

INDIAN EVIDENCE ACT, 1872

INTRODUCTION: -The law of evidence is the most important branch of adjective law. It is to legal practice what logic is to all reasoning. Without it, trials might be infinitely prolonged to the great detriment of the public and the vexation and expense of suitors. It is by this that the judge separates the wheat from the chaff among the mass of facts that are brought before him, decides upon their just and mutual bearing, learns to draw correct inferences from circumstances, and to weigh the value of direct testimony.

The Evidence Act codifies the rules of English law of evidence with such modification as are rendered necessary by the peculiar circumstances of this country.

The main principles which underlie the law of evidence are:-

- Evidence must be confined to the matters in issue,
- Hearsay evidence must not be admitted, and
- The best evidence must be given in all cases.
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The evidence Act is divided into three parts comprising of eleven chapters—

Part I- consists of two Chapters dealing with definitions and relevancy of facts.

Part II comprises Chapters III to V which provide for proof of facts by oral or documentary evidence.

Part III embodies Chapters VI to XI which contain rules for the production of evidence in court, the effect of presumptions and the duties of the court in dealing with the evidence produced before it.

The functions of Court of Justice are two-fold:-

- To ascertain the existence or non-existence of certain facts, and
- To apply the substantive law to the ascertained facts and to declare the rights and liabilities of the parties.

For this, the court has to collect, peruse, analyse and sift the evidential material brought before it. The means whereby the court informs itself of the existence of these facts is called Evidence.

JURIST PROPOSITION

- ▶ ‘Evidence’ is derived from the Latin term “Evidere” which means - “to show clearly, to make plainly certain, to ascertain, to prove”
- ▶ **Taylor says-** (functional description of court process)
- ▶ “The word ‘evidence’ includes all legal means, exclusive of mere arguments, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation.”
- ▶ **Classical exposition of Bentham-**
- ▶ “Any matter of fact, the effect or tendency of which is to produce in the mind a persuasion, affirmative or disaffirmative of the existence of some other matter of fact.” (comprehends both physical and psychological facts)

Evidence may bear two meanings or refer to –

- MEANS – that tend to create a belief in the mind of judge; and
- FINAL BELIEF – actually created in his mind, known as PROOF.

“*PROOF IS THE END AND EVIDENCE IS THE MEANS TO PROOF*”. In the Indian Evidence Act, 1872, the word ‘Evidence’ is used in the sense of “Means”.

STATUTORU INTERPRETATION

Sec-3 of the Indian Evidence Act, 1872 reads:

EVIDENCE means and includes –

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

Court need not concern itself with the method by which such evidence is obtained.
(Pushpa Devi M. Jatia vs. M.L.Wadhwan)

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

OBJECT OF LAW OF EVIDENCE

- ▶ Ascertaining controverted questions of fact in judicial proceedings. Evidence is to a judicial investigation what Logic is to reasoning.
- ▶ To prevent laxity in the admissibility of evidence.
- ▶ **CARDINAL PRINCIPLES OF LAW OF EVIDENCE:**
 - i) Evidence must be confined to the matter in issue.
 - ii) Hearsay evidence must not be admitted.
 - iii) Best evidence must be given in all cases.
 - iv) Facts judicially noticeable need not be proved.(S-56)

V) Facts admitted need not be proved. (S-58)

CLASSIFICATION OF EVIDENCE

Evidence may be divided into –

- I. Direct Evidence and
- II. Circumstantial Evidence.

- ▶ I) Oral Evidence (S-60)
- ▶ II) Documentary Evidence. (Ss-61 to 65)
 - ▶ Primary Evidence (Ss-62/64)
 - ▶ Secondary Evidence. (Ss-63/65)

- ▶ The Indian Evidence Act, 1872 *is divided into 3 parts, 11 chapters and comprises of 167 sections.*
- ▶ Part-I answers the question '*what facts may or may not be proved?*' (Ss-1 to 55)
- ▶ Part-II deals with '*what sort of evidence is to be given of these facts?*' (Ss-56 to 100)
- ▶ Part-III covers '*by whom and in what manner the facts are to be proved?*' (Ss-101 to 167)
- ▶ **Sec-5 to 55 deal with RELEVANCY and**
- ▶ **Sec-56 to 167 deal with the ADMISSIBILITY.**

EXTENT AND APPLICATION OF THE INDIAN EVIDENCE ACT, 1872



Sec - 1

- ▶ The Indian Evidence Act, 1872 came into force on 1st September, 1872.
- ▶ It applies to the whole of India except J & K.
 - ▶ It applies to all JUDICIAL PROCEEDINGS in or before a court, including court Martials under the Army Act, 1950, The Navy Act, 1957 and the Air Force Act, 1950.

Not applicable to –

- ▶ i) proceedings under The Army Act, The Naval Discipline Act, 1934 and the Air Force Act passed by the British Parliament.
- ▶ ii) Affidavits
- ▶ iii) Arbitration proceedings.
 - ▶ The provisions of this Act are not applicable to Departmental Inquiries / Domestic Inquiries/Commissions of Inquiries / Administrative Tribunals.
- ▶ Refer to Court – Judicial Proceedings – Taking of evidence on oath.

1. Interpretation (Clause (Sec.3))

1. Court
2. Fact
3. Relevant Fact
4. Facts in Issue
5. Document
6. Evidence
7. Proved
8. Disproved
9. Not Proved; and
10. Indian.

2. Presumptions (Sec.4)

(May Presume, Shall Presume and Conclusive Proof).

1. INTERPRETATION CLAUSE (Section-3)

In this Act, the following words and expressions are used in the following senses,, unless a contrary intention appears from the context.

The words and expressions which are used in the sense in which they are defined in the Evidence Act have to be understood only in that sense unless a contrary intention appears from the context. For example, the expression ‘court’ has to be understood only in the sense in which it is defined in Sec. 3, But the expression ‘court’ may also mean a tennis court, a badminton court if used in different contexts.

1. Court (Sec.3):

According to Sec.3 of the Indian Evidence Act, 1872., ‘Court’ includes ‘all Judges and Magistrates and all person except arbitrators, legally authorized to take evidence’.

Etymologically the word ‘court’ means King’s Durbar. It is also understood in the sense of: (1) the place where justice is administered, and (2) the person or persons who administer justice. The expression ‘court’ is defined in the Evidence Act in the latter sense.

According to the definition given in Sec.3 of the Act the court does not mean the four walls of the premises where justices is administered but it means and includes all Judges, Magistrates and such other persons who are legally authorized to take evidence.

The above definition under Sec.3 is not exhaustive. The expression ‘court’ is not confined only to regular courts. It also includes any person who administers justice and is authorised to take evidence.

Eg.: Commissioners appointed under the Code of Civil procedure, 1908 and the Code of Criminal Procedure, 1973.

2. Fact (Sec.3):

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

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

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

Illustrations:

- i. That a person heard or saw something.
- ii. That person said certain words.

2. any mental condition of which any person is conscious

Illustrations:

- i. A person has an intention to commit murder.
- ii. That a man has certain reputation.

Rights and liabilities in a judicial proceedings emerge (arise) out of facts. Sec.3 categorizes facts into: (i) Physical Facts; and (ii) Psychological Facts.

- (i) **Physical Facts:** – It means and includes anything, state of thing or relation of things, capable of being perceived by sense. In other words, all facts, which are subject to

perception by bodily senses, are 'Physical Facts'. They are also known as external facts.

- (ii) **Psychological facts:** – They are also known as 'internal facts'. Those facts, which cannot be perceived by senses, are 'Psychological Facts'.
Eg.: intention (means area) knowledge, good faith, fraud etc.

3. Relevant Fact (Sec.3):

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

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

Kinds of relevancy:

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

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

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

- i. Facts connected with facts in issue or relevant facts.
- ii. Facts to the issue as admission (Ss.17-23) and confessions (Ss.24-30).
- iii. Statements under special circumstances (Ss.34-38).
- iv. Judgments (Ss.40 and 41).
- v. Opinion of third person (Ss.45-51), and
- vi. Character of Parties (Ss.52-55).

Facts in Issue (Sec.3):

The expression 'Facts in issue' means and includes— any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied 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.

Illustrations:

'A' is accused of the murder of 'B'

At his trial the following facts may be in issue:

That A caused B's death; That A intended to cause B's death; That A 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.

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

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

Eg.: A is accused of murdering B. At trial, the following facts may be in issue.

That A caused B's death. (It refers to the question, whether A has caused the death of B. If the answer is 'no', A is discharged/acquitted. If the answer is 'yes' the following question will arise).

That A intended to cause B's death. (If A caused B's death, the next question arises is, whether A had an intention to cause B's death or not. If the intention (mens rea/mental element) is present, it is murder or culpable homicide and A is awarded serious punishment i.e. death or life imprisonment. Otherwise (if intention/mens rea is absent) it amounts to accident, which is a defence Under Sec.80 I.P.C. If the accident is by negligence, the punishment is up to 2 years imprisonment or fine or both).

That A had received grave and sudden provocation from B. (It refers to the question, whether B is instrumental/responsible for such a grave and sudden provocation by A, amounting to cause B's death).

That at the time of committing the act, whether A was incapable of knowing the nature and extent of the consequences (of his act) by reason of unsoundness or other. (Even if A caused B's death intentionally, A may plead the defence, on the ground that he was incapable of knowing the nature and extent of consequence of the act was doing, due to

insanity under Sec.84 I.P.C., Drunkenness under Sec.85 & 86 I.P.C. etc.). In short, the questions, which give rise to right or liability, are called Facts in issue.

In a Criminal Proceeding, Charge contains facts in issue. Facts in issue are alleged by the prosecution and denied by the defence counsel/defendant. According to Sec.3 of the Act, facts in issue are asserted by the plaintiff and denied by the defendant. According to Sec.3 of the Act, facts in issue arise out of a legal right or liability or disability of a party to the case.

Definition: – Section 3 of the Evidence Act, defines ‘Facts in Issue’ as follows:

“Facts in issue means and includes any facts from which either by itself or in connection with other facts gives rise to the existence, non-existence, nature or extent of any right, liability asserted or denied in any suit or proceeding.”

Recording facts in issue by civil court is also a fact in issue. Answers to facts in issue are also facts in issue.

Eg.: A sues B for default against promissory note. B denies execution of promissory note. The questions and also answers in this example constitute ‘facts in issue’.

Questions:

1. Whether B executed promissory note in favour of A.
2. What is the relief that A is entitled to?

Answers

1. B executed promissory note in favour of A.
2. B is liable to pay the amount due to A.

Distinction between Facts in issue and Relevant Facts:-

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

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

5. Document (Sec.3):

The word ‘Document’ in the general parlance is understood to mean any matter written upon a paper in some language such as English, Hindi, Urdu and so on. Under the

Evidence Act it means “any matter expressed or described upon any substance, paper, stone, or anything by means of letters or marks.

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

Illustrations:

Writing is a document. Words printed, lithographed or photographed are document: A map or plan is a document: an inscription on a metal plate or stone is a document: A caricature is a document.

The word ‘Documents’ literally means “written papers”. According to Sec.3 of the Evidence Act, it means and includes matters expressed or described on all material substances by means or letters, figures or marks. For example, writing is a document, and inscription on a metal plate or stone is a document. A writing on the wall is a document. Numbers given on fixed tables and trees are document Hence, document means all material substance on which human thoughts are recorded. Documents are inanimated proofs while witnesses are animated proofs.

6. Evidence (Sec.3) :

‘Evidence’ means and includes—

1. All statements which the Court permits or requires to be made before it by Witnesses, in relation to matter of facts under inquiry; such statements are called oral evidence;
2. All document (including electronic records produced for the inspection of the Court; such documents are called documentary evidence”.

7. Proved (Sec.3):

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

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

8. Disproved (Sec.3):

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

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

9. Not Proved (Sec.3):

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

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

Distinction between Proved, Disproved and Not Proved:

Proved	Disproved	Not Proved
1. The term ‘proved’ is Positive.	1. The term ‘Disproved’ is Negative.	1. The term ‘Not Proved’ is a mean between the terms proved and disproved.
2. When a fact is proved, the court decides/gives judgment in favour of the person, who has proved it.	2. When a fact is disproved no further question arises as to its proof.	2. When a fact is not proved, it implies (gives room for further evidence either to prove or disprove the fact.

10. Indian (Sec.3.):

‘India’ means the territory of India excluding the State of Jammu and Kashmir.

{The expressions “Certifying Authority”, “digital signature”, “Digital Signature Certificate”, “electronic form”, “electronic records”, “information”, “secure electronic record”, “secure digital signature” and “subscriber” shall have the meanings respectively assigned to them in the Information Technology Act, 2000}.

**2. PRESUMPTIONS (Section–4).
(May Presume, Shall Presume and Conclusive Proof)**

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

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

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

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

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

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

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

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

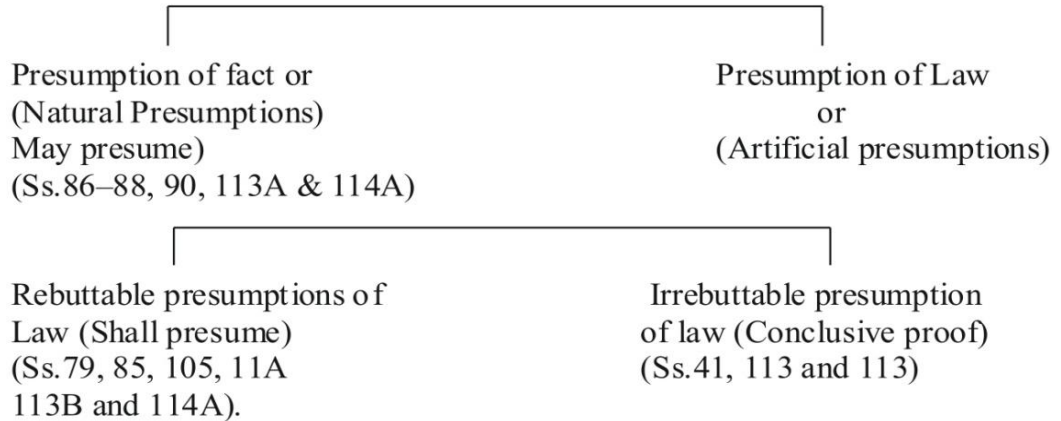
Definition:– The term ‘Presumption’, in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning from something proved or taken for granted.

Classification of Presumption:– Presumptions may be classified as follows:

1. Presumption of Fact or Natural Presumption or May Presume (Ss.86–88, 90, 133, A and 114)
2. Presumption of Law or Artificial Presumption–
 - (i) Rebuttable Presumptions of Law or Shall Presume (Ss.79–86, 189, 105, 11.A, 111.B and 114.A)
 - (ii) Irrebuttable Presumptions of Law or Conclusive Proof (Ss.41, 112 and 113).

The above classification is shown in the table given below:

PRESUMPTIONS



**May Presume or
Presumption of Fact or natural Presumption
(Sections 86–88, 90, 113.A and 114)**

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

- Sec.86 deals with “Presumption as to certified copies of foreign judicial records”.
- Sec.87 deals with “Presumption as to books, maps and charts”.
- Sec.88 deals with “Presumption as to telegraphic messages”.
- Sec.90 deals with “Presumption as to documents thirty years old”.
- Sec.113 A deals with “presumption as to abetment of suicide by a married woman”.
- Sec.114 deals with ‘Court may presume existence of certain facts’.

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

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

**Shall Presume or Rebuttable Presumptions of Law
(Sections 79–85, 89, 105, 111A, 113B and 114A)**

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

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

Sec.80	deals with “Presumption as to documents produced as record of evidence”.
Sec.81	deals with “presumption as to Gazettes, newspapers, private Acts or Parliament and other documents”.
Sec.82	deals with “Presumption as to document admissible in England without proof of seal or signature”.
Sec.83	deals with “Presumption as to maps or plans made by authority of Government”
Sec.84	deals with “Presumption as to collection of laws and reports and decisions”.
Sec.85	deals with “Presumption as to powers-of-attorney”.
Sec.89	deals with “Presumption as to due execution, etc., of documents not produced”.
Sec.105	deals with “Burden of proving that cause of accused comes within exceptions”.
Sec.111A	deals with “Presumption as to certain offences”.
Sec.113B	deals with “Presumption as to dowry death”.
Sec.114A	deals with “Presumption as to absence of consent in certain prosecution for rape”.

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

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

Conclusive Proof or Irrebuttable Presumptions of Law (Section 41, 112 & 113)

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

Sec. 41	deals with “Relevancy of certain judgments in probate, ect. Jurisdiction”.
Sec.112	deals with ‘Birth during marriage, conclusive proof of legitimacy”.
Sec.113	deals with “Proof of cession of territory”.

According to Section 4 of the Evidence Act, when one fact is declared by the Evidence Act to be conclusive proof of another, the court, on proof of that fact must regard the other having been proved and it (court) shall not permit any kind of evidence for the purpose of rebutting or disproving that fact. In other words, when a fact is proved to be

conclusive under evidence Act, the court must confirm it as conclusive and shall not permit/entertain any evidence for the purpose of disproving that fact. In such words, neither the court has discretion to call for evidence nor the party has the privilege to disprove it. Even if the party seeks to disprove it, the court has a duty, not to allow evidence for that purpose.

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

1. EVIDENCE OF ONLY FACTS IN ISSUE AND RELEVANT FACTS (Section-5)

Section 5 of the Indian Evidence Act, 182 says that, “Evidence may be given of facts in issue and relevant. It runs as follows:

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

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

Illustrations:-

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

At A’s trial the following the club;
A’s beating B with the club;
A’s causing B’s death by such beating;
A’s intention to cause B’s death.

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

Section 5 of the Evidence Act says that evidence may be given of existence or non-existence of every facts in issue and of such other facts as are hereinafter declared to be relevant and of no others. The words “and of no others” under Section 5 indicate clearly that to be admissible in evidence, a fact must be either in issue or must fall within the purview of Section 6 to 55 of the Evidence Act. Otherwise, the fact cannot be admitted in evidence.

DOCTRINE OF RES GESTAE

2. DOCTRINE OF RES GESTAE (Section-6) (Relevancy of Facts Forming Part of Same Transaction)

Section 6 of the Indian Evidence Act, 1872 lays down the provisions relating to the “Doctrine of Res Gestae” or “Relevancy of facts forming part of the same transaction”. It runs as follows—

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

Illustrations:-

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

The term “same transaction” under Section 6, has not been defined in the Evidence Act. The principle underlying Section 6, the following is sometimes termed as “Res Gestae”.

Res Gestae- Meaning:— The Doctrine of ‘Res Gestae’ is borrowed from English Law and incorporated in Section 6 of the Indian Evidence Act, 1872. The term ‘res’ is a Latin word, which means “thing” and the expression “Res Gestae” literally means “the thing done, a subject matter, a transaction or essential circumstances surrounding the subject.” In Law of Evidence, it means thing done including words spoken, forming part of the same transaction. There is a fact story behind every case before the court of law. It (fact story) contains certain acts, omissions or statements, which are not in issue, but are capable of throwing some light upon the nature of the transaction revealing its true quality and character. Such acts, omissions, or statements from part of the same transaction in issue and are allowed to be proved.

Definition:— The doctrine of ‘Res Gestae’ may be defined as those circumstances, which are automatic and undersigned incidents of a particular litigated act and which are admissible when illustrative of such acts.

Halsbury defines ‘res gaste’ as “Facts which from part of the res gestae and are consequently provable as facts relevant to the issue’ include acts, declarations and incidents which themselves constitute or accompany and explain the facts or transaction issue.

Section of 6 of the Indian Evidence Act deals with the ‘Doctrine of Res Gestae’. According to Section 6, facts though not in issue are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places. (Some times fact itself is not a fact in issue, but is connected with transaction. It may occur at the same time and place or at different times and places. In simple words, only relevant facts are admissible in evidence. However, there are

certain circumstances in which certain facts, though not relevant admissible, since they form part of the same transaction.)

E.g:- A is accused of murdering B by beating. Whatever is said or done by A or B bystanders at the beating, or shortly or after is (beating) forms part of the same transaction and is relevant.

In simple words, relevancy of facts, which form part of the same transaction, denotes 'Res Gestae'. Now the question is, what is transaction?

According to Stephen, "a transaction is a group of facts so connected together as to be referred to by single legal name such as a crime, a contract wrong or any other subject of inquiry, which may be in issue". This definition was approved in many cases.

In the above example, certain words like "I will kill you", "I will not spare you", "Oh! Please do not beat he would die" – uttered by A, B or bystanders, are not the facts in issue. But they form part of the same transaction (beating-crime) and become provable under Section-6 of the Act.

While applying the principle of Res Gestae, the courts are very rigid and cautious, since it is very difficult to understand what facts do form and what facts do not form part of the same transaction.

Case Law:-

R.V. Foster, (1941) SC 363 – The accused in the instant case was charged with manslaughter for killing a person by driving over him. A witness saw the vehicle at a high speed, but did not see the accident. On hearing cries of the victim, he reached the spot. The victim died after making a statement as to the cause of the accident. The statement was held admissible.

Conditions:- A statement to be admissible under Section 6, the following conditions are to be satisfied:

1. The statement must be a statement of fact and not of opinion.
2. The statement must have been made by a participant or witness of the transaction.
3. The statement made by a bystander is admissible, if he was present at the scene of the offence.
4. The statement must explain, elucidate or characterise the incident in the same manner.

3. MOTIVE, PREPARATION AND PREVIOUS OR SUBSEQUENT CONDUCT (Section 8)

Section 8 of the Indian Evidence Act, 1872 lays down the provisions relating to the relevancy of three principal facts, which are very important in connection with every kind of civil or criminal cases. They are:

- i. Motive
- ii. Preparation; and
- iii. Conduct.

Section 8 runs as follows:

Any fact is relevant which show or constitutes a motive or preparation for any facts 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 facts in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any facts in issue or relevant fact, and whether it was previous or subsequent thethereto.

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 his presence and hearing which affects such conduct is relevant.

Illustrations:

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

(i) Motive:- The word ‘motive’ means “the reason behind the act or conduct or an act to be achieved in doing an act.” Salmond describes motive as “the ulterior intent”. It may be good or bad.

Motive is the moving power, which impels one to do an act. In other words, a motive is that, which moves a man to do a particular act. It is and emotion of state of mind, which leads a man to do an act. Motive by itself is no cime, however heinous it may by. But once a crime has been committed, the evidence of motive becomes important. Therefore, evidence of the existence of a motive for the charged is admissible.

Motive differs from intention. Intention refers to immediate consequences, whereas, motive refers to ultimate purpose with which an act is done. An may be done with bad intention but good motive.

Eg.: A thief steals money and helps the poor. To establish liability whether civil or criminal, motive is generally irrelevant but an enquiry into motive is often of great importance, particularly in cases of circumstantial evidence. It helps in estimating probabilities and thus fixing the crime upon the proper person and in some cases, it is strongly instrumental in determining the degree of offence. It may also be an important factor in evidencing the state of mind, which is material for establishing a particular offence.

Proof of Motive:- Motive cannot always be shown directly. It has to be inferred from the facts and circumstances in evidence.

Eg.: A is tried for murder of B. The fact that B was present at the scene of the offence, while A was murdering C. B tried to extort money from A, by threatening him to reveal in the public that A murdered C are relevant.

Similarly, A sues B upon a bond for the payment of money, B denies the execution of the bond. The fact that, at the time, when the bond is alleged to have been made, B required money for a particular purpose is relevant to show his motive.

Importance of evidence of Motive:- Motive is a relevant factor in all criminal cases, whether based on the testimony of eye witnesses or circumstantial evidence. Motive alone is not sufficient evidence to establish that the crime in question has been committed by a particular person. Where a crime is to be proved beyond reasonable doubt, it is not necessary to consider the evidence of motive. Inadequacy of motive does not affect the cogent evidence but is important, whether evidence is doubtful (Matadin vs. Emperor, AIR 1931 Oudh 199).

Sukh Ram vs. State of M.P. AIR-1992 SC 758:

It was laid down in this case that absence of motive may not be relevant, where there is overwhelming evidence against the accused but it is a plus point where evidence against him is only circumstantial. It is therefore, not proper to consider the evidence of motive before examining the evidence as to commission of the crime.

(ii) Preparation:- Section 8, Para I of the Indian Evidence Act, 1872 says “Any fact is relevant which shows constitutes a motive or preparation for any fact in issue or relevant fact”

Preparation consists in arranging the means necessary for the commission of a crime. Every crime is necessarily preceded by preparation.

For the commission of any crime preparation must be there. Illustration (c) to Sec. 8, says:

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

The facts that a day prior to the murder of B, A went to the druggist shop and obtained a particular poison, is relevant to show that he made necessary preparation for committing the crime.

There are four stages in commission of a crime/an offence viz. i) Intention; ii) Preparation; iii) Attempt; and iv) Accomplishment/Completed act. The first (intention) is not punishable. The second stage in Commission of a Crime is preparation, which is punishable in creation cases. The third stage ‘attempt’ is exempted from criminal liability in rare cases in respect of minor offences. Preparation consists in devising or arranging means necessary for commission of an offence.

Mohan Lal vs. Emperor, AIR 1937 Sind 293;

In this case, the accused was charged with cheating for importing goods without paying proper customs duty by deceiving customs authorities. The evidence of his previous visits to the port trying to make certain arrangements whereby he could import goods without paying duty, was held admissible under this Section.

The preparation on part of the accused may be, to accomplish the crime, to prevent discovery of crime or it may be to aid the escape of the criminal and avert suspicion.

iii) Conduct:- The second paragraph of Sec. 8 deals with the relevancy of conduct. It says.

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

Conduct is different from the character. Conduct is what a person is in the estimation of others.

Paragraph 2 to Sec. 8 deals with the relevancy of the conduct of the following persons:

1. Parties to the suit and of their agents.
2. Person, and offence against whom is the subject of proceedings.

Against whom admissible:- The conduct of any person, if relevant under Section 8, is admissible only against himself and not against any other person. The conduct of an accused is not, therefore, admissible, against a co-accused.

Conditions of admissibility:- The conduct is admissible only if the following conditions are satisfied:

- i) It must be in reference to the suit or proceeding or in reference to any fact in issue therein or relevant thereto.
- ii) It must directly influence or be influenced by any fact in issue or relevant fact.

The conduct remains inadmissible if any one of the above two conditions is not satisfied.

Statement accompanying or explaining conduct:- Evidence can be given of a statement, which either accompanies some conduct or explains acts other than statements.

Previous Conduct:- The fact that two months before his death the deceased had lodged complaint with the police expressing apprehension of death or injury would be relevant as previous conduct of the deceased, such conduct being influenced by his fear of injury.

Habeeb Mohammed vs. State of Hyderabad, Air 1954, S.C. 51:

The allegation against the appellant was that he was acting in pursuance of the policy of the Ittehad-ul-Muslimeen and that he wanted to exterminate Hindus. It was held by the Supreme Court that he was entitled to lead evidence to show that his behavior towards the Hindus throughout his official career has been very good and could possibly think exterminating them.

Subsequent conduct:- The conduct of an accused soon after an incident plays an important role in determining the guilt of the accused and in ascertaining his state of mind. When a person is accused of a crime the fact that after the alleged crime he destroyed or concealed evidence or prevented the presence or procured the absence of persons who might have been witnesses or suborned a person to give false evidence is relevant. Where murder and robbery have been shown to be parts of the same transaction, recent and unexplained possession of stolen property would be a presumptive evidence against a person on the charge of robbery as well as murder. Disappearance of the accused after occurrence is a conduct, which in the absence of any plausible explanation might be taken into account against him.

To be an absconder under Section 8 it is not necessary that he should run away from his house. It is sufficient even if he hides himself in his own house to evade the process of law.

Balmukund Ram vs. Ghansam Ram, (1895) I.L.R. 22 Cal. 391:

In this case, the landlord of a house was found in the midnight in a room of his tenant in which the tenant and his wife were sleeping. Upon being detected the accused was subjected to severe treatment but did not utter a word of protest or show of innocence nor made any show of remonstrance. In his trial under Section 45 of I.P.C. it was held that judging from time, place and conduct of the accused it was impossible to suppose that trespass was with innocent intention.

IDENTIFICATION PARADE

4. IDENTIFICATION PARADE (Section 9) (Facts necessary to explain or introduce relevant facts)

Section 9 of the Indian Evidence Act, 1872 provides for “Facts necessary to explain or introduce relevant facts. It runs as follows:

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

Illustrations:

- (a) The question is, whether a given document is the will of A.
The state of A’s property and of his family at the date of the alleged will may be relevant facts

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

Section 9 provides for the “Identification parade of persons”. The purpose of identification test is to test the memory and veracity of a witness, who claims to identify an accused person, who is said to have participated in a crime. Section 7 and 8 of the Evidence Act deal with facts, which have some causal relation with the facts in issue or relevant facts. Whereas Section 9 of the Act deals with the facts, which are not so connected but are necessary to introduce or explain the facts in issue or relevant facts.

Identification is as important process in the administration of justice. Where the Court has to know the identity of any thing or any person, any fact, which establishes such identity is relevant. The identity of a person can be established by the evidence of person, who know him. Identification parades are held for the purpose of identifying the properties, which are subject matter on an offence or persons concerned in an offence. During the course of investigation test identification parades are arranged by the police either in jail or at some other place. Certain persons are brought to such a place and the accused person is mixed with them. In case of property, the property recovered is mixed with some other articles/properties, of similar description. Then the Magistrate or the Panch witnesses will ask the witness to identify the accused person or the property in questions. The evidence given by such witness is relevant under Section 9.

CONSPIRACY

5. CONSPIRACY (Section–10)

(Things said or done by Conspirator in reference to common design)

Section 10 of the Indian Evidence Act 1872 says that “things said or done by conspirator in reference to common design” It runs as follows

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

Illustration:

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

The fact that B procured arms in Europe for the purpose of the conspiracy, C collected money in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Kabul the money which C had collected at Calcutta, and the contents of a letter written by H giving and account of the conspiracy, and to prove A’s complicity in it, although he may have been ignorant of all of them, and although the persons by whom they ignorant of all of strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

Conspiracy– Meaning & Definition:– Etymologically, the word ‘Conspiracy’ means “breathing together”. When two or more persons agree to commit a crime, they are said to have conspired to do an illegal act or a legal act by an illegal means. Such persons are said to be conspirators. Section 120.A of the Indian Penal Code, 1860 defines ‘Criminal Conspiracy’ and Section 120.B prescribes punishment for the same.

Section 120.A defines criminal conspiracy as follows:

“When two or more persons agree to do, or cause to be done;

1. an illegal act, or
2. an act which is not illegal by illegal means, such an agreement is designated as criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation:– It is immaterial whether the illegal act is the ultimate object of such agreement or is merely incidental to that object.

Ingredients or Essentials of Conspiracy:– To constitute criminal conspiracy, the following ingredients are to be satisfied.

1. There must be an agreement between the persons, who are alleged to conspire; and
2. The agreement should be:
 - (i) for doing of an illegal act; or
 - (ii) for doing by an illegal means an act, which may not itself be illegal.

In simple words, to constitute criminal conspiracy:

1. There must be an agreement between two or more persons.
2. The agreement must be for:
 - (i) doing an illegal act; or
 - (ii) doing a lawful act by illegal means; and
3. There must exist overt act.

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

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

1. **Reasonable ground to believe the existence of Conspiracy:**– Before the application of Section 10, it must be established by independent evidence that, there is a reasonable ground to believe that two or more persons conspired to commit an offence or an actionable wrong. In other words, there must be a prima facie evidence in support of the existence of conspiracy between two or more persons.
2. **Act or statement of the Conspirator:**– Section allows evidence to be given of anything said, done or written by any one of the conspirators.

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

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

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

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

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

1. The evidence is capable of being used only for two purposes, namely:
 - (a) to prove the existence of conspiracy, and
 - (b) to prove that a particular person was a party to the conspiracy.
2. The death of the conspirator does not affect the act or statement.
3. The evidence of anything said, done or written by one conspirator cannot be rendered inadmissible merely because of the fact that the person who made the statement or had done the act is dead.
4. Acts and statements of one conspirator cannot be utilized in favour of another Conspirator.


ALIBI

6. ALIBI

(facts not otherwise relevant become relevant: Section 11)

Section 11 of the Indian Evidence Act that, ‘when facts not otherwise relevant become relevant. It reads as follows

Facts not otherwise relevant are relevant–

1. If they are inconsistent with any fact in issue or relevant fact;
2. If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable relevant fact highly probable or improbable.

Illustrations:

- (a) The question is whether A committed a crime at Calcutta on a certain day.
The fact that, on that day, A was at Lahore is relevant.

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

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

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

As stated above, Section 11 comprises of two clauses. First clause provides that the facts, which are inconsistent with the facts in issue or relevant facts, are relevant. The second clause provides that the facts, which by themselves or in connection with other facts make the existence or non-existence of any facts in issue or relevant fact highly probable or improbable, are relevant.

Clause 1 of Section 11 contains five common instances/cases of inconsistent facts as stated below:

- (i) Alibi.
- (ii) Absence or non-access of husband
- (iii) Survival of the alleged deceased.
- (iv) Commission of an offence by a third person; and
- (v) Self-infliction of harm alleged.

Among the above, alibi is of great importance.

(i) Alibi

‘Alibi’ comes under the head ‘Facts otherwise relevant becomes relevant’ as explained Section 11 of the Evidence Act.

Meaning

‘Alibi’ is a Latin term] which means “elsewhere”. The accused very often takes the plea that he was not present at the place, where the offence was committed. In other words, alibi is a defence under which a person accused of an offence alleges that he was so far away from the place of the commission of that he was so far away from the place of the commission of the offence, that he could not be guilty.

Eg.: A is accused of B’s murder on a particular day at Bombay. On that day A was Delhi, is relevant to prove alibi. He (A) has to prove that it would be impossible for him to commit murder at Bombay as he was in Delhi on the occurrence of the offence.

The plea of alibi ----- be proved with absolute certainty, offence.

In *Bhuboni Sahu v. The king*, AIR 1949 PC 257:

The privy Council held that ‘Alibi evidence through disinterested and impartial witness has a greater evidentiary value. But, in certain cases, the accused may not be able to produce such evidence. For instance, if he can produce alibi evidence at home at the time of crime. In Such cases, it is not possible through his family members. In such cases, it is not possible for him to prove the alibi through disinterested and impartial witness.

(ii) Absence or non-access of husband

Where legitimacy of a child is in question the absence or non-access of husband is a relevant fact because legitimacy of the offspring implies a begetting by the husband. (See for details Sec. 112, Evidence Act).

(iii) Survival of the alleged deceased

Where A is alleged to have killed B on a particular date the fact that after that date B was seen alive is a relevant fact as being inconsistent with this being killed on that date. (See for details Section 107 and 108 of the Evidence Act).

(iv) Commission of an offence by a third person

Where A is charged with a crime committed by himself alone, any evidence which includes that B might have committed the crime may be received. Threats by a third person or motive of such third person are generally offered to prove that he and not the accused have committed the alleged crime.

(v) Self-infliction of harm alleged

Where A is charged with murder of B, if it is proved that B has committed suicide A cannot be convicted for murder of B. Where a lover was charged with murder of a woman, whose body was found in a river the fact that during the week before her death she had actually attempted to drown herself and had been prevented from doing so was held to be relevant to show that she might have made a second attempt.

Right or Custom

7. RIGHT OR CUSTOM (Section–13)

(Facts relevant when right or custom is in questions)

Section 13 of the Indian Evidence Act, 1872 speaks about, “Facts relevant, when right or custom is in question”. It runs as follows:

Where the question is as to the existence of any right or custom, the following facts are relevant-

- (a) Any transaction by which the right or custom in questions was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence;
- (b) Particular instances, in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration

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

Right:- The word ‘right’ literally means “an interest recognised and protected”. If it is protected by the administration of justice, it is called “legal right”. Sec. 13 is concerned with legal rights only.

The word ‘right’ as used under Section 13 of the Evidence Act means, “only public and incorporeal rights such as right to ferries, right to roads, right to fisheries etc. The right of private ownership of a house or chattel is not covered by Sec. 13. However, the High Courts of Bombay, Madras and Allahabad took a different view on this point.

Custom: - Meaning & Definition: The term ‘Custom’ Means ‘Achara of usage or traditionally followed long practice by the members of a society. Manu recognized custom to be transcendent law. Custom is a good source to interpret law in the administration of justice.

A custom is a particular rule, which has existed from time immemorial and has obtained the force of law, in a particular locality. A custom is nothing but a long-standing usage.

Sec. 3, Clause (d) of the Hindu Succession Act 1956 defines a custom as follows:

The expressions ‘custom and usage’ signify Act 1956 defines a custom as follows:

The expressions ‘custom and usage’ signify any rule which having been continuously and uniformly observed for a long time, have obtained the force of law, among Hindus in any local area, tribe community, group or family:

Provided that the rule is certain and not unreasonable and opposed to Public Policy, and provided further that in the case of a rule applicable only to a family it has not been discontinued by the family.

Requisites or Essentials of a valid custom

1. Custom must be ancient (antiquity)
2. It must be continuous.
3. It must be reasonable.
4. It must be moral, equitable and in accordance with the public policy.
5. It must not be contrary to justice, equity & public policy.
6. It must not be contrary to statutory law.

1. Custom must be ancient

It is necessary that it should be ancient. It must be from time immemorial.

2. Custom must be continuous

A custom to be valid, must be continuous without any break or interruption for a long time

3. Custom must be reasonable

A custom must be good and reasonable. Unreasonable customs are void.

4. Custom must not be immoral

Custom be moral. If it is immoral, it is not treated as a law.

5. If must not be contrary to justice, equity & public policy

A custom to be valid, must not be contrary to justice equity and public policy.

6. Custom must not be contrary to Statutory Law

The last ingredient of a custom is that, it should not be contrary to justice, equity and public policy.

Proof of Custom: Section 13 makes the instances and transactions relevant to prove or disprove a custom: it has nothing to do with the mode of proof.

A custom is a mixed question of law and fact. First certain facts are to be proved and from those facts an inference of the existence of a valid custom is drawn. Where a custom is pleaded by one party and denied by the other, the onus is on the party pleading it to show its existence.

A custom may be proved or disproved in any of the following ways:

1. By opinion likely to know of its existence of having special means of knowledge thereof.
2. By statement of persons who are dead or whose attendance cannot be procured without unreasonable delay or expenses] provided they were made before any controversy as to such custom arose and were made by persons who would have been or likely to have been aware of the existence of such custom if it existed
3. By any transaction by which the custom in question was claimed, modified recognized, asserted or denied or which was inconsistent with its existence.
4. By particular instances by which the custom was claimed] recognized or exercised or knowledge of its existence was disputed, asserted or departed from.

Judgments, orders or decrees are relevant to prove a custom but they are not conclusive proof thereof. But, when a custom has been repeatedly brought to the notice of the court and judicially recognized, it becomes a part of the law of the locality where it prevails and it is not necessary to prove its attributes in each individual case.

STATE OF MIND

8. STATE OF MIND OR BODY OR BODILY FEELING (Section–14) (Facts showing existence of state of Mind or of Body or Bodily Feeling)

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

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

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

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

Illustrations:

(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

1. State of mind; and
2. State of Body or Bodily Feeling.

1. State of Mind

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

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

2. State of Body or Bodily Feeling

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

9. FACTS BEARING ON QUESTION WHETHER ACT WAS ACCIDENTAL OR INTENTIONAL (Section–15)

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

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

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

Illustrations:

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

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

Confession

CONFESSIONS (Section 24-30)

Meaning & Definition

The expression 'Confession' means "a statement made by an accused admitting his guilt: It is an admission or acknowledgement as to commission of an offence. If a person accused of an offence (accused) makes a statement against himself] it is called confession or confessional statement.

Eg: A is charged with the murder of B. If A said that he had killed B, it is a confession or confessional statement by A. Confessions are special form of admissions. Thus] it is popularly said that "All Confessions are Admissions; but all admissions are not Confessions."

The term 'Confession' has not been defined anywhere. It appears for the first time in Section 24 of the Evidence Act. According to Sir James Stephen 'a confession made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime.'

Sections 24 to 30 deal with confessions. Confessions should be voluntary. Section 24 says that confessional statement made and inadmissible. Similarly, Section 24 and 26 exclude evidence of confessional statements to police officer. Section 27 deals with how much of information received from accused may be proved. Section 28 and 29 are in the nature of exception to Section 24. Section 30 deals with the admissibility of confession of a co-accused jointly tried with the accused.

It is a rule of universal law that 'a person may be convicted on the basis of his confession made in a judicial proceeding. The underlying principle is enshrined in two Latin maxims as stated below;

1. **Confession in Judicio Omini Probatione Major Est:** It means confession in judicial proceedings is greater than any other proof'.
2. **Confession Facta in Judicio Est Plena Probatio:** It means 'confession is the absolute proof.'

Judicial and Extra-judicial Confessions

Confessions are of two kinds namely—Judicial and Extra-judicial. Confessions made during the course of judicial proceedings are called 'Judicial Confessions'. Confessions made outside the course of judicial proceedings are called 'Extra-judicial confessions'.

Evidentiary Value of Confession

Confession, whether it is judicial or extra-judicial, must be clear and unequivocal. No reliance can be placed on confessions, which are in general or vague terms. The judicial confessions of an accused is good evidence and he can be convicted on the strength of it. Law does not require that a confession must be corroborated before it can

be acted upon. It is the duty of the court to decide whether it believes a confession or not. Thus, the court must apply double test:

1. Whether the confession was perfectly voluntary?
2. If so, whether it is true and trust-worthy.

Satisfaction of the first test is a sine qua non for its admissibility in evidence. If the first test is satisfied, the Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If, on such examination and comparison the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test.

Section 24 to 30 of the Evidence Act, lay down the provisions relating to Confessions as follows:

Confessions caused by Inducement, threat or promise (Section 24)

A Confession to be admissible in evidence, it must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. A Confession made by an accused in a criminal proceeding is irrelevant, if it is caused by any inducement, threat or promise.

Eg.: If the Magistrate says the accused, 'explain, how you committed the offence, so that I will help you'. It is inadmissible.

Ingredients: To attract the prohibition enacted in Section 24 the following facts must be established:

1. that the statement in question is a confession,
2. that such confession has been made by the accused,
3. that it has been made to a person in authority,
4. that the confession has been obtained by reason of any inducement, threat or promise, proceeding from a person in authority,
5. such inducement threat or promise must have reference to the charge against the accused; and
6. the inducement, threat or promise must in the opinion of the court be sufficient to give the accused ground, which would appear to him reasonable, for supporting that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceedings against him.

It is very difficult, to lay down any hard and fast rule as to what constitutes inducement. It is for the Judge to decide in every case. An inducement may be express or implied; it need not be made to the accused directly from the person in authority.

Pyarelal Bhorgava vs. State of Rajasthan, AIR 1963 SC 1094:

The accused in the instant case was charged and tried for theft of certain official files. He was taken to the Chief Secretary, where he made confession. Later, he retracted the confession, on the ground that he was threatened with dismissal. The Supreme Court held that, the threat by the Chief Secretary was not sufficient, to cause reasonable belief in the mind of the accused and the confession was held to be admissible.

Confessions to Police Officer (Section 25)

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

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

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

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

Explanation: In this section, 'Magistrate' does not include the head of a village discharging magisterial, functions in the presidency of Fort St. George, or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.

According to Section 26, confessions made by an accused in police custody shall not be proved against him.

Confessions caused by inducement, threat or promise have been made inadmissible by Sections 24. Confessions made to a police have been declared irrelevant by Section 25 without proof of inducement, threat or promise.

How much of information received from accused in police custody may be prove (Sec.27)

Section 27 is an exemption to the preceding three Sections 24, 25 and 26. According to Section 27, when an information, given by the accused in police custody leads to the discovery of an incriminating material object, like jewellery, weapons etc. the portion of the information can be proved. The reason is such discovery guarantees truth of the information.

Eg.: A is tried for murder of B. If A, in police custody says 'I have killed B and buried the dead body in my garden'. Accordingly, if the body is found, A's statement (confession) becomes provable under Sec.27.

Section 27 runs as follows:

How much of information received from accused may be proved:

Provided that, when any fact is discovered to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Conditions:– For application of Section 27, the following conditions are to be satisfied.

1. The accused in police custody has given some information in his confessional statement.
2. Such information must relate to the discovery of certain fact relating to the commission of some offence.
3. In pursuance of such information, the police discovered certain facts.
4. The facts discovered must be connected with (or relevant to) the offence.

When the above conditions are satisfied, only that portion of the information which directly relates to the fact discovered, shall be relevant.

Thimma vs. State of Mysore, AIR 1971 SC 1871, 1971 Cr.LJ 1314 (SC):

In this case, the accused was charged with the murder of his mistress and the dead body of the lady was found in a gunny bag left in a railway compartment. The accused was arrested. He pointed out the shop where he had purchased the gunny bag and he also pointed out the coolie whom he had to be inadmissible because it leads only to the discovery of a psychological fact, and not, to the discovery of some physical fact. The word ‘discovery’ in Section 27 has been used in the sense of discovery of some material object.

As held by the Privy Council in Pulukuri Kotayya’s case, the Supreme Court in Udaibhan vs. State of U.P. AIR 1962 SC 1116 laid down that – a discovery of fact includes

- (i) the object found;
- (ii) place from which it is produced; and
- (iii) the knowledge of the accused as to its existence.

Constitutional validity of Section 27

The validity of Section 27, Indian Evidence Act, 1872 was challenged on the ground that, it violates Article 20(3) of the Indian Constitution.

According to Article 20(3) of the Indian Constitution, ‘No person accused of an offence shall be compelled to be a witness against himself’. It is the responsibility of the prosecution to prove the guilt of the accused. The constitutional validity of Section 27, Indian Evidence Act was challenged on the ground that, using information given by the accused for discovery of a fact against him, makes the accused, a witness against himself.

Before the constitution came into force, the information leading to discovery was provable and admissible, whether it was given by the accused voluntarily or against

compulsion. After the constitution came in to force, such information obtained by compulsion is not admissible on the ground that, it violates Article 20(3) of the constitution. This view was followed by A.P. High Court in Re madugula Jermaiah (AIR 1957, AP 611) Allahabad High Court in Amin vs. State (AIR 1958 All 293) and Bombay High Court in Amrut vs. State (AIR 1960 Bom, 488). But the Mysore High Court in Re Govinda Reddy (AIR 1958 Mys. 150) was of the view that Section 27 of the Evidence Act, is not controlled by Article 20(3) of the Constitution.

The above conflict was resolved by the Supreme Court in State of Bombay vs. Kati kallu Oghad (AIR 1961 SC 1808 : 1961 (2) Cr. LJ 856 (SC) that, such information obtained does not give rise to a presumption that the information was given under compulsion. It is the prosecution to find out whether the accused gave the information voluntarily or by compulsion.

Sections 28 and 29 provide for exceptions to Section 24. That is to say that confessions made after removal of impression caused by inducement, threat or promise are relevant (Section 28), and confession under the promise of secrecy (Section 29).

Consideration of proved confession affecting person making it and others jointly under trial for same offence (Section 30)

When more person than one are being jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such person is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Explanation: 'Offence' as used in this section, includes the abetment of, or attempt to commit the offence.

Illustrations;

(a) A and B are jointly tried for the murder of C. It is proved that A said, 'B and I murdered C'. The Court may consider the effect of this confession as against B.

Admissions not conclusive proof, but may stop (Section 31)

Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provision hereinafter contained.

Distinction between Admission and Confession

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

DYING DECLARATION

DYING DECLARATION

(STATEMENTS OF PERSONS WHO CANNOT BE CALLED AS WITNESSES)

Of relevancy of facts provided for under Sections 5-55 of the Indian Evidence Act, 1872, Section 32 and 33 of the Act lay down the provision relating to “Statements by person, who cannot be called as witnesses”. Section 32 says that “Cases in which statement of relevant fact by person, who is dead or cannot be found etc. is relevant (Dying declaration). Section 33 deals with “Relevancy of certain evidence for proving, in subsequent proceeding, the truth of certain facts therein stated”.

Section 32 makes relevant statement made by a person.

- (i) Who is dead;
- (ii) Who cannot be found;
- (iii) Who has become incapable of giving evidence; or
- (iv) Whose attendance cannot be procured without unreasonable delay or expenses.

Dying Declaration: Clause (1) Section 32 of the Indian Evidence Act, 1872 lays down the provision relating to ‘Dying Declaration’. It is provable in Evidence.

Meaning and Definition: “A dying declaration is a declaration written or verbal 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.”

Eg.: A has been attacked by B. If A, shortly before death, makes a declaration holding B, responsible for his injuries, it is called ‘dying declaration’.

Section 32(1) of the Act defines ‘dying declaration’ as ‘statements written or verbal, of relevant facts made by a person, who is dead or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expenses, which under the circumstance of the case, appears to the court unreasonable, are themselves relevant facts in the following cases.

1. When it relates to cause of death; or
2. When it is made in course of business; or
3. Against the interest of the maker; or
4. Gives opinion as to public right or custom or matters of general interest; or
5. Relates to existence of relationship; or
6. When it is made in will or deed relating to the family affairs; or
7. In document relating to transaction mentioned in Section 13(a); or
8. When it is made by several person and expresses feeling relevant to matter in question.

In fine, according to Section 32(1), “dying declaration is a statement oral/verbal or written made by a person who is dead or cannot be found or written made by a person who is dead or cannot be found or incapable of giving evidence or whose attendance involves delay or expensive under the circumstances stated above, which the court considers reasonable.”

Dying declaration is of the utmost importance and the evidence as to it should be as exact and full as possible. The general rule is, ‘hearsay evidence is no evidence and is not admissible in evidence’. Sections 32 and 33 of the Evidence Act are among the exceptions, as such dying declaration is an exception to this general rule.

Reasons for admissibility of dying declaration:– Dying declaration is admissible for the following two reasons.

1. As the victim is sole eye witness, exclusion of his evidence defeats the ends of justice.
2. Declarations made by a person under expectation of death are presumed to be true.

Underlying principle/maxim:– The admissibility of dying declaration is based on the maxim ‘**Nemo Moritur Prasumitur Mentiri**’. It means that a man will not meet his maker with a lie in his mouth. In other words, a person who is about to die would not lie. Truth sits on the lips of a person who is about to die. Such person would not lie, because he has to face his Maker, the Almighty, in the other world. This is the reason, why dying declaration is made admissible under Section 32(1).

Though dying declarations are not statements made on oath and no cross-examination is possible, yet because of the solemnity of the occasion, which ensures truth more than a positive oath they are received in evidence. Absolute guarantee of truth cannot be expected even in case of statements made on oath in a Court.

The second reason for admissibility of dying declarations is necessity. Where is the only evidence available under the circumstances, rejection of it may result in injustice. The person, being no more in the world cannot be called in the Court to testify and other evidence is not available to help in determining the truth.

Conditions:- For admissibility of dying declaration, the following conditions are to be satisfied.

1. The person making statement must have died.
2. Injuries must have caused the death.
3. Statement must have been made as to cause of his death or as to circumstances of the transaction resulting in his death.
4. The cause of his death must be in question.
5. The person making statement must be in a fit condition to make the statement.
6. The statement must be complete.
7. Declaration must be competent.

1. The declarant must have died

Dying declaration to be admissible, the declarant must be dead. If the declarant survives, it is not admissible under Sec.32(1) although it is admissible under Sec. 157 (Corroborative evidence).

Maqsoodan vs. State of U.P, AIR 1983 SC 126:

In this case, survival of the declarant was held to be admissible under Section 157 for corroborating his testimony in the court.

Ram Prasad vs. State of Maharashtra, AIR 1999 SC 1969:

In this case, dying declaration was recorded by the Judicial Magistrate. But, the declarant survived. It was held that the statement/declaration could not be used under Section 32, but it could be used to corroborate his evidence under Section 157 of the Evidence Act.

The term 'death' under Section 32 includes both suicidal and homicidal deaths (Kans Raj v. State of Punjab, AIR 2000 SC 2324, Sudhakar vs. State of Maharashtra, AIR 2000 SC 2602).

2. Injuries must have caused the death

The person (declarant) must have been dead as a consequence of the injuries inflicted, but not as a consequence of some other reason or ailment.

Moti Singh vs. State of U.P, AIR 1964 SC 900:

It was held in this case that, if the person survives, his statement cannot be said to be the statement as to cause of his death.

3. Statement as to cause of death or circumstances leading to death

The statement must relate to the cause of his death or circumstances of the case resulting in his death. Statements which relate to cause or circumstances not responsible for his death are not admissible as dying declaration under the Clause (1) of Section 32.

4. Cause of death must be in question

The statement as to cause of the death of the deceased person will be relevant only if the cause of his death is in question.

5. The declarant must be in fit condition to make the declaration

Dying declaration to be admissible under Section 32(1), the person making the statement must be in a fit condition to make the statement.

6. The statement must be complete

To be admissible in evidence, dying declaration must be complete. This is a matter of common sense because the deceased might have added something in contradiction to things already stated. It is, therefore, necessary that incomplete declaration should not be received in evidence.

7. Competence of declarant

The admissibility of statement under Section 2 is based on the assumption that the maker of the statement was competent to take oath as a witness.

Evidentiary Value of Dying Declaration:– The evidentiary value of the dying declaration will vary according to the circumstances of a particular case in which it is made. While considering the value of dying declaration, the courts take into account the whole, but not a part of it. It cannot be allowed as sole basis for conviction for the following reasons.

1. The declarant is not subject to cross-examination.
 2. The declarant may be in a state of confusion.
 3. The declarant may take last opportunity to take revenge against his enemies.
- The declaration must be as to the cause of death or as to any of the circumstances that resulted in death.

Distinction between English Law and Indian Law

1. In English Law, a dying declaration is provable only in criminal cases (homicide cases). While in Indian Law, it is provable both in civil and criminal cases.
2. Under English Law, the declarant must die without a ray of hope of survival. But according to para 2 of Section 32(1) statements made not under expectation of death are relevant and admissible.
3. According to English Law, the declarant must be competent. A statement/declaration by an infant/child is not admissible. But in Indian Law, every person whether major or not is competent to make a declaration.

Section 33

Section 33 of the Evidence Act deals with ‘relevancy of certain evidence for

proving, in subsequent proceedings, the truth of certain facts therein stated’. It runs as follows:

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 state of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without ‘an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided—

That the proceeding was between the same parties or their representatives in interest.

That the adverse party in the first proceeding had the right and opportunity to cross-examine.

That the questions’ in issue were substantially the same in the first as in the second proceedings.

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

Section 33 recognises the relevancy of evidence given by a witness in a judicial proceeding to prove a particular fact when such witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or whose presence cannot be obtained without an amount of delay or expense. It provides that the truthness of a fact can be proved by using the evidence given by a witness relating to that fact. However such evidence can be used to prove the said fact either in the same case or in another case, on the circumstances laid down by the said section.

Conditions:- For application of Section 33, the following conditions (as applicable to Section 32) are to be satisfied.

- (i) the maker of the statement is dead; or
- (ii) cannot be found; or
- (iii) has become incapable of giving evidence; or
- (iv) his evidence cannot be procured without unreasonable delay or expense; or
- (v) is kept out of the ‘way of the adverse party.

The first 4 conditions are common to Section 32 and 33. But the 5th condition is peculiar to Section 33.

Judgments

JUDGMENTS

(JUDGMENTS OF COURTS OF JUSTICE, WHEN RELEVANT)

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

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

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

1. Judgments in rem

Judgments affecting the legal status of some subject matters, persons or things are called 'Judgments in rem'. E.g. Divorce Court Judgment, grant of probate or administration etc. Such judgments are conclusive evidence against all the persons, whether parties to it or not.

2. Judgments in personam

Judgments in personam are all the ordinary judgments not affecting the status of any subject matter, any person or any thing. In such judgments, the rights of the parties to the suit or proceedings are determined.

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

Judgments

Distinction between

Distinction between 'Judgment in rem' and 'Judgment in personam':	
Judgments in Rem	Judgments in Personam
<p>1. Judgments in rem is adjudication pronounced upon the status of a person or a thing by a competent or a thing by a competent court to the world generally.</p>	<p>1. Judgment in personam are all the ordinary judgments not affecting the status of any subject matter, any person or anything.</p>
<p>2. Judgment of a court in exercise of probate,</p>	<p>2. The judgments of the civil court are the</p>

matrimonial or insolvency jurisdiction confirming or taking away any legal character are judgments in rem.	judgments in personam.
3. It is binding on all persons, whether they are parties to those proceedings or not.	3. It is binding on the parties to the suit only.

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

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

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

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

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

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

Such judgment, order decree is conclusive proof

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

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

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

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

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

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

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

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

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

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

Illustration:

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

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

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

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

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

Illustrations:

- (a) A and B separately sue C for a libel which reflects upon each of them. C in each case says, that matter alleged to be libelous is true, and the circumstances are such that it is probably true in each case, or in neither.
A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.
- (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.
- (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 facts that B prosecuted A for libel and that A was convicted and sentenced is relevant under Section 8 as showing the motive for the facts in issue.

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

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

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

FACT
↓

Sec-3: Interpretation.

FACT means and includes –

- ▶ i) Anything, state of things or relation of things capable of being perceived by the senses **Called as Physical Facts.**
- ▶ ii) Any mental condition of which any person is conscious ... **.called as Psychological facts.**

Fact may be divided into–

- i) Fact in issue (FACTUM PROBANDUM) and, ii) Relevant Fact (FACTUM PROBANS)/Evidentiary fact.

Facts are the subjects of judicial inquiry and form the fulcrum of adjudication. A fact may be not only the object of perception by any one of the five senses, but also the subject of consciousness.

STANDERED OF PROOF

S-3 – PROVED – DISPROVED – NOT PROVED

▶ These terms deal with the degree or standard of proof. What and how much proof is necessary to convince the judge of a fact in issue depends upon many circumstances. These terms assess the degree of certainty to be arrived at before a fact is said to be proved, disproved or not proved.

‘Proved’ refers to a state when the court believes in the existence of a fact absolutely, or considers its existence highly probable that prudent man would act on the assumption of its existence.

‘Disproved’ indicates that the material is sufficient to establish the non-existence of the fact asserted. Court believes in the non-existence of a fact or its existence highly improbable.

‘Not proved’ implies that the material on record falls short of the requisite proof. A fact is said to be not proved when it is neither proved nor disproved.

- ▶ Standard of proof in civil cases – Preponderance of probability.
- ▶ Standard of proof in criminal cases – Proof beyond any shadow of doubt.

Proof does not mean proof to rigid mathematical demonstrations, but must be such to induce an apprehension in a reasonable man to come to the conclusion.

Suspicion cannot take the place of proof. “The sea of suspicion has no shore and the court that embarks upon it is without rudder and compass.” – Justice Caldwell.

RELEVANT

▶ One fact is said to be relevant to another when the one is connected with the other in any of the ways mentioned from S-5 to 55 of on relevancy. So only those facts that fall within the sweep of S-6 to 55 will be known as Relevant Facts.

▶ S-5 of the I.E. Act, 1872 lays down the rule of relevancy. Evidence may be given in respect of (i) fact in issue and (ii) relevant Fact falling within the sphere of section 5 to 55 and OF NO OTHERS.

▶ Thus opinions and individual presumptions cannot form evidence except to the extent permitted by the Indian Evidence Act, 1872.

Facts which need not to be proved:-

- ▶ **Section 56 to 58 describe the situations in which facts are not required to be proved.**
- ▶ S-56 Facts which are judicially noticeable by the court need not be proved. (Take judicial notice means- recognition without proof of something as existing or as being true For Examples court taking judicial notice that the law and order situation has deteriorated over the years and continues to be worsening fast and, therefore, it is an importune time to think of reconsidering death penalty (Shashi Nayar v/s Union Of India, AIR 1992 SC 395. The court can take judicial cognizance of the fact that a certain area is terrorist-stricken etc.
- ▶ S-57 Facts of which court must take judicial notice. All Indian laws in force, all public acts passed by the U.K. Govt., Articles of war for all the three forces in India etc.)
- ▶ S-58 Facts which are admitted by the parties need not be proved, provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions. This section deals with admission-at or before the hearing.

ORAL EVIDENCE:-

S-59 says that all facts - except the contents of documents or electronic records - may be proved by oral evidence.

If a fact is to be proved by oral evidence, the evidence must be of a person who has directly perceived the facts which he testifies or who has the personal knowledge of the facts i.e. oral evidence must be 'direct'. (S-60)

- ▶ S-3 provides that "all statements which the court permits or requires to be made before it by witnesses in relation to the matters of fact under inquiry" – called oral evidence.
- ▶ Statements of facts made by the parties to the suit or proceedings, and witnesses constitute oral evidence.
- ▶ Statements made by gestures may be considered as oral evidence. Ex. R. vs. Abdullah.

DOCUMENTARY EVIDENCE:-

S-3: DOCUMENT – "Any matter expressed or described upon any substance by means of letters, figures or which may be used, for the purpose of recording that matter." Ex. A writing is a document.

- Words printed, lithographed or photographed are documents.
- A map or plan is a documents;
- An inscription on a metal plate or stone is a document.
- A caricature is a document.

Thus the term includes all material substances on which the thoughts of men are represented by writing or any other species of conventional work or symbol.

This definition is similar to the definition in sec.29 of the I.P.C.

VOX AUDIT PETIT – LITERA SCRIPTA MANET – The law of evidence recognizes the superior credibility of the documentary evidence as against oral evidence.

PROOF OF CONTAINMENT OF DOCUMENT:-

- S-61 says that the contents of a document may be proved either by primary or by secondary evidence.
- S-62: PRIMARY EVIDENCE means ‘the document itself produced for the inspection of the court’.

Explanation-1.

- Where a document is in several parts, each part is primary evidence. If executed in counterparts, each counterpart is primary evidence.

Explanation-2:

- Where documents are made one uniform process, i.e. printing, lithograph or photography, each is primary evidence of the contents of the documents.

SECONDARY EVIDENCE:-

S-63 – Secondary Evidence means and includes –

- ▶ i) Certified copies of the original documents.
- ▶ Copies made from the original by mechanical process which assure the accuracy of the copy,
- ▶ copies made from or compared with the original,
- ▶ Counterpart of a document against the party who did not sign it,
- ▶ V) Oral account of the contents of a document given by a person who has himself seen the document.

This section is not exhaustive of all kinds of secondary evidence.

WHEN SECONDARY EVIDENCE IS ADMISSIBLE:-

S-65 provides that Secondary Evidence may be given in the following cases: - (i) When a document is in possession of –

- (a) The person against whom it is to be proved (b) any person out of reach or not subject to the process of the court
- (c) Person legally bound to produce does not produce even after notice.

- ii) When the contents of the original are admitted in writing by the party against whom to be proved,
- iii) When the original is lost or destroyed not out of one's own negligence,
- iv) When the original is not easily movable,
- v) When the original is a public document,
- vi) When the certified copy of the original is permitted by the Act,
- vii) When the original consists of numerous accounts and unwieldy for perusal, a summary result of such documents.

Ss-45 to 51 dealing with 'Expert Evidence' or opinions of third persons constitute exception to the rule of relevancy of S-5 of I.E. Act, 1872.

- ▶ S-45 provides that when the court has to take opinion upon a point
 - ▶ i) of foreign law
 - ▶ ii) of science or art
 - ▶ iii) identity of hand writing
 - ▶ iv) Finger impressions
- ▶ The opinions of 'persons especially skilled' on that point will be considered as relevant. Such persons are called Experts. (Expert opinion is only opinion evidence and is not helpful to the court in interpretation of the law- "**Forest Range officer v/s Mohammed Ali, AIR 1994 SC 120**". *(Both under section 45 and section 47 the evidence is of opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience.)*)

Who is an expert:-

An expert witness is one who has devoted time and study to a special branch of learning, and thus is specially skilled on those points on which he is asked to state his opinion. ("Ramesh Chandra Agarwal v/s Regency Hospital Ltd., AIR 2010 SC 806")

Principle:- It is a general rule that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject- matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgement upon it without such assistance. In all other cases witnesses must speak only of facts and not of opinion or inference. The supreme court of India in "**Mubarik Ali Ahmed v/s The State of Bombay, AIR 1957 SC 857**" - "A witness has to state the facts which he has seen, heard or perceived and not the conclusion which he has formed on observing or perceiving them (sec.60). The function of the drawing inference is a judicial function and must be performed by the court."

- ▶ **Ex:** whether the death of a person is caused by poison? The opinion of an expert doctor as to the symptom produced by the poison may be considered as relevant.
- ▶ Opinion of a professional goldsmith as to the purity of gold may be relevant as expert evidence. (Abdul Rahaman vs. State of Mysore- (1972)
- ▶ **Section 45A-** When in an proceeding, the court has to form an opinion on any matter relating to any information transmitted or sought in any computer resource or any other electronic or digital form, the **opinion of the Examiner of Electronic Evidence referred to in section 79A of the I.T. Act, 2000 is a relevant fact.**
- ▶ Muslim law is not a foreign law in India.
- ▶ **S-46** says that facts bearing upon opinion of experts are relevant. (The opinion of an expert is **open to corroboration or rebuttal**)
- ▶ **Ex.** The question whether A was poisoned by certain poison. The fact that persons who were poisoned by the same poison had exhibited the same symptoms is relevant.

S-47 says when the opinion as to handwriting would be relevant. - Opinion of any person acquainted with the handwriting of the person supposed to have written or signed, is relevant.

- ▶ may be proved –
 - ▶ i) By the evidence of the writer himself
 - ▶ ii) by the opinion of an expert
 - ▶ iii) by the evidence of a person who is acquainted with the handwriting of the person in question (Shankeappa v/s Sushilabai, AIR 1984 Kant 112)
 - ▶ iv) by the court under Sec-73 itself comparing the handwriting in question with the proven handwriting.
 - ▶ In case of digital signature, by the opinion of the Certifying Authority. (section 47A)
 - ▶ S-48 makes relevant the opinions of persons who know the existence of a general right or custom. (**Ex:-The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.**)
 - ▶ Custom:-Custom is an unwritten law established by usage. Usage is a fact and custom is a law. There can be usage without custom, but not custom without usage.
 - ▶ S-49 refers to opinions as to usages, tenets etc.- opinions of persons having special means of knowledge thereon are relevant.
 - ▶ Usages: - These will include usages of trade and agriculture, mercantile usage and any usage common to a body of men of family. Usages of family will include, for instance. The custom of any peculiar course of descent.
 - ▶ Tenets: - This will include any opinion, principle, dogma or doctrine which is held or maintained by a body of men. It will apply to religion, politics, science, etc.
 - ▶ Special means of knowledge: - Means that the person must have had opportunities for acquiring knowledge of a usage or custom and that he had acquired the necessary knowledge.
- S-50 says when the court has to form an opinion as to the relationship of one person with another, opinion expressed by conduct as to such relationship by any family member or person having special means of knowledge on that subject is relevant.
- ▶ Ex. Whether A was the legitimate child of B. Whether A and B were married.
 - ▶ S-51 says that whenever the opinion of a person is relevant, the grounds on which such opinion is based are also relevant. (Opinion means a belief or a conviction resulting from what one thinks on a particular question, it is something more than mere retailing of gossip or of hearsay.)

Character when relevant:-

- ▶ S-52 In civil cases evidence of the character of any party to the suit to prove the probability or improbability of any conduct imputed to him is irrelevant. (In respect of the character of a party, two distinction must be drawn, namely between the cases when the character is in issue and is not in issue and when the cause is civil or criminal.
- ▶ S-53 In criminal proceedings the fact that the person accused is of a good character is relevant (In criminal cases if the evidence were in even balance, previous character should make it preponderate in favour of the defendant.
- ▶ S-54 In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant. (This section is not applicable to cases in which the bad character of any person is itself a fact in issue but a previous conviction is relevant as evidence of bad character.)
- ▶ S-55 In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.
- ▶ **Explanation**- In sections 52,53, 54 and 55, the word “character” includes both reputation and disposition, but except as provided in section 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

PUBLIC AND PRIVATE DOCUMENT

S-74 says that the following documents are public documents: -

1) Documents forming the acts or records of the acts (Inserted by the I.T. Act 2000 section 92 w.e.f. 17.10.2000)

- ▶ i) of sovereign authority,
- ▶ ii) official bodies and tribunals, and
- ▶ iii) Of public officers, legislative, judicial and executive of India or of the Commonwealth or of a foreign country.

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

- ▶ Ex. Memorandum of Articles of a Company registered with the Registrar of companies.
- ▶ A private Wakf deed recorded in the office of the sub-registrar is a public document.
- ▶ Entries made by a police officer in the site inspection map and site memo held to be public documents.
- ▶ Bankers' books of nationalized banks are public documents.
- ▶ But an application for a license filed in Govt. is not a public document.
- ▶ Similarly a post-mortem report is not a public document as a proof of identity of the dead without producing the doctor in evidence.
- ▶ SEC-75 SAYS THAT ALL OTHER DOCUMENTS ARE PRIVATE DOCUMENTS.

PROOF OF DOCUMENTS:-

Proof of Public Documents by secondary evidence/certified copies.

- ▶ S-76 says that every public officer having the custody of a public document, shall give on demand a copy of it on payment of legal fee to every person who has a right to inspect such document.
- ▶ Endorsement at the foot of such copy that it is a true copy of such document, and shall be signed, dated and affixed with official title and sealed.
- ▶ S-77 provides that such certified copies may be produced in proof of the contents of the public documents, or part thereof.
- ▶ Cultivation registers, registers of paddy producers prepared by village assistants provable by secondary evidence.

S-78 deals with the proof of other official documents –

- ▶ Central Acts, orders or notifications – certified by the Heads of the departments concerned.
- ▶ Proceedings of the Legislatures – Journals of those bodies or copies printed by the Govt.
- ▶ Proclamations, orders or regulations issued by Her Majesty or Privy Council – by copies of extracts of London Gazette.
- ▶ Foreign legislative Acts – journals published by foreign authority, copy certified under the seal of the sovereign of such foreign country.
- ▶ Municipal Proceedings – publications of such body certified by their legal keeper
- ▶ Public documents of any other class in a foreign country may be proved by the original or certified copy issued by the legal keeper of the document with a certificate and seal of notary public, or Indian counsel or diplomatic agent.

Sec-79 to 90 Deal with certain Presumptions as to Documents.

This section proceeds upon the maxim “Omnia proesumuntur rite esse acta (all acts are presumed to be rightly done). In fact all the following sections down to section 90 inclusive, are illustration of, and founded upon, this principle. This presumption is liable to be rebutted.

This section imperatively directs the court to raise a presumption. The terms of section 114 are only permissive. The word “shall presume’ indicate that if no other evidence is given the court is bound to find that the facts mentioned in the section exist. They occur in sections 79, 85 and 89 of the Act. These sections are, therefore mandatory.

- ▶ S-79 – Presumption as to genuineness of certified copies – Courts shall presume to be genuine every documents purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the central Government or of state Government.
- ▶ S-80 – The Court shall presume genuineness of documents produced as records of evidence – Deposition of witness, confessional statement of accused before Judge or Magistrate
- ▶ S-81 – The court shall presume as to the genuineness of the gazettes, newspapers, private acts of parliament and other documents purporting to be a document directed by any law to be kept by any person etc.
- ▶ S-81-A presumption as to Gazettes in electronic forms.
- ▶ S-82 – The court shall presume the genuineness of documents admissible in England without proof of seal or signature, will be admissible in courts in India.
- ▶ S-83 – Presumption as to maps and plans issued under the authority of Government – The courts shall presume their genuineness. (But maps or plans made for the purposes of any cause must be proved to be accurate.)
- ▶ S-84 – The courts shall presume the genuineness of collections of laws and reports of decisions of the courts of such a foreign country.
- ▶ S-85& S-85A – Presumption as to power of attorney, electronic agreements and digital signatures. – Courts shall presume. (Section 85B- presumption as to electronic records and digital signature and section 85C- presumption as to digital signature certificate, until in both these cases contrary is proved.)
- ▶ S-86 – Presumption as to certified copies of foreign judicial records – courts shall presume.
- ▶ S-87 – Presumption as to books, maps and charts - May presume that any book to which it may refer for information on matters of public or general interest, and any published maps and charts, the statement of which are relevant facts and produced before it for its inspection.
- ▶ S-88 – Presumption as to telegraphic messages - May presume.
- ▶ S-88A- Presumption as to electronic messages- May presume.
- ▶ S-89 – The court shall presume due execution of documents not produced even after due notice.
- ▶ S-90 – Presumption as to documents of 30 years old – MAY PRESUME.
S-90A- Presumption as to electronic records five years old.

Of the exclusion of oral by Documentary

- ▶ S-91- When a transaction has been reduced to writing either by agreement of the parties or by requirement of law, the writing becomes the exclusive memorial thereof, and no evidence shall be given to prove the transaction, except the document itself or secondary evidence of its contents where such evidence is admissible.
- ▶ The first provision that is either by the agreement of the parties refers to transactions voluntarily reduced to writing (a contract, a grant etc.), and the second by the requirement of

law refers to those cases in which any matter is required by law to be reduced to the form of a document, e.g, sale of immovable property, mortgage, lease, trust and gifts.

- ▶ **Illustration** – If a contract is contained in several letters, all the letters in which it is contained must be proved. If a bill of exchange is drawn in a set of three, one only need be proved.
- ▶ S-92- Exclusion of evidence of oral agreement. When a transaction has been reduced into writing, either by requirement of the law or by agreement of the parties, no oral agreement or statement shall be admitted.
- ▶ Section 93 to 99 deals with the interpretation of documents by oral evidence. These sections deals with the rules for construction of documents with the aid of extrinsic evidence.
- ▶ S-93- Exclusion of evidence to explain or amend ambiguous documents.
- ▶ S-94- Exclusion of evidence agained application of document to existing facts.
- ▶ S-95- Evidence as to document unmeaning in reference to existing facts.
- ▶ S-96- Evidence as to application of language which can apply to one only of several persons.
- ▶ S-97- Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.
- ▶ S-98-Evidence as to meaning of illegible characters, etc. short hand –writers note or of foreign obsolete, technical, local and of words used in peculiar sense evidence may be given.)
- ▶ S-99- Who may give evidence of agreement varying terms of document.(persons who are not parties to a document, or their representatives in interest, may give evidence of any facts to show a contemporaneous agreement varying the terms of the document.
- ▶ S-100- Saving of provisions of Indian succession Act relating to wills.

Production and effect of evidence

Of the Burden of Proof Section 101 to section 114 of the act

S-101-Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. In another word when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. The party on whom the onus of proof lies must, in order to succeed, establish a prima facie case.

The expression means two different things. It means something that a party is required to prove an allegation before judgment can be given in its favour, it also means that on a contested issue one of the two contending parties has to introduce evidence. The burden will, at the beginning of a trial, lie on one party, but during the course of the trial it may shift from one side to another. (**Deena v/s Union of India, AIR 1983 SC 1155**)

The term “onus probandi” in its proper use, merely means that, if a fact has to be proved, the person whose interest it is to prove it, should adduce some evidence, however slight, upon which a court could find the fact he desires the court to find. It does not mean that he shall call all conceivable or available evidence. It merely means that the evidence he lays before the court should be sufficient. Where there is an admission by a party the burden of proof shifts and it is for the party making the admission to explain it away.

In the matter of proof, in a civil case, a defendant cannot take up the same stand as an accused in a criminal case. In civil cases, unlike criminal ones, it cannot be said that the benefit of reasonable doubt must necessarily go to the defendant. Even the preponderance of probability may serve as a good basis for decision. (**Himmat mal v/s Shah Magaji Khubji (1953), 3 Raj. 815.**)

In a tort action for malicious prosecution, the plaintiff failed to prove that the criminal complaint was lodged against him without any reasonable and probable cause. His suit failed. (**Philip v/s Hindu Madhan Dharma Paripalana Sabha, AIR 2003 Ker 205**).

In a claim of damages for breach of contract, the burden is on the complainant to show the basis on which the damages claimed by him have been quantified. (**Usha Beltron Ltd. v/s Nand Kishore Parasramka, AIR 2001 Cal.137**) – **The case required proof of market price for assessment of damages.**

In the criminal trial the burden of proving the guilt of the accused beyond all reasonable doubts always rest on the prosecution and on its failure it cannot fall back upon the evidence adduced by the accused in support of his defense to rest his case solely thereon. (**Jarnail Singh v/s State of Punjab, AIR 1996 SC 755** – The prosecution cannot take undue advantage of the defence put by the accused even if the same was found to be false and improbable. In a criminal trial burden of proof squarely rests upon prosecution.

In an accusatory system, such as that prevailing in India, it is for the prosecution to prove beyond reasonable doubt that the accused committed the offence, it is not for the court to speculate as to how the crime has been committed.

Recovery of articles by itself does not connect anybody with the crime. Connection of the accused with the article must be proved beyond a reasonable doubt.

Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely by carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed.

Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between may be true and must be true and this basic and golden rule only helps to maintain the vital distinction between conjunctures and sure conclusions to be arrived by the touch stone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record. (**Ashish Batham v/s State of M.P., AIR 2002 SC 3206**)

More serious the crime, more strict proof would be requisite.

Examples: - The possession of small quantity of psychotropic substance for personal use requires the prosecution to prove its allegation of commercial possession beyond reasonable doubt. It is enough for the accused in his defence to satisfy the judicial mind on a preponderance of probability (**Offence under NDPS Act**)

Plea of Alibi (his presence elsewhere)- **"In soma Bhai v/s State of Gujrat AIR 1975 SC 1453-** Where it was taken to be a settled law that a plea of alibi has got to be proved to the satisfaction of the court.

In state of Maharashtra v/s Narsingarao Gangaram Pimple 1984 Cr. LJ 4- to the effect that- **" the plea of alibi must be proved with absolute certainty so as to completely, exclude the possibility of the presence of the accused at the place of occurrence.**

In the cases where the evidence is of such a nature that conclusion cannot be arrived at as to who started the fight or how the quarrel started, the benefit of doubt should be given to the accused.

Other examples are:- Proof of good faith, blank signature, whole evidence on record, presumption as to consideration and dishonour of cheques, Gift deed, will caste claim etc.

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

Example: - 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 is given on either side, A would succeed, as the bond is not disputed and fraud is not proved.

The phrase “burden of proof” has two meanings- one, the burden of proof as a matter of law and pleading, and the other the burden of establishing a case. The former is fixed as a question on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as the party adduces sufficient evidence to raise a presumption in his favour.

The burden of proof lies upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. In another word the party on whom the burden of proof lies begins.

In criminal cases the prosecution has to prove the ingredients of the offence.

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

Example: - 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 (Alibi). He must prove it.

The burden of proving a particular fact lies on the party as indicated in the section irrespective of the fact whether it is an affirmative or negative of the issue.

Claim for setting aside gift deed- The plaintiff filed a suit for a declaration that the gift deed relating to his property was null and void because at the time of its execution he was a minor. His birth certificate was neither exhibited nor proved through other witnesses. It was for him to prove his age and not for the defendant. The suit was filed 3 years after attaining majority. He was held not entitled to the relief claimed. (**Habib Ullah Bhat v/s Juna, AIR 2003 J&K 32.**)

S-104- Burden of proving fact to be proved to make evidence admissible –The burden of proving any fact necessary to be proved to enable any person to give evidence of any other fact is on the person who wishes to such evidence.

EX- A wishes to prove a dying declaration by B. A must prove B’s death.

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

Principle- Whenever it is necessary to prove any fact, in order to render evidence of any other fact, admissible, the burden of proving that fact is on the person who wants to give such evidence.

“Kalooram v/s Mangilal, AIR 1984 MP 147. (A person seeking to recover possession has to prove that he was dispossessed within 12 years.)

“Mahboob Sab v/s Union of India, AIR 2011 Kart. 8 (Where the Railways contentions was that the person who died by falling from a train was not a bonafide passenger being without ticket, the court said that it was for the Railways to prove that fact.

S-105- Burden of proving that the case of the accused comes within exceptions.- When a person is accused of any offence, the burden of proving the existence of circumstance bringing the case within any of the general exceptions in the I.P.C. or within any special exceptions 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.

Ex. -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).

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).

Section 325 of the I.P.C. provided 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.

Comment:- The onus of establishing an exception shifts to the accused when he pleads an exception.

“Subodh Tiwari v/s State of Assam, 1988 Cr LJ 223 (Gau.) – The court never presumes the existence of circumstances which entitle the accused to his defense.

“Brindaban Prasad v/s State of Bihar, AIR, 1964 pat.138- If on a consideration of the evidence as a whole a reasonable doubt is created in the mind of the court as to the guilt of the accused he would be entitled to acquittal.

“Rizam v/s State of Chhattisgarh, 2003 Cr LJ 1227- The burden on the accused to prove his defense stands discharged by showing preponderance of probability in his favor.

Presumption of innocence- In criminal cases, the rule is that the legal burden of proving every element of the offence and the guilt of the accused, lies from first to last on the prosecution. The prosecution must disprove any defence or explanation raised by the accused, even if it appears 'affirmative in nature. (In **woolmington v/s DPP 1935 AC 462 at 481, 482.**)

‘General exceptions- The general exceptions here referred to are those applicable to all crimes, and are laid down in chapter IV of the I.P.C.

This section is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception, and there is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition in a case in which it is not so included.

Special exceptions- Special exceptions are those which are restricted to a particular crime.

Section 113A raises a presumption as to abetment of suicide by a married woman by her husband or his relatives. Similarly section 114A raises presumption of absence of consent in a rape case.

Several statutes also provide for putting evidential burden on the accused.

S-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.

Ex. - A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Principle: - Where the knowledge of the subject-matter of an allegation is peculiarly within the province of one party to a suit the burden of proof must lie there also.

Where a person was found in possession of gold with foreign markings, the S.C. held that burden lay upon him to account for his possession. **State of Maharashtra v/s Natarwarlal Damodardas soni, 1980 2 SCR 340.**

Especially- This word means facts that are pre-eminently or exceptionally within the knowledge of the person.

Burden of proving negligence and res ipsa loquitur- It has been considered by the Privy Council that the burden of proving negligence always rests with the plaintiff, even when the maxim res ipsa loquitur applies. Once the initial burden of showing the setting of the mishap is discharged, this maxim will relieve the plaintiff of showing further evidence of negligence.

Taking away dead body- Ram Gulam Choudhury v/s State of Bihar, 2001 Cr LJ 4632.

Payment of rent- In an eviction proceedings on the ground of default in payment of rent, the burden lies on the tenant to prove payment.

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

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

Comment- Section 107 and 108 must be read together because the latter is only a proviso to the rule contained in the former, and constitute one rule when so read together.

S-109 -Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent- When the existence of a personal relationship, or a state of things, is once established by proof, the law presumes that the relationship or the state of things continues to exist as before till the contrary is shown or till a different presumption is raised, from the nature of the subject in question.

S-110- Burden of proof as to ownership- This section gives effect to the principle that possession is prima facie evidence of complete title, anyone who intends to oust the possessor must establish a right to do so. Longer the possession, stronger the presumption.

S-111- Proof of good faith in transactions where one party is in relation of active confidence-
Ex. The good faith of a sale by a son just come of age to a father is in question in a suit brought by a son. The burden of proving the good faith of the transaction is on the father. The principle of law embodied in this section which was called “the great rule of the court” is “he who bargains in a matter of advantage with a person placing confidence in him is bound to show, that a reasonable use has been made of that confidence, a rule applying to trustees, attorneys or anyone else.

S-111A – presumption as to certain offences- under section 121, 121A, 122 or section 123 of the I.P.C. (criminal conspiracy or attempt to commit, or abetment of, an offence u/s 122 or 123 of IPC.) in an area declared to be disturbed area under any enactment, disturbing public peace.

S-112- Birth during marriage conclusive proof of legitimacy- Evidence that a child is born during wedlock is sufficient to establish its legitimacy, and the shifts the burden of proof to the party, seeking to establish the contrary.

Under the section the fact that any person was born-

- (1) During the continuance of a valid marriage between his mother and any man, or
- (2) Within two hundred and eighty days after its dissolution, the mother remaining unmarried.

S-113- Proof of cessation of territory- This section is now obsolete.

S-113-A- Presumption as to abetment of suicide by a married woman- When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband has subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. **For the purpose of this section 'cruelty' shall have the same meaning as in section 498A of the I.P.C.**

S-113-B- presumption as to dowry death-When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

Explanation: - For the purpose of this section, 'dowry death' shall have the same meaning as in section 304B of the I.P.C.

Section 113B of the Evidence Act being procedural, it has been held that it is retrospective in operation. (**"Bhoora Singh V/S State of U.P., 1992 Cr LJ 2294 (All).**)

The Presumption under section 113B shall be raised only on the proof of the following essentials:-

1. The presumption can be raised only if the accused is being tried for the offence U/S 304B, I.P.C. (accused has committed the dowry death of a woman).
2. The woman was subjected to cruelty or harassment by her husband or his relatives.
3. Such cruelty or harassment was for or in connection with any demand for dowry;
4. Such cruelty or harassment was taking place soon before her death.

S-114- court may presume existence of certain facts: - The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

Ex.- That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

That a bill of exchange, accepted or endorsed, was accepted or indorsed for good consideration.

Presumption and burden of proof: - Section 104 to 113 direct on whom burden of proof will lie. The court is bound in every instance to presume against that party on whom the burden of proof is directed to lie. No option is given to the court as to whether it will presume the fact or not. But there are various presumptions where room is left for the court to exercise its powers of inference, the court can throw the burden of proof on whichever side it chooses. A presumption is not evidence or proof. It only shows on whom the burden of proof lies.

Venkatramiah, J. of the Supreme Court observed: "A presumption is not in itself evidence but only makes a prima facie case for party in whose favor it exists. It indicates the person on whom the burden of proof lies.

Presumption may be either of law or fact, and when of law may be either conclusive, or rebuttable, but when of fact are always rebuttable. Mixed presumptions are those which are partly of law and partly of fact.

Presumption of law differ from presumptions of fact in the following respects:-

1. Presumptions of law derive their force from law. While presumptions of fact derive their force from logic.
2. A presumption of law applies to a class, the conditions of which are fixed and uniform, a presumption of fact applies to individual cases, the conditions of which are inconstant and fluctuating.

3. Presumptions of law are drawn by the court, and in the absence of opposing evidence are conclusive for the party in whose favour they operate, presumptions of fact are drawn by the jury, who may disregard them however cogent.

In the Indian Evidence Act, 1872, there are three cases where conclusive presumption may be drawn. They are sections 41, 112 and 113.

S-114-A- Presumption as to absence of consent in certain prosecutions for rape (Sub-section (2) of section 376 of the I.P.C. under clause a, b, c, d, e, g of this section)

“Dev kishan v/s State of Rajasthan, 2003 Cr LJ 1118 (Raj) –The accused were punished under s.376 (2) (g) of I.P.C.

CHAPTER VIII- ESTOPPEL

Doctrine of Estoppel under the Indian Evidence Act, 1872

When one person has —

By his

(i) Declaration

(ii) Act, or

(iii) Omission

Intentionally caused or permitted another person

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

(ii) To act upon such belief,—

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

Illustration:

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

Principle of Section 115:

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

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

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

Scope of Section 115:

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

1. That A believed a thing to be true.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Tenant (Section 116)

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

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

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

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

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

4. Bailee or licensee (Section 117):

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

Estoppels are of seven kinds:

1. Estoppel by record;
2. Estoppel by deed;
3. Estoppel by conduct;
4. Equitable estoppel;
5. Estoppel by negligence;
6. Estoppel on benami transactions; and
7. Estoppel on a point of law. (Additionally, there is also the concept of promissory estoppel, which is discussed later.)

1. Estoppel by record:

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

2. Estoppel by deed:

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

Problem:

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

Ans:

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

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

3. Estoppel by conduct:

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

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

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

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

4. Equitable Estoppel:

The Evidence Act is not exhaustive of the rules of estoppel. Thus, although S. 116 only deals with the estoppel that arises against a tenant or licensee, a similar estoppel has been held to arise against a mortgagee, an executor, a legatee, a trustee, or an assignee of property, precluding him from denying the title of the mortgagor, the testator, the author of the trust, or the assignor, as the case may be. Further, S. 116 is not exhaustive of all instances of estoppel as between landlord and tenant. Thus, there are cases of estoppel which, though not within the terms of Ss. 115 to 117 of the Evidence Act, are recognised instances of estoppel. Estoppels which are not covered by the Evidence Act may be termed equitable estoppels.

5. Estoppel by Negligence:

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

6. Estoppel on benami transactions:

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

7. Estoppel on a point of law:

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

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

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

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

Differences between
Limitation and Estoppel

Main Differences between Limitation and Estoppel are as follows:

Limitation:

1. Limitation is a procedural law. It precludes a person claiming a right to sue after the period of limitation.
2. Limitation does not apply to a matter of defense barring a few exceptions.
3. The defense of limitation is open even when the plaintiff's delay in instituting the suit is due to the conduct of the defendant except where it is fraudulent.

Difference between Estoppel and Admission

Difference between Estoppel and Admission are as follows:

1. An admission may, under certain circumstances, bind strangers as well, whereas estoppel binds only parties and privies thereto. It cannot be taken advantage of by strangers.
 2. Estoppel being a rule of evidence, an action cannot be founded on it, whereas an action may be founded on an admission.
 3. An admission of a party is strong evidence against him, but he is at liberty to prove that such admission was mistaken or untrue. But, if another person has been induced by it to alter his position, the party is estopped from disputing its truth with respect to that person.
- When an admission has been acted upon by another person, the admission is an estoppel, and the estopped party is required to make good his representation; in other words, the admission is conclusive. An estoppel differs from an admission in that it cannot be taken advantage of by strangers. It binds only the parties and privies. An estoppel is only a rule of evidence, for an action cannot be founded upon it.

Estoppel

1. Estoppel is a rule of evidence. It precludes a person from denying the truth of some statement previously made by himself.
2. Estoppel may apply to either party.
3. There can be no estoppel against statute. So a person cannot be debarred of the right to contest the issue of limitation by any prior admission.

The Difference between Res Judicata and Estoppel

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

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

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

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

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

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

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

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

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

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

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

Difference between Estoppel and Waiver

Difference between Estoppel and Waiver are as follows:

Estoppel and waiver are entirely different. Estoppel is not a cause of action. It may, if established, assist a plaintiff in enforcing a cause of action, by preventing the defendant from denying the existence of some fact essential to establish the cause of action. It is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant (or his authorised agent) to the plaintiff or someone on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement, and (c) the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. Thus, if an agent with an authority to make such an agreement on behalf of the principal agrees to waive his principal's right, then (subject to any other question such as consideration), the principal will be bound by the contract, not by estoppel. There is no such thing as estoppel by waiver. (*Dawson's Bank Ltd. v Nippon Menkwa Kabushiki Kaisha*, 62 I.A. 100)

Law relating to competence of a witness

Law relating to competence of a witness (sections 118-121) - The modern judicial system is based on evidence. The knowledge of how an event happened is arrived at by the court through witnesses. As BENTHAM said, "witnesses are the eyes and ears of justice." The court gives its finding based on the evidence given by witnesses. It is important, therefore, to understand who can and who cannot be a competent witness. Section 118 of the evidence Act, 1872, contains the provisions for determining a competent witness.

Section 118- who may testify- All persons shall be competent to testify unless the court considers that they are prevented from understanding the question put to them, or from giving rational answer to those questions, by tender years, extreme old age, disease, whether by body or mind, or any other cause of the same kind.

Explanation: - A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the question put to him and giving rational answers to him.

As is evident from section 118, in general, nobody is barred from being a witness as long as he is able to understand the questions that are put to him as well as is able to give rational replies to those questions. There may be several reasons because of which a person may not be able to comprehend the questions and / or is unable to reply coherently. This section does not attempt to define all such reasons but gives examples of such reasons such as young age (in case of a child) mental illness, or extreme old age. It is up to the court to determine whether a person is able to understand the questions or give rational answers. Thus, competency is a rule, while incompetency is an exception. Even a lunatic is considered a competent witness if his lunacy does not prevent him from understanding the questions and giving rational answers.

Child witness: -A young child, if he is able to understand the questions and is able to reply rationally, is a competent witness even if he is of a tender age. For example:- In the case of “Jai Singh v/s State, 1973, Cr LJ, a seven year old girl who was the victim of attempted rape was produced as a witness and her testimony was held valid

It has been held in several cases that a child under the age of seven years can be a competent witness if, upon the strict examination of the court, the child is found to understand the nature and consequence of an oath. “IN Rameshwar Kalyan Singh v/s State of Rajasthan AIR 1952, where the accused was charged with the offence of rape of a girl of 8 years of age. It was held that omission of oath only affects the credibility of the witness and not competency of the witness. The competency is determined by section 118, and the only ground that is given for incompetency is the inability to comprehend the questions or inability to give rational answers.

The S.C. however has emphasized the need for carefully evaluating the testimony of a child. Adequate corroboration of his testimony must be looked from other evidence.

Dumb Witness:- Section 119- A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and signs made in open court. Evidence so given shall be deemed to be oral evidence.

Competency of a wife as a witness against her husband: - As per section 120, in all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witness. Further, in criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

S- 121- Judges and Magistrate as witnesses:-

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

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

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

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

A distinction should be drawn between questions which a witness cannot be compelled to answer (Ss. 121, 124 and 125) and those which he cannot be permitted to answer (Ss. 123 and 126).The latter class of

questions might properly be forbidden but questions of the former class are in no way barred, a witness has merely the right of refusing to answer such questions, without any hostile inference being drawn from his refusal. The most that a court can do, in the case of a witness who is ignorant of his privilege, is to warn him that he need not answer. But if the witness elect to waive his privilege of refusing to answer, his answer is admissible in evidence.

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

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

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

- (a) When the person who made it or his representative in interest consents, or
- (b) In suits between married persons, or
- (c) In proceedings in which one married person is prosecuted for any crime committed against the other.

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

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

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

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

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

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

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

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

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

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

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

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

Provided that nothing in this section shall protect from disclosure-

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

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

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

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

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

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

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

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

S-128- Privilege not waived by volunteering evidence.

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

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

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

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

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

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

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

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

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

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

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

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

"Examination of witness"

Chapter X containing Sections 135 to 166 of the Evidence act, 1872 lay down the provisions relating to "Examination of witness"

1. Section 135 provides for the order in which witnesses ought to be produced and examined.
2. Section 136 confers on Judge-power to decide as to admissibility of evidence.
3. Section 137 deals with Examination in Chief and provides for three stages of examination.
4. Section 138 deals with the order of examination.
5. Section 139 deals with the cross examination of a person called to produce a document.
6. Section 140 provides for cross-examination and re-examinations of witnesses to character.
7. Section 141 to 143 lay down the provisions relating to 'Leading Questions'.
8. Section 144 deals with Evidence as to matters in writing.
9. Section 145 relates to cross-examination as to previous statement in writing.
10. Section 146 speaks about the questions lawful in cross-examination. **(Section 146 to 152 deals with questions which can be put to a witness with a view to shake his credit by damaging his character.)**
11. Section 147 deals with the situation when witness to be compelled to answer.
12. Section 148 confers on court power to decide when question shall be asked and when witness compelled to answer.
13. Section 149 prescribes questions not to be asked without reasonable grounds.
14. Section 150 provides for procedure of court in case of question being asked without reasonable grounds.
15. Section 151 confers on court power to forbid indecent and scandalous questions.
16. Section 152 empowers the court to forbid questions intended to insult or annoy.

17. Section 153 deals with exclusion of evidence to contradict answers to questions testing veracity.
18. Section 154 deals with question by party to his own witness or Hostile witness.
19. Section 155 deals with impeaching credit of witness.
20. Section 156 deals with questions tending to corroborate evidence of relevant fact, admissible.
21. Section 157 deals with former statements of witness may be proved to corroborate later testimony as to same fact.
22. Section 158 deals with what matters may be proved in connection with proved statements relevant under Sections 32 or 33.
23. Sections 159 to 161 lay down the rules relating to 'Refreshing memory'.
24. Section 162 deals with production of documents.
25. Section 163 deals with giving, as evidence, of document called for and produced on notice.
26. Section 164 deals with using, as evidence of document, production of which were refused on notice.
27. Section 165 confers on judge powers to put questions or order production and finally Section 166 speaks about power of jury or assessors to put questions.

Order of production and Examination of witnesses- Section 135:-

This section deals with the order in which witnesses are to be examined and not with the quantity or quality of the proof.

Section 135 provides that the order in which witnesses are to be produced and examined before court. As per this section the order of the witnesses shall be regulated by the law and practice for time being relating to civil and criminal procedure respectively, and in the absence of any such law, by the discretion of the court.

{The relevant legal provisions are enshrined in - Orders XVIII and XLI of the code of civil procedure, 1908 and Chapters XVIII, XIX, XX, XXI and XXIX of the code of criminal procedure, 1973.}

Examination of witness- Stages in examination of witnesses- Section 137:-

Stages in the examination of witness consists of the following stages:-

- **Examination in chief or chief examination-** (The examination of a witness by the party who calls him shall be called his examination-in-chief).
- **Cross examination-** (The examination of a witness by the adverse party shall be called his cross-examination).
- **Re-examination-**(The examination of a witness, subsequent to the cross examination by the party who called him, shall be called his re-examination).

Examination in chief

Examination in chief- it means examination of a witness called by the party. If the advocate for the plaintiff introduces witnesses in support of his case and examines them, it is called 'Examination in Chief'.

Similarly, in case of the defendant's side examination is the first stage. It is infect viva voce examination, where questions are put to the witnesses on either side by their counsels in a chronological order.

In Chief .examination, no leading questions can be put except in certain special cases. Leading question is one, which suggests the answer. So in examination in Chief only relevant questions should be asked.

Cross examination

Cross examination: - The examination of a witness by the opposite party is called 'cross examination'. Cross examination is considered as the most powerful weapon. **According to Philip Wendell, it is double edged weapon, if you know how to wield, it helps to cut enemy's neck. Otherwise, it cuts one's own hands.**

Cross examination must relate to relevant facts and leading questions may be asked. A witness may be cross examined as to previous statements made by him in writing or reduced in writing.

When a witness is cross examined, he may be asked any question which tends:-

- To testify his correctness,
- To discover, who he is, and what is his position, and
- To shake his character.

These questions cannot be asked in examination-in-chief.

Re-Examination

Re-Examination:- After cross-examination is over, the party, who called the witness feels, necessary, may once again examine the witness. Re-examination cannot be claimed as a matter of right, except with the permission of the court. The purpose of re-examination is to explain any new matters raised in cross-examination, but not to prove another fact. It refers to matters in cross-examination, and new matter with permission of the court.

Leading questions should not be asked in re-examination except in the following cases:-

- If not objected by the opposite party,
- With the permission of the court.
- Already sufficiently proved matter (undisputed)

The other (Adverse) party may further re-cross examine the witness.

Leading questions

Leading questions (Sections 141-143):-

Sections 141 to 143 of chapter x deals with 'Leading questions'.

• Section 141- deals and defines leading question- according to it the expression 'Leading question' literally means "a question. Which by itself suggests the answer as expected by the person asked/ put the same". Or in another words – any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

- Examples:-
 1. Do you reside in such a place?
 2. Is not your name so and so?
 3. Did you see A enter B's shop and take a watch?

When leading questions must not be asked-Section 142:-

According to this section leading questions must not be asked in Examination-in-Chief or in Re-examination except with the permission of the court.

The court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

Objection to leading questions is not that they are illegal but that they are unfair. The rule excluding leading questions is intended to prevent unfairness in the conduct of the inquiry. The Act gives absolute discretion to court to allow or disallow leading questions.

When leading questions must be asked Section 143:-

According to section 143 of the Evidence act, leading question may be asked in cross-examination. The reason why leading questions are allowed to be put to an adverse witness in cross-examination is that the purpose of a cross-examination is that the purpose of a cross-examination being to test the accuracy, credibility and general value of the evidence given, and to sift the facts already stated by the witness, it sometimes becomes necessary for a party to put leading questions in order to elicit facts in support of his case, even though the facts so elicited may be entirely unconnected with facts testified to in an examination-in-Chief.

Leading questions can be freely asked in cross-examination:

“First and principally, on the supposition that the witness has a bias in favour of the party bringing him forward, and hostile to his opponent.

Secondly, that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove, and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favorable to his side, or even put a false gloss upon the whole.

Exclusion of Evidence

Exclusion of Evidence Section 153:-

This section deals with 'Exclusion of evidence to contradict answers to questions testing veracity (correctness). According to it:- When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him, but if he answers falsely, he may afterwards be charged with giving false evidence.

Explanation 1:- If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Explanation 2:- If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.

Illustrations:- A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The Evidence is inadmissible.

Object: The object of the section is to prevent trials being spun out to an unreasonable length. If every answer given by a witness upon the additional facts mentioned in section 146 could be made the subject of fresh inquiry, a trial might never end. These matters are after all not of the first importance, beyond what is comprised in the exceptions.

Principle:- When a witness deposes to facts which are relevant, evidence may be given in contradiction of what he has stated. But when what he deposes to affects only his credit, no evidence to contradict him can be led for the sole purpose of shaking his credit by injuring his character. However, a witness answering falsely can be proceeded against for giving false evidence under section 193 of the I.P.C. There are two exceptions to this: - 1. Previous conviction when denied can be proved by section 298 of Cr.P.C. and any fact tending to impeach his impartiality when denied can be proved.

Hostile witness

Hostile witness Section 154:- Section 154 of the Evidence Act, 1872 speaks about 'Hostile witnesses'. Section 154 deals with Questions by party to his own witness.

According to this section- The court may, in its discretion, permit the person who calls a witness to put any questions to him, which might be put in cross-examination by the adverse party.

Such condition arises where a party calling a witness and examining him discovers that he is either hostile or unwilling to answer questions put to him, he can obtain permission of the court to put questions to him which may be put to him by way of cross-examination.

The word 'hostile' literally means "unfriendly". A witness is generally expected to give evidence in favour of the party by whom he is called. But, in certain cases such witness may unexpectedly turn hostile and gives evidence or makes statements against the interest of the party, who has called him. Such witness is called "hostile witness". He is also known as "Adverse witness" or "unfavorable witness". A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.

Where the witness is adverse to the party called him, such party is not entitled as of right to cross-examine the witness. The matter is entirely in the discretion of the court whether to permit the person calling the witness to put any questions to him, which might be put by the adverse party in cross-examination. Before putting such questions, the party must take permission of the court.

The concept of the hostile witness has been explained by the Apex court in – Sat Paul v/s Delhi Administration. AIR 1976 SC, 303.

In this case, an officer was charged / tried for taking bribe.

A trap was laid by the anti-corruption department. The office of the accused was raided after the bribe money was supposed to have been passed on to him. The evidence of the witness and of the inspector, who participated in the trap, was rejected on the ground that they were interested in the success of their trap. Two other witnesses, who were supposed to be independent, made contradictory statements and the prosecution, with the permission of the court cross-examined them. Then, the question of the value of their evidence arose.

The court said that "a hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him and an unfavorable witness is one called by a party to prove a particular fact, who fails to prove such fact or proves an opposite fact".

The court also remarked that in view of the uncertain nature of the expressions the draftsman of the Indian evidence Act have not felt it making necessary that the court shall grant permission to a party to cross-examine his own witnesses.

The court laid down that even when a witness is cross-examine by the party who called him, his evidence cannot be treated as washed off from the record altogether. The court can still rely upon that part of the testimony of the witness, which inspires confidence and credit. On the facts of the case, however the court found that the credit of the witness was substantially shaken and, therefore, it was not safe to rely on them.

Impeaching credit of witness Section 155:- The court relies upon the evidence given by the witness to arrive at the truth or falsity of the claim or charge in the litigation. Sometimes, the witness called by the party turns hostile and it is not safe to rely upon such evidence. Then, the parties may be provided with an opportunity to give independent testimony by impeaching the credit of witness.

This section enables the parties to give independent testimony as to the character of a witness in order to indicate that he is unworthy of belief by the court. Its provisions apply to both criminal and civil cases.

Section 155 of the Indian Evidence act, 1872 deals with "Impeaching credit of witness"

According to it:- 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 accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;
3. By proof of former statement inconsistent with any part of his evidence which is liable to be contradicted.

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.

Illustration:- A is indicted for the murder of B.

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

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

The evidence is admissible.

Refreshing memory

Refreshing memory Sections 159-161:- Sections 159 to 161 of the Evidence Act, 1872 lay down the provisions relating to “refreshing memory”.

Section 159 provides for use of the material by a witness to refresh his memory.

Section 160 provides for testimony to facts stated in document as mentioned in section 159.

Section 161 deals with “rights of adverse parties as to writing used to refresh memory”.

When a witness is examined, by putting certain questions connected to the case, he may not be able to answer /reply promptly as he would not recollect the points. Then, the witness is given an opportunity to ‘refresh his memory’ by referring any writing or document. The refreshing of memory is intended to enable the witness to recollect the exact facts pertaining to the case, in the interest of the justice. Generally, there is a long gap between the date of the incident and commencement of legal proceedings. During this gap, the memory of the witness is likely to fade and it becomes necessary to refresh their memory. Generally, the doctors, police officers and other professional experts, who deal with a number of cases regularly, find it difficult to remember the facts unless certain time is given for the purpose.

Rule of refreshing memory

Rule of refreshing memory (Sections 159-161): Sections 159 to 161 of the Act, provide for certain rules to enable the witnesses to refresh their memory as follows:-

- The witness is permitted to refer his own writing at the time of the transaction. The court does not prescribe any precise time. It may allow even a few weeks, for the purpose (Section 159).
- The witness is also permitted to refer the writings made by others. He must read such other writing within a prescribed time (Section 159).
- The court permits the witness to refer to a copy of the document to refresh his memory. The witness must prove it as a true copy of the original (Section 159).
- An expert may refresh his memory by reference to professional treatises.
- The witness need not have specific recollection of the facts (Section 160).

- The adverse party has a right to inspect the writing and to cross-examine the witness (Section 161).

Other provisions (Section 156) – Questions tending to corroborate evidence of relevant fact, admissible

When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the court is of the opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Principle: - It is well settled law that even where the evidence of the complainant is quite credible, no conviction can be based on such evidence unless it is corroborated by independent material. **{“M.G. Thatte V/S State Of Maharashtra 1993 Cr.LJ 2878(Bom.)”}** This section permits the court to allow a witness, who is testified to a relevant fact, to corroborate his testimony by deposing to any circumstances which he observed at or near the time or place at which such relevant fact occurred. **The frame of the section indicates what questions are to be asked in examination-in-chief. In most cases, it paves the way for cross-examination, which, if successful, brings out contradiction, but which, if unsuccessful, must inevitably result in corroboration. Like contradiction, corroboration is meant to test the truthfulness of a witness.**

According to Section 157 of the act- Former statements of witness may be proved to corroborate later testimony as to same fact.

Principle: -A witness former statement relating to the same fact made at or about the time when the fact took place may be proved in order to corroborate his present testimony. There are only two things which are essential for the section to apply. The first is that a witness should have made a statement earlier with respect to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact. But in order to make the former statement admissible it is not necessary that the witness to be corroborated must also say in court in his testimony that he had made the former statement.

Any former statement- means such statement may be written or verbal, on oath, or in ordinary conversation. A witness's accounts books, duly kept in the ordinary course of business, may be used under this section.

At or about the time when the fact took place- These words mean that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself. What is reasonable time is a question of fact in each case. The object of the section is to admit statements made at a time when the mind of the witness is still so connected with the events as to make it probable that his description of them then would be accurate. But if time for reflection passes between the event and the subsequent statement, it not only can be of very little value but may be actually dangerous as such statements can be easily brought into being. Such delayed statements are inadmissible.

“In Mahabir singh V/S State of Haryana AIR 2001 SC 2503- “The supreme court construed the words “at or about the time when the fact took place”.

What matters may be proved in connection with proved statement relevant under section 32 or 33 (Section 158)- Whenever ant statement, relevant under section 32or 33, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

Section 32 and 33 of the Act permit the putting in of statements, oral or written, or statements made in a judicial proceeding, by a person who cannot be examined as a witness. The legislature intends by this section to submit such statements to the tests of contradiction and corroboration, in the same way as if those statements were made by the witness in the box. **No sanctity attaches to such statements**

simply because the person is dead or cannot be examined as a witness. His credibility may be impeached or confirmed in the same manner as in the case of a living witness.

Production of documents

Production of documents (Section 162)—A witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objections shall be decided upon by the court.

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

Translation of documents:—If for such a purpose it is necessary to cause any document to be translated, the court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence, and if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the I.P.C.

Giving as evidence of document called for and produced on notice (Section 163):— When a party calls for a document of which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

This section is applicable to criminal trials as well as to civil actions. A party can call for a document during trial. The court has a discretion whether or not to order disclosure.

Using as evidence of document, production of which was refused on notice (Section 164):— When a party refuses to produce a document of which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the party or the order of the court.

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

Principle:— If a party having a document in his possession refuses to produce it when called upon at the hearing to do so, he is not at liberty afterwards to give the document in evidence for any purpose without – the consent of the other party, or the order of the court. This is meant as a penalty for unfair tactics. The C.P.C.- O XI, r.15, makes a similar provision.

This section does not contemplate the production of a document for inspection. It contemplates that one party should call upon another party in court to produce a document of which the first party has given the other party notice to produce.

Judge's power to put questions or order production (Section 165):— The judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant, and may order the production of any document or thing, and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.

Provided that the judgement must be based upon facts declared by this act to be relevant, and duly proved.

Provided also that this section shall not authorize any judge to compel any witness to answer any question or to produce any document **which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive**, if the questions were asked or the documents were called for by the adverse party. Nor shall the judge ask any question which it would be improper

for any other person to ask **under section 148 or 149**, nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

Principle- This section is intended to arm the judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it, the court will be able to look at and enquire into every fact whatever.

Power of jury or assessors to put questions (Section 166):- In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the judge, which the judge himself might put and which he considers proper.

Of Improper Admission and Rejection of Evidence

Of Improper Admission and Rejection of Evidence: - Chapter XI containing section 167 of the Evidence Act, 1872 deals with improper admission and rejection of evidence. IT says, “No new trial for improper admission or rejection of evidence” and runs as follows.

The improper admission or rejection of evidence shall not be a ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

Object:- The object of the section is that the court of appeal or revision should not disturb a decision on the ground of improper admission or rejection of evidence, if in spite of such evidence, there are sufficient materials in the case to justify the decision. In other words, technical objections will not be allowed to prevail, where substantial justice appears to have been done.

Principle:- The improper (a) admission, or (b) rejection, of evidence is no ground for a new trial, or reversal, of any decision, if—

- **In the case of improper admission-** there is sufficient evidence to justify the decision, independently of the evidence objected to and admitted, or
- **In the case of improper rejection—**the decision could not be varied, if the rejected evidence had been received.

The provisions of this section are made applicable by the clearest possible words to all judicial proceedings in or before any court. The section applies to civil cases and to criminal cases whether or not the trial has been had before a jury.