LAW OF EVIDENCE

INTRODUCTION

A legal dispute arises between the parties to a litigation when one of the parties asserts some right and the other party denies it. The aggrieved party, i.e., the party whose rights are denied approaches a Court having jurisdiction by presenting his pleadings. In the pleadings submitted by him, the party instituting the case pleads facts and claims relief based on certain grounds. The Court issues summons to the opposite party. Along with the summons a copy of the pleadings presented by the party instituting the case is supplied to the opposite party. The opposite party appears before the Court and presents its pleadings in reply to the pleadings submitted by the party instituting the case.

In the pleadings submitted by the opposite party, he pleads his version of facts, and seeks dismissal of the case against him. The Court compares the two pleadings, one submitted by the party instituting the case and the other submitted by the opposite party. By doing so, the Court separates two sets of facts. 1. Facts pleaded by the party instituting the case and admitted by the opposite party. These set of facts are called 'admitted facts'.

2. Facts pleaded by the party instituting the case and denied by the opposite party. These facts are called the 'disputed facts'.

As there is a consensus among the parties in respect of the admitted facts, they form the facts of the case. In respect of disputed facts, the versions of the parties differ, and the Court has to decide which facts of these two different sets should be treated as the facts of the case. In this regard, the Court frames issues. Issues so framed are the questions of fact involved in the case. These issues specify the exact controversy between the parties. The Court answers these questions of fact based on the evidence on record, which is produced by the parties.

An analysis of the above discussion leads to the conclusion that in a case there can be four sets of facts. 1. the actual facts, or the real facts;

2. the facts pleaded by the party instituting the proceedings;

3. the facts pleaded by the opposite party; and

4. the Court's findings.

The Court's findings should be based on the 'material before it', which includes pleadings of the parties, evidence on record and material objects. The judge cannot apply his personal knowledge in finding the fact of the case. The decision of the Court is based on the facts admitted by both the parties and the facts found by the Court.

CONCEPT OF FACT

Jurisprudentially, 'fact' may be viewed in two different ways:

1. First, **fact may be viewed as distinguished from law**.

Law is something which may be ascertained from the books of law. Anything which may not be ascertained from the books of law is a fact.

2. Second, **fact is something which may be perceived**.

In this sense, a fact is something which may be seen, heard, tasted, smelt or felt.

DEFINITION OF FACT, RELEVANT FACT and FACT IN ISSUE

Section 3 of Indian Evidence Act, 1872 defines Fact as:

"**Fact**" means and includes--
(1) any thing, state of things, or relation of things, capable of being perceived by the senses;
(2) any mental condition of which any person is conscious.

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

The definition of "fact" includes two parts. The first part deals with what may be called the "physical facts", while the second part deals with what may be called "psychological facts".

2) "Relevant Fact" -

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of Indian Evidence Act, relating to the relevancy of facts.

The word 'relevant' has two meanings. in one sense, it means "connected" and another sense "admissible". One fact is said to be relevant to another when the one is connected with the

other, in any of the way referred to in the provisions of the Evidence Act relating to the relevancy of facts as under Section 5 to 55

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(i) Logical Relevancy - A fact is said to be logically relevant to another when by application of our logic if it appears that one fact has a bearing upon another .

(ii) Legal Relevancy - A fact is said to be legally relevant when it is expressed as relevant under Section 5 to 55 (Relevancy of Fact).

A fact may either be logically relevant or legally relevant. Where a fact bears such casual relation to the other that it renders probable its existence or non-existence, it is said to be a logically relevant fact. For instance, where it is to be determined where it is to be determined whether A has placed the murder weapon in the field or not, the fact that B saw A walking towards the field with the murder weapon is relevant.

The Evidence Act recognizes some of the kinds of causal relations. Thus, those kinds of causal relations which are recognized by law are known as legally relevant fact. Therefore, while all legally relevant facts are logically relevant, all logically relevant facts may not be legally relevant.

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3) Fact in Issue:

According to Section 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 in 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.

llustrations -

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 had 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

he expression "Facts in issue" refers to facts out of which a legal right, liability or disability arises and such legal right, liability, or disability is involved in the inquiry and upon which the Court has to give the decision. The question as to what to what facts may be "facts in issue" must be determined by substantive law or the branch of procedural law which deals with pleadings. Generally, in criminal cases the charge constitutes the facts in issue whereas in civil cases the facts in issue are determined by the process of framing issues.

PROOF

Normally "proof" and "evidence" are mistaken to be synonymous. "Proof" of a fact is showing the existence of the fact. Thus, a fact may be "proved", "disproved" or "not proved".

Proved

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.

Disproved

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 man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

Not Proved

A fact is said not to be proved when it is neither proved nor disproved.

Thus, where neither party can produce evidence in its favour, the fact is said to be not proved. In normal parlance, expression "proof" included "dis-proof" also. Thus "burden of proof" is burden not only of proving but also disproving depending upon circumstances.

EVIDENCE

Evidence is something which is used to prove or disprove a fact. Evidence, is itself a fact. Evidence is classified as under

1. Oral Evidence
2. Documentary Evidence

However, under some legal systems there is a third type of evidence which is called as Real Evidence, which is not recognized under Indian Evidence Act. Real Evidence is in the form of objects which are covered under documentary evidence

Section 3 of IEA defines Evidence as

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 fact under inquiry; such statements are called oral evidence;

(2) all documents produced for the inspection of the Court; such documents are called documentary evidence

Evidence can be said to be any matter of fact which produces a persuasion in the mind regarding the existence and non-existence of some other matter of fact. Evidence may be oral, which refers to the testimony of witnesses, or documentary, which refers to the documents and electronic records tendered before the Court.

Kinds of Evidence

Direct Evidence

The evidence given by a witness who saw or heard or perceived the fact in issue or relevfant fact. Under this the evidence is given by the witness on the basis of his own perception, for instance eye witness. Direct evidence is considered as the best form of oral evidence of the fact to be proved.

Indirect or Circumstantial Evidence

Indirect or circumstantial evidence are which attempts to prove the facts in issue by proving other facts. They do not provide a definite proof, but gives a general idea as to the existence or non existence of the facts in dispute.

Hearsay Evidence

It is the evidence given by a witness who derived it from the person who saw it. It is is the one which witness neither personally seen it or perceived it through his senses, but has come to his knowledge from other person It comes under the weaker category of evidence. The Act lays down that hearsay evidence must always be excluded. However there are few occasions where it is admissible.

Presumptions

The term “presumption” refers to an affirmative or non-affirmative illation pertaining to a doubtful fact or proposition and drawn by following a process of probable reasoning from something substantive.

Section 4 of the Indian Evidence Act, 1872, enunciates the law of presumption. It defines “May Presume”, “ Shall Presume” and “Conclusive Proof”

May Presume

Whenever it is required by this Act that the court may presume a fact, it may it may regard the fact as proved until and unless it is disproved or may call for the proof of it.

Thus, wherever the words “may presume” have been used, the court has the discretion to either make a rebuttable presumption or call for confirmatory evidence. It must be noted here that the presumption so made is not conclusive or incapable of being rebutted.

Shall Presume

Whenever it is directed by this Act ,that the court shall presume a fact, it shall regard the fact as proved until it is disproved.

Unlike “may presume”, wherever the words “shall presume” have been used, the court has to regard a fact as proved unless it is disproved. Thus, the court has to necessarily make a rebuttable presumption regarding the existence or non-existence of a fact. For disproving a fact so presumed or, in other words, rebutting a statutory presumption, the evidence has to be clear and convincing. It must be such that, by judicial application of mind, it is established that the real fact is not the one that has been presumed.

Conclusive Proof

When one fact is declared by this Act to be 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.” The section provides for non-rebuttable presumptions, that is, presumptions which are conclusive in nature.

Section 4 deals with two types of presumptions. Presumptions of Fact and Presumptions of Law. Presumptions fact is a natural presumptions based upon the human experience which are always rebuttable. The court enjoys a discretion either to presume a fact as proved or may call evidence to disprove it. May presume cases come under the natural presumptions.

Presumptions of Law or legal presumptions are based upon a systematic analysis of facts. Legal presumptions are of two types, rebuttable and irrebutable. Rebuttable presumptions are those where the courts shall presume as fact as proved until it is disproved. The court has no discretion except to presume the fact, however can allow the evidence to disprove it. Irrebuttable presumptions are those where the court shall presume the fact as proved on proof of another fact and cannot call any evidence to disprove it. Ex: Sec. 40 Relevancy of Judgments, Sec 112 Legitimacy of Children.

Relevancy and Admissibility

The expressions 'relevancy' and 'admissibility' are often taken to be synonymous. But they are not the same. Their legal implications are different. All admissible evidence are relevant but all relevant evidence are not admissible. Relevancy is the genus of which admissibility is the species**.**

Relevancy is the ultimate touchstone for determination of the admissibility of evidence. It is due to this fundamental rule of the Law of Evidence that the terms 'relevancy' and 'admissibility' are often used interchangeably. It must be noted that both the concepts are quite distinct from each other. For instance, a confession made by an accused to his wife may be relevant but is inadmissible since it falls within the purview of 'Privileged Communications' under the Indian Evidence Act, 1872. It may be stated that all that is admissible is relevant but all that is relevant may not be admissible.

Admissibility refers to the question as to whether the court must consider a relevant fact in deciding upon the issue or not. A fact is admissible only if it does not infringe any of the rules of exclusivity provided by law. Thus, logically relevant facts are relevant but may not be admissible whereas legally relevant facts are relevant as well as admissible. Relevancy is a question pertaining to the tendering of evidence before a court of law and is for the lawyers to decide. On the other admissibility is for the judge to decide since it pertains to the weight that must be attached to a piece of evidence tendered before the court.

Rules of Evidence in Civil and Criminal Cases

The Indian Evidence Act applies to both civil and criminal cases. The Rules of Evidence are in general same in both Civil and Criminal Cases. However, owing to some differences between the nature of the civil cases and criminal cases, there are some differences in the rules of evidence:

1. Confessions are applicable only to criminal cases. With reference to civil cases, the parties may admit facts. Formal admissions need not be proved, and courts may accept them as true and proceed to decide the cases on the basis of such admissions. But the Courts are under a duty to ensure that a confession is not only voluntary but also true.

2. The main difference between the use of evidence in criminal and civil cases is the burden of proof. Though in both the cases the initial burden is on the person who initiates the case, in civil cases the burden of proof shifts from one party to another as the case proceeds. On the other hand, the burden of proving the guilt of accused always lies on the prosecution and never shifts on the accused.

3. Standard of Proof in criminal cases are stricter which means that the guilt of accused must be proved beyond any reasonable doubt. Where as in civil cases the standard of proof goes by probabilities.

4. The character evidence is no relevance in civil cases except in determining the quantum of damages in suit for defamation, where as the character evidence is significant in criminal cases.

5. Few provisions relating to admissions and estoppels apply only to civil cases, where as confessions and character evidence are peculiar to criminal cases

Relevancy of Facts

Section 6: Facts forming part of the Same Transaction:

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

Illustrations

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

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

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the 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.

This section is based on the English Law of Evidence Doctrine of *Res Gestae* which means, *things done or words spoken.* Indian Evidence Act doesn't use the word *Res Gestae* but holds that whenever any fact in issue all the facts which form the part of the same transaction becomes relevant.

Sec. 6 read in the light of illustrations appended to it makes the following points clear:

1. Acts including statements which form the part of the transaction of which a fact in issue is also a part are relevant.
2. Such acts and statements may be of the parties to the case or of third persons.
3. They must be contemporaneous with the fact in issue or must be so soon
before or after it that it may be considered as part of the same transaction of which the fact in issue is a part.
4. Such acts or statements may take place at the same time and place or at different times and places.

The statement must be a spontaneous statement and not a narrative of the past. This is because if the statement is a spontaneous statement there is no chance of concoction and hence it is reliable. If there is some time gap between the occurrence of the fact and the statement, there is enough time to fabricate facts or to distort the fact, and its reliability is lost. Such statement becomes hearsay. Similarly, an act accompanying the fact in issue is a relevant fact if it is a spontaneous reaction. An act which is done at a later time is a premeditated act and hence is not a relevant fact.

R v Christie

The accused was charged with indecent assault on a five year old boy. Shortly after the assault the boy and his mother came up to the accused and the boy told his mother, "Mom, this is the man." The evidence of the statement of the boy identifying the accused was admitted as forming the part of the same transaction, but evidence of the boy's explanation of assault was rejected as hearsay.

R v. Beddingfield

Here, a woman with a cut throat came running out of a house. She was crying continuously but did not say a word about how the injury was caused. However, as soon as her aunt came she told her, O Aunt, see what Beddingfield has done to me.

Cockburn CJ delivering the judgment explained:

Such statements in order that they may be admissible as res gestae should be contemporaneous with the transaction in issue, so as to give no time/opportunity for concoction or fabrication. The statements should not amount to a mere of a past occurrence.

Ratten v Reginan

The accused was prosecuted for committing the murder of a woman by shooting her. His defence was that the gun fired accidentally and that he did not intend to kill her. There was evidence to show that the victim had tried to call the police shortly before her death. Her call and the words she spoke were held to be relevant under s. 6. Her call showed that the shooting was intentional and not accidental because no victim of accidental shooting can think of calling police.

Sawal Das V. State of Bihar.

The cry of the children from the house when their mother was being killed by their father became a part of the same transaction and therefore fell under section 6 and became admissible as valid evidence.

Resgaeste is qn exception to the rule of exclusion go hearsay evidence. For example in *R v Foster* he deceased was killed in an accident by a speeding truck. The witness had only seen the speeding vehicle towards the deceased and not the actual accident, his view being blocked by another vehicle coming from the opposite direction. Immediately after the accident the witness went to the deceased and he explained to him the nature of the accident

The witness was allowed to give evidence of what the deceased said, it being a part of the transaction.

Section 7 : Occasion, Cause, Effect, State of things and Opportunity

facts which are the occasion, cause, or effect, immediately 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.

Under this section the following facts are relevant:

1. Facts which are the occasion, cause or effect of a fact in issue or relevant fact.
2. Facts which constitute the state of things under which a fact in issue or a relevant fact under which they happened.
3. Facts which afforded opportunity for the happening of a fact in issue or a relevant fact.
4. Facts which constitute the state of things under which a fact in issue or a relevant fact under which they happened.
5. Facts which afforded opportunity for the happening of a fact in issue or a relevant fact.

Occasion

Evidence can always be given of the set of the circumstances which constituted the occasion for the happening of the principal fact. For example in *R v Richardson* that fact that the deceased girl was alone in her cottage at the time of her murder constituted the murder. Illustration (a) is also on the same point.

Cause

Evidence can be given of the set of the circumstances which constitute the cause for the happening of the principal fact. Cause explains why a particular act was done that helps the court to connect a person with act. For example, in a case where the question is whether a person has taken a loan, the fact that he was running short of money can be shown as evidence as the cause loan.

Effects

Every act leaves behind certain effects which not only records the happening of the act but also throw light upon the nature of the act. Illustration (b) is on the same point. Such facts may be either immediate or otherwise are relevant. *R v Richardson,* where a young girl was killed in her cottage, the foot prints , the scattered things explain the nature of the act.

Opportunity

Circumstances which afford opportunity for the happening of a fact in issue are relevant. Illustration (c) is on the same point.

State of things

The facts which constitute the state of things for the happening of a fact in issue are relevant under this section.

Section 8: Motive, Preparation, Conduct Previous or Subsequent

"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 offense against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.

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

Motive

Motive, generally means that which moves or induces a person to act in a certain way. A desire, fear, reason etc. which influences a person's volition. Motive is productive of physical or mechanical motion. Motive is often used as meaning, purpose, something objective and external as contrasted with a mere mental state. Motive by itself is no crime, however heinous it be. But once the crime is committed, the evidence of motive become important. Helps the court to connect the person with the crime.

Illustration:

A is tried for the murder of B.

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

According to illustration A has committed a murder of which B has knowledge and B tries to extort money from A by threatening to make his knowledge public. A in consequence kills B also. B's Knowledge of A's earlier murder and threatening him are relevant to show the motive on the part of A for killing B.

Preparation

Acts of preparation are relevant under this section. Again preparation by itself is no crime. But once an offence is committed the evidence of preparation becomes important. For example in *R v Palmer*, where the death is caused by poisoning, the a fact shortly before the accused procured the poison similar to the one administered is relevant

Conduct

Facts constituting the Conduct are also relevant under this section. The conduct of the party before or after the transaction is also very relevant as circumstantial evidence.

To be relevant under s. 8, conduct must satisfy the following conditions:

1. The conduct must be
(a) of any party to any suit or proceeding, or
(b) of any agent to any party to any suit or proceeding, or
(c) of any person an offence against whom is the subject of any proceeding.

2. The conduct must be in reference to
(a) such suit or proceeding, or
(b) any fact in issue in such suit or proceeding, or
(c) a fact relevant to any fact in issue in such suit or proceeding.

3. The conduct must
(a) influence any fact in issue or relevant fact; or
(b) be influenced by any fact in issue or relevant fact.

4. The conduct may be
(a) previous conduct, or
(b) concurrent conduct, or
(c) subsequent conduct.

Illustrations:

. *A* is accused of a crime
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The facts, either before or at the time of, or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself, on 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

2. *A* is accused of a crime.

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

Explanation 1 to Section 8

Statements may be classified into two categories.
1. Mere statements, which do not do anything more than giving information of or narrating a fact.
2. Statements which are themselves an act.

Statements falling under the second category are relevant as conduct, inasmuch as they are themselves acts.

As to the first category of the statements, Explanation 1 to sec. 8 provides that they are not relevant except under the following two circumstances:

1. The statement accompanies and explains acts other than statements.
2. The statement is relevant under any other section of this Act.

Section 9; Facts Necessary to Explain Or Introduce Relevant Facts

Sec. 9 deals with relevancy of facts which are introductory or explanatory in nature, or supports or rebuts a fact in issue or a relevant fact, or which establishing identity of a person or thing.

Under sec. 9 the following facts are relevant:

1. facts which explain a fact in issue or relevant fact,
2. facts which introduce a fact in issue or relevant fact,
3. facts which support an inference suggested by a fact in issue or relevant fact,
4. facts which rebut an inference suggested by a fact in issue or relevant fact,
5. facts which establish the identity of anything or person whose identity is relevant,
6. facts which fix the time or place at which any fact in issue or relevant fact happened,
7. facts which show the relation of parties by whom any such fact was transacted.

Explanatory Facts

There are many pieces of evidence which have no meaning at all if considered separately, but become relevant when consider in connection with some other facts. Such facts explain the fact in issue or relevant fact.

Introductory Facts

Facts which are introductory of a relevant fact, are of great importance in understanding real nature of transaction and being relevant. Therefore, evidence is allowed of facts which are necessary to introduce fact in issue or relevant fact.

Facts Supporting Inference

There are facts which are neither relevant as facts in issue nor as relevant facts but they support the inference suggested by the facts in issue or relevant fact or contradict the facts in issue or relevant fact.

Facts Rebutting Inference

There are facts, which can rebut or contradict the inferences suggested by the facts in issue or relevant fact, and hence, relevant

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Facts Establishing Identity of a Thing

Facts establishing identity of a thing or a person may be relevant in some cases. When the identity of thing is in question, every fact which will be helpful to identify the thing is relevant.

Facts Establishing Identity of a Person

When the identity of a person is in question, identification by parents, wife or other relatives is relevant. In any special case identification of a person can be made by bodily mark, sign or cut mark. There are other means of identification by medical examinations, namely, examination of skeleton, bones, age, voice, blood group etc. The identification of any person may also be possible by expert evidence, such as evidence of handwriting, finger print, foot print, photograph etc. experts.

Test Identification Parade

One of the methods of establishing identity of the accused is ‘test identification parade. The purpose of TI parade is “to check memory of eye-witness and also for prosecution to decide as

to who can be cited as eye-witness.”Its object is also to enable the eye-witness of the incident to identify the accused before a Magistrate.

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 if it affected the relations between A and B.

(c) A is accused of a crime. The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section 8, as a 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 better offer." The 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 pat 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.

Things Said or Done By Conspirator In Reference To Common Intention [Sec. 10]

Sec. 10 deals with relevancy of facts in cases of conspiracy.

According to sec. 10, "Where there is reasonable ground to believe that two or more person have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such person in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the person believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it." Facts in this section are all separate and independent acts, not connected to each other, but for the conspiracy. Therefore, *prima facie* existence of conspiracy is *sine qua non* for the applicability of sec. 10. Unless *prima facie* existence of conspiracy is proved, facts under this section do not become relevant.

Words "where there is reasonable ground to believe that two or more person have conspired together" imply exactly that. The expression 'reasonable ground to believe' does not mean that conspiracy should be proved before these facts become relevant. It certainly contemplates something short of actual proof and means that there should exists *prima facie* evidence in support of the existence of the conspiracy between two or more accused persons.

Conspiracy

The term conspiracy means a secret plan by a group to do something unlawful and harmful or something which is not unlawful but by unlawful means. According to Stephen, "when two or more persons agree to commit any crime, they are guilty of conspiracy whether the crime was committed or not".

It is not necessary in order to constitute a conspiracy that the acts agreed to be done should be acts which if done should be criminal. A conspiracy consists of unlawful combination of two or more persons to do that which is contrary to law or to do that which is wrongful towards other persons. A mere agreement to commit an offence becomes criminal conspiracy.

Ingredients of Conspiracy

1. There must be an agreement between two or more persons who are alleged to conspire, and
2. The agreement should be to do or cause to be done:
(a) An illegal act, or
(b) An act which is not illegal but by illegal means.

Cases:

Emperor v Shafie Ahmed

It was held that if two or more persons conspire together to commit an offence, each is regarded as the agent of the other, and just the principal is liable for the acts of agent, so each conspirator is liable for what is done by his fellow conspirator, in furtherance of the common intention entertained by both of them.

Badri Roy v State

It has been held that sec. 10 of the Evidence Act has been deliberately enacted in order to make such acts or statements of the co-conspirator admissible against the whole body of conspirators, because of the nature of the crime.

A conspiracy is hatched in secrecy, and executed in darkness. Naturally, therefore it is not feasible for the prosecution to connect each isolated act or statement of one accused with the acts or statement of the others, unless there is Common bond linking all of them together.

When any conspirator has assumed to do any act of conspiracy in furtherance of common design, it is a part of *res gestae*. All conspirators must have "common intention" at the time when the thing was said, done or written

It is held that confessions by accused made after the object of the conspiracy is carried out are not relevant as the common intention was not then existing. In fact, the rule is that confession made by the accused after common intention of parties was no longer in existence, sec. 10 cannot be invoked against co-accused.

Once it is shown that a person is out of conspiracy and statement made to the police officer during post arrest period, whether such statement is a confession or otherwise touching his involvement in the conspiracy, would not fall within the ambit of this section.
A person may be out of a conspiracy
1. because he drops out, or
2. because the conspiracy itself ends.

Facts Not otherwise Relevant [Sec. 11]

According to sec. 11 of the Indian Evidence Act, 1872, Facts not otherwise relevant are relevant

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

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

Secs. 6-55 of the Indian Evidence Act deal with different types of facts and make them relevant. Certain facts which are not relevant under other sections are made relevant under sec. 11. Therefore, this section is regarded as a residuary section. The effect of this section is, therefore, to clearly enlarge the classes of relevant facts. A fact would be relevant if the conditions specified in clauses (1) and (2) as explained by illustrations are fulfilled.

These clauses are so broadly worded that it, on the first reading, appears that they induct logical relevancy into the Indian Evidence Act, and all other provisions in the Act in respect of relevancy are rendered redundant. However, it is not true. For the purpose of interpretation, a statute should be read as a whole, and every provision in the statute must be understood with in the context of other provisions in the statute. Thus, if there is any provision or a set of provisions in the Act which deal with any particular aspect of relevancy of facts, sec. 11 is not applicable to such relevancy 'Not otherwise relevant' does not mean that such a fact is declared to be not relevant under other sections, but that such a fact does not come under any other sections.

Thus, we have three situations:

1. A fact is declared to be relevant under any other section of the sections dealing with relevancy of facts, *i.e.*, secs. 6-55. The fact is relevant under that section.
2. A fact is declared to be not relevant under any other section of these sections. The fact is not relevant.
3. A fact is neither declared to be relevant, nor declared to be not relevant. It may be relevant under sec. 11 if the requirements of that section are fulfilled.

So also, at first sight, it would appear that this section would make every fact relevant because of the wording of clause (b). But care must be taken not to give this section an improperly wide scope by a liberal interpretation of the phrase "***highly probable or improbable***".

Jhabwala vs. Emperor

It was held that "The words 'highly probable or improbable' indicate that the connection between the facts in issue and the collateral facts sought to be proved must be immediate so as to render the co-existence of the two highly probable. The relevant facts under this section either (i) exclude, or (ii) imply, more or less distinctly, the existence of the fact sought to be proved."

Rajendra Singh vs. Ramganit Singh

It was observed that the words "highly probable" are of great importance, and the fact sought to be proved must be so closely connected with the fact in issue or the relevant fact, that a Court will not be in a position to determine it without taking them into consideration. Sec. 11 declares as admissible, facts which are logically relevant to prove or disprove the main fact or the fact in issue.

There may be collateral facts which have no connection with the main fact, except by way of disproving any material facts proved or asserted by the other side, *i.e.*, when they are such as to make the existence of the fact so "highly improbable" as to justify the inference that it never existed.
Well-known instances of application of the first limb of sec. 11 are:

(a) *Alibi*: *Alibi* is a Latin word, which means elsewhere. It is used when the accused takes the plea that when the occurrence took place he was elsewhere. In such a situation the prosecution has to discharge the burden satisfactorily. Once the prosecution is successful in discharging the burden it is incumbent on the accused who takes the place of alibi to prove it with absolute certainly.

Illustration (a)

The question is, whether *A* committed a crime at Calcutta on a certain day. 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) Non Access of Husband to Show Illegitimacy of the Child: Since legitimacy of the child implies a cohabitation between husband and wife, for disproving the legitimacy the husband has to prove that he had no cohabitation with his wife during the probable time of begetting as he was in abroad.

(c) Survival of the Murder Victim: That the victim was alive on a date subsequent to the date on which it is alleged that the accused committed his murder, is relevant under cl. (1) of sec. 11, as the same is inconsistent with the charge against the accused.

Illustration

A is accused of murdering *B* on 10th August 2014. *A* offers to prove that *B* was alive on 25th December 2016. As the fact is inconsistent with the charge against A, it is relevant under cl. (1) of sec. 11.

(d) Commission of the Offence by a Third Person: Where a person accused of an offence wants to show that the offence was committed by some other person, in the circumstances in which the offence could not have been committed by both of them, the fact is relevant under cl. (1) of sec. 11.

Illustration

A is charged with the murder of *B*. *A* wants to lead evidence that *B* was murdered by *C*. This is admissible being inconsistent with fact in issue.

(e) Self Infliction of Harm: That the victim committed suicide, is a fact relevant under cl. (1) of sec. 11 to show that he was not murdered by the accused.

Illustration

A is charged with the murder of B. *A* proves that *B* had committed suicide. The evidence is admissible.

(f) Non-execution of Document: That a document has not yet been executed is a relevant fact in a suit for performance of obligation under that document, because until and unless the document is executed, no obligation arises under it.

Illustration

A files a suit for recovery of possession against *B* alleging that he has purchased the land. *B* leads evidence that the deed of sale was not executed as yet. The fact is relevant

Rendering Highly Probable and Improbable

Under the second limb a fact which by itself or in combination with other facts make the existence and non-existence of the fact in issue or relevant fact highly probable or improbable. The words “highly probable” indicate that the Court has to go by the prohibits of the circumstances as regards the existence or non-existence of fact in issue or relevant fact. It also indicates that the connection between the facts in issue and the collateral facts sought to be proved must be immediate as to render the co-existence of the two highly probable. Collateral facts can be admitted in evidence if they make the existence of the fact in issue highly probable or improbable.

It is well settled that it is not a mere reasonable probability but carries great weight in bringing the court to conclusion whether facts exist or not.

In order to make a collateral fact admissible, the collateral facts must be established by convincing evidence and when established these must afford a reasonable presumption as to matter in dispute.

When a person is charged with forging a particular document, evidence is afforded to prove that a number of documents apparently forged or held in readiness for the purpose of forgery were found in possession of the accused.

R vs. Prabhudas

It was held that in a charge of forgery, the evidence offered to prove that a number of documents apparently forged or held in readiness for the purpose of forgery found in possession of the accused is not admissible. This section renders inadmissible the evidence of one crime to prove the existence of another unconnected crime, even though it is cogent.

Illustration (b)

The question is, whether *A* committed a crime. The circumstance 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 either *B*, *C* or *D*, is relevant

Facts Tending to Enable Court to Determine Amount of Damages [Sec. 12]

In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant. Under sec. 12, any fact which will enable the Court to determine the amount of damages which ought to be awarded, will be relevant in suits for damages.

Under this section the court can determine the amount of damages in an action based on contract or tort. In a suit for damages, the amount of damages must be a fact in issue. Thus the section lays down that evidence tending to determine, i.e., to increase or diminish damages is admissible. Sec. 55 of this Act lays down the conditions under which evidence of character may be given in civil cases to affect the amount of damages. Similarly sec. 73 of the Indian Contract Act, 1872 also lays down the rule governing damages in actions in contract. In a suit for damages for a breach of contract of marriage, the evidence as to status of the defendant may be given for determination of the amount of damages.

Facts Relevant When Right Or Custom Is In Question [Sec. 13]

Where the question is as to the existence of any right or custom, the following facts are relevant under sec. 13:

1. Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence;

2. Particular instances in which the right or custom was claimed, recognized, or exercised or in which its exercise was disputed, asserted or departed from.

Illustration

The question is whether *A* has a right to a fishery.
A deed conferring the fishery on *A*'s ancestors, a mortgage of the fishery by *A*'s father, a subsequent grant of the fishery by *A*'s father, irreconcilable with the mortgage, particular instances in which *A*'s father exercised the right, or in which the exercise of the right was stopped by *A*'s neighbors, are relevant facts.

When any question as to the existence of any right or custom is in issue the
following facts under clause (a) and clause (b) are relevant: Clause (a) makes any transaction relevant, if it is a transaction
1. by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or
2. which was inconsistent with its existence.

Clause (b) makes an instance relevant if it the particular instance

1. in which the right or custom was claimed, recognized or exercised, or
2. in which its existence was, disputed, asserted or departed from

Under sec. 13, existence or non-existence of a right or a custom may be proved by

1. any transaction; or
2. any particular instance,

as provided there under.

Only particular instances and not statements are relevant.

Relevancy of the Facts showing the existence of any state of mind body or bodily feeling (Section 14)

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

Explanations

A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

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.

Sec. 14 deals with the relevancy of facts showing the existence of a person's
1. state of mind,
2. state of body, or
3. bodily feeling.

Illustrations

(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article. The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession, to be stolen.

(b) A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit. The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant. The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.

(c) A sues B for damage done by a dog of B's which B knew to be ferocious. The facts that the dog had previously bitten X, Y, and Z, and that they had made complaints to B, are relevant.

(d) The question is whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious. The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B. The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question. The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss. The fact that at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor A's defence is that B's contract was with C. The fact that A paid C for the work in question is relevant, as proving that A did, in good faith make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether when he appropriated it, he believed in good faith that the real owner could not be found. The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the properly could not be found. The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing the fact that A knew of the notice did not disprove A's good faith.

(i) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved as showing intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife. Expressions of their feeling towards each other shortly before or after the alleged cruelly, are relevant facts.

(l) The question is, whether A's death was caused by poison. Statements made by A during his illness are relevant facts

(m) The question is, what was the state of A's health at the time when an assurance on his life was effected. Statements made by A as to the state of his health at or near the time in question are relevant facts.

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured. The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant. The fact that B was habitually negligent about the carriages which he let to hire is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.

(p) A is tried for a crime. The fact that he said something indicating an intention to commit that particular crime is relevant. The fact that he said something indicating a general disposition to commit crime of that class is irrelevant

Facts Bearing on Question Whether Act was Accidental or Intentional [Sec. 15]

Sec. 15 deals with relevancy of a series of similar facts. This section is an application of the general rule laid down in sec. 14. It is merely a deduction from the more general provisions of sec. 14. The series of acts relevant under thisection shows a system.

Where it is uncertain whether an act was done with a guilty knowledge or intention, or whether it was innocent or accidental, proof that it formed one of a series of similar acts raises the presumption that the act in question and the others together forming a series, were done upon a system and were therefore not innocent or accidental.

Illustrations

(a) *A* is accused of burning down his house in order to obtain money for which it is insured. The facts that *A* lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires *A* received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

In illustration (a) the fact that the houses of the person insured against fire were successively burnt down on different occasions is relevant to prove that the incidents were not accidental but part of a design or plan.

Illustrations

(b) *A* is employed to receive money from the debtors of *B*. It is *A*'s duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he
really did receive. The question is, whether this false entry was accidental or intentional. The facts that other entries made by *A* in the same book are false, and that the false entry is in each case in favour of *A*, are relevant.

(c) *A* is accused of fraudulently delivering to *B* a counterfeit rupee. The question is, whether the delivery of the rupee was accidental. The facts that, soon before or soon after the delivery to *B*, *A* delivered counterfeit rupees to *C*, *D* and *E* are relevant, as showing that the delivery to *B*, was not accidental.

Under sec. 15, like under sec. 14, the prosecution may place evidence of criminal acts other than those charged, without waiting for the accused to set up a specific defence calling for rebuttal evidence. When the Act in question forms part of a series of similar occurrences, evidence of similar facts is admissible, to prove intention or knowledge of the person and to rebut the defence of accident, mistake, etc.

Admissions and Confessions under Indian Evidence Act

Admission are defined under **section 17** of the as,

"An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances hereinafter mentioned."

The definition makes it clear that an admission is statement in oral or written form including electronic forms like pen drives, disks, floppies suggesting an inference as to existence or non existence of any fact in issue or a relevant to the fact in issue.

As already defined above, admissions are statements that attach a liability, as inferred from the facts in issue or relevant facts, to the party who made such statements; the statement, denouncing any right, should be conclusive and clear, there should not be any doubt or ambiguity. This was held by the Supreme Court in **Chikham Koteswara Rao v C Subbarao (AIR 1981 SC 1542).** They are only prima facie proof and not conclusive proof.

Admissions can be either formal or informal. The formal admissions are also called judicial admissions made during the proceedings**,** while the latter is made during the normal course of life. Judicial admissions are admissible under Section 58, (facts admitted through pleadings need not be proved.) of the act and are substantive. They are a waiver of proof, that is, no further proof is needed to prove them unless the court asks the same.

The Supreme Court in **Nagindas Ramdas v Dalpatram Ichharam** explained the effect of it, stating that if admissions are true and clear, they are the best proof of the facts admitted. Through informal or casual admission, the act brings in every written or oral statement regarding the facts of the case (by the party), under admission.

A person's conduct may also be taken as an admission. In an Australian case, **Mayo v Mayo** a woman registered the birth of her child but did not enter the name of the father or his profession. The court said that either she did not know who the father was or she was admitting that the child is illegitimate. In either case, there is an admission of adultery and an admissible evidence of adultery.

Admission is a statement of facts, asserting or denying them. Admissions are of two types:

1. Formal Admissions
2. Evidentiary Admissions

Formal admissions are admissions made in the proceedings of a case. They are often, made in the pleadings. They may also be made through the submissions of parties or their advocates.

Formal admissions are binding upon the parties and therefore, the facts so admitted need not be proved

On the other hand, evidentiary admissions are made outside the court before or while the case is pending in the court.

Statements of facts made by a person may be classified into two categories:
1. self serving statements;
2. self harming statements

A self-serving statement is one, which is beneficial to the person making it. A self harming statement is one, which is against the interest of the person making it.
As self-serving statement are beneficial to the maker, and therefore they are not reliable. Hence, they are not relevant except in certain circumstances.

On the other hand, self-harming statements are against the interest of the maker and therefore the courts readily believe them because a person will not make a statement against his interest unless it is true.

Illustration

The question between *A* and *B* is, whether a certain deed is or is not forged. *A* affirms that it is genuine, *B* that it is forged. *A* may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged; but *A* cannot prove a statement by himself that the deed is genuine, nor can *B* prove a statement by himself that the deed is forged.

Thus the admissions are the best evidence though its relevancy depends upon the conditions as mentioned in Sections 18 to 20

Who can make admissions..?

Section 18, 19 and 20 lays down the persons who can make admissions. Sec 18 persons who are related to the suit or proceeding and Ss 19 and 20 relate to the third persons

Admission- by party to proceeding or his agent"

Statements made by party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

By suitor in representative character Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they are made while the party making them held that character.

(1) By party interested in subject-matter persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested,

(2) By person from whom interest derived- Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

Sec 19 Admissions by persons whose position must be proved as against party to suit"

Statements made by persons whose position or liability it is necessary to prove as against any party to the suit are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration: A under takes to collect rents for B. B sues A for not collecting rent from A. A denies that rent was due form C to B. A statement by C that he owed rent to B is an admission, and is a relevant fact against A.

Section 20 of Evidence Act "Admissions by persons expressly referred to by party to suit"

Statements made by persons to whom party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration: The question is whether a horse sold by A to B is sound. A says to B “Go and ask C, he know all about it:”. C’s Statement is an admission

When Admissions can be proved by or behalf of the persons making them (Sec 21)

Admissions are the best evidence as they always go against the person making them and relevant as long as they are against the interest of the person making them. But section 21 lays down an exception as to when the admissions may be proved by or on behalf of the person making them

Sec 21 - Proof of admissions against persons making them, and by or on their behalf.-

Admissions are relevant and may be proved as against the person who makes them or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:--

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may by proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(a) The question between A and B is, whether a certain deed is or is not forged, A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the Captain of a ship, is tried for casting her away. Evidence is given to show that the ship was taken out of her proper course. A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating mat the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta. He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post mark of that day. The

statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen. He offers to prove that he refused to sell them below their value. A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit. He offers to prove that he asked a skillful person to examine the coin as he doubted whether it was counterfeit or not, and that the person did examine it and told him it was genuine. A may prove these facts for the reasons stated in the last preceding illustration

Admissions Made Upon Express Condition that Evidence of it is not to be Given (Section 23)

Where the admission is made under an express or implied agreement that the evidence of the admission shall not be given in any civil case which may be instituted or which may be pending against the party making admission, such evidence of admission is barred by sec. 23.

Explanation to sec. 23 provides that nothing in sec. 23 shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under sec. 126.

Similarly, sec. 81 of the Arbitration and Conciliation Act, 1996 excludes certain statements and admissions made by the parties to a conciliation proceeding from being proven in civil cases and arbitration proceedings.

Conclusiveness of Admissions

Sec. 31 makes it clear that admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.

Definition of Confession and Distinction with Admissions

The term confession is not defined under Indian Evidence Act unlike in English Law of Evidence Act. All the provisions relating to confessions dealt under the heading of Admissions which signifies that the legislature didn't intend to distinguish both. The definition of Admission under section 17 applicable to confession too. Admission is a statement made orally or in written form which suggests an inference to the fact in issue or relevant fact. If the statement is made in civil proceeding it is admission and if it is made in criminal cases it is confession. Thus the confession is a statement made by a person charged with a crime suggesting an inference as to any facts in issue or relevant fact. The inference that the statement should suggest that he has committed the crime. An admission is a *genus* where as confession is a *species* of it. One practical effect would be if a statement which cannot be a confession can still be an admission.

Sir Stephen defines confession as an "admission made at any time by a person charged with a crime stating or suggesting that he committed that crime." The Privy Council in **Pakala Narayan Swami V. Emperor,** held that "A confession must either be admitted in the context of any offence or in relation with any substantial facts which inaugurate the offence with criminal proceedings. And an admission of serious wrongdoing, even conclusively incriminating fact is not itself a confession". For example an admission by the person that he is the owner or having the possession of a knife or a gun which caused the death of another person by itself is not a confession.

This definition was approved by Supreme Court in **Plavinder Singh v State** and held that Firstly, the confession must either admit the guilt in terms or substantially all the facts which constitute the offence. Secondly, a mixed up statements (like mixture of inculpatory and exculpatory Statements) which though contains a confessional element will still lead to acquittal is no confession. It held that a confession must either accept in full or reject in full. It held a confession or an admission must either accept in full or reject in full. The court cannot accept inculpatory statement and convict a person by rejecting the exculpatory statement totally.

However, the Supreme Court in **Nishi Kanth Jha v State** held that there is no wrong on relying some part of statements confessed by the accused and neglecting the other part, the court has traced out this concept from English Law and when court in its capacity understood that it has enough evidence to neglect the exculpatory part of the confession, then it may rely on the inculpatory part such confession.

Conclusively we can understand that the expression of confession means any statements made by an accused which proves his guilt. And there is just a thin line difference between the two terminologies of the Indian Evidence Act that admission is no other different term than admission as a confession only ends up in admission of guilt by the accused.

Confessions and Admissions Distinguished

Both Confession and Admissions have many common features that all the provisions relating to them occur under Admission. In both the cases the statements suggest an inference as to a fact in issue or a relevant fact. As the definition of admission is also applicable to that of confession and confession comes under the topic of 'admission,' it can be inferred that admission is a broader term and it covers confessions. Hence, all confessions are admissions but not all admissions are confessions. However, there are few points which distinguishes them. They are as under:

1. Admissions are genus, where as Confessions are species
2. Section 17 which defines admissions also defines confessions
3. A confession is admission of guilt in reference to a crime and therefore always goes against the interest of the maker. Where as the admission though against the interest of the maker, but under section 21 which provides and exception that admissions by or on behalf of the of the persons making them.
4. The conditions for admissibility of confessions and admissions as evidence are different. The Confessions must by voluntarily made. A confessions made under inducement, threat or promise are n irrelevant under section 24. Similarly a confessions made to a police officer (Sec 25) and made during the police custody (sec 26) cannot be proved against the accused. Admissions however are relevant irrespective of the fact whether made to any person or any ay inducement etc.
5. Confessions made voluntarily are always conclusive proof of the facts admitted and the accused may be convicted on the basis of the same. Where as, Admissions are not conclusive proof of the fact admitted but act as estoppels against the maker.
6. Confessions made by one accused can be considered against a co accused provided both are jointly tried for the same offence. However, admission made by one defendant cannot be considered against the co defendant in the same suit or proceeding as they do not have same interest.
7. Confession made under promise or secrecy is provable. Where as an Admission obtained under the promise of secrecy is not relevant

Dying Declaration and its relevancy

The rules of evidence requires the persons with the knowledge of facts in any case should come personally to the court and depose. Section 32 however, lays down an exception that where a person having the knowledge of facts of the case but due to the reasons mentioned in the section is unable to attend the court and depose, any person to whom such knowledge is transmitted can give evidence and such evidence is held to be relevant.

Section 32: 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.
(2) Or is made in course of business.
(3) Or against interest of maker.
(4) Or gives opinion as to public right or custom or matters.
(5) Or relates to existence of relationship.
(6) Or is made in will or deed relating to family.
(7) Or in document relating to transaction mentioned in section 13, clause (a).
(8) Or is made by several persons & expresses feelings relevant to matter in question

Section 32(1) deals with Dying Declaration:
It runs, "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.

Section 32 is a pretty long one. It provides an exception to the rule of exclusion of hearsay evidence. It is based upon the principle that the person who has first hand of knowledge of the facts of the case, but who, for the reasons mentioned in the section unable to attend the court, then his knowledge should be transmitted to the court through another person. The law wants best evidence in all the cases.

Dying Declaration:

Statement by a person as to the cause of his death or any circumstances which resulted in his death. Such statements shall become relevant in all the cases in which his death comes in as question. The section further lays down that such statements are relevant whether the person making them was or was not under the anticipation of death and whatever be the nature of the case in which the cause of his death comes in as question.

Difference between Indian law and English law

1. Under English Law, the statement is relevant only in criminal cases of murder or manslaughter (R v Mead). But under Inian Law such statements are relevant in all the cases whether civil or criminal cases where the cause of the death of the person comes in as question

2. Under English law the person who is making the statement must be in expectation of death. (R v Jennings) . Under Indian Law anticipation of death is not necessary. 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. (Pakala Narayana Swamy v Emperor)

Admissibility of Dying Declaration

The concept of dying declaration is based on the Maxim ***"NEMO MORTURE PRAESUMNTUR MENTIRI"*** which means that the person who is about to die would not tell lie. The necessity of relying on the dying declaration is that a) victim being the sole eye witness of the crime committed, b) the statements made by a person who is about to die would be nothing but just truth. These are the two principles on which the concept of admissibility of dying declaration it is based upon.

Dying declaration" is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations, courts attach intrinsic value of truthfulness to such statement.

Conditions for its admissibility

1. It may be oral or written or even in the form of gestures (Queen Empress v. Abdulla)
2. It must be complete
3. Anticipation of death is not necessary (Pakala Narayana Swamy v. Emperor)
4. Proximity of time between the statement and death. There has to proximate relationship between the death and circumstances of death. (Sharada v State of Maharashtra)

Evidentiary Value of Dying Declaration

Dying declaration can only be taken into consideration when it is

a) Recorded by a competent magistrate (with certain exception),
b) the said statement must be recorded in the exact words,
c) there must not be any scope of influence from the third party, and hence the declaration must be made soon after the incident that is the reason of the death,
d) there must not be any ambiguity regarding the identity of the offender or cause of death.

It is very important to note that such a statement must not be made under the influence of anybody or it must not be given by promoting or tutoring. In case there is such a suspicion, then such dying declaration needs evidence to corroborate.

Some general prepositions: Factors in reliability as laid down by Supreme court in *Kusa v State of Orissa, R Mani v State of TN, State v Mohan, Lal, Rambihari Yadav v State*

1. There is no absolute rule that DD cannot become the sole basis for conviction unless corroborated it. If the declaration is coherent, consistent, and trustworthy and appears to have been made voluntarily, conviction can be made on the basis of it even if it is not corroborated \.
2. Each case must go in its own facts
3. A dying declaration is not a weaker kind of evidence just becaue it was not taken on oath.
4. A properly recorded DD by a competent authority in form of questions and answers as fas as practicable is highly reliable.
5. To test the veracity of DD the court has to keep in view of circumstances like the opportunity of the dying man observation.
6. Delay in recording DD if the person is not in fit condition is of no consequence

If the person making Dying Declaration survives, then it is no longer a dying declaration. As long as the person survives it remains as a document in the investigation. If he survives the statement needs to be corroborated like any other evidence

Relevancy of Previous Evidence [Sec. 33]

Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness

1. is dead or cannot be found, or
2. is incapable of giving evidence, or
3. is kept out of the way by the adverse party, or
4. if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.

Provided,

1. That the proceeding was between the same parties or their representatives in interest;
2. That the adverse party in the first proceeding had the right and opportunity to cross examine;
3. That the questions in issue were substantially the same in the first as in the second proceeding.

Explanation: A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

Evidence in one case cannot be considered in another case. S. 33 which is an exception to this rule is applicable to the cases in which evidence given by a witness:

1. in a judicial proceeding, or
2. before any person who is authorized by law to take evidence; and
3. The witness cannot be called to give evidence

(a) before the same Court at a later stage;
(b) before the same or another Court in a subsequent case.

In Judicial Proceedings

The principle is applicable in judicial proceeding and before any person authorized by law. Judicial proceeding means any proceeding where evidence is taken on oath. Evidence given by a witness in a judicial proceeding is relevant for the purpose of proving a particular fact in later stage of the same judicial proceeding, when the witness cannot be found or is dead.

Relevancy of Certain Judgments in Probate Etc., Jurisdiction [Sec. 41]

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

The general principle is that a person is not bound by any transaction to which he is not a party. Therefore, judgment between two parties (judgment *inter parties*) is binding upon a third party. However, judgments may be either
1. judgments *in personam*; or
2. judgments *in rem*.
In the above-mentioned general rule, 'judgment' means 'judgment *in personam'*.
Sec. 41 refers to a judgment *in rem*.

Judgments *In Personam*
A judgment *in personam* is a judgment between the parties to a contract, tort crime. Judgments *in personam* bind the parties and their representatives-in interest. Such a judgment is not relevant under s. 41, in any subsequent
proceeding.
Judgments *In Rem*
A judgment in rem is a judgment against the whole world. Taylor defines 'judgment *in rem* as an adjudication pronounced, as its name indeed denotes upon the status of some particular subject-matter, by a tribunal having competent authority for the purpose. A judgment in rem under this section is conclusive in a civil as well as in criminal proceeding. Both the proceedings may run simultaneously. Judgments mentioned in s. 41, viz., judgments of courts exercising probate, matrimonial, admiralty or insolvency jurisdictions, are judgments *in rem.*

A judgment in rem is conclusive proof of matters showing that:
1. it has conferred legal character; or
2. it has declared that person has such legal character; or
3. it has declared that such legal character has ceased to exist.

'Legal character' means a 'legal status'. To say that a person is not a partner of a firm is not to declare his status or legal character; it is merely to declare his position with respect to the particular firm.

Probate Jurisdiction

Probate jurisdiction means jurisdiction of a court under the Indian Succession Act, 1925 in respect of testamentary and intestate matters. By exercising probate jurisdiction the court can pronounce the genuineness of will of a deceased person and grant letter of probate in favour of a person who may act for the deceased in execution of his will. The court must also satisfy its conscience before it passes an order. A judgment by a probate is a judgment *in rem* by which legal character of a person is granted. A judgment of a court of probate is conclusive proof and is binding on the entire world. The grant of probate is the decree of a court which no other court can set aside except for fraud or want of jurisdiction.

Matrimonial Jurisdiction

A court having matrimonial jurisdiction can decide matrimonial causes under various Acts. By virtue of this jurisdiction the court can decide the legal status of a person whether she is married or widow or divorcee. The judgment of a Matrimonial court is judgment *in rem* and is admissible under s. 41. A decree of nullity and divorce under Marriage Law has the same effect.

Admiralty Jurisdiction

Admiralty jurisdiction is exercised by certain High Courts under the Letters Patent. An Admiralty Court decides cases arising out of war claims. The finding of a court of admiralty jurisdiction is a judgment *in rem*

Insolvency Jurisdiction

A court having insolvency jurisdiction exercised its power under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. Now the jurisdiction is exercised under the Insolvency Code. By exercising insolvency jurisdiction the court can determine legal status of a person whether he is insolvent or he is discharged from insolvency or annulment of his insolvency. A judgment of an insolvency court is a judgment *in rem* and binding on all.

Effect of Judgements *in Rem*

Such judgment, order or decree is conclusive proof
1. that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;
2. 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;
3. 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
4. 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 declares that it had been or should be his property.

Relevancy and Effect of Judgments, Orders or Decrees other than those mentioned in Sec. 41 [Sec. 42]

Judgments, orders or decrees other than those mentioned in, sec. 41 are relevant if they relate to matters of a public nature relevant to the enquiry. But such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration

A sues *B* for trespass on his land.
B alleges the existence of a public right of way over the land, which *A* denies The existence of a decree in favour of the defendant in a suit by *A* against *C* for a trespass on the same land, in which *C* alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

Under s. 42, judgments, orders or decrees other than those mentioned in s. 41 are relevant if they relate to the matters of public nature whether between the same parties or not. Thus, this section is another exception to the general rule that no one should be affected by a judgment to which he is not a party. Under this section, judgments neither *inter parties* nor *in rem* are relevant, if they relate to matters of public nature under inquiry.

The words 'matters of public nature' means matters affecting entire population or at least a large section of the population. It should be remembered that judgments relating to matters of public nature relevant under s. 42 neither work as *res judicata* nor they are conclusive as judgment *in rem*. They can be used as corroborating evidence. Such evidence may not be between the same parties, but they are related only to the matters of public nature relevant to the inquiry.

Relevancy of Judgments other than those mentioned in secs. 40-42 [sec. 43]

Judgments, orders or decrees, other than those mentioned in secs. 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. Sec. 43 provides that if a judgment is not relevant under secs. 40, 41 or 42 it will not be relevant.

Illustrations

(a) *A* and *B* separately sue *C* for a libel which reflects upon each of them. *C*, in each case, says that the matter alleged to be libelous is true. 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*.

(b) *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*.

(c) *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.

However, such judgment may become relevant if the existence of judgment itself is a fact in issue or is relevant under some other provisions of the Act. This section expressly contemplates cases in which a judgment itself is fact in issue or a relevant fact. The illustrations (d) to (f) appended to sec. 43 show that judgments have become relevant under some other provisions (*i.e.*, secs. 6 to 55) of the Act.

Illustrations
(d) *A* has obtained a decree for the possession of land against *B*. *C*, *B*'s son, murders *A* in consequence. The existence of the judgment is relevant, as showing motive for a crime.

(e) *A* is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) *A* is tried for the murder of *B*.
The fact that *B* prosecuted *A* for libel and that *A* was convicted and sentenced is relevant under s. 8 as showing the motive for the fact in issue.

Thus, a judgment not *inter parties* is admissible if its existence is a relevant fact. This section makes it clear that judgments other than those mentioned in Ss. 40, 41 or 42 are of themselves irrelevant. Bombay High Court in *Laxshman Govind vs. Amrit Gopal* has held a judgment not *inter parties* is inadmissible to prove the fact stated therein. However, s. 43 provides that the existence of the judgment may become relevant under some other provisions of the Act, in which case, it will be admissible in evidence in a case not *inter partes*.

A judgment not *inter partes* is admissible if its existence is a relevant fact. Thus, the findings in civil proceeding are not binding on a subsequent prosecution, and judgment in a criminal case cannot be relied on as binding in civil case. For example, judgment of a Criminal Court would not be relevant in the claim petition under the Motor Vehicle Act.

Fraud or Collision in obtaining Judgment or Lack of Competency of Court [sec. 44]

Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under secs. 40, 41 or 42, which has been proved by the adverse party,

1. was delivered by a court not competent to deliver it, or
2. was obtained by fraud or collusion.

Sec. 44 gives an opportunity to the adverse party to raise questions that the judgment obtained under secs. 40, 41 and 42 by the first party in the previous suit or proceeding on the grounds mentioned in sec. 44. Sec. 44 is not applicable to sec. 43.

For Example: though the genuineness of the will cannot be challenged once the probate is issued under section 41, but the judgment can be challenged that it was obtained by fraud or collusion.

The Competency on the part of court means lack of jurisdiction. Thus if any court without jurisdiction gives judgment on any matter it is null and void. It cannot be used as evidence as relevant.

Statements by the Third Persons when Relevant Experts Opinion and the Circumstances when it becomes relevant [Sections 45 -50]

The general principle of law of evidence is that every witness is a witness of a fact not of an opinion. It means that every person who appears before the court has to tell the court only the facts of which he has the first hand knowledge and not his opinion. He has to tell what he has seen or heard or perceived about a fact. Not his beliefs which are irrelevant. The forming of opinion is a judicial function and not of a witness.

Exception: Sections 45 to 50 lays down the exceptions as to when the opinions of the third persons become relevant.

Section 45: Experts Opinion.

This section provides that, " 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 or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, 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.

The courts seeking opinion of experts has been a long standing practice. The reason is obvious that there are many matters which require technical and professional knowledge, which the court may not possess and it has to rely upon the person who are experts in such fields. Example, the court has to know the reasons of air crash, cause of a ship wreck, cause of a death, effect of poison, nature of art, value of articles, meaning of terms and foreign law etc..

Who is an Expert: The IEA does not define who is expert simply lays down that any person who is specially skilled i.e. has acquired a special knowledge shall be called as expert. A gold smith without any formal education has been considered as an Expert to find out the purity of the gold (*Abdul Rahman v. State of Mysore*).

When Experts opinion becomes relevant: In the following matters the opinions of Experts become relevant:

1.Foreign Law

2. Matters of Science

3. Question of Art

4. Identity of Hand writing

5. Finger Impressions

1.Foreign Law : Foreign Law means which is not in force in India. The courts may not be conversant with them. When the court has to form an opinion on any point of foreign law, the opinions of the persons who are experts in such law becomes relevant and the courts can seek their opinions. The law in force in India is not a foreign law. Ex. Shia Law is not a foreign Law in India (*Aziz Bhanu v. Mohammad Ibrahim Hussain*). Who is an expert in foreign law.? He should be a practitioner in law (*Bristow v Sequeville*)

2.Matters of Science of Art: The expression science or art includes all subjects on which a course of special knowledge is necessary for the formation of an opinion. The words science and art are broadly construed. The word science not limited to physical or biological sciences and an area which requires a special knowledge. The word arts does not just include a fine arts. To determine the particular matter of science or art the test to be applied is to see whether a common man could answer or it requires an expert in such fields

3.Identity of Hand Writing & Finger Impressions : When the court has to decide the identity of hand writing of a person or the identity of certain person's finger impression, it may receive the opinion of the persons who have expertise in such matters. Apart from the persons of professional knowledge even the person who is acquitted with the hand writing of a person, his opinion is also relevant (*R v Silverlock*).

As far as the reliability of such opinion is concerned, the supreme court in number of cases has held that they are not conclusive by themselves. They required to be corroborated with a clear or direct or circumstantial evidence. Hoverer, finger impression expert's opinion is given more value because such opinions are based upon exact science and correctness. Because

fingerprints of any person remain the same from their birth till death and no two individuals finger impression have been found to have the same pattern.

4. Other technical Matters: The opinion of experts is relevant only on the matters mentioned above.

Evidentiary Value of Experts Opinion

The evidence of expert is not conclusive. The opinion of expert is not binding upon the judge and that is why the court can refuse to rely on such opinion. It is necessary that there are some corroborating or supporting evidences in relation to the matter. It is necessary to show that the expert has some special knowledge and experience and is competent to form an opinion. Credibility and competency of an expert is material question. The reasons in support of the opinion, if convincing makes the opinion admissible and relevant.

Section 45A – Opinion of examiner of electronic evidence- This section provides that opinion of examiner is relevant when the court has to form an opinion on matter or information transmitted or stored in any computer resource or digital form.

Section 46 – Facts bearing upon opinions of experts – This section provides that facts are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant.

Section 47 – Opinions as to handwriting – the opinion of person acquainted with the handwriting of person in question is a relevant under this section. When the court has to form an opinion as to the person by whom document was written or signed, the opinion of such person is relevant. In the case of *State of Maharashtra v. Sukhdeo Singh,* the Supreme Court held that two things must be proved beyond any doubt for expert evidence – 1) The genuineness of the specimen or admitted handwriting as that of the suspect must be established. 2) The handwriting expert is a competent, reliable witness whose evidence inspires confidence.

Section 47A – Opinion as to digital signature when relevant – the opinion of certifying authority which issued the digital signature certificate is admissible when the court has to form an opinion on digital signature.

Section 48 – Opinion as to existence of right or custom when relevant – the opinion of persons who would be likely to know about the existence of any right or custom is relevant.

Section 49 – Opinion as to usage's, tenants, etc., are relevant – the opinions of persons having special means of knowledge about the usage's and tenants of any body of men or family, the

constitution and government of any religious or charitable foundation, or the meaning of words or terms used in particular districts or by particular classes of people are relevant.

Section 50 – Opinion on relationship, when relevant – the opinion of persons having special means of knowledge about the relationship of one person to another or as a member of family is relevant.

Section 51 – Grounds of opinion are relevant –This section provides that the grounds on which the opinion of living person is based are also relevant.

Modes of Proving Handwriting and Finger Impressions

Section 47 of Indian Evidence Act, 1872 deals with '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.

A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted

Illustration The question is, whether a given letter is in the underwriting of A, 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 him thereon. The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

Modes of proving the handwriting

Sections 45 and 47 put together, the following modes of proving the handwriting

1. By the writer himself
2. By the expert opinion
3. By the evidence of the person who is acquainted with the handwriting of the person in question
4. Under section 73 by the court itself by comparing the handwriting in question with the proven handwriting.

Character Evidence[sections 52-55]

Secs. 52-55 of the Indian Evidence Act, 1872 deal with character evidence. The wordcharacter thus includes both reputation and disposition. Explanation at the end of these sections and which is common to them provides that for the purpose of all these sections, character includes both reputation and disposition.

'Reputation' means what is thought of a person by others, and is constituted by public opinion. 'Disposition' respects the whole frame and texture of the mind. It comprehends the springs and the motives of actions. 'Temper' influences the action of the moment,'disposition is permanent and settled; 'temper' may be transitory and fluctuating. It is possible and not infrequent to have a good disposition with a bad temper and *vice versa*.

The explanation further provides that except as provided in sec. 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

Thus, evidence of reputation or disposition must be confined to the particular traits which the issue is concerned about. Therefore, it would be useless to offer the evidence of a party's reputation for honesty where the fact in issue is cruelty, or of his mild disposition where the fact in issue is fraud. Reputation for honesty would be relevant on an issue of fraud, and a merciful disposition on an issue of cruelty.

Character is not relevant in both civil and criminal cases. However, where character itself is a fact in issue or a relevant fact, evidence of character is admissible. Also, in some other exceptional cases character evidence may become admissible.

Character Evidence in Civil Cases

In Respect of the character of a party, cases may be divided into the following two categories:

1. The cases in which character of the party is in issue
2. The cases in which the character of party is not in issue.

When the general character of a party is in issue, naturally, the character of the party is relevant. Thus for example, in a suit for defamation where the alleged defamatory statement is regarding the character of the plaintiff, the plaintiffs character is at issue and therefore, evidence of plaintiffs' character is relevant.

But where general character of the party is not in issue, but is tendered in support of some other issue, as a general rule, in civil cases evidence of character of any party to the suit is excluded. Therefore, sec.52 of the Indian Evidence Act declares that in civil proceedings, evidence of character of a party to prove conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

This general exception is based upon grounds of public policy and fairness, because its admission would surprise and prejudice the parties by taking up their whole careers which they could not possibly come into court preferred to defend.

The Supreme Court has pointed out that the business of the courts is to try the cases and not the persons. A very bad man may have a very righteous cause.

Sec. 52 refers to character of parties to the suit and not the character of witnesses. Therefore, character of witness may be relevant under sec. 155 to impeach the credit of the witness.

Further, sec. 52 excludes evidence of character from being given only when the purpose of such evidence is to render probable or improbable any conduct imputed to the party. But when the facts which are relevant otherwise than for the purpose of showing character are proved, those facts raise inferences conserving the character of the party to the suit, such facts become relevant not only to prove the facts for which they are directly tendered, but also for the purpose of showing the character of the party concerned.

However, sec. 55 is an exception to this rule under sec. 52. The evidence of character of the plaintiff for the purpose of determining the quantum of damages awardable to him is admissible in civil proceedings.

In civil cases, good character of the plaintiff is presumed. Therefore, good character of the plaintiff may not be proved in aggravation of damages. But bad character is admissible in mitigation of damages provided that it would not, if pleaded, amount to a justification. The argument in favour of considering reputation is that a person should not be paid for the loss of that which he never had.

Character Evidence in Criminal Cases

Secs. 53 and 54 of the Indian Evidence Act, 1872 cover the relevancy of character evidence in criminal cases.

Sec. 53 provides that in criminal proceedings the fact that the person accused is a good character is relevant.

Sec. 54 provides that in criminal proceedings the fact that the accused person has a bad character is not relevant. But if the defence has given evidence to show that he has a good character, evidence of his bad character becomes relevant.

Explanation 1 to sec. 54 provides that bad character of the accused is always relevant in the cases in which his bad character itself a fact in issue.
Explanation 2 to sec. 54 provides that a previous conviction is relevant as evidence of bad character.

One of the basic rules of criminal evidence is that the guilt of the accused must be proven beyond all reasonable doubt. That the accused is of good character creates a doubt in the mind of the Court about the commission of the offence by the accused. Therefore, in criminal proceedings, the fact that the accused is of a good character, is relevant. To prove the good character of the accused, what must be proved is his general reputation in the community, and not particular good acts by him.

In criminal cases the accused previous bad character is irrelevant. The court is not concerned with his general character. What it is to be proved is the charge in that particular case. The prosecution cannot take the help of bad character of the accused in order to establish its case. Otherwise it would prejudice the minds of the court and there is a possibility that the court may become biased against the accused. Court may come to the conclusion that he has committed the offence in question. Therefore, this would prejudice the fair trial to which the accused is entitled.

Exceptions:

1. The previous bad character is relevant in reply, if the evidence has been given that he has good character. The prosecution can bring the evidence to prove the bad character of the accused.

2. The evidence of bad character can be proved in cases in which the bad Character is in issue.

3. A previous conviction is not admissible in evidence against the accused, except where he is liable to enhanced punishment under Section 75 of the Indian Penal Code, on account of previous conviction, or unless evidence of good character be given, in which case the fact that the accused had been previously convicted of an offence is admissible as evidence of bad character.

Facts need not be proved
[sections 56-58]

As we were discussing in our classes in every case whether criminal or civil, the facts in issue and relevant facts to the facts to the fact in issue are to be proved by the parties who contend them to true and exist. The question is do all the facts need to be proved or is there any exception to this.

Sections 56, 57 and 58 deals with facts which need not be proved by the facts. They are as under:

Section 56: Facts judicially noticeable need not be proved

Section 57: Facts of which the court must take judicial notice

Section 58: Facts admitted need not be proved

Let's see one by one of these provisions

Section 56: Facts judicially noticeable need not be proved: No fact of which the court will take judicial notice need be proved

This section spares the parties from proving the facts which the court takes the judicial notice of it by itself. It means the court which is bound to take the judicial notice of a particular fact, such fact need not be proved by the court. For example, the court is bound to know the law of land. The effect of this section is the recognisition of something as existing or being true without proof of it. This section is based upon reasons of convenience or expediency. It lays down the facts which are within the common knowledge of everyone requires no proof.

In **Managing Committee of Raja Sidheshwar High School v. State of Bihar** the Supreme Court held that the court can take judicial notice of the fact that the system of education in the State has virtually crumbled and serious allegations are made frequently about the manner in which the system is being worked.

Section 57: Facts of which the Court must take Judicial Notice: The court shall take judicial notice of the following facts:

(1) All laws in force in the territory of India

(2) All public Acts passed or hereafter to be passed by Parliament of the United Kingdom, and all local and personal Acts directed by Parliament of the United Kingdom to be judicially noticed;

(3) Articles of War for the Indian Army Navy or Air Force

(4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any laws for the time being in force in a Province or in the States;

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland ;

(6) All seals of which English Courts take judicial notice: the seals of all the Courts in India and of all Courts out of India established by the authority of the Central Government or the Crown Representative, the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by the Constitution or an Act of Parliament of the United Kingdom or an Act or Regulation having the force of law in India

(7) The accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in any Official Gazette

(8) The existence, title and national flag of every State or Sovereign recognized by the Government of India;

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;

(10) The territories under the dominion of the Government of India;

(11) The commencement, continuance, and termination of hostilities between the Government of India and any other State or body of persons;

(12) The names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of or all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it;

(13) The rule of the road on land or at sea

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable to so

The two effects of the last two paras in the section, The first one says that in all these matters, and also on matters of public history, literature, science or art, the court may consult the appropriate books or documents of reference. The second is that if a party calls upon the court to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as the court may consider necessary to enable it to take judicial notice. It means that the party who desires the court to take judicial notice of a fact has to produce before the court the reference material. Where, for example, a party request the court to take judicial notice of the proceedings of the legislatures, he should produce before the court the journal of those bodies, or their published acts or abstracts, or copies purported to be printed by order of the government concerned. In other words, the source material in which the judicially noticeable fact is recorded will have to be produced before the court.

Section 58: Facts admitted need not be proved

No fact need to be proved in any proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings."

Provided that court may in its discretion require the facts admitted to be proved otherwise than such admissions

This section lays down that facts which have been admitted by the parties need not be proved.. Averments made in a petition which have not been contended by the respondent carry the effect of a fact admitted.

In **Thimmappa Rai v. Ramanna Rai,** it was held, an admission made by a party to a suit in an earlier proceeding is admissible against him in a subsequent suit also.

The court gives its judgment, on the basis of the contentions argues before it that is to say, according to the issues between the parties. Facts which have been admitted on both sides are not an issue and, therefore, no proof needs to be offered of them.

However, with respect to the admissions, the court may in its discretion require proof of it as the effect of admissions are conclusive but only acts as estoppel.

Modes of Proof of Facts
[sections 59 – 90]

A fact may be proved either by oral evidence or documentary evidence. That means there are two methods, one by producing the witness of fact and getting his deposition which is called as oral evidence, second by producing a document which records a fact, which is called as documentary evidence. Section 3 defines what is oral and documentary evidence. Both oral evidence and documentary evidence carry equal weight age in their acceptance as evidence. We discuss the rules governing these two kinds of evidences.

Sections 59 and 60 deal with rules of oral evidence where as sections 61 to 90 deal with rules of documentary evidence.

Oral Evidence

Section 3 defines oral evidence as "All the statements which the court permits or requires to be made before it by witnesses in relation to the maters under inquiry; such statements are called as Oral Evidence.

Section 59: All facts except the contents of a document or electronic records may be proved by oral evidence.

Section 59 makes it clear that all the facts except those which are contained in documents be proved by oral evidence, which includes electronic documents, which are considered as documents after IT Act 2000 has been passed.

Rules of Oral Evidence:

Section 60: Oral Evidence must be direct: Oral evidence must, in all cases whatever, be direct; that is to say-

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

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

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

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

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

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

Direct or oral evidence: This section provides that oral evidence must be direct. This means the witness can tell the court only of a fact of which has firsthand knowledge in the sense that he perceived the fact by any of his five senses. On the other hand he cannot appear as witness if he has derived the knowledge about the fact through somebody. The effect of this section is clear that if the fact which could be seem, then the evidence must be by the person who actually saw it. If the fact is to be heard, then the evidence must be by the person who says he heard it, if the fact is to be perceived, then the evidence must be by the person who say he perceived it. Such person is called as direct witnesses and they only must give evidence in the court. Thus in all cases, the evidence has to be that of person who himself witnessed the happening of the fact of which he gives Evidence. such witnesses is called as eye witnesses or a witness of fact and the principle is known as that of direct Oral Evidence or of the exclusion of hearsay Evidence.

Exclusion of Hearsay Evidence: This section expressly excludes the hearsay evidence. Hearsay evidence means the evidence from a person who heard it from the person who saw or heard or perceived it. The reasons for exclusion of hearsay evidence are:

1. Hearsay evidence cannot be tested by cross examination
2. It is a weaker evidence
3. The declarant not under any personal liability
4. There is a possibility of fabrication
5. The truthfulness may depreciate in the process of repetition

Exceptions to the rule of exclusion of Hearsay Evidence

1. **Resgestae under section 6:** The statement may be proved through another person who appears as witness, if such person is a part of same transaction which is in issue**. (R v Foster).** It is essential the words sought to be proved by hearsay evidence must associate with time, place, and circumstances that they are the part of the thing being done.
2. **Admissions and Confessions:** The extra judicial admissions and confessions come under the category of hearsay evidence. They can be proved by the witness to whom they

have been made outside the court. Such witnesses are not the witness of the fact, but they have heard it from the party who admitted their liability. The reasons for their admissibility as discussed under sections 17 as the statements which are against the interest of the maker hence admissible even if they are made outside the court.

3. **Statements under section 32:** Statements which are admitted under section 32 are mostly of the persons who are dead, or could not be found or became incapable of giving evidence or whose attendance cannot be procured except by an amount of delay or expense which court feels not necessary. The evidence of such statements from the persons who received from the persons mentioned are relevant under section 32. Hey include dying declarations, statements against the interest of the maker etc..
4. **Statements in Public Documents:** Section 74 defines what public documents are. They include the Acts of Parliament, official books, registers. The contents of such documents need not be proved by the production of the document itself. They can be proved by the certified copies of such documents
5. **Evidence in Former Proceedings:** Section 33 provides that evidence given in former proceeding by a witness can be used as evidence of truth in subsequent proceeding between the same parties or their privies if such witness is dead or has become incapable of giving evidence
6. **Statements of Experts in treatise:** Proviso under section 60 recognizes this exception. It says that the opinions expressed by the experts in any documents. They can be proved by producing such documents if the author has dead, or could not be found or became incapable of giving evidence. The opinion of expert can be cited only if it is expressed in any book form and expert himself is dead or unavailable to give evidence personally.

Rules of Documentary Evidence

Section 3 defines Documentary evidence as " All the documents produced for the inspection by the court". Such documents are called as Documentary Evidence.

The plain reading of the section makes it clear that, the documents which are submitted to the court for its inspection are documentary evidence. It means the documents which are submitted in the form of applications are not documentary evidence. Example Memos, Interlocutory Application etc..

Modes of proof of the contents of document

Section 61 : Proof of contents of documents
The contents of documents may be proved either by Primary or Secondary evidence.

Section 62 defines 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.

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

The section makes it clear that any number of copies of original document will be considered as primary evidence for the other copies produced, but not for the contents of the original document.

The section says that the best evidence is original document itself. That is the contents of any document can be proved by the writing itself.

Section 63 defines **Secondary Evidence as:**

Secondary evidence means and includes

1. Certified copies
2. Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies.
3. Copies made from or compared with the original.
4. Counterparts of documents as against the parties who did not execute them
5. Oral accounts of the contents of a document given by some person who has himself seen it.

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 he 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.

Section 64 provides that the documents must be proved by primary evidence except herein after mentioned.

Section 65 lays down the circumstances in which the document can be proved by secondary evidence. This can be termed as an exception to section 64.

Cases in which secondary evidence can be given:

(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 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.

Public Documents and their Proof [sections 74-76]

Public Documents: Public Documents are those documents which relate to the public offices of the state available the public for reference and use. They also contain statements made by the public officer in their official capacity, which are admissible as evidence in civil cases mostly. They are also known as public records issued for the knowledge of public

Section 74 of the Indian Evidence Act, 1872 states that the following documents are considered public documents:

Documents forming the acts or records of the acts:

1. Of sovereign authority
2. Of official bodies and tribunals
3. Of public officers, legislative, judiciary and executive of any part of India or of the commonwealth, or of a foreign country.
4. The public record kept in any State of Private document

The Public Documents further explained as:

1. **<u>Documents forming the acts or records of acts-</u>**

    - Statements recorded by police officers under section 161, Cr.P.C are required by S. 115(5) and (7) read together to be furnished to the accused.
    - Records maintained by revenue officers relating to land revenue, survey and settlement etc are public documents, '*pahanies'* and '*faisal patties'* are public documents.
    - Records of development authorities are public documents.

a) Published Scheme Under Statute-

- A scheme was published in the Official Gazette under the Electricity Supply Act, 1948. The scheme envisaged installation of overhead transmission lines. The scheme had thus become a public document.

b) Orders of civil court, FIR, Charge-sheet-

- Certified copies of the orders of the civil court and FIR were allowed to be submitted because they all are Public Documents.
- A charge- sheet under S.120-B of IPC, 1860 against an election candidate was held to be a public document and admissible in evidence without any proof.

c) Marriage register-

- Hindu Marriage Register has been held to be a Public Document.
- A death certificate though a public document, could not be accepted without considering circumstances.

2) Public records kept in any state of private documents.

- For example, Memorandum of Articles of a Company registered with the Registrar of companies.

How Public Document are Proved

Public Documents are always proved by certified copies. For this reason it is an exception to the rule of exclusion of Hearsay Evidence

Section 76 provides the method of certified copies of public documents from the public officer. It states that if a public document is open to inspection, it's copy may be issued to any person who is demanding it. The copy of the public document is issued on payment of legal fees and a certificate shall be attached thereof, containing the following particulars:

1. That it is a true copy.
2. The date of the issue of the copy.
3. The name of the officer and his official seal.
4. The seal of the office, if there is any.
5. It must be dated.

When these particulars are mentioned in the copy, then only it is considered as a Certified Copy.

Ancient Documents
[section 90]

Where any document, purporting or proved to be thirty years old, produced from any custody which the Court considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation: What is proper custody?

Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be. However, no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

Illustrations of 'Proper custody':
(a) A has been in possession of landed property for a long time. He produces from his custody. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

The Exclusion of Oral Evidence by Documentary Evidence [sections 91-100]

Secs. 91 to 100 deal with the law relating to inadmissibility of oral evidence where documentary evidence is available, or where a transaction must be in writing

Sec. 91: Evidence of Terms of Contracts, Etc. Reduced to Form of Document

Section 91 provides that :

1. when the terms of a contracts or grants or other depositions of the property is reduced into writing and
2. in all the cases in which any matter is required by law to be reduced to a form of 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

1. the document itself, or
2. secondary evidence of its contents in cases in which secondary evidence is admissible

Explanation 1 clarifies that the contracts, grants or dispositions of property referred in this section may be contained in one document or they may be contained in more documents than one.

Illustrations

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

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

.

Explanation 2 further clarifies that where there are more originals than one, one original only need be proved.

Illustration

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

Explanation 3 is also by way of removal of doubt. According to this explanation the statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustration

(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.

There are two exceptions to this rule:

1. When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.
2. Wills admitted to probate in India may be proved by the probate.

Exclusion of Evidence of Oral Agreements [section 92]

Section 92 is complimentary to section 91. According to it, when the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Illustrations

(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 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.

There are six provisos to sec. 92. These provisos are based on the principle that what cannot be included in a document cannot be insisted to be proven by documentary evidence. For example, the true ages of the parties, their mental capacities, actual payment of the consideration, *etc*. require oral evidence to prove them. Therefore, oral evidence to prove them is admissible.

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

Illustrations

(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 inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

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

(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.

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.

Illustrations

(g) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in thesewords: "Bought of *A* a horse of Rs. 500". *B* may prove the verbal warranty. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

(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.

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 it, what manner the language of a document is related to existing facts.

Illustration

(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.

Oral Evidence to explain Ambiguity in the Document [Sections 93-100]

Where any word, expression, sentence or statement is capable of giving more than one meaning, such word, expression etc. is called ambiguous. Ambiguity may be patent ambiguity or latent ambiguity.

Patent Ambiguity

Where the ambiguity is apparent on the face of the document, it is called patent ambiguity. It is apparent from the reading itself.

Section 93 provides that oral evidence is not admissible to resolve a patent ambiguity in a document. Section also covers patent defects. patent defects.

The section reads,
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.

When there is no ambiguity, whether patent or latent, oral evidence is not admissible that the document means something else.

Section 94 provides 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.

Illustrations

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.

Latent Ambiguity

latent ambiguity, as the term suggests, is a hidden ambiguity. It is not apparent on the face of the document. When the document is read, it does not appear to be ambiguous. But the external facts make it ambiguous.

Sections 95, 96.97, 98.99 &100 provide Oral Evidence be given to resolve the latent ambiguity

- **Sec 95**: Evidence as to document unmeaning in reference to existing facts
- **Sec 96**: Evidence as to application of language which can apply to one only of several persons
- **Sec 97**: Evidence as application of language to one of two sets of facts to neither of which the whole correctly applies
- **Sec 98:** Evidence as meaning of illegible characters..etc
- **Sec 99**: Who may give evidence of agreement varying terms of document
- **Sec 100**: Saving of provisions of Indian Succession Act relating to wills

Burden of Proof[sections 101-113

'Burden of proof' may be defined as the obligation to offer evidence that the court or jury could reasonably believe, in support of a contention, failing which the case will be lost. Burden of proof is the obligation on a party to establish such facts in issue or relevant facts in a case to the required degree of certainty in order to prove its case.

The pleadings predominantly contain the facts of the case. Pleadings of each party contain the relevant party's version of the facts of the case. Thus, the plaint contains plaintiff's version of the facts of the case. This is called the plaintiff's case Similarly, written statement contains the defendant's version of the case. This is called defendant's case.

In majority of cases, cases of both sides will not be entirely different. There may be facts pleaded by one party and admitted by the other party. These facts are called admitted facts. In respect of some other facts, the parties may differ. Facts pleaded by one party may be denied by the opposite party. These facts are called disputed facts. The function of the Court is to find out which of the two versions is true. To discharge this function, Court needs evidence.

Under the adversarial procedure followed by the Indian Courts, evidence has to be presented by the parties to the Court. By presenting the evidence, each party attempts to prove its case and disprove the case of the opposite party.

Both the parties need not prove every fact or disprove every fact. Only one party has to prove a fact. The other party will have to disprove the fact if the first party is able to p r o v e the fact. But it may have to prove some other fact which the first party will have to disprove if former is able to prove it.

This requirement of proving or disproving a fact is called burden of proof. The requirement of proving a fact is called the initial burden of proof and when the party on whom the initial burden lies is able to prove the fact and therefore when the opposite party is required to disprove the fact we say that the burden of proof has shifted – is called onus of proof.

Burden of Proof and Onus of Proof

"burden of proof" and "onus of proof", though literal meaning of these expressions may be the same. Yet they differ

The 'Burden of Proof' is the burden to prove the main contention of party requesting the action of the court, while the 'Onus of Proof' is the burden to produce actual evidence.

The Burden of Proof is constant and is always upon the claimant but the Onus of Proof shifts to the other party as and when one party successfully produces evidence supporting its case.

Thus, burden of proof indicates the initial burden of proof. If the party who has the burden of proof of a fact proves that fact, the onus of disproving the same shifts on the other side. This is a continuous process.

Rules of Burden of Proof
[Sections 101-106]

Section 101 explains the concept of Burden of Proof which states that when a person is bound to prove the existence of a fact, the burden to provide evidence for the same lies upon him. Burden of proof is not defined in the Act. But it is based on the principle that in criminal cases the burden of proving the charges lies on the prosecution not on the accused. Evidence Act lays down some principle of burden of proof of general nature.

The concept of Burden of Proof is based on two concepts:

Burden of Proof *(onus probandi)*

Onus of Proof *(factum probandum)*

Burden of proof is constant always remains on one person. Whereas the onus of proof is like pendulum in the clock shifts from one person to another toll the final inference is drawn by the court.

S.101 defines Burden of Proof as : Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence to 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.

Illustration

(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.

In short, the burden of proof means the obligation to prove a fact. Every party has to establish fact which goes in his favour or against his opponent and this is the burden of proof.

Section 102: On whom Burden of Proof lies

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

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father. If no evidence were given on either side, B would be entitled to retain his possession.
Therefore, the burden of proof is on A.

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

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved. Therefore the burden of proof is on B.

This section tries to locate the party on home burden of lies. The burden of proof lies upon the party whose case would fail, if no evidence is given on either side.

In ***Triro vs Dev raj*** in this case when there was a delay in filing the suit, the defendant had taken a plea of limitation period. The burden of proving that the case was within prescribed limit was on the plaintiff.

Section 103.Burden of proof as to particular fact

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

Illustration
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.

The principle of section 103 is that whenever a party wishes is the court to believe and act upon the existence of the fact, burden lies upon him to prove that fact .If party wishes ti the Court to believe that his opponent has admitted a fact burden lies upon him to prove that the fact of admission.

Section 104.Burden of proving fact to be proved to make evidence admissible

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations
A wishes to prove a dying declaration by B .A must prove B's death.
B wishes to prove, by secondary evidence, the contents of a lost document.
A must prove that the document has been lost.

This section provides that the proof of fact on which evidence become admissible. Where the admissibility of evidence of any fact depends upon the proof of a fact, burden of proof of such fact depends upon the person who wants to prove the fact.

Section 105.Burden of proving that case of accused comes within exceptions

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the 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.

Illustrations

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.
The burden of proof is on A.

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

(c) Section 325 of the Indian Penal Code, (45 of 1860), provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments. A is charged with voluntarily causing grievous hurt under section 325.The burden of proving the circumstances bringing the case under section 335 lies on A.

This section provides that provide if the accused claims that his case comes within any of the recognized exceptions of Indian Penal Code, the burden of proving that the case comes within the exceptions lies on him.

Section 106. Burden of proving fact specially 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 ticket is on him
According to this section, whenever the existence or non existence of any fact lies within the special knowledge of a person alone, the burden of proving such fact lies on him.

Special Rules of Burden of Proof

Presumption of Life and Death of A Person

Sec. 107 and 108 deal with burden of proof death of a person. Sec. 107 provides that when it is shown that a person was alive within 30 years, the burden of proving his death is on the person who affirms his death.

But if it is shown that the persons close to him have not heard of a person for seven years, the burden of proving that he is alive is on the person who affirms that he is alive, under sec. 108.

Sec. 108, which is a proviso to sec. 107, provides the presumption of the fact of death. It does not provide for the presumption of the time of death. However the probability of the time of death may be taken into account when it is necessary to meet the ends of justice.

Continuance of Relationship

Sec. 109 provides that when the relationship between two person is proved, the burden of proving that such relationship has ceased is on the party alleging that the relationship has ceased.

Sec. 110 The burden of proving that a person in possession of a thing as owner is not the owner is on the person denying the ownership of the possessor.

The rationale behind these sections as well as under sec. 107 is that a presumption should be positive and not negative. The presumption is that state of things continue rather than end.

Genuineness of Transaction Between Parties Having Fiduciary Relationship

Sec. 111 deals with the burden of proof of good faith of any transaction between the persons standing in fiduciary relationship with each other. The burden of proof is on the person who is in active confidence.

Illustrations

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

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

Presumption of Legitimacy of a Child [section 112]

Sec. 112 deals with the presumption of legitimacy of a child who is born during the valid marriage if his mother and any man or within 280 days from the dissolution of the marriage.

This presumption is conclusive, and therefore, cannot be rebutted. But sec. 112 itself provides for one ground to rebut the presumption of legitimacy under it. Thus, it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Thus, there are two requirements for the application of sec. 112.

1. The child should have born
   (a) during valid marriage between its parents; or
   (b) if the marriage was dissolved, within 280 days from dissolution of marriage
2. There should be no evidence to show non access between the parents at the time when the child could have been begotten.

The burden of proof is therefore, entirely on the party challenging the legitimacy of the child and not on the party asserting its legitimacy. As such, the party asserting legitimacy need not prove access, the opposite side should prove non-access.

Cessation of Territory [section 113]

Sec. 113 provides that a notification in the official gazette of a cession of a British territory before the commencement of Part III of the Government of India Act, 1935 to any Indian State is conclusive proof that the cession took place on the date mentioned in the notification.

Doctrine of Estoppel

Estoppel is a rule of evidence that bars a party from denying or alleging a certain fact owing to that party's previous conduct, allegation, or denial The rationale behind estoppel is to prevent injustice owing to inconsistency or Fraud.

Types of Estoppel

There are two general types of estoppels

1. Equitable Estoppel
    a. Promissory Estoppel and
    b. Estoppel by laches
2. Legal Estoppel
    a. Estoppel by Record
    b. Estoppel by Deed

Equitable Estoppel

Equotable Estoppel sometimes known as estoppel in *pais*, protects one party from being harmed by another party's voluntary conduct. Voluntary conduct may be an action, silence, acquiescence, or concealment of material facts.

There are several specific types of equitable estoppel:

Promissory Estoppel

It is a contract law doctrine. It occurs when a party reasonably relies on the promise of another party, and because of the reliance is injured or damaged.

Estoppel by Laches

Estoppel by laches precludes a party from bringing an action when the party knowingly failed to claim or enforce a legal right at the proper time.

This doctrine is closely related to the concept of statutes of limitations, except that statutes of limitations set specific time limits for legal actions, whereas under Laches, generally there is no prescribed time that courts consider "proper."

Legal Estoppel

Legal estoppels onsists of estoppel by deed and estoppel by record.

Estoppel by Deed

Under the doctrine of estoppel by deed, a party to a property deed is precluded from asserting, as against another party to the deed, any right or title in derogation of the deed, or from denying the truth of any material fact asserted in the deed.

Estoppel by Record

Estoppel by record, also known as "collateral estoppel", or as "estoppel by judgment", prevents the re-argument of a factual or legal issue that has already been determined by a valid judgment in a prior case involving the same parties.

Estoppel by record is frequently confused with the related doctrine of *res judicata*, which bars re-litigation of the same cause of action between the same parties o n c e there has been a judgment.

Estoppel under Indian Evidence Act, 1872

The doctrine of Estoppel is based on the principal of equity. Secs. 115, 116 and 117 of Indian Evidence Act deal with the doctrine Estoppel.

It would be most inequitable and unjust if one person is allowed to speak contrary to his earlier statement, as it would cause loss and injury to the person who has acted on such statement.

Sec. 115 of the Indian Evidence Act defines Estoppel as under:

"When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

Illustration

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of 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 of title.

Conditions for the application of Doctrine of Estoppel

1. There must be a representation made by one person to another person. The representation must have been made as to fact and not as to law. The representation must be false.

2. The person to whom the representation is made must have believed the same to be true.
3. The person to whom the representation is made must have acted upon it.
4. By so acting, the person to whom the representation is made must have suffered some detriment.

Estoppel of Tenant and of Licensee of Person In Possession [sec 116]

Under sec. 116, a tenant of an immovable property is estopped from contending that his landlord did not have title to such property at the time of creation of the tenancy. In other words, he cannot say that the property which he is occupying as a tenant was taken by him on lease from an unauthorised person. This bar is applicable against the tenant only during the continuance of the tenancy. Thus,

1. After terminating the tenancy the tenant may say that his landlord did not have title at the time of creation of the tenancy;
2. Even during the continuance of the tenancy he may say
   (a) that subsequent to the creation of the tenancy, the landlord ceased to have title to the property, or
   (b) that at any time before the creation of the tenancy he was not having title to the property.

The same rule is applicable, *mutatis mutandis*, to person who came upon any immovable property by the license of the person in possession thereo.

Estoppel of Acceptor of Bill of Exchange, Bailee or Licensee[sec 117]

Sec. 117 prohibits

an acceptor of bill of exchange from denying that the drawer had authority to draw such bill or to endorse it;

However, explanation 1 to sec. 117 permits acceptor of a bill of exchange to deny that the bill was really drawn by the person by whom it purports to have been drawn.

a bailee from denying that his bailor had authority to make such bailment at the time of making the bailment;

Explanation 2 sec. 117 provides that 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.

a licensee from denying that his licensor had authority to grant such licence at the time when such licence was granted.

Privileged Communications[sections 121-126]

Certain communications cannot be revealed in evidence. The bar is to protect the someone whose interest, other than the interest involved in the suit or proceeding, may be affected.

In most of the cases, the interest likely to be affected is a private interest of an individual. In such cases, it is his discretion to reveal or to give consent to reveal the communication.

In other cases, the interest likely to be affected is not a private interest, but is some p u b l i c interest. In such cases, the discretion to reveal the communication or to give consent to its revealing is vested in the person whose responsibility it is to protect that interest.

It is the privilege of the person, at whose discretion the communication may be revealed, to withhold the communication. Therefore, these communications are called privileged communications. In relation to documents it means privilege to withhold documents.

Provisions concerning privileged communications use two different expressions:

the witness shall not be 'compelled';

the witness shall not be 'permitted'.

The witness shall not be 'compelled' means if the witness is willing to reveal the communication, he may be permitted to do so. If he is not willing, he cannot be compelled to reveal it.

The witness shall not be 'permitted' means even if the witness is willing to reveal the communication, he cannot be permitted to do so.

This means that it is not the discretion and privilege witness but some other person to disclose or to withhold the revealing of the communication. This further means that revealing the communication is likely to affect the interest not of the witness, but of some other person.

The following are the privileged communications:

Marital Communication [Sec. 122]

Evidence as to Affairs of State [Sec. 123]; and

Official Communication [Sec. 124]

Information About Commission of Offence [Sec. 125]

Professional Communication [Secs. 126-129]

Communications During Marriage [S. 122]

No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married;

Nor shall he be permitted to disclose any such communication, unless the person who made it or his representative in interest, consents,

Except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Evidence as to Affairs of State [Sec. 123]

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

Official Communication [Sec. 124]

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.

Information as to Commission of Offence [sec. 125]

No Magistrate or police-officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenueofficer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue. Explanation.— "Revenue-officer" in this section means any officer employed in or about the business of any branch of the public revenue.

Professional Communication [sec. 126-129]

Sec. 126 of Indian Evidence Act deals with the professional communications. Here Professional Communication means, the communication made by the client to his advocate or the advocate to the client for the purpose of or in the course of employment of his advocate. Accordingly no facts disclosed by the client to his advocate and no advice given by the advocate to the client during the pendency of employment of the advocate may be permitted to be disclosed without the client's express consent. A person is said to be a client of an advocate if he approaches the advocate with a case, whether or not the advocate is employed by him.

Sec. 126 has been enacted to enable free communication of facts between the advocate and his client. The purpose of this section is not to enable the people to take legal advice to commit crimes or illegal activities in a full proof manner.

Illustration

A, a client, says to *B*, an attorney, "I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty, is not a criminal purpose, this communication is protected from disclosure.

Therefore, the first proviso to Sec. 126 excludes the communications made in furtherance of any illegal purpose from the purview of the protection given under sec. 126. Hence, where the client says to his attorney that he has committed forgery and that he wishes the attorney to defend his case the communication is not being in furtherance of any criminal purpose the communication is protected, under sec. 126.

Defence of a person known to be guilty is not a criminal purpose. On the other hand, if the client asks the advocate as to how to commit forgery in such a way that the client can escape punishment, the client is seeking advice to commit a crime and therefore, this communication is hit by the first proviso to sec. 126 and therefore, is not a privileged communication.

Illustrations

A, a client, says to *B*, an attorney, "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

A, being charged with embezzlement, retains *B*, an attorney, to defend him. In the course of the proceedings, *B* observes that an entry has been made in *A*'s account book, charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

By virtue of sec. 127, the provisions of s. 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

Sec. 128 further clarifies that it cannot be presumed that privilege is waived by volunteering evidence.

Sec. 129 provides that if any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in sec. 126.

Accomplice Evidence[sec 133]

An “accomplice” is a person who helps someone else to commit a crime. If he is tried jointly with the accused, he becomes a “co-accused”. An accomplice who is granted pardon under sec. 306 of the Criminal Procedure Code, 1973 to give evidence for the prosecution is called an “approver”.
Sec. 133 provides that an accomplice shall be a competent witness against an accused person. Sec. 133 further clarifies that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

But it has now become almost a universal rule of practice not to base a conviction on the testimony of an accomplice unless it is corroborated in material particulars. As to the amount of corroboration which is necessary, no hard and fast rule can be laid down. It will depend upon various factors, such as the nature of the crime, the nature of the accomplice’s evidence, the extent of his complicity and so forth.

Examination of Witnesses[sections135-137]

Examination of witnesses refers to the process of adducing oral evidence in the Court.

Order of Examination

1. Examination-in-chief
2. Cross-examination and
3. Re-examination.

Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross- examined, then (if the party calling him so desires) re-examined.

Examination in Chief

Examination in chief is the first stage wherein the questions are asked to the witness by the advocate representing the party on whose side the witness is giving evidence. The purpose of examination in chief is to disclose the case of the party and to prove it, and also to disprove the case of the opposite side. Evidence given through affidavit is equivalent to the examination in chief of the deponent.

Cross Examination

After the examination in chief the next stage is to cross examination wherein the witness will be asked question by the advocate of the opposite party. The purpose of cross examination is to disclose the case of the opposite party conducting cross

examination, to prove the case of that opposite party and more important is to disprove the case of the party on whose side the witness is giving evidence.

Cross examination is the best guarantee of truth. The advocate conducting the cross examination can skillfully reveals the falsity or error in the evidence given by the witness in his examination in chief. Therefore, cross examination is the most valuable right of the opposite party. If the evidence is given through affidavit, the deponent has to be appear for cross examination if demanded by the opposite party, except in the cases in which his identity is sought to be concealed. Where the opposite party is a notorious person such as a criminal or terrorist, or a powerful person such as a politician, the identity of the witness is to be concealed. This is necessary not only for the protection of the witness and his family members against risk to their lives and properties, but is also necessary in the public interest. If the witnesses are not protected, no one will be forthcoming to give evidence against notorious or powerful persons, and as a result they will find themselves free to commit offences.

Cross examination is also necessary in view of *audi alteram partem* rule. Therefore, if opportunity of cross examination is not available evidence of the witness cannot be considered. Thus, if after the examination in chief, the cross examination is deferred to some other day, and on the adjourned date, if the witness does not present himself for cross examination and therefore, if cross examination is not possible the evidence of the witness given in the examination in chief will have to be struck off the record and same cannot be considered for deciding the case

Re Examination

Re examination is directed to the explanation of matter referred to in cross examination and mainly it is be confined to the resolving of ambiguity between examination in chief and cross examination. If such matter is to be introduced in re-examination, permission of the court is necessary. If such matter is introduced with the permission of the court, the opposite party will get a right of cross-examination on those points.

Leading Questions[Sections 141-143]

Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

They may be asked in cross-examination.

Generally, they cannot be asked in examination-in-chief and in re-examination.
Exception to the above general rule are:

1. When they are not objected to by the opposite party [Sec. 142]
2. When they are permitted by the Court [Sec. 142]
   (a) When they are introductory facts;
   (b) When they are undisputed facts; or
   (c) When they are, in the opinion of the Court sufficiently proved.
3. When the witness is declared hostile.

Leading questions may be asked by the Court exercising its power to examine the witness under sec. 165

Impeaching credit of witness[Sec.155]

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 1*[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

1. 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

2. 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 admissible.

Question by party to his own witness

Hostile Witness [Sec.154]

A witness who readily gives answers desired by the advocate examining him is called a 'favourable witness', because his answers are favourable to the party calling him to give evidence.

A witness who is reluctant or refuses to give such answers is called a 'hostile witness', because of his hostile attitude towards the advocate examining him.

Normally the same witness is favourable and hostile: favourable during examination-in-chief and re-examination, and hostile during cross-examination. However, at times, especially in criminal case, a witness may turn hostile during examination-in-chief itself.

In such cases, the advocate for the party calling him, may, with the permission of Court under sec. 154, ask questions which are permissible in cross-examination.

Refreshing Memory[Sec.159]

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.

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.

Proviso to sec. 159 permits an expert to refresh his memory by reference to professional treatises.

Sec. 160 provides that a witness may also testify to facts mentioned in any such document as is mentioned in sec. 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 knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Right of Adverse Party

Where a party uses any writing to refresh its memory while giving evidence, sec. 161 gives a right to the adverse party to inspect that writing. Any writing referred to under the provisions secs. 159 and 150 must be produced and shown to the adverse party as if he requires it. Such party may, if he pleases, cross-examine the witness thereupon.