaintiff, malice *in law* will be inferred from the fact of intentional publication unless the defendant can show that his language was excusable as a privileged communication, in which case the plaintiff must establish *actual* malice and in order to do so, must, either by extrinsic or intrinsic evidence, prove facts which are inconsistent with *bona fides*. So, in other actions for damages founded on wrongs, as for a malicious prosecution, and the like, the fact that the defendant has had recourse to legal proceedings raises a *prima facie* inference in his favour, which the plaintiff is bound to rebut by proving the absence of all reasonable and probable cause [*Abrath v. N E Ry Co*, 1886, 11 AC 247; *Davidson v. Smyth*, 20 LR Ir 326] and the presence of an actual malicious intent [Tay s 118].

Absconding after occurrence and giving false name and residence may be a ground for suspicion and some evidence of guilty intent against an accused [*R v. Ritbaran*, 19 CrLJ 789: 46 IC 709]. The publisher must be deemed to intend the natural result of the words used having regard to the character and description of the public who are expected to read the articles [*per* MOOKERJEE J, *In re A B Patrika*, 25 CWN 1057].

Issue. [Celibacy].—There is no presumption that a person died without issue [*Re Jackson*, 1907, 2 Ch 354]. No presumption arises from the presumption of death of a person that he left no heirs [*Pannaloori v. Chelakapathi*, 33 MLJ 295 (*Re Jackson, supra* refd to)]. Where the deceased, when last heard of, was unmarried, he may be presumed as a matter of fact, though not of law to have died unmarried and without any issue [*Re Harding*, 1891 Times May 28; *Re Callan*, 39 Ir LT Jo 372, cited in Phip 11th Ed p 919].

Jamabandi.—Entries in *jamabandi* are not proof of title [*Guru Amarjit Singh v. Rattan Chand*, A 1994 SC 227, 229].

Judgment.—The factual recitals or observations made in a judgment or order are taken to be correct unless rebutted. The burden to rebut it is on the person who challenges it. One of the methods to rebut such observation is to file the affidavit of the person who was present in the court and to produce such material which may satisfy the court that the recital in the judgment crept in inadvertently or it was erroneous [*State of Maharashtra v. Admane Anita Mote*, 1995 SC 350, 352].

Khasra.—Entries made in Khasra are not conclusive of any matter but they have presumptive value [*Kashiram v. State*, 1996 MP 247, 251].

Knowledge.—(see *ante*, "*Intention*").

Land. [Possession of].—The law will presume every possession lawful, the commencement and continuance of which is not proved to be wrongful [*Ram Parson v. Shk Kalab*, 36 IC 100]. In the absence of any contrary evidence, the Court may presume that the property of two adjoining owners belongs in equal halves [*Mobarak v. Toofany*, 4 C 906: 2 CLR 446; see also *Khagendro v. Matangini*, 17 IA 62: 17 C 814 and 15 CPLR 93]. Where it is found that a party is in possession of certain property, the court may presume that he is in possession as regards the appendage of such property; though no definite acts of possession are proved as regards the appendage [*Iqbal v. Nund*, 24 A 294]. Where a tenant is in possession of land adjacent to other lands admittedly under his cultivation and pays rent for the whole area, it is presumed to be part of his holding [*Kashinath v. Durga*, 1 Pat LJ 604; see *Rajendra v. Mahim*, 3 CWN 763]. Where plaintiff proved his proprietary title to land previous to twelve years before the suit, he was entitled to claim the presumption that he had possession which continued within twelve years of the suit [*Midnapore Z Co Ltd v. Panday*, 2 PLJ 566]. The mere fact that a widow is in possession of certain properties does not give rise to a presumption that she got the same as the heir of her husband [*Diwan Ram v. Indrapal*, 26 IA 226: 26 C 871: *Boddu v. Aripirala*, A 1968 AP 276]. Presumption of ownership and possession of land arising from several entries in revenue records of large number years does not stand rebutted by mere stray entires in favour of others [*Bhimeshwara v. Pedapudi*, A 1973 SC 1299]. See Notes to s 110 *ante*.

Legal Necessity.—[See '*Reversioner*' *post*]. Alienation of joint family property by representative of all branches of family and by adult male members raises a presumption of legal necessity [*Dhunraj v. Ramnaresh*, 79 IC 1019 (A); see *Balvant v. Babaji*, 8 B 602; *Chuttan v. Jairam*, 33 A 283; *Ananat v. Ram Pd*, 78 IC 919 (A); *Hari Pd v. Surendra*, 1 P 506: 66 IC 945]. The more ancient the alienation, strict proof may not be required [*Mukabasappa v. Hanmantappa*, A 1953 B 302]. Recitals of legal necessity in old documents when independent evidence is not available, raise a presumption [*Jagat v. Banga*, 21 CWN 225 PC]. When permanent lease by a *shebait* is not challenged for a long time, legal necessity is presumed [*Magniram v. Kasturbhai*, A 1922 PC 163: 49 IA 54]. Consent of reversioner, male or female, is presumptive proof of legal necessity [*Krushna v. Fakir*, A 1953 Or 290].

Legitimacy.—The general presumption of legitimacy is not confined to cases within s 112 [*Dularey v. Suraj*, 43 IC 478]. When the paternity of a person is admitted there is a general presumption in favour of the legitimate birth of that person, [*Hoovayya Kanthappa Shetty v. Renuka S Shetty*, A 1984 Bom 229, 230]. As to legitimacy see notes to s 112 *ante*.

Life.—[See ss 107, 108].

Locker in joint name.—Ornaments kept in locker in joint name of husband and wife and operatable by both can be presumed to belong to both and not to one alone [*Braj Kishore Sinha v. Rekha Sinha*, A 1992 Pat 173, 175].

Mahomedan Law.—In the absence of express contract, a Mahomedan dower is presumed to be prompt, demandable, at any time, and not merely deferred, *ie* demandable on divorce [*Umdo Begum v. Muhamadi*, 33 A 291]. Amongst Sunnis, if there is an express agreement that dower should be prompt, only reasonable portion should be deemed to be prompt [*Md Subhanullah v. Saghirunnessa*, 41 A 562]. It

may be presumed that dower was fixed [*Umrao v. Md Baksh*, 55 IC 236]. In the case of Mahomedans there is no presumption that property purchased in the name of a member of the family was purchased out of joint property [*Mahomed Wari v. Mohi-ul-din*, 24 CWN 321: 58 IC 843; *Krishnajiban v. Md Masiuddin*, 33 CLJ 369].

Maintenance.—Where it is proved that the husband had sufficient means to pay decretal amount at the time of the judgment in maintenance suit it can be presumed that such means to pay continued [*Pankaj Mahakud v. Tara Mahakud*, A 1992 Ori 199, 203].

Malice.—"Malice," in its legal sense, does not necessarily signify ill-will towards a particular individual, but denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. Therefore the law implies malice where one deliberately injures another in an unlawful manner [*Spies v. People*, 3 Am St Rep 320]. The wrongful act thus implying malice may be either criminal or civil. Thus, in libel and slander, malice in the sense expressed is implied from the publication of false and defamatory matter [*Childers v. S, J M Printing Co*, 45 Am St Rep 40]. Malice in this sense is often called "implied" or "legal" malice "Express" or "actual" malice is important in certain circumstances, as in breaking down conditional or qualified privilege, in the law of slander and libel, and in laying the basis for malicious prosecution. There is, however, no presumption as to malice of the latter sort [Jones s 29]. See *ante*: "*Intention and Knowledge*" and *ante*: notes to ss 101-104 under: *Damages for Defamation and Malicious Prosecution*".

Marriage.—The law presumes in favour of marriage and against concubinage. Continuous cohabitation for a number of years may raise the presumption. The presumption can be replied only by strong and conclusive evidence and the mere fact that direct evidence of marriage which took place many years ago is unsatisfactory, cannot displace the presumption [*Badri v. Dy Director*, A 1978 SC 1557; *Indar v. Thakur*, 2 L 207: 63 IC 397; *Mohabbat v. Md Ibrahim*, 56 IA 201: 10 L 275; *Doep v. Fleming*, 4 Bing 266; *Collins v. Bishop*, 48 LJ Ch 31; *Sastry Velaider v. Sembecutty*, 6 App Cas 364: 38 C 800; 43 IC 478: 45 PR 191: *Breadlabane Case*, LR 1 HL Sc 182; *Gnanamuthu v. Anthoni*, A 1960 M 430 (cases collected); see also *Sadik v. Hashim*, 43 IA 212: 38 A 627; *Imambandi v. Motasuddi*, 15 CLJ 621 (on appeal 45 IA 73: 45 C 878); *Bepin v. Atul*, 15 IC 328; *Chandulal v. Khatemonnessa*, 1942, 2 Cal 299; *Mg Po Han v. Ma Talok*, 7 LBR 79; *Md Jan v. Sundar*, A 1934 A 884; *Nizampatam v. Kondiparti*, A 1948 M 198, *Smt Mandakini Pundalik Saikar v. Chandrasen Raikar*, A 1986 Bom 172, 178: (1986)2 Hindu LR 229]. Regarding the presumption of marriage on account of the man and woman living together for sufficiently long time and also, the evidence about tying of that and performance of shastiabda poorth unless the other side adduces clear, cogent and reliable evidence, the presumpion is not rebutted. Mere suggestions and stray sentence elicited in the course of cross-examination and questions put on interrogation cannot be sufficient to rebut the presumption [*Parameshwari Bai v. Mnthojirao Scindia*, A 1981 Kant 40, 46]. If children are born to such a couple, there is further presumption in favour of their legitimacy. The presumption does not get mitigated or weakened merely because there may not be positive evidence of any marriage having taken place. If there is some evidence that the couple had gone through some form of marriage, the presumption gets strenghened. [*Ningu Vithu Bamane v. Sadashiv Ningu Banane*, A 1987 Bom 27, 31: 1986 Mah LJ 186; *Ranganath Parmeshwar P. Mali v. E.G. Kulkarni*, A 1996 SC 1290]. If there is also evidence that they were married according to social custom, a legal and valid marriage must be presumed. [*Khageswar Naik v. Domani Bewa*, A 1989 Ori 10, 12; *Kanesh Malakar v. Mastt, Protiva Rani Malakar*, 1989 Cri LJ 1540, 1544: (1988)2 All Cri. LR. 1123].

A presumption of legal marriage can be rebutted only by showing that the marriage was most highly improbable and not reasonably possible; marriage can be proved by repute and intention to enter into wedlock. After lapse of time the Pandit who officiated in the ceremonies and other witnessess will disappear and no evidence except the hard fact of the husband and wife living together survives. [*Ashok Kumar v. Smt. Ushakumari*, A 1984 Del 347, 350]. The presumption under Hindu Law is not otherwise [see *Indar v. Thakur*, 2 L 207: 63 IC 387]. As to presumption of marriage from long cohabitation, see Hals 3rd Ed Vol 19 paras 1323 and 1324. Long cohabitation as husband and wife would raise a presumption of lawful marriage [*Nera Bai v. Pusia Bai*, 1996 AIHC 122 (MP)]. If a man and woman live together for long years as husband and wife then a presumption arises in law of legality of marriage existing between the two. But the presumption is sebuttable [*S.P.S. Balasubramanayam v. Suruttayan*, A 1994 SC 133, 134]. Presumption of second marriage on the basis of long cohabitation can be raised if the said marriage took place when polygamy was permissible [*A Bal Reddy v. Saraswathi*, 1994 Cri LJ 1125 (AP); *Ma Wuw Di v. Ma Kins*, 18 MLJ 3, **distinguished**]. When some sort of marriage ceremony was undergone between the parties, there is always a presumption of validity of marriage [*Subhash Popatlal Shah v. Lata Subhash Shah*, A 1994 Bom 43, 45]. When there is a cohabitation of a man and a woman as husband and wife, presumption arises that there was a valid marriage between the parties. Formality and customs for valid marriage would also be presumed to have been performed [*Nirmala v. Rukhminibai*, A 1994 Kant 247, 252]. Where the husband even after having caught his wife being indulged in sexual intercourse with another person in April, lived happilly with his wife till the middle of May when the wife left for her parent's house, the fact of living together gives rise to a strong presumption of condonation of the wife's offence by the husband [*Arun Kumar Bhardwaj v. Anila Bhardwaj*, A 1993 P&H 33, 37].

There is a general presumption of marriage from cohabitation with habit and repute. The habit and repute which alone is effective is habit and repute of that particular status which, in the country in question is lawful marriage. The presumption varies from country to country or society to society. Among people where open cohabitation without marriage is uncommon, the fact of cohabitation sets up a repute of marriage. Where concubinage is recognised or condoned or winked at, the presumption becomes weak [*Ma Wan v. Ma Kin*, 35 IA 41: 35 C 232: 12 CWN 220: 18 MLJ 3; *Nizamapatam v. Kondiparti*, A 1948 M 198; *Ma Shwe v. Bo Tin*, 76 IC 620; *Mal Singh v. Ram*, A 1973 P&H 124]. But mere evidence of class or clan proclivity to concubinage is not admissible to rebut the presumption of marriage [*Mohabbat v. Md Ibrahim*, A 1929 PC 135; *Bira v. Tauli*, A 1972 Or 143]. Presumption of marriage from repute arises only when the parties were living together for a sufficiently long period. But when a man had already married a woman and had children by her, there is no presumption that another woman with whom he is said to have lived long is his wife [(SA No 592 of 1921) 46 MLJ 9*n*; *Nagarajamma v. State Bank*, A 1961 AP 320; see *Chokalingam v. Swami*, A 1925 M 426: 76 IC 623; *Vaikuntam v. Puppala*, A 1971 Or 49, *Alagammal v. Rakkammal*, A 1982 Mad 354, 363]. When a man and a woman continuously lived under the same roof and cohabited for a number of years the law would raise presumption that they lived as husband and wife [*S.P.S. Balasubramanyam v. Suruthayan*, A 1992 SC 756, 757].

Where second marriage is not prohibited if a person goes through a form of marriage with a woman for a second time and lives with her as husband and wife there is no obstacle to the presumption being raised from the fact of long cohabitation and repute [*Raghuvir v. Shanmughavadivu*, A 1971 M 331 (*Nagarjamma v. State Bank of*

India, A 1961 AP 320 dissent; *Rajagopal v. Pakkiam*, 1968, 2 MLJ 411 **rel** on)]. As to general evidence of repute in proof of relationship, see *ante* s 50.

Where the parties constantly, continuously, and openly lived and co-habited together for 20 years, had nine children and were regarded and recognised as man and wife by their relations and friends, these facts in the absence of countervailing circumstances afford clear and conclusive evidence of marriage [*Dinohamy v. Balahamy*, A 1927 PC 185: 104 IC 327: 47 CLJ 412; *Bikash v. Nandarani*, A 1979 C 358; see also Hals 3rd Ed Vol 19 paras 1323, 1324]. Presumption of marriage from long cohabitation is rebuttable [*Gokal v. Parvin*, A 1952 SC 231: 1952 SCR 825, *Pravinbhai v. Nalinkant*, A 1961 MP 93; *Nagarajamma v. State Bank*, A 1962 AP 260]. The presumption would be almost irresistable if the conduct of the parties were shown to be compatible with the existence of relation of husband and wife [*Abdul Razak v. Aga Md*, 21 C 666, 674 PC].

Long cohabitation raises the presumption, but if it is known that the connection started in mere concubinage, the presumption cannot arise [*Indi v. Jaimal*, A 1927 L 48: 98 IC 887; *Ghazaffar Ali v. Kaniz Fatima*, 37 IA 105: 32 A 345: 14 CWN 690: 20 MLJ 579; *Gangadhar v. Rachappa*, A 1929 B 246; *Rafiuddin v. Zubedabai*, A 1968 Mys 155]. The Judicial Committee declined to presume that a woman, once a concubine, had, merely by lapse of time and propriety of conduct, become a wife, and that the ordinary legal presumption was that there has been no marriage [*Jariatool v. Hosseinee*, 11 MIA 194: 10 WR 10]. Presumption which might have been raised where the woman was not found to be a prostitute and where connection was not found to be adulterous in its inception, can have no bearing when these facts have been proved. The position is the same under unalloyed Mahomedan law [*Rahmat v. Harbhanjan*, A 1946 L 450]. The presumption does not also arise when the persons living together are such that they cannot *prima facie* contract valid marriage [*Gulab Chand v. Bhanja Lal*, A 1930 N 343; *Koduri v. Simhadri*, A 1944 M 862]. But although there may be a custom prohibiting re-marriage of a widow, when two persons live as man and wife the presumption arises after the Hindu widows' Re-marriage Act [*Nizamapatam v. Kandiparti*, A 1948 M 198]. Even if the connection started in adultery, the presumption arises when it is established that the woman was divorced and after they continued to live together [*Gurdial v. Bhagat*, A 1943 L 517]. Under the Mahomedan law, mere continuance of cohabitation is not alone sufficient to raise a presumption of marriage, but the continued cohabitation must be as between man and wife [*Masitunnissa v. Pathani*, 26 A 295]. Where a Mahomedan woman lived with a Sikh for a number of years as his wife, there is a strong presumption in favour of marriage [*Sulakhan v. Santa*, 66 IC 375].

Where it is established that there has been a marriage in fact, there would be a presumption of marriage in law [*Inderun v. Ramaswamy*, 13 MIA 141; *Kashinath v. Bhagwan*, A 1947 PC 168]. The presumption under Hindu Law is that a marriage should be deemed to be in an approved form [*Mahadeo v. Chandrika*, A 1946 N 232; *Kodu v. Lola*, A 1948 N 141]. In a suit for restitution of conjugal rights, the fact of marriage having been established, the presumption, in the absence of anything to the contrary, is that all the necessary ceremonies have been complied with [*Brindabun v. Chandra*, 11 C 140; *Bai Diwali v. Moti Karson*, 22 B 509; *Lachman v. Murdan*, 8 A 142; *Lopez v. Lopez*, 12 C 706; discussed in *In re Millard*, 10 M 218. See also *Lachmi Koer v. Raghunath*, 27 IA 142: 27 C 971: 4 CWN 685]. The law on the subject was fully considered by the *House of Lords in Piers v. Piers*, 2 HLC 231. Where in a suit for restitution of conjugal rights, the validity and legality of marriage is one of the most essential points in issue, the court is not entitled to presume, from

the mere finding that the marriage was celebrated, that all the rites and ceremonies necessary to constitute a legal and valid marriage were performed [*Suriyamoni v. Kali Kanta*, 27 C 37: 5 CWN 195].

Marriage may in certain cases be a matter of legal presumption under the Mahomedan law [*Secy of S v. Mariam*, A 1937 S 126]. If direct evidence of marriage is disbelieved, the effect of presumption of acknowledgment of sonship by father is not lost and the failure does not absolve the opposite party from rebutting the presumption [*Ahasanulla v. Nejabat Ali*, A 1929 C 682]. No presumption in favour of validity of marriage between parties in different sub-divisions of sudra caste can be made, unless sanctioned by any special custom, although long co-habitation existed between the parties [*Narain v. Rakhal*, 1 C 1: 23 WR 334: **Follq** in *Kirpal Narain v. Sukurmoni*, 12 C 91]. It has however been subsequently held that in Bengal marriage between a Kayastha and Tanti is valid [*Bishwanath v. Sarasibala*, 25 CWN 639]. The presumption under the Hindu law is that marriage is in the *Brahma* form unless it can be shown that it was in Asura form [*Gabrielnathaswami v. Valiammal*, 53 IC 423: 26 MLT 348 (32 M 12: 33 B 433: 37 B 295 refd to)].

Motor accident.—When the owner of the motor vehicle was not required to produce the permit, nor the counsel representing him was asked to produce the same, no adverse inference can be drawn as regards liability of the owner for the motor accident [*Oriental Fire and General Insurance Co. Ltd. v. B. Sitharam Singh*, A 1995 AP 268, 271].

Murder.—The court may draw the inference that accused committed a murder or was present when it was committed when the accused is found in possession of a property proved to have been in possession of the murdered person at the time of the murder [*Narayana v. R*, 1932 MWN 801; see *ante* p 989]. The discovery of blood-stained cloth of the deceased in the house of the accused does not entitle the court to make any presumption against the accused as to his guilt [*Bhagwati v. R*, A 1934 O 373].

Negligence.—As a rule negligence is not to be presumed; it is rather to be presumed that ordinary care has been used [*Chandrasekhar v. Abid Ali*, 80 IC 902 (N)]. The rule does not apply in the case of common carriers, who, on grounds of public policy, are presumed to have been negligent if goods entrusted to their care have been lost or damaged or delayed in delivery [*Ross v. Hill*, 2 CB 890; Jones s 15]. The law will conclusively presume that the carrier has been guilty of a negligence unless he can show that the loss or damage was occasioned by what is technically called the "act of God", or by King's enemies. The same principle applies to goods under the custody of a stage-coachman, a cabman, or even a gratuitous bailee [Tay s 187]. In the case of bailment and loss, the law presumes negligence on the part of the bailee [*Kushkanta v. Chandrakanta*, 28 CWN 1041. See *Vishnu v. B B & C I Rly Co*, 85 IC 416 (B)]. If the Court finds itself unable to discover to what extent the negligence of the plaintiff or the defendant contributed to bring about the accident, the defendant is entitled to succeed [*Nanibala v. Auckland Jute Co Ld*, 52 C 602]. The mere fact that a man is knocked down by a motorist and killed cannot raise presumption of negligence. There must be proof that the rash or negligent act of the accused was the proximate cause of his death and there must be a direct nexus between the death of a person and the rash or negligent act of the accused [*Suleman v. S*, A 1968 SC 829; *Tukaram v. S*, A 1971 B 164]. When a new born child was injured by a cat in the premises of Govt. owned and managed hospital, there is a presumption of fact that there had been negligence of proper care and caution on the part of the hospital entrusted with the

job of providing medical facilities and ensuring safety to the lives of patients [*Jasbir Kaur v. State of Punjab*, A 1995 P&H 278, 280].

Damages are presumptive evidence of negligence on the part of the railway company. Under certain circumstances negligence may be good evidence of mis-conduct or mismanagement [*B N Ry v. Moolji*, A 1929 C 654].

Negotiable Instruments Act, 1881.—

Section 139 of Negotiable Instrument Act provides:

> 139. It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in S. 138 for the discharge, in whole or in part, of any debt or other liability.

For an action under s. 138 of the Act, there are certain conditions precedent, (1) a cheque issued by a person must have been presented to the bank within the period of validity and it must have been dishonoured; (2) After such dishonour, the payee or the holder shall make a demand for the payment of the amount by giving a notice in writing to the drawer of the cheque within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; (3) after receipt of such notice, the drawer of such cheque fails to make payment of the amount of money to the payee of the holder. Only if the above conditions are satisfied an action can be taken under S. 138 of the Act by which the drawer of the cheque shall be deemed to have committted an offence. If such an action is taken, there is a presumption under S. 139 of the Act in favour of the holder. The presumption is to the effect that the holder of the cheque received the cheque of the nature referred to in S. 138 of the Act for the discharge, in whole or in part, of any debt or other liability [*R. Sankaralingam v. Union of India*, 1996 Cri LJ 3387, 3389 (Mad)]. The section does not run counter to the basic principles of criminal law that an accused must be presumed to be innocent. Under S. 138 of the Act, when an action is taken against a particular person, there are certain admitted facts and circumstances which have been referred to above. On such admitted facts and circumstances, the law raises a presumption that the accused is guilty. Then the burden shifts on to the accused to prove that he is not guilty by establishing that the cheque was not supported by any consideration and it was not in discharge of any debt [*R. Sankaralingam v. Union of India*, 1996 Cri LJ 3387, 3389].

Notice in Newspaper.—There is no presumption that a notice published in a newspaper must have been read by a subscriber. In order to amount to actual notice, it must be shown that his attention was drawn to the said notice [*Bhairab v. Kalidhan*, 33 CWN 369: A 1929 C 736].

Partition.—Admission or proof of partition of some of the joint family properties, raises a presumption that the property has been partitioned [*Kanshi v. Duni*, A 1934 L 707; *Kaulesari v. Ambika*, A 1950 P 365; *Ramnagina v. Harihar*, A 1966 P 179]. Oral partition being permissible under Hindu law, once a partition is alleged presumption of complete partition arises unless contrary is proved [*Sitaram v. Mahadeo*, A 1980 P 254]. When no scrap of paper is produced to show that there was a prior partition in the family the presumption is that the family continues to be joint and the properties are joint family properties. [*Bhagaban Panda v. Dullav Panda*, A 1991 Orissa 66, 70].

Partnership.—The fair inference from s 253 Contract Act and s 114 is that in the absence of a special agreement to the contrary, if unequal shares between the partners are admitted in respect of the sharing of profits, the same inequality of shares apply

to losses also [*Pitchaiah v. Subramanian*, 58 M 25]. Notice of dissolution of firm or retirement of partner should be given to third parties who deal with a firm. When such individual notices are given there is no question of themselves being led into wrong belief and acting to their detriment [*State of Kerala v. Saroja*, A 1987 Kerala 239, 245: 1987 Ker LJ 205].

Pledge.—Where the postmaster pledged National Saving Certificate in favour of a party it can be presumed that the pledge was proper [*Gorakhnath Upadhyaya v. State of U.P.*, A 1994 All 283, 292 (HC)].

Possession. [See "Land"].—It is well settled that title ordinarily carries with it the presumption of possession [*Bitola v. Ramcharan*, A 1978 A 555]. If a person without title acquires possession of part of land and proceeds to mark out the area of the entire land which he intends to possess, he will be presumed to be in possession of the entire area though he has physical control only over a portion [*Tikait v. Nawab*, 80 IC 544 (P)]. See also *Sivasubramanaya v. Secy of S*, 9 M 285 p 305; *Bithaldas v. Secy of S*, 26 B 410, 417; *Ramzan v. Fakir*, 82 IC 861 (S)]. Presumption of title on account of possession will arise only when none of the parties establishes title to the property. [*Abdul Gani Mia Alias Abdul Waheb v. Abdul Gani Alias*, A 1990 Gau (NOC) 77]. See *ante* s 110: "*Nature and evidence of possession*".

Entry in Record of Rights has only a probative value, but under s 114 presumption is of certain facts. If none can prove possession, the court must hold that possession is with the rightful owner [*Nanda v. Emdad*, A 1927 C 49 (see notes to s 110 *ante*)].

Press. [Prosecutions Relating to].—Upon an application under s 17 of Press Act (1 of 1919), the Court does not approach the case with the presumption that the order is erroneous. The burden lies upon the petitioner to establish that the publication is not of the nature described in s 4(*1*) of the Act. The decision in 41 C 466 can no longer be treated as binding in so far as it is inconsistent with 37 MLJ 139; 39 M 1085 [*In re A B Patrika*, 23 CWN 1057: 30 CLJ 289. See 4 PLJ 174: 1919 Pat HCC 65].

Prevention of Corruption Act.—The presumption under s 4 of the Prevention of Corruption Act is a presumption of law and therefore it is obligatory of the court to raise this presumption in every case brought before it because unlike the case of presumption of fact, presumption of law constitutes a breach of jurisprudence [*S v. Vaidyanatha*, A 1958 SC 61]. The presumption under s 4 of the Act arises when it is shown that accused received the stated amount and such amount was not legal remuneration [*Sailendranath v. S*, A 1968 SC 1292; *Jhingam v. S*, A 1966 SC 1762; *Dhanvantrai v. S*, A 1964 SC 575; *Emden v. S*, A 1960 SC 548]. In bribery cases it is sufficient, if the accused gives a satisfactory explanation in the absence of any acceptable evidence with regard to payment of bribe. It is sufficient if the accused raises preponderance of probability and that it need not be proved to the hilt beyond reasonable doubt [*Balakrishnan v. State*, 1994 Cri LJ 1258, 1271].

Publication.—Where a municipality's assessment register is produced, there is a presumption that it was duly published and became final [*Bhagalpur Mun v. Faik*, A 1932 p 370].

Recital.—See "*Reversioner*" *post* and notes to ss 101-104 under "*Recital in a deed or other instrument*" and s 115 *post*.

Record of Rights.—See also *post*, "*Statutory Presumption*". The entry in mutation paper or in khewat or any other village or revenue papers, cannot be given as much sanctity as an entry made in the Record of Rights. About the entry in the

Record of Rights the law enjoins that such entry has to be presumed to be correct; and if any body wants to show that the entry is wrong, the burden of proof lies on the person alleging the entry to be wrong'. As regards to evidentary value of an entry in the Record of Rights, a Division Bench of Patna Court seems to have observed in A 1939 Pat 23 that such an entry in the Record of Rights may be considered to be sufficient proof of separation of the two branches of the family. Several other decisions, as already noticed above, indicate that entry in the Record of Rights (and some of the decisions indicate that even the entries in other revenue and village papers) may afford slight indication of separation, though such entries may not by themselves establish partition and rebut the strong presumption, which has to be raised in favour of jointness of a Hindu family. In view of the decision of the Division Bench reported in A 1939 Pat 23, any contrary observation made in the single Bench decision reported in 1988 PLJR 686 or A 1960 Pat 548 cannot be accepted. The earlier Privy Council decisions do not appear to have laid down law, in the context of entry in the Record of Rights, and none has said that an entry in the Record of Rights cannot be taken to be the piece of evidence for indicating separation of joint status [*Janandan Rai v. Mandeo Rai*, A 1997 Pat 124]. Though Record-of-Rights by itself does not create nor extinguishes title, a presumptive value is attatched to the entries in the Record-of-Rights, in the absence of any other material, presumption can be raised on the basis of the entry in the reord of Rights [*Paramananda Mohanty v. Hadibandhu Mohanty*, 1997 AIHC 880, 882 (Ori)]. Entry in Record of Rights has to be presumed to be correct; and if anybody wants to show that the entry is wrong, the burden of proof lies on the person alleging the entry to be wrong [*Janandan Rai v. Mandeo Rai*, A 1997 Pat 124, 129].

Religion.—Want of religious belief, or irreligious conduct, will not be presumed. All the members of a Christian community being presumed to entertain the common faith, no man is presumed to disbelieve the existence and moral government of God [Best s 351. Greenleaf, s 42]. A child born in India must under ordinary circumstances be presumed to have his father's religion and his corresponding civil and social status [*Skinner v. Orde*, 14 MIA 309; *Md Azim v. Saadat Ali*, A 1931 O 177]. As regards the law by which persons changing religion are to be governed and the presumption from following custom after conversion, see *Lastings v. Gonslaves*, 23 B 539. A man by becoming a Brahmo does not necessarily cease to be a Hindu. A declaration under Act 3 of 1879 does not involve a renunciation of Hindu religion [*In re jnanendra*, 26 CWN 700].

Repeal.—"It is undoubtedly true that the legislature can exercise the power of repeal by implication. But it is equally well settled principle of law that there is a presumption against an implied repeal. Upon the assumption that legislature enacts laws with a complete knowledge of all existing laws pertaining to the same subject the failure to add a repealing clause indicates that the intent was not to repeal existing legislation. Of course this presumption will be rebutted if the provisions of the new Act are so inconsistent with the old ones that the two cannot stand together [*Municipal Council Palai v. T.U. Joseph*, A 1963 SC 1561. **Followed** in *J.K. Kalra v. Regl. Inspectress of Girls Schools*, A 1997 All 44, 56].

Revenue Record [Mutation].—Presumption of correctness of revenue entries is rebuttable [*Nagar Palika Bulandshahr v. Hanuman Prasad*, 1996 AIHC 3148 (All)]. Mutation may be a proof of possession of the property but not a proof of title to the property [*Talat Fatima Hasan v. Nawab Syed Murtza Ali Khan*, 1997 All 122, 128]. Mutation of name in revenue record is not evidence of title [*Nawal Shankar Iswarlal Dave v. State of Gujarat*, A 1994 SC 1496, 1501 : 1994 Cri LJ 2170]. An entry in revenue paper cannot form the basis for declaration of title to the land [*State of H.P.*

v. Keshav Ram, A 1997 SC 2181]. Where in the revenue records the husband was entered as tenant before mortgage of the land was created and after his death his wife's name was recorded as tenant for some years and later she was recorded as mortgagee, change of revenue entries would not indicate that the tenant ceased to be in possession till something to the contrary was proved. There was no basis for the trial court to presume that though the husband was recorded as tenant before creation of the mortgage, yet he ceased to be a tenant [*Ram Rakhi v. Atti*, A 1993 HP 137, 140]. When challenge is made to the entry in the record of rights, the burden lies on the person who challenges the entry to establish by placing evidence of unimpeachable character that the entries were incorrect and erroneous [*Anwar Hussain Sheikh v. Santi Kumar Mondal*, A 1997 Cal 120, 122].

Reversioner.—Consent of immediate reversioners to an alienation by a Hindu widow would raise, according to circumstances, a presumption either of the existence of legal necessity or of reasonable enquiry and honest belief as to its existence [*Debi Pd v. Golap*, 17 CWN 701 FB: 40 C 721; see *Bijoy v. Girindra*, 18 CWN 673 PC: 41 C 793: 16 Bom LR 425; *Parasurama v. Malireddi*, 42 IC 496; *Ramesh v. Sashi*, 23 CWN 1025; *Mata Pd v. Devi Shuklain*, 58 IC 567; *Madhav v. Shiddaya*, 22 Bom LR 79; *Adhikari v. Lokanath*, 56 IC 426; *Bhup Singh v. Jhumman*, 19 ALJ 881; *Hari Kishen v. Kashi*, 42 IA 64: 28 MLJ 565: 19 CWN 370: 42 C 876; *Darbari v. Gobind*, 46 A 822]. It cannot be said that the only effect of consent of a presumptive reversioner is to raise a presumption of necessity [*Kunja v. Raisk*, 39 CWN 474]. The presumption does not arise when the transfer is to such reversioner himself [*Upendra v. Gurupada*, 34 CWN 405: A 1930 C 508].

Sanity.—The law presumes that every human being is possessed of the ordinary faculties of reason and understanding, Idiocy, lunacy &c are not presumed. Every man is presumed to be sane until the contrary is proved [Tay ss 197, 370]. But if insanity is established it will be presumed to continue until disproved [*Prinsep v. Dyce*, 10 Moo PC 232 (see the presumption in illustration (*d*)]. A finding under the Lunacy Act (35 of 1858) that a person is a lunatic raises a presumption that he continues to be of unsound mind until the contrary is shown [*Amanchi v. Padmanabha*, 40 M 660].

Statutory Presumptions.—The Legislature is presumed to have knowledge of the facts and conditions which renders a particular piece of legislation expedient and beneficial. Good faith of a Legislature in enacting a statute must also be presumed (*Raval v. Co v. Ramchandran*, A 1967 M 57 FB). S 118 of the Negotiable I Act (25 of 1881) provides for several cases in which presumptions shall be made. It includes the case put in illustration (*c*); see also ss 119-122 and s 137 of the same Act.—Presumption under ss 53 and 101 of the Transfer of Property Act of 1882.—Presumption under s 6 of the L A Act, I of 1864, that land is required for a public purpose &c, &c. There are numerous other statutory presumptions besides those mentioned above. Statutory presumption of correctness cannot be rebutted by another presumption under general law [*Surpat v. Bhupendra*, 16 P 105; *Ramnath v. Dowas*, A 1950 P 487]. It is sound principle of interpretation of statutes that the courts always presume that legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. This principle of presumption is equally made applicable in the case of rule making authority [*Balkishan v. Shrilal*, A 1994 MP 14, 17; See also *J.K.C.S. & W Mills v. State of U.P.*, A 1961 SC 1170]. There is a rebuttable presumption that the certificate of Inland Revenue Department is evidence of facts stated therein [*Government of Federation of Malaysia v. Lee Tain Tshung*, (1992) 1 Malayan LJ 629 (Kota Kinabalu HC)].

Rajasthan High Court Ordinance, 1949.—In case of special appeal filed under section 18 of the Rajasthan High Court Ordinance, 1949 and Rule 134 of the Rules for High Court of Judicature for Rajasthan, it may be presumed under section 114 of the Evidence Act that the then Additional Advocate General Rajasthan, was duly authorised to file the appeals [*Regional Transport Authority Jodhpur v. Sita Ram*, 1993 Raj 76, 80].

In view of sections 43 and 45 of the Constitution of J&K a presumption of validity is attached to orders of detention under J&K Public Safety Act signed by the Addl. Home Secretary to the Govt. of J&K or authenticated in the name of the Govt. of J&K. Though such presumption may be rebuttable but in that event the *onus* lies upon such a person who asserts the same to the contrary to the provisions of the constitution of J&K [*Mohd Yasin Shanger v. State*, 1993 Cri LJ 727, 729 (J&K)].

An entry in a record of rights (*khatian*) is presumed to be correct until it is proved by evidence to be incorrect (v s 103-B B T Act) [see *Harshamukhi v. Kshitindra*, A 1943 C 453: 47 CWN 662; *Grant v. Harashai*, 18 CLJ 76; *Kalinath v. Pratap*, 5 CLJ 92; *Haidar v. Secy of S*, 9 CLJ 265; *Sambhu v. Purna*, 35 C 175; *Durga Charan v. Prasanna*, 36 CLJ 291 on appeal 26 CWN 947; *Md Guran v. Basarat*, 55 IC 645: 61 IC 420; 22 CWN 49: 9 IC 504]. When the entry in the record-of-rights does not confer the status of an occupancy raiyat on a person, the subsequent conduct of acceptance of rent would not confer any right of occupancy. [*Sadananda Sa v. Commr Consolidation Cuttack*, A 1985 Orissa 33, 37: (1984) 57 Cul LT 524]. The presumption is rebuttable [*Rakimajan v. Amar*, A 1925 C 404; *Ramnath v. Offl Trustee*, A 1925 C 799; *Kiron v. Srinath*, A 1927 C 210; *Adu v. Hiralal*, A 1929 C 255; *Shyama v. Anam*, A 1976 Or 126; *Gulap v. Union*, A 1977 Gau 41, "*Shankaraligappa v. Nanje*, A 1981 Kant 78]. The mutation proceedings by themselves do not determine the question of right and title and the presumption of correctness attaching to the entries of mutation as well as the record-of-rights is rebuttable. [*Nand v. Punnu Ram*, A 1982 Him Pra, 38, 41]. In a conflict between an old and a recent record-of-rights, the latter is presumed to be correct [*Bhupendra v. Abdur*, 61 CLJ 18; *Dost Md v. Bahadur*, A 1932 L 278; *Mt Alo v. Sher*, A 1927 L 607; *Durga Singh v. Tholu*, A 1963 SC 361; see *Tengaroo v. Chattu*, 9 P 347; see however *Haji Mumtajuddin v. Debendra*, A 1959 C 78].

When the three persons whose names are recorded in the settlement record-of-rights admittedly died long before the settlement operation, the entries in the settlement record completely lose their presumption force [*Jatiram Charami v. Atul Krishna Das Kuri*, A 1988 Cal 79, 82]. Entries in record-of-rights are not conclusive and are subject to the decision in a suit or other appropriate proceedings [*Abdulsab v. Spl Dy Comm*, A 1977 Knt 4]. A record-of-right is not a document of title and it is at best an evidence of possession [*Smt Katya Bala Dasi v. Nilmoni Pakhira*, A 1987 Calcutta 248, 260 (DB): (1986) 2 Cal LJ 1]. Entries in khatian as to occupation of a particular person raises a presumption of continuity of his possession and the presumption is not rebutted by rent receipts in favour of someone else [*Purni v. Shibu*, A 1971 P 249]. The entries in a settlement *khatian* afford a strong presumption as to the nature of the land mentioned in them when they were made and not before [*Prakash v. Subodh*, 64 CLJ 341]. Entry as to area is a rebuttable presumption [*Priyanath v. Tarachand*, 27 CWN 982]. The presumption applies not only in suits between landlord and tenant but in all cases where the subject matter with which it deals is in dispute [35 IC 424]. It operates in the same way, between landlords of the same or neighbouring estates or between tenant and tenant [*Mazharal v. Gopal*, 84 IC 488 (P)]. Presumption applies only to finally published record-of-rights. Entries in draft Records are not admissible [*Gulab v. Ramratan*, 18 CWN 896; *Ambar Ali v.*

Lutfe, 21 CWN 996: 25 CLJ 690; *Sarup v. Srikant*, 55 IC 922 (P); 67 IC 871 (C). See however 2 P 814, where it has been held that draft Record is admissible but no presumption arises in its favour]. The presumption applies to actual entries in the Record of Rights and not to the orders of the Settlement Officer on which the entries are based [78 IC 605]. Presumption does not apply when proceedings were carried on without jurisdiction [70 IC 822: 36 CLJ 124]. The presumption is not strictly applicable to an entry relating to non-agricultural land to the same extent, yet it raises some presumption [*Sashikanta v. Sandhyamoni*, 26 CWN 483: 65 IC 4; *Chand Mia v. Tuka*, 80 IC 805 (C)]. Unless in any record-of-rights completed after 18th November 1871 it is expressly provided that the forest, quarry, etc, would vest in the Government, the presumption is that they vest in the land owners [*State of Punjab v. Subash Chander*, A 1991 P & H 134, 137].

Correctness of entries in record-of-rights under Bengal Tenancy Act s 103-B (*5*) attaches also to non-agricultural lands [*Satish v. Sk Sahadat*, A 1973 C 264]. Statutory presumption of correctness attaches to Wajib-ul-urs [*Avadh v. Ramgopal*, A 1979 SC 861]. Entries in the record-of-rights finally published under WB Estate Acquisition Act and Rules thereunder are presumed to be correct [*Jatindra v. Sushilendra*, A 1965 C 328 [*Krishna Dayal v. Bhubaneshwari*, A 1931 PC 221: 35 CWN 921 **folld**)]. A subsequent entry in the record-of-rights made after a civil court decision cannot carry presumption of accuracy [*Kazi Md v. Sibram*, A 1967 C 10: *Jaladhar v. Birendra*, A 1921 C 761(*1*)]. Entries in Jamabandi are presumed to be correct [*Parasram v. Dayal*, A 1965 HP 32]. The presumption of correctness of entries in revenue records can apply only to genuine, not forged or fraudulent entries [*Vishwa v. Fakhrul*, A 1966 SC 1485 (*Sonawati v. Sriram*, A 1968 SC 466, 468 rel on)]. Resolution of company signed by its chairman must be presumed to be correct [*Bharat Fire & Ganl Ins v. Parameshwari*, A 1968 D 68].

S 47 of the Calcutta Police Act (4 of 1866) does not create a presumption in the sense in which that term is used in the Evidence Act. It provides that something which would not be evidence is made evidence and it is for the court to take it into consideration [*Rangalal v. R*, 1937, 1 Cal 610].

Sub-letting.—On proof of fact that a tenant has parted with possession, even in respect of a part of accommodation let out to him and that the alleged sub-tenant of the premises is in exclusive possession of that portion of the demised premises on inference of sub-letting can be legitimately drawn unless the tenant is able to prove satisfactorily some arrangement between him and the alleged sub-tenant which negatves the inference of sub-letting [*Gur Dayal Khanna v. Matti Davi*, A 1993 All 90, 93].

Where it was the case of the landlord that another person 'G' alone was carrying on business in the shop in dispute and it was found that 'G' was not the tenant in joint capacity but was in posession of the shop, it was for the tenant of the shop, within whose knowledge the specific facts and evidence was, to show the capacity in which 'G' was occupying the shop. When the tenant failed to produce the same, adverse inference regarding sub-letting had to be drawn against him [Banshilal v. Mohanlal, A 1995 Raj 167, 168 (HC)].

Tenancy. [Nature of].—Entries in girdawari could be relied upon to prove tenancy, unless there is evidence to the contrary. Entries in Jamabandi are presumed to be correct unless contrary is proved. [*Mangal v. Tharu Ram*, A 1983 Punj (NOC) 148]. Long possession, transfer of the holding by succession and purchase, erection of pucca building with the permission of the landlord by successive tenants, are sufficient for a presumption that the tenancy is a permanent one [*Casperz v. Kedar*,

28 C 738: 5 CWN 858; *Durga v. Rakhal*, 5 CWN 801; *Ismail v. Aghore*, 7 CWN 734; *Beni Ram v. Kundun*, 26 IA 58: 21 A 496: 3 CWN 502 PC; *Krishna v. Mir Md Ali*, 3 CWN 255; *Promoda v. Srigobinda*, 32 C 648: 9 CWN 463; *Nilratan v. Ismail*, 31 IA 149: 32 C 51: 8 CWN 985; *Upendra v. Ismail*, 31 IA 144: 32 C 41: 8 CWN 889; *Ismail v. Asmutulla*, 8 CWN 379; *Ismail v. Mrinmoyi*, 8 CWN 301; *Seturatnam v. Venkatachala*, 47 IA 76: 25 CWN 485: 18 ALJ 707: 22 Bom LR 567: 43 M 567; *Ram Sahai v. Md. Sadiq*, 4 Lah LJ 311; *Abdur Salam v. Kandasami*, 43 MLJ 556; *Secy of S v. Annada*, 65 IC 145; *Jogendra v. Subhasini*, 45 CWN 590]. As to the principle upon which presumption of permanence is to be made or rejected, see also *Secy of S v. Luchmeswar*, 16 IA 6: 16 C 223: *Nabakumari v. Behari*, 34 IA 160: 34 C 902]. The inference of permanence requires the presence of circumstances explicable, when taken as a whole, only on the hypothesis of permanence [*Shankar v. Dagaduji*, 45 CWN 57: A 1940 PC 192]. The presumption applies in temporarily settled districts [*Afzalunnissa v. Abdur Karim*, 47 C 1: 23 CWN 966: 46 IA 131: A 1919 PC 11].

Where the origin of tenancy was unknown but it had existed for a very long time at an uniform rent and dwelling houses were built from the inception [*Soroshi v. Bhagloo*, 32 CLJ 85; see *Banga v. Kailas*, 58 IC 189], or *pucca* structures made without objection [*Abdul Hakim v. Elahi*, 29 CWN 138: 52 C 43] permanency can be presumed. The true test is not whether the buildings are *pucca* but whether the buildings are of a substantial character. *Kuchha* structures may be so substantial as no poor man would be likely to build unless his interest in the land was secured [*Hafiz v. Shk Dargahan*, A 1939 P 448]. A tenancy was inferred to be permanent though there was no evidence of erection of pucca structures [*Pramatha v. Champa*, 56 C 275].

Where origin of tenancy for residential purposes is known, no presumption of permanency can arise [*Gopal v. Satya*, 92 IC 963 (52 C 43 **folld**)]. No presumption of permanent tenancy is applicable to a property which was *debutter* or temple property at the time the tenancy originated. The presumption is against it [*Satya Sri v. Kartick*, 16 CWN 418: 15 CLJ 227 (13 MIA 270 refd to); *Chinnamul v. Ratnasabhapati*, 1920 MWN 532: 41 M 709]. There can be no presumption that a tenancy created by a *Shebait* was a permanent tenancy [*Nainapillai v. Ramanathan*, 51 IA 83: 22 ALJ 130: 28 CWN 809: 47 M 337]. Long possession without payment of rent raises a presumption of lackere right [*Biprodas v. Monorama*, 45 C 574: 22 CWN 396; *Anant v. Banke*, 55 IC 36; see 20 CLJ 295].

Where a tenent enters into occupation of a dwelling house as a tenant, the tenancy in the absence of evidence to the contrary will be presumed to be from month to month [*Ramaswami v. Thayammal*, 26 M 488]. The fact that defendant was in permissible possession of residential premises and that he paid rent raises a presumption of monthly tenancy [*Sukanraj v. Nekarachand*, A 1970 Raj 17 (*Ramkumar v. Jagadish*, A 1952 SC 23; *Lalchand v. Radhaballabh*, A 1959 Raj 240 **folld**)]. No tenant is expected to give away or surrender his tenancy rights for nothing and more specially when such rights stand recognised by a court of competent jurisdiction. Strong presumption, therefore, arises in favour of the continuity of the tenancy [*Hans Raj v. State of H.P.*, 1985 Cri LJ 1463, 1469: (1985) 1 Chand LR (Cri) (HP) (DB)]. When the subsequent of the return of the defendant to the suit premises clearly shows that the defendant retained control over the suit premises and there is nothing to show that the alleged sub-tenant had ever any exclusive right of enjoyment of the property or any other portion thereof, the presumption under this section cannot be drawn [*Sankar Mukherjee v. Atulananda Kundu*, A 1987 Cal 115, 121]. S 23-D of the M.P. Accommodation Control Act deals with the presumption of the '*bona fide*' nature of the requirement of the landlord. The landlord has to prove that he requires the

premises and then only the presumption of the *bona fide* nature of the requirement would come in [*Kamal Kishore Sharma v. Smt Tarabai*, A 1990 MP (NOC) 154]. In a case between a landlord and tenant, if exclusive possession is established with a third person and the version of the tenant as to the particulars and the incidents of the transaction is found unacceptable, it may not be impermisible for the court to draw an inference that the transaction was entered into with monetary consideration in mind. It is open to the tenant to rebut this inference [*Smt. Rajbir Kaur v. S Chokosiri*, A 1988 SC 1845, 1857].

Trade and Merchandise Marks.—In a case of registration of trade mark of sewing machines adverse inference can be correctly drawn against alleger not allowing inspection of machines [*Singer Mfg Co v. Registrar*, A 1965 C 417].

Truth.—All testimony given in a court of justice is presumed to be true until the contrary appears [Best s 352; *Ambar Ali v. R*, 33 CWN 55].

Underground Rights.—A zemindar is presumed to be the owner of underground rights in tenancies created by him [*Hari Narayan v. Sriram*, 37 IA 136: 37 C 723: 20 MLJ 569; *Durga Pd v. Brajanath*, 39 C 696 PC].

Unlawful Association.—There is no presumption of continued membership after an association is declared unlawful [*R v. Dharmanand*, A 1931 B 203; *R v. Shripad*, 55 B 484].

User.—If the parties have a right of user of a thoroughfare, it is a fair presumption in the absence of clear evidence to the contrary that they have used it [*Vellayam v. Balakrishna*, A 1931 M 495].

Using unfair means.—There is no presumption that while the answer in the examination was correct, the calculation work in solving a question in Mathematics in detail having not been given, by a candidate, he must have used unfair means by copying from the answer book of any other candidate or from any other material [*Naresh Pal v. H.S. & Intermediate Edn. Boad, Branch office, Bareilly*, A 1995 All 81, 82 (HC)].

Will.—Every presumption will be made in favour of due execution and attestation in the case of a will regular on the face of it and apparently duly executed [*Wright v. Sanderson*, 1884, 9 PD 149, 163; *Brahmadat v. Chaudan*, 20 CWN 192]. The execution of a will is proved by cogent evidence. The presumption is that the testator was sane and had sound testamentary capacity [*Smt. Man Kaur v. Gurnam Singh*, A 1984 NOC 51 (P&H). If the will is a natural one and due execution is proved, testamentary capacity is presumed [*Kedar v. Rajkumar*, A 1939 C 674: 69 CLJ 394].

When a will is traced to the possession of the deceased and is not forthcoming at his death, the presumption is that he has destroyed it [*Allan v. Morrison*, 1900 AC 604; *Aditram v. Bapulal*, 45 B 906: A 1921 B 143; *Rangrao v. Gopal*, A 1959 B 287; *Satya v. Asutosh*, A 1953 C 657; *Devicharan v. Durga*, A 1967 D 128]. The presumption that, when a will properly executed and registered by the testator could not be found at the time of testator's death, the will must be presumed to have been revoked by the testator, must be applied carefully [*Nishabar Singh v. Local Gurdwara Committee Manji Sahib*, A 1986 P&H 402, 405: (1986)2 Cur LJ (CIV & Cri) 546. In England wills are ordinarily deposited in a Bank or with a solicitor. The presumption must be applied with considerable caution to the wills of the people of India [*Padman v. Hanwanta*, A 1915 PC 111; *Efart v. Podei*, 55 C 482: A 1928 C 307; *Ferozdin v. Mula*, A 1925 L 540; *Brundaban v. Ananta*, A 1956 Or 151].

Miscellaneous Presumptions.—Genuineness of a document cannot be presumed merely because the said document has been exhibited [*Hari Kumar v. Sat Narain Mehra*, 1996 AIHC 2700, 2705 (Del)(HC)]. Simply because a student obtained good marks in an earlier examination that by itself cannot be a ground to presume that he would get same marks in the subsequent examination [*Sromoya Ghosh v. The State of W.B.*, A 1996 Cal 1, 2 (Cal)]. Merely because the police officer who conducted the search did not sign on various documents alleged to have been prepared at the spot it cannot be presumed that he was not present there at that time [*John Bamidele v. State*, 1996 Cri LJ 3649, 3650 (Del)(HC)]. Merely because the cash amount was lying at the same place wherefrom herein was recovered, would not raise a presumption that it was the amount of sale of the drug, in absence of any material to *prima facie* link the amount with the sale proceeds [*Jagwat Prasad v. Delhi Admn.*, 1993 Cri LJ 37, 21 (Del)]. Where two persons jointly possess any land and there is no evidence as to the extent of their shares, the presumption is that they possess in equal shares [*Arifan v. Narimtulla*, 48 CLJ 135]. In the absence of specification of shares in a sale-deed, the presumption is that the shares of the vendees are equal [*Abdullah v. Ahmad*, A 1929 A 817]. In a partnership business, the party who alleges that the shares are unequal, must begin [*Jadab Ram v. Buliaram*, 26 C 281].

Out of two suits decided on the same date, the suit which bears the earlier number must be presumed to have been decided first [*Shiam v. Sarmadi*, A 1940 A 171].

The High Court being a court of superior jurisdiction, the want of jurisdiction is not to be presumed, but the contarary [*R v. Nabadwip*, 1 BLR Cr 15: 17 WR 71 note]. In questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest court [*Chimma v. Motilal*, 55 IC 75].

Payment of rent in a certain form for a number of years is presumptive evidence of the existence of a contract to pay rent in that form or at that rate so long as the relation of landlord and tenant may continue [*Venkatagopal v. Rangappa*, 7 M 365 FB; *Krishnapur Mutt v. Gopalakrishnayya*, A 1967 Mys 65]. Payment of rents in each year must be presumed to be for the current year; and surplus payments to be for past, not subsequent years [*Taramoni v. Kalichurn*, WR Act X, 1864, 14]. The payment of entire rent of a subsequent year affords a presumption in favour of the payment of the rent for the previous year [*Sarat Sundari v. Brodie*, 1 WR 274; *Inayat v. Didar*, WR 1864 Act X, 97; *Mitrajit v. Chowar*, 2 WR 58]. When payment is *made* towards a decree, it is a fair presumption that it was made towards both principal and interest [*Suggusetty v. Irugulapati*, 92 IC 687 (M)].

Court would presume a legal origin from long continued payment of enhanced rate of rent, if the claim could have had a legal commencement [*Shivaramiyya v. Raja v. Venkatagiri*, A 1930 M 339; *Peria Karuppa v. Rajeshwara*, 42 M 475 FB]. Long payment of cesses, though it will not by itself give to a cess, which is purely voluntary or which is on the face of it illegal, a binding character, will be presumptive evidence that the payment had a legal origin [*Venkatachalam v. Aiyamperumal*, 42 M 702].

A wrong-doer (*eg* a trespasser) cannot be allowed to call in aid s 14 [*Zamuran v. Rahim*, 8 ALJ 247].

S 114 may be invoked in favour of a person whose name appears in the copyright register as the proprietor of the copyright [*Chellappaswamy v. Singaravelu*, 30 IC 721].

The presumption is that a court deals with the arguments put before it and if the form of the judgment shows that the only points presented were those with which it

has dealt, the only inference, specially in the absence of an affidavit to the contrary, is that the remaining points were not argued and were definitely abandoned [*Harjimul v. Daviditta*, 77 IC 398: A 1924 L 107: 4 L 366; *Krishna v. Dhirendra*, A 1929 PC 50: 56 C 813; *Rajkishore v. Subak*, A 1959 P 89; *Dhanjiram, v. Union*, A 1961 Pu 178; *Ramanujamma v. Nagamma*, A 1968 AP 223]. When a judgment is silent on point mentioned in appeal, the presumption is that it was given up [*Abdul Karim v. Ramjaggu*, A 1923 L 124]. If a judgment deals with one point only, it must be presumed that that is the only point put before him by counsel and that the court has performed his judicial acts regularly [*Harcharan v. Lachhman*, A 1928 L 94]. When the remand order is silent as to the provisions of law under which it was passed, it is just and reasonable to presume unless and until the contrary intention is to be gathered from the facts and circumstances of the case, that the order was deemed to have been passed in the exercise of such provision of law against which a valuable right of appeal exists [*Purapabutchi v. Vimalkumari*, A 1969 AP 217; *Kulsoomunnissa v. Ram Pd*, A 1922 A 226—CONTRA: *Punja v. Ramlal*, A 1956 Raj 43; *Sultan-ul-Malak v. Sultan*, A 1937 Sind 279]. When there is contradiction between the affidavits of two pleaders as to what occurred before the court, the court's notes should be presumed to be correct [*Mittadar v. Devarayya*, A 1927 M 625: 107 IC 648].

Where an insured ship has disappeared at sea and nothing more is known, the presumption may well be that the loss was due to perils of sea; but where either party gives evidence as to probable cause, the assured must fail unless he affirmatively proves the loss by one of the perils insured against [*La Compania v. Corporation of R E A*, 1923, 1 QB 650].

In the case of joint tenants, service of notice to quit upon one is *prima facie* evidence that it reached the others [*Harihar v. Ramasahi*, 45 IA 222: 46 C 458: 21 Bom LR 522: A 1918 PC 102: 23 CWN 77; *Bhusan v. Bengal Coal Co*, A 1966 C 63]. Notice sent by regd post to lessees on addresses as in lease-deed—Effective service must be presumed [*Bhusan v. Bengal Coal Co, sup*].

Where all the adult members of a Hindu joint family appear on the record as plaintiffs or defendants, it is a legitimate presumption that they are acting as manager, on behalf of themselves and of the minors [*Krishnajiva v. Bishwanath*, 34 A 615. See *Harilal v. Munnan*, 34 A 549; *Madanlal v. Kishen*, 34 A 527; *Chetan v. Sartaj*, 79 IC 1001 (A)].

Where money is remitted to a person there is no persumption that the transaction was one of deposit and not of loan [*Murugiah v. Pakkiria*, A 1928 M 499].

The endorsement of payment of interest on a pronote imported that demand had been made for payment of interest [*Brown v. Rutherford*, 14 Ch D 687 (refd to in *Rangaswami v. Kuppuswamy*, A 1928 M 637)].

Where a taluq under Oudh Estates Act, 1869 is governed by the rule of devolution on a single heir, it raises a presumption of same rule of succession to non-taluqdari immovable property [*Mohan Singh v. Pashipati*, A 1970 SC 42 (*Ara Begum v. Dy Commr*, A 1938 PC 252: 65 IA 397; *Murtaza v. Md Yasin*, A 1916 PC 89: 43 IA 269; *Thakur Isri v. Baldeo*, 11 IA 135: 10 C 792 **folld**)].

Entries in ancient marriage register maintained in church with respect to payment of *Streedhanam* and produced from proper custody must be presumed to be genuine in the absence of evidence of rebuttal [*Acharu v. Rappai*, A 1979 K 34 FB].

Burden to prove that the properties of the temple were held by *mahant* on trust for public purposes being on the Board fo Trust, court cannot draw adverse inference for

failure of *mahant* to produce documents [*S v. Biseshwar*, A 1971 SC 2057 (*Parmanad v. Nihal*, A 1938 PC 195: 65 IA 252 rel on)].

The presumption is that *ghee* is an article intended for human consumption [*Daulat v. Corp of Calcutta*, A 1929 C 283].

In the absence of exceptional circumstances such as the land being entirely rocky or barren all forest lands in Kerala are agricultural lands [*Venugopala v. Controller of ED*, A 1969 K 304].

If merchants congregate in particular area to do particular business that area is likely to command good price for a shop for that business [*Ambalal v. Addl SLA*, A 1968 G 5].

In land acquisition proceedings payment of compensation would not necessarily mean that widow's title to land is established [*Ramrati v. Dwarika*, A 1967 SC 1134].

There is no presumption in law that a person who possesses only a learner's licence or possesses no licence at all does not know driving [*Suleman v. S*, A 1968 SC 829].

Wife deliberately refusing to give reasons for not consummating marriage and also refusing to submit to medical examination. Subsequent offer by her to consummate marriage being not found genuine inference of impotency could be drawn [*Jayraj v. Mary*, A 1970 M 103 SB]. Court can infer petitioner's allegation of impotency to be true on wife's refusal to submit to medical examination by an expert appointed by it [*Probhat v. Sukriti*, A 1971 C 1 SB].

Able-bodied young man has to be presumed to be capable of maintaining his wife and children and where the husband does not disclose his actual income the presumption easily holds good [*Chander v. Shila*, A 1968 D 174]. It does not seem to be the intention of Hindu Adoptions and Maintenance Act that a presumption of ability to earn and maintain herself should, in the case of a Hindu unmarried daughter, be raised from her bodily health or age alone [*Wali Ram v. Mukhatiar*, A 1969 Pu 285].

The plaintiff filed a suit claiming both melvaram and kudrvaram right in respect of an inam land. The defendant claimed to be in possession of land holding the kudiwaram right. When the plaintiff did not let in any evidence to prove the nature of grant, there cannot be any presumption that the grant consists of both warrants [*Satyapramoda Thirathaswamula Varu v. Mulla Gunnayya*, A 1982 A P 24, 30]. The mere proof of idiocy at a point of time does not establish congenital idiocy and that is a fact to be proved as any other fact and cannot be presumed; the presumption on the other hand being that sanity must be presumed unless congenital idiocy is established [*Smt K. Kusuma Kumari v. Grandhi Surya Bhaghawan*, A 1982 Andh Pra. 163, 169]. When it has been proved on evidence that trusteeship is being enjoyed by certain persons and the ancestors for more than a century, it shall be presumed that they have been functioning as trustees from the time of its founder [*Lingraj Samataray v. Sri Sidhabaladerjew*, A 1984 Ori 187, 196]. Lost grant cannot be presumed in favour of inhabitants of a village which is a fluctuating and unascertained body [*Mahue Alias Mohan Lal Dey v. Sudhir Chandra Dey*, A 1984 NOC 246: (1984)1 Cal LJ 408]. The heirs of a deceased christian take the estate as tenants-in-common. So there is no presumption that any acquisition made by one of them is for the benefit of others or the family [*G K Kempegowda v. Smt Lucinda*, A 1985 Kant 231, 236: (1985) 1 Kant LJ 83]. In a suit it was held that the properties in question belong to a math, namely, the Bodh

Gaya Math and not to any deity or deities. The true origin of the endowments and the proof of title was not only forthcoming but was actually and designedly produced on the record to convincingly prove the nature of the grant. In such a case, the principles governing the case of a lost grant are not even remotely attracted [*Mahanth Dhansukh Giri v. State of Bihar*, A 1985 Pat 129, 136: 1985 LJR 235].

A statutory provision which creates a rubuttable presumption as regards the proof of a set of circumstances which would make a transaction liable to tax with the object of preventing evasion of the tax cannot be considered as conferring, on the authority concerned, the power to levy a tax which the Legislature cannot otherwise levy [*Sodhi Transport Co. v. State of U.P.*, A 1986 SC 1099, 1106: (1986) 2 SCC 486]. Having regard to the ordinary course of business, it has to be presumed that every manufacturer passes on the burden of what he had paid for the raw material, to the consumer of his product and that every dealer who resells such product to another, equally recovers the same from his purchaser [*N V Ramiah v. State of Andh Pra*, A 1986 AP 361, 369 (DB): (1986) 2 An LT 206]. If by cross-examination the opposing party can discredit the plaintiff's witness to show that there is no case to answer then in that case whether he himself deposes is not a ground on which the plaintiff can question the conduct of the defendant to establish his own case [*The Eastern Bank Ltd Plaintiff v. Part Services of India Ltd*, A 1986 Cal 61, 70: (1985) 89 Cal WN 1021]. A conclusive presumption is the acceptance or recognition of a fact by law as conclusive proof. But a presumptive or conditional proof is a fact which amounts to proof only so long as there exists no other fact amounting to disproof [*Maniyan Krishnan v. Maniyan Nanukuttan*, A 1986 Ker 75, 82: 1986 Ker LT 203]. The only consequence of non-compliance of a direction under sec. 73 is that it is open to the Court to draw a presumption under sec. 114 of the Act about the disputed writings which may go against the person or party [*Sashi Bhusan Pati v. State Bank*, A 1986 Orissa 218, 220:(1985) 60 Cut LT 591]. It is possible for a section or a provision of different statutes to be in *pari materia* but to label two different statutes as in *pari materia* (unless they are pure carbon copy of each other) is inherently erroneous and inference from such a presumption would necessarily lead to error [*Ram Ballah Pd v. State of Bihar*, A 1986 Pat 218, 235: 1986 LJR (HC) (FB) 373]. When it is proved that a pedastrian was electrocuted from a live wire hanging down from an electric post, there is a presumption of fact that there was lack of proper care on the part of those in the management or control of the power supply system at the particular place [*Kerala State Electricity Board v. Kamalakshy Amma*, A 1987 Kerala 253, 255 (DB): 1986 Ker LT 1124]. Mere existence of heavy liability of a person and previous undischarged decrees cannot lead to the inference that the intention was to obstruct or delay the execution [*Tatanagar Transport Corpn v. Ajanta Enterprises*, A 1987 Ori 107, 109: (1987) 63 Cut LT 5].

When a clause in Navodaya Vidyalaya Scheme only raises a presumtpion that student will have a rural domicile who had attended and studied in Classess III, IV & V in a recognised school in a rural area, it does not mean that students who belong to rural area but who happen to study in an urban area are to be denied admission in the reserve quota for the rural area [*Santosh Kumar v. R S A Aur Prashikshan Parishad New Delhi*, A 1988 All 131, 132 (DB): 1987 All CJ 590]. When the versions of the rival sides are found unbelievable, the court may presume the existence of any fact which the court thinks likely to have happened regarding the whole conduct [*Mahendra Mohanlal Mistry v. Mehta Mohanlal Mathurdas*, A 1988 Gujarat 110, 118]. While during the pendency of writ petition, the University authorities claim to have disposed of the answer papers for making a pulp to a paper factory on adverse

inference has to be drawn that had they been produced the University would have been exposed to the criticism that the student has been victimised [*S A Jaffer v. University of Gulbaraga*, A 1989 Kant 174, 175].

An old respectable person, aged 65 years, would not depose about an incident in open court which would disgrace his family members unless it is true [*Kiran Mandal v. Smt Mohini Mandal*, A 1989 P & H 310, 312 (DB)]. When the original document is lost from the custody of the Court, it will be totally unjustified to assume that it was not properly stamped [*Harijiwan Sahu v. Jairam Sahu*, A 1989 Pat 96, 100]. There is no presumption that highly qualified persons would not venture to live together under the same roof [*Boranna v. M A Chandra Raju*, A 1990 Kant 121, 125]. Presumption whether a temple is a public temple is available not only in the enquiry pending before the Deputy Commissioner, Hindu Religious & Charitable Endowments Board under S. 87 of the A.P Charitable and Hindu Religious Endowments Act (30 of 1987) but also at the stage of the listing of the temple under S. 6 of the Act [*M Ramaswamy v. Commissioner of Endowment A.P, Hyderabad*, A 1991 AP (NOC) 25].

Sec. 4(1) of the Prevention of Corruption Act provides for presumption of guilt in cases falling under sec. 5(1) (a) and (b) [*State of Maharashtra v. Wasudeo Ramchandra Kaidalwar*, 1981 Cri. LJ 884: A 1981 SC 1186, 1189 (DB)]. There is no presumption that whatever the complainant states on oath is correct and what accused states on oath is wrong [*Fatch Bahadur Srivastava v. The State*, 1983 All WC 92: 1983 Cri LJ 751, 752 (All)]. The mere fact that the police station is adjacent to the court, does not mean that the confession was made only on account of pressure from the police [*Jure-Thangaraju*, 1983 Cri LJ NOC 95 (Mad) (DB): 1981 Mad LW (Cri) 227]. When the accused does not discharge the trust, in consequence of which he comes to have dominion over the property, then the misappropriation can legitimately be inferred against him [*State of Punjab v. Rattan Chand*, 1984 Cri LJ NOC 153 (P&H) (DB)]. The evidence of a partisan witness is not to be discarded merely on the ground of partisanship as often enough, where there are factions in a locality and an occurrence takes place, the prosecution may not be in a position to examine independent witnessess [*Bengali v. State of Orissa*, 1985 Cri LJ 580, 583 (Orissa) (DB)]. When a prosecution witness could reasonably be expected to have known some of the accused as resident of villages in close vicinity, and as student of the same institution is a statable probability and his feigned ignorance of any prior familiarity with their identity becomes irreconcilable with what are incidents of ordinary human intercourse. The omission to disclose the identity in the F.I.R would raise a reasonable doubt about their complicity in the crime [*Harinath v. State of U.P*, A 1988 SC 345, 347, 1988 Cri LJ 442].

Every circumstance cannot be presumed in favour of the prosecution. Presumption must be natural and consistent keeping in view the existence of facts and the common course of events [*Basudev Yadav v. State of Bihar*, 1988 Cri LJ 1408, 1410: 1987 BLJ 658: 1987 Pat LJ R (HC) 112 (Pat) (DB)]. When the detenue in a COFEPOSA case is a practising advocate we could assume that such a practising advocate must have very properly placed his points before the Advisory Board which formulates its recommendations to the State Government which makes the order confirming the recommendations for detention [*State of Rajasthan v. Shamsher Sigh*, A 1985 SC 1082, 1089 : 1985 Cri LJ 1348]. It is not open to a person who has refused to receive the order of detention, the grounds of detention and the copies of the documents to content that the order of detention, the grounds of detention and the copies of the documents were not served, communicated or furnished to him [*Smt. Changamma v. State of Karnataka*, 1991 Cri LJ 315, 319 (Kant)].

*S. 114-A. **Presumption as to absence of consent in certain prosecutions for rape.**—In a prosecution for rape under Cl. (a) or Cl. (b) or Cl. (c) or Cl. (d) or Cl. (e) or Cl. (g) of sub-section (2) of Sec. 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

COMMENTARY

It is not discretionary with the court whether to draw the presumption under section 114-A or not. If the conditions given in the provision are satisfied, the court shall presume about the absence of consent on the part of the prosecutrix. The presumption is rebuttable by contrary evidence. However, before that presumption can be drawn, there should be reliable evidence amounting to proof to hold that sexual intercourse took place between the accused and the woman concerned. If there is no satisfactory evidence on that question, it would be clearly wrong to resort to the presumption and to hold that the woman did not consent, since that would be begging the question if sexual intercourse at all took place [*Shatrughan v. State of M.P.*, 1993 Cri LJ 120].

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* Insterted by the Criminal Law (Amendment) Act, 1983 (Act 43 of 1983), w.e.f. 25-12-1983.