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# THE BHARATIYA SAKSHYA ADHINIYAM, 2023

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**THE BHARATIYA SAKSHYA ADHINIYAM, 2023**

ACT NO. 47 OF 2023

[25th December, 2023.]

An Act to consolidate and to provide for general rules and principles of evidence for fair trial. BE it enacted by Parliament in the Seventy-fourth Year of the Republic of India as follows:—

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 codified the rules of English law of evidence with such modification as are rendered necessary by the peculiar circumstances of this country. On 1st July, 2024, the Bharatiya Sakshya Adhiniyam, 2023 came into force which repeals the previous Indian Evidence Act, 1872.

## PART I

## CHAPTER I

## PRELIMINARY

**1. Short title, application and commencement.**

(1) This Act may be called the Bharatiya Sakshya Adhiniyam, 2023.

(2) It applies to all judicial proceedings in or before any Court, including Courts-martial, but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator.

(3) It shall come into force on such date[1] as the Central Government may, by notification in the Official Gazette, appoint.

**SECTION 1 OF BSA: SHORT TITLE, APPLICATION AND COMMENCEMENT**

**Corresponding provision**

Section 1 of the BSA corresponds to section 1 of the Evidence Act

**Territorial extent of the legislation**

- Section 1 of the Evidence Act provided that it extended to the whole of India. Section 1 of the BSA omits this provision on territorial extent. It also omits the definition of "India" given in section 3 of the Evidence Act.
- The possible reason for such omission is that any stipulation that the BSA extends to the whole of India would call into question the admissibility of evidence digitally generated outside the borders of India.

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[1] 1st July, 2024, vide notification No. S.O. 849(E), dated, 23rd day of February, 2024, see Gazette of India, Extraordinary, Part II, sec. 3(ii).

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**Applicability to Courts-martial**

- Section 1 of the Evidence Act provided that the said Act did not apply to Courts-martial convened under the Army Act, the Naval Discipline Act or ed the Indian Navy (Discipline) Act or the Air Force Act.
- Section 1(2) of the BSA omits the words "convened under the Army Act, the Naval Discipline Act or the Indian Navy (Discipline) Act or the Air Force Act".
- Thus, unlike the Evidence Act, the BSA shall also apply to courts-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy (Discipline) Act or the Air Force Act.

**2. Definitions.**

(1) In this Adhiniyam, unless the context otherwise requires,—

(a) **"Court"** includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence;

(b) **"conclusive proof"** means when one fact is declared by this Adhiniyam to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it;

(c) **"disproved"** in relation to a fact, means when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist;

(d) **"document"** means any matter expressed or described or otherwise recorded upon any substance by means of letters, figures or marks or any other means or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter and includes electronic and digital records.

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**Illustrations.**

(i) A writing is a document.

(ii) Words printed, lithographed or photographed are documents.

(iii) A map or plan is a document.

(iv) An inscription on a metal plate or stone is a document.

(v) A caricature is a document.

(vi) An electronic record on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence and voice mail messages stored on digital devices are documents;

**SECTION 2(1)(d) OF BSA: DOCUMENT**

Corresponding provision

Section 2(1)(d) of the BSA corresponds to section 3, para 5, of the Evidence Act

**Electronic & digital records**

- Section 2(1)(d) of BSA gives a new definition of the word "document" which is compatible with the modern digital era.

- The new definition specifically includes electronic and digital records within the scope of the term "document".
- The five statutory illustrations in old definition have been retained. The new definition gives a sixth statutory illustration No. (vi) which clarifies that "An electronic record on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence and voice mail messages stored on digital devices are documents".
- Under the new definition, to qualify as "document" or "documentary evidence", it is not necessary that matter be expressed or described upon any substance by means of letters, figures or marks only.
- Any matter which is "otherwise recorded" upon any substance "by any other means" will also qualify as "document" or "documentary evidence".
- It appears that video recording on mobile phone would qualify as "documentary evidence" as it is "otherwise recorded" upon any substance "by any other means".

(e) **"evidence"** means and includes—
(i) all statements including statements given electronically which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry and such statements are called oral evidence;
(ii) all documents including electronic or digital records produced for the inspection of the Court and such documents are called documentary evidence;

**SECTION 2(1)(e) OF BSA: EVIDENCE**

**Corresponding provision**

Section 2(1)(e) of the BSA corresponds to section 3, para 6, of the Evidence Act

**Electronic/Digital records**

- Under the new definition of "evidence" in section 2(1)(e) of the BSA, 'statements including statements given electronically' are to be treated as evidence as well as oral evidence. This is a logical corollary to section 530 of Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) providing for examination of complainant and witnesses in electronic mode by use of electronic communication or by audio-video electronic means.
- Under Evidence Act, only electronic records were treated as documentary evidence and there was no express mention of digital records in definition of 'evidence' under Evidence Act.
- Section 2(1)(e) of BSA specifically includes electronic or digital records as documentary evidence.

(f) **"fact"** means and includes—
(i) any thing, state of things, or relation of things, capable of being perceived by the senses;
(ii) any mental condition of which any person is conscious.
**Illustrations.**
(i) That there are certain objects arranged in a certain order in a certain place, is a fact.

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(ii) That a person heard or saw something, is a fact.
(iii) That a person said certain words, is a fact.
(iv) That a person holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact;

**SECTION 2(1)(f) OF BSA: FACT**

**Corresponding provision**

Section 2(1)(f) of the BSA corresponds to section 3, para 2, of the Evidence Act

**Illustration**

Illustration (e) in section 3 (2nd para) of Evidence Act which states that "(e) That a man has a certain reputation, is a fact." is omitted in new definition of "fact" in section 2(1)(f)

(g) **"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:—
(i) That A caused B's death.
(ii) That A intended to cause B's death.
(iii) That A had received grave and sudden provocation from B.
(iv) 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;
(h) **"may presume"**.—Whenever it is provided by this Adhiniyam 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;
(i) **"not proved".**—A fact is said to be not proved when it is neither proved nor disproved;
(j) **"proved"**.—A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists;
(k) **"relevant".—**A fact is said to be relevant to another when it is connected with the other in any of the ways referred to in the provisions of this Adhiniyam relating to the relevancy of facts;
(l) **"shall presume"**.—Whenever it is directed by this Adhiniyam that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
(2) Words and expressions used herein and not defined but defined in the Information Technology Act, 2000 (21 of 2000), the Bharatiya Nagarik Suraksha Sanhita, 2023 and the Bharatiya Nyaya Sanhita, 2023 shall have the same meanings as assigned to them in the said Act and Sanhitas.

**Types of Evidence (Detailed Explanation)**

1. **Direct Evidence**:

   **Definition**: Direct evidence refers to evidence that directly addresses the fact in issue without requiring inference or presumption. It is the most straightforward type of evidence as it proves or disproves a fact explicitly.

   **Examples**:

   - **Eyewitness Testimony**: A witness who directly observed the crime taking place, such as a person who saw the accused commit murder.
   - **Original Documents**: Producing an original contract in court to prove the terms agreed upon between two parties.

   Since direct evidence comes straight from the source (e.g., from an eyewitness or a primary document), it is generally considered stronger and more credible than indirect or circumstantial evidence.

2. **Circumstantial Evidence**:

   **Definition**: Circumstantial evidence, also known as indirect evidence, requires the court to make inferences based on a series of connected facts that lead to a conclusion. Unlike direct evidence, circumstantial evidence does not directly prove a fact but helps the court establish the likelihood of the fact based on surrounding circumstances.

   **Examples**:

   - A person is seen fleeing from the scene of a murder with a bloody knife moments after the crime was committed. The fact that they fled may suggest their guilt.
   - Evidence of a motive, such as proof that the accused had a financial dispute with the victim, is circumstantial evidence supporting the case.

   **Rules for Use**:

   - The facts must be clearly established beyond a reasonable doubt.
   - All facts should be consistent with the accused's guilt and should rule out any reasonable alternative explanations.
   - Circumstantial evidence must form a complete chain that leaves no room for doubt.

   **Case Law**: In **Raghav Prapanna Tripathi v. State of Uttar Pradesh (AIR 1963 SC 74)**, the Supreme Court held that circumstantial evidence must exclude any other possibility other than the guilt of the accused.

3. **Real Evidence**:

   **Definition**: Real evidence refers to physical objects or material items that are directly

presented to the court for inspection. This type of evidence includes anything tangible that can be seen, touched, or felt and is typically referred to as "physical evidence."

**Examples**:

- The murder weapon (e.g., a gun or knife) used in the crime.
- Fingerprints left at the scene of the crime or stolen goods recovered from the accused's possession.

Real evidence can provide concrete proof of a fact, as it allows the court to physically inspect the item in question. For instance, a bloodstained shirt could demonstrate a person's involvement in a crime.

4. **Expert Evidence**:

**Definition**: Expert evidence is presented by individuals with specialized knowledge or expertise in a particular field. This type of evidence is used when the facts or issues of the case fall outside the general knowledge of the court.

**Examples**:

- A forensic expert analyzing DNA samples to determine if the accused's DNA matches samples found at the crime scene.
- A medical expert explaining the cause of death in a murder trial.

**Rules for Admissibility**:

- The expert must be recognized in a specific field of expertise.
- The methods used by the expert must be based on reliable principles.
- The expert should be well-qualified in their area of knowledge.

**Case Law**: In **Ramesh Chandra Agrawal v. Regency Hospital Ltd. (AIR 2010 SC 806)**, the court ruled that expert testimony must meet the standard of reliability and relevance to be admissible.

5. **Hearsay Evidence**:

**Definition**: Hearsay evidence involves statements made outside of court and repeated in court by a witness who did not directly perceive the facts. Since the witness did not experience the event firsthand, this evidence is generally considered unreliable.

**Examples**: A witness testifying, "I was told by someone that the accused confessed to the crime." This is hearsay because the witness did not directly hear the confession.

**Admissibility**: Hearsay is typically inadmissible unless it falls under specific exceptions, such as dying declarations or statements made during the heat of the moment.

6. **Primary Oral Evidence**:

**Definition**: This refers to firsthand testimony provided by a witness who directly perceived the event in question. It is often considered the strongest form of oral evidence

because the witness shares their own knowledge and experience.

**Examples**: A witness testifying that they personally saw the accused committing a crime or heard them making a statement.

Primary oral evidence is often called **direct evidence**, as it is based on the witness's firsthand experience, as opposed to hearsay or indirect knowledge.

7. **Secondary Evidence**:

**Definition**: Secondary evidence is used when primary evidence (such as original documents) is unavailable. It typically includes copies of documents, oral recollections, or other representations of primary evidence.

**Examples**:

- A photocopy of a contract when the original is lost.
- Oral testimony from a witness who read a now-lost document and recalls its contents.

**Conditions for Use**: Secondary evidence is only admissible under certain conditions, such as when the original document has been destroyed, lost, or is otherwise unavailable after diligent search. This principle was affirmed in **Sattamma v. Ch. Bhikshapati Goud (AIR 2010 AP 166)**.

8. **Oral Evidence**:

**Definition**: Oral evidence refers to any statements made by witnesses verbally or through gestures in court. It can include what the witness saw, heard, or perceived through their senses.

**Examples**:

- Testimony from a person describing an event they witnessed.
- A dumb person testifying through gestures or sign language.

Oral evidence is a key part of trials, and when credible, it can establish facts without needing additional documentary proof. As per **Nandam Mohanamma v. Markonda Narasimha Rao (AIR 2006 AP 8)**, oral evidence can be as effective as documentary evidence in proving a fact.

9. **Documentary Evidence**:

**Definition**: Documentary evidence consists of written or recorded documents presented to the court to support or dispute facts. It includes all forms of written, printed, or electronic documents that serve as proof.

**Examples**:

- A signed contract, a will, or business records.
- Emails, digital records, or photographs.

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**Rules for Admissibility**:

- Proof of the document's content.
- Proof of the document's authenticity.

10. **Positive and Negative Evidence**:
    - **Positive Evidence**: Evidence that proves the existence of a fact.
    - **Negative Evidence**: Evidence that disproves the existence of a fact or establishes that something did not occur.
    - **Example**: Testimony that a person was present at the scene of a crime (positive evidence) versus testimony that they were not present (negative evidence). While positive evidence is typically more persuasive, negative evidence can still be valuable when it rules out other possibilities, as seen in **Rahim Khan v. Khurshid Ahmed (AIR 1975 SC 290)**.
11. **Substantive and Non-substantive Evidence**:
    - **Substantive Evidence**: Evidence that directly relates to the main issue in the case and can independently establish facts.
    - **Non-substantive Evidence**: Evidence used to corroborate or contradict substantive evidence but cannot stand on its own to establish a fact.
    - **Example**: The primary testimony of an eyewitness (substantive) may be supported or challenged by forensic evidence like DNA tests (non-substantive).
12. **Prima Facie and Conclusive Evidence**:
    - **Prima Facie Evidence**: Evidence that appears to be sufficient to establish a fact unless contradicted by further evidence.
    - **Conclusive Evidence**: Evidence that is so strong that it cannot be rebutted or contradicted. It leads to a presumption that the fact is true without allowing for further evidence.
    - **Example**: A certified copy of a government order may serve as conclusive proof of the order's existence, as illustrated in **Somawanti v. State of Punjab (AIR 1963 SC 151)**.
13. **Scientific Evidence**:
    - **Definition**: Evidence derived from scientific techniques or processes, such as DNA analysis, chemical testing, or fingerprint identification.
    - **Examples**:
        - DNA matching in criminal cases.
        - Blood alcohol tests in DUI cases.
    - **Admissibility Criteria** (from **Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993)**):
        - Whether the technique has been tested.
        - Whether it has been subjected to peer review.
        - The potential error rate.
        - Standards controlling the technique's operation.
        - General acceptance within the scientific community.
14. **Digital Evidence**:
    - **Definition**: Evidence obtained from digital sources such as computers, smartphones, or online databases. With the increasing reliance on technology, digital evidence plays a significant role in modern legal proceedings.
    - **Examples**:
        - Email records or chat logs.

- Social media posts, GPS tracking data, or files stored on a computer.

Digital evidence must be handled carefully to preserve its integrity. The **Information Technology Act, 2000** introduced provisions for recognizing electronic records as admissible evidence.

15. **Tape Record Evidence**:
    - **Definition**: Audio or video recordings presented in court as direct evidence of statements made or events that occurred.
    - **Examples**:
        - A recorded phone conversation presented to prove a bribe was solicited.
        - A video recording showing a defendant at a crime scene.
    - **Rules for Use**: The authenticity of the recording must be established, and the possibility of tampering must be ruled out. In **V.V. Giri's case (AIR 1971 SC 1162)**, the Supreme Court held that tape recordings can be admissible as evidence provided their authenticity is proven.
16. **Dog Evidence**:
    - **Definition**: Evidence based on the behavior of tracker or sniffer dogs used by law enforcement during investigations. Although dogs have high sensory abilities, their evidence is considered unreliable because it involves an element of interpretation.
    - **Example**: A tracker dog leading police to a suspect's hiding place after a crime.
    - **Case Law**: In **Abdul Razak Murtaza Dafadar v. State of Maharashtra (AIR 1970 SC 283)**, the court noted that dog-tracking evidence is not scientific and should not be given significant weight in criminal trials.
17. **Electronic Evidence**:
    - **Definition**: This includes digital or electronic records such as emails, electronic documents, or any other data stored electronically. In today's digital age, electronic evidence is becoming increasingly common.
    - **Examples**:
        - Digital signatures on contracts.
        - Emails or text messages submitted to prove communication.
    - **Case Law**: The Supreme Court in **State of Maharashtra v. Praful B. Desai (AIR 2003 SC 2053)** allowed evidence to be recorded via video conferencing, recognizing electronic evidence's legitimacy.

**Law of Evidence as Lex Fori**

Lex Fori is a Latin maxim which simply means 'law of the forum'. As regards law of evidence, we know that it plays a significant role in the proceedings of a case be it criminal or civil. The law of evidence, being an adjective law, is part of the procedural law meaning thereby, a court has to observe it. This is represented by the maxim lex fori i.e. law of the forum. Since it is matter of convenience, a foreigner coming to India cannot insist upon the application of their law of evidence. Indian courts only know the Indian law of evidence and will follow it only. It means that even if a fact to be proved in an Indian court is one that occurred in any other country, it shall be proved in accordance with the Indian law of evidence. For instance, in ***Niharendu Dutt Majumdar v. King Emperor*** , where the fact had occurred in

England, the Federal court observed that "Though the question is one of the methods of proving an event which occurred in England, the law applicable is the Indian and not the English law of evidence."

Basically, the Indian Evidence Act, 1872, governs all judicial proceedings in or before any court (including all judges and magistrates, and all persons, except arbitrators, who are legally authorised to take evidence) where there is an obligation to take evidence from both sides, to hear both sides, to hear both sides and formulate a judgment by the use of discretion.

# PART II

# CHAPTER II

# RELEVANCY OF FACTS

### 3. Evidence may be given of facts in issue and relevant facts.

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

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

**Illustrations.**

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death. At A's trial the following facts are in issue:—

A's beating B with the club;

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

A's intention to cause B's death.

(b) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure, 1908 (5 of 1908).

**Facts in issue:** The facts in issue are those that are required to be proven, and they are also known as **"principal facts"** or **factum probandum**. When the parties' rights and liabilities are based on a facts that is in dispute or disagreement, that fact is in issue.Proof of facts in issue decides the merits and outcomes of cases.

**For example,**

'X' is accused of defamation for defaming 'Y'. The following facts could be at issue: 'X' harmed 'Y's reputation; 'Y's business suffered damages as a result of 'X's defamation; 'X' authored and published defamatory comments about 'Y' with malice, etc.

The facts in the issue define both the plaintiffs' and defendants' arguments. To persuade the court's decision in their favor, the parties must demonstrate that the facts in dispute favor their pleas. What constitutes the facts in dispute is determined by the substantive law applicable to the offense. In criminal proceedings, the facts in question are determined by the contents of the charge sheet, whereas in civil trials, issues are framed.

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The facts in the issue serve as the foundation for the parties' arguments, and when these facts are proven to the court's satisfaction, a decision can be made.

**Relevant facts:**
Relevant facts are those that are required to prove or disprove a given fact. Relevant facts are sometimes known as **evidential facts (factum probans)**. These facts are not in issue – they are not the primary root of the dispute or argument between the parties. Rather, pertinent or evidentiary facts delve deeper into the background or circumstances of the facts in hand, allowing inferences to be drawn about them.

Admissions and confessions, declarations by those who are not witnesses, precedents from case laws, statements made under special circumstances, facts that form a chain of rational thought with the facts in issue, third-party opinions, and evidence as to a person's character are all examples of relevant facts.

Relevant facts suggest a relationship between facts that, based on a reasonable chain of logic and common sense, either prove or disprove each other's existence. Relevant facts serve as supplemental material to persuade the court's view in favor of the party making the argument regarding the facts at issue.
**For example**, 'A' is suspected of stealing. An important piece of information is that 'A' has a history of pick-pocketing and shoplifting and has previously been prosecuted. The question would be whether A committed stealing.

**Relationship between Facts in Issue and Relevant Facts:**
It is important to understand the relationship between the facts at issue and the relevant facts in judicial proceedings. During the stage of formulating issues or charges, the courts determine the facts in issue based on the facts and pleadings of the case. On the other hand, relevant facts are reviewed during the case's trial to support or disprove the facts in issue. The facts in issue are concerned with establishing rights, liabilities, or disabilities, while relevant facts assign possibilities to the existence or absence of those liberties and responsibilities. The facts at issue are the fundamental facts that must be proven, while relevant facts offer the required evidential support.
Facts in issue are the major disputed facts that decide a case's conclusion, whereas relevant facts are the supporting evidential facts that assign probabilities to the existence or absence of rights and obligations

*Closely connected facts*

**4. Relevancy of facts forming part of same transaction.**

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

**Illustrations.**

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

(b) A is accused of waging war against the Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked and jails are broken open. The

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occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

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

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

**SECTION 4 OF BSA: RELEVANCY OF FACTS FORMING PART OF SAME TRANSACTION**

**Corresponding provision**

Section 4 of the BSA corresponds to section 6 of the Evidence Act

**Facts not in issue**

Section 6 of Evidence Act provided that facts which, though not in issue, but which are so connected with a **fact in issue** as to form part of the same transaction, are relevant.

In addition, section 4 of the BSA also provides that facts though not in issue are so connected with a **relevant fact** as to form part of the same transaction, are relevant.

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**Res Gestae**
Originally the Romans used Res gestae to mean acts are done or actus. It was described by the English and American writers as facts forming the same transaction. Res gestae are the facts that form a part of the same transaction automatically or naturally. They are the acts that speak for themselves. Due to their association with the main transaction, these facts become relevant in the nature of the fact in question. Circumstantial facts are admitted to be part of res gestae, i.e. it is part of the original evidence of what happened. Statements can also accompany physical events such as gestures. Things said or acts done in course of transaction amounts to res gestae.

The principle embodied in law in Section 4 of BSA, is usually referred to as the res gestae doctrine. The facts that can be proved as a part of res gestae must be facts other than those in question but must be linked to them. Although hearsay evidence is not admissible, it may be admissible in a court of law when it is res gestae and may be reliable proof. The reason behind this is the spontaneity and immediacy of such a statement that for concoction there is hardly any time. Such a statement must, therefore, be concurrent with the acts that constitute the offense or at least immediately thereafter.

**'Same transaction': meaning of.--**
The term 'same transaction' has not been defined in the BSA . It signifies that a series of activities are linked together to present a continuous story. A definition of the word is given by Stephen who says,
"A transaction is a group of facts, connected together to be referred to by a single legal name, a crime, a contract, a wrong or any other subject of enquiry which may be in issue." From its very

nature the word 'transaction' is difficult to define. It should be interpreted neither in any strict nor in technical way but in its ordinary etymological meaning of "an affair" or "a carrying through."
The rule of efficient test for determining whether a fact forms part of the same transaction or another "depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as probable and subsidiary acts as to constitute one continuous action."
Proximity of time is not so essential for the continuity of action and purpose. On the one hand, the mere proximity of time between several acts will not necessarily constitute them parts of the same transaction, on the other hand, the mere fact that there are intervals of time between the various acts will not necessarily import want of continuity. To ascertain whether a series of acts are parts of the same transaction, it is essential to see whether they are linked together to present a continuous whole. Section 4 lays down that facts, which form part of the same transaction are relevant.

Therefore, all facts which are connected with the 'facts in issue' or a 'relevant fact' due to:
1. Proximity of time
2. Proximity of place
3. Continuity of action
4. Community of purposes, whether happen at same time and place or different time and different place
Then, they are said be 'part of the same transactions'.

**5. Facts which are occasion, cause or effect of facts in issue or relevant facts.**
Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.
**Illustrations.**
(a) The question is, whether A robbed B. The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.
(b) The question is, whether A murdered B. Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.
(c) The question is, whether A poisoned B. The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

These facts are those which provide either occasion or cause or create effect over 'facts in issue'.
For example in murder case, 'presence' of accused and victim at the place of occurrence at same time or accused 'having gun', at given time, or 'altercation between' accused and victim are the facts proving occasion, and thus they are relevant in this section. 'Firing' of bullet is cause of death, so 'firing' as such is a relevant fact; 'firing of bullet' may have effect of causing death or serious injuries, here injuries or death is effect of 'firing of bullet', so such injuries are relevant facts.

**6. Motive, preparation and previous or subsequent conduct.**

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

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

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

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

**Illustrations.**

(a) A is tried for the murder of B. The facts that A 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. The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

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

(d) The question is, whether a certain document is the will of A. The facts that, not long before, the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate; that he consulted advocates in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

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

(f) The question is, whether A robbed B. The facts that, after B was robbed, C said in A's presence— "the police are coming to look for the person who robbed B", and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B ten thousand rupees. The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—"I advise you not to trust A, for he owes B ten thousand rupees", and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime. The fact that A absconded, after receiving a letter, warning A that inquiry was being made for the criminal, and the contents of the letter, are relevant.

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

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(j) The question is, whether A was raped. The fact that, shortly after the alleged rape, A made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant. The fact that, without making a complaint, A said that A had been raped is not relevant as conduct under this section, though it may be relevant as a dying declaration under clause (a) of section 26, or as corroborative evidence under section 160.

(k) The question is, whether A was robbed. The fact that, soon after the alleged robbery, A made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant. The fact that A said he had been robbed, without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under clause (a) of section 26, or as corroborative evidence under section 160.

**SECTION 6 OF BSA: MOTIVE, PREPARATION AND PREVIOUS OR SUBSEQUENT CONDUCT**

**Corresponding provision**

Section 6 of the BSA corresponds to section 8 of the Evidence Act

The first para in section 8 of Evidence Act is now sub-section (1) of section 6 in the BSA

The second para in section 8 of Evidence Act is now sub-section (2) of section 6 in the BSA

**Illustrations**

In Statutory Illustration (d) to section 8 of Evidence Act, reference to "vakils" is replaced with "advocates"

In Statutory Illustration (e) to section 8 of Evidence Act, typographical error of "proved" corrected by making it "provided"

In Statutory Illustration (f) to section 8 of Evidence Act, word "man" is replaced with "person" to make it gender neutral

In Statutory Illustration (j), word "ravished" has been replaced with the word "raped"

Facts suggesting **motive** (say example previous fighting, property dispute, love affair, family dispute, business rivalry etc.) or **preparation** (say example just before the murder accused purchased a gun or bullets, or took training for shooting, or in case of forgery, he purchase few stamp papers to forged a sale deed etc) or **conduct,** whether previous or subsequent of the parties are also relevant (examples of previous conducts like, previous attempts, any fights; example of subsequent conduct such as being missing from house after committing murder, suspicious act of hiding himself or certain goods used for the offence etc.)

It is important to note that conducts of parties as well as their agents both are relevant in any suit or proceeding.

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**7. Facts necessary to explain or introduce fact in issue or relevant facts.**

Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or a 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 affirms that the matter alleged to be libellous is true. The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue. The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime. The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section 6, as conduct subsequent to and affected by facts in issue. The fact that, at the time when he left home, A had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly. The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

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

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

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

**Under section 7 the following facts are relevant:-**

(1) Fact which are necessary to explain a fact in issue or relevant fact.

(2) Facts which are necessary to introduce a fact in issue or relevant fact.

(3) Facts which support an inference suggested by a fact in issue or relevant fact.

(4) Facts which rebut an inference suggested by a fact in issue or relevant fact.

(5) Facts which establish the identity of anything or person whose identity is relevant.

(6) Facts which fix the time or place at which the facts in issue or relevant fact happened.

(7) Facts which show the relation of parties by whom any such fact was transacted.

It should be borne in mind that these seven categories of facts are not admissible generally.

They are relevant only in so far as they are necessary for the purpose indicated in each category.

It is often challenging to address the main fact directly in a legal suit or proceeding. A judge, much like a listener in a story, seeks introductory context to understand the key facts and events that follow. These preliminary details are valuable in clarifying the nature of the case and filling in any missing links.

For example, in ***Hunt v. Swyney, 33 PAC 854,*** a case was filed by Hunt, executor of a will, against Swyney to compel the transfer of certain lands alleged to be held in trust. Mrs. Sharp, the widow, intervened, claiming the defendant held the land in trust for her. In her testimony, she was asked if Swyney had acted as her agent for rents during a specific period, and although an objection was raised, the question was allowed because it was deemed introductory to the relevant facts.

**Identification Test is not Substantive Evidence**

In ***Musheer Khan @ Badshah Khan v. State of Madhya Pradesh,*** the Supreme Court held that an identification test is not considered substantive evidence. Its purpose is to provide assurance to investigators that they are on the right track in their investigation, particularly when it comes to identifying people or objects related to the crime.

The identity of a person or thing is necessary to establish relevant facts in a case. Additionally, this aspect of the law overlaps with Section 9 of the BSA. Certain facts may not be directly relevant but can support or refute inferences related to the main issue. For instance, if someone accused of robbery flees immediately after the crime, that flight may suggest involvement in the crime. However, if evidence shows the person had another reason for leaving, such as urgent business, it may rebut that inference.

**Establishing Identity**

This section of the law does not deal with testimonial identity but with circumstantial evidence of identity. This includes factors like physical characteristics (height, age, hair, complexion), distinctive features (thumb impressions, voice, handwriting), and other personal details (residence, occupation, family relationships).

**Facts Showing Relationships**

The relationships between parties involved in a case are also relevant. For example, if a document is alleged to have been created under undue influence, the relationship between the maker of the document and the person accused of exercising that influence becomes a relevant fact (Boyse v. Roosbarough).

**Test Identification Parade (TIP)**

A TIP is conducted primarily for investigative purposes, not for the court. The aim is twofold: to allow witnesses to verify that the suspect is indeed the person they saw in connection with the crime and to help investigators confirm that their suspect matches the witnesses' accounts (***Mulla v. State of Uttar Pradesh***). The TIP strengthens the credibility of the witness's testimony in court and serves as corroborative evidence.

In summary, while identification tests and introductory facts may not be substantive evidence, they play a critical role in guiding investigations and establishing a logical connection between facts and issues in a case.

**8. Things said or done by conspirator in reference to common design.**

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

**Illustration.**

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the State.

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

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**<u>To prove conspiracy the following elements must be proved:</u>**

**(A) In Criminal Conspiracy to commit an offence-**

(i) there must be an agreement between two or more persons; and

(ii) that agreement must be to commit an offence under the Indian Penal Code or any special or local Act.

**(B) In Criminal Conspiracy other than to Commit an offence-**

(i) there must be an agreement between two or more persons;

(ii) the agreement must be to do some illegal act or legal act by illegal means; and

(iii) that some overt act1 was committed in pursuance of such agreement.

**(C) In Civil Conspiracy-**

(i) that there was an agreement between two or more persons;

(ii) that the agreement was to effect some unlawful purpose or a lawful purpose by unlawful means;

(iii) that some overt act1 was done in pursuance of the agreement; and

(iv) that the overt act resulted in damage to the plaintiff.

Thus 'damage' is essential condition for establishing civil conspiracy.

**Proof of conspiracy.-**

Conspiracy is generally hatched in secrecy and executed in darkness and hence section 10 is deliberately enacted so as to make the acts and words of a conspirator admissible against the whole body of conspirators. Direct evidence of conspiracy by its very nature being rare, it is proved more often than not by inferential or circumstantial evidence like the conduct of the parties including their acts, words and writings.

**9. When facts not otherwise relevant become relevant.**
**Facts not otherwise relevant are relevant—**
(1) if they are inconsistent with any fact in issue or relevant fact;
(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.
**Illustrations.**
(a) The question is, whether A committed a crime at Chennai on a certain day. The fact that, on that day, A was at Ladakh is relevant. The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.
(b) The question is, whether A committed a crime. The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B, C or D, is relevant.

Section 9 (1) is based on the principle of inconsistency, while section 9 (2) is based on that of probability. In the first clause the inconsistency or contradiction is complete while in the second it is not so. Thus, Illustration (a) is an instance of perfect alibi. As A was present in Lahore, it is impossible that he could have committed the crime in Calcutta. While Illustration (b) is an instance of imperfect alibi, for that A was at some distance, it was not altogether impossible for him to have committed the offence. It affords a weak defense, base probability and hence it is not a conclusive alibi. The theory of alibi is that the fact of presence elsewhere is essentially inconsistent with presence at the place and time alleged and therefore with personal participation in the act.

**10. Facts tending to enable Court to determine amount are relevant in suits for damages.**
In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

**11. Facts relevant when right or custom is in question.**
Where the question is as to the existence of any right or custom, the following facts are relevant:
(a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence;

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(b) particular instances in which the right or custom was claimed, recognised 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.

**12. Facts showing existence of state of mind, or of body or bodily feeling.**

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

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

**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 he was in possession to be stolen.

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

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

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

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

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

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(g) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor. A's defence is that B's contract was with C. The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.
(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found. The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found. The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.
(i) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.
(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.
(k) The question is, whether A has been guilty of cruelty towards B, his wife. Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.
(l) The question is, whether A's death was caused by poison. Statements made by A during his illness as to his symptoms are relevant facts.
(m) The question is, what was the state of A's health at the time when an assurance on his life was effected. Statements made by A as to the state of his health at or near the time in question are relevant facts.
(n) A sues B for negligence in providing him with a car for hire not reasonably fit for use, whereby A was injured. The fact that B's attention was drawn on other occasions to the defect of that particular car is relevant. The fact that B was habitually negligent about the cars which he let to hire is irrelevant.
(o) A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.
(p) A is tried for a crime. The fact that he said something indicating an intention to commit that particular crime is relevant. The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

**13. Facts bearing on question whether act was accidental or intentional.**

When there is a question whether 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 to obtain money for which it is insured. The facts that A lived in several houses successively each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance company, are relevant, as tending to show that the fires were not accidental.

(b) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive. The question is, whether this false entry was accidental or intentional. The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.
(c) A is accused of fraudulently delivering to B a counterfeit currency. The question is, whether the delivery of the currency was accidental. The facts that, soon before or soon after the delivery to B, A delivered counterfeit currency to C, D and E are relevant, as showing that the delivery to B was not accidental.

**14. Existence of course of business when relevant.**

When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

**Illustrations.**

(a) The question is, whether a particular letter was dispatched. The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place are relevant.
(b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Return Letter Office, are relevant.

***Admissions***

Sections 15 to 25 of the BSA deal with what is called as 'admissions and confessions'. However, the Act treats 'confessions' as merely a kind of 'admissions'. This way one can say that the admissions in the Criminal cases is 'confessions'. Here, admission is a statement, oral or documentary or contained in electronic form. Admission plays a very important part in judicial proceedings. If one party proves that the other party had admitted his case, the work of court becomes easier.
According to section 25 , Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained. Admissions are those statements of made by the parties which are against their own interest. Why these statements are relevant is easy to appreciate. If some one is making statement against his own interest, then either he is insane or he is speaking truth, and if he is speaking truth, law must recognise that statement. For example when the question between A and B is, whether a certain deed is or is not forged? And A affirms that it is genuine, B that it is forged. Here, 'A' may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine nor con B Prove a statement by himself that the deed is gorged.
Since, admissions are made by parties against their own interest, during suit or proceeding, they are often proved by opposite party, except in following cases:
1. An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead it would be relevant as between third person under section 26 i.e. dying declaration

- For example 'A' the captain of a ship, is tried for casting the ship away. Evidence is given to show that the ship was taken out of her proper course. 'A' produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statement, because they would be admissible between third parties, if he were dead under Section 26, Clause (2).

- Another example would be where ‘A’ is accused of a crime committed by him at Calcutta. He produces a letter written by him, and dated at Lahore on that day, and bearing the Lahore post-mark of that day. Generally this letter will not be admissible as it is written by him only; however, this will be admissible because if A were dead it would be admissible under Section 26, Clause (2).

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

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

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

Eg- A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit. He offers to prove that he asked a skilful person to examine the coins as he doubted whether it was counterfeit or not, and that person did examine it and told him it was genuine. A may prove these facts because they are explanatory of conduct that he has no intention to possess any counterfeit coins and this is very must suggested by the fact the he as asked some one to examine the coin.

**15. Admission defined.**

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

**16. Admission by party to proceeding or his agent.**

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

(2) Statements made by—

(i) parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character; or

(ii) (a) persons who have any proprietary or pecuniary interest in the subject matter of the proceeding, and who make the statement in their character of persons so interested; or

(b) persons from whom the parties to the suit have derived their interest in the subject matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.

**Admissions can be made by:**
**a. Parties to the case**
**b. Authorised agents of parties, whether expressly authorised or authorised impliedly**
**c. In a Representation suit, the person who is representing others**

‘A’ files a representation suit against government against torts of Nuisance. An admission made by A, would be binding all interested parties, if the statement was made when A was holding representative character.

**d. Persons having any proprietary or pecuniary interest in the subject-matter of the**

**proceeding**

• A, a partner in a firm with B, files suit for possession of property against Z. B, makes an statement that A is fighting a wrong claim against B, would be relevant as he has pecuniary interest in the property and still making such comment.

**e. Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, and where statement was made during the continuance of such interest of the persons making the statements**

• A files suit for recovery of 20, 000/- Rs against B, claiming that the house which he purchased from C was under mortgage with said amount in his name. A want to prove a statement given by C, which was made when house was owned by C, that house is under a mortgage for 20,000/- Rs, with A. Since, the statement was given when C was having possession of the house, this would be good piece of admission as he made statement against his own interest and now B is deriving his interest from the same house.

**f. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit**

• A undertakes to collect rent for B. B sues A for not collecting rent due from C to B. A denies that rent was due from C to B. A statement by C that he owned B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

**g. Admission by persons expressly referred to by party to suit**

• The question is, whether a horse sold by A to B is sound A says to B "Go and ask CC knows all about it" C's statement is an admission.

**Admission can be made both in civil proceeding as well as in criminal proceedings.**

For example,

if during a criminal trial for murder, accused admit his presence at place or occurrence or admit that weapon use for committing offence belongs to him etc., then such facts need not to be proved. It is because of this reason it is stated that 'facts admitted need not to be proved.'

**17. Admissions by persons whose position must be proved as against party to suit.**

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

**Illustration.**

A undertakes to collect rents for B. B sues A for not collecting rent due from C to B. A denies that rent was due from C to B. A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

**18. Admissions by persons expressly referred to by party to suit.**

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

**Illustration.**

The question is, whether a horse sold by A to B is sound.

A says to B— "Go and ask C, C knows all about it". C's statement is an admission.

**19. Proof of admissions against persons making them, and by or on their behalf.**

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

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(1) an admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 26;
(2) an admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable;
(3) an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

**Illustrations.**

(a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged. A may prove a statement by B that the deed is genuine, and B may prove a statement by A that deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.
(b) A, the captain of a ship, is tried for casting her away. Evidence is given to show that the ship was taken out of her proper course. A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under clause (b) of section 26.
(c) A is accused of a crime committed by him at Kolkata. He produces a letter written by himself and dated at Chennai on that day, and bearing the Chennai post-mark of that day. The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under clause (b) of section 26.
(d) A is accused of receiving stolen goods knowing them to be stolen. He offers to prove that he refused to sell them below their value. A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.
(e) A is accused of fraudulently having in his possession counterfeit currency which he knew to be counterfeit. He offers to prove that he asked a skilful person to examine the currency as he doubted whether it was counterfeit or not, and that person did examine it and told him it was genuine. A may prove these facts.

**20. When oral admissions as to contents of documents are relevant.**

Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

**21. Admissions in civil cases when relevant.**

In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

**Explanation.**—Nothing in this section shall be taken to exempt any advocate from giving evidence of any matter of which he may be compelled to give evidence under sub-sections (1) and (2) of section 132.

**SECTION 21 OF BSA: ADMISSIONS IN CIVIL CASES WHEN RELEVANT**

**Corresponding provision**

Section 21 of the BSA corresponds to section 23 of the Evidence Act

**Advocate**

"Advocate" is replaced for "barrister, pleader, attorney or vakil"

**22. Confession caused by inducement, threat, coercion or promise, when irrelevant in criminal proceeding.**

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, coercion or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him:

Provided that if the confession is made after the impression caused by any such inducement, threat, coercion or promise has, in the opinion of the Court, been fully removed, it is relevant:

Provided further that if such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

**SECTION 22 OF BSA: CONFESSION CAUSED BY INDUCEMENT, THREAT, COERCION OR PROMISE, WHEN IRRELEVANT IN CRIMINAL PROCEEDING**

Corresponding provision

- Section 22 of the BSA corresponds to sections 24, 28 and 29 of the Evidence Act
- Section 22(1) of BSA corresponds to section 24 of IPC
- Section 22(1), first proviso of BSA corresponds to section 28 of IPC
- Section 22(2), second proviso of BSA corresponds to section 29 of IPC

**Coercion**

Words **"coercion"** are inserted in section 22 of BSA, which was not there in section 24 of Evidence Act

Confession is that type of admission in criminal matter where accused admits guilt in its absolute terms, leaving prosecution to prove nothings. In other words, confession of guilt in its

entirety may be termed as confession.
Lord Atkin in ***Pakla Narayan Swami v. Emperor (AIR 1941 PC 39)*** provided interesting example of confession. If accused admit the guilt which highly inclupatory and says that he had stabbed the victim to death through his knife, and admit the knife as well, it is still not confession because prosecution would have to prove whether or not act of accused is covered by any private defense or protected under any general exception such as unsoundness of mind.

**Rule regarding Admissibility of Confession:**

• According to section 22(1), No confession given by an accused person would be relevant if it given in a criminal proceeding, and it was given under any inducement, threat coercion or promise, with reference to the charge against the him, and such inducement, threat or promise was given by a person in authority in relation to that case and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

• It must be noted that until all elements of section 22(1) are there, no such confession could be rejected. Say example, even if there is threat or promise, but it was not related to the consequence (like spiritual threat) or not coming out from the authority in proceeding, then if confession is made, it will be relevant.

A, an accused was threaten by a priest as to spiritual consequences, unless he confess, and accordingly accused makes confession, here only few elements of section 22(1) are there and not all, so this confession is admissible.

• The best example of cases where all elements mentioned in this section is present is when a police officer arrest any accused. It because of this reason that any confession made to a police officer is inadmissible by section 23(1).

• Only coercive confessions are made inadmissible. However, if the accused want to confess voluntarily, then the Bharatiya Nagarik Suraksha Sanhita, 2023, prescribes such procedure in section 183, and a Magistrate, when satisfied that accused is making confession voluntarily, he may record the same, and that is often used as substantial piece of evidence against the accused. If the confession is made through this process, it is called as judicial confession. Any confession made otherwise to any other person, such as friend, stranger etc. is called as Extra Judicial Confession. An extra judicial confession is legal and valid.

• It is difficult to rely upon the extra judicial confession as the exact words or even the words as nearly as possible have not been reproduced. Such statement cannot be said to be voluntary so the extra judicial confession has to be excluded from the purview of consideration for bring home the charge; ***C.K. Raveendran v. State of Kerala, AIR 2000 SC 369.***

**Exception to Rules of Confession**

• The first exception to rule of confession is provided in section 23. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. For example if accused says that "I killed B, and I can show you the place where I have buried the knife"…in this statement, police, if discover the 'knife' then the fact that it was discovered at the instance of accused may be proved.

• The condition necessary to bring the section 23 into operation is that the discovery of a fact in a consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved; ***PulukuriKottaya v. Emperor, AIR 1947 PC 119.***

• If such a confession as is referred to in Section 22 is made after the impression caused by any

inducement, threat or promise has, in the opinion of the Court been fully removed it is relevant.

• Section 22 provides that Confession otherwise relevant not to become irrelevant because of promise of secrecy etc. Say for example B asked A, an accused of murder to make confession to him and he (B) promises that he will not disclose it to any one. Since, it is extra judicial confession which is admissible, it will not be held inadmissible only because there was a promise of its secrecy.

• Section 24 of IEA provides that when a confession is given by one accused, and the same was proved, it can be used against the co-accused if he is tried together in the same case during the joint trial.

However, as per **Illustration (b) of Section 119 of BSA**, such confession should not be relied until the same is proved with material corroboration. Why corroboration is important in this case? Let's examine. A committed murder of B with the help and conspiracy of X, Y and Z. all four were put on joint trial. During trial, X became approver and made confession. So, illustration (b) of section 119 provides rule of logic or rule of prudence that such testimony should not be relied on until corroborated in material particular i.e. through other evidence.

**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.

(b) A is on his trail for the murder of C. There is evidence to show that C was murdered by A and B, and that B said, "A and I murdered C". The statement may not be taken into consideration by the Court against A as B is not being jointly tried.

**Differences between Confessions and Admissions**

1. **Confessions**: A confession is a statement made by an accused person, used against them in a criminal proceeding to establish their involvement in an offense.
   **Admissions**: An admission generally relates to civil matters and includes all statements defined under Section 17 of the Evidence Act, made by persons specified in Sections 18, 19, and 20.
2. **Confessions**: If a confession is made deliberately and voluntarily, it may be accepted as conclusive proof of the facts confessed.
   **Admissions**: Admissions are not conclusive regarding the facts admitted, though they may function as estoppel in some cases.
3. **Confessions**: A confession always works against the person making it.
   **Admissions**: Admissions may sometimes be used in favor of the person making the admission, as provided under the exceptions in Section 21 of the Evidence Act.
4. **Confessions**: A confession made by one of two or more accused persons, who are being tried jointly for the same offense, can be considered against the co-accused (Section 30).
   **Admissions**: An admission made by one of several defendants in a civil suit does not serve as evidence against the other defendants.
5. **Confessions**: A confession is a direct admission, whether written or oral, of the crime.
   **Admissions**: An admission is an oral or written statement that implies liability, but it is not a direct acknowledgment of guilt.

**23. Confession to police officer.**

(1) No confession made to a police officer shall be proved as against a person accused of any offence.

(2) No confession made by any person while he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate shall be proved against him:
Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact discovered, may be proved.

**SECTION 23 OF BSA: CONFESSION TO POLICE OFFICER**

**Corresponding provision**

- Section 23(1) of the BSA corresponds to section 25 of the Evidence Act
- Section 23(2) of the BSA corresponds to sections 26 and 27 of the Evidence Act

**Magistrate**

**Explanation** to section 26 of the Evidence Act providing that "Magistrate" does not include head of a village, etc., is omitted

**24. Consideration of proved confession affecting person making it and others jointly under trial for same offence.**
When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.
**Explanation I.**—"Offence", as used in this section, includes the abetment of, or attempt to commit, the offence.
**Explanation II.**—A trial of more persons than one held in the absence of the accused who has absconded or who fails to comply with a proclamation issued under section 84 of the Bharatiya Nagarik Suraksha Sanhita, 2023 shall be deemed to be a joint trial for the purpose of this section.
**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.
(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said— "A and I murdered C". This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

**SECTION 24 OF BSA: CONSIDERATION OF PROVED CONFESSION AFFECTING PERSON MAKING IT AND OTHERS JOINTLY UNDER TRIAL FOR SAME OFFENCE**

**Corresponding provision**

Section 24 of the BSA corresponds to section 30 of the Evidence Act

**Joint Trial**

- Explanation to section 30 of Evidence Act incorporated in section 24 of BSA is renumbered as Explanation I
- New Explanation II is added in section 24 of BSA so as to clarify that "A trial of more persons than one held in the absence of the accused who has absconded or who fails to comply with a proclamation issued under section 84 of the Bharatiya Nagarik Suraksha Sanhita, 2023 shall be deemed to be a joint trial for the purpose of this section."

**25. Admissions not conclusive proof, but may estop.**

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

Statements by persons who cannot be called as witnesses

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

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

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

(b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him;

(c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;

(d) when the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen;

(e) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;

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(f) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised;

(g) when the statement is contained in any deed, will or other document which relates to any such transaction as is specified in clause (a) of section 11;

(h) when the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

**Illustrations.**

(a) The question is, whether A was murdered by B; or A dies of injuries received in a transaction in the course of which she was raped. The question is whether she was raped by B; or the question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow. Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth. An entry in the diary of a deceased surgeon regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Nagpur on a given day. A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned, in Nagpur, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Mumbai harbour on a given day. A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in Chennai, to whom the cargo was consigned, stating that the ship sailed on a given day from Mumbai port, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land. A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders is a relevant fact.

(f) The question is, whether A and B were legally married. The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the cause of the wreck of a ship. A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way. A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased business person in the ordinary course of his business, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B. A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A. A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.
(m) The question is, whether, and when, A and B were married. An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.
(n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

Generally, no statement given by any person can be used as evidence, until he comes to the court and testified on oath as to veracity of his statement. The reason behind this rule is that court cannot rely on a statement which is just a hearsay or rumor. What someone said, who know better than the person who made that statement, and until he comes to court, his statement should not be considered. However, in those cases where calling that person to court would be futile because either he exist no more or live at some place from where he could not be brought to the court, and he made certain statement which is so relevant to the case, then as a matter of public policy the same must be allowed to be proved. Let's take an example. A killed B. before his death, B made certain statement to doctor as to cause of his death i.e. who causes those injuries. Now, as matter of general rule, his statement should not be proved since a dead man cannot be brought to the court to testify something on oath. It is also a fact that no body knows better as to cause of his death other than he. In such a case, public policy allows that such a statement may be admissible subject to certain strict rules.
A statements, written or verbal, made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:
**(1) When it relates to cause of death** –
When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.
**(2) Or is made in course of business** –
When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum
made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods securities or property of any kind; or of a document used in commerce written or signed by him or of the date of a letter or other document usually dated, written or signed by him.
**(3) Or against interest of maker –**
When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true it would expose him or would have exposed him to criminal prosecution or to a suit for damages.
**(4) Or gives opinion as to public right or custom, or matters of general interest –**
When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest of the existence of which if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to

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such right, custom or matter had arisen.
**(5) Or relates to existence of relationship –**
When the statement relates to the existence of any relationship 1by blood, marriage or adoption between persons as to whose relationship 1by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.
**(6) Or is made in will or deed relating to family affairs –**
When the statement relates to the existence of any relationship 1by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.
**(7) Or in document relating to transaction mentioned in section 11, Clause (a). –**
When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 11, Clause (a).
**(8) Or is made by several persons and express feelings relevant to matter in question –**
When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

A 'Dying declaration' means the statement of a person who has died explaining the circumstances of his death. Such a statement can be proved when it is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death. The statement will be relevant in every case or proceeding in which the cause of that person's death comes into question.
Dying declarations are statements oral or documentary made by the person as to the cause of his death or as to the circumstances of the transactions resulting in his death. The grounds of admission of a dying declaration are:

1. firstly, necessity, for the victim being generally the only principal eye-witness to the crime, the exclusion of his statement might defeat the ends of justice; and

2. secondly, the sense of impending death which creates a sanction equal to the obligation of an oath.

The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world has gone, when every motive to falsehood is silence and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn and so lawful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice; ***R. v. Woodcock, (1789) I Leach 500.***

The principle on which the Dying Declarations are admitted in evidence is indicated in legal maxim "*Nemo moriturus praesumitur mentiri*" implies that a man who is on death bed would not tell a lie to falsely implicate innocent person; ***Sharda v. State of Rajasthan, AIR 2010 SC 408.***

**English Law and the Indian Law - Difference.--**

(1) Under English Law, a dying declaration is admissible only on a criminal charge of homicide or manslaughter, whereas in India it is admissible in all proceedings, civil or criminal.

(2) Under the English Law, the declarations should have been made under the sense of impending death, whereas under the Indian Law it is not necessary that the deceased, at the time of making the dying declaration, should have been under expectation of death.

(3) Under the English Law, the declaration must have been competent as a witness, thus, imbecility of tender age will exclude the declaration. It is, however, doubtful whether this rule is applicable in India. The credit of such a declarant may be impeached in the same way as that of witness actually examined in a court.
Evidentiary value of a dying declaration.--

By enacting section 26 the Legislature in its wisdom has placed a dying declaration on par with evidence on oath for the reason that at the time when a man is in danger of losing himself it is not likely that he would speak a falsehood and involve an innocent person. There is no absolute rule of law nor is there any rule of prudence which has ripened into a rule of law that a dying declaration cannot form the sole basis of a conviction unless it is corroborated by independent evidence. The circumstances which lend strength and assurance to a dying declaration are as follows:

(1) That it was recorded by a competent Magistrate after taking all proper precautions.

(2) That it was taken down in the exact words in which it was spoken.

(3) That it was made shortly after the assault when there was no opportunity of its being coloured by impressions received from others.

(4) That deceased had ample opportunity of observation.

(5) That the incident happened in a sufficiently lighted place.

(6) That the deceased had made more than one statement and all of them were consistent as to the circumstances of the occurrence and the identity of the attackers.

**27. Relevancy of certain evidence for proving, in subsequent proceeding, truth of facts therein stated.**

Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided 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 and the questions in issue were substantially the same in the first as in the second proceeding.

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

***Statements made under special circumstances***

**28. Entries in books of account when relevant.**

Entries in the books of account, including those maintained in an electronic form, regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

**Illustration.**

A sues B for one thousand rupees, and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

**29. Relevancy of entry in public record or an electronic record made in performance of duty.**

An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record, is kept, is itself a relevant fact.

Section 35 of IEA (29 of BSA) provides that entry in public record or an electronic record made in performance of official duty is relevant for example it has been held regarding proof about legitimacy of child that the Birth Certificate proceeding on the basis of Baptism Certificate, containing fact that Baptism record was read and checked before the god parents and signed by person along with god parents, such certificate is valid. Thus, Birth Certificate proceeding on basis of Baptism Certificate, legally recognised legitimacy; ***Luis Caetano Viegan v. Esterline Mariana R.M.A. Da'Costa, AIR 2003 SC 630.***

**30. Relevancy of statements in maps, charts and plans.**

Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

Section 30 provides that statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts, or plans are themselves facts.

**31. Relevancy of statement as to fact of public nature contained in certain Acts or notifications.**

When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Central Act or State Act or in a Central

Government or State Government notification appearing in the respective Official Gazette or in any printed paper or in electronic or digital form purporting to be such Gazette, is a relevant fact.

**SECTION 31 OF BSA: RELEVANCY OF STATEMENT AS TO FACT OF PUBLIC NATURE CONTAINED IN CERTAIN ACTS OR NOTIFICATIONS**

**Corresponding provision**

Section 31 of the BSA corresponds to section 37 of the Evidence Act

**Official Gazette in electronic or digital form**

Electronic or digital form of Official Gazette is made admissible evidence by section 31 of BSA

**32. Relevancy of statements as to any law contained in law books including electronic or digital form.**

When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published including in electronic or digital form under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book including in electronic or digital form purporting to be a report of such rulings, is relevant.

**SECTION 32 OF BSA: RELEVANCY OF STATEMENTS AS TO ANY LAW CONTAINED IN LAW BOOKS INCLUDING ELECTRONIC OR DIGITAL FORM**

**Corresponding provision**

Section 32 of the BSA corresponds to section 38 of the Evidence Act

**E-books/Websites**

In certain circumstances electronic or digital form of law books as well as Court's rulings in electronic or digital form are now made admissible in evidence by section 32 of BSA

Section 32 of BSA provides that when the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published including in electronic or digital form under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book including in electronic or digital form purporting to be a report of such rulings, is relevant.

***How much of a statement is to be proved.***

**33. What evidence to be given when statement forms part of a conversation, document, electronic record, book or series of letters or papers.**

When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a

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book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, electronic record, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

When evidence is given of a statement which forms part of (a) a longer statement or (b) a conversation, or (c) an isolated document, or (d) a document contained in a book, or (e) a series of letters of papers, the court has discretion as to how much evidence should be given of the statement, conversation, document, book, or series of letters or papers for the full understanding of the nature and effect of the statement and the circumstances under which it was made. The principle on which this section is based is that it would not be just to take part of a conversation, letter, etc., as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he wrote or said on the same occasion. Thus, the rule enacted in this section will not warrant the reading of distinct entries in an account book, or distinct paragraphs in a newspaper, unconnected with the particular entry or paragraph relied on by the opponent.

***Judgments of Courts when relevant***

**34. Previous judgments relevant to bar a second suit or trial.**

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

This section is intended to include all cases in which a general law relating to res judicata inter partes applies. The rule which emanates from this section is that the existence of a judgement, decree, or order is a relevant fact, if, by law, it has the effect of preventing any court from taking cognizance of a suit, or holding a trial.

**Res Judicata**

The main object of the doctrine of res judicata is to prevent multiplicity of suits and interminable disputes between litigants. Res judicata means, by its very words, a thing upon which the court has exercised its judicial mind. Section 11 of the Code of Civil Procedure lays down the law as to res judicata.

In ***C (a minor) v Hackney London Borough Council, (1996) 1 All ER 973 (CA),*** a resident in a Council house sued the Council for ill-health caused by disrepair and dampness. Subsequently, her dependent daughter brought an action for her disability on the same facts. The suit was held to be maintainable, the earlier suit being not between the same parties. The court said that she being not a party to the earlier proceedings, the doctrine of res judicata, even in its widest sense, had no application.

The court restated the general principle to be as follows:

The doctrine of res judicata in its wider sense, which includes a bar on the subsequent litigation not only of all issues resolved in the earlier proceedings but also of every point which properly belongs to the subject-matter of the litigation, applies only when the cause of action or issue is or remains between the same parties or their predecessors in title and does not extend to those not themselves party to the earlier proceedings. The expression “a party to earlier proceedings”

would not include a disabled and dependent child of one of the parties.

This section has nothing to do with questions of evidence beyond the admissibility of the judgments, because a plea of res judicata is not a plea as a matter of evidence, but only a plea barring the action as a matter of procedure as distinguished from the rules of evidence.
**Conditions for Application:** For the principle of res judicata to apply, several conditions must be met:

- The previous judgment must have been pronounced by a court of competent jurisdiction.
- The judgment must be final.
- The judgment must have been on the merits of the case.
- The same parties or their legal representatives must be involved in the subsequent case.

The principle of this section applies to criminal courts as well. The plea of autrefois convict or autrefois acquit, that is, of a previous lawful conviction or lawful acquittal, has always been held to be a good plea. However, it is a well-recognised principle of law that a conviction in a criminal case is no evidence of the facts on which that conviction was based in a civil case in which those facts are in issue or form the subject-matter of the suit. But the authorities are clear that, when the conviction is based on a plea of guilty, that plea is relevant and to prove in the judgment in the criminal case is admissible in evidence in the subsequent civil suit in which the facts giving rise to the charge are in issue or form the subject-matter of the suit. A judgment in personam which is not inter partes has been held to be not admissible in evidence.

**Binding Nature:** Once a matter has been conclusively decided by a competent court, it cannot be reopened or re-agitated between the same parties in subsequent proceedings. This principle is crucial for the finality and certainty of legal decisions.

**35. Relevancy of certain judgments in probate, etc., jurisdiction.**
(1) A final judgment, order or decree of a competent Court or Tribunal, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.
(2) Such judgment, order or decree is conclusive proof that:
(i) any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;
(ii) 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;
(iii) 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
(iv) anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

**SECTION 35 OF BSA: RELEVANCY OF CERTAIN JUDGMENTS IN PROBATE, ETC., JURISDICTION**

**Corresponding provision**

Section 35 of the BSA corresponds to section 41 of the Evidence Act

**Tribunal's Orders**

Tribunal's orders are now also covered in section 35 of BSA

**Two rules emanate from this section:**

- The first part makes the final judgment, order or decree of a competent court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction relevant.
- The second part makes the judgments conclusive proof in certain matters.

**Judgements in rem**

Judgements in rem means the judgement which are not only conclusive against the parties to the suit, but also against the world. **Taylor, 12th Edn, section 1674,** defines Judgement in rem to be "an adjudication pronounced, as its name indeed denotes, upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose."

It was held in ***State of UP v Arvind Kumar Srivastava, (2015) 1 SCC 347,*** that the intention in judgment in rem may be to give benefit to all similarly situated persons, whether they approached the court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated persons. Such a situation can occur when the subject-matter of the decision touches upon the policy matters, like the scheme of regularisation and the like.

Once a judgment falls within the section law dispenses with the proof of the legal character which it confers or declares together with the declarations of property arising from that legal character. A judgment in rem is conclusive only as regards status but not as regards the ground on which it is based. A judgment in rem can only be impeached if it can be shown—

- that the court has no jurisdiction; or
- that the judgment was obtained by fraud or collusion; or
- that it was not given on the merits; or
- that it was not final, e.g., interlocutory.

**Competent Court under this section**

The word "Court" is not limited to courts in India. The expression "competent Court" means the court of any country which is competent to pass such a judgment as is referred to in this section, that is to say, a judgment in rem. Tribunal's orders are now also covered in section 35 of BSA.

The Supreme Court following its own decision in ***R Viswanathan v Ruk-ul-Mulk Syed Abdul Majid, (1963) 3 SCR 2***, held that a judgment of a foreign court to be conclusive must be by a competent court, as contemplated by section 13, IPC, in an international sense and not merely by the law of the foreign State. Such judgments can be challenged on the ground of fraud.

In ***Roy Andre Sales de Andrade v State of Goa, 1996 AIHC 99 (Bom)***, an Indian couple had gone to Brazil where they obtained judicial separation from a competent court by mutual consent. On returning to India, they prayed for confirmation of their consensual divorce and the same was granted as the grounds of divorce were not opposed to public policy in India and the judgment was pronounced by the court of competent jurisdiction. It was held that presumptions

as to the conclusiveness of the judgment were available to the parties
In ***Kalyanchand v Sitabai, (1913) 16 Bom LR 5***, the executors named in a will, executed in the mofussil, applied for probate of the will. The court refused probate on the ground that the testator was not of a sound disposing mind at the time of execution. The testator's widow filed a regular suit against the defendants, as executors de son tort, to recover possession of the testator's property. The defendants again set up the will and claimed to be invested under it with all the legal character of executors.
It was held that this section was not applicable to the judgment of the Probate Court, for the finding of the court that an attempted proof had failed was not a judgment such as was contemplated in this section. The only kind of negative judgment which was contemplated was that which expressly took away from a person the legal character which had up to that time subsisted. In order to attract section 35 it is necessary that the judgment should have been pronounced. The mere pendency of proceedings whether civil or criminal is not sufficient in itself to enable anyone to seek the benefit of the section.

**36. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 35.**

Judgments, orders or decrees other than those mentioned in section 35 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

**Illustration.**

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

Under this section judgments relating to matters of a public nature are declared relevant, whether between the same parties or not. It also forms an exception to the general rule that no one shall be affected or prejudiced by judgments to which he is not a party or privy. The exception just stated is allowed in favour of verdicts, judgments, and other adjudications upon subjects of a public nature, such as customs, prescriptions, tolls, boundaries between parishes, counties, or manors, rights of ferry, liabilities to repair roads, or sea-walls, moduses, and the like.
Under this section the decrees of competent courts are good evidence in matters of public interest, such as the existence of a custom of succession in a particular community, or of a custom under which a tenure is held.

In ***Virupakshayya Shankarayya v Neelakanta Shivacharaya Pattadadevaru, AIR 1995 SC 2187***, an appointment to a post in a temple has been held to be a matter of public importance. A suit was filed for recovery of math property by the Padadayya (Mathadhipati) by virtue of his appointment as successor. There was a claim that some other person had been appointed and installed and that appointment was found to be valid by the Privy Council in an earlier litigation initiated by another person. It was held by the Supreme Court that the judgement of the Privy Council did not have the effect of res judicata. It was not binding on the appellant in the present case but it was relevant under section 42 of IEA( corresponds to Section 36 of BSA without changes).

**37. Judgments, etc., other than those mentioned in sections 34, 35 and 36 when relevant.**
Judgments or orders or decrees, other than those mentioned in sections 34, 35 and 36, 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 Adhiniyam.
**Illustrations.**
(a) A and B separately sue C for a libel which reflects upon each of them. C in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither. A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.
(b) 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.
(c) 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.
(d) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.
(e) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 6 as showing the motive for the fact in issue.

This section expressly contemplates cases in which judgments would be admissible under other sections of the Act, which are not admissible under section 34, 35 and 36. The cases contemplated by this section are those where a judgment is used not as res judicata or as evidence more or less binding upon an opponent by reason of the adjudication which it contains. But the cases referred to in this section are such as the section itself illustrates, viz., when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if A sued B for slander, in saying that he had been convicted forgery and B justified upon the ground that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by B like any other fact in the case, and quite irrespective of whether A had been actually guilty of the forgery or not. This would be one of the many cases alluded to in this section.
**Admissibility of judgement in Civil and Criminal Matters**
A judgment in a criminal case cannot be received in a civil action to establish the truth of the facts upon which it is rendered. The ruling of the ***Privy Council in Emperor v Khwaja Nazir Ahmad, AIR 1945 PC 18,*** has been applied by the Supreme Court in ***KG Premshanker v Inspector of Police, AIR 2002 SC 3372.*** In this case a civil suit for damages was also filed against the person accused in a criminal proceeding. The suit was dismissed. The court observed that criminal proceedings are not required to be dropped on that ground. The court also felt that it was bound by the decision of the Constitution Bench in ***MS Sheriff v State of Madras, AIR 1954 SC 397***, which was to the effect that no hard and fast rule could be laid down and that the possibility of conflicting decisions in civil and criminal courts was not a relevant consideration. The law envisaged such an eventuality when it expressly refrained from making the decision of one court binding on another court or even relevant except for limited purposes such as sentence or damages.
In ***Kharkan v State of UP, (1964) 4 SCR 673,*** it was observed that the "earlier judgment could only be relevant if it fulfils the conditions laid down by the Evidence Act in sections 40 to 43.

The earlier judgment is no doubt admissible to show the parties and the decision but it is not admissible for the purpose of relying upon the appreciation of evidence."

**38. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.**

Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 34, 35 or 36, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

The section lays down not only a rule of law relating to evidence, but also a rule of procedure. A party to a suit or other proceeding may show that a judgment, order, or decree, which is relevant under section 40, that is, which would, as a judgment inter partes, operate as res judicata, or which is relevant under section 41, that is, which is evidence as a judgment in rem, or which is relevant under section 42, that is, which is evidence as a judgment relating to a public matter, and which is proved by the adverse party, was passed by a court, which had no jurisdiction to pass it or was obtained by fraud or collusion.

The existence of a judgement over a matter which is again in question is a satisfactory piece of evidence, though, nothing is said about its evidentiary value in the Indian Evidence Act. The Act only provides that the value of a judgement may be demolished by showing that it was delivered by a court of incompetent jurisdiction , or it was obtained by fraud or collusion.

Such a judgement does not have the effect of res judicata. A judgement obtained by collusion means that there was no cause of action between the parties and by collusion of the parties a cause of action was feigned thus enabling the court to pass its judgement.

The judgment or decree which the section allows a party to impeach on the ground of fraud must be one which has been proved by the adverse party. A party can impeach a decree even if he was a party to the suit in which the decree was passed.

**Delivered by a Court not competent to deliver it**

The "competency" of a court and its "jurisdiction" are synonymous terms. They mean the right of a court to adjudicate in a given matter. They do not mean, in a case where that right exists, the coming to a correct conclusion upon any question of law or fact arising in that matter. The words "not competent" refer to a court acting without jurisdiction. Every species of judgment will be rendered inadmissible in evidence on proof given that the court which pronounced it had no jurisdiction.

**Obtained by Fraud or Collusion**

This section allows a party to prove fraud or collusion in order to avoid a judgment or order. The section is not applicable in cases of gross negligence. The fraud contemplated in this section must be a fraud practised on the court itself. "Fraud" is an extremely collateral act which vitiates the most solemn proceedings of courts of Justice. The term "fraud" is defined in section 17 of the Indian Contract Act. There must be actual or positive fraud, that is, there must be an intention to cheat or deceive another person to his injury.

"Collusion" means an agreement or contract between two or more persons to do some act in order to prejudice a third person, or for some improper purpose. It may be of two kinds: (1) when the facts put forward as the foundation of the sentence of the court do not exist; (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the sentence.

It was held in ***Nistarini Dassi v Nundo Lall Bose, (1899) 26 Cal 891***, in applying this rule it matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest court of Judicature in the realm; in all cases alike it is competent for every court,

whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud. Further, in ***Goberdhan Singh v Ritu Roy, (1896) 23 Cal 962***, the Court held that a distinction exists between those cases in which the fraud is only attempted but not carried into effect and those in which it has actually been carried into effect. In the former case a party attempting to commit fraud is not precluded from maintaining an action to set aside the fraudulent transaction; but in the latter case he is not allowed to take advantage of his own wrong and is precluded from maintaining an action to set aside the fraudulent transaction actually carried into effect.
In ***J v Oyston, [1999] 1 WLR 694***, A decree passed by a foreign court was not allowed to be challenged by a person who was a stranger to the proceedings which culminated in the decree. It is necessary for a person to be able to challenge that he had a pre-existing interest in the subject-matter of the decree and that was adversely affected by the decree. Events happening subsequently to the passing of the decree could not clothe the stranger with a right to maintain an action against the decree. A person marrying a woman was trying to challenge that the decree of divorce passed in a proceeding between the woman and her first husband was illegal.

***Opinions of third persons when relevant***

**39. Opinions of experts.**
(1) When the Court has to form an opinion upon a point of foreign law or of science or art, or any other field, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or any other field, or in questions as to identity of handwriting or finger impressions are relevant facts and such persons are called experts.
**Illustrations.**
(a) The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.
(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law. The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.
(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.
(2) When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored 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 Information Technology Act, 2000 (21 of 2000), is a relevant fact.
**Explanation.**—For the purposes of this sub-section, an Examiner of Electronic Evidence shall be an expert.

**SECTION 39 OF BSA: OPINIONS OF EXPERTS**

Corresponding provision

- Section 39(1) of the BSA corresponds to section 45 of the Evidence Act
- Section 39(2) of the BSA corresponds to section 45A of the Evidence Act

**Experts in 'other' fields**

- Section 45 of Evidence Act provided that when the Court has to form an opinion upon a point of foreign law, or of science, or art, the opinions upon that point of persons specially skilled in such foreign law, science or art are relevant facts. Such specially skilled persons are "experts".
- Section 39 of BSA incorporates provisions of section 45 of Evidence Act and provides that opinions of experts in a field other than foreign law, or of science, or art are also relevant facts when Court has to form to an opinion upon a point in that field.

The opinions or beliefs of third persons are, as a general rule, irrelevant, and therefore, inadmissible. Witnesses are to state the facts only, i.e. what they themselves saw or heard, etc. It is the function of the judge or jury to form their own conclusion or opinion on the facts stated. Thus, the opinion or the impression of a witness that it appeared to him from the conduct of a mob that they had collected for an unlawful purpose is inadmissible to prove the object of the assembly.
There are, however, cases in which the court is not in a position to form a correct opinion, without the help of persons who have acquired special skill or experience in a particular subject. In these cases, the rule is relaxed, and expert evidence is admitted to enable the court to come to a proper decision. The rule admitting 'expert evidence' is, thus, founded on necessity.
**Sec. 39** permits only the opinions of an expert to be cited in evidence. The term 'opinion' means something more than mere relating of gossip or of hearsay; it means judgment or belief, that is a belief or conviction resulting from what one thinks on a particular question. 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. His evidence on such points is admissible to enable the court to come to a satisfactory conclusion. An expert could be qualified by skill and experience as well as by professional qualifications. Thus, an experienced police officer may be permitted to give **'expert'** evidence as to how an accident may have occurred.
**On what matters expert opinion can be given**
The subjects on which an expert is competent to testify are : foreign law, matters of science, questions of art, identity of handwriting, or of finger impressions. The words 'science' or 'art' include all subjects on which the course of special study or experience is necessary to the formation of opinion. The matter in question must be of technical
nature, for no expert can be permitted to speak on a matter with which the judge may be supposed to be equally well acquainted.

**Section 39 of BSA** incorporates provisions of section 45 of Evidence Act and provides that opinions of experts in a field other than foreign law, or of science, or art are also relevant facts when Court has to form to an opinion upon a point in that field.

The Supreme Court has held that the opinion of a person that a particular letter was typed on a particular typewriter is not admissible as it does not fall within Sec. 45 of Indian Evidence Act

***(Hanumant v State of U.R AIR 1952 SC 343)***. The decision has been criticized and it has been suggested that "the claim of experts that the identity of machine may be established by proving the identity of defects or peculiarities which it impresses on paper should have been considered".

**40. Facts bearing upon opinions of experts.**

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

**Illustrations.**

(a) The question is, whether A was poisoned by a certain poison. The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall. The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

According to section 40 of the Act, when the opinion of an expert is relevant that any fact which will either support his opinion or contradict it, will also become relevant. In other words, facts otherwise not relevant, became relevant to support or rebut the expert opinion.

***Mohd. Zahid v. State of Tamil Nadu, AIR 1999 SC 2416.*** In this case the credibility of doctors 'opinion' concluding post-mortem vis-a-vis statement found in textbook was compared. The prosecution made suggestion to the doctor on basis of statement found in authoritative textbook. The book disagreed with the statement of authoritative textbook without giving any reasons. No other authority was produced in support of opinion. The Evidence of the doctor was self contradictory regarding her opinion about cause of death of victim, cannot be relied.

**41. Opinion as to handwriting and signature, when relevant.**

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

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

**Illustration.**

The question is, whether a given letter is in the handwriting of A, a merchant in Itanagar. B is a merchant in Bengaluru, who has written letters addressed to A and received letters purporting to be written by him. C, is B's clerk whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising him thereon. The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

(2) When the Court has to form an opinion as to the electronic signature of any person, the opinion of the Certifying Authority which has issued the Electronic Signature Certificate is a relevant fact.

The evidence of experts may not be conclusive regarding the handwriting or mark. No doubt that the opinion of an expert has great weight but in addition to that, section 41 of the Act, permits the court to admit the opinion of non-experts.
Competency of non-expert witness

A statement of the non-expert witness who was acquainted with the handwriting, is sufficient. Such acquaintance or knowledge might have been acquired:

(i) by having at any time seen the person write, or

(ii) by the receipt of written communication purporting to be in his handwriting, or

(iii) by having observed in the ordinary course of business, received documents written by that person or such documents are habitually submitted to him.

In reference to the first point it was held by the Supreme Court in ***Fakhruddin v. State of Madhya Pradesh, AIR 1967 SC 1326***, it was held that handwriting may be proved by evidence of a witness in whose presence the writing was done and this would be direct evidence and if it is available the evidence of any other kind is rendered unnecessary.

**Modes of proving handwriting**

**What are the ordinary methods of proving handwriting?**

**The following are the ordinary methods of proving handwriting under the Evidence Act:**

(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.

(iv) by the evidence of a person who saw the document being written i.e., attestation witness.

(v) by the comparison of the disputed writing with the writing of the alleged writer by the Court.

(vi) by other circumstantial evidence; Kanya Ram Vira Singh v. Manipur Drivers Association, AIR 1957 Manipur.

Section 41(2) (earlier section 47A of IEA) has been added by the Information Technology Act, 2000, and as amended by the Information Technology (Amendment) Act, 2008 (10 of 2009) provides for the relevancy of expert opinion on the genuineness of a electronic signature.

**42. Opinion as to existence of general custom or right, when relevant.**

When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

**Explanation.**—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

**Illustration.**

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.

**43. Opinion as to usages, tenets, etc., when relevant.**

When the Court has to form an opinion as to—

(i) the usages and tenets of any body of men or family;

(ii) the constitution and governance of any religious or charitable foundation; or

(iii) the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

India is a multilinguistic, multireligious country having different customs, castes, languages, usages and dialects. Thus, there are terms, customs, tenets which prevail in a particular area, community, caste or trade. Therefore, when the court has to form an opinion as to usages and tenets of any body of men or family or as to the Constitution any Government of religious or charitable foundation; or as to the meaning of certain words or terms as used in a particular area or by any class of people, the opinion of any person who has the special means of knowledge on the matter in question is relevant. Section 43 of the Act helps to interpret a particular term in its true meaning.

**44. Opinion on relationship, when relevant.**

When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Divorce Act, 1869 (4 of 1869), or in prosecution under sections 82 and 84 of the Bharatiya Nyaya Sanhita, 2023.

**Illustrations.**

(a) The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

'Opinion' means 'something more than mere gossip or hearsay. Under section 44 of the Act, when the Court has to determine the relationships of one person to another, the opinion expressed by conduct as to such relationship by a person who has special knowledge shall be

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relevant.
The evidence under section 44 is a sort of circumstantial evidence. According to this, the opinion under this section should be expressed by conduct, not merely by words or statements.
Where the question was of the fact of a valid adoption of the plaintiff, the deposition of the cousin of the adoptive father, the family priest and family barber that the ceremony had taken place at the residence of the natural father was held relevant. They had the special means of knowledge of the fact whether the plaintiff was an adopted son; ***Bami Bewa v. Krushna Chandra Swain @ Gochhayat, AIR 2004 Ori 14***

**45. Grounds of opinion, when relevant.**

Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

**Illustration.**

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

Where the opinion of an expert is receivable, the grounds or reasoning upon which such opinion is based may also be inquired into. Opinion is no evidence, without assigning the reason for such opinion. The correctness of the opinion can better be estimated in many instances when the reasons upon which it is based are known. If the reasons are frivolous or inconclusive the opinion is worth nothing.

***Character when relevant***

Character is "a combination of peculiar qualities impressed by nature or by the habit of the person, which distinguish him from others." In respect of the character of a party, two distinctions must be drawn, namely between the cases when the character is in issue and not in issue and when the cause is civil or criminal.

**46. In civil cases character to prove conduct imputed, irrelevant.**

In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

Thus, a party cannot give evidence of his good character for the purpose of showing that it is improbable that he should be guilty of the conduct imputed to him. The reason is that the court has to try the case on the basis of its facts for the purpose of determining whether the defendant should be liable or not.
The general exclusion of character evidence is based on grounds of public policy and fairness, since its admission would surprise and prejudice the parties by raking up the whole of their careers, which they could not possibly come into court prepared to defend. The business of the court is to try the case, and not the man; and a very bad man may have a very righteous cause.
However, it must be remembered that this section refers to the character of parties to the suit, and not to the character of witnesses. It excludes evidence of character from being given only for the purpose of rendering probable or improbable any conduct imputed to the party. But when

the facts which are relevant otherwise than for the purpose of showing character are proved, and those facts raise inferences concerning the character of a party to the suit, such facts become relevant not only to prove the facts for which they were directly tendered, but also for the purpose of showing the character of the party concerned. In such a case it is open to the court to form its own conclusion as to the character of the party, and as to the effect of such character on the conduct imputed to the party.
The word "character" occurring in this section and sections 47 and 48 has been defined in the Explanation to section 50. "Character" is a combination of the peculiar qualities impressed by nature or by habit of the person, which distinguish him from others.

**47. In criminal cases previous good character relevant.**
In criminal proceedings the fact that the person accused is of a good character, is relevant.

The principle upon which good character may be proved is that it affords a presumption against the commission of crime. This presumption arises from the improbability, as a general rule as proved by common observation and experience, that a man who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur; but they are exceptions. The rule is otherwise; the influence of this presumption from character will necessarily vary according to the circumstances of different cases. It was held in ***Bhagwan Swarup v State of Maharashtra, AIR 1965 SC 682***, that character evidence is a very weak evidence; it cannot outweigh positive evidence in regard to the guilt of a person.

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**48. Evidence of character or previous sexual experience not relevant in certain cases.**
In a prosecution for an offence under section 64, section 65, section 66, section 67, section 68, section 69, section 70, section 71, section 74, section 75, section 76, section 77 or section 78 of the Bharatiya Nyaya Sanhita, 2023 or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

This section was inserted vide the Criminal Law (Amendment) Act, 2013 on the basis of recommendation given by Justice JS Verma Committee report in the aftermath of the Nirbhaya Rape incident. The Criminal Law (Amendment) Act, 2018 has further amended section 53A of the Indian Evidence Act, 1872 and now is section 48 of BSA

**49. Previous bad character not relevant, except in reply.**
In criminal proceedings, the fact that the accused has a bad character, is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.
**Explanation 1.**—This section does not apply to cases in which the bad character of any person is itself a fact in issue.
**Explanation 2.**—A previous conviction is relevant as evidence of bad character.

Evidence of bad character of an accused person (of whose good character evidence has not been

given) is not relevant under this section for the purpose of raising a general inference that the accused is likely to have committed the offence charged. Such evidence is irrelevant and cannot be legally admitted in evidence whether elicited by the prosecution or by the defence.

It was held in ***Sarojekumar Chakrabarti v Emperor, (1932) 59 Cal 1361***, if evidence is otherwise relevant, it is not rendered inadmissible under this section, merely because it shows bad character or the commission of offences other than the offence with which the accused is charged.

**Explanation 1**

Where the bad character of any person is itself a fact in issue, then the principle of this section does not apply. Therefore, evidence can be given of a particular trait of bad character which may be in issue.

**Explanation 2**

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

Criminal cases also admit of certain exceptions. There are certain cases in which the evidence of a prisoner's bad character can be give:

i. To rebut prior evidence of good character;
ii. The character is itself a fact in issue ;
iii. A previous conviction is relevant as evidence of bad character in criminal cases

**50. Character as affecting damages.**

In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

**Explanation.**—In this section and sections 46, 47 and 49, the word "character" includes both reputation and disposition; but, except as provided in section 49, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition has been shown.

**Evidence to be confined to general reputation and general disposition.** — It is in civil cases, where the question of amount of damages to be awarded to the plaintiff is concerned, that the character of the plaintiff becomes relevant.

In ***Jefferson v Paskell, (1916) 1 KB 57 at p 68 (CA),*** an action for breach of promise of marriage, the defendant was allowed to cite evidence of the plaintiff's bad character in mitigation of damages. In an action for damages, for seduction or rape, evidence of bad character of the plaintiff was allowed as it was likely to affect the damages that the plaintiff ought to receive.

**Knowledge of the witness must be based on residence in the place of repute, not on mere inquiry**

The admissible reputation is that which is built up in the neighbourhood of a man's domicile or in the circle where his livelihood is followed and it is of slow formation. It is the sum of all that is said or not said for or against him. Consequently, it used to be ruled that a reputation can be adequately learned only by the witness' residence in the place, not by a mere visit of inquiry, or by a casual sojourn, or by a conversation with a resident who reports the reputation.

**Definition of Character under Explanation**

The word "character" includes both reputation and disposition. "Reputation" means what is

thought of a person by others, and is constituted by public opinion. "Disposition" respects the whole frame and texture of the mind. It comprehends the springs and motives of actions. “Temper” influences the action of the moment, “disposition” is permanent and settled; "temper" may be transitory and fluctuating. It is possible to have a good disposition with a bad temper, and vice versa.

## PART III
## ON PROOF
## CHAPTER III
## FACTS WHICH NEED NOT BE PROVED

**51. Fact judicially noticeable need not be proved.**

No fact of which the Court will take judicial notice need be proved.

**Judicial Notice**

Judicial notice is based upon very obvious reasons of convenience and expediency; and the wisdom of dispensing with proof of matters within the common knowledge of every one has never been questioned. The Supreme Court has held that the court can take judicial notice of alternative sources. The court can take judicial cognizance of the fact that a certain area is terrorist-stricken. The court can take judicial notice of the fact that many blind persons have acquired great academic distinction.

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**52. Facts of which Court shall take judicial notice.**

(1) The Court shall take judicial notice of the following facts, namely:—

(a) all laws in force in the territory of India including laws having extra-territorial operation;

(b) international treaty, agreement or convention with country or countries by India, or decisions made by India at international associations or other bodies;

(c) the course of proceeding of the Constituent Assembly of India, of Parliament of India and of the State Legislatures;

(d) the seals of all Courts and Tribunals;

(e) the seals of Courts of Admiralty and Maritime Jurisdiction, Notaries Public, and all seals which any person is authorised to use by the Constitution, or by an Act of Parliament or State Legislatures, or Regulations having the force of law in India;

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

(g) the existence, title and national flag of every country or sovereign recognised by the Government of India;

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

(i) the territory of India;

(j) the commencement, continuance and termination of hostilities between the Government of India and any other country or body of persons;

(k) the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of advocates and other persons authorised by law to appear or act before it;
(l) the rule of the road on land or at sea.
(2) In the cases referred to in sub-section (1) and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference and if the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

**SECTION 52 OF BSA: FACTS OF WHICH COURT SHALL TAKE JUDICIAL NOTICE**

**Corresponding provision**

Section 52 of the BSA corresponds to section 57 of the Evidence Act

**Scope of provisions**

Section 52(a) of the BSA requires Courts to take judicial notice of all laws in force in the territory of India including laws having extra-territorial operation. Section 57(1) of Evidence Act referred to 'all laws in force in territory of India'.

Section 52(b) of the BSA requires Courts to take judicial notice of international treaty, agreement or convention with country or countries by India, or decisions made by India at the international associations or other bodies.

Section 52 of the BSA omits reference to all public Acts passed or hereafter to be passed by Parliament of the United Kingdom, and all local and personal Acts directed by Parliament of the United Kingdom. Courts in India will not be required to take judicial notice of Acts passed by Parliament of UK since India ceased to be a UK colony in 1947.

Section 52 of the BSA omits reference to "The course of proceeding of Parliament of the United Kingdom". No judicial notice will be required to be taken of 'course of proceedings of UK Parliament'.

Section 52 of the BSA also omits reference to "The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland" and to "All seals of which English Courts take judicial notice" and "all seals which any person is authorised to use by the Constitution or an Act of Parliament of the United Kingdom or an Act".

Reference to "The territories under the dominion of the Government of India" have been replaced with "the territory of India".

Reference to "articles of war for Indian Army, Navy or Air Force" are omitted.

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**53. Facts admitted need not be proved.**

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

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

This section stipulates that there is not need to give proof of facts which the parties or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by writing under their hands, or which, by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings.

The Court in ***Maung Wala v Maung Shwe Gon, (1923) 1 Ran 472***, held that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted. The court may in its discretion require any fact so admitted to be proved otherwise than by such admission (O VIII, rule 3, Code of Civil Procedure). Where a document is not admitted in the pleadings but only at the trial in evidence, the document must be proved.

It objective behind the section was explained by the Court in ***Rasamani Das v Patrabalo Devi, AIR 1981 Gau 42***, where in the Court stated that it is with the object of doing away with the necessity of proving documents or facts admitted that admission are obtained, and the party unreasonably refusing or neglecting to admit any documents or facts when called upon to do so may be ordered to pay the costs of proof. Where the defendant admitted in his written statement that his father was married to the plaintiff's mother according to Henga custom, he was not allowed subsequently to contradict it.

In ***Raman Pillai v Kumaran Parameswarn., AIR 2002 Ker 133***, the facts in question were admitted in a written statement. In a suit for title, admissions were made by the predecessor-in-interest of the plaintiffs in their written statement in earlier judicial proceedings to the effect that the rights in the suit property were lost by adverse possession and limitation and that the predecessors of the respondents had perfected their title. Certified copy of the written statement was held to be relevant under section 53. Admissibility could not be discarded on the ground that the statement in question was not a public document.

Section 53 also provides that the court may, in its discretion, require some other proof of an admitted fact. It may be noted that this section applies to civil suits only. It is an elementary rule that except by a plea of guilty, admissions dispensing with proof are not permitted in a criminal trial.

## CHAPTER IV
## OF ORAL EVIDENCE

**54. Proof of facts by oral evidence.**

All facts, except the contents of documents may be proved by oral evidence.

**SECTION 54 OF BSA: PROOF OF FACTS BY ORAL EVIDENCE**

**Corresponding provision**

Section 54 of the BSA corresponds to section 59 of the Evidence Act

**Electronic records**

Though section 54 of BSA omits reference to "electronic records" which words were there in section 59 of Evidence Act, it makes no substantive change as section 2(1)(c) of BSA defines 'documents' to include electronic records.

Oral evidence has been defined by the Act to be all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry (section 3). In general, the evidence of witnesses is given orally and this means oral evidence. A witness who cannot speak may communicate his knowledge of the facts by signs or by writing and in either case it will be regarded as oral evidence. All facts except the contents of documents may be proved by oral evidence. This section is not happily worded. Contents of documents may be proved by oral evidence under certain circumstances, viz., when evidence of their contents is admissible as secondary evidence.
Oral evidence, if worthy of credit, is sufficient without documentary evidence to prove a fact or title. It is a cardinal rule of evidence that where written documents exist, they must be produced as being the best evidence of their own contents. Where oral testimony is conflicting, much greater credence is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented.
In ***Radha Kant Yadav v State of Jharkhand, 2003 Cr LJ (NOC) 13 (Jhar),*** where a body was recovered from a well, but the evidence of the witnesses to the fact of recovery could not be accepted because of the absence of their signature on the inquest and they also did not support the recovery, it was held that in such circumstances, the investigating officer himself becomes a direct witness and his evidence could not be disbelieved unless there was evidence that he had a motive to create a false evidence.

**55. Oral evidence to be direct.**
Oral evidence shall, in all cases whatever, be direct; if it refers to,—
(i) a fact which could be seen, it must be the evidence of a witness who says he saw it; (ii) a fact which could be heard, it must be the evidence of a witness who says he heard it;
(iii) a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
(iv) an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:
Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:
Provided further that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

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**Direct Oral Evidence**

Where a person is a witness of fact, his testimony is regarded as direct evidence, even if he is not able to recollect the facts with precision and has to rely upon his "belief" as to what he saw or heard. It was held in ***Lord Melvillie's case, (1806) 29*** St., that a witness who perceived an event with his senses is not confined, when giving an account of it, to what he can swear to with complete certainty or with complete precision. He may swear to the substance or effect of the words used. And it has long been established that, in giving evidence of what he saw or heard, he may swear, "to the best of his belief", if his recollection does not enable him to be more positive and precise. Unless there is some indication to the contrary, he may be taken, when he expresses his evidence in that way, to be stating his recollection but conceding that its quality does not enable him to swear with complete certainty and precision. But, of course, if the context or circumstances show that the reference to "belief" means that the witness is speaking from conjecture, from deduction or from information regarding what was perceived by others, then the evidence will ordinarily be rejected.

The reason for the laxity is that the law cannot afford to help to hold the social and psychological reality out of the court room. People's memories are fragile and short. Details fall out of mind rapidly with time. Subsequent publicity, discussions and suggestive questioning all exert their influence. This may lead to the exclusion of evidence which is superior in trustworthiness to evidence which is freely admitted. To minimise such chances, the courts have modified the rigid rule as to direct evidence by a number of exceptions.

**Hearsay Evidence**

The term hearsay is used with reference to what is done or written, as well as to what is spoken, and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, and that in many cases it supposes some better testimony which might be adduced in the particular case, are not the sole grounds for its exclusion. It was held in ***Shard Bircichand Sarda v State of Maharashtra, AIR 1984 SC 1622***, that the expressions "saw it", "heard it", and "perceived it", in clauses 2, 3 and 4 of the section mean "saw the fact deposed to", "heard the fact deposed to", and "perceived the fact deposed to".

Derivative or second-hand evidence is excluded owing to its infirmity as compared with its original source. Thus, where a witness told a material fact to another but himself resolved from it in the witness box, narration of the other was rejected as hearsay.

**Exceptions to the Hearsay Rule**

The Courts have modified the rigid rule as to direct evidence by a number of exceptions:

i. Res Gestae
ii. Admissions and Confessions
iii. Statements relevant under Section 26
iv. Entries in books of account kept in the course of business (Section 28)
v. Entries in public registers (Section 29)
vi. Statements of experts in treatises

**Proviso 1**

The first proviso is a departure from the rule of English law, under which medical and other treatises are not admissible, whether the author is alive or not. Any scientific textbook commonly offered for sale is admissible in evidence under the circumstances mentioned in the proviso. Section 45 refers to the evidence of expert witnesses who may be examined in court. ***Kripal J., in Hashamatullah v State of MP, (1996) 4 SCC 391,*** explained the quality of literary work which can be relied upon as:

Every article published or a book written cannot ipso facto be regarded as conclusive or worthy of acceptance. What is stated therein may only be a view of the author and may not be based on data which is scientifically collected from a reliable source.

**Proviso 2**

This proviso enables the court to require the production of a material thing for its inspection. Under section 168 the court has power to direct the production of any document or thing in order to discover or to obtain proper proof of relevant facts.

## CHAPTER V
## OF DOCUMENTARY EVIDENCE

**56. Proof of contents of documents.**

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

**57. Primary evidence.**

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

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

**Explanation 2.**—Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

**Explanation 3.**—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

**Explanation 4.**—Where an electronic or digital record is created or stored, and such storage occurs simultaneously or sequentially in multiple files, each such file is primary evidence.

**Explanation 5.**—Where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed.

**Explanation 6.**—Where a video recording is simultaneously stored in electronic form and transmitted or broadcast or transferred to another, each of the stored recordings is primary evidence.

**Explanation 7.**—Where an electronic or digital record is stored in multiple storage spaces in a computer resource, each such automated storage, including temporary files, is primary evidence.

**Illustration.**

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

**SECTION 57 OF BSA: PRIMARY EVIDENCE**

**Corresponding provision**

Section 57 of the BSA corresponds to section 62 of the Evidence Act

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**Electronic record**

New Explanations (Explanation 4 to Explanation 7) are inserted in section 57 of BSA.

New Explanation 4 clarifies that where an electronic or digital record is created or stored, and such storage occurs simultaneously or sequentially in multiple files, each such file is primary evidence.

New Explanation 5 clarifies that where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed.

New Explanation 6 clarifies that where a video recording is simultaneously stored in electronic form and transmitted or broadcast or transferred to another, each of the stored recordings is primary evidence.

New Explanation 7 clarifies that where an electronic or digital record is stored in multiple storage spaces in a computer resource, each such automated storage, including temporary files, is primary evidence.

**58. Secondary evidence.**

Secondary evidence includes—

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

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

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

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

(v) oral accounts of the contents of a document given by some person who has himself seen it; (vi) oral admissions;

(vii) written admissions;

(viii) evidence of a person who has examined a document, the original of which consists of numerous accounts or other documents which cannot conveniently be examined in Court, and who is skilled in the examination of such documents.

**Illustrations.**

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

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

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

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

**SECTION 58 OF BSA : SECONDARY EVIDENCE**

**Corresponding provision**

Section 58 of the BSA corresponds to section 63 of the Evidence Act Secondary evidence

**Under section 58 of BSA Secondary evidence also includes**

- oral admissions.
- written admissions.
- evidence of a person who has examined a document, the original of which consists of numerous accounts or other documents which cannot conveniently be examined in Court, and who is skilled in the examination of such documents.

**59. Proof of documents by primary evidence.**

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

A written document can only be proved by the instrument itself. It is a general rule that if a person wants to get at the contents of a written document the proper way is to produce it if he can. "Where the contents of any document are in question, either as a fact directly in issue or a subalternate principal fact, the document is the proper evidence of its own contents. But where a written instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some fact, independent proof aliunde is receivable.

This section embodies one of the underlying principles which states that a document must be proved by its primary evidence. The meaning of the expression ―primary evidence‖ has been explained in sec 57. But lest technical considerations should defeat substantial justice, the following section, namely, sec 60, embodies situations which would sanctify secondary evidence.

In ***Butu Naik v Saraswati Devi, AIR 1998 Ori 119***, a matter of title was settled by a settlement which was entered into the revenue record. A copy of the settlement was produced in evidence. The Court rejected it. The settlement had to be proved either by its primary evidence which was the original document containing the settlement or by its secondary evidence wherever permissible. There was no permission in this case for production of a copy in evidence. Further, the Supreme Court in ***Malay Kumar Ganguly v Sukumar Mukherjee, AIR 2010 SC 1162,*** observed:

It is true that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning its admissibility at a later stage. But it is trite that a document becomes inadmissible in evidence unless the author is examined as to contents and also subjected to cross-examination.

**60. Cases in which secondary evidence relating to documents may be given.**

Secondary evidence may be given of the existence, condition, or contents of a document in the following cases, namely:—

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

(i) of the person against whom the document is sought to be proved; or

(ii) of any person out of reach of, or not subject to, the process of the Court; or

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(iii) of any person legally bound to produce it,
and when, after the notice mentioned in section 64 such person does not produce it;
(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
(d) when the original is of such a nature as not to be easily movable;
(e) when the original is a public document within the meaning of section 74;
(f) when the original is a document of which a certified copy is permitted by this Adhiniyam, or by any other law in force in India to be given in evidence;
(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.
**Explanation.**—For the purposes of—
(i) clauses (a), (c) and (d), any secondary evidence of the contents of the document is admissible;
(ii) clause (b), the written admission is admissible;
(iii) clause (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible;
(iv) clause (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such document.

It may be noted that secondary evidence of the contents of a written instrument cannot be given, unless there is some legal excuse for the non production of the original (primary evidence). Further, secondary evidence can only be given when the primary evidence or the document itself is admissible (If a deed of gift is inadmissible in evidence for want of registration, no secondary evidence of the deed can be given in a suit to recover the gifted property). When the contents of a document have been admitted by the party against whom it has to be proved , his written admission can be given as a secondary evidence of the document.
This section enumerates the seven exceptional cases in which secondary evidence is admissible. Under it secondary evidence may be given of the contents of a document in civil as well as in criminal proceedings.

**Original in possession of opposite party**

When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved and when, after notice mentioned in section 64, such person does not produce it, then, the secondary evidence relating to these documents can be permitted. The document need not be in the actual possession of the party; it is enough if it is in his power.

**Documents admitted by opposite party**

This clause must be read with section 20. Under it the written admission may always be proved. The oral admission can only be proved under the circumstances mentioned in clauses (a), (c) and (d). But secondary evidence by means of a written admission under this clause cannot be given of the contents of a document, which is inadmissible for want of registration or of stamps. Admission of documents amounts to admission of contents thereof but not its truth. Truth or correctness is to be ascertained from evidence.

**Original lost or destroyed**

Secondary evidence of a lost public document, other than a certified copy, is admissible upon proof of loss or destruction of the original, and further proof that no certified copy of the original is available to the party seeking to prove the contents of the original. So long as the original is in existence, no secondary evidence other than a certified copy is admissible.

**Original not easily movable**

This clause covers things not easily moved, as in the case of things fixed in the ground or a building; for example, notices painted on walls, tablets in buildings, tombstones, monuments, or marks on boundary stones or trees. Secondary evidence is admissible on account of the great inconvenience and impracticability of producing the original. The principle of law is that where you cannot get the best possible evidence, you must take the next.

**Public Document**

This clause is intended to protect the originals of public records from the danger to which they would be exposed by constant production of evidence. Secondary evidence is admissible in the case of public documents mentioned in section 74. What section 74 provides is that public records kept in any state of private documents are public documents, but private documents of which public records are kept are not in themselves public documents. A registered document, therefore, does not fall under either clause (e) or clause (f).

**Certified copies permitted by law**

Certified copies are admissible as secondary evidence under this clause. Sections 75, 77 and 88 may be read along with it. Where an original document cannot be given in evidence owing to a statutory ban, its certified copy cannot be admitted in evidence, e.g., certified copy of the income tax return.

**Documents which cannot be conveniently examined**

This provision is meant for saving public time. Where the fact to be proved is the general result of the examination of numerous documents and not the contents of each particular document and the documents are such as cannot be conveniently examined in court, evidence may be given, under this section, as to the general result of the documents by a person who has examined them and who is skilled in the examination of those documents, although they may be public within the meaning of this section and section 74.

**61. Electronic or digital record.**

Nothing in this Adhiniyam shall apply to deny the admissibility of an electronic or digital record in the evidence on the ground that it is an electronic or digital record and such record shall, subject to section 63, have the same legal effect, validity and enforceability as other document.

**SECTION 61 OF BSA: ELECTRONIC OR DIGITAL RECORD**

**Corresponding provision**

Section 61 of BSA is a new provision. There was no corresponding provision in Evidence Act.

**Electronic records**

Section 61 of BSA provides that electronic or digital record shall have the same legal effect, validity and enforceability as paper records.

Section 61 of BSA provides that nothing in the Adhiniyam shall apply to deny the admissibility of an electronic or digital record in the evidence on the ground that it is an electronic or digital

record and such record (subject to section 63 of BSA) shall have the same legal effect, validity and enforceability as other documents.

**62. Special provisions as to evidence relating to electronic record.**

The contents of electronic records may be proved in accordance with the provisions of section 63.

**63. Admissibility of electronic records.**

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

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

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

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

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

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

(3) Where over any period, the function of creating, storing or processing information for the purposes of any activity regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by means of one or more computers or communication device, whether—

(a) in standalone mode; or

(b) on a computer system; or

(c) on a computer network; or

(d) on a computer resource enabling information creation or providing information processing and storage; or

(e) through an intermediary,

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

(4) In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things shall be submitted along with the electronic record at each instance where it is being submitted for admission, namely:—

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

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer or a communication device referred to in clauses (a) to (e) of sub-section (3);

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) and an expert shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it in the certificate specified in the Schedule.

(5) For the purposes of this section,—

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

(b) a computer output shall be taken to have been produced by a computer or communication device whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment or by other electronic means as referred to in clauses (a) to (e) of sub-section (3).

**SECTION 63 OF BSA: ADMISSIBILITY OF ELECTRONIC RECORDS**

**Corresponding provision**

Section 63 of the BSA corresponds to section 65B of the Evidence Act

**Scope of provision**

- Section 63 of BSA uses the words "computer or any communication device" for words "computer"
- Section 65B(1) of Evidence Act provided that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (the computer output) shall be deemed to be also a document, if the specified conditions are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

Section 63(1) of BSA extends the scope of above provision to make it applicable also to any

information contained in semiconductor memory or in any communication device (e.g. smartphone) or otherwise stored, recorded or copied in any electronic form.

Section 63 of BSA provides that notwithstanding anything contained in this Adhiniyam, any information contained in an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic media or semiconductor memory which is produced by a computer or any communication device or otherwise stored, recorded or copied in any electronic form (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

- Section 65B(3) of Evidence Act provides that where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computer, whether-

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

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

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

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

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

- Section 63(3) of BSA provides that where over any period, the function of creating, storing or processing information for the purposes of any activity regularly carried on over that period as mentioned in clause (a) of sub- section (2) was regularly performed by means of one or more computers or communication device, whether-

(a) in standalone mode; or

(b) on a computer system; or

(c) on a computer network; or

(d) on a computer resource enabling information creation or providing information processing and storage; or

(e) through an intermediary,

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

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accordingly.

- Sub-sections (4) and (5) of section 65B of Evidence Act provides that in any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,-

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

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

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

For the purposes of this section,-

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

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

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

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

- Sub-sections (4) and (5) of section 63 of BSA provides that in any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things shall be submitted along with the electronic record at each instance where it is being submitted for admission, namely:-

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

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

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computer or a communication device referred to in clauses (a) to (e) of sub-section (3);

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) and an expert shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be MOC sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it in the certificate specified in the Schedule.

For the purposes of this section,-

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

(b) a computer output shall be taken to have been produced by a computer or communication device whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment or by other electronic means as referred to in clauses (a) to (e) of sub-section (3).

Format of certificate under section 63(4) which is to accompany electronic record evidence is specified in Schedule to BSA. There was no such format specified in Evidence Act for certificate in section 65B(4).

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**64. Rules as to notice to produce.**

Secondary evidence of the contents of the documents referred to in clause (a) of section 60, shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate or representative, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(a) when the document to be proved is itself a notice;

(b) when, from the nature of the case, the adverse party must know that he will be required to produce it;

(c) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(d) when the adverse party or his agent has the original in Court;

(e) when the adverse party or his agent has admitted the loss of the document;

(f) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

**SECTION 64 OF BSA: RULES AS TO NOTICE TO PRODUCE**

**Corresponding provision**

- Section 64 of the BSA corresponds to section 66 of the Evidence Act

**Advocate**

- Reference to "attorney or pleader" is replaced with reference to "advocate or representative"

This section lays down that a notice must be given before secondary evidence can be received under section 60(a). Notice to produce a document must be in writing. O XI, rule 15. of the Code of Civil Procedure, prescribes the kind of notice to produce a document.
Notice is required in order to give the opposite party a sufficient opportunity to produce the document, and thereby to secure the best evidence of its contents. Such notice may be dispensed with if it is not necessary on the pleadings, or the court thinks fit to dispense with it.
Proviso
The proviso enumerated under this section stipulates six cases in which a notice is not required to be given to the party in whose possession or power the document is, in order to render secondary evidence admissible.
The procedure for the production of documents in criminal cases is laid down in BNSS. And Section 210 of BNS punishes the person who omits to produce a document required by a public servant.

**65. Proof of signature and handwriting of person alleged to have signed or written document produced.**

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Section 65 mandates that the signature and handwriting of a person on a written document can be proved only by examining the person concerned. When the person is very much available and alive, an attempt to prove his signature and handwriting by examining a third person as a witness would have its own drawback.
It was held in ***Bulakidas v Shaikh Chhotu, (1942) Nag 661,*** that mere admission of execution of a document is not sufficient. Proof that the signature of the executant is in his handwriting is necessary. Furthermore, the Court in ***Ramjan Khan v Baba Raghunath Das, AIR 1992 MP 22***, held that in the case of a document executed by the thumb impression of an illiterate person, the party putting forth the document has to prove that the document was read over and explained to the executant.

**66. Proof as to electronic signature.**

Except in the case of a secure electronic signature, if the electronic signature of any subscriber is alleged to have been affixed to an electronic record, the fact that such electronic signature is the electronic signature of the subscriber must be proved.

This section was initially inserted vide Information Technology (Amendment) Act, 2000. Thereafter, in 2008, an amendment was made in this section, whereby the word "digital signature" was substituted by the word "electronic signature" at three places in this section. This substitution is a part of the entire scheme under which the digital signature regime is being switched over to the electronic signature regime in the field of e-commerce and e-governance. This switching over of regime is meant to broaden the spectrum and follow the global trend.

**67. Proof of execution of document required by law to be attested.**

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

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

As held by the Court in ***Veerappa Kavundan v Ramasami Kavundan, (1907) 30 Mad 251,*** this section applies to cases where an instrument required by law to be attested bears the necessary attestation. What the section prohibits is a proof of execution of a document otherwise than by the evidence of an attesting witness if available.

It was further held in ***Dashrath prasad v Laloosingh, (1951) Nag 873,*** that mere general denial of a mortgage or not admitting it cannot be regarded as a specific denial of its execution within the meaning of the proviso to this section. When there is only a general denial of execution and there is no cross-examination regarding attestation of a witness who comes forward to swear to execution then it can be presumed that there was due attestation.

**Attested**

"Attested" means that a person has signed the document by way of testimony to the fact that he saw it executed. An attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment of the execution of the document by the executant.

"Attested", in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it is not necessary that more than one of such witnesses should be present at the same time, and no particular form of attestation is necessary (see section 3 of the Transfer of Property Act, 1882 and section 63(c) of the Indian Succession Act, 1925).

It was held in ***Nainsukhdas Sheonarayan Shop v Goverdhandas, (1947) Nag 510,*** that a document cannot be attested by a party to it. The object of attestation is that some person should verify that the deed was signed voluntarily. Knowledge of the contents of a document ought not to be inferred from the mere fact of attestation.

**Proof of Will**

The principle underlying the section is that execution of the will must be proved by at least one attesting witness, that it is only an attesting witness who is entitled to prove the execution of the will. It is a concession that the legislature has made. If that concession does not result in complying with the mandatory requirements of this section the only proper method is to call the

other attesting witness, so that both the attesting witnesses are before the court, and the due execution of the will is proved by the two attesting witnesses which are necessary before a will can become a valid document. This section is not permissive or enabling. It lays down the necessary requirements which the court has to observe in order that a document can be held to be proved.

**Gift Deed**

In ***Sushama Rani Roy Chowdhury v Bani Roy, AIR 2017 NOC 34 (Cal)***, where the executant of the gift deed, an illiterate lady, pleaded that her signature on the gift deed was taken without explaining its contents to her and no evidence was given to prove that the same was read out and explained to her, besides its attestation was not proved, it was held that the gift deed was invalid

**Registered Document [Proviso]**

The proviso under this section was added to IEA by Act XXXI of 1926. It simplifies the difficulty of calling attesting witnesses where the document to be proved is a registered one and is not a will and its execution is not specifically denied by the person executing it. If the attestation is not specifically denied it is not necessary to call any attesting witness. What has to be specifically denied is the execution of the document and a mere denial of the genuineness of the document is not enough to indicate that the execution of the document was denied.

**68. Proof where no attesting witness found.**

If no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

**SECTION 68 OF BSA: PROOF WHERE NO ATTESTING WITNESS FOUND**

**Corresponding provision**

Section 68 of the BSA corresponds to section 69 of the Evidence Act

**Outdated references omitted**

Reference to "or if the document purports to have been executed in the United Kingdom" are omitted from section 69 of Evidence Act.

**69. Admission of execution by party to attested document.**

The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

This section completes the remaining part of section 67. The effect of this section is to make the admission of the executant a sufficient proof of the execution of a document as against the executant himself, even though it may be a document attestation of which is required by law. The document is not for that reason binding on other persons.

If the attesting witness denies or does not remember the execution of the document, its

execution should be proved by other evidence. Where the attester was an illiterate person and he attested by putting his thumb impression, and though it was a conveyance by his predecessor-in-interest, he was not bound by the document unless it could be shown that the document was read out to him and he understood it. The Calcutta and the Allahabad High Courts have held that the word ―admission relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it. In other words, it has no relation to any admission of execution made before an attesting witness without reference to any suit or proceeding.
In ***Raja Ram v Thakur Rameshwar Bakhsh Singh, (1936) 12 Luck 109,*** the Court held that if a mortgagor admits execution of a document in the written statement, it is wholly unnecessary for the mortgagee to adduce any evidence as to the execution of the document. It is only in cases where it appears on the face of a document or it is positively made out by the evidence on record that a document required by law to be attested has not been attested in accordance with law that this section cannot be made applicable in spite of the admission of a party to an attested document of its execution by himself for the simple reason that a court cannot shut its eyes to obvious facts appearing on the face of a document or on the record.

**70. Proof when attesting witness denies execution.**

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

Section 70 is in the nature of a safeguard to the mandatory provisions of section 68, to meet a situation where it is not possible to prove the execution of the will by calling attesting witnesses though alive. Aid of section 70 can be taken only when the attesting witnesses who have been called, deny or fail to re-collect the execution of the document to prove it by other evidence. This section is meant to lend assistance and come to the rescue of a party who had done his best but driven to a state of helplessness and impossibility cannot be left down without any other means of proving due execution by other evidence as well.

**71. Proof of document not required by law to be attested.**

An attested document not required by law to be attested may be proved as if it was unattested.

Where the law does not require attestation for the validity of a document, it may be proved by admission or otherwise, as though no attesting witnesses existed.

**72. Comparison of signature, writing or seal with others admitted or proved.**

(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

(2) The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

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(3) This section applies also, with any necessary modifications, to finger impressions.

This section will come into operation only when a dispute is pending before the court and not otherwise. The Court may compare the disputed signature, writing, or seal of a person with signatures, writings or seals which have been admitted or proved to the satisfaction of the court to have been made or written by that person. The rule of prudence is that comparison of signatures by Courts as a mode of ascertaining the truth should be used with great care and caution. The dispute about the genuineness of handwriting or signature should not be decided by the court merely on the basis of its personal comparison.

**Power of Court**

(i) The court is entitled to make a comparison of disputed and admitted signatures for just conclusion as a rule of prudence expert opinion can be obtained. Reasons necessary to reach a conclusion.

(ii) It is within the jurisdiction of court to instruct a party to submit his writing or signature enabling court to compare and decide the case, if the instructions are not followed court is free to presume what is most closer to justice.

(iii) It is not open for the court to compare handwriting and or a signature of its own. Services of experts are liable to be taken for this purpose.

(iv) Under the law the court has power to compare signatures or handwriting strengthening its findings based on other cogent material and evidence on record.

**Methods to prove handwriting**

Handwriting can be proved in the following ways: —

- By proof of signature and handwriting of the person alleged to have signed or written the document.
- By the opinion of an expert who can compare handwriting.
- By a witness who is acquainted with the handwriting of a person by whom it is supposed to have been written and signed.
- By comparison of signature, writing or seal with others admitted or proved .

**Court may direct any person present in Court to write any words or figures**

In ***Punamchand v State of MP, (1957) 59 Bom LR 1165,*** the Court held that this section limits the power of the court to direct a person present in court to write any words or figures only where the court itself is of the view that it is necessary for its own purposes to take such writing in order to compare the words or figures so written with any words or figures alleged to have been written by such person. The power does not extend to permitting one or the other party before the court to ask the court to take such writing for the purpose of its evidence or its own case.

Furthermore, the words "any person present in Court" may not include an onlooker or a spectator who has come to Court for the purpose of sightseeing or witnessing the proceedings in court. The words refer to persons who are parties to a "cause" pending before the court and may include the witnesses of the contesting parties in the cause.

In ***Kumaran Nair v Bhargavi, 1988 Cr LJ 1000 Ker***, where a person denied that he was married to the complainant and a letter supposed to have been written by him which had a bearing on the fact of marriage was also denied by him, the direction by the court requiring him to give a specimen of his handwriting was held to be proper.

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**73. Proof as to verification of digital signature.**

In order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may direct—

(a) that person or the Controller or the Certifying Authority to produce the Digital Signature Certificate;

(b) any other person to apply the public key listed in the Digital Signature Certificate and verify the digital signature purported to have been affixed by that person.

**SECTION 73 OF BSA: PROOF AS TO VERIFICATION OF DIGITAL SIGNATURE**

**Corresponding provision**

Section 73 of the BSA corresponds to section 73A of the Evidence Act

**Controller**

Definition of 'controller' in Explanation to section 73A of Evidence Act is omitted in view of section 2(2) of BSA.

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**Public documents**

**74. Public and private documents.**

(1) The following documents are public documents:— (a) documents forming the acts, or records of the acts—

(i) of the sovereign authority;

(ii) of official bodies and tribunals; and

(iii) of public officers, legislative, judicial and executive of India or of a foreign country; (b) public records kept in any State or Union territory of private documents.

(2) All other documents except the documents referred to in sub-section (1) are private.

**SECTION 74 OF BSA: PUBLIC AND PRIVATE DOCUMENTS**

**Corresponding provision**

- Section 74(1) of the BSA corresponds to section 74 of the Evidence Act
- Section 74(2) of BSA corresponds to section 75 of the Evidence Act

**Outdated references**

Reference to "of the Commonwealth" is omitted from section 74 of BSA

**Union Territory**

Words "Union Territory" is added after "State"

**75. Certified copies of public documents.**

Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal; and such copies so certified shall be called certified copies.

**Explanation.**—Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

This section provides the means of proof of public documents which any person has a right to inspect. There is a common law right of a person to take inspection of a document in which that person is interested for the protection of such interest. It was held in ***Khadim Ali v Jagannath, (1940) 16 Luck 230***, that section requires that a copy of a public document given by a public officer should bear a certificate written at the foot of such copy that it is a true copy of such document. Where a copy bears no certificate and it is not supported by the evidence of the person who prepared it, it is not admissible in evidence. But a carbon copy of the court order issued in official process but not marked as "true copy" was allowed in evidence.

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**76. Proof of documents by production of certified copies.**

Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

A certified copy of a public document is admissible in evidence without being proved by calling a witness.

In ***Jaswant Singh v Gurdev Singh, (2012) 1 SCC 425***, the Court held that Even a compromise becomes part of the decree which is passed by the court, it is a public document in terms of section 74 of the Evidence Act, 1872 and certified copy of public document prepared under section 76 of the Act is admissible in evidence under section 77 of the said Act.

With regards to marriage certificate, the Court in **Seema v Ashwani Kumar, (2006) 2 SCC 578,** held that registration of a marriage cannot be proof of a valid marriage per se and is also not a determinative factor regarding validity of a marriage. But it has a great evidentiary value in family matters. This is shown by the fact that a marriage can be denied where it is not registered nor otherwise ceremonially performed.

**77. Proof of other official documents.**

The following public documents may be proved as follows: —

(a) Acts, orders or notifications of the Central Government in any of its Ministries and Departments or of any State Government or any Department of any State Government or Union territory Administration—

(i) by the records of the Departments, certified by the head of those Departments respectively; or

(ii) by any document purporting to be printed by order of any such Government;

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(b) the proceedings of Parliament or a State Legislature, by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of the Government concerned;
(c) proclamations, orders or Regulations issued by the President of India or the Governor of a State or the Administrator or Lieutenant Governor of a Union territory, by copies or extracts contained in the Official Gazette;
(d) the Acts of the Executive or the proceedings of the Legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in any Central Act;
(e) the proceedings of a municipal or local body in a State, by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body;
(f) public documents of any other class in a foreign country, by the original or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of an Indian Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

**SECTION 77 OF BSA: PROOF OF OTHER OFFICIAL DOCUMENTS**

**Corresponding provision**

Section 77 of the BSA corresponds to section 78 of the Evidence Act

**Omission of outdated referencer**

- Section 77 of BSA omits references to "Crown Representative", "Her Majesty", "Privy Council", "Her Majesty's Government", "London Gazette" and "Queen's Printer" contained in section 78(1) of Evidence Act.
- Section 77 of BSA omits the provision that proclamations, orders or regulations issued by her Majesty or by the Privy Council, or by any department of her Majesty's Government may be proved by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer. [Section 78(3) of Evidence Act].
- Section 77(c) of BSA provides that proclamations, orders or regulations issued by the President of India or the Governor of a State or the Administrator or Lieutenant Governor of a Union territory, may be proved by copies or extracts contained in the Official Gazette.

***Presumptions as to documents***

As a general rule of evidence, a party must prove all those facts on the basis of which he is seeking judgment in his favor. A court must not take into account a fact that has not been duly proved and no reliance shall be placed on such a fact for the purpose of basing a judgment. However, the law of evidence recognizes certain exceptions to this rule in the form of presumptions i.e. the court may presume existence or non-existence of certain things without

asking the parties to prove the same. Here, a few questions may arise in readers mind as to what presumption means. Why the general rule has been diluted in case of presumptions?
Presumption literally means "taking as true without examination or proof". Presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known. It is a conclusion drawn from the proof of facts or circumstances and stands as establishing facts until overcome by contrary proof. For Example: If a man is found in possession of a stolen property, it would be logical to presume that either he stole the property or he is receiver of stolen property. However, if the man gives reasonable explanation as to the account and possession of such a property, the presumption so raised against him will stand rebutted.
The word presumption, in law of evidence, means an inference, affirmative or negative, of the existence of some fact, drawn by a court through the process of probable reasoning. Further, a presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.
**Kinds of Presumptions—Presumptions have be classified into three categories i.e.**
(i) Presumption of fact or Natural Presumptions
(ii) Presumption of Law
(iii) Mixed presumption or presumption of law and fact.
**Presumption of Fact:** Those inferences that a man may naturally draw from his observation and logical reasoning without taking recourse to some legal rules or principle are termed as ‘presumptions of fact’ or ‘natural presumptions’. The Act indicates presumptions of fact by the phrase ‘may presume’. ‘May presume’ allows a court to exercise its discretion in raising presumptions. It is left to the prudence of the court to draw a presumption depending upon the facts and circumstances of the case.
The Adhinayam says that whenever it is provided by this Adhiniyam 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. It is evident from the language of the provision that a court is at liberty to draw presumptions of fact. If a presumption of fact is drawn by a court, the party against whom such presumption is raised may give evidence contrary to the presumption drawn by the court. However, if the court decides not to draw a presumption then it may call the party concerned to prove the same.
**For example:** Section 119 deals with presumption of fact. Illustration (c) appended to this section provides that a court may presume that a bill of exchange, if accepted or endorsed, was accepted or endorsed for good consideration. Here, let’s take two hypothetical situations to indicate as to where a court may or where a court may not presume a fact depending upon the facts and circumstances of the cases.

| Aspect | Case I | Case II |
|---|---|---|
| Position of parties | A' – A reputed businessman<br>'B' – A known supplier of goods | A' – A reputed businessman<br>'B' – An illiterate pradanashin lady who is a relative of the businessman |

| | | |
|---|---|---|
| Facts | There is a series of transactions between 'A' and 'B'. In one of these, a bill of exchange is drawn by 'A', and 'B' accepts it. | The pradanashin lady accepts a bill of exchange drawn by 'A', the businessman. |
| Court's approach | The court may presume that the bill of exchange was accepted for consideration due to the nature of their business relationship. | The court may not presume that consideration exists and might require the businessman to prove it, given the vulnerability of the illiterate lady. |

As you can see in the first case the court may presume that the bill of exchange was accepted for good consideration because in given circumstances it is probable that the parties may transact through bill of exchange. Thus, it is logical to draw such a presumption. As regards the second case, it is not usual or natural for a pradnashin lady to accept a bill of exchange. Thus, the court may not draw such a presumption and may call the other party to prove that the bill of exchange was accepted for consideration.

Basically, presumptions of fact do not constitute a branch of jurisprudence rather they fall within the realm of logic. For instance, if a man is found in a room, where a dead person is lying, with blood-stained knife and clothes, it will be logical to presume that the person with the blood-stained knife is the murderer. Also, they are permissive in the sense that the court has discretion to draw or not to draw them. If the court decides to draw a presumption, the same can be rebutted also by contrary evidence and if rebutted, the evidentiary value of the presumption so raised may diminish. In this sense these presumptions afford a provisional proof.

**Presumptions of Law:** Presumptions of law, also known as artificial presumptions, are not something that one can logically draw rather they are presumed by virtue of the mandate created by law.

**For example**: In a suit between A and B for partition of property, if a map a brought before the court by 'B' purporting to be made by the authority of central government, the court must presume that the map is accurate.

Presumptions of law are obligatory in the sense that the court cannot exercise its discretion in drawing a presumption as regards the accuracy of the map. The court is bound to draw the presumption that the map produced is accurate. Presumptions of law are further classified as:

(i) Rebuttable Presumptions

(ii) Irrebuttable Presumptions

**Rebuttable presumptions of law:** The Adhiniyam indicates the presumptions of law by the phrase 'Shall Presume'. The Adhiniyam says that whenever it is directed by this Adhiniyam that

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the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. A plain reading of this provision suggests that the court is bound to draw a presumption but such presumptions are not immune to attack by contrary evidence. Thus, rebuttable presumptions of law hold good so long they are not rebutted. Let's take a hypothetical example to understand how 'shall presume' operates.

In a suit between 'A' and 'B' for recovery of property, 'A' alleges that 'B' is in wrongful possession of the property. 'B' denies the allegations and says that "A' executed a mortgage deed in his favor for a sum of 10000 whereby he is entitled to hold the property. B produced a letter purporting to be written by 'A' admitting in terms the execution of mortgage deed. 'A' accepts the letter to be written by him but alleged that the mortgage deed was not executed as required by law. The court calls for the production of mortgage deed.

Here, if 'A' fails to produce the mortgage deed even after reasonable time has been given to him, the court must presume that the mortgage deed was duly attested, stamped and Executed in the manner required by law. This will result in the suit being decided in favor of 'B' unless 'A' gives some reasonable explanation as to the non-production of document. Thus, if 'A' satisfies the court that the document was destroyed in fire and gives some other evidence contrary to the due execution of mortgage deed, the presumption operating against him will stand rebutted.

Irrebuttable presumption of law: Irrebuttable presumptions of law or 'conclusive proof is a creation of law. When it is a case of 'Conclusive proof,' it is mandatory for the court to presume certain facts on proof of some other facts. Also, no evidence contrary to the presumption so raised can allowed to be adduced. Thus in this sense these are irrebuttable presumptions of law. Basically, conclusive proof accords an artificial probative value to certain facts in given circumstances by the operation of law.

The Adhiniyam provides that 'conclusive proof' means 'when one fact is declared by this Adhiniyam to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.'

For instance, you all must be aware with the concept of doli incapax . It is a principle of law that protects children below the age of 7 from criminal liability. It allows a court to raise an irrebuttable presumption that a child, being incapacitated by tender age, cannot form the requisite criminal intent for committing a crime. If evidence to the effect that the age of the child is below 7 years is given, it would be conclusive proof of the innocence of a child and would ipso facto be an answer to the charge against him.

Further, a perusal of the provision clarify that whenever it is mentioned that a fact is 'Conclusive proof' of another fact, no evidence to prove or disprove the fact shall be allowed to be given. Such presumptions, if once raised, generally, it cannot be rebutted by any piece of evidence. Only on rare occasions the court may allow evidence to be adduced in cases involving 'conclusive proof'. In, ***Cheeranthoodika Ahmmedkutty v. Parambur Mariakutty Umma*** the court observed that the embargo that a court shall not allow evidence to be given for the purpose of disproving the conclusiveness of the fact will not bar a party who alleges fraud or collusion from establishing that the document is sham or vitiated by such factors. Except regarding the said limited sphere the conclusiveness of the document would remain beyond the reach of contradiction.

**Difference between Natural Presumptions and Artificial Presumptions**

While natural presumptions or presumptions of fact allow a court to exercise its discretion in raising a presumption, presumption of law or artificial presumptions leave no scope for discretion. However, when a court has an option to draw a presumption and thereby draws such a presumption, the difference between 'presumption of fact' and 'presumption of law' ceases. Also, the fact so presumed have effect till it is proved otherwise.

| Presumptions of Fact/Natural Presumptions | Presumptions of Law/Artificial Presumptions |
|---|---|
| i. Presumptions of fact fall within the realm of logic, human experience and law of nature<br>ii. The court may or may not take into account presumption of fact irrespective of its strength.<br>iii. Presumptions of fact are 'discretionary' i.e. court is free to raise such presumptions<br>iv. These are uncertain and transitory in the sense that they are drawn based on the facts and circumstance the case.<br>v. These are derived based on the law of nature, human experience and prevalent custom.<br>vi. These are always rebuttable and its value can be negative by contrary evidence. | i. Presumptions of law are artificially created by the law.<br>ii. The court must take into account presumptions of law as mandated by the law.<br>iii. Presumptions of law are 'mandatory' i.e. court is bound to raise such presumptions.<br>iv. These are certain and uniform in the sense that they are drawn as per the mandate of law.<br>v. These are derived based on judicial norms and principle that subsequently became part of legal rules.<br>vi. These are not always rebuttable e.g., 'Conclusive Proof' |

**Mixed Presumptions:** mixed presumptions are presumptions of fact and mixed law. Basically, those presumptions of fact that are recognized by law are considered as mixed presumption. These presumptions do not find their place in Indian law of evidence. They are mainly confined to the English law of real property.

| Presumptions of Fact/May Presume | Rebuttable Presumptions of Law/Shall Presume | Irrebuttable Presumptions of Law/Conclusive Proof |
|---|---|---|

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| | | |
|---|---|---|
| **Section 88**—Presumption as to certified copies of foreign judicial records.<br><br>**Section 89**—Presumption as to books, maps and charts.<br><br>**Section 90**—Presumption as to electronic messages.<br><br>**Section 92**—Presumption as to documents of 30 years old.<br><br>**Section 93**— Presumption as to electronic records five years old.<br><br>**Section 119**—Court may presume existence of certain facts.<br><br>**Section 117**— Presumption as to abetment of suicide by a married woman. | **Section 78**— Presumption as to genuineness of certified copies.<br><br>**Section 79**— Presumption as to documents produced as record of evidence, etc.<br><br>**Section 80**— Presumption as to Gazettes, newspapers, and other documents.<br><br>**Section 81**— Presumption as to Gazettes in electronic or digital record.<br><br>**Section 82**— Presumption as to maps or plans made by authority of Government.<br><br>**Section 83**— Presumption as to collections of laws and reports of decisions.<br><br>**Section 84**— Presumption as to powers-of-attorney.<br><br>**Section 85**— Presumption as to electronic agreements.<br><br>**Section 86**— Presumption as to electronic records and electronic signatures.<br><br>**Section 87**— Presumption as to certified copies of foreign judicial records.<br><br>**Section 91**— Presumption as to due execution, etc., of documents not produced.<br><br>**Section 108**— Burden of proving that case of accused comes within exceptions.<br><br>**Section 115**— Presumption as to certain offences.<br><br>**Section 118**— Presumption as to dowry death. | **Section 35**— Relevancy of certain judgments in probate, etc., jurisdiction.<br><br>**Section 116**— Birth during marriage, conclusive proof of legitimacy. |

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| | | |
|---|---|---|
| | **Section 120**— Presumption as to absence of consent in certain prosecution for rape. | |

**78. Presumption as to genuineness of certified copies.**

(1) The Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or of a State Government:

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

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

**SECTION 78 OF BSA: PRESUMPTION AS TO GENUINENESS OF CERTIFIED COPIES**

**Corresponding provision**

Section 78 of the BSA corresponds to section 79 of the Evidence Act

**Jammu & Kashmir**

References to "State of Jammu and Kashmir" omitted since that legal entity ceased to exist with effect from 31-10-2019 and what exist now are UT of Jammu and Kashmir and UT of Ladakh.

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**79. Presumption as to documents produced as record of evidence, etc.**

Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume that—

(i) the document is genuine;

(ii) any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true; and

(iii) such evidence, statement or confession was duly taken.

The section is applicable to:

- To a document which purports to be a record or memorandum of the evidence given by a witness in a judicial proceeding or before any official authorised by law to take such evidence and;

- To a statement or confession by an accused person, taken in accordance with law, and signed by any Judge or Magistrate.

The section dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law. For instance, in ***Kheman v Crown, (1924) 6 Lah 58***, Where a confession is reduced to writing by a Magistrate in accordance with the provisions of the Code of Criminal Procedure, the record is admissible in evidence without further proof.
Furthermore, this section will not apply to any statement failing to satisfy the provisions of section 27. The Court in ***Queen-Empress v Durga Sonar, (1885) 11 Cal 580***, held that a deposition given by a person is not admissible in evidence against him in a subsequent proceeding without it being first proved that he was the person examined and giving the deposition. A pardon was tendered to an accused, and his evidence was recorded by a Magistrate. Subsequently the pardon was revoked, and he was put on trial before the Sessions judge along with the other accused. At the trial the deposition given by him before the Magistrate was put in and used in evidence against him without any proof being given that he was the person who was examined as a witness before the Magistrate. It was held that the deposition was inadmissible without proof being given as to the identity of the accused with the person who was examined as a witness before the Magistrate.
However, if particular provisions of law in recording evidence are not fully complied with, this section does not operate.

**80. Presumption as to Gazettes, newspapers, and other documents.**

The Court shall presume the genuineness of every document purporting to be the Official Gazette, or to be a newspaper or journal, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

**Explanation.**—For the purposes of this section and section 92, document is said to be in proper custody if it is in the place in which, and looked after by the person with whom such document is required to be kept; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render that origin probable.

**SECTION 80 OF BSA: PRESUMPTION AS TO GAZETTES, NEWSPAPERS, AND OTHER DOCUMENTS**

**Corresponding provision**

Section 80 of the BSA corresponds to section 81 of the Evidence Act

**Official Gazette**

- Section 80 of BSA omits references to "the London Gazette or any Official Gazette, or the Government Gazette of any colony, dependency or possession of the British Crown" and "a copy of a private Act of Parliament of the United Kingdom printed by the Queen's Printer". Courts in India are not anymore required to presume the genuineness of these documents.
- Section 80 of BSA requires that Court shall presume genuineness only of every document purporting to be the Official Gazette, or to be a newspaper or journal. Section 80 of BSA provides that the Court shall presume the genuineness of every document

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purporting to be the Official Gazette, or to be a newspaper or journal, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

**British Private Acts**

Reference to private Acts of Parliament in marginal note of section 81 of Evidence Act are omitted from marginal note of section 80 of BSA.

**Custody of documents**

- Section 81 of Evidence Act provided that the Court shall presume the genuineness of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody. However, section 81 did not define what is proper custody.
- **Explanation** to section 80 clarifies that for the purposes of sections 80 and 92 of BSA, document is said to be in proper custody if it is in the place in which, and looked after by the person with whom such document is required to be kept; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render that origin probable.

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**81. Presumption as to Gazettes in electronic or digital record.**
The Court shall presume the genuineness of every electronic or digital record purporting to be the Official Gazette, or purporting to be electronic or digital record directed by any law to be kept by any person, if such electronic or digital record is kept substantially in the form required by law and is produced from proper custody.
**Explanation.**—For the purposes of this section and section 93 electronic records are said to be in proper custody if they are in the place in which, and looked after by the person with whom such document is required to be kept; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render that origin probable.

**SECTION 81 OF BSA: PRESUMPTION AS TO GAZETTES IN ELECTRONIC OR DIGITAL RECORD**

**Corresponding provision**

Section 81 of the BSA corresponds to section 81A of the Evidence Act

**Digital record**

Section 81A of Evidence Act provided that the Court shall presume the genuineness of every electronic record purporting to be the Official Gazette. Section 81 of BSA provides that the Court shall presume the genuineness of every electronic or digital record purporting to be the Official Gazette.

**Keeping of records**

- Section 81A of Evidence Act provided that the Court shall presume the genuineness of every electronic record purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from proper custody. However, section 81A did not clarify as to what is proper custody.
- Section 81 of BSA provides that the Court shall presume the genuineness of every electronic or digital record purporting to be electronic or digital record directed by any law to be kept by any person, if such electronic or digital record is kept substantially in the form required by law and is produced from proper custody. Further, new Explanation in section 81 of BSA clarifies that "For the purposes of this section and section 96 electronic records are said to be in proper custody if they are in the place in which, and looked after by the person with whom such document is required to be kept; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render that origin probable."

**82. Presumption as to maps or plans made by authority of Government.**

The Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

The presumption as to accuracy is limited only to maps or plans made under the authority of the Government. Such maps or plans contain the results of inquiries made under competent public authority. In all other cases proof of accuracy is needed. Where maps are prepared by private persons no presumption in favour of accuracy can be drawn under this section. This section must be read with section 30, which deals with statements in maps, charts and plans. These are provable under Sections 76 and 78 by the production of certified copies.
In ***Ranganath Ramchandra Suryavanshi v Mohan, AIR 2008 NOC 2814 (Kar),*** the Court held that this section concludes by providing that maps, etc. made for any particular cause must be proved to be accurate. This can be done by examining persons who actually prepared them. Any defect or infirmity can be overcome by bringing before the court the maker of the map, etc. and testifying to the accuracy.

**83. Presumption as to collections of laws and reports of decisions.**

The Court shall presume the genuineness of, every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country, and of every book purporting to contain reports of decisions of the Courts of such country.

This section should be read along with section 32, which makes relevant statements as to any law and rulings contained in officially printed books of any country. It dispenses with the proof of the genuineness of authorized books of any country containing laws and reports of decisions of courts. Section 52 authorizes the courts to take judicial notice of the existence of all laws and statutes in India and in the UK. Section 74 recognizes statutory records to be public records. Section 77 lays down the method of proving the statute passed by the legislature.

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**84. Presumption as to powers-of-attorney.**

The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated.

Indian Stamp Act, 1899, under section 2(21), defines powers of attorney as "power-of-attorney includes any instrument (not chargeable with a fee under the law relating to court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it."
The court shall presume the due execution and authentication of a power-of-attorney when executed before and authenticated by a notary public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, etc. it was held in ***Punjab National Bank v Parmesh Knitting Works, AIR 1986 P&H 214,*** that the section does not exclude other legal modes of proving the execution of a power-of attorney.
The Court in ***Raj Kumar Gupta v Des Raj, AIR 1995 HP 107***, held that mere fact that the document had not been drafted or typed out by the executant before the Notary Public and the fact that the typed matter duly signed by the executant was presented before the Notary Public, did not in any way, make the execution and authentication doubtful.

**85. Presumption as to electronic agreements.**

The Court shall presume that every electronic record purporting to be an agreement containing the electronic or digital signature of the parties was so concluded by affixing the electronic or digital signature of the parties.

**SECTION 85 OF BSA: PRESUMPTION AS TO ELECTRONIC AGREEMENTS**
Corresponding provision

Section 85 of the BSA corresponds to section 85A of the Evidence Act Digital signature

Section 85A of Evidence Act provided that the Court shall presume that every electronic record purporting to be an agreement containing the electronic signatures of the parties was so concluded by affixing the electronic signature of the parties.

Section 85 of BSA provides that the Court shall presume that every electronic record purporting to be an agreement containing the electronic or digital signature of the parties was so concluded by affixing the electronic or digital signature of the parties.

**86. Presumption as to electronic records and electronic signatures.**

(1) In any proceeding involving a secure electronic record, the Court shall presume unless contrary is proved, that the secure electronic record has not been altered since the specific point of time to which the secure status relates.

(2) In any proceeding, involving secure electronic signature, the Court shall presume unless the contrary is proved that—

(a) the secure electronic signature is affixed by subscriber with the intention of signing or approving the electronic record;
(b) except in the case of a secure electronic record or a secure electronic signature, nothing in this section shall create any presumption, relating to authenticity and integrity of the electronic record or any electronic signature.

**SECTION 86 OF BSA: PRESUMPTION AS TO ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES**

**Corresponding provision**

- Section 86 of the BSA corresponds to section 85B of the Evidence Act
- There are no changes

**Electronic signature**

In section 85 of BSA words 'electronic or digital signature' are used. However, in section 86 words 'electronic signature' alone are used.

**87. Presumption as to Electronic Signature Certificates.**
The Court shall presume, unless contrary is proved, that the information listed in an Electronic Signature Certificate is correct, except for information specified as subscriber information which has not been verified, if the certificate was accepted by the subscriber.

This section was initially inserted vide the Information Technology (Amendment) Act, 2000. In 2008, an amendment was made in this section, whereby the word “digital Signature” was substituted by the word “electronic signature” and the word “digital signature certificate” was substituted by the word “electronic signature certificate”. This substitution is a part of the entire scheme under which the digital signature regime is being switched over to the electronic signature regime in the field of e-commerce and e-governance. As mentioned earlier, this switching over of regime is meant to broaden the spectrum and follow the global trend.

**88. Presumption as to certified copies of foreign judicial records.**
(1) The Court may presume that any document purporting to be a certified copy of any judicial record of any country beyond India is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Central Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.
(2) An officer who, with respect to any territory or place outside India is a Political Agent therefor, as defined in clause (43) of section 3 of the General Clauses Act, 1897 (10 of 1897), shall, for the purposes of this section, be deemed to be a representative of the Central Government in and for the country comprising that territory or place.

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**SECTION 88 OF BSA: PRESUMPTION AS TO CERTIFIED COPIES OF FOREIGN JUDICIAL RECORDS**

**Corresponding provision**

Section 88 of the BSA corresponds to section 86 of the Evidence Act

**Outdated reference**

References to "Her Majesty's Dominions" have been omitted

**Place outside India**

- For words "place not forming part of India", words "place outside India" are used
- For words 'any country and not forming part of India', words 'any country beyond India' are used

**89. Presumption as to books, maps and charts.**

The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

The court may presume that any book to which it may refer for information on matters of public or general interest or any published chart or map, was written and published by the person, and at the time and place by whom or at which it purports to have been written or published.

**90. Presumption as to electronic messages.**

The Court may presume that an electronic message, forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person by whom such message was sent.

**SECTION 90 OF BSA: PRESUMPTION AS TO ELECTRONIC MESSAGES**

**Corresponding provision**

Section 90 of the BSA corresponds to section 88A of the Evidence Act

**Definition of "addressee" and "originator"**

- Explanation to section 88A has been omitted. The said Explanation clarified that the expressions "addressee" and "originator" shall have the same Gore meanings respectively assigned to them in clauses (b) and (za) of sub-section (1) of section 2 of the Information Technology Act, 2000.
- Explanation has been omitted since it has become redundant in view of section 2(2) of BSA providing that words used but not defined in BSA shall have the meanings

assigned to them in the Information Technology Act, 2000 if defined in that Act. The definitions of "addressee" and "originator" in clauses (b) and (za) of sub-section (1) of section 2 of the Information Technology Act, 2000 will apply to section 90 of BSA in view of section 2(2) of BSA.

**91. Presumption as to due execution, etc., of documents not produced.**

The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

When a document is called for and not produced after proper notice so to do, the court shall presume that it was duly attested, stamped and executed in the manner prescribed by law. The section refers only to stamp, execution and attestation of documents. It is restricted to cases where notice to produce a document is given to a party. Where a document is shown to have remained unstamped for some time after its execution, the party who relied on it must prove that it was duly stamped. Where the defendant failed to produce mortgage deed despite notice, presumption that the mortgage deed was duly attested could be drawn.

**92. Presumption as to documents thirty years old.**

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

**Explanation**.—The Explanation to section 80 shall also apply to this section.

**Illustrations.**

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody shall be proper.

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

(c) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody shall be proper.

**SECTION 92 OF BSA: PRESUMPTION AS TO DOCUMENTS THIRTY YEARS OLD**

**Corresponding provision**

Section 92 of the BSA corresponds to section 90 of the Evidence Act

**Custody of documents**

- Explanation to section 90/90A of Evidence Act dealing with custody of documents is omitted
- Explanation to section 92 of BSA refers to section 80 of BSA which refers to custody of

documents

**93. Presumption as to electronic records five years old.**
Where any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the electronic signature which purports to be the electronic signature of any particular person was so affixed by him or any person authorised by him in this behalf.
**Explanation.**—The Explanation to section 81 shall also apply to this section.

**SECTION 93 OF BSA: PRESUMPTION AS TO ELECTRONIC RECORDS FIVE YEARS OLD**

**Corresponding provision**

- Section 93 of the BSA corresponds to section 90A of the Evidence Act

**Custody of documents**

- Explanation to section 90/90A of Evidence Act dealing with custody of documents is omitted
- Section 93 of BSA now refers to section 81 of BSA which deals with custody of documents

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## CHAPTER VI OF THE EXCLUSION OF ORAL EVIDENCE BY DOCUMENTARY EVIDENCE

**94. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.**
When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
**Exception 1.**—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.
**Exception 2.**—Wills admitted to probate in India may be proved by the probate.
**Explanation 1.**—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.
**Explanation 2.**—Where there are more originals than one, one original only need be proved.

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

**Illustrations.**

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

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

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

(d) A contracts, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) A gives B a receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible.

This section and section 95 define the cases in which documents are exclusive evidence of transactions which they embody. They only apply when the document evidencing a contract appears to contain all the terms thereof. Sections 96–103 provide for the interpretation of documents by oral evidence.

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. This rule is based on the principle that the best evidence, of which the case in its nature is susceptible, should always be presented. The section lays down the best evidence rule but does not prohibit any other evidence where the writing is capable of being construed differently and which shows how the parties understood the document.

**When the terms ... have been reduced to the form of a document**

The section prohibits the admission of oral evidence to prove the contents of the document. The Court in ***Jamna Doss v Srinath Roy, (1889) 17 Cal 176,*** held that if parties have reduced all the terms of a contract or of a grant or of any disposition of property into writing, then no parole evidence is admissible, but if they intended only to reduce to writing a portion of the terms of the contract, then they are entitled to give parole evidence of the terms which they did not intend to reduce to writing.

The expression “terms” in this section and section 95 relates to statements, assertions or representations contained in a written contract which relate to the subject-matter of the contract and to something to be done or not to be done under the contract, and has no application to a provision in the nature of a condition precedent to the very existence or formation of a contract. The section does not preclude from proving that the real contract was different from what was found in the deed.

In ***Ebrahimbhoy Pabaney Mills Co Ltd, v Hassan Mamooji, (1920) 23 Bom LR 767,*** where a contract was signed by the defendant personally and he attempted to lead oral evidence to show that he was contracting as agent and that the name of his principal was disclosed at the time of the contract, it was held that such evidence was not admissible for the purpose of exonerating a contracting party from liability, for that would be substituting a different agreement from that evidenced by the writing.

**Any matter is required by law to be reduced to the form of a document**

Whereby any matter is required by law to be reduced to the form of a document, then the document itself must be put in evidence, e.g., deeds, conveyances of land, mortgages, wills, etc.

No other evidence can be substituted so long as the writing exists. But where the matter is not required by law to be reduced to the form of a document, this section does not apply,

**Appointment of public officer [Exception 1]**

This Exception is partly based on the maxim *omnia praesumuntur rite esse acta.* "It is a general principle, that a person's acting in a public capacity is prima facie evidence of his having been duly authorised so to do; and even though the office be one the appointment to which must have been in writing, it is not, at least in the first instance, necessary to produce the document, or account for non-production".

**Wills admitted to probate [Exception 2]**

Probate means the copy of a will certified under the seal of a court of competent jurisdiction with a grant of administration to the estate of the testator. Probate of a will is evidence of the contents of the will against all the parties interested thereunder. Probate is secondary evidence, but it is made admissible by this section.

**Transactions in one or more than one documents [Explanation 1]**

Illustration (a) to the section exemplifies this Explanation. When parties negotiate at a distance by letters or telegrams, the entire mass of correspondence indicates the true nature of the agreement entered into by the parties.

**More than one original [Explanation 2]**

Illustration (c) exemplifies the meaning of this Explanation. See section 57, Explanations 1 and 2. Bills of exchange and bills of lading have more originals than one.

**Extraneous facts in documents [Explanation 3]**

Illustrations (d) and (e) exemplify this Explanation. When the contents of a document are in question, either as fact in issue or as a sub-alternate principal fact, the document is the proper evidence of its own contents, and all derivative proof is rejected until its absence is accounted for. But when a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent proof aliunde is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it. A receipt for sums paid in part liquidation of a bond hypothecating immovable property must be registered to render it admissible as evidence. Under illustration (e) to this section such payments may nevertheless be proved by parole evidence, which is not excluded owing to the inadmissibility of the documentary evidence.

The Supreme Court has expressed the view in ***Hriday Narain Choudhury v Shyam Kishore Singh, AIR 2002 SC 2526,*** that where an unregistered partition deed is not admissible in evidence, other evidence may be adduced by a member to show the extent of his land holding and such evidence has to be considered. This would be more particularly so when the suit is not based on such a document. On the basis of other evidence, the lower Courts recorded a concurrent finding that the plaintiff's holding was less than 5 acres and, therefore, the relevant Bihar Act was not applicable. The Supreme Court found it to be improper for the High Court to interfere in the finding on the ground that the transaction was reduced to writing and the document being not admissible in evidence, oral evidence on the point could not have been looked into. Further, the Court in ***Krishna Bai v Shivnath Singh, AIR 1993 MP 65***, held that an unregistered memorandum of the partition of a joint property, though inadmissible in evidence, can be used for collateral purpose of proving intention of partition. To prove partition, oral evidence is not hit by any bar contained in section 94 of the BSA.

**95. Exclusion of evidence of oral agreement.**

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section

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94, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

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

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

Provided also that the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:

Provided also that the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:

Provided also that any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

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

Provided also that any fact may be proved which shows in what manner the language of a document is related to existing facts.

**Illustrations.**

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

(b) A agrees absolutely in writing to pay B one thousand rupees on the 1st March, 2023. The fact that, at the same time, an oral agreement was made that the money should not be paid till the 31st March, 2023, cannot be proved.

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

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

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

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

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words— "Bought of A a horse for thirty thousand rupees". B may prove the verbal warranty.

(h) A hires lodgings of B, and gives B a card on which is written— "Rooms, ten thousand rupees a month". A may prove a verbal agreement that these terms were to include partial board. A hires lodging of B for a year, and a regularly stamped agreement, drawn up by an advocate, is made between them. It is silent on the subject of board. A may not prove that board was included in the term verbally.

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

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

It was held in ***Rangubai v Govind, (1949) Nag 78,*** that this section operates only as between, the parties to a deed or their representatives in interest. It has no application to strangers and does not therefore prevent a stranger from showing that a transaction which on the face of it purports to be one thing was in fact never intended by the parties to be that but was effected for some collateral purpose and that the real transaction between them was something different. But such a case must be pleaded and proved.

When a transaction has been reduced into writing, either by requirement of law, or agreement of the parties, the writing becomes the exclusive memorial thereof; and no extrinsic evidence is admissible either to prove independently the transaction, or to contradict, vary, add to, or subtract from, the terms of the document, though the contents of such document may be proved by either primary or secondary evidence.

**The grounds of exclusion are:**

(1) that to admit inferior evidence when the law requires superior would be to nullify the law; and

(2) that when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith, or treacherous memory.

It was held in ***Jumna Doss v Srinath Roy, (1886) 17 Cal 176 n, 177***, that the section applies only where, upon the face of it, the written instrument appears to contain the whole contract. If the parties have intended to reduce all the terms of the contract into writing, then no parole evidence is admissible; but if they intended only to reduce into writing a portion of the terms of the contract, then they are entitled to give parole evidence of the terms which they did not intend to reduce into writing.

**[Proviso 1]**

This proviso applies to cases where evidence is admitted to show that a contract is void, or voidable, or subject to re-formation, upon the ground of fraud, duress, illegality, etc., in its inception. See Illustrations (d) and (e). The instances given in the proviso are not exhaustive. They are set out by way of illustration only.

**Matters on which document is silent [Proviso 2]**

Under this proviso evidence of any collateral parole agreement which does not interfere with the

terms of the contract may be given. See Illustrations (f), (g) and (h). Parties can prove that, either contemporaneously or as a preliminary measure, they entered into a distinct oral agreement on some collateral matter. The only case in which oral evidence will be admitted under this proviso is where the instrument is silent on the matter sought to be proved and the agreement to be proved is consistent with the terms of the document.

**Condition precedent to obligation [Proviso 3]**

This proviso presupposes that the contract, grant or disposition of property itself remains intact, but the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition itself and as agreed must come into existence before the obligation attaches thereunder.

**Rescission or Modification [Proviso 4]**

This proviso is based on the principle—Nothing is so agreeable to natural equity as that a thing be unbound in the manner in which it was bound." Under this proviso a prior written contract may be varied by a subsequent verbal one, in cases in which the law does not require the contract to be in writing. Where the original contract is of such a nature as that the law requires it to be in writing or where its execution has been followed by the formality of registration, the only way of proving the rescission or modification of the original contract must be by proof of an agreement of the like formality and not by an oral agreement.

**Customs and usages [Proviso 5]**

Parole evidence of usage or custom is admissible in aid of the construction of a written instrument. Such evidence is received for explaining or filling up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writings of a similar kind—when the language, though well understood by the parties, and by all who have to act upon it in matters of business, would often appear to the common reader scarcely intelligible, and sometimes almost a foreign language. The terms used in these instruments are to be interpreted according to the recognised practice and usage with reference to which the parties are supposed to have acted; and the sense of the words, so interpreted, may be taken to be the appropriate and true sense intended by the parties.

**Repugnant or inconsistent with, the express terms of the contract [Proviso 6] (NEW PROVISION)**

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

**Relationship with existing facts [Proviso 7]**

The proviso is a substantive provision laying down the law relating to the admissibility of extrinsic evidence as an aid to the construction of a document in cases in which it is necessary to find out how the document is related to the existing facts. Where a document is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. But where the terms of the document themselves require explanation, then evidence can be led within the restrictions laid down in this proviso.

**96. Exclusion of evidence to explain or amend ambiguous document.**

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

**Illustrations.**

(a) A agrees, in writing, to sell a horse to B for "one lakh rupees or one lakh fifty thousand rupees". Evidence cannot be given to show which price was to be given.

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

Sections 96–101 deal with rules for construction of documents with the aid of extrinsic evidence. Sections 94 and 95 define the cases in which documents are exclusive evidence of the transactions which they embody. Sections 96– 102 deal with the interpretation of documents by oral evidence.

There are two sorts of ambiguities of words—the one is *ambiguitas patens* and other *latens. Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seems certain and without ambiguity, for anything that appears upon the deed or instrument; but there is some collateral matter out of the deed that breeds the ambiguity.

The principle envisaged under this section is that of *Patent ambiguities*. If the language of a deed is, on its face, ambiguous or defective, no evidence can be given to make it certain. It was held in **Lallubhai Patel v Lalbhai Trikumlal Mills, (1958) SCJ 866,** that **the duty of the court is always interpretation; to find out not what really was the intention of the parties, as distinguished from what mere words expressed but merely to find out the meaning of the words used by them.** Under this section it is the language of the document alone that will decide the question and it would not be open to the parties or the court to attempt to remove the vagueness by relying upon any extrinsic evidence. Such an attempt would really mean the making of a new contract between the parties.

In **Food Corp of India v Birendra Nath Dhar, AIR 1989 NOC 119 (Cal),** a contract of transport made with the Food Corporation of India, the column for transport charges was left blank, the attempt of both sides to give evidence of the oral agreement on the point was not accepted, since blank spaces cannot be filled by oral agreements.

**Difference Between Patent and Latent Ambiguities**

| S. No | Patent Ambiguity | Latent Ambiguity |
|---|---|---|
| 1. | When the language of the document is so uncertain and effective that no meaning can be granted to the document then it is called Patent Ambiguity. | When the language of a document is certain and meaningful but the document makes no relevance in the present circumstance then it is latent ambiguity. |
| 2. | The patent ambiguity is personal in nature and it is related to the person executing the document. | The latent ambiguity is of objective nature and it is related to the subject matter and object of the document. |

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| 3. | Oral evidence is not allowed for the removal of patent ambiguity. | To remove latent ambiguity, oral evidence is allowed. |
|---|---|---|
| 4. | The rule on which the patent ambiguity is based is that the patent ambiguity makes the document useless. | Giving oral evidence in case of latent ambiguity is based on the principle the latent ambiguity does not make a document useless. |
| 5. | A patent ambiguity is on the face of the document and is evident from inspection of the document itself. | Latent ambiguity is not evident from *prima facie* inspection of the document but it becomes apparent when the language of a document is applied to existing circumstances |

**97. Exclusion of evidence against application of document to existing facts.**

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

**Illustration.**

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

Under this section evidence to show that common words, whose meaning is plain, not appearing from the context to have been used in a peculiar sense, have been in fact so used, is not admissible. Where the language in its ordinary sense properly applies to the facts without any difficulty, evidence to show that it bears a different meaning will be rejected, as it contradicts the document.

In ***Tata Iron & Steel Co Ltd v State of Bihar, AIR 1996 Pat 37***, where in a lease agreement with the Government, payment of interest on arrears of rent was stipulated but mode of payment was not stipulated, the Collector was not prevented by section 94 ( now section 97 of BSA) from deciding the mode. A promissory note was not allowed to be explained away as a deposit.

**98. Evidence as to document unmeaning in reference to existing facts.**

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

**Illustration.**

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

Where the language of a document is plain in itself but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense. It is based upon the maxim *falsa demonstratio non necet* (a false description does not vitiate the document). Section 100 is a part of the rule in this section, and both the sections must be read together. The illustration to this section shows that if A sells to B "my house in Calcutta," and if A has no house in Calcutta but has a house in Howrah, of which B has been in possession since the execution of the deed, these facts may be proved to show that the deed related to the house in Howrah.
In ***Karuppa Goundan alias Thoppala Goundan v Periathambi Goundan***, where a sale deed describes the land sold by wrong survey numbers, extrinsic evidence is admissible to show that the lands intended to be sold and actually sold and delivered were lands bearing different survey numbers.

**99. Evidence as to application of language which can apply to one only of several persons.**

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

**Illustrations.**

(a) A agrees to sell to B, for one thousand rupees, "my white horse". A has two white horses. Evidence may be given of facts which show which of them was meant.

(b) A agrees to accompany B to Ramgarh. Evidence may be given of facts showing whether Ramgarh in Rajasthan or Ramgarh in Uttarakhand was meant.

Where the description in the document applies equally to any one of two or more subjects, evidence to explain its language is admissible. Where the language of a document, though intended to apply to one person or thing only, applies equally to two or more, and it is impossible to gather from the context which was intended, an equivocation arises, e.g., when the same name or description fits two persons or things accurately; when the same name or description fits one exactly and the other but tolerably; when the same name or description fits two objects equally but subject to a common inaccuracy, provided that the inaccuracy be a mere blank or applicable to no other person or thing.
This section modifies the rule laid down in section 97 by providing that where the language of a document correctly describes two sets of circumstances but could not have been intended to apply to both, evidence may be given to show to which set it was intended to apply. Here the language is certain. The doubt as to which of similar persons or things the language applies has been introduced by extrinsic evidence.

**100. Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.**

When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

**Illustration.**

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A agrees to sell to B "my land at X in the occupation of Y". A has land at X, but not in the occupation of Y, and he has land in the occupation of Y but it is not at X. Evidence may be given of facts showing which he meant to sell.

This section is based upon the maxim *falsa demonstratio non necet.* It is only an extension of the provision of section 98. Sections 98, 99 and 100 all deal with latent ambiguity. "Where in a written instrument the description of the person or thing intended is applicable with legal certainty to each of several subjects, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author." The rule rejecting erroneous description not substantially important is applicable only where there is enough to show the intention clearly.
The illustration to this section shows that if A agrees to sell to B "my land at X in the occupation of Y", and A has land at X but not in the occupation of Y, and has land in the occupation of Y but it is not at X, evidence may be given to show which was intended to be sold. Another common case is where land within certain boundaries is sold and is wrongly described as containing a certain area, the error in area is regarded as a mere misdescription and does not vitiate the deed. The maxim *falsa demonstratio non necet* applies.

**101. Evidence as to meaning of illegible characters, etc.**

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

**Illustration.**

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

Evidence as to the meaning of illegible characters (e.g., shorthand-writer's notes) or of foreign obsolete, technical, local and provincial expressions and of words used in a peculiar sense may be given. In such cases the evidence cannot properly be said to vary the written instrument; it only explains the meaning of expressions used. Mercantile usage has given special meanings to many ordinary words. Evidence of the meaning which these words bear in mercantile transactions can be given under this section.
In ***Holt & Co v Collyer, (1881) 16 Ch D 718,*** the Court held that the principle upon which words are to be construed in instruments is very plain— where there is a popular and common word used in an instrument, that word must be construed prima facie in its popular and common sense. If it is a word of a technical or legal character it must be construed according to its technical or legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is its primary meaning, namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word, you must satisfy the court from the instrument itself or from the circumstances of the case that the word ought to be construed, not in its popular or primary signification, but according to its secondary intention.

**102. 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 tending to show a contemporaneous agreement varying the terms of the document.

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**Illustration.**

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

In this section the word "varying" only is used, while in section 95 the words are "contradicting, varying, adding to, or subtracting from". But it is difficult to see that in using the term "varying" only, anything less could have been meant than what is conveyed by the several expressions in section 95 and as every "contradicting", "adding to", or "subtracting from" would necessarily be a "varying" of the instrument, the legislature apparently used that expression as sufficient to convey all that is denoted by the other different expressions occurring in the earlier section.
In ***Bageshri Dayal v Pancho, (1906) 28 All 473*****,** the plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. It was held that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale.

**103. Saving of provisions of Indian Succession Act relating to wills.**

Nothing in this Chapter shall be taken to affect any of the provisions of the Indian Succession Act, 1925 (39 of 1925) as to the construction of wills.

## PART IV PRODUCTION AND EFFECT OF EVIDENCE

## CHAPTER VII OF THE BURDEN OF PROOF

**104. Burden of proof.**

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, and when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

**Illustrations.**

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.

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

This expression means two different things. It means sometimes 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 of proof is of importance where by reason of not discharging the burden which was put upon it, a party must eventually fail. This 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 the other.
It was held in ***Narayan v Gopal, AIR 1960 SC 100,*** at the end of a case when both the parties have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic.
The burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. This rule of convenience has been adopted in practice, not

because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. Moreover, it is reasonable and just that the suitor, who relies upon the existence of a fact, should be called upon to prove his own case. Taylor, 12th Edn, Section 364, p 252, states that in the application of this rule, regard must be had to the substance and effect of the issue, and not to its grammatical form, for in many cases the party, by making a slight alteration in the drawing of his pleadings, may give the issue a negative or affirmative form, at his pleasure.

It was held in ***State of MP v Ushadevi, (2015) 8 SCC 672***, that it is a settled law that parties are governed by their pleadings and the burden lies on the person who pleads to prove and further the plaintiff has to succeed on the strength of his case and cannot depend upon the weakness of the defendant's case.

It was held in ***Unkar Nath v Mittu Lal, (1898) 18 AWN 107***, 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, if not contradicted, to form the basis of a judgment and decree upon that point in his favour.

**Civil Cases**

It was held in ***Gulabchand v Kudilal, AIR 1966 SC 1734***, 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 probabilities may serve as a good basis for decision. The Supreme Court has held that in a civil case involving allegations of charges of criminal or fraudulent character, insistence on proving charges clearly and beyond reasonable doubt is wrong.

**Criminal Trial**

The Court in ***Jarnail Singh v State of Punjab, AIR 1996 SC 755***, held that in a criminal trial the burden of proving the guilt of the accused beyond all reasonable doubts always rests on the prosecution and on its failure, it cannot fall back upon the evidence adduced by the accused in support of his defence to rest its case solely thereon. In criminal cases it is for the prosecution to bring the guilt home to the accused.

In ***MP Gupta v State of Rajasthan, AIR 1974 SC 773***, the Court has held that as against this heavy burden on the prosecution the accused can claim the benefit of his defence just by showing a balance of probabilities. He has not to prove his defence beyond a reasonable doubt. The prosecution proved in a case that an official had accepted a sum of money which was intended to be a bribe. The Supreme Court said that the accused must prove his justification and he can do so on a balance of probabilities and need not prove beyond reasonable doubt.

**Plea of Alibi**

In ***Jagarnath Giri v State of Bihar, 1992 Cr LJ 648 Pat***, where the accused raises the plea of alibi (his presence elsewhere), burden lies on him to substantiate that fact at least to the extent of a reasonable probability. Even if the evidence produced is capable of creating a doubt whether the accused was there at the time of the happening, he becomes entitled to the benefit of doubt.

**Challenging a Constitutionality**

In the petition challenging the constitutionality of a statute, the allegations regarding the violation of the constitutional provision should be specific, clear and unambiguous and the burden of proof is on the person challenging its constitutionality.

In ***Gauri Shanker v UOI, 1994 AIR SCW 4059***, the Supreme Court stated the following: —
there is always a presumption in favour of constitutional validity of an enactment and the

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burden is upon him who attacks it to show that there has been clear transgression of the constitutional principles;
it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every date of facts which can be conceived existing at the time of legislation.

**Benami Transaction**

The Supreme Court in ***Jaydayal Poddar v Bibi Hazra, AIR 1974 SC 171***, held that when a person purchases property in another person's name and also gets it registered in that person's name (benami), if subsequently he wishes to assert his ownership, the burden would be upon him to prove that fact. The Court in the said case held that:

It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. The essence of a benami is the intention of the parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be a benami of the serious onus that rests on him, nor justify the acceptance of a mere conjecture or surmises, as a substitute for proof.

**105. On whom burden of proof lies.**

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

**Illustrations.**

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

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

***Phipson, 10th Edn, p 92***, states that the burden of proof lies upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. This rule, derived from the maxim of Roman law, *ei qui affirmat, non ei qui negat, incumbit probatio*, is adopted partly because it is but just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative

This section lays down a test for ascertaining on which side the burden of proof lies. The section makes it clear that the initial onus is on the plaintiff. If he discharges that onus and makes out a case which entitles him to relief, the onus shifts on to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same. There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person

who has to prove a fact and it never shifts but the onus of proof shifts. Such a shifting onus is a continuous process in the valuation of evidence.

In **Kundan Lal v Custodian, Evacuee Property, AIR 1961 SC 1316**, the Court explained the phrase "burden of proof" as having 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.

In **Ram Chand v Chhunnu Mal, (1925) 6 Lah 470**, where an unregistered document, the execution of which is admitted or proved, contains an admission of the payment of the consideration, the onus lies on the person executing the document to prove that what he himself admitted to be true was, as a matter of fact, false and that he did not receive the consideration.

In **Dibyeddu Bhowmik v Jogesh Chandra Nath, 1996 AIHC 557 (Gau),** a suit for eviction against a sub-tenant, the tenant did not contest the suit nor appeared as a witness. The landlord also did not appear but produced witnesses on his behalf. Decree was claimed on the basis of a document (*sulenama*) entered into between the landlord and the tenant. Contents of the *sulenama* were not proved. It was held that the *sulenama* could not be relied upon and the onus squarely lay on the landlord to prove sub-tenancy. Eviction decree was set aside.

**106. Burden of proof as to particular fact.**
The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
**Illustration.**
A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission. B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

This section amplifies the general rule laid down in section 104. It differs from section 104. By section 104 the party has to prove the whole of the facts which he alleges to entitle him to judgment when the burden of proof is on him. This section provides for the proof of some one particular fact. The illustration sufficiently points out the meaning. All the facts, however numerous and complicated, which go to make up the accused's guilt, must be proved by the prosecution.

In **Champalal v Thakurji Shri Gopalji, AIR 1998 Raj 220**, where the defendant alleged that the suit property was a public trust property, the plaintiff did not accept this fact throughout the

proceedings. Thus, it became a fact which was asserted by the defendant and was denied by the plaintiff. The court said that the onus of proving the same was on the defendant.

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. In the tort action of malicious prosecution, for example, the burden of proving that the plaintiff was prosecuted without reasonable and probable cause is on him although it is the negative of the issue.

In **Habib Ullah Bhat v Juna, AIR 2003 J&K 32**, 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.

**107. Burden of proving fact to be proved to make evidence admissible.**
The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.
**Illustrations.**
(a) A wishes to prove a dying declaration by B. A must prove B's death.
(b) A wishes to prove, by secondary evidence, the contents of a lost document. A must prove that the document has been lost.

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. In **Sri Siya Ram v Lilawati, AIR 1990 All 75**, an illiterate woman contended that the sale deed which she executed was not read over to her. It was held that the burden was upon the other party to prove that she was made fully aware of the contents of the document.

**Res Ipsa Loquitur**

In **Sumati Debnath v Sunil Kumar Sen, AIR 1994 Gau 59**, where the vehicle suddenly went off the road, overturned and killed the victim, doctrine of res ipsa loquitur was attracted and onus was shifted from the claimant to the driver to prove his non-negligence or vigilance.

**108. Burden of proving that case of accused comes within exceptions.**
When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Bharatiya Nyaya Sanhita, 2023 or within any special exception or proviso contained in any other part of the said Sanhita, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.
**Illustrations.**

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A.
(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control. The burden of proof is on A.
(c) Section 117 of the Bharatiya Nyaya Sanhita, 2023 provides that whoever, except in the case provided for by sub-section (2) of section 122, voluntarily causes grievous hurt, shall be subject to certain punishments. A is charged with voluntarily causing grievous hurt under section 117. The burden of proving the circumstances bringing the case under sub-section (2) of section 122 lies on A.

**In criminal cases the burden of proof, using the phrase in its strictest sense, is always upon the prosecution and never shifts whatever the evidence may be during the progress of the case.** When sufficient proof of the commission of a crime has been adduced and the accused has been connected therewith as the guilty party, then the burden of proof, in another and quite different sense, namely in the sense of introducing evidence in rebuttal of the case for the prosecution is laid upon him. In **Babu Lal v State of UP, AIR 1960 All 223**, it was held that the onus of establishing an exception shifts to the accused when he pleads an exception. This onus can be discharged either by affirmatively establishing the plea taken by an accused person or by eliciting such circumstances which would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated.

The Supreme Court has laid down, in **Yogendra Morarji v Gujarat**, **AIR 1980 SC 660**, that the burden of proving defences arises only when the prosecution discharges its initial and traditional burden of establishing the complicity of the accused. Even under this section the standard of proof required for establishing a defence is that of a prudent man as laid down in section 3. But within that standard there are degrees of probability. The nature of the burden on an accused person is not as onerous as the general burden of proving the charge beyond reasonable doubt. The accused may discharge his burden by establishing a mere balance of probabilities in his favour with regard to the alleged crime.

Furthermore, 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. Where a fact is especially within the knowledge of the accused, the burden lies upon him to prove that fact.

**109. Burden of proving fact especially within knowledge.**
When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
**Illustrations.**
(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

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

This section does not cast any burden on an accused person to prove that no crime was committed by proving facts especially within his knowledge; nor does it warrant the conclusion that if anything is unexplained which the court thinks the accused could explain, he ought therefore to be found guilty. It does not affect the onus of proving the guilt of the accused. That onus rests on the prosecution and is not shifted on to the accused by reason of this section. It is only in cases where the facts proved by the evidence give rise to a reasonable inference of guilt unless the same is rebutted and such inference can be negatived by proof of some fact which in its nature can be negatived by proof of some fact which in its nature can only be within the special knowledge of the accused that the burden of proving the fact is on the accused. It was held in **Jethalal v State of Gujarat, AIR 1968 Guj 163**, that this section cannot be used to shift the onus of establishing an essential ingredient of the offence on the accused.

**Burden of proving negligence and *res ipsa loquitur***

It has been considered by the **Privy Council in Ng Chun Pui v Lec Chuen Tat, The Times, May 25, 1988 PC**, 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.

Acting upon this maxim and following the decision of the Supreme Court in **Sayed Akbar v State of Karnataka, AIR 1979 SC 1848,** the Kerala High Court held that where a live wire was hanging on the road from an electric pole, it must be presumed that it must have been due to negligent management creating liability to the dependents of the pedestrian who was electrocuted.

**Dowry Death**

In **Amarjit Singh v State of Punjab, 1989 Cr LJ (NOC) 13 (P&H),** where the prosecution proved that there was a strong motive for the crime, that the deceased woman was last seen alive in the company of the accused and that the death was unnatural and homicidal, it was held that the burden to account for the circumstances of the death was shifted to the person in whose care the woman met her death. He alone must be in possession of the knowledge of those circumstances.

**Maintenance**

In **Dalip Singh v State of Haryana, 1993 Supp. (3) SCC 336**, when once it was established that the victim was taken into police custody it was their responsibility to show how the prisoner went out of their custody. There was not even a whisper from the side of the accused as to what

happened to the deceased after he was taken into custody by them. Due to lack of direct evidence in such cases, the Supreme Court stated the approach to be followed in such cases: Exaggerated adherence to and insistence upon requiring the truth to be established by proof which is beyond every reasonable doubt would in such cases often result in miscarriage of justice and make the justice delivery system suspect and vulnerable.

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

This section provides that if it appears that a person, whose present existence is in question, was alive within 30 years, and nothing whatever appears to suggest the probability of his being dead, the court is bound to regard the fact of his still being alive as proved. Dealing with a case **Surjit Kaur v Jhujhar Singh, AIR 1980 SC 274**, the Supreme Court observed that in view of the fact that Sardul Singh was alive on 24 May 1960, it shall be presumed that he was not dead on 24 May 1970. The appellant has alleged that Sardul Singh was dead on that date. The onus to prove that fact shall be on him. But as soon as anything appears which suggests the probability of his being dead, the presumption disappears, and the question has to be determined on the balance of proof.

**The presumption is not a very strong one. It may be rebutted by slight evidence to the contrary, for example, seven years' absence. The court may not act upon it until positive proof of the person being still alive is offered.**

**111. Burden of proving that person is alive who has not been heard of for seven years.**
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.

Sections 110 and 111 must be read together because the latter is only a proviso to the rule contained in the former, and both constitute one rule when so read together. It was held in ***Veeramma v Chenna Reddi, (1021) 37 Mad 440***, that there is no presumption in law that a person was alive for seven years from the time when he was last heard of. These sections deal with the procedure to be followed when a question is raised before a court, as to whether a person is alive or dead, but do not lay down any presumption as to how long a man was alive or at what time he died. Assuming that the court could make a presumption that a person was alive for seven years after he was last heard of, it depends on the circumstances of each case, whether the court could draw such a presumption or not.

**Presumption of death**

If a person has not been heard of for seven years, there is a presumption of law that he is dead. and the burden of proving that he is alive is shifted to the other side. But at what time within that time he died is not a matter of presumption, but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. The presumption of death does not extend to the date of death. Further, as it was held in ***Jeshankar v Bai Divali, (1919) 22 Bom LR 771***, the earliest date to which the death can be presumed can only be the date when the suit to claim that right is filed. It cannot have a further retrospective effect.

In ***Pooja V Raichandani v State Bank of India, AIR 2009 NOC 685 (Guj)*****,** whereabouts of an account holder in a bank were not known for years. His wife and children filed a writ petition for an order permitting to withdraw the money from the account and also to collect the contents of the locker, they being not able to file a case for succession certificate. The court said that they could not be denied such relief. They were allowed to collect their inheritance as being heirs of the first degree.

**112. Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.**

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

When the existence of a personal relationship, or a state of things, is once established by proof, the law presumes that the relationship or state of things continues to exist as before, till the contrary is shown, or till a different presumption is raised, from the nature of the subject in question. A partnership, tenancy, or agency, once shown to exist, is presumed to continue, till it is proved to have been dissolved.

In ***Liladhar Ratanlal v Holkarmal, (1958) 60 Bom LR 203***, the Apex Court held that a partnership once shown to exist is presumed to continue until the contrary is Proved. Under section 45 of the Indian Partnership Act, 1932, after a firm is dissolved, the partners continue to be liable to third parties for any act done which would have been an act of the firm if done before the dissolution, until public notice of dissolution is given.

Where an authority to do an act is once shown to exist, it is presumed to continue until the contrary is proved. Sections 182–238 of the Indian Contract Act, 1872, deal with the relationship of principal and agent. Section 206 provides that a reasonable notice must be given of revocation or renunciation of agency. Section 208 provides when the authority of an agent is terminated.

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**113. Burden of proof as to ownership.**

When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

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. This is to be presumed from lawful possession until the want of title or a better title is proved. However, the principle of the section does not apply where the possession has been obtained by fraud or force. The term "possession" in this section is to be understood as opposed to juridical possession and to denote actual present possession. Longer the possession, stronger is the presumption.

It was held in **Gobind Prasad v Mohan Lal, (1901) 24 All 157**, that a person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which unless and until the true owner interferes, is capable of being disposed of by deed or will, or by execution sale, just in the same way as it could be dealt with if the title were unimpeachable.

**114. Proof of good faith in transactions where one party is in relation of active confidence.**

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

**Illustrations.**

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

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

The principle of the rule 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." Where a fiduciary or quasi-fiduciary relationship exists, the burden of sustaining a transaction between the parties rests with the party who stands in such relation and is benefited by it.

It was held **in Raghunathji v Varjiwandas, (1906) 8 Bom** LR 525, that the words **"active confidence**" indicates that the relationship between the parties must be such that one is bound to protect the interests of the other. This had been held to apply to a trustee, an executor, an administrator, a guardian, an agent, a minister of religion, a medical attendant, an auctioneer, and attorney. Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the

satisfaction of the court that the person by whom the benefits have been conferred had competent and independent advice in conferring them.

**115. Presumption as to certain offences.**

(1) Where a person is accused of having committed any offence specified in sub-section (2), in—

(a) any area declared to be a disturbed area under any enactment for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order; or

(b) any area in which there has been, over a period of more than one month, extensive disturbance of the public peace,

and it is shown that such person had been at a place in such area at a time when firearms or explosives were used at or from that place to attack or resist the members of any armed forces or the forces charged with the maintenance of public order acting in the discharge of their duties, it shall be presumed, unless the contrary is shown, that such person had committed such offence.

(2) The offences referred to in sub-section (1) are the following, namely:—

(a) an offence under section 147, section 148, section 149 or section 150 of the Bharatiya Nyaya Sanhita, 2023;

(b) criminal conspiracy or attempt to commit, or abetment of, an offence under section 149 or section 150 of the Bharatiya Nyaya Sanhita, 2023.

**116. Birth during marriage, conclusive proof of legitimacy.**

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

The section is based on the principle that when a particular relationship, such as marriage, is shown to exist, then its continuance must prima facie be presumed. Under the section the fact that any person was born—

a. during the continuance of a valid marriage between his mother and any man, or
b. within 280 days after its dissolution, the mother remaining unmarried,

shall be conclusive proof that he is the legitimate son of that man unless the parties had no access to each other at any time when he could have been begotten. Evidence that a child is born during wedlock is sufficient to establish its legitimacy, and shifts the burden of proof to the party, seeking to establish the contrary.

It was held in **Chilukuri Venkateswarlu v Chilukuri Venkatanarayana, (1954) SCR 424**, that the presumption under this section is a conclusive presumption of law which can be displaced only by proof of non-access between the parties to the marriage at a time when according to the ordinary course of nature the husband could have been the father of the child.

Access and non-access connote the existence and non-existence of opportunities for marital intercourse. Non-access can be proved by evidence direct or circumstantial though the proof of non-access must be clear and satisfactory as the presumption of legitimacy is highly favoured by law.

**Paternity of Child**

Section 116 requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or nonexistence of opportunities for sexual contact; it does not mean actual cohabitation. It is a rebuttable presumption of law under section 116 that a child born during the lawful wedlock is legitimate, and the access occurred between the parents.

It was held in **Bhabani Prasad Jena v Convenor Secretary, Orissa State Commission for Women, AIR 2010 SC 2851**, that the use of DNA test is an extremely delicate and sensitive aspect. There is an apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and the duty of court to reach the truth. The court must exercise its discretion only after balancing the interest of the parties. DNA test should be allowed only when it is eminently needed. It should not be directed as a matter of course or in a routine manner. Diverse aspects have to be considered including presumption under section 112 (now section 116 of BSA) and whether it is not possible for the court to reach the truth without resorting to DNA test.

In **Ningamma v Chikkaiah, AIR 2000 Kant 50,** the Court held that compelling a non-consenting person to submit himself for medical test or for blood group test under the exercise of inherent powers for determining paternity would run counter to the mandate of Article 21, i.e., interference with the fundamental right of life and liberty. An order of this kind would create a doubt about the chastity of the woman, and also about the paternity

In **Rekha Devi v Sanjeev Kumar Jha, AIR 2015 Pat 177**, where the husband claimed divorce on the ground of unfaithfulness of his wife on the ground that the child born to her was illegitimate but the wife volunteered to furnish DNA sample of herself and the child, it was held that the court should have forced the husband to furnish his blood sample for DNA matching before granting divorce.

**117. Presumption as to abetment of suicide by a married woman.**

When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

**Explanation.**—For the purposes of this section, "cruelty" shall have the same meaning as in section 86 of the Bharatiya Nyaya Sanhita, 2023.

The words "all other circumstances of the case" require that a cause-and-effect relationship between the cruelty and suicide has to be established before drawing the presumption. Therefore, the presumption is not of mandatory nature.

The Court in **Mangat Ram v State of Haryana, (2014) 12 SCC 595 (para 30),** held that mere fact that if a married woman commits suicide within a period of seven years of her marriage, the presumption under this section would not automatically apply. The term "the Court may presume, having regard to all the other circumstances of the case, that such suicide has been abetted by her husband" would indicate that the presumption is discretionary.

In **State of WB v Orilal Jaiswal, AIR 1994 SC 1418**, it was held that the requirement of proof beyond reasonable doubt in dowry death cases does not stand altered even after the introduction of section 498A of the IPC and section 113A of the Evidence Act. "Although, the Court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials placed on record."

**Retrospective application of the Section**

The provisions of the section are applicable to the pre-amendment cases also. In the words of the Supreme Court in **Gurbachan Singh v Satpal Singh, AIR 1990 SC 209**, "these provisions do not create any new offence, (or any substantive right), but merely a matter of procedure and as such are retrospective and applicable to the present case. The presumption against retrospective does not apply to legislation concerned merely with matters of procedure or of evidence; on the contrary, the provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament."

In **P Mani v State of TN, AIR 2006 SC 1319**, where the accused was charged under section 302, IPC, the presumption under section 113-A, Evidence Act, is not available. In such a case conviction and sentence has to be based on cogent and reliable evidence.

**118. 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.

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**Explanation.**—For the purposes of this section, "dowry death" shall have the same meaning as in section 80 of the Bharatiya Nyaya Sanhita, 2023.

**The presumption under section 118 shall be raised only on the proof of the following essentials:**

(1) The question before the court must be whether the accused has committed the dowry death of a woman. This means that the presumption can be raised only if the accused is being tried for the offence under section 80 of BNS
(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.

**The requirements of this presumption in offence under section 304-B of IPC for the purposes of its applicability, have been thus re-phrased by Supreme Court:**

(i) death should be of burns or bodily injury or has occurred otherwise than under normal circumstances;
(ii) within seven years of the marriage; and
(iii) that soon before her death she had been subjected to cruelty or harassment by her husband or his relatives.

Presumption under this section is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. **While the words "shall presume" in section 118 mandate that the court is duty bound to proceed on the basis that the person has caused the dowry death, the presumption is rebuttable and it is open to prove that the ingredients of section 80 of BNS are not satisfied**.

**119. Court may presume existence of certain facts.**
(1) 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.
**Illustrations.**
The Court may presume that—
(a) a man who is in possession of stolen goods soon, after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;
(b) an accomplice is unworthy of credit, unless he is corroborated in material particulars; (c) a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;
(d) a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;

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(e) judicial and official acts have been regularly performed;
(f) the common course of business has been followed in particular cases;
(g) evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;
(h) if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;
(i) when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.
(2) The Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:—
(i) as to **Illustration** (a)—a shop-keeper has in his bill a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;
(ii) as to **Illustration** (b) —A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself;
(iii) as to **Illustration** (b) —a crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;
(iv) as to **Illustration** (c)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence;
(v) as to **Illustration** (d)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;
(vi) as to **Illustration** (e)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances;
(vii) as to **Illustration** (f)—the question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;
(viii) as to **Illustration** (g)—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;
(ix) as to **Illustration** (h)—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;
(x) as to **Illustration** (i)—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

The effect of this provision is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging the effect of particular facts, and that they are to be subject to no particular rules whatever on the subject. The illustrations given are, for the most part, cases of what in English law are called presumptions of law: artificial rules as to the effect

of evidence by which the court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section 119 in question. A presumption is not evidence or proof. It only shows on whom the burden of proof lies.

**Venkatramiah J of the Supreme Court in Sodhi Transport Co v UP, AIR 1986 SC 1099, observed:**

> *A presumption is not in itself evidence but only makes a prima facie case for the party in whose favour it exists. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over.*

In **M Narsinga Rao v State of AP, AIR 2001 SC 318,** in a case under the Prevention of Corruption Act, 1988, it was proved that a sum of money was paid to the accused. The court said that it could be presumed that payment was made for the performance of an official act. This presumption could be based upon a proved fact, but there could not be further presumption on the basis of this presumption. The court relied upon its own decision in which it was observed: “a presumption can be drawn only from facts—and not from other presumptions—by a process of probable and logical reasoning.”

**Presumption of Law and Presumption of Facts**

Presumptions may be either of law or fact, and when of law may be either conclusive *(proesumptiones juris et de jure),* or rebuttable *(proesumptiones juris)*, but when of fact *(proesumptiones hominis)* are always rebuttable. Mixed presumptions are those which are partly of law and partly of fact.

**Difference between Presumption of Facts and Presumption of Law**

| | PRESUMPTION OF FACTS | PRESUMPTION OF LAW |
|---|---|---|
| 1. | Presumption of fact is based on logic, human experience and law of nature | Presumption of law is based on provision of law. |
| 2. | Presumption of fact is always rebuttable and goes away when explained or rebutted by the establishment of positive proof. | Presumption of law is conclusive unless rebutted as provided under rule giving rise to presumption. |

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| | | |
|---|---|---|
| 3. | The position of presumption of fact is uncertain and transitory. | The position of presumption of law is certain and uniform. |
| 4. | The court can ignore the presumption of fact however strong it is. | The court can't ignore the presumption of law. |
| 5. | The presumptions of fact are derived on the basis of law of nature, prevalent customs and human experience. | Presumption of law is derived from established judicial norms and they have become part of legal rules. |
| 6. | The Court can exercise its discretion while drawing presumption of fact i.e. presumption of fact is discretionary presumption. | Presumption of law is mandatory i.e. court is bound to draw presumption of law. |

**Common Course of Natural Event**

It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of section 119 of the BSA. It empowers the court to presume the existence of any fact which it thinks likely to have happened.

In **Devyani v Kantilal Gamanlal, (1962) 65 Bom LR 24**, the Court held that a case of adultery must be judged having due regard to the social conditions and the manner in which the parties are accustomed to live. If there is enough evidence to show that they had reasonable opportunities of having sexual intercourse in the conditions of life in which they live for days together then the court may be justified in raising an inference of adultery.

**Human Conduct**

As an example of an inference to be drawn from the conduct of a person the following is apposite. It is settled law that where property is entrusted to a servant, it is the duty of the servant to give a true account of what he does with the property so entrusted to him. If such servant fails to return the property or to account or gives an account which is shown to be false and incredible, it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use.

In **Kiran Mandal v Mohini Mandal, AIR 1989 P&H 310**, in a husband's suit against his wife for divorce on the ground of mental cruelty being caused by repeated accusations of adultery with his brother's wife, his father and a social friend testified to the accusations, the court,

having regard to human conduct, said that the father, an old and respectable person, would not testify to a fact which would disgrace his family, unless it was true.

**Public or Private Business**

A catalogue which embodies a statement of the firm regarding the price at which it is prepared to sell its articles is not hearsay and is admissible in evidence in proof of the price. **There is a presumption that every person in his private character does his duty and unless the contrary is proved, it is presumed that all things are rightly and regularly done.** On the other hand, **"there must be an assumption that whatever is published in the Government owned paper correctly represents the actual state of affairs relating to governmental business** until the same is successfully challenged and the real state of affairs is shown to be different from what is stated in the Government publication."

In **Atul Mehra v Bank of Maharashtra, AIR 2003 P&H 11**, the plaintiff could not prove that he had kept jewellery in his bank locker. The court said that hiring a locker is not entering into a contract of bailment, and that, even if it were a contract of bailment, it could not be said that the bank had not exercised proper care. The court was not to presume, in the absence of evidence that the lockers installed were not built according to specifications.

**Illustrations not exhaustive**

The illustrations given under this section are not exhaustive. They are merely a few examples of this class of "natural" presumptions, and they do not exclude the other numerous cases in which such presumptions are constantly drawn. The court need not draw the presumption in any particular case. The word used is "may"; and wherever the informative facts proved over-balance the probability that the inference would be a sound and just one, the court will exercise its sound discretion in electing not to rest upon the presumption.

**There are several presumptions**

recognised in Hindu law, Mahammadan law, criminal law, etc., e.g., the original status of a Hindu family must be presumed to be joint and undivided; in a joint Hindu family the whole property of the family is joint estate; in the absence of express contract a Mahammadan dower is presumed to be prompt; every person is presumed to be acquainted with the law of the land; the accused is presumed to be innocent.

**Stolen Property**

Illustration (a) relates to this subhead. The illustration raises two presumptions, viz., that the person in possession of stolen goods soon after the theft is either (1) the thief, or (2) has received the goods knowing them to be stolen. The question as to which of the two presumptions is to be drawn will depend upon the facts of each particular case. This is a

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presumption which the court is not bound to draw but it is in the option of the court to draw it. But it does not, in any way, shift the burden of proof to the accused.

The Supreme Court in **Tulsiram v State, AIR 1954 SC 1,** has held that the presumption permitted to be drawn under this illustration has to be read along with the important time factor. If the gap of time is too large, the presumption that the accused was concerned with the crime itself gets weakened. The presumption is stronger when the discovery of the fruits of crime is made immediately after the crime is committed.

**Long stay in India and citizenship**

In a case before the Supreme Court, **Bhanwaroo Khan v UOI, AIR 2002 SC 1614**, the facts were that the appellant had gone to Pakistan and acquired a Pakistani passport voluntarily. He obtained a visa to visit India. On the expiry of the visa, he neither went back nor sought extension of visa, but, instead went underground. There was no evidence to show that the Pakistani passport was obtained under compelling circumstances. **It was held that a conclusive presumption could be raised that Pakistani citizenship was taken voluntarily. The claim for Indian citizenship was rejected**. The court said that a long stay in a country and enrollment in voters' list does not confer any right on an alien to continue to stay in the country.

**Accomplice**

Illustration (b) relates to this subhead. An accomplice is one who is a guilty associate in crime. Where the witness sustains such a relation to the criminal act that he could be jointly indicted with the accused, he is an accomplice. It is a rule of prudence and practice which practically amounts to a rule of law that the evidence of an accomplice ought not to be acted upon unless it is corroborated as against the particular accused in material respects.

It was held in **Kedar v Rex, (1949) All 152**, that where there are a large number of accused it is essential that the evidence of an accomplice be corroborated by evidence which implicates each of the accused individually. Independent evidence which corroborates the evidence of an accomplice

so far as one of several co-accused is concerned is not necessarily evidence which corroborates the statement of the accomplice so far as the other accused are concerned.

**Rape Cases**

The Supreme Court in **Rameshwar v State of Rajasthan, (1952) SCR 377,** has held that though a woman who has been raped is not an accomplice, her evidence has been treated by the courts on somewhat similar lines, and the rule which requires corroboration of such evidence save in exceptional circumstances has now hardened into law. The view that though corroboration should

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ordinarily be required in the case of a grown-up woman, it is unnecessary in the case of a child of tender years is not correct. The true position is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the judge; whether corroboration is unnecessary is a question of fact in every case.

**Presumption as to consideration**

Illustration (c) relates to this subhead. The presumption on which this illustration is founded is in accordance with the maxim *omnia praesumuntur rite, esse acta*, i.e., all things are presumed to be

done in due form. Thus, if an act can only be lawful after the performance of some prior act, due performance of that prior act will be presumed. Again, although in the case of contracts not under seal, a consideration must in general be averred and proved, yet bills of exchange and promissory notes enjoy the privilege of being presumed, prima facie, to be founded on a valuable consideration.

**Continuity of things**

Illustration (d) relates to this subhead. This illustration is founded on the presumption which exists in favour of continuance or immutability. If a thing or a state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and backwards may sometimes be drawn. The rule that the presumption of continuance may operate retrospectively also has been recognised in India. How far the presumption may be drawn backwards and forwards depends upon the nature of the thing and surrounding circumstances.

**Judicial and official acts**

Illustration (e) relates to this subhead. The rule embodied in the illustration flows from the maxim *omnia praesumuntur rite et solemniter esse acta*, i.e., all acts are presumed to have been rightly and regularly done. The principle conveys that there is a general disposition in court of justice to uphold official, judicial, and other acts, rather than to render them inoperative, and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in other the assumption rests solely on grounds of public policy". **The presumption is in favour of the constitutional validity of an Act passed by the parliament.**

In **Kailash Chand Gaggar v State of Assam, 1993 Cr LJ 2632 (Gau),** where the Magistrate has not recorded in the order-sheet the ascertainment of intactness of seal and mark and non-tampering of signature of the accused on the sample received from the Local Health Authority before sending it to the Director of Central Food Laboratory which was not challenged before the Magistrate, presumption of regular performance of judicial act could be drawn.

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**Common Course of business**

Illustration (f) relates to this subhead. This illustration leaves it to the discretion of the court to presume that a common course of business has been followed: but the court is not bound to presume it. In commercial transactions the presumption is that the usual course of business was followed by the parties thereto.

In **VP Shivanna v Bhadramma,** it was held that, in a case of recovery of maintenance, notice sent to the husband by Registered AD and not as contemplated under section 125(3), CrPC was illegal and question of any inference about its receipt to be drawn under section 114 does not arise.

**Withholding of evidence**

Illustration (g) relates to this subhead. **The presumption under section 114, illustration (g) is only a permissible inference and not a necessary inference**. The court has the option, it may or may not raise presumption on the proof of certain facts. It depends upon the nature of the fact required to be proved and its importance in the controversy, the usual mode of proving it, the nature, quality and cogency of evidence, which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party.

In **Krishan Lal v Mohd. Din, AIR 1994 Del 10**, where in an accident claim, the insurer pleaded limited liability and produced only the attested copy of the policy on a different form, adverse inference could be drawn against the insurer for non-production of the original or office copy of the policy.

**Refusal to answer questions**

Illustration (h) relates to this subhead. Refusal to answer a question is a legitimate ground of unfavourable inference against the person who has to answer the question. But this illustration does not contemplate the case of witnesses who are not compelled to answer on grounds of privilege.

**Document in the hands of the obligor**

Illustration (i) relates to this subhead. This presumption is founded on the natural supposition that a man will protect his own interests by securing his bond before or at the time of discharging it. Where the instrument of a debt and the security for that debt are found in the hands of the debtor, the prima facie presumption is that the debt has been discharged.

In **Mohamad Mehdi Hasan Khan v Mandir Das, (1912) 39 IA 184**, a suit for money due on a mortgage bond, the plaintiff produced only a copy of the document, alleging in his plaint that it had been lost. The defendant admitted its execution, but alleged that the debt had been discharged, and in support of his allegation he produced the original document containing the

endorsement of the mortgagee through her agent of payment of the debt. It was held that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of proving that the debt was still outstanding.

**120. Presumption as to absence of consent in certain prosecution for rape.**

In a prosecution for rape under sub-section (2) of section 64 of the Bharatiya Nyaya Sanhita, 2023, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

**Explanation**.—In this section, "sexual intercourse" shall mean any of the acts mentioned in section 63 of the Bharatiya Nyaya Sanhita, 2023.

Evidence of bad character of an accused person (of whose good character evidence has not been given) is not relevant under this section for the purpose of raising a general inference that the accused is likely to have committed the offence charged. Such evidence is irrelevant and cannot be legally admitted in evidence whether elicited by the prosecution or by the defence.

It was held in ***Jagwa Dhanuk v King-Emperor, (1925) 5 Pat 63***, that the prohibition does not in any way affect evidence which is required to prove a motive for the crime or which is otherwise relevant. But in assessing punishment the court may take into consideration the accused's character and antecedents or the state of crime in the country or locality.

## CHAPTER VIII

## ESTOPPEL

**121. Estoppel.**

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

**Illustration.**

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

**The doctrine of Estoppel is steeped in the principles of equity and good conscience. Equity will not allow a person to say one thing at one time and the opposite of it at another time**.

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It would "estop" him from denying his previous assertion, act, conduct or representation, to say something contrary to what was implied in the transaction under which he obtained the benefit of being let in possession of the property to be enjoyed by him as a tenant.

This section is founded upon the doctrine laid down in **Pickard v Sears, (1837) 6 Ad & El 469, 474**, 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."** The doctrine embodied in this section is not a rule of equity, but is a rule of evidence formulated and applied in courts of law. It precludes a person from denying the truth of some statement previously made by himself. No cause of action arises upon estoppel itself.

Furthermore, the **principle of Estoppel is based on the maxim, *allegans contraria non est audiendus (a person alleging contradictory facts should not be heard),* and is that species of *presumptio juris et de jure*, where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by reason of some act done; it is in truth a kind of argumentum and hominem.** Hence it appears that "estoppel" must not be understood as synonymous with "conclusive evidence"—the former being conclusions drawn by law against parties from particular facts, while by the latter is meant some piece or mass of evidence, sufficiently strong to generate conviction in the mind of a tribunal, or rendered conclusive on a party, by either common or statute law.

**To invoke the doctrine of estoppel three conditions must be satisfied:**

1. representation by a person to another,
2. the other shall have acted upon the said representation and
3. such action shall have been detrimental to the interests of the person to whom the representation has been made.

It was held in **Gyarsi Bai v Dhansukh Lal, AIR 1965 SC 1055**, even where the first two conditions are satisfied but the third is not, there is no scope to invoke the doctrine of estoppel.

**Scope of Estoppel**

The Supreme Court in **Chhaganlal Keshavlal Mehta v Patel Narendas Haribhai, AIR 1982 SC 121**, has stated the requirements in terms of a larger number of points to bring the case within the scope of estoppel as defined in section 121 of BSA:

> *(1) there must be a representation by a person or his authorised agent to another in any form—a declaration, act or omission;*
> *(2) the representation must have been of the existence of a fact and not of promises de futuro or intention which might not be enforceable in contract;*
> *(3) the representation must have been meant to be relied upon;*
> *(4) there must have been belief on the part of the other party in its truth;*

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*(5) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment;*
*(6) the misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice;*
*(7) the person claiming the benefit of an estoppel must show that he was not aware of the true state of things—if he was aware of the real state of affairs or had means of knowledge, there can be no estoppel;*
*(8) only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee."*

**Estoppel and Presumption**

Estoppel differs from presumption. An estoppel is a personal disqualification laid upon a person peculiarly circumstantial from proving peculiar facts; whereas a presumption is a rule that particular inferences shall be drawn from particular facts, whoever proves them.

**Estoppel and Res Judicata**

| | ESTOPPEL | RES JUDICATA |
|---|---|---|
| 1. | Estoppel is part of the law of evidence and proceeds upon the equitable principle of altered situation; | The doctrine of res judicata belongs to procedure and is based on the principle that there must be end to litigation. |
| 2. | Estoppel prohibits a party from proving anything which contradicts his previous declarations or acts, to the prejudice of party, who, relying upon them, altered his position | Res Judicata prohibits the Court from enquiring into a matter already adjudicated |
| 3. | Estoppel prevents a man from saying one thing at one time and the opposite at another. | Res judicata precludes a man averring the same thing twice over in successive litigations. |

**Estoppel and Waiver**

| | ESTOPPEL | WAIVER |
|---|---|---|
| 1. | Estoppel cannot be the cause of action although it can facilitate or aid the enforcing of a cause of action by | Since waiver is contractual, that is, it is an agreement to release somebody out of an agreement by waving the previous set |

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| | | |
|---|---|---|
| | preventing the defendant from not denying what was earlier said by him. | policy or to assert a right. Therefore, a waiver can be a cause of action. |
| 2. | In this, the injured party will have to prove that injury, loss or harm occurred. | No such requirement is there in the waiver. |
| 3. | It is not necessary for the parties to know the truth or have the knowledge of the reality. | In the case of waiver the parties involved have the knowledge of the real facts and they know the truth. |
| 4. | There might be situations where acquiescence would amount to estoppel. | In case of waiver, along with acquiescence, some act or conduct is also necessary. |
| 5. | Parties use the doctrine of estoppel as a defence in a court of law and not as a cause of action. | Waiver can be used as a cause of action for claiming damages. |

In **State of J&K v Karan Singh, AIR 1997 J&K 132**, after the accession of the state of J&K to India, articles of great value were left in the treasury of J&K. The former Maharaja or his sons did not claim the articles as their private property for over 30 years. The court held that it could be said that either there was relinquishment of the right or waiver of it voluntarily.

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**Kinds of Estoppel**

***a. Estoppel by matter of record***

A matter of record is something part of the records of a Court. It is at once the narrative and the proof of its proceedings. Estoppel by records results from the judgment of a competent Court. The law allows a party ample opportunity, by way of appeal and otherwise, of upsetting a wrong decision. And if he takes the opportunity and fails, or does not choose to avail himself of it, he cannot subsequently re-open or dispute that decision.

In **Muthakke v Devanna Rai, AIR 2002 Ker 301**, in a suit for partition, the court found that there were earlier two suits which recorded a finding of oral partition. The plaintiff was a minor at that time but he was a party to those suits and was represented by his guardian. There was no plea that the two earlier proceedings were null and void, nor any prayer for setting aside decrees passed in those suits. There was also no evidence to show that the minor was adversely affected. He obtained the fruits of those two decrees. He was not allowed to turn around and say that those decrees should be ignored as they had affected his interest.

***b. Estoppel by Deed***

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Phipson, 10th Edn., lays down that where a party has entered into a solemn engagement by deed as to certain facts, neither he nor any claiming through or under him is permitted to deny such facts. This rule, however, is subject to certain, qualifications:

1. The rule applies only between parties and privies, and only in actions on the deed.
2. No estoppel arises upon recitals or descriptions which are either immaterial or not intended to bind.
3. No estoppel arises where the deed is tainted by fraud or illegality.
4. A deed which can take effect by interest shall not be construed to take effect by estoppel. Thus, if a party leases premises to another for a longer term than he himself possesses, it only ensures to the extent of his own interest and no further

In **Atmaram v State, AIR 1995 MP 225**, where the petitioner claimed his possession on the land of a tribal by virtue of a registered sale deed obtained with due permission, the plea raised by the petitioner must be considered before drawing the conclusion that the possession was without lawful authority.

***c. Estoppel in pais by Conduct***

Estoppel *in pais* (i.e., "in the country", or "before the public"), or more fully "estoppel *in pais* dehors the instrument" (i.e., with regard to matters outside a record or deed) as known to the common law was of an entirely different character to the estoppel *in pais* of the present days. Estoppel *in pais* arises:

*(1) from agreement or contract and*
*(2) from act or conduct of misrepresentation which has induced a change of position in accordance with the intention of the party against whom the estoppel is alleged.*

To raise an estoppel by conduct, a person must by word or conduct induce another to believe that a certain state of things exists, and to cause that other to act on that belief in a way he would not have done had he known the facts, so that, if in an action between them the person making a representation were allowed to prove the true facts—to tell the truth—the other person would be prejudiced.

**The following are the recognised propositions of an estoppel *in pais*:**

1. *If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.*
2. *If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.*

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3. *If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.*
4. *If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist.*

**Equitable Estoppel**

A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular argument or contention which the rules of equity and good conscience prevent his using as against his opponent. The law of estoppel by representation is confined to the provisions of this section and apart from the provisions of this section there is nothing like what is called "equitable estoppel" evolved by the English judges.

**Proprietary Estoppel**

Proprietary estoppel is a legal claim, especially connected to English land law, which may arise in relation to rights to use the property of the owner, and may even be effective in connection with disputed transfers of ownership.

The claimant lived for more than 30 years on an agricultural land of which the landlord lady was the half owner. She had given a promise to the claimant that she would leave her share in the land to him on her death if he cared for the land until her death and cultivated it. The claimant paid no rent, but he continued to fulfil the conditions in the owner's promise. He sold the surplus agricultural produce and retained the proceeds for himself. But the owner sold the land to a purchaser for value, who notified the claimant to quit the land. The claimant brought an action against the purchaser on the basis of promissory estoppel. The court ruled that he was entitled to half the share of the land. The court said that the question depended on what assurances were given to him and what was the degree of his reliance on those assurances and the detriment which was likely to be caused to him.

**Promissory Estoppel**

This doctrine, which is derived from a principle of equity enunciated in 1877, has been the subject of considerable recent development. This is a doctrine evolved by equity in order to prevent injustice. It differs from estoppel properly so called because the representation relied upon need not be one of present fact. The doctrine can be stated as follows:

*When one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly,*

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*then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced.*

In **Gopi Chand Television v Director, Doordarshan Kendra, Hyderabad, AIR 1995 AP 199**, where the petitioner accepted the proposal to produce a serial for Doordarshan in 13 episodes but subsequently he sought permission to produce the said serial in 26 episodes, he was barred by estoppel.

In **Tara Singh v Kehar Singh, AIR 1989 SC 1426**, where certain mortgaged lands had reverted to the State and orders were passed to transfer the lands to the persons to whom they were allotted after receiving from them the mortgage money, the Government was not allowed to resile from its orders after accepting payments.

In **Mangalam Timber Products Ltd v State, AIR 1996 Ori 13**, the Court held that where the Government held out a promise to a company to supply specified quantity of wood at a specified rate and the company on that assurance set up a factory by investing a huge amount, subsequent unilateral decision of the Government to enhance the rate of royalty would be hit by the principle of promissory estoppel.

**Promissory Estoppel against Government and its Agencies**

In the earlier decisions of the Court the proposition used to be that government and its agencies are immune to the promissory estoppel, however, it is a settled proposition now that Government and its agencies are no longer immune from the operation of the doctrine of promissory estoppel. government agencies have to work within the framework of the legal system.

In **Nandkishore v Nagar Palika Shajapur, AIR 1991 MP 99**, where the right of collection of terminal tax was allotted at an auction to a bidder who had also deposited the bid amount and, before the final contract was executed, the Government adopted the policy of not granting such rights, the Government was held to be precluded from cancelling the auction.

In **State of Kerala v New World Investment Pvt Ltd, AIR 2016 NOC 369 (Ker),** Where the sale deed of area comprising in "reserve forest", initially the registering authority refusing to register the same, was got registered under the directions issued by the High Court, that does not mean that the High Court had pronounced about the validity or otherwise of the document, the State was not estopped from raising its objection under section 22 of the Kerala Forest Act, 1962 for its violation.

**Promissory Estoppel and Legislative Function of State**

The Patna High Court in **Sah Mahadeo Lal Mohan Lal v State of Bihar, AIR 1982 Pat,** summed up the scope of the plea of doctrine of promissory estoppel against the Government as follows:

1. *The plea of promissory estoppel is not available against the exercise of the legislative functions of the State. Thus, where the Government changed its export policy by an order which had the force of legislation, exporters who had contracted on the basis of earlier policy were not permitted to claim any estoppel against the State.*
2. *The doctrine cannot be invoked for preventing the Government from discharging its functions under the law or to act contrary to law.*
3. *When an officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the Government cannot be held bound by the unauthorised acts of its officers.*
4. *When the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvantageous position, the court is entitled to require the officer to act according to the scheme and the agreement or representation. The officer cannot arbitrarily act on his mere whim and ignore his promise on some undefined and undisclosed grounds of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position.*
5. *The officer would be justified in changing the terms of the agreement to the prejudice of the other party on special circumstances, such as difficult foreign exchange position or other matters which have a bearing on general interests of the State.*

In **Shanmugraja v Superintending Engineer, AIR 2002 Mad 159**, concession was given in the tariff of power supply to new industries for a period of five years. The same was withdrawn in respect of an industry which started earning profit within the concession period of five years. The court said that such withdrawal was reasonable and also necessary in public interest. The doctrine of promissory estoppel would not apply.

**<u>Estoppel against Universities and other educational Institutions</u>**

In **B Jayalakshmi v SC University of HS Vijayawada, AIR 1994 AP 297,** where admission of a candidate to Medical College was done due to the mistake of the selection committee, applying the doctrine, her admission was not allowed to be cancelled four months after her joining the Medical College, more so when she had given up her studies in an agricultural college

In **Ruchira Chauhan v Rohilkhand University, Bareilly, AIR 1996 All 12**, Where a candidate securing lesser marks in MSc Part I, appeared in the improvement test and was allowed to appear at MSc Part II examination in the same academic year, her result could not be withheld on the basis of a resolution prohibiting students from taking two examinations in a year when such resolution was never communicated to her.

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**No Estoppel against Criminal Proceeding**

It was held in **Madhumuri Surya Narayana Raja v State, 2003 Cr LJ (NOC) 75 (Kant),** that the doctrine of estoppel would not apply where parties agreed to compound an offence which is otherwise not compoundable. A petition was filed for quashing proceedings under sections 498A, 304, IPC and under the Dowry Prohibition Act because of the agreement between the parties. The petition was dismissed. The party to the agreement was not bound by the unlawful compromise and, therefore, there was no question of estoppel either.

**Estoppel by negligence**

In support of a plea of estoppel on the ground of negligence it must be shown that the party against whom the plea is raised owed a duty to the party who raises the plea, or towards the general public of which he is one and that the negligence on which it is based should not be indirectly or remotely connected with the misleading effect assigned to it but must be proximate or real cause of that result i.e. the negligence which can sustain a plea of estoppel must be in the transaction itself and it should be so connected with the result to which it led that it is impossible to treat the two separately.

**Estoppel by consent/compromise decree**

A compromise decree is the acceptance by the court of something to which the parties had agreed. Such a decree might create an estoppel by conduct between the parties but such an estoppel must be specially pleaded. An estoppel by consent decree can arise only when the question raised in the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. In order to effect an estoppel it is also necessary that it should appear on record that the question had been put in issue.

**122. Estoppel of tenant and of licensee of person in possession.**

No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy or any time thereafter, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

**SECTION 122 OF BSA: ESTOPPEL OF TENANT AND OF LICENSEE OF PERSON IN POSSESSION**

**Corresponding provision**

Section 122 of the BSA corresponds to section 116 of the Evidence Act

**During continuance of tenancy or anytime thereafter**

- Section 116 of the Evidence Act provided that no tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property
- Section 122 of BSA provides that no tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy or any time thereafter, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property

**123. Estoppel of acceptor of bill of exchange, bailee or licensee.**

No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to 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.

**Explanation 1.**—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

**Explanation 2.**—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.

This section deals with further instances of estoppel by agreement. Sections 122 and 123 are however not exhaustive of the doctrine of estoppel by agreement. Agents, for instance, are not ordinarily permitted to set up the adverse title of a third person to defeat the rights of their principals.

Under this section an acceptor of a bill of exchange cannot deny that the drawer had authority to draw such a 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 ***(Explanation 1).***

A bailee or licensee cannot deny that his bailor or licensor had, at the commencement of the bailment or license, authority to make the bailment or grant the license. But a bailee, if he delivers the goods bailed to a third person, may prove that such person had a right to them as against the bailor ***(Explanation 2).***

## CHAPTER IX
## OF WITNESSES

**124. Who may testify.**

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

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**Explanation.**—A person of unsound mind is not incompetent to testify, unless he is prevented by his unsoundness of mind from understanding the questions put to him and giving rational answers to them.

**SECTION 124 OF BSA: WHO MAY TESTIFY**

**Corresponding provision**

Section 124 of the BSA corresponds to section 118 of the Evidence Act

**Person of unsound mind**

Reference to "lunatic" is replaced with reference to "person of unsound mind"

**125. Witness unable to communicate verbally.**

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 the signs made in open Court and evidence so given shall be deemed to be oral evidence:

Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed.

When a deaf-mute is a witness the court will ascertain before he is examined that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. A deaf-mute's evidence may be taken

a. by written questions to which he may reply in writing or
b. by means of signs.

In **Lakhan Singh v King-Emperor, (1941) 20 Pat 898**, Where the witness had taken a religious vow of silence, and the magistrate took his evidence in writing in open Court when he could not get it in any other way without forcing the witness to break his religious vow, it was held that the witness should be deemed unable to speak within the meaning of this section and the course adopted by the magistrate was correct.

**2013 Amendment to the Section**

This section( in IEA) was amended vide the Criminal Law (Amendment) Act, 2013 on the basis of recommendations given by the Justice JS Verma Committee, constituted in the aftermath of December 2012 Nirbhaya rape incident. The title of this section has been changed by this amendment, so as to enable the courts to take resort to the modalities during the course of recording of evidence, as prescribed in this section, to not merely the dumb witnesses, but to all those witnesses who are unable to communicate verbally.

The effect of this section is that all such victims of sexual offences or any other offence, who are having problems in communicating verbally, can be a witness and the court can record their statements during trial. A proviso has also been added to this section whereby the court has been obligated to take the assistance of an interpreter or a special educator in recording the statement, and get the recording of such statement videographed, if the witness is unable to communicate verbally.

**126. Competency of husband and wife as witnesses in certain cases.**

(1) In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses.

(2) In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

In civil proceedings parties to the suit are competent witnesses. Husbands and wives are competent witnesses for or against each other in civil as well as criminal proceedings. Parties in civil proceedings are competent witnesses and therefore their testimony is to be scrutinised in the same manner as that of any other witness. There is no inflexible rule that if a party gives his testimony he must be disbelieved because he is a party to the suit. In **Aidan v State of Rajasthan, 1993 Cr LJ 2413 (Raj),** it was held that truthfulness of the statement of wife could not be disbelieved merely because her emotional reaction was different from what it should have been, in the opinion of the court.

**127. Judges and Magistrates.**

No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any question as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

**Illustrations.**

(a) 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 superior Court.

(b) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the superior Court.

(c) A is accused before the Court of Session of attempting to murder a police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

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

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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.

The privilege given by this section is the privilege of the witness, that is, of the judge or magistrate of whom the question is asked. If he waives such privilege, or does not object to answer such a question, it does not lie in the mouth of any other person to assert the privilege.

**Judge or Magistrate as 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. In this last case, the proper course appears to be that the Judge, who has thus become a witness, should leave the bench, and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another.

**128. Communications during marriage.**

No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Under this section a married person shall not be—

1. compelled to disclose any communication made to him during marriage by any person to whom he is married; and

2. permitted to disclose any such communication, except—

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

This section "rests on the obvious ground that the admission of such testimony would have 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. It was held in **Emperor v Ramchandra, (1932) 35 Bom LR 174**, the protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife. It extends also

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to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is party on the record. It is, however, limited to such matters as have been communicated 'during the marriage'. This section limits the rule enunciated in section 126.

**During Marriage**

The protection conferred by the section is limited to such matters as have been communicated during marriage. It was held in **MC Verghese v TJ Ponnan, AIR 1970 SC 1876,** a communication made to a woman before marriage would not be protected. But the privilege continues even after the marriage has been dissolved by death or divorce. The bar to the admissibility in evidence of communications made during marriage attaches at the time when the communication is made, and its admissibility will be adjudged in the light of the status at that date and not the status at the date when evidence is sought to be given in court.

**Evidence of mistress cohabitee**

It was held in **Shankar v State of TN, 1994 Cr LJ 3071**, where the accused confessed his offence to his mistress, it was held that section 122 did not in any manner come in the way of the evidence of a mistress and such evidence could be relied upon.

**129. 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 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.

**This section involves two things:**

1. That the document is an unpublished official record relating to any affairs of State and;
2. that the officer at the head of the department concerned may give or withhold the permission for giving the evidence derived therefrom.

On grounds of public policy, evidence derived from unpublished official records of the State cannot be given, except with the permission of the head of the department concerned. The court is bound to accept without question the decision of the public officer. It was held in **Tukaram v King-Emperor, (1946) Nag 385,** that 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 or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.

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**130. 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.

A public officer cannot be compelled to disclose communications made to him in confidence if he considers that public interests would suffer by this disclosure. This section is confined to public officers; section 129 embraces everyone. Section 129 deals with unpublished records; this section deals with communications made in official confidence.

It was held in **Pandit Chandra Dhar Tewari v The Deputy Commissioner, Lucknow, (1938) 14 Luck 351,** that this section is designed to prevent the knowledge of official papers, that is to say papers in official custody, beyond that circle which would obtain knowledge of them in confidence whether the confidence was express or implied. It would normally include all officers including clerks of superior officers and might also apply to non-officials to whom such papers were disclosed on the understanding express or implied that the knowledge should go no further.

The term "public officer" means an officer with public, as opposed to private, duties who receives communications made to him in official confidence of such a nature that disclosure in certain cases would injure the public interests. The word "disclose" means the first disclosure of communications made in official confidence and does not apply to a disclosure in a Court of law of what has already been disclosed outside it.

**Communications made to him in official confidence**

The question that arises under this section is whether the communication in question was made to the public officer in official confidence. This is a condition precedent to the claim, and the question is to be primarily decided by the court before whom the privilege is claimed. It was laid out by the Court in **Bhalchandra v Chanbasappa, (1938) 41 Bom LR 391, that there is no clear-cut rule of procedure as to when and how the privilege should be claimed. It should be claimed at the earliest opportunity by the public officer concerned when in reply to the summons he produces the document in his control or charge.**

**131. Information as to commission of offences.**

No Magistrate or police officer shall be compelled to say when he got any information as to the commission of any offence, and no revenue officer shall be compelled to say when he got any information as to the commission of any offence against the public revenue.

**Explanation.**—"revenue officer" means any officer employed in or about the business of any branch of the public revenue.

On 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 an offence. Similarly, a

revenue-officer cannot be compelled to say whence he got information as to any offence against the public revenue. Such an officer may, if he likes, disclose the name of the informant. It is of importance to the public for the detection of crimes that those persons who are the channel by means of which the detection is made should not be unnecessarily disclosed.

It was held in **Weston v Peart v Mohan Dass, (1912) 40 Cal 898**, that this section does not in express terms prohibit a witness, if he be willing, from saying whence he got his information, the protection afforded by this section does not depend upon a claim of privilege being made, but it is the duty of the court, apart from objection taken, to exclude such evidence. If objection is taken, it cannot, since the law allows it, be made the ground of adverse inferences against the witness.

**132. Professional communications.**

(1) No advocate, 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 service as such advocate, 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 service, or to disclose any advice given by him to his client in the course and for the purpose of such service:

Provided that nothing in this section shall protect from disclosure of—

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate, in the course of his service as such, showing that any crime or fraud has been committed since the commencement of his service.

(2) It is immaterial whether the attention of such advocate referred to in the proviso to sub-section (1), 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 professional service has ceased.

**Illustrations.**

(a) A, a client, says to B, an advocate— "I have committed forgery, and I wish you to defend me". As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an advocate— "I wish to obtain possession of property by the use of a forged deed on which I request you to sue". This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an advocate, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his professional service. This being a fact observed by B in the course of his service, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

(3) The provisions of this section shall apply to interpreters, and the clerks or employees of advocates.

**SECTION 132 OF BSA: PROFESSIONAL COMMUNICATIONS**

**Corresponding provision**

- Section 132(1) and (2) of the BSA corresponds to section 126 of the Evidence Act
- Section 132(3) of BSA corresponds to section 127 of Evidence Act

**Advocate**

The words "barrister, attorney, pleader or vakil" are replaced by the word "advocate"

Sections 132 to 134 deal with the privilege that is attached to professional communications between the legal adviser and the client. Sections 132 and 133 mention the circumstances under which the legal adviser can give evidence of such professional communications. Section 132(3) provides that interpreters, clerks or servants of legal advisers are restrained similarly. Section 134 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. Communications between an insurer and his counsel are also privileged. Notes made by lawyers of statements of witnesses are within the range of protection.

This section is based upon the principle that if communications to a legal adviser were not privileged, a man would be deterred from fully disclosing his case, so as to obtain proper professional aid in a matter in which he is likely to be thrown into litigation. Under this section no barrister, attorney, pleader or vakil shall at any time be permitted to—

**1. Disclose**

i. any communication made to him by or on behalf of his client

ii. any advice given by him to his client in the course and for the purpose of his employment;

2. to state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his employment.

It was held in **Silver Hill Duckling v Minister of Agriculture, Ireland, 1987 Irish Reports, 289**, that the privilege also extends to documents prepared in connection with the client's claim for the dominant purpose of preparing for litigation.

**The section does not protect from disclosure—**

1. any communication made in furtherance of any illegal purpose;

2. any fact observed in the course of employment showing that any crime or fraud has been committed since the commencement of the employment.

   Under section 132(3) the above provisions apply to interpreters and the clerks or servants of barristers, pleaders, attorneys and vakils.

Furthermore, it was held in **Deepchand v Sampathraj, AIR 1970 Mys 34**, that the privilege under this section is not absolute. When defamatory questions are put by a lawyer to a witness in cross-examination on client's instructions without any reasonable basis for putting them, such a communication is not professional and its disclosure is not protected under this section.

**133. Privilege not waived by volunteering evidence.**

If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 132; and, if any party to a suit or proceeding calls any such advocate, as a witness, he shall be deemed to have consented to such disclosure only if he questions such advocate, on matters which, but for such question, he would not be at liberty to disclose.

**SECTION 133 OF BSA: PRIVILEGE NOT WAIVED BY VOLUNTEERING EVIDENCE**

**Corresponding provision**

Section 133 of the BSA corresponds to section 128 of the Evidence Act

**Advocate**

The words "barrister, attorney, pleader or vakil" are replaced by the word "advocate"

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**134. Confidential communication with legal advisers.**

No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal 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.

**SECTION 134 OF BSA: CONFIDENTIAL COMMUNICATION WITH LEGAL ADVISERS**

**Corresponding provision**

Section 134 of the BSA corresponds to section 129 of the Evidence Act Legal Adviser

The words "legal professional adviser" are replaced by words "legal adviser"

**135. Production of title-deeds of witness not a party.**

No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

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.

The section protects a witness, who is not a party to the suit in which he is called, from producing—

1. title-deeds to any property,
2. any document in virtue of which he holds any property as pledgee or mortgagee, or
3. any document the production of which might tend to criminate him, unless he has agreed in writing to produce such document.

It would be entirely optional for the witness to produce his title-deeds, and to raise any objection whatever.

**136. Production of documents or electronic records which another person, having possession, could refuse to produce.**

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 possession or control, unless such last-mentioned person consents to their production.

Persons in possession of documents on behalf of others are generally agents, attorneys, mortgagees, trustees, etc. This section extends to these persons the same protection which the preceding section provides for a witness who is not a party to a suit.

It was held in **Chandra Narayan Deo v Ramchandra, (1945) 24 Pat 541**, that it is not open to a litigant to refrain from producing a document which he considers to be irrelevant and if the opposing litigant is dissatisfied, he may apply for its production and inspection. If he fails to do so, neither he nor the court at his suggestion is entitled to draw any inference as to its contents.

**137. Witness not excused from answering on ground that answer will criminate.**

A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer

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to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:
Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution forgiving false evidence by such answer.

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.

The section makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the court to give

The Bombay High Court has in a Full Bench case **Bai Shanta v Umrao Amir, (1925) 28 Bom LR 1,** laid down that relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding are not protected by this proviso where the witness has not objected to answering the questions put to him.

**138. Accomplice.**
An accomplice shall be a competent witness against an accused person; and a conviction is not illegal if it proceeds upon the corroborated testimony of an accomplice.

**SECTION 138 OF BSA: ACCOMPLICE**

**Corresponding provision**

Section 138 of the BSA corresponds to section 133 of the Evidence Act

**Accomplice**

- Words "if" is substituted in section 138 of BSA for words "merely because" in section 133 of Evidence Act
- Section 133 of Evidence Act provides that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.
- Section 138 of BSA provides that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal if it proceeds upon the corroborated testimony of an accomplice.

**139. Number of witnesses.**

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. 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.

## CHAPTER X
## OF EXAMINATION OF WITNESSES

**140. Order of production and examination of witnesses.**

The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

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

In civil proceedings the order is to be regulated by the provisions of the Civil Procedure Code; and in criminal proceedings, by those of the BNSS. Failing these, the order is to be determined by the discretion of the court. In practice, however, it is left largely to the option of the party calling witnesses to examine them in any order he chooses.

The court is very slow to interfere with the discretion of counsel as to the order in which witnesses should be examined. While counsel has discretion, the court has also the power to direct the order in which witnesses cited by the party shall be examined.

**141. Judge to decide as to admissibility of evidence.**

(1) When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

(2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

(3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

**Illustrations.**

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 26. The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

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(b) It is proposed to prove, by a copy, the contents of a document said to be lost. The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.
(c) A is accused of receiving stolen property knowing it to have been stolen. It is proposed to prove that he denied the possession of the property. The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.
(d) It is proposed to prove a fact A which is said to have been the cause or effect of a fact in issue. There are several intermediate facts B, C and D which must be shown to exist before the fact A can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

It was held in ***Dwijesh Chandra Ray Chaudhuri v Naresh Chandra Gupta, (1946) 1 Cal 149***, that though proper time for objecting to the admissibility of a document is when it is tendered, mere omission to so object does not constitute an inadmissible document evidence. Party seeking to put a document in evidence must show under which section it is admissible. Improper admission or rejection of evidence will not by itself form ground for a new trial or reversal of a decision if, in view of the other evidence in the case, the decision would be the same even if there had been no such improper admission or rejection.

**Evidence relating to facts in issue and also relevant facts [Clause 1]**
In order to focus the attention of the litigants to the points in dispute between them, issues are raised on the pleadings. The parties are called upon to lead evidence on them. Such evidence must primarily relate to facts in issue; but it may also refer to relevant facts (section 3). In the latter case, the first paragraph of this section enables the presiding judge to ask the party to show the relevancy of the fact which is sought to be proved. Questions of admissibility of evidence are to be determined by the judge.

**Other Facts on assurance may be proved later [Clause 2]**
This clause should be read with section 107. Its purpose is to facilitate a party in laying his case before the court. Where a witness in the box deposes to a story, some portions of which would become admissible only on proof of certain other facts, it is convenient as well as economical in time to permit him to complete his story, as soon as the party calling him gives an assurance that such other facts will be proved by him later on. Illustrations (a) and (b) demonstrate the application of the rule.

**Judge's discretion—Either fact proved first [Clause 3]**
This clause is expressed in wider terms than clause 2. When the relevancy of one fact depends upon the proof of another fact, the judge has full discretion to allow either fact to be proved first. The clause is illustrated by illustrations (c) and (d).

**142. Examination of witnesses.**
(1) The examination of a witness by the party who calls him shall be called his examination-in-chief.

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(2) The examination of a witness by the adverse party shall be called his cross-examination.
(3) The examination of a witness, subsequent to the cross-examination, by the party who called him, shall be called his re-examination.

In ***Nandgopal v State, (1951) Nag 172,*** the Court laid down that the evidence of witnesses examined in defence on behalf of one accused and cross-examined on behalf of another accused is admissible as against the latter. It may be otherwise where that other accused had no opportunity of cross-examining them or where he has not been given an opportunity by the magistrate or the judge to explain the circumstances appearing in such evidence.
In ***State of Karnataka v S Dhandapani Modaliar, 1992 Cr LJ 24 (Karn)***, it was held that some time should intervene between framing of the charge and statement of the accused about his desire of cross-examination because in a large number of cases they are ignorant of the law and must need advice before they can make up mind whether to further cross-examine the witnesses already examined by the prosecution.

**Cross-examination without examination-in-chief**

Section 143 envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by the prosecution. There is no purpose in tendering a witness for cross-examination only. Tendering of a witness for cross-examination without examination-in-chief amounts to giving up the witness by the prosecution.

**143. Order of examinations.**

(1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.
(2) The examination-in-chief and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in chief.
(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

The viva voce examination consists generally of three stages: first of all, the witness is examined by the party who calls him; this is called examination-in-chief (section 142). He is next examined by the adverse party; this is called cross-examination (section 142). Finally, he is examined again by the party who called him; this is called re-examination (section 142).

**Examination-in-chief**

Once the examination-in-chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prime facie opinion as to complicity of some other person who may be connected with the offence. The Court in **Hardeep Singh v State of Punjab, (2014) 3 SCC 92**,

held that on the basis of examination-in-chief, the court or the magistrate can proceed against a person as long as the court is satisfied that the evidence appearing against such person is such that it prima facie necessitates bringing such person to face trial. In fact, an examination-in-chief untested by cross-examination, undoubtedly in itself, is an evidence.

Furthermore, no witness can be cross-examined unless he has been first examined-in-chief. This section provides that cross-examination follows examination-in-chief but it cannot be so without examination-in-chief.

**Cross-examination**

The testimony of a witness is not legal evidence unless it is subject to cross-examination; and where no opportunity has been given to the appellant's counsel to test the veracity of the principal prosecution witness or where owing to the refractory attitude of the witness the court is constrained to terminate all of a sudden and prematurely the cross-examination of the witness, the evidence of such a witness is not legal testimony and cannot be the basis of a judicial pronouncement.

In **Madan Lal v State of Rajasthan, 2012 Cr LJ 1430 (Raj),** in a criminal trial, leading questions were permitted to be asked to a prosecution witness in examination-in-chief in the absence of defence counsel. It was held that asking leading questions is not only against the tenor of section 142 of the Evidence Act but also violates the right of an accused to a fair trial when such leading questions are permitted to be asked in the absence of defence counsel. Such conduct of trial gives accused persons a reasonable cause for their apprehension that justice is not being done to them.

Like examination-in-chief, cross-examination must "relate to relevant facts": but unlike re-examination, it need not be confined to facts deposed to in the preceding examination (section 143). Further, it differs from both of them, inasmuch as leading questions can be asked (sections 146).

No cross-examination can be allowed of a witness who is "summoned to produce a document," (section 144), but it is competent of a witness to character (section 145). Similarly, a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question without such writing being shown to him or being proved (section 148).

**Re-examination**

The object of re-examination is to afford the party calling a witness an opportunity of filling in the lacuna or explaining the inconsistencies which the cross-examination has discovered in the examination-in-chief of the witness. It is accordingly limited to the explanation of matters referred to in cross-examination (section 143). It partakes of the nature of examination-in-chief inasmuch as no leading questions can be asked (section 146).

***Powell on Evidence Law, 10 Edn, p 469 notes***, in re-examination the party has a right to ask all questions which may be proper to draw forth an explanation of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive, or provocation, which induced the witness to those expressions, but he has not right to go further, and to introduce matter new in itself and not suited to explain either the expressions or the motives of the witness.

In **Pannayar v State of TN, AIR 2010 SC 85,** the Court held that the examination-in-chief cannot be supplemented by way of re-examination. Totally new facts cannot be introduced which have no concern with cross-examination. During the cross-examination of a prosecution witness, doubts arose about interpretation of certain parts of his evidence. The prosecution failed to clarify the same by calling the witness for re-examination. The court said that the benefit of doubt had to go to the defence.

**144. Cross-examination of person called to produce a document.**

A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

A witness summoned merely to produce a document does not become a witness for purposes of cross-examination, since he may either attend the court personally or may depute any person to produce the document in court (Civil Procedure Code, O XVI, rule 6; Criminal Procedure Code, section 91).
In ***Re Premchand Dowlatram, (1887) 12 Bom 63***, the wife of a partner was called upon to produce the deed of dissolution of the firm. She was not permitted to be examined as a witness.

**145. Witnesses to character.**

Witnesses to character may be cross-examined and re-examined.

This section must be read with section 47. In most cases, witnesses to character not only may but must be cross-examined. The use of character evidence is to assist the court in estimating the value of the evidence brought against the accused. **Holt CJ**, observed in a case that "a man is not born a knave; there must be time to make him so; nor is he presently discovered after he becomes one. A man may be reputed an able man this year, and yet be a beggar the next; it is a misfortune that happens to many men, and his former reputation will signify nothing to him upon this occasion."

**146. Leading questions.**

(1) Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.
(2) Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.
(3) The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

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(4) Leading questions may be asked in cross-examination.

For, if it were not allowed to approach the points at issue by such questions, the examination would be most inconveniently protracted. In **Abdul Aziz Lokhandwala v Nasir Ali, AIR 2010 NOC 613 (Bom),** to abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case which have been already established.

In **Barindra, Kumar Ghose v Emperor, (1909) 37 Cal 467**, Jenkins CJ, noted that it is the court, and not counsel for the State, who can determine whether leading questions should be permitted, and the responsibility for that permission rests on the court.

In **Varkey Joseph v State of Kerala, AIR 1993 SC 1892**, the Court held that the prosecution cannot put leading questions on the material part of the evidence which the witness intends to give against the accused. It would be a method of eliciting evidence from the witness which is desired by the prosecutor. Such leading questions offend the right of the accused to fair trial enshrined in Article 21 of the Constitution. It is not a curable irregularity.

**147. Evidence as to matters in writing.**

Any witness may be asked, while under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

**Explanation**.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

**Illustration.**

The question is, whether A assaulted B. C deposes that he heard A say to D— "B wrote a letter accusing me of theft, and I will be revenged on him". This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

This section is meant to enable parties to carry out the provisions of sections 94 and 95. It should be read along with those sections. It refers both to the examination-in-chief and cross examination. A party can compel the opposite party to produce a document (or to make out a case for letting in its secondary evidence)—

1. When a witness is about to give evidence as to any

*(a) contract,*

*(b) grant, or;*

*(c) other disposition of property, which is contained in a document; or*

2. When he is about to make any statement as to the contents of any document.

This rule does not forbid a witness to give oral evidence of statements as to relevant facts, made by other persons, about the contents of documents.

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

The object of this provision is either to test the memory of a witness or to contradict him by previous statements in writing. Such writing may be documents, letters, depositions, police diaries, etc. It must be noted that the previous record should be in writing.

It was held in **President, SVV Mandal v Yellaiah, AIR 1969 AP 148**, that statements which are not fully recorded or statements which are recorded in the form of memorandum are statements falling within the ambit of this section. The statement may be either written by the witness himself or which was reduced into writing by someone else.

Furthermore, in **State (NCT of Delhi) v Mukesh, (2014) 15 SCC 661**, it was held that the expression "previous statements made" used in section 145 cannot be extended to include statements made by a witness, after the filing of the charge sheet. The expression must, therefore, be confined to statements made by a witness before the police during investigation and not thereafter.

**149. Questions lawful in cross-examination.**
When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—
(a) to test his veracity; or
(b) to discover who he is and what is his position in life; or
(c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture:
Provided that in a prosecution for an offence under section 64, section 65, section 66, section 67, section 68, section 69, section 70 or section 71 of the Bharatiya Nyaya Sanhita, 2023 or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the

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general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.

This section extends the power of cross-examination far beyond the limits of section 143, paragraph 2, which confines the cross-examination to relevant facts, including of course the facts in issue.

It was held in **State v Hazura Singh, (1952) Pat 48**, where the cross-examination of a witness before a committing magistrate was deferred to the next date as the court time was over at the conclusion of the examination-in-chief of the witness but the witness breathed his last before the date fixed in the case and could not be cross-examined, it was held that it could not be said that the accused was given the opportunity to cross-examine the witness and had failed to avail of the opportunity, therefore the statement of such a witness could not be received in evidence at the trial.

This section gives very wide powers to the cross-examiner in addition to those given by section 143; and is more extensive in scope. As long as the cross-examiner confines his questions to the points of testing the veracity of a witness or discovering his status in life, there seem to be no limits to his power of putting questions. But when he undertakes the difficult yet delicate task of impeaching the character of witness, the following sections (sections 150–153) give ample protection to a witness in speaking the truth and impose wholesome restraints upon groundless assertions levelled against him.

A witness may be examined not only as to the relevant facts but also as to all facts which reasonably tend to affect the credibility of his testimony. This is generally spoken of as cross-examination to credit, inasmuch as a large part at any rate of the facts which are relied on for the purpose are facts which touch the credit and good name of the witness. But no such cross-examination can be legitimate unless it has some reasonable bearing on his credibility.

**150. When witness to be compelled to answer.**

If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 137 shall apply thereto.

**151. Court to decide when question shall be asked and when witness compelled to answer.**

(1) If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it.

(2) In exercising its discretion, the Court shall have regard to the following considerations, namely:—

(a) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(b) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;
(c) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;
(d) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

The object of this section is to prevent the unnecessary raking up of the past history of a witness, when it throws no light whatsoever on the questions at issue in a case. It protects a witness from the evils of a reckless and unjustifiable cross-examination under the guise of impeaching his credit. In the course of cross-examination, the temptation is always too great to run down a witness's character; the Legislature has, therefore, wisely provided ample safeguards for the unfortunate witness and placed wholesome checks on the wily cross-examiner. It would seem that under this section a witness cannot be compelled to answer irrelevant questions; but if he chooses to answer them, he cannot be contradicted by other evidence (section 156).

In **Queen v Holmes, (1871) LR 1 CC R 334**, on an indictment for rape, or attempt at rape, or for an indecent assault, the prosecutrix cannot be asked in cross-examination whether she had connection with another person not the accused; and if she denies it, evidence cannot be called to contradict her. But she can be asked whether she had on previous occasions connections with the accused, or whether she was a common prostitute.

**152. Question not to be asked without reasonable grounds.**
No such question as is referred to in section 151 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.
**Illustrations.**
(a) An advocate is instructed by another advocate that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.
(b) An advocate is informed by a person in Court that an important witness is a dacoit. The informant, on being questioned by the advocate, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.
(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.
(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

**SECTION 152 OF BSA: QUESTION NOT TO BE ASKED WITHOUT REASONABLE GROUNDS**

**Corresponding provision**

Section 152 of the BSA corresponds to section 149 of the Evidence Act

**Advocate**

Words "advocate" is used for "barrister"

**153. Procedure of Court in case of question being asked without reasonable grounds.**
If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any advocate, report the circumstances of the case to the High Court or other authority to which such advocate is subject in the exercise of his profession.

**SECTION 153 OF BSA: PROCEDURE OF COURT IN CASE OF QUESTION BEING ASKED WITHOUT REASONABLE GROUNDS**

**Corresponding provision**

Section 153 of the BSA corresponds to section 150 of the Evidence Act

**Advocate**

The words "barrister, attorney, pleader or vakil" are replaced by the word "advocate"

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**154. Indecent and scandalous questions.**
The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

This section forbids the putting of any question which is indecent or scandalous, unless it relates to facts in issue or is necessarily connected with them.

In **Rozario v Ingles, (1893) 18 Bom 468**, a proceeding to recover maintenance by a married woman for her illegitimate children, under section 125 of the Criminal Procedure Code, she “can be examined to prove non-access of her husband during their married life, without independent evidence being first offered to prove the illegitimacy of the children”.

**155. Questions intended to insult or annoy.**
The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

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**156. Exclusion of evidence to contradict answers to questions testing veracity.**

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.

Exception 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.

Exception 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) 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.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it. Evidence is offered to show that he was dismissed for dishonesty. The evidence is not admissible.

(c) A affirms that on a certain day he saw B at Goa. A is asked whether he himself was not on that day at Varanasi. He denies it. Evidence is offered to show that A was on that day at Varanasi. The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Goa. In each of these cases, the witness might, if his denial was false, be charged with giving false evidence.

(d) A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence. He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

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It was held in **Bhogilal v Royal Insurance Co Ltd, (1927) 30 Bom LR 818**, when a witness deposes facts which are relevant, evidence may be given in contradiction of what he has stated. But when what he deposes 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 229 of the Indian Penal Code. There are two exceptions to this:

1. previous conviction when denied can be proved; and
2. any fact tending to impeach his impartiality when denied can be proved. This is a salutary rule and is meant to curtail every inquiry.

In **Urban Transport Authority v Nweiser, 1993 ALMD 1487 (CA),** it was held in principle that evidence cannot be adduced to contradict the denials of a witness in cross-examination on matters going to collateral issues affecting credit only, although a general rule, is an absolute rule and the categories of exceptions to it are not closed.

**157. Question by party to his own witness.**
(1) The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.
(2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness.

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 section does not say that a person who calls a witness may cross-examine him in certain circumstances, but he might put questions to him which might be put in cross-examination by the adverse party. That is not the same as cross-examination.

This section vests discretion in the court to permit such a person to put any such question. Such a request can be made in civil as well as in criminal cases. Permission for cross-examination in terms of the section cannot and should not be granted at the mere asking of the party calling the witness. The courts are under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances.

**Hostile 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. In **Shatrughan v State of MP**, **1993 Cr LJ 120 (MP),** a hostile witness is not necessarily a false witness. The court can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the adverse party to cross-examine him on the answers elicited which do not find place in examination-in-chief.

In **Balu Sonba Shinde v State of Maharashtra**, **AIR 2002 SC 3137**, while it is true declaration of a witness to be hostile does not ipso facto amount to rejection of his evidence—and it is now well settled that the portion of evidence being advantageous to the parties may be taken advantage of—but the court before whom such a reliance is placed shall have to be extremely cautious and circumspect in such acceptance.

**158. Impeaching credit of witness.**
The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him—
(a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;
(b) 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;

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(c) by proof of former statements 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.

**Illustrations.**

(a) A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B. Evidence is offered to show that, on a previous occasion, he said that he had not delivered goods to B. The evidence is admissible.

(b) A is accused of the murder of B. C says that B, when dying, declared that A had given B the wound of which he died. Evidence is offered to show that, on a previous occasion, C said that B, when dying, did not declare that A had given B the wound of which he died. The evidence is admissible.

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. The section indicates four ways in which the credit of a witness may be impeached;

*(a) by the adverse party, or;*

*(b) with the consent of the court by the party who calls him.*

They are: —

(1) evidence of persons that the witness is unworthy of credit;

(2) proof that the witness

(i) has been bribed;

(ii) has accepted the offer of a bribe; or

(iii) has received any other corrupt inducement;

(3) former statements inconsistent with the present evidence and

(4) general immoral character of the prosecutrix in cases of rape or attempt to ravish.

In **R v Nagrecha (Chandu), (1997) 2 Cr App R 401 [CA (Crim Div)**, the defendant was accused of indecently assaulting the complainant in a restaurant. There were no witnesses. The defence cross-examined the complainant as to allegations of sexual impropriety which she had made against other men. She denied making the complaints. The judge refused to allow the defence to call evidence as to the making of those complaints. On appeal it was contended that the judge erred in so ruling. It was held, allowing the appeal and ordering a retrial, that the

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judge should have permitted N to adduce the evidence of the making of the other complaints which went not merely to credit but to the central issue as to whether or not there had been any indecent assault in the instant case. As to that matter, only the complainant and the defendant were able to give evidence. If the evidence as to the other complaints had been called, it might well have caused the jury to take a different view.

In **The Queen v Brown and Hedley, (1867) LR 1 CCR**, it was held that in order to impeach the character of a witness for veracity, witnesses may be called to prove that his general reputation is such that they would not believe him upon his oath. Such evidence can be given, and the practice is ancient and undoubted.

In **Hussain Khan of Mamdot v Iftikhar Hussain Khan of Mamdot, (1949) 2 Lah 844**, it was held that the credit of a witness may be impeached on the ground that his evidence was obtained by corrupt inducement, and it was open to the defendant to contend that the application of a third-degree method by the persistent questioning in the investigation constituted a form of unfair evil, the avoidance of which was a corrupt inducement to witness to say what was required of him. It would be open to the defendant also to attempt to establish this by evidence, and it was clear that an important witness for this purpose would be the counsel. There was also the possibility of certain contingencies in which the counsel's association with the enquiry may be unseemly.

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**159. 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 opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

**Illustration**.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed. Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

It is a 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. This section permits the court to allow a witness, who has 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.

**160. Former statements of witness may be proved to corroborate later testimony as to same fact.**

In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

It was held in **Satendra Singh v State of Jharkhand, 2009 Cr LJ 2280**, that the word investigate used in section 157 of IEA is not to be understood in the narrow sense in which it is used in CrPC. It must carry its ordinary dictionary meaning in the sense of ascertainment of facts, sifting of materials and search of relevant data etc.

Furthermore, A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under this section or to contradict it under section 148 of this Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses.

**At or about the time when the fact took place**

The Supreme Court in **Rameshwar v State of Rajasthan, (1952) SCR 377**, held that the main test as to whether a previous statement was made "at or about the time when the fact took place" is whether the statement was made as early as could reasonably be expected in the circumstances of the case and before there was an opportunity for tutoring or concoction.

**Any authority legally competent to investigate**

The Court in **Gajadhar Lal v King-Emperor, (1931) 7 Luck 552**, held that the first information report recorded under section 154, Criminal Procedure Code, is not a substantive piece of evidence; it can be used merely by way of corroboration or contradiction and not any further. It is inadmissible for the purpose of proving that the facts stated in it are correct.

**161. What matters may be proved in connection with proved statement relevant under section 26 or 27.**

Whenever any statement, relevant under section 26 or 27, 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.

Sections 26 and 27 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.

**162. Refreshing memory.**

(1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory:

Provided that the witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it, he knew it to be correct.

(2) Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided that the Court be satisfied that there is sufficient reason for the non-production of the original:

Provided further that an expert may refresh his memory by reference to professional treatises.

This section says how a witness may refresh his memory. He may, during his examination, refresh his memory by referring to—

(1) any writing made by himself (i) at the time of the transaction concerning which he is questioned, or (ii) so soon afterwards that the court considers it likely that the transaction was fresh in his memory;

(2) any such writing made by any other person and read by the witness within the time aforesaid;

(3) professional treatises, if the witness is an expert (section 165).

**In the matter of the petition of Jhubboo Mahton, (1882) 8 Cal 739,** the grounds upon which the opposite party is permitted to inspect a writing used to refresh the memory of a witness are threefold;

(i) to secure the full benefit of the witness's recollection as to the whole of the facts;

(ii) to check the use of improper documents; and

(iii) to compare his oral testimony with his written statement.

**163. Testimony to facts stated in document mentioned in section 162.**

A witness may also testify to facts mentioned in any such document as is mentioned in section 162, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

**Illustration.**

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

The principle of the foregoing section is carried a step further here. A witness may refresh his memory by a document even though he has no specific recollection of the facts themselves; but he must be sure that the facts were correctly recorded in the document. If the witness had not correctly recorded the words used by the speaker but only his impression, then the notes made by him would be inadmissible to prove the words used.

In **Partap Singh v The Crown, (1925) 7 Lah 91**, the section applies when the witness states in so many words that he does not recollect, and when the circumstances establish beyond doubt that this is so. Having no specific recollection of the facts he can only testify regarding the contents of the document before him and explain that he recorded correctly what the deponent said at the time.

In **Abdul Salim v Emperor, (1921) 49 Cal 573,** a witness may refresh his memory from a writing made by another person and inspected and signed by him, at the close of the day on which it was made, when it brings to his mind neither any recollection of the facts mentioned therein nor any recollection of the writing itself but when it nevertheless enables him to testify to a particular fact from the conviction of his mind on seeing the writing which he knows to be genuine.

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**164. Right of adverse party as to writing used to refresh memory.**

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

This section gives the opposite party a right of inspecting documents used in court for the purpose of refreshing the memory of a witness. He may look at the writing to see what kind of writing it is in order to check the use of improper documents. He has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness.

**165. Production of documents.**

(1) 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:

Provided that the validity of any such objection shall be decided on by the Court.

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(2) 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.
(3) 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 198 of the Bharatiya Nyaya Sanhita, 2023:
Provided that no Court shall require any communication between the Ministers and the President of India to be produced before it.

**SECTION 165 OF BSA: PRODUCTION OF DOCUMENTS**

**Corresponding provision**

Section 165 of the BSA corresponds to section 162 of the Evidence Act

**Communication between Ministers and President of India**

New proviso to section 165 of BSA provides that no Court shall require any communication between the Ministers and the President of India to be produced before it

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

This section is applicable to criminal trials as well as to civil actions. Records of statements made not on oath in the course of a departmental inquiry by the Government are not public documents.

Where a party to a suit gives notice to the other party to produce a document, and when produced, he inspects the same he is bound to give it as evidence if the other party requires him to do so. The reason for this rule is that it would give an unconscionable advantage to a party to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects as evidence for both parties.

In **Liladhar Ratanlal v Holkarmal, (1958) 60 Bom LR 203,** the Court held that a party is bound to give the opponent's documents as evidence in the case if three conditions are fulfilled:

1. the document should be required by that party to be produced in evidence;
2. it should be inspected by the party calling for its production;
3. the party producing the document should require the party calling for it to put it in evidence.

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**167. Using, as evidence, of document production of which was refused on notice.**

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

**Illustration.**

A 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.

The Court in **Shyamdas Kapur v Emperor, (1932) 60 Cal 341**, held that this section does not contemplate the production of a document for inspection. It contemplates that one party should call upon another in court to produce a document of which the first party has given the other notice to produce. It does not give him any right, at any stage of the case, to call upon his opponent to produce the document and, after inspecting it, use it or not as he sees fit. It is doubtful if this section applies to criminal proceedings.

**168. Judge's power to put questions or order production.**

The Judge may, in order to discover or obtain proof of relevant facts, ask any question he considers necessary, in any form, at any time, of any witness, or of the parties about any fact; and may order the production of any document or thing; and neither the parties nor their representatives shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Adhiniyam to be relevant, and duly proved:

Provided further that this section shall not authorise 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 127 to 136, both inclusive, if the question were asked or the document 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 151 or 152; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

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. In **Vikas Kumar Roorkewal v State of Uttarakhand, (2011) 2 SCC 178,** the Court held that a trial judge is not expected to act like a mere tape recorder to record whatever has been stated by the witnesses. Section 311 of CrPC and section 165 of Evidence Act confers vast and wide powers on Court to elicit all necessary materials by playing an active role in the evidence collecting process.

In **Ritesh Tewari v State of UP, (2010) 10 SCC 677**, this power has been explained by the Supreme Court as **an extraordinary power conferred upon the court to elicit the truth and to act in the interest of justice. A wide discretion has been conferred on the court to act as the exigencies of justice require. Thus, in order to discover or obtain proper proof of the relevant facts, the court can ask the question to the parties concerned at any time and in any form.** "Every trial is voyage of discovery in which truth is the quest". Therefore, power is to be exercised with an object to subserve the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth.

**CHAPTER XI OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE**

**169. No new trial for improper admission or rejection of evidence.**

The improper admission or rejection of evidence shall not be 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.

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

(i) in the case of improper admission— there is sufficient evidence to justify the decision independently of the evidence objected to and admitted; or

(ii) in the case of improper rejection— the decision could not be varied, if the rejected evidence had been received.

The Court explained the objective of the section in **Mohur Singh v Ghuriba, (1870) 6 Beng LR 495, 499 PC,** when it held 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.**

It was held in **Imperatrix v Pitamber Jina, (1877) 2 Bom 61, that** 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.

## CHAPTER XII REPEAL AND SAVINGS

**170. Repeal and savings.**

(1) The Indian Evidence Act, 1872 (1 of 1872) is hereby repealed.

(2) Notwithstanding such repeal, if, immediately before the date on which this Adhiniyam comes into force, there is any application, trial, inquiry, investigation, proceeding or appeal pending,

then, such application, trial, inquiry, investigation, proceeding or appeal shall be dealt with under the provisions of the Indian Evidence Act, 1872 (1 of 1872), as in force immediately before such commencement, as if this Adhiniyam had not come into force.