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LAW OF EVIDENCE

**Law of Evidence**

## Introduction-

Almost every branch of law is composed of rules of which some are grounded upon practical convenience and the Technical experience of actual litigation, whilst others are closely connected with the constitution of human nature and society, Thus the criminal law contains many provisions of no general interest, such as those which relate to the various forms in which dishonest persons tamper with or imitate coin; but it also contains provisions, such as those which relate to the effect of madness on responsibility, which depend on several of the most interesting branches of moral and physical learning. This is perhaps more conspicuously true of the law of evidence than of any other branch of the law. Many of its provisions, however useful and necessary, are technical and the enactments in which they are contained can claim no other merit than those of completeness and perspicuity.

The Indian Evidence Act is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India.

## Purpose of Law of Evidence

The law of evidence, which determines how the parties are to convince the court of the existence of that state of facts which, according to the provisions of substantive law, establish the existence of the right or liability which they allege to exist.

The following is a simple illustration : A sues B on a bond for Rs. 1,000. B says that the execution of the bond was procured by coercion.

The question stated under that provision is, whether the execution of the bond was procured by coercion.

The law of evidence determines

(1) What sort of facts may be proved in order to establish the existence of that which is defined by the substantive law as coercion.

(2) What sort of proof is to be given of those facts.

(3) Who is to give it.

(4) How is it to be given.

Thus, before the law of evidence can be understood or applied to any particular case, it is necessary to know so much of the substantive law as determines what, under given states of fact, would be the rights of the parties, and so much of the law of procedure as is sufficient to determine what questions it is open to them to raise in the particular proceeding.

Thus in general terms the law of evidence consists of Result, provisions upon the following subjects:

(1) The relevancy of facts.

(2) The proof of facts.

(3) The production of proof of relevant facts.

**Fundamental Principles of Law of Evidence**

* Evidence must be confined to the matters in issue,
* Hearsay evidence must not to be admitted
* In all the cases best evidence must be given

## Interpretation Clause [ Sec.3]

**Evidence** means and includes –

1. All statements which the court permits or requires to be made before it by witnesses, in relation to matters of facts under inquiry **– such statements are called ORAL EVIDENCE**.
2. All documents produced for the inspection of the court – called DOCUMENTARY EVIDENCE. This interpretation is not exhaustive. It did not cover ‘Material Objects’ like, photos, weapon used in murder, bloodstained clothes etc. which are admitted in practice.

Court need not concern itself with the method by which such evidence is obtained.

(Pushpa Devi M. Jatia vs. M.L.Wadhwan)

* Tape recorded conversation is held as documentary evidence. (Rama Reddy vs. V.V.Giri)
* Dock tracking evidence is held to be scientific evidence. (Abdul vs. State)

**Fact (Sec.3):**

The term ‘fact’ means “an existing thing’. But under the Evidence Act, the meaning of the word is not limited to only what is tangible and visible or, is any way, the object of sense.

According to Sec.3 of the Act, fact means and includes:

1. anything, state of things or relation of things capable of being perceived by the senses.

**Illustrations:**

1. That a person heard or saw something.
2. That person said certain words.

2. any mental condition of which any person is conscious

**Relevant Fact (Sec.3):**

The word ‘relevant’ has two meanings. In one sense, it means, “Connected” and in another sense “admissible”. One fact is said to be relevant to another, when the one is connected is said to be relevant to another, when the one is connected with the other, in any of the ways referred to in the provisions of the Evidence Act relating to the relevancy of facts (S.s. 5-55). In other/simple words, a fact is said to be relevant to another, if it is connected there with under the provision of the Evidence Act.

The expression ‘relevancy’ means “connection between one fact and another”. According to Stephen, ‘relevancy’ means “Connection of events as to cause and effect”. What is really meant by ‘relevant facts’ is a fact that has a certain degree of probative force?

**Kinds of relevancy:**

1. Logical Relevancy, and
2. Legal relevancy.
3. **Logical Relevancy:–** A fact is said to be logically relevant to another, when by application of our logic, it appears (to us that one fact has a bearing on another fact. Facts. Which are logically relevant are not provable. For instance, Confessional statement made to wife, by her husband. Husband said his wife that he had committed a crime i.e. murder or rape or theft. If the wife gives evidence as to the commission of crime by her husband, it is not admitted in evidence under Sec. 122 of the Indian Evidence Act. The Act does not deal with logical relevancy. (The Act means Evidence Act). Therefore, it is aid that ‘All facts logically relevant are not provable; however, legally relevant facts are provable.”
4. **Legal Relevancy:-** A fact is said to be legally relevant when it is expressed as relevant under Sections 5 to 55 (Relevancy of Facts).

Ex.: A is tried for administering poison to B with a motive of inheriting property. Here, the motive is relevant under Sec.8. Similarly the fact revealed by post-mortem expert that the death is caused by the poison is relevant under sec.45. The Act deals with legal relevancy.

According to Section 6-55 of the Act, following are relevant facts:

1. Facts connected with facts in issue or relevant facts.
2. Facts to the issue as admission (Ss.17-23) and confessions (Ss.24-30).
3. Statements under special circumstances (Ss.34-38).
4. Judgments (Ss.40 and 41).
5. Opinion of third person (Ss.45-51), and
6. Character of Parties (Ss.52-55).

**Facts in Issue (Sec.3):**

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

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

**Illustrations:**

‘A’ is accused of the murder of ‘B’

At his trial the following facts may be in issue:

That A caused B’s death; That A intended to cause B’s death; That A hand received grave and sudden provocation from B; That A, at the time of doing the act which caused B’s death, was, by reason of unsoundness of mind, incapable of knowing its nature.

Facts in issue in the plain sense mean ‘facts, which are in issue and form the subject matter of the court’s decision’. The questions relating to a fact enabling the court to give decision are ‘Facts in Issue’.

‘Facts in issue’ are those facts, which are alleged by one party and denied by the other in the pleading in a civil case or alleged by the prosecution and denied by the accused in a criminal case.

**Distinction between Facts in issue and Relevant Facts:-**

Following are the notable points of distinction between facts in issue and relevant facts:

|  |  |  |
| --- | --- | --- |
| **S.No.** | **Facts in Issue** | **Relevant Facts** |
| 1. | It is a necessary ingredient of a right or liability. | It is not a necessary ingredient of a right or liability. |
| 2. | It is called the principal fact or ‘factum probandium.’ | It is called evidentiary fact or factum probandi. |
| 3. | Facts in issue are affirmed by one party and denied by the other party. | Relevant facts are the foundation of inference regarding them. |

**Document (Sec.3):**

The word ‘Document’ in the general parlance is understood to mean any matter written upon a paper in some language such as English, Hindi, Urdu and so on. Under the Evidence Act it means “any matter expressed or described upon any substance, paper, stone, or anything by means of letters or marks.

According to Sec.3 of the Indian Evidence Act, 1872, “Document” means any matter expressed or described on any substance by means of letters, figures, or marks; or by more than one of those means, intended to be used, or which may be used, for the purpose of recoding that matter.

**Proved (Sec.3):**

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

The word ‘Proof’ means “anything, which serves the purpose of convincing either immediately the mind as to the truth or falsehood of a fact or profession. The expression proof under Section 3 of the Evidence Act means “such evidence as would induce a reasonable man to come to a conclusion.

**Disproved (Sec.3):**

A fact is said to be ‘disproved’ when after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent ma ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

The definition of the expression disproved is converse of the definition of the expression proved.

**Not Proved (Sec.3):**

A fact is said to be proved when it is neither proved nor disproved.

A fact is said to be not proved when neither its existence nor its non-existence is proved. It also indicates a state of mind in between the two, that is one cannot say whether a fact is proved or disproved. It negatives both and disproof.”

## PRESUMPTIONS (Section–4)

**(May Presume, Shall Presume and Conclusive Proof)**

Sec.4 of the Indian Evidence Act; 1872 provides for three types of presumptions namely, May Presume, Shall Presume and conclusive Proof. It runs as follows:

**‘May Presume’:–** Whether it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it:

**‘Shall Presume’:–** Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

**‘Conclusive Proof’:–** When one fact is declared by this Act to be the conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

Evidence is a ‘means’ to arrive at proof. Proof is a process by which truth or falsehood as to fact is convinced. Proof enables a reasonable man to come to a conclusion. Before analyzing the expressions, May Presume, Shall Presume and Conclusive Proof, it is necessary to explain ‘presumption’, from which the above’ expressions are emerged as follows:

**Presumption:–** In the absence of absolute certainty, we resort to presumptions. The word ‘presume’ means “supposed to be”. The word ‘presumption’ means “an inference from known facts’.

For instance, A finds B’s scooter in front of a, restaurant. Then, A may presume that B is in the restaurant. When A entered into the restaurant, he found B, then his presumption is correct/true. Instead of b’ if C (B’s brother) is found, his (A’s) presumption is incorrect/wrong. Thus, presumptions may be true or untrue. In other words, they may be rebuttable (may be challenged or irrebuttable (cannot be challenged).

‘Presumption’ is and inference, which takes place in the absence of absolute certainty as to truth or falsehood of a fact. In other words, presumption is an inference drawn by the court as to the truth of a particular, from other known or proved factsa.

**Definition:–** The term ‘Presumption’, in its largest and most comprehensive signification, may by defined to be an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning from something proved or taken for granted.

**Classification of Presumption:–** Presumptions may be classified as flllows:

1. Presumption of Fact or Natural Presumption or May Presume 9Ss.86–88, 90, 133, A and 114)

2. Presumption of Law or Artificial Presumption–

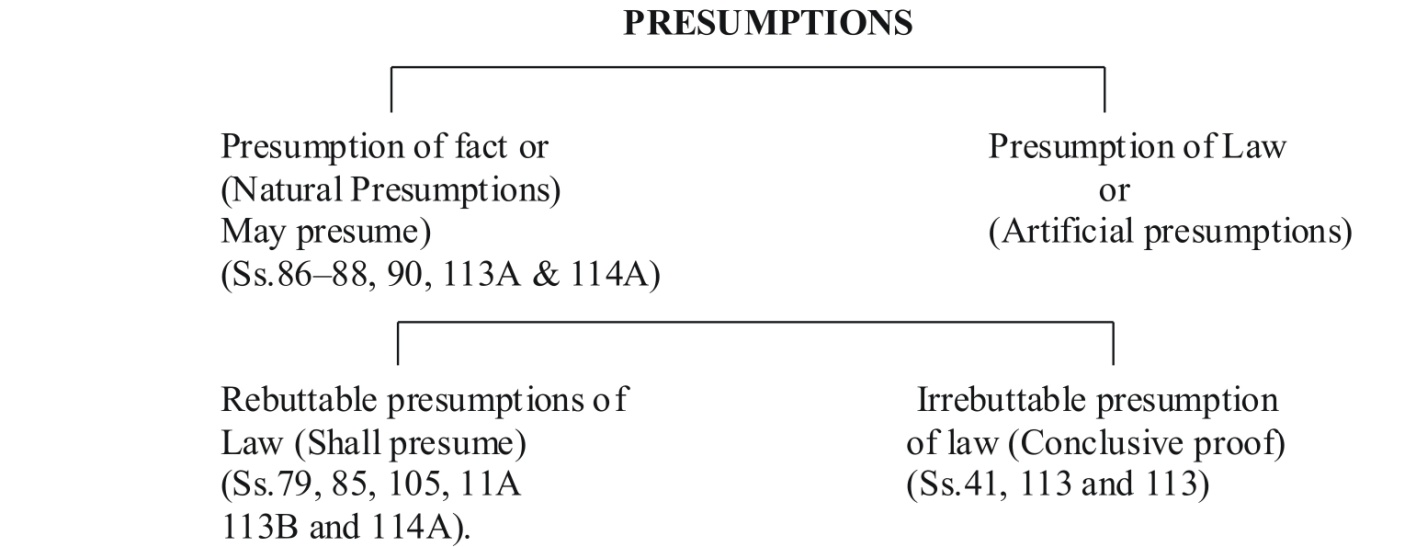
(i) Rebuttable Presuptions of Law or Shall Presume

(Ss.79–86, 189, 105, 11.A, 111.B and 114.A)

(ii) Irrebuttable Presumptions of Law or Conclusive Proof

(Ss.41, 112 and 113).

The above classification is shown in the table given below:



**May Presume or**

**Presumption of Fact or natural Presumption**

**(Sections 86–88, 90, 113.A and 114)**

Section 86–88, 90 113A and 114 lay down the provision relating to Presumption of Fact or Natural Presumption or May Presume as stated below:

Sec.86 deals with “Presumption as to certified copies of foreign judicial records”.

Sec.87 deals with “Presumption as to books, maps and charts”.

Sec.88 deals with “Presumption as to telegraphic messages”.

Sec.90 deals with “Presumption as to documents thirty years old”.

Sec.113 A deals with “presumption as to abetment of suicide by a married woman”. Sec.114 deals with ‘Court may presume existence of certain facts”.

The expressioin ‘may presume’ refers to discretion of the court as to the exietence or non-existence of a fact in issue. For instance, when a person is found in possession of stolen property, the court may presume him as thief or has received such goods with the knowledge that they are stolen (Sec/11 Evi.Act).

According to Sec.4 of the Evidence Act, ‘may presume’ a fact mean (a) regard it as proved unless and until it is disproved, or (b) call for proof of it. In the above example, the court has discretionary power either to presume the possessor (of stolen property) as thief; or may presume that he had received such goods with the knowledge that they are stolen or may refuse to presume the guilt of accused and may ask (direct0 the prosecution to prove the guilt of the accused. These presumptions are generally rebuttable.

**Shall Presume or Rebuttable Presumptions of Law**

**(Sections 79–85, 89, 105, 111A, 113B and 114A)**

Section 79–85, 89, 105, 11A, 113B and 114A lay down the provisions relating to ‘Rebuttable Presumptions or Shall Presume as stated below:

Sec.79 deals with “Presumption as to genuineness of certified copies”.

Sec.80 deals with “Presumption as to documents produced as record of evidence”.

Sec.81 deals with “presumption as to Gazettes, newspapers, private Acts or Parliament and other documents”.

Sec.82 deals with “Presumption as to document admissible in England without proof of seal or signature”.

Sec.83 deals with “Presumption as to maps or plans made by authority of Government”

Sec.84 deals with “Presumption as to collection of laws and reports and decisions”.

Sec.85 deals with “Presumption as to powers-of-attorney”.

Sec.89 deals with “Presumption as to due execution, etc., of documents not produced”.

Sec.105 deals with “Burden of proving that cause of accused comes within exceptions”.

Sec.111A deals with “Presumption as to certain offences”.

Sec.113B deals with “Presumption as to dowry death”.

Sec.114A deals with “Presumption as to absence of consent in certain prosecution for rape”.

According to Sec.4 of the Evidence Act, the Court has no option or discretionary power in drawing a presumption as to the existence or non-existence of a fact in issue. The Court is bound to regard a fact as proved, unless an evidence is produced to disprove it. However, (rebuttable presumption of law) ‘shall presume’ is not conclusive, but only rebuttable. Section 79 directs that when a certified copy of a public document is produced, the Court shall presume that the certifying officer held that official character when the copy was certified. The Court cannot call for evidence to disprove this fact but the opposite party still has privilege to disprove that he held that official character.

Eg.:– The Court presume the genuineness of every document purporting to be the official Gazette (U/s.81 of Evidence Act). Similarly, the court shall presume the accuracy or genuineness of the maps and plans made by the Government authority (U/s.83 of Evidence Act).

**Conclusive Proof or Irrebuttable Presumptions of Law**

**(Section 41, 112 & 113)**

Section 41, 112 and 113 of the Indian Evidence Act, 1872 lay down the provisions relating to “Conclusive Proof or Irrebuttable of Law as stated below:

Sec. 41 deals with “Relevancy of certain judgments in probate, ect. Jurisdiction”.

Sec.112 deals with ‘Birth during marriage, conclusive proof of legitimacy”.

Sec.113 deals with “Proof of cession of territory”.

According to Section 4 of the Evidence Act, when one fact is declared by the Evidence Act to be conclusive proof of another, the court, on proof of that fact must regard the other having been proved and it (court) shall not permit any kind of evidence for the purpose of rebutting or disproving that fact. In other words, when a fact is proved to be conclusive under evidence Act, the court must confirm it as conclusive and shall not permit/entertain any evidence for the purpose of disproving that fact. In such words, neither the court has discretion to call for evidence nor the party has the privilege to disprove it. Even if the party seeks to disprove it, the court has a duty, not to allow evidence for that purpose.

Eg.:– ‘A’ and ‘B’ are married but divorced. When the question arises whether ‘A’ and ‘B’ are husband and wife, if the decree of divorce is submitted to the court, the court shall conclusively presume that they are no longer husband and wife from the date of such decree for divorce. In this example, the divorce decree is regarded as conclusive proof.

## Relevancy of Facts

S. 5: Evidence may be given of facts in issue and relevant facts (only)

Remember: S. 5 does not give an overriding right to give evidence where it would be in contravention of the procedure laid down in the CPC

S. 136: the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise

U/S. 136 🡪 the Judge may ask in what manner a fact sought to be proved is relevant.

Legal relevance: The relevance of a fact under Indian law must be established with reference to one or more provisions of the IEA.

U/S. 5: Fact in issue:

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

At A’s trial the following facts are in issue:-

A’s beating B with the club;

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

A’s intention to cause B’s death.

Facts in issue are evident from the crime sought to be made out/provision of law sought to be applied. There is no need to classify a fact in issue under some other provision of the Evidence Act.

## S. 6- Facts Forming the part of Same transaction [Res Gestae]

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

Illustrations

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

(b) A is accused of waging war against the 11[ Government of India] by taking part in an armed insurrection in which property is destroyed troops are attacked and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

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

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

S. 6 (Relevancy of facts forming part of same transaction) 🡪 Exception to the Rule against hearsay 🡪 Also known as the principle of *Res Gestae* or “excited utterances”:

* Facts, not in issue
* Connected to a fact in issue
* Such that they form part of the same transaction

Eg: A attacks B. during the attack, B cries out that A has hit B. B’s statement amounts to Res Gestae. Subsequently, B goes into coma. B’s out of court statement would be made relevant under S. 6 [This means that one of the bystanders who witnessed B’s statement could later prove it in court].

S. 60 [general rule]: Oral evidence must be direct 🡪 If A hit B, B should give oral evidence of the fact (because B directly perceived the fact of being hit). Res Gestae is an exception to this.

Res Gestae : statement made by a person not in court, where at the time he made the statement he was in such a state so as to have been unlikely to have been untruthful (in a state of shock)

How do you show that the statement was made in such a state of mind? Under English law 🡪 there was confusion regarding the requirement of geographic/temporal proximity between crime and statement. Stephen wanted to avoid such a situation in India 🡪 S.6: “...whether they occurred at the same time and place or at different times and places”. Even though Stephen drafted the provision to distinguish it from the principle of Res Gestae, the SC has routinely interpreted it to mean the same as Res Gestae. In the *Jayantilal* case, the SC introduced a requirement of temporal proximity to S. 6.

**Case-Law**

## Ratan Singh v. State of HP 1996

Facts: The fact sought to be made relevant was the statement of the deceased identifying the assailant and pronouncing that he was standing with a gun and firing the gun at her.

Held: “Here the act of the assailant intruding into the courtyard during dead of the night, victim's identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so intertwined with each other by proximity of time and space that the statement of the deceased became part of the same transaction. Hence it is admissible under Section 6 of the Evidence Act..”

Factors that indicate that the statement was part of the same transaction: temporal proximity, that it was between the same parties, at the same place (even though S. 6 says that these factors are not necessary).

“In either case, whether it is admissible under Section 32(1) or under Section 6 of the Evidence Act, it is substantive evidence which can be acted upon with or without corroboration in finding guilt of the accused.”

## Sukhar v. State of UP 1999

Facts: One day, while Nakkal (deceased) was going on the road, Sukhar caught hold of his back and fired a pistol shot towards him. Nakkal raised an alarm on account of which Ram Kala (PW 1) and Pitam (PW 2) reached the scene of occurrence and at that point of time, Nakkal fell down and the accused made his escape.

“Nakkal raised an alarm on account of which PW 1 and 2 reached the scene of occurrence and at that point of time, Nakkal fell down and the accused made his escape ... During trial, the prosecution witnesses, PW 1 and 2 merely stated as to what they heard from the injured at the relevant point of time and according to PW 2, the injured had told him that the assailant, Sukhar had fired upon him.”

Issue: Whether Nakkal’s statement can be proved?

“Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter.”

Held: “his statement indicating that the injured told him that his nephew has fired at him, would become admissible under Section 6 of the Evidence Act.”

How would you argue for the defence in Sukhar?: At the time when Sukhar shot at the deceased, nobody was present. After that, the deceased raised the alarm, which alerted the witnesses. It was then that the deceased stated that Sukhar had fired upon him. It could be argued that there was a lapse in time such that the statement was not part of the same transaction 🡪 likelihood of fabrication.

## Yusufalli v. St. of Maharashtra 1968 AIR 147, 1967 SCR (3) 720

Facts:

First offence: In the presence of Naik, the appellant offered a bribe of the Rs. 25 to Shaikh (officer) on July, 18, 1960. but Shaikh did not accept the bribe.

Second offence: On August 2, 1960 the appellant had a telephone talk with Shaikh and fixed a appointment at Shaikh 's residence in the evening. At his residence, Shaikh stayed in the outer room. Other members of the investigating party remained in the inner room. At the appointed hour, the appellant came to Shaikh's residence and was received by Shaikh in the outer room. Shaikh and the appellant had an intimate conversation. The appellant offered a bride to Shaikh, produced ten currency notes of Rs. 10 each and gave them to Shaikh. This was recorded on a tape recorder.

Held:

“The dialogue is proved by Shaikh. The tape record of the dialogue corroborates his testimony.

The contemporaneous dialogue formed part of the *res gestae* and is relevant and admissible under S. 8 of the Indian Evidence Act.

The process of tape recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under s. 7 of the Indian Evidence Act.”

## S. 7, IEA: Facts which are the occasion, cause or effect of facts in issue

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

Illustrations

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

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

(b) The question is whether A murdered B.

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

(c) The question is whether A Poisoned B.

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

## Balram Prasad Agarwal v. State of Bihar 1996

Facts: Prior to the deceased’s death by falling into a well, she had continuously been harrased by her in-laws for many years for not bearing children and for dowry. [Her married life in the household of the accused had undergone rough weather all throughout. She was ill-treated both for not bringing dowry amount to the satisfaction of the accused and also for not giving birth to children. She had earlier tired to commit suicide but was saved in the nick of time by neighbours. Even after birth of two sons ill-treatment and quarrels with her continued till the fateful night]

The deceased’s father was informed by the neighbours that on the previous night of the date of the occurrence there was quarrel in the house of the accused and they had heard the crying and weeping of Kiran Devi and she was being assaulted by her in-laws.

Held: Even if the information given to the father of the deceased by the neighbours about what they heard may be hearsay, the father’s conduct in rushing to the police is relevant conduct, and the information given to him will also be relevant as influencing his conduct.

Further issues:

* Whether the fact of her crying and weeping could be proved as a relevant fact?
* Whether her being tortured over the course of 11 years is a relevant fact?

If the crime sought to prosecuted was murder:

* Can possibly be argued that her being tortured over the course of 11 years was the state of things u/s. 7 in which she was injured leading to her death.
* Crying and weeping 🡪 could be argued that it is the “effect” of her torture u/s. 7 (her torture being a relevant fact because it constituted the state of things) OR could be argued that it was part of the same transaction leading to her murder u/s. 6.

If the crime sought to be prosecuted was cruelty u/S 498A, IPC:

* The fact of torture (subjecting to cruelty) likely to drive woman to commit suicide would be a fact in issue
* The crying and weeping could be argued as an effect u/s. 7 of the torture (fact in issue) OR as part of the same transaction u/s. 6.

Remember – establishing the relevancy of facts is only the first step (makes the evidence to prove them admissible) 🡪 you then have to prove them.

## S. 8, IEA: Motive, preparation and previous or subsequent conduct

Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

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

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

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

llustrations

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

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

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

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

(c) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

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

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

(e) A is accused of a crime.

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

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

The facts that, after B was robbed, C said in and A’s presence- "the police are coming to look for the man who robbed B" and that immediately afterwards A ran away, are relevant.

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

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

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

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

(i) A is accused of a crime.

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

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

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

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

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

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

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

## R v. Lillyman (1896)

Facts: Shortly after being ravished, the victim went and complained to her mistress. The prosecution tried to prove both the fact that she complained as well as the contents of her complaint.

Held: The entire particulars of the complaint could be admitted – but only to show the consistency of the conduct of the prosecutrix, her demeanor, etc.

“The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box ... it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts [complained of], or for any other purpose than that we have stated.”

## Amina v. Hasan Koya 1985

Facts: The appellant was married to respondent and 4 months later a girl child was born to the appellant. 4 years later, the respondent divorced the appellant. The appellant filed a petition seeking maintenance for herself and for the daughter. In reply to the petition the respondent admitted the factum of the marriage. However, he contended that the fact that the appellant was already pregnant at the time of marriage was concealed from him, and that the marriage was therefore invalid and void.

Held: “Next we have to notice the conduct of the respondent at the relevant time. He goes through the marriage. He does not raise any objection even after the marriage. He is present at the time of delivery of the child. Presumably he gives his own name as the name of the father of the child for the official record. Even thereafter for nearly four years he goes along with the marriage and brings up the child while treating appellant as his wife. The divorce is said to have been given on 2nd May, 1977. Any person who learns that his newly married wife is already pregnant for five months and who does not accept that marriage or pregnancy, will not behave in the manner in which respondent did. If we believe the respondent that he did not know about the pregnancy of the appellant at the time of marriage, how can we accept his conduct after the marriage? If what respondent is saying is true, a normal reasonable person would have immediately turned out the wife from his house on coming to know of the fact of pregnancy. Nobody will continue with such a marriage for four and half years, specially when a child is born just after four months of the marriage. Respondent says that the child is not his yet he gives his name to the child and continues to bring up the child for nearly four years after she was born. When it comes to the question of paying maintenance he says the marriage was invalid and the child is not his.”

S. 125 (CrPC) proceeding – standard of proof: balance of probabilities.

How does the accused’s conduct fall under S. 8?

First part of S. 8 – conduct of any party to a proceeding in reference to a relevant fact

The validity of the marriage is a fact in issue in maintenance proceedings

The fact of her previous pregnancy from another person could be a relevant fact as

* a state of things under which this fact in issue happened (u/s. 7); or
* as a fact introducing or explaining the fact in issue (u/s. 9)

Doubt: does the absence of conduct fall under conduct in s. 8? (How is the husband’s *absence* of conduct made relevant by the court?)

## S. 9, IEA: Facts necessary to explain or introduce relevant facts

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

Illustrations

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

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

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

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

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

(c) A is accused of a crime

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

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

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

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

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

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

S. 9 embodies the rule used in US jurisprudence: “laying the foundation” – A particular fact can only be introduced if facts leading up to that particular fact are first proved.

While S. 9 does not lay down a mandatory rule to lay the foundation, S. 9 pertains to foundational facts.

Laying the foundation is essential in a direct examination (examination in chief) – begin by asking basic questions “what is your name” etc and eventually lead up to questions concerning the crime. If you fail to do this and directly ask him something pertaining to the crime, it amounts to leading the witness (especially considering that he is your witness and you have presumably tutored him).

Leading question: one where the expected answer is implicit in the question. eg: “you saw X on the day of the murder, did you not?” as opposed to “what did you see?”

S. 141, IEA: Leading questions are not allowed in examination-in-chief.

Best practice in cross-examination – ask only leading questions – lead the witness to a conclusion opposite to what he stated in direct examination.

Prosecution witness is generally made to identify accused in court – has the effect of tying the accused to the crime scene 🡪 Identifying the accused in court is a suggestive process because in the court everyone knows who the accused is, based simply on how and where he is made to stand in court.

Test identification parade: carried out by police at investigation stage.

Identification parade should not be suggestive (eg: if the witness claims that the person he saw committing the crime was black, there should not be only one black person in the line up)

Problems with identification parade – confirmation bias – someone called to identify the accused will attempt to identify the accused in the line up *even if* the accused is not in the line up – because of an unwillingness to admit that you do not remember what you saw – because of a presumption that the police have actually caught the accused – because of a difficulty to properly distinguish between features of persons when they are of another race.

## The Bhowal Raja case (Bibhabati Devi v. Ramendra Narayan (1947) 49 BOMLR 246)

Facts: The Second Kumar of Bhowal was the owner of a huge zamindari estate. He lived a very decadent life. At a young age, he contracted syphilllis, deadly at the time. On his doctor’s advice, he along with his family went to stay at Darjeeling. On evening, he apparently died. His family decided to cremate the body. His body was taken to the cremation ground. Just as the funeral pyre was about to be lit, a sudden hail storm broke out. The funeral party ran away for shelter. It was reported that later the funeral was performed. After 15 years, a person appeared in Dhaka who had the appearance of a sadhu (ash smeared on his body, dreadlocks etc) and he began saying things that made people believe that he may be the Second Kumar of Bhowal. He remembers certain things such as the name of the Second Kumar’s wet nurse. He is taken back to Bhowal. Several tenants began paying their rent to him. The Second Kumar’s wife, Bibhabati Devi, claimed that he was an imposter. The Second Kumar claimed that when he was left on the funeral pyre, he was saved by a group of sadhus who then cured him of his syphilis and along with whom he travelled for many years. He then filed a suit seeking a declaration that he was in fact the Second Kumar.

For each side, hundreds of witnesses were called. Factors considered in order to identify him:

* The eye colour in a doctor’s report of Kumar was listed as “grey” but the sadhu’s eyes were brown
* When Kumar went to Darjeeling, he had numerous ulcers on his arms and legs, which would have left permanent scars, but the sadhu had only a small number of scars
* Kumar could speak Bengali but the sadhu could not
* The sadhu was barely literate – there were witnesses from the family who confirmed that Kumar was also barely literate

Eventually it was held that he was in fact the Second Kumar (Confirming both lower courts’ concurring decisions)

## Dana Yadav v. State of Bihar 2002

Facts: Accused had requested that test identification parade (TIP) be conducted, lower court had directed the police to conduct an identification parade, but the police did not. The only identification of the accused was carried out in court (which can be very suggestive – seep. 13).

Held:

1. It is a rule of prudence that the identification of the accused in court should be corroborated with the identification of the accused in a test identification parade. However, there are certain exceptional circumstances where a test identification parade is of no value, for eg: where the accused is known personally to the informant/witness.
2. Situation could arise where the accused claims that he is not known to the informant (in order to reduce weight of identification in court) while the witness claims to know the accused.

In such a dispute, without holding a “mini-enquiry,” the court has to come to a finding on the question of whether the accused and witness know each other.

1. Even if the court has directed the conduct of a TIP and the police does not do so, it is not fatal to the prosecution case (It is merely a “rule of prudence”).

Rules regarding the conduct of TIPs 🡪 police manuals.

What happens where the witness correctly identifies the accused in the TIP but not in court/vice versa? The law surrounding identification in India has developed to favour the prosecution.

* If witness fails to identify accused in TIP, court will disregard it by saying that TIP is only corroborative, identification in court is substantive evidence.
* If witness fails to identify accused in court but identifies accused in TIP, court will justify admitting the evidence of TIP as corroborative to some other evidence stating that it was closer to the time of the crime and so the memory was fresh in the mind of the witness (The response to this is to say that corroborative evidence cannot be admitted on its own, can only be admitted if it attaches itself to some other evidence).

## S.10 Conspiracy

Conditions for application of Section 10:– For the purpose of Section 10 of the Evidence Act, the following conditions are to be satisfied:

1. Reasonable grounds to believe the existence of Conspiracy.
2. Act or Statement of the Conspirator.
3. Common Intention; and
4. The act or statement must be in reference to common intention.
5. Reasonable ground to believe the existence of Conspiracy:– Before the

application of Section 10, it must be established by independent evidence that, there is a reasonable ground to believe that two or more persons conspired to commit an offence or an actionable wrong. In other words, there must be a prima facie evidence in support of the existence of conspiracy between two or more persons.

1. Act or statement of the Conspirator:- Section allows evidence to be given of anything said, done or written by any one of the conspirators.
2. Common Intentions:– ‘Intention’ means “the desire of doing an act”. If two or more persons desirous of doing an act by prior meeting or pre-arranged plan, it is called ‘Common Intention’. For application of Section 10, there must exist common intention before the act or statement by the conspirator.
3. Act or Statement must be in reference to common intention:– The expression “in reference to common intentions or in furtherance of common intention” means “action of helping forward.” The offence is committed in accordance with the common intention. In other words, putting the common intentions in operation.

However, the expression “in reference to their common intentions used in Section 10 of the Evidence Act is very comprehensive.

## Bhagwan Swaroop vs. State of Maharashta, AIR 1965 SC 682:

In this case, the Supreme Court pointed out that the expression “in reference to common intention” has a wider scope than the expression “in furtherance of common intention” used under English Law.

Restrictions as to use of Evidence:– The evidence of anything said, done or written by one conspirator against the other conspirator may be used subject to the following restrictions:

1. The evidence is capable of being used only for two purposes, namely:

(a) to prove the existence of conspiracy, and

(b) to prove that a particular person was a party to the conspiracy.

1. The death of the conspirator does affect the act or statement.
2. The evidence of anything said, done or written by one conspirator cannot be

rendered inadmissible merely because of the fact that the person who made the statement or had done the act is dead.

1. Acts and statements of one conspirator cannot be utilized in favour of another

Conspirator.

## PLEA OF ALIBI

**S. 11, IEA: When facts not otherwise relevant become relevant**

Facts not otherwise relevant are relevant-

(1) If they are inconsistent with any fact is issue or relevant fact;

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

Illustration

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

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

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

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

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

S. 11 cannot be applied to make relevant facts that are expressly declared to be irrelevant (eg. Facts under S. 24)

## Dudhnath Pandey v State of U.P. 1981 AIR 911, 1981 SCR (2) 771

Vijay Bhan Kishore alias Pappoo was the son of an Advocate called Brij Bhan Kishore who died in about 1967 leaving behind a widow, three daughters and Pappoo. The youngest of the three daughters was married while the two elder were working as school teachers. Out of those two, Ranjana Kishore was a teacher in the St. Anthony's Convent.

The appellant, Dudh Nath Pandey, who was a motor-car driver by occupation, used to live as a tenant in an out- house of a sprawling bungalow belonging to the family of the deceased, situated at 17, Stanley Road, Allahabad. The appellant developed a fancy for Ranjana who was about 20 years of age when he came to live in the out-house. The overtures made by the appellant to Ranjana created resentment in her family and its only surviving male member, her brother Pappoo, took upon himself the task of preventing the appellant from pursuing his sister. As a first step, the appellant was turned out of the out-house. Soon thereafter, he filed an application before the City Magistrate, Allahabad, asking for the custody of Ranjana, alleging that she was his lawfully wedded wife. That application was dismissed by the learned Magistrate after recording the statement of Ranjana, in which she denied that she was married to the appellant. The appellant thereafter filed a habeas corpus petition in the Allahabad High Court alleging that Ranjana was detained unlawfully by the members of her family, including her uncle K. P. Saxena, and asking that she be released from their custody. Ranjana denied in that proceedings too that she was married to the appellant or that she was unlawfully detained by the members of her family. The habeas corpus petition was dismissed by the High Court on November 8, 1973. On August 1, 1975, the Principal of St. Anthony's Convent made a complaint to the police that the appellant had made indecent overtures to Ranjana. The appellant was arrested as a result of that complaint.

On November 1, 1976, Ranjana was having an evening stroll with her brother, the deceased Pappoo, in the compound of their house. The appellant came there in a rickshaw, abused Pappoo and is alleged to have threatened to kill him, if he dared oppose his, the appellant's marriage with Ranjana. As a result of these various incidents and the family's growing concern for Ranjana's safety, Pappoo used to escort Ranjana every morning to the school where she was teaching.

On the following day, i.e. on November 2, 1976, Pappoo took Ranjana to her school on his scooter as usual. The classes used to begin at 9-30 A.M. but Ranjana used to go to the school 30 to 40 minutes before time for correcting the students' home-work. After dropping Ranjana at the school, Pappoo started back for home on his scooter. While he was passing by the Children's Park, known as the Hathi Park, the appellant is alleged to have fired at him with a country- made pistol. Pappoo fell down from his scooter and died almost instantaneously.

**Held THAT-**

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

## STATE OF MIND OR BODY OR BODILY FEELING (Section–14)

**(Facts showing existence of state of Mind or of Body or Bodily Feeling)**

Section 14 of the Indian Evidence Act, 1872 deals with the proof of “Facts showing the existence of any state of mind or of body or bodily felling”. It runs as follows:

Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or goodwill towards any particular person, or showing the existence of any state of mind or body or bodily felling, is in issue or relevant.

**Explanation–1:** A fact relevant as showing the existence of a relevant state of mind must that the state of mind exists, not generally, but in reference to the particular matter in questions.

**Explanation–2:** But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.

**Illustrations:**

1. A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which

1. State of mind; and

2. State of Body or Bodily Feeling.

**1. State of Mind**

Facts showing the state of mind constitute Intention, Knowledge, Good Faith, Negligence, Rashness, ill will or Good will. For the purpose of showing the existence of state of mind, it is not possible to provide direct evidence.

Brain, C.J. observed, “It is common knowledge that thought of a man cannot be tried for devil knoweth not what passes in one’s mind.” But it is now well established that the state of one’s mind is as much a fact as the state of his digestion. If need not be directly proved by confession by the accused or by the evidence of a person who had an admission from the accused about his intention.

**2. State of Body or Bodily Feeling**

The condition of one’s body or his bodily felling may help a lot in finding the truth. Thus, where it is alleged that A was murdered by administering poison to him his statements regarding his condition and bodily felling may help in finding whether poison was given to him and which type of poison was administered.

**FACTS BEARING ON QUESTION WHETHER ACT WAS. ACCIDENTAL OR**

**INTENTIONAL (Section–15)**

Section 14 and 15 of the Evidence Act are overlapping. Section 15 is an application of the general rule laid down in Section 14.

Section 15 of the Evidence Act deals with “Facts bearing on question whether act was accidental or incidental”. It reads as follows:

When there an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

**Illustrations:**

1. A is accused of burning down his house in order obtain money for which it is insured.

The fact that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fire A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

## R v. George Joseph Smith (Brides in the Bath case)

Facts: Accused tried for the murder of his wife, who was found dead in the bathtub of their house. A few weeks prior to the death, the accused had rented a bathtub for the house. A few days prior to the death, he had taken her to the doctor, saying that she was suffering epileptic fits. Investigation uncovered that the accused had, under several false names, married several women previously. Most of them had also died under the same circumstances as were present in this case

Circumstances:

* Just prior to the death of the wife, certain financial transactions would take place 🡪 the wife would will away her entire property to him/ an insurance policy would be taken out where the accused was the beneficiary
* All the women were found to have drowned in their bathtubs
* It was always the accused who would have found the wives drowned
* There were no signs of struggle or physical violence on the bodies of the wives

The prosecution sought to prove the facts of all of these deaths as a relevant fact 🡪 they would go towards proving that the murder in the present case was not accidental, but was part of a plan/system.

The problem with this is that it comes uncomfortably close to admitting evidence of character. Even though the prosecution may admit it only in order to demonstrate a system, they are in fact implying that he was a murderer, and there is no guarantee that these facts would not influence the jury as such.

[Fun facts: The accused argued that while the wife was in the bathtub, she suffered an epileptic fit and drowned.

The first stage of an epileptic fit involves the violent thrashing around of the limbs 🡪 second stage involves an immediate stiffening of the limbs. The doctors said that if the limbs had stiffened, her head would have been pushed over the water in the tub, so she couldn’t have drowned due to an epilepsy.

Scotland yard seized the bathtub. Upon investigation, it seemed that there was no way that someone could drown in the bathtub, except by pulling on the legs of someone sitting in the bathtub such that their head went under and hit the bathtub.]

Scope of S. 15 🡪 what facts establish a pattern or a system? Only facts which are identical to the fact situation at hand?

## 

## Confession and Admission

**Distinction between Admission and Confession**

|  |  |  |
| --- | --- | --- |
| **S.No.** | **Admission** | **Confession** |
| 1. | It means voluntary acknoweldgement  as to the truth of a fact. | It means a statement made by an accused admitting his guilt. |
| 2. | It is defined Under Sec. 17 of the Evidence Act, 1872. | It is not defined in the Act. |
| 3. | It is not a conclusive proof. | Judicial confession is conclusive proof. |
| 4. | All admissions are not confessions. | All confessions are admissions. |
| 5. | It is made in civil cases. | It is made in criminal cases. |
| 6. | Admissions can be made on behalf of another/or by a stranger. | Confession must be made by the accused himself. |

**Confessions to Police Officer (Section 25)**

According to Section 25, Confession made to Police Officer is inadmissible. Confession under Section 25 may be a statement directly made to a Police Officer orally or in writing or indirectly made to such Police Officer. The reason is the Police Officers in India resort to third rate methods to extort Confession. Confessions to Police Officer are excluded even if arrest and custody are illegal 9Emperor vs. Mst.Jagia, AIR 1938 Pat. 308).

## Sitaram vs. State (1996) Supp. S.C.R. 265

The accused after committing murder left a confessional letter on the dead body. The letter was addressed to Police Officer. The court treated the letter, not addressed to Police, since Police Officer was not nearby. The confession was admitted and the accused was convicted.

Confession by accused while in custody of the Police not be proved against him 9Sec. 26): No confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

**Section 27 – Evidentiary Value**

## Pulukuri Kottaya v. King-Emperor, 1946 Bom HC

* Statement made by accused: I Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Boddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kotayya.
* Sec. 27 is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused
* The Crownargued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure
* But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. **Therefore the proviso to Section 26, added by Section 27, should not be held to nullify the substance of the section**. **It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact.Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered.**
* Information supplied by a person in custody that "**I will produce a knife concealed in the roof of my house**" does not lead to the discovery of a knife; knives were discovered many years ago. It **leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.**
* Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.
* 13. Court held that the whole of the impugned statement except the passage "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible
* 14. A confession of accused 3 was deposed to by the police sub-inspector, who said that accused 3 said to him:-“I stabbed Sivayya with a spear; I hid the spear in a yard in my village. I will show you the place.”-The first sentence must be omitted. Similarly statement that ‘it was with that spear that he had stabbed Boddapati Sivayya," must be omitted.

## State of Bombay v. Kathi Kolu Oghad-11 judge bench, SC 1958

* **Issues**: Whether a direction given by a Court to an accused person present in Court to give his specimen writing and signature for the purpose of comparison under the provisions of section 73 of the Indian Evidence Act infringes the fundamental right enshrined in Article 20(3) of the Constitution.
* (2) whether the mere fact that when those specimen handwritings had been given, the accused person was in police custody could, by itself, amount to compulsion, apart from any other circumstances which could be urged as vitiating the consent of the accused in giving those specimen handwritings
* **Majority judgment:**Agreed with *M.P. Sharma v. Satish Chandra* on the point the guarantee against testimonial compulsion includes not only oral testimony given in court or out of court, but also to Dagduas in writing which incriminated the maker when figuring as an accused person.
* 11. However held that ‘to be a witness’ is not the same thing as ‘to furnish evidence’-**To be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification.** "Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that - though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject - they **could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice.**
* **12. The giving of finger impression or specimen signature or of handwriting, strictly speaking, is not "to be a witness**". **"To be a witness" means imparting knowledge in respect of relevant fact, by means of oral Dagduas or Dagduas in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation.** A person is said 'to be a witness' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay or giving his opinion, as an expert, in respect of matters in controversy.
* The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document in accordance with the provisions of section 139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession or power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-examined.
* **Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge**. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. **When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'.**
* **The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character**. **Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'.**
* 13. **What is self-incriminatory:** In order that a testimony by an accused person may be said to have been self-incriminatory for the purpose of Art. 20(3) **it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so**. In other words, **it should be a statement which makes the case against the accused person at least probable, considered by itself**. **A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with**. **They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable**. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony'.
* **14. Similarly, during the investigation of a crime by the police, if an accused person were to point out the place where the corpus delicti was lying concealed and in pursuance of such an information being given by an accused person, discovery is made within the meaning of section 27 of the Evidence Act, such information and the discovery made as a result of the information may be proved in evidence even though it may tend to incriminate the person giving the information**, while in police custody. Unless it is held that the provisions of section 27 of the Evidence Act, in so far as they make it admissible evidence which has the tendency to incriminate the giver of the information, are unconstitutional as coming within the prohibition of clause (3) of Article 20, such information would amount to furnishing evidence.
* **Whether Sec. 27 of IEA violates Art. 20(3)-** If the self-incriminatory information has been given by an accusedperson without any threat, that will be admissible in evidence and that will not be hit by theprovisions of clause (3) Article 20 of the Constitution for the reason that there has been nocompulsion. **Sec. 27 will not violate 20(3) unless compulsion has been used in obtaining the information.**
* ‘Compulsion’ means duress-17. **The compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted.** Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence, **the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement**. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. It is a question of fact in each case to be determined by the Court on weighing the facts and circumstances disclosed in the evidence before it.
* **Conclusion**
* (1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.
* (2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.
* (3) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; it does not include the production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.
* **(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.**
* **(5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.**
* (6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.
* (7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made
* **Minority**-S. K. Das, Sarkar and Das Gupta, JJ.
* **27**.While on the one hand we should bear in mind that the Constitutionmakerscould not have intended to stifle legitimate modes of investigation we have to rememberfurther that quite clearly they thought that certain things should not be allowed to be done,during the investigation, or trial, however helpful they might seem to be to the unfolding of truthand an unnecessary apprehension of disaster to the police system and the administration ofjustice, should not deter us from giving the words their proper meaning.
* To limit the meaning of the words "to be a witness" in Article 20(3) in the manner suggested wouldresult in allowing compulsion to be used in procuring the production from the accused of a largenumber of documents, which are of evidentiary value, sometimes even more so than any oralstatement of a witness might be. For example, an **accused person has in hispossession, a letter written to him by an alleged co-conspirator in reference to their commonintention in connection with the conspiracy for committing a particular offence. Under section 10of the Evidence Act this document is the relevant fact as against the accused himself for thepurpose of proving the existence of the conspiracy and also for the purpose of showing that anysuch person was a party to it. By producing this, the accused will not be imparting any personalknowledge of facts; yet it would certainly be giving evidence of a relevant fact.** Again, **thepossession by an accused of the plan of a house where burglary has taken place would be arelevant fact under section 8of the Evidence Act as showing preparation for committing theft.** Byproducing this plan is he not giving evidence against himself?
* 32. It is clear from the scheme of the various provisions, dealing with the matter that the governing idea is that to be **evidence, the oral statement or a statement contained in a document, shall have a tendency to prove a fact-whether it be a fact in issue or a relevant fact which is sought to be proved**. The protection of Article 20(3) being available even at the stage of investigation, at that stage also the purpose of having a witness is to obtain evidence and the purpose of evidence is to prove a fact.
* It is not only by imparting of his knowledge that an accused person assists the proving of a fact; he can do so even by others means, such as the production of documents which though not containing his own knowledge would have a tendency to make probable the existence of a fact in issue or a relevant fact.
* **Is an accused person furnishing evidence when he is giving his specimen handwriting or impressions of his fingers, or palm or foot?-**Yes-For, these are relevant facts, within the meaning of section 9 and section 11 of the Evidence Act. Just as an accused person is furnishing evidence and by doing so, is being a witness, when hemakes a statement that he did something, or saw something, so also he is giving evidence andso is being a "witness", when he produces a letter the contents of which are relevant undersection 10, or is producing the plan of a house where a burglary has been committed or is givinghis specimen handwriting or impressions of his finger, palm or foot. **However 20(3) does not say that an accused person shall not be compelled to be a witness. Itsays that such a person shall not be compelled to be a witness against himself. Therefore an accused person is not furnishing evidence against himself, when hegives his specimen handwriting, or impressions of his fingers, palm or foot**
* **The evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions, identity between the two set is established. By themselves, these impressions or the handwritings do not incriminate the accused person, or even tend to do so**. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself-Art. 20(3) will not be violated
* By themselves they are of little or of no assistance to bring home the guilt of an accused. Nor is there any chance of the accused to mislead the investigator into wrong channels by furnishing false evidence. For, it is beyond his power to alter the ridges or other characteristics of his hand, palm or finger or to alter the characteristics of his handwriting.

## State of Uttar Pradesh v. Deoman Upadhyaya-1960 SC

* Deoman made a murderous assault with a gandasa (which was borrowed by him from one Mahesh) upon one Sukhdei and killed her on the spot and thereafter, he threw the gandasa into the village tank, washed himself and absconded from the village. He was arrested in the afternoon of the 20th near the village Manapur. On June 21, he offered to hand over the gandasa which he said, he had thrown in the village tank, and in the presence of the investigating officer and certain witnesses, he waded into the tank and took out a gandasa, which, on examination by the Serologist, was found to be stained with human blood.
* Deoman was convicted-appealed to Allahabad HC-it was contended that the evidence that Deoman made a statement before the police and two witnesses was inadmissible in evidence, because s. 27 of the Indian Evidence Act which rendered such a statement admissible, discriminated between persons in custody and persons not in custody and was therefore void as violative of Art. 14 of the Constitution
* Issues

1. Whether s. 27 of the Indian Evidence Act is void because it offends against the

provisions of Art. 14 of the Constitution ? and

2. Whether sub-s. (2) of s. 162 of the Code of Criminal Procedure in so far as it

relates to s. 27 of the Indian Evidence Act is void?

* The expression, "accused person" in s. 24 and the expression "a person accused of any offence" have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. The adjectival clause "accused of any offence" is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban.
* The ban imposed by s. 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By s. 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered. By s. 26, a confession made in the presence of a Magistrate is made provable in its entirety
* Sections 25 and 26 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, prohibited them from being received in evidence. It is manifest that the class of persons who needed protection most where those in the custody of the police and persons not in the custody of police did not need the same degree of protection. **But by the combined operation of s. 27 of the Evidence Act and s. 162 of the Code of Criminal Procedure, the admissibility in evidence against a person in a criminal proceeding of a statement made to a police officer leading to the discovery of a fact depends for its determination on the question whether he was in custody at the time of making the statement. It is provable if he was in custody at the time when he made it, otherwise it is not. (because s. 27 only applies to statements made in custody)**
* 12. There is nothing in the Evidence Act which precludes proof of information given by a person not in custody, which relates to the facts thereby discovered; it is by virtue of the ban imposed by s. 162 of the Code of Criminal Procedure, that a statement made to a police officer in course of the investigation of an offence under Ch. XIV by a person not in police custody at the time it was made even if it leads to the discovery of a fact is not provable against him at the trial for that offence.
* But the distinction which it may be remembered does not proceed on the same lines as under the Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police.
* Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person in sufficient. **A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of s. 27 of the Indian Evidence Act :** Legal Remembrancer v. Lalit Mohan Singh I.L.R. (1921) Cal.167 Santokhi Beldar v. King Emperor I.L.R. (1933) Pat. 241
* Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer. But in considering whether a statute is unconstitutional on the ground that the law has given equal treatment to all persons similarly circumstanced, it must be remembered that the legislature has to deal with practical problems; the question is not to be judged by merely enumerating other theoretically possible situations to which the statute might have been but is not applied. As has often been said in considering whether there has been a denial of the equal protection of the laws, a doctrinaire approach is to be avoided. **A person who has committed an offence, but who is not incustody, normally would not without surrendering himself to the police give informationvoluntarily to a police officer investigating the commission of that offence leading to thediscovery of material evidence supporting a charge against him for the commission of theoffence.**
* The fact that the principle is restricted to persons in custody will not by itself be a ground for holding that there is an attempted hostile discrimination because the rule of admissibility of evidence is not extended to a possible, but an uncommon or abnormal class of cases
* 14th amendment cases in America-the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied". There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms".
* 18. Counsel for the defence contended that in any event Deoman was not at the time when he made the statement, attributed to him, accused of any offence and on that account also apart from the constitutional plea the statement was not provable. This contention is unsound. **As we have already observed, the expression "accused of any offence" is descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by s. 27 of the Evidence Act. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability.**
* SC held: The evidence that Deoman slapped Sukhdei and threatened her that he would "smash her face" coupled with the circumstances that on the morning of the murder of Sukhdei, Deoman absconded from the village after washing himself in the village tank and after his arrest made a statement in the presence of witnesses that he had thrown the gandasa in the village tank and produced the same, establishes a strong chain of circumstances leading to the irresistible inference that Deoman killed Sukhdei
* **Subba Rao J-Dissenting judgement**
* The result brought about by the combined application of s. 27 of the Evidence Act and s. 162 of the Code of Criminal Procedure: A and B stabbed C with knives and hid them in a specified place. The evidence against both of them is circumstantial. One of the pieces of circumstantial evidence is that both of them gave information to the police that each of them stabbed C with a knife and hid it in the said place. They showed to the police the place where they had hidden the knives and brought them out and handed them over to the police; and both the knives were stained with human blood. Excluding this piece of evidence, other pieces of circumstantial evidence do not form a complete chain. If it was excluded, both the accused would be acquitted; if included, both of them would be convicted for murder.
* But A, when he gave the information was in the custody of police, but B was not so. The result is that on the same evidence A would be convicted for murder but B would be acquitted: one would lose his life or liberty and the other would be set free. This illustration establishes that *prima facie* the provisions of s. 27 of the Evidence Act accord unequal and uneven treatment to persons under like circumstances.
* There is no justification for the suggestion that the prosecution is in a better position in the matter of establishing its case when the accused is out of custody than when he is in custody.
* The constitutional validity has to be tested on the facts existing at the time the section or its predecessor was enacted but not on the consequences flowing from its operation. When a statement made by accused not in the custody of police is statutorily made inadmissible in evidence, how can it be expected that many such instances will fall within the ken of Courts. If the ban be removed for a short time it will be realized how many such instances will be pouring in the same way as confessions of admissible type have become the common feature of almost every criminal case involving grave offence. That apart, it is also not correct to state that such confessions are not brought to the notice of Courts.
* 39. Section 150 stated: "When any fact is deposed to by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence."
* 40. Section 150 of the Code of 1861 was amended by Act VIII of 1869 and the amended section read as follows: "Provided that when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, or in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt, or not, as relates distinctly to the fact thereby discovered, may be received in evidence."
* **Till the year 1872, the intention of the legislature was to provide for all confessions made by persons to the police whether in custody of the police or not**. Can it be said that in 1872 the legislature excluded confessions or admissions made by a person not in custody to a police-officer from the operation of s. 27 of the Evidence Act on the ground that such cases would be rare? Nothing has been placed before us to indicate the reasons for the omission of the word "or" in s. 27 of the Evidence Act. If that be the intention of the legislature, why did it enact s. 25 of the Evidence Act imposing a general ban on the admissibility of all confessions made by accused to a police officer? Section 27 alone would have served its purpose.
* On the other hand, s. 25 in express terms provides for the genus, i.e., accused in general, and s. 27 provides for the species out of the genus, namely, accused who are in custody. A general ban is imposed by one section and it is lifted only in favour of a section of accused of the same class. **The omission appears to be rather by accident than by design. In the circumstances it is not right to speculate and hold that the legislature consciously excluded from the operation of s. 27 of the Act accused not in custody on the ground that they were a few in number.**
* It is not possible to state as a proposition of law what words or what kind of action bring about submission to custody; that can only be decided on the facts of each case. It may depend upon the nature of the information, the circumstances under, the manner in, and the object for, which it is made, the attitude of the police-officer concerned and such other facts. It is not, therefore, possible to predicate that every confession of guilt or statement made to a police-officer automatically brings him into his custody.
* The classification is made between accused not in custody making a confession and accused in custody making a confession to a police-officer: the former is inadmissible and the latter is admissible subject to a condition. The point raised is why should there be this discrimination between these two categories of accused? It is no answer to this question to point out that in the case of an accused in custody a condition has been imposed on the admissibility of his confession. The condition imposed may be to some extent affording a guarantee for the truth of the statement, but it does not efface the clear distinction made between the same class of confessions. The vice lies not in the condition imposed, but in the distinction made between these two in the matter of admissibility of a confession. The distinction can be wiped out only when confessions made by all accused are made admissible subject to the protective condition imposed
* **There is no acceptable reason why a confession made by an accused in custody to a police-officer is to be admitted when that made by an accused not in custody has to be rejected.** The condition imposed in the case of the former may, to some extent, soften the rigour of the rule, but it is irrelevant in considering the question of reasonableness of the classification.

## Sec. 30 Confession by Co-accused

## Sardul Singh Caveeshar v. State of Bombay, SC 1957

* Charge against accused that they acquired control of Jupiter by acquiring controlling block of shares using the funds of Jupiter itself-charge of conspiracy to commit criminal breach of trust-defense argued that only acts relating to the acquisition of the controlling block of shares are relevant under s. 10-prosecution argued acts to screen such transactions and show them as legitimate would be relevant as well.
* Defense-The transactions of the year 1950 and the steps taken then are only for the purpose of screening the second set of transactions of the later part of 1949 and not the first set of transactions of January, 1949-the evidence relating thereto, which falls wholly outside the conspiracy period, is not admissible under s. 10 of the Evidence Act being too remote and having no direct bearing on the original transactions which are the subject matter of the conspiracy-object of conspiracy was achieved when funds of Jupiter were paid to Khaitan (the original director)
* Held-The transactions were admissible to the extent they were integrally connected and relevant to show the bogus character of the earlier transactions and the criminal intention of individual accused-however they could not be made relevant against co-conspirators under Sec. 10-nor could they be made relevant as conduct under Sec. 8-Mirza Akbar's case1940 Indlaw PC 37 is a clear authority for the position that in criminal trials, on a charge of conspiracy **evidence not admissible under s. 10 of the Evidence Act as proof of the two issues to which it relates, viz., of the existence of conspiracy and of the fact of any particular person being a party to that conspiracy, is not admissible under any other section of the Act.**

## Bhagwan Swarup v. State of Maharashtra-1963 SC

* Subba Rao J-**The expression "in reference to their common intention" is very comprehensive and it appears to have been designedly used to give it a wider scope than the words "in furtherance of" in the English law**; with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it-Sec. 10 cannot be used in favour of the other party to show that they are not a party to the conspiracy.
* Double Jeopardy argument-motive is not an ingredient of an offence-Defendants committed fraud on Empire to hide Jupiter transactions-however they were 2 separate conspiracies.

## Kashmira Singh v. State of Madhya Pradesh, AIR 1952 SC 159, 3 judges

* Appellant was Assistant Food Procurement Inspector-Deceased’s father reported him for polishing of rice-his services were terminated-This embittered the appellant who on at least two occasions was heard to express a determination to be revenged. In pursuance of this determination he got into touch with the confessing accused Gurbachansingh and enlisted his services for murdering the boy Ramesh.
* On the 26th December, 1949, festivities and religious ceremonies were in progress all day in the Sikh Gurudwara at Gondia. The boy Ramesh was there in the morning and from there was enticed to the house of the appellant's brother Gurudayalsingh and was done to death in a shockingly revolting fashion by the appellant, with the active assistance of Gurubachansingh, in the middle of the day at about 12 or 12.30. The body was then tied up in a gunny bag and rolled up in a roll of bedding and allowed to lie in Gurudayal's house till about 7 p.m.
* At 7 p.m. the body wrapped as above was carried by Gurubachan on his head to a chowkidar's hut near the Sikh Gurudwara. The appellant accompanied him. The map, shows that the distance along the route indicated was about half a mile to three quartersof a mile. It was left there till about midnight.Shortly before midnight the appellant and Gurubachan engaged the services of a rickshawcoolie Shambhu alias Sannatrao. They took him to the chowkidar's but, recovered thebundle of bedding and went in the rickshaw to a well which appears from the map,to be about half a mile distant. There the body was thrown into the well.
* The proper way to approach a case of this kind is, **first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it**. If it is capable of belief independently of the confession, then of course **it is not necessary to call the confession in aid**. But cases may arise **where the judge is not prepared to act on the other evidence** as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event **the judge may call in aid the confession and use it to lend assurance to the other evidence and thus believe what he would not be prepared to accept without the aid of the confession.**
* A co-accused who confesses is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when **the "evidence" is not on oath and cannot be tested by cross-examination**. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice is regarded by the judge as having no grater probative value.
* So far as the law is concerned, **a conviction can be based on the uncorroborated testimony of an accomplice provided the judge has the rule of caution,** which experience dictates, in mind and **gives reasons why he thinks it would be safe in a given case to disregardit.The testimony of an accomplice can in law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons disclosed.**
* Weakness in prosecution case-as disclosed in the confession, Gurubachan was a stranger to Gondia. He had come there only six weeks before the murder and did not meet the appellant till there weeks later and then only casually. Their second meeting, equally casual, was on the 21st, that is, five days before the murder, and on that date the appellant is said to have disclosed his intention to this stranger whom he had only met once before
* At the murder itself, Gurbachan did not give any assistance which a grown man could not easily have accomplished himself on a small helpless victim, of five. The appellant could have accomplished all this as easily without the assistance of Gurubachan, and equally Gurubachan, a mere hired assassin, could have done it all himself without the appellant running the risk of drawing pointed attention to himself as having been last seen in the company of the boy. Therefore **previous association of a type which would induce two persons to associate together for the purposes of a murder was not established**
* Court found that the appellant was away from the Gurudwara for a long enough time to commit the murder-had given a false statement that he was present-however **save in exceptional circumstances one accomplice cannot be used to corroborate another, nor can he be used to corroborate a person who though not an accomplice is no more reliable than one**-**have to seek corroboration of a kind which will implicate the appellant apart from the confession or find strong reasons for using Gurubachan's confession for that purpose**-examined reliability of Gurubachan’s confession against the appellant.
* First point: Confession was not made until 2 months after the murder-though Gurubachan was kept in the magisterial lock up **the distinction between the magisterial lock up and police custody in Gondia was only theoretical.** In practice, **it was no better than police custody**-SHO in Gondia deputes constables for duty to the lockup-Head Constable was in charge-Inspector admitted that **he interrogated Gurubachan in the lock up twice within the ten days which succeeded the confession**
* **No explanation was given for why these directions, which were made for good reason, were disregarded in Gurubachan's case.** The other prisoners were all committed to jail custody in the usual way, so there was no difficulty about observing the rule. **All this makes it unsafe to disregard the rule about using accomplice testimony as corroboration against a non-confessing accused. In the circumstances, the confession by itself could not be used to corroborate the rickshaw coolie Sannatrao, P. W., 14.**
* The prosecution was criticised for not calling the magistrate who recorded the confession as a witness. Court referred to the judgement of the Privy Council in *Nazir Ahmad* v. *King Emperor*regarding the undesirability of such a practice. Held-the magistrate was rightly no called and it would have been improper and undesirable for the prosecution to have acted otherwise.
* **Sari borders, Articles F, G, and T**.- Articles F & G were two pieces of a sari border which were used for tying up the mouth of the gunny bag in which the body was placed. Article T was another piece of a sari border which was found in the appellant's house on the 30th December, 1949. It was seized on the same day that the body was discovered. There was strong proof that Articles F and G are a part of the same border as Article T-That therefore afforded corroboration of Sannatrao's evidence-**court observed confession can be called in aid to lend assurance to the inference which arises fromthese facts, namely that the appellant did help to dispose of the body**
* But the matter cannot be carried further because, not only are the sari borders not proved to have had any connection with the crime of murder but the confession shows that they did not. The only conclusion permissible on these facts is that the appellant, at some time which is unknown, subsequent to the murder assisted either actively or passively in tying up the gunny bag in which the corpse was placed and that he then accompanied Gurubachan in the rickshaw from the chowkidar's hut to the well in the middle of the night.
* In the appellant's favour were the facts that there is no proof of his having been last seen in the company of the deceased. The only evidence of the boy's movements was that of Krishna (alias Billa) P. W. 9, a boy of seven years, and all he says is that Pritipal asked him to bring Ramesh with him to the Gurudwara that morning about 9 A.M. The boys played about and had some tea and then Pritipal took Ramesh away in the direction of the prostitute's house. Pritipal later returned without Ramesh. The Sessions Judge thought this witness had been tutored on at least one point. Pritipal's so called confession has been rejected because, in the first place, it is not a confession at all, for it is exculpatory, and, in the next the High Court was not able to trust it.
* The next point in the appellant's favour was that he was seen without a coat shortly before the murder and at a time when he was not in the vicinity of his own house. According to the prosecution, the murderer wore the coat, Article X, and the safa, Article Y.
* The Third point is that the appellant was not seen by anyone in the vicinity of the place of occurrence. The fourth point was that no one saw the appellant and the boy on a cycle through nearly a mile of what the High Court, which made a spot inspection, describes as a crowded locality.
* The points against the appellant were (1) that he had a motive and that he said he would be revenged, (2) that he was absent from the Gurudwara about the time of the murder long enough to enable him to commit it, and denied the fact, (3) that some twelve hours after the crime he assisted in removing the body from a place between half to three quarters of a mile distant from the scene of the crime, and (4) that at some unknown point of time he assisted in tying up the mouth of the gunny bag in which the body was eventually placed. Unsafe to convict of murder on the basis of these facts.
* In most of the cases cited by the prosecution the accused was associated with the disposal of the body very soon after the occurrence and at the scene of the crime. Here, twelve hours had elapsed and the first connection proved with the disposal is at a place over half a mile distant from where the body is said to have been murdered-however appellant was convicted u Sec. 201-7 years’ RI

## DYING DECLARATION

Assumption: That nobody would lie when they are about to die (because they would be scared to meet their maker with a lie on their lips) 🡪 has the effect of strengthening the left leg of the Hearsay triangle, reduces the risk of insincerity.

Problems with this assumption:

* Not everyone believes in God
* Not everyone knows that they are about to die

Old English cases required that the declarant should have had an *absolute* and *irrevocable* belief in his mind that he was going to die (no hope of survival).

**S. 32, IEA: Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant**

Statements, written or verbal, or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expenses which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) When it relates to cause of death—When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

## Pakala Narayanswami v. Emperor 1939

Facts: On Saturday 20th March 1937, the deceased man received a letter the contents of which were not accurately proved but it was reasonably clear that it invited him to come that day or next day to Berhampur. It was unsigned. The widow said that on that day her husband showed her a letter and said that he was going to Berhampur as the appellant's wife had written to him and told him to go and receive payment of his dues.

Issue: Whether the statement of the widow that on 20th March the deceased had told her that he was going to Berhampur as the accused's wife had written and told him to go and receive payment of his dues was admissible under Section 32(1), Evidence Act, 1872?

Held: The transaction is one in which the deceased was murdered on 21st March or 22nd March: and his body was found in a trunk proved to be bought on behalf of the accused. The statement made by the deceased on 20th or 21st March that he was setting out to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused's house, appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted.

## Khushal Rao v. State of Bombay 1958 AIR 22, 1958 SCR 552

Facts: Sampat, Mahadeo, Khushal and Tukaram suddenly attacked Baboolal with swords and spears and inflicted injuries on different parts of his body. The occurrence took place in a narrow lane of Nagpur at about 9 p.m.

**Dying declarations:**

* At about 9.25 p.m. The doctor in attendance Dr. Kanikdale (P.W. 14) at once questioned him about the incident and Baboolal is said to have made a statement to the doctor which the latter noted in the bed head ticket (Ex. P-17) that he had been assaulted by Khushal and Tukaram with swords and spears.
* The Sub- Inspector decided that it would be more advisable for him to record the dying declaration without any delay. Hence, he actually recorded Baboolal's statement in answer to the questions put by him (Ex. P-2) at 10.15 p.m.
* In the meantime, Shri M.S. Khetkar, a magistrate, first class, was called in, and he recorded the dying declaration (Ex. P-16) between 11.15 and 11.35 p.m. in the presence of Dr. Ingle who certified that he had examined Baboolal and had found him mentally in a fit condition to make his dying declaration.

Held: Baboolal had been consistent throughout in naming the appellant as one of his assailants, and he named him within less than half an hour of the occurrence and as soon as he reached the Mayo Hospital. There was, thus, no opportunity or time to tutor the dying man to tell a lie. At all material times, he was in a proper state of mind in spite of multiple injuries on his person, to remember the names of his assailants. Hence, we have no reasons to doubt the truth of the dying declarations and their reliability. We have also no doubt that from the legal and from the practical points of view, the dying declarations of the deceased Baboolal are sufficient to sustain the appellant's conviction for murder.

The court lays down a 6-point test for dying declarations:

(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;

(2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other piece of evidence;

(4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;

(5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and

(6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Before a dying declaration is recorded, a doctor should be made to certify that the declarant is in a fit state to recount his experience.

Police manuals generally provide that dying declarations ought to be recorded by a Magistrate. A dying declaration recorded by a police officer is least trustworthy (officer has vested interest in recording dying declaration).

It should not be recorded in the presence of persons parties to the case, or even in the presence of relatives of the declarant (since they may influence the declarant to say something).

**Queen v Abdulla (1885) ILR 7 All 385 [Read the Judgment]**

## JUDGMENTS OF COURT

**(JUDGMENTS OF COURTS OF JUSTICE, WHEN RELEVANT)**

Section 40 to 44 of the Indian Evidence Act, 1872 lay down the provisions relating to Judgment of Court of Justice, when relevant. Section 40 deals with pervious judgments relevant to bar a suit or trial. Section 41 deals with the relevancy of certain judgments in probate etc. jurisdiction. Section 42 deals with relevancy and effect of judgments, orders or decrees other than those mentioned in Section 41. Section 43 relates to judgments etc. other than those mentioned in Section 40 to 42, when relevant. Section 44 speaks about fraud or collusion in obtaining judgment or incompetence of court, may be proved.

**Kind of Judgments:** Judgments are categorized/classified in to two kinds, namely–

1. Judgments in rem; and
2. Judgments in personam
3. **Judgments in rem**

Judgments affecting the legal status of some subject matters, persons or things are

called ‘Judgments in rem’. E.g. Divorce Court Judgment, grant of probate or administration etc. Such judgments are conclusive evidence against all the persons, whether parties to it or not.

1. **Judgments in personam**

Judgments in personam are all the ordinary judgments not affecting the status of

any subject matter, any person or any thing. In such judgments, the rights of the parties to the suit or proceedings are determined.

Under Sections 40 to 44, a judgment is not relevant to prove that the plaintiff has filed a false case 9Hassan Abdullah vs. State of Gujarat, AIR 1962 Guj. 214 : 1962 (2) Cr.LJ 55).

**Judgments**

**Distinction between**

|  |  |
| --- | --- |
| **Distinction between ‘Judgment in rem’ and ‘Judgment in personam:** | |
| **Judgments in Rem** | **Judgments in Personam** |
| **1.** Judgments in rem is adjudication  probnounced upon the status of a person or  a thing by a competent or a thing by a  competent court to the world generally. | **1.** Judgment in personam are all the  ordinary judgments not affecting the  status of any subject matter, any person  or anything. |
| **2.** Judgment of a court in exercise of probate,  matrimonial or insolvency jurisdiction  confirming or taking away any legal  character are judgments in rem. | **2.** The judgments of the civil court are the  judgments in personam. |
| **3.** It is binding on all persons, whether they  are parties to those proceedings or not. | **3.** It is binding on the parties to the suit  only. |

Section 40 provides for ‘pervious judgments relevant to bar a second suit or trial.’ It runs as follows:

The existence of any judgments, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognizance of such suit, or to hold such trial.

Section 40 permits evidence of the previous judgment, order or decree, which by law prevents any court from taking cognizance of a suit or holding a trial, when the question arises whether such court ought to take cognizance of such suit or hold such trial. The object of Section 40 is to avoid multiplicity of suits and to save the precious time of the court. This provision is incorporated under Section 11 of the Code of Civil Procedure, 1908, which deals with the doctrine of Res judicata.

**Relevancy of certain judgments in probate, ect., jurisdiction (Section 41):**

Section 41 deals with judgments in rem, which bind not only the parties and their representatives but the whole world. A judgment in rem under Sec. 41 shall be conclusive in civil as well as criminal proceedings. Section 41 runs as follows:

A final judgment, order decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person to any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing is relevant.

Such judgment, order decree is conclusive proof

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree delares that it has been or should be his property.

Section 41 deals with what is known as judgments in re. Under this section a final judgment, order or decree of a competent court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character or which declares any person to be entitled to any such character or to be entitled to any specific thing absolutely (not as against some specific person) is relevant when existence of any such legal character or title to any such things is relevant.

A judgment in rem under this section shall be conclusive in civil as well as criminal proceedings.

**Conditions:–** For application of Section 41, the following conditions are to be satisfied:

1. The judgment should be final judgment, not an \*\*\*\*\*\*\*\*\*\* one;
2. The court must be competent;
3. The judgment must be in exercise of any of the following four types of jurisdictions mentioned in the Section viz. probate, admiralty, matrimonial and insolvency;
4. Such judgment must confer upon or take away from any person any legal character or declare that any person is entitled to such character, or declare that any person is entitled to any specific thing absolutely.

**Relevancy and effect of judgments, orders or decrees, other than those mentioned in Section 41 9Section 42):**

According to Section 42, Judgments, Orders or Decrees other than those mentioned in Section 41, are relevant if they relate to matters of public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state

**Illustration:**

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant; but it is not conclusive proof that the right of way exists.

**Judgments etc. other than those mentioned in Sections 40 to 42, when relevant (Section 43)**

Section 43 provides that judgments, orders or decrees, which are not mentioned in Section 40, 41 are not relevant unless the existence of such judgment, order or decree is a fact in issue or a relevant fact under some other section of the Evidence Act. It runs as follows:

Judgments, orders or decrees, other than those mentioned in Section 40, 41 and 42 are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.

**Illustrations:**

1. A and B separately sue C for a libel which reflects upon each of them. C in each case says, that matter alleged to be libelous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

1. A prosecutes B for adultery with C, A’s wife.

B denies that C is A’s wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A’s lifetime. C says that she never was A’s wife.

The judgment against B is irrelevant as against C.

1. A prosecutes B for stealing a cow from him. B is convicted.

A afterwards, sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

1. A has obtained a decree for the possession of land against B. C, B’s son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

1. A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.
2. A is tried for the murder of B. The facts that B prosecuted A for libel and that A was convicted and sentenced is relevant under Section 8 as showing the motive for the facts in issue.

**Fraud or collusion in obtaining judgment, or incompetence of Court, may be proved (Section 44)**

The general rule is, a judgment of a competent court shall be binding on the parties operating as res judicata in subsequent proceedings between the same parties. Section 44 contains exceptions to this general rule. According to Section 44, a judgment is liable to be annulled /impeached on the ground of a) want of jurisdiction; b) fraud; and c) collusion. It runs as follows:

Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Section 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court no competent to deliver it, or was obtained by fraud or collusion.

## EXPERT EVIDENCE

The opinion of experts are generally admissible as evidence under Section 45 of the Indian Evidence Act. This evidence usually plays an important role in many cases where technical aspects are involved. This is particularly true in medico legal cases. The rationale behind the same is that it is not practical to expect the Judges to have adequate knowledge in medical issues. Hence, the parties bring in experts who are qualified and sufficiently equipped in that field as witnesses to prove their stand.

**Who is Expert**

When the Court has to form and opinion upon a point of foreign law or of science or art, or as to identity of handwriting 30[ or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, 31[ or in questions as to identity of handwriting ] 30[ or finger impressions ] are relevant facts.

Such persons are called experts.

**Illustrations**

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the Act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant.

**In** Re Pier Ridge Case

A ship that was docked in a particular manner ran agound when the tide went low. Damages were claimed from the insurance company. If the damage was caused by the master’s own negligence, insurance company would not be liable. The court took the opinion of a very old and experienced dock worker. This was objected to on the grounds that he had no formal education – how could he be an expert? However, it was evident that he had substantial practical knowledge in respect of the docking of ships.

S. 46, IEA: Facts bearing upon opinions of experts

Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations

(a) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbor is caused by a certain sea-wall.

The fact that other harbors similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

As per S. 46, the grounds of an expert opinion (Eg: whether the test conducted by the expert was conducted properly) are always made relevant. Expert evidence cannot be taken blindly.

Person travelling on the railway had accidentally fallen down, his leg got completely severed from below the knee. He was taken to a hospital, but the doctor chose not to treat the person. The only thing that was done was to bandage the leg and give blood transfusions. The doctor did not amputate the leg. Gangrene set in, the person went into septic shock and passed away within a couple of weeks, while at the hospital. The hospital assembled a special post-mortem team to conduct the post mortem. The opinion was that the doctor had been negligent in treating the deceased. The case went to court, the primary evidence against the doctor was the opinion testimony of the post-mortem team. The doctor, using S. 46, questioned the fact that a special team of 3 doctors had been set up rather than the standard procedure of one doctor conducting the post mortem. He also argued that the report was vitiated by bias since the administration harboured ill-will towards him. HC agreed, quashed the proceedings.

S. 47, IEA: Opinion as to handwriting, when relevant

When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Illustration

The question is, whether a given letter is in the handwriting of A, merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B’s clerk, whose duty it was to examine and file B’s correspondence. D is B’s broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C and D ever saw A write.

Oscar Pistorius – the defence has adduced the opinion of a “sound expert” to give an opinion on the sound of the gun (murder weapon). The question was whether the sound made by the gun being fired could have been heard by the neighbours claiming to hear it.

Video: prosecution grills expert witness in pistorius trial:

* Through his cross-examination, the prosecutor implied that the expert was not an expert

Test laid down in Frye: The opinion given by the expert must be one that is “generally accepted” in the particular scientific field.

Frye test has been overruled in Daubert. The court held that after Congress adopted the [Federal Rules of Evidence](https://en.wikipedia.org/wiki/Federal_Rules_of_Evidence) in 1975, Frye was no longer the governing standard for admitting scientific evidence

Daubert laid down a test to determine whether or not something amounts to expert evidence:

* Whether this scientific technique (which was used to arrive at the opinion) has been tested
* Whether the scientific technique has been peer reviewed
* Whether the scientific technique has been published (exposing it to a great deal of scrutiny)
* What is the rate of error of utilising the technique
* Whether the scientific technique enjoys general acceptance

Narco analysis: does this amount to forced self-incrimination? The drugs administered have the effect of causing severe disorientation and failure of the brain centre that is responsible for a person’s foresight – the person loses the ability to decide whether to lie/not lie/be silent – he will continue talking without being aware of what he is saying.

## Selvi v. State of Karnataka 2010

Issues:

1. Constitutionality of narco analysis
2. Constitutionality of lie detection tests /polygraph test

Held:

1. In case of narco analysis, a person is incapacitated from withholding or altering what he wants to say – this affects his ability to *voluntarily* give information.

2. In a polygraph test, nobody is being forced to answer any questions. However, the inference that is being drawn is not with respect to his physiological state, but with respect to his mental state (truthfulness or untruthfulness) – so, it is a ‘compulsion’ leading to the disclosure of such mental state.

3. “However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with [Section 27](https://indiankanoon.org/doc/1312051/) of the Evidence Act, 1872.”

There are several factors which indicate whether a lie detection test is reliable:

1. Accuracy
   1. Sensitivity: Does it detect lies? (80% sensitivity means that 80% of the time, lies are correctly identified as lies & there are 20% false negatives)
   2. Specificity: Does it detect truthfulness? (80% specificity means that 80% of the time, truths are correctly identified as truths and 20% false positives)
2. Predictive Value

Generally, there is a greater possibility of false positives than false negatives – thus, there is a danger because innocent people who are telling the truth would be recorded as having lied.

## Chandradevi v State of TN 2002

Facts: Accused charged with rape and murder of several girls. DNA tests were conducted – confirmed that the accused was the father of the victim’s child. The defence introduces another expert witness who opines that the test was not properly conducted.

Held: The prosecution’s expert witness’ opinion was relied on and the defence opinion was rejected.

* The defence witness is a partisan witness engaged by the defence for the purpose of reviewing the evidence of the prosecution witness
* The defence had only the sample of the aborted foetus and the sample blood of the accused, but not of the mother, which is necessary to conduct a proper DNA test
* The report of the defence witness was not signed by the lab authorities or by the experts conducting the test

Swami Shraddhanand v State of Karnataka

The accused’s had killed his wife by administering a heavy dosage of sleeping pills. Their children lodged a missing person complaint. A police officer went undercover as an employee in the accused’s house. The body was discovered under the floor of the master bed room.

On trial – the prosecution expert witness conducted tests – determined that the death was homicidal due to drug overdose. The accused was convicted of murder – sentenced to death.

Went on appeal to the SC.

In determining whether or not to uphold the death sentence (rarest of rare), the SC examined the mode of killing:

Held: “it is undeniable that the appellant killed Shakereh in a planned and cold blooded manner but at least this much can be said in his favour that he devised the plan so that the victim could not know till the end and even for a moment that she was betrayed by the one she trusted most. Further though the way of killing appears quite ghastly it may be said that it did not cause any mental or physical pain to the victim.”

“In light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.

**Evidentiary Value of Expert Opinion:**

The nature of expert witness in corroborative and not conclusive. Expert evidence is of two types - Opinion Evidence and Data Evidence. Data Evidence is generally given more importance and precedence over opinion evidence. But in any case sole reliance cannot be placed on expert evidence. If the Judge completely relied on expert opinion, then it weakens the case. This is because even if a person is an eminent expert in his field, he is still not considered a direct witness. He has only adduced what might have happened. He is not a direct witness. Hence, his evidence is not conclusive in nature. Secondly, corroborative evidence means that such evidence needs a primary evidence and it cannot survive alone. In cases where expert opinion is considered, there should be a primary evidence and the expert testimony can support it. If the expert opinion contradicts an unimpeachable eye witness or documentary evidence, then it will not have an upper hand over direct evidences. Expert opinion is used only to help the Judge to form an independent opinion. Expert testimony by its very nature is considered weak and hence, cannot solely form the basis It should be taken with due caution. Thus, it is merely an advisory opinion as the Judge is not bound to accept the expert opinion even after he fulfills the test of competency.

## Documentary Evidence

**S. 3, IEA: Interpretation clause**

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

Illustrations

A writing is a document;

Words printed, Lithographed or photographed are documents;

A map or plan is a document;

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

A caricature is a document.

Electronic records are also documents.

**S. 59, IEA: Proof of facts by oral evidence**

All facts, except the 8A[contents of documents or electronic records], may be proved by oral evidence.

**S. 61, IEA: Proof of contents of documents**

The contents of documents may be proved either by primary or by secondary evidence.

## S. 62, IEA: Primary evidence

Primary evidence means the documents itself produced for the inspection of the Court.

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

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

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

**Illustrations**

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

Thus, to prove an original, another original created by the same process is primary evidence.

To prove a copy, the original or another copy made from the original is primary evidence.

Photography:

* Photos developed from photo negatives are considered primary evidence
* Digital photos – the electronic copy is the original whereas a printed physical copy is a copy
* Instant photo – the photo is original

## S. 63, IEA: Secondary evidence

Secondary evidence means and includes—

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

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

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

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

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

Illustration

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

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

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

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

Encryption and Decryption – Leads to creation of new documents

**S. 64: Proof of documents by primary evidence**

Documents must be proved by primary evidence except in the cases hereinafter mentioned

Where documents annexed to plaint/written submissions are certified copies, they need not be proved.

Stages of proving a document (In trial courts):

1. The document must be marked: Produce the document before the court, inform the court of what the document purports to be, how it is relevant. Marking has a very low threshold, courts generally mark all documents. It will be marked as an ‘exhibit.’

2. The document must be proved: For eg: In a sale deed/will, it is important to show execution. This can be done by calling persons who have signed on the document as witnesses to testify to the existence of the document. This signature can then be marked as an exhibit.

**S. 65, IEA: Cases in which secondary evidence relating to documents may be given**

Secondary evidence may be given of the existence, condition, or contents of a documents in the following cases:-

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

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

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

of any person legally bound to produce it,

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

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

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

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

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

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 40[India] to be given in evidence ;

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

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

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

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

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

## S. 74, IEA: Public documents

The following documents are public documents :-

(1) documents forming the acts, or records of the acts –

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, 48[of any part of India or of the Commonwealth ] or of a foreign country;

(2) Public records kept 49[ in any State ] of private documents.

## 65B. Admissibility of electronic records

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,-

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

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

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

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

The police can look at the call detail record (CDR) of a person’s cellular device to determine whether or not they were at a particular place at a particular time. The record is generated by the company officials (of the cellular service provider) and sent to the police. This record would have to be certified by the person responsible for generating the record. Such certificate will contain particulars as mentioned in S. 65B (4).

Navjot Sandhu held that if a document meets the requirement of S. 63 and S. 65, that is sufficient for it to be proved – the requirements of 65B need not be met.

Anvar overruled Navjot Sandhu, holding that where *secondary* evidence of computer output is sought to be produced, the certification requirements under S. 65B would have to be met. 🡪 this is strange reasoning – what is secondary evidence of computer output? All computer output under 65B is deemed to be a document even in the absence of proof of the original.

## Navjot Sandhu v NCT Delhi 2005

Held: “According to Section 63, secondary evidence means and includes, among other things, "copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies". Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the Court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service providing Company can be led into evidence through a witness who can identify the signatures of the certifying officer or otherwise speak to the facts based on his personal knowledge. Irrespective of the compliance of the requirements of Section 65B which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely Sections 63 & 65. It may be that the certificate containing the details in sub-Section (4) of Section 65B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely Sections 63 & 65.”

## Anvar v Basheer 2014

Held:

* Any documentary evidence by way of an electronicrecord under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B.
* The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2).
* Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the conditions are satisfied [certification requirements]. Such a certificate must accompany the electronic record.

## Narbad Devi Gupta v. Birendra Kumar Jaiswal 2003

Facts: Whether certain rent receipts can be introduced in court. The rent receipts contained the signatures of the plaintiff, and were being used to show that the plaintiff knew that the tenant was a tenant. The plaintiff did not contest the signature in his pleadings – so the existence of the rent receipts could not be disputed.

## Pawan Kumar v. State of Haryana

Facts: 3 persons came to a hotel late at night, spoke to the waiter, took a room. Next morning, two of the persons left, telling the hotel employee that “my uncle is in the room, take care of his needs as and when he requires it.” Later, the person in the room was found dead. Document sought to be adduced at trial – the hotel register, showing that the accused had visited the hotel. The witness who was called to court was the owner of the hotel, not the waiter who had made the entry in the register. The owner was not present at the time that the persons checked into the room (hit by S. 60).

[How would the contents of the document ordinarily be proved? – you would call the person who made the entry and get him to testify that he made the entry because the accused had actually checked in at the time that he made the entry]

Held: The accused’s presence could not be proved

**S. 68, IEA: Proof of execution of document required by law to be attested**

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

47[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

## Janki Narayan Bhoir v. Naryan Nandeo Kadam

Facts: will – written by a scribe and attested by two witnesses. A woman, claiming under the will, had to prove the execution of the will.

The High Court took the view that though the scribe had written down the Will he had also signed it and he could have been treated as an attesting witness as he had also signed the Will.

[What does it mean to attest? An attesting witness is one who witnesses execution of a particular document. The attestor is made to agree that he has read and understood the document, that he knew the mental condition of the person signing the document.]

In the case on hand it was not established that the two witnesses attested the Will. The High Court was also wrong in treating the scribe of the Will, as an attesting witness without any basis. A scribe does not amount to an attesting witness, because he does not possess *animo attestendi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

**S. 71, IEA: Proof when attesting witness denies the execution**

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

Janki Narayan Bhoir also explained the interplay between S. 68 and S. 71 of the IEA: One of the two attesting witnesses can be examined even though the other one was available, but he must prove execution of the will as per S. 63(e) of the Succession Act, that is, attestation by him as well as by the other witness. If he fails to do so, the other witness will have to be called. S. 71 of the IEA is intended to meet a situation where an attesting witneess could not be called and supplements S. 68. Normally, S. 68 has to be followed, but when it is not possible to do so, S. 71 is intended to help the party to produce other evidence.

It is only in a case falling under S. 71 (where the attesting witnesses have not confirmed the execution of the document) that the court goes into the surrounding circumstances of the document

Probate: If probate on a document is conducted, that means that a proper enquiry into the validity of the will has already occurred in court. Probate actions determine the validity of the will as a whole (with respect to the capacity of the testator and its execution) but not the construction of the terms of the will. Then, if someone later claims under the will, it can go straight to the execution stage. The testator has to be examined by the court when conducting probate.

## Venkatachala Iyengar v. Thimmayamma, 1959 AIR 443, 1959 SCR Supl. (1) 426

Facts: 5 parcels of land – jointly owned by husband and wife. The husband made a lot of expenditures. Accordingly, the wife claimed that the husband had exhausted his share in the property, and that the property was now wholly owned by her. In her will, she bequeathed a life interest in the property to certain persons. The will was registered.

Held: The will was not proved to be validly executed - none of the witnesses could prove that she had willingly and knowingly accepted the contents of the will. “even the interested testimony of the appellant does not show that be obtained approval of the draft from the testatrix after reading it out fully to her clause by clause.”

“Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the dispositions in the will ? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills.”

“Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator.”

Documents are required to be ‘registered’ to serve as public notice as to the contents of the document.

**S. 91, IEA: Evidence of terms of contracts, grants and other dispositions of property reduced to form of document**

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

**Exception 1**. – When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

**Exception 2**. – Wills 75[ admitted to probate in 40[India] may be proved by the probate.

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

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

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

Illustration

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

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

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

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

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

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

Oral evidence is offered of the payment.

The evidence is admissible.

S. 91 can be said to be the foundational fact that must be proved for S. 92 to be triggered.

**S. 92, IEA: Exclusion of evidence of oral agreement**

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

Provision (1) – Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 76[want or failure] of consideration, or mistake in fact or law.

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

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

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

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

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

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

Illustration

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

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

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

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

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

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

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

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

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

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

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

**S. 93, IEA: Exclusion of evidence to explain or amend ambiguous document**

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

Illustrations

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

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

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

**S. 94, IEA: Exclusion of evidence against application of document to existing facts**

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

Illustration

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

**S. 95, IEA: Evidence as to document unmeaning in reference to existing facts**

When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration

A sells to B, by deed, “my house in Calcutta”. A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed. These facts may be proved to show that the deed related to the house of Howrah.

**S. 96, IEA: Evidence as to application of language which can apply to one only of several persons**

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

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

(b) A agrees to accompany B to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sindh was meant.

**S. 97, IEA: Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies**

When the language used applies partly to one set existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply. Illustrations A agrees to sell to B “my land at X in the occupation of Y". A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

**S. 98, IEA: Evidence as to meaning of illegible characters, etc**

Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration

A, a sculptor, agrees to sell to B, “all my mods”. A has both models and modelling tools. Evidence may be given to show which he meant to sell.

**S. 99, IEA: Who may give evidence of agreement varying term of document**.—Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration

A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months’s credit shall be given to A. This could not be shown as between A and B, but it might be shown by C, if it affected his interests.

S. 99 is generally considered to be a statutory exception to privity of contract.

An attesting witness (who is not a party to the contract) can give evidence under S. 99.

## Examination of Witnesses

**S. 159, IEA: Refreshing memory**

A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.—Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original. An expert may refresh his memory by reference to professional treatises.

**S. 145, IEA: Cross-examination as to previous statements in writing**

A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

**S. 160, IEA: Testimony to facts stated in document mentioned in section 159**

A witness may also testify to facts mentioned in any such document as is mentioned is section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration

A book- keeper may testify to facts recorded by him in books regularly kept in the course of business, if he know that the books were correctly kept, although he has forgotten the particular transactions entered.

**S. 161, IEA: Right of adverse party as to writing used to refresh memory**

Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

**S. 162, IEA: Productions of documents**

A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents – If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence : and, if the interpreter disobeys such direction , he shall be held to have committed an offence under section 166 of the Indian Penal Code (45 of 1860).

**S. 163, IEA: Giving, as evidence, of document called for and produced on notice**

When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

**S. 164, IEA: Using, as evidence, of document production of which was refused on notice**

When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration

A use B on an agreement and gives B notice to produce it, At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce documents itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

**Read S. 165**

The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question: Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved: Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

General principles regarding examination of witnesses:

* Who can be a witness – question of competence – S. 118, IEA

Issues:

If you bring a 7 year old child as a witness – she may be able to understand the question and give a rational answer, but does she understand the importance of telling the truth/ can she appreciate the seriousness of the situation? – in such cases, administering the oath has no effect.

The Oaths Act says that children below 12 years are not required to take the oath.

Child witnesses are placed in a special category – it is very easy to tutor a child witness. A judge is supposed to first ascertain that the child appreciates the importance of telling the truth before taking her testimony.

Order of examination:

1. Direct examination / examination in chief – conducted by the party that has called the witness [S. 137, IEA]

Leading questions may not be asked in examination in chief or re examination if the other party objects [S. 142, IEA]

Effective practices to follow when conducting examination in chief:

* Looping: There might be certain parts of the testimony that are particularly important. If the witness brings up an important fact in an answer, that fact should be looped into the next question. Eg: “Where were you on 9th June?” “At X” “On the night of 9th June, *when you were* at X, what were you doing?”
* Specificity: If the witness states specific facts in an examination in chief, they should never be reduced to general terms.

2. Cross examination – conducted by the adverse party after the examination in chief is over

Generally speaking, the scope of questions that can be asked in a cross is restricted by what was asked in the direct examination.

But, S. 138: The examination and cross – examination must relate to relevant facts but the cross –examination need not be confined to the facts to which the witness testified on his examination –in-Chief.

S. 143: Leading questions may be asked in cross examination

Leading questions are such question which suggest the answer itself.

3. Re examination – conducted by same party that conducted direct examination

## BURDEN OF PROOF AND PRESUMPTION

T HE term "burden of proof" is used in our law to refer to two separate and quite different concepts. The distinction was not clearly perceived until it was pointed out by James Bradley Thayer in 1898. The decisions before that time and many later ones are hopelessly confused in reasoning about the problem. The two distinct concepts may be referred to as-

(1) The risk of non-persuasion, or the burden of persuasion or simply persuasion burden

(2) The duty of producing evidence, the burden of going forward with the evidence, or simply the production burden or the burden of evidence.

Standard of Proof

Preponderance of Probability – In civil cases - preponderance of the evidence (means) the greater weight of the evidence, superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Prove beyond reasonable doubt- In Criminal Cases- The standard that must be met by the prosecution's evidence in a criminal prosecution: that no other logical explanation can be derived from the facts except that the defendant committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty.

**S. 101, IEA:** 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 committed.

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.

**S. 102, IEA:**  **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.

While 101 speaks of the general burden at the beginning of the suit/proceeding, S. 102 also accounts for shifts in burden, for eg: under the NDPS Act, if possession was proved, the presumption would operate against the accused, and if no more evidence were adduced, he would fail.

**S. 103, IEA:** 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.

Illustration

(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.

S. 3 defines proved/not proved/disproved

S. 4 defines may presume/shall presume/conclusive proof

S. 104, IEA - 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.

S. 105, IEA - 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 Indian Penal Code 45 of 1860, 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.

**Dahyabhai Chhaganbhai Thakker v State of Gujarat**

General burden of proof never shifts, the presumption of innocence continues. Once the accused rebuts the presumption of sanity, the prosecution must discharge its burden to disprove insanity.

**S. 106, IEA: Burden of proving fact especially within knowledge**

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.

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

S. 106 was used in the **Aarushi Talwar** case – since the murder took place in the house and there were no signs of forced entry or exit – the persons inside the house would have had ‘special knowledge’ of whatever happened.

“last seen together” theory – since someone was seen at the time, place, and with the victim, it is likely that he did something. This amounts to weak, circumstantial evidence.

S. 107, IEA: Burden of proving death if alive within 30 years is on person asserting death

S. 108, IEA: proviso to S. 107 – Burden of proving that person is alive who has not been heard of for seven years shifts to the person asserting that he is alive

S. 109, IEA: 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.

S. 110, IEA: When a person is in possession of anything, the burden of proving that he is not the owner is on the person so asserting

S. 111, IEA: 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 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. Illustrations: sale from son to father/ client to attorney.

 S. 111A: presumption as to certain offences - If certain basic facts are established, the accused is presumed to have committed the offence, ‘unless the contrary is shown’.

S. 112, IEA: 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 man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the parties to the marriage had no access to each other at any time when he could have been begotten.

Basic facts: born during valid marriage or within 280 days of its dissolution, the mother remaining unmarried.

Presumption: the child is the legitimate child of that man. [except where non-access can be shown]

S. 112 is a rule of policy – it is in the interest of the child and society at large to confer legitimacy on children. What about adducing DNA evidence to rebut presumption of legitimacy? The section does not seem to permit it – ‘conclusive proof.” But the fact that they are acknowledging non-access as an exception means that there is a some focus on the truth of the matter.

S. 113: proof of cession of (British) territory

**S. 113A, IEA: Presumption as to abetment of suicide by a married women**

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 circumstance s 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 section 498 A of the Indian Panel Code (45 of 1860).

Basic facts: question of abetment of suicide, suicide within 7 years of marriage, subjected to cruelty

Presumption: person responsible for cruelty has abetted suicide

**S. 113B, IEA: 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 had 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.

Explanation.- For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code(45 of 1860).]

Basic facts: subjected to cruelty soon before death, in connection with dowry

Presumption: person responsible for cruelty is responsible for death

S. 304B, IPC: Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.

**114. Court may presume existence of certain acts**

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.

See Illustrations to S. 114

**S. 79, IEA: Presumption as to genuineness of certified copies**

The Court shall presume 57[to be genuine] every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer 58[of the Central Government or of a State Government, or by any officer 59[in the State of Jammu and Kashmir] who is duly authorized thereto by the Central Government] :

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified held when he signed it, the official character which he claims in such paper.

Basic Facts: duly certified by authorised officer

Presumption: document is genuine

Provisos are ways to rebut the presumption

## Noor Aga v. State of Punjab

Facts: Accused was caught at the airport in possession of drugs. S. 35 of the NDPS Act triggered (S. 35: Presumption of culpable mental state -(1) In any prosecution for an offence under this act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. (2) For the purpose of this section, a fact is said to be proved only when the court believes it to exit beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.)

Issue: constitutionality of reverse onus clause (Art. 21)

Grounds of challenge:

* Law is not just, fair, and reasonable (substantive due process)
* Amounts to reversal of Burden of Proof (to the extent that the accused must disprove to a standard of beyond reasonable doubt) – arbitrary and unreasonable

Held: Presumption of innocence is not an absolute right. It may be watered down where (a) the offence is a socio-economic offence (that affects the socio-economic interests of citizens) and (b) is difficult to prove.

S. 35(2), which lays down a standard of beyond reasonable doubt is for the prosecution to prove the basic facts (possession) that trigger the presumption. For the defence to rebut the presumption, it has to be shown to a standard of preponderance.

## Estoppel

**Doctrine of Estoppel under the Indian Evidence Act, 1872**

When one person has —

By his

(i) Declaration

(ii) Act, or

(iii) Omission

Intentionally caused or permitted another person

(i) To believe a thing to be true, and

(ii) To act upon such belief,—

Neither (i) he, nor (ii) his representative can be allowed to deny the truth of that thing in a suit or proceeding between himself and such person or his representative.

**Illustration:**

A intentionally and falsely leads В to believe that certain land belongs to A, and A seeks to set aside the sale on the ground that at the time of the sale, he had no title. He must not be allowed to prove his want to title.

**Principle of Section 115:**

Estoppel is based on the principle that it would be most inequitable and unjust that if one person, by a representa­tion, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.

Sir Edward Coke had defined estoppel in these words: An estoppel exists “where a man’s own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.” In simpler language, a person cannot be allowed to say one thing at one time and the contrary at another: He cannot blow both hot and cold at the same time.

This section is founded upon the doctrine laid down in Pickard v. Sears (1837 6A. & E. 475), namely, that where a person “by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things as existing at the same time.” This doctrine precludes a person from denying the truth of some statement previously made by himself. No cause of action arises upon estoppel itself.

**Scope of Section 115:**

In order to hold that a case comes within the scope of this section, a Court must find:

1. That A believed a thing to be true.

2. That in consequence of that belief, he acted in a particular manner.

3. That that belief, and A’s so acting were brought about by some representation by S, either by a declaration, act, or omission, which representation was made intentionally to produce that result.

If the above three points are established, В is prohibited by law from denying the truth of his representation in a proceeding by or against A or A’s representative.

It may be noted that it is not necessary to prove any fraudulent intention on B‘s part. He will be nonetheless estopped if he himself was acting under a mistake or misapprehension.

The section does not apply where the statement relied upon is made to a person who knows the true facts and is not misled by the untrue statement. There can be no estoppel if true facts are known to both the parties. Therefore, if A knew the true facts, no estoppel arises.

In Chhaganlal Mehta v. Haribhai Patel, [(1982) 1 S.C.C. 223 ], the Supreme Court analysed the scope of S. 115 of the Act, and laid down that the following eight conditions must be satisfied to bring a case within the scope of estoppel, as defined in S. 115.

(i) There must have been a representation by a person (or his authorised agent) to another person. Such a representation may be in any form — a declaration or an act or an omission.

(ii) Such representation must have been of the existence of a fact, and not of future promises or intention.

(iii) The representation must have been meant to have been relied upon.

(iv) There must have been belief on the part of the other party in its truth.

(v) There must have been some action on the faith of that declaration, act or omission. In other words, such declaration, act or omission must have actually caused the other person to act on the faith of it, and to alter his position to his prejudice or detriment.

(vi) The misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice.

(vii) The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. There can be no estoppel if such a person was aware of the true state of affairs or if he had means of such knowledge.

(viii) Only the person to whom the representation was made or for whom it was designed (or his representative) can avail of the doctrine.

**There are four classes of estoppel to be found in section 116 and 117 of the Act, viz., and estoppel of—**

**1. Tenant (Section 116)**

No tenant of immovable pro­perty (or person claiming through such tenant) can, during the continuance of the tenancy, be permitted to deny that the land-lord of such tenant had, at the begi­nning of the ten­ancy, a title to such immovable property.

**2. Licensee of a person in posse­ssion (Section 116)**

No person who came upon im­movable property by the licence of the person in po­ssession thereof can deny that such person had a title to such possession at the time when such licence was given.

**3. Acceptor of a bill of exchange (Section 117)**

No acceptor of a bill of exchange can deny that the drawer had au­thority to draw such bill or to endorse it; but he may deny that the bill was really drawn by the person by whom it purports to have been drawn.

**4. Bailee or licensee (Section 117):**

No Bailee or lice­nsee can deny that his bailor or licensor had, at the time when the bailment or lice­nce commenced, authority to make such bailment or grant such lice­nce. But, if a bai­lee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

**Estoppels are of seven kinds**:

1. Estoppel by record;

2. Estoppel by deed;

3. Estoppel by conduct;

4. Equitable estoppel;

5. Estoppel by negligence;

6. Estoppel on benami transactions; and

7. Estoppel on a point of law. (Additionally, there is also the concept of promissory estoppel, which is discussed later.)

**1. Estoppel by record:**

Under this kind of estoppel, a person is not permitted to dispute the facts upon which a judgment against him is based. It is dealt with by (i) Ss. 11 to 14 of the Code of Civil Procedure, and (ii) Ss. 40 to 44 of the Indian Evidence Act.

**2. Estoppel by deed:**

Under this kind of estoppel, where a party has entered into a solemn engagement by deed as to certain facts, neither he, nor any one claiming through or under him, is permitted to deny such facts.

**Problem:**

A deed of gift by D in favour of his daughter M for life provided that the property should go to her male issue, and in default, to D’s sons. One of D’s two sons induced a purchaser to buy his sister’s property, and the sale deed was attested by the other son. M died without leaving any male issue, and D’s son filed a suit to recover the property from the purchaser. State, giving reasons, whether the plea of estoppel would be available to the defendant against the plaintiff.

**Ans:**

So far as the son who had induced the purchaser is concerned, he is estopped. But, so far as the son attesting the document is concerned, the plea of estoppel will not be available, if such attesting person denies the knowledge of the contents of the document. The Privy Council has held in Pandurang Krishnaji v. Markandeya Tukaram (40 I.A. 60), that the knowledge of the contents of the deed is not to be inferred from the mere fact of attestation.

In the above problem, there is nothing to show that the attesting son did so attest with the knowledge of the contents of the document. Therefore, the plea of estoppel will not be available against him.

**3. Estoppel by conduct:**

Sometimes called estoppel in pais, may arise from agreement, misrepresentation, or negligence. Estoppel in pais is dealt with in Ss. 115 to 117. (Estoppel in pais means “estoppel in the country” or “estoppel before the public.”)

If a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will not offer any opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained from doing, he cannot question the legality of the act to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.

If a party has an interest to prevent an act being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no right to challenge the act to their prejudice. (Chand Sing v. Commr., Burdwan, (A.I.R. 1958 Cal. 415).

S. 115 deals with estoppel by representation by act or conduct, and Ss. 116 and 117 deal with estoppel by agreement or contract,

**4. Equitable Estoppel:**

The Evidence Act is not exhaustive of the rules of estoppel. Thus, although S. 116 only deals with the estoppel that arises against a tenant or licensee, a similar estoppel has been held to arise against a mortgagee, an executor, a legatee, a trustee, or an assignee of property, precluding him from denying the title of the mortgagor, the testator, the author of the trust, or the assignor, as the case may be.

Further, S. 116 is not exhaustive of all instances of estoppel as between landlord and tenant. Thus, there are cases of estoppel which, though not within the terms of Ss. 115 to 117 of the Evidence Act, are recognised instances of estoppel. Estoppels which are not covered by the Evidence Act may be termed equitable estoppels.

**5. Estoppel by Negligence:**

This type of estoppel enables a party, as against some other party, to claim a right of property which in fact he does not possess. Such estoppel is described as estoppel by negligence or by conduct or representation or by a holding out of ostensible authority. Such estoppel is based on the existence of a duty which the person estopped is owing to the person led into the wrong belief or to the general public of whom the person is one. (Mercantile Ваnk. Central Bank, (A.I.R, 1938 Privy Council, 52)

**6. Estoppel on benami transactions:**

If the owner of property clothes a third person with the apparent ownership and a right of disposition thereof, not merely by transferring it to him, but also by acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property and who has taken it in good faith and for value. (Li Tse Shi v Pong Tse Ching, (A.I.R. 1935 P.C. 208)

**7. Estoppel on a point of law:**

Estoppel refers to a belief in a fact, and not in a proposition of law. A person cannot be estopped for a misrepresentation on a point of law. An admission on a point of law is not an admission of a “thing” so as to make the admission matter of estoppel. Where persons merely represent their conclusions of law as to the validity of an assumed or admitted adoption, there is no representation of a fact to constitute an estoppel.

The principle of estoppel cannot be invoked to defeat the plain provisions or a statute. There is no estoppel against an Act of Legislature. Thus, if a minor represents himself to be of the age of majority, and thereafter enters into an agreement, the agreement is void, and the minor is not estopped from pleading that the agreement is void ab initio, as he was, in truth, a minor at the date of making the contract.

Estoppel only applies to a contract inter partes, and it is not open to parties to a contract to estop themselves or anybody else in the face of an Act. The rule of estoppel is one of evidence. It cannot prevail against a plain and mandatory provision of law.

The Supreme Court has observed that the doctrine of estoppel does not operate where the mandatory conditions laid down by law on grounds of public policy are ignored. Thus, estoppel would not apply against a sanction obtained by fraud or by collusion between the parties. (S.В. Noronah v. Prem Kumari Khanna, (1980) 1 S.C.C. 52)

Differences between Limitation and Estoppel

**Main Differences between Limitation and Estoppel are as follows**:

**Limitation:**

1. Limitation is a procedural law. It precludes a person claiming a right to sue after the period of limitation.

2. Limitation does not apply to a matter of defense barring a few exceptions.

3. The defense of limitation is open even when the plaintiff’s delay in instituting the suit is due to the conduct of the defendant except where it is fraudulent.

Difference between Estoppel and Admission

**Difference between Estoppel and Admission are as follows:**

1. An admission may, under certain circumstances, bind strangers as well, whereas estoppel binds only parties and privies thereto. It cannot be taken advantage of by strangers.

2. Estoppel being a rule of evidence, an action cannot be founded on it, whereas an action may be founded on an admission.

3. An admission of a party is strong evidence against him, but he is at liberty to prove that such admission was mistaken or untrue. But, if another person has been induced by it to alter his position, the party is estopped from disputing its truth with respect to that person.

When an admission has been acted upon by another person, the admission is an estoppel, and the estopped party is required to make good his representation; in other words, the admission is conclusive. An estoppel differs from an admission in that it cannot be taken advantage of by strangers. It binds only the parties and privies. An estoppel is only a rule of evidence, for an action cannot be founded upon it.

**Estoppel**

1. Estoppel is a rule of evidence. It precludes a person from denying the truth of some statement previously made by himself.

2. Estoppel may apply to either party.

3. There can be no estoppel against statute. So a person cannot be debarred of the right tc contest the issue of limitation by any prior; admission.

The Difference between Res Judicata and Estoppel

Res judicata corresponds to the part of the doctrine of estoppel, which is known as estoppel by record. Estoppel as enunciated in Section 115 of the Indian Evidence Act is by conduct or agreement or estoppel in pais.

Thus, even though res judicata may be said to be included in the doctrine of estoppel, as understood in the wider sense of the term, it must be distinguished from estoppel as distinctly provided for in the Indian Law of Evidence.

The doctrine of res Judicata can be distinguished from estoppel, as generally understood, on the following grounds:

The rule of res judicata is based on public policy, i.e., it is to the interest of the State that there should be an end to litigation and belongs to the province of procedure.

Estoppel, on the other hand, is part of the law of evidence and proceeds on the equitable principle of altered situation, viz., that he who, by his conduct, has induced another to alter his position to his disadvantage, cannot turn round and take advantage of such alteration of other’s position.

Res judicata precludes a man from avowing the same thing in successive litigations, while estoppel prevents a party from saying two contradictory things at different times.

Res judicata is reciprocal and binds the parties, while estoppel binds the party who made the previous statement or showed the previous conduct.

Res judicata, as observed by Mahmud, J. in Sita Ram v. Amir Begum, (8 Allahabad, 324), prohibits the court from entering into an enquiry as well as to a matter already adjudicated upon; estoppel prohibits a party, after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party who, relying upon these declarations or acts, has altered his position.

In other words, res judicata prohibits an inquiry in limine, and bars the trial of a suit while estoppel is only a piece of evidence and emphasizes that a man should not be allowed to retrace the steps already walked over.

Res judicata ousts the jurisdiction of the court, while estoppel shuts the mouth of a party.

The doctrine of res judicata results from a decision of the court, while estoppel results from the acts of the parties themselves.

**Difference between Estoppel and Waiver**

**Difference between Estoppel and Waiver are as follows:**

Estoppel and waiver are entirely different. Estoppel is not a cause of action. It may, if established, assist a plaintiff in enforcing a cause of action, by preventing the defendant from denying the existence of some fact essential to establish the cause of action. It is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant (or his authorised agent) to the plaintiff or someone on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement, and (c) the plaintiff does act upon the faith of the statement.

On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. Thus, if an agent with an authority to make such an agreement on behalf of the principal agrees to waive his principal’s right, then (subject to any other question such as consideration), the principal will be bound by the contract, not by estoppel. There is no such thing as estoppel by waiver. (Dawason’s Bank Ltd. v Nippon Menkwa Kabushiki Kaisha, 62 I.A. 100)

## HOSTILE WITNESS

Hostile witness- S. 154

**Who is Hostile Witness**-

Hostile witness is said to be when a party calls in a witness to depose in its own favor, instead the witness goes against the party calling him. This situation arises in many of the cases where witnesses do not give answers in favor of the party calling the person as a witness. The court has to declare the witness as a hostile one. It is not the option of the party calling the witness to do so. The adverse reference by the witness towards the person who calls him is a manner which helps the court to uphold or reject the statement of witness if crucial to a case and the trial.

**Examination of Hostile Witness**

The law states that, 'The court may, in its discretion, permit the person who also witness to put any questions to him which might be put in cross-examination by the adverse party'. In English law, an advocate who had called a witness who turned out to be hostile was permitted to employ at least some of the techniques of cross-examination. Section 154 confers a discretion not limited by the criteria relevant to determining hostility, though in practice similar ideas appear to have been applied, at least in standard cases.

It is usually believed that when a party offers to prove evidence by way of witnesses, they might end up calling those persons who actually might be persons having adverse reference for them. These witnesses under the law are said to be 'hostile' witness which the court is required to declare. A party cannot on his own declare a witness hostile, for any reason including that he has answered some questions which might not have gone in his favor in a trial. It does not discredit the witness to be hostile, or reflect upon him an impression of dishonesty, having malice or any adverse feeling. He may otherwise also not recollect the details for which he is called to testify. However where a witness genuinely is malicious and answers adversely to all things questioned, or where it appears that he is maliciously trying to sabotage the case of the party calling him as a witness, he should then be declared a hostile witness by the court.

**Probative Value of Statement made by a Hostile Witness**

The courts through various judgments has held that declaration of a witness to be hostile does not ipso facto reject the evidence. The precedence of cases reflects it to be a well settled that the portion of evidence, which besides being advantageous to both the parties and helps the courts in arriving at a judgment, may be upheld and made admissible. It though has to be subject to all scrutiny and have to be extremely cautious in such acceptance. The decision made by the apex court, 43 that “it is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favor of the prosecution or the accused but it can be subjected to closer scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defense may be accepted." In another case the court held, "If the judge finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution and care, accept in the light of other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. In **Raja v. State of Karnataka**, the Hon’ble Supreme Court has held as under:- "That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny." Further In **Koli Lakhman Bhai Chanabhai,** it was held that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record. Yet in other cases the court did not reject the testimony only because the prosecution found their witness to be hostile and cross examined the witness. The testimony of a hostile witness subject to scrutiny may be relied or nullified would depend on circumstances of each case. It could be used for corroboration or be corroborated and relied upon or nullified for availability of better evidence.

## Impeaching the Credit of the Witness

The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:-

(1) by the evidence of persons who testify that they, from their knowledge of the witness believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has 90[accepted] the offer of a bride, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

**Explanation –**A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations

(a) A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had delivered goods to B.

The evidence is admissible.

(b) A is indicated for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

## Privilege Communication

**S- 121– Judges and Magistrate as witnesses:-**

Under this section a judge or Magistrate shall not be compelled to answer questions as to –

1. His conduct in court as such judge or Magistrate, or
2. Anything which came to his knowledge in court as such judge or Magistrate, except upon the order of a court to which he is subordinate. He may be examined as to other matters which occurred in his presence while he was so acting.

**Illustration**:- A, on his trial before the court of session, says that a deposition was improperly taken by B, the Magistrate, B cannot be compelled to answer questions as to this, except upon the special order of a supreme court.

**Sections 121-132 declare exceptions to the general rules that a witness is bound to tell the truth, and to produce any document in his possession or power relevant to the matter in issue. They deal with the privilege of certain classes of witnesses.**

*A distinction should be drawn between questions which a witness cannot be compelled to answer (Ss. 121, 124 and 125) and those which he cannot be permitted to answer (Ss. 123 and 126).The latter class of questions might properly be forbidden but questions of the former class are in no way barred, a witness has merely the right of refusing to answer such questions, without any hostile inference being drawn from his refusal. The most that a court can do, in the case of a witness who is ignorant of his privilege, is to warn him that he need not answer. But if the witness elect to waive his privilege of refusing to answer, his answer is admissible in evidence.*

**Judge or Magistrate as a witness**: - A judge, before whom the cause is tried, must conceal any fact within his own knowledge, unless he be first sworn, and, consequently, if he be the sole judge, it seems that he cannot depose as a witness, though if he be sitting with others, he may then be sworn and give evidence.

**S-122- communications during marriage-** This section “Rests on the obvious ground that the admission of such testimony would leave a powerful tendency to disturb the peace of families to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence which is the most endearing solace of married life.

Under this section a married person shall not be compelled to disclose any communication made to him during marriage by any person to whom he is married and permitted to disclose any such communication, except-

1. When the person who made it or his representative in interest consents, or
2. In suits between married persons, or
3. In proceedings in which one married person is prosecuted for any crime committed against the other.

The ban of the section is confined to communications only. A wife can testify to the deeds of her husband of which she was the eye witness. (Ram Bharosey v/s U.P., AIR 1954 SC 704).

The section protects the individuals, and not the communications if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made.

Marital communication can be proved by evidence of the over-hearers. (**Appu v/s State, AIR1971 Mad 194**).

Confession to the wife in the presence of others were allowed to be proved by others. (**Appu v/s State, AIR1971 Mad 194**).

Letters written by husband to wife were held to be provable otherwise than through wife. (**A. Manibhushana Rao v/s A. Surya Kantam, AIR 1981 AP 58).**

**S- 123- Evidence as to affairs of state-**  No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of the state, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

The only ground sufficient to justify non- production of an official document marked confidential is that production would not be in the public interest, for example where disclosures would be injurious to national defence or to good diplomatic relations. care has, however, to be taken to see that interests other than the interest of the public do not masquerade in the garb of public interest and take undue advantage of the provisions of this section.

Subject to this reservation the maxim *salus populi est suprema lex,*which means that regard for public welfare is the highest law, is the basis of the provisions contained in this section.

**S-124- Official communications-** No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

This section is confined to public officers and deals with communications made in official confidence.

**S- 125- Information as to commission of offences-** On the grounds of public policy, a Magistrate or a police-officer cannot be compelled to give the source of information received by him as to the commission of the offence.

**S-126- Professional communications-** No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Provided that nothing in this section shall protect from disclosure-

1. Any such communication made in the furtherance of any illegal purpose,
2. Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

(It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.)

**Explanation: - The obligation stated in this section continues after the employment has ceased.**

The purpose of a legal professional privilege is to allow a client to make full discloser to a solicitor without fear that disclosure of their communications might subsequently be made against his will.

**Scope:**-Sections 126 to 129 deal with the privilege that is attached to professional communications between the legal adviser and the client. Section 126 and 128 mention the circumstances under which the legal adviser can give evidence of such professional communications. Section 127 provides that interpreters, clerks, or servants of legal advisers are restrained similarly. Section 129 says when a legal adviser can be compelled to disclose the confidential communication which has taken place between him and his client.

Law officers have been held to be within the scope of the section. Communication between an insurer and his counsel are also privileged. Notes made by lawyers of statements of witnesses are within the range of protection.

The protection afforded under this section cannot be availed of againsed an order to produce documents under section 91 of the Cr. Pc. The documents to be produced and then, under section 162 of evidence Act, it will be for the court, after inspection of the documents, if it deems fit, to consider and decide any objection about their production or admissibility.

**S-127- The provisions of section 126 shall apply to interpreters, clerks or servants of barristers, pleaders, attorneys and vakils.**

**S-128- Privilege not waived by volunteering evidence.**

**S-129- No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.**

**S-130- Production of title deeds of witness, not a party-** This section is based on the principle that great inconvenience and mischief would result to witnesses, if they are compelled to disclose their titles by the production of their title-deeds. The object of the privilege is that the title may not be disclosed and examined.

**S-131- (productions of documents) Subsituted by I.T. Act, 2000 section 92 and second schedule W.E.F. 17.10. 2000-** As per new section no one shall be compelled to produce documents in his possession or electronic records under his control which any other person would be entitled to refuse to produce if they were in his control or possession unless he consents to their production.

**Persons in possession of documents on behalf of others are generally agents, attorneys, mortgagees, trustees etc. This section provides the protection to these persons also as provided to witness who is not party to a suit (section 130).**

**S-132-** Under this section a witness is not excused from answering any question relevant to the matter in issue on the ground that answer to such question may criminate him or expose him to a penalty or forfeiture.

**S-132-** The evidence of an accomplice, though it is uncorroborated, may form the basis for a conviction.

The word ‘accomplice’ has not been defined by the Act. It is generally understood that an accomplice means a guilty associate or partner in crime. An accomplice by becoming an approver becomes a prosecution witness. An approver’s evidence has to satisfy a double test:-

1. His evidence must be reliable and,
2. His evidence should be sufficiently corroborated.

**S-134-** No particular number of witnesses shall in any case be required for the proof of any fact.

Under the Act no particular number of witnesses is required in any case. Of course it is open to a final court of fact to believe or disbelieve a statement, but simply because the statement is of one witness that cannot by itself be a ground for not acting upon that testimony.

Neither the number of witnesses, nor the quantity of evidence is material. It is the quality that matters. There is a general public reluctance in appearing as witnesses. Hence there should be no insistence that there should be more witnesses than one.

The Supreme Court has been sustaining convictions on the basis of the testimony of a sole witness. In one of them: - ROHATGI, J. remarked: “There is no computerized rule. Nor are Judges Computers. It must always depend on the circumstances of each case and the quality of the evidence of the single witness.