

**ESTOPPEL — SECTION 115****I. INTRODUCTORY**

**57.1.** Chapter 8 of the Act deals with estoppel. The most important section of the Chapter is section 115. **Scope.**

Under section 115, a person who makes a representation and induces a belief in the other person is precluded from denying its truth if the other person has acted upon it. This, of course, is not the text of the section; but it expresses the principle in ordinary language. The doctrine is known as 'estoppel' — a word which occurs in the marginal note of the section but not in the text.

**57.2.** "The Promise, like the wheel", said<sup>1</sup> O.K. Chesterton, "is unknown in Nature and is the first mark of Man". This 'Promise' is as essential to all contractual relations, whether of individuals or States, as the wheel is to machinery. The recognition of the sanctity of the spoken or the written word, and of the responsibility attaching to a man's declaration, acts or omissions, which others have relied on, underlies the modern ESTOPPEL arising out of REPRESENTATIONS.<sup>2</sup> That is the basis of the section. The principle is well understood, and needs no amendment. The discussion that follows is intended merely to elucidate certain important aspects. On a few points of detail, it will also be necessary to examine the case-law.

The two main doctrines.

**57.3.** At common law, there were three kinds of estoppel, namely, (a) by record, (b) by deed, and (c) *in pais*. **Various kinds of estoppel at common law.**

(a) Estoppel by record is dealt with in sections 11-14 of the Code of Civil Procedure, 1908, and in sections 40-44 of the Evidence Act.

(b) Estoppel by deed is not the subject matter of any special rule in the Indian Legal system.

(c) Estoppel *in pais* is dealt with in this Chapter (Chapter 8 of the Act).

**57.4.** In dealing with this and the following sections, it is to be remembered that they are not exhaustive of the law of estoppel, since all rules of estoppel are not also rules of evidence;<sup>3</sup> secondly,<sup>4</sup> section 115 or section 116 does not enact, as law in India, anything different from the law of England on the subject of estoppel. **Not exhaustive.**

**II. NATURE OF ESTOPPEL**

**57.5.** At this stage, a brief discussion of the nature of estoppel may be useful. In the case of *Moorgate Mercantile Co.*,<sup>5</sup> Lord Denning M. R. made the following observations which succinctly describe the nature of estoppel.

<sup>1</sup>G. K. Chesterton on Belgium (August 1914). Casperz, Estoppel and the Substantive Law (1915) page 1.

<sup>2</sup>Casperz, Estoppel and the Substantive Law (1915), page 1.

<sup>3</sup>*Ganges Manufacturing Co. v. Sourujmull*, (1880) I.L.R. 5 Cal. 669.

<sup>4</sup>*Sarat Chander v. Gopal Chunder* 19 I.A. 203 215 (1892); I.L.R. 20 Cal. 296 (P.C.).

<sup>5</sup>*Moorgate Mercantile Co. v. Turlahan*, (1975) 3 All. E.R. 314, 323 (C.A.).

"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so."

Dixon J. put the principle in these words:<sup>1</sup>

"The principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations".

57.6. An estoppel, is thus, a personal disqualification, laid upon a person peculiarly circumstanced, from proving particular facts; whereas a presumption is a rule that particular inferences shall be drawn from particular facts, whoever proves them<sup>2</sup>. A man is estopped when he has said, done or permitted something or act, which the law will not allow him to gainsay.

57.7. It is obvious that an estoppel amounts to a fictitious statement treated as true,<sup>3</sup> and modern estoppel has the effect of making untruth take the place of truth.<sup>4</sup>

57.8. However, this untruth is substituted in the interests of justice — primarily for the reason that where an untruth has led another person to act upon it and change his position, it is just and fair to him that the untruth must be adhered to by its author.

Fraud not necessary.

57.9. The conditions in which estoppel may arise are dealt with in section 115. In order that estoppel may arise, it is not necessary that there is any fraudulent intention established in connection with the misrepresentation which is the subject of estoppel.<sup>5</sup> Occasionally, one comes across observations to the contrary. For example, in all Allahabad case<sup>6</sup> it was observed that if the appellant acted in ignorance of his rights, there could be no question of estoppel operating against him. These observations were *obiter*, and we do not think that the Court intended to lay down any such rule. Section 115 does not require that the person who, by his declaration or conduct, induces a belief in the mind of others, must have been aware of his rights.<sup>7</sup>

Estoppel not favoured in early times.

57.10. Owing to its use in ancient times in shutting out the truth against reason and sound policy, the doctrine of estoppel<sup>8</sup> was not favoured, and was characterised as "odious". In modern times, the doctrine has lost all odium, and has become one of the most important, useful and just, factors of the law. At the present day, it is employed not to exclude the truth; its whole force being directed to preclude parties, and those in privity with them, from unsettling what has been fittingly determined, — a just principle which can be, and is daily administered to the well-being of society.

<sup>1</sup>*Grundt v. Great Boulder Pty Gold Mines Ltd.* (1937) 59 C.L.R. 641, 674 (Dixon J.) quoted by Lord Denning in *Moorgate Mercantile Co. v. Turlahan*, (1975) 3 All. E.R. 314, 323.

<sup>2</sup>Stephen, *Introduction to the Evidence*, page 175.

<sup>3</sup>*General Finance Co. v. Liberator*, (1878) L.R. 10 Ch. D. 15; 20 (Jessel M.R.).

<sup>4</sup>*Simmi v. Anglo American Telegraph Co.* (1879) L.R. 5 Q.B.D. 202.

<sup>5</sup>*Sarat Chunder v. Gopal Chunder*, (1892) I.L.R. 20 Cal. 296 (P.C.)

<sup>6</sup>*Lachman v. Rent Controller*, A.I.R. 1953 All. 458.

<sup>7</sup>A.I.R. 1925 P.C. 146.

<sup>8</sup>Bigelow, *Estoppel* (6th Ed.), pages 5, 6, cited in Woodroffe.

### III. MINORS

So much as regards the principle of the section and the nature of estoppel. A few points of detail relating to the section may now be considered.

**57.11.** On the question whether section 115 applies to a minor, there seems to be some conflict of decisions, as would be apparent from a Bombay case,<sup>1</sup> where the case law on the subject is reviewed. It should be stated here that the controversy arose in the context of false declarations by minors as to age with reference to contractual capacity. That particular point is not of much importance now. But the views judicially expressed in the course of the discussion, as to the meaning of "person" in section 115, are still relevant. Application to minors.

**57.12.** According to one view, the word "person" in section 115 is confined to persons having capacity to contract. This is the view taken in the Calcutta High Court in an early case<sup>2</sup> by Maclean C. J. and Prinsep J. while Ameer Ali J. was of the view that the section was not totally inapplicable to minors.

**57.13.** This view has not found favour with many High Courts; and, in the Bombay case, to which we have just now made a reference,<sup>3</sup> Beaumont C. J. described the view as "plainly untenable". At the other extreme is the view<sup>4</sup> that section 115 applies to a minor, and a minor is estopped from pleading his minority even in relation to contractual liability if there is fraud. In between is the Bombay view, namely, that (i) section 115 applies to minors, but (ii) in relation to contractual capacity, it is overridden by section 11 of the Indian Contract Act, 1872.

**57.14.** In the leading case on the contractual capacity of minors,<sup>5</sup> the question whether section 115 applies to minors or does not apply, was left open by the Privy Council. There are, however, observations of the Privy Council in a later case<sup>6</sup> to the effect that a deed by a minor is a nullity and incapable of founding a plea of estoppel.

**57.15.** As already stated above, the position regarding effect of false declaration as to age is not of importance. In terms of the relationship between section 115 on the one hand, and the provision regarding incapacity of minors in the Contract Act on the other hand, the proper view seems to be that estoppel cannot override a plain statutory provision of law. In other words, section 11 of the Contract Act being a matter of substantive law, it must prevail over section 115, Evidence Act, which is merely a matter of procedure.<sup>7</sup> Proper view.

**57.16.** But this does not mean that section 115 does not apply to a minor in other cases. The section could, for example, apply where the cause of action is not in contract or transfer of property, and is one not barred by a specific statutory provision. The Bombay view thus appears to be correct.

**57.17.** To elaborate the point, we can state two aspects of the matter thus — Position as to minors analysed.

(a) The law relating to estoppel must be read together with, and subject to, other laws in force, such as those relating to contract and transfer of property, and where such laws declare a minor to be free of liability in respect of a particular transaction, he cannot be made liable by virtue of an estoppel. An estoppel cannot alter the law, but in other cases, a minor may be estopped. A minor

<sup>1</sup>Gadigeppa v. Balangowda, A.I.R. 1931 Bom. 561, 568 (Full Bench) (reviews cases).

<sup>2</sup>Brahmo Dutt v. Dharmo Dos, (1898) I.L.R. 26 Cal. 381.

<sup>3</sup>Gadigeppa v. Balangowda, A.I.R. 1931 Bom. 561, 568 (Full Bench) (reviews cases).

<sup>4</sup>Jagar Nath Singh v. Lalta Prasad, (1909) I.L.R. 31 All. 21 (Banerji J.'s view).

<sup>5</sup>Mohori Bibee v. Dharmo Das, (1903) I.L.R. 30 Cal. 539 (P.C.).

<sup>6</sup>Sadiq Ali Khan v. Jai Kishore, A.I.R. 1928 P.C. 152; 30 Bom. Law Reports 1346.

<sup>7</sup>Gadigeppa v. Balangowda, A.I.R. 1931 Bom. 561, 568.

is not liable upon a contract nor for a wrong arising out of, or immediately connected with his contract, such as a fraudulent representation, at the time of making the contract that he is of full age.<sup>1</sup>

(b) A person under disability cannot by an act *in pais*, do what he cannot do by deed.<sup>2</sup> He cannot, by his own act, enlarge his legal capacity to contract or to convey. He cannot be made liable upon a contract by means of an estoppel under this section, if it be elsewhere declared that he shall not be liable upon a contract. To say that by act *in pais* that could be done in effect which could not be done by deed, would be practically to dispense with all the limitations the law has imposed on the capacity to contract.<sup>3</sup>

(c) But this does not mean that a minor can never be estopped. Under section 116, for example, (estoppel between landlord and tenant), a minor can be estopped.<sup>4</sup> This is because section 11 of the Contract Act does not come in the way where the original tenancy was not entered into by a minor, who has now succeeded to the tenancy.

The broad assertion that the doctrine of estoppel *in pais* has no application whatever to infants, does not, therefore appear to be correct.<sup>5</sup>

Our own view has been set out at length above, in view of the doubts expressed on the subject.<sup>6</sup>

#### IV. PROMISSORY ESTOPPEL

Broad features of promissory estoppel.

57.18. In recent times the doctrine of promissory estoppel has emerged. It is too early to say anything very definite about its scope, but the following propositions taken from *Cheshire*<sup>5</sup> indicate its broad<sup>6</sup> features—

(1) If a promise is given by one party to a contract not to insist upon his rights under that contract and there is no consideration for the promise, the promisee cannot sue upon it.

(2) If the promisor breaks this promise and sues on the original contract, the promisee may use *the promise by way of defence*.

(3) To succeed in this defence, the promisee must persuade the court that it is "inequitable" to allow the promisor to sue on the original contract.

If the promisee has himself been guilty of unconscionable conduct the court will certainly not allow the equity to be pleaded. But in the present context as elsewhere the word 'inequitable' has a more technical significance.

The promisee must have acted or omitted to act in reliance upon the promise; and by this act or omission he must have altered his position for the worse. Thus, in the New Zealand case of *P. v. P.*<sup>7</sup> he was induced not to take advantage of his statutory powers.

(4) The fourth point is still the subject of controversy. It has been strongly urged that the doctrine of promissory estoppel applies only to suspend and not to abrogate the promisor's legal rights. Such, indeed, has been its effect in most of the cases in which the question has been relevant. But it was not so restricted in the case of *P. v. P.*; and Lord Cairns in

<sup>1</sup>Pollock, Contracts, 6th Ed., pages 52 and 72.

<sup>2</sup>*Brahmo Dutt v. Dhurmodass Ghosh*, (1898) I.L.R. 26 Cal. 388, 394.

<sup>3</sup>Bigelow, Estoppel, 6th Ed., page 621, cited by Woodroffe, Evidence (1941), page 865.

<sup>4</sup>*Kamiz Mehdi v. Rasul Beg*, 5 Cal. L.J. 551; 48 I.C. 39, cited in Woodroffe, Evidence Act, (1941), page 865.

<sup>5</sup>*Cheshire and Pifoot*, Contracts, (1971), pages 89, 90.

<sup>6</sup>Some of the footnotes have been omitted.

<sup>7</sup>*P. v. P.*, (1957) H.E.L.R. 854.



*Hughes v. Metropolitan Rail Co.*<sup>1</sup> clearly stated the proposition in the alternative. The equitable doctrines might be applied, he said, when the promisee had been led "to suppose that the strict rights will not be enforced or will be kept in suspense or held in abeyance". The point would seem at least to be open to argument.

57.19. In India also, "promissory estoppel" has received consideration in judicial decisions.<sup>2</sup> It has been debated at great length in periodical legal literature also. However, the dimensions of this concept await further definition. Apart from that, it may be stated that the topic may not properly belong to the law of evidence, since its subject-matter is nearer to substantive law than estoppel in the limited sense as known to section 115. For these reasons, we do not propose to discuss this topic in the present report.

## V. NO ESTOPPEL AGAINST STATUTE

57.20. In general, there is no estoppel against a statute, in the sense that if a certain provision is made by statute for the public benefit, the enforcement of that provision by the competent statutory authority cannot be defeated by arguing that the competent authority had made a representation of fact which renders the statutory provision inapplicable and which estops the concerned authority from relying on the statute.

57.21. Where a particular act is declared to be void and unlawful by statute, a party cannot, by representation, any more than by other means, raise against him an estoppel so as to create a state of things, which he is under a legal disability from creating, as pointed out by Vice-Chancellor Beacon in *Barrow's case*.<sup>3</sup>

57.22. "The doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract *inter partes*, and it is not competent to the parties to a contract to estop themselves or anybody else in the face of an Act of Parliament ..... I am of opinion that as between the parties to this contract there was no estoppel, they contracted to do a thing which in the result it was unlawful to do".

57.23. On the same principle it has been held<sup>4</sup> that a corporate body cannot be estopped from denying that they have entered into a contract, which it was *ultra vires* for them to make.

## VI. RECOMMENDATION

57.24. In the result, the only change needed in section 115 is the addition of an Explanation as follows to clarify the position as to minors—

*"Explanation.—This section applies to a minor or other person under disability; but nothing in this section shall affect any provision of law whereby the minor or other person under disability becomes incompetent to incur a particular liability."*

<sup>1</sup>*Hughes v. Metropolitan Rail Co.*, (1887) 2 App. Cas. 439.

<sup>2</sup>(a) *Union of India v. Anglo Afghan Agencies*, A.I.R. 1908 S.C. 718; (1962) 2 S.C.J. 869.

(b) *State of Tamil Nadu v. Krishnamurthi*, (1974) 1 S.C.J. 235.

(c) A.I.R. 1973 All. 230.

(d) *Sankaranayanan v. State of Kerala*, (1971) 2 S.C.C. 364.

(e) *I.F.C. Agency v. Union of India*, A.I.R. 1976 Delhi 4.

(f) *Nathulal v. State*, 1976 Raj. 12.

<sup>3</sup>*Barrow's case* (1880) 14 Ch. D. 432-33, affirmed on appeal in (1880) 14 Ch. D. 443.

<sup>4</sup>*Canterbury Corporation v. Cooper*, (1909) 100 L.T. 597.

## RULE EXCLUDING EVIDENCE OF TITLE — SECTION 116

## I. INTRODUCTORY

58.1. A special rule excluding evidence of title is given in section 116. It reads —

“116. 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; and no person who came upon any immovable property by the license 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 license was given”.

58.2. As the Evidence Act was enacted before the passing of the Transfer of Property Act in 1882, it uses the expression “tenant”, while the expression used in the Transfer of Property Act is “lessee”.

Analogous  
estoppel.

to 58.3. This section is described in the Act as a species of estoppel—vide the marginal note to the section—but, strictly speaking, where a tenant enters into occupation of premises, he does not make any representation of fact to the landlord, though he does make a promise to pay the rent. In this respect, section 116 can be distinguished from section 115. It is really estoppel by agreement.

58.4. It will be more accurate to say that since the tenant could not have got the possession of the land without admitting the right of the landlord, he should not be allowed to deny that right, so long as he is in possession.

58.5. There is, no doubt, some element of estoppel present in this case namely, that on the strength of the implied undertaking made by the tenant, the landlord put him into occupation and thereby *did something to his detriment*. The tenant is now estopped from denying the truth of that which was the foundation of the relationship. Thus, action taken by a person (landlord in this case) on the strength of the act of another, is the common element in sections 115-116.

## II. RATIONALE

Rationale.

58.6. As to the rationale underlying the section, we would like to quote the observations of Baron Martin in *Cuthbertson v. Irving* :<sup>1</sup>

“If the lessor have no title and the lessee be evicted by him who has title paramount the lessee can plead this and establish a defence to any action brought against him; but so long as the lessee continues in possession under the lease the law will not permit him to set up any defence founded upon the fact that the lessor ‘nil habuit in enemantis’ and that upon the execution of the lease there is created in contemplation of law a reversion in fee simple by estoppel in the lessor which passes by descent to his heir and by purchase to an assignee or devisee.....

“This state of law in reality tends to maintain right and justice and the enforcement of the contracts which men enter into with each other (one of the great objects of all law); for so long as lessee enjoys everything which his lease

<sup>1</sup>*Cuthbertson v. Irving*, (1860) 4 H & N 742; 757; 28 L.J. Ex. 306; 5 Jur (NS) 740, quoted in *Krishna Prasad v. B.C. Concern*, A.I.R. 1937 P.C. 251, 254.

purports to grant, how does it concern him what the title of the lessor or the heir or assignee of his lessor really is? All that is required of him is that having received the full consideration for the contract he has entered into, he should on his part perform it".

58.7. The Privy Council has, after quoting this passage, observed :<sup>1</sup>

"Not every word of this passage can be taken as law in India at the present time, but it is a useful exposition of the reason<sup>2</sup> which underlies the wellknown doctrine of estoppel which has been enacted for India in section 116, Evidence Act".

58.8. It would thus appear that the estoppel under section 116 is by reason of agreement, and is based on permissive enjoyment. If A, being in possession of land, delivers the possession to B upon his request and upon his promise to return it, with, or without rent, at a specified time, or at the will of A, then B cannot be allowed, while still retaining possession, to dispute A's title, because, to allow him to do so would be to allow him to work a wrong against A, by depriving him of the advantage which his possession afforded him, and with which he would not have parted, but for the promise (or, rather the implied agreement) of B that he would hold it from him and in his place and stead<sup>3</sup>. Estoppel based on agreement.

The broad principle is that a person who has received property from another will not be permitted to dispute the title of that person or his right to do what he has done.<sup>4</sup>

58.9. Thus, the estoppel of a tenant is founded upon the contract between him and his landlord. The tenant took possession under a contract to pay rent as long as he held possession under the landlord, and give it up at the end of the term to the landlord, and having taken it in that way he is not allowed to say that the man whose title he admitted and under whose title he took possession has not a title.<sup>5</sup>

58.10. The section enacts no new principle. This was so even before the Act, as is clear from the cases which arose in Calcutta,<sup>6</sup> and Bombay.<sup>7</sup> Previous law.

### III. SCOPE AND CONSEQUENCES OF THE DOCTRINE

58.11. The section covers tenants as well as licensees. There is no distinction between the relation of a tenant and that of a licensee, to whom the same principles apply.<sup>8</sup> The section, therefore, specifically mentions licensees of immovable property. Licensee and other relationship.

Though not mentioned in the section, licensees of trade marks and patents are also governed by a similar principle—compare section 117. Even as to tenants, it is true to say that the section does not contain the whole law of the tenant estoppel.<sup>9</sup>

58.12. An important consequence of the rule estopping a tenant is that a tenant cannot acquire a title against his landlord during the currency of the lease;

<sup>1</sup>Krishna Prasad v. B. C. Concern, A.I.R. 1937 P.C. 251.

<sup>2</sup>Emphasis added.

<sup>3</sup>Franklin v. Mirda, 35 Cal. 558 (American case) cited in Woodroffe.

<sup>4</sup>Bigelow, Estoppel (6th Ed.), pages 589-590.

<sup>5</sup>In re Stringre's Estate, L.R. 6 Ch. D., 9, 10. See Duke v. Ashoy, 7 H. & N., 602.

<sup>6</sup>Mohesh Chandra Biswas, (1863) Marshall 3771; and Banee (1866) Bengal Law Reports Supplement Vol. 588.

<sup>7</sup>Vasudev Daji, (1871) 8 Bom. High Court Reports 175.

<sup>8</sup>Doe d. Johnson v. Baytop, 3 A. & E., 188.

<sup>9</sup>Md. Mujibar v. Sheik Isab, (1928) 32 C.W.N. 867; A.I.R. 1928 Cal. 546.

for, occupation by a tenant is never adverse to the landlord's title, which the tenant is estopped from denying. Any encroachment by the tenant on land belonging to third parties will also ensure for the landlord's benefit,<sup>1</sup> unless a different intention is shown by the conduct of the landlord,<sup>2</sup> or tenant.

#### IV. LIMITATIONS OF THE SECTION

**58.13.** It might be useful to draw attention to an important limitation on the scope of the section. In the first place, the operation of the section is restricted to the period of "continuance of the tenancy", so that the tenant is not estopped from denying the title of the person who was his landlord, if the tenancy has expired. Usually, judicial decisions dealing with this aspect assume that this principle applies only after the tenant has surrendered possession. We shall discuss this aspect later.<sup>3</sup>

**58.14.** The second important limitation of the section is that the estoppel is confined to the title of the landlord "at the beginning of the tenancy". The section so provides expressly. Its application to cases of attornment is, however, a matter of some difficulty, and will be adverted to later.<sup>4</sup>

**58.15.** In the third place,—to discuss a limitation not so explicit in the section—a plea of the illegality of the transaction of lease can, according to judicial decisions,<sup>5-6</sup> be raised by the tenant. The landlord will have to recover possession on the basis of title.

**58.16.** In the fourth place, if the relationship of tenancy is itself denied and not proved, the section can have no application.

#### V. ENGLISH LAW AS TO ESTOPPEL BETWEEN LANDLORD AND TENANT

**58.17.** There is, in England, a general rule that a tenant is estopped from denying his landlord's title,<sup>7-9</sup> and a landlord from denying his tenant's. This is connected with the rule that if A permitted B to take possession of A's land, B may not dispute A's title and so plead *jus tertii* against him<sup>9</sup>.

Estoppel is a principle of the law of evidence which, in this case, precludes parties who have created a tenancy from denying their *respective capacities* as against one another.<sup>10</sup>

<sup>1</sup>(a) *Whitmore v. Rumohr*, (1871) L.R. 7 C.P. 1;

(b) *Att. Gen. v. Tomline*, (1880) 15 Ch. D. 150;

(c) *East Stonchouse U.D.C. v. Willoughby Bros. Ltd.* (1902) 2 K.B. 318;

(d) *King v. Smith*, (1950) 1 All. E.R. 553.

<sup>2</sup>*Kingsmill v. Millard*, (1855) 11 Exch. 313.

<sup>3</sup>See discussion as to "continuance of tenancy", *infra*.

<sup>4</sup>See discussion as to attornment, *infra*.

<sup>5</sup>*Abdul Aziz v. Kanthu Mallick*, (1911) I.L.R. 38 Cal. 512, 515 (non registration under the Bengal Land Registration Act, 1876).

<sup>6</sup>*Madras Hindu Mutual Benefit Permanent Fund v. V. Ragava Chootty*, (1896) I.L.R. 19 Mad. 200, 208.

<sup>7</sup>Mogarry & Wade, *Law of Real Property* (1966), page 651

<sup>8</sup>*Cock v. Loxley*, (1972) 5 T.R. 4; *Alchorne v. Gomme*, (1824) 2 Ring. 54; *Cathbertson v. Irving*, (1860) 6 H&N 135; Halsb. Vol. 5, 247, 248, approved in *Mackley v. Nutting*, (1949) 2 K.B. 55, 62; (1949) 1 All. E.R. 413.

<sup>9</sup>*Tadman v. Henman*, (1833) 2 Q.B. 168, 171.

<sup>10</sup>Spencer Bower, *Estoppel by Representation* (1st Ed.), pages 251, 252, cited by Mogarry and Wade, *Law of Real Property* (1966), page 651.

Thus, the landlord cannot question the validity of the tenancy that he has purported to grant, and the tenant may not question the landlord's title to grant it,<sup>1</sup> unless *ultra vires*.<sup>2</sup> The estoppel operates from the time when the landlord puts the tenant into possession<sup>3</sup>.

58.18. The doctrine is not confined to lease by deeds. It applies to tenancies from year to year as well as to leases for a year,<sup>4</sup> and at sufferance,<sup>5</sup> and statutory tenancies under the Rent Acts;<sup>6</sup> it applies even to licences;<sup>7</sup> and it operates whether the tenancy was created by deed or writing or orally.<sup>8</sup>

## VI. ENGLISH LAW AS TO TENANCY BY ESTOPPEL

58.19. In addition to the estoppel between landlord and tenant, there are, in England, certain cases in which there is said to be a *tenancy by estoppel*, which has been thus explained: "If a person with no estate in land purports to grant a tenancy of the land, the grant can pass no actual estate."<sup>9</sup>

"Yet, even though the lessor's want of title is apparent to the parties", both the parties and their successors in title will be estopped from denying that *the grant was effective to create the tenancy that it purported to create*. There is thus brought into being a tenancy by estoppel under which the parties and their successors in title have (as against one another) most of the rights and liabilities of an estate in land, although no estate is actually granted. Such a tenancy will, for example, devolve and may be alienated in the same way as any other tenancy, and the landlord may distrain for rent in the ordinary way. But since estoppels do not bind strangers, he cannot exercise his normal right to distrain goods not owned by the tenant."

## VII. ATTORNMENT

58.20. Reverting to the section in our Act, we should note that there is some obscurity as to the effect of an attornment—that is to say, how far attornment creates an estoppel, and in what manner. The view has been taken<sup>10</sup> that though attornment creates an estoppel, it does so by virtue of an *uncodified rule* not falling within section 116. It has also been stated that attornment may create an estoppel under section 116, but only if the attornment has the effect of creating a new tenancy. It is also commonly understood that even if an attornment creates an estoppel either under the section or otherwise, it is possible for the tenant to show that the attornment was made under mistake or by fraud.<sup>11</sup>

58.21. In order to appreciate the position in this regard, it may be useful to examine the nature and origin of attornment. In England, attornment originated in the feudal times, and seems to have been a concomitant of the doctrine that the tenant owed loyalty only to his landlord (until attornment). Though attornment, or the consent of the tenant to hold under the transferee, was still required up to the 16th century, the *Old Nature Brevium* (temp. Edward III, ed.

Origin.

<sup>1</sup>*Webb v. Austin*, (1844) 7 Man. & G. 701.

<sup>2</sup>*Rhyl UDC v. Rhyl Amusements Ltd.* (1959) 1 W.L.R. 465 (*ultra vires*).

<sup>3</sup>(a) *Hall v. Butler*, (1830) 10 A. & E. 204;

(b) *Doe d. Marlow v. Wiggins*, (1843) 4 Q.B. 367.

<sup>4</sup>*Halsbury*, 2nd Ed., Vol. 13, page 504, para 572 approved in *Mackley v. Nutting*, (1949) 1 All. E.R. 413, 416, 417.

<sup>5</sup>*Doe d. Bailey v. Poster*, (1846) 3 C.R. 215, 229.

<sup>6</sup>*Stratford v. Syrett*, (1958) 1 Q.B. 107.

<sup>7</sup>(a) *Doe d. Johnson v. Baytop*, (1835) 3 A. & E. 188;

(b) *Compare Tadman v. Henman*, (1893) 2 Q.B. 168, 171.

<sup>8</sup>(a) *E. H. Lewis & Son Ltd. v. Morell*, (1948) 2 All. E.R. 1021.

(b) *Mackley v. Nutting*, (1949) 2 K.B. 55.

<sup>9</sup>*Megarry & Wade, Law of Real Property* (1966), page 1008.

<sup>10</sup>The doctrine is discussed by A.M. Pritchard in 80 L.Q.R. 370.

<sup>11</sup>Footnotes referring to cases omitted.

<sup>12</sup>See *infra*.

<sup>13</sup>See the Bombay case, *infra*.

Pynson (n.d.) fo. xlix; ed. Tottell (1584), ff. 168-70 contains two forms of writ (*Quid Juris Clamat*, and *Per Que Servitia*) which can be traced back to Bracton's own day, to *compel the tenant* not being a tenant in tail (Bowles case (1615), 11 Co. Rep. 80a) to *attorn or be attorned*<sup>1</sup>. Meanwhile, the passing of the Statute of Uses had dealt a further blow at the theory of feudal allegiance; for it was soon afterwards held (Heyward's case (1595), 2 Co. Rep. 35a) that a conveyance which operated by virtue of the statute passed the reversion *without attornment of the tenant*<sup>2</sup>. Finally, in 1705, a statute (4 & 5 Anne, c. 16, s.9) abolished the necessity for attornment in all "grants and conveyances" of reversions. It would seem that at the present day, attornment is not, in law, necessary to continue the relationship of landlord and tenant on a transfer of the reversion.

58.22. A tenant is, however, protected if he pays rent to the former reversioner without notice of the transfer of the reversion.<sup>3</sup> To that extent, attornment is desirable. Any act which recognises the position of the new reversioner will be sufficient as an attornment<sup>4</sup> in this context

Position as to  
estoppel.

58.23. This statement of the present position made above with reference to England would, in substance, be true of India<sup>5</sup>—although, of course, we have no history of feudalism. As to the effect of attornment as estoppel, in *Krishna Prasad's case*,<sup>6</sup> the Privy Council (Sir George Rankin) observed: "The section does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with one cardinal and simple estoppel and states it first as applicable between landlord and tenant and then as between licensor and licensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation. Whether, during the currency of a term, the tenant by attornment to A who claims to have the reversion, or the landlord by acceptance of rent from B who claims to be entitled to the term is estopped from disputing the claim which he has once admitted are important questions, *but they are instances of cases which are outside S. 116 altogether*,"<sup>7</sup> and it may well be that as in English law the estoppel in such cases proceeds upon somewhat different grounds and is not wholly identical in character and completeness with the case covered by the section. *The section postulates that there is a tenancy still continuing*,<sup>8</sup> that it had its beginning at a given date from a "given landlord." It provides that neither a tenant nor anyone claiming through tenant shall be heard to deny that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise—which is the case before the Board on this appeal—the section applies against the lessee, any assignee of the term and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title *at the date of the lease* and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to dis-entitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversion, though in such cases there may be other grounds of estoppel, e.g., by attornment, acceptance of rent etc. In this sense it is true enough that the principle only applies to the title of the landlord who "let the tenant in" as distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end.

<sup>1</sup>Adapted from Jenks, Digest of English Civil Law (1947), Vol. 2, page 633.

<sup>2</sup>Jenks, Digest of English Civil Law (1947) Vol. 2, page 633.

<sup>3</sup>Section 151(2), Law of Property Act, 1925.

<sup>4</sup>*Gladman v. Plumer*, (1845) 15 L.J. Q.B. 79.

<sup>5</sup>See *Pulin v. Misshla*, A.I.R. 1957 Cal. 627 and S. 109 of T.P. Act.

<sup>6</sup>*Krishna Prasad v. B. C. Concern*, A.I.R. 1937 P.C. 251, 255.

<sup>7</sup>Emphasis added.

<sup>8</sup>Emphasis supplied.

58.24. In the above observations of Sir George Rankin section 116 was treated as not covering attornment. In a Bombay case,<sup>1</sup> the application of section 116 to attornment was confined to cases where there is a new tenancy, and it was observed that when, through ignorance or fraud, the tenants had made an attornment to a particular person, they were not altogether estopped from showing that the person to whom the attornment had been made had no title at the date of the attornment. This decision follows an earlier Calcutta case,<sup>2</sup>—though it may be pointed out that the observations in the Calcutta case were *obiter*.

Attornment —  
Bombay and Cal-  
cutta cases.

58.25. While we appreciate that section 116 is narrowly worded, the effect of attornment requires consideration. It seems to us that if attornment does create an estoppel, that is not because a *new tenancy* in the technical sense is created. The creation of a (new) tenancy would require compliance with the formalities prescribed by the Transfer of Property Act, 1882, or other legislation relevant to the case. In our view, estoppel is created by attornment because attornment amounts to a *recognition of the new status*,—the derivative title of the landlord to whom the tenant is attorned.

Estoppel when  
created.

58.26. By virtue of the recognition of the new landlord and by reason of the fact that having so recognised the new landlord, the tenant continues in possession or otherwise derives a benefit which would not have come to him but for the acknowledgement, the tenant is estopped from challenging the derivative title of the new landlord.

58.27. As regards the question whether the situation falls within or outside section 116, a doubt may be legitimately entertained, the discussion in the Privy Council case being *obiter* and inconclusive. But if there is a doubt, we think it should be removed by suitable amendment. The doubt arises because of the words “beginning of the tenancy” in section 116<sup>3</sup>. Do they mean the tenancy with the particular person, or do they mean tenancy in the abstract?

Doubt as to  
scope of section  
116 in relation to  
attornment.

58.28. Whatever be the true construction, we are of the view that after attornment, the relationship between the tenant and the landlord should not, so far as estoppel is concerned, be left to be governed by an uncodified rule. The rule applicable should find a place in the statute. The content of the rule could, in certain respects, differ from the rule governing the relationship of the original landlord and the original tenant. But the rule, whatever be its content, should find a place in the Act. The situation is a frequently occurring one, and it is desirable that the section should specifically deal with it. The present position is not satisfactory.

58.29. It would appear that a part of the obscurity is due to the fact that this subject of great practical importance has been totally left out of section 116—most probably because the attention of the draftsman was not drawn to it. It can hardly be denied that the principle, in its broad content, should not, after attornment, be different from that before attornment. No doubt, alleged *derivative title* can be challenged<sup>4</sup> by the tenant. But once there is attornment, this cannot be permitted in the absence of mistake or fraud. Attornment has, as its very object, the recognition of the derivative title. Apart from any question of fraud or mistake, it is difficult to understand how a tenant can question the title of the assignee of the landlord after attornment. We are of the view that the position should be set out clearly in the section. We recommend a suitable amendment of the section for the purpose.

Cause of present  
confusion exam-  
ined.

<sup>1</sup>*Nadjarian v. E. F. Trist*, Bombay, A.I.R. 1945 Bom. 299, 399, 400 (Chagla J.).

<sup>2</sup>*Changlu v. Taheru Deb*, A.I.R. 1926 Cal. 720.

<sup>3</sup>See the underlined words in the Privy Council case, *supra*.

<sup>4</sup>*Prakash Kaur v. Gian Chand*, A.I.R. 1940 Lah. 341.

## VIII. CONTINUANCE OF TENANCY

58.30. We have already mentioned<sup>1</sup> that the section, as it stands at present, is confined to the period of "continuance of the tenancy". Taken literally, this requirement would mean that if the tenancy is terminated by, say, a notice to quit, and the tenant continues in possession, there is no estoppel. This, however, is not the common understanding of the section. In fact, such a construction would lead to anomalies, where a recalcitrant tenant continues in possession after termination. It is hardly fair that he should be allowed to dispute the title of the landlord and that too as a result of his own default.

Fortunately, this is not the usual construction. According to the commonly accepted view, even if the tenancy terminates (e.g., by a proper notice to quit or by forfeiture), the estoppel continues to operate <sup>2,3</sup> under the section.

This is well established<sup>4</sup> by a series of decisions.

Change needed.

58.31. It appears to us that the language of the section requires a slight amplification in this regard, in order that it may reflect the judicial construction.

Of course, the above discussion is not concerned with the acquisition as a result of adverse possession by a tenant remaining in possession after termination of the tenancy.

That is a separate topic. If the tenant disputes the title of the landlord as of a date later than the period of tenancy, the section is not relevant.

Statutory tenancy.

58.31A. In many cities, by virtue of the legislation relating to control of rent and eviction, a tenant whose contractual tenancy has been terminated nevertheless continues in possession as a 'statutory tenant'.

Such a person would also presumably be governed by section 116.

## IX. RECOMMENDATION

58.31B. In the light of the above discussion, we recommend two amendments in section 116. In the first place, after the words "during the continuance of the tenancy", the words "*or at any time thereafter if the tenant continues in possession after termination of the tenancy*" should be inserted.

Secondly, we recommend the insertion of a new sub-section in section 116, as follows:—

*"(2) Where a tenant in possession of immovable property is attorned to another, the tenant or any other person claiming through him shall not, during the continuance of the tenancy, or at any time thereafter if the tenant continues in possession after termination of the tenancy, be permitted to deny that the person to whom the tenant was attorned had, on the date of the attornment, title to such immovable property; but nothing in this sub-section shall preclude the tenant from producing evidence to the effect that the attornment was made under mistake or was procured by fraud."*

<sup>1</sup>See discussion as to limitations of the section, *supra*.

<sup>2</sup>*Id. Mufibar v. Shq. Issb*, 32 C.W.N. 867, A.I.R. 1928 Cal. 546.

<sup>3</sup>*Bilas v. Besraj*, (1915) 42 I 202; 19 C.W.N. 1207; I.L.R. 37 All. 557; A.I.R. 1915 P.C. 96.

<sup>4</sup>(a) *Makhan v. Balsakhi*, A.I.R. 1919 Lah. 334;

(b) *Krishna Prasad v. Adyanath*, A.I.R. 1944, Patna 77, 83, 84 (Discusses effect of attornment on original landlord also);

(c) *Charubala v. Gomes*, A.I.R. 1934 Cal. 499;

(d) *Hirabai v. Jiwanlal*, A.I.R. 1955 Nag. 234, 236. para 10.11 (review cases);

(e) *Bhaiganti Bawa v. Himmat*, A.I.R. 1917 Cal. 498 (see Ashutosh Mookerji J.'s judgment).



**ESTOPPEL OF ACCEPTOR OF BILL, BAILEE OR LICENSEE —  
SECTION 117**

**59.1.** In section 116, which we have discussed so far, the estoppel dealt <sup>Introductory</sup> with rests on agreement. The next section—section 117—also deals with three other instances of estoppel by agreement, namely, (i) against the acceptor of a bill of exchange, (ii) against a bailee, and (iii) against a licensee. In all the three cases there is an express or implied agreement which forms the basis of the relationship created by the parties.

The principal provision in the section reads—

“117. 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 license commenced, authority to make such bailment or grant such license.”

There are two Explanations appended to the section, which we shall deal with later.

**59.2.** To take up, first, the estoppel against the acceptor of a bill of <sup>Acceptor of a bill of exchange.</sup> exchange. The acceptance of a bill of exchange amounts to *an undertaking* to pay to the order of the drawer, but the transaction would be idle if, after having so undertaken, the acceptor were allowed to set up that the drawer had no authority to draw the bill.<sup>1</sup> He is, therefore, precluded from doing so, for to allow him to do so would be to allow him to contradict that which the act of acceptance really imports.

**59.3.** To elaborate the matter, the acceptance of a bill of exchange is deemed a conclusive admission, as against the acceptor, of the drawer's capacity to draw; and, if the bill is to be payable to the order of the drawer, then of his capacity to endorse. If it is drawn by “procuration”, then it is also a conclusive admission of the authority of the agent to draw the bill in the name of the principal. But, there is no admission on the part of the acceptor, of the signature of the payee—even where the payee is the same party as the drawer, or of the signature of any other indorser; and this is so, even though, at the time of the acceptance, the endorsements were already contained on the bill.

**59.4.** There are two Explanations to the section. Under the first <sup>First Explanation.</sup> Explanation, “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.” It may be noted that this Explanation is a departure from the English law. In England, the acceptor is bound to know his correspondent's signature.

**59.5.** That portion of section 117 which relates to the acceptor was <sup>Portion relating to acceptor.</sup> discussed in a previous Report of the Law Commission,<sup>2</sup> and a recommendation was made that the matter should be incorporated in the Negotiable Instruments Act.<sup>3</sup> But this recommendation may be carried out only after the

<sup>1</sup>*Rup Chand v. Sarbeswar Chandra*. (1906) 10 C.W.N. 747, I.L.R. 33 Cal 914.

<sup>2</sup>11th Report of the Law Commission (Negotiable Instruments Act), page 66, para 164, last sub-paragraph (summarised at page 151 in Appendix III).

<sup>3</sup>The provision to be recommended to be inserted in the Negotiable Instruments Act is in the 11th Report at page 113, draft section 104.

necessary legislation is passed to revise the Negotiable Instruments Act. It may be noted that no such legislation has yet been initiated.

Provisions in the  
Negotiable Instru-  
ments Act.

59.6. To complete this discussion, in so far as it relates to bills of exchange, we may state that there are certain provisions creating estoppel, in relation to negotiable instruments, in the Negotiable Instruments Act.<sup>1</sup>

Bailee  
licensee, and

59.7. So much as regards the acceptor of a bill of exchange. The estoppel of bailee and licensee, dealt with in the latter half of the section, is analogous to that of landlord and tenant, and is based on a similar principle. In particular, the estoppel against a bailee has great practical utility. For example, where a car is delivered for repairs by X to Y, Y is estopped from questioning the title of X,<sup>2</sup> because of this part of the section.

Second  
Explanation.

59.8. The second Explanation to the section provides that if a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them *as against the bailor*.<sup>3</sup> This relaxation of estoppel is, in a sense, analogous to eviction by paramount title in the case of a landlord and tenant—which also has a similar effect of relaxing the tenant's estoppel and leaving the matter at large.

Licencees  
patents  
trademarks, of  
and

59.9. The position of a licensee of a patent who, under a licence, is working a right for which another has a patent, is analogous<sup>4</sup> to the position of tenant and landlord, and the licensee is bound in the same way:<sup>5</sup> he cannot question the validity of the patent during the continuance of the license, though he may show what the limits of the patent are.<sup>6</sup> A right to use a trademark may be created by license. Such a licensee is also estopped from denying the licensor's title or the validity of the license, even though he attempts to repudiate the contract.<sup>7</sup>

No changes are required in this part of the section.

Agency.

59.10. It may be noted that the Evidence Act is silent as to estoppel arising from agency. The law of agency is dealt with in the Contract Act<sup>8</sup> but that Act does not deal with estoppel *between principal and agent*, though it has a provision<sup>9</sup> dealing with "pretended agency" which would operate in favour of third persons. It may, however, be stated that ordinarily, an agent is not permitted to set up the adverse title of a third person in order to defeat the rights of the principal, or to dispute the title of the principal.

59.11. As was observed<sup>10</sup> by Woodroffe J., sections 115 and 116 are not exhaustive of the law of estoppel. Hence the sections may be applied by analogy, to parties not mentioned therein. On that basis, the agent would be estopped to the extent mentioned above. We respectfully agree with Woodroffe's view and do not suggest any change.

<sup>1</sup>Sections 120, 121 and 122, Negotiable Instruments Act, 1881.

<sup>2</sup>*Calcutta Credit Corporation v. Prince Peter of Greece* A.I.R. 1964 Cal. 374, 377, para 9; 68 C.W.N. 554.

<sup>3</sup>As to English law, see *Biddle v. Pond*, (1805) 6 B. & S. 225, approved in *Rogers Sons & Co. v. Lambert & Co.*, (1891) 1 K.B. 318, 325.

<sup>4</sup>For an exception in England, see *Ex parte Davies*, (1881) 19 Ch. D. 86.

<sup>5</sup>*Clark v. Addie*, 2 App. Ca., 423. In the matter of *D.H.R. Moses*, (1887) I.L.R. 15 Cal. 244.

<sup>6</sup>As to estoppel against patentee, see further.

(a) *Cropper v. Smith*, 26 Ch. D., 700.

(b) *Proctor v. Bennis*, 36 Ch. D., 749.

<sup>7</sup>*Jagannath v. Cresswell*, (1913) I.L.R. 40 Cal. 814, affirmed in *Hannah v. Jagannath*, (1914) I.L.R. 42 Cal. 262 (Trademarks).

<sup>8</sup>Sections 148-186, Contract Act.

<sup>9</sup>Section 235, Contract Act.

<sup>10</sup>*Rup Chand v. Sarveshwar*, (1906) I.L.R. 33 Cal. 915, 921.

## COMPETENCE AND COMPELLABILITY — GENERAL RULE SECTIONS 118-119

### I. INTRODUCTORY

**60.1.** So far, the Act has mostly dealt with rules applicable to *evidence* Introductory. as such, and not to the *witnesses* who give it. With section 118, the Act directs its attention towards the witnesses. Oral evidence comes to the court through the medium of witnesses. It is, therefore, important to inquire into certain matters concerned with witnesses, namely:—

- (1) who can be a witness;
- (2) who can be compelled to be a witness;
- (3) what questions witnesses otherwise competent and compellable can be *compelled* to answer, and
- (4) what questions such witnesses can be permitted to answer.

**60.2.** We take up the first question. Evidence must be given by legally competent witnesses. The ordinary individual is competent, and presumed to be so. The law of competence is, therefore, practically the law of incompetence, consisting of rules of exclusion.<sup>1</sup> Competence.

**60.3.** The tendency of modern legislation is to expand the sphere of competence so as to allow the witness to make his statement,<sup>2</sup> leaving its truth to be estimated by the tribunal, rather than to reject his testimony altogether.<sup>3</sup> Competency thus becomes the rule: incompetency the exception: and incompetency is reduced within a narrow compass.<sup>4</sup>

**60.4.** Proceeding on this principle,<sup>5</sup> the Evidence Act declares all persons to be competent witnesses except such as are wanting in *intellectual capacity*.<sup>6</sup> Granted this capacity, all persons become competent as witnesses, it being left to the court "to attach to their evidence that amount of credence which it appears to deserve, from their *demeanour*, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained, if not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements."<sup>7</sup>

**60.5.** Thus, absence of religious belief, nor physical defect, not involving intellectual incapacity;<sup>8</sup> nor interest, arising from the fact that the witness is a party to the record, or wife or husband of such party,<sup>9</sup> or otherwise: nor the

<sup>1</sup>Cockle, *Cases and Statutes on Evidence*. (1963), p. 270.

<sup>2</sup>Woodroffe, referring to Taylor, *Evidence*, section 1343, etc. seq.; Best Ev., sec. 622, 132, 35 seq.; Wigmore, Ev. s. 501.

<sup>3</sup>See remarks in *Blake v. Albion Life Assurance Society* (1881) 4 C.P.D. 109.

<sup>4</sup>Woodroffe.

<sup>5</sup>Woodroffe.

<sup>6</sup>Section 118.

<sup>7</sup>Field, *Evidence*, 6th Ed., 399, 400

<sup>8</sup>Sections 118, 119.

<sup>9</sup>Section 120.

fact that the witness is an accomplice in the commission of a crime,<sup>1</sup> constitutes any ground for the exclusion of the testimony.<sup>2</sup>

#### Compellability.

60.6. As to the second question, namely, who can be compelled to be a witness, it is to be noted that the competency of a witness to give evidence is one thing and the power to compel him to give evidence another.<sup>3</sup> Though competent, a person may not be compellable to be sworn or affirmed. Heads of foreign states and other persons entitled to immunity can be cited as examples. Then, in matrimonial proceedings, to which the Indian Divorce Act applies, the parties are competent but not compellable<sup>4</sup> in proceedings based on adultery, by virtue of judicial construction of certain provisions. Under the Bankers Books Evidence Act,<sup>5</sup> an officer of the Bank is not, in any proceeding to which the Bank is not a party, compellable to produce, or to appear as witness to prove, any bankers' books, without the order of a judge made for special causes. An accused is now a competent witness for the defence, but not compellable.

#### Particular questions, — privilege.

60.7. As to the third aspect, namely, what questions a witness can be compelled to answer—it is to be stated that a person who may be generally compellable to give evidence, may yet be privileged in respect of particular matters<sup>6</sup> concerning which he may be unwilling to speak. This topic is more conveniently dealt with under the head "privilege". The privilege is generally based on the existence of some relationship or the nature of the subject matter which is supposed to justify a bar against inquiry into particular matters.

#### Particular questions disability.

60.8. Finally—coming to the fourth question—it is to be noted that in certain cases, the law will not permit the witness to speak, even if he be willing. What the exception in such cases amounts to is not a *privilege*, but a *disability*.

#### Broad scheme.

60.9. The procedure to be followed in order to compel the giving of evidence is regulated by the codes of Civil and Criminal Procedure, and need not be discussed here.

The broad scheme of the act, thus, is as follows:—

- (a) Generally, all persons with the requisite intellectual capacity (section 118) are competent; but there are exceptions arising from specific statutory provisions.
- (b) Persons competent to depose are compellable to give evidence, but there are exceptions here also. Such exceptions are usually created by statute.
- (c) Compellability to be sworn or affirmed is distinct from compellability, (when sworn), to answer *specific questions*. A witness, though compellable to give evidence has a privilege not to answer certain questions. This pertains to the sphere of privilege.
- (d) Even if a witness be willing to depose about certain matters, the Court will *not allow disclosure* in some cases where the statute imposes a prohibition in that regard. This pertains to the sphere of disability.

<sup>1</sup>Section 133.

<sup>2</sup>Woodroffe.

<sup>3</sup>See *De Bretton v. De Bretton and Holme*, (1889) I.L.R. 4 All. 49, 52.

<sup>4</sup>See Indian Divorce Act, (4 of 1869), sections 51, 52, as construed judicially. See *De Bretton v. De Bretton & Holme*, *supra*.

<sup>5</sup>Bankers Books Evidence Act, (18 of 1891)

<sup>6</sup>Sections 122, 124, 125 and 129.

<sup>7</sup>Sections 122, 123, 126 and 127.

## II. SECTION 118

**60.10.** We now come to the sections proper. Section 118 provides that 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.

The Explanation to the section makes it clear that a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Thus, intellectual capacity is the sole test of competence.

**60.11.** In England, an infant may be sworn in a criminal prosecution provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the *nature and consequences of an oath*; in other words, a court has to ascertain from the answers to the questions propounded to such a witness whether he appreciates the danger and impiety of falsehood. The only cases in which oath of affirmation should not be administered are cases in which it clearly appears that the witness does not understand the *moral obligation* of an oath or affirmation or the consequences of giving false evidence. Infants.

This test is, however, of no importance in India so far as *competence to give evidence is concerned*. The test may be relevant for deciding the question whether the oath should be administered. But competence to give evidence is entirely governed by section 118.

**60.12.** The Explanation to section 118 applies to the case of a monomaniac, or a person who is affected with partial insanity who may be a very good witness as to the points other than that on which he is insane.<sup>1</sup> His evidence will be admissible if the judge finds, upon investigation, that he is capable of understanding the subject with respect to which he is required to testify. In *R. v. Hill*,<sup>2</sup> the witness believed that he had 20,000 spirits personally appertaining to him. On all other points he was perfectly sane. His testimony as to all other matters was received. Explanation to section 118.

Taifourd J. observed:<sup>3</sup> in *R. v. Hill*.

"If the prisoner's counsel would maintain the proposition which he has laid down, that any human being who labours under a delusion of the mind is incompetent as a witness, there would be most wide-spreading incompetency. Martin Luther, it is said, believed that he had had a personal conflict with the Devil. The celebrated Dr. Samuel Johnson was convinced that he had heard his mother calling him in a supernatural manner.....".

The observations of Lord Campbell C. J. are also of interest:<sup>4</sup> in *R. v. Hill*.

The rule contended for would have excluded the evidence of Socrates, for he believed that he had a spirit always prompting him."

This concludes our consideration of section 118, which needs no change.

<sup>1</sup>Norton, pages 306 and 307, cited by Woodroffe, (1941), page 922.

<sup>2</sup>(a) *R. v. Hill*, (1851) 2 Den. 25-4; 169 E.R. 495;

(b) *Spittle v. Walton*, (1871) 11 Eq. 420.

<sup>3</sup>*R. v. Hill*, (1851) 169 E.R. 495.

<sup>4</sup>*R. v. Hill*, (1851) 169 E.R. 495.

## III. SECTION 119

## Introductory.

60.13. Under section 119, a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open court.

This in substance is the English law also.<sup>1</sup> Evidence so given shall, under the section, be deemed to be oral evidence.

Evidence taken  
in camera.

60.14. The requirement that the writing must be written or the signs must be made in open court is, we take it, not applicable, where, by reason of a power vested in the court, evidence is taken *in camera*—although the section is silent on this point.

Interpretation of  
signs made by  
dumb witnesses.

60.15. A minor point arising from this section is the question whether signs made by dumb witnesses may be translated by an interpreter. This appears to be doubtful, in view of the words "manner in which he can make it intelligible". In English law, signs made by dumb witnesses may be translated by an interpreter.<sup>2</sup> This is the American view also.<sup>3</sup> Not much difficulty, however, seems to have been caused by the absence of a provision on the subject in India, and the matter may be left as it is.

In the result, section 119 also needs no change.

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<sup>1</sup>(a) *Barthelomen v. George*, cited in Phipson (1963) page 582.

(b) *R. v. Imrie*, (1917) 12 Cr. App. R. 282.

<sup>2</sup>Taylor, *Evidence*, Articles 1376, cited in Munir, *Evidence Act*, 4th Ed. Vol. 2, page 799.

<sup>3</sup>*Cowby v. People*, 83 N.Y. 478, cited by Woodroffe.

## PARTIES AND THEIR SPOUSES

## SECTION 120

## 1. INTRODUCTORY

61.1. The special topic of competence of parties is dealt with in section 120. The section is in two parts. Under the first part, in all civil proceedings the parties to the "suit",<sup>1</sup> and the husband or wife of any party to the "suit", shall be competent witnesses. Under the second part, in criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Compellability.

The section is silent about compellability. At common law, competence includes compellability,<sup>2</sup> but compellability on this principle may not, in England exist in the case of spouses.<sup>3</sup>

The section does not expressly provide that if a witness is competent, he will be compellable. But compellability may follow, either by reason of the procedural law or by reason of the common law<sup>4</sup> referred to above. Compellability may, of course, be excluded by specific statutory provisions.<sup>5</sup>

61.2. The latter half of the section, dealing with criminal cases, does not mention the accused. In India, the accused in a criminal case is not compellable to be a witness; the Code of Criminal Procedure prohibits such compulsion.<sup>6</sup> The Constitution<sup>7</sup> also prohibits compelling the accused to be a witness "against himself". Formerly, in India, the accused was not even competent to testify on his own behalf; he could not be given the oath,<sup>8</sup> nor could he swear an affidavit. Since the insertion of section 342A in the Code of Criminal Procedure, 1898, (by Act 26 of 1955)—which provision has, in substance, been re-enacted in the Code of 1973,—an accused has the option to examine himself as a witness for the defence. If he exercises the option, he has to take the oath. His position is then like that of any other witness, and he can be cross-examined like any other witness. So the accused is now competent, but not compellable.

Accused.

61.3. It may be noted that in India, even comment on failure to enter the witness-box is not allowed. In England, comment on the failure of the accused to enter the witness-box is permissible. It should, however, be noted that even in England, the Court of Appeal has more than once pointed out the need for exercising caution as to comment.

Comment on failure to give evidence.

<sup>1</sup>This should be "proceeding".

<sup>2</sup>*R. v. Lapworth*, (1931) 1 K.B. 117 (C.C.A.).

<sup>3</sup>*Leach v. R.*, (1912) A.C. 305.

<sup>4</sup>See Common Law rule, *supra*.

<sup>5</sup>E.g. sections 51-52, Indian Divorce Act, 1869.

<sup>6</sup>Section 315, Code of Criminal Procedure, 1973.

<sup>7</sup>Article 20(3) of the Constitution.

<sup>8</sup>*Akshoy v. R.*, (1918) I.L.R. 45 Cal. 720.

A trial Judge who is minded to make a comment on the absence of the accused from the witness-box, has to have regard to the caution given by higher Court from time to time. In *Waugh v. R.*,<sup>1</sup> Lord Oaksey observed:

"It is true that it is a matter for the Judge's discretion whether he shall comment on the fact that a prisoner has not given evidences, but the very fact that the prosecution are not permitted to comment on the fact shows how careful a Judge should be in making such comments."

In *R. v. Bathurst*,<sup>2</sup> Lord Parker, C. J., described the following as an acceptable form of comment:

"The accused is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing that they must not do is to assume that he is guilty because he has not gone into the witness-box."

61.4. In the U.S.A., the Supreme Court has held<sup>3</sup> that allowing comment by the prosecution on the election of an accused not to testify is unconstitutional, in view of the privilege against self-incrimination. (Fifth Amendment).

## II. HISTORY OF ENGLISH LAW

61.5. The law on the subject in England has an interesting history. A brief historical survey of the English law may be useful at this stage.<sup>4</sup>

1. *Common law.* At common law, neither the parties nor their spouses were competent to give evidence at all. Certain statutory modifications for civil cases are as follows:—

2. (a) *Lord Brougham's first Evidence Act, 1851:* Section 2 of Evidence Act, 1851 made the parties (but not their spouses)<sup>5</sup> competent and compellable. Section 3 of the Act made an exception in criminal proceedings. Section 4 made exceptions in proceedings instituted in consequence of adultery and in actions for breach of marriage.

(b) *Lord Brougham's second Evidence Act, 1853:* Section 1 of the Evidence Act, 1853, made the spouses of the parties competent and compellable. Section 2, however, made exceptions to section 1 in criminal proceedings and "in any proceeding instituted in consequence of adultery".

3. *The Matrimonial Causes Act, 1857,* (which created divorce courts) allowed divorce mostly on the ground of adultery. The preservation by the Act of 1853 of the common-law rule that parties and their spouses were neither competent nor compellable to give evidence in proceedings instituted 'in consequence of adultery' thus assumed a new importance, as most proceedings under the 1857 Act fell within the category.

4. *Evidence Further Amendment Act, 1869: Sec. 1 of the Act—*The exceptions made in Lord Brougham's Acts (1851-1853) in respect of actions for breach of promise of marriage and proceedings instituted in consequence of adultery were repealed by the Act of 1869, section 1.

<sup>1</sup>*Waugh v. R.*, (1950) A.C. 203, 211 (P.C.).

<sup>2</sup>*R. v. Bathurst*, (1968) 1 All. E.R. 1175, 1178, 1179, approved in *R. v. Mutch*, (1973) 1 All. E.R. 178.

<sup>3</sup>*Griffin v. California*, (1965) 380 U.S. 609 85 S.Ct. 1129, 14 L. Ed. 2d 106.

<sup>4</sup>Adapted from *Tilley v. Tilley*, (1949) Probate 240, 154 (1948) 2 All E.R. 1113, 1119, 1120.

<sup>5</sup>See *Tilley v. Tilley*, (1948) 2 All E.R. 1113, 1120.



5. *Criminal Evidence Act, 1898*: None of these statutes applied to criminal cases, so that the common law rule of the competence of the parties and the spouses continued to apply. The Act of 1898 made the accused competent, but not compellable, as a witness. It also made certain statutory changes pertaining to the wife of the accused.

The Act made her a *competent witness* for the prosecution in certain special cases,<sup>1</sup> but she is still not compellable.

The present position in England, is that the parties and their spouses are (subject to privilege) competent and compellable in Civil cases. The accused is competent, but not compellable. The spouse is not competent or compellable, except in a few cases. This, of course, is a very broad statement of the position.

### III. POSITION OF SPOUSE OF THE ACCUSED

61.6. We shall now refer to one point on which the section requires some consideration. Under the section, the spouse of the accused in a criminal prosecution is a *competent* witness. Since the Act makes no express provision to the effect that the spouse is not *compellable* and since there is no other statutory provision to that effect, the result is that the spouse is *compellable* also. Now, the question to be considered is whether this is a satisfactory position. *Prima facie*, one would think that the dictates of marital harmony postulate that the position should be just the reverse. Marital harmony can hardly survive if one spouse has to give incriminating evidence against the other. The spouse against whom such evidence could be given would live in a constant atmosphere of suspicion. But, worse than that, the spouse who could be compelled to give such evidence would be placed in an extremely harsh situation, where he or she may have to make a cruel choice between telling the truth and permanently alienating the affections of the partner for life. No doubt, whenever one person has to give evidence against a relative, some embarrassment is likely to be caused. But the cases of spouses stand on a special footing. The existence of the very fabric of the relationship is threatened if one spouse cannot depend on the other. The relationship of father and son is one of blood; it is created by nature and it can survive a few shocks. But the relationship of husband and wife is man-made. By its very nature, it is a delicate one. Its very foundation is mutual trust and confidence. The law still attaches the greatest importance to the sanctity of marriage. Any act which may damage this feeling of trust would totally shake the relationship. After such an act, the soul of the relationship would be gone, and only the shell would remain.

Paramount importance of marital harmony.

61.7. Is it desirable that the law should allow such a situation to be created? No doubt, truth is valuable; but truth can be too zealously pursued; too intensely sought. The need for bringing the truth before the Court is not denied, but there are other considerations which may override that need. In the present case, it is suggested, the other considerations are over-powering. The law has never regarded the proposition that the truth must come before the court at all costs and through every possible medium, as a proposition without exceptions. Were it so, the various privileges embodied in sections 121 to 132 would not have found their way into the Act.

Need for change.

It can be argued by way of reply to the above approach that the present position has not created any practical difficulty. This, we would like to observe, misses the point. A position which is bound to cause serious harm from the sociological point of view, and which is fundamentally objectionable, should not be allowed to continue merely because no difficulty has been reported. The position is, by its very nature, likely to cause serious hardship, as explained above.

<sup>1</sup>See "Position of the spouse", *infra*.

Previous view.

61.8. Unfortunately, the various aspects discussed above were not considered by those who framed the Act—at least the recorded discussions on the Evidence Bill do not show that the point was considered.

It is sometimes taken for granted that the law before the Act was the same as it is in the Act. This is not, strictly speaking, accurate.

A Calcutta case<sup>1</sup>, which arose before the passing of the Act, is usually referred to in this connection. But all that was held in that case was that the principle of the *incompetence* of the wife did not apply to the *Mofussil*, since it had not been established that the English Criminal law or the English law of evidence had been extended to the *Mofussil*. That case itself holds that in the Supreme Courts, the wife was not a competent witness, that being the English common law rule which did apply to the Presidency towns.

61.9. In that case — *R. v. Khairulla*<sup>2</sup> — Peacock C.J. observed —

“Two questions have been referred in this case; first, whether upon a trial in the *mufassil* of a person charged with an offence his wife is *competent* to give evidence for or against him? Second, whether, upon a trial in the *mufassil* of several persons charged jointly with an offence, the wife of *one of them* is *competent* to give evidence for or against the others? I am of opinion that both of those questions must be answered in the affirmative. It is a general rule of English law, subject to certain exceptions, that in criminal cases, a husband and wife are not competent to give evidence for or against each other. *But the English law is not the law of the mufassil*..... It is clear that the English Criminal Law was not the Criminal Law of the *mufassil*, and that the English Law of Evidence was never extended by any Regulation of Government to criminal trials there.”

61.10. The judgement does not decide the question of compellability. Even if, for the sake of argument, it is assumed that the judgment has decided the question, it must not be forgotten that the decision was based primarily on the proposition—a proposition which need not be disputed—that in the *Mufassil*, the English law of crimes or evidence did not apply. The judgment, in any case, does not express any view as to the wisdom or otherwise of the common law rule.

Thus, the previous law does not come in the way of making any change in the section—if such a change is otherwise desirable.

English law.

61.11. It may be noted that the law in England on the subject is different. In England,<sup>3</sup> the accused's spouse is not, generally, a competent or compellable prosecution witness except in certain specified cases which are very limited, given below—

- (a) The wife is competent and compellable in cases falling within the Evidence Act, 1877, which concerns prosecutions relating to public highway and other criminal proceedings instituted for the purpose of trying or enforcing civil rights.
- (b) She is competent at common law on charges to effect that violence against herself or injury to her liberty or health has been committed by the accused:<sup>4</sup> this includes buggery.<sup>5</sup>
- (c) Then, the spouse is probably competent and compellable on a charge of treason.<sup>6</sup>

<sup>1</sup>*R. v. Khairulla*, (1866) 6 W.R. (Cr.) 21 (Cal.); B.L.R. Supp: Vol: App: 11 (F.B.).

<sup>2</sup>*R. v. Khairulla*, (1866) 6 W.R. (Cr.) 21 (Cal.); B.L.R. Supp: Vol: App: 11 (F.B.).

<sup>3</sup>Heydon, *Cases and Materials on Evidence* (1975) page 383.

<sup>4</sup>*R. v. Blanchard*, (1952) 1 All. E.R. 114.

<sup>5</sup>*R. v. Yeo*, (1951) 1 All. E.R. 864n.

<sup>6</sup>*Director of Public Prosecutions v. Blady*, (1912) 2 K.B. 89, 92.

- (d) The spouse is competent but not compellable in a number of cases provided by statute. These include neglect to maintain or desertion of wife or family, bigamy, most sexual offences, offences against children, national insurance offences and any offence "with reference to" the spouse or committed against the spouse's property.<sup>1</sup>

Provided the accused consents, the wife is competent but not compellable as a witness for the co-accused.<sup>2</sup> The exceptions listed in the preceding paragraph apply here too: when they apply, the wife testifies without the accused's consent being necessary.

**61.12.** The accused's spouse is a competent, but not compellable witness for the accused. However, she is compellable<sup>3</sup> in the cases covered by the Evidence Act, 1877, on charges of violence or injury to the spouse's health or liberty and in treason. The prosecution is prohibited from commenting on the failure of the accused's spouse to testify.<sup>4</sup>

It is obvious from the above discussion that in England, subject to very limited exceptions, the spouse cannot be compelled to be a witness in a criminal case. Even a divorced spouse is incompetent to testify to matters occurring during the marriage as one who has not been divorced.<sup>5</sup>

Of course, we are not suggesting that our law should be altered merely because the English law is different. We are referring to the English cases as a matter of interest. Also, they contain some instructive observations—observations which, perhaps, apply with greater force in Indian conditions.

**61.13.** Let us consider the matter from the point of view of principle. It is no doubt, desirable that all available and relevant evidence which might conduce to a correct judgement should be before the Court. But this consideration has to be balanced against—(i) the undesirability of disturbing marital harmony more than is absolutely necessary, and (ii) the harshness of compelling a spouse to give evidence against the other spouse. The supposed theoretical unity of the spouses, or the likelihood that the spouse will be biased in favour of the accused, may have no place in a legislative determination as to the extent of competence and compellability. But the question of the right balance between the considerations of policy mentioned above is an important one which seems to require serious examination.

Balancing of various considerations.

**61.14.** In this connection, we may refer to the discussion in the judgement of the House of Lords in *Leach v. R.*<sup>7</sup> The precise point in issue in that case related to statutory construction. As competence usually implies compellability, many people thought that section 4(1) of the Criminal Evidence Act of 1898, which made the accused's spouse competent, also made the accused's spouse compellable for the prosecution in the specified cases. The House of Lords, however, decided that this was not so.

We are not concerned with this aspect of the judgment. But let us have a look at the facts relevant to the rationale of the privilege. Leach was charged with incest with his daughter. His wife was called as a witness on behalf of the prosecution. She objected to giving evidence, claiming privilege. After an un-

<sup>1</sup>See Theft Act, 1968, s. 30(3); *R. v. Noble*, (1974) 2 All. E.R. 811; (1974) 1 W.L.R. 894.

<sup>2</sup>Criminal Evidence Act, 1898, section 1(c).

<sup>3</sup>Heydon, Cases and Materials on Evidence (1975), page 383.

<sup>4</sup>Section 1(b) Criminal Evidence Act, 1898.

<sup>5</sup>*R. v. Algar*, (1954) 1 Q.B. 279; (1953) 2 All. E.R. 1381, 1383 (C.C.A.) referring to *Monroe v. Twisleton*, 170 E.R. 250—a case approved again and again.

<sup>6</sup>See *infra*.

<sup>7</sup>*Leach v. R.*, (1912) A.C. 305, 311 (H.L.).

successful appeal to the Court of Criminal Appeal, he (the accused) successfully appealed to the House of Lords. The House held that the general rule that competence implied compellability did not apply in this case.

61.15. The importance attached to conjugal harmony is shown by the Judgement. The following observations of Lord Atkinson are important for our purpose—

“The principle that a wife is not to be compelled to give evidence against her husband is *deep-seated in the common law of this country*,<sup>1</sup> and think if it is to be overturned, it must be overturned by a clear, definite and positive enactment, not by an ambiguous one such as the section relied upon in this case”.

Earl Loreborn L.C. observed in the same case—

“It is very desirable that in a certain class of cases justice *should not be thwarted by the absence of the necessary evidence*,<sup>2</sup> but upon the other hand it is fundamental and old principle to which the law has looked, that you ought not to compel a wife to give evidence against her husband in matters of criminal kind”.<sup>3</sup>

Spouse in criminal case not to be compelled.

61.16. On a careful consideration of the various aspects of the matter, we have come to the conclusion, that the spouse of the accused should not be compellable in a criminal prosecution, except in certain specified cases. We think that the present provision is indefensible in principle. It seems to have been enacted without a serious consideration of the sociological and other aspect of the matter which we have discussed above, and the matter is so important that a maintenance of the *status quo* may cause serious hardship and consequential injustice of a grave character. We find ourselves in entire agreement with the approach of Earl Loreborn L.C.<sup>3</sup>—already quoted.

“It is very desirable that in a certain class of cases justice *should not be thwarted by the absence of the necessary evidence*, but upon the other hand it is fundamental and old principle to which the law has looked, that you ought not to compel a wife to give evidence against her husband in matters of criminal kind.”<sup>1</sup>

To put it in our own words, in the situation under discussion, the considerations of marital confidence are paramount. An important practical consideration to be mentioned is that the spouse, if compelled, will, in general, not speak the truth. So the present position would encourage perjury.

#### IV. RECOMMENDATION

61.17. In the light of the above discussion, we recommend that the following proviso should be inserted below section 120:—

“Provided that the spouse of the accused in a criminal prosecution shall not be compelled to give evidence in such prosecution except to prove the fact of marriage unless—

- (a) such spouse and the accused shall both consent, or
- (b) such spouse is the complainant or is the person at whose instance the first information of the offence was recorded, or
- (c) the accused is charged with an offence against such spouse, a child of the accused or a child of the spouse, or a child to whom the accused or such spouse stands in the position of a parent.”.

<sup>1</sup>Emphasis supplied.

<sup>2</sup>*Leach v. R.*, (1912) A.C. 305 (H.L.).

<sup>3</sup>*Leach v. R.*, (1912) A.C. 305, *supra*.

## PRIVILEGE AND DISABILITY — GENERAL OBSERVATIONS

**62.1.** With section 121 beings a group of sections dealing with privilege or disability in regard to evidence of certain matters. We have already adverted to the distinction between privilege and disability.<sup>1</sup> A privilege can be waived, while a disability cannot be waived. Introductory.

The privileges and disabilities are spread over a number of sections—sections apparently heterogenous in character; but this should not obscure certain fundamental matters which are common to all or most of the sections.

**62.2.** It has traditionally been the position of the law that “the public has a right to every man’s evidence”.<sup>2</sup> Obviously, a contrary rule would render orderly legal procedure both frustrating and futile. The interest of society favours procuring from each person relevant facts in order to resolve the issue being litigated or investigated.<sup>3</sup> Right of public to every man’s evidence.

In England, by the Act of Elizabeth,<sup>4</sup> service of process requiring the person served to testify concerning any cause pending in the court could be had out of any court of record.

As the Supreme Court of the United States has observed<sup>5</sup> there is a long-standing principle that the Grand Jury has a right to every man’s evidence, “except that evidence which is protected by a constitutional, common law or statutory privilege”.

As early as 1612, Lord Bacon declared<sup>6</sup> that “all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery”. Therefore, each citizen owed the unfailing duty to reveal all his knowledge, including its sources. To this general principle, the law creates an exception in public interest, when it grants a privilege.

**62.3.** In law, a privilege is an immunity or exemption conferred by special grant to a certain class or individual in derogation of a common right.<sup>7</sup> Consideration of public policy.

Usually, a privilege or disability is created by law on the ground of some consideration of public policy. The law excludes, or dispense with, some kinds of evidence on grounds of public policy, because it is thought that greater mischiefs would probably result from requiring or permitting their admission, than from granting a privilege or creating a disability. Where privilege is granted, it is based upon a recognition that in appropriate circumstances the public benefits more from protecting the particular relationship than it is injured by the impediments which such privileges may cause to the administration of justice.

<sup>1</sup>See discussion as to sections 118-120, *supra*.

<sup>2</sup>*In re Investigation of World Arrangements with Relation to the Production*, 13 F.R.D. 280, 281 (D.D.C. 1952). See also *United States v. Bryan*, (1950) 339 U.S. 323, 331.

<sup>3</sup>Wigmore, *Evidence*, (3rd ed. 1940); Pol. 8, section 2192 *Blackmer v. United States*, (1932) 283 U.S. 421, 438 (dictum).

<sup>4</sup>(1562) 5 Eliz., c. 9, Section 12.

<sup>5</sup>*Brenzborg v. Haiz*, (1972) 33 Lawyers Edition 2d 626.

<sup>6</sup>*Countess of Shrewsbury's Case* (1613) 12 Cokd 94. See also *Lord Grey's Trial*, (1682) 9 How. St. Tr. 127.

<sup>7</sup>Webster's New World Dictionary (1955) p. 1160.

62.4. By "public policy" in this context, we do not mean some merely political consideration. Public policy embraces considerations of paramount importance—be they political, social or any other—which the law deems it proper to take into account from the point of view of public welfare. To take one example, public interest in the maintenance of domestic harmony is the rationale underlying the privilege of spouses under section 122. Its importance is mainly social. Then, public interest in the maintenance of the security of the State is the foundation of sections 123 and 124.

Privilege necessary for relationship or function

62.5. The privileges recognised by the law of evidence differ in their content, but a certain binding thread seems to connect them. To the explanation given above—public welfare—may be added another element, namely, that most, if not all, of the privileges recognised by the law are needed for the proper functioning of the particular relationship. This relationship may be of various types. It may be domestic—as of husband and wife—or professional—attorney and client—or may be wider—e.g. the government's retention of certain information, or it may consist in a particular character occupied by the person concerned, e.g. the judge privileged under section 121.

But the point to be made is that the law assumes that the proper performance of the function in question, or the proper maintenance of the relationship in question, justifies the grant of an evidentiary privilege in respect of certain matters which are considered essential for that function or relationship. It is on this assumption that the privileges are founded. The assumption may or may not be acceptable to some persons. But that is not a matter with which we are concerned in these introductory remarks. We are, at the moment, concerned only with the common thread which may be discerned as underlying the apparently heterogeneous provisions.

Explanation in California Evidence Code.

62.6. In order to indicate more clearly the common thread underlying the various privileges we may usefully refer to the California Evidence Code,<sup>1</sup> section 910, which makes privileges applicable to "all proceedings". The section has the following Explanatory note which may be helpful for understanding the rationale of the privileges. The note was mainly intended to justify the broad application of the privileges (i.e. its application to administrative tribunals also); but the observations are of interest for our purposes also. The note says—

"Most rules of evidence are designed for use in courts. Generally their purpose is to keep unreliable or prejudicial evidence from being presented to the trier of fact. Privileges are granted, however, for reasons of policy unrelated to the reliability of the information involved. A privilege is granted because it is considered *more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding.*"

The Explanatory note then gives this illustration of what has been said earlier.

"Thus, for example, to protect the attorney-client relationship, it is necessary to prevent disclosure of confidential communications made in the course of that relationship. If confidentiality is to be protected effectively by a privilege, the privilege must be recognised in proceedings other than judicial proceedings. The protection afforded by a privilege would be insufficient if a court were the only place where the privilege could be invoked."

<sup>1</sup>Section 910, California Evidence Code, Explanatory notes.

62.7. In elucidation of the aspect of public policy, we may add that as recently as 1973,<sup>1</sup> the U.S. Supreme Court quoted with approval the dictum of Mr. Justice Reid that there is a public policy involved in the claim of privilege—in that case, the executive privilege. Mr. Justice Reid had also pointed out that where the privilege is recognised in respect of State secrets, the privilege is “granted by customs or statute for the benefit of the public and not of the executives who may happen then to hold office.” These observations had been made by Mr. Justice Reid while sitting in the Court of Claims in an earlier case.<sup>2</sup>

In *Clark v. U.S.A.*,<sup>3</sup> which related to the privilege of secrecy enjoyed by jurors, it was pointed out that the privilege takes as its postulates a “genuine relation, honestly created and honestly maintained”.

62.8. It is clear that every matter raising an issue of privilege involves an examination and balancing of competing interests. Balancing.

“This privilege, as do all evidentiary privileges effected and adjustment between important but competing interests”, so observed Judge Robinson of the Court of Appeals for the District of Columbia.<sup>4</sup>

62.9. Although, in the field of the law of evidence, privileges operate merely as exclusionary rules, they also have a wider importance, namely, that they represent a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the coercive or supervisory powers of the State and from the nuisance of its eves-dropping.<sup>5</sup> Wider importance.

It would be of interest to know that the California Evidence Code, section 911, expressly codifies the rule of law that privileges are not recognised in the absence of statute.

62.10. It should be noted that as the position is now understood, the only legally recognised source of a privilege in relation to the law of evidence is a specific statutory provision or rule of common law which recognises a privilege. The fact that the parties have, as a matter of agreement or of honour, stipulated that certain matters shall not be disclosed, is not in itself enough for a successful claim to privilege in a court of law. The particular situation or relationship must have been regarded by the laws as one conferring such privilege. It is for this reason that even where the circumstances may be such that there can be inferred or implied an obligation to maintain confidence,—as in the case of a doctor and a patient—that obligation cannot, in itself, be put forth as an excuse for claiming protection from disclosure in obedience to a summons of the court for giving evidence. Such an obligation will,—unless an evidentiary privilege is specifically recognised—be a ground only for prohibiting disclosure elsewhere than in a Court of law. Source of privilege.

62.11. The argument that the rules of the employer forbid the disclosure of the name of the informant cannot succeed in a Court. In *People ex rel. Phelps v. Fancher*,<sup>6</sup>—an American case,—a newspaper editor called as a witness before a grand jury refused to disclose the name of the author of an article on the

<sup>1</sup>*Environmental Protection Agency v. Mink*, (1973) 35 Lawyers Edition 2d. 119.

<sup>2</sup>*Kaiser Aluminium & Chemical Corporation v. United States*, (1958) 141 Court of Claims 38.

<sup>3</sup>*Clark v. United States*, (1933) 77 Lawyers Ed. 993.

<sup>4</sup>Judge Robinson cited in *Nixon v. Sirica by remove Wilker*.

<sup>5</sup>Uouisell, “Confidentiality ..... Privileges in Federal Court today” (1956) 31 Tulane L.R. 101, 109, reproduced in Louisell and Others, *Principles of Evidence and Proof* (1972), 467, 468.

<sup>6</sup>*People ex rel. Phelps v. Fancher*, 2 Hun 226, (N. Y. 1874).

ground that to do so would be to violate a regulation of the newspaper. The court held—

“As the law now is, and has for ages existed, no court could possibly hold that a witness could legally refuse to give the name of the author of an alleged libel, for the reason that the rules of a public journal forbade it.”

**62.12.** In England, in some trials in the 17th century, the obligation of honour among gentlemen was argued successfully as sufficient ground for silence.<sup>1</sup> This doctrine, known as “Point of Honour”, was formally abandoned in the *Duchess of Kingston’s*<sup>2</sup> cases involving a trial by the House of Lords for bigamy. Invoking his honour, a witness who was a long-time friend of the accused, refused to disclose whether the Duchess had ever admitted to the first marriage. The judges, after much heated discussion, stated: “It is the judgment of this House that you are bound by law to answer all such questions as shall be put to you”.

One year later, in *Hill’s trial*,<sup>3</sup> the doctrine was further repudiated when the court said:

“If this point of honour was to be so sacred as that a man who comes by knowledge of this sort from an offender was not to be at liberty to disclose it, the most atrocious criminals would every day escape punishment; and, therefore, it is that the wisdom of the law knows nothing of that point of honour.”.

Privilege  
the Act.

under

**62.13.** Reverting to our Act, the matters which, under the Act, are privileged from disclosure are—

- (1) matters relating to conduct of judges or coming to the knowledge of judges etc. in their judicial capacity (section 121);
- (2) communications which are made to spouse during marriage (s. 122);
- (3) State secrets (sections 123-124);
- (4) communications between a legal adviser and a client (section 126 and 129);
- (5) certain title deeds (sections 129, 131); and
- (6) certain incriminating matters (s. 132).

After these introductory remarks, the sections proper can be considered.

<sup>1</sup>H. J. Wigmore, 8 Evidence, section 2286 at 537, n. 13 (3rd ed. 1940).

<sup>2</sup>*Duchess of Kingston* (1776) 20 How. St. Tr. 586 (1776), *Notable British Trials Series* (Melville ed. 1927) p. 256.

<sup>3</sup>*Hill’s Trial*, (1771) 20 How. St. Tr. 1318, 1362.



## JUDICIAL PRIVILEGE

**63.1.** Certain special provisions are needed in relation to Judges and Magistrates, if embarrassment is to be avoided to them, and if they are to discharge their functions properly. Indian Statute law has a number of provisions recognising the special status of judicial officers, and special provisions exist in the substantive civil<sup>1</sup> and criminal law,<sup>2</sup> and also in the law of procedure,<sup>3</sup> in regard to Judges and persons similarly situated. In the field of the law of evidence, the matter is taken care of by section 121, which provides that no Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions 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.

We shall deal with the illustrations to the section later.

**63.2.** The broad principle underlying this section is that a matter of which Principle. the Judge took cognizance *in his judicial capacity*, shall not be raised in evidence if the Judge objects, unless the superior court grants permission for the purpose. This does not, of course, debar examination of the Judge in regard to other matters which occurred in his presence whilst he was acting as a Judge. The section applies to Magistrates also; but, for brevity's sake, this discussion will refer only to judges.

**63.3.** There are three illustrations to the section. Illustration (a) applies to a Magistrate. A, on his trial before the Court of Sessions, 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.

Illustration (b) also refers to a Magistrate. 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.

In both these cases, the matters in question came to the knowledge of the Magistrate in his official capacity and the matters were, so to say, directly connected with that capacity. Hence the privilege applies.

Illustration (c) relates to a Session Judge. A is accused before the Court of Session of the offence of attempting to murder a police officer whilst on his trial before B, a Session Judge. B may be examined as to what occurred.

Thus, with regard to matters not coming to his knowledge, *in Court as Judge*, a Judge is as competent and compellable a witness any other person.<sup>4</sup> The illustration brings out the difference between judicial conduct and cognizance on the one hand and other matters. The fact that a judicial proceeding was the occasion when the act or event occurred confers no privilege. There must be an integral connection between the Act or event and the judicial capacity.

<sup>1</sup>The Judicial Officers' Protection Act, 1855.

<sup>2</sup>Sections 76 to 79, Indian Penal Code.

<sup>3</sup>Section 197, Code of Criminal Procedure, 1973.

<sup>4</sup>Stephen Digest Article 111 and Note XLII.

63.4. The section is generally stated to be based on the general grounds of convenience<sup>1</sup> (e.g. the inconvenience of withdrawing a Judge from his own Court, and public policy.<sup>2</sup> But it is possible to seek its justification in a deeper rationale—that of judicial independence at least in so far as it protects conduct. If the conduct of a judge or magistrate is to be investigated—even by way of evidence,—some safeguards are needed.

English law.

63.5. There is a substantially similar privilege in England, though the law on the subject is not codified. A Judge of the Supreme Court may refuse to give evidence as to judicial proceedings which have taken place before him.<sup>3</sup>

Meaning of 'Judge'

63.6. The expression 'Judge' is not defined in the section, but we can take it as broadly having the same<sup>4</sup> meaning as in Indian Penal Code.

Whether Judge can be a witness.

63.7. Commentaries on the Act often discuss the question whether a Judge can be a witness in the very sense under trial. In our view, there can be only answer to the question, namely, he cannot be a witness. It is somewhat unfortunate that the question is discussed at length, with a citation of much irrelevant case law. We believe that the position was correctly stated by Markby J. in a Calcutta case reported in 1875—*Empress v. Donnelly*.<sup>5</sup>

63.8. No ruling of importance has been reported since then, that would detract from the soundness of his exposition of the law or throw any doubt on it. In *Empress v. Donnelly*, Markby J., observed: "As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to resolve itself into this: "*Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence?*"

"It has been strongly contended on the part of the Crown that he is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. No instance of this kind has, however, been found, and no authority of any Judge or text-writer has been cited in support of such a proposition."

Later on, in the judgment, Markby J. observed:—

"The Appeal Court would deal with the evidence including that of the Judge. But in my opinion the evidence of the Judge, being practically incapable of challenge or contradiction, ought not to be even taken. Moreover, a Court of appeal is not a check in the same way that Judges sitting together are a check upon each other. I am, therefore, of opinion that a Judge who is a sole Judge of law and fact cannot file his own evidence and then proceed to a decision of the case in which that evidence was given."

63.9. Prinsep, J., in the same case considered the authorities quoted by Mr. Justice Norman in one of the earlier cases—(also quoted by Markby J.) as 'conclusive', that one, who is sitting as a Judge, is not competent also to be a witness."

<sup>1</sup>See—

(a) *R. v. Cazard*, (1838) 8 C. & P. 595; Halsbury, 3rd Ed., Vol. 15, page 420, para 756, footnote (c).

(b) *Buccloough v. Metropolitan Board of Works*, (1815) L.R. 5 H.S. 418, 433.

(c) *R. v. Lord Thanet*, 27 St. Tr. 836.

<sup>2</sup>For the law before the Act, see *Ramaswami v. Ramu*, (1867) 3 Mad. H.C.R. 372.

<sup>3</sup>Halsbury, 3rd Ed., Vol. 15, page 420, para 754.

<sup>4</sup>Section 19, I.P.E.

<sup>5</sup>*Empress v. Donnelly*, (1875) I.L.R. 2 Cal. 405, 413, 414, (per Markby J., with Prinsep J., agreeing).

We have no further comments on the section.

We would like to mention that in the United States, an unusual occasion for ascertaining the privilege of the Judges as to confidentiality arose<sup>1</sup> recently. It arose in the very important case involving the validity of right of way and permits granted by the Department of Interior for the construction of the trans-Alaska Pipeline extending to 789 miles and costing \$3½ billion. While the case was under consideration before the Court of Appeal, a United States Senator wired the Chief Judge of the Court, requesting him to give information to the Senator as to certain judges who were supposed to have disqualified themselves. The Senator wished to know their identity and reasons for disqualification. In the reply for the Court of Appeal for the District of Columbia by the Chief Judge Bazelon, that court exercised its privilege to protect the confidentiality of its deliberations stating as follows:—

“In re your telegram of February 5, 1973 inquiring as to whether I or more judges have disqualified themselves in the trans-Atlantic (sic) pipeline cases currently under advisement and in which you request their identities and reasons if this is the case. The opinion, when issued, will reveal the names of the judges who have participated therein. With great respect, we believe that further reply to your inquiry would not be appropriate with cordial wishes”.

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<sup>1</sup>Leon Friedman, U.S. v. Nixon, (1975) page 77.

## MARITAL PRIVILEGES—SECTION 122

## I. INTRODUCTORY

We now come to an important section dealing with what may be conveniently called "marital privilege".

**64.1.** In India, as the law now stands, the spouses are compellable witnesses against each other.<sup>1</sup> But, even in the existing law, there is a special provision relating to the disclosure of communications made during marriage. In general, when the course of justice requires the investigation of truth, no man has any knowledge that is rightly private. But specific considerations of public policy may demand that certain matters should be kept private. Of those matters, one example is furnished by section 122, which deals with certain communications made to a spouse during marriage.

**64.2.** By this section, which consists of two parts, there is created a privilege and there is also created a disability. The first part of the section, which creates the privilege, provides that 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 or she has been married.

**64.3.** The second part of the section, creating the disability, provides that such person shall not be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except (i) in suits between married persons, or (ii) in proceedings in which one married person is prosecuted for any crime committed against the other.

**64.4.** There is a semi-colon separating the two parts of the section and this seems to suggest the construction that so much of the matter contained in the latter-half of the section as begins with the words "unless the person....." and ends with the section, is not intended to govern the first-half. In other words, the exception created in the second half for the case where a person consents or where the proceedings are between married persons etc. is not to control the first half of the section.

**64.5.** On the merits also, this appears to be the right approach. If a spouse in the witness-box is asked about a communication made during marriage, then, even if the other spouse consents or the proceedings are between married persons etc., there is still a reason why disclosure should not be compelled. The spouse in the witness box may find it embarrassing. The other spouse may have lost an interest in the marriage relationship—say, temporarily—but the testifying spouse may still have such interest. It would not, therefore, be proper to compel him or her to disclose the communication if he or she is, unwilling to do so.

**64.6.** Under the section, then, a person cannot be *compelled* to disclose communications made during marriage by his spouse. Without the consent of the spouse he is not even *permitted* to do so (except in certain cases).

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<sup>1</sup>Section 121.

## II. RATIONALE

64.7. Let us examine the rationale of the section. Traditionally,<sup>1</sup> the law of evidence has demonstrated a degree of solicitude towards the sanctity of marriage—a solicitude not manifested with regard to other protected relationships. In England, until the late nineteenth century, the privilege for confidential communications between spouses was not separated from the broader principle that neither husband nor wife was competent to testify to any facts against the other. In some jurisdictions in the U.S.A. even the modern rule is not confined to a privilege for confidential statements. It rather prevents the spouse from testifying to any information gained on account of the marital relation.<sup>2</sup> Rationale.

64.8. We need not, for the present purpose, go into the controversy whether there was in England a *separate privilege* of confidentiality.<sup>3</sup> This privilege came to be recognised by statute in England. By and large, in most States in the U.S.A. also, whether or not they recognise the testimonial immunity of a spouse, the privilege not to disclose marital communications is recognised. We shall discuss the comparative position later in due course.<sup>4</sup>

64.9. As to the prohibition enacted by section 122, Jenkins C.J., in a Calcutta case,<sup>5</sup> observed that the prohibition is founded on a "principle of high import" which no court is entitled to relax. In that case, one H and others had committed a murder. A few days after the murder, H committed suicide. While he was alive, H made certain statements to J, his wife, implicating certain persons in the murder. It was held that J. could not disclose those communications under section 122. The same principle applies to a confession made by a husband to his wife.<sup>6</sup>

Best C. J. (later Lord Wyndford) in *Doker v. Halser*<sup>7</sup> (where the other spouse was dead), explained the rationale in these terms:

"..... I think that the happiness of the marriage state requires that the confidence between man and his wife should be kept for ever inviolable."

64.10. Similar views were expressed in England by the Commission on Common Law Procedure, in their second Report,<sup>8</sup> submitted in 1853. The Commission observed —

"So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosure of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss light which such revelations might throw on the questions in dispute..... hence all communications between them should be held privileged."

The signatories to the report are Lord Jervis, C.J., Martin, B., Lord Cockburn, C.J., Lord Bramwell and Willes, JJ.

<sup>1</sup>See *Stapleton v. Crofts*, (1852) 18 Q.B. 367.

<sup>2</sup>See e.g., *State v. Robbins*, (1950) 35 Wash. 2d, 289, 213, p. 2d 310, cited in Note in 77 Harvard Law Rev. at page 734.

<sup>3</sup>This is discussed *infra*.

<sup>4</sup>See discussion as to English statutory law and law in the U.S.A., *infra*.

<sup>5</sup>*Nawab Hilawdar v. Emperor*, (1913) I.L.R. 40 Cal. 891.

<sup>6</sup>*Fatima v. Emperor*, A.I.R. 1914 Lah. 380.

<sup>7</sup>*Doker v. Halser*, (1824) 171 E.M. 992.

<sup>8</sup>Commission on Common Law Procedure, 2nd Report (1853), page 13, cited in *Shenton v. Tyler*, (1939) 1 All. E.R. 827.

64.11. The provisions of the section, it is unnecessary to say, are not based on any theory of the *legal unity* of the spouses. The section is based on the abiding communion between husband and wife, which is of such a nature that their mutual communications are not always to be regarded on the same footing as communications between persons who have no such intimate tie.

Greenleaf<sup>1</sup>, in a very striking sentence, said that the rule is that nothing shall be extracted from the bosom of the wife which was confided there by the husband.

### III. SCOPE

A few aspects of the scope of the section may be briefly referred to.

64.12. In the first place, it is necessary that the communication must be made during marriage. The privilege does not cover communications before marriage.

64.13. Secondly, on the other hand, the privilege survives the marriage, as is clear from the words "or has been married", which occur in the section.<sup>2</sup> The communication must be made during marriage. But the disclosure thereof remains privileged even after the termination of the marriage. "Miserable indeed", said Lord Alvanley,<sup>3</sup> "would be the condition of a husband if, when the woman is divorced from him, perhaps for her own misconduct, all the occurrences are to be laid at large".

64.14. Thirdly, once the relationship of marriage is established and it is proved that the communications were made during marriage, the privilege applies irrespective of the subject matter of the communication and the nature of the proceedings. For example, the decisions in England show almost no trace of any exception for crime. One of the earliest<sup>4</sup> English cases clearly to recognise a marital privilege involved a wife's request to her husband to commit forgery.

Fourthly, it is not necessary that the spouse claiming the privilege, or the other spouse, must be a party to the proceedings.

### IV. LIMITATIONS—THIRD PERSON NOT PRIVILEGED

64.15. The above points bring out the scope of the section. Attention must now be drawn to an important limitation provided in the section. The section does not prevent the communication from being proved by the evidence of a *third person*. Thus, for example, a letter written by the accused to his wife and found in the search of her house has been held to be admissible, notwithstanding the terms of this section. The result is that a document in the hands of a third party, even though it contains communications between spouses, is admissible in evidence given by the third party<sup>5</sup>.

Position in England before 1968.

64.15A. In England, it had been held before 1968,<sup>6</sup> that a third person can give evidence of a conversation which he has heard between a husband and wife'. We shall later offer our comments on this limitation.<sup>7</sup>

<sup>1</sup>Greenleaf, Evidence (7th Ed.), Vol. 1, paragraph 254, quoted by Woodroffe (1941), page 930.

<sup>2</sup>*M. C. Verghese v. T. J. Poonam*, A.I.R. 1970. S.C. 1876 (on appeal from A.I.R. 1967, 228).

<sup>3</sup>*Cf. Monroe v. Twistleton*, (1802) 170 E.R. 256 (Divorced woman).

<sup>4</sup>*Lady Ivy's Trial*, (1784) 10 Now. St. Tr. 555, 628.

<sup>5</sup>*Queen Empress v. Dopoghue*, (1899) 1 L.R. 22 Mad. 13.

<sup>6</sup>Halsbury, 3rd Edition, page 422, para 758, footnote (a), and the cases cited there.

<sup>7</sup>As to the English position in this respect after 1968, see below.

<sup>8</sup>See *infra*.

## V. PRIVILEGE DISTINCT FROM TESTIMONIAL IMMUNITY

**64.16.** The privilege in regard to marital communications is distinct from any immunity that may be recognised by a particular legal system regarding testimonial compulsion against a spouse. The two may overlap, but one could conceive of cases where, while there is no testimonial immunity, yet there is a reason for claiming the privilege in relation to the marital communications. The privilege is confined to the mutual communications of the spouses. The immunity applies to their very act of giving testimony against the spouse. Wigmore on Evidence<sup>1</sup> gives the history of the privilege, in a passage which, while expounding the rationale of the privilege, also discusses the distinction between privilege and incompetence.

"The privilege for communications between husband and wife is apparently, in time of origin, the second of such privileges to be enforced at common law, and yet the last to be definitely recognised and distinguished. In the second half of the 1600s an instance of its application is found; and yet the explicit statement of the privilege, as a distinct one from any other rule, did not come in England until the statutory reforms of the Common law procedure Act, just as the second half of the 1800s was beginning. The explanation of the paradox is that until that time the present privilege for communications between husband and wife had not been plainly separated from the other privileges of husband and wife not to testify to "any facts against the other. This latter privilege was fully established by the end of the 1600s. But among the various reasons advanced for its support was the policy of protecting domestic confidence by prohibiting their mutual disclosures. In other words, the true policy of the present privilege was perceived, and yet it was not enforced in the shape of any rule distinct from the old-established privilege of each one to testify against the other as a party or interested in the suit. That the two are distinct is plain; for the privilege not to testify against the other is order in the respect that it excludes testimony to any adverse facts even though they have been learnt wholly apart from marital confidence, and is narrower in the respect that it applies only to testimony in its tenor and adverse to a party to the cause or to one in an equivalent position."

## VI. ENGLISH LAW — THE STATUTORY PROVISIONS

**64.17.** The position under the present statutory provisions in England may now be stated. First, as to criminal cases, section 1(d) of the Criminal Evidence Act, 1898, provides as follows:—<sup>2</sup>

"No husband shall be compelled to disclose any communication made to him by his wife during the marriage, and no wife shall be compelled to disclose any communication made to her by her husband during the marriage."

**64.18.** There was an identical provision in section 3 of the Evidence (Amendment) Act, 1863, applicable to all proceedings. But, as to civil proceedings, this was repealed by the Civil Evidence Act, 1968.<sup>3</sup>

**64.19.** Section 16(3) of the Act of 1968 is as follows:

"16. (3) Section 3 of the Evidence (Amendment) Act, 1853 (which provides that a husband or wife shall not be compellable to disclose any communication made to him or her by his or her spouse during the marriage) shall cease to have effect except in relation to criminal proceedings."

English Act of  
1968.

<sup>1</sup>Wigmore, (1901-1905), Vol. 4 pages 3257-3258 cited in *Shelton v. Tyler*, (1939) 1 All. E.R. 827, 838.

<sup>2</sup>For history of the section, see *Rumong v. D.P.P.* (1968) 3 All. E.R. 256.

<sup>3</sup>Sections 16(3) and 18(5), Civil Evidence Act, 1968, (Engl.).

**64.20.** It should be noted, however, that the discretion of the Court is saved under section 18(5)—

“18(5). Nothing in this Act shall prejudice—

- (a) any power of a court, in any legal proceedings, to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion; or
- (b) the operation of any agreement (whenever made) between the parties to any legal proceedings as to the evidence which is to be admissible (whether generally or for any particular purpose) in those proceedings.”

Position in England.

**64.21.** The present position in England<sup>1</sup> is that in a criminal case “no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.”<sup>2</sup>

In civil cases there is no privilege but there is a discretion vested in the Court.

## VII. ENGLISH COMMON LAW

**64.22.** We have so far dealt with the statutory provisions in England. The question whether, apart from statutes, there was a privilege at common law, may now be discussed briefly.

**64.23.** It was believed to be an old rule of the common law<sup>3</sup> that any communications between husband and wife during coverture were inviolable.<sup>4</sup> The rule was not even limited to communications of a strictly confidential nature, and it applied even after the death of one party to the marriage<sup>5</sup> or after the dissolution of the marriage.<sup>6</sup>

Communications during marriage.

**64.24.** A controversy, however, arose in 1939 on the question. In *Shanton v. Tyler*,<sup>7</sup> Simonds J., in the trial court, had held that a widow need not disclose communications between her and her late husband. His decision, which followed a few earlier cases, was based on the view that at common law such communications were privileged, and that section 2 of the Evidence Amendment Act, 1853, did not, in any way, modify that rule.

**64.25.** In the Court of Appeal, however, Sir Wilfrid Greene, M. R., in his judgment, distinguishing between “competence” and “privilege” in the rules of evidence, held that there was no common law rule of privilege protecting marital communications as such, as distinct from the general testimonial incompetence of the spouses. Because the wife was immune from testifying against her spouse, the need for privilege was not felt. But Greene, M. R., emphasised that there was no privilege in addition to the immunity of a spouse.

**64.26.** It would appear that before 1853, because of testimonial incompetence, the question could not arise in England in the form of a privilege. The decisions before 1853 were concerned with the incompetence of spouses to give evidence for or against the other. This was the view of Greene, M.R.

<sup>1</sup>See “English Law”, *infra*.

<sup>2</sup>Section 1(d), Criminal Evidence Act, 1898, (*supra*).

<sup>3</sup>(1938) 86 L.J. 359.

<sup>4</sup>*O’Conner v. Marjori Banks*, (1842) 6 Jur. 609.

<sup>5</sup>*Doker v. Rasler*, (1824) Ry. & M. 198; 171 E.R. 992.

<sup>6</sup>*Monroe v. Twisleton*, (1802) 170 E.R. 250.

<sup>7</sup>*Shanton v. Tyler*, (1939) 1 All E.R. 827 (C.A.)



**64.27.** In 1853, the privilege did find its way to the state book. The rule was recommended by the Second Report of the Common Law Commissioners of 1853, which recommended that "all communications *between them* (husbands and wives) should be held to be privileged," and it was enacted as the Evidence Act, 1853, section 3. That section provided that "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

**64.28.** The decision of the Court<sup>1</sup> of Appeal did not escape criticism. In the case cited above, the Court of Appeal construed those words to mean that the privilege given by the section is not to continue after the marriage has come to an end. On this judgment of the Court of Appeal, the Law Journal wrote:<sup>2</sup> "Although this may, in the present case, be a proper result, we do not feel that as a general principle it is altogether a satisfactory one, and we doubt whether it can have been the intention of the Legislature."

**64.29.** Even after this decision, the matter proved to be controversial. The late Sir William Holdsworth wrote in the Law Quarterly Review<sup>3</sup> a note strongly criticising the judgment of the Court of Appeal on historical grounds.

**64.30.** The controversy again made itself manifest in 1962. In *Rumping v. Director of Public Prosecutions*,<sup>4</sup> the House of Lords gave detailed consideration to the rules relating to the admissibility of communications between husband and wife. The appellant, Rumping, had been convicted of the murder of a young woman. Part of the evidence against him admitted at his trial was a letter written by him to his wife shortly after the killing, which virtually amounted to a confession by him to her of the murder. The letter was never, in fact, received by his wife, as he had entrusted the delivery of it to a friend who, after Rumping's arrest handed the letter unopened to the police. Rumping appealed against his conviction on the ground that the letter should not have been admitted in evidence against him.

Communication  
between husband  
and wife inter-  
cepted by stranger  
— Admissibility.

**64.31.** For the appellant, Rumping, it was argued that there was a broad *common law rule*, quite apart from statute, which rendered inadmissible all communications between husband and wife intended to be confidential. The Court of Criminal Appeal rejected the appeal on the narrow ground that even if there existed the broad common law rule contended for, there was no justification for regarding the rule as applicable to an intended communication which never reached the spouse for whom it was intended and which could be proved by a witness other than that spouse. Rumping appealed to the House of Lords.<sup>5</sup>

**64.32.** The House of Lords rejected the appeal (Viscount Radcliffe dissenting), on the broad ground that except for certain statutory provisions there was no rule of law nor any requirement of public policy which prevented the admission in evidence of communications between husband and wife.

**64.33.** In this dissenting opinion, Viscount Radcliffe made an examination of certain early authorities and deduced that it was a fundamental policy of the common law, — although nowhere made explicit, — to treat all communications between spouses during coverture as sacrosanct, in the sense that they could

<sup>1</sup>*Shanton v. Tyler*, *supra*.

<sup>2</sup>87 L.J. 173.

<sup>3</sup>Holdsworth in 56 L.Q.R. 137.

<sup>4</sup>*Rumping v. Director of Public Prosecutions*, (1962) 3 W.L.R. 763.

<sup>5</sup>See note in (1963) 30 Australian Law Journal 459.

not be the subject of disclosure in court. In his view, the policy was not "confined merely to securing that the spouses themselves do not become the agents of disclosure by appearing as witnesses", but "goes further and for reasons of public policy protects the marital *confidence as such*, in whatever form it is sought to expose them as material for evidence".

64.34. We shall have occasion to refer again to Viscount Radcliffe's speech. For the present, it is enough to state that while scholars and others in England are not agreed on the question of the separate existence of the privilege at common law, the matter is now regulated beyond doubt by a statutory provision.<sup>1</sup>

#### VIII. LAW IN U.S.A.

64.35. The marital privilege has received full recognition in the U.S.A. The marital privilege, it is stated, is two-fold: testimonial privilege and confidential communication. The testimonial privilege is the privilege *not to testify against a spouse*. It lasts only as long as the marriage exists. It would include matters occurring even before the marriage. The testimonial privilege is held by the spouse against whom testimony is sought, as well as by the spouse whose testimony is sought.

64.36. Confidential communication is the other aspect. It is regarded in that country as similar to the attorney-client relationship. Although it does not exist until there is a marriage — and therefore cannot relate to pre-marriage communications — the privilege attaching to marital communications is said to last for ever.

Although the position is not exactly uniform in all States in the U.S.A., the above statement represents the law in an overwhelmingly large number of States.

Sherwood J. observed<sup>2</sup>—

"It is necessary to preserve family peace and maintain that full confidence which ought to subsist between husband and wife."

In the eloquent language of Taylor, C.J.<sup>3</sup>—

"Society has a deeply-rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status. Therefore, the law places the ban of its prohibition "upon any breach of the confidence between husband and wife by declaring all confidential communications between them to be incompetent matter for either of them to expose as witnesses."

New Jersey Rule. 64.37. The following provision<sup>4</sup> in the New Jersey Rules of Evidence (1972) is a sample of the provision contained or recognised in most States:—

#### "Rule 28. MARITAL PRIVILEGE—CONFIDENTIAL COMMUNICATIONS

No person shall disclose any communication made *in confidence between such person and his or her spouse* unless both shall consent to the disclosure or unless the communication is relevant to an issue in an action between them

<sup>1</sup>See, "Statutory provision in England", *supra*.

<sup>2</sup>Sherwood, J., in *Pringle v. Pringle*, 59 Pa. 281, 288.

<sup>3</sup>*Mercer v. State*, 40 Fla. 216, 226, 24 So. 154 74 Am. St. Rep. 135.

<sup>4</sup>Rule 28, New Jersey Rules of Evidence (1972).

or in a criminal action or proceeding coming within Rule 23(2). When a spouse is incompetent or deceased, consent to the disclosure may be given for such spouse by the guardian, executor or administrator. The requirement for consent shall not terminate with divorce or separation. A communication between spouses while living separate and apart under a divorce from bed and board shall not be a privileged communication".

64.38. Although the expression used is "in confidence" or "confidential", the general understanding in the United States in relation to that expression is that 'all communications made during marriage' are confidential unless the circumstances show that they were not intended to be so.

Another rule in the same State (Rule 23(2)) precludes a spouse of the accused in a criminal proceeding from testifying except in certain enumerated cases.

#### IX. NEED FOR AMENDMENT

64.39. It is now time to discuss a few points which require consideration with reference to the section. The marital privilege under the section does not apply in proceedings between the spouses or proceedings in which one married person is prosecuted for any crime committed against the other. This exception is expressly enacted in the section. There is however, no exception in respect of proceedings where a *child* of the marriage is concerned. Welfare of the child is a consideration that has assumed importance in modern legal thought, and it would not be improper if an exception is made for proceedings in which a child of the marriage is concerned. It could usefully cover children who, though not born of the marriage, are children of one of the spouses.

Proceedings involving offences against children.

64.40. By way of illustration, we may cite an American case discussed a few years ago in the Boston University Law Review,<sup>1</sup> where the defendant was convicted of mistreatment of his five-month old infant. The defendant's wife voluntarily testified against her husband, and the testimony was admitted over the defendant's objection. The Missouri Statute (which was the one at issue in the case) reads: "No person shall be incompetent to testify as a witness in a criminal cause or prosecution by reason of being the husband or wife of the accused.....provided.....no.....wife or husband shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf.....; provided, that in no such case shall husband and wife when testifying be permitted to disclose confidential communications..... in the relation of such husband and wife".

64.41. The court held that it was a recognised common law rule that the wife may testify against her husband if the injury was to the wife. The child was regarded as *an extension of the wife's personality* and, therefore, the wife could testify. The statute, it was observed, was not created for the purpose of creating new disabilities, and the common law exception remained.<sup>2</sup>

64.42. It is desirable to make the position clear, in India also. The present exception is based on the principle that where the interests of the two parties are not identical but conflicting, disclosure should be allowed. The same principle should be applied to proceedings where the interests of the child are concerned; for, in such proceedings between spouses, the interests of the parties are not identical.

<sup>1</sup>(1958) 38 Boston University Law Review, "Case and Comment", page 156.

<sup>2</sup>*State v. Kollanborn*, (1957) 304 S. W. 2nd 855, cited in "Cases and Comment" (1958) 38 Boston University Law Review 158.

**Recommendation.**

**64.43.** Attention may be drawn, in this connection, to a provision suggested in the Model Code of Evidence,<sup>1</sup> Rule 216, which (so far as is relevant) provides that neither spouse has a privilege in a case relating to a crime against the person or property of the other or of a *child* or either or desertion of the other or of a *child* of either.

We recommend that a suitable amendment should be made in section 122 on the point discussed above.

Amendment re-  
commended re-  
garding commu-  
nications made by  
testifying spouses.

**64.44.** At present, section 122 does not cover communications made by the *testifying spouses*. An important question for consideration is whether this position is satisfactory. The present section may lead to anomaly. For example, if the husband is called as a witness, he can be forced to make a disclosure of communication made *by him*, though not of communications made *to him*. After this, the wife may be called and she, in her turn, could be forced to disclose communications made *by her*. But this process, the entire episode or the whole *complex* of communications could be reconstructed, at least to the extent to which such reconstruction is possible by fragmentary disclosures. We are not having in mind, at present cases where the spouse is made to testify against the accused — that situation may not cause this particular anomaly, because the accused is not compellable to appear as a witness.<sup>2</sup> But the point to be made is that the present position might virtually render the privilege futile. It is apparently for this reason that the formulation of the privilege in some of the American States<sup>3</sup> phrases the privilege in terms of “communications made.....between such persons and his or her spouse”. The Model Code of Evidence framed by the American Law Institute<sup>4</sup> has the following suggested Rules relating to this aspect of marital privileges:—

“Rule 215. MARITAL PRIVILEGE: CONFIDENTIAL COMMUNICATIONS BETWEEN SPOUSES.

Subject to Rules 216, 217, 218 and 231, a person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that—

- (a) the communication was a confidential communication between spouses, and
- (b) the witness was at the time of the communication of the spouses or is the duly appointed, qualified and acting guardian of his person, and
- (c) the claimant is the holder of the privilege, or a person authorised to claim privilege for him.”

The Uniform Rules of Evidence<sup>5</sup> contain similar provisions.

We are of the view that for the reasons given above, the privilege should cover communications whether made by or to a testifying spouse (or ex spouse) during *marriage*.

Recommendation  
to exclude inter-  
cepted or over-  
heard communi-  
cations.

**64.45.** There is yet another point on which the section seems to need amendment. We have stated<sup>6</sup> above that a third person, as the law now stands, can give evidence of a conversation he has heard or intercepted between a husband

<sup>1</sup>Model Code of Evidence (American Law Institute, 1942), page 155, Rule 216.

<sup>2</sup>See discussion as to section 120.

<sup>3</sup>Rules of Evidence, New Jersey, Rule 28, quoted *supra*.

<sup>4</sup>Rule 215 of the Model Code of Evidence.

<sup>5</sup>Rules 22(2) and 28(2), Uniform Rules of Evidence.

<sup>6</sup>See *supra* Limitations — third person not privilege.

and wife. This may be a correct construction of the statutory provision, narrowly worded as it is. But, since the primary object of marital privilege is to protect peaceful marriage life, so that spouse can make any communication to the other without hesitation and reservation, *it sounds reasonable to extend the provision to communications overheard or intercepted by others also.* We commend that the section should be so amended.

64.46. In this connection, we would like to refer to Viscount Radcliffe's dissenting speech in *Rumping's case*.<sup>1</sup> His observations were as follows:--

"Ought the law to apply a different rule merely because the letter has miscarried and has come into the hands of the police? Considering the history and the nature of the principle that lies behind the special rules governing testimony of husband and wife in criminal trials, I do not think that it should. If it does, we must recognise the implications that, personally, I find overwhelmingly distasteful. A husband may gasp or mutter to his wife some agonised self-incrimination, intended for no ear in the world but hers: yet the law will receive and proceed upon the evidence of the successful eavesdropper, professional, amateur or accidental. It is free, I suppose, to entertain the testimony of the listening device, if properly proved. An incriminating letter may be intercepted by any means: it may be snatched from the wife's hand after receipt, taken into custody if she has mislaid it accidentally, withdrawn from her possession by one means or another: in all these cases, it is said the trophy may be carried into court by the prosecution and proof given that the prisoner is its author, the law has no rule that excludes it from weighing against him as a confession.

"I do not, for a moment, suppose, of course, that any of your Lordships is indifferent to these implications or that by this decision you desire to countenance them. But the only alternative to admitting them is to rely, as the learned Solicitor-General did in argument, upon the exercise of an inherent discretion in the judge who presides at the trial to exclude which he regards as unfairly prejudicial to the accused. Certainly, there is much discretion, and there are, for instance, judges' rules. But I cannot agree that a matter of this sort is a proper subject for so vague and uncontrollable a thing as judicial discretion. By what considerations is it to be guided? It is assumed that the evidence, if admitted, will be materially prejudicial to the prisoner. Is the guiding principle then to be some general conception as to what is fair and what unacceptably unfair in methods of police or amateur detection? I cannot think that the law should leave the prisoner's fate to be determined by discretion. After all, policemen have their duty to detect and bring home a crime; and in this very case, it must be remembered, the trial judge admitted the evidence of the letter despite the fact that the man's fellow seamen had betrayed his trust to post it to the wife and, though ignorant of the contents, had handed the closed packet to the ship's captain.

No doubt, society has an interest in the successful detection and prosecution of crime, but it is axiomatic that it postpones that interest to such considerations as the indecy of listening to evidence obtained by torture or intimidation, or improper inducement. The only question here is whether or not listening to the confidential communications passing between husband and wife should be included among those considerations."

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<sup>1</sup>*Rumping v. D.P.P.*, (1962) 3 W.L.R. 763, 782-783.

## X. RECOMMENDATION

**Recommendation.** **64.47.** In the light of the above discussion, we recommend that section 122 should be revised as follows:—

122. (1) No person who is or has been married, shall be compelled to disclose any communication made.....during marriage *between him* and any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person *to whom he is or has been married* or his representative in interest, consents or unless the proceedings are of the nature specified in sub-section (3).

(2) No one who has overheard or intercepted or has acquired possession otherwise than by the consent of both the spouses any communication made during marriage between spouses and no one who is in possession of a communication so intercepted, shall be permitted to disclose any such communication unless both the spouses or their representatives in interest consent or unless the proceedings are of the nature specified in sub-section (3).

“(3) The proceedings referred to in sub-sections (1) and (2) are—

- (a) proceedings between married persons;
- (b) proceedings in which one married person is prosecuted for any offence committed against the other;
- (c) proceedings in which one married person is prosecuted for any offence committed against a child of the other person or a child of the first mentioned person or a child to whom either of them stands in the position of a parent; and
- (d) proceedings in which one married person is the complainant or is person to whose instance the first information of the offence was recorded, and the other married person is the accused”.

## STATE PRIVILEGE—SECTION 123

## I. INTRODUCTORY

**65.1.** An important point of public law arises out of the next section—section 123 — which now requires to be considered. It pertains to public law in its procedural aspect.

Although the citizen may sue public bodies and the Government, it does not necessarily follow that the law and procedure applied by the courts will be the same as is applied in litigation between private citizens. Apart from substantive rules, special procedural advantages and protections are enjoyed by the State, of which one may now be considered.

In the law of evidence — as is shown by our discussion of the preceding sections — there are many situations where a party to litigation or other person may claim a privilege and thereby resist the production of a document or the giving of oral evidence on a particular subject. Apart from privilege enjoyed by private persons, the State has the right to withhold a document, or evidence, on the ground that the disclosure will be prejudicial to the public interest. This privilege is dealt with in section 123, which prohibits the giving of evidence derived from unpublished official records relating to affairs of State except with the permission of the head of the Department.

**65.2.** Strictly speaking, this is not a privilege which can be claimed by the State only, because it is not confined to litigation to which the State is a party; no witness can give evidence of matters privileged under this rule. "State privilege" is, therefore, only an expression used for the sake of convenience. However, the expression is correct in so far as the privilege can be waived by the State.

The use of the expression "privilege" itself has been criticised. But it has been established by usage, and this question of terminology need not detain us.

The law on the subject is stated in section 123 thus:

"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.*"

Connected with this section is the provision in section 162, under which a witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided by the Court.

That section further provides that the Court, if it seems fit, may inspect the document, *unless it refers to matters of State*, or take other evidence, to enable it to determine on its admissibility. (The last paragraph of the section is not material for the present purpose).

## II. HISTORY AND RATIONALE

**65.3.** As regards the rationale of the privilege in section 123, historical material in India is scanty. Indian case-law on the subject is profuse, but those cases do not elucidate this aspect of the matter.

How the matter  
viewed in Eng-  
land and the  
U.S.A.

**65.4.** In England, Crown privilege is usually dealt with as an aspect of the general law of State liability. In this connection it may be noted that the Crown Proceedings Act, 1947, while making the Crown liable as a private citizen in many respects, took care to provide that its provisions should not affect this general law.

In one article, published a few years ago, it was stated—

"The source of the Crown's privilege in relation to production of documents in a suit between subject and subject (whether production is sought from a party or from some other) can, no doubt, be traced to the *prerogative right* to prevent the disclosure of State secrets, or even of preventing the escape of inconvenient intelligence regarding Court intrigue. As is pointed out in Pollock and Maitland's History of English Law (2nd ed., Vol. I, page 517), 'the king has power to shield those who do unlawful acts in his name, and can withdraw from the ordinary course of justice cases in which he has any concern. If the king disseises A and transfers the land to X, then X when he is sued will say that he cannot answer without the King, and the action will be stayed until the King orders that it shall proceed'. We find similar principles applied to the non-disclosure of documents in the seventeenth and eighteenth centuries.

"But with the growth of democratic government, the interest of the Crown in these matters developed into and became identified with public interest.

".....In the early days of the nineteenth century, when principles of 'public policy' received broad and generous interpretation.....we find the privilege of documents recognised on the ground of public interest. At this date, public policy and the interest of the public were to all intents synonymous."

**65.5.** In the report of *Layer's case*,<sup>2</sup> (1722), the Attorney-General claimed that minutes of the Lords of the Council should not be produced; and Sir John Pratt L.C.J. supported the claim, adding that "*it would be for the disservice of the King to have these things disclosed.*"<sup>1</sup>

Position in U.S.A.

**65.6.** In the United States, the corresponding privilege, known as "executive privilege", is definitely considered as an aspect of "sovereign immunity". Of course, this American version of Crown privilege has never been at par as the British doctrine was known in some of the earlier cases, but we need not discuss that aspect of the matter at present.

**65.7.** In India, the privilege incorporated in section 123 was, perhaps, intended to incorporate a policy decision. It is not, however, very clear whether the framers of the Evidence Act examined the English law in detail.

**65.8.** It is possible to view the matter as one concerning the liability of the State in the adjective sphere. Though the provision is contained in the Evidence Act, it is obvious that it has important repercussions in administrative law. We are referring to this aspect in order to put the matter in its proper perspective.

Foundation of the privilege.

**65.9.** The foundation for the privilege under consideration is injury to the public interest. The expression "affairs of State" is of very wide amplitude and it will cover every business activity of the State, so as to take in even day to

<sup>1</sup>"Documents Privileged in Public Interest" 39 Law Quarterly Rev. 476-477.

<sup>2</sup>*Layer's case*, (1722) 16 How. St. Tr. page 224.



day routine administration — and not merely highly confidential matters pertaining to defence, foreign affairs, Cabinet minutes or what advice was tendered by the Ministers to the Governor specified in Article 163(3), secret service and the like.<sup>1</sup> Therefore, the activities of a Democratic Welfare State extend to so many fields and all such activities can be brought within the compendious expression "affairs of State", if broadly construed. It only shows that any document relating to any affairs of State cannot partake the character of a privileged document, the disclosure of which would not be, without possible injury to the public interest.

65.10. Lord Reid observed in *Conway v. Rimmer*:<sup>2</sup>

Two kinds of public interest.

"It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."

This aspect is of crucial importance in determining what ought to be the law.

Before we proceed to consider the present section and the changes needed therein, it will be useful to bear in mind certain aspects of the privileges.

65.11. It has been pointed out by one writer<sup>3</sup> that there could be several possible situations in relation to documents—

Several shades of privilege.

- "(1) The document may safely be seen by all the world.
- (2) It would be desirable for the document to be in some measure restricted in its forensic publication; but this consideration ought to yield to the greater desirability that justice should manifestly be seen to be done.
- (3) The document might be disclosed to the parties (or the opposite party, if the Crown is a party) on their undertaking to the Court, so as to render a breach a contempt of court, not to disclose its contents to any person except for the purpose of the proceedings in question or by order of the court.
- (4) The document might be disclosed to the parties (or the opposite party, if the Crown is a party) on condition that it should not be produced or referred to except in close court. Any further publication would then automatically "be punishable as contempt of court."
- (5) The document might be disclosed to the trial judge, but not to the parties (or the opposite party, if the Crown is a party).
- (6) The document might be disclosed to a judge for the purpose of determining its degree of forensic publication; but he might hold that its evidential importance is so slight that its further forensic publication is not justified in the light of its possible prejudice to the public interest.
- (7) The document being of a highly secret and confidential nature, its forensic publication in any form or circumstances must be absolutely withheld."

<sup>1</sup>*Ramanna v. Government of Andhra Pradesh*, A.I.R. 1968 A.P. 196, 208, para 36.

<sup>2</sup>*Conway v. Rimmer*, (1968) 1 All. E.R. 874, 880 (H.L.).

<sup>3</sup>T.E.S. Simon, "Evidence excluded by State Secrets" (1955) Cambridge L.J. 62, 76.

<sup>4</sup>Cf. *Scott v. Scott*, (1913) A.C. 417.

65.12. The same writer has further pointed out<sup>1</sup> that hardship from too rigid a claim of privilege arises because of the failure to distinguish between "national security" and "public interest".

"The law, indeed, appears to be unnecessarily rigid in this sphere. While there are overwhelming arguments in favour of giving to the executive an exclusive power to determine what matters may prejudice the *public security*, those arguments give no sanction for extending to the executive an equally exclusive power to determine what matters may affect the *public interest*. And since the Minister cannot fairly weigh the degree of injury to the State by the disclosure of the document against the degree of injury to a private citizen from its non-disclosure, there seem to be strong grounds for removing the decision from him and vesting it in an independent tribunal; for example, a judge of the High Court. The Minister's decision as to what evidence should be excluded by consideration of *public security* should be conclusive; but any claim based on his own considerations of *public interest* should be examinable, and should be balanced against such other considerations of public interest as are urged by those seeking disclosure. The possible injury suggested in *Broome v. Broome*<sup>2</sup> to the morale of the armed forces if the evidence were admitted could be weighed against the probable injury to the moral or the material interests of the litigants, or one of them or to the administration of justice, if it were excluded."<sup>3</sup>

65.13. His suggestion<sup>4</sup> for amendment can be thus summarised :

"The unequal disclosure of material is inherently likely to work injustice, and there is ground for thinking that injustice has in fact been caused by the wide scope and the rigidity of the present rules. It has been submitted that the interest of the executive can be conveniently reconciled with the claims of the private litigant for justice if it were possible to stipulate various degrees of forensic publication. Of these, the most important, between absolute withholding and full disclosure, would be the hearing of the *questioned evidence in closed court*. It is considered that the Minister should still be given an absolute discretion to state whether any particular evidence would be prejudicial to national security, or so prejudicial to the *public interest* that its forensic publication in any form must be barred. If he states that full disclosure of the evidence would be prejudicial to the *national security*, but that it could be disclosed in closed court, there should be power to order a hearing in closed court. So far as concerns evidence of facts the disclosure of which the Minister alleges to be contrary to the *public interest*, unless he is prepared to certify that the forensic publication of the evidence in any form must, on the ground of its high secrecy and confidential nature, be absolutely withheld, the question of its degree of disclosure would be for a judge of the High Court. He would weigh considerations of public interest as stated by the Minister against considerations of public interest as urged by the party seeking disclosure; and would have power to order a limited forensic publication including its disclosure only in closed court."

<sup>1</sup>J.E.S. Simon, "Evidence excluded by State Secrets" (1955) Cambridge L.J. 62, 76.

<sup>2</sup>*Broome v. Broome*.

<sup>3</sup>This distinction between considerations of public security and considerations of public interest reflect in a different context the suggestion of Sachs J. that the public interest in question might be limited to specific heads.

<sup>4</sup>J.E.S. Simon, "Evidence Excluded by State Interest" (1955) Cam. L.J. 62, 78.

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### III. ESSENTIAL CONDITIONS

**65.14.** So much by way of introduction. Let us analyse the section proper. In order that the section may *apply*, it is, in the first place, necessary that the evidence should relate to affairs of state—a requirement expressly mentioned in the section. This expression thus possesses some importance. Important conditions for application of the section.

Secondly, the evidence must be derived from unpublished official records relating to such affairs.

Thirdly, disclosure of information so derived is not permissible except with the permission of the head of the department concerned. So the question—who is the head of the department—is also of practical importance.

Fourthly, it is for the head of the department “to give or withhold such permission as he thinks fit”.

**65.15.** This, taken literally, would exclude judicial determination. These ingredients are explicit in the working of the section. If that were all, the matter would be very simple. But, in the interests of justice, these ingredients had to be elaborated and the prohibition in the section justified on an examination of certain fundamental factors not mentioned in the section. Courts have, therefore, found it necessary to address themselves to two questions—(i) In giving or withholding permission, what ought to be the guideline to be observed by the head of the department? (ii) Is every document relating to governmental work privileged, or is there any implicit limitation to be read with the expression “affairs of state”? Broadly speaking, these queries pertain to the first and the last condition in the above analysis.

**65.16.** Answering these queries, judicial decisions have read into the section the test of public interest. Public interest. The result—to state it very briefly for the purpose of this preliminary discussion—is that in order that a document may be legitimately regarded as privileged under the section, there must be a likelihood of some prejudice to the public interest. Whether the public interest in this context is confined to national security and foreign affairs and the maintenance of public order and the like, or whether it has a larger sweep is a matter the consideration whereof can be conveniently postponed to a later stage. The point to be made is that in order to justify the section, courts have been compelled to read into it a very important ingredient which is not explicitly mentioned in the section, though it may be implicit therein.

**65.17.** It is the scope and ambit of this aspect of public interest which has proved to be controversial and which, in some respects, appears to be obscure. Controversy and obscurity. Because of the fact that “public interest” is not expressly mentioned, problems arise. Chief amongst them are—(i) who decides the question if the public interest is likely to suffer by disclosure of the particular document? (ii) If it is for the head of the department to decide that question, how is the court to satisfy itself about his *bona fides*—assuming that the court cannot ordinarily go into the merits?

These and related queries have furnished the grist for academic and judicial mill in other countries, as also in India. Certain principles on the subject have also emerged elsewhere as in India,—but it would be too much to say that their application is easy. This is evident from the fact that again and again the question whether the particular document in issue is privileged under this head comes up before the highest courts.

Application of  
conditions  
Sukhdev Singh's  
case.

65.18. Reverting to the conditions expressed by the section, according to the Supreme Court in *Sodhi Sukhdev Singh's case*<sup>1</sup>—

- (i) it is for the trial court to decide whether the first condition is satisfied (Affairs of State);
- (ii) the expression "affairs of State" does not mean the entire public business of the State;
- (iii) for such adjudication, the court, while it cannot permit evidence about contents of the document (section 162), can take other collateral evidence which may help the court in determining the validity of the objection;
- (iv) it is for the departmental head to give or withhold permission for disclosure, and the court cannot determine whether the disclosure would cause injury to the public interest or not.

65.19. In *State of Punjab v. Sodhi Sukhdev Singh*,<sup>2</sup> the subject was discussed and considered at length. The court was concerned in that case with minutes of discussion by the members of the Council of Ministers and with the advice tendered by the Public Service Commission to the Council of Ministers. Both were held to be privileged by the majority judgment, on the ground that the disclosure *prima facie* would lead to injury to the public interest. But the court took care to review the case law exhaustively and to indicate the proper principles to be followed. The court emphasised that the sole and the only test which determines the decision of the head of the Department was injury to the public interest, and nothing else. The court itself could not hold an enquiry into the possible injury to public interest: "but the court is competent, and indeed is bound, to hold a preliminary inquiry and determine the validity of the objections—to its production, and that necessarily involves an inquiry into the question as to whether the evidence relates to an affair of State under section 123 or not."

65.20. In order to ensure that the privilege was not claimed on extraneous grounds, the court laid down the following guidelines:—

"First, the initial claim to the privilege should be made through an affidavit generally by the minister concerned; if not by him, then by the Secretary of the department. In the latter case, the court may require an affidavit of the minister himself. The affidavit should indicate that such document in question has been carefully read and considered, and the person making the affidavit is satisfied that its disclosure would lead to public injury. The affidavit should also "indicate briefly, within permissible limits, the reason why it is apprehended that public interest would be injured by the disclosure of the document. If the court finds the affidavit unsatisfactory then the person making the affidavit, whether he is the minister or the secretary, can be summoned for cross-examination on the relevant points."

Later decisions of the Supreme Court and important cases of the High Courts will be referred to while discussing the topics to which they relate.

<sup>1</sup>*State of Punjab v. Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 493; (1961) 2 S.C.R. 371.

<sup>2</sup>*State of Punjab v. Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 493.

We do not propose to refer here to all the cases on the section or on "Crown privilege". Important cases are given in the foot-notes<sup>1</sup>, and will be referred to on particular points when necessary.

#### IV. AFFAIRS OF STATE

65.21. The expression "affairs of State" does not seem to have been used in any legislative formulation in other context, but it is used frequently in text books and academic literature on the subject. The principal object of the expression is to indicate the distinction between matters of concern to the State, as distinct from matters of private interest. Affairs of State.

65.22. This, of course, is not the only ingredient of the privilege, since it is further required that the matters must be of such a nature that their disclosure would be prejudicial to the public interest. The principle on which the protection is given is that where a conflict arises between public and private interest, private interest must yield to the public interest.<sup>2</sup>

65.23. Every communication from an officer of the State to another officer is not necessarily relating to affairs of State.<sup>3</sup> The privilege could not arise, for example, in respect of the posting register kept by the Customs Preventive Service, the entry in question being merely a note of the times when particular preventive officers were ordered to be at their stations.<sup>4</sup> The particular entry did not refer to matters of State in sections 123 and 162, though there may be other privileged entries in that book. Scope of "Affairs of State".

65.24. "Affairs of State" may cover the case of documents in respect of which the practice of keeping them secret is necessary for the proper security of the State. Reports relating to an individual with a view to taking action under the Preventive Detention Act is a matter relating to affairs of State.<sup>5</sup>

65.25. The expression "affairs of State" would also cover the advice given by a Minister. Thus, in a Rajasthan case,<sup>6</sup> the plaintiff brought an action for the recovery of Rs. 1,19,000 against the State of Rajasthan, on account of a refund of a part of the excise duty paid on the stocks of matches produced by the plaintiff for consumption in the State territory. This was in pursuance of an agreement with the State Government. There was a document which embodied the minutes of the discussion and indicated the advice given by the Minister. The State claimed privilege in respect of this document under section 123. The claim of privilege was upheld by the trial court as well as by the High Court. The High Court held that the document which embodied the minutes

<sup>1</sup>(a) *State of Punjab v. Sodhi Sukhdev Singh*, (1961) 2 S.C.R. 371; A.I.R. 1961 S.C. 493;

(b) *Amar Chand Butail v. Union of India*, (1965) 1 S.C.J. 243; A.I.R. 1964 S.C. 1658;

(c) *State of U.P. v. Raj Narain*, A.I.R. 1975 S.C. 865, 975.

<sup>2</sup>(a) *Dinbai v. Dominion of India*, A.I.R. 1951 Bom. 72;

(b) *Bhalchandra v. Chanbasappa*, A.I.R. 1939 Bom. 237, 246.

<sup>3</sup>(a) *Robinson v. State of South Australia*, A.I.R. 1931 P.C. 254;

(b) *Duncan v. Cammanwell Laird & Co.*, (1942) A.C. 623;

(c) *Glasgow Corpn. v. Central Land Board*, (1956) S.C. 1 (H.L.) (from Scotland);

(d) *Conway v. Rimmer*, (1968) 1 All. E.R. 874 (H.L.).

<sup>4</sup>*U.S. v. Nixon*, (1974) 418 U.S. 643.

<sup>5</sup>*State of Punjab v. Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 493; and also *Lady Dinbai v. Dominion of India*, A.I.R. 1951 Bom. 72.

<sup>6</sup>*Chamarbaghwalla v. Parpia*, A.I.R. 1950 Bom. 230.

<sup>7</sup>*Rukumali v. R.*, 22 C.W.N. 451.

<sup>8</sup>*Choudhury v. Changkakati*, A.I.R. 1960 Assam 210.

<sup>9</sup>*Kotah Match Factory, Kotah v. State of Rajasthan*, A.I.R. 1970 Raj. 118.

of discussion and which indicated the advice given by the Minister is certainly protected under section 123, and the Court cannot compel the State to produce it.

On the other hand, documents and letters relating to a contract with the Government for the supply of goods do not relate to affairs of State.<sup>1</sup>

Illustrative cases  
as to "affairs of  
State" — Income  
tax Papers.

**65.26.** These simple situations may not present much difficulty. But the obscurity of the expression "affairs of State" is illustrated by the decisions that were rendered with reference to other matters. Returns made to income-tax officers and assessment orders may be cited as an example.

**65.27.** Before the enactment of a specific statutory provision on the subject, it was held that returns submitted to the Income-tax officer, and statements before him or orders made by him, did not refer to "affairs of State" (section 123), nor were they made in official confidence (section 124), and the officer concerned was bound to produce them if summoned to do so.<sup>2,3</sup>

It was after these judicial decisions that section 54 of the Income-tax Act, 1922, was enacted.

**65.28.** Section 54 of the Income-tax Act, 1922 (now section 137 of the Income-tax Act, 1961)—to state only the gist thereof—enacted that statements made or returns, accounts or documents produced for evidence before Income-tax authorities shall be treated as confidential and disclosure thereof by any public servant was prohibited, and no official shall be required to produce any such document or to give evidence in respect thereof.

Departmental  
proceedings.

**65.29.** The difficulty of deciding whether a matter is or is not an affair of State, is also illustrated by the case-law relating to statements made by witnesses in the cases of a departmental enquiry into the conduct of a public officer. The question arises when, after the departmental enquiry, the guilty public servants are prosecuted—usually for the offence of accepting illegal gratification, it was held by the Calcutta High Court<sup>4</sup> that such statements were not privileged under section 123 to 125, and the accused was entitled to cross-examine the witnesses under section 153 with reference to the statements made by the witness at the departmental enquiry. The same view was taken by the Nagpur High Court.<sup>5</sup> On the other hand, statements by witnesses in a secret and confidential investigation by the C.I.D. for ascertaining whether there is a prima facie case for a departmental enquiry against the public servant were held to be privileged by the Lahore<sup>6</sup> and Orissa<sup>7</sup> High Courts.

Service papers.

**65.30.** In a Punjab case,<sup>8</sup> the respondent Surjit Singh had filed a suit against the State of Punjab for a declaration that his retirement from service before he reached the age of superannuation was illegal and violative of various provisions of the Constitution of India. He requested the trial court to direct the department to produce in Court the Character Rolls and confidential reports maintained in the department, in respect of himself and some other inspectors

<sup>1</sup>*G. G. in-Council v. Peer Md.*, A.I.R. 1950 Punj. 228.

<sup>2</sup>*Venkatachella v. Sampatu Chettiar*, (1909) I.L.R. 32, 62; 19 Mad. L.J. 263.

<sup>3</sup>*Jadabaram v. Bulloram*, (1899) I.L.R. 26 Cal. 281.

<sup>4</sup>*Harbans v. R.*, 16 C.W.N. 431.

<sup>5</sup>*Ibrahim v. Secretary of State*, A.I.R. 1936 Nag. 25.

<sup>6</sup>*Nazir v. R.* A.I.R. 1944 Lah. 424.

<sup>7</sup>*James Bushi v. Collector of Ganjam*, A.I.R. 1959 Orissa 152.

<sup>8</sup>*State of Punjab v. Surjit Singh*, A.I.R. 1975 P & H 11.



who were junior to him but were retained in service. The State claimed privilege under section 123, on the ground that the documents were unpublished official records relating to "affairs of State". The trial court disallowed the privilege, holding that these documents did not relate to "affairs of State".

**65.31.** The matter came up before the High Court under section 115 of the Code of Civil Procedure, 1908. The High Court allowed the petition filed by the State, and held that the character Rolls and confidential reports maintained for the purpose of providing an appraisal of the merit of State servants by their superiors from time to time, are in the nature of confidential communications from one officer to another, and are meant to serve as part of the material designed to maintain the efficiency of the public servants. The High Court further held that these documents would relate to "affairs of State". The High Court dissented from two earlier cases<sup>1</sup> to the contrary. Thus, conflicting views within the same High Court exist.

**65.32.** In a Punjab case,<sup>2</sup> Khosla J. attempted to evolve a definition of affairs of State. This definition was relied on in the same High Court in a later case,<sup>3</sup> but, in appeal before the Supreme Court,<sup>4</sup> this definition was treated as not exhaustive.

Definition possible, not

We are referring to these cases, to show how the expression "affairs of State", without further guidelines, is found to be imprecise.

**65.33.** The next important concept is that of public interest. The scope and ambit of public interest is, as we have pointed out earlier, a matter of uncertainty and obscurity. It would be convenient to examine it under its principal heads.

Public interest,

In the first place, where the security of the State is involved, the claim of privilege would be reasonable and well-founded, provided it is properly substantiated by adequate material. These were the circumstances of *Duncan's case*.<sup>5</sup> It was obviously a matter of State security at the time of the war that plans for new submarines that had been pressed in service should not be disclosed to the enemy.

Secondly—and this is a much wider ground than security of the State—the claim of privilege has been sought to be justified in circumstances where a report has been made from one public servant to another in course of his duty, the argument being that the report should be treated as confidential if it was prepared in conditions under which the official making it expected it to be so treated. The rationale in this situation, as suggested, is that if its confidentiality is destroyed, then the civil servant would not be prepared to write full and frank reports if these reports are subsequently to be produced in the litigation so as to cause prejudice to the Crown. One may conveniently label such claims as claims arising under the head of public service. It is difficult to say how far the privilege under this head is recognised in England. The argument that a confidential report will not be made frankly if there is a probability of public scrutiny has been criticised more than once by academic writers.<sup>6</sup> Garner<sup>7</sup> has

<sup>1</sup>(a) *Union of India v. Raj Kumar*, A.I.R. 1967 Punj. 387.

(b) *Niranjan Dass v. State of Punjab*, A.I.R. 1968 Punj. 255.

<sup>2</sup>*G. G. in-Council v. Peer Mohd.*, A.I.R. 1950 Punj. 228, 233 (Khosla, J.).

<sup>3</sup>*Sodhi Sukhdev Singh v. The State*, A.I.R. 1961 Punj. 407.

<sup>4</sup>*The State v. Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 493; (1961) 2 S.C.R. 379.

<sup>5</sup>*Duncan v. Cammell Laird & Co. Ltd.*, (1942) 1 All. E.R. 587.

<sup>6</sup>For example, Ingris Bell in 1957 Public Law.

<sup>7</sup>Garner, *Administrative Law* (1967), page 252, — a view repeated in his (1972) edition.

suggested that it really does not stand up to close examination, because "a civil servant should not be prepared to write a report that may be open to criticism or one that he does not wish to be examined in court (save on State security grounds)."

**65.34.** Dealing with the argument that candor of communication between civil servants might be prejudiced, if a privilege is not recognised, the House of Lords in *Conway's case*<sup>1</sup> (per Lord Hodson) observed:

"It is strange that civil servants alone are supposed to be unable to be candid in their statements made in the course of duty without the protection of an absolute privilege denied to their other fellow subjects."

**65.35.** Apart from public security and public service—the two heads mentioned above—we have to consider a third variety of circumstances in which privilege is claimed. This is the residual category under "public interest". It seems, that in England this category is defined by reference to specific heads, such as, the prevention of specific crimes and the maintaining of the morale of the armed forces of the Crown. Even these specific heads have not escaped criticism, judicially<sup>2</sup> and otherwise.<sup>3</sup>

**65.36.** After *Conway v. Rimmer*, three subsequent cases also reached the House of Lords. In *R. v. Lewes JJ. ex p. Home Secretary*<sup>4</sup> and in *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners* (No. 2)<sup>5</sup> claims to privilege were upheld. In *Norwich Pharmacal Co. v. Commissioners of Customs and Excise*,<sup>6</sup> the claim was overruled, and discovery of documents ordered.

**65.37.** In the *Norwich Pharmacal case*, the House of Lords stressed the need to balance the public interest in non-disclosure against the public interest in seeing that justice is done to the parties.

None of these cases takes us much further forward, but what they do achieve is to show that the judges will consider each case of a claim of privilege (or whatever else it may now be called) on its merits.<sup>7</sup>

As to criminal cases, in England, it is stated not to be the practice to claim privilege on the ground of state interest.<sup>8</sup>

**65.38.** The matters in respect of which the discretion of the court should be exercised as to inspection are not, as such, defined by statute. Suggestions have appeared that legislative action should be taken to particularise the *species of public interest* which should be taken into account.<sup>9</sup> But no such restrictive legislation seems to have been enacted in the Commonwealth.

<sup>1</sup>*Conway v. Rimmer*, (1968) 1 All. E.R. 874 (H.L.).

<sup>2</sup>*Re Crosvenor Hotel (London) Ltd.* (No. 1), (1963) 3 All. E.R. 426; on appeal (1964) 1 All. E.R. 92.

<sup>3</sup>Articles in—

(a) 79 L.Q.R. 37, 153, 487;

(b) 80 L.Q.R. 24, 158;

(c) (1963) Public Law 405.

<sup>4</sup>*R. v. Lewes JJ. ex p. Home Secretary*, (1972) W.L.R. 279.

<sup>5</sup>*Alfred Crompton Amusement Machines Ltd.*, (1972) 2 All. E.R. 1169; (1973) 3 W.L.R. 268.

<sup>6</sup>*Norwich Pharmacal Co. v. Commissioners of Customs & Excise*, (1973) 2 All. E.R. 943; (1974) A.C. 133.

<sup>7</sup>D.C.M. Yardley, "Executive Privilege" (1974) New Law Journal 794, 796.

<sup>8</sup>Cross, *Evidence* (1974), page 274.

<sup>9</sup>Clark, "The last Word on the Last Word" (1969), 32 Modern Law Rev. 142, 148.



## V. AUTHORITY COMPETENT

**65.39.** The question which authority will determine the existence or otherwise of the privilege in relation to a particular document is one on which we find considerable disparity between the Indian law on the one hand and the English law on the other. According to Indian law—if we are to take literally what is stated in section 123—it is for the head of the department concerned to determine whether or not the document should be disclosed. On the other hand, in England, at least after the decision in *Conway v. Rimmer*,<sup>1</sup> it is definitely held that whenever an objection is made as to the production of a document, it is for the court to decide whether the objection should be upheld.<sup>2</sup> To a large extent, this disparity between Indian law and English law has been reduced by judicial decisions in India. We shall also consider section 162 in due course.

## VI. PROCEDURE

**65.40.** Section 123 speaks of the permission of the head of the department. It has been held<sup>3</sup> by a majority judgment of the Supreme Court that the Court is competent, and indeed bound, to hold a preliminary inquiry and determine the validity of an objection to the production of the document when privilege is claimed under section 123. This necessarily involves an inquiry into the question whether the evidence relates to “affairs of state” or not. It does not, however, permit the Court to substitute its own judgment in place of that of the head of the department as to whether the public interest would suffer by disclosure.

**65.41.** Although under section 123, as it is at present worded, the head of the Department has the final decision, he must apply his mind. In *Amarchand v. Union of India*<sup>4</sup> a judgment referred to in the Court of Appeal in the English case of *Conway v. Rimmer*,<sup>5</sup>—the Supreme Court rejected the claim for privilege on the ground that the statement of the Home Minister did not show that he had seriously applied his mind to the contents of the document, or that he had examined the question whether their disclosure would injure the public interest. The Supreme Court observed:

“In view of the fact that section 123 confers wide powers on the head of the department, the heads of departments should act with scrupulous care in exercising their right under section 123 and should never claim privilege only or even mainly on the ground that the disclosure of the document in question may defeat the defence raised by the State. Considerations which are relevant in claiming privilege on the ground that the affairs of the State may be prejudiced by disclosure must always be distinguished from considerations of expediency.”

**65.42.** It is well-known that the practice in India is for the head of the department to make an affidavit setting out the objection on behalf of the State and relevant factors. The present practice was thus described by the Supreme Court in *State of U.P. v. Raj Narain*<sup>6</sup>

<sup>1</sup>*Conway v. Rimmer*, (1968) 1 All. E.R. 874.

<sup>2</sup>See particularly, the speech of Lord Morris of Borth-Y-Gest and the comments in 84 L.Q.R. 172; 46 Can. Bar Rev. 452.

<sup>3</sup>*State of Punjab v. Sodhi Sukhdev Singh*, A.I.R. 1961 S.C. 493; (1961) 2 S.C.R. 372.

<sup>4</sup>*Amarchand v. Union of India*, A.I.R. 1964 S.C. 1658, 1661 (not reported in the S.C.R.).

<sup>5</sup>*Conway v. Rimmer*, in the Court of Appeal.

<sup>6</sup>*State of U.P. v. Raj Narain*, A.I.R. 1975 S.C. 865, 876, para 42.

"It is now the well settled practice in our country that an objection is raised by an affidavit affirmed by the head of the department. The Court may also require a Minister to affirm an affidavit. That will arise in the course of the enquiry by the Court as to whether the document should be withheld from disclosure. If the Court is satisfied with the affidavit evidence that the document should be protected in public interest from production, the matter ends there. If the Court would yet like to satisfy itself, the Court may see the document. This will be the inspection of the document by the Court. Objection as to production as well as admissibility contemplated in section 162 of the Evidence Act is decided by the Court in the enquiry as explained by this Court in *Sukhdev Singh's case*.<sup>1</sup>

"This Court has said that where no affidavit was filed, an affidavit could be directed to be filed later on. The *Grosvenor Hotel, London* group of cases, (1963 2 All E.R. 426; (1964) 1 All E.R. 92; (1964) 2 All E.R. 674 and (1964) 3 All E.R. 354 (*supra*) in England shows that if an affidavit is defective, an opportunity can be given to file a better affidavit. It is for the Court to decide whether the affidavit is clear in regard to objection about the nature of documents. The Court can direct further affidavit in that behalf. If the Court is satisfied with the affidavits, the Court will refuse disclosure. If the Court in spite of the affidavit *wishes to inspect* the document, the Court may do so."

65.43. It may be noted that inspection of a document which relates to "matters of State" is prohibited by section 162. In *Amar Chand Butail's case*,<sup>2</sup> the appellant called upon the respondents, the Union and the State to produce certain documents. The respondents claimed privilege. The Supreme Court saw the documents and was satisfied that the claim for privilege was not justified. This case illustrates how inspection may become necessary, to determine whether the claim to privilege is justified.

## VII. ILLUSTRATIVE CASE FROM ANDHRA

65.44. We may refer, at this stage, to an Andhra case,<sup>3</sup> as illustrating some of the problems encountered by courts in the application of the section.

65.45. First, as regards inspection by the Court, it was held that "there is an absolute prohibition" of inspection of a document if it pertains to or refers to matters of State and the question of "recording other collateral evidence when such objection is raised, does not arise, as, when the document pertaining to affairs of State cannot be inspected, it cannot be proved by any indirect way of letting in other evidence, to speak to the very nature of the contents."

65.46. It was argued in that case that the notes and minutes made on the files were within the privileged class and were exempt from production. The privilege claimed by the Additional Chief Secretary could not be questioned in view of section 123. It was held that there was nothing in the affidavit to "suggest that the notes made, relate to expression of an opinion in the determination and execution of public policies",—a test suggested in *Sukhdev Singh's case*.<sup>4</sup>

<sup>1</sup>*State of Punjab v. Sodhi Sukdev Singh*, (1961) 2 S.C.R. 371; A.I.R. 1961 S.C. 493.

<sup>2</sup>Emphasis supplied.

<sup>3</sup>*Amar Chand Butail*, A.I.R. 1964 S.C. 1658.

<sup>4</sup>*R. Ramanna v. Govt. of A.P.*, A.I.R. 1971 A.P. 196.

<sup>5</sup>Section 162.

<sup>6</sup>*Sukhdev Singh's case*, A.I.R. 1961 S.C. 493, 502.

**65.47.** Further, it was said that the Supreme Court has not suggested that notes and minutes made by officers other than those pertaining to the determination and execution of public policies would come within the privileged class of documents. Certain observations were also made as to the application of section 123 in relation to article 226.

**65.48.** We are concerned not with the actual decision—which was given on the basis of the affidavit of the head of the department—but with some of the difficulties felt by the court in the administration of the present provisions. These difficulties are apparent from the observations quoted above. A later decision of the Supreme Court<sup>1</sup> also contains instructive discussion. We shall have occasion to refer to it in due course.

## VIII. ENGLISH LAW

**65.49.** The evolution of English law on the subject presents certain interesting aspects. We have stated above that “Crown privilege” is often dealt with as a topic of state liability. Although the general law of state liability in England was put on a liberal and efficient basis by the Crown Proceedings Act, 1947, the Act failed to deal with the problem of “Crown privilege”. “Crown privilege” is the name given in England to the Government’s power to prevent evidence being given in court where it is claimed that its disclosure will be against the public interest. The expression is not a happy one<sup>2</sup> but is well-known.

**65.50.** Judicial attitudes in England on the subject fluctuated till 1968, when in *Conway v. Rimmer*<sup>3</sup> the position came to be settled to a large extent. The matter could be usefully considered with reference to the pre-1942 period, the period from 1942 to 1955, the period from 1956 to 1964, the period from 1965 to 1970 and the position after 1970.

**65.51.** Until the Second World War,<sup>4</sup> it was generally recognised in the courts that the power of the Crown to forbid the disclosure of specified evidence was not absolute. The Crown was entitled to claim that evidence of any description ought not to be given in court because its disclosure was contrary to the public interest, whether or not the Crown was a party to the proceedings. But, in the last resort, *the court would disallow* the claim if it seemed unjustified, and this had several times been done. There had to be some machinery for preventing secret information about such things as weapons of war and diplomatic negotiations from being disclosed in court; and the procedure was that a minister of the Crown swore an affidavit that disclosure would, in his opinion, be contrary to the public interest. In that case there was a conflict between the national interest and the litigant’s interest, and the latter had to give way.<sup>5</sup>

Pre-1942 period.

**65.52.** In *Duncan v. Cammell Laird and Co.*,<sup>6</sup> decided during the Second World War, an affidavit was made by the First Lord of the Admiral to the effect that certain blue-prints relating to the construction of a submarine *Thetis*, in support of an objection to producing the document on the ground of the Crown’s privilege. It was held to conclude the matter; in the affidavit, the First Lord of the Admiral had stated—“I am of the opinion that it would be

Period 1942-1955.

<sup>1</sup>*State of U.P. v. Raj Narain*, A.I.R. 1975 S.C. 865.

<sup>2</sup>See *infra*.

<sup>3</sup>*Conway v. Rimmer*, (1968) 1 All. E.R. 874 (H.L.). Re-affirmed in *Rogers v. Home Secretary*, (1972) 2 All. E.R. 1057.

<sup>4</sup>Schwartz and Wade, *Legal Control of the Executive*, page 192.

<sup>5</sup>*Duncan v. Cammell Laird and Co.*, (1942) A.C. 624, 632; (1942) 1 All. E.R. 58, followed in *Gail v. Gail*, (1961) 1 W.L.R. 1959.

injurious to the *public interest* that any of the said documents should be disclosed to any person." The decision of the lower courts, that inspection of the documents should not be ordered, was upheld by the House of Lords.

As observed by Lord Simon in that case, the Court of law had to uphold an objection, taken by a public department when called on to produce documents in a suit between private citizens, that on grounds of public policy the documents should not be produced.

**65.53.** The decision in *Duncan's case* was criticised by several writers. While the result actually reached was stated to be sound on the facts of the case, the enunciation of a categorical rule, making the Crown officer's decision *final in every case*, did not find favour with writers.

The case was understood as laying down that a ministerial claim of privilege was unquestionable in law. The case itself<sup>1</sup> was a plain one. The evidence required by the plaintiff widow was the plans of a naval submarine on which her husband had been killed. But it was obvious, especially in wartime, that secrecy must prevail, even at the cost of depriving the plaintiff of her legal rights. But the decision struck a new ground inasmuch as (1) the minister's affidavit was conclusive, no matter what the nature of the case was, and (2) also because the House ruled that the minister might say that the evidence belonged to a class of documents which the public interest required to be withheld from production.

**65.54.** After this judgment, cases started being decided on the basis of "class". It is easy for a government department to persuade itself that all sorts of official papers are better kept confidential, that candid reports will not be made if there is the remotest chance of their being used in public, and that the only safe course is to give the public interest the benefit of every doubt.<sup>2</sup> Under this policy, privilege was coming to be claimed, as one law Lord put it<sup>3</sup> in a case from Scotland, for "everything, however common place, that has passed between one civil servant and another".

Section 28 of the Crown Proceedings Act, 1947, which, in effect, preserved the Crown Privilege, was discussed at length in the Lords<sup>4</sup> in the debate on the Bill. Section 28 took away the immunity of the Crown from discovery, but provided that this should be "without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be *injurious to the public interest*."

The speech of Lord Parker of Waddington in *The Zamora*<sup>5</sup>. "Those who are responsible for the national security must be the sole judges of what the national security requires", was quoted in the Debates on the Crown Proceedings Bill.

Period from 1956  
to 1964.

**65.55.** This legal position created hardships. Government, realising the extremeness of the position, made certain concessions. In June 1956, the Lord Chancellor made in the House of Lords a statement of policy in relation to future claims of Crown Privilege for documents and oral evidence.<sup>6</sup>

<sup>1</sup>*Duncan v. Cammell Laird and Co. Ltd.*, (1942) A.C. 624.

<sup>2</sup>Schwartz and Wade, *Legal Control of the Executive*, page 193.

<sup>3</sup>Lort Radcliffe in *Glasgow Corporation v. Central Land Board*, (1956) S.C. 1.

<sup>4</sup>Parliamentary Debates, Lords, Vol. 146, Col. 924 (Viscount Jowitt), Col. 926, 929 (Viscount Simon), Cols. 932-933 (Lord Simon).

<sup>5</sup>*The Zamora*, (1916) 2 A.C. 77, 107.

<sup>6</sup>*Glasgow Corporation v. Central Land Board*, (1956) S.L.T. 41.

A few months earlier, in December 1955, the House of Lords had decided that the law of Scotland was rather more favourable to the private litigant than the law of England.

**65.56.** The changes announced in 1956 were based on the distinction that has been mentioned in some of the cases between objections founded on the contents of a particular document, and those founded on the fact that the document belongs to a class which ought to be kept secret in the public interest. In the case of the latter, some of the objections that were formerly tendered will not, it was stated, be raised any more. For example, exemption would not be claimed for reports of accidents to employees of the Crown, or for medical reports concerning civilian employees and, where the Crown or the doctor is a defendant in an action founded on the negligence of the latter, exemption would not be claimed for medical reports concerning members of the forces.

**65.57.** Certain further changes were announced in 1962 relating to police matters.<sup>1</sup> In future, it was stated, in proceedings against the police for such matters as malicious prosecution or wrongful arrest, no claim to exclude evidence relating to the justification for the police action would be made unless its disclosure would reveal the name of a police informer. In the case of statements by civilians to the police, the claim to exclude will be made in all cases, but it will be done by affidavit and not by certificate, so that the final decision to admit or to exclude may be made by the court.

**65.58.** It is unnecessary to go into the details of all the English cases decided between 1956 and 1964. The judgment of the Court of Appeal in *Merricks v. Nott Bower*<sup>2</sup> and *Re Grosvenor Hotel, London (No. 2)*<sup>3</sup> meet many of the criticisms of Lord Simon's speech in *Duncan v. Cammell Laird & Co. Ltd.*<sup>4</sup>

Period from 1965  
to 1970.

**65.59.** The modifications in the rigid rule flowing from *Duncan's* case, made by executive orders were followed by certain judicial developments. The courts began to break away from the House of Lords' sweeping rule. This movement started in 1965. For a time, the decisions swayed to and fro, and confusion reigned. But, in 1968, the House of Lords unanimously repudiated its extreme propositions of 1942, and re-asserted judicial control.<sup>5</sup> This was in a case where a junior police officer had brought an action for malicious prosecution against a superior officer and needed to see the reports made on him in the police service. The Home Secretary intervened with a claim of "class" privilege. The House of Lords disallowed the claim, inspected the documents themselves, and ordered their disclosure, saying that they could see no possible danger to the public interest. They reviewed the law comprehensively and made it clear that, though the courts will naturally respect claims based on genuine secrets of State, they will not allow other claims unless the public interest in secrecy really outweighs the public interest in doing justice to the litigant; and that this is to be determined by the court, not by the executive.

<sup>1</sup>See—

(a) Professor T. B. Smith in (1956) *Modern Law Review* 427;

(b) Sir Carleton Allen in (1956) 72 *L.Q.R.* 322;

(c) E.C.S. Wade in (1956) *Cambridge Law Journal*, 133, 136.

<sup>2</sup>(1962) *Public Law*, page 203.

<sup>3</sup>*Merricks v. Nott-Bower*, (1965) 1 *Q.B.* 57; (1964) 1 *All. E.R.* 717.

<sup>4</sup>*Re Grosvenor Hotel, London (No. 2)*, (1965) *Ch.* 1210; (1964) 2 *All. E.R.* 674.

<sup>5</sup>*Duncan v. Cammell Laird & Co. Ltd.* (1942) *A.C.* 624; (1942) 1 *All. E.R.* 587.

<sup>6</sup>*Re Grosvenor Hotel, London (No. 2)*, (1965) *Ch.* 1210.

<sup>7</sup>*Conway v. Rimmer*, (1968) *A.C.* 910; (1968) 1 *All. E.R.* 1714.

Thus, the law was in 1968 brought into general accord with the law of the United States—and, indeed, with the law of several Commonwealth countries that had refused to accept the House of Lords' earlier judgment.

9. To come more specifically to *Conway v. Rimmer*,<sup>1</sup> it was established that where a Minister claims that documents should not be used because their production would be injurious to the public interest, the court has power to disallow the claim and order their production, after weighing the probable injury to the public interest against the injury to the interests of justice that their suppression would cause. For this purpose, the court may inspect the documents privately, i.e. without disclosure to the parties.

The position resulting from *Conway v. Rimmer* can be broadly stated thus—

The Court has jurisdiction to order the disclosure of documents for which Crown Privilege is claimed, as it is the right and the duty of the court to hold the balance between the interests of the public in ensuring the proper administration of justice and the public interest in the withholding of documents whose disclosure would be contrary to the national interest; accordingly, a Minister's certificate that disclosure of a class of documents or of the contents of a particular document, would be injurious to the public interest is not conclusive against disclosure, particularly where the privilege is claimed for routine documents within a class of documents, though in a few instances (e.g., cabinet minutes), the nature of the class of documents may suffice to resist application for disclosure.

Position  
1970.

after

**65.61.** The judgment in *Conway v. Rimmer* was put into statutory form in 1970. The Administration of Justice Act, 1970,<sup>2</sup> enables a court to order disclosure of documents, etc. and specifically provides that the provisions apply to the Crown except that no such order may be made if the court considers "that compliance with the order, if made, would be likely to be injurious to the public interest". The material provision is quoted below<sup>3</sup>:

"35.—(1) This part of this Act shall bind the Crown.

(2) Section 21 of the Administration of Justice Act, 1969 (power of court to order inspection, custody, etc. of property pending commencement of action) shall bind the Crown so far as it relates to property (within the meaning of that section) as to which it appears to the court that it may become the subject-matter of subsequent proceedings involving a claim in respect of personal injuries to a person or in respect of a person's death.

(3) A court shall not make an order under section 31 of this Act, nor an order under section 21 of the said Act of 1969 if it considers that compliance with the order, if made, *would be likely to be injurious to the public interest*.<sup>4</sup>

(4) In this section references to the Crown do not include references to Her Majesty in Her private capacity nor to Her Majesty in right of Her Duchy of Lancaster, nor to the Duke of Cornwall."

#### IX. POSITION IN U.S.A.

**65.62.** In the U.S.A., the privilege in question is known as "executive privilege". It is an aspect of sovereign immunity in the governmental authority to withhold evidence on the ground that disclosure would be against the public

<sup>1</sup>*Conway v. Rimmer*, (1968) 1 All. E.R. 874 (H.L.).

<sup>2</sup>Administration of Justice Act, 1970, sections 31-35.

<sup>3</sup>Section 35, Administration of Justice Act, 1970.

<sup>4</sup>Emphasis supplied.

interest.<sup>1</sup> Executive privilege has been asserted both vis-a-vis congress and in cases in court. This American version of Crown privilege has, however, never been pushed as far as the British doctrine. There has never been an American counterpart<sup>2</sup> of *Duncan v. Cammell, Laird & Co. Ltd.*,<sup>3</sup> in which the House of Lords held that Crown privilege could not be questioned in a court of law. American courts have consistently refused to recognise any absolute power in the executive to forbid the disclosure of evidence.

**65.63.** The leading case in the U.S.A. upto 1974 was *United States v. Reynolds*,<sup>4</sup> reported in 1953. The case arose out of the crash of a military airplane on a flight to test secret electronic equipment. Several civilian observers aboard the airplane were killed in the Air crash. Their widows sued the government under the Federal Tort Claims Act. Plaintiffs moved for discovery of accident investigation report of the Air Force, but the government claimed privilege, and refused to produce the report. The court rejected the view that the assertion of executive privilege was conclusive on the question of production. It recognised that there are "state secrets"<sup>5</sup> which need not be disclosed. "The court itself must determine whether the circumstances are appropriate for the claim of privilege". Only where the court is satisfied "that compulsion of the evidence will expose military matters which in the interest of national security, should not be divulged" will it refuse to require disclosure.

**65.64.** It would thus appear that in the U.S.A., the privilege for government secrets is qualified.<sup>6</sup> The decision in *United States v. Reynolds*<sup>7</sup> does suggest that the court might be warranted in balancing the competing needs and policies in deciding how far it should require disclosure to the Judge himself, in determining whether the matter is indeed privileged.

**65.65.** It may be stated that in the United States, heads of Departments make regulations as to disclosure, which the Courts may or may not accept. American courts, it was stated<sup>8</sup> in 1967, are less willing than English courts to accept a plea of privilege, and are willing to look at the documents, distinguishing between "secret of State" and mere "official information". The case decided in 1974 relating to documents whereof production was sought to be withheld by President Nixon fortifies this conclusion.<sup>9</sup>

**65.66.** It has been pointed out<sup>10</sup> by an eminent American writer that the question of privilege for official information can arise in at least five different kinds of cases not all of which should necessarily be treated alike. The cases referred to by him are: (1) criminal proceedings; (2) civil proceedings with the State as party plaintiff; (3) civil proceedings with the State as party defendant; (4) proceedings in which the State is not a party; and (5) proceedings in which disclosure of the records of public authorities *other than the Central Government* is sought.<sup>11</sup>

On the basis of the above classification, the following detailed analysis of the position in each case has been offered by that writer:

<sup>1</sup>Schwartz and Wade, *Legal Control of the Executive*, pages 198-199.

<sup>2</sup>Schwartz and Wade, *Legal Control of the Executive*, page 198.

<sup>3</sup>*Duncan v. Cammell, Laird & Co. Ltd.*, (1942) A.C. 624.

<sup>4</sup>*United States v. Reynolds*, (1953) 345 U.S. 1.

<sup>5</sup>The term used in Model Code of Evidence, Rule 227.

<sup>6</sup>Wright, *The Law of the Federal Courts* (1963), page 337, note 30.

<sup>7</sup>*United States v. Reynolds*, (1953) 345 U.S. 1; 97 L. Ed. 727.

<sup>8</sup>Hood Philips, *Constitutional Law* (1967), page 692.

<sup>9</sup>*U.S. v. Nixon*, *supra*.

<sup>10</sup>See Schwartz, *American Administrative Law* (1958), page 245.

<sup>11</sup>Compare Note, (1954) 29 New York University Law Review, 194, 201-11.

## (1) CRIMINAL PROCEEDINGS

It is stated<sup>1</sup> that the proper approach to be followed where claims of governmental privilege are invoked to prevent disclosure of official information in criminal proceedings is that articulated by Judge Learned Hand in *United States v. Andolschek*.<sup>2</sup> In that case, the defendants were tax inspectors of a federal agency and were tried criminally for a conspiracy which included their taking of bribes. They sought discovery and the introduction in evidence of certain reports which they had made to their superiors in their official capacity. According to Judge Learned Hand, the Government could not claim privilege for these official reports in such a criminal proceeding. "While we must accept it as lawful", states his opinion, "for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose, either it must have the transactions in the obscurity from which a trial will draw them, or it must expose them fully."<sup>3</sup>

Judge Learned Hand's approach was relied on expressly by the United States Supreme Court in *Jencks v. United States*.<sup>4</sup> That case involved a prosecution for filing a false affidavit with the National Labour Relations Board.

The Court held that the defendant was entitled to an order directing the Government to produce for inspection all reports of two Government witnesses to the Federal Bureau of Investigation touching upon events and activities as to which they testified at the trial, and the defendant was entitled to inspect such reports and to decide whether to use them in his defence. "We hold", the Court observed, "that the criminal action must be dismissed when the Government, on the ground of privilege elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. The burden is the Government's.....to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure."

We shall refer later to the epoch making decision in *U.S. v. Nixon*, which is peculiarly relevant to criminal cases.

## (2) CIVIL PROCEEDINGS WITH STATE AS PLAINTIFF

It can be argued<sup>5</sup> that many of the considerations which apply to criminal cases apply as well to proceedings instituted by the State as party plaintiff. In such cases, too, it can be said, if the Government chooses to commence an action, it should stand in the position of the private litigant and be held to waive any privilege against disclosure of official information which it possesses if it were not a party to the litigation. As one American judge has expressed it, it is but a short step, and a necessary one, from the rule of criminal cases discussed above, to the rule that where the State is the complainant in a civil suit,

<sup>1</sup>Schwartz, *American Administrative Law* (1958), pages 245-246.

<sup>2</sup>*United States v. Andolschek*, 142 F. 2d 503 (2d Cir. 1944).

<sup>3</sup>*U.S. v. Andolschek*, 142 F. 2d. 503, 506 (2d Cir, 1944).

<sup>4</sup>*Jencks v. United States*, (1957) 353 U.S. 657, 672.

<sup>5</sup>Schwartz, *American Administrative Law* (1958), page 247.



it should likewise be required to make its own choice—either to make disclosure or to drop the suit.<sup>2</sup>

### (3) CIVIL PROCEEDINGS WITH STATE AS DEFENDANT<sup>3</sup>

The use of the Crown-privilege doctrine in cases brought under the Crown Proceedings Act, 1947 gave rise in England to most of the criticism of that doctrine. Speaking of Crown privilege in *Ellis v. Home Office*,<sup>4</sup> Devlin, J., declared—

"It is a rule, of course, which is particularly unfortunate when the person who is responsible for deciding whether they should be disclosed or not, happens also be the defendant in the action in which he is being sued. It means that every litigant against a government department—and such litigation is becoming more and more frequent as the sphere of government activities is extended—is denied, as a matter of course, the elementary right of checking the evidence of government witnesses against the contemporary documents."

As to the U.S.A., a number of American decisions apply the theory (already discussed) of waiver of privilege by the Government to cases brought under the American equivalent of the Crown Proceedings Act. Their reasoning is that the State, by consenting to be sued, has waived its privilege against disclosure of official information, just as it does when it institutes a criminal proceeding.<sup>5</sup> It should be borne in mind that the Federal Tort Claims Act (and other American statutes authorizing suits against the State) contain no limitations such as that in section 28(2) of the Crown Proceedings Act, 1947, which expressly preserved the Crown privilege rule until it was abrogated in 1970. That being the case, American judges have been able to read into the State's consent to suit, a consent to waive its privilege against disclosure of official information.

"The consent, being general, amounts to an endorsement of libel<sup>6</sup> with the sovereign's command 'Soit droit fait al partie'. But right cannot be done if the government is allowed to suppress the facts in its possession."<sup>7</sup>

### (4) STATE NOT A PARTY

The disclosure of official information in suits to which the State is not a party, stands on a slightly different footing, even if one agrees with the view expressed in the American cases already referred to,<sup>8</sup> under which the State waives whatever privilege it might otherwise have, by appearing as a party.

When the State is itself a party, there is a real danger that the doctrine of privilege will be used to advance the Government's position as litigant. Where, on the other hand, the State is not a party, the suit is between private individuals alone, and the State has no direct interest in the outcome, there is much less danger of Crown privilege being used for the arbitrary suppression of evidence. And this is why some American cases permit the State to claim privilege for

<sup>2</sup>*Bank Line Ltd. v. United States*, 76 F. Supp. 801, 803 (S.D.N.Y. 1948). A striking case applying this principle is *United States v. Cotton Valley Oil Operators Committee*, 9 F.R.E. 719 (D. La. 1949), affd. *per curiam* by an equally divided Court, 339, U.S. 940 (1950), where an antitrust action by the Government was dismissed because of its failure to submit documents whose disclosure was sought by discovery proceedings.

<sup>3</sup>Schwartz, *American Administrative Law* (1958), pages 248, 249.

<sup>4</sup>*Ellis v. Home Office*, (1953) 2 Q.B. at 138.

<sup>5</sup>Schwartz, *American Administrative Law*, (1958), page 199.

<sup>6</sup>This was an admiralty suit, hence the use of this term.

<sup>7</sup>*Bank Line Ltd. v. United States*, 76 F. Supp. 801, 104 (S.D.N.Y. 1948).

<sup>8</sup>Schwartz, *American Administrative Law* (1958), page 248.

official information in cases in which the State is not a party. It should, however, be emphasised that, even under them, the rule on the western side of the Atlantic does not begin to approach the doctrine of "privilege by unexaminable certificate" enunciated by the House of Lords in *Duncan v. Cammell, Laird & Co.* The Court in the United States may still examine the evidence for which privilege is claimed to determine whether the claim of privilege is a valid one. And, where only official information not involving "state secrets" is at issue, it would seem that the American courts would not follow the approach of *United States v. Reynolds*, already discussed, under which the judge looks only to see whether there is a reasonable danger that compulsion of the evidence will expose matters which should not be divulged. That approach is valid only where "state secrets" are involved. In the case of other official information, the judge should determine himself whether there is, in fact, a public interest in barring disclosure. Only then should the claim of privilege be upheld, even in cases in which the State does not have the direct interest of a litigant.

#### (5) PUBLIC AUTHORITIES OTHER THAN CENTRAL GOVERNMENT\*

According to Scott L.J., in *Blackpool Corporation v. Locker*,<sup>1</sup> nothing analogous to Crown privilege has yet been conceded by the courts to any local government officer.

The American Courts too look with disfavour upon assertions by administrative agencies, other than those of the federal government, of a privilege against disclosure of official information.<sup>2</sup>

65.67. The suggestion of Schwartz<sup>3</sup> as regards each situation is as follows :

- (1) *Criminal Proceedings* : The Government must choose; either it must choose to leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.
- (2) *Civil Proceedings in which the State is a Plaintiff* : Where the State is the plaintiff in a civil suit, it should likewise be required to make its own choice, either to make a full disclosure, or to drop the suit.
- (3) *Civil Proceedings in which the State is a defendant* : The State's consent to be sued implies a consent also to waive its privilege against the disclosure of official information.
- (4) *Civil Proceedings in which the State is not a party* : The State may claim privilege for official information in cases in which the State is not a party. But it is not as 'privilege by unexaminable certificate' enunciated by the House of Lords in *Duncan v. Cammell, Laird & Co.* The Court may still examine the evidences for which privilege is claimed, in order to determine whether the claim of privilege is a valid one. And, where only official information not involving "state secrets" is at issue, the court should not follow the narrower approach (under which the judge looks only to see whether there is a reasonable danger that compulsion of the evidence will expose matters which should not be divulged). That narrower approach is valid only where "state secrets" are involved.

In the case of other official information, the judge should determine himself whether there is, in fact, a public interest in barring disclosure.

<sup>1</sup>The leading case in *Boska v. Comingore*, (1900) 177 U.S. 459.

<sup>2</sup>Schwartz, *American Administrative Law* (1958), page 250.

<sup>3</sup>*Blackpool Corporation v. Locker*, (1948) 1 K.B. 349, 380.

<sup>4</sup>See Note (1954) 29 New York University Law Review, 194, 209.

<sup>5</sup>Schwartz, *American Administrative Law*, 1958.

- (5) *Proceedings by or against other public authorities*: Assertions by administrative agencies, other than those of the federal government, of a privilege against disclosure of official information are not allowed.

65.67A. According to the American Model Code of Evidence,<sup>1</sup> which clearly makes a distinction<sup>2</sup> between "state secrets" and "official information", the term "official information" means "information not open or therefore officially disclosed to the public relating to internal affairs of.....the United States acquired by a public official of.....the United States in the course of his duty, or transmitted from one such official to another in the course of duty."<sup>3</sup> Only State secrets are privileged.

65.68. While the propositions set out above hold true even today, their application was made in dramatic circumstances in *U.S. v. President Nixon*,<sup>4</sup> to which reference may now be made. These were the facts<sup>5</sup>—

Following an indictment alleging violation of federal statutes by certain staff members of the White House and political supporters of the President, the Special Prosecutor filed a motion under Fed. Rules of Crim. Proc. Rule 17(c), for a *subpoena duces tecum* for the production before trial of certain tapes and documents relating to precisely identified conversations and meetings between the President and others. Having rejected the President's contentions (a) that the dispute between him and the Special Prosecutor was non-justiciable as an 'intra-executive' conflict, and (b) that the judiciary lacked authority to review the President's assertion of executive privilege, the court stayed its order pending appellate review, which the President then sought in the Court of Appeals. The Special Prosecutor then filed, in that Court, a petition for a writ of certiorari before judgment (No. 73-1766) and the President filed a cross-petition for such a writ challenging the grand jury action (No. 73-1834). The Court granted both petitions.

65.69. The President, claiming executive privilege, filed a motion to quash the subpoena. The District Court, after treating the subpoenaed material as presumptively privileged, concluded that the Special Prosecutor had made a sufficient showing to rebut the presumption and that the requirements of Rule 17(c) had been satisfied. The Court thereafter issued an order for an *in camera* examination of the subpoenaed material.

65.70. The Supreme Court held that neither the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.<sup>6</sup> Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the confidentiality of Presidential communications is not significantly diminished by producing material for a criminal trial under the protected conditions of *in camera* inspection, and any absolute executive privilege under Article II of the Constitution would plainly conflict with the function of the courts under the Constitution.

<sup>1</sup>Rule 228, American Penal Code of Evidence.

<sup>2</sup>The distinction was anticipated in Wigmore, *Evidence*, section 2378 (3rd ed. 1940).

<sup>3</sup>A similar definition is contained in Rule 34 of the Uniform Rules of Evidence, 1953.

<sup>4</sup>*U.S. v. President Nixon*, (July 1974) 418 U.S. 683, 708, 709.

<sup>5</sup>Facts taken from the headnote in 418 U.S. 683.

<sup>6</sup>The Court referred to *Marbury v. Madison*; 1 Cranch 137, 177; *Baker v. Carr*, 369 U.S. 186, 211.

Although the courts will afford the utmost deference to Presidential acts in the performance of an Article II function—*United States v. Burr*<sup>1</sup>—when a claim of Presidential privilege as to materials subpoenaed for use in a criminal trial is based, as it is here, not on the ground that military or diplomatic secrets are implicated, but merely on the ground of a generalized interest in confidentiality, the President's generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial and the fundamental demands of the process of law in the fair administration of justice.

On the basis of this Court's examination of the record, it cannot be concluded that the District Court erred in ordering *in camera* examination of the subpoenaed material, which shall now forthwith be transmitted to the District Court.

Since a President's communications encompass a vastly wider range of sensitive material than would be true of an ordinary individual, the public interest requires Presidential confidentiality be afforded the greatest protection consistent with the fair administration of justice, and the District Court has a heavy responsibility to ensure that material involving Presidential conversations irrelevant to or inadmissible in the criminal prosecutions be accorded the high degree of respect due a President and that such material be returned under seal to its lawful custodian. Until released to the Special Prosecutor no *in camera* material is to be released to anyone.

**65.71 to 65.74.** No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution, but other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution.<sup>2</sup>

The following passage in the judgment is important:—

"The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.

"In *Nixon v. Sirica*, 159 U.S. App. D.C. 58, 487 F. ed. 700 (1973), the Court of Appeals held that such Presidential communications are 'presumptively privileged,' *id.*, at 75, 487 F. 2d at 717, and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall's observation, therefore, that 'in no case of this kind would a court be required to proceed against the President as against an ordinary individual'. *United States v. Burr*, 25 F. Cas., at 192.

<sup>1</sup>*United States v. Burr*, 25 F. Cas. 187, 190, 192 (No. 14,694).

<sup>2</sup>*Powell v. McCormack*, (1969) 395 U.S. 486; *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) 343 U.S. 579.

"But this presumptive privilege must be considered in the light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that 'the twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer'. *Berger v. United States*, 295 U.S. at 88. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depends on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defence."

The decision of the Supreme Court in *United States v. Nixon*<sup>1</sup> was unanimous. Despite press reports that there was considerable internal dispute among the Justices, it appears that they were of one mind from the beginning.<sup>2</sup> The Supreme Court press officer announced that there had been only one conference of the Justice after the argument until the final opinion was issued. This implied that the Chief Justice had assigned himself to write the opinion at the initial conference for a unanimous Court. The opinion carefully examined each of the issues raised by the parties and in logical and inevitable steps declared that the President must deliver the subpoenaed tapes. Mr. St. Clair—Counsel for the President—immediately announced that the President would comply with the ruling.

The Brief for Mr. Nixon put the point thus—

"The universal view of the legal community, as reflected in the literature, was that the courts lack power to substitute their judgment for that of the Presidents on an issue of this kind and that they lack power to compel a President to make production. It was, quite literally horn-book law that 'confidential communications to and from the President are inviolate to a judicial request.....' Forkosch, *Constitutional Law* 131 (1963)."

The crucial question in *United States v. Nixon* was that raised in the brief for the American Civil Liberties Union:—

"The issue is whether the President has the implied authority under the Constitution to withhold data from Congress (and the Courts) *solely in his discretion*, or whether his decision to do so is subject to constitutional limitation and judicial review."

This issue was answered squarely by deciding that the President has no such authority.

A distinguished American constitutional lawyer<sup>4</sup> has thus summed up the importance of this ruling:—

"Great Supreme Court cases, especially those dealing with separation-of-powers review over presidential and legislative authority are sometimes like delayed-fuse aerial bombs. They have an initial impact when they first hurtle to earth, but their greater effect comes later, when their full explosive force is released.

<sup>1</sup>*United States v. Nixon*, (July 1974) 418 U.S. 683.

<sup>2</sup>Leon Friedmann (Ed.), *United States v. Nixon*, (1975) page 600.

<sup>3</sup>Leon Friedman; *U.S. v. Nixon*, (1975), page 600.

<sup>4</sup>Alan Westin, Foreword to Leon Friedmann (Ed.) *United States v. Nixon*, (1975) page xx.

"That is quite likely to be the legacy of *United States v. Nixon*. The decision's immediate effect was to order 64 taped conversations to be delivered. And the immediate rule of law in the public focus is that the President cannot withhold information from a criminal proceeding in which such information is directly relevant, on the grounds of a general claim that this would impair the confidentiality of executive communications and not be in the public interest.

"But the decision declared a larger promise that will be far more significant in the long run. It rejects the argument of some populist-minded commentators that there is no constitutional basis at all for executive privilege. The Justices were unanimous in declaring that in many key areas—the court stipulated 'military, diplomatic or sensitive national security secrets'—the President has a constitutional basis for asserting privileges and can have this enforced by the courts.

"In my view, this judgment about the Executive's need for and right to confidential communications is entirely right in principle. What it will mean in practice, however, is that from now on, the federal courts have been given the role of arbitrating both the general definitions and the document-by-document review of those presidential communications that may become central to criminal proceedings."

#### X. OTHER COUNTRIES

##### Australia.

65.75. The present position in Australia would seem to be that the ultimate decision to the claim of privilege rests with the court.

Secondly, the power of the court to carry out inspection of the document is also recognised. The Court may, if it thinks fit, disclose the documents to the parties.

##### France.

65.76. It seems that in France the Conseil d'Etat, can, on behalf of the parties, demand production of a document against the Government,<sup>1</sup> and the ultimate decision is vested in the Conseil d'Etat.

##### Scotland.

65.77. A Scottish case<sup>2</sup> shows that the position in Scotland may be more favourable to the subject than the law of England as it was understood before 1968. It also throws new light upon what is the extent of the "public interest".<sup>3</sup> In that case, the Glasgow Corporation was seeking to establish that the Central Land Board, which, by statute, acts by and on behalf of the Crown, should disclose certain documents in litigation which challenged the *vires* of the Board's method of assessing development charges. The documents included, (*inter alia*), letters and minutes passing between the Board and District Valuers, which related to the methods whereby such charges should be calculated and determined; in other words, they were inter-departmental communications, and accordingly the Secretary of State for Scotland had certified that they ought not to be produced, because they belonged to a class of documents which it was necessary to withhold for the proper functioning of the public service. The Courts in Edinburgh, with one dissentient in the First Division on Appeal, held that they were precluded by the decision of the House of Lords in the English case of *Duncan v. Cammell, Laird & Co. Ltd.* from questioning the ruling by the Minister. On appeal to the Lords, the House, consisting of five Law Lords including two from Scotland, were unanimously of opinion, to quote Lord

<sup>1</sup>Hood Phillips, *Constitutional Law* (1967), page 692.

<sup>2</sup>*Glasgow Corporation v. Central Land Board*, (1956) S.L.T. 41.

<sup>3</sup>Summary of the case is taken from Note by E.C.S. Wade, in (1956) *Cambridge L.J.* 133, 136, 137.

Radcliffe, that in Scottish Law "The power reserved to the court is the power to order production, even though the public interest is to some extent affected prejudicially..... The interest of Government which the Minister should speak with full authority do not exhaust the public interest..... It is open to the court to dispute with the Minister whether his view.....is well-founded." There may, in other words, be wider considerations of public policy which are incidental to the administration of justice. This view was mentioned by Morris L.J. in *Ellis v. Home Office*.<sup>1</sup> Of such considerations, in Scotland the court may be the judge and may thus overrule the Minister. In the present case it exercised its discretion by upholding the Minister.

65.78. The Kenya Evidence Act has an elaborate provision<sup>2</sup> on the subject **Kenya** in these terms:

"Privilege relating to official records.

131. Whenever it is stated on oath (whether by affidavit or otherwise) by a Minister, or by the Secretary-General of the Organisation, that he has examined the contents of any document forming part of any unpublished official records, the production of which document has been called for in any proceedings, and *that he is of the opinion that such production would be prejudicial to the public service,*<sup>3</sup> either by reason of the content thereof or of the fact that it belongs to a class which, on grounds of public policy, should be withheld from such production, the document shall not be admissible."

This provision codifies the view taken by the House of Lords in *Duncan's case*—since repudiated in *Conways' case*.

65.79. In Sweden, every citizen, whether a party to litigation or not, has a **Sweden** general right of free access to official documents, with certain specific exceptions such as foreign policy, defence and police.<sup>4</sup>

## XI. RESULT OF THE COMPARISON

65.80. The above comparison of the salient features of the law on the subject under the Act, with the law in England and in the United States and certain other countries, is not a matter of mere academic interest; it is intended to bring out certain important characteristics of our own provision. Without meaning to be exhaustive, one may state that the Indian Act, taken literally, is more stringent in its effect on the citizen's right to summon evidence than the law in England and the U.S.A.—at least in one respect, namely, that the decision of the head of the department is, so far as the text of the section goes, final—which is not the position in England and in the United States. It may also be stated that in India, the implication of section 162,—again, taken literally,—is that even the judge in his chambers is not entitled to see the very document in respect of which the privilege is claimed—a matter in regard to which the present English practice seems to be different. In both these respects, thus, the law in India is stringent, on the text of the relevant provisions.

## XII. POINTS FOR AMENDMENT

65.81. Should the law in India be changed? That is the question to be considered. Of course, the fact that the law elsewhere is more liberal is not a **Points to be borne in mind.** sufficient consideration,—though it may show that if the experience of other countries is any guide, practical difficulties need not be apprehended.

<sup>1</sup>*Ellis v. Home office*, (1953) 2 Q.B. at 147.

<sup>2</sup>Section 131, Kenya Evidence Act.

<sup>3</sup>Emphasis added.

<sup>4</sup>Nils Herlitz, "Publicity of Official Documents in Sweden" (1958) Public Law 50, cited in Hood Philips, Constitutional Law (1967), page 692.

65.82. In taking a decision on the question whether the section requires an amendment, it should not be overlooked that the present section was framed a hundred years ago at a time when the activities of the State were not so wide and all embracing as they are at present. Further, it must be borne in mind that thinking on the subject had not then crystallised as it is today; and several aspects of the privilege—its impact on the administration of justice and its effects on the rights of citizens—had not been thoroughly discussed at that time. For these reasons, one is entitled to consider the need for substantial modifications or additions and amplifications with greater readiness than one would be in the case of other provisions.

65.83. There is the very important aspect of rule of law. "In a democracy based upon the rule of law, surely the only acceptable repositories of absolute discretion should be the courts."<sup>1</sup>

Recommendation  
to amend section  
162.

65.83A. We first address ourselves to the present provision barring the inspection of the document (section 162). This provision<sup>2</sup> has caused serious practical difficulties. If the court cannot inspect the document, it is inconvenient for the Court to decide the question whether the document falls within "affairs of State". On principle also, where the admissibility of a document is to be decided, the materials—and more particularly the document itself—ought to be before the Court. The Court would, it is true, ordinarily accept the statement of the Minister or head of the department, if made on oath, as to whether the document is one whose disclosure would be injurious to public interest. The court may, in a proper case, get him cross-examined at the hands of a party claiming disclosure. The court will treat his objection as sufficiently, provided the objection is validly and properly taken and based on materials which the court considers evidence. But the ultimate power of inspection should always be vested in the court. In the peculiar circumstances of a case, the court may accept the view of the responsible officer, but the decision must be of the court.

65.84. It may be noted that the practice elsewhere has been liberalised. Lord Denning, who gave the dissenting judgment in *Conway's case*<sup>3</sup> (in the Court of Appeal), referred to a number of cases from all the dominion countries for holding the view that *the documents could be inspected by the court* for keeping the balance between the parties even. The following observations of Lord Denning can be read with advantage:<sup>4</sup>

"I know that in *Duncan v. Cammell, Daird & Co. Ltd.*, (1942) 1 All E.R. 587; (1942) A.C. 624, the House of Lords dissented from *Robinson's case*, (1931) All E.R. 533; (1931) A.C. 704; but the courts of the Commonwealth being free to choose have unanimously followed *Robinson's case* and have endorsed the views of this court in the *Grosvenor Hotel case*, (1964) 3 All E.R. 354; (1965) Ch. 1210; or in other cases have acted on like principles. Let me recite the cases. They are a veritable roll call. The Supreme Court of Canada in *R. v. Shinder*, (1954) S.L.R. 479 and *Gagnon v. Quebec Securities Commission*, (1964) S.C.R. 329. The Supreme Court of Victoria in *Bruce v. Waldron*, (1963) V.L.R. 3. The Court of Appeal of New South Wales in *Re Tunstall, Ex. P. Brown*, (1966) 84 W.N. (Pt. 2) (N.S.W.) 13. The Court of Appeal of the New Zealand in *Corbett v. Social Security Commission*, (1962) N.Z.L.R. 878. The Supreme Court of India in

<sup>1</sup>D.C.M. Yardley, "Executive Privilege" (1974) New L.J. 794, 797.

<sup>2</sup>Section 162.

<sup>3</sup>*Conway v. Rimmer*, (1967) 2 All. E.R. 1260, 1262 (C.A.). On appeal (1968) 31 All. E.R. 874 (H.L.).

<sup>4</sup>See also para 65.101, *infra*.



*Amar Chand v. Union of India*, A.I.R. 1964 S.C. 1658. The Supreme Court of Ceylon in *Apponhamy v. Illangaretue*, (1964) 66 C.L.W. 17. The Court of Appeal of Jamaica in *Allen v. Byfield* (No. 2), (1964) 7 W.I.R. 69 at page 71. To say nothing of the Court of Session in Scotland backed in this respect by the House of Lords, itself in *Glasgow Corporation v. Central Land Board*, 1956 S.C. (H.L.).”

65.85. Our first recommendation, then, is to amend section 162 for the purpose by deleting the words which exclude from inspection a document relating to matters of State. Amendment of section 162.

65.86. In addition, power to decide the question of privilege should also in our view, be vested in the Court. In practice, the Court will pay due regard to the Ministerial Certificate. But it seems to us that the legislative provision must not be rigid as at present. The ultimate decision as to whether disclosure should or should not be allowed, should, in every case under section 123, be with the Court. It is to be pointed out, in this context, that the foundation for the privilege is *injury to the public interest*.<sup>1</sup> The expression “affairs of State” is of very wide amplitude; literally, it will cover every activity of the State so as to take in even day to day routine administration and not merely highly confidential matters pertaining to defence, foreign affairs, Cabinet minutes or advice tendered by the Ministers to the Governor under Article 163(3). The crucial test should be whether there is injury to the interest of the public, and a determination of that question should be left to the Court. Decision of privilege — section 123.

65.87. According to Wigmore,<sup>2</sup> the extent to which this privilege has gone beyond “secrets of State” in the military or international sense is by no means clearly defined, and therefore its scope and bearing are open to careful examination in the light of logic and policy. According to him, in a community under a system of representative government, there can be only few facts which require to be kept secret with that solidity which defies even the inquiry of courts of justice.

65.88. We may also quote the views of Salmon L.J. Addressing the members of Justice in July, 1967, Salmon L.J. (as he then was)<sup>3</sup> observed, after referring to the case law on the subject, as follows:—

“This is a constitutional question of first importance and it can be settled only in the courts. The law relating to crown privilege is entirely judge-made law. No statute is concerned. If the courts lack the will, it would be unrealistic to expect of any government that it should find the parliamentary time to introduce legislation for the purpose of conferring upon the courts a power which they have shown that they are unwilling to acknowledge, let alone exercise. The courts in Scotland have held that they have this power. So have the courts of Canada, Australia, New Zealand and India. These decisions have been upheld in the House of Lords; *Glasgow Corporation v. Central Land Board*, (1956) S.C. (H.L.), and the Privy Council; *Robinson v. State of South Australia*, (1931) A.C. 704. The *Grosvenor Hotel case* laid down that a similar rule of the common law prevails in England. There is, indeed, no country in which the common law holds sway, whose courts have failed to recognise that they have such

<sup>1</sup>*State of U.P. v. Raj Narain*, A.I.R. 1975 S.C. 865.

<sup>2</sup>Wigmore, “Evidence”, 3rd ed. Vol. 8, page 788, referred to by Mathew J. in A.I.R. 1975 S.C. 865, 884, para 73.

<sup>3</sup>Lord Justice Salmon, “Bench: The Last Bulwark of individual Liberty” (1967), reprinted in (1967), 69 Bom. L.R. Journal 123.

a power—to be exercised no doubt rarely and in the last resort, but nevertheless to be exercised when necessary. It would be said indeed if the courts of this country, which is the fount of the common law, should alone, and contrary to its whole spirit and all its principles, wholly abdicate a power which is vital to the true administration of justice.”

Affairs of State  
and public in-  
terest — Compa-  
rative importance.

65.89. The question why the determination of the question of public interest should be by the court may be viewed from another angle. For this purpose, it is necessary to discuss in detail the expression “affairs of State”. These words have not been defined, nor has the expression “matters of State”,<sup>1</sup> which is used in section 162, been defined in the Act. The shorter Oxford Dictionary explains “matter” as a “thing, affair, concern”. Therefore, one may presume that there is, for all practical purposes, no difference between the scope of section 123 and section 162 so far as this particular ingredient is concerned.

Dictionary mean-  
ing of “affairs of  
State”.

65.90. In the absence of a statutory definition of the expression “affairs of State”, one is driven to consulting the Dictionary. The shorter Oxford Dictionary explains “affairs of State” as “public business”. Now, such a meaning cannot be attributed to this expression in the context of section 123, because that will mean that all public business would be excluded from the purview of the law of evidence, unless the head of the department consents. This is not the usual understanding of the section. Such a view, though sometimes put forth on behalf of the government,<sup>2</sup> has never been accepted judicially.

It may be noted that the expression “affairs of State” does not possess much importance in English common law. The emphasis is on “public interest”. In *Robinson's case*<sup>3</sup> for example, the Privy Council said :

“The principle of the rule is the concern for public interest and the rule will accordingly be applied no further “than the attainment of that object requires.”

Injury to the public interest was the test adopted by the House of Lords in *Duncan's case* also, and in *Conway v. Rimmer*. It has been emphasised in India by the Supreme Court and High Courts on numerous occasions.

65.91. Having regard to the fact that the expression “affairs of State” is not defined in the Act, and that judicial decisions in India also do not give a precise definition, it is legitimate to consider the question whether the scope of the privilege should be defined in some other terms. Judicial decisions, on the whole, seem to suggest that these words have acquired a *secondary meaning*, namely, those matters of State *whose disclosure would cause injury to the public interest*.<sup>4</sup> Such a reading would, in fact, be inescapable if the foundation of the privilege is injury to the public interest.

65.92. The whole difficulty arises because, under the section as is now stands, prominence is given to the expression “affairs of State”—a prominence really not deserved by that expression if the matter is viewed on the basis of principle and unhampered by the fact that section already happens to use the expression. The crucial test ought to be injury to the public interest. In fact, this has been described as the foundation of the privilege, as already stated. The difficulty arises because the test which is really crucial does not find a place in the section, while an expression which is really not crucial is used in the section—and that

<sup>1</sup>Section 162.

<sup>2</sup>*Robinson v. State of South Australia*, A.I.R. 1931 P.C. 704.

<sup>3</sup>See discussion in the concurring judgment of Subba Rao, J. in *State of Punjab v. Sodhi Sukhdev Singh*, A.I.R. 1961 493, 567, para 94.

too without a definition. It would, therefore, be appropriate if the real test is incorporated in the section. After that is done, application of the test to each case should be with the court as is the case now with "affairs of State".

65.93 The result, in substance, would be that "relevant evidence must be excluded if its reception would be contrary to the public interest"—which is the formulation by Cross and Wilkins<sup>1</sup> of the rule in England. This is also in accordance with what Lord Morris Said in *Conway's case*,<sup>2</sup> namely,—

"Whenever objection is made to the production of a relevant document, it is for the court to decide whether to uphold the objection..... the power of the court must also include a power to examine the documents privately."

In this connection, reference may be made to the observations of Mathew J. in *State of U.P. v. Raj Narain*<sup>3</sup>, which were as follows:—

"As it was held in that case<sup>4</sup> that the Court has no power to inspect the document, it is difficult to see how the Court can find, without conducting an enquiry as regards the *possible effect of the disclosure of the documents upon public interest*, that a document is one relating to affairs of State as, *ex-hypothesi*, a document can relate to affairs of State only if its disclosure will injure public interest.<sup>5</sup> It might be that there are certain classes of documents which are *per se* noxious in the sense "that, without conducting an enquiry, it might be possible to say that by virtue of their character their disclosure would be injurious to public interest. But there are other documents which do not belong to the noxious class and yet their disclosure would be injurious to public interest. The enquiry to be conducted under section 162 is an enquiry into the validity of the objection that the document is an unpublished official record relating to affairs of State and therefore, permission to give evidence derived from it is declined. The objection would be that the document relates to secret affairs of State and its disclosure cannot be permitted, for, why should the officer at the head of the department raise an objection to the production of a document if he is prepared to permit its disclosure even though it relates to secret affairs of State? Section 162 visualizes an enquiry into that objection and empowers the court to take evidence for deciding whether the objection is valid. The court therefore, has to consider two things; whether the documents relate to secret affairs of State; and whether the refusal to permit evidence derived from it being given was in the public interest. No doubt, the words used in section 123 'as he thinks fit' confer an "absolute discretion on the head of the department to give or withhold such permission. As I said, it is only if the officer refuses to permit the disclosure of a document that any question can arise in a court and then section 162 of the Evidence Act will govern the situation. An overriding power in express terms is conferred on the court under section 162 to decide finally on the validity of the objection. The court will disallow the objection if it comes to the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure or that the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. This conclusion flows from the fact that in the first part of section 162 of the Evidence

<sup>1</sup>Cross and Wilkins, *Cutlines of the Law of Evidence* (1975), page 187, article 68(i).

<sup>2</sup>*Conway v. Rimmer*, (1968) 1 All. E.R. 874, 880 (H.L.).

<sup>3</sup>*State of U.P. v. Raj Narain*, A.I.R. 1975 S.C. 882, 883 para 69.

<sup>4</sup>*State of Punjab v. Sodhi Sukhdev Singh*, A.I.R. 1961 Punj. 493, 567, para 94.

<sup>5</sup>Emphasis added.

Act, there is no limitation on the scope of the court's decision, though in the second part, the mode of enquiry is hedged in by conditions. It is, therefore, clear that even though the head of the department has refused to grant permission, it is open to the court to go into the question after examining the document and find out whether the disclosure of the document would be injurious to public "interest and the expression 'as he thinks fit' in the latter part of section 123 need not deter the court from deciding the question afresh as section 162 authorises the court to determine the validity of the objection finally (see the concurring judgment of Subba Rao, J. in *Sukhdev Singh's case*)."

65.94. We should also mention that on the whole, the attitude of the courts in India has also been towards liberalising the interpretation of the law, though gradually. For example, in *Sukhdev Singh's case*, inspection of the original documents was regarded as totally barred by virtue of section 162. But, in *Amar Chand's case*, a further step was taken, and to do justice to the parties, it became necessary for the Court to call for the documents. Similarly, in *Sukhdev Singh's case*, an examination of the merits of the privilege claimed was out of question, while, in *Amar Chand's case*, the court, after seeing the document, was satisfied that the claim of privilege was not justified<sup>1</sup>.

65.95. Ray, C.J., in *State of U.P. v. Raj Narain*<sup>2</sup> after examining several decisions and observing that it is *injury to the public interest* which is the reason for exclusion from disclosure of the documents in question, and after giving certain illustrations of documents which would be privileged, pointed out<sup>3</sup>—

"In the ultimate analysis, the contents of the documents are so described that it could be seen at once that in the *public interest the documents are to be withheld*"<sup>4</sup>.

View of Mr. Justice Boulnois on the Evidence Bill quoted.

65.96. In this context, the following comment of a Judge of the erstwhile Punjab Chief Court on draft section 110 of the Indian Evidence Bill (present section 123), is also of interest<sup>5</sup>—

"Upon section 110 of the Bill it may be said that there is no corresponding provision with reference to documents, and, assuming "that a corresponding section will form part of Part II, Chapter VII that the words of section 22 of Act 2 of 1855 are preferable to those which would be so substituted for them, though much difficulty often arises in practice upon the law as it stands at present.

"If the head of the department is to be the Judge whether the 'document shall be produced or not,' some such words as section XXII of Act II of 1855 contains, are necessary for his guidance.

"It can be well understood that to obtain production of a document from the Indian Foreign Department is not the same as to put in evidence a contingent bill out of the Department of Public Accounts, or a contract obtained from that of Public Works.

<sup>1</sup>This aspect was noticed by Ray C. J. in *State of U.P. v. Raj Narain*, A.I.R. 1975 S.C. 865, 973, para 32.

<sup>2</sup>*State of U.P. v. Raj Narain*, A.I.R. 1975 S.C. 865, 875, 976, para 41.

<sup>3</sup>*Merriks v. Nottbower*, (1964) 1 All. E.R. 717 was referred to.

<sup>4</sup>Emphasis supplied.

<sup>5</sup>Justice Boulnois (Punjab Chief Court). Proceedings regarding the Evidence Bill (National Archives), Paper No. 82 (4th September 1871), page 129.

"The pecuniary interests of Government might require the non-production of the latter as much as the general interests of public policy might require the withholding of the former, but documents *should only be privileged on the ground of such general interests as are understood by the words 'public policy'*. Provision should be made for documentary as well as for oral evidence on this subject in the Bill."

65.97. It may be stated that section 22 of the Evidence Act, 2 of 1855, was as follows :—

"XXII. A witness shall not be forced to produce any document relating to affairs of State the production of which would be contrary to good policy".

Section 22. Act of 1855.

That section did not provide that the decision rests with the head of the department.

Under our recommendation,<sup>1</sup> the decision as to the validity of the claim will be by the Court. Of course, the court will pay adequate regard to the view of the highest officer as to whether the public interest would be prejudiced by disclosure, the more so when national security is put forth as the basis.

65.98. We consider it desirable that section 123 should be amended so as to incorporate a few proposition which are of fundamental importance, or are otherwise of such a nature that the gist thereof should find a place in the section and should not be left to be deduced from judicial decisions on the subject or otherwise left in a state of obscurity. We have in the course of the preceding discussion, referred to most of them. By way of summarising the points made so far and completing the discussion, we may state the propositions that should find legislative expression in section 123.

Lines of revision of section 123.

- (1) No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, *unless* the officer at the head of the department concerned has given permission for giving such evidence.

[This proposition does not make any substantial change in the existing provision. It operates primarily as between the witness and his superior].

- (2) Such officer should not withhold such permission unless he is satisfied that the giving of such evidence would be injurious to the public interest. He should make an affidavit also in this regard. The Court may, if it thinks fit, call for a further affidavit from the head of the department.

[This proposition amplifies the section by highlighting the test of injury to the public interest—a test discernible from the case law—and by codifying the procedure already indicated judicially].

- (3) Where such officer has withheld permission for the giving of such evidence, and the court, after inspecting the unpublished official records concerned<sup>2</sup> and after considering the affidavit, is of the opinion that the giving of such evidence would not be injurious to the public interest, the court should record its decision to that effect and thereupon the section will not apply to such evidence.

[This proposition modifies the existing section, for reasons already given. The change is an important one, as the decision as to injury to the public interest will be with the court].

<sup>1</sup>See *infra*.

<sup>2</sup>Section 162 to be amended also.

Section 162 to be amended.

65.98A. Amendment of section 162, second paragraph, by removing the words "unless it refers to matters of State", should also be carried out<sup>1</sup> separately.

### XIII. NATIONAL SECURITY

Cases of national security.

65.99. We do not propose to exclude, from the proposed provisions for inspection by the court and final determination by the court, cases where national security is put forth as a ground for claiming privilege. No such exception has been recognised elsewhere. On principle also, it is the courts which should decide questions of privilege.

If the Executive can act with discretion, the Judge can also act with discretion.

It is rarely that in private matters, documents concerning security of the State will be in issue. If it is a case of suit for wrongful dismissal of a civil servant and the dismissal is on the ground of national security, Article 311 of the Constitution will take care of it.

65.100. We are discussing this aspect because a point of view has been put forth that where the Minister gives an affidavit to the effect that the security of the State would be affected by the disclosure, his affidavit should be final. In our view, such a step would be a retrograde one. Even now, the decisions of the Supreme Court show that the Courts claim a right of inspection, and decide the question of privilege, whatever be the ground put forth for claiming the privilege. Moreover, in all Commonwealth countries, it is the court which decides the issue, whether the matter claimed to be privileged is alleged to relate to national security or whether the claim is made on any other basis.

Recent Commonwealth practice.

65.101. We have referred already<sup>2</sup> to the wealth of Commonwealth authority which was mentioned in the judgment of Lord Denning in *Conway v. Rimmer* in the Court of Appeal. Simply by way of illustrating from recent practice, we would refer to a New Zealand decision.<sup>3</sup> In that case, the plaintiffs brought an action alleging breach of contract between themselves and the State. The Minister concerned objected to the production of documents relating to the formation of government policy on the basis that it would be injurious to the public interest to reveal to public scrutiny the inner workings of government at high levels. It was held that in this particular case, which was a claim for breach of contract, and where there was no question of the security of the country being affected by the disclosure of secret matters, where the Judge feels a doubt about the documents for which privilege is claimed, the citizen is entitled to some scrutiny on his behalf. An order was accordingly made by Beattie, J., of the Supreme Court that the documents should be supplied for the inspection of the Judge.

Position in Canada.

65.101A. The Canadian rule was recently changed; while the pre-1954 view was similar to that of England, the case of *Regina v. Snider*,<sup>4</sup> marked a turning point. The Court, it was held, had now the responsibility of determining whether on the basis of "any rational view" the public interest required that the document should not be revealed. If an affirmative finding is made on this point, the court then would defer to the Minister's claim. In

<sup>1</sup>To be carried out under section 162.

<sup>2</sup>Paragraph 65.84, *supra*.

<sup>3</sup>*Meates v. Attorney General*, (Supreme Court, Wellington) (18th February, 1976); Butterworth's Current Law (1976), (Case Nos. 191 and 301).

<sup>4</sup>*Regina v. Snider*, (1954) 4 D.L.R. 483.

the case in which it was announced, the Supreme Court could not find any public interest requiring non-disclosure of income tax returns *despite statutory provisions assuring their privacy*. Moreover, dicta in the case made it clear that the judiciary was expected to exercise control of administrative discretion in this area.

In 1964, the rule was laid down in Canada practically in the same<sup>1</sup> terms as it is in England now.

**65.101B.** In order to allay possible mis-apprehension as to the effect of the proposed amendment in regard to those provisions of the substantive law which create certain special safeguards on the ground of security of State, we should mention here that those safeguards would not be affected by the proposed amendment. This is for the reason that where the substantive law itself takes the case out of the realm of court, there can be no occasion for invoking this or any other evidentiary privilege because the matter would not be litigated at all. We are making this observation since the apprehension may arise that, in regard, for example to the special provision as to the security of the State made in Article 311 of the Constitution the proposed amendment may have an undesirable effect. Cases under article 311 are outside the sphere of justiciability, where the dismissal or removal of the civil servant concerned is itself on the ground of security of State. This is by reason of the special provision contained in that behalf in that very Article, ruling out justiciability.

**65.102.** The clarification which we have recommended is needed from the practical point of view. It may be mentioned that in *Amar Chand's case* frivolous pleas were raised—the document sought to be withheld was one which completely established the opposite party's case.

**65.103.** Any system of law in a democratic society must have as one of its primary goals, equality before the Law and the equal protection of the laws.

A bureaucracy may become too cumbersome, proceeding by formula on its own rigid lines, and thus may not be able to understand the spirit of the law or the fine, subtle and intangible considerations of justice. It is given to the judge to steer the law between the dangers of rigidity on the one hand, and of arbitrariness on the other hand. There is no sound reason why, when so many important matters are decided by courts in the field of procedure, a departure should be made in regard to the question of state privilege.

A Judge is the person entrusted, on behalf of the community, to weigh the various conflicting interests—to weigh, on the one hand, the needs of security of the State and, on the other hand, the ultimate interest of the community in justice being done and in a proper investigation being made into facts. If the judge determines that the government servant must produce the document, then no privilege should avail him to refuse.

**65.104.** It would be convenient to summarise our reasons for the recommendation:—

Reasons  
summarised.

- (a) The rule of law justifies the course recommended.
- (b) Balance of convenience is in favour of the course recommended.
- (c) Only the Judge can decide such questions.
- (d) There is no likelihood of abuse of the power proposed to be conferred on the Judge.

<sup>1</sup>*Gagnan*, (1964) S.C.R. (Canada).

- (e) Past experience shows that having regard to the unsatisfactory grounds on which privilege was claimed, courts had to reject the claim. This shows how the proposed amendment is in the interests of justice.

#### XIV. CASE LAW DISALLOWING CLAIM

**65.105.** At this stage, we may refer to a few decided cases where the claim of privilege was rejected. Though security of the State was not put forth specifically in those cases, they are relevant to show how a claim is made sometimes on unsubstantial grounds.

**65.106.** In a Bombay case,<sup>1</sup> the Collector of Bombay refused to renew the licence granted to the petitioner—R.M.D. Chamarbaghwalla—to run a prize competition. In support of the refusal, the Collector stated in his affidavit, "I say that Government decided and laid its general policy and confidentially circulated it for the guidance of its officers".

At the time of hearing, the Advocate-General raised a preliminary objection that the circular issued by Government was privileged from production under section 123, Evidence Act.

This objection of the Advocate-General was over-ruled by the High Court.

**65.107.** In a Madras case,<sup>2</sup> the writ petition was filed by A. Ramachandran against the appointment of the respondent as Government Pleader by the State of Madras on 1-7-1960.

One of the allegations made by the petitioner in his affidavit was that he believed that in 1959 the name of the respondent was sent up for appointment as a High Court Judge but had been rejected on the ground that he lacked judicial experience.

To this allegation, the then Law Minister of the State replied in his affidavit as under :—

"I am not in a position to disclose any matter relating to the proposals or consultations for appointment of a High Court Judge. Under Article 217(1) of the Indian Constitution, the President makes such appointments in consultation with the Chief Justice of the High Court. Their consultations are confidential and no Minister or other officer can disclose details thereof".

**65.108.** Dealing with this aspect of the matter, the High Court observed that there is no duty on Government to claim privilege in a case of this kind. "But they have a duty to speak the truth and the whole truth whether in a case of this kind or different—and affidavits are not excepted from the scope of the rule.

**65.109.** An Allahabad case<sup>3</sup> was a civil case between two private parties regarding the demolition of a wall in a property dispute. The plaintiff summoned the case diary of a criminal case investigated by the Police to show the existence of some windows at an earlier period. A clerk from the police department who brought the case diary to the Court claimed privilege and this was allowed by the Court, with the result that the evidence could not come on record and the suit was dismissed. On appeal by the plaintiff, the lower appellate Court held that the privilege was not claimed in a proper form, nor

<sup>1</sup>R. M. D. Chamarbaghwalla v. Y. R. Parpia, A.I.R. 1950 Bombay 230.

<sup>2</sup>A. Ramachandran v. A. Alagiriswami & others, A.I.R. 1961 Madras 450.

<sup>3</sup>Mahabirji Birajman Mandir v. Prem Narain Shukla and others, A.I.R. 1965 All. 494.



by the head of the department and consequently remanded the case to the trial Court. Against this order, the defendant came up in the High Court. It was contended that the case diary maintained by a Police Officer during the investigation of a crime was a confidential document with regard to which privilege could be claimed and no evidence could be allowed to come on the record. The High Court held that a part of the case diary containing the confidential communications or reports are privileged but not the statements of witnesses or other allied matters contained therein.

65.110. The High Court further held that the same inference can be drawn on a consideration of section 123. The term "affairs of State" is a general one, but it cannot include all that is contained in the record. Where an open enquiry is made, statements recorded during the open enquiry cannot be deemed to be confidential and, similarly, any application or complaint made by a person cannot be held to relate to the "affairs of State".

65.111. In an Andhra case,<sup>1</sup> the revision petitions were filed by the Public Prosecutor in the High Court against the orders of a magistrate, over-ruling a claim of privilege under sections 123 and 124 in respect of some documents summoned for by the respondent.

65.112. The respondent who was the President of a Cooperative Society was prosecuted for criminal breach of trust in respect of a sum of Rs. 4807/- belonging to the Society. The respondent applied to the magistrate for summoning the records of enquiries made by the Sub-Registrar of the Cooperative Societies and the Audit reports for the years 1953-54.

The Deputy Registrar who was summoned to produce those documents did not produce the same, and, instead, filed an affidavit of the Registrar of the Cooperative Societies and claimed privilege on the ground that these are unpublished official records relating to "affairs of State" and their disclosure will be prejudicial to public interest.

65.113. The Magistrate, after considering this claim of privilege under section 123, passed an order negating it on the ground that the documents related to the conduct of cooperative Societies and had nothing to do with the "affairs of State" in any manner.

65.114. The Public Prosecutor, Andhra, filed a revision petition against the said order. The High Court held that the magistrate was right in over-ruling the claim of privilege. The revision petition was dismissed.

#### XV. RECOMMENDATION

65.115. In the light of the above discussion, we recommend that section 123 **Recommendation.** should be revised on the following lines :—

"123. (1) Subject to the provisions of this section, no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, *"unless the officer at the head of the department concerned has given permission for giving such evidence.*

*Such officer shall not withhold such permission, unless he is satisfied that the giving of such evidence would be injurious to the public interest : and where he withholds such permission, he shall make an affidavit containing a statement to that effect and setting forth his reasons therefor :*

<sup>1</sup>The Public Prosecutor v. Damara Venkata Narasayya, A.I.R. 1957 A.P. 486.

*Provided that where the court is of opinion that the affidavit so made does not state the facts or the reasons fully, the Court may require such officer or, in appropriate cases, the Minister concerned with the subject, to make a further affidavit on the subject.*

*(3) Where such officer has withheld permission for the giving of such evidence, the court, after considering the affidavit or further affidavit, and, if it so thinks fit, after examining such officer or, in appropriate cases, the Minister, orally,—*

- (a) Shall issue a summons for the production of the unpublished official records concerned, if such summons has not already been issued;*
- (b) shall inspect the records in chambers; and*
- (c) shall determine the question whether the giving of such evidence would or would not be injurious to the public interest, recording its reasons therefor.*

*(4) Where, under sub-section (3), the court decides that the giving of such evidence would not be injurious to the public interest, the provisions of sub-section (1) shall not apply to such evidence."*

Recommendation.

**65.116.** The above recommendation is subject to reservation by two members—Shri Dhavan and Shri Sen-Verma—who have written a separate note.<sup>2</sup>

<sup>1</sup>Amendment of section 162, second paragraph, by deleting the words "unless it refers to matters of State", to be carried out separately.

<sup>2</sup>Note by Shri Dhavan and Shri Sen-Verma.

## COMMUNICATIONS IN OFFICIAL CONFIDENCE—SECTION 124

## I. INTRODUCTORY

66.1. Besides section 123, there is yet another section relevant to official matters, the disclosure whereof would be injurious to the public interest. Under section 124, no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure. Introductory.

66.2. It may be recalled that section 123—the preceding section—provides that 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. To some extent, sections 123 and 124 may seem to overlap; in certain respects, they differ from each other. They overlap insofar as evidence which is derived from unpublished official records, and which consists of communications made to a public officer in official confidence, falls under both the sections. Sections 123 and 124 compared.

66.3. Of course, as already stated, the two sections are not identical in all respects. Section 123 is not confined to a public officer, while section 124 is so confined. On the other hand, section 123 is confined to a written communications, while section 124 is not so confined.

66.4. Section 123, as it now stands, vests the decision in the head of the department. Section 124 leaves to the public officer deposing in the case the decision of the question whether he should disclose the matter or not. Section 124 is concerned with confidential official *communications*—to use a convenient label, though it is not very accurate—while section 123 is concerned with unpublished official *records*.

66.5. In certain cases—say, in regard to *oral* official communications—it is enough to comply with section 124. Such cases do not present problems of magnitude. But the overlapping to which we have referred may create difficulties, where both the sections apply. In particular, while under section 123, as it now stands, it is for the *head of the department*, to give permission; under section 124, it is for the *public servant* to decide whether the public interest would suffer by the disclosure. It will be necessary to revert to this aspect later.

## II. ENGLISH LAW

66.6. Before we discuss the need for amendments in the section, it would be useful to refer to the English law on the subject. The general principle in England is that relevant evidence must be excluded if its reception would be contrary to the public interest. It is this general principle that seems to regulate the disclosure or non-disclosure of communications in the conduct of official affairs. There is no separate rule for official communications in addition to that applicable for official papers. In particular, the Crown is not allowed to object to the giving of any oral evidence by a witness, even if he be a civil servant. The witness must attend, and objection must be limited to questions relating to matters claimed to be covered by the doctrine of public policy<sup>1</sup>—whatever be the proper scope of that doctrine. Position in England.

<sup>1</sup>*Broome v. Broome*, (1955) Probate 190; (1955) 1 All. E.R. 201, 204, (Sachs J.). For comment, see (1957) Cambridge Law Journal 11.

The case of *Broome*<sup>1</sup> is an illustration. The wife had sued the husband for dissolution of the marriage, on the ground of cruelty, alleging, *inter alia*, that when she joined the husband in Hong Kong, where the husband was posted as a sergeant in the army, the husband took her to a filthy apartment of a standard far below his means and failed to provide her with any assistance and kept her short of money. For proving this allegation, the wife caused a subpoena (for oral evidence and for producing certain documents) to be served on one Mrs. Allsop, who was, at the material time, the sole representative of the Soldiers' Families Association in Hong Kong. The Secretary of State for war, by a certificate, recorded the opinion that it was not in the public interest that "the documents should be produced or the evidence of Mrs. Allsop given orally". We are, at the moment, concerned with the latter part of the certificate relating to oral evidence. Sachs J., held that it was wrong on the part of the Minister to adopt a procedure which would prevent the witness from giving any evidence, whatsoever, of any sort. On the merits also, he was not persuaded that, in the circumstances of the case, there was a legitimate justification for claiming the privilege. But, in any case, the form of the certificate was not such as to enable the court to ascertain what really was the nature of the evidence for which privilege was being claimed. He also pointed out that in the present case, the evidence of Mrs. Allsop as to the way in which the wife was received at the Quay at Hong Kong and the sort of accommodation available and connected matters was relevant and of assistance to the court and in none of those matters was there any apparent cause for any intervention in the name of Crown privilege.

No separate rule  
in England.

66.7. So far as could be gathered from the case law on the subject, there is, in England, *no separate privilege of confidential communications* to public servants—at least according to the modern theory. The principle of injury to the public interest applies, and it would appear that whatever rule applies to written records, applies to oral communications. However, it is said<sup>2</sup> that the procedure which may be appropriately followed in respect of oral evidence may have to be worked out.

Lord Simon, in *Rogers v. Secretary of State*,<sup>3</sup> observed—

"I am not, for myself, convinced that there is any general privilege protecting communications given in confidence (see *Smith v. East India Co.*,<sup>4</sup> but cf. *Alfred Crompton Amusement Machines Ltd. v. Comrs. of Customs and Excise*)."

After advertg to the circumstances from which the law might itself infer confidentiality, he observed:

"But if this is a correct classification, it would suggest that the privilege (a true privilege being waivable) is that of the impartor of the information and not that of recipient."

While Lord Simon was cautious enough not to make a categorical statement, the treatment of the subject in some of the recent works on evidence<sup>5,7</sup> seems to suggest that cases of confidential communications made for official purposes are not separately dealt with, but are subsumed under the general category of public interest.

<sup>1</sup>*Broome v. Broome*, (1955) 1 All. E.R. 201.

<sup>2</sup>*Broome v. Broome*, (1955) Probate 190, 198; (1955) 1 All. E.R. 201 (Sachs, J.).

<sup>3</sup>*Rogers v. Secretary of State*, (1972) 2 All. E.R. 1057, 1067 (H.L.).

<sup>4</sup>*Smith v. East India Co.*, (1841) 1 Ph. at 54.

<sup>5</sup>*Alfred Crompton Amusement Machines Ltd. v. Comrs. of Customs and Excise*, (1972) 2 All. E.R. 353, 380; (1972) 2 W.L.R. 835, 859.

<sup>6</sup>Cross on Evidence (1974), page 268, 271-273.

<sup>7</sup>Phipson, Manual of Evidence (1972), page 94.

## III. POINTS FOR AMENDMENT

66.8. It would, thus, appear that in England a separate rule is not considered necessary on the topic forming the subject of section 124. If this view is correct, then it can be said that the developments that have taken place in England as to Crown privilege in relation to the production of documents<sup>1</sup> will effect the law relating to oral communications also.

Questions for consideration arising from co-existence of two sections.

We may now revert to the survey of the two sections in our Act, and the overlapping to which we have already referred. A question arises for consideration whether, in so far as the two sections overlap, it is not desirable that the overlapping should be removed.

66.9. Dealing with this question, we are, in the first place, of the opinion that, in the interest of clarity, overlapping between the two sections should be avoided, and the only possible method of doing this is to confine section 124 to matters *which are not in the form of unpublished official records*. For brevity, we may call them "oral communications",—though that expression does not very accurately indicate the scope of section 124 as it now stands. We use the expression "oral" simply as a convenient label to exclude unpublished official records. These are dealt with in section 123 and we do not see the need for any additional protection for unpublished official records consisting of "communications in official confidence". All unpublished official records—whether made in "official confidence" or otherwise—should be governed by section 123. The privilege as provided in that section—subject to the amendment which we have recommended in that section—should be adequate for the purpose. There is no reason why evidence derived from unpublished official records relating to affairs of State should, besides enjoying the protection conferred by section 123, also be subject to a special protection under section 124. At present, not only the permission of the head of the department must be obtained, but also the willingness of the public servant must be secured. Since such a double safeguard is hardly called for, we recommend that whatever falls within section 123 should be excluded from section 124. In the result, section 124 will be needed only for the residuary category—briefly, oral official communications made in official confidence whose disclosure may injure the public interest.

Recommendation—section 124 to be confined to oral communications.

66.10. Secondly, as regards this residuary category of oral official communications, the proper test should be *injury to the public interest*. Section 124 already so provides,—by the words "the public interests would suffer by its disclosure". The test is sound. As to the authority which should apply this test, we deal with the question below.

Test of injury to public interest to be retained.

66.11. The third question to be considered is whether the application of this test—i.e. whether the decision of injury to the public interest likely to be caused by disclosure of the communication—should be left to (i) the public servant concerned, as at present, or (ii) the head of the department, as in section 123 (as it now stands); or (iii) the court, as in our recommendation relating to section 123.<sup>1</sup>

Determination of injury to public interest — by whom?

66.12. According to section 124, as it now stands, the question as to whether a communication was made in official confidence, is a matter subject solely to judicial decision. But, if the Court comes to the conclusion that the communication was made in official confidence, then it is for the officer alone to whom the communication has been made to decide whether the disclosure should be made.

<sup>1</sup>See Chapter 65, *supra*.

This is laid down in the case law<sup>1</sup> under section 124 which—though the cases actually related to documents,—were decided with reference to section 124 also.

66.13. It appears to us that this position cannot be allowed to continue. In this case also, the Court should be the judge of the likelihood of injury to the public interests. No doubt, this can be ensured only if the materials available to the public servant are made available to the court also. On this latter score, however, no difficulty should arise, because the public servant concerned can, without disclosing all the materials to the parties, disclose them to the judge in chambers—a course which could be expressly provided for in the section.<sup>2</sup>

Decision to be  
with the court.

66.14. It is after careful consideration that we have come to the conclusion that the decision should be with the court. It is too much to leave the question of injury to the public interest to the decision of the public servant who may happen to be deposing in the particular case. He may be a petty public servant, while the judge may be a person with a much higher official rank. Apart from that, however, there does not seem to be any serious probability of grave injury to the public interests if the decision is left to the court, instead of to the public servant. If necessary, the court can ascertain in chambers the nature of the evidence to be given and the objections likely to be made by the public servant concerned. But it would be more in consonance with the general scheme of the Act to give to the court the power to decide the objection in question. We recommend that the section should be so amended.

66.15. It is to be noted that even now, the question whether the communication is to be regarded as one made in official confidence is primarily to be decided by the court in which the privilege is claimed.<sup>3</sup> The only change of substance recommended by us is that while, at present, the public officer has to decide the question of injury to the public interest, our recommendation is to transfer the power to the Court. This will avoid arbitrary or capricious decision by the public servant—a situation which not infrequently arises.<sup>4</sup>

It may be pointed out that the approach suggested above, namely, that the decision should be with the court, will bring uniformity between sections 123 and 124. In this connection it is pertinent to observe that the fact that these two sections really should be based on the same consideration does not represent anything very radical. In the leading Bombay case<sup>5</sup> in which the matter was considered fully by a Division Bench, Wassodew J. observed—

“This section (124) as well section 123 protects the discovery of documents referring to matters of State. That is based on the general rule<sup>6</sup> that no person can be compelled to give evidence of matters which are State secrets including communications between public officers in the discharge of their public duties. (Halsbury, Volume 22, paragraph 597, at page 427).”

<sup>1</sup>(a) *In re Mantubhai Mehta*, A.I.R. 1945 Bom. 122; I.Q.B. 126 (N.J. Wadia & Weston, JJ.).

(b) *In re Makky Moithu*, A.I.R. 1943 Mad. 278; 279 (Horwill J.).

(c) *Ijjatali Talukdar v. Emperor*, A.I.R. 1943 Cal. 539.

(d) *Nagaraja v. Secretary of State*, I.L.R. 39 Mad. 204.

(e) *Collector of Jaunpur v. Jamna*, A.I.R. 1922 All. 37, 40.

<sup>2</sup>See para 66.17, *infra*.

<sup>3</sup>*Bhalchandra v. Chandbassappa*, 41 Bom. L.R. 391; A.I.R. 1939 Bom. 234.

<sup>4</sup>*Excelsior Films v. Union of India*, (1966) 69 Bom. Law Reporter 878.

<sup>5</sup>*Bhalchandra v. Chandbassappa*, A.I.R. 1939 Bom. 237.

<sup>6</sup>Emphasis supplied.

66.16. We find that a substantially similar suggestion was made by a Judicial Commissioner in his comment on the Evidence Bill<sup>1</sup> (under draft section 112— which is now section 124). The suggestion was as follows:—

Suggestion made on the original Bill.

"Section 112. It might be well to add to this section the words 'unless with the permission of the Court'. It is sometimes very necessary for the ends of justice, that the source whence information was derived, especially by the Police, should be known."

66.17. Having regard to all these considerations, we recommend that the power to determine the question of public interest should be in the Court. An examination of the public servant *in camera* for ascertaining the nature of the objection and the reasons therefor should be provided for, as a safeguard.

Recommendation to give power to the Court and to provide for examination in Chambers.

#### IV. MEANING OF OFFICIAL CONFIDENCE

66.17A. A few other points not calling for amendment may now be dealt with. We may note that there is some obscurity as to the expression "official confidence" as used in the section. According to the view of Oldfield J. in a Madras case,<sup>2</sup> the dominant intention in section 124 is to prevent disclosure to the detriment of the public interest and nothing special turns upon the word "confidential". On this view, the expression "communication in official confidence" imports no special degree of secrecy, but includes generally matters communicated by one officer to another in the performance of their duties, where detriment to the public interest may result. It has been said<sup>3</sup> that an easier and more probable explanation of the phrase "official" is evolved by comparison with the expression "professional confidence" in section 126.

Meaning of "official confidence".

66.18. According to the Bombay view,<sup>4</sup> however, the communication contemplated by section 124, necessarily involves the wilful confiding of secrets with a view to avoiding publicity by reason of the official position of the person in whom trust is reposed. The Bombay view could not include within the section all communications to public officers, but would leave the court free to examine the nature of the communication—broadly on a determination of the question whether the need for secrecy was expressed or can be implied.

66.19. We are of the opinion that the Bombay view is to be preferred. The wider view taken in Madras would make the section all-embracing, and we do not think that the section was intended to be so. However, since injury to the public interest is a vital ingredient of the section, this controversy does not have much practical importance.

66.20. In some of the judicial decisions,<sup>5</sup> the test applied is whether the document was prepared in pursuance of a legal process, or whether it was prepared otherwise than under a legal process. With great respect, however, it appears to us that this would not be a universal test suitable for every case. It may be true to state that if the document is prepared under a legal process, then it cannot ordinarily be a confidential one, because it has to be submitted to some judicial or quasi-judicial authority. That does not, however, imply that all other documents would be regarded as made in official confidence.

Test of legal process not satisfactory.

<sup>1</sup>Mr. P. S. Melvill, Officiating Judicial Commissioner C. P. in Paper No. 69, page 72, under section 112 (papers regarding Evidence Act, 1872) (National Archives).

<sup>2</sup>See para 66.13, *supra*.

<sup>3</sup>*Nagaraja v. Secretary of State*, I.L.R. 39 Madras 304, 310-312 (Oldfield, J.), (Iyabji J. did not go so far).

<sup>4</sup>*Nagaraja v. Secretary of State*, I.L.R. 39 Madras 304, 310, 312.

<sup>5</sup>*Bhalchandra v. Chandbassappa*, A.I.R. 1939 Bom. 237, 245, 247 (Sen & Wassoodew, JJ.).

<sup>6</sup>*In re Suryanarayana*, A.I.R. 1954 Mad. 278 (reviews cases).

For example, every routine paper of a trivial nature sent to a public office and not made under a legal process,—such as an application for leave,—can hardly be contemplated as falling within section 124 under the category of a communication made in official confidence. Therefore, the test referred to above would create anomalies in practice, and theoretically also it is not sound, there being no logical basis for an assumption that the absence of the element of judicial process implies the presence of the element of confidence.

66.21. In this connection, we may quote what viscount Dilhorne observed in *Norwich Pharmacal Co. v. Customs Commissioner*<sup>1</sup>—

“I do not accept the proposition that all information given to a government department is to be treated as confidential and protected from disclosure, but I agree that information of a personal character obtained in the exercise of statutory powers, information of such a character that the giver of it would not expect it to be used for any purpose other than that for which it is given, or disclosed to any person not concerned with that purpose, is to be regarded as protected from disclosure, even though there is no statutory prohibition of its disclosure”.

## V. RECOMMENDATION

### Recommendation.

66.22. In the light of the changes needed in the section as discussed in this chapter,<sup>2</sup> we recommend that section 124 should be revised as under :—

“124. (1) No public officer shall be compelled to disclose communications made to him in official confidence, *other than communications contained in unpublished official records relating to any affairs of State, when the court considers that the public interests would suffer by the disclosure.*

(2) *Where a public officer who is a witness is asked a question which might require the disclosure of any such communication, and he objects to answering the question on the ground that the public interests would suffer by its disclosure, the court shall, before rejecting his objection, ascertain from him, in chambers, the nature of his objection and reasons therefore.*”

66.23. We should note that this recommendation is subject to reservation by two Members—Shri Dhavan and Shri Sen-Verma. The reservation made by them in regard to section 123 applies to section 124 also, since both the sections are concerned with injury to the public interest.

<sup>1</sup>*Norwich Pharmacal Co. v. Customs Commissioner*, (1973) 2 All. E.R. 943 (H.L.).

<sup>2</sup>Paras 66.9, 66.10 and 66.17, *supra*.



## INFORMATION AS TO OFFENCES—SECTION 125

## I. INTRODUCTORY

67.1. The disclosures of matters injurious to public interest in general has been discussed so far. A particular species of matters involving the public interest is dealt with in section 125. Under section 125, no Magistrate or Revenue Officer or Police Officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue. Introductory.

“Revenue Officer” in this section means any officer employed in or about the business of any branch of the public revenue.

67.2. The principle underlying the section is this. While it is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner, on the other hand, it is absolutely essential to the public welfare, that the names of parties who give information should not be divulged; for otherwise,—be it from fear, or shame, or the dislike of being publicly mixed up in enquiries of this nature,—few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequences would be that many great crimes would pass unpunished.<sup>1</sup> For the same reason, counsel for the defence is not entitled to elicit from a witness for the prosecution that he is a spy or informer.<sup>2</sup> Principle.

67.3. While the principle may be taken as sound in a broad sense, it must be noted that the rule is enacted in the section without any express limitations. The source of information may be a very material fact in the proceeding in question, and yet the section makes no exception. The broad question to be considered then, is whether it is absolutely essential that the section should be retained with its present broad sweep, or whether some exceptions should be created, in the interest of justice, to meet hardships which are likely to be caused in practice, to which we shall presently advert. Before discussing those hardships, let us have a look at the (i) previous law in India, and (ii) the English law. The previous law was much narrower than the present section, and so is the present English law, as will be evident from the ensuing discussion. Rule without limitations.

## II. PREVIOUS LAW

67.4. Before the passing of the Act, the law in India was narrower than what it is under the section. It was held<sup>3</sup> by the Calcutta High Court that the rule which laid down that a witness cannot be examined about the information given by him to the Government for the discovery of offender, was *confined to offences against the State or breach of revenue laws*. The propositions so laid down would seem to be in accord with the English law as was understood *at that time*.<sup>4</sup> Previous law.

<sup>1</sup>Woodroffe, Evidence Act (1941) referring to Taylor, Ev., S. 941, *R. v. Hardy*, (1794) 24 How. St. Tr., 808, 816; *Home v. Bentink*, 2 B. & B., 162; *Hennesay v. Wright*, 21 Q.B.D. 509.

<sup>2</sup>*Amrita v. R.*, (1815) I.L.R. 42 Cal. 957.

<sup>3</sup>*In re Mohesh Chandra*, 1810, 13 Weekly Reports, 1, 10, (Calcutta).

<sup>4</sup>*Reg. v. Richardson*, 1863, 3F. & F., 693, see para. 67.6, *infra*.

## III. ENGLISH LAW

Position in England.

67.5. This matter is usually discussed under the head of informer's privilege. The "informer's privilege" is recognised in England also but the privilege<sup>1</sup> is not absolute or unlimited. The channel of communication of detection of a crime, it is said, is exempt from disclosures, but the privilege is stated to be subject to the consideration that no injustice is caused to the accused. That the identity of police informers must, in the public interest, be kept secret, is not disputed.<sup>2</sup> But the consideration of justice, referred to above, prevails. In *Rogers v. Secretary of State*,<sup>3</sup> for example, Lord Simon of Glaisdale observed:

"Sources of police information are a judicially recognised class of evidence excluded on the ground of public policy *"unless their production is required to establish innocence in a criminal trial"*"

Although Lord Simon's observations speak merely of establishing innocence, some earlier cases state the limitation in wide terms.

Lord Esher M. R. in *Marks v. Beyfus*<sup>4</sup> observed that if, upon the trial of a prisoner, the Judge should be of opinion that the disclosure of the name of the informant was necessary or right in order to show the prisoner's innocence, then, one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. Lord Esher was dealing with one aspect of injustice, but the scope of the limitation is wider.

*Regina v. Richardson*<sup>5</sup> furnishes an example. It was an indictment for administering poison with intent to murder. The police had, in consequence of certain information, found the bottle containing the poison in a place used by the prisoner — a maid servant. It was held, that the police were bound to disclose from whom they had the information. The disclosure was compelled because the court found it material to the ends of justice.

Then, in *Hardy's case*<sup>6</sup> the following question was put to a witness: "How came you to go there?" (to the seditious meetings). He replied, "I was sent by a gentleman". He was asked, "By whom?" This question was objected to, and Eyre, C.J., said, "He has said what is proper and material for the purpose..... I do not think it is proper;" and the question objected to was withdrawn. Another witness was afterwards asked, without objection, whether he gave the information to a magistrate; which he answered in the negative. The next question was: "Then to whom was it?" This was objected to by the Attorney-General, who said, he could not see what it had to do with the justice of the case. Eyre, C.J., said, "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed. *If it can be made to appear that really and truly it is necessary, for the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it.*"<sup>7</sup>

<sup>1</sup>*Marks v. Beyfus*, (1890) 25 Q.B.D. 494 (C.A.).

<sup>2</sup>*Roggers v. Secretary of State*, (1972) 2 All. E.R. 1057 (H.L.).

<sup>3</sup>*Roggers v. Secretary of State*, (1972) 2 All. E.R. 1057 (H.L.).

<sup>4</sup>Emphasis supplied.

<sup>5</sup>*Marks v. Beyfus* (1890) 25 Q.B.D. 494, 498.

<sup>6</sup>*Regina v. Richardson* (1863) 3 F. & F. 693 Sussex Spring Assizes (Cockburn C. J.).

<sup>7</sup>*Hardy* (1794), 24 St. Tr. 751.

<sup>8</sup>Emphasis supplied.

67.6. There is, in the English case law, sufficient material for taking the view that the privilege relating to information concerning an offence originated in regard to matters of high state policy, that is to say, offences against the State or the revenues of the State. In fact, the Reporters's note to the case of *Reg. v. Richardson*,<sup>1</sup> quotes the views of Greenleaf, Taylor and Best, to the effect that the privilege is confined to offences of a political nature.

We are referring to these authorities to show an important limitation on the privilege of the informer in England.

67.7. Finally, it may be mentioned that the Lord Chancellor announced<sup>2</sup> in 1962 that in future, in proceedings against the police for such matters as malicious prosecution or wrongful arrest, no claim to exclude evidence relating to the justification for the conduct of the police will be made unless its disclosure would reveal the name of a *police informer*.

We have so far considered one limitation of the privilege in England. The second limitation should also be noted. The rule in England does not seem to apply to a private prosecution.<sup>3</sup>

#### IV. AMERICAN LAW

67.8. It will be possible to refer to only a few important features.

67.9. The privilege which protects from disclosures the identity of informers is not applicable in all situations in the U.S.A. The United States Supreme Court has said<sup>4</sup> that no fixed rule with respect to disclosure of the identity of an informer is justifiable; that the problem is one that calls for a balancing of the public interest in protecting the flow of information against the *individual's* right to prepare his defence; and that whether a proper balance renders non-disclosure erroneous must depend upon the particular circumstances of each case, taking into consideration the crime charged, the possible defence, the possible significance of the informer's testimony, and other relevant factors.

Position in U.S.A.  
— Limitations.

There is authority for the proposition that once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

67.10. The privilege is also held to be inapplicable where, in claiming it, the government seeks to avoid disclosure of the contents of a communication from the informer, but, in fact, it appears that the contents of the communication will not tend to reveal the informer's identity.

67.11. The most important limitation on the applicability of the privilege of non-disclosure of the identity of an informer arises from the fundamental requirements of fairness. Thus, it is held that where the disclosure of an informer's identity is relevant and helpful to the defence of an accused, or is essential to a fair determination of the cause, the privilege must give way. In the *Scher Case*,<sup>5</sup> the Supreme Court said that "Public policy forbids disclosure of an informers' identity *unless essential to the defence*, as, for example, where this turns upon an officers' good faith."

<sup>1</sup>*Reg. v. Richardson*, (1863) 3 F. & F. 693 (Cockburn, C.J.).

<sup>2</sup>See (1962) 237 H.L. Deb. Cols. 1191-11931 (1962) Public Law, page 203.

<sup>3</sup>*Attorney-General v. Briant*, 15 M. & W. 169.

<sup>4</sup>Stephen's Digest, Article 113.

<sup>5</sup>Annotation in 1 L. Ed. 2d, 1998, 2001-2002.

<sup>6</sup>*Scher case*, 305 U.S.A. at 254.

**Position in U.S.A.** 67.12. Subject to important limitations, it is a general rule applicable in the U.S.A. — applicable in civil as well as criminal cases — that the Government is privileged to withhold from disclosure<sup>1</sup> (notwithstanding its relevance), the identity of persons who furnish information relating to violations of law to officers charged with enforcement of that law.

67.13. The privilege is founded upon public policy, and seeks to further and protect the public interest in effective law enforcement.<sup>2</sup> It recognises the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officers, and by preserving their anonymity, encourages them to perform that obligation. The privilege is designed to protect the public interest, and *not to protect the informer*.

**Professional  
formers.**

in- 67.14. In the United States, the leading case on the subject is *Reviaro*.<sup>3</sup> In that case, the Supreme Court stated that the purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The theory is that if persons desirous of assisting law enforcement are constantly threatened with exposure of their identity, the *utilisation of informants* would virtually disappear. From the statements and discussions contained in the various text-books and in the literature on the subject, it would appear that in this context, by the 'informer' is meant a *professional informer*. In other words an informant is a person who regularly supplies information to the law enforcement agency and who is compensated in some form for the furnishing of the information. The emphasis is on the *paid informant*, of the quasi criminal supplier of information—the paid informer receives money while the latter is compensated not in cash but by promises of immunity or of lessened charges or punishment. Wigmore has described the privilege in these words<sup>4</sup>:—

"A genuine privilege, on fundamental principle must be recognised for the identity of persons supplying the government with information concerning the commission of crimes. Communications of this kind ought to receive encouragement. They are discouraged "if the informer's identity is disclosed. Law enforcement officers often depend upon *professional informers* to furnish them with a flow of information about criminal activities."

67.15. In many States in the U.S.A., the statutory provision requires the court, in effect, to balance the interests of the competing parties. Thus, the California Evidence Code<sup>5</sup> allows the privilege if disclosure of the identity of the informer is not in the public interest—in other words, if the need to preserve the confidentiality of the identity outweighs the necessity for disclosure in the interest of justice.

67.16. It would appear that one method<sup>6</sup> of placing the competing interests in proper perspective is a review of the informant's disclosures by a magistrate in order to determine the question whether revealing his identity is necessary. This method has been held to be constitutional,<sup>7</sup> and is generally favoured.

<sup>1</sup>Annotation in 1 L. Ed. 2d. 1998-2000.

<sup>2</sup>Annotation in 1 L. Ed. 2d. 1998-2000.

<sup>3</sup>*Reviaro v. U.S.* (1957) 453 U.S. 53.

<sup>4</sup>John H. Wigmore, *Evidence* (Roston; Little, Brown, 1961), Sect. 2374 & a Emphasis added.

<sup>5</sup>Section 1041 a (2), California Evidence Code.

<sup>6</sup>An illustration of this method will be found in *Mc Cray v. Illinois*, (1967) 386 U.S. 300.

<sup>7</sup>*Mc Cray v. Illinois*, (1967) 386 U.S. 300.

## V. NEED FOR CHANGE

67.17. We now revert to a consideration of the Indian Law and we cannot help the comment that the section states the rule too widely and overlooks certain important limitations which ought to have been taken note of. Need for change in Indian law.

If regard be had to the limitations recognised in the U.S.A. and in England as set out in the above discussion, it seems that the Indian Law is more stringent than the rule in these countries. That in itself is not a ground for changing the law; but it shows that the limitations cause no harm in other countries. In our view the existing section is likely to cause serious hardship in a few situations. For example, where a person takes civil proceedings for defamation or malicious prosecution against another person who had given false information to the police or a Magistrate, it would be impossible for him to prove an essential part of his case—namely, that the defendant was the person who gave the information—if disclosure thereof is not allowed.

Secondly, a person who wishes to prosecute another person for making a false charge or for instituting false criminal proceedings<sup>1</sup> or for giving false information to a public servant<sup>2</sup>, would find it difficult to prove that the person against whom the prosecution is now filed took the initiative in making the false charge or in instituting criminal proceedings or gave the false information, unless the rule contained in the section is relaxed.

We do not, of course, imply that in a suit for malicious prosecution, nothing else is to be proved. There are other ingredients essential to create liability; but we are concerned, at the moment, with one feature which is essential, namely, the giving of false information. In the proceedings to which we have referred, irremediable hardship would be caused if the provision prohibiting disclosure of the information is enforced rigidly. The right to recover compensation for malicious prosecution or to take the other proceedings mentioned above would be rendered almost nugatory if the section is not relaxed.

67.18. We need not go into the difficult question—in what cases a person who gives false information to the police can be liable in damages for malicious prosecution. It cannot be disputed that a person who gives false information to the police or the magistrate or other law enforcement officer may, in certain circumstances, be liable to such action. In *Gaya Prasad v. Bhagat Singh*<sup>3</sup>, the argument that only a person who had made a formal complaint to a court could be sued for malicious prosecution, was rejected by the Privy Council in these terms:

"In India the police have special powers in regard to the investigation of criminal charges and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the police by bringing suborned witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the Magistrate—it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him."

<sup>1</sup>Section 211, Indian Penal Code.

<sup>2</sup>Section 182, Indian Penal Code.

<sup>3</sup>*Gaya Prasad v. Bhagat Singh*, (1908) 35 Indian Appeals 189; I.L.R. 30 All. 525, 533 (P.C.).

Decisions of High Courts make it clear that<sup>1</sup> the defendant is liable if the prosecution was by the police for the State at his instance and on his information.

67.19. In determining the liability for malicious prosecution, an important question to be considered is, who is the real prosecutor. The defendant's conduct before and during the trial will be material in deciding it<sup>2</sup>. This is a question of fact<sup>3</sup>, and the onus is on the plaintiff to prove the affirmative. The point to be made is that if the plaintiff wishes to sue for malicious prosecution, the name of the informant would be a very material circumstance and the non-disclosure thereof would constitute a serious obstacle. This hardship in itself is, again, not a conclusive argument against the privilege. But it can legitimately be taken into consideration.

67.20. To draw an illustration from an Orissa case,<sup>4</sup> it was held relying on the case law, that if the defendant gives information of the commission of a cognizable offence and names the accused in that report, in consequence of which a charge-sheet is filed by the police after investigation against the persons mentioned in the information, it can be said that the defendant is the prosecutor. In that case, the defendant also attended the hearings on some dates, but the High Court did not rely merely on that fact, and expressly dissented from an earlier ruling<sup>5</sup> where the proposition was enunciated that the mere giving of false information cannot give a cause of action to the plaintiff in a suit for malicious prosecution.

It would thus appear that in the very interests of law enforcement, a false information should not be protected from disclosure — since its disclosure would really encourage law enforcement — i.e. the enforcement of remedy of malicious prosecution — in the situation discussed above.

Possible  
natives.

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67.21. If the hardship likely to be caused in certain cases, as explained above, is to be removed or reduced, there are several alternatives, as follows :—

- (i) The scope of the section could be limited to offences against the State and offences against the revenue — which was the previous law in India.<sup>6</sup>
- (ii) Suits for damages or malicious prosecution or defamation or prosecutions for making a false charge may be excluded from the prohibition imposed by the section.
- (iii) The court may be given a discretion to dispense with the requirements of the section in the interests of justice.

Alternative (i) may perhaps be considered radical. In that case, either the second or the third alternative should be considered. On the merits, in our opinion, the third alternative is the best, because, while leaving the matter elastic,

<sup>1</sup>(a) *Amaldar v. Sabhajit*, A.I.R. 1963 All. 580;

(b) *Nitya Nanda v. Binayak*, A.I.R. 1955 Orissa 129;

(c) *Mohan Singh v. Bhirgunath*, A.I.R. 1952, Pt. 283;

(d) *Ucho Singh v. Nageshar Prasad Singh*, A.I.R. 1956 Pat 285.

<sup>2</sup>(a) *Radha Krishna v. Kedar Nath*, (1924) I.L.R. 46 All. 815;

(b) *Rishabha Kumar v. Sharma*, A.I.R. 1961 M.P. 329, 330.

<sup>3</sup>(a) *Lakshmoji Rao v. Venkatappaish*, A.I.R. 1966 A.P. 292;

(b) *Jagoendra v. Lingraj*, A.I.R. 1970 Orissa 91, 94, para 7.

<sup>4</sup>*Nita Nand v. Vishnu Sahai*, A.I.R. 1955 Orr. 129, 132, 133 (Narasimhan and P. V. B. Rao JJ.).

<sup>5</sup>*Radhu v. Dhandu*, A.I.R. 1953 Orr. 56.

<sup>6</sup>See para. 67.4, *supra*.

it will ensure that the privilege is relaxed only where the interests of justice so require. Such a relaxation would not be in conflict with the principle underlying the section. A person honestly — even mistakenly — giving information of an offence should have nothing to fear by such disclosure. At the same time, a person dishonestly giving false information does not deserve protection where the person aggrieved by his conduct wishes to pursue his lawful claim for compensation.

## VI. RECOMMENDATION

**67.22.** For the reasons stated above, we recommend that the following Recommendation. exception should be inserted in section 125 :

*Exception :—Nothing in this section shall apply where it appears to the court that the giving of the information is a fact in issue on which the liability of a party depends or is otherwise a material fact, and the court, for reasons to be recorded and in the interests of justice, directs the disclosure of such information by the Magistrate, Police Officer or revenue Officer."*

## LEGAL PROFESSIONAL PRIVILEGE—SECTIONS 126-129

## I. INTRODUCTION

68.1. In our introductory observations about privileges, we referred to the aspect of relationship and stated that, in general, when the law recognises a privilege, it does so on a consideration of public policy for the proper functioning of a relation. This aspect of relationship assumes prominence in a group of sections (sections 126 to 129), dealing with what is commonly known as legal professional privilege. This expression does not quite accurately indicate the nature of the privilege. The privilege is not of the legal profession, but of the client. However, it does arise out of the *professional relationship*.

68.2. It is necessary to deal with the aspect of confidence when discussing this privilege. In law, a confidential relationship does not, in itself, create a privilege *in regard to disclosure by way of evidence in a court of law*. Where a communication is made in confidence, and the confidence is regarded as one deserving of legal protection, the legal remedy against violation of the confidence (where available) could assume one of several forms. There might be a contractual action permitted by the law, for breach of the confidence; there might, in some cases, be the possibility of an injunction being granted by the court; and there might even be criminal prosecution<sup>1</sup> if the violation of the confidence is punishable by a specific statutory provision. But the fact that confidence is protected in certain respects, does not necessarily mean that the communication made in confidence will be protected from disclosure in a court of law. For that purpose, specific rule in the law of evidence is required.

68.3. Which of the various remedies is allowed, is a matter of substantive law. In order to distinguish the situation where the remedy is given by substantive law, from the situation where the sanction is contained in the law of evidence, one must bear this aspect in mind.

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68.4. Coming to fields other than the law of evidence, there is, in the first place, the developing equitable doctrine that a man shall not profit from the wrongful publication of information *received by him in confidence*. This doctrine, said to have its origin in *Prince Albert v. Strange*,<sup>2</sup> has been frequently recognised as a ground for restraining the unfair use of commercial secrets transmitted in confidence.

During the development of the bill of discovery in equity, a number of grounds of privilege from discovery came to be accepted.<sup>3</sup>

68.5. These heads of privilege were reduced considerably in number by the Civil Evidence Act, 1968. The notes to the Supreme Court Practice 1973, volume 1, state the three main heads as extending only to documents with legal professional privilege, documents tending to incriminate and documents privileged on the ground that production would be injurious to the public interest. Indeed, in numerous cases in equity, it was accepted that the basis of the first two heads

<sup>1</sup>Of section 40, Administration of Justice Act, 1970 (*infra*).

<sup>2</sup>*Prince Albert v. Strange*, (1841) Mad. & G. 25.

<sup>3</sup>R. B. L. Prior, "Confidentiality" (1975) *New Law Journal* 920.



of privilege was to be found in the "well-being of society".<sup>1</sup> We are referring to this aspect to show the origin of equitable relief in this field and also to show the approach of equity. So far as legal professional relationship is concerned, there is a broader basis.<sup>2</sup>

In *Coco v. A. M. Clarke Ltd.*,<sup>3</sup> Megarry J., reviewing the authorities, set out the requirements necessary for an action based on breach of confidence to succeed:

"In My judgement three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M. R. in the *Saltman case*,<sup>4</sup> must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

**68.6.** The law has shown its determination to protect confidential information in a number of recent cases in England. The majority of these cases have been brought by the owner of the information himself to prevent its use by the defendant to his financial or commercial benefit. Therefore, in some of these cases,<sup>5</sup> the court has required, as a condition to granting relief, some detriment to the third party. The detriment, whether expressly required or not, would in all cases, save for exceptional cases like *Prince Albert v. Strange*,<sup>6</sup> be tangible in form. Sometimes, in these cases, there is a contract which may be said to have been broken by the breach of confidence, but it is clear<sup>7</sup>, that the doctrine applies independently of contract.<sup>8</sup> Types of cases.

**68.7.** There may be an implied contractual relationship imposing an obligation of confidence. Unlike the ordinary debtor and creditor relationship, that of bank and customer entails an implied contractual duty on the banks to ensure that confidentiality concerning the condition of customers' accounts is maintained.<sup>9</sup>

Incidentally, in England, it is an offence by statute to unduly publicise the existence of any debit with the object of concerning the debtor to pay.<sup>10</sup> The offence is labelled as the offence of "unlawful harassment".

**68.8.** These cases mainly concern business. It is not until the decision in *Argyll v. Argyll*<sup>11</sup> that the principle of protecting confidential communications by an independent action was applied to domestic secrets, such as those passing between husband and wife during marriage. It was held in that case that the plaintiff wife could obtain an order to restrain the defendant husband from communicating such secrets, and the principle is well expressed in the headnote in the official Law Reports.

<sup>1</sup>*Southmark Water Co. v. Quick*, 3 Q.B.D. 317.

<sup>2</sup>See *infra*.

<sup>3</sup>*Coco v. A. M. Clarke Ltd.*, (1969) R.P.C. 41, 47, referred in *A. G. v. Jonathan*, (1975) 3 All. E.R. 484.

<sup>4</sup>*Saltman Engineering v. Campbell*, (1963) 3 All. E.R. 413, 415.

<sup>5</sup>*Coco v. A. M. Clark (Engineers) Ltd.*, (1969) R.P.C. 41 (Megarry, J.).

<sup>6</sup>*Prince Albert v. Strange*, 2 De G. & Sm. 652.

<sup>7</sup>*Saltman Engineering v. Campbell*, (1903) 3 All. E.R. 413.

<sup>8</sup>See—

(a) *A. G. v. Jonathan* (1975) 3 All. E.R. 484, 494,

(b) *Re x*, (1975) 1 All. E.R. 697.

<sup>9</sup>*Revin Williams*, "Privacy and the Private Bank", (1974) *New Law Journal* 612.

<sup>10</sup>Section 40, Administration of Justice Act, 1970 (Eng.).

<sup>11</sup>*Argyll v. Argyll*, (1965) 1 All. E.R. 611. (Ungoed Thomas J.).

".....a contract or obligation of confidence need not be express but could be implied, and a breach of contract or trust or of faith could arise independently of any right of property or contract.....and that the court in the exercise of its equitable jurisdiction, would restrain a breach of confidence independently of any right at law".

68.9. This extension of the doctrine of confidence beyond commercial secrets has never been directly challenged, and was noted without criticism by Lord Denning M. R. in *Fraser v. Evans*.<sup>1</sup>

Incidentally, we may mention that some protection is afforded to correspondence without prejudice.<sup>2</sup>

## II. RATIONALE

68.10. Let us now examine in brief the rationale of legal professional privilege. A communication made to a legal adviser is certainly made in confidence, and in almost all countries some kind of protection or other has been afforded to such communications, even in regard to their disclosure in a court of law. But this does not mean that the privilege rests on the confidence itself, because there are certain requirements to be satisfied which we shall consider presently.

68.11. Though legal professional privilege has been said<sup>3</sup> to be based on the necessity of securing full and unreserved intercourse between the adviser and the advised, this would not be a complete statement of the true position. As has been pointed out,<sup>4</sup> this statement obviously presupposes some other basis, because the necessity of complete confidence may also exist when the advice is financial, and yet communications between, say, a banker and customer are not privileged against disclosure in a court of law. There is, of course, a statutory provision relating to the production of Bankers' books, but that confers no privilege as such. It relates to the method of proof.

It has, therefore, been explained<sup>5</sup> that the privilege for communications between solicitor and client rests 'not upon the confidence itself, but upon the necessity for carrying it out'; and this necessity is not usually regarded as extending to the confidence reposed in members of other professions.

The philosophy underlying the exemption from disclosure of privileged<sup>6</sup> communications is well stated in *Anderson v. Bank of British Columbia*,<sup>7</sup> a case relating to the professional relationship of lawyer and client. The court speaking through Jessel M. R., said:

"The object and meaning of the rule is this: That as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his right or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of

<sup>1</sup>*Fraser v. Evans* (1969) 1 All. E.R. 8, 10, 11.

<sup>2</sup>See section 23.

<sup>3</sup>*Tournier v. National Provincial and Union Bank of England*, (1924) 1 Kings Bench 471, 479.

<sup>4</sup>G. D. Nokes, "Professional Privilege" (1950) 66 Law Quarterly Review 88.

<sup>5</sup>*Russell v. Jackson* (1851) 9 Hare 387, 391 (Turner, v.).

<sup>6</sup>Nokes, "Professional Privilege", (1950) 66 L.Q.R. 471, 475.

<sup>7</sup>*Anderson v. Bank of British Columbia*, (1876) L.R. 2 Ch. D., 644, 649.

his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

68.12. There is also the moral aspect, namely, that a professional legal adviser would hardly find it consistent with his profession to disclose what was communicated to him by the client. Wigmore comes to the heart of the matter when he states<sup>1</sup>:

"The consideration of 'treachery', so inviting an argument for Bentham's sarcasms, is after all not to be dismissed with a sneer. The sense of treachery in disclosing such confidence is impalpable and somewhat speculative; but it is there nevertheless. .... If the counsellors were compellable to disclose, 'No man... of a noble or elevated mind would stoop to such an employment.' Certainly the position of the legal adviser would be a difficult and disagreeable one; for it must be repugnant to any honourable man to feel that the confidences which his relation naturally invites are liable at the opponent's behest to be laid open through his own testimony. He cannot but feel the disagreeable inconsistency of being at the same time solicitor and the revealer of the secrets of the cause. This double-minded attitude would create an unhealthy moral state in the practitioner. Its concrete impropriety could not be over balanced by the recollection of its abstract desirability. If only for the sake of the peace of mind of the counsellor, it is better that the privilege should exist."

68.13. As Judge Wyzanski has observed, "It is in the public interest that the lawyer should regard himself as more than a predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations."

68.14. In the U.S.A., the Attorney and client privilege is recognised as having a common law origin, and the basis of the privilege was thus stated in a case which arose in California.<sup>2</sup>

"The privilege is given on the grounds of *public policy* in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defence of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the law suit will be conducted along improper lines, the trial will be full of surprises..... Unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks to be unfavourable facts."

68.15. The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest of administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.<sup>3</sup>

<sup>1</sup>Wigmore, cited by Louisell etc. *Evidence and Proof* (1972), page 169.

<sup>2</sup>*City and Country of San Francisco v. Superior Court*, (1951) 31 Cal. 2d 227 (California).

<sup>3</sup>Note "Attorney Client Privilege" (1965) 74 Yale L.J. 539, 545, foot note 36.

<sup>4</sup>*Hunt v. Blackburn*, (1888) 128 U.S. 464, 470, decree made absolute, (1889) 131 U.S. 403.

Other purposes for the privilege have been suggested, e.g. regard for human dignity and inviolate personality,<sup>1</sup> deference to strong sentiment of loyalty attached to attorney-client relationship,<sup>2</sup> and the duty of fidelity.<sup>3</sup>

In the early history of the privilege, its purpose seems to have been to protect the attorney's oath and honour.<sup>4</sup>

Thus, a variety of considerations serve as the justification for the privilege, and this seems to bear out Judge Wyzanski's comment, mentioned above.<sup>5</sup>

**68.16.** To sum up the points mentioned above, the privilege is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing the fullest and most unreserved communication between the client and his legal adviser. Further, a compulsory disclosure of confidential communications is so opposed to the popular conscience that it would lead to frequent falsehoods as to what had really taken place. It is quite immaterial whether the communications relate to any litigation commenced or anticipated; it is sufficient if they pass as professional communications in a professional capacity; if the rule were so limited, no one could safely adopt such precautions as might eventually render any proceedings successful or all proceedings superfluous.<sup>6</sup>

### III. SECTION 126 — PRINCIPLE AND SCOPE

**68.17.** So much as regards the rationale of the privilege. We now come to the sections proper. So far as the disability of the lawyer is concerned, the principal section is section 126. This is how the operative part reads —

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

Under the proviso to the section, nothing in this section shall protect from disclosure—

"(1) Any such communication made in furtherance of any illegal purpose;

<sup>1</sup>Gardner, "A-Re-evaluation of the Attorney-Client Privilege" (1963) 8 Villanova Law Rev. 279, 308, 316, 511, 519, cited in the note "Attorney Client Privilege" (1965) 74 Yale L.J. 539, 545.

<sup>2</sup>Ma Cormick, Law of Evidence (1954), page 182, cited in the Note "Attorney-Client Privilege" (1965) 74 Yale L.J. 539, 545.

<sup>3</sup>Radin, "The Privilege of Confidential communication between lawyers and client", (1928), 16 Calif. L. Rev. 487, 492, 497.

<sup>4</sup>Wigmore Vol. 8 Article 2290, cited in Note, "Attorney Client Privilege" (1965) 74 Yale L. J. 539, 545, footnote 36.

<sup>5</sup>Judge Wyzanski, quoted *supra*.

<sup>6</sup>(a) *Grenough v. Gaskell*, 1 M. & K. 103;

(b) *Lyell v. Kennedy*, 9 App. Cas. 85;

(c) *Holton v. Corporation of Liverpool*, 1 M. & K. 99;

(d) *Goldey v. Richards*, 19 Beav. 404;

(e) *Ex parte Campbell*, 5 Ch. App., 705.

(f) *Framji Bhicaji v. Mohansing Dhansing*, (1893) 11 L.R. 18 Bom. 263;

(g) *Southward Co. v. Quick*, 3 Q.B.D. 317.

(h) *Munchershaw Bezonji v. New Dhurumsey, etc. Co.*, (1880) 11 L.R. 4 Bom. 576 (West J.).

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

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

It is also made clear (vide the Explanation) that the obligation stated in this section continues after the employment has ceased.

There are three illustrations appended to the section.—

"(a) A, a client, says to B, an attorney — "I have committed forgery, and 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 attorney — "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

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

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

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

Sections 127 and 128 contain certain supplemental provisions. Section 129 deals with the client's privilege.

68.18. It is to be noted that sections 126 to 128 which apply *when the legal adviser or his clerk etc.* is interrogated as a witness, do not make a distinction between a party to a suit and a witness. Section 129, which applies when the client himself is interrogated also applies whether such client be a party to the case or not; of course, it is only communications which have passed between a person and his legal professional adviser that are privileged. Scope and waive.

The rule is established for the protection not of the legal adviser, but of the client, and the privilege, therefore, may only be waived by the latter.<sup>1</sup>

68.19. The question how far legal professional privilege can be lost by a third party learning of a confidential communication or obtaining a confidential document was raised in England in the controversial decision in *Butler v. Board of Trade*.<sup>2 3</sup> The plaintiff in that case sought a declaration that the Board of Trade was not entitled, in criminal proceedings in which the plaintiff was the accused, to adduce in evidence a copy of a privileged letter from his solicitor. Goff J. held that though there is no privilege as regards copies of privileged documents, there is jurisdiction to restrain the production of such copies because Third parties.

<sup>1</sup>See section 128.

<sup>2</sup>*Butler v. Board of Trade*, (1971) Ch. 680.

<sup>3</sup>See—

(a) C. Tapper, "Privilege and Confidence" (1972) 35 M.L.R. 83;

(b) Heydon in (1974) 37 Modern Law Rev. 201.

they contained confidential information, at least in private prosecutions and civil litigation. In public prosecutions, however, the interests of the State prevail over the individual's property interests, so that then the documents must be disclosed.

In India, since the law is codified, third parties can be compelled to disclose communications overheard by them.

#### IV. SECTION 126—THE EXCEPTION FOR ILLEGAL PURPOSE

Exception for  
illegal purpose.

**68.20.** The attorney-client privilege has always been subject to the qualification that protection is denied to communications wherein a lawyer's assistance is sought in an activity which the client knows to constitute a crime or tort.<sup>1</sup> This is sometimes called the "future crime or tort" exception. In England, the exception is sometimes described in narrow terms as confined to "criminal activity"; but, it is generally understood that the exception covers all illegal activities.<sup>2</sup>

**68.21.** Sometimes, however, it may be difficult to apply the exception very strictly. If, for example, a client is engaged in a continuing offence, a statement of his intention to continue is necessarily inseparable from a confession of past conduct.

**68.22.** In *Gartside*<sup>3</sup>, the proposition is enunciated that there are some confidential communications which should not be protected by the courts. In this case the plaintiff's clerk had taken documents which, he alleged, showed fraudulent transactions on the part of the plaintiffs. On the question of the confidentiality of the documents, Wood V. C. said:

"You cannot make me the confidant of a crime or a fraud, or be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist."<sup>4</sup>

There is thus a moral basis for the exception regarding crime or tort. There can also be advanced a juristic reason. A legal adviser does not undertake to assist in illegal activities. He, on the other hand, is expected to act in furtherance of the law.

**68.23.** In jurisdictions in which the privilege of a patient in regard to communications made by him to his physician is recognised, that privilege is also subject to the exception regarding activities undertaken for a criminal or illegal purpose. For example, the patient's privilege does not cover a request to procure narcotics illegally.

**68.24.** In England, the rule that communications in furtherance of fraud or crime are not protected,<sup>5</sup> is subject to the rule that there must be some definite evidence produced, or charge made, of fraud or illegality.<sup>6</sup>

Other evidence re-  
quired to prove  
illegal purpose.

**68.25.** In the U.S.A., the method adopted by the Uniform Rules of Evidence for invoking the "future crime or tort exception" is of interest. As to the attorney-client privilege, it provides,<sup>7</sup> "such privilege shall not extend.....

<sup>1</sup>Garner, "The Crime or Fraud Exception to the Attorney-Client Privilege" (1961), 47 American Bar Association Journal 708.

<sup>2</sup>See "Future Crime or Tort Exception" (1964) 77 Harvard Law Rev. 730, 736, 737.

<sup>3</sup>*Gartside v. Outram*, (1856) 26 L. J. Ch. 113, 114.

<sup>4</sup>See also *Distillers v. Times Newsp.* (1975) 1 All. E.R. 41, 48.

<sup>5</sup>*R. v. Cox*, 14 Queens Bench Division 153.

<sup>6</sup>*Bullivant v. Attorney General of Victoria*, (1901) A.C. 106.

<sup>7</sup>Uniform Rules of Evidence 26(2).

"to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding (of illegal purpose) .....". The source of this procedure is the English case of *O'Rourke v. Darbishire*,<sup>1</sup> in which the court denied an application for a bill of discovery, which merely alleged that communications between client and solicitor were in furtherance of a wrongful act, on the ground that "there must be something to give colour to the charge . . . . some *prima facie* evidence that it has some foundation in fact."

Later, the Supreme Court of the U.S.A. endorsed the rule in the context of a dispute over the admissibility of juror testimony,<sup>2</sup> but only a small number of cases have held rigidly to this requirement that a foundation for the exception be laid solely in extrinsic evidence.<sup>3</sup>

## V. SUGGESTED NEW EXCEPTION

**68.26.** So much as regards the exception for illegal acts. Section 126 does not make any exception for cases where the suit itself is between a person and his legal adviser, or where a legal adviser is prosecuted for an offence against the client or *vice versa*. We are of the view that in such a case also, the privilege should not apply for the following reasons:—

Section 126—  
Proceedings between a person and his legal adviser — exception for.

- (i) the application of the privilege in such a case would shut out essential evidence and no other evidence would be available, and
- (ii) by taking such a proceeding, the client can be presumed to have waived the privilege if the proceeding is *by the client* and for the sake of mutuality, the same principle should be applied where the proceeding is *against the client*.

This aspect does not seem to have received detailed attention in India. But a simple illustration could be cited to show how the point could arise. 'X', a client, gives instructions to his legal adviser for conducting certain litigation. The litigation is decided against 'X', and 'X' files a suit against his legal adviser for professional negligence in not conducting the case properly.

**68.27.** The defence of the legal adviser is that the instructions given by X were not adequate. In such a case it may be necessary to communicate to the court the instructions given by the client, their exact purport and text. Under the existing section, however, this cannot be done.

**68.28.** Taking a converse case, where a client is sued by his legal adviser for remuneration, the disclosure of communications made for the purpose of the previous litigation may become necessary. In both cases, strict application of the privilege would work hardship, and an exception should, therefore, be made for such cases.

The following provision in the California Code<sup>4</sup> of evidence may be noted:

"S. 958. *Exception: Breach of duty arising out of lawyer-client relationship.*

There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."

<sup>1</sup>*O'Rourke v. Darbishire*, (1920) A.C. 581, 604.

<sup>2</sup>*Clark v. United States*, (1933) 289 U.S. 1, 14.

<sup>3</sup>See, e.g., *United States v. Bob*, 106 F. 2d 37 (2d Cir.), Cert. denied, (1939) 308 U.S. 589.

<sup>4</sup>Section 958, California Code of Evidence.

The following comment is appended to the section quoted above:

*Comment . . . . .* It would be unjust to permit a client either to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defence of the charge or to refuse to pay his attorney's fee and invoke the privilege to defeat the attorney's claim. Thus, for example, if the defendant in a criminal action claims that his lawyer did not provide him with an adequate defence, communications between the lawyer and client relevant to that issue are not privileged. See *People v. Tucker*, 61 Cal. 2d 828, 40 cal. Rptr. 609, 395 p. 2d 449 (1964). The duty involved must, of course, be one arising out of the lawyer-client relationship, e.g., the duty of the lawyer to exercise reasonable diligence on behalf of his client, the duty of the lawyer to care faithfully and account for his client's property, or the clients' duty to pay for the lawyer's services."

#### VI. SECTION 126—DOCUMENTS

**68.29.** It is necessary now to refer to that part of section 126 which deals with documents. The gist thereof is that a legal professional adviser is not permitted to disclose the contents of documents with which "he became acquainted" for the purpose of, and in the course of, the professional relationship. Now, there is a dictum in a Gujarat case<sup>1</sup> that "The protection against production or disclosure, however, does not extend to any original document which might have come into the possession of the advocate from his client." This is followed by the observation—"The advocate is but the agent of the client to hold the document, there is no reason either on principle or authority on which the advocate can refuse to produce the document."

**68.30.** In the Gujarat<sup>1</sup> case, a letter received from the State Government by the complainant, which was in the possession of the advocate of the accused, was the subject-matter of dispute, the letter being of material importance in the present prosecution for defamation. The precise question before the court was whether section 94, Cr. P. C. 1898 (power to issue a search warrant), could apply to the document, and that question was answered in the affirmative. This was on a construction of section 94, which contained no exception for section 126, Evidence Act. This conclusion as to the scope of section 94 need not be questioned. Section 94 has not been construed to apply to the accused, whether it excludes the lawyer, we need not discuss.

But the dictum that section 126 does not seem to extend to any original document which might have come into the possession of the advocate does not, with respect, appear to be consistent with the express language of section 126.

**68.31.** In the Evidence Act, the section relevant to mere production of a document, is section 162, and, a document in respect of which there is any objection must, nevertheless, be produced; that section expressly so provides. It is for the court to determine the objection—a rule which applies as much to a document privileged under section 126, as to any other.

**68.32.** A Madras case<sup>2</sup> on section 94, Cr. P. C., also contains a similar dictum as to the scope of section 126. The document in question was a letter written by accused 1 to accused 6 and in the possession of the counsel for accused 6. The High Court observed—"Prima facie, those letters are not

<sup>1</sup>*Chundubhai v. The State*, A.I.R. 1962 Guj. 290, 293, Paragraph 3 (P. N. Bhagwati, J.).

<sup>2</sup>*Public Prosecutor v. M. S.*, A.I.R. 1939 Mad. 914 (Lakshmana Rao, J.).



privileged communications by accused to his lawyer under section 126....." With respect, the dictum seems to go contrary to the plain language of the section.

Since however, both the observations are *obiter dicta*, and since the words of section 126 appear to be specific, we do not recommend any amendment on this point.

68.33. As a matter of interest, however, we would like to note that in England, "a solicitor cannot be compelled to disclose the contents of documents (which are) professionally entrusted to him, and which he is acquainted with only by virtue of professional conduct".<sup>1</sup> He is not permitted even to disclose the date when his client's documents were entrusted to him.<sup>2</sup> Nor can he disclose the condition of the document when they were in his possession; for example, whether they were stamped, indorsed, or bearing erasures.<sup>3</sup>

Position in England as to documents.

Of course, this does not allow the solicitor to withhold a deed which the other side is ordinarily, in the course of things, *entitled to see*, merely because the solicitor had obtained it in the course of his profession for the purpose of the litigation.

What documents the opposite party is entitled to see is a subject governed by the law of procedure. In general, a party is entitled to see documents which are essential for the case of the party desiring inspection.

"In England, it is considered contrary to the interest of justice to compel a litigant to disclose to his opponent before trial the evidence to be adduced against him..... so to do would give undue advantages for cross-examination and lead to endless side issues; and would enable witnesses to be tampered with, and give unfair advantage to the unscrupulous." This principle, which was laid down by Lindley, L. J. in *Re Strachan*,<sup>4</sup> has been applied by the Court of Appeal in an interlocutory appeal, by the defendants in the case of *Brooks v. Prescott*.<sup>5</sup>

## VII. SECTION 126—SOME POINTS OF DETAIL

68.34. Section 126 does not speak of "confidential communications", while section 129 is so limited expressly. It has, however, been held<sup>6</sup> that section 126 is also confined to private and confidential communications. Thus, a communication made in the presence of a third person, or a communication with a view to its being communicated to the other party, is not privileged,<sup>7</sup> not being confidential.

Section 126—Confidential communications.

68.35. We shall now deal with a question of phraseology. In protecting against the disclosure of communications made in professional confidence to a legal practitioner by or on behalf of a client, section 126 uses the word "employment" at several places. It seems to us that the word "employment" is not quite appropriate to denote the relationship between a client and his legal adviser. We would prefer the word "engagement", and recommend that it should be substituted.

Word "employment" to be replaced by "engagement".

<sup>1</sup>*Dwyer v. Collins*, (1852) 7 Exchequer 639.

<sup>2</sup>*Tourquand v. Knight*, (1836) 2 M. & W. 798.

<sup>3</sup>*Wheatley v. Williams*, (1836) 1 M. & W. 533.

<sup>4</sup>*Re Strachan*, (1895) 1 Ch. 439, 445, citing *Benbow v. Law*, (1880) 16 Ch. D. 93.

<sup>5</sup>*Brooks v. Prescott*, (1948) 1 All. E.R. 907, 910, relying in particular on *O'Cowke v. Darbishire*, (1920) A.C. 581, 605.

<sup>6</sup>*Pranji v. Mohan Singh*, I.L.R. 18 Bom. 263, 271; *Kali Kumar v. Raja Kumar*, A.I.R. 1932 Cal. 148; I.L.R. 58 Cal. 1379.

<sup>7</sup>*Kali Kumar v. Raja Kumar*, A.I.R. 1932 Cal. 148; I.L.R. 58, Cal. 1379.

Section 126—  
"Barrister" etc. to  
be replaced by  
legal practitioner.

68.36. Another verbal point may be mentioned. In dealing with the privilege regarding communications between a client and his legal adviser, section 126 speaks of "barrister, attorney, pleader or vakil". For brevity, it may be desirable now to use the word "legal practitioner"—an expression used in the Constitution. It may also be desirable to extend the provisions of this section to persons who, though they cannot be regarded as legal practitioners, tender professional advice in legal or semi-legal matters. Important illustrations of these are chartered accountants who can practise as income-tax practitioners and sales-tax practitioners, and also advise companies. It may be convenient to frame a definition of legal practitioner so as to include such persons. We recommend that the section should be suitably amended for the purpose.

#### VIII. RECOMMENDATION

Recommendation.

68.37. In the light of the above discussion we recommend that section 126 should be revised as follows:—

"126. *No legal practitioner*<sup>1</sup> shall, at any time, be permitted, *except* with his client's express consent, to disclose any communication made to him in the course and for the purpose of his *professional engagement*, 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 *such engagement*, or to disclose any advice given by him to his client in the course and for the purpose of *such engagement* :

Provided that nothing in this section shall protect from disclosure—

- (a) any such communication made in furtherance of any illegal purpose;
- (b) any fact observed by *any legal practitioner* in the course of his *engagement* as such, showing that any crime or fraud has been committed since the commencement of his *engagement*.
- (c) *any such communication when required to be disclosed in a suit between the legal practitioner and the client arising out of the professional engagement or in any proceeding in which the client is prosecuted for an offence against the legal practitioner or the legal practitioner is prosecuted for an offence against the client, arising out of the professional engagement.*

*Explanation 1.*—The obligation stated in this section continues after the *engagement* has ceased.

*Explanation 2.*—In this section and in sections 127 to 129, the expression '*legal practitioner*' or '*legal professional adviser*' includes any person who is, by law, empowered to appear on behalf of any other person before any administrative authority; and the expression '*client*' shall be construed accordingly.

*Explanation 3.*—For the purpose of clause (b) of the proviso to this section, it is immaterial whether the attention of such *legal practitioner* was or was not directed to such fact by or on behalf of his client."

[Illustrations as at present, with substitution of "engagement" for employment in illustration (c) and with substitution of *legal practitioner* for attorney in all illustrations].

<sup>1</sup>See proposed definition, *infra*.

## IX. SECTIONS 127 TO 129

68.38. This takes us to section 127, which reads—

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

Recommendation  
as to section 127.

The words “barristers, pleaders, attorneys and vakils” should be replaced by “legal practitioners”,<sup>1</sup> and we recommend accordingly.

68.39. Section 128 reads—

“128. 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 126; and if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.”

Recommendation  
as to section 128.

The words “barrister, pleader, attorney or vakil” should be replaced by the words “legal practitioner”, and we recommend accordingly.

Section 129 reads—

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

It needs no change.

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<sup>1</sup>Cf. Recommendation as to section 126.

## INCRIMINATING DOCUMENTS AND TITLE DEBTS — SECTION 130 AND 131

### I. INTRODUCTORY

69.1. Certain affairs of a man's personal life may require special protection for reasons of public policy. This may be so even though no professional relationship is in issue. A privilege relevant to such affairs is created by section 130 in respect of two kinds of documents — title-deeds and incriminating documents. In its earlier half, the section provides that 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. In its latter half, the section provides that no such witness shall be *compelled to produce* any document the production of which might tend to criminate him.

In both cases, a written waiver is permissible— as is provided in the following words — “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.”

### II. TITLE DEEDS

Section 130 — earlier half — Necessity in the present days

69.2. It will be convenient to consider the two parts of the section separately. The earlier half of the section, which enacts the rule that *a witness who is not a party shall not be compelled* to produce his title deeds<sup>1</sup> to any property, is derived from the English law. In English law, this rule was said to be founded upon a consideration of the great inconvenience and mischief which might result to individuals if they are compelled to disclose their titles by the title deeds. The rule was, however, criticised by Cross, writing in 1958 (when the rule was in force), in these words<sup>2</sup>—

“It is doubtful whether a privilege of this nature ought to survive in modern times, although it is difficult to think of cases in which its continued existence can do much harm.”

The law on the subject has now been altered in England by the Civil Evidence Act,<sup>3</sup> which abolishes the privilege in relation to civil proceedings. The relevant provision of the Act reads—

#### *Abolition of certain privileges*

16(1). The following rules of law are hereby abrogated except in relation to criminal proceedings, that is to say—

- (b) the rule whereby, in any legal proceedings, a person other than a party to the proceedings cannot be compelled to produce any deed or other document relating to his title to any land.”

It may be of interest to note that in India also, section 130 has been criticised in these words<sup>4</sup>—

“In England the law's failure to protect title adequately by legislation and the inevitable risk which was thereby created for even *bona fide* titles

<sup>1</sup>The expression “title deeds” is used for brevity to cover documents of pledge and mortgage as well.

<sup>2</sup>Cross, Evidence (1958), page 244.

<sup>3</sup>Section 6(1)(b), Civil Evidence Act, 1968.

<sup>4</sup>Woodroffe and Amir Ali, Evidence (1959), Vol. III, page 1630.

furnished a sufficient explanation, if not a justification. But under a system of compulsory public registration in such privileges there is neither necessity nor utility."

69.3. In our view, there is considerable force in this criticism. Registration of most documents concerning immovable property is now compulsory or, where an exemption from registration is granted, it is based on some special principle. If a person does not register a document voluntarily, he takes the risk of loss, and should need no special protection whether or not it is compulsorily registrable. If a person gets the document registered, he also needs no special protection, because the title is publicly recorded, and privately. The need for privacy is hardly a valid consideration in respect of proprietary documents which are registered. Even where the document is not registered, it is, in modern times, more likely than not to have acquired some publicity. We therefore recommend deletion of this part of the section.

Recommendation to delete the earlier half.

69.4. It may be noted that section 130 does not deal with the position of parties. So far as parties are concerned, the duty to produce the documents in their possession is a matter entirely outside the section. The rule in the law of procedure is that a party may refuse to produce title deeds — or, for that matter, any other document, — if the document relates only to his case<sup>1</sup> and does not relate to or tend to prove or support the opponent's case and does not contain anything impeaching his own case. This position is not affected by the section.

Documents relating to title—production by parties.

69.5. The matter seems to be more one of procedure than of evidence so far as the parties are concerned, and primarily pertains to the subject of divorce<sup>2</sup>. The following observations in a Madras case,<sup>3</sup> which state<sup>4</sup> the position in India, bear reference to the Code of Civil Procedure, and not to the Evidence Act :—

"The documents have been filed as relating to matters in issue in the suit, and we think the opposite parties should be allowed to inspect and take copies of them unless they, as privileged in law, relate exclusively to the case of the parties producing them as containing nothing supporting or tending to support his opponent's case."

We do not, of course, recommend any change in this provision of the Civil Procedure Code.

### III. INCRIMINATING DOCUMENTS

69.6. This disposes of the earlier half of the section 130. The latter half of the section provides that no witness who is not the party shall be compelled to produce an incriminating document. Analogous to this provision is the one in section 132<sup>5</sup>, relating to incriminating questions.

Section 130—latter half—Applicability to documents incriminating spouse.

69.7. One of the fundamental canons of the Anglo-Indian system of criminal jurisprudence is that the accused shall not be compelled to incriminate himself. The principle was based on a feeling of revulsion against the methods adopted in the Star Chamber<sup>6</sup>. The principle was extended to the

<sup>1</sup>Halsbury, 3rd Edn., Vol. 12, pages 38, 39, para. 55, and page 59, para. 78.

<sup>2</sup>As to discovery, see Order 11, Rules 13, 14, 15, Code of Civil Procedure, 1908.

<sup>3</sup>*Halamonov v. Romaswamy Chettiar*, I.L.R. 30 Mad. 231.

<sup>4</sup>See also *Vinayak v. Norottam*, I.L.R. 17 Bom. 581.

<sup>5</sup>See discussion relating to section 132, *infra*.

<sup>6</sup>*John Lilburns case*, 5 State Trial 1315.

production of documents by an accused person in response to a subpoena or other from of legal process. Mansfield C.J. observed in *Noe v. Narvey*<sup>1</sup>:

"In a criminal or penal cause the defendant is never forced to produce any evidence though he should hold in his hand."

**Aspect of privacy.**

69.7A. In modern times, the concept of the right to respect for private life has come into some prominence. A person's family and personal life, his intimate spiritual life and "the life he lives at home with the door shut" is being recognised to an increasing extent in the interest of the protection of the dignity of the individual. In this context, the provisions of this section assume importance. The disclosure of embarrassing facts relating to a person's private life is one factor of the field of privacy. The material which might damage a person's honour and reputation in his private life (as distinguished from his public life) might raise issues analogous to privacy. The question then to be considered is whether such disclosure ought to receive absolute protection or whether there should be any limitations in that regard. Section 130 strikes a compromise between conflicting considerations by providing that a witness who is not a party to a suit shall not be compelled to produce 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. Parties to the suit are, therefore, excluded from the protection. But all others receive the protection unless they have already waived it in writing.

This is not to say that harm to reputation is the only consideration which would have weighed with the Legislature in providing this protection. The likelihood of prosecution would harm person and property also.

**Section 130—  
latter half—party.**

69.8. It may be noted that the accused is now a competent witness, but not compellable. The question whether the latter half of the section applies to the accused *in his capacity as a witness* has not arisen so far. Under article 20(3) of the Constitution, a person accused of any offence cannot be compelled "to be a witness" against himself. The Supreme Court, in *State of Bombay v. Kathi Kalu*,<sup>2</sup> construed the expression "to be a witness" in article 20(3), but the judgement does not specifically discuss the topic of production of documents under section 130. We may, however, note that with reference to section 94 of the Code of Criminal Procedure, 1898, which was the provision empowering the Court to issue summons for production, it has been specifically held by the Supreme Court that it does not apply to the accused.<sup>3</sup> This was as a matter of construction.

In *Bedfern v. Bedfern*,<sup>4</sup> Bowen L.J. stated:

"It is one of the inveterate principles of English Law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure."

69.9. There is, in England, a general rule of evidence that a person should not be compelled to say anything which might tend to bring him into the peril and possibility of being convicted as a criminal. Hence a party cannot be compelled to produce documents for inspection or to answer interrogatories if the production or answer would tend to subject him to any punishment

<sup>1</sup>*Doe v. Harvey* (1769) 4 Burr. 2484.

<sup>2</sup>*State of Bombay v. Kathi Kalu*, A.I.R. 1961, S.C. 1808, 1816, para. 16.

<sup>3</sup>*State of Gujarat v. Shamlal* A.I.R. 1965 S.C. 1251, 1258 (Majority view).

<sup>4</sup>*Bedfern v. Bedfern*, (1891) Probate 139.

whether by way of criminal prosecution, the payment of penalties, or forfeiture, and the rule applies even if a negative answer will not imperil him.<sup>1</sup>

In England, the privilege has been held to apply<sup>2</sup> to incriminating documents where the possible charge was one of —

- (a) theft;<sup>3</sup>
- (b) incest;<sup>4</sup>
- (c) subornation of perjury;<sup>5</sup>
- (d) assault and false imprisonment;<sup>6</sup>
- (e) forgery;<sup>7</sup>
- (f) embezzlement;<sup>8</sup>
- (g) fraud;<sup>9</sup>

#### IV. RECOMMENDATION AS TO SECTION 130

69.10. In the light of the above discussion, we recommend that section 130 should be revised as follows:—

"130. No witness who is not a party to a suit shall be compelled to produce .....<sup>10</sup> any document the production of which might tend to criminate him unless he has agreed in writing to produce the document with the person seeking its production or some person through who such person claims."

#### V. SECTION 131

69.11. Section 131 provides that no one shall be "compelled" to produce documents which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production. Now, the word "compelled", according to its grammatical meaning, would lead to the result that the exercise of the privilege is optional, so that if the person in present possession of the document waives the privilege, production of the document would be lawful. For example, where the confidential communications between a client and his adviser are in the possession of the client's clerk who is called upon to produce them, and he *chooses* to produce them, he can produce them, because he is not "compelled". This is an anomalous position, as it would certainly defeat the client's privilege. This is only one illustration. There could be many others — e.g. the agent temporarily in possession of the principal's documents, the safe custodian of documents, and so on.

The proper course should be to provide that the person in *present possession* of the document should not be "permitted" to produce the documents without the consent of the person entitled to the privilege.

<sup>1</sup>Halsbury, 3rd Ed. Vol. 15, page 50, para. 72.

<sup>2</sup>Halsbury, 3rd Ed. Vol. 12, page 50.

<sup>3</sup>*Cartwright v. Green*, (1803) 8 Ves. 405.

<sup>4</sup>*Claridge v. Hoare*, (1807) 14 Ves. 59, 65.

<sup>5</sup>*Baker v. Pritchard*, (1742) 2 Aik. 387.

<sup>6</sup>*Glynn v. Houston*, (1836) 1 Keen, 329, 337.

<sup>7</sup>*Lloyd v. Passingham*, (1809) 16 Ves. 59.

<sup>8</sup>*Waters v. Earl of Shaftesbury*, (1864) 14 W.R. 259.

<sup>9</sup>*Mesullum v. Turton*, (1828) 2 Y.&J. 183.

<sup>10</sup>Portion relating to title deeds is omitted.

If the privilege is of the third person then the third person must have the choice.

We may also state that the section appears to be intended for persons who are temporarily in possession — as is apparent from the words “any other person entitled to the possession”. This aspect should be brought out.

Section 131—  
Recommendation

69.12. This appears to be the only just principle. Otherwise, the privilege can be bartered away by a dishonest agent, or lost through his indifference. The section should be revised to avoid such an anomalous situation. Accordingly, we recommend that section 131 should be revised so as to read as follows:—

“151. No one shall be permitted to produce documents in his temporary possession which *any other* person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.”



## CHAPTER 70

### INCRIMINATING QUESTIONS — SECTION 132

#### I. INTRODUCTORY

**70.1.** Section 132 deals with the important subject of self-incriminating questions. While the subject of incriminating *documents* was dealt with in the latter half of section 130, incriminating *questions* are governed by section 132, where the questions relate to a matter not relevant to the matters in issue -- there is a separate provision in section 148 intended for incriminating questions intended to impeach the credit of a witness. But questions relevant to the matters in issue are governed by section 132. A witness, it provides, 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 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.

This is subject to a proviso whereunder 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 in a prosecution for giving false evidence by such answer.

Both in practice and in theory, it is the proviso which is of importance, since it now takes the place of the positive protection that was available at common law in respect of incriminating questions. The protection is taken away by the main paragraph. The proviso really confers an immunity from subsequent prosecution, and not a *present* "privilege" to refuse to answer. However, for the sake of convenience, we shall refer to it as a privilege.

**70.2.** The privilege against self-incrimination has been said to represent many fundamental values and aspirations. It is "an expression of the moral striving of the community ..... a reflection of our conscience .....".<sup>1</sup> That is why it is regarded as a fundamental part of the Constitutional fabric of the U.S.A. despite the fact that "the law and the lawyers ..... have never made up their minds just what it is supposed to do or just whom it is intended to protect".

In the U.S.A. the constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements,<sup>2</sup> and the government cannot make use of statements so elicited.

**70.3.** It should be noted that the position at common law is different from that under the section, inasmuch as the privilege is to refuse to answer the questions, and the rule at common law is not merely concerned with immunity from prosecution.

**70.4.** A similar privilege was formerly recognised in India before the Act of 1855. It would also be of interest to mention that one of the earliest English

<sup>1</sup>*Malloy v. Mogan*, 378 U.S. 9, 84 S. Ct. 1494, n. 7, quoting Griswold, *The Fifth Amendment Today* (1955), page 73.

<sup>2</sup>Kalven, "Invoking the Fifth Amendment—Some legal and Impractical Considerations", 9 *Bull. Atomic Sci.* 181, 182.

<sup>3</sup>See e.g., *Counselman v. Hitchcock*, 142 U.S. 547 12 S. Ct. 195.

cases relating to the privilege against self-incrimination had a factual connection with India. In that case<sup>1</sup>, the defendant refused to "discover" certain information in the proceedings in an English court, on the ground that it might subject him to punishment in the courts of another country (India). The court unanimously held that the privilege against self-incrimination precluded a witness in an English court from being compelled to give testimony which could be used to convict him in the courts of another jurisdiction.

70.5. The privilege available at common law, was, in India, withdrawn by section 32 of Evidence Act, 2 of 1855, which is re-enacted in present section 132. The law in India thus denies to the witness a protection which was recognised by English law. But protection of a different nature is extended to the witness, who is now indemnified against a future criminal prosecution, except where he has perjured himself. The Legislature in India thought that the existence of the privilege "in some cases tended to bring about a failure of justice, for, the allowance of the excuse, when the matter to which the question related was in the knowledge solely of the witness, deprived the Court of the information which was essential to its arriving at a right decision".

70.6. To put the matter in a different form, the rule in section 132 secures to the cause of justice the benefit of the answer of the witness and, at the same time, secures to the witness the benefit of the common law rule (that no one shall be compelled to criminate himself): by affording protection to the witness when (in future) a criminal proceeding is instituted against him.

## II. IMMUNITY

History of immunity.

70.7. This protection is a qualified one — immunity for the future. It may be stated that immunity as a substitute for the privilege has also a history. Soon after the privilege against compulsory self-incrimination became firmly established in law in England, it was recognised that the privilege did not apply when immunity, or "indemnity" in the English usage, had been granted.<sup>2</sup> Parliament for example, enacted an immunity statute in 1710; directed against illegal gambling, 9 Anne, c. 14, ss. 3-4 (1710), which became the model<sup>3</sup> for an identical immunity statute enacted in 1774 by the Colonial Legislature of New York, Law of March 9, 1774, c. 1651, 5 Colonial Laws of New York 621, 623 (1894). These statutes<sup>4</sup> provided that the loser could sue the winner, who was compelled to answer the loser's charges. After the winner responded and returned his ill-gotten gains, he was "acquitted, indemnified (immunized) and discharged from any further or other punishment, Forfeiture or Penalty, which he..... may have incurred by the playing for, and winning such Money .....".<sup>5</sup>

70.8. Immunity statutes are quite common in the United States, and have been the subject matter of numerous controversies raising the question how far they satisfy the constitutional privilege against self-incrimination. We need not go into details of this constitutional question, but, in general, where the immunity

<sup>1</sup>*East India Company v. Campbell* (1740) 27 English Reports 1010, cited in *Murphy v. Waterfront Commission of New York*, (1964) 12 Lawyers Edition 2d. 678, 683.

<sup>2</sup>*The Queen v. Gopal Dass*, (1878-1881) I.L.R. 3. Mad. 271, 279, 280 (F.B.) (per Turner, C. J.).

<sup>3</sup>See L. Levy, *Origins of the Fifth Amendment* (1968), 328, 495, cited in *Kastigar v. U.S.*, (1972) 32 L. Ed. 2d. 212.

<sup>4</sup>*Kastigar v. U.S.* (1972) 32 L. Ed. 2d. 212.

<sup>5</sup>*Kastigar v. U.S.* (1972) 32 L. Ed. 2d. 212.

<sup>6</sup>*Kastigar v. U.S.* (1972) 32 L. Ed. 2d. 212.

<sup>7</sup>9 Anne, c. 14, s. 4 (1710); Law of March 9, 1774, c. 1651, 5 Colonial Laws of New York 621, 623 (1894).

is total, the privilege is not violated by the legislation that substitutes the immunity for the privilege.

### III. TWO DOCTRINES

70.9. In order to appreciate the significance of this section, it is desirable to refer to a few juristic doctrines. There are several doctrines relevant to the question under consideration: Various doctrines.

- (a) the right of the accused to be silent;
- (b) the privilege of the witness against incrimination of oneself;
- (c) the privilege against incrimination of the spouse;
- (d) immunity as a substitute for the privilege.

Two of these seem to be important. According to the rule relating to the right of the accused not to be questioned, neither the judge nor the prosecution is entitled at any state to question the accused unless he chooses to give evidence. "At the common law", says Blackstone, "*nemo tenetur prodere seipsum*": and his fault was not to be wrung out of himself, but rather to be discovered by other means and other men".

Then, there was *another rule*, namely, the *privilege of any witness to refuse* to answer an incriminating question; this is not in every respect identical with the rule relating to the right not to be questioned, which applies only to persons accused of crime, and prevents *the question from being asked at all*. Although the two doctrines very often overlap, and although the first is usually discussed along with the second, there is at least one situation where they do not overlap, namely, where a witness (who is not the accused) is asked incriminating questions. The privilege to be considered in such a case is merely that against self-incrimination, and not the right not to be questioned. Of course, Indian statute law does not incorporate the privilege in this particular form (section 132, proviso), but that aspect is not material at present, since what we are considering is the doctrinal background, and not the actual content of the law.

70.10. Since the eighteenth century, English and American courts have recognised that an accusation should not come from a person's own mouth, and that nobody *called as a witness* in any kind of proceeding should be forced to reveal incriminating matter. It does not matter what the nature of the proceeding is. It can be a legislative committee hearing, an administrative agency proceeding, a civil case in any of its phases or a criminal case in any of its stages. However, the privilege is not a general one against taking an oath and testifying. Instead, it extends only to a right to refuse each individual answer as it is sought by the questioning authority.

Rationale of privilege against self-incrimination.

70.11. The proposition that the accused could not be compelled to testify in a criminal case, and the idea that no one could be obliged to jeopardise his life or liberty in answering questions on oath, are two ideas which, when necessity arises, could be kept distinct. The privilege not to testify in a criminal case when one is accused of the charge, originated in the unpopularity of the procedure adopted in the Star Chamber, under which those who were charged with an offence were interrogated on oath. The idea that no one

Two distinct ideas.

<sup>1</sup>Cf. *Miranda v. Arizona*, (1966) 384 U.S. 436.

<sup>2</sup>Williams, *The Proof of guilt*, Chapter 3.

<sup>3</sup>Indian law will be discussed later in detail.

<sup>4</sup>*Cross on Evidence* (1974), pages 146 and 243.

could be obliged to jeopardise his life and liberty by incriminating questions, came to be applied to all witnesses in all proceedings in the course of the seventeenth century<sup>1</sup>. It is possible that<sup>2</sup> the right of the accused not to be questioned and the privilege of the witness, were recognised in the same century. But the two are not identical.

Right to silence.

**70.12.** We have referred above to the right to silence. The position has been thus stated<sup>3</sup> with reference to England —

“Police officers are entitled to question any person, whether suspected or not, from whom they think that useful information may be obtained, whether or not that person has been taken into custody *so long as he has not been charged with the offence or informed that he may be prosecuted*, “but if there are reasonable grounds for suspecting that a person has committed an offence, a caution must be given before any further questions are put.”

We may refer to one case which illustrates its practical impact, though the actual point related to adverse inference from silence. In *Hall v. R.*<sup>4</sup> the accused was convicted of the unlawful possession of ganja. A policeman told the accused after the search of his home (where ganja was discovered) that the co-accused had said that the ganja belonged to the accused Hall. He remained silent. He was convicted in Jamaica. He appealed to the Privy Council against his conviction.

Lord Diplock observed :

“It is a clear and widely known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. A *fortiori* he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordship's view silence alone or being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation. This is well-established by many authorities such as *R. v. — Whitehead*, (1929) 1 K. B. 99; (1928) All E.R. 507, C.C.A.”

**70.13.** We are referring to this case as indirectly illustrating the right to silence. This right came to be recognised in the 17th century<sup>5</sup>. Right down to the middle of the seventeenth century, the examination of the accused is the central feature of the criminal procedure of the common law<sup>6</sup>. Nor do we read anywhere that a witness could refuse to answer on the ground that his answer might incriminate him.<sup>7</sup> It was in the Commonwealth period that this

<sup>1</sup>Cross on Evidence (1974), pages 146 and 243.

<sup>2</sup>Holdsworth H.E.L., Vol. 9, page 198 (middle of 17th Century).

<sup>3</sup>Harold Williams, O. C., LL.D., Foreword to Shoolbred, Criminal Justice in England & Wales (Pergamon Pres) (1960), page viii.

<sup>4</sup>Emphasis supplied.

<sup>5</sup>*Hall v. R.*, (1971) 1 All. E.R. 322 (P.C.).

<sup>6</sup>For Indian statutory provisions, see sections 161(2), 164(2), 175(1), 313(3), 316, Cr. P.C. 1973.

<sup>7</sup>Holdsworth, H.E., Vol. 9, pages 199 and 277.

<sup>8</sup>For later cases, see *R. v. Sparrow*, (1973) 2 All. E.R. 129.

<sup>9</sup>The first instance of this seems to have been *R. v. Reading*, (1679) 7 S. T. at page 296.

privilege to refuse to answer incriminating questions is accorded to accused persons<sup>1</sup>. Its existence was well established after Restoration<sup>2</sup>; and it was then extended to ordinary witnesses.<sup>3</sup>

70.14. It is possible that the decision of the common law to allow a party the privilege of refusing to answer questions at the *suit of his opponent*, assisted indirectly the establishment of the privilege of parties and witnesses to refuse to answer *incriminating questions*—a privilege which made its appearance in the middle of the seventeenth century<sup>4</sup>. At any rate, the introduction of this privilege was helped forward by the hostility of the common law courts to the opposite methods pursued by the ecclesiastical courts in the exercise of their criminal jurisdiction.<sup>5</sup>

History of self-incrimination.

70.15. Although, in practice, greater importance is attached to the privilege of the accused, it should not be forgotten that the privilege is not of the accused merely, but of the witnesses as well. The rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the Judge, have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the Judge regards as reasonably likely to incriminate him.<sup>6</sup> Civil liability, however, is not an excuse<sup>7</sup>.

Privilege of accused as also of witnesses.

70.16. The distinction made above, — namely, the distinction between the right not to be questioned and the right not to answer self-incriminating questions,—is brought out in clear terms in the California Evidence Code.<sup>8</sup> Section 930 of that Code provides as follows:—

Distinction illustrated in California Code of Evidence.

#### “PRIVILEGE OF DEFENDANT IN CRIMINAL CASE

S. 930. *Privilege not to be called as a witness and not to testify—*

To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.”

Section 940 of the California Evidence Code is in these terms:

#### “PRIVILEGE AGAINST SELF-INCRIMINATION

S. 940. *Privilege against self-incrimination—*

To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has privilege to refuse to disclose any matter that may tend to incriminate him.”

Section 404 reads —

“S. 404. *Determination of whether evidence is self-incriminating—*

Whenever the proffered evidence is claimed to be privileged under section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence

<sup>1</sup>(a) *King Charles' Trial*, (1649) 4 S. T. at page 1101;

(b) *Lilburn's Trial*, (1649) 4 S. T. at page 1292-1293, 1341.

<sup>2</sup>*R. v. Scroop*, (1660) 5 S. T. at page 1039.

<sup>3</sup>(a) *R. v. Reading*, (1679) 7 S. T. 296;

(b) *R. v. Rosewell*, (1694) 10 S. T. at page 169.

<sup>4</sup>Hodsworth, H.E.L., Vol. 9, page 198.

<sup>5</sup>Hodsworth, H.E.L., Vol. 9, page 196.

<sup>6</sup>*Blunt v. Parkle Hotel Ltd.*, (1942) 2 All. E.R. 187, 189.

<sup>7</sup>Witnesses Act, 1806 (Eng.).

<sup>8</sup>California Evidence Code, sections 930 and 940.

"is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege."

#### IV. ENGLISH LAW

Principle of the common law, how modified in England.

70.17. The principal doctrines relevant to section 132 having been dealt with, we now proceed to a consideration of the manner in which and the extent to which they have found recognition in the law. We shall first consider the English law. It is a deep-rooted principle of the common law that no one should be obliged to *criminate himself* out of his own mouth. This is one branch of the privilege. The other branch of the privilege concerns penalties and forfeitures. Civil actions for penalties or forfeitures are liable to be oppressive and this accounts for the other branch of the privilege - prohibition of questions which may lead to penalty or forfeiture.

This common law rule as to self-incrimination was recognised in England in a number of statutes. Section 2 of the Evidence Act, 1851 (14 and 15 Vict. c. 99), for example, rendered the parties to a cause competent and compellable to give evidence, but section 3 expressly provided that nothing therein contained "shall render any person compellable to answer any question tending to incriminate himself." A similar provision was made in section 5 of the Foreign Tribunals Evidence Act, 1856 (19 and 20 Vict. c. 113) and section 4 of Evidence by Commission Act, 1859 (22 Vict. c. 20). The protection of the English rule applies equally to parties and to witnesses, and a witness cannot be forced to answer questions or interrogatories having such a tendency.

70.18. As this rule, howsoever wholesome, was prone to be abused, certain limitations are recognised by the Courts both in England and in America. In *R. v. Boyes*,<sup>1</sup> Cockburn, C.J. observed that the object of the law was to afford to a party called upon to give evidence in a proceeding, *inter alia*, protections, against being brought, by means of his own evidence, within the penalties of the law; but it would be to convert a salutary protection into a means of abuse, if it were to be held, that a mere imaginative possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. It was also observed that the danger to be apprehended by the person must be real and appreciable, having regard to the ordinary operation of law in the ordinary course of things and not a danger of any imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.

It was also laid down that to entitle a party called as a witness to the privilege, the Court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.

It must be noted that the Civil Evidence Act, 1968, abolishes the rule whereby a person cannot be compelled to answer any question or to produce any document or thing if to do so would tend to expose him to a forfeiture; the section is confined to civil cases.

No protection against civil liability.

70.19. Even at common law, the privilege against self-incrimination does not extend to questions tending to expose the witness to any other civil liability<sup>2</sup> (including liability to an affiliation order<sup>3</sup>) or to a finding of adultery<sup>4</sup>.

<sup>1</sup>Cross, Evidence (1974), page 83.

<sup>2</sup>*R. v. Boyes*, (1861) 30 L.J.O.B. 301.

<sup>3</sup>See also *Re Reynolds*, (1882) 20 Ch. D. 294; 15 Cox's C.C. 108 (C.A.).

<sup>4</sup>Witnesses Act, 1806.

<sup>5</sup>*S. v. E.*, (1967), 1 Q.B. 367; (1967) 1 All. E.R. 593.

<sup>6</sup>*Blunt v. Park Lane Hotel*, (1942) 2 K.B. 253; (1942) 2 All. E.R. 187.

**70.20.** It may be stated that in England, the privilege against incriminations of self or spouse in civil proceedings has been the subject matter of a statutory provision, — section<sup>1</sup> 14, Civil Evidence Act, 1968. Statutory amendment in England.

Sub-section (1) of that section makes two provisions as to the right of a person in any legal proceedings *other than criminal proceedings*<sup>2</sup> to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty. In the first place, it provides that the right shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law. In this respect, a narrow scope is given. But it also provides that the right shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the *husband or wife* of that person to proceedings for any such criminal offence or for the recovery of any such penalty.

By sub-section (2), any existing enactment recognising such a privilege shall be construed as providing also that any answer or evidence given by the person concerned shall not be admissible in evidence *against the husband or wife* of that person in the proceedings or class of proceedings in question.

Under sub-section (3), references to "giving evidence" are construed as references to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

**70.21.** As regards forfeiture, which is also mentioned in section 132, it was held in *Pye v. Butterfield*<sup>3</sup>, that a witness may refuse to answer a question which tends to show that he has done an act which would render him liable to *forfeit property*. That was an action of ejectment. The court refused to compel the defendant to answer interrogatories, where the answer would tend to show that he had incurred forfeiture by breaching the covenant not to under-let. Forfeiture.

The following is from the judgement as reported in the Law Journal:

"Cockburn C.J. .... According to the authorities which have been cited and the expressions used by the text-writers who have written upon the subject, those rules are perfectly fixed and established, that no man shall be compelled to give an answer which shall have an effect leading to the forfeiture of his estate ....."

"Crompton J.: .... It is a principle of the law of evidence which these courts have always recognised as applicable to the examination of witnesses, and everything shows that they were averse to extending the power of discovery to cases of forfeiture. From the earliest times the rule has been adopted in the court of equity with regard to discovery ....."

Mellor J. concurred.

The equitable rule against assisting a common informer or aiding a forfeiture was noted by Lord Esher<sup>4</sup>. Equity did not grant discovery or order interrogatories in aid of a forfeiture of property, and that seems to be the origin of the prohibition against questions the answer whereof would tend to establish liability to forfeiture<sup>5</sup>. In England, this part of the privilege has, in civil cases, been abolished by statute<sup>6</sup>, as already stated.

<sup>1</sup>Section 14, Civil Evidence Act, 1968 (C-64).

<sup>2</sup>The Act does not apply to criminal proceedings.

<sup>3</sup>*Pye v. Butterfield*, (1864) 34 L.J.O.B. 17, 220; 122 E.R. 1038.

<sup>4</sup>*Earl of Mexborough v. W. Urban District Council*, (1897) 2 Q.B. 111, 115.

<sup>5</sup>Cross, Evidence (1974), page 244.

<sup>6</sup>Section 1(1)(a), Civil Evidence Act, 1968.

70.22. As to questions imposing a penalty, the rule that a witness cannot be obliged to answer a question which would expose him to the risk of a penalty seems to have originated in the doctrine that equity would not insist on a common informer for making an order of discovery *in his favour*.<sup>1</sup>

Statutory Exceptions in England.

70.23. There have been statutory exceptions in England to the privilege against self-incrimination. We are at the moment concerned with the most important one, applicable to the accused. An accused who gives evidence on his own behalf under the Criminal Evidence Act,<sup>2</sup> cannot object to answering a question because of its tendency to criminate him *as to the offence charged*. There are other statutes under which the privilege cannot be invoked in special proceedings, such as examinations in bankruptcy. For example, under section (3) of the Theft Act, 1968, a witness may not refuse to answer any question in proceedings for the recovery, or administration of property or the execution of a trust on the ground that to do so might incriminate him or his spouse of an offence under the Act; but the witness's answers are not admissible against him in subsequent proceedings for an offence under the Act, or, unless they married after the answer was given, his spouse. Several other statutes contain similar provisions for special situations.

70.24. After this discussion of the background in which the section was enacted and of certain theoretical aspects, we proceed to deal with a few points that require consideration.

## V. TENDENCY TO INCRIMINATE

The meaning of "tend to incriminate".

70.25. The privilege conferred by section 132 applies if there is a "tendency" to incriminate. This is based on the English law. The tendency must, however, be real and appreciable. In *Queen v. Boyes*,<sup>3</sup> a witness had declined to answer a question on the ground that it might tend to incriminate him, but the plea was rejected because he had already been pardoned and the pardon was produced by the Solicitor-General. As to the objection of the witness that he could still be *impeached by Parliament*, the court held that the danger to be apprehended must be real and appreciable with reference to the *ordinary* operation of law in the ordinary course of things.

Tendency to incriminate indirectly.

70.26. At the same time, it should be noted that the privilege applies not only to answers *directly* incriminating the witness, but also to answers *that tend to do so indirectly*. A number of such answers taken together, or taken with other evidence, might incriminate the witness in such a way that if he is forced to answer, the danger avoided by the privilege will occur.<sup>4</sup>

70.27. But the witness's own view is not necessarily to be accepted: the court can override it. As Goddard L.C.J. observed:<sup>5</sup>

"The rule is that no one is bound to answer any question if the answer thereto would, *in the opinion of the judge*, have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for. This rule was laid down by the Queen's Bench in *R. v. Boyes*,<sup>6</sup> and the words in which I have stated it are those of Stephen, J. in *Lamb v. Munster*.<sup>7</sup>

<sup>1</sup>Cross, *Evidence* (1974), page 244.

<sup>2</sup>Section 1(c), Criminal Evidence Act, 1898 (Eng.).

<sup>3</sup>*R. v. Boyes*, (1861) B & S 311.

<sup>4</sup>*R. v. Slancy*, (1832) 5 C. & P. 213.

<sup>5</sup>*Blunt v. Parklanegeorge*, (1943) 2 All. E.R. 187, 189.

<sup>6</sup>*R. v. Boyes*, (1861) B. & S. 311.

<sup>7</sup>*Lamb v. Munster*, (1882) 10 O.B.D. 110 (Stephen J.).



"A party can also claim privilege against discovery of documents on the like grounds: see *Hunninos v. Williamson*<sup>1</sup>."

## VI. POSITION OF THE ACCUSED

**70.28.** It is now necessary to deal with an important point relating to the accused. We have referred above to two privileges: the right to silence (the right not to be questioned) and the privilege against self-incrimination. When the accused offers himself as a witness, he certainly waives the first privilege, referred to above, namely, the right not to be questioned. The question arises whether he waives the second privilege also, namely, the right not to be compelled to answer incriminating questions. If he is not deemed to have waived the second privilege, the next question is, is it desirable to make a provision in the opposite direction, that is to say, to the effect that he can be compelled to answer incriminating questions and to what extent?

**70.29.** In India, in 1955, when the accused was made a competent witness in all criminal cases by amending the Code of Criminal Procedure, 1898, then in force, this question was not dealt with specifically in the relevant statutory provision. But there appears to be need for a specific provision on the subject. Sarkar has drawn attention to the need for specific provisions as to the situation where the accused becomes a witness. He has stated:<sup>2</sup>

"As to the competency of an accused to testify for the defence, it was at long last recognised by the legislature by a slovenly addition of section 342A to the Criminal Procedure Code, 1898 (by Act 26 of 1955) which leaves unsolved many important problems like the answering of any incriminating question by the accused in his cross-examination, or any question tending to show that the accused has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is a bad character & c. & c. These and many other questions would naturally crop up when an accused comes to offer himself as a witness for the defence. These and other intricate questions have been dealt with in the English Criminal Evidence Act, 1898, (61-62 Vic. c. 36), section 1(e), (f), (g) & c. of that Act. Section 342 of the Burma Criminal Procedure Code, as amended by Burma Act, 13 of 1945, which proceeds on the lines of the English Criminal Evidence Act, 1898, is a better piece of legislation."

**70.30.** We are dealing with this question because it is one of importance, and also of some difficulty. Judicial decisions are scanty, and take the view<sup>3</sup> that the accused is in the same position as a witness. But the question is not merely whether what has been laid down should be codified. There are a few other aspects also to be considered.

In *Laxmipat's case*<sup>4</sup>, the following observations were made by the Supreme Court in regard to a person who was not the accused, after referring to article 20(3) of the Constitution and section 132, Evidence Act.

"A person who voluntarily answers questions from the witness box waives the privilege which is against being compelled to be a witness against himself because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself."

<sup>1</sup>*Hunninos v. Williamson*, (1883) 10 Q.B.D. 459.

<sup>2</sup>Sarkar, *Law of Evidence* (1965), Preface, 5.

<sup>3</sup>(a) *In re Khandaswami*, A.I.R. 1957 Mad. 727, 734.

(b) *People's Insurance Co. v. Sardul Singh*, A.I.R. 1962 Punjab, 101.

<sup>4</sup>*Laxmipat Choraria v. State of Maharashtra*, A.I.R. 1968 S.C. 938, 944, para. 13 (on appeal from I.L.R. 1966 Bombay 347.).

"In this respect the witness is in no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of a co-accused. There too the accused waives the privilege conferred on him by the article<sup>1</sup>, since he is subjected to cross-examination and may be asked questions incriminating him."

The observations were, however, *obiter*.

Two aspects to be borne in mind.

70.31. So far as the narrow legal aspect of the matter is concerned, in taking a decision on the question, two sides of the matter must be borne in mind. On the one hand, the Code of Criminal Procedure can only make the accused a competent witness; it cannot make him a compellable witness, in view of the provision in article 20(3) of the Constitution. And, if it cannot make him a compellable witness, then it could be argued (in theory) that it cannot make him a compellable witness in relation to particular questions.

On the other hand, however, if incriminating questions are entirely excluded when the accused becomes a witness, cross-examination of the accused (as a witness) would be rendered almost impossible. Practical considerations, thus justify the later course.

By this course, the constitutional provision in article 20(3) is not violated, since the accused voluntarily offers himself as a witness and it would be a reasonable view to take that he waives the privilege.

Recommendation as to the accused.

70.32. We are of the view that the position regarding the extent to which the accused, when appearing as a witness, may be compelled to incriminate himself should be dealt with more specifically than at present and that in the interests of neatness and clarity the situation of the accused should be dealt with in a separate sub-section.

Distinction between accused and witness.

70.33. It may be noted that in England, in the case of the common law privilege of refusing to answer incriminating questions, it is perfectly lawful and proper for the question to be put, and it is for the witness to claim privilege if he thinks fit<sup>2</sup>. But, as already stated, an accused person who elects to give evidence on his own behalf cannot claim privilege in respect of the offence *with which he is charged*. There is a specific statutory provision on the subject<sup>3</sup> in England.

Questions not to impeach credit.

70.34. This is as regards the incriminating questions which are relevant to the matters in issue. So far as questions which are put to a witness relating to his credit are concerned, the matter pertains to section 148. Should the accused have to face every question which is asked to impeach his credit, including questions about his past offences or convictions? That point will be considered under section 148.

Recommendations as to section 132

70.35. Our recommendation, then, on the subject of cross-examination of the accused concerning his capacity as a witness under section 132, is as follows:—

An accused person who offers himself as a witness in pursuance of section 315 of the Code of Criminal Procedure, 1973, may be compelled to answer questions which incriminate him as to the *offence charged*. This provision should be added in section 132 of the Act. The matter should be dealt with in a separate sub-section.

<sup>1</sup>Emphasis added.

<sup>2</sup>*Boyle v. Wiseman*, (1855) 10 Exch. 647.

<sup>3</sup>Para. 70.24, *supra*.

## VII. PROVISIO — EXTENSION TO SPOUSE

70.36. This takes us to the proviso to section 132, which (in effect) provides that if a witness is compelled to give certain answers to incriminating questions, the answers shall not subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence. It is to be noted that there is no protection for a question which may incriminate *the spouse* of the witness. An interesting point that can be raised in this connection is, how far a witness ought to be forced to incriminate his spouse. The principle that the peace of families should be preserved, is well-known to the law of evidence. It is on this principle that section 122 protects from disclosure communications during marriage. The protection given by section 122 rests upon the ground that the admission of such testimony would have a powerful tendency to disturb the peace of families and to weaken the mutual confidence upon which the happiness of the married status depends.

Section 132 Pro-  
viso— Protection  
for the wife of  
the witness.

70.37. On this principle, it is desirable that under section 132 also, a witness should not be placed in a position where he would be made to answer a question that might harm the interests of the spouse. It is true that section 120 makes the parties and their spouses competent witnesses. But that does not necessarily imply that there should be no protection for particular kinds of communications, or questions which are of importance with reference to the husband-wife relationship.

70.38. In English law<sup>1</sup> a witness can refuse to answer questions incriminating a spouse. For civil cases, this is now specifically recognised by statute<sup>2</sup>.

In criminal cases, the rule that the privilege extends to the spouse, is a rule which applies by virtue of the common law<sup>3</sup>. The rule at common law is that no witness, whether party or stranger, is (except in specified cases) compellable to answer any question or to produce any document, the tendency of which is to expose the witness (or the wife or the husband of the witness), to any criminal charge, penalty or forfeiture.

70.39. One possible objection to the suggestion made above may be answered here. It may be argued that in England the witness is completely protected and may refuse to answer incriminating questions, while, in India, the privilege of the witness is limited — he must answer the question, but once he gives the answer, is not used against him later<sup>4</sup>. This distinction, however, is not of any practical consequence for the point under consideration, because the quality of the privilege is not material; what needs to be stressed is, that whatever protection the law gives to a witness in respect of incriminating questions concerning the witness himself, should be available in respect of incriminating questions concerning his or her spouse also.

<sup>1</sup>Halsbury, 3rd ed., Vol. 15, page 422, paragraph 760.

<sup>2</sup>Civil Evidence Act, 1968, section 14(1)(b).

<sup>3</sup>*R. v. All Saints Worcester*, (1817) 6 M & S 194, 201 (spouse).

<sup>4</sup>Section 132, proviso.

70.40. We, therefore, recommend that section 132 should be extended to questions incriminating the spouse.

### VIII. PROVISO--THE MEANING OF "COMPULSION".

Recommendation  
as to spouse.

Meaning  
"Compelled"—  
Three views.

70.41. The meaning of the word "compelled" as used in the proviso to section 132 also requires to be clarified. Judicial decisions on the subject disclose a controversy. Does the word "compelled" contemplate that the witness must have been *forced* to answer the question put by the court and must have made his unwillingness known to the court? Or, is the requirement indicated by that word satisfied even if the witness does not object to the question? On this point, there seems to be a conflict of decisions.

Three views have been expressed on the above point, which may, for the sake of convenience, be described as the narrow view, the wide view, and the intermediate view.

Narrow view.

70.42. The narrow view is taken in a Bombay Case. It was decided in *Emperor v. Gunna*<sup>1</sup> that unless a person objects to any question the answer to which is likely to incriminate him, he cannot be said to have been "compelled" to give such answer within the meaning of the proviso. Mr. Justice Hayward observed: "If a man voluntarily makes an incriminating statement, he must take the consequences for it. He can also plead protection if he has specifically declined to make the statement, and has been specifically compelled to do so by the Court". This was approved by a Full Bench in *Bai Shanta's Case*.<sup>2</sup>

70.43. This view bases itself upon the fact that the words "which he is compelled to give" must be given some meaning: these words contemplate two situations—(i) where the witness raises no objection, (ii) where he raises an objection. In the first case, he can be taken as having acted voluntarily, and is not "compelled". It is only in the second situation that he is "compelled" and can therefore claim the immunity provided in the proviso.

70.44. In an earlier Bombay case,<sup>3</sup> there was a difference of opinion between two judges (on the one hand) and one judge on the other hand. The majority (Bayley Ag. C.J. and Persons J) took the view that protection is afforded only to an answer to which the witness has objected. Birdwood J. held that the compulsion is operative whether or not the witness asks to be excused. This controversy, so far as Bombay is concerned, is now settled by *Bai Shanta's case*<sup>4</sup> taking the narrow view as stated above.

Wide view.

70.45. This is one view of the matter. According to what may be called the wide view, there is compulsion, at least where the witness makes an *objection expressly*. Compulsion is implicit in the legislative scheme, according to this

<sup>1</sup>*Emperor v. Gunna*, (1920) 22 Bom. L.R. 1271 approved in *Bai Shanta v. Umrao*, (1925) I.L.R. 50 Bom. 162, 173 (F.B.).

<sup>2</sup>*Bai Shanta v. Umrao*, (1925) I.L.R. 50 Bom. 162 (F.B.).

<sup>3</sup>*Queen Empress v. Ganu*, (1887) I.L.R. 12 Bom. 440.

<sup>4</sup>*Bai Shanta v. Umrao*, (1925) I.L.R. 50 Bom. 162 (F.B.).

view. This view was strongly put by Muttuswami Aiyar J. in his dissenting judgement in the earliest Madras case<sup>1</sup> on the subject. In that case, there was a difference of opinion between the majority (3 judges) and the minority (2 judges). While the majority took a narrow view, the minority (Kernan and Muttuswami Aiyar, JJ.) took a wide view. According to that view, a witness giving evidence on oath when summoned by the court is, in every case, protected, since the compulsion arises by law.

This was also, in substance, the view of Walsh J. in *Emperor v. Ganga Sahai*<sup>2</sup> (an Allahabad case). He observed:

"that a witness in a civil suit cannot be prosecuted for defamation in respect of an answer made by him to a question asked by the Court". For this conclusion, he relied, *inter alia*, on section 132, proviso. He expressed disagreement with two judgements of his own Court, and held that the word "compelled" refers to the obligation *under the law*<sup>3</sup> to answer questions. In that case the question was asked by the Court, but the judgement does not rest on that consideration.

70.46. One of the Madras judgements<sup>4</sup> in a later case can be said to take the intermediate view. These are the pertinent observations:

Intermediate  
view.

*"Whether the witness seeks the protection of the Court in a set form of words, or not,<sup>5</sup> if the witness is made to understand directly or indirectly that he had no option in the matter but to answer all the questions put to him, I conceive he would bring himself within the proviso to section 132. I am not prepared to hold that the proviso would only apply to witness who ask in so many words the protection of the Court under section 132. The words of the proviso should be understood in the ordinary sense and the word "compelled" means forcing or insisting upon a witness to answer the question. The witness may not know that he should apply for protection; but any reasonable man ought to know that any statement defamatory of another would expose him to a charge of defamation. If he hesitates to answer and the court tells him he must answer the questions, I would hold that hesitation and the direction of the court to the witness to answer would bring the witness within the proviso".*

This view recognises that a claim to protection may be *implied*.

70.47. The intermediate view is also represented by an Allahabad case<sup>6</sup>. It was held that it would be too narrow an interpretation to say that the word "compelled" must involve the necessity of a *formal objection* to giving the answer. Whether there was or was not compulsion, depended on the facts of each case.

Allahabad Case.

70.48. The Calcutta' view is that section 132, proviso, does not, apply unless pressure is put upon a witness after he is in the box and when he asks to be excused from answering a question.

<sup>1</sup>*Queen Empress v. Gopal Das*, (1878-1881) I.L.R. 3 Mad. 271.

<sup>2</sup>*Emperor v. Ganga Sahai*, (1920) I.L.R. 42 All. 257; 18 A.L.J. 112

<sup>3</sup>Emphasis supplied.

<sup>4</sup>*Peddappa v. Varada*, A.I.R. 1929 Mad. 236, 239 (Devadoss J.).

<sup>5</sup>Emphasis supplied.

<sup>6</sup>*King Emperor v. Banarsi*, A.I.R. 1924 All. 381, (Walan & Ryves, JJ.).

<sup>7</sup>*Moher Sheikh v. Queen Empress* (1894) I.L.R. 21 Cal. 392 (Trevelyan and Rampini, JJ).

In that case, with reference to the view expressed by Muttuswami Aiyar J. in his dissenting judgement, in the Madras case<sup>1</sup>, it was stated that it is not correct to say that the Judge has nothing to say in the matter, or that it is a mere formality for the witness to seek protection. It was observed— "the Judge has to decide whether the question is relevant to the matter in issue and upon that determination partly depends the obligation to answer".

With great respect, this explanation does not satisfactorily or completely answer the principal query, namely, if the question is held to be relevant to the matter in issue, has the court a discretion to disallow the question on the ground that it would incriminate the witness? If so, what is the statutory provision constituting the authority for that discretion?

70.49. According to the later Madras view<sup>2</sup>, a witness who answers a question put to him by counsel without claiming the protection of this section is not entitled to any protection. With respect, however, one may point out that the section, as it stands, if construed literally, confers no "protection" in the main paragraph, and does not contemplate the seeking of a protection by the witness. In fact, the main paragraph denies a protection to the witness, because it begins with the negative provision—

"No witness shall be excused ....."

70.50. The narrow view stresses the relative clause beginning with the word "which" in the proviso. To this, answer has been given:

"As to the relative clause in the proviso, it is neither superfluous nor inconsistent with the construction which I place upon the section. It is not superfluous, because the indemnity does not extend to voluntary affidavits. Nor is it material that the word "compel" refers to a compulsion by the Judge, since the Judge may be said to compel as much by issuing a process and placing a person in the position of a witness—in which he is compulsorily sworn and placed under the necessity of incriminating himself—as by saying to a witness "you claim to be excused, but the law directs me not to excuse you". "Further, section 148, which confers upon a witness the privilege of not answering a criminative question that is material only in so far as it injures his character, and thereby affect his credit, expressly gives power to the judge to warn the witness that he need not criminate himself until it is decided that the question must be answered. If it were intended by section 132 that the witness must decline to answer if he wishes to claim the indemnity, would not a power to warn the witness to that effect be expressly given?"

Need to remove  
conflict between  
main paragraph  
and proviso.

70.51. It seems to us that this controversy must continue so long as the present wording of the section is not changed. There seems to be fundamental lacuna or want of logic in the section. This lacuna becomes apparent when one reads the main paragraph of the section in contrast with the proviso. In the main paragraph, the section enacts the rule that a witness shall not be excused from answering incriminating questions—we are concerned only with questions pertaining to matters relevant to the matters in issue. This negative provision implies that there is no immunity and a witness is bound to answer the question in every case.

<sup>1</sup>Queen Empress v. Gopal Das, (1878-81) I.L.R. 3 Mad. 271 (supra).

<sup>2</sup>Perdappa Reddy v. Varada Reddy, A.I.R. 1929 Mad. 236.

<sup>3</sup>Cf. Queen v. Gopal Dass, (1876-81) I.L.R. 3 Mad. 279, 285. (F. B.). (Muttuswami Aiyar J.—dissenting judgment).

The proviso, however, says that no such answer which a witness "shall be compelled to give" shall subject him to arrest or prosecution etc. The proviso creates the impression that there is a discretion — vide the relative pronoun "which". But if there is no immunity, compulsion must follow,— unless the law gives a discretion to the court to allow or not to disallow the question. Hence, the relative expression "which" creates difficulty. The use of the word "which" suggests that there is a distinction between case and case, and that two alternative situations are contemplated—one in which compulsion exists and another in which compulsion does not exist.

**70.52.** Unfortunately, however, the section does not contain any provision in express terms indicating that such a choice or discretion exists in the court. In this connection, reference may be made to the fact that in those sections of the Act where a discretion in the court is contemplated, there is an express provision—for example, sections 146(3), 147 and 148, which deal with the exercise of discretion in regard to questions intended to impeach the credit of a witness. If the provisions of section 132 had in express terms conferred such a discretion, then one can understand those judicial decisions which hold that the words "shall be compelled" in section 132 apply only where the court puts pressure on the witness and the witness in response makes a request for being excused for answering the question<sup>1</sup>.

No provision for discretion.

Such is not the case and in the absence of an express provision conferring discretion, one cannot be over-critical of the view that the ordinary layman, unacquainted with the technical terms of the section, may reasonably be regarded as a person compelled to answer all questions that are put by counsel or by the court.<sup>2</sup> The difficulty arising from the present scheme of the section was emphatically described by Muttuswami Aiyar J. in his dissenting judgment in the Madras case<sup>3</sup> where he observed :—

"It seems to me incongruous that the Legislature should have directed the judge never to excuse a witness from answering a criminative question relevant to the matter in issue, and at the same time commanded the witness to ask the Judge to excuse him from answering such a question".

**70.53.** Having taken into consideration all aspects of the matter, we are of the view that in the case of a witness compulsion<sup>4</sup> must be taken as arising by law, since a court has no power to excuse a witness. This is the only reasonable construction of the main paragraph. It is necessary that the proviso should be brought into line with this proposition enacted in the main paragraph.

Need for change.

## IX. RECOMMENDATION

**70.54.** In the light of the above discussion, we recommend that section 132 should be revised as below :—

Recommendation.

"132. (1) 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 to such question will criminate, or may tend directly or indirectly to criminate, such witness or the spouse of the witness or that it will expose, or tend directly or indirectly to expose, such witness or spouse to a penalty or forfeiture of any kind.

<sup>1</sup>*Moher Sheikh v. Q.E.*, (1893) Mad. 392, 400.

<sup>2</sup>*Emperor v. Banarasi*, A.I.R. 1924, All. 381

<sup>3</sup>*Queen Empress v. Gopal Dass*, (1878-1881) I.L.R. 3 Mad. 271, 284

<sup>4</sup>Para 70.45, *supra*.

(2) *An accused person who offers himself as a witness under section 315 of the Code of Criminal Procedure, 1973, shall not be excused from answering any question as to any matter relevant to the matter in issue in the prosecution on the ground that the answer to such question will criminate or may tend directly or indirectly to criminate the accused or the spouse of the accused or that it will expose, or tend directly or indirectly to expose, the accused or the spouse to a penalty or forfeiture of any kind.*

(3) *Where by virtue of the obligation imposed by sub-section (1) or sub-section (2), a witness or the accused is bound to answer a question, no answer which the witness or the accused gives to that question shall subject the witness, the accused or the spouse of the witness or the accused, as the case may be, to arrest or prosecution, or be proved against the witness or the accused or the spouse, as the case may be, in any criminal proceeding, except a prosecution for giving false evidence by such answer."*



**PRIVILEGE OF FAMILY COUNSELLORS : SECTION 132A**  
**SECTION 132A**

**71.1.** We have so far dealt with existing provisions of the Act which concern privileges and disabilities in the field of evidence. Before we part with this topic it is necessary to consider one matter on which there is no provision creating a privilege or disability in the present Act. The matter is an important one deserving consideration, having regard to the current thinking on the subject of disputes arising in family law. Introductory.

So far as the law of evidence is concerned, what we have in mind is the protection from disclosure of statements made to a person appointed by the Court for the purpose of effecting reconciliation between the parties to a dispute concerning the family. In order to appreciate the need for such a provision, it is necessary to give a short background of certain trends in thinking and legislative developments on the subject.

**71.2.** It is now being increasingly realised that disputes relating to family law—in particular, matrimonial proceedings—require a different approach from the conventional method adopted in relation to other disputes. The court does not take any active part in ordinary litigation. But family disputes stand on a different footing. Such disputes concern not merely the immediate parties thereto, but the children and,—taking a wider view—society as a whole. It is for the good of the society that such disputes ought to be prevented from arising, as far as possible; but if unfortunately a dispute does arise, it is in the interest of society that its resolution should be effected with as little acrimony as possible and after bearing in mind the wider interest to which we have made a reference. In this connection, it is pertinent to refer to the Report of the Law Commission<sup>1</sup> on the Code of Civil Procedure. We stressed in that Report the need for certain special procedural provisions in relation to disputes in the field of family law. Our recommendation has, in substance, been implemented by the insertion of a new Order—Order 32A—in the Code of Civil Procedure as recently amended. We recommend, *inter alia*, a statutory provision calling upon the Court to make efforts at reconciliation. That has also been implemented by the insertion of an appropriate provision in the Code. Disputes concerning the family.

**71.3.** In order that the amended provision may be properly carried out, it may be necessary for the Court to appoint counsellors who could give their advice to the parties. For brevity's sake, we shall describe such persons as family counsellors. Such counsellors would find their task smooth if communications made during the course of the proceedings held by them are protected from disclosure. That is how the matter becomes relevant to the field of the law of evidence. Relevance to the law of evidence.

**71.4.** The existing law of evidence does not meet the situation. Communications made by one spouse to another are privileged under section 122; but that section is based on the consideration of maintenance of marital confidence between married person, and is confined to their mutual communications. What we have in mind is a slightly different consideration, namely, the social interest in the preservation of a marriage which, through it threatens to come to an end, could yet be saved by wise and careful action on behalf of the society, of No provision in existing law.

<sup>1</sup>54th Report of the Law Commission (Code of Civil Procedure, 1908, proposed order 32).

which the family counsellor is a representative. And the communications for which the privilege is intended need not take place between spouses. It is in the interests of society generally that the spouse who is willing to confide in the family counsellor about his conduct should be encouraged to do so. The proceedings for reconciliation may then have a reasonable prospect of success, or at least the spouse making such communications will have the satisfaction that the truth is known to one person who is neutral and impartial and who is acting for the benefit of both the parties. When we speak of "spouses", we do not imply only matrimonial disputes.

Whose  
privilege.

71.5. If the approach which we have outlined above is to be implemented, a question of detail arises, namely, should the privilege be that of the communicating spouse, or should the privilege be that of the family counsellor? On this question, much can be said on both sides. The grant of a privilege to the spouse would be in symmetry with the provisions of the Act concerning legal advisers. But it can be said, on the other side, that the position of the family counsellor is not totally similar to that of a legal professional adviser. The proposed privilege is to be created in the interest of society, in order that the family counsellor may function effectively and the privilege should exist irrespective of the fact that the family counsellor is or is not engaged by the party. On this reasoning, the privilege should be of the family counsellor. The communication should be protected, because society has an interest in the preservation of marriage. We think that on the whole the privilege should be of the family counsellor.

71.6. But the privilege should not apply to proceedings *against the counsellor* — where the proceedings are based on a cause of action arising from matters concerning the action of the counsellor.

English law —  
privilege of parties.

71.7. It would be of interest to note that in England, a privilege<sup>1</sup> regarding such communications seems to be recognised,—though the privilege is of the spouse. Thus, in *McTaggart v. McTaggart*,<sup>2</sup> probation officer was obliged to give evidence concerning that which had passed at an interview between the parties, at which he had been present. The spouses each gave evidence about this interview, and the Court of Appeal accordingly, held that such privilege as attached to their statements to the probation officer had been waived; but the Court had no doubt that the statements were privileged, although the privilege was *that of the parties*. In *Mole v. Mole*,<sup>3</sup> it was decided that the privilege existed even when only one of the parties had enlisted the services of a probation officer, so that he could not give evidence about a letter written to him by *the other party without that person's consent*. It was emphasised that a similar privilege would apply when one or other of the parties approached a doctor, clergyman or marriage guidance counsellor *with regard to his or her matrimonial differences* and there was said to be a tacit understanding that negotiations were to be without prejudice in such cases.

In *Henley v. Henley*, the initiative in endeavouring to effect a reconciliation was taken by a clergyman, a friend of the parties, and it was held that the privilege attached to statements made to him.

In *Pais v. Pais*,<sup>4</sup> it was observed after referring to Cross's opinion that the privilege should be of the adviser—

"It may be that it would be very convenient and just that it should be the law, but in my judgment it is not the law of England that there is a privilege

<sup>1</sup>Cross, *Evidence* (1974), page 262.

<sup>2</sup>*McTaggart v. McTaggart*, (1949) Probate 94; (1948) 2 All E.R. 754.

<sup>3</sup>*Mole v. Mole*, (1951) Probate 21; (1950) 2 All E.R. 328; see also *Pais v. Pais*, (1971) Probate 119; (1970) 3 All. E.R. 491.

<sup>4</sup>*Henley v. Henley*, (1955) Probate 202; (1955) 1 All. E.R. 590.

<sup>5</sup>*Pais v. Pais*, (1970) 3 All. E.R. 491.

attaching to a priest or other professional man, or to any other marriage guidance counsellor as such.<sup>1</sup> The privilege of communications between lawyer and client is the *privilege of the client, not the privilege of the lawyer*. So, too, the privilege of communications between priest and spouse, and I am dealing only with the case of conciliation, is the *privilege of the spouse not the priest*."

71.8. This is the English common law. In some countries, the matter has been dealt with by statute. There was, for example, in the Australia (Matrimonial Causes) Act, 1959, section 12(1) (recently re-enacted), a provision that a marriage guidance counsellor is neither competent nor compellable as a witness in respect of communications made to him in that capacity. Other countries.

It appears that the privilege has been recognised in New Zealand and in the New York State. It has also been enacted in regard to the Los Angeles County Family Court, and in the Rules in force in New Jersey.

71.9. The New Jersey Rule on the subject reads—<sup>2</sup>

New Jersey Rule

"28A—1. Any communication between a marriage counsellor and the person or persons counselled shall be confidential and its secrecy preserved. This privilege shall not be subject to waiver, except where the marriage counsellor is a party defendant to a civil, criminal or disciplinary action arising from such counselling, in which case, the waiver shall be limited to that section."

71.10. In the above discussion, we have mentioned counsellors appointed by the court. For the present, we do not recommend that the protection proposed by us be extended to marriage guidance counsellors who are consulted privately by the parties in connection with disputes concerning the family. In India, such counselling is nascent institution. Some such privilege may be needed even for private counsellors, if they are to function effectively. When such institutions take root, it will be necessary to deal with the matter. A day might come when counselling and conciliation will be available not only to spouses who approach the court, but also to married people who seek to avoid that result. It is vital to the preservation of the social fabric, if it is to withstand the on slaughts that are bound to be made by the winds of "modernisation", that there is available disinterested and competent advise. The process of divorce is merely a remedial one in the legal sense, and not a preventive one. We hope that preventive social therapy to avoid disputes will be available. Non-judicial counsellors.

71.11. Although the amendment recommended by us will be primarily important where the reconciliation relates to the *main issue* in matrimonial proceedings, it may not be improper to point out that there might be many other issues in respect of which reconciliation or common agreement could be worked for. Even where the parties cannot agree to resume their married life, it might well be advisable to ensure that as far as possible the question of financial provisions and custody of children, including, in particular, the crucial question of access to children are settled by agreement. It is not to be overlooked that though orders on these matters are regarded as incidental orders, it is such matters that constitute the heart of the real dispute. From the sociological point of view, they are much more important than the dissolution of the marriage or other relief prayed for, however important the latter may be to the legal eye. Recommendations as to financial provisions and custody.

<sup>1</sup>Manchester and Whelton, "Marital Conciliator" (1974) 23 C.L.O. 339, 361, 362, 364, 368.

<sup>2</sup>New Jersey Rules of Evidence, Rule 28A-1 (Effective January 10, 1969).

Where children are concerned, the court may like to direct and supervise meaningful negotiations and to review all arrangements so as to ensure that the rights of children are protected.

Access to a child is an intrinsic aspect of arrangements or dispositions made for the child's custody, care and upbringing. The purpose of access is to recognise a child's interest in a continuing relationship with each parent.

**Recommendation.** 71.12. In the light of the above discussion, we recommend the insertion of a new section on the following lines :—

"132A. (1) No communication between a family counsellor as such and the person or persons counselled shall be compelled or permitted to be disclosed.

(2) The provisions of sub-section (1) shall not apply where the family counsellor is a party to a civil or criminal proceeding arising from such counselling.

*Explanation 1.*—In this section, "a family counsellor" means a person appointed by the court for the purpose of effecting reconciliation between parties to a proceeding wherein the court is empowered or required by law to appoint such a person.

*Explanation 2.*—This section applies to the proceedings referred to in Explanation 1 as well as to any other proceedings."

## PATENT AGENTS—SECTION 132B

72.1. There is another matter which raises questions of privilege, on which at present there is no specific provision in the Act. Under the Patents Act,<sup>1</sup> a patent agent can practise not only before the High Court, but also before the Controller General of Patents, Designs and Trademarks (briefly described as the Controller) in proceedings under the Act. To this extent the functions of patent agents are analogous to those of professional legal advisers. In the Evidence Act, however, there is no provision protecting their confidence. Patent agents do not enjoy any privilege in regard to confidential communications. Since the very nature of the proceedings under the Patents Act implies that in most cases, a communication between a patent agent and client will be confidential and should deserve protection, we are of the view that a provision is necessary in the Evidence Act on the subject.<sup>2</sup>

72.2. It may be noted that in England, provision has now been made conferring privilege in respect of certain communications relating to patent proceedings. The relevant provision, which is contained in the Civil Evidence Act, 1968,<sup>3</sup> is as follows:—

English Act as to  
privilege.

“Privilege for certain communications relating to patent proceedings.

15.—(1) This section applies to any communication made for the purpose of any pending or contemplated proceedings under the Patents Act, 1949 before the Comptroller or the Appeal Tribunal, being either—

- (a) a communication between the patent agent of a party to those proceedings and that party or any other person; or
- (b) a communication between a party to those proceedings and a person other than his patent agent made for the purpose of obtaining, or in response to a request for, information which that party is seeking for the purpose of submitting it to his patent agent.

For the purpose of this sub-section, a communication made by or to a person acting—

- “(i) on behalf of a patent agent; or
  - (ii) on behalf of a party to any pending or contemplated proceedings,
- shall be treated as made by or to that patent agent or party, as the case may be.

(2) In any legal proceedings other than criminal proceedings a communication to which this section applies shall be privileged from disclosure in like manner as if the proceedings mentioned in the foregoing sub-section had been proceedings before the High Court and the patent agent in question had been the solicitor of the party concerned.

(3) For the purpose of this section, a communication made for the purpose of a pending or contemplated proceeding under the Patents Act, 1949 shall be treated as made for the purpose of contemplated proceedings

<sup>1</sup>Sections 126-127, Patents Act, 1970.

<sup>2</sup>See para 72.3, *infra*.

<sup>3</sup>Section 15, Civil Evidence Act, 1968 (c. 64).

under that Act before the Comptroller or the Appeal Tribunal of every kind to which a proceeding of that description may give rise, whether or not any such proceedings are actually contemplated when the communication is made.

“(4) In this section—

“the Comptroller” and “the Appeal Tribunal” have the same meanings as in the Patents Act, 1949 ;

“patent agent” means a person registered as a patent agent in the register of patent agents maintained pursuant to the Patents Act, 1949 or a company lawfully practising as a patent agent in the United Kingdom or the Isle of Man ; and

“party”, in relation to any contemplated proceedings, means a prospective party thereto”.

Indian Act as to  
patents

**72.3.** In India, under the Patents Act in force,<sup>1</sup> a patent agent whose name is entered in the Register is entitled<sup>2</sup> to practise before the Controller and to prepare all documents, transact all business and discharge such other functions as may be prescribed in connection with any proceeding before the Controller under the Act. Besides advocates, persons who have obtained a degree and passed the qualifying examination prescribed for the purpose, are qualified to have their names entered in the Register of Patent Agent.<sup>3</sup>

**72.4.** An appeal from the decision of the Controller (The Controller General of Patents, Designs and Trade marks) lies, to the High Court in certain cases.<sup>4</sup> The Act contains no provisions as to the privileges of patent agents. Having regard to rapid scientific progress in the country and the growing importance of inventions and patents, it can be reasonably asserted that the institution of patent agents will assume practical importance in the not distant future. Correspondingly, the law of evidence should also give due recognition to their functions and grant a privilege that will enable them to discharge their functions smoothly—a protection which is required in the public interest.

Recommendation.

**72.5.** We, therefore, recommend that the following new section should be inserted in the Evidence Act. It should apply to civil as well as criminal proceedings :

“132B. (1) This section applies to any communication made for the purpose of any pending or contemplated proceedings under the Patents Act, before the Comptroller or the High Court, being either—

- “(a) a communication between the patent agent of a party to those proceedings and that party or any other person ; or
- (b) a communication between a party to those proceedings and a person other than his patent agent made for the purpose of obtaining, or in response to a request for, information which that party is seeking for the purpose of submitting it to his patent agent.

<sup>1</sup>Patents Act, 1970 (39 of 1970).

<sup>2</sup>Section 127, Patents Act, 1970.

<sup>3</sup>Section 126, Patents Act, 1970.

<sup>4</sup>Section 116(2), Patents Act, 1970

*Explanation.*—For the purpose of this sub-section, a communication made by or to a person acting—

- (i) on behalf of a patent agent, or
- (ii) on behalf of a party to any pending or contemplated proceedings ; shall be treated as made by or to that Patent agent or party, as the case may be.

(2) In any legal proceedings,<sup>1</sup> a communication to which this section applies shall be privileged from disclosure in like manner as if the proceedings mentioned in sub-section (1) had been proceedings before a Court and the Patent agent in question had been the legal professional adviser of the party concerned.

(3) For the purposes of this section a communication made for the purpose of a pending or contemplated proceeding under the Patents Act shall be treated as made for the purpose of contemplated proceedings under that Act before the Comptroller or the High Court of every kind to which a proceeding of that description may give rise, whether or not any such proceedings are actually contemplated when the communication is made.

(4) In this section—

- (a) “the Comptroller” has the same meaning as in the Patents Act ;
- (b) “Patents Act” means the Patents Act, 1970 ;
- (c) “patent agent” means a person registered as a patent agent in the register of patent agents maintained pursuant to the Patents Act, or a company lawfully practising as a patent agent in India ;
- (d) “party”, in relation to any contemplated proceedings, means a prospective party thereto.”

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<sup>1</sup>The intention is that the new section should apply to civil as well as criminal proceedings.

## ACCOMPLICE EVIDENCE

## SECTION 133 AND SECTION 114, ILLUSTRATION (b)

## I. INTRODUCTORY

73.1. With section 133, the Act deals with particular witnesses. Two provisions relating to the evidence of accomplices should now be considered. The first is section 133. It 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.

The second is section 114, illustration (b), which cautions the court that the court may presume that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars.

Disharmony with section 114, illustration (b).

73.2. There is a certain amount of disharmony between the two provisions—which is usually solved by stating the proposition that the rule that an accomplice is unworthy of credit unless corroborated, is a rule of prudence and not one of law. Nevertheless, the present duality creates complications in practice. We shall deal with this aspect later.

73.3. Two propositions are enacted in section 133. The first proposition, that an accomplice is a competent witness against an accused person, is a proposition which is really superfluous in view of section 118.

The section does not make a distinction between one kind of accomplice and another, nor does it confine the expression “accomplice” to a person who is an approver.<sup>2</sup>

It should be noted that the expression “accomplice” is not an expression used in the Indian Penal Code, or (except as a marginal note) in the Code of Criminal Procedure. It appears only in the Evidence Act.

The expression “testimony”, which occurs in section 133, is also not ordinarily used in Indian statutory law. These are, however, questions of mere semantics, and we may proceed to discuss more substantial matters.

## II. NEED FOR SECTION 133 DOUBTED

Convictions based on uncorroborated evidence of an accomplice not to stand.

73.4. It is not quite clear why section 133 was inserted at all in the Act. Markby has dealt with the point thus—

“It was not necessary, as section 118 makes all persons competent to testify; except those there enumerated. Nor is there any rule which requires that the evidence of an accomplice should be corroborated. But the emphatic statement in this section might lead persons to suppose that the Legislature desired to encourage convictions on the uncorroborated evidence of an accomplice. This, however, cannot have been the case, because, in section 114, we find given, as one of the presumptions based on the common course of human conduct, the presumption that an accomplice is unworthy

<sup>1</sup>See *R. v. Nga Myo*, A.I.R. 1933 Rang. 177.

<sup>2</sup>See discussion as to meaning of “accomplice”, *infra*.



"of credit, unless he is corroborated in material particulars". Moreover, no conviction based on the uncorroborated evidence of an accomplice would be allowed to stand by a court of appeal, *except under very rare and exceptional circumstances*<sup>1</sup> and if a Judge in his charge to the jury omitted "to warn them against the danger of convicting on such uncorroborated evidence, he would be held to have misdirected them. *It would, however, have been better to omit this section*<sup>2</sup>. The law on the subject would then have been the same as it is now, and the awkwardness of appearing to sanction a practice so universally condemned would be avoided."<sup>3</sup>

73.5. Perhaps, the draftsman of the Act thought that since several points were discussed in various cases<sup>4</sup> (holding that legally a man may be convicted on uncorroborated testimony of an accomplice provided the judge had called the attention of the jury to the fact that this was the sole evidence), it was proper to codify all those points.

### III. VARIOUS SITUATIONS WHERE ACCOMPLICE

73.6. There are numerous situations in which an accomplice may become a competent witness. A person may have been granted pardon under the Code of Criminal Procedure (popularly known as the Queen's pardon in England) and he is then said to become an approver. Or, he may not have been pardoned, but may be under trial separately from the other accused—a course which is not illegal, though usually inconvenient. He might have already been convicted, for example, where the other accused has absconded, so that he is no longer the 'accused'—and therefore, he becomes a competent and compellable witness. Or, though a prosecution was instituted against him, it may have been withdrawn, so that he ceases to be the "accused". In the alternative, for some reason—say, insufficient evidence of or factual ignorance on the part of the police or otherwise—he might not have been charged at all, and it now transpires that he was also involved in the offence and was a guilty associate in crime.

Again, though a co-accused, he may choose to give evidence.<sup>5</sup> In every case, he is an accomplice, and his evidence will be subject to the safeguard indicated in section 114, illustration (b). Of course, the extent of corroboration needed will differ from case to case.

73.7. How an accomplice becomes a witness even though he has not received pardon in accordance with law, is illustrated in a Bombay case.<sup>6</sup> A large number of persons were prosecuted for offences of conspiracy under section 120B of the Indian Penal Code, for importing and bringing into India gold in contravention of the provisions of the Sea Customs Act, 1878. They were convicted. In appeal against the convictions, the defence argued in the High Court that two of the accomplices ought to have been prosecuted along with the accused, as there was sufficient evidence against them. If the customs authorities wanted to use their evidence against the accused, they (the authorities) ought to have proceeded to obtain the same by the procedure prescribed by the Code of Criminal Procedure or otherwise by law, but they had no right, on their own responsibility, to choose particular persons as witnesses and prosecute the others.

Accomplice giving evidence without pardon.

<sup>1</sup>Note the word "exceptional".

<sup>2</sup>Emphasis added.

<sup>3</sup>Mark by on Evidence, page 98, quoted by Field.

<sup>4</sup>*Queen v. Elahi Buksh*, 1 Weekly Reports Criminal Rulings 80, followed in *Regina v. Neel-John*, 8 Weekly Reports Criminal Rulings 19, and *Regina v. Shamsher Beg*, 9 Weekly Reports Criminal Rulings 51.

<sup>5</sup>The enumeration is not intended to be exhaustive.

<sup>6</sup>*Lakshman Das Chagan Lal Bhatia & Ors. v. The State*, A.I.R. 1968 Bom. 400.

73.8. The High Court rejected this contention of the defence, and held that if it is desired to use an accomplice as a witness without the procedure of pardon, his trial can be separated, and he may either be tried first and then be examined as a witness, or he may be examined as a witness first and then tried.

73.9. The High Court observed that this is not to say that the police were not to charge-sheet a particular accused. The prosecution should obtain either pardon in accordance with section 337 of the Code of Criminal Procedure, 1898, or the accused should have been discharged, or acquitted under section 494. The police may charge him separately, and he may plead guilty. But these points did not affect the *competence* of the person concerned to give evidence.

73.10. The point came up before the Supreme Court in *Sirajuddin*.<sup>1</sup> In that case, there were charges under the Prevention of Corruption Act, 1947, against the accused, who was the Chief Engineer, Madras. During the course of investigation of the case, the police promised "pardon" to some other officials, who were the subordinates of the accused and had assisted him in the commission of his malpractices. The police thought that if the subordinate officials were prosecuted along with the accused, the case might fail for lack of evidence. The police issued "certificates" to two subordinate officials, assuring them immunity from prosecution for the part played by them.

73.11. The Supreme Court, while upholding the conviction on the merits, observed that the granting of immunity to two persons who are sure to be examined as witnesses for the prosecution was highly irregular and unfortunate. Neither the Code of Criminal Procedure nor the Prevention of Corruption Act recognises the immunity from prosecution given under these "assurances"; the grant of pardon was not in the discretion of police authorities. However, it may be noted that this irregularity does not seem to have been treated as affecting the position regarding evidence given by the persons concerned.

73.12. Many cases could be cited from the High Courts in which the examination of one of the suspects as a witness was not held to be illegal, and accomplice evidence was received (subject to safeguards) as admissible evidence in the case. In those cases, section 342 of the Code of Criminal Procedure, 1898, and section 5 of the Indian Oaths Act (then in force) were considered, and the word "accused" as used in those sections was held to denote a person actually on trial before a court, and not a person who could have been so tried. The witness was, of course, treated as an accomplice. The evidence of such an accomplice was received with necessary caution in those cases. These cases have been mentioned in *Re Khandaswami Gounder*<sup>2</sup> and were approved by the Supreme Court in *Lakshmipat's case*.<sup>3</sup> The leading cases of the High Courts are:

(Case law as to trial of accomplice)

*Queen Empress v. Mona Puna*, (1892) I.L.R. 16 Bom. 661;

*Banu Singh v. Emperor*, (1906) I.L.R. 33 Cal 1353;

*Keshav Nasudeo v. Emperor*, I.L.R. 59 Bom 355; A.I.R. 1935 Bom. 186;

*Empress v. Durant*, (1899) I.L.R. 23 Bom. 213;

*Akhoy Kumar Mookerjee v. Emperor*, I.L.R. 45 Cal. 720; A.I.R. 1919 Cal. 1021;

<sup>1</sup>*Sirajuddin v. State of Madras*, A.I.R. 1971 S.C. 520, 529, affirming A.I.R. 1968 Mad. 117.

<sup>2</sup>*In re Kandaswami Gounder*, A.I.R. 1957 Mad. 727.

<sup>3</sup>*Lakshmipat Choraria v. State of Maharashtra*, A.I.R. 1968 S.C. 938, 944, para 13.

*A. V. Joseph v. Emperor*, I.L.R. 3 Rang. 11; A.I.R. 1925 Rang. 122;  
*Amdumiyar v. Emperor*, I.L.R. 1937 Nag. 315; A.I.R. 1937 Nag. 17 (F.B.)  
*Gallagher v. Emperor*, I.L.R. 54 Cal. 52; A.I.R. 1927 Cal. 307, and  
*Emperor v. Har Prasad*, I.L.R. 45 All. 226; A.I.R. 1923 All. 91.

#### IV. MEANING

73.13. So much as regards the position in the law of procedure. The meaning of the expression "accomplice" is a matter of some interest. In the new Oxford Dictionary, it is stated that the word "accomplice" may be spelt as "a complice", meaning a partner in crime, an associate in guilt.<sup>1</sup>

The term "accomplice" is not defined in the Evidence Act. The Penal Code does not even refer to it. The Code of Criminal Procedure does not use it; it merely refers to the term "accomplice" in a marginal note, which reads thus: "Tender of pardon to accomplice".

The term "accomplice" signifies a guilty associate in crime; or when the witness sustains such a relation to the criminal act that he could be jointly indicated with the accused he is an accomplice.<sup>2</sup> This definition is based upon *U.S. v. Neversen*<sup>3</sup> and *White v. Com*.<sup>4</sup>

The Patna case of *Kailash Missir v. Emperor*<sup>5</sup>, the Oudh case of *Jagannath v. Emperor*<sup>6</sup>, and the Sind case of *Chetumal v. Emperor*<sup>7</sup>, have adopted this definition of "accomplice" which was also adopted in a few other cases<sup>8</sup>. The terms was explained in *Ismail Hussain Ali v. Emperor*<sup>9</sup>, as follows:—

"The expression 'accomplice' has not been defined in the Evidence Act, but there can be little doubt that it means a person who knowingly or voluntarily cooperates with or aids, and assists another in the commission of a crime."

73.14. In *Emperor v. Mathews*,<sup>10</sup> Cuming J. made the following observations elucidating the various grades of accomplices: Grades.

"It is to be remembered that there are, it may be said, many grades of accomplices. They vary from the man who, for example, with his own hand committed a murder, to the man who as in the present case it is alleged, offered a bribe to another when the latter is being tried for taking the illegal gratification and to that extent aided the accused in committing his offence of taking an illegal gratification.

"For, this man is not strictly speaking guilty of the offence of which the other is being tried, and he certainly does not come strictly within the meaning of the term "accomplice" if we accept the definition of term "accomplice" as given by Subrahmanya Ayyar J. in the case of *Ramaswami*

<sup>1</sup>*Kailash Missir v. Emperor*, A.I.R. 1931 Pat. 105, 109.

<sup>2</sup>*Ramaswami Gounder v. Emperor*, I.L.R. 27 Mad. 271; 14 M.L.J. 226 (per Subrahmanya Ayyar, J.).

<sup>3</sup>*U.S. v. Neversen*, 14 Century, Dig. Col. 1279.

<sup>4</sup>*White v. Com.*, 14 Century Dig. Col. 1280.

<sup>5</sup>*Kailash Missir v. Emperor*, A.I.R. 1931 Pat. 105.

<sup>6</sup>*Jagannath v. Emperor*, A.I.R. 1942 Oudh 221.

<sup>7</sup>*Chetumal v. Emperor*, A.I.R. 1934 Sind 185.

<sup>8</sup>(a) *Ghudo Ramdhar v. Emperor*, A.I.R. 1945 Nag. 143;

(b) *K. S. Nirmalkumarsinghi v. State*, A.I.R. 1956 Sau. 55.

(c) *Gobinda Balji Sonar v. Emperor*, A.I.R. 1936 Nag. 245.

(d) *Chetumal Rekumal v. Emperor*, A.I.R. 1934 Sind. 185.

<sup>9</sup>*Ismail Hussain Ali v. Emperor*, A.I.R. 1947 Lah. 220.

<sup>10</sup>*Emperor v. Mathews*, A.I.R. 1929 Cal. 822, 826, (case of bribery).

*Gounden v. Emperor*<sup>1</sup>, or by Glover, J., in the case of *Queen v. Ram Sahoy*.<sup>2</sup> Subramanya Ayyar J. held that the term "accomplice" signifies a guilty associate in crime or where the witness sustains such a relation to the criminal act that he could be jointly indicated with the accused.

Guilty association  
necessary.

73.15. Every "participation" in the physical act which constitutes an offence does not make a person an accomplice. There must be a guilty association in crime. It depends upon the nature of the offence and the extent of the complicity of the witness in it. There must be *mens rea*.

Presence  
equated  
complicity.

not  
with

73.16. In particular, mere presence at the scene of crime does not constitute complicity in crime unless there is guilty association. *R. v. Coney*<sup>3</sup> decided that non-accidental presence at the scene of the crime is not conclusive of aiding and abetting. The jury has to be told by the judge in clear terms, what it is that has to be proved before they can convict of aiding and abetting; what it is of which the jury must be sure as matters of inference before they can convict of aiding and abetting, in such a case where the evidence adduced by the prosecution is limited to non-accidental presence. What has to be proved is stated by Hawkins J. in a well-known passage in his judgment in *R. v. Coney*, where he said :

"In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not, of necessity, amount to aiding and abetting; it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."

An accessory after the fact is an accomplice,<sup>4</sup>

On the meaning of "accomplice", the observations of Ramaswami J., in *Ambujan Ammal, In re*<sup>5</sup> are worthy of perusal;

"An accomplice is a person who has concurred in the commission of an offence.....".

"The word 'accomplice' means a guilty associate or partner in crime, or who in some way or other is connected with the offence in question, or

<sup>1</sup>*Ramaswami Gounden v. Emperor*, (1904) I.L.R. 27 Mad. 271.

<sup>2</sup>*Queen v. Ram Sahoy*, 20 M.R.Cr. 19.

<sup>3</sup>*R. v. Coney*, (1882) 8 Q.B.D. 534, 557, 558.

<sup>4</sup>A.I.R. 1943 P. C. 4.

<sup>5</sup>*Surya Kant v. R.*, 24 C.W.N. 119 (Huda J.).

<sup>6</sup>*In re Ambujan Ammal*, A.I.R. 1954 Mad. 326.

<sup>7</sup>*R. v. Mullins*, (1848) 3 Cox. C.C. 526; 12 I.P. 776 (Maule J.).

who makes admissions of fact showing that he had a conscious had in the offence.<sup>1</sup> It includes an accessory after the fact."<sup>2</sup>

73.17. The scope of the concept of accomplice has raised interesting problems with reference to a variety of situations in India. For example, is a person who offers a bribe to public officer an accomplice ?<sup>3</sup> The question has been answered in the affirmative. Variety of situations.

73.18. The question of spies has also come up. A distinction is sometimes made between an agent for the prosecution who is a mere spy and a person who associates with criminals with a criminal design. The former is not an accomplice, and his evidence does not require corroboration, though the weight to be attached depends on the character of the individual witness; the latter is an accomplice whose evidence requires corroboration.<sup>4,5</sup> Agent for prosecutions.

If the position of a witness is analogous to that of an accomplice, corroboration in material particulars would be required.<sup>6</sup>

A few leading cases on the subject, apart from those of Supreme Court (referred to separately) are—

(a) Those of the Privy Council, *Bhubani Sahu v. The King*<sup>7</sup> and *Mahadeo v. The King*<sup>8</sup>, and

(b) The Madras cases of *Ramaswami Gounden v. Emperor*,<sup>9</sup> *In re. S. A. Sattar Khan*,<sup>10</sup> *In re Addanki Venkadu*,<sup>11</sup> *Venkatish v. Emperor*,<sup>12</sup> *In re M. K. Thiagaraja Bhagavathar*,<sup>13</sup> *Vayasa Rao v. The King*,<sup>14</sup> *Muttukumaraswami v. Emperor*,<sup>15</sup> *Emperor v. Nilakanta*,<sup>16</sup> *In re. B. K. Rajagopal*,<sup>17</sup>

(c) The Calcutta cases of *Hafizuddin v. Emperor*,<sup>18</sup> *Narain Chandra v. Emperor*,<sup>19</sup> *Nurul Amin v. Emperor*,<sup>20</sup> *Alumuddin v. Queen Empress*,<sup>21</sup> *Dhappati Dev v. Emperor*.<sup>22</sup>

(d) the Bombay case of *Papa Kamal Khan v. Emperor*,<sup>23</sup> the Nagpur case of *Ghudo v. Emperor*.<sup>24</sup>

<sup>1</sup>(a) *Jagannath v. Emperor*, A.I.R. 1942 Oudh 221.

(b) *Emperor v. Burn*, 11 Bom. L.R. 1153.

<sup>2</sup>*Ismail v. Emperor*, A.I.R. 1947 Lah. 220.

<sup>3</sup>(a) *R. v. Chhagan*, I.L.R. 14 Bom. 331;

(b) *Huntley v. Emperor*, A.I.R. 1944 F.C. 66.

<sup>4</sup>*Emperor v. Chaturbhuj*, (1911) I.L.R. 38 Cal. 96.

<sup>5</sup>*See S. v. Samuel*, A.I.R. 1961 Ker. 99.

<sup>6</sup>*Vemireddy v. S.*, (1956) S.C.R. 347; A.I.R. 1956 S.C. 379; explained in *Ramratan v. S.*, A.I.R. 1962 S.C. 424, 428; (1962) 3 S.C.R. 590.

<sup>7</sup>*Bhubani Sahu v. The King*, A.I.R. 1949 P.C. 257; (1949) 2 M.L.J. 194.

<sup>8</sup>*Mahadeo v. The King*, A.I.R. 1936 P.C. 242; 37 Cr. L.J. 914.

<sup>9</sup>*Ramaswami Gounden v. Emperor*, I.L.R. 27 Mad. 271; 14 M.L.J. 226.

<sup>10</sup>*In re. S. A. Sattar Khan*, A.I.R. 1939 Mad. 283.

<sup>11</sup>*In re. Addanki Venkadu*, A.I.R. 1939 Mad. 266.

<sup>12</sup>*Venkatiah v. Emperor*, (1937) Mad. Cr. C. 27.

<sup>13</sup>*In re. M. K. Thiagaraja Bhagavathar*, A.I.R. 1946 Mad. 271; (1946) 1 M.L.J. 42.

<sup>14</sup>*Vayasa Rao v. The King*, 12 M.L.J. 283.

<sup>15</sup>*Muttukumaraswami v. Emperor* I.L.R. 35 Mad. 397.

<sup>16</sup>*Emperor v. Nilakanta*, 22 M.L.J. 490.

<sup>17</sup>*In re B. K. Rajagopal*, A.I.R. 1944 Mad. 117 (F.B.); (1943) 2 M.L.J. 634.

<sup>18</sup>*Hafizuddin v. Emperor*, A.I.R. 1934 Cal. 678.

<sup>19</sup>*Narain Chandra v. Emperor*, A.I.R. 1936 Cal. 101.

<sup>20</sup>*Nurul Amin v. Emperor*, A.I.R. 1939 Cal. 335; 40 Cr. L.J. 667.

<sup>21</sup>*Alimuddin v. Q.E.*, (1896) I.L.R. 23 Cal. 361.

<sup>22</sup>*Dhanpati Dev v. Emperor*, A.I.R. 1946 Cal. 156.

<sup>23</sup>*Papa Kamal Khan v. Emperor*, A.I.R. 1935 Bom. 230.

<sup>24</sup>*Ghudo v. Emperor*, A.I.R. 1945 Nag. 143.

(c) the Oudh case of *Jagannath v. Emperor*,<sup>1</sup> the Lahore case of *Ismail v. Emperor*,<sup>2</sup> and the Patna case of *Kailash Missir v. Emperor*.<sup>3</sup>

## V. ENGLISH LAW

**73.19.** Evolution of the law in England is of interest. In the leading case of *R. v. Baskerville*,<sup>4,5</sup> reported in 1916, Lord Reading, Chief Justice, delivering the judgment of the court of Criminal Appeal (which included Scrutton, Avory, Rowlatt and Atkin JJ.) observed :

“There is no doubt that the uncorroborated evidence of an accomplice is admissible in law..... but it has long been a rule of practice at common law for the judge to warn of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice and in the discretion of the judge, to advise them not to convict upon such evidence ; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence.”

*Statham v. Statham*<sup>6</sup> reported in 1929, contains a useful analysis of the whole law relating to corroboration of the evidence of accomplices. Lord Hanworth M. R. referred to the cases of *Thompson v. The King*, (1918) A.C. 221, *R. v. Jellyman*, (1838) 8 Car. & P. 604; 173 E.R.637, *R. v. The Tate* (1908) 2 K. B. 680 and *R. v. Baskerville*, (1916) 2 K. B. 658 and deduced three propositions from them. First, that the evidence of an accomplice is not accepted without corroboration. Second, that a conviction may be quashed in an appeal court where a trial judge had omitted to caution a jury against convicting on the uncorroborated evidence of an accomplice. Third, that the corroboration must be found in some material particular tending to show that the accused had committed the acts charged. The evidence must also be such as affected that accused by connecting him or tending to connect him with the crime. This case shows a more stringent approach.

Later, in *Davies v. D.P.P.*,<sup>7</sup> the following propositions were enunciated by the House of Lords :

“(1) On any view, persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term ‘accomplice’. But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule : viz.,

(2) Receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (*R. v. Jennings*, (1912) 7 Cr. App. R. 242 ; *R. v. Dixon*, (1925) 19 Cr. App. R. 36).

(3) When X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted, on his “having committed crimes of this identical type on other occasions, as proving system and intent and negating accident ; in such

<sup>1</sup>*Jagannath v. Emperor*, A.I.R. 1942 Oudh 221.

<sup>2</sup>*Ismail v. Emperor*, A.I.R. 1947 Lah. 220.

<sup>3</sup>*Kailash Missir v. Emperor*, A.I.R. 1931 Pat. 105.

<sup>4</sup>*R. v. Baskerville*, (1916) 2 K.B. 658 (C.C.A.).

<sup>5</sup>This was cited with approval in *Rameshwar v. The State*, (1952) S.C.R. 377, 385 ; A.I.R. 1952 S.C. 54, 57.

<sup>6</sup>*Statham v. Statham*, (1929) Probate 13, 139.

<sup>7</sup>*Davies v. D.P.P.*, (1954) A.C. 378, 399 (H.L.).

cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration (*R. v. Farid* (1945) 30 Cr. App. R. 168) .....

The position as to "traps" will be discussed later.<sup>1</sup>

The following are not accomplices in England :

- (a) a child under the age of criminal responsibility assisting in a crime ;<sup>2</sup>
- (b) a child victim of a sexual assault,<sup>3</sup> and
- (c) a woman upon whose immoral earnings the accused is alleged to have lived.<sup>4</sup>

73.20. But, in general, a warning has to be given if a witness has some purpose of his own to serve<sup>5</sup> It is the same with any witness of dubious and doubtful character<sup>6</sup> so that, in practice, a warning would be given about the evidence of a woman on whose immoral earnings the accused is alleged to have lived.<sup>7</sup> It may be stated also with reference to children who are helpers in crime and child victims of assaults, that corroboration will be required even though they are not "accomplices", in view of separate rules based on different grounds.

## VI. ENTRAPMENT

73.21. An important point connected with the subject of accomplices is that concerning "traps". The subject of trap witnesses from the point of view of the law of evidence has been thus dealt with<sup>8</sup> by the Supreme Court :

"The correct rule is that if such witnesses are accomplices who are *particeps criminis*, their evidence must be treated in the same way as that of accomplices ; if they are not accomplices but are partisan or interested witnesses concerned in the success of the trap, their evidence must be treated in the same way as other interested evidence by the application of diverse considerations, and in a proper case the court may even look for independent corroboration. To convict upon such partisan evidence is neither illegal nor imprudent, but inadvisable."

73.22. In some countries, the use of traps has repercussions on substantive liability and "entrapment" may even constitute a defence to criminal liability. Though we are not concerned with the question of substantive criminal liability it will not be improper to refer to the cases relating to the effect of entrapment on substantive liability. Traps.

It is settled in the U.S.A. that if the police or other government agents act as *agents provocateurs*—that is, going beyond mere infiltrators affording the opportunity or facility for criminal activity—the defence of "entrapment" may

<sup>1</sup>See "Entrapment" *infra*.

<sup>2</sup>*R. v. Cratchley*, (1913) 9 Cr. App. R. 232.

<sup>3</sup>*R. v. Pitts*, (1912) 8 Cr. App. R. 126; *R. v. Tatham*, (1921) 15 Cr. App. R. 132.

<sup>4</sup>*R. v. King*, (1914) 10 Cr. App. R. 117.

<sup>5</sup>*R. v. Prater*, (1960) 2 Q.B. 464.

<sup>6</sup>*R. v. Brown*, (1910) 6 Cr. App. R. 24.

<sup>7</sup>See in *R. v. King*, (1914) 10 Cr. App. R. 117, 119, Reading L.C.J.

<sup>8</sup>*S. v. Basawan*, A.I.R. 1958 S.C. 500. Also see A.I.R. 1969 S.C. 17.

<sup>9</sup>*Ramchand v. S.*, A.I.R. 1958 Bom. 287.

be raised in defence of any subsequent prosecution. This was clearly established by the Supreme Court in *Sorrel v. U.S.*<sup>1</sup> In the lower federal courts, it had clearly been the practice for some time.<sup>2</sup>

73.23. In *Sorrel*, Chief Justice Hughes commented:

"It is well settled that the fact that officers or employees of a government merely afford opportunity or facility for the commission of the offence does not defeat the prosecution..... A different question is presented when the criminal design originates with the officials of the government, and they implant into the minds of an innocent person the disposition to commit the alleged offence and induce its commission in order that they may prosecute."

73.24. The facts of the later Supreme Court decision in *Sherman v. U.S.*<sup>3</sup> illustrate the problem. In August 1951, K., a narcotics informer met S. at a doctor's office, where, apparently, both men were being treated for drug addiction. From that time K. and S. met frequently at that same office and at the pharmacy. At these "accidental" meetings, conversation ensued.

After some time K. asked S. if S. knew of a source of drugs as K. said he was not responding to the treatment. S. tried to avoid the issue, but after a number of requests he gave way and on several occasions following S. obtained drugs and shared them with K. who contributed to the cost, K. then informed the police and on three subsequent occasions in November the police observed S. giving drugs to K.

73.25. In the Supreme Court, Chief Justice Warren drew a distinction between infiltration and the manufacture of 'criminal' activity and made the following observations:

"To determine whether entrapment has been established a line must be drawn between a trap for the unwary innocent and a trap for the unwary criminal."

In a separate judgment, Frankfurter J. stated the policy underlying the defence of entrapment in these words:

"The courts refuse to convict an entrapped defendant not because his conduct falls outside the prescription of status, but because even if his guilt be admitted the methods employed on behalf of the government to bring about a conviction cannot be countenanced."

Warren, C.J. elucidated the aspect of *manufacturing a crime* in these words:<sup>4</sup>

"The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Though stealth and strategy are necessary weapons in the arsenal of a police officer for *detecting criminal activity*, these become objectionable police methods if the criminal design originates with the officers of the Government and is implanted into the mind of an innocent person."

<sup>1</sup>*Sorrel v. U.S.*, 77 L.Ed. 413, 416.

<sup>2</sup>Article "Entrapment" (1974), New Law Journal, page 1072.

<sup>3</sup>*Sherman v. U.S.*, 2 L. Ed. 2d 848, 850, 855.

<sup>4</sup>*Sherman v. U.S.*, (1958) 356 U.S. 369.



Chief Justice Warren further observed that such objectionable police methods are in the same category as coerced confessions or unlawful search. To quote the Chief Justice:

"Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."

Mr. Justice Frankfurter while dismissing the indictment (when the case was remanded), examined the principle of entrapment and observed:

"No matter what the defendant's (accused person's) past record and present inclination to criminality or the depths to which he has sunk in the estimation of the society, certain police conduct to en snare him into further crime is not to be tolerated by an advanced society..... The possibility that no matter what his past crime and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements, must not be ignored. Past crimes do not for ever outlaw the criminal and open him to police practices aimed at securing his repeated conviction from which the ordinary citizen is protected. The whole ameliorative hopes "of modern penology and prison administration strongly counsel against such a view."

73.26. While recognising that it is the obligation of the police to detect those engaged in criminal conduct and ready and willing to commit further crimes, should the occasion arise, Frankfurter J. further observed:

"It does not mean that in holding out inducements they should act in such manner as is likely to induce to the commission of crime only those persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations..... The power of Government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who left to themselves might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations without Government adding to them and generating crime."

73.27. The English approach to the problem, starting from *Brannan v. Peek*<sup>1</sup> this has been reviewed by the Court of Appeal in a number of cases. The Court of Appeal has refused to accept the proposition that "entrapment" can amount to a defence, but observed that it may be a proper matter to be taken into account when assessing sentence. English law as to entrapment.

73.28. Thus, no defence of "entrapment" is available in English law—as it is in America,—to one who has been led by the police into committing a crime. It has been held in England<sup>2</sup> that while it is wrong for the police to encourage the commission of an offence which otherwise might not be committed, they may, in order to trap the criminal, participate in an offence which has already been "laid on" and is going to be committed in any event.<sup>3</sup>

Entrapment is, however, a matter which may be taken into account in fixing the sentence in England. Thus, where there was possibility that a theft might not have been committed but for a police trap, the accused was sentenced as if he had been convicted of a conspiracy to steal, rather of actual theft.<sup>4</sup>

<sup>1</sup>*Brannan v. Peek*, (1948) K.B 69; (1947) 2 All. E.R. 572.

<sup>2</sup>*Birtles*, (1969) 2 All. E.R. 1131, note.

<sup>3</sup>*McCann*, (1971) 56 Cr. App. Rep. 359.

<sup>4</sup>*McCann*, (1971) 56 Cr. App. Rep. 359.

**73.29.** The case of *Birtles*<sup>1</sup> illustrates this. In that case Lord Parker observed: "..... there is, as it seems to this court, a real likelihood that he would not have committed....., he had previously remarked that there was (appellant) was encouraged to commit an offence which otherwise he "a real possibility ..... that the appellant was encouraged by the informer and indeed by the police officer concerned. A five year sentence was consequently, reduced to one of three years. However, although the appeal had originally been against conviction and sentence, the appeal against conviction was abandoned at the hearing and so no argument was heard on the point of guilt.

**73.30.** These were cases of public servants laying traps. A private citizen cannot take it upon himself to instigate crime. This is clear from the case of *Smith*<sup>2</sup> where a private citizen took it upon himself to instigate a crime though with the object of procuring a conviction, and was himself convicted.

**73.31.** Although English law on this important topic is not very definite, it appears that from case law the following propositions may, according to one article,<sup>3</sup> be deduced.

- (1) There is a dividing line between permissible police practice and acting as *agent provocateur*.
- (2) If the police or their informers act as *agents provocateur*, such evidence may be excluded in the discretion of the trial judge.
- (3) If such evidence is not excluded and the defendant is convicted, the sentence imposed may still be mitigated in its severity.

In the same article,<sup>4</sup> it is stated:

"Clearly, proposition (2) has the least authority to support it. However, it would, in this writer's view, be prudent policy, if imperfect jurisprudence, to allow the exercise of judicial discretion to exclude such evidence as appears to have been illegally or unfairly obtained in such circumstances, and thereby putting clear restraints on how far legitimate police 'investigation' may go."

Indian cases.

**73.32.** In India also, judicial decisions have unanimously condemned the use of illegitimate traps to secure evidence against an accused.<sup>5</sup>

**73.33.** In the Supreme Court<sup>6</sup>, this question came up for consideration in a case reported in 1954, where the following observations occur:—

"It may be that the detection of corruption may sometimes call for the laying of traps, but there is no justification for the police authorities to bring about the taking of a bribe by supplying the bribe money to the giver where he has neither got it nor has the capacity to find it for himself. It is the duty of the police authorities to prevent crimes being committed. It is no part of their business to provide the instruments of the offence."

**73.34.** Having passed strictures on the action of the Additional District Magistrate, their Lordships further stated that they would completely eliminate from consideration the evidence of the Additional District Magistrate, Shantilal

<sup>1</sup>*Birtles*, (1969) 53 Cr. App. R. 469.

<sup>2</sup>*Smith*, (1960) 2 Q.B. 423; (1960) 1 All. E.R. 256.

<sup>3</sup>Article "Entrapment" in (1974) New Law Journal, page 1073.

<sup>4</sup>Article "Entrapment" in (1974) New Law Journal, page 1073.

<sup>5</sup>(a) A.I.R. 1938 Mad. 893;

(b) A.I.R. 1968 Kerala 60.

<sup>6</sup>A.I.R. 1954 S.C. 332.

Ahuja, who was the principal trap witness to prove the illegitimate trap. In the well-known case of *Ramjanam Singh v. The State of Bihar*,<sup>1</sup> their Lordships expressed themselves in more sympathetic terms against the laying of illegitimate traps. To quote their Lordships :

".....that this was not a case of laying a trap, in the usual way, for a man who was demanding bribe, but of deliberately tempting a man to his own undoing after his suggestion about breaking the law had been finally and conclusively rejected with considerably emphasis and decision."

"Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; and more particularly by those who are the guardians and keepers of the law. However regrettable the necessity of employing agents provocateurs may be (and we realise to the full that this is unfortunately often inevitable if corruption is to be detected and bribery stamped out), it is one thing to tempt a suspected offender to overt action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which it has been finally and firmly decided shall not be done."

The very best of man have moments of weakness and temptation, and even the worst times when they repent on an evil thought and are given an inner strength to set Satan behind him; and if they do, whether it is because of caution, or because of their better instincts, or because some other has shown them either the futility or the wickedness of wrong doing, it behoves society and the State to protect them and help them in their good resolve; not to place further temptation in their way and start a fresh a train of criminal thought which had been finally set aside. This is the type of cases to which the strictures of this Court in *Shiv Bahadur Singh v. State of Vindhya Pradesh*<sup>2</sup> apply."

In *Shiv Bahadur Singh*, the Supreme Court had set aside the order of the High Court and restored the order of the trying court acquitting the accused.

## VII. RECOMMENDATION

**73.35.** We have discussed so far the scope of the concept of accomplices and the effect of participation in crime in general. Coming specifically to the sections, it remains now to consider the question of reconciling the provisions of section 114, illustration (b) and section 133. Notwithstanding the judicial pronouncements to the effect that the first is a rule of prudence and the second a rule of law, the impression still survives that the approaches underlying the two provisions are not in perfect harmony with each other. That a conviction is not illegal even if based on the uncorroborated testimony of an accomplice, may be true in theory; but, according to current trends, such convictions have not been upheld.

**73.36.** The true position is that it is section 114, illustration (b) which has to be given an overriding effect. This correct position, emerging from the case law, is obscured by reason of the existence of the two provisions—and that too at two different places in the Act. To remedy this defect, it was suggested to us that we should give a prominent place to section 114, illustration (b)—a rule of prudence which overrides the bare legal rule in section 133. If at all it is

<sup>1</sup>*Ram Janam Singh v. State of Bihar*, A.I.R. 1956 S.C. 643.

<sup>2</sup>*Shiv Bahadur Singh v. State of Vindhya Pradesh*, A.I.R. 1954 S.C. 322; (1954) S.C.R. 1098.

considered necessary to retain section 133, it could be by way of retaining the earlier half. But the matter should be dealt with by one section, which would incorporate section 114, illustration (b) as the general *and mandatory provision* and (ii) combine with is section 133, earlier half.

73.37. The observations of Stephen on these sections unfortunately fail to explain why it was felt necessary to insert both section 114, illustration (b) and section 133. These observations do not also explain why it was considered proper to place the two different provisions in different chapters—except that the rule in section 114, incorporating a presumption based on ordinary commonsense, covers a much wider field than the rule in section 133. Moreover, whatever may have been the position in 1872, the rule of prudence requiring corroboration has now practically attained the status of a rule of law<sup>1</sup>.

Observations  
Ameer Ali J.

of 73.38. The observations of Ameer Ali J. in *Kamla Prasad*<sup>2</sup> state the position thus :—

“The principle underlying the rule against the acceptance of an accomplice’s evidence without corroboration proceeds upon certain reasons. Those reasons have been set forth in a number of cases which it is not necessary for us to refer here. Primarily an accomplice’s evidence requires to be accepted with a great deal of caution and scrutiny, because it is naturally supposed that, when a person is concerned in a crime and has been discovered as being so concerned, he is likely to swear falsely in order to shift the guilt from himself. It is also supposed that an accomplice, in other words a participator in the crime, is a person of bad character, and that his evidence, although given under the sanction of an oath, is open to suspicion, and thirdly, evidence given in expectation of any hope of pardon is sure to be biased in favour of the prosecution. It is for these reasons, although the law declares that a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice, that the Courts have held, that ordinarily speaking the evidence of an accomplice should be corroborated in material particulars, and the practice which has been laid down has become, one may say, a part of the law itself”.

73.39. As to the correct position, it is enough to refer to a fairly recent Supreme Court case.<sup>3</sup> In that case, so far as is material, the testimony of the accomplice had not been corroborated, the charge being one of forgery by means of tampering with certain dates in a register. The error of the High Court, in failing to notice that the evidence of the accomplice had not been corroborated, was described by the Supreme Court as an error in law. It pointed out that there was no evidence offered by any of the prosecution witnesses examined from the appellant’s office to show the dates when the application were received.

73.40. In a Supreme Court judgment reported in 1970<sup>4</sup>, it was observed that an accomplice is competent to depose but, as a rule of caution, it will be unsafe to convict upon his testimony alone. These observations were made with reference to the evidence of an approver. As to the nature of corroborative evidence, it was laid down clearly that it must confirm that part of the testimony

<sup>1</sup>See case law, *infra*.

<sup>2</sup>*Kamla Prasad v. Sital Prasad*, (1911) I.L.R. 28 Cal. 339, 342, 343 (Ameer Ali J. at Pratt. II.).

<sup>3</sup>*R. R. Chari v. State of U.P.* A.I.R. 1962 S.C. 1573, 1583, 1584 (Gajendragadkar & Wanchoo, JJ.) reversing A.I.R. 1959 All. 149 (R. K. Chowdhury J.).

<sup>4</sup>*Sheshanna v. State of Maharashtra*, A.I.R. 1970 S.C. 1330.

which suggests that the crime was committed by the accused. On the facts, corroborative evidence was held to be sufficient. In an earlier case,<sup>1</sup> it was even said that the test of reliability of approver's and accomplice's evidence was for the court to be satisfied that there was nothing inherently impossible in their evidence. After that conclusion is reached as to reliability, corroboration is required.

**73.41.** It would appear that while for some time, particularly in the Bombay and Madras High Courts, there existed a controversy or uncertainty as to whether there was a rigid rule that the evidence of the accomplice must be corroborated, there has now come to be recognised a mandatory rule to that effect. It is in this sense that the latter half of section 133, which provides that the conviction is legal, is a dead letter. The first half of section 133, which provides that an accomplice is a competent witness, though a redundant provision in view of section 118, is harmless. But the latter part cannot be described as merely harmless, because it creates a noticeable conflict with section 114, illustration (b), as judicially construed. In other words, if one reads the judicial construction especially during the recently decided cases, on section 114, illustration (b), one cannot deny that it is squarely inconsistent with the latter half of section 133.

**73.42.** The view taken by the majority judgment in the Madras case<sup>2</sup> and the minority judgment may be cited as examples. The majority would take the view that a court may be warranted in declining to draw the presumption. Section 133 declares the law, while section 114 merely lays down certain presumption of fact. The minority would take the view that the presumption under illustration (b) must first be drawn.

In the minority judgment, Shankaran Nayar J. recognised the possibility of exceptional circumstances, but recent Indian decisions do not recognise even this possibility.

The current view goes beyond the minority view. Even exceptional circumstances are not recognised.

**73.43.** That the presumption under section 114 is mandatory, though not so expressed in the language, is fairly clear from the reported cases. In *Macdonalds case*<sup>3</sup> the Privy Council observed that "by every code of evidence, the testimony of a professed accomplice requires to be carefully scrutinised with anxious search for corroboration". These observations, though not made, with reference to the Indian Act, state the correct principle.

Presumption under section 114 (b) practically mandatory.

**73.44.** Thus, the position briefly is that (i) section 114, illustration (b) is construed in practice as mandatory, and (ii) section 133, latter half, is a dead letter. The suggestion in concrete terms was to substitute one section, in place of section 114, illustration (b) and section 133.

Suggestion considered.

**73.45.** While we entirely agree that an amendment is needed so as to remove the apparent inconsistency between the two provisions, we do not wish to make the provision in section 114, illustration (b), a mandatory one. As regards section 133, we think that the entire section should be deleted, instead of retaining its earlier half as was the suggestion.

Recommendation as to section 114 and section 133.

Our recommendation, then, is that a section 133 should be omitted, and that in section 114, illustration (b), the words "by independent evidence" should be added after the words "material particulars", that being the general understanding of the nature of corroborative evidence required in respect of accomplices.

<sup>1</sup>*Lachi Ram*, A.I.R. 1967 S.C. 792.

<sup>2</sup>I.L.R. 35 Mad.

<sup>3</sup>*W. C. Macdonald v. Fred Latimer*, A.I.R. 1929 P.C. 15, 18.

CHAPTER 74  
MINIMUM NUMBER OF WITNESSES  
SECTION 134

I. INTRODUCTORY

Introductory

**74.1.** We have noted in the introductory discussion that the modern tendency of the law is to dispense with a minimum number of witnesses. In conformity with this trend, section 134 provides that no particular number of witnesses shall in any case be required for the proof of any fact. The section thus makes a clean sweep of all antiquated rules of the common law requiring a certain minimum number of witnesses for proving particular facts.

**74.2.** In general, then, it is not necessary to produce a particular number of witnesses or a particular type of evidence, to prove a fact. This principle is well recognised in England—subject, of course, to certain specific exceptions; and it is also recognised in our law.

**74.3.** The volume of legitimate evidence required for judicial decision is no longer the subject of any mandatory rule. One of the great differences between the modern English law of evidence and that prescribed by the canon or civil law, which usually applied the maxim *testis unus testis nullus* (One witness is no witness), consists in the absence of any general requirement of a plurality of witnesses.<sup>1,2</sup> But the rule, where adhered to rigidly,<sup>3</sup> was felt to impose an obstacle in the administration of justice. Hence, it did not find favour in England.

**74.4.** Section 134 corresponds to section 28 of the repealed Act 2 of 1855. But the previous section was more directly and in terms in accord with the English law on the subject than the present section, as will be noticed presently.<sup>4</sup>

II. HISTORY

Position in ancient times.

**74.5.** In Anglo-Saxon and Norman Times and before the development of the common law, proof was, according to the importance of the case, made six-handed, twelve-handed, etc., he who had the greater number of witnesses prevailing. Attempts were not lacking to import this system into the common law; but, though various statutes were passed requiring two or more witnesses in particular cases, the attempts failed, and from about the middle of the sixteenth century onward the present rules began to be more or less effectively recognised.<sup>5</sup> By 1800, the rule was well-established.<sup>6,7</sup>

**74.6.** In 1551, in the case of *Reniger v. Fogossa*,<sup>8-9</sup> the Attorney-General argued that the testimony of one witness was “not sufficient in any law”, because

<sup>1</sup>Cross, *Evidence* (1974), page 168.

<sup>2</sup>Best, *Evidence* (1922), para 597-598.

<sup>3</sup>*Kulum Mundal v. Bhawani Prasad*, (1874) 22 Weekly Reports Criminal 12 (Calcutta).

<sup>4</sup>See para 74.17, *infra*.

<sup>5</sup>(a) *Reniger v. Fogossa*, (1551) Plowden 1, 8, 12;

(b) *Articuli Cleri*, (1605) 2 How. St. Tr. 131 (143-144);

(c) *R. v. Tong*, (1662) 6 How. St. Tr. 225.

<sup>6</sup>*R. v. Rushy*, (1800) 2 Peake N.P.C. at page 193.

<sup>7</sup>Holdsworth, H.E.L., Vol. 9, pages 205, 206.

<sup>8</sup>*Reniger v. Fogossa*, (1551) Plowden 1, 8, 12.

<sup>9</sup>Holdsworth, H.E.L., Vol. 9, page 206.

it was contrary to the law of God. To this objection, this was the answer given by Brooke —

“As to that which has been said by the King’s Attorney, that there ought to be two witnesses to prove the fact; it is true that there ought to be two witnesses at least where the matter is *to be tried by witnesses only*, as in the civil law, but here the issue was to be tried by twelve men, in which case witnesses are not necessary, for in many cases an inquest shall give a precise verdict, although there are no witnesses, or no evidence given to them.”

74.7. In the proceedings on Bacon’s impeachment<sup>1</sup> in 1620, Coke thought it necessary to combat the idea that more than one witness was necessary:<sup>2</sup>

“It is objected that we have but one single witness; therefore no sufficient proof. I answer that in the 37th of Eliz, in a complaint against Soldier-Sellers, for that having warrant to take up soldiers for the wards, if they pressed a rich man’s son they would discharge him for money, there was no more than *singularis testis* in one matter.”

74.8. The rule in the Star Chamber was different. In 1632, in Sherfield’s case,<sup>3</sup> Heath, C. J. commented on the fact that there was only one witness to prove one part of the charge. Indeed, it would seem from the two cases of *Adams v. Canon*<sup>4</sup> and *R. v. Newton*<sup>5</sup>, that it was almost an accepted rule of the Court of Star Chamber that a charge must be proved by two witnesses; though, from what was said by Lord Cottington in the Bishop of Lincoln’s case,<sup>6</sup> it would seem that it was not an invariable rule. “It is not always necessary in this court to have a truth proved by two or three witnesses. ....And *singularis testis* many times shall move and induce me verily to believe an act done when more proofs are shunted.”

Rule in Star Chamber.

The rule was stated in the widest terms by *Strafford*<sup>7</sup> on his impeachment. He is reported as saying,—“that the testimonies brought against him were all of them single, not two one way; and therefore could not make faith in the matter of debt, much less in matter of life and death”.

### III. PRESENT ENGLISH LAW

74.9. The present position in England is that as a general rule, Courts may act on the testimony of a single witness, even though uncorroborated; or upon duly proved documentary evidence without such testimony at all<sup>8</sup>. And, where that testimony is unimpeached, they should act on it<sup>9</sup>, and need not leave its credit to the jury<sup>10</sup>. One credible witness outweighs any number of other witnesses.<sup>11</sup>

This is subject, in the first place, to statutory exceptions and, in the second place, to those rules which, though non-statutory, have been evolved in the course of centuries as to the need for corroboration in particular cases.

<sup>1</sup>*Bacon’s Impeachment*, 2 S.T. at page 1093.

<sup>2</sup>Holdsworth, H.E.L. Vol. 9, pages 206, 207.

<sup>3</sup>S. T. page 545.

<sup>4</sup>*Adams v. Canon* (1622) Dyer 53b note 15.

<sup>5</sup>*R. v. Newton*, (1623) Dyer 99b, note 68.

<sup>6</sup>*Bishop of Lincoln’s case*, (1637) 3 S. T. at page 786.

<sup>7</sup>*Strafford*, (1640) 3 S.T. at page 1450.

<sup>8</sup>*Wright v. Tatham*, 5 C. & F. 670

<sup>9</sup>*Morrow v. Morrow*, (1914) 2 I.R. 1834.

<sup>10</sup>*Davis v. Hardy*, 2 B. & C. 225.

<sup>11</sup>*The Wega*, (1895) Probate 156, 159.

Statutory provisions requiring corroborative evidence.

74.10. The following may be cited as illustrations of cases in which corroboration is required by statutory provisions in England—

- (a) Offences relating to places of public worship<sup>1</sup>;
- (b) Personation at elections<sup>2</sup>;
- (c) Perjury and allied offences<sup>3</sup>;
- (d) Procurement of women or girls for prostitution or unlawful sexual intercourse, and administering drugs to facilitate intercourse<sup>4</sup>;
- (e) Unsworn evidence of a child of tender years<sup>5,6</sup>;
- (f) Affiliation proceedings<sup>7,8</sup>.

#### Affiliation

74.11. The gist of the provisions in England in regard to affiliation is that on the hearing of a complaint by the mother of an illegitimate child, a Magistrates court may, *if the evidence of the mother is corroborated in some material particulars by other evidence* to the satisfaction of the court, adjudge the defendant to be the punitive father and make an affiliation order against him. An appeal lies to the Crown Court, but that court also cannot confirm the affiliation order or reverse the order of the Magistrate refusing an affiliation order unless the evidence of the mother is corroborated as above.

74.12. In bastardy cases, it was the rule of English common law that, before an order of affiliation can be made, the evidence of the mother must be corroborated in some material particular by other testimony. "This rule has been wisely established," says Taylor<sup>9</sup>, "in order to protect men from accusations which profligate, designing or interested women might easily make, and which however false, it might be extremely difficult to disprove."

74.13. Finally, section 2 of the Evidence Further Amendment Act, 1869<sup>10</sup>, enacts that "the parties to an action for breach of promise of marriage shall be competent to give evidence in such action; provided always that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

74.14. Besides the statutory rules requiring corroboration stated above, there are, in England, rules of the common law on corroboration. In the following cases, the warning to the jury as to the need for the corroboration is given as a matter of course, because experience has shown that it is always dangerous in those cases to act on uncorroborated evidence. These cases are—

- (a) accomplices<sup>11</sup>;
- (b) sexual offences—even in cases where there is no statutory provision requiring corroboration<sup>12</sup>;

<sup>1</sup>Places of Religious Worship Act, 1812.

<sup>2</sup>Section 146(5), Representation of the People Act, 1949. (At least two credible witnesses are required).

<sup>3</sup>Section 13(1), Perjury Act, 1911.

<sup>4</sup>Sections 2, 3, 4, 22 and 23, Sexual Offences Act, 1956.

<sup>5</sup>Section 38(1), Children and Young Persons Act, 1933.

<sup>6</sup>See *R. v. Campbell*, (1956) 2 All. E.R. 272.

<sup>7</sup>Sections 4(2) and 8(2), Affiliation Proceedings Act, 1957.

<sup>8</sup>See *R. v. Nottingham Justices*, (1970) 2 All. E.R. 641.

<sup>9</sup>Taylor, cited in Field.

<sup>10</sup>32 & 33 Vict. cap. 68.

<sup>11</sup>*Davies v. Director of Prosecution*, (1954) A.C. 378 (H.L.).

<sup>12</sup>*R. v. Trigg*, (1963) 1 Weekly Law Reports 305, 309.



- (c) matrimonial causes—where a sexual offence is involved<sup>1</sup>, or where the proceedings are for a declaration of nullity, and impotence is alleged<sup>2</sup>;
- (d) sworn evidence of children<sup>3</sup>;
- (e) claims against the estates of deceased persons<sup>4</sup>, unless the circumstances are exceptional<sup>5</sup>.

**74.15.** The reason why corroboration of the evidence of adultery is regarded as desirable in proceedings for divorce, is that a charge of this type is particularly difficult to rebut. Further, where the witness is the woman, the person who is making the accusation is in the same kind of position as the position of an accomplice<sup>6</sup>. Adultery.

In *Alli v. Alli*<sup>7</sup> it was observed:

“In our opinion, therefore, there is abundant authority to support Sir Boyd Merriman, J.’s statement of the practice of the court in *B. v. B.*<sup>8</sup>, namely, that the court demands that, when a matrimonial offence, whatever it is, is charged, if “possible the evidence of the spouse making the charge should be corroborated. To sum up, then, our view of the authorities so far:

(a) where a matrimonial offence is alleged, the court will look for corroboration of the complainant’s own evidence; (b) the court will normally, before finding a matrimonial offence proved, require such corroboration if, on the face of the complainant’s own evidence, it is available; (c) these are not rules of law, but of practice only. They spring from the gravity of the consequences of proof of a matrimonial offence; and because, he would add, experience has shown the risk of a miscarriage of justice in acting on the uncorroborated testimony of a spouse in this class of case; (d) it is, nevertheless, open to a court to act on the uncorroborated evidence of a spouse if it is in no doubt where the truth lies; (e) these statements are equally applicable to proceedings in courts of summary jurisdiction as to those in the High Court.”

**74.16.** It will be useful finally to refer to the observations of Lord Morris in a recent case—<sup>9</sup>

“**LORD MORRIS OF BORTH-Y-GEST:** The accumulated experience of courts of law, reflecting accepted general knowledge of the ways of the world, has shown that there are many circumstances and situations in which it is unwise to found settled conclusions on the testimony of one person alone. The reasons for this are diverse. There are some suggestions which can really be made but which are only with more difficulty rebutted. There may in some cases be motives of self-interest, or of self-exculpation, or of vindictiveness. In some situations the straight line of truth is diverted by the influences of emotion or of hysteria or of alarm or of remorse. Some times it may be that owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from

<sup>1</sup>*Curtis v. Curtis*, (1905) 21 Times Law Reports 616.

<sup>2</sup>*Hodgkins v. Hodgkins*, (1950) Probate 183; as explained in *Alli v. Alli*, (1963) 3 All. E.R. 480.

<sup>3</sup>*R. v. Mitchell*, (1952) 36 Criminal Appeal Courts 79; *R. v. Trigg*, (1963) 1 W.L.R. 305.

<sup>4</sup>*Re Hodson*, (1885) 31 Chancery Division 177.

<sup>5</sup>*Thomas v. Times Book Company*, (1966) 1 Weekly Law Reports 911.

<sup>6</sup>*Galler v. Galler*, (1954) 1 All. E.R. 536 (Court of Appeal).

<sup>7</sup>*Alli v. Alli*, (1965) 3 All. E.R. 480, 484.

<sup>8</sup>*B. v. B.*, (1935) All. E.R. Rep. at page 429; (1935) Probate at page 83.

<sup>9</sup>*Director of Public Prosecutions v. Hester*, (1972) 3 All. E.R. 1056.

falsehood. It must, therefore, be sound policy to have rules of law or of practice which are designed to avert the peril that findings of guilt may be insecurely based. So it has come about that certain statutory enactments impose the necessity in some instances of having more than one witness before there can be a conviction. So also it has come about that in other instances the courts have given guidance in terms which have become rules. Included in such cases are those in which charges of sexual offences are made. It has long been recognised that juries should in such cases be told that there are dangers in convicting on the uncorroborated testimony of a complainant though they may convict if they are satisfied that the testimony is true. As this is no mere idle process it follows that there are no set words which must be adopted to express the warning. Rather *must the good sense* of the matter be expounded with clarity and in the setting of a particular case. Also included in the types of cases above referred to are those in which children are witnesses. The common sense and the common experience of men and women on a jury will guide them when they have to decide what measure of credence and dependence they should accord to evidence which they have heard.

All the rules which have been evolved are in accord with the central principle of our criminal law that a person should only be convicted of a crime if those in whose hands decision rests are sure that guilt has been established. In England it has not been laid down that such certainty ought never to be reached in dependence upon the testimony of but one witness. It has, however, been recognised that the risk of danger of a wrong decision being reached is greater in certain circumstances than in others. It is where those circumstances exist that rules based upon experience, wisdom and common sense have been introduced."

#### IV. PREVIOUS LAW IN INDIA

History.

**74.17.** It may be noted that in India the law before 1872 made an exception for treason. Section 28 of the repealed Act 2 of 1855, was as follows:—

"28. Except in cases of treason the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such court or before any such person. But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury."

**74.18.** This is a fuller statement of the position than the present section — more elaborate and more in conformity with actual practice. In the wellknown case of *Queen v. Lal Chand Kowrah*,<sup>1</sup> it was laid down, with reference to this section of the old Act, that the uncorroborated evidence of a single witness in a case of perjury was insufficient, and that there must be proof adduced, independent of the oath of one of the parties. But, it was also held, under the old Act, that the comparison of signatures is one kind of corroboration, which would justify a conviction on the testimony of a single witness in a case of false evidence.<sup>2</sup>

Accused not to be convicted of perjury on uncorroborated single testimony.

**74.19.** The most important decision under the previous law is a Full Bench ruling of the Calcutta High Court in *Queen v. Lal Chand Kowrah*,<sup>3</sup> where Peacock, C. J. observed :

<sup>1</sup>*Queen v. Lal Chand Kowrah*, (1866) 5 W.R. (Cr.) 23 (Calcutta).

<sup>2</sup>*Queen v. Bukhorce Chowbey*, 5 W.R. (Cr.) 98.

<sup>3</sup>*Queen v. Lal Chand Kowrah*, B.L.R. Supp. Vol. 417 (F.B.); 5 W.R. (Cr.) 23, cited by Field.

According to the law as administered in the exercise of original criminal jurisdiction, the evidence of only one witness uncorroborated is not sufficient to convict for perjury, because it is governed by the rule of the law of England. I do not mean to say that every rule of the law of evidence as administered in England applies to the Mufassil. But I cannot think that we ought to put such a construction upon section 28, Act 2 of 1855, as would allow a person to be convicted of perjury at Alipore,<sup>1</sup> or in other parts of Mufassil upon the uncorroborated testimony of a single witness, when such evidence would be insufficient for a conviction in Calcutta before the High Court in the exercise of its original criminal jurisdiction. Such a construction would not be very consistent. But if the law is so, we are bound by it. If there was any rule or practice in the Sadar Court or in the Courts in the Mufassil which, before Act II of 1855, prevented a conviction for perjury upon the evidence of a single witness without any corroboration, it appears to me that such Courts fall within the proviso in section 286. Now, there is a case which was decided by Mr. Samuells in the Sadar Court,<sup>2</sup> in which the rule was laid down as follows: "Perjury is not to be assumed because the story of one man appears more credible than that of another. There must be certain proof adduced, independent of the oath of one of the parties, that the deposition of the other is false." That is to say, the oath of one man is not sufficient to convict another of perjury, when he has sworn to the contrary; that you are not to take the evidence which by an accident is the more credible for the purpose of convicting of perjury, but you must bring something corroborative, or something more than the evidence of one witness. The rule, which was laid down by the Sadar Court in this case, is supported by other cases, and is in accordance with the principle of the English law. Indeed, I think, I may safely say that it was the practice of the Sadar Nizamat and of the Mufassil Courts not to allow a conviction for perjury upon the uncorroborated evidence of a single witness; consequently the case does not fall within the general rule of section 28, in as much as it is taken out of that rule by the provision, which says that the rule is not to affect any rule or practice of any Court that requires corroborative evidence of a single witness in case of perjury."

**74.20.** In the case of *Queen v. Bakhoree Chowbey*<sup>3</sup>, the accused was charged with giving false evidence by denying that he had verified or presented a certain written statement, and it was held that the corroboration derived from a comparison of signatures, was sufficient to sustain a conviction.

Corroboration derived from comparison of signature sufficient for conviction.

**74.21.** In the earlier Bombay case *R. v. Hedger*<sup>4</sup> the rule that required more than one witness in the case of a trial for perjury, if applied as an inflexible rule of law, was criticised, but it was also pointed out that, at the same time, the principle on which the rule rests is of great value in the "difficult task of weighing evidence." In this connection, it may be noted that while the Act of 1855 specifically saved a rule or practice requiring corroborative evidence in support of a witness in the case of perjury,<sup>5</sup> on such saving provision is found in the present Act.<sup>6</sup>

<sup>1</sup>A suburb of Calcutta just outside the local limits of the original jurisdiction of the High Court, and the headquarters of the district of the Twenty-four Parganas.

<sup>2</sup>See *Government v. Gharib Peada*, Nizamat Reports, Vol. XI, page 212.

<sup>3</sup>*Queen v. Bakhoree Chowbey*, 5 W.R. (Cr.) 98, cited by Field.

<sup>4</sup>*R. v. Hedger*, (1852) referred to by Woodroffe in his commentary under section 134.

<sup>5</sup>*R. v. Lal Chand*, (1866) February, Bengal Law Reports Supplement Volume, Full Bench 414; 5 Weekly Reports Criminal 23 (Calcutta).

<sup>6</sup>*R. v. Chulet*, (1884) I.L.R. 7 Allahabad 44, 50 (Duthoit J.).

**74.22.** In a Calcutta case<sup>1</sup>, the Session Judge had observed :

"The only doubt that arises in my mind in this case is whether, if a complainant deposes on oath to the existence of certain facts which go to establish the charge *instituted by him*, and he produces no witness who can support his charge, a Criminal Court is justified in finding the accused guilty on the complainant's evidence alone, however trustworthy."

The High Court did not share the doubt, and held—

"A conviction on the strength of the evidence of the complainant is lawful."

## V. PRESENT LAW IN INDIA

**74.23.** The effect of the present section is that in any case the testimony of a single witness (if believed by the Court or jury) is sufficient for the proof of any fact. Thus, a conviction upon the statement of a complainant alone is lawful.<sup>2</sup>

**74.24.** The effect of the section was noticed in a case under the Muslim law of pre-emption,<sup>3</sup> which held that it is not necessary for the performance of a valid 'talab-i-ishhad' that it should be made before at least two witnesses, or any number of witnesses, but it would suffice if it can be proved that the 'Ishhad' was made before a witness or witnesses for purposes or proving that fact. The requirement of making the 'talab-i-ishhad' in the presence of at least two witnesses, which under the general Muslim Law of Evidence was only necessary to prove its performance, was a matter governing procedure which has been replaced by the Evidence Act. The omission from the Evidence Act of a provision for the proof by means of at least two witnesses for the enforcement of a right of pre-emption is significant in that Legislature did not consider it necessary to require at least two witnesses for the proof of a pre-emptive right.

## VI. PERJURY

**74.25.** As regards the offence of "giving false evidence", the framers of the Indian Penal Code, for reasons stated in Note G. to their Report dated the 14th October, 1837, thought it proper<sup>4</sup> to discard the English law of "perjury", and to draft the provisions of the Indian Penal Code in this respect upon the lines of the French Code Penal regarding 'faux temoignage'.<sup>5</sup> The Indian Law Commissioners were afterwards pressed to at least allow the word "perjury" to be retained in their Code, as being one familiar to the people of India and long in use; but they refused to give way<sup>6</sup> on the ground that "the authors of the Code thought it inexpedient to use the technical terms of the English law where they did not adopt its definitions, and so materially departed from it in substance".

Perjury.

**74.26.** It has been held that in India in cases relating to the offence of giving false evidence, though the law does not provide that there must be corroboration

<sup>1</sup>Kullum Mundul v. Bhowani Prasad, (1874) 22 W.R. Cr. 32 (Cal.).

<sup>2</sup>Kullum Mundul v. Bhowani Prasad, (1874) 22 W.R. Cr. 32.

<sup>3</sup>Sonaji v. Narhar, A.I.R. 1952 Hyd. 159.

<sup>4</sup>Draft Penal Code, Note G.

<sup>5</sup>Parl. Papers, 3rd August, 1838, Indian Law Commission, 673.

<sup>6</sup>Parl. Papers, 16th May, 1848, Indian Law Commission, 330, para 130 of the Report dated the 24th June, 1847.

to support a conviction, the rule of English law which is based on substantial justice may be followed as a safe guide.<sup>2</sup>

**74.27.** The Code of Criminal Procedure also provides additional safeguards in regard to the offence of perjury, inasmuch as a written complaint of the court before which the offence is committed is necessary in order to proceed with the prosecution. Previously, a private party could apply for "sanction" for prosecution. But since it was found that this position often led to action inspired by feelings of revenge, the law was changed and the present law is as stated below.

**74.28.** The case of a solitary witness who is neither an accomplice nor in a position analogous to that of an accomplice was considered by the Supreme Court in *Vadivelu Thevar v. State of Madras*.<sup>3</sup> The Court held that as a general rule the court may act on the testimony of a single witness though uncorroborated. The court, it was held, could do so except where corroboration was required by statute, or where the nature of the testimony of the single witness itself requires, as a rule of prudence, that corroboration should be insisted upon, and that the question whether corroboration of the testimony of a single witness was or was not necessary, must depend upon the facts and circumstances of each case.<sup>4</sup>

Solitary witness.

In the case of *Mohammad Sugal Esa Mamasan Rer Alalah v. The King* (an appeal from Somaliland where the Indian Evidence Act and the Indian Oaths Act, 1869, had been applied), the Privy Council dealt with the question of corroboration of the testimony of a *child witness* in a murder case. In that case, the testimony of the single witness in support of the murder charge was attacked as suffering from two infirmities, namely:—

- (1) The witness was a girl of about 10 or 11 years at the time of occurrence and her evidence had not been corroborated.
- (2) The child witness had not been administered oath, because the Court did not consider that she was able to understand the nature of the oath though she was competent to testify.

The second ground was rejected in view of section 13, Oaths Act, whereunder "omission" to administer an oath does not invalidate the evidence. The Privy Council held that "omission" covered the case of non-administration of oath to a child witness on the ground that the witness would not be able to understand the nature of oath.

**74.29.** The second ground will be dealt with later. Special leave had been granted to appeal to the Privy Council, on the ground that the local courts had admitted and acted upon the unsworn evidence of a girl of 10 or 11 years of age. The Privy Council, however, ultimately upheld the conviction and sentence of death, holding that the evidence, such as it was, was admissible. The following observations were made in the judgment:

Evidence of child of 10 years held admissible.

"It was also submitted on behalf of the appellant that assuming the unsworn evidence was admissible the Court could not act upon it unless it was corroborated. In England, where provision has been made for the

<sup>1</sup>(a) *R. v. B. G. Tilak*, (1904) I.L.R. 28 Bom. 479, 498.

(b) *R. v. Lal Chand*, B.L.R. Supp. Vol. 417 (F.B.); 5 W.R. Cr. 23;

(c) *R. v. Bakhoree*, 5 W.R. Cr. 98.

(d) *R. v. Ross*, 6 M.H.C. 342.

<sup>2</sup>*Vadivelu Thevar v. State of Madras*, (1957) S.C.R. 981; A.I.R. 1957 S. C. 614.

<sup>3</sup>See also *Ramratan v. The State of Rajasthan*, A.I.R. 1962 S.C. 424, 428.

reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

On the facts, the Privy Council found sufficient corroboration.

#### VII. CONCLUSION

The above discussion does not disclose any need for amendment of the section.

## ORDER OF EXAMINATION OF WITNESSES

### SECTION 135

**75.1.** Under section 135, 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. Introductory.

**75.2.** In civil cases, the rule governing the production of evidence depends on the principles applicable to the right to begin. This is governed by the Code of Civil Procedure. Very briefly, the scheme of that Code is this.<sup>1</sup> The plaintiff has a right to begin. To this, there is an exception where the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. Civil cases.

**75.3.** The party having the right to begin has to state his case on the first hearing and produce his evidence in support of the issues which he is bound to prove. After this, the other party has to state his case and produce his evidence, if any, and may then address the court generally on the whole case.

**75.4.** There may be situations where there are several issues, the burden of proving some of which lies on the other party. The burden of proof, it may be recalled, is governed by the Evidence Act—we have already considered the relevant provisions.<sup>2</sup> The party beginning may, in such a situation, at his option, either produce his evidence on these issues, or reserve it by way of answer to the evidence produced by the other party; and in that case, that is to say, where the party beginning has reserved his evidence on some of the issues, he may produce evidence on those issues after the other party has produced all his evidence. After such production of evidence the other party is entitled to reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

**75.5.** In criminal trials, the prosecution always begins. — in fact, provisions expressing or implying this position are contained in the various chapters of the Code of Criminal Procedure applicable to the different kinds of trials under the Code. By way of example, the provisions in that Code, in so far as they are relevant to the subject under consideration, may be thus summarised as regards warrant cases and sessions cases. Criminal cases.

#### (a) *Warrant cases before Magistrates.*<sup>3</sup>

In warrant cases tried before Magistrates, if the accused does not plead guilty or though he pleads guilty, he is not convicted on that plea, the Magistrate fixes a date for the examination of witnesses. On that date, the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution, but he may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined, or recall any witness for

<sup>1</sup>Order 18, rules 1 to 3, Code of Civil Procedure, 1908.

<sup>2</sup>Sections 101 *et seq.*

<sup>3</sup>Sections 242 to 247, Code of Criminal Procedure, 1973.

further cross-examination. The accused shall then be called upon to enter upon his defence and produce his evidence. After such evidence is taken, arguments are heard, and the judgment is pronounced.

(b) *Sessions trials.*

In a trial before a Court of Sessions,<sup>1</sup> the procedure is slightly different. When the accused appears before the court or is brought before it, the public prosecutor opens his case by explaining the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. Unless the accused is discharged by the Sessions Judge on the ground that there is not sufficient proof, the charge is framed by the Court of Sessions<sup>2</sup> and the accused is asked whether he pleads guilty or claims to be tried. Except when the accused pleads guilty and is convicted on that plea, the judge has to fix a date for the examination of the witnesses. On the date fixed, the judge shall proceed to take all such evidence as may be produced in support of the prosecution. But he may, in his discretion, permit the cross-examination of any witness to be deferred. If, after taking the evidence of the prosecution and the defence, the judge considers that there is no evidence that the accused has committed the offence, he shall record an order of acquittal. Otherwise, the judge shall call upon the accused to enter upon his defence and to adduce any evidence which he may have in support thereof. When the examination of the witnesses for the defence is complete, the prosecutor sums up his case.

After hearing arguments, the judge gives the judgment in the case.

75.6. It would have been noted that this scheme does not contemplate the leading of evidence initially by the accused. The prosecution always begins.

Order of examining witnesses.

75.7. The provisions of the two Codes to which we have referred above regulate the order of production of evidence as *between the parties*. As between a party's witnesses *inter se*, it is counsel's privilege to determine, subject to the limitations mentioned in section 135, the order in which witnesses should be produced and examined; but the court has always the power to direct the order in which witnesses should be examined, if the circumstances of the case require the making of such an order.<sup>3</sup>

75.8. In general, a court cannot refuse to examine a witness produced by a party.<sup>4,5</sup> There are, however, express provisions in the Code of Criminal Procedure whereunder the court may refuse to summon *unnecessary* witnesses. And the same practice is followed in civil cases.

Not calling a party as witness.

75.9. The disreputable practice under which counsel does not call his own client who is an essential witness but endeavours to force the other party to call him and so suffer the discomfiture of having him treated as his own, the other party's witness, has been repeatedly condemned by the Privy Council in numerous cases.<sup>6</sup> Lord Atkinson dealt with the subject in *Lal Kunwar v. Chiranji Lal*,<sup>7</sup> calling it "a vicious practice, unworthy of a hightoned or reputable system of advocacy."

<sup>1</sup>Sections 225 to 237, Code of Criminal Procedure, 1973

<sup>2</sup>This is the new procedure.

<sup>3</sup>*Achytana Pitchaiah vs. Gwantha Chinaiah* A.I.R. 1961 A.P. 420, 422 (reverse cases)

<sup>4</sup>*Jaswant Singhjee v. Jat Singhjee*, 2 M.I.A. 242; 6 Weekly Reports 46 (P.C.).

<sup>5</sup>*Sheikh Ibrahim v. Sheikh Suleman* (1885) I.L.R. 9 Bom. 146, 149, 150, West J.).

<sup>6</sup>*Sardar Gurbaksh Singh v. Gurdial Singh*, A.I.R. 1927 P.C. 230, 233.

<sup>7</sup>*Lal Kunwar v. Chiranji Lal*, (1910) I.L.R. 32 All. 104 (P.C.) See *Bidan Das v. Maneal Singh* A.I.R. 1929 Lah. 868.



**75.10.** Generally, when a party calls the opponent as a witness, the opponent must be asked whether he is going to appear as his own witnesses. If that party then declares that he does not propose to appear as his own witness, the court should point out to the party producing him that ordinarily speaking the matter should be left as it is, and the court be left to draw any adverse inference which may justifiably be drawn from the refusal of the party to appear in the witness-box and subject himself to cross-examination. If the party, however, insists on examining the opponent as his own witness, the court should be careful not to allow the counsel for the opponent to cross-examine his own witness, because unless the witness is declared hostile, a party has no right to cross-examine his own witness.<sup>1</sup>

On refusal of a party to enter witness-box.

**75.11.** Certain matters are governed by the practice of the courts. For example, witnesses should be called one by one. In *Lalmani v. Bejai Ram*,<sup>2</sup> Bonnet, J. held that the universal practice in the courts in India is that witnesses should be called in one by one, and that no witness who is to give evidence should be present when the deposition of a previous witness is being given in the court, and this may well be termed an abuse of the process of the court, and, therefore, under section 151, Code of Civil Procedure, the court has inherent power to prevent that abuse and the court can order that such witness should not be heard as a witness.

Witnesses should be called one by one.

**75.12.** This is a broad outline of the law and practice relating to the order of examination of witnesses. We have no changes to recommend in the section in the Evidence Act.

Conclusion

<sup>1</sup>*Puran Singh Relu Singh v. Mathra Das*, A.I.R. 1934 Lah. 126, 127.

<sup>2</sup>*Lalmani v. Bejai Ram*, A.I.R. 1934 All. 840.

DETERMINATION OF QUESTIONS AS TO ADMISSIBILITY

SECTION 136

Introductory.

**76.1.** Section 136 is vitally important for understanding the role of the Judge in the field of evidence. Three propositions—all of importance—are set out in section 136. In order to understand their importance, it is necessary to deal briefly with the grounds of inadmissibility of evidence.

Grounds of rejection — First paragraph.

**76.2.** These grounds (of inadmissibility of evidence) are numerous. The legal principle that evidence must be relevant to the facts in issue is, of course, paramount and is incorporated in the first paragraph of section 136 and in section 5. But it is an important function of the law of evidence to exclude certain evidence, even though relevant, on the grounds of policy or other considerations. It is for this reason that Phipson defined evidence as “the facts, testimony and documents which may be *legally received* in order to prove or disprove the facts under inquiry”.<sup>1</sup>

The same idea is expressed—though in different words—by Professor Cross. When defining judicial evidence, Cross lays stress on what “a court will accept” as evidence<sup>2</sup> of the facts in issue in a given case. What requires to be pointed out is that evidence on which a court can act must relate to facts which are *legally relevant*, and the means adopted for attempting to prove the facts must also themselves be those permitted by law.

Relevance.

**76.3.** The first paragraph of the section deals with relevance. It is for the judge to decide the question of relevance. Accordingly, the first paragraph provides that when either party proposes to give evidence of any fact, the judge may ask the party proposing to give 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.

Grounds of objection.

**76.4.** Although this paragraph is confined to relevance, it cannot be disputed that it is for the Judge to decide *other grounds* of objection also. Objection to evidence can be taken on several grounds and not merely on the ground of relevance. Even where the fact is relevant, the evidence may be excluded by rules of policy. Or, the form in which it is tendered may be excluded by specific rules. Then, even on relevant matters and even where the nature of the evidence is legally permissible, the form of the particular question may be objectionable. Again, the person through whom the evidence is tendered may not be competent to do so.

Grounds of objection.

**76.5.** To illustrate what is stated above, it may be convenient to note some of the important grounds of objection. The list is not, however, exhaustive.

*Facts*

1. The fact of which evidence is proposed to be given is not relevant under any section of the Evidence Act.<sup>3</sup>

<sup>1</sup>Phipson, *Evidence*, 5th Edition (1920), page 1, cited in Nokes, *Introduction to Evidence* (1967), page 6.

<sup>2</sup>Cross, *Evidence* (1974), page 4

<sup>3</sup>Sections 5 and 136.

*Nature of the evidence.*

2. Though the fact is relevant, evidence thereof is excluded by the specific provisions regarding confessions<sup>1</sup>—e.g. a confession which is excluded as involuntary.<sup>2</sup>
3. The evidence is not admissible, being hearsay,<sup>3</sup>—assuming that it does not fall within the recognised exceptions to that rule, e.g. section 10, sections 17 to 31, 32 to 35, section 60 proviso, and (as regards corroborative evidence) section 157 or the provision of any special law by way of exception to hearsay.
4. The evidence tendered is evidence of opinion or character, and is, therefore, inadmissible, not being covered by sections 45 to 55.

*Form of the evidence.*

5. The evidence tendered is excluded by the rules relating to secondary evidence.<sup>4</sup>
6. The evidence tendered is excluded by the rules relating to the exclusion of oral evidence by documentary evidence.<sup>5</sup>

*Exclusions operating on particular persons*

7. The evidence tendered is barred by the rule of estoppel,<sup>6</sup> which prevents a particular party from testifying in support, of a particular plea, inconsistent with his previous representation.
8. The evidence tendered is excluded by privilege—a protection enjoyed by the particular witness.<sup>7</sup>

*Witness—competence.*

9. The witness through whom the evidence is tendered is incompetent by reason of age or mental infirmity.<sup>8</sup>

*Questions—nature and form.*

10. The particular question put to the witness is a leading question and cannot be allowed<sup>9</sup> in examination-in-chief.
11. The particular question put to the witness should not be permitted, as it is indecent or scandalous or intended to insult or annoy or is offensive in form.<sup>10</sup>
12. The question is by way of cross-examination and should not be allowed unless the witness is treated as hostile.<sup>11</sup>
13. The evidence tendered is not admissible, as it contradicts the answers given by the witness in answer to questions put to shake his credit.<sup>12</sup>

<sup>1</sup>Sections 24, 25 and 26.<sup>2</sup>See discussion relating to “relevant fact”.<sup>3</sup>Section 60.<sup>4</sup>Section 65.<sup>5</sup>Sections 91-98.<sup>6</sup>Sections 115-117.<sup>7</sup>Sections 121 to 132.<sup>8</sup>Section 118.<sup>9</sup>Section 142.<sup>10</sup>Sections 151 and 152.<sup>11</sup>Section 154.<sup>12</sup>Section 153.

14. The witness cannot refresh his memory by referring to the writing, as it was not made at the time stated in the section.<sup>1</sup>

*Other laws*

15. The evidence is excluded by the specific provisions of any other law.<sup>2</sup>

This illustrative list will show the wide powers of the Judge in ruling on questions of evidence.

No discretion.

**76.6.** At the same time, it should be noted that, in India, the Judge has no discretion to exclude evidence if it is relevant and admissible and not excluded by any specific provision of law. In certain cases,—e.g. grant of permission to cross-examine one's own witness—the court has a limited power. In England, the powers are wider. A discretion is recognised, at least in criminal cases, particularly when the evidence is prejudicial to the accused.

...part from the cases where there is a discretion to exclude prejudicial evidence, there exists in certain other cases also, a discretion in relation to the law of evidence. Thus, there is an absolute discretion vested in the trial Judge in England as to whether a witness is to be treated as hostile—a discretion derived from statute.<sup>3</sup> Similarly, when the accused offers himself as a witness by virtue of the Criminal Evidence Act, 1898, and the question arises how far he can be cross-examined as to character, there is a certain amount of discretion in the court to be exercised in favour of the accused.<sup>4</sup> For example, in the case of *Flynn*,<sup>5</sup> the accused was charged with the offence of robbery and made allegations of indecent assault by the prosecutor for money, as a hush money. It was held that the cross-examination of the past convictions of the accused was wrongly allowed, in the circumstances, since the imputation made by the accused against the prosecution witness was rendered necessary by the very nature of the defence, the trial court should not, on that ground alone, have allowed the character of the accused to be put in issue in his cross-examination.

Again, in regard to the breach of the Judges' Rules, while the breach itself is not sufficient to make a confession inadmissible in law, yet, where a breach of the rules has, in fact, occurred, the trial Judge is vested with a discretion to exclude the confession.<sup>6</sup> It was on this ground that a statement obtained by the police without a caution, where such a caution was necessary in the circumstances under the Judges' Rules, was excluded, it having been held that the trial court ought not to have admitted the confession made in such circumstances.<sup>6</sup>

In *R. v. List*,<sup>7</sup> Roskill J. observed that the court has an overriding discretion to disallow the admission of evidence, if the prejudicial effect would make it virtually impossible for the jury to take a dispassionate view of the crucial facts of the case.

**76.7.** Examples of the existence of such discretion are furnished by the rules of English law relating to evidence of similar facts,<sup>8</sup> confessions,<sup>9</sup> prejudicial

<sup>1</sup>Section 159.

<sup>2</sup>E.g. section 162, Cr. P.C. 1973.

<sup>3</sup>Section 22, Common Law Procedure Act, 1854.

<sup>4</sup>Section 1(f)(i), Criminal Evidence Act, 1898.

<sup>5</sup>*R. v. Flynn*, (1961) 3 All. Eng. Reports 58 (C.C.A.).

<sup>6</sup>*R. v. Ovenell*, (1968) 52 Cr. App. Rep. 167.

<sup>7</sup>*R. v. List*, (1965) 3 All. Eng. Rep. 702.

<sup>8</sup>*Noor Mohamed v. R.*, (1949) A.C. 182, 192.

<sup>9</sup>*R. v. Wattam*, (1952) 36 Cr. App. Reports, 72, 77.

facts<sup>1,2</sup> evidence illegally obtained,<sup>3,4</sup> and trivial facts.<sup>5</sup> This, list, again, is illustrative only.

In all these cases, the Judge has a discretion to exclude evidence principally on the ground of unfairness<sup>6</sup> or some public policy. For example, in *Callis v. Gunn*,<sup>7</sup> the Court of Criminal Appeal, while holding finger-prints evidence to be admissible, referred to the overriding discretion of the Judge to exclude it by stating "provided there is no suggestion of it being obtained oppressively by false representation, by trick, by bribes, anything of that sort".

**76.8.** So much as regards the proposition in the first paragraph of section 136, and points allied thereto. The second paragraph of the section is concerned with facts conditionally admissible. It provides that if the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such other fact must be proved before evidence is given of the first mentioned fact, unless the party undertakes to give proof of the other fact and the court is satisfied with such undertaking. Illustration (b) illustrates this paragraph. Second paragraph.

**76.9.** The second paragraph is thus concerned with questions where the admissibility of evidence of one fact depends upon the proof of some other fact. Sometimes, however, the relevancy of one alleged fact may depend upon the proof of some other alleged fact. In such a case, under the third paragraph, 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), (c) and (d) illustrate this paragraph. Third paragraph.

**76.10.** None of the paragraphs in the section needs any change. Conclusion

<sup>1</sup>Nokes, *Introduction to Evidence* (1967), page 85.

<sup>2</sup>*R. v. List*, (1965) 3 All. E.R. 710-713.

<sup>3</sup>(a) *Kuruma v. R.*, (1955) A.C. 197, 205.

(b) *R. v. Mitten*, (1966) 1 Queens Bench 10.

(c) Comment by Schwartz, "Excluding evidence illegally obtained" (1966) 29 Modern Law Review 635.

<sup>4</sup>Edmund Gabbay, *Discretion in Criminal Justice* (1973), page 25.

<sup>5</sup>Nokes, *Introduction to Evidence* (1967), page 85.

<sup>6</sup>*R. v. Hall*, (1973) 1 All. E.R. 1 (C.C.A.).

<sup>7</sup>*Callis v. Gunn*, (1963) 3 All. E.R. 77 (C.C.A.).

## EXAMINATION AND CROSS-EXAMINATION — SECTIONS 137-138

## I. INTRODUCTORY

Introductory.

77.1. In the adversary system of trial, which has been adopted in India, a judicial proceeding is a contest *between parties*. The court does not take the initiative in collecting evidence. Nor does a person who claims to be acquainted with the facts in dispute come to the court and communicate his knowledge to the court unaided. The parties take the initiative. The medium through which oral evidence is presented is the witness. But the use of that medium is only at the instance of the parties. And since, in the adversary systems, the procedural rights of both parties have to be dealt with, it becomes necessary to demarcate the boundaries of the use of the witness—the medium—by each party, and to regulate the nature of “examination” by the parties. That, in brief, is the reason why detailed provisions on the subject appear in the Act.

## II. DEFINITION AND SCOPE

Order and scope of each examination.

77.2. The subject of examination of witnesses is spread over a number of sections. It will be convenient to consider the first two sections relevant to the subject—sections 137 and 138—together. Section 137 provides that the examination of a witness by the party who calls him shall be called his examination-in-chief. The examination of a witness by the adverse party shall be called his cross-examination. The examination of a witness by the party who called him, subsequent to the cross-examination, shall be called his re-examination. These are the principal types of examination. They are not exhaustive. After re-examination, there could be re-cross-examination, if new matter is introduced in re-examination, and so on.

77.3. The chronological order of the various types of examination is as follows:

Section 138 provides that “witnesses” shall be first examined-in-chief, *then* (if the adverse party so desires) cross-examined, and then (if the party calling so desires) re-examined. The plural “witnesses”, though legally in order,<sup>1</sup> is not expressive of the practice. What happens in practice is that *each witness* is first examined, then cross-examined and then re-examined. It is not the practice first to hold the examination-in-chief of *all witnesses* and then to cross-examine them. Sometimes, in criminal cases, the cross-examination of prosecution witness may be postponed; but the general position is as stated above.

In the same section, the scope of each type of examination is dealt with. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief. The re-examination shall, however, be directed to the explanation of matters referred to in cross-examination; and, if new matter, by permission of the Court, is introduced in re-examination, the adverse party may further cross-examine upon that matter.

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<sup>1</sup>See the General Clauses Act.

**77.4.** Of these three types of examination, cross-examination plays a major role. Usually, the object of cross-examination is stated to be two-fold; (a) to destroy the credit and credibility of the witness, and (b) to secure on matters not touched in the examination-in-chief answers favourable to the party cross-examining. But (b) is itself an object of a complex character. A party cross-examining would like—(c) to secure contradiction of what has been stated by *other witnesses*, and (d) to get support for, and confirmation of, statements made by *other witnesses* which are favourable to the party cross-examining.

Cross-examination  
— Object of.

**77.5.** As to impeaching the credit of a witness, it is to be noted that a party calling a witness cannot impeach the credit of that witness, unless permitted by the court to do so.<sup>1</sup> It is generally stated that the reason why the party calling a witness to testify under examination-in-chief, is not permitted to impeach the witness is that that party generally vouches for the credibility of that witness. It should be noted, however, that this assumption has not gone unchallenged. And, in some countries, a different practice prevails. For, example, in the U.S. Federal Rules, rule 607 provides as follows<sup>2</sup>—

Impeaching credit  
of one's own witness.

“607. The credibility of a witness may be attacked by any party, including the party calling him.”

The Advisory Committee's Note on this Rule explains the departure from the traditional rule in these words:

“The traditional rule against impeaching one's own witness is abandoned as based on false promises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under rule 801 (d)(1).”

“The substantial inroads into the old rule, made over the years by decisions, rules and statutes are evidence of doubts as to its basic soundness and workability.”

The Note then proceeds to refer to certain case law as also to Revised Rules 32(a)(i) of the Federal Rules of Civil Procedure (allowing any party to impeach a witness by means of his deposition), and Rule 43(b) (allowing the calling and impeachment of an adverse party or person identified with him). Illustrative statutes allowing a party to impeach his own witness under varying circumstances are also referred to as also Uniform Rule 20; California Evidence Code, Section 785; Kansas Code of Civil Procedure, Section 60-420 and New Jersey, Evidence Rule 20.

### III. HISTORY

**77.5A.** Cross-examination is that phase of the trial which has the potentiality of being the most spectacular. It affords the opportunity for the most successful employment of an aptitude for quick thinking, sharp repartee and dramatics.<sup>3</sup> Unless the judge is alert and vigilant, cross-examination may sometimes turn into an engine of torture. We shall make certain observations as to the role of the judge in this regard at the appropriate place.<sup>4</sup>

<sup>1</sup>Section 154.

<sup>2</sup>Rule 607, Rules of Evidence for U.S. Courts (1974) 34 L. Ed. 2d 133.

<sup>3</sup>Keeton, Trial Techniques and Methods (1954), page 87.

<sup>4</sup>See concluding chapter.

History.

77.6. The use of cross-examination as a weapon for the discovery of truth is not of recent origin. In the Bible,<sup>1</sup> the story of Sussanna and the Elders furnishes an example of its use for the purpose of discovering the truth. Sussanna was charged with adultery in the garden and the charge was made by two Elders, the allegation being that adultery had been committed with a young man. In order to test the veracity of the charge which cast an imputation on a lady of great virtue and beauty. Daniel considered it necessary to examine separately the two witnesses and asked each of them under which tree the adultery had been committed. The answer of one was the Mastic tree, while the answer of the other was holm tree. This discrepancy was sufficient to discredit their story and the result was that instead of Sussanna being punished for the alleged adultery which was a capital offence, the two witnesses were sentenced to death for perjury.

Among the Greeks, cross-examination of witnesses was permissible at least a hundred years before Christ.<sup>2</sup> Even in earlier Greek law, something in the nature of cross-examination was known, though it was restricted to the parties.<sup>3</sup>

During the Roman period, we come across a celebrated passage in a book on rhetoric by the famous Quintilian, who was a rhetorician and occasionally also appeared as a preacher.<sup>4</sup>

Coming nearer to our own times, we may note that in two noted passages of fiction, cross-examination has been mentioned and the inveterate abuse of cross-examination has also been satirized.<sup>5</sup>

#### IV. CROSS-EXAMINATION WIDER THAN DIRECT EXAMINATION

Cross-examination not confined to relevant facts.

77.7. The scope of cross-examination need not be co-extensive with the actual matters put in the examination-in-chief. Its range extends to the whole case. No matter which is in issue in the suit or proceeding is outside it. Section 138 so provides expressly, in the second paragraph, as we have mentioned above. However, in the same paragraph, the section provides that cross-examination may relate to "relevant" facts. This proposition cannot be taken as meaning that it *must* so relate, because facts which are not relevant to the facts in issue may yet be elicited in cross-examination where they may affect the credit of the witness.<sup>6</sup>

For example, where it is alleged that a wife (party to a matrimonial proceeding) committed adultery on a certain specified occasion, and the wife denies it, she can be asked in cross-examination whether she had ever committed adultery—a question which, though not relevant to the facts in issue, is permissible as shaking her credit.<sup>7</sup>

<sup>1</sup>Book of Daniel.

<sup>2</sup>Wigmore, *Panorama of the World's Legal Systems* 317, quoted in Nokes, *Introduction to Evidence* (1967), page 17.

<sup>3</sup>Jones, *The Law and Legal Theory of the Greeks* (1956), page 140, cited in Nokes, *Introduction to Evidence* (1967), page 7.

<sup>4</sup>Quintilian, *Institution Oratoria* (the teaching of oratory), *Lib. V., Chapter 7*, quoted in *Best on Evidence* and also in *Meer Sujad Ali v. Kashee Nath*, 6 Weekly Reports Civil 181, 182, 183.

<sup>5</sup>(a) Dickens, *The Pickwick Papers*, Chapter 24;

(b) Anthony Trollope, *The Three Clerks*, Chapter 40.

<sup>6</sup>Sections 146 to 153.

<sup>7</sup>Compare section 146(3).

<sup>8</sup>See further O'Donogh, "Imputations on Prosecution Witnesses" (1966), 29 *Modern Law Review*, 492.



**77.8.** For this purpose, one can also draw an example from the position in England regarding the complainant in a charge of rape. It is now settled law that the woman who complains of rape can be cross-examined about the following matters:<sup>1</sup>

Illustration from cases of rape.

- "(1) Her general reputation and moral character;
- (2) Sexual intercourse between herself and the defendant on other occasions;
- (3) Sexual intercourse between herself and other man."

In the enumeration of cases<sup>2</sup> in which the women can be cross-examined, as quoted above, item (2)—intercourse with the defendant on other occasions—would tend to show likelihood of consent, apparently because it would show presence of the element of passion between the two. As regards item (3)—intercourse with other man—the evidence would not be relevant to a fact in issue, but, in this particular case, it would be admissible as impeaching the credit of the witness.<sup>3</sup>

In this connection, the provisions of section 155(4) of our Act may be compared. Contradiction of the evidence given on this subject is disallowed by law in order to avoid excessive time being spent on collateral enquiries.

**77.9.** As regards general reputation of the prosecutrix in cases of rape, it is almost impossible to set up a defence of consent without imputing immorality to the prosecutrix so far as previous sexual relations with the accused are concerned.<sup>4</sup> On the other hand, particular acts of immorality with man other than the accused cannot be relevant, and evidence thereof is admissible only as going to the credit of the prosecutrix.<sup>5</sup>

General reputation of prosecutrix.

**77.10.** In the United States, the Rules of Evidence for United States Courts and Magistrates<sup>7</sup> specifically provide that "a witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination".

Scope in U.S.

**77.11.** In India and in England, cross-examination is not confined to matters raised in examination-in-chief. However, it is to be noted it is not the law in every country that cross-examination has such a wide scope as in England or in India. In some States in the U.S.A., for example, cross-examination on matters not raised in the direct examination and not affecting credibility is not allowed without the permission of the Court. Thus, the California Evidence code<sup>8</sup> provides that a witness examined by one party may be cross-examined upon any matter within the scope of the direct examination of each other party to the action.

Scope in other countries.

**77.12.** In a case decided by the Supreme Court of Pennsylvania<sup>9</sup>, it was described as elementary that unless the witness is himself one of the litigants, cross-examination of his testimony should be confined to the matters upon

<sup>1</sup>*R. v. Grausz*, (1973) 57 Criminal Appeal Reports 466.

<sup>2</sup>*R. v. Crausz*, (1973) 57 Criminal Appeal Reports 466 (Stephen L.J.).

<sup>3</sup>*R. v. Holmes*, (1871) L.R.I.C.C.R. 334.

<sup>4</sup>*Stokes v. R.*, (1860) 105 C.L.R. 279.

<sup>5</sup>*Cf. R. v. Turner*, (1944) Kings Bench 463.

<sup>6</sup>Nokes, *Introduction to Evidence* (1967), page 149.

<sup>7</sup>Rule 616, Rules of Evidence of United States Courts and Magistrates.

<sup>8</sup>California Evidence Code, section 73.

<sup>9</sup>*Soloman v. Harmony Shortline & Motor Transport Company*, (1944) 349 Pennsylvania 420 (Pennsylvania Supreme Court).

which he was examined in chief. Of course, the action of the trial judge in this regard will not be reversed in the absence of an abuse of discretion or unless an obvious disadvantage results therefrom to the other party. In that case, by denying the agency of the operator of the bus, the defendant made it necessary for the plaintiffs to call the operator—an essentially hostile witness—"out of the camp of the enemy" in order to question him as to his employment. The examination-in-chief was confined to the nature of the employment of the operator, but the defendant took advantage of the situation created by the defendant himself and cross-examined the operator of the bus as to the facts of the accident. This course was strongly condemned, and the judgment was reversed and a new trial granted, by the Supreme Court of Pennsylvania.

The reason for this rule was thus stated in another case,<sup>1</sup> which also arose in Pennsylvania.

"The underlying reason for confining the scope of cross-examination is to permit order and method in the presentation of the case. Each party must have an opportunity to present his side of the case without the introduction of matters unrelated to his case in the chief and not touched upon in his evidence. The Pennsylvania rule makes the issues as clear as possible to the jury by reducing to a minimum the possibility of the intermingling of matters purely defensive in character with the facts of the plaintiff's case."

This rule, however, does not apply to the parties, the theory being that a party should not withhold matters affecting his trial.

History.

**77.13.** Restrictive cross-examination was a feature of English chancery procedure. The practice in England is summarized in Hinton,<sup>2</sup> cases on Evidence, as follows:—

"In *Dean of Ely v. Stewart*, 2 Atk. 44 (1740), the following statement was made by Lord Hardwicke: "Where at law a witness is produced to a single point by the plaintiff or defendant, the adverse party may cross-examine as to the same individual point, *but not to any other matter*; so in equity, if a great variety of facts and points arise, and the plaintiff examines only as to one, the defendant may cross-examine to the same point, but cannot make use of such witness to prove a different fact". This statement is probably correct as to the chancery practice of that period, when the written cross-interrogatories were almost as a matter of necessity based on the direct interrogatories. It seems, however, that Lord Hardwicke may have been mistaken as to the actual practice *at law*. In *Dikenson v. Shee*, 4 Esp. 67 (Nisi Prius, 1801), it was ruled by Lord Kenyon that a witness called by the plaintiff to prove one of the elements of his case was subject to cross-examination on a "distinct matter of defence. The editor has been unable to find a ruling by a court on the point."

## V. INCOMPLETE CROSS-EXAMINATION

Incomplete cross-examination.

**77.14.** A question often arises whether the evidence of a witness can be regarded as complete until he has been cross-examined or the opportunity for cross-examination has been fully availed of. In dealing with this question, a distinction should be made between various situations in which such evidence may come up before the Court.

<sup>1</sup>Conley, c. Murphy, (Supreme Court of Pennsylvania) (1936) 324 Pennsylvania 577.

<sup>2</sup>Hinton, Cases on Evidence (1931), page 267, note 71; cited by Ronald Carison, "Cross-Examination of the Accused" 52 Cornell Law Review 705, 708, footnote 6.

In the first place, where evidence given in a *previous* proceeding is sought to be made use of in a subsequent proceeding, section 33 specifically requires that in the previous judicial proceeding the right and opportunity of cross-examination should have been available.

In the second place, where evidence given at a *prior stage* of the *same* judicial proceeding is sought to be made use of, the position is the same by virtue of section 33. In these two situations, the earlier evidence is formally tendered, the witness having been dead or otherwise become unavailable.

The third situation, which is more frequent, arises where the evidence given in the *same* judicial proceeding has to be made use of for the purpose of arriving at conclusions of fact in that very proceeding. Difficulty may arise where a witness, though examined-in-chief, could not be cross-examined. The witness may die or become incapable of giving evidence, or leaves the country, or cannot be found. Literally taken, section 33 does not apply to this situation because the evidence is evidence in the very case and is not formally tendered. Technically, the evidence continues to be the evidence in the case<sup>1</sup> itself, but its probative value may be very small.

In *Rex v. Doolin*,<sup>2</sup> a prosecution witness was taken seriously ill while under cross-examination; his evidence was taken into consideration and it was held by the majority of the Judges that the conviction based on his evidence was good in law. This has been regarded as a leading case.

In *Davies v. Otty*,<sup>3</sup> the Master of the Rolls observed:

"The evidence of Sussannah Davies must be admitted. It appears that her evidence was given on the 28th August last year, and that she died two or three days afterwards, which made it impossible to cross-examine her; but there being no impropriety and nothing wrong in examining her, and no keeping her out of the way to prevent a cross-examination, I must receive her evidence and treat it exactly in the same way that I should the evidence of any other witness who from any cause whatever, either had not been cross-examined, or whom it was impossible to cross-examine."

The matter relates not to any rule of law, but to the weight to be attached to evidence.

## VI. CO-DEFENDANTS AND CO-ACCUSED

**77.15.** So much as regards the scope of cross-examination and the effect of incomplete cross-examination. As to the party to whom the right is available, the Act gives a right to cross examine a witness called by the "Adverse party".<sup>4</sup> This raises interesting questions in criminal cases. By virtue of the expression "adverse party", one accused person may cross-examine a witness called by another co-accused for his defence, when the case of the second accused is adverse to that of the first.<sup>5</sup> There might be many cases of injustice if that were not so. The section does not, however, make any special provision for the case of cross-examination of the *co-accused* or *co-defendant*. This matter bears some investigation.

<sup>1</sup>*Maharaja of Kolhapur v. Sundaram*, A.I.R. 1925 Mad. 497, 535.

<sup>2</sup>*Ahmed v. Jyoti*, A.I.R. 1944 All. 188(2), 190 (Allsop and Mathur, JJ.).

<sup>3</sup>*Mangal Sen*, A.I.R. 1929 Lah. 840.

<sup>4</sup>*Rex v. Doolin*, Jebb, S.C.C. 123.

<sup>5</sup>*Davies v. Otty*, (1865) 55 E.R. 875.

<sup>6</sup>*Ram Chand v. Hanif Sheikh*, (1894) I.L.R. 21 Cal. 401, 403 (Trevelyan & Rampini, JJ.).

<sup>7</sup>*Ram Chand v. Hanif Sheikh*, (1893) I.L.R. 21 Cal. 401, 403.

Examination  
co-accused.

77.16. Since cross-examination is described in the section in terms of the right of an "adverse party", the answer depends on the meaning of that expression. On the question whether an accused person who gives evidence on his behalf can be cross-examined by any of the other co-accused, neither the Evidence Act nor the Code of Criminal Procedure seems to contain a specific provision.

Though there is no reported decision on the subject, we can, having regard to the words "adverse party", assume that if one accused has given evidence against any other co-accused—that is to say, evidence implicating him, then the co-accused can claim the right of cross-examination of the accused who has given such implicatory evidence. But where the accused giving evidence has not given such implicatory evidence and their defences do not clash, is it permissible?

Position in Eng-  
land.

77.17. This question has arisen in England, and the currently accepted view is that even in such a case there is a right to cross-examine the accused at the instance of the co-accused.<sup>1</sup> The position has been stated by Cross<sup>2</sup> in these terms:—

"All parties have the right to cross-examine the witnesses not called by them whether or not the witness himself is a party, whether or not the witness has given evidence against the party seeking to cross-examine him and even though the witness is a co-accused."

The case of *R. v. Hilton*<sup>3</sup> and the observation of Lord Morris in an earlier case of *Murdock v. Taylor*<sup>4</sup> before the House of Lords, also indicate a trend in this direction.

Take the analogy of defendants. In the case of *Lord v. Colvin*,<sup>5</sup> the Vice-Chancellor consulted the whole of the Judges, and said: "The opinion of the whole of the Judges is that a defendant may cross-examine a co-defendant's witness." In *Allen v. Allen*<sup>6</sup> Lopes, L.J. after quoting this decision, observed:

"If a defendant may cross-examine his co-defendant's witnesses, *a fortiori*, he may cross-examine his co-defendant, if he gives evidence. If it is objected that there is no issue between a respondent and a co-respondent, the answer is that in most cases there is no issue between co-defendants, but still the right to cross-examine exists. In our judgment, no evidence given by one party affecting another party in the same litigation can be made admissible against that other party, unless there is a right to cross-examine, and we are at a loss to see why there should be any deviation from that rule in the Divorce Court."

77.18. In England, therefore, it would appear that when a witness has been intentionally called and sworn by either party, any other party has a right, if the examination-in-chief is either waived or closed, to cross-examine him. Or, to state the matter more neatly, any witness may be cross-examined by any party who did not call him.<sup>7</sup>

77.19. The right, therefore, of a defendant to cross-examine a co-defendant is, according to the English cases, unconditional and not dependent upon the

<sup>1</sup>*R. v. Hilton*, (1971) 3 All. E.R. 541, 543, (Court of Appeal, Criminal Division).

<sup>2</sup>Cross, Evidence (1974), page 227.

<sup>3</sup>*R. v. Hilton*, (1971) 3 All. E.R. 541, 543.

<sup>4</sup>*Murdock v. Taylor*, (1965) 1 All. E.R. 406; (1965) 2 Weekly Law Reports 425 (H.L.).

<sup>5</sup>*Lord v. Colvin*, 3 Drew. 222.

<sup>6</sup>*Allen v. Allen*, (1894) P.D. 248, 254.

<sup>7</sup>Phipson, Manual of Law of Evidence (1972), pages 282-283.

fact that the cases of the defendant and co-defendant are adverse, or that there is an issue between the defendant and his co-defendant.<sup>1</sup> If a defendant may cross-examine a co-defendant's witnesses, *a fortiori*, he may cross-examine his co-defendant, if the co-defendant gives evidence.<sup>2</sup>

**77.20.** It is well settled in England that the evidence of one party cannot be received in evidence against another party unless the latter had had an opportunity of testing the evidence by cross-examination.<sup>3</sup> It has been held<sup>4</sup> that all evidence taken, whether in examination-in-chief or any cross-examination, is common and open to all the parties. Since all evidence is common and that which is given by one party *may be used* for or against another party, it follows that the other party must have the right to cross-examine him.

Of course, the above proposition may require qualification where the law of evidence itself lays down *limitations* as to the *parties* against whom particular evidence can be used,—e.g. admissions.

Thus, in a suit for divorce, the fact<sup>5</sup> that the co-respondent's counsel has raised questions in cross-examination upon the contents of letters which had properly been admitted as evidence *against the respondent*, does not make the letters evidence against the co-respondent, since the respondents admission are no evidence against a co-respondent. But the general position is as stated above.

**77.21.** The points raised above relating to the accused and co-accused do not seem to have arisen in any reported case in India in criminal trials. However, on general principles, one could state that the position in India may not be substantially different. Irrespective of the question whether a defence witness has, in his examination-in-chief or cross-examination by the prosecution, given evidence unfavourable to the co-accused, the co-accused should be regarded as an "adverse party". Once a person is before the court, all other parties have the right to utilise his knowledge of facts.

Position in India.

**77.22.** As regards civil cases in India, the current view seems to be that, even if there is no issue between the co-defendants, each defendant has a right to cross-examine a witness of the other defendant.<sup>6</sup> Although sometimes it is stated that the right exists where a defendant's witness has made a *statement injurious to another defendant*, it would appear from the text books and authorities cited that the right exists even if he does not make any such injurious statement.<sup>7</sup> The position could hardly be different in criminal cases.

How far an accused person can, in his cross-examination, be asked questions not relevant to the facts in issue but throwing reflections on his *character*, is a matter which is governed by a special provision,<sup>8</sup> in England. This will require consideration later.<sup>9</sup>

## VII. CONCLUSION

**77.23.** The above discussion does not show any need for amending section 137. As to section 138, only a verbal change is required. The last paragraph should use the singular "witness" in view of the singular "him" which occurs in the section. We recommend that section 138 should be so amended.

Conclusion —  
Section 138 to be amended.

<sup>1</sup>Lord v. Colvin, 3 Drewery, 222, followed in Allen v. Allen, (1894) P.D. 222.

<sup>2</sup>Allen v. Allen, (1894) P.D. 222, 254.

<sup>3</sup>Allen v. Allen, (1894) Probate Division 248, 254.

<sup>4</sup>Lord v. Colvin, V. Brewery 222, cited by Woodroffe.

<sup>5</sup>Vrasa Pillai v. Elliamsi, (1925) 52 I.A. 372; A.I.R. 1925 P.C. 229.

<sup>6</sup>Mrs. Des Raj v. Puran Mul, A.I.R. 1975, Delhi 111, para. 16 (Sachar J.).

<sup>7</sup>Sohan Lal v. Gulab Chand, A.I.R. 1966 Raj 229, 232, para. 27 (Jagat Narain J.).

<sup>8</sup>Section 1(f)(iii), Criminal Evidence Act, 1898, (Eng.).

<sup>9</sup>Sections 145 to 148.

## CHAPTER 78

### CROSS-EXAMINATION — WHO CAN BE CROSS-EXAMINED — SECTIONS 139 AND 140

#### SECTION 139

**78.1.** A summons may be issued to a person either for giving oral evidence or for production of documents.

Under section 139, a person summoned to produce a document does not become a witness by the mere fact that he produced it, and he cannot be cross-examined unless and until he is called as a witness. With this section may be read provisions in the two procedural Codes<sup>1,2</sup> which, in substance, enact that—(i) any person may be summoned to produce a document, without being summoned to give evidence; and (ii) any person, summoned merely to produce a document, shall be deemed to have complied with the summons, if *he causes such documents to be produced instead of attending personally to produce the same.*<sup>3</sup>

**78.2.** An omission to produce a document when ordered by a court is an offence under section 175, Indian Penal Code. Omission to attend the court in obedience to a summons is an offence under section 174 of the same Code.

If a witness attends the Court, section 174 of the Penal Code does not apply. In a Bombay case<sup>4</sup> a witness had been summoned to produce a document. He came to court and stated on oath that he could not produce it. The Judge, disbelieving him, fined him Rs. 85/- under section 174, Indian Penal Code. It was, however, held that the section was not applicable, though the witness could have been punished under section 175, Indian Penal Code, or section 480, Code of Criminal Procedure, 1882 (then in force). He could also, if guilty of falsehood, have been prosecuted for giving false evidence in a judicial proceeding.

No change needed.

**78.3.** We have no further comments on section 139.

#### SECTION 140

**78.4.** Under section 140, witnesses to character may be cross-examined and re-examined.

It may be noted that the practice in England is not to cross-examine, except under special circumstances, witnesses who are called merely to speak to the character of the accused: but there is no rule which forbids the cross-examination of such witnesses. Presumably, the practice of not cross-examining such witnesses may be due to a desire not to prolong the proceedings by spending an unreasonably long time in collateral inquiries. Section 140 was, apparently, considered necessary by way of abundant caution in order to avoid any argument that there is any prohibition in law against the cross-examination of witnesses to character.

No changes are needed in the section.

<sup>1</sup>Order 16, Rules 6 and 15 of the Code of Civil Procedure, 1908.

<sup>2</sup>Section 94(2), Cr. P.C. 1898, and section 91(2) in 1973 Code.

<sup>3</sup>Emphasis supplied.

<sup>4</sup>In *re Prem Chand Daulatram*, (1888) I.L.R. 12 Bom. 63.

**LEADING QUESTIONS — SECTIONS 141 TO 143**

**79.1.** Besides regulating the content of the inquiry and the order of examination of witnesses, our system of trial regulates the method of inquiry. It requires that the parties proceed by question and answer—and they must also adhere to certain forms of questions. And the restrictions as to the nature of questions are far more severe on the side that has called the witness to the stand than on the adverse side. The examination of one's own witnesses must be made without the use of leading questions,—that is, questions which suggest their own answers. Such questioning may often lead to injustice, at the hand of the side calling the witness. A typical leading question is, "was the defendant's black car going about fifty miles an hour when you first saw it on the right, bearing down on you?" The witness may answer 'Yes', but it is the questioner's version of the story that the court hears. Introductory.

This consideration has led to an important point which marks the difference between examination-in-chief and cross-examination—the permissibility of leading questions in the latter, and their impermissibility in the former.

**79.2.** There are three sections in the Act dealing with leading questions—sections 141 to 143. Under section 141, any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question. Sections 141 to 143.

Section 142 provides that leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in re-examination, except with the permission of the Court.

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

Under section 143, leading questions are permitted in cross-examination.

**79.3.** The principal reason why leading questions in examination or re-examination are generally improper is that the witness is presumed to be biased in favour of the party examining him and might thus be prompted. In cross-examination, as the reason generally ceases, so does the rule.<sup>1</sup> Rationale.

**79.4.** A question is leading when, by its substance or from it suggests a desired answer, or, as some of the cases say, "when it puts the thoughts or words in the mouth of the witness to be echoed back". If a question is made up of an unqualified statement of an assumed fact, either unproved or contested followed up by an interrogation as to that fact, it is almost necessarily leading and objectionable.

A question which purports to state a fact, and then suggests an interpretation of that fact, is leading. A question which incorporates a reference to an unproved or disputed fact, and suggests an affirmative answer, is leading. A similar question which suggests a negative answer is likewise objectionable.

**79.5.** A question is not necessarily leading merely because it calls for a categorical answer, if it is so worded as not to indicate the answer desired. Sometimes, a compound question, if free from suggestion, is not leading; such, for

<sup>1</sup>Woodroffe.

example, as, "State whether or not there was any conversation between you at that time, and, if so what it was".

Similarly, a question put in the alternative, as, for example, "Was he or was he not running at the time?" is not necessarily leading.

Definition  
Stephen, by

**79.6.** Stephen<sup>1</sup> defined a leading question as one which either suggests the answer to that question or suggests the existence of disputed facts as to which the witness is to testify. The definition in the Act, quoted above (section 141), is briefer, but it substantially brings out the essence, the essence being the tendency of the question to "lead" the witness to the expected answer.

What are leading  
questions? Ben-  
tham's view.

**79.7.** "A question", says Bentham<sup>2</sup>, "is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him? It is clear that under this form every sort of information may be conveyed to the witness in disguise.

"It may be used to prepare him to give the desired answers to the questions about to be put to him: the examiner while he pretends ignorance and is asking for information, is, in reality, giving instead of receiving it.<sup>3</sup>

"Thus also, a witness called to prove that A stole a watch from B's shop must not be asked, "Did you see A enter B's shop and take a watch?" The proper inquiry is, what he saw A do at the time and place in question: "A question shall not be so propounded to a witness as to indicate the answer desired".

Test of affirma-  
tive or negative  
answer.

**79.8.** It is usually stated — following Lord Ellenborough<sup>4</sup>, — that if questions are asked to which the answer "Yes" or "No" would be conclusive, then those questions would certainly be objectionable. The matter, however, is not so simple. As has been pointed out by Cross,<sup>5</sup> if the question "Did you notice any traffic" is put, the answer "Yes" or "No" would be conclusive; but the question should not be regarded as a leading question if it is put to a witness who had just said that he was standing on the side of the road. Much, therefore, depends on what the point at issue is, and how the question is related to it. That is why Best said that "leading" is a relative and not an absolute term.

It has often been declared<sup>6</sup> that a question is objectionable as leading which embodies a material fact and admits of answer by a simple affirmative or negative. While it is true that a question which may be answered by "Yes" or "No" is generally leading, it is not always so, as we have pointed out.

There may be such questions which in no way suggest the answer desired, and to which there is no real objection. On the other hand, leading questions are by no means limited to those which may be answered by "Yes" or "No". A question proposed to a witness in the form "whether or not", that is, in the alternative, is not necessarily leading. But it may be so, when proposed in that form, if it is so framed as to suggest to the witness the answer desired.<sup>7</sup>

<sup>1</sup>Stephen, Digest of Law of Evidence, Article 140.

<sup>2</sup>Bentham, Rationale of Judicial Evidence, cited in Woodroffe.

<sup>3</sup>U.S. v. Dickinson, 2 McLean, 331 (Amer), (McLean, J.) cited in Sarkar.

<sup>4</sup>Nichollas v. Dowding and Kemp. (1855) 1 Stark 81.

<sup>5</sup>Cross, Evidence (1974) page 200.

<sup>6</sup>See Taylor, Evidence, S. 1401; Greenleaf, Evidence, S. 434, cited in Woodroffe.

<sup>7</sup>Burr. Jones, Evidence, S. 815; Best, Evidence S. 641, cited in Woodroffe.



Cornish, C. J., in *Audibert v. Michaud*,<sup>1</sup> observed—

"A question is not necessarily leading because it can be answered by "Yes" or "No". The presiding justice, who has an unprejudiced view of the entire situation, is allowed a wide discretion in this respect. The legitimate object of all examination of witnesses is the eliciting of the truth; and the danger which arises from so-called leading questions is not that the truth may thereby be extracted in an untechnical manner, but that the untrue may be stated by a witness, who is either indifferent to his oath or overzealous in the cause and eager to adopt any suggestion made by the attorney although not in accordance with the fact. It is not the mere leading, but the leading into temptation, that is to be deprecated and avoided."

79.9. Notwithstanding the general rule that an examiner-in-chief cannot ask leading questions, an exception has been made in the interests of justice. Leading questions are often an indispensable prelude to further interrogation—which is the reason why, in many situations, the prohibition against leading questions in examination-in-chief is dispensed with. Chief amongst these situations are those relating to questions concerning introductory or undisputed matters, questions of identity, and questions which are designed to bring a witness to the point. In addition, where the matter has been sufficiently proved and it is intended to call a particular witness to confirm the evidence already given or—to take the converse case,—where a matter has been vouched for by one witness and it is intended to call another witness to contradict it, the witness now called can be asked a leading question without much objection.

Leading questions when permissible.

For example,<sup>2</sup> if a witness is allowed to remain in court while a previous witness has given evidence about the contents of a letter, he may be asked leading questions as to the letter. When the time comes for the second witness to give his evidence in chief, he says, that he wrote the letter; he can then be asked whether the letter contained a particular passage. Similarly, where a previous statement made by a person is tendered by witness A, and witness B was present when the previous statement was made, witness B may be asked the formal question whether the statement tendered is of witness A. In these cases, there is a reasonable basis for dispensing with the prohibition against leading questions in examination-in-chief, either because the reasons why leading questions are disallowed do not operate with full force or because the asking of leading questions would not cause prejudice in the particular situation.

79.10. While leading questions are, under section 143, permissible in cross-examination, yet, even in cross-examination, those which assume the existence of any *disputed facts* might well be disallowed in the interests of justice. The cross-examiner would then not be "leading" the witness, but misleading him.

Cross-examination.

79.11. So much as regards the present law. Administered wisely, it will not, in general, lead to injustice; but there is one lacuna in section 143 which must now be discussed. There is a categorical provision in that section to the effect that leading questions may be asked in cross-examination. This provision may be based on the assumption that a witness under cross-examination is not favourable to the party cross-examining. In a broad and general way, this, may be true. There must, however, be cases where this assumption is not true, and this suggests the query whether this rule should be allowed to retain its *present unrestricted scope*.

Leading questions in cross examination of favourable witness.

<sup>1</sup>*Audibert v. Michaud*, 119 Ms. 295; 111 Atl. 305. (American case) cited by Field.  
<sup>2</sup>*Courteen v. Touse*, (1807) 1 Camp 40.

Although some commentators seem to be of the view that the rule is, even now, not unrestricted in its scope, the text of the section does not make any such exception. If an exception is to be recognised as a matter of policy, it would be better to provide for it expressly in the section. The question to which we address ourselves is whether such a restriction should be imposed.

It will be noted that we are not concerned, in dealing with this question, with the right of a party calling a witness to cross-examine that witness, in the situation where a witness is declared to be "hostile" to use an expression in common use though not sanctioned by legislative usage.<sup>1</sup> We are concerned with the question whether there is need for a restriction on the right of the opposite party. The precise question is—should the court have a power to restrain a party cross-examining a witness who shows that he is biased in favour of the cross-examining party, from putting leading questions?

*Prima facie*, it would appear that in such cases the court should have a discretion to forbid leading questions, in view of the bias of the witness. Without some such restriction, the cross-examiner would be able to extract from the witness that version of the facts which the cross-examiner desires to secure. Though ostensibly "receiving" the answer, the cross-examiner gives the answer. Should a process be allowed where a witness too willing to help the party cross-examining is encouraged to do so?

Provisions  
California.

in **79.12.** We did consider this approach worth serious consideration. In this connection, attention was drawn to the California Evidence Code,<sup>2</sup> which has following provisions as to leading questions :

"Section 764. A 'leading question' is a question that suggests to the witness the answer that the examining party desires.

Section 767. Leading questions—Except under special circumstances where the interests of justice otherwise require :

- (a) A leading question may not be asked of a witness on direct or re-direct examination.
- (b) A leading question may be asked of a witness on cross-examination or re-cross-examination."

It may be pointed out that clause (b) of section 767 of the California Evidence Code, quoted above, is also subject to the excepting words contained in the opening paragraph of the section.

**79.13.** In the U.S.A.<sup>3</sup>, the court may forbid the asking of leading questions in cross-examination, where the witness is biased in favour of the cross-examiner and would be unduly susceptible to the influence of questions that suggested the desired answer.

Provision in Ceylon.

**79.14.** In this connection, it is also of interest to note revised section 143 of the Ceylon Evidence Ordinance<sup>4</sup>—

"143. (1) Leading questions may be asked in cross-examination, subject to the following qualifications :

<sup>1</sup>Section 154.

<sup>2</sup>Sections 764 and 767. California Evidence Code.

<sup>3</sup>Wigmore, Evidence S. 773 (3d ed. 1940), cited in Louisell, Principles of Evidence and Proof (1972), page 393.

<sup>4</sup>See Sarkar on Evidence.

“(a) the question must not put into the mouth of the witness the very words which he is to echo back again ; and

(b) the question must not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact.

(2) The court in its discretion may prohibit leading questions from being put to a witness who shows a strong interest or bias in favour of the cross-examining party.”

**79.15.** On a consideration of the merits of the matter, and in order to prevent abuse of cross-examination, a suggestion was made to us that section 143 should be revised by adding a proviso empowering the court to prohibit a leading question to a biased witness or in a misleading form. The precise suggestion was to revise section 143 as under :—

Suggestion considered, consi-

“143. Leading questions may be asked in cross-examination.

*Provided that the court may prohibit a leading question from being put to a witness—*

“(a) *if the witness shows a strong interest or bias in favour of the party cross-examining the witness ; or*

(b) *the particular question is objectionable, as likely to mislead.”*

One of us,<sup>1</sup> however, does not consider the suggested amendment necessary, and we are not inclined to recommend the suggested amendment in the absence of unanimous agreement.

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<sup>1</sup>Shri Dhavan.

## MATTERS IN WRITING USED IN EXAMINATION

## SECTION 144

Introductory.

**80.1.** Sometimes, when a witness under oral examination is giving evidence, questions arise which involve the existence or use of written statements. The witness may be giving evidence of a fact as to which, it is believed, there also exists a written evidence in the form of a written contract, grant or disposition of property or other writing, though the witness does not make a reference to the writing at all.<sup>1</sup> In such a case, it is necessary to ensure that the factual position is before the Court. Or, what the witness states in court is found to differ from what he stated on a previous occasion in writing; in such a case, the adverse party may naturally like to cross-examine the witness with reference to the writing containing the contradiction.<sup>2</sup> Then, there may be situations where the question is not of conflict with the previous statement of the witness, but of confirming his testimony by a previous statement made by him in writing; this time, the party calling the witness may be interested.<sup>3</sup> Apart from these situations, in which the party calling, or the adverse party, is interested, the witness may, in order that he may be able to state all facts in detail, like to refresh his memory by a previous writing that was seen or approved by him. All these situations involve the question of inter-relationship between oral evidence of the witness and previous written statements to which the witness is a party or of which he is aware, and it becomes necessary for the law to lay down rules as to the procedure to be followed in the various situations. On some of these matters, rules are also found in earlier sections<sup>4</sup> as to the use of the writing. But the law must also see to it that the rules contained in the earlier sections are observed at the stage of the examination of each witness. On some of the situations, the provisions of the Act discussed so far, are silent. The Act, therefore, proceeds to lay down, in the sections commencing with section 144, rules dealing with these situations. The situations themselves vary but the object of the relevant provisions, stated very broadly, is either to secure the best evidence or to ensure that what comes on the record is the truth and the whole truth, and that the best possible use is made of a previous record which, being of more permanent and reliable character, should not be disregarded.

Section 144.

**80.2.** Of the various situations mentioned above, the first situation — evidence as to matters in writing — is dealt with in section 144. The operative provision in that section enacts that any witness may be asked, whilst under examination, whether a 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 (so contained) or if he is about to make a 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 to entitle the party to

<sup>1</sup>Section 144.<sup>2</sup>Section 145.<sup>3</sup>Section 157.<sup>4</sup>Sections 65, 91 and 92.

call the witness to give secondary evidence of it. In stating the substance of the section, we have adhered to the language of the section as it now stands; but the section is not very happily expressed, as we shall show later.

80.3. According to Cunningham<sup>1</sup>, section 144 merely points out the manner in which the provisions of sections 91, 92 and 65 as to the exclusion of oral or documentary evidence may be enforced by the parties to the suit. If the adverse party does not object, it is still the duty of the judge to prevent such oral evidence—a duty which can be deduced from the general provision in the Act that the judge must exclude inadmissible evidence (section 165, second proviso).

80.4. If the case is tried in a court in which there are no properly qualified practitioners, or if none be employed in the case, or if the adverse party, himself ignorant of the law and of his privilege, does not object—should the court disallow the evidence until the document be produced or until facts have been proved which entitle the party concerned to give secondary evidence? This query often arises and, as stated above, the court should certainly do so,<sup>2</sup> since the Act declares it to be the duty of the judge, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties. Several provisions of the Evidence Act lead to this result—e.g. the last portion of the second proviso to section 165, to which we have already referred, section 59, the word “must” in section 64, section 65 and the word “shall” in section 66.

On principle also, where evidence has been received in direct contravention of an imperative provision of the law, acquiescence, waiver or estoppel may not apply.<sup>3</sup>

80.5. So much as regards the main paragraph of the section. The Explanation to the section makes it clear that 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. It is obvious that *if* such a case what the witness is deposing is not “the contents of any documents”, but the statements made by other persons about the contents of documents. These statements are admissible, not as proof of the contents of the documents, but as proof of some other relevant fact—motive in the case put in the illustration to the section. Under the 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. The witness, in the case put in the illustration, is not deposing to any terms of a document, and is not giving extrinsic evidence affecting the contents of a document. The terms of the document are not material. The really material fact is the mental element—A’s motive—which is discernible from his statement. The statement of A is received independently in evidence as original evidence, and not because it tends to prove or disprove the terms of any document. The illustration really deals with a declaration about a mental element<sup>4</sup> made contemporaneously.

Nor can objection be made to evidence of that statement on the score of hearsay. The distinction between hearsay and original evidence is well-known.

<sup>1</sup>Cunningham, Evidence, Note to section 144, cited in Woodroffe.

<sup>2</sup>See Woodroffe.

<sup>3</sup>*Shiv Chandra Singh v. Gour Chandra Pal*, 27 G.W.N. 134.

<sup>4</sup>Section 14.

It is nowhere better stated than in the case of *Subramaniam v. Public Prosecutor*,<sup>1</sup> where it was observed that—

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, *but the fact that it was made.*”

The illustration satisfied this test. These points do not necessitate any amendment of the section.

Defective drafting.

**80.6.** There is, however, one matter in respect of which the section is in need of improvement. The scope of the section is really two-fold; first, it is intended to apply to a situation where a contract, grant or other disposition of property as to which a witness is giving evidence is contained in a document. The second situation is where a witness is about to make any statement as to the contents of “any document”, (which in the opinion of the court, ought to be produced). In both these situations, the adverse party has a right to object to such evidence being given until the document is produced or a case is made out for secondary evidence. The first situation is confined to contracts, grants and dispositions of property etc. while the second situation is not so confined.

Recommendation.

**80.7.** In regard to the first situation, the word “evidence” is used, and, for the second situation, the words “the statement” are used, in the earlier half of the section. But, in the latter half, only the expression “such evidence” is used. This is not a satisfactory way of drafting. Besides, it would be conducive to clarity if the section is recast to deal with the two distinct situations separately. The following redraft of the section is recommended so far as the operative part is concerned—

“144. (1) 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, 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; *and if, in the opinion of the court, the document ought to be produced,<sup>2</sup> the objection shall be upheld.*

(2) If a witness, whilst under examination, is about to make any statement as to the contents of any document, the adverse party may object to such *statement being made* 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, *and, if in the opinion of the court, the document ought to be produced, the objection shall be upheld.*”

(Explanation and illustration as at present).

**80.8.** We recommend that the operative part of the section should be recast as above, while retaining the present Explanation and illustration.

<sup>1</sup>*Subramaniam v. Public Prosecutor*, (1956) 1 W.L.R. 965, 969 (P.C.).

<sup>2</sup>The underlined words do not occur in the present section in connection with contracts etc. But they seem to be worth adding. See, for examples the provisos to section 91. Also consider the case where the document is already admitted by adverse party.

## CONTRADICTION OF WITNESSES — SECTION 145

## I. INTRODUCTORY

**81.1.** For understanding the significance of section 145, some discussion is needed about the purposes of cross-examination. One of the purposes of cross-examination is to impeach the credibility of a witness.<sup>1</sup> One method of impeaching credibility is contradiction of the witness by his previous inconsistent statements. This mode of contradiction finds an express mention in section 155(3). The procedure in that regard is dealt with in section 145, so far as *written statements* are concerned. The use of this section, then, is for impeaching the credibility of a witness by contradiction.

**81.2.** The credibility of a witness can be impeached by direct attacks upon the character of witnesses to discover intentional falsification. But much more is involved.<sup>2</sup> Everything relating to a witness which discloses the probability of inaccuracy or error in his testimony<sup>3</sup> is a ground for challenging his credibility. Therefore, the testing of credibility is directed to the diversified factors which enable the triers of fact intelligently to estimate the value of the testimony by judging the quality of the witness and his opportunity to know the facts.

Credibility -- its wide scope.

For example, the mental deficiencies of a witness are considered in determining his credibility.<sup>4</sup> Professor Weichen has, in an able article showing the greater need for expert psychiatrists, stated :

"That the court has found the witness to possess minimal degree of capacity to testify should not foreclose a showing that because of mental defect or disorder, his testimony is so untrustworthy that it should be given little weight. Some disordered persons, such as the psychopathic liar, may be so convincing that they can easily pass the test of competency; but it would be unjust to deny the other party the opportunity to show the existence of the condition and its effect upon reliability of testimony. Because modern practice admits, as competent to testify, persons proved or conceded to be mentally ill to some degree, a liberal admission policy for evidence on the effect of mental conditions upon credibility is needed."

**81.3.** What, then, are the mental conditions that are relevant for judging credibility? These are multifold, and were discussed by Judge Medina in the *Communist Conspiracy case*.<sup>5</sup> He has observed:

Element in judging credibility.

"By what yardstick and in accordance with what rules of law are you to judge the credibility of the witness?"

"This judging of testimony is very like what goes on in real life. People may tell you things which may or may not influence some important decisions on your part. You consider whether the people you deal

<sup>1</sup>See discussion as to section 138, *supra*.

<sup>2</sup>Mason Ladd, "Impeachment of Witness" (1967), 52 Cornell L. Quart. 239, 242.

<sup>3</sup>Weinstein, "Some difficulties in devising Rules for determining truth in judicial trials" 66 Col. Law Rev. 223, cited by Mason Ladd, "Impeachment of Witness" (1966), 52 Cornell L. Quart. 239, 242.

<sup>4</sup>Weichen, quoted in Mason Ladd, "Impeachment of Witness" (1967), 52 Cornell L. Quart. 239, 242.

<sup>5</sup>*United States v. Foster*, 9 F.R.D. 367, 388-90 (S.C.N.Y. 1949) cited by Mason Ladd, "Impeachment of Witness" (1967), 52 Cornell Law Quarterly 239, 240, footnote 5.

with had the capacity and the opportunity to observe or be familiar with and to remember the things they tell you about. You consider a person's demeanour, to use a colloquial expression, you "size him up" when he tells you anything; you decide whether he strikes you as fair and candid or not."

"Then you consider the inherent believability of what he says, whether it accords with your own knowledge or experience. It is the same thing with witnesses. You ask yourself if they know what they are talking about."

"You watch them on the stand as they testify and note their demeanour. You decide how their testimony strikes you."

**Wigmore's view.**

**81.4.** Of testing the inherent believability of a witness, one method is contradiction. It may not be inappropriate to note that according to Wigmore,<sup>1</sup> the end aimed at by impeaching evidence of this kind is the same as that aimed at by impeaching evidence of specific error, namely, to show the witness to be, in general, capable of making errors in his testimony, for, upon perceiving that the witness has made an erroneous statement upon one point, we are ready to infer that he is capable of making an error upon other points. According to Wigmore, the general end obtained is the same indefinite end obtained by impeachment by specific evidence, that is, some undefined capacity to error which may be a moral disposition to lie, partisan bias, faulty observation, defective recollection or any other quality. No specific defect is indicated, but each and all are hinted at.

The primary object of contradiction is thus to cast a doubt on the strength of the evidence. Contradictory statements are not necessarily put in to show falsehood. That a person contradicts himself does not imply that he is telling the untruth, and even if, in the circumstances, it suggests untruth, it does not imply that there is untruth in every particular narrated by the witness.

The maxim "*Falsus in uno, falsus in omnibus*," that is, "he who speaks falsely on one point will speak falsely on all" is often cited, but that may not be universally true. The maxim contains in a loose fashion a kernel of truth which no one needs to be told, and is not applicable in all cases. The real value of contradiction lies in its shaking the belief of the Court in the perception and recollection of the witness.

## II. SECTION 145 - HISTORY AND GIST

**Introductory.**

**81.5.** Five sections, namely, sections 138, 140, 145, 148 and 154, are relevant in regard to impeaching the credibility of a witness by cross-examination.<sup>2</sup> We have already considered sections 138 and 140. Section 145 may now be considered.

**81.6.** Previous statements in writing — whether in court or elsewhere — which are inconsistent with his present evidence, are the subject matter of the section. Wigmore called such inconsistent statements "self-contradictions". The law is that<sup>3</sup> prior inconsistent statements can be proved either out of the mouth of the witness himself in cross-examination or, where they relate to facts relevant to the merits of the case, by the extrinsic evidence of other witness or documents.

<sup>1</sup>Wigmore, para 1017.

<sup>2</sup>*Husseiniah v. Yerraiiah*, A.I.R. 1954 A.P. 39, 40, para. 7 (Subba Rao, C.J.).

<sup>3</sup>Section 155(3).



81.7. The procedure in this regard in India in regard to *written statements* is Procedure dealt with in section 145, which incorporates two propositions, (i) a witness may be cross-examined without showing the previous writing, (ii) if it is intended to contradict him, the writing must be shown to him. We are stating very briefly the gist of the section in order to draw attention to the significance of the section.

81.8. In so far as the section permits cross-examination as to a previous Utility. written statement without the writing being shown to him or being proved, the utility of the section is limited. If the witness denies having made any written statement, but later on, on being shown the writing, admits it, that is a reflection on his memory. In so far, however, as the writing is used to contradict him, after following the procedure laid down in the section in the latter half, the utility of the section is far greater, inasmuch as whatever he said in court, if it is contradicted by the writing, loses its value—though, of course, the previous written statement does not thereby become substantive evidence in itself.<sup>1,2</sup>

81.9. Section 145 partly modifies the rule laid down in *Queen's case* — a Queen's case. rule which, in England, was modified by statute in 1865. A preliminary analysis of what is known as the rule of the *Queen's case*<sup>3</sup> is required for a comprehensive understanding of the use of inconsistent statements for impeachment.

In that case,—so far as is material,—it was held that the witness cannot be cross-examined at all without the writing being shown.

The rule of the *Queen's case* confused<sup>4</sup> the principles applicable to the best evidence rule with principles applicable to cross-examination concerning the terms of a writing of the witness, when he is being examined about the writing only for the purpose of discrediting his testimony given in court. Under the best evidence rule, where the writing itself is the subject of inquiry, the proof of the contents of the writing is the document itself. Inquiry through secondary sources as to its content cannot be made until it is shown by acceptable proof that the original document is unavailable.

81.10. If, however, the purpose of the examination into the content of the document is to discredit the witness about matters stated therein cross-examination as to whether he wrote it and what he said in it may be a most effective method of determining his credibility, if he denies making the writing or states its content to be something different than in fact it is.

The *Queen's case* held, *inter alia*, that the writing should be shown to the witness before permitting interrogation upon its content, thus eliminating what may be an effective part of the impeachment. Likewise, in reference to an oral statement made out of court, counsel may, on cross-examination, prefer, for the purpose of impeachment, first to ask the witness what he had said, if anything, rather than confront him initially with the statement. In the situation either of a writing or of an oral statement, if the witness were asked what he said before being confronted with the statement, he might give a different story, thus disclosing his desire to evade the effect of what he had said previously.

<sup>1</sup>*Melappa v. Guramma*, A.I.R. 1956 Bom. 129.

<sup>2</sup>See para 81.12, *infra*.

<sup>3</sup>*Queen's case*, (1820) 2 Br. & B. 284; 129 Eng. Rep. 976 (Common Pleas).

<sup>4</sup>*Mason Ladd*, "Impeachment of Witness" (1967) 52 Cornell L. Quart. 238, 246.

It is for this reason that, as already stated,<sup>1</sup> section 145 modifies, in part, the rule in *Queen's case*.

### III. ENGLISH LAW

Inconsistent statements in England.

**81.11.** So much as regards the gist of section 145. It may be of interest to compare the English law. In England, the present law is this<sup>2</sup>—if a witness is asked whether he has made a former statement, relative to the subject-matter of the proceeding (that is, not merely relating to credit), which is inconsistent with his present testimony, the circumstances of the supposed statement being mentioned to the witness, and he does not admit that he made the statement, proof may be given that he did make it.<sup>3</sup>

The statement may have been oral, and may be proved by oral evidence.<sup>4</sup> If the statement was made in writing or reduced to writing, the witness need not be shown the writing,<sup>5</sup> unless it is intended to contradict him, when his attention must be called to the parts of the writing which are to be used for contradicting him.

He may be handed the paper, told to look at it, and asked if he still adheres to his previous answer.<sup>6</sup>

The judge may require the writing to be produced, and may make such use of it for the purpose of the trial as he thinks fit.<sup>7</sup> It will be produced in any event if it has to be proved to contradict the denial of the witness. Even if the witness admits the inconsistency, counsel for the party calling the witness may require that the document shall be produced, and any privilege attaching to it may be waived by its use in cross-examination.<sup>8</sup>

The principal statutory provisions are to be found in the Criminal Procedure Act, 1865, sections 4 and 5. These sections apply in both civil and criminal cases. Section 4 concerns oral statements, and section 5 concerns written statements. The two sections read—

“4. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

“5. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention

<sup>1</sup>Para 81.9, *supra*.

<sup>2</sup>Nokes, *Introduction to Evidence* (1967), page 146.

<sup>3</sup>Criminal Evidence Act, 1865, section 4; *R. v. Hart*, (1957) 42 C.A.R. 47, 50, *Subject to rebutting evidence, R. v. Whelan*, (1881) 14 Cox C.C. 595.

<sup>4</sup>*R. v. Hart*, (1957) 42 C.A.R. 47, 50, cited by Nokes, *Introduction to Evidence*, (1967), page 146.

<sup>5</sup>He cannot insist on seeing it: *North Australian Territory Co. v. Goldsborough Port & Co.*, (1893) 2 Ch. 381, 386 (C.A.).

<sup>6</sup>Criminal Procedure Act, 1865, section 5; *R. v. Yousry* (1914) 11 C.A.R. 13, 18, *But it is not evidence against another person: see R. v. Smith*, (1962) Crim. L.R. 844, C.C.A.

<sup>7</sup>Criminal Procedure Act, 1865, section 5.

<sup>8</sup>*Burnell v. British Transport Commission* (1956) 1 Q.B. (C.A.).

must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit".

The Civil Evidence Act<sup>1</sup> makes previous inconsistent statements admissible evidence of the truth of what they assert. In criminal cases, the former rule that they go only to show inconsistency still continues to apply.

#### IV. USE OF PREVIOUS STATEMENTS

**81.12.** Previous contradictory statements of parties are useful as admissions also. But, in the case of other witnesses, impeaching the statements of non-party witnesses cannot be considered as proof of the facts stated in the declaration. They are limited only to discrediting the testimony which the witness has given in court. The impeaching statements of a non-party witness are *confined to discrediting the testimony he gives in court*. The usual reason given for this position is that the out-of-court statements are hearsay.<sup>2</sup>

Use of impeaching statement — not substantive evidence.

However, it may be mentioned that in England, in civil cases, previous written statements are, by statute, made general evidence,<sup>3</sup> as already stated.

**81.13.** This position may create problems in jury trials, since a jury may find it difficult to distinguish between the impeaching effect and the substantive effect. In *Bartley v. United States*,<sup>4</sup> Judge McGowan observed:

Problems in jury trials.

"The error resides, rather, in the treatment of the statutory purpose for which the prior inconsistent statement was admissible. This is stated in terms to be that "only of affecting the credibility of the witness". The differentiation, of course, is between this rigorously limited objective, and the one of proving as a fact what is contained in the statement. The crucial character of this distinction has been recognised and emphasised by this Court. . .

"Without the protection of an admonition or instruction from the court to the latter end, we cannot say that the jury did not give weight, when it was not entitled to do so, to the prior written statement and feel itself free to choose between the conflicting versions".

**81.14.** The position, therefore, has not escaped criticism. In *United States v. De Sisto*,<sup>5</sup> Judge Friendly expressed approval of the use of prior inconsistent statements for substantive purposes, stating:

"The sanctioned ritual seems peculiarly absurd when a witness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge of his second; to tell a jury it may consider the prior testimony as reflecting on the varacity of the later denial of relevant knowledge but not as the substantive evidence, that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this the orthodox rule defies the dictate of common sense that 'the fresher the memory, the fuller and more accurate it is'."

<sup>1</sup>Section 3(1)(a), Civil Evidence Act, 1968.

<sup>2</sup>Mason Ladd, "Impeachment of Witness" (1967), 52 Cornell L. Quart. 239, 249.

<sup>3</sup>Section 3, Civil Evidence Act, 1968 (*supra*).

<sup>4</sup>*Bartley v. United States*, 319 F. ed. 717, 719, 720 (D.O. Cir. 1963), cited by Mason Ladd, "Impeachment of Witness" (1967), 52 Cornell Law Quart. 239, 249.

<sup>5</sup>*United States v. De Sisto*, 329 F. ed. 929, 933 (2d Cir.), cert. denied, (1964) 377 U.S. 979.

It is, however, unlikely that this approach will find many adherents in India. Moreover, since there are no juries in India, the criticism becomes inapplicable to India.

#### V. POINTS FOR CONSIDERATION—ORAL STATEMENTS

**81.15.** Reverting to section 145, we may state that while the principle underlying the section does not require modification, certain questions of detail arise, namely—

- (a) (i) Is the section applicable to oral statements?
- (ii) In particular, is the section applicable to tape-records?
- (b) What is the position regarding documents which are lost?

**81.16.** As to point (a) (i), — oral statements, — it is to be noted that the section relates only to previous statements made in, or reduced into, writing. The section does not cover the entire ground covered by section 155(3). If the previous statement was oral and not reduced to writing, it can, under section 155(3), be proved to impeach the witness's credit, if such former statement be inconsistent with any part of the witness's evidence which is liable to be contradicted.<sup>1</sup> This being a permissible course, some guidance should be provided in the Act as to whether the witness should be confronted with the statement.

**81.17.** Unfortunately, the Act makes no express provision to the effect that the witness's attention must first be drawn to the previous oral statement and the witness asked whether he made such a statement, before his credit can be impeached by independent evidence. As Field has pointed out,<sup>2</sup> there can be little doubt that here also the circumstances of such previous statement that are sufficient to designate the particular occasion ought to be mentioned to the witness and he ought to be asked whether or not he made such a statement.

In the English case of *Carpenter v. Wall*,<sup>3</sup> Patterson J. observed—

"I like the broad rule that when you mean to give evidence of a witness's declaration, for any purpose, you shall ask him whether he ever used such expression".

Tape records.

**81.18.** Coming to point (a) (ii) — tape records, — we may note that the proposition that tape-records are admissible, is not now disputed,<sup>4</sup> though certain safeguards may have to be observed to ensure that there has been no tampering. That they can be used for contradiction is also not disputed.<sup>5</sup> But the procedure to be followed when they are used for contradiction is not laid down in the Act and ought to be laid down. Section 145, taken literally, does not cover them. In *Rup Chand*,<sup>6</sup> it was held that the record of a conversation appearing on a tape-recorder cannot be regarded as a statement "in writing or reduced into writing" within the meaning of section 145. The record which appears on a tape-recorder cannot fall within the ambit of the definition of "writing" as given in section 3(65), General Clauses Act, 1897.

It was held in that case that the expression "writing", appearing in section 145, refers to the tangible object that appeals to the sense of sight and that which is susceptible of being reproduced by printing, lithography, photography,

<sup>1</sup>Section 155, Clause (3).

<sup>2</sup>Field, Ev., 6th Ed., 458.

<sup>3</sup>*Carpenter v. Wall*, 3 P & D 457; 113 E.R. 619 cited in Woodroffe and also in A.I.R. 1952 Orissa at page 277, para 28.

<sup>4</sup>*Pratap Singh v. The State*, A.I.R. 1964 S.C. 72.

<sup>5</sup>See section 155(3).

<sup>6</sup>*Rup Chand v. Mahabir Parshad*, A.I.R. 1956 Punj. 173, para. 3.

etc. It is not wide enough to include a statement appearing on a tape which can be reproduced through the mechanism of a tape-recorder. With reference to section 155(3), it was held that a defendant who is endeavouring to shake the credit of a witness by proof of former inconsistent statements, can depose that while he was engaged in conversation with the witness, a tape-recorder was in operation, or can produce the said tape-recorder in support of the assertion that a certain statement was made in his presence.

**81.19.** It would appear that the position in this regard would be clearer if the correct procedure as to oral statements is laid down.

Need for provision as to oral statements.

**81.20.** It may be noted that contradiction by an oral statement is a permissible means of impeaching the credit of a witness. Section 155(3) and illustrations (a) and (b) thereof, make this clear. There can be no distinction in principle, between an oral and written statement. Of course, the contradiction must be *in regard to a matter relevant to the issue*—that being the implication of the words ‘liable to be contradicted’ in section<sup>1</sup> 155(3). Acting on this reasoning the Orissa High Court would apply the principle of section 145 also to oral statements.<sup>2</sup>

Present position.

But the Nagpur<sup>3</sup> and Rajasthan<sup>4</sup> High Courts have taken a different view on the subject, holding that since section 145 covers only written statements, the procedure laid down therein need not be followed.

The conflict of decisions is obvious. But even if there were no conflict, it is desirable that the legislative provision should be self-contained, on such an important matter.

**81.21.** In view of the fact that the mode of proof<sup>5</sup> for the purpose of contradiction is already dealt with by section 145, it would seem appropriate that the procedure to be followed in regard to *oral statements* should also be dealt with in that section. The rule in section 145 is one of substance, and not of form.<sup>6</sup> Justice requires that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradiction, whether the statement be written or oral.

Need for amendment.

**81.22.** It may be noted that, in Srilanka, the corresponding section has been numbered as sub-section (1) and sub-section (2) has been added as follows:—<sup>7</sup>

Ceylon amendment as to oral statement.

“(2) If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such a statement.”

**81.23.** It would also be of interest to note that, in New South Wales, there is a specific provision in this regard. Section 54 of the Evidence Act, 1898-1954 (New South Wales), is in the following terms:

Position in New South Wales.

<sup>1</sup>*Khadija v. Abdul Kareem* (1890) I.L.R. 17 Cal. 344 (Wilson J.).

<sup>2</sup>*State v. Minaketan* A.I.R. 1952 Orr 267, 277, 26 (Narasimhan J.).

<sup>3</sup>*Muktavandas v. R.*, A.I.R. 1939 Nag. 13.

<sup>4</sup>*Ram Rattan v. The State*, A.I.R. 1956 Raj. 196, 197 (Manawat and Sharma, JJ.).

<sup>5</sup>*Gopi Chand v. R.*, A.I.R. 1930 Lah. 491.

<sup>6</sup>*Bhagwan v. S.*, A.I.R. 1952 S.C. 214.

<sup>7</sup>Section 145, Ceylon Evidence Ordinance, cited in Sarkar.

"If a witness upon cross-examination as to a former statement made by him relative to the subject matter of the cause or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it.

But before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not he has made such statement".

Section 55 of the New South Wales Act is in the following terms:

"(1) A witness may be cross examined as to:

- (a) a previous statement made or supposed to have been made by him in writing or reduced into writing; or
- (b) Evidence given or supposed to have been given by him before any justice, without such writing or the deposition of such witness being shown to him. But if it is intended to contradict him by such writing or deposition, his attention must, before such contradictory proof can be given, be called to those parts of the writing or deposition which are to be used for the purpose of so contradicting him... ..".

**81.24.** We have already referred to the English provision<sup>1</sup> which is wide enough to provide for oral statements. We are of the view that section 145 should be amended to deal with the matter.

## VI. SECONDARY EVIDENCE

**Loss of document.** **81.25.** Then, — to come to point (b)<sup>2</sup> — there is another matter requiring attention with reference to section 145. The Act is silent with reference to the case where the document sought to be used for contradiction has been lost or destroyed, and the question may arise whether in these or in any other cases a copy can be used (instead of the originals) for contradiction. It has been stated<sup>3</sup> (with reference to the position in England) that in such a case the witness might be cross-examined as to the contents of the paper, notwithstanding its non-production; and that, if it were material to the issue, he might be afterwards contradicted by secondary evidence. In such a case, the cross-examining party may interpose evidence out of his turn to prove the events, such as loss, etc., relating to the document and to furnish secondary evidence thereof.

In India, such a case may perhaps fall within section 155(3), so far as the use of secondary evidence is concerned. But the procedure,—i.e. the applicability of section 145—is doubtful. We are of the view that a suitable provision regulating the contradiction of the witness by secondary evidence should be inserted. A case for secondary evidence must, of course, be made out before it can be used for contradiction.

## VII. RECOMMENDATION

**81.26.** The points discussed above show the need for amending the section so as to cover—

- (a) oral statements, including oral statements that have been tape recorded;<sup>4</sup>

<sup>1</sup>Section 4, Criminal Evidence Act, 1865 (*supra*).

<sup>2</sup>para 81.15, *supra*.

<sup>3</sup>Taylor, Ev., s 1447 cited by Woodroffe.

<sup>4</sup>Para. 81.24, *supra*.

(b) contradiction by secondary evidence.<sup>1</sup>

81.27. In the light of the above discussion, we recommend that section 145 should be amended by adding the following sub-sections—<sup>2</sup>

Recommendation.

"(2) Where a witness is sought to be contradicted by his previous statement in writing by a party entitled to produce secondary evidence of the writing in the circumstances of the case, his attention must, before such secondary evidence can be given for the purpose of contradicting him, be called to so much of it as is to be used for the purpose of contradicting him.

(3) If a witness, upon cross-examination as to a previous oral statement (including a statement recorded mechanically) made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and in-consistent with his present evidence, denies that he made the statement or<sup>3</sup> does not distinctly admit that he made such statements, proof may be given that he did in fact make it, but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statement."

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<sup>1</sup>Para 81.25, *supra*.

<sup>2</sup>Section 145 to be renumbered as sub-section (1).

<sup>3</sup>The specific intention of denial is considered desirable.

## IMPEACHING THE CREDIT — SECTIONS 146 AND 147

**82.1.** In cross-examination, the cross-examiner enjoys a wider power of interrogation than in examination-in-chief. This wider power covers not only *the form* of the questions, but also the *substance*. As to form of the questions, we have already dealt with leading questions. Apart from the fact that leading questions can be put in cross-examination,<sup>1</sup> what is to be noted is that the subject-matter of the question could be somewhat larger when a witness is cross-examined than when he is examined-in-chief. Not only can the witness be contradicted by his previous statements<sup>2</sup> which are inconsistent with his present evidence, but also the inquiry can travel beyond facts which are strictly relevant, in so far as credit of the witness can be impeached. Some questions are, therefore, lawful in cross-examination which are not so in examination-in-chief; the questions must relate to matters relevant to the facts in issue in the proceeding. The range of such cross-examination is dealt with in the sections beginning with section 146.

Section 146 — **82.2.** Section 146 provides that where a witness is cross-examined, he may, in addition to the questions "hereinbefore referred to", be asked any questions which tend —

- (1) to test his veracity.
- (2) to discover who he is and what is his position in life, or
- (3) 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.

Safeguards. **82.3.** Certain matters of importance, namely, in what cases the witness is compellable to answer such questions, are dealt with in latter sections—sections 147, 148, 149 and 150. Indecent and scandalous questions and insulting questions are specifically governed by sections 151 and 152. Of course, the last two sections—section 151 and section 152—are not confined to cross-examination, but, in practice, the need for invoking them arises mostly in relation to cross-examination.

The textual provisions and the decisions show that the range of questions which can be put for shaking the credit of a witness is wide enough. This renders it desirable that the witness should be protected against improper cross-examination. Certain safe-guards are, therefore, provided in sections 146 to 153, as already stated.

How far answers to questions put to impeach the credit of a witness can be contradicted is dealt with in section 153. This is, in brief, the scheme of the sections.

Section 146(1). **82.4.** Of the questions that can be put under section 146, the first category comprises questions intended to test veracity.

<sup>1</sup>Sections 141 to 143.

<sup>2</sup>Section 145.

<sup>3</sup>Section 138, see and paragraph.



**82.5.** The expression "veracity" is a narrow one. We have already referred to<sup>1</sup> the diverse factors which enable the court to make an intelligent estimate of the value of the testimony of the witness. These go beyond mere contradiction or impeachment of credit or veracity. It is important to note<sup>2</sup> that a witness may believe himself to be true, and yet be mistaken. "The means of detecting both the fact and the source of error because of mistake involve a different type of resourcefulness in truth testing than the direct attack upon perjury."<sup>3</sup>

**82.6.** Our system of evidence requires that evidence of a fact which has been perceived by the senses must be given by a witness who has actually perceived the fact—a principle described by Wigmore as the principle of knowledge. This rule involves at least three requirements, namely,—capacity to observe, opportunity to observe, and actual observation. Questions which are put in cross-examination to test the existence and quality of these requirements are, therefore, admissible, since they go to the root of the matter, namely, whether the external reality comes through a medium which can be trusted.

**82.7.** A distinguished writer on the Law of Evidence<sup>4</sup> has pointed out that human testimony cannot be assigned its proper value without a knowledge of the powers of perception, memory and narration of the witness, and of his opportunity and desire to exercise those powers honestly and efficiently in the situation under examination. "It requires no extended trial experience to demonstrate that for every perjurer there are scores of honest witnesses whose direct examination produced the effect of falsehood because its subject-matter was incorrectly or incompletely observed or inaccurately remembered or inadequately narrated. It might, then, be argued that in a judicial investigation no testimony should be received which is not tested in the fire of cross-examination."

**82.8.** Cross-examination on relevant matters affecting human behaviour and opportunities for knowledge constitutes the most reliable means of exposing error, apart from falsehood.<sup>5</sup> Even an honest and accurate witness may, for example, be compelled to tell a lie by reason of threat or duress or other attempts to tamper with the witness. Then, unconsciously, a bias may arise by reason of the relationship between the witness and the party. Many of the factors which, at common law, were regarded as grounds for total incompetence of the witness are now factors which can be taken into consideration as relevant to weight or value of the evidence of the witness.

Cross-examination on opportunities for knowledge.

For example, interested witnesses were previously incompetent—particularly, the parties. Under the present law, they are competent; but, the nature and quality of their interest may legitimately be enquired into in cross-examination on the ground of bias or possibility of bias. This is not to say that in every case where a witness is related to a party, there is a possibility of bias and the witness must be taken as biased. To take a hypothetical example<sup>6</sup> if, in a suit for damages for injury caused by an accident, a witness to an accident, married the defendant's daughter before the trial, his previous consistent declaration about what he had seen, which was made before he

<sup>1</sup>See discussion as to section 145, *supra*.

<sup>2</sup>See discussion as to section 145, *supra*.

<sup>3</sup>Mason Ladd, "Impeachment of Witness", (1966-67) 52 Cornell Law Quarterly 239, 243.

<sup>4</sup>Morgan, "The Relation between Hearsay and Preserved Memory" (1927) 40 Harv. L. Rev. 712.

<sup>5</sup>*Alford v. U.S.* (1931) 288 U.S. 687, 691.

<sup>6</sup>Mason Ladd, "Impeachment of Witnesses", (1966-67) 52 Cornell Law Quarterly 239, 255.

met the daughter, would be admissible to dispel any presumption that the testimony given in the court was distorted, provided, of course, that the statutory conditions for the use of corroborative statements are satisfied.<sup>1</sup>

82.9. Cases in which the capacity of a witness to observe the fact as to which he is called to give evidence is in question will be rare. Such incapacity to observe may exist as a result of some organic incapacity of the witness such as insanity, feeble-mindedness, infancy, blindness and deafness. In extreme cases organic incapacity of this kind will be obvious.<sup>2</sup> In less extreme cases, for example, where the witness has poor eyesight or poor hearing, the existence of such facts, if relevant, should be elicited by the cross examiner. There is no doubt that such questions are properly admissible, but as Wigmore observes, mere questions on cross-examination as to those matters can seldom affect much and the useful approach is usually something of a mixed nature, that is, experiments made in Court to test the witness's powers which, according to Wigmore, should be freely allowed, subject to the<sup>3</sup> discretion of the Court. He also expresses the view that extrinsic evidence of particular instances of the incapacity of the particular witness to observe would not be admissible.<sup>4</sup>

Psychology  
testimony.

82.10. In the United States, academic writings deal in detail with the psychology of testimony and it has often been pointed out that even where the witness is not wilfully telling a lie, it is important to determinate his ability to tell the objective truth "to translate an outward event into words" for the use of the court. In England also, one common species of mistake is recognised, namely an event being "remembered" as belonging to a different occasion from the one on which actually happened. This is described as the error of "transference", and commonly occurs where the customary is affirmed and the departure from the usual practice goes unnoticed.<sup>5</sup> It is desirable that defects of the nature described above should be remedied.

Ceylon  
Amendment.

82.11. It is of interest to note that in Sri Lanka,<sup>6</sup> the corresponding section also uses the expressions "accuracy" and "credibility". This seems to be a useful improvement, inasmuch as, apart from any moral aspersions which are covered by "veracity" and "credit",—whichever the expressions used in clauses (1) and (3) of section 146—there could be cases where the cross-examiner wishes to challenge the accuracy or power of observation or memory of the witness.

"Veracity".

82.12. Whitley Stokes<sup>7</sup> says that the word "veracity" means accuracy or credibility. But this is not the ordinary sense in which the word is understood. In the ordinary parlance, "veracity" does carry certain moral overtones and is not appropriate enough to cover cases where there is no moral aspersion involved. Most of the dictionary meanings also give a primacy of place to the restricted meaning.

Recommendation.

82.13. In so far as the witness can be contradicted by previous inconsistent statements intended to challenge the credibility of the witness, section 145 takes care of the matter. But it is not inconceivable that the mental capacity of the

<sup>1</sup>Section 157.

<sup>2</sup>Wigmore, para. 931.

<sup>3</sup>Wigmore, para. 945.

<sup>4</sup>Wigmore, para. 995.

<sup>5</sup>Cf. Morgan, "A study in the psychology of Testimony", (1917) Vol. 8, Journal of the American Institute of Criminal Law 222; Louisell, Principles of Evidence and Proof (1972), page 797.

<sup>6</sup>See William, Proof of Guilt (1960), page 84.

<sup>7</sup>Section 146, Ceylon Evidence Ordinance, see Sarkar.

<sup>8</sup>Whitley Stokes, page 927.

witness is believed to be defective and is proposed to be challenged otherwise than by the use of a previous inconsistent statement. There should be some provision on the subject.

We recommend that section 146(1) should be suitably widened for the purpose.

**82.14.** So much as regards clause (1) of section 146, Section 146(2) needs no comments, but section 146(3) is of practical importance. It really consists of two propositions. Sections 146(2) and 146(3).

- (a) The cross-examiner can put questions intended to shake the credit of the witness, and this he can do by injuring his character.
- (b) For this purpose, he can even put incriminating questions.

The first proposition relates to the range of the cross-examination in general terms. The cross-examiner can shake the "credit" of the witness—i.e. the credit in the eyes of the court in relation to the evidence given in the particular proceeding. Of course, as is commonplace, an injury to credit, inflicted on one occasion, could be of an enduring nature. It could last long beyond the duration of the particular occasion. Walter Scott<sup>1</sup> said that "credit is like a looking-glass, which, when once sullied by a blemish, may be wiped clear again; but if once cracked, can never be repaired." As to the second proposition, it is to be noted that the word "character" does not, in this clause, mean only disposition. Rather, it seems to mean "reputation";<sup>2</sup> which is distinct from disposition. A man's character is the reality of himself. His reputation is the opinion others have formed of him. Character is in him; reputation is from other people; that is the substance, this is the shadow.<sup>3</sup> In the section, the word 'character' is used in an extended sense. Of course, these observations do not necessitate an amendment of the section.

**82.15.** The only change required is in clause (1) of the section. As a result of the points already discussed, we recommend that in clause (1) of section 146, the words "accuracy or credibility" should be added after the word 'veracity'. Recommendation to amend section 146(1).

**82.16.** With reference to section 147, only a verbal point needs to be mentioned. The words "relevant to the suit or proceeding" in this section refer to what is relevant to a matter in issue, as in section 132.<sup>4</sup> It would be desirable to make this clear, since the next section—section 148—makes a distinction between questions (strictly) relevant to the matter in issue and questions which are "relevant to the suit or proceeding" only because they affect the credit of the witness by injuring the character of the witness. We, therefore, recommend that in section 147, after the words "relevant to", the words "the matter in issue in" should be added. Amendment of section 147, regarding the words "relevant to the suit".

<sup>1</sup>Walter Scott, Co. Saying quoted in the 'D'.

<sup>2</sup>Compare section 55.

<sup>3</sup>N. W. Beecher, Life Thoughts.

<sup>4</sup>Woodroffe.

## CROSS-EXAMINATION AS TO CREDIT — THE POWERS OF THE COURT

## SECTION 148

## I. INTRODUCTORY

Introductory.

83.1. In order that the right to put questions in cross-examination may not be abused, certain safeguards are needed, as we have already pointed out<sup>1</sup> in our discussion of section 146. These safeguards are provided in a number of sections. We take up the principal provision in section 148, which provides that 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 swear and shall warn him that he is not obliged to swear it.

In exercising its discretion, the court shall have regard to the following considerations:—

- (1) 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;
- (2) 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;
- (3) 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;
- (4) 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.

Markby's comment.

83.2. Commenting on this section, Markby observed<sup>2</sup>.

"The provisions of sections 148, 153 are restricted to questions relating to facts which are relevant only in so far as they affect the credit of the witness by injuring his character; whereas some of the additional questions enumerated in section 146 do not necessarily suggest any imputation on the witness's character. Nevertheless, I think it was the intention of the Act, and I believe it to be the practice to consider all the questions covered by section 146 to be governed by the provisions of sections 148-53".

He also added—<sup>3</sup>

"Sections 148-52 were intended to protect the witness against being improperly cross-examined; a protection which is often very much required. But the protection afforded by section 148 is not very effectual, because an innocent man will always be eager to answer the question and a guilty man by claiming protection almost confesses his guilt as is indicated by the last para of the section".

<sup>1</sup>See discussion as to sections 146 and 147, *supra*.

<sup>2</sup>Markby, pp. 106-107, quoted by Woodroffe.

<sup>3</sup>Markby, pages 146-147, quoted by Woodroffe.

83.3. In so far as the section applies to ordinary witnesses, we have no comments on it. The position of the accused as a witness, however, requires some discussion. At the time when the Act was enacted the accused was not a competent witness and the section was not framed with the accused in mind. The broad question to be decided is, should the section apply to the accused, and, if so, to what extent.

## II. SPECIAL CONSIDERATIONS

83.4. In deciding the question how far the accused should be subject to cross-examination as to character, one has to strike a very delicate balance between certain competing considerations. If the accused is given complete exemption from cross-examination as to character, he would become free to cast aspersions on the prosecution witnesses without any hindrance. He would then also be free to secure the unjust conviction of his co-accused, if there be one.

Need to strike a balance.

On the other hand, if he is treated as liable to cross-examination on all past convictions, in order to show his lack of credit, then a possibly innocent man would be deterred from entering the witness-box and telling his own story on oath, because of the mental anguish that the unfolding of the past would cause, apart from any prejudice that might be caused in the mind of the judge. It is for this reason that in several countries, a compromise has been effected in the legislative provisions on the subject, and, in view of the considerations mentioned above, a distinction is usually made between the position of the accused and that of the ordinary witness who is not the accused. That distinction is supportable on the ground that an ordinary witness entering the witness box is not—at that moment at least—facing trial for an offence, and there is no danger of his conviction in those proceedings.

83.5. The course adopted by legislation in several countries is usually to protect<sup>1</sup> the accused from disclosure about his past character except in certain exceptional cases. Those exceptional cases, to put the matter broadly are postulated on the theory that the considerations of fairness require that an exception should be made, the circumstances and the conduct of the accused in regard to the prosecution being such that the other considerations favourable to the accused, which are mentioned above,<sup>2</sup> should be over-ridden by the requirements of fairness in the peculiar circumstances.

83.6. What matters is the effect of the prohibited question on the court. A veiled suggestion of a *previous offence* is just as damaging as a definite statement,—which is the reason why the expression “tend to show” is used in some legislative precedents, on the subject.<sup>3</sup> If the accused, by himself or his witnesses, seeks to give evidence of his own good character to show that he is unlikely to have committed the offence charged; he raises an *issue as to good character*, so that he may be fairly cross-examined on that issue, just as any witness called by him to prove his good character may be cross-examined.

Even where the accused has not raised a question of his own good character, the evidence falling within the rule that where issues of intention or design are involved in the charge or defence, questions relevant to these matters may be asked, would be admissible.

In these cases, the consideration that the court may be prejudiced or the accused oppressed is displaced by weightier considerations, and evidence, even if it goes to his credibility, is permitted.

<sup>1</sup>Instances are cited, *infra*.

<sup>2</sup>para 53.4, *supra*.

<sup>3</sup>E.g. section 1, proviso (3), Criminal Evidence Act, 1898 (Engl.).

## III. LEGISLATIVE PRECEDENTS

Law in England,

83.7. Let us, at this stage, turn to a few legislative precedents from other countries. In England, by section 1 of the Criminal Evidence Act, 1898, the accused was made a competent witness for the defence.<sup>1</sup> That section then set out a series of provisos regulating his appearance as a witness. We shall refer only to so much of the section as is material for the present purpose. Proviso (e) to the section abolished the privilege of the accused in respect of *incrimination* of the crime in question, in these terms:—

“(e) a person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged”.

As to cross-examination in regard to credit, proviso (f) to section 1 of the Act enacts that “a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character.

This proviso is itself restricted by three exceptions. The first exception deals with a situation where character evidence is relevant by some other provision of law in proof of the *offence wherewith he is charged*. This is not the text of the proviso, but shows its main object. The actual language used is—

“The proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is charged”.

This exception may bring up, for example, evidence of similar facts where such evidence is relevant, having regard to the questions at issue (e.g. state of mind).

Under the second exception, proviso (f) does not apply where the accused himself has made an attempt to establish his own good character or has challenged the character of the prosecutor or of a prosecution witness. The actual text reads as follows:—

“Has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution”.

The third exception relates to the case where the accused “has given evidence against any other person charged with the same offence”. The exception, as is obvious, is mainly intended to empower the other co-accused to put questions as to the credit of the accused who has given evidence. On its wording, it appears to cover cross-examination by the prosecution as well.<sup>2</sup>

83.8. It is unnecessary to add that the English Act does not exclude relevant evidence. In *Makin v. A. G. for New South Wales*,<sup>3</sup> Lord Merschell, L. C., observed—

“..... the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the

<sup>1</sup>Section 1, Criminal Evidence Act, 1898 (Eng.).

<sup>2</sup>Nokes. *Introduction to Evidence* (1967), page 156.

<sup>3</sup>*Makin v. A. G. for New South Wales*, (1894) A.C. at p. 65.

question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In *R. v. Kennaway*,<sup>1</sup> Lord Reading, C.J. said:

"It is not necessary to repeat what has often been stated in this court, that evidence which is otherwise admissible will not be inadmissible merely because it may show that the prisoner has committed other offences".

83.9. When Lord Herschell used<sup>2</sup> the term "relevant to an issue before the jury", he meant, of course, an issue on facts relevant to the accused's guilt of the offence with which he was charged; he did not mean to include an issue about the accused's character, credit or credibility as shown by matters unconnected with that offence.

83.10. To complete this discussion of English law, it may be noted that exclusionary rules are applied even to trials by a professional judge sitting alone, such a stipendiary magistrate hearing a case summarily, or a recorder trying a case on appeal.<sup>3</sup> In a magistrate's courts, the law of evidence is supposed to be the same as in trials on indictment.<sup>4</sup>

83.11. In Australia, many jurisdictions associated with the common law have a provision<sup>5</sup> similar to that in section 1(f) of the Criminal Evidence Act, 1898, of England, permitting the previous convictions of the accused to become an issue only if, *inter alia*, the nature or conduct of his defence is such as to involve imputations on the character of prosecution witnesses. Law in Australia.

Even if the provision becomes applicable, there is a discretion in the trial judge whether to allow cross-examination of the accused as to his record. In Victoria, the relevant provision contains a proviso that the permission of the judge, to be applied for in the absence of the jury, must first be obtained before the cross-examination is allowed. The proviso, as Dixon C.J. observed in *Dawson's case*,<sup>6</sup> is taken to confer complete discretion on the trial judge. In that case, the accused had done little more than deny that a document alleged to contain material by way of admissions in question and answer form was an accurate record of what he had told the police, and to deny having made any admission. The High Court held that neither the nature of the defence nor the conduct of it involved imputations upon the prosecutor or the Crown witnesses, and even if that were not so, discretion ought to have been exercised against allowing the cross-examination.

83.12. The position in New South Wales is interesting. By Statute 55 Vic. No. 5 section 6 (1891), it was enacted that every person charged with an indictable offence: New South Wales.

"shall be competent, but not compellable, to give evidence in every court on the hearing of such charge:

*Provided that the person so charged shall not be liable to be called as a witness on behalf of the prosecution nor to be questioned on cross-examination without the leave of the Judge as to his or her previous character or antecedents."*

<sup>1</sup>*R. v. Kennaway*, (1917) 1 K.B. at p. 29; (1916-17) All. E.R. Rep. at p. 653.

<sup>2</sup>Para 83.8.

<sup>3</sup>*R. v. Ormsby Borough*, Q.S. (1956) 1 Q.B. 36; (1955) 3 All. E.R.

<sup>4</sup>*Davies v. Griffiths*, (1937) 2 All. E.R. 671.

<sup>5</sup>Mr. Justice Neasey (Supreme Court of Tasmania), "Rights of the Accused, etc." (1969) 43 Aust. L.J. 482, 499.

<sup>6</sup>*Dawson v. The Queen* 106 C.L.R. 1.

<sup>7</sup>Emphasis supplied.

83.13. The statutory provision quoted became proviso No. 1 to section 407 of the Crimes Act, 1900 (New South Wales). Thus, the Judge in New South Wales is given a discretion on general considerations of justice and fairness as they appear to him.

83.14. The legislative intention underlying this provision conferring judicial discretion may be gathered from the speech of the Attorney General when he was introducing the Bill in the Legislative Council of New South Wales. This is what he said :<sup>1</sup>

"However, I think it desirable, as I said before that this provision should be surrounded with safeguards; and so I propose that no person charged with the commission of a criminal offence shall be questioned, on cross-examination, as to his or her previous character or antecedents without the leave of the Judge. It is necessary that that provision should be inserted, otherwise a prisoner who is giving evidence on his own behalf, and who is perfectly innocent of the offence with which he is charged to-day, might be placed in this position: Some twenty, or fifteen, or ten years ago he might have committed some offence against the law, and if he were asked when giving evidence today upon his trial for a particular offence, whether ten years ago he was not found guilty of another offence, a great deal of harm and great injustice might be done. I provide, therefore, that he must not be asked as to his antecedents, as to whether so many years ago he did not do this or that. But whilst I provide that, as a matter of course, he must not be asked questions with reference to previous convictions, or as to his antecedents, I reserve power to the Judge to allow such questions if he thinks that the interests of justice require that the person should be so examined. A Judge also—just as much as a Crown prosecutor; possibly more so—is imbued with a very strong sense of doing justice to the people who are unfortunately accused with the commission of certain offences, and a judge will always see that no question is allowed to be put to a prisoner which might do him an injustice unless really the public interests require it. If it is necessary for the conviction of a person who, in all probability, is guilty, and is likely to be acquitted by reason of those questions not being asked—if a judge thinks no unfair advantage will be taken of the man, he will allow the questions to be asked".

83.15. The relevant section in Victoria is 399 of the Crimes Act, 1958 substantially on the same lines as New South Wales. Incidentally, one of the exceptions to that section reads:

"Unless the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution :

Provided that the permission of the Judge (to be applied for in the absence of the jury) must first be obtained".

On this exception the decision of the High Court in *Dawson v. The Queen*,<sup>2</sup> is of considerable importance. The accused was charged with being an accessory after the fact to a burglary. He denied any knowledge of the crime, and that he had made the incriminating admissions sworn to by two police officers, and claimed that a contemporary record of interrogation produced contained much more than the couple of questions which he had been asked and answered. The trial judge had taken the view that the Crown prosecutor should be

<sup>1</sup>Speech of Attorney General, Mr. G. B. Simpson.

<sup>2</sup>*Dawson v. The Queen* 106 C.L.R. 1.



allowed to cross-examine as to previous offences. The Victorian Supreme Court upheld the conviction, but the High Court allowed an appeal, quashed the conviction and ordered a new trial.

83.16. The then Chief Justice, Sir Owen Dixon, in a characteristically powerful and lucid judgment, expressed the opinion that the cross-examination should not have been allowed, as not being within the exception of the sub-section, or alternatively, if that view was wrong, that it was an improper exercise of the Judge's discretion. He was of the view that the facts fell far short of satisfying the condition of the sub-section. He analysed the language to show that what is referred to is not a denial of the case for the Crown nor of the evidence by which it is supported, but the use of matter which will *have a particular or specific tendency to destroy*, impair or reflect upon the character of the prosecutor, etc. He considered that the word "involve" was not meant to cover inferences, logical implications or consequential deductions which may spell imputations against the character of witnesses.

83.17. On the question of the exercise of the discretion (the alternative basis of his judgment), Dixon C.J. was firmly of the view that it had been erroneously exercised. Amongst the considerations which led him to this view, the following are very important:

- (a) It was necessary for the judge to consider whether the interests of justice were not best served by excluding evidence of the accused's convictions or bad character in order that his guilt should be judged on the facts of the case and not upon the propensities which his past disclosed or the prejudices his character or career might engender.
- (b) It is the thesis of English law that the ingredients of a crime are to be proved by direct or circumstantial evidence of the events, that is to say, the parts and details of the transaction amounting to the crime, and are not inferred from the character and tendencies of the accused.
- (c) In England and Victoria, the accused is protected against the disclosure of a discreditable past, unless in exceptional conditions, and he could not see on what ground consistent with the general policy of the proviso, the discretion was exercised in this case against the accused.

#### IV. POSITION IN U.S.A.

83.18. In the U.S.A., the Uniform Rules of Evidence provide—

"Rule 21. *Limitations on Evidence of conviction of crime as affecting Credibility*—Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility". Uniform Rule.

83.19. In the New Jersey Rules<sup>1</sup> of Evidence, the material provision reads New Jersey.  
as follows:—

"Rule 25. *Self-incrimination etc.*—Subject to rule 37,<sup>2</sup> every natural person has a right to refuse to disclose in an action or to a police officer or other official, any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate, except that under this rule.

<sup>1</sup>Carlson, "Cross-Examination of Accused" (1966-67) 52 Cornell Law Quarterly 705.

<sup>2</sup>Brown v. U.S. (1958) 356 U. S. 148.

- (d) subject to the same limitations on evidence affecting credibility as applied to any other witness, the accused in a criminal action, or party in a civil action who voluntarily testifies in the action upon the merits, does not have the privilege to refuse to disclose in that action any matter relevant to any issue therein."

It may be noted that under this rule, cross-examination of an incriminating character or in respect of other offence is not allowed.

83.20. It may be noted that in the United States, the accused is a competent witness—in federal prosecutions since 1878.<sup>1</sup> In *Brown v. United States*,<sup>2</sup> Frankfurter, J. made the following observations which summarise the law applicable to criminal defendants who testify in their own behalf:

"Our problem is illumined by the situation of a defendant in a criminal case. If he takes the stand and testifies in his own defence, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. 'He has no right to set forth to the jury all the facts which tend in his favour without laying himself open to a cross-examination upon those facts'. *Fitzpatrick v. United States*, 178 U.S. 304, 315; and see 157 U.S. 301, 304, 305. The reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf. It is that reasoning, that controls the result in the case before us."

83.21. In the case of *Brown*, the actual proceeding related to a civil defendant, whom it was proposed to punish summarily for criminal contempt committed in the actual proceedings of the court. The petitioner admitted that she was a member of the Communist League, but denied that she belonged to a Communist Party during the period before 1946. She refused to answer questions about activities and associations that were unlimited in time or directed during the period of 1946, on the ground that the answers might incriminate her; and the District Court sustained the claim of privilege.

But the court held that the petitioner had waived the claim of privilege, and convicted her of contempt. This conviction was upheld by the court of Appeal on the ground of waiver. In the Supreme Court of the U.S.A., Frankfurter, J., speaking for the majority, declared that the rule applicable in criminal cases that, one who takes the stand and testifies thereby foregoes the right regarding matters made relevant for direct examination, was applicable equally in civil cases. Frankfurter J. referred to the two earlier cases<sup>3,4</sup> in discussing the position of the criminal defendant.

Analysing the constitutional privilege in this setting, he adverted, *inter alia*, to *Fitzpatrick v. United States*<sup>5</sup> and pointed out that a defendant has no right to set forth all the facts in his favour without laying himself open to cross-examination on these facts. The judgment contains relevant comments which seem to indicate that waiver of the fifth amendment privilege extends to matters opened up by the party on direct examination, but perhaps only that far.

Commentators have summarised *Brown* as laying down a constitutional rule of limited waiver. Thus, in a note in the *Harvard Law Review*,<sup>6</sup> the *Brown*

<sup>1</sup>Carlson, "Cross-Examination of Accused" (1966-67) 52 Cornell Law Quarterly 705.

<sup>2</sup>*Brown v. U.S.* (1958) 356 U.S. 148.

<sup>3</sup>*Fitzpatrick v. U.S.*, 44 Lawyers Edition 1080, 1083.

<sup>4</sup>*Reagan v. United States*, 39 Lawyers Edition 791.

<sup>5</sup>*Fitzpatrick v. U.S.* (1958) 356 U.S. 148, 153; 44 Law Ed. 1080 (*Supra*).

<sup>6</sup>Note, "The Supreme Court, 1967 Term," (1958) 72 Harv. L. Rev. 77, 177.

case is summarised as holding that a defendant who voluntarily takes the stand waives the privilege against self-incrimination to the extent of cross-examination on matters raised by his own testimony on direct.

It is interesting to note, moreover, that *Brown* was cited by the Seventh Circuit as imposing constitutional limitations on cross-examination in criminal prosecutions.<sup>1-2</sup> In reviewing a criminal conviction, that court carefully noted that the cross-examination of the defendant who testified was related to his direct testimony. The court went on to observe:

"In a criminal case, if a defendant voluntarily takes the stand to testify in his own behalf, his testimony may be impeached and he may be cross-examined. The extent of the waiver of the privilege against self-incrimination is determined by what the defendant's testimony makes relevant for cross-examination".

These federal decisions contain distinct indications to the effect that a limited cross-examination of the accused is required by the fifth amendment. Much of the language militates in the direction of extending the waiver of the constitutional privilege to matters opened up on direct examination, but not beyond. As stated by one writer:<sup>3</sup>

"In the absence of special statutory provision, courts following the federal rule hold that a defendant in taking the stand in a criminal case waives his constitutional privilege not to testify to the extent that the federal rule permits cross-examination".

Under this view, the waiver extends only to matters touched upon in direct examination, since this is the extent to which the federal rule permits cross-examination. Another commentator has concluded:<sup>4</sup>

"The constitutional privilege against self-incrimination and the statute of 1878, permitting the defendant to testify have been construed as requiring a restrictive cross-examination."

83.22. The doctrine of limited waiver is recognised elsewhere in the law of evidence in the U.S.A. Most of the authorities agree that if the accused takes the stand for the purpose of testifying on a preliminary question, such as the voluntariness of a confession, this is not to be taken as a complete waiver. Many cases limit the waiver to the particular issue, because it is felt that to do otherwise would penalise the defendant for testifying.<sup>5</sup>

83.22A. Thus, in the U.S.A., the matter has been discussed from the point of view of the constitutional privilege also, the precise question being—"Is cross-examination beyond the scope of the direct examination prohibited by the privilege against self-incrimination?" In 1954, the (federal) privilege against self-incrimination was extended to the states in *Malloy v. Hogan*.<sup>6</sup> Following this extension, the privilege was applied to limit stringently pre-trial interrogation of suspects by state officers,<sup>7</sup> and to prohibit comment on the accused's refusal to testify at trials.<sup>8</sup>

<sup>1</sup>*United States ex rel. Irwin v. Date*, 357 F. ed. 9111, 915-16 (7th Cir.).

<sup>2</sup>"Cross examination of the Accused", 52 Cornell L.Q. at p. 716.

<sup>3</sup>Note (1939) 24 Iowa L. Rev. 564, 569, cited in 52 Cornell L.J. at p. 716.

<sup>4</sup>Orfield, "Examination of witnesses in Federal Criminal cases," (1962) 4 Ariz. L. Rev. 215, 240 (1962); Orfield (1964). "The privilege against Self-Incrimination in Federal Cases," 25 U. Pitt. L. Rev. 503, 553 (1964).

<sup>5</sup>McCormick s. 131. See also, Maguire, Evidence of Guilt s. 2. 082 (2) (1959); Model Code of Evidence rule 208, comment (1942).

<sup>6</sup>*Malloy v. Hogan* (1964) 378 U.S. 1.

<sup>7</sup>*Miranda v. Arizona*, (1966) 384 U.S. 436; *Escobedo v. Illinois*, (1964) 378 U.S. 478.

<sup>8</sup>*Griffin v. California*, (1965) 380 U.S. 609.

The constitutional problem has obvious ramifications for those jurisdictions which permit wide cross-examination. If a rule of restricted cross-examination is constitutionally required, then a wide interrogation may be unconstitutional.

#### V. RECOMMENDATIONS AS TO ACCUSED

83.23. We are of the view that the special considerations to which we have referred at the outset,<sup>1</sup> and which have been the basis of the legislative provisions in other countries, justify the insertion of certain restrictions as to the scope of questions as to character, in relation to the accused.

83.24. We have discussed the matter at length in view of its importance.

Our recommendations on this point are as follows:—

- (a) An accused person who offers himself as a witness in pursuance of section 315 of the Code of Criminal Procedure, 1973, may be compelled to answer questions which incriminate him as to the offence charged ;<sup>2</sup>
- (b) An accused so offering himself as a witness, shall not, however, be compelled to answer questions tending to show that he has committed, or has been convicted of, or been charged with, any other offence, nor shall he be compelled to answer questions showing that he is of bad character, except in the following cases:—
  - (i) where proof of commission or conviction or charge of such other offence is relevant to a matter in issue (i.e. relevant to the very offence with which he is now charged) ;
  - (ii) where he himself has asked questions to a witness to establish his good character, or has given evidence of his good character ; or
  - (iii) where the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or prosecutrix, provided leave of the Court is obtained.

The situation in (iii) may arise, for example, in a sexual offence, where the accused not only takes the plea of free consent, but in order to prove this plea, produces evidence which will tend to show that the prosecutrix is a woman of loose character. Leave of the Court should, however, be necessary in this case, to avoid abuse.

- (iv) where the accused has given evidence against any other person charged with the same offence.

The last mentioned situation may arise where two or more persons are being tried at the same time and their defences are contradictory. In this case, the accused is really like any other witness against the co-accused.

#### SECTION 148(2)—TO BE ADDED

The following is a very rough draft of a new sub-section<sup>3</sup> that could be inserted in section 148 to deal with the position of the accused on the subject :—

“(2) An accused person who offers himself as a witness in pursuance of section 315 of the Code of Criminal Procedure, 1973, shall not be asked, and if asked, shall not be compelled to answer, any question tending to

<sup>1</sup>Para. 83.A, *supra*.

<sup>2</sup>See discussion as to section 132.

<sup>3</sup>Existing section 148 to be re-numbered as section 148(1).

show that he has committed or been convicted of or been charged with any offence other than that with which he is then charged, or that he is of bad character, unless—

- (i) the proof that he has committed or been convicted of such other offence is relevant to a matter in issue; or
- (ii) he has personally or by his advocate asked questions of the witness for the prosecution with a view to establishing his own good character, or has given evidence of his good character, or
- (iii) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, provided the leave of the court is obtained for asking the particular question; or
- (iv) he has given evidence against any other person charged with the same offence."

## VI. DEFAMATION

83.25. We have, in our discussion of section 55, considered the question whether, when a person sues for damages for injury to reputation in respect of a particular facet of his character, other facets of his character should be allowed to be raised.<sup>1</sup> We have recommended the insertion of a suitable proviso to the Explanation to section 55, with the object of limiting roving cross-examination under the head of facts which are relevant to character. The broad object of that amendment is to limit the inquiries into disposition or character by confining them to the aspect to which the libel relates.

Section 148 —  
Suit for defama-  
tion — Scope of  
cross-examination  
as to plaintiff's  
character.

For ready reference, the amendment which has been recommended to section 55, may be reproduced.

*"Section 55, Explanation (Proviso to be added.)*

Provided that in a suit for damages for defamation for injury to the reputation of a person, no aspect of the character of that person, other than that to which the matter alleged to be defamatory relates, shall be relevant merely by virtue of this section, but nothing in this proviso shall exclude evidence relating to any fact which is admissible under any other provision of this Act."

83.26. This amendment, linked up with section 55, is naturally concerned with the scope of "relevancy" of facts showing character. The question now to be considered is, whether, in regard to section 148 also, it is desirable to give any indication of the approach to be adopted. Section 148 relates to the questions to be permitted in cross-examination. It must, of course, be noted that the subject matter of section 148 is wider than that of section 55, in so far as section 148 covers questions intended to impeach the credit of the witness, even where they are not relevant to the issue. Section 55 is confined to facts relevant to the issues, but section 148 is not so confined. In this sense, their fields differ. Still, we are keen that the court should be vigilant, even when acting under section 148, in regard to the cross-examination of the plaintiff in a suit for defamation.

<sup>1</sup>See recommendation as to section 55.

Recommendation  
as to cross-exa-  
mination as to  
character of a  
person suing for  
defamation.

83.27. Section 148 itself throws a duty on the court to determine the propriety of questions likely to injure character and sets out certain guidelines. It would not be inappropriate to draw the attention of the court more particularly to those guidelines in regard to libel suits. To achieve this object, we recommend the addition of an Explanation in section 148 as follows:—

*"Section 148, Explanation to be added*

*Where, in a suit for damages for defamation for injury to the reputation of a person, an aspect of the character of that person, other than that to which the matter alleged to be defamatory relates, is likely to be injured by a question under this section, the court shall have particular regard to the question whether, having regard to the considerations mentioned in this section, such question is proper."*

**OBJECTIONABLE QUESTION IN CROSS-EXAMINATION —  
SECTIONS 149 TO 152**

**SECTION 149**

**84.1.** The Court is, by section 148, vested with power to determine the propriety of questions which are not relevant to the suit or proceeding except in so far as they affect the credit of the witness by injuring his character. Certain matters of detail regulating such questions, namely, the procedure to be followed by the court, and the obligation of counsel putting such questions, are dealt with in sections 149 to 152. Introductory.

**84.2.** The first important provision, which deals with the obligation of counsel, is contained in section 149. It provides that no such question as is referred to in section 148—that is to say, a question which is not relevant to the suit for proceeding but is intended to affect the credit of the witness by injuring his character—ought to be asked unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded. It would appear from the illustrations to the section that if a barrister<sup>1</sup> is instructed by an attorney or vakil that an important witness is a dacoit, the instruction is regarded as a reasonable ground for asking the witness whether he is a dacoit. Then, if a pleader is told by a person in court that an important witness is a dacoit and, on being questioned by the pleader, the informant gives the factual reason, that is also a reasonable ground for putting the question. In contrast, witness, of whom nothing whatever is known, cannot be asked, at random, whether he is a dacoit. There are here no reasonable grounds for the question. The case is different if the witness, on being questioned as to his mode of life and means of living, gives an unsatisfactory answer. Thus, whether there are reasonable grounds depends on the facts of the case and in determining whether they exist, several considerations may be material—such as, the source of the information, the importance of the witness, the care taken to check the accuracy of the information, and so on. Section 149.

It is, thus, primarily the duty of counsel to check the accuracy of the information. This duty is often described as a discretion.

**84.3.** The importance of this section cannot be over-emphasised. But it must be pointed out that the discretion vested in counsel under the section is of greater importance than the function of the court in checking improper questions. A court can, under section 148, overrule an improper question. But half the damage is done by putting the question. Once a serious defamatory allegation, particularly about a person having been guilty of a serious crime is made, the harm done may be irreparable. An innocent witness would be too eager to answer the question, but the psychological harm to the witness and the impact which the question might have on others who are not prepared to believe the denial by the witness, would be of great magnitude. Therefore, the duty placed on the shoulders of counsel under section 149 to make reasonable enquiries before putting a question which might injure the character of the witness, is a very heavy one. In this sense, section 149, though briefer than section 148, is of far greater importance. Importance.

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<sup>1</sup>These are the expressions used at present.

Case of previous  
convictions  
misconduct, or

84.4. The considerations which weigh with the court under section 148 must, of course, be borne in mind by counsel under section 149. He must also bear in mind that the impeachment of a witness by a reference to his bad character is subject to an important limitation, namely, the misconduct alleged must be of such a nature that it *affects the credibility of the witness*. Even though the scope of the cross-examination as to particular acts of misconduct may have been virtually unlimited at common law, and even though section 146, where it uses the phrase "affect the credit of the witness by *injuring his character*", may suggest a very wide line of attack on the reputation of the witness, yet the provisions of section 148 and sections 151 and 152 are also important as to the content of the questions that are permissible. The provisions of sections 149 and 150 are equally important as to the duty of the court and as to the principles on which counsel's discretion is to be exercised. Judicial guidance and supervision, by way of an appeal to the counsel's own discretion and sense of propriety, is not therefore ruled out.

The fact that the witness has suffered a previous conviction may have a material bearing on his credibility; but, if the matter is to be considered on principle, the nature of the crime would also appear to be relevant.<sup>1</sup>

Original draft.

84.5. It may be of interest to note that in view of the harm that would be caused to the witness, the original draft of the section in the Evidence Bill, as introduced by Stephen, was much more stringent as regards the obligation of counsel. In substance, that draft provided that no person should be asked a question which affects his character as to matters irrelevant to the case before the court, *without written instructions*; the court was even empowered to require the production of the instructions where it considered the question improper. It was further sought to be provided that the giving of such instructions should itself be an act of defamation, subject, of course, to the various rules about defamation laid down in the Indian Penal Code. As regards the person asking those questions, though he was not to be regarded as guilty of defamation, to ask such questions without instructions was to be punishable as a contempt of court.

84.6. These proposals were, however, very strongly criticised by the Bar and were also objected to by most of the local Governments. It was pointed out that the difficulty of obtaining written instructions would be practically insuperable. It was also urged that the Bar was already subject to forms of discipline which should, for all practical purposes, be sufficient. Finally, it was stated that it is of the greatest importance that the character of the witnesses should be open to full inquiry, particularly in Indian conditions, and rigid restrictions in this regard might lead to injustice.

The weight of this criticism was realised, and the sections were revised at the Committee stage, and put in the form in which they now appear. A hope was expressed by the Law Member (Stephen) that "they will be admitted to be sound by all honourable advocates and by the public".<sup>2</sup>

84.7. It would be too much to say that the hopes expressed by the Law Member, to which we have referred above, have been fully realised. Cross-examination does, sometimes, travel beyond legitimate limits, owing to insufficient attention paid to the obligation imposed on the Court by section 148 or on counsel under section 149. Section 148, in general, and sections 151 and 152 in particular, expect the court to use its overseeing eye and to disallow questions which are improper, indecent, scandalous, insulting or annoying or

<sup>1</sup>Cross, Evidence (1974), page 235.

<sup>2</sup>Proceedings of the Legislative Council of India; Gazette of India, 30th March, 1872, Supplement, Pages 237-238.



needlessly offensive. Of course, nothing which is relevant can be scandalous, as was observed by Subramanian Iyer J. Nevertheless, there do exist certain boundaries beyond which cross-examination ought not to travel, even if the boundaries may not be very well defined.

84.8. The matter requires a balancing of considerations on the facts of each case. That there are two sides to the question was lucidly brought out by Stephen, in his *General View of the Criminal Law in England*. He pointed out.<sup>1</sup> Balancing of considerations.

"If a woman prosecuted a man for picking her pocket, it would be monstrous to enquire whether she had not had an illegitimate child ten years before, though circumstances *might* exist which might render such an inquiry necessary. For instance, she might owe a grudge to the person against whom the charge was brought on account of circumstances connected with such a transaction and (might) have invented the charge for that reason."

The illustrations to the section show the general scope of the reasonable grounds which justify such questions and ought to guide legal practitioners and the court. Necessity and proportion are the two broad principles, which underline the propositions enacted in the sections on the subject;

It has to be remembered, as was pointed out extra-judicially by Lord Birkenhead,<sup>2</sup> that in some cases, the issues are of such a nature that severe and even very wounding cross-examination is required. "Justice in such cases could not be elucidated without the most searching, offensive and exhaustive cross-examination."

The same point of view has been expressed more pithily in the Dharma Shastras, where it is stated<sup>3</sup> that the *deceit* underlying a case has got to be extracted as a physician takes from the body an iron dart by means of surgical instruments.

Finally, we may refer to what Lord Chief Justice Cockburn, responding to that toast of the Judges at a Bar dinner given in honour of the great French advocates M. Berryer, said.<sup>4</sup>

"My noble and learned friend Lord Brougham, whose words are the words of wisdom, said that an advocate should be fearless in carrying out the interests of his client; but I couple that with this qualification and restriction that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his clients *per fas* but not *per ne fas*. It is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain and the duty it is incumbent on him to discharge with the immutable interests of truth and justice."

84.9. If worked in this spirit, the present law should prove to be adequate. Recommendation.  
We have no further comments to make on section 149, except that the illustrations could be revised and the expression "advocate" substituted in the section also.

<sup>1</sup>Stephen, *General View of the Criminal Law in England*, quoted by Field.

<sup>2</sup>Birkenhead, *Law, Life and Letters*, Vol. 1, page 242, quoted by Ramaswami J. in *Ayeasha Bi v. Peer Khan*, A.I.R. 1954 Mad. 741, 750.

<sup>3</sup>Kane *History of Hindu Dharma Shastras*, Vol. 3, page 271.

<sup>4</sup>Cockburn, cited by Ramaswami, *Magisterial and Police Guide* (1951), Vol. 1, page 190.

## SECTION 150

## Section 150.

**84.10.** Under section 150, if the court is of opinion that any such question was asked without reasonable grounds, the court may, if it was asked by any barrister-pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister-pleader, vakil or attorney is subject in the exercise of his profession. The words referring to barrister etc. should now be replaced by "*legal practitioner*". This is a purely verbal change.

## Question of liability of counsel.

**84.11.** There is a point of considerable interest relating to the obligations of the counsel and their protection in respect of questions put to witnesses. Though the matter is one of substantive liability, it has some connection with the law of evidence and may be discussed while on section 150. The question has been extremely discussed in Indian judicial decisions, namely, whether, in India, an advocate can be proceeded against either civilly or criminally for the words uttered as advocate and if so, what is the extent of the protection.

## Rationale.

**84.12.** That counsel enjoy a certain amount of protection is well established. First, as to the rationale, it has been observed :—

"It belongs to every subject to this realm in all Courts of Justice to assert and defend his rights, and to protect his liberty and life by the free and unfettered statement of every fact, and make use of every argument and observation that can legitimately—that is, according to the rules and principles of our law—conduce to these important ends. Every man has this right, and may exercise it in his own person—he may commit its exercise to counsel, who takes it as his delegates; its nature and character is not altered by this delegation; it is still the same to be exercised in the same manner and for the same purposes and subject to the same limitation and control as it would be if the party were pleading his own cause. These considerations will at once show the fallacy of the argument that instructions to counsel are the test by which we should try whether or not the line of duty has been passed; no instructions can justify observations that are not warranted by facts proved, or which may legally be proved; and it is the duty of counsel towards their clients to use their own judgment and experience and discretion and as the result, whatever be their instructions, to exclude all topics and observations of which the case does not properly admit. Subject to its just and necessary limits, this right, when duly exercised and directed to its proper purposes, should not be fettered or impeded; for if it be (fettered or impeded), an injury is sustained, not by the advocate, *but by the client*, and not by the client alone, by the whole community, whose interests are inseparably connected with a right essential to the administration of justice.<sup>1</sup>

The advocate, it has been stated, is not bound to consider the position in life of the person whose conduct he is condemning. His words and acts ought only to be guided by a sense of duty—duty to his client—and by a constant recourse to his own sense of right to guard against the abuse of the powers and privilege entrusted to him.<sup>2</sup>

This, in a broad sense, is the rationale underlying the privilege. But it is necessary to state the position in greater detail with reference to (i) civil liability; and (ii) criminal liability.

<sup>1</sup>Per Lord Chief Justice Blackburn in *Butt v. Jackson*, 10 Ir. Law Rep. 120, 123.

<sup>2</sup>*Sullivan v. Norton*, I.L.R. 10 Mad. 28.

84.13. In England, a plaintiff is not permitted to obtain compensation by reason of statements made by the defendant in certain situations, regardless of the motive of the person making the statement and regardless of the truth of such statement. The reason for such immunity lies in public policy—without this total protection from actions for libel and slander, the process of the law itself would be seriously inconvenienced. Among the statements absolutely privileged are those made during and connected with the trial of any action in court. This privilege extends to judge, jury, parties, witnesses and advocates.

English law—  
Civil liability.

84.14. The leading English case on the subject of privilege of counsel is *Munster v. Lamb*.<sup>1</sup> In that case the defendant, an advocate, was sued for having, while defending an accused, used expressions suggesting that the plaintiff was accustomed to keep and use drugs for immoral purposes. Brett, M.R., observed :

Scope of the protection in England — Civil liability.

"This action is brought against a solicitor for words spoken by him before a court of justice, whilst he was acting as advocate for a person charged in that court with an offence against the law. For the purpose of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, i.e., to say, not with the object of doing something useful towards the defence of his clients; I shall assume that the words were uttered without any justification or even excuse and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court when they were uttered. Nevertheless, inasmuch as the words were uttered with reference to and in the course of a judicial enquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been..... If upon the grounds of public policy and free administration of the law, the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes, judge, witness and counsel, it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows. He is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to urge as best he can without degrading himself in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position, he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he will have his mind so embarrassed that he could not do the duty which he is called upon to perform. That rule is founded upon public policy. With regard to counsel, the question of malice, bona fide and relevancy, cannot be raised. The only question is whether what is complained of has been said in the course of the administration of the law."<sup>2</sup>

84.15. The position in India is the same so far as *civil liability* is concerned. For some time, a doubt existed as to whether advocates, parties and witnesses have an absolute privilege or only a qualified privilege, so far as civil liability is

Position in India — Civil liability.

<sup>1</sup>*Munster v. Lamb*, (1882) 11 Q.B.D. 588.

See *Jagat Singh v. Kalipado*, (1921) I.L.R. 1 Pat. 371; A.I.R. 1922 Pat. 104.

<sup>2</sup>A spiteful advocate may be nevertheless amenable to the disciplinary jurisdiction of the Court and the Bar Council. But see *Brook v. Montague*, (1605) 79 E.R. 77; *Flint v. Pike*, (1825) 107 E.R. 1136.

concerned. Though the language of the section of the Indian Penal Code suggested that the privilege was only qualified, and therefore it was thought that *whether it was a civil case or a criminal case*, the privilege was only qualified, the privilege is now regarded as absolute.

**84.16.** In one civil case<sup>1</sup>, the Bombay High Court held that a member of the Bar has no absolute privilege and that an advocate who makes defamatory statements in the conduct of a case has no wider protection than a layman. This view, with respect, is not a well considered one, and is opposed to the general trend of authority.

**84.17.** The present view is that the privilege of parties, witnesses and counsel is absolute<sup>2</sup> as regards civil liability.

**Criminal liability in England.**

**84.18.** In England, the protection for such statements is absolute even in criminal cases. The matter is governed by the same rules whether it be a party, witness or counsel. In England, the right of free speech is, having regard to the occasion, allowed to prevail over the right of reputation. In the *Royal Aquarium case*,<sup>3</sup> Lopez L.J., observed:—

“The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in Office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words written or spoken were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed. This absolute privilege has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them.”

**Position in India in criminal cases.**

**84.19.** The position in India in criminal cases is, however, different. The matter is governed by the Indian Penal Code — section 499, 7th and 9th Exceptions. These Exceptions confer only a qualified privilege — qualified because good faith is an essential ingredient of the Exceptions in question. Good faith, as defined in section 52 of that Code, postulates —

- (i) honesty of motive plus
- (ii) due care and attention.

Since the use of the occasion for an improper purpose takes the matter outside the realm of good faith, the privilege cannot be described as absolute and must be described as a qualified one — if one has to use terminology that is employed in dealing with civil liability. Malice, however, is not presumed. Rather, there is, to begin with, a presumption of good faith on the part of counsel.

<sup>1</sup>*Tulsidas v. Billimoria*, A.I.R. 1932 Bom. 490.

<sup>2</sup>(a) *Thiruvengada v. Thiripurasundari*, I.L.R. 49 Mad. 728; A.I.R. 1926 Mad. 906;

(b) *Dinshaw Edalji v. Jehangir*, I.L.R. 47 Bom. 15; A.I.R. 1922 Bom. 381; *Bal Shanta v. Umrao*, I.L.R. 50 Bom. 162; A.I.R. 1926 Bom. 141;

(c) *Nikunia v. Harendra*, (1913) I.L.R. 41 Cal. 514;

(d) *Banerjee v. Anukul*, (1928) I.L.R. 55 Cal. 85; A.I.R. 1927 Cal. 823;

(e) *Bhikumber v. Becharam*, (1888) I.L.R. 15 Cal. 264;

(f) *Woolfun Bibi v. Jasarat*, (1900) I.L.R. 27 Cal. 262;

(g) *Re Alraja Naldu*, (1906) I.L.R. 30 Mad. 222;

(h) *Jagar Mohan v. Kalipado*, (1922) I.L.R. 1 Pat. 371.

<sup>3</sup>*Royal Aquarium etc. Society Ltd. v. Parkinson*, (1892) 1 Q.B. 431, 451.

**84.20.** Judicial decisions illustrate the position. Where a pleader was prosecuted for the use of defamatory words in the course of his address (calling the witness "loafers") during the trial of a suit, and convicted of defamation, it was held, reversing the conviction and sentence, that in the absence of express malice (which was not to be presumed), the pleader was protected by the ninth Exception to section 499.<sup>1</sup>

Malice of counsel not to be presumed.

**84.21.** In considering whether there was good faith, i.e., under section 52, Indian Penal Code, due care and attention of the person making the imputation must be taken into consideration. The good faith of an advocate is well expressed by the Master of Rolls (Lord Esher) in *Munster v. Lamb*.<sup>2</sup> "The advocate speaks from instructions; he reasons from facts sometimes true, sometimes false. He does not express his own inferences, his own opinion or his own sentiments, but those which he desires the Tribunal, before which he appears, to adopt. This duty the law allows, almost compels him to perform. Such being his duty, it seems that where express malice is absent (and it ought not to be presumed) 'a court having due regard to public policy would be extremely cautious before it deprived the advocate of the protection of Exception 9 to section 499, I.P.C.'"<sup>3</sup>

Good faith.

It is clear from the reported decisions that the presumption in the case of pleaders asking questions in cross-examination is that such questions are put in good faith for the protection of the client's interests within the Exception to section 499,<sup>4</sup> Indian Penal Code.

**84.22.** It must be then presumed that the counsel acted honestly and without malice. If this were not so, counsel could not possibly discharge their duties to their clients. If a counsel renders himself liable to a prosecution for defamation every time he makes serious allegations in a pleading on instructions, it would be quite impossible for him to carry on his duties at all. He is under a duty to his client to plead the allegations which his client makes, always provided that they are not so wild and reckless that no one would possibly accept them.<sup>5</sup>

**84.23.** The Court should presume, when a complaint is made against a legal practitioner for defamation, that the remark was made on instructions and in good faith, and that there can be no defamation unless the circumstances showed that the remark was made wantonly, or from a malicious or private motive.<sup>6</sup>

**84.24.** Regarding the extent of immunity which an advocate enjoys under the 9th Exception to section 499, Indian Penal Code, for words uttered in his capacity as advocate, the following observations of Mookerjee, A.C.J., in *Satis Chandra v. Ram Dayal*<sup>7</sup> are pertinent.

Extent of immunity of an advocate.

"In this country questions of civil liability for damages for defamation and questions of liability to criminal prosecution for defamation do not, for purposes of adjudication, stand on the same basis, as regards the former, we have no codified law, as regards the latter, relevant provisions are embodied in the Penal Code."

Basis different for civil or criminal liability for defamation.

<sup>1</sup>*In re Nagardas*, (1894) I.L.R. 19 Bom. 340.

<sup>2</sup>*Munster v. Lamb*, 11 Q.B.D. 588, 603.

<sup>3</sup>See *In re. Nagarji Trikamji*, I.L.R. 19 Bom. 340.

<sup>4</sup>(a) *Narayan Chandra Ganguli v. Hurish Chandra Saha*, A.I.R. 1933 Cal. 185.

(b) *Muhammad Taqi v. M. A. Ghani*, A.I.R. 1945 Lah. 97.

<sup>5</sup>*U Pike v. Makhin Thein*, A.I.R. 1940 Rang. 77.

<sup>6</sup>*McDonnell v. Emperor*, A.I.R. 1925 Rang. 345.

<sup>7</sup>*Satish Chandra v. Ram Dayal*, 48 Cal. 388; A.I.R. 1921 Cal. 1; 59 I.C. 143; 22 Cr. L. J. 31 (S. B.)

Advocate how far immune from criminal liability for defamation.

84.25. The position appears to be that the immunity which an advocate enjoys in a criminal proceeding for words uttered or written in the performance of his functions as an advocate is not in the nature of an absolute privilege, but of a qualified privilege.<sup>1</sup> It is highly improper for counsel to misuse the privilege of free speech which they enjoy when examining witnesses or presenting arguments for the consideration of the Court. They owe it to the Court and to the profession, of which they are members, not to indulge in their arguments in defamatory remarks of a gratuitous nature about the complainant, accused or witnesses in the cases, entirely irrelevant for the purpose of protection of the interest of the party whom they are representing. The weight of authorities appears to be in favour of the view that such gratuitous remarks reflecting on the conduct of a party, if made with a malicious intent to lower him in the estimation of his fellow-men in a case where the party's character is not in issue or relevant for the purposes of a right determination of the case, would not protect counsel from criminal defamation.<sup>2</sup>

Counsel's immunity from defamation on basis of unnecessary cross-examination.

84.26. The responsibility of a lawyer for putting defamatory questions was thus dealt with by Bardswell, J., in *Bashyam Ayyangar v. Andal Ammal*:<sup>3</sup>

"Where a pleader is charged with the offence of defamation punishable under section 500, I.P.C., in that he unnecessarily in cross-examination put to the complainant, who was a witness in a criminal case, certain questions which imputed immoral character and there is no allegation, and much less proof, that the pleader in putting the questions was actuated by any motive or private malice and was not acting in the interests of his clients, the pleader is entitled to the benefit of Exception 9 to section 499, I.P.C., and the charge which imputes no ill-faith but merely refers to the questions as having been put unnecessarily cannot stand and that therefore the entire proceedings against the pleader ought to be quashed."

These observations, with respect, state the law correctly.

Madras view criticised.

84.27. It is, however, difficult to agree with the dicta in *Madras v. Sullivan v. Norton* and some later cases of that High Court, that the privilege is absolute even in criminal cases. Not only does section 499 of the Indian Penal Code give an indication to the contrary, but also section 2 of that Code puts the matter beyond doubt by providing expressly that all acts punishable under the Code shall be punished "under the Code and not otherwise". The invocation of rules of the English common law in relation to offences under the Code is excluded by section 2, where the matter is governed by an express provision.

84.28. Questions relating to civil liability for defamation are determined with reference to the rules of the English common law, to the extent to which those rules are shown to be applicable.<sup>4</sup> This is on the principle that where no specific statutory directions are given, judges act on justice, equity and good conscience, and "justice, equity and good conscience" — generally, but not invariably, — mean the principles of English common law applicable to a similar state of circumstances.<sup>5</sup> But the position in respect of criminal liability

<sup>1</sup>See also in *re Nagarji Trikamji*, I.L.R. 19 Bom. 340; *Emperor v. Ganga Parsad*, I.L.R. 29 All. 685.

<sup>2</sup>*L. Gendan Lal v. Rex*, A.I.R. 1948 All. 409, 410.

<sup>3</sup>*Bashyam Ayyangar v. Andal Ammal*, 1934 Mad. W. N. (Cr.) 81.

<sup>4</sup>*Sullivan v. Norton*, I.L.R. 10 Mad. 28.

<sup>5</sup>See cases collected in *Satish Chandra v. Ram Dayal*, A.I.R. 1921 Cal. 1 (Mookerjee Ag. C. J.).

<sup>6</sup>*Mayor of Lyons v. East India Company*, (1836) 1 Moore Indian Appeals 176.

<sup>7</sup>See discussion by Mookerjee Ag. C.J. in *Satish Chandra v. Ram Dayal* A.I.R. 1921 Cal. 1.

for defamation in India is not precisely the same. In cases of criminal prosecution for defamation, the court is bound to apply the codified law of India as contained in section 499 of the Indian Penal Code; and Exceptions 7 and 9 to that section (which are the Exceptions mainly relevant to the situation under discussion) recognise only a qualified privilege. With the exception of certain Madras rulings, the general trend of decisions in India now is that the privilege of counsel is a qualified one, being governed by the Penal Code.

84.29. We have discussed these points relating to the privilege of counsel in order to show how important it is that counsel must exercise due care in putting questions making imputations against witnesses. The existence of a privilege from legal liability — whether qualified or absolute — does not affect their moral accountability to society as the members of an honourable profession. In fact, the greater the exemption, the higher may be the ethical standard expected by society of those so exempt.<sup>1</sup> Care to be exercised.

84.30. In *Gendan Lal v. Rex*,<sup>2</sup> the applicant in the revision was one Lala Gendan Lal. He (the applicant) was an accused person in a case, *Habib v. Gendan Lal*, under section 324, Penal Code, in the Court of the Bench Magistrates at Muzaffarnagar. Habib (the complainant) was represented in that case by an advocate, Mr. Banarsi Das. It was alleged that, while arguing the case for Habib, Mr. Banarsi Das made two defamatory statements regarding Gendan Lal. The first statement was that he, Gendan Lal, had abducted a Khatri woman. The second statement was that he had illicit connection with a Jain woman. These statements were quite unnecessary for the purposes of argument in the case and the case of Gendan Lal in the present revision was that they were deliberately made with a view to lowering him in the estimation of his fellow men. The lower Court had acquitted Banarsi Das of defamation, presumably under section 499, 9th Exception, I.P.C.

Dismissing the application for revision, Sapru J. made these observations :

"There is not the least doubt that Mr. Banarsi Das was perfectly reckless in the manner in which, in the course of his argument, he attacked the accused, Gendan Lal. From the point of view of presenting the case for his client, it was absolutely unnecessary for him to make statements of a *prima facie* defamatory character against the applicant, Gendan Lal, particularly when in cross-examination such questions which would have been in any case of an irrelevant nature had never been asked of the witnesses produced on his behalf. The only excuse that can be advanced for Banarsi Das and which has appealed to the Courts below is that these reckless statements were made by him in a moment of excitement, without premeditation and forethought. The reason for this excitement appears to have been the fact that counsel for the opposite party had in the course of his arguments indulged in an attack on his client. It is because of this consideration and the fact that the lower courts were not satisfied that he was actuated by malice that I have not considered it proper to interfere in this revision. Further this Court is reluctant to interfere in applications by private parties for revision against orders of acquittals."

He added that though technically, the case did not fall within section 500, I.P.C., yet the conduct of Banarsi Das was not worthy of a member of one of the most honourable professions in the world.

<sup>1</sup>*Satish Chandra v. Ram Dayal*, A.I.R. 1921 Cal. 1, 11-13 (Reviews case).

<sup>2</sup>*Gendan Lal v. Rex*, A.I.R. 1948 All. 409 (Sapru, J.).

84.31. With respect, we may point out that if the statement of Banarsi Das was "reckless", then he could hardly claim exemption from criminal liability. The exemption requires good faith, and good faith requires due care and attention. Comments made recklessly cannot be privileged within the Ninth Exception to section 499, I.P.C.

Verbal  
needed.

change

84.32. The above discussion was intended to deal with certain questions allied to the subject matter of section 150.<sup>2</sup> So far as the section is concerned, only a verbal change is needed, regarding the expressions "barrister" etc. Those expressions should be replaced by "advocate".

Recommendation.

84.33. The following redraft of section 150 is recommended :—

#### REVISED SECTION 150

"150. 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<sup>3</sup>....."

#### SECTION 151

84.34. The gist of section 151 can be thus expressed. The Court has a power to forbid scandalous or indecent questions or inquiries, unless they relate to facts in issue or are necessary to find out whether facts in issue existed. In practice, the question that arises most frequently with reference to the prohibition in this section is whether the inquiry is scandalous *and irrelevant*, or whether it is relevant for, nothing can be rejected as scandalous if it is relevant.

According to Taylor —

"The law excludes, on public grounds, evidence which involves the unnecessary disclosure of matter that is indecent, or offensive to public morals, or injurious to the *feelings of third persons*.<sup>1</sup> A disclosure is for this purpose 'unnecessary' whenever the parties themselves have no interest in the matter, except what they have impertinently created. The mere indecency of disclosures will not exclude them, where the evidence is necessary for the purpose of civil or criminal justice; as, on an indictment for a rape; or on a question upon the sex of one claiming an estate tail, as heir male or female; or upon the legitimacy of one claiming as lawful heir, or on a petition for dissolution of marriage, for judicial separation, or for damages on the ground of adultery. But where the parties have impertinently interested themselves in a question, tending to violate the peace of society by exhibiting an innocent third person in a ridiculous light, or to disturb his peace and comfort, or to offend public decency by the disclosures which its decision may require, the evidence will not be received. Of this sort are wagers or contracts, respecting the sex of a third person, or upon the question whether an unmarried woman has had a child."<sup>2</sup>

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questions  
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84.35. There are cases in which the subject matter of the enquiry is such that questions will have to be asked which cannot be fit for the drawing room, or which may appear to be scandalous. "Nothing could be more scandalous than a wife proclaiming her infamy from the witness box; but the latter part of the section expressly provides that if such questions relate to matters in issue, they shall be allowed." These observations were made in a Bombay case<sup>4</sup> where a woman claimed maintenance for her illegitimate child.

<sup>1</sup>*Deep Chand v. Sampath Raj*, A.I.R. 1970 Mys. 34.

<sup>2</sup>See introduction.

<sup>3</sup>The words "or other authority" are to be omitted. The High Court will take such action as it may think fit.

<sup>4</sup>Emphasis supplied.

<sup>5</sup>Taylor, section 949.

<sup>6</sup>*Rozario*, I.L.R. 18 Bom. 468-470.



**84.36.** In a Calcutta case also, it was held that if the indecent or scandalous questions relate to facts in issue or to matters necessary to be known to determine whether or not facts in issue exist, they must be allowed. In that case, during the examination of one of the defendants by the plaintiff, a question was put whether she was made pregnant by a certain person. The question was objected to, but the plaintiff contended that it was relevant, his case being that the witness did not inherit the property by reason of her unchastity during the life time of her husband. The form in which the question was asked did not show what period it referred to. Hence the case was remanded.

"If the plaintiff's case was that she did not inherit the property of her husband by reason of her unchastity during his life time, then *the question would be relevant*. If, however, it was asked for impeaching her credit as a witness, the Court will have to consider the provisions of sections 146 and 148 to 152."

**84.37.** In cases of this nature, the questions cannot be prohibited because they relate to facts in issue. All that can be done to mitigate the "scandal" is to exercise such power as is given by the law to the court to hold the proceedings *in camera*.

**84.38.** We do not recommend any amendment in the section, since the problems referred to above are concerned with the application of the section rather than with its content.

## SECTION 152

**84.39.** Allied to the prohibition in section 151 is that contained in section 152. The court has, under section 152, *a duty* to forbid two kinds of questions—(a) questions which are insulting or annoying, or (b) questions which, though proper in content, are needlessly offensive. The first group emphasises the improper *content* of the question. The second group is concerned with the offensive *form* of the question. In regard to the second group of questions, it is to be noted that even if the content of the question is proper, the form may be objectionable. Propriety of the question, so far as its content is concerned, is governed (apart from questions relevant to the issues) mainly by section 148, vide the words "such questions are proper" and "such questions are improper" in the various clauses of that section. It is not, however, enough that the content is one permissible by the tests laid down in section 148. The form must also avoid "needless offence".

**84.40.** This section thus reflects the regard of the law for the susceptibilities of the witnesses — and, sometimes, for the susceptibilities of third parties also. It may be noted that in England, on November 6, 1950, the Bar Council approved rules with regard to cross-examination, of which the first Rule is material, and reads —

"(1) In all cases it is the duty of a barrister to guard against being made the channel for questions which are only *intended to insult or annoy either the witness or any other person*, and to exercise his own judgement both as to the substance and (as to) the form of the questions put."

No further comments are needed on this section, which needs no change.

<sup>1</sup>*Subala v. Indra Kumar*, A.I.R. 1923 Cal. 315(2), (Chatterjee & Pearson, JJ.).

<sup>2</sup>Archbold, Criminal Pleadings, Evidence and Proof (1966), page 530, para. 1389.

CONTRADICTION AS TO MATTERS AFFECTING CREDIT —  
SECTION 153

I. INTRODUCTORY

Introductory.

85.1. In order that the inquiry may not travel too far into collateral matters, certain restrictions have been considered desirable. A witness can be cross-examined as to credit; such an examination does introduce collateral materials. What is to happen if the witness denies the damaging imputation introduced in cross-examination? Can an inquiry be held in detail into that imputation? Obviously, this may prolong the trial. Section 153, therefore, prohibits the contradiction of a witness as to matters affecting his credit, except in certain specified cases. We shall come to the exceptions later. The general rule underlying the section is that a witness cannot be contradicted on collateral matters, but only on matters relevant to the questions at issue.

85.2. The general principle underlying the section can be traced to the leading English case of *A. G. v. Hitchcock*,<sup>1</sup> which lays down that a witness cannot be contradicted on collateral matters.

The defendant in that case was charged with using a cistern for making malt without complying with various statutory requirements. One Spooner gave evidence of the use of the cistern and was asked in cross-examination on behalf of the defendant whether he had not told the cook that the excise officers had offered him twenty pounds to say that the cistern had been used. Spooner denied that he had ever made such a statement, and it was held that the defendant could not ask cook to narrate the alleged conversation. If Cook had been able to prove that Spooner had actually received a bribe from the excise officers, his testimony would have been admissible because it would have tended to show bias under an exception to the rule prohibiting contradictory evidence on collateral issues.

Pollock C.B. observed in that case—

“The test whether a matter is collateral or not is that: if the answer of a witness is on a matter which you would be allowed on your own part to prove in evidence—if it have such a connection with the issues, that you would be allowed to give it in evidence—then it is a matter on which you may contradict him.”

Effect.

85.3. The effect of the judgment in *Hitchcock's case* is aptly stated in the following passage from an American author:<sup>2</sup>

“Independent evidence may be given to prove a self-contradictory statement by a primary witness only if (a) the statement contradicts testimony by the primary witness about a matter directly in issue in the litigation, or (b) the statement contradicts testimony by the primary witness as to ‘those matters which affect the motives, temper and character of the witness..... with reference to his feelings toward one party or the other.’”<sup>3</sup>

<sup>1</sup>*A. G. v. Hitchcock*, (1847) 1 Exch. 91, 99.

<sup>2</sup>Maguire, *Evidence, Common sense and common law*, page 67, cited in Gross, *Evidence* (1974), page 232.

<sup>3</sup>The sub-quotation is from the Judgment of Pollock C. B. in *A. G. v. Hitchcock*. (1847) 1 Ex. 91.

**85.4.** The rule against contradiction on collateral matters is intended to present side issues from arising.<sup>1</sup> The facts are collateral; therefore the answers are final. The court is free not to believe the answers given by the witness. But in order to persuade it not to believe them, further evidence is not permissible.

If the courts are to be spared the task of considering, on "most imperfect material",<sup>2</sup> issues which have no bearing upon the matters really in contest between the parties, some limitations ought to be recognised. This is what section 153 seeks to achieve.

**85.5.** The reason of the rule which restricts the right to contradict is, that it is an object of great importance to confine the attention of the court as much as possible to the specific issues. Without some such rule, many collateral questions of fact might be raised in the course of a long trial; and the specific questions to be determined might be lost sight of. At the same time, it is desirable that any evidence should be admitted which may assist in determining the respective value of conflicting testimony.<sup>3</sup>

## II. SCOPE AND APPLICATION

**85.6.** An Australian case may be cited to illustrate the application of the principle enacted in the section. In *Piddington v. Bennett*,<sup>4</sup> a person claiming to be eye-witness of an accident explained his presence at the spot by stating that he was carrying a message from a bank to J. The opposite party attempted to produce evidence to prove that J had not operated upon his account with the bank on that day—the suggestion being that the witness was lying when he said that he was carrying a message to J. The evidence was ruled out as inadmissible by the High Court of Australia. It laid down that if a question in cross-examination affects *only the credit* of the witness and is not relevant to the matters actually in issue, the answers of the witness cannot be contradicted by other evidence, except in certain exceptional cases.

Australian case illustrative of the principle.

**85.7.** We have already referred to the usual test for what is not a collateral fact, stated by Pollock C.B. in *A.G. v. Hitchcock*.<sup>5</sup>

Test for collateral facts.

If the answer of a witness is a matter which you would be allowed on your own part to prove in evidence, then it is a matter on which you may contradict him. Thus, collateral facts are those which are relevant to credibility rather than to the main issue.

## III. EXCEPTIONS

**85.8.** To the rule prohibiting the contradiction of the evidence of a witness as to matters affecting credit, there are certain exceptions — apart from the rule permitting contradiction by the previous inconsistent statement of the witness himself. The first important exception is that relating to previous conviction.

Exceptions — previous conviction.

It may be noted that one of the important modes of challenging the credibility of a witness is by giving evidence of previous conviction of the witness as an offence. Where a witness, having been asked a question about his previous conviction in order to impeach his credit, denies having been so convicted, the first exception to section 153 permits evidence contradicting the denial made by the witness. Technically, of course, a previous conviction of a witness (unless

<sup>1</sup>Heydon, *Cases and Materials on Evidence* (1972), page 434.

<sup>2</sup>*Bhogilal*, A.I.R. 1928 P. C. 54, 63.

<sup>3</sup>6 B.H.C.R. 96.

<sup>4</sup>*Piddington v. Bennett* (1940) 63 C.L.R. 533.

<sup>5</sup>*A. G. v. Hitchcock*, (1847) 1 Ex. 91, 99.

relevant under some specific provision) is a collateral matter and a discussion thereof might lead the court into a consideration of matters too remote. At the same time, the law recognises that, in practice, the proof of a previous conviction does not take much time and the materials available for such proof are precise enough so as to avoid causing prolonged controversy. Under the Code of Criminal Procedure so far as is material, a previous conviction may, in addition to any other mode provided by any law for the time being in force,<sup>1</sup> be proved —

- (a) by an extract certified under the hand of the officer having the custody of the records of the court in which such conviction or acquittal was held, to be a copy of the sentence or order, or
- (b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was undergone, or by production of the warrant of commitment under which the punishment was suffered,

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

85.9. A previous conviction need not be of a kind directly reflecting on the veracity of the witness. At the same time, regard must also be had to the words of section 148(2), under which a certain amount of connection between the previous conviction and credibility of the witness is contemplated. As has been pointed out by Cross,<sup>2</sup> little attention would normally be paid to the testimony of a confirmed perjurer, but the veracity of a reckless motorist concerning matters other than his own driving might be considered beyond reproach. Where proof of a previous conviction is permissible as affecting credit, contradiction of the denial of previous conviction is allowed, because of the practical considerations mentioned above.

85.10. There is no particular restriction as to the kind of previous convictions that can be raised. In England, the matter has been covered by statute — section 6, Criminal Procedure Act, 1865,<sup>3</sup> — which applies to civil cases also. The section reads —

“A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction.”<sup>4</sup>

Although there is no direct authority on the point, the statute (section 6, Criminal Procedure Act, 1865) is usually taken to mean what it says, so that a witness may be asked *about any conviction*, whether it would ordinarily be thought relevant to credibility or not, and the conviction may be proved if it is not admitted.<sup>5</sup>

It would appear that the position would be substantially the same in India also, having regard to the wide language of the relevant Exception to section 153.

<sup>1</sup>Section 298, Code of Criminal Procedure, 1973.

<sup>2</sup>Cross, Evidence (1974), page 235.

<sup>3</sup>Criminal Procedure Act, 1865, section 6.

<sup>4</sup>On the position at common law, see the judgment of Dixon, J., in *Bugg v. Day*, (1949) 79 C.L.R. 442.

<sup>5</sup>*Olifford v. Olifford*, (1961) 5 All. E. R. 231, 232; *Mard v. Sinfield*, (1881) 49 L. J. Q. B. 696; (deciding that a conviction for embezzlement may be proved against a witness in a commercial case, though going only to credibility).

**85.11.** The second exception to the rule against contradiction on collateral facts permits the statement of a witness as to the non-existence of factors leading to a bias to be contradicted. This is apparently on the assumption that the partiality of a witness is such an important flaw that it must, in all probability, seriously shake his credit, and in view of its important effect on the persuasive force of the evidence, contradiction should be allowed even though it is a collateral fact. **Impartiality.**

**85.12.** On a consideration of the various aspects relevant to the subject, we do not think that the section needs any change. **No change.**

## CROSS-EXAMINATION OF ONE'S OWN WITNESS — SECTION 154

## I. INTRODUCTORY

## Introductory

**86.1.** In order to understand the significance of section 154, it is necessary to revert to the definition of cross-examination. According to section 138, cross-examination means the examination of the witness of an adverse party. An adherence to that definition implies that a party cannot *cross-examine his own witness*. In fact, the very word "cross" implies the array of the party examining and the witness examined on opposite sides, as it were.

That a party should not be allowed to cross-examine his own witness is a proposition which is founded on two postulates. (1) The party calling *knows*, at least in broad terms, what the witness is going to say, and (2) what the witness is going to say will *help* the party calling him. Occasions, however, do arise where the first or the second postulate is found to be inapplicable on the facts. The story narrated by the witness at the trial differs substantially from the story which he was expected to narrate. A witness makes a statement in court which is entirely contradictory to what he was expected to depose. Although, nominally, he is a witness "of the party", virtually he ceases to be so because the version of facts which the party producing or summoning him expects him to present to the court is not presented and something contrary is deposed to. If, in such a situation, the strict rule that a party can put to his witness only those questions that are allowed in examination-in-chief is adhered to, truth may be prevented from coming on the record. Not only would the situation be unfair to the party concerned, but also it is likely to cause injustice in the ultimate. In any case, the party calling the witness may be led to nourishing a feeling of injustice. This is not to say that in every case where a witness gives an unfavourable account, the party calling should be allowed to cross-examine him. There are other considerations to be taken into account. Nevertheless, it cannot be denied that the situation where a witness departs from what he was expected to depose to, is an exceptional one. Exceptional situations may require a relaxation of the ordinary rule, or at least justify a consideration of the question whether relaxation ought not to be allowed.

**86.2.** To provide for such exceptional cases, section 154 lays down a special rule, providing that the court may, in its discretion, permit the person who calls a witness "to put any questions to him which might be put in cross-examination by the adverse party". The language employed carefully avoids calling it cross-examination, because that would conflict with the definition in section 138. But the object of avoiding injustice is, in substance, achieved.

## Width of the section.

**86.3.** Though the language is restricted as above, the rule in the section is a wide one.<sup>1</sup> It does not, in the first place, require, as a condition precedent, that there must be a formal declaration of a witness as "hostile"—though that is the expression often used in practice. Secondly, application of the section is not confined to cases where a witness deliberately and corruptly "betrays" the cause of the party sponsoring him. The witness may be a perfectly honest one, having no animus against the party calling him. Yet, if there is a possibility of injustice, there is a scope for applying the section. The matter rests in

<sup>1</sup>See note in 34 C. W. N. 114.

the discretion of the court, which is not trammelled by any rigid rules with pigeon-holes for particular situations. Truth is paramount, and all ordinary rules of procedure must yield to it if the circumstances so require. That is the supreme guideline which the court bears in mind.

Let us quote a Mysore judgement<sup>1</sup> where the position is dealt with at some length —

"In normal cases where it can fairly be assumed that a party calling a witness represents to the court that he is a trustworthy witness, an occasion for the party calling him to seek permission under section 154 of the Evidence Act can arise only where he unexpectedly gives an answer which is adverse to his case. Even there, it is not enough if the party feels that the witness is hostile to him: it is necessary that the court should come to entertain an opinion that the witness has such hostile animus against the party calling him as to be inspired by a desire to speak the untruth or not to speak the truth.

"Hence, in such cases, an *element of surprise* of the type mentioned above becomes the starting point for a consideration by the court of the question whether it should exercise its discretion under section 154 and permit the party calling a witness to cross-examine him.

"It is with reference to such cases that Rowland J., observed in *Sachidanand Prasad v. Emperor*,<sup>2</sup> that permission under section 154 could hardly be refused when any witness makes an unexpected statement adverse to the case of the prosecution. As I read the observation, it means that an attempt on the part of the witness to depart from what is tentatively believed to be true is open to the suspicion that he may be departing from the truth, making it necessary to test his veracity by cross-examination by the party to whose detriment his *unexpected departure may operate*."<sup>3</sup>

Since it is not possible to catalogue the exceptional circumstances where the above considerations may have to be borne in mind, the section has been couched in a wide and elastic phraseology.

The width of the section will be still better brought out if it is contrasted with the English law.<sup>4</sup>

## II. ENGLISH LAW

**86.4.** There is, in England, a discretion vested in the trial judge to impeach the credit of one's witness to declare a witness hostile. This is derived from section 22 of the Common Law Procedure Act, 1854. An "adverse" witness, in this context, is one who, in the opinion of the trial judge, manifests that he has no desire to speak the truth at the instance of the party calling him.<sup>5</sup> English law.

**86.5.** The Common Law Procedure Act of 1854, section 22, provides<sup>6</sup>:—

"22. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence or by the leave of the Judge, prove that he has made at other times a statement inconsistent with the present testimony; but before such

<sup>1</sup>*Situmurthi Swamy v. Agodi Songanne*, A.I.R. 1969 Mysore 12, 15, para. 16.

<sup>2</sup>*Sachidanand Prasad v. Emperor*, A.I.R. 1933 Pat. 488, 492.

<sup>3</sup>Emphasis supplied.

<sup>4</sup>Para. 86.8, *infra*.

<sup>5</sup>*Price v. Manning*, (1889) 42 Chancery Division 372.

<sup>6</sup>Section 22, The Common Law Procedure Act, 1854 (17 & 18 Vict. C. 125).

last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement."

Meaning of "ad-  
verse" in  
England.

86.6. Section 22 of the English statute quoted above, uses the expression "in case the witness shall prove adverse". The question was then debated as to what was the meaning of the word "adverse" in the English statute. Did that word mean that the witness himself shall prove hostile to the party calling him, or that the testimony he gives shall be adverse? Upon this question there appear to have been conflicting decisions in England. In some cases<sup>1</sup> it has been held that a witness is adverse when, in the opinion of the Judge, he bears a hostile<sup>2</sup> feeling to the party calling him (as indicated by his attitude and demeanour and mode of answer) and not merely when his testimony contradicts his "proof".<sup>3</sup>

But the contrary view has been taken in several other cases.<sup>4</sup>

86.7. It would not, therefore, be correct to say that in England it is only when a witness manifestly shows a hostile personal feeling by his conduct and demeanour that the Court ought to allow his cross-examination and impeachment. "The testimony of a witness, if adverse, is only the more dangerous if he shows no hostile disposition;<sup>5</sup> and if he be astute as well as treacherous, he will take care to conceal his true sentiments from the Court." In the language of Lord Denman,<sup>6</sup> "it is impossible to conceive a more frightful inquiry than the triumph of falsehood and treachery in a witness who pledges himself to depose to the truth when brought into Court and in the meantime is persuaded to swear, when he appears, to a completely inconsistent story."

Position in India.

86.8. On a comparison with section 154, it appears that in India, the Legislature has given two indications that any rule upon this point should be of a liberal character.<sup>7</sup> (a) It has placed no fetter on the discretion of the Court to allow cross-examination under the provisions of section 154; and (b) it has relaxed the rule of English law<sup>8</sup> that a party shall not in any case be allowed to impeach his witness's credit by general evidence of his bad character.<sup>9</sup> Under the provisions of section 154, the party calling a witness may, with the permission of the Court, impeach his credit by cross-examination by putting all the questions mentioned in section 146 and may, under the provisions of section 155,

<sup>1</sup>*Greenough v. Eccles*, (1859) 5 C. B., N. S., 786 (1859), per Williams and Willes, JJ., (Cockburn, C. J., not wholly concurring in the judgment); *Reed v. King*, (1858) 30 L. T. 290.

<sup>2</sup>In *Coles v. Coles*, (1866) L. R. 1 P. & D. 71, Wilde, K. O., adopting counsel's definition, said: "An adverse witness is one who does not give the evidence which the party calling him wished him to give. A hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court."

<sup>3</sup>"Proof" here means what he is expected to prove.

<sup>4</sup>*R. v. Little*, (1883) 15 Cos, 319 (1883); where the objection was expressly taken that there was nothing in the demeanour of the witness to show that she was hostile; yet the evidence was admitted per Day, J., in consultation with Cave J., *Amstell v. Alexander*, (1867) 16 L. T., N. S., 830 (1867); ("In *Greenough v. Eccles*, 5 C. B., N. S., 786, it is laid down that to enable a party thus to contradict his own witness, the witness must appear not only unfavourable, but actually hostile. There must be some exhibition of animus which this witness does not seem to exhibit. He is, however, in my opinion, adverse," per Bramwell, B.); *Pound v. Wilson*, (1865) 4 F. & F., 301 Erle, J. (In this case there was merely different statements and the witness was held adverse); *Dear v. Knight*, (1859) 1 F. & F., 433.

<sup>5</sup>*Greenough v. Eccles*, 5 C. B., N. S., 786 (arguendo).

<sup>6</sup>*Wright v. Beckett*, 1 M. & R., 414.

<sup>7</sup>Woodroffe.

<sup>8</sup>*Greenough v. Eccles*, 5 C. B., N. S., 802.

<sup>9</sup>The meaning of this rule is that a party, after producing a witness, cannot prove him to be of such a general bad character as would render him unworthy of credit.



impeach his credit by the independent testimony of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit. It is, of course, clear that the mere fact that a witness tells two different stories does not necessarily and in all cases show him to be hostile.<sup>1</sup> But it is also clear that<sup>2</sup> where these conflicting statements involve great discrepancies and contradictions and are the outcome of fraud, dishonesty and treachery on the part of the witness, the party calling him should be permitted to cross-examine him under this section as to the fact and cause of the discrepancies and contradictions, and, if necessary, to impeach his credit under section 155 by substantiating the facts contained in the questions put to him by independent testimony. "If a party, not acting himself a dishonest part, is deceived by his witness — or if a witness professing himself a friend, turns out an enemy, and after promising proof of one kind gives evidence directly contrary — is the party to be restrained from laying the true state of the case before the Court? The common sense of mankind might be expected to answer this proposition in the negative, and to decide that the true state of the case should be made known."<sup>3</sup>

### III. QUESTION OF EFFECT

86.9. So much by way of introduction and comparison. We may now turn to one important question, which seems to have given rise to a fluctuation of views. The question, formulated in very broad terms, is this. When a witness is allowed to be cross-examined (declared to be "hostile" — to use the expression in general use though not accurate), can the party calling him rely on so much of his evidence as is still favourable to that party?

Question of effect of evidence.

86.10. The recent judgment in *Jagir Singh v. The State* (Delhi Administration)<sup>4</sup> lends importance to this question. The observation in that judgement may appear to approve the view taken in *Khijiruddin Sonar and Others v. Emperor*,<sup>5</sup> that when a hostile witness is cross-examined by the party calling him, the result is to discredit his evidence altogether.

Supreme case. Court

In *Jagir Singh's* case, two brothers were tried for the murder of one Harnek Singh. Two witnesses gave evidence in support of the prosecution. Swaran Singh departed from the prosecution story and stated that he did not know the name of the assailants and added that only one of them was present in the court and that was Karam Singh.

86.11. Commenting on the evidence of Swaran Singh, the Supreme Court observed:

"Swaran Singh (P.W. 11) was also examined on behalf of the prosecution but his evidence is of no help to the prosecution because he went back on the story of the prosecution and was permitted to be cross-examined on behalf of the prosecution. It is now well settled that when a witness, who has been called by the prosecution, is permitted to be cross-examined on behalf of the prosecution, the result of that course being adopted is to discredit that witness altogether and not merely to get rid of a part of his testimony. See *Khijiruddin v. Emperor*."<sup>6</sup>

These observations were *obiter*, because Swaran Singh's evidence had been rejected by two successive courts below.

<sup>1</sup>*Kalachand v. R.*, (1880) I.L.R. 13 Cal. 53; *R. v. Sagal*, (1893) I.L.R. 2 Cal. 642, 654.

<sup>2</sup>Woodroffe.

<sup>3</sup>Ph. & Arn., Ev., S. 555 cited by Woodroffe.

<sup>4</sup>*Jagir Singh v. The State*, (Delhi Administration), A.I.R. 1975 S. C. 1400 (Bhagwati & Patwalia, JJ.).

<sup>5</sup>*Khijiruddin Sonar and Others v. Emperor*, A.I.R. 1926 Cal. 139 (D.B.).

<sup>6</sup>*Khijiruddin v. Emperor*, A.I.R. 1926 Cal. 139 (D.B.).

**86.12.** In a later decision of the Supreme Court on the subject<sup>1</sup> the accused, Bhagwan Singh, who was a C.I.D. Police constable, attempted to give a bribe of Rs. 1000/- to Head Constable Jagat Singh for obtaining his favour for certain persons from whom stolen gold coins and gold bangles were recovered by Jagat Singh. The accused Bhagwan Singh was arrested in the process of offering the bribe to Jagat Singh and was convicted under section 165-A, Indian Penal Code.

Jagat Singh, the Head Constable, was declared hostile on the request of the Public Prosecutor during the trial of the case, as he did not support the prosecution case fully in his examination-in-chief.

The main ground of appeal argued before the Supreme Court by the counsel of the accused was that since the prosecution case rested principally upon Jagat Singh's testimony, the whole edifice was destroyed on that witness being declared hostile and the appellant was entitled to an acquittal.

**86.13.** The Supreme Court rejected this contention of the defence counsel and held that the fact that the Court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as what is described as a hostile witness, did not completely efface his evidence. The evidence remained admissible in the trial and there was no legal bar to basing a conviction upon his testimony if corroborated by other suitable evidence.

**86.14.** In *Sat Pal*,<sup>2</sup> the following observations were made by the Supreme Court:—

"If, in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto."

"It was in the context of such a case, where, as a result of the cross-examination by public Prosecutor, the prosecution witness concerned stood discredited altogether, that this Court in *Jagir Singh v. State*,<sup>3</sup> with the afore-said rule of caution — which is not to be treated as a rule of law — in mind, said that the evidence of such a witness is to be rejected *en bloc*."

**86.15.** It may be noted that in an earlier case of *Narayan Nathu Naik v. Maharashtra State*,<sup>4</sup> the court actually used the evidence of the prosecution witnesses who had partly resiled from their previous statements, to the extent they supported the prosecution, for corroborating the other witnesses.

Both logic and common sense seem to justify the view that the fact that a witness is permitted by the Court to be subjected to questions of the nature described in section 154 ought not to preclude the party calling him from relying on the favourable statements. Of course, so much of the evidence as is unfavourable should either be explained or met, or taken as it is. But that is a separate question.

**86.16.** So far as the rulings of the High Courts are concerned, the position is settled by a series of decisions, of which the Calcutta Full Bench ruling in *Prafulla Kumar Sarkar*<sup>5</sup> is only one example.

<sup>1</sup>*Bhagwan Singh v. The State of Haryana*, A.I.R. 1976 S. C. 202 (January). (Bhagwati, Goswami and Untwalia, JJ.)

<sup>2</sup>See also *Sat Paul v. The State*, A.I.R. 1976 S. C. 294 (February). (Bhagwati & Sarkaria, JJ.).

<sup>3</sup>*Sat Paul v. The State*, A.I.R. 1976 S. C. 294 (Feb.) (Bhagwati and Sarkaria, JJ.)

<sup>4</sup>*Jagir Singh v. State*, A.I.R. 1975 S. C. 1400.

<sup>5</sup>*Narayan Nathu Naik v. Maharashtra State*, (1971) 1 S.C.R. 133; A.I.R. 1971 S.C.1636.

<sup>6</sup>*Prafulla Kumar Sarkar and others v. Emperor*, A.I.R. 1931 Cal. 401 (F.B.).

The narrow view originated in the Scottish case of *Faulkner v. Brine*.<sup>1</sup> The current English view, however, is the opposite.

86.17. Some High Court held: "When a witness who has been called by the prosecution is permitted to be cross-examined on behalf of the prosecution under the provisions of section 154 of the Evidence Act, the result of that course being permitted is to discredit that witness altogether and not merely to get rid of a part of his testimony."

86.18. But the opposite view was established by a Full Bench decision of the Calcutta High Court.<sup>2</sup> Other High Courts have taken the same view. These included Allahabad,<sup>3</sup> Bombay,<sup>4</sup> Calcutta,<sup>5</sup> Madhya Pradesh,<sup>6</sup> Madras,<sup>7</sup> Mysore,<sup>8</sup> Lahore,<sup>9</sup> Orissa,<sup>10</sup> Patna<sup>11</sup> and Rajasthan.<sup>12</sup> Later High Court cases.

86.19. It seems to us that having regard to the fluctuation of views on the subject, it is desirable to restate the position in positive terms in the section, the point being one of a recurring nature and of practical importance. Both logic and common sense require that there should be no bar against a party relying on the evidence of a "hostile" witness. Circumstances of the case may throw doubt on the veracity of the entire evidence. But there should be no general prohibition. Need for amendment.

#### IV. RECOMMENDATION

86.20. In the light of the above discussion, we recommend the addition of the following sub-section in section 154<sup>13</sup>—

"(2) Nothing in this section shall disentitle the party so permitted to rely on any part of the evidence of such witness."

<sup>1</sup>*Faulkner v. Brine*, (1958) 1 F & F 254.

<sup>2</sup>*Profulla Kumar*, A.I.R. 1931 Cal. 401 (F.B.).

<sup>3</sup>*Babu Ram v. Emperor*, A.I.R. 1937 All. 754.

<sup>4</sup>*Shridher Mahadeo v. Emperor*, A.I.R. 1935 Bom. 36 (D.B.).

<sup>5</sup>*Romesh Chandra Das v. National Tobacco Co.*, A.I.R. 1940 Cal. 536.

<sup>6</sup>*In re Kalu Singh*, A.I.R. 1964 M. P. 30.

<sup>7</sup>*Ammathayarammal v. Official Assignee*, A.I.R. 1933 Madras 137.

<sup>8</sup>*Sivaramamurthi v. Angodo Songanno*, A.I.R. 1969 Mysore 137.

<sup>9</sup>*Jalal Din v. Nawab*, A.I.R. 1941 Lah. 55.

<sup>10</sup>*Purushottam Das v. Chakradhar Naik*, A.I.R. 1959 Orr. 19.

<sup>11</sup>*Emperor v. Karadhan*, A.I.R. 1933 Pat. 517.

<sup>12</sup>*Nand Kishore v. Brij Behari*, A.I.R. 1955 Raj. 65.

<sup>13</sup>Present section 154 be re-numbered as sub-section (1).

## IMPEACHMENT OF CREDIT OF WITNESSES — SECTION 155

## I. INTRODUCTORY

Introductory.

87.1. In connection with the assessment of the weight of the evidence of witnesses, we have so far been concerned with the questions that can be put to the witnesses themselves, either on relevant matters or on matters affecting their credit. There is, however, scope for another mode of impeaching the credit of witnesses. In certain cases, one witness may be allowed to testify directly as to the character of *another witness* or of the prosecutrix. In this sense, the credit of a witness can itself be made the subject-matter of evidence. This is possible under section 155, which deals with impeaching the credit of witnesses by independent evidence.

Section 155 shows that cross-examination is not the only mode of impeaching the credit of a witness, and the credit can also be impeached by giving independent evidence, e.g., testimony of other witnesses. There is no specific provision in any section about the impeachment of credit by contradiction of facts stated by a witness which are relevant to the issue, and this raised some doubt in a Bombay case as to whether the law in the Evidence Act is co-extensive with the law in England.<sup>1</sup> But, under section 5, evidence may always be given of the existence or non-existence of any fact in issue or fact relevant to the issue. So, when the facts stated by a witness are relevant to the issue, independent evidence may always be given to contradict them. Or, when the questions put to a witness in cross-examination for discrediting him relate to facts directly relevant to the matters in issue, his answers may be contradicted.<sup>2</sup>

Such contradictory evidence is really disproving the testimony of the witness on a fact material to the issue by offering counter-evidence, although it is in a sense impeaching his credit in an indirect manner. As observed by Field, "the Evidence Act assumes that where the facts are relevant, evidence may be given to contradict." Of course, section 155 does not say that it is confined to impeachment of one witness by the evidence of *another witness*. But most cases under the section are of this type where,—to use the phraseology of the Explanation to section 155,—one witness declares another to be unworthy of credit.

Extrinsic evidence — to use a convenient phrase — is admissible to impeach the credit of the witness. Thus, if witness A has given evidence, witness B can give evidence to show that A is unworthy of credit. Theoretically, this could be an infinite process, but in practice it is not so.

The Act does not contain, at present, any provision for confirming or re-establishing the credit of the witness — a matter which falls outside section 155.

Introductory.

87.2. At this stage, it may be convenient to enumerate the various modes of impeaching the credit of witnesses. The credit of a witness *may be impeached* —<sup>3</sup>

- (a) by cross-examination, (that is, by eliciting, from the *witness himself*, facts disparaging to him);

<sup>1</sup>See the observation in *R. v. Sakharan*, 11 B.H.C.R., 169.

<sup>2</sup>Section 155, illustration (c).

<sup>3</sup>Woodroffe.

- (b) by calling *other witnesses* to disprove his testimony on *material points* (the credit of a witness is *indirectly* impeached by evidence disproving the facts which he has asserted);
- (c) by contradiction on matters affecting credit, through other witness;
- (d) by independent proof given by other witnesses as to character.

In section 155, we are concerned with (c) and (d). According to that section, the credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him:—

- (1) By the evidence of *persons* who testify that they, from their knowledge of the witness, believe him, to be unworthy of credit;
- (2) By proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;
- (3) By proof of former statements of the witness inconsistent with any part of his evidence which is liable to be contradicted;
- (4) When a man is prosecuted for rape or any attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

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

Illustration (a) to the section presents these facts — 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 the goods to B.

The evidence is admissible.

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

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

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

The evidence is admissible.

Both the illustrations fall under clause (3) of section 155, as they deal with contradiction of a witness or relevant facts.

**87.3.** It is desirable to point out that evidence of character under section 155 is concerned with the character of witnesses and the prosecutrix. Sections 52 and 155 deal with different matters. Section 52 prohibits character evidence in regard to the *subject-matter of the suit*, whereas section 155 prescribes the manner of impeaching the credit of a witness.<sup>1</sup> Sections 138, 140, 145, 146, 148 and 154 provide for impeaching the credit of a witness by *cross-examination*. In particular, section 146 permits questions injuring the character of a witness to be put to him in cross-examination. Section 155 lays down a different method of discrediting a witness by allowing even independent evidence to be adduced.

Sections 52, 146 and 155 distinguished.

<sup>1</sup>*Guntake Husseniah v. Buseti Yerraiah*, A.I.R. 1954, A. P. 39, 40.

Section 155 restricts evidence permissible under section 153.

87.4. The importance of section 155 lies in this, that, by implication, it restricts the evidence, which may be given (otherwise than in the exceptional cases mentioned in section 153) to impeach a witness's credit, to that specified in the section.<sup>1</sup>

## II. SECTION 155(1) to 155(4)

Section 155(1).

87.5. Of the circumstances which can be tendered in evidence to impeach the credit of a witness under section 155, the first is "the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit." This is direct evidence as to the character of a witness. A question that often arises in connection with such evidence of character of a witness is; what kind of immoral character can be imputed to the witness under this head? To make the matter more concrete, the query is this — is it necessary that the evidence should relate to some trait of character which may directly affect the "veracity, accuracy or credibility" of the witness; or is it enough if the trait tends to show any defect indicating moral turpitude of any kinds? This question arises because of the wide word "credit" used in the clause. Does it refer only to veracity and allied features or has it a wider connotation?

Position in England.

87.6. In England, the scope of evidence that can be tendered under the corresponding rule is narrow. Article 146 of Stephen's Digest of the Law of Evidence (12th ed., page 168) states the position thus—

"The credit of any witness may be impeached by the opposite party, by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his Oath. Such persons may not, upon their examination in chief, give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted."

The words "credit upon his Oath" in the above formulation are universally understood as confined to veracity.

Medical evidence.

87.7. Although Stephen wrote a hundred years ago, this is substantially the present position, — with one addition. It would appear that now, in England, medical evidence can be given to show certain facts of a medical nature relating to the credibility of a witness. In *Toohy v. Commissioner of Metropolitan Police*,<sup>3</sup> the accused were charged with assaulting a boy of sixteen with intent to rob him. The boy's case was that the accused had demanded money and cigarettes, taken him up an alley and assaulted him in the course of searching him. The accused's defence was that they had found the boy in a state of hysteria exacerbated by drink and were helping him home. At the trial, the accused wished to call a police surgeon to testify to the fact that the boy was in an hysterical condition when brought to the police station, that he smelt of drink, and that drink was liable to exacerbate hysteria. They were, however, not allowed to do so. The accused were convicted and the conviction was affirmed by the Court of Criminal Appeal. The conviction was, however, quashed by the House of Lords. The surgeon's evidence was relevant to the issue, because it assisted in the resolution of the question whether the alleged assault accounted for the hysteria, or whether the hysteria accounted for the allegation of assault. The primary importance of the decision of the House of Lords is that it sanctions the calling of a witness to impugn the re-liability of an opponent's witness on medical grounds.<sup>4</sup>

<sup>1</sup>Markby on Evidence, page 109.

<sup>2</sup>Stephen's Digest, Article 146, cited in *R. v. Cunewardene*, (1965) 2 All. E. R. 290, 294.

<sup>3</sup>*Toohy v. Commissioner of Metropolitan Police*, (1965) A. C. 595; (1965) 1 All. E. R. 506 (H. L.).

<sup>4</sup>Cross, Evidence (1974), page 238.

87.8. According to the theory of English law, evidence intended to impeach credit should relate to general reputation only and should not express the mere opinion of the impeaching witness.<sup>1</sup> It is not sufficient that the impeaching witness should profess merely to state what he has heard "others" say; for those others may be but few. He must be able to state what is generally said of the person by those among whom he dwells, or by those with whom he is chiefly conversant; for, it is this only which constitutes his general reputation.

In practice, the question is generally shortened thus — "from your knowledge of the witness would you believe him on his oath?"<sup>2</sup>

87.9. As regards the position in the United States, it would appear that in most jurisdictions, at least in a direct attack on the credibility of the witness the evidence used is designed to show the general propensity of the witness who is falsified. "In effect, it is designed to show that the conscience of the witness would not be disturbed if he is falsified." "Truth and veracity" are the common tests for impeaching the witness. The Uniform Rules of Evidence limit inquiry to honesty or veracity of the witness. Although, in a few jurisdictions, general moral character is permitted as a means of impeachment, it would appear that the trend now is in the narrower direction, there being a realisation of the dangers of a broader test.<sup>4</sup>

Section 155(1)—  
position in U.S.A.

87.10. In California, for example, the sphere of admissibility under this head is somewhat narrow. The California Evidence Code<sup>5</sup> provides, so far as is material, as follows:

Position  
U.S.A. in

"Section 787. *Specific instances of conduct*—Subject to section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.

Section 788. *Prior felony conviction*—For the purpose of attacking the credibility of a witness it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:

- (a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.
- (b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with section 4852.01) of Title 6 of Part 3 of the Penal Code.
- (c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offence.
- (d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to procedure substantially equivalent to that referred to in subdivision (b) or (c)."

<sup>1</sup>Woodroffe.

<sup>2</sup>*R. v. Brown*, 1 C.C.R. 70.

<sup>3</sup>Mason Ladd, "Impeachment of Witnesses" (1966-67) 52 Cornell Law Quarterly 239, 241.

<sup>4</sup>Mason Ladd, "Impeachment of Witness" (1966-67) 52 Cornell Law Quarterly 239, 241, *l. n.* 7.

<sup>5</sup>Sections 787 and 788, California Evidence Code.

<sup>6</sup>Emphasis supplied.

Need for clarifying the scope of clause (1).

**87.11.** It seems to us on a consideration of the merits of the subject that it would be desirable to clarify the scope of clause (1) and that it should be confined to attacks on veracity accuracy on credibility.<sup>1</sup>

Section 155(2).

**87.12.** This takes us to clause (2) of section 155, which allows proof that a witness has been bribed or has accepted an offer of a bribe or has received other corrupt inducement. As to the words "has accepted the offer of a bribe", it is to be noted that the clause was originally framed "has had the offer of a bribe."

The substitution was probably grounded<sup>2</sup> upon the ruling in the case of the *Attorney-General v. Hitchcock*, where it was held that the fact that the witness has accepted a bribe to testify may, if denied, be proved, but a bare admission by the witness that he has been offered a bribe cannot; Pollock, C.B., remarking that it was no disparagement to a man that a bribe is offered to him, though it may be a disparagement to the person who makes the offer.<sup>3</sup>

No further comments are needed on this clause.

Clause (3)—Evidence liable to be contradicted.

**87.13.** Under clause (3), the witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. Illustrations (a) and (b) to the section illustrate this clause.<sup>4</sup>

Some comments are called for as to the phrase 'his evidence which is liable to be contradicted', which occurs in this clause. Some obscurity exists as to the exact meaning of the words in question. It was observed by Wilson J. in a Calcutta case<sup>5</sup> that these words mean (evidence) "which is relevant to the issue". On the other hand, Cunningham<sup>6</sup> raises the query whether these words do not refer to any part of the evidence which relates to a fact in issue, or relevant fact, or which falls within the exception to section 153. The latter interpretation appears to be correct, for two reasons. First, the wording in section 155(3) is wide, "any part of his evidence which is liable to be contradicted", and, second, the two exceptions to sections 153 lay down, in substance, that where a witness denies a previous conviction, or a fact impeaching his impartiality, he can be contradicted.

Recommendation as to section 155 (3).

**87.14.** In our opinion it would be useful to insert a clarification adopting the wider view of clause (3).

Section 155 (3) Tape Records.

**87.15.** Here we may refer to a Supreme Court case<sup>7</sup> relating to the admissibility of tape recorded evidence in the election petition in respect of a presidential election. The petitioners relied on some tape-recorded statement in order to contradict a witness of the respondent. This was objected to by the counsel for the respondent, on the ground that the tape-recorded conversation was not admissible in evidence for contradicting the evidence of the witness. It was urged by the counsel that under section 155(3) of the Evidence Act, before any former statement can be put in evidence to impeach the credit of a witness, the court must be satisfied that the previous statement is relevant to the matter in issue. Overruling this contention, the Supreme Court held that a previous statement, made by a person and recorded on tape, can be used not only to corroborate

<sup>1</sup>Cf. recommendation as to section 146(1).

<sup>2</sup>Woodroffe.

<sup>3</sup>*Attorney-General v. Hitchcock*, (see discussion as to section 153).

<sup>4</sup>See also *Anup v. Kedarnath*, (1925) 30 C. W. N. 835.

<sup>5</sup>*Khadijah v. Abdol*, (1889) I.L.R. 17, Calcutta, 344, 346.

<sup>6</sup>Cunningham, Evidence, section 373, cited in Woodroffe & Amir Ali, Evidence (1959) Vol. 3, page 1777.

<sup>7</sup>*M. Sri Rama Reddy v. Shri V. V. Giri*, A.I.R. 1971 S. C. 1162.



the evidence given by the witness in court, but also to contradict the evidence given before the court, as well as to test the veracity of the witness and *also to impeach his impartiality*.

87.16. The Supreme Court also held that the interpretation placed by Calcutta High Court in (1890) I.L.R. 17 Cal. 344 was not correct as to the words "which is liable to be contradicted". The court remarked that the evidence may be given that the witness is unworthy of credit and this evidence may be of a general nature and may not be directly relevant to the issue. The evidence may also be regarding the receipt of bribe by the witness so that his statement cannot be acted upon. The previous statement recorded on tape must be considered to be relevant to the issue to impeach the credit of the witness by establishing that he was making contradictory statements.

87.17. A question of procedure may be dealt with, Section 155(3) only lays down that the credit of a witness may be impeached, *inter alia*, by "proof of former statements inconsistent with any part of the evidence, which is liable to be contradicted", but it does not lay down the manner in which the former statement in writing, when it is sought to be tendered in evidence for contradicting a witness, is to be proved. That is provided in section 145. In other words, section 155 is controlled by section 145 and is not independent of it<sup>1</sup>. As laid down by their Lordships of the Privy Council in *Bal Gangadhar Tilak v. Shrinivas Pandit*,<sup>2</sup> and in *Jagrani Kunwar v. Durga Prasad*,<sup>3</sup> if a party wants to rely on a previous statement, contained in a letter of a person who has gone into the witness-box, in order to contradict him, it is the duty of such person to put that letter to the party or the witness and to give him an opportunity to explain it.

Relationship between section 155 and section 145. Recommendation,

We have dealt with this aspect under section 145, when considering its scope in relation to oral statements. So far as section 155(3) is concerned, it may be useful to provide that it is subject to section 145.

87.18. Section 155(4) provides that when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Section 155(4).

Such evidence means something more than that it can be proved that she has on specific occasions done acts which may be called immoral. Some meaning must be given to the word 'generally', and it appears that the clause refers to such evidence as that her general reputation was that of a prostitute, or that she had the general reputation of going about and committing immoral acts with a number of men<sup>4</sup>.

87.19. It may be stated that the Act, as originally drafted, contained the following additional section on the subject of character:—"In trials for rape or attempts to commit rape the fact that the woman on whom the alleged offence was committed is a common prostitute or that her conduct was generally unchaste is relevant". It was, however, thought unnecessary to retain this as a separate section<sup>5</sup>, and it was accordingly incorporated with the present one. In the case now mentioned, evidence is receivable not so much to shake the credit of the witness, as to show directly that the act in question has not been committed. In trials for rape or attempts to commit that crime, not only is evidence of general

History of clause (4).

<sup>1</sup>*Gopi Chand v. Emperor* 1930 Lah. 491, 495.

<sup>2</sup>*Bal Gangadhar Tilak v. Shrinivas Pandit* A.I.R. 1915 P.C. 7; 42 I.A. 135, I.L.R. 39 Bom. 441 (P.C.).

<sup>3</sup>*Jagrani Kunwar v. Durga Prasad* (1914) I.L.R. 36, All. 93; 41 I.A. 76 (P.C.).

<sup>4</sup>*Mahid Ali v. Emperor* A.I.R. 1932, Cal. 523, 524.

<sup>5</sup>Woodroffe.

bad character admissible under the first clause—"to show that the prosecutrix ought not to be believed upon her oath", but also as proof that she is reputed prostitute for it goes for towards raising an inference that she yielded willingly<sup>1</sup>.

Question of consent.

87.20. Evidence of the general immoral character of the prosecutrix is admissible not only to show that she is unworthy of credit, but also on the question of consent. In the American Case of *People v. Johnson*<sup>2</sup>, the following observations occur—

"It is certainly more probable that a woman who has done these things voluntarily in the past would be much more *likely to consent*<sup>3</sup> than that one whose past reputation was without blemish and whose personal conduct could not truthfully be assaulted".

This does not, of course, mean that the bodily integrity of a woman is regarded as any the less deserving of legal protection because her character is suspicious.

The character is relevant only for deciding the question of fact—probability of consent.

87.21. Apart from general character, the prosecutrix may be cross-examined as to other immoral acts with the prisoner and if she denies these, such immoral acts may be independently proved<sup>4</sup>. This is because they are relevant facts as indicating consent. In *England*,<sup>5</sup> on the other hand, while the prosecutrix may be cross-examined as to immoral acts as to other men (as shaking her credit) yet if she denies them, witnesses cannot be called to contradict her. This is because the question this time is relevant only to her credit as a witness.

87.22. Section 155, in its opening lines, speaks of the credit of a "witness". But, on the other hand, clause (4) is defective in the sense that while clauses (1), (2) and (3) begin with the words "by evidence" or "by proof", clause (4) does not so begin. It would, in our view, be better to make the matter clearer by putting clause (4) also as a branch of section 155.

Position of the accused.

87.23. We have disposed of the four clauses of section 155 as it now stands. It remains now to consider one point which does not concern any particular clause of the section, but is relevant to the entire section. This point arises because since section 155 speaks of impeaching the credit of a "witness". Literally, it may become applicable also to the accused who offers himself as a witness. So far as *cross-examination of the accused* on matters in issue is concerned, the matter will be taken care by the relevant earlier sections, in regard to which we have made suitable recommendations for dealing with the problem of the accused as a witness<sup>6</sup>. The question how far his character can be attacked under section 155, by *independent evidence*, however, still remains since it falls outside sections 132 and 148. When the credit of an accused-witness is attacked under section 155, the danger arises that not only his credibility *as a witness* (in the restricted sense) would be attacked, but also there may be a certain amount of mental harassment and a likelihood of prejudice by such cross-examination, if it is allowed without some qualification. We have discussed the relevant aspects under section 148, and stressed the need for special provisions. It seems to us that the best

<sup>1</sup>Woodroffe.

<sup>2</sup>*People v. Johnson*, (1893) 106 California 289, cited by Sarkar.

<sup>3</sup>Emphasis added.

<sup>4</sup>Phipson, Manual (1972), page 288.

<sup>5</sup>(a) *R. v. Riley*, (1887) 18 Q.B.D. 481.

(b) *R. v. Basher*, (1969) 1 W.L.R. 190.

<sup>6</sup>See discussion as to sections 132 and 148, *supra*.

course would be to create, in section 155 also, a separate provision substantially on the same lines as we have recommended in relation to section 148 as regards the cross-examination of the accused on matters affecting his credit.

### III. RECOMMENDATION

87.24. The result of the above discussion is that in regard to section 155, the following amendments are desirable.— Amendments  
summed up.

- (i) Clause (1) should be restricted to such matters as affect the *credibility, accuracy* or veracity of the witness<sup>1</sup>.
- (ii) Clause (3) should be made subject to section 145, in regard to the procedure<sup>2</sup> for contradiction and the meaning of the expression "liable to be contradicted" should also be clarified<sup>3</sup> in that clause.
- (iii) As regards the accused, a separate provision is recommended<sup>4</sup>
- (iv) Clause (4) to be put as a branch.

In the light of the above discussion, we recommend that section 155 should be revised as under:—

"155. (1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the permission of the Court, by the party who calls him:

- (a) by the evidence of persons who, from their knowledge of the witness, impeach his *credibility, accuracy or veracity*;
- (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;
- (c) *subject to the provisions of section 145*, by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted, *that is to say, evidence on a fact in issue or a relevant fact or evidence relating to any matter referred to in the First or Second exception to section 153*;
- (d) where a man is prosecuted for the offence of rape or attempt to commit rape, and the witness is the prosecutrix, by evidence showing that the prosecutrix was of generally immoral character.

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

155. (2) *When an accused person offers himself as a witness in pursuance of section 315 of the Code of Criminal Procedure, 1973, another witness shall not be asked any question tending to show that the accused has committed or*

<sup>1</sup>Para. 87.11, *supra*.

<sup>2</sup>Para. 87.17, *supra*.

<sup>3</sup>Para. 87.14, *supra*.

<sup>4</sup>Para. 87.24, *supra*.

*been convicted or been charged with any offence other than that with which he is then charged, or that he is of bad character, unless—*

- (i) the proof that he has committed or been convicted of such other offence is relevant to a matter in issue; or*
- (ii) he has personally or by his legal practitioner asked questions of the witness for the prosecution with a view to establishing his own good character, or has given evidence of his good character; or*
- (iii) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, provided the leave of the court is obtained for asking the particular question; or*
- (iv) he has given evidence against any other person charged with the same offence.*

**CORROBORATIVE EVIDENCE AND RE-ESTABLISHING CREDIT —  
SECTIONS 156-157 AND PROPOSED SECTION 157A**

**SECTION 156**

**88.1.** In the Chapters immediately preceding, the discussion was mainly concerned with *impeaching* the credit of witnesses by various modes. When the credit of a witness is impeached or likely to be impeached, the question arises of corroboration of the witness and re-establishing his credit. When the testimony of a witness is contradicted by his previous inconsistent statements, it may become necessary to give evidence in rebuttal and to counter-act the damaging effect of his inconsistent statements. If contradiction is important from the point of view of the adverse party, confirmation of the credit of the witness is equally important from the point of view of the party calling the witness. Significance.

**88.2.** Any good advocate would know where there is need for corroboration of the evidence of a particular witness. In such a case, corroboration is a matter of tactics. But the situation may be one where corroboration is required by a mandatory provision of law. Under section 34, for example, entries in books of account regularly kept in the course of business, are relevant whenever they refer to a matter in which the Court has to inquire, but such statements shall not alone be sufficient to charge a person with liability. The need for corroboration is obvious. In the absence of mandatory legal provisions, there may yet be rules which require corroboration as a matter of prudence. Finally, even where neither law nor prudence necessitates the introduction of corroborative evidence, a party may, as a matter of strategy, consider it desirable that the evidence of a particular witness may be corroborated to increase its persuasive force. Need.

**88.3.** Corroborative evidence of a fact, then, is that which confirms or supports other evidence of the same fact<sup>1</sup>. As a general rule, evidence does not need the support of corroborative evidence, and the court may act upon the uncorroborated evidence of one witness, even if that means disregarding more than one opposing witness<sup>2</sup>. There are, however, several exceptions to this general rule, where corroboration is required. Nature of corroboration.

**88.4.** Corroboration of a witness's evidence may be found in the evidence of another witness. Although this is the commonest kind of corroboration, it is not the only kind; and where the law requires corroboration it does not usually specify this, or indeed any other, kind. A document or thing may supply corroboration, and so may the evidence,<sup>3</sup> or the conduct out of court, of the person against whom the corroboration is required such as a confession by him<sup>4</sup> or the telling of lies about the matter<sup>5</sup>, or his similar conduct on other occasions<sup>6</sup> or even his silence when the gist of the evidence is repeated in his presence, where such silence can be construed as an admission<sup>7</sup>. Forms.

<sup>1</sup>Phipson, *Manual of Law of Evidence* (1972), page 246.

<sup>2</sup>Phipson, *Manual of Law of Evidence* (1972), page 246.

<sup>3</sup>*R. v. Brown*, (1911) 6 Cr. App. R. 147; *R. v. Doss*, (1918) 13 Cr. App. R. 158, 162.

<sup>4</sup>*R. v. Hook*, (1858) Dears. & B. 606; *R. v. Arnold*, (1949) W. N. 184.

<sup>5</sup>*Credland v. Knowler*, (1951) 35 Cr. App. R. 48; *Corfield v. Hodgson*, (1966) 1 W.L.R. 590.

<sup>6</sup>*Ante*, page 63.

<sup>7</sup>*Ante*, page 168.

The essence of corroboration is that it must confirm, in some material particulars, the evidence standing in need of corroboration.

#### Section 156.

88.5. The Act deals with two types of corroboration evidence. The questions which can be put to a witness whom it is intended to corroborate as regards any relevant fact, are the subject matter of section 156. The nature of evidence that may be given to corroborate the testimony of a witness is dealt with in section 157.

According to section 156, 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 the circumstances, if proved would corroborate the testimony of the witness as to the relevant fact which he testifies.

According to the illustration to the section, 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.

#### Object of section 156.

88.6. Section 156 provides for the admission of evidence given for purposes not of proving a directly relevant fact, but of confirming the truthfulness of a witness. One of the best methods to check this is to ascertain the accuracy of his evidence as to surrounding circumstances though they are not immediately connected with the relevant fact. Provision for this is made in the section which is the reverse of the process of contradiction. Contradiction impeaches the credit, while corroboration confirms it. In fact, corroboration under section 156, or rather, questions tending to corroborate his evidence, is not the only method of confirming the truthfulness of a witness. However, so far as section 156 is concerned, its utility lies in this, that, in order to prepare the ground for corroboration, it is necessary to elicit the surrounding circumstances in the first instance from the witness himself, and it is for this purpose that the section makes a provision<sup>1</sup>.

88.7. There is often no better way of proving the truthfulness of a witness than by ascertaining the accuracy of his evidence as to surrounding circumstances, though they are not so immediately connected with the facts of the case as to be in themselves relevant<sup>2</sup>. While, on the one hand, important corroboration may be given in the case of truthful witness, a valuable field for cross-examination and exposure is afforded in the case of a false witness. In order to prepare the ground for the corroboration of a witness, it is necessary to elicit these surrounding circumstances in the first instance from the witness himself, and for this the section makes a provision<sup>3</sup>.

#### Recommendation to amend section 156.

88.8. The principle of the section hardly needs any change, but a minor point should be mentioned. The mention of a "relevant fact" in section 156 suggests a query whether the principle should not apply to *facts in issue* also, since section 5 makes a distinction between the two—apart from the fact that the two expressions are separately defined. It is desirable that opportunity should be taken of adding the expression of "fact in issue" before the words "relevant fact" in section 156.

<sup>1</sup>Cunningham, Evidence, Commentary on section 156, cited by Woodroffe.

<sup>2</sup>Field.

<sup>3</sup>Cunningham, Evidence, section 156, page 316.

## SECTION 157

Section 157.

**88.9.** According to section 157, 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.

Such statements were admissible before the Act,<sup>1</sup> and this section and subsequent decisions<sup>2</sup> apply the same principle.

**88.10.** In effect, section 157 declares evidence of certain facts to be admissible; and if the section had not been inserted, what we have said of section 156 would apply and, the Judge would have had to determine the relevancy of these facts by reference to sections 7 and 11, and he might perhaps have been influenced by the practice in England, which has been against the admission of such evidence<sup>3</sup>. It is not incumbent on a party to give corroborative evidence of statements challenged by the other party.<sup>4</sup> However, where the witnesses for the prosecution were proved to be untruthful in the greater part of their evidence, it would be dangerous to convict on the residue unless it was corroborated<sup>5</sup>.

Effect.

**88.11.** To express the principle underlying section 157 in different terms, prior statements otherwise inadmissible by virtue of the rule against hearsay are let in to lend credibility, particularly to rebut any suggestion of recent fabrication. If the hearsay rule is strictly applied, it would not be permissible to admit prior statements. But when questions of credibility arise, certain aspects assume importance, and a limited exception is made. Even then, the prior statements are not substantive evidence. So far as the aspect of hearsay is concerned, however, it is proper to point out that even though the previous statements was not made before the Court on oath and the declarant was not subject to cross-examination, the previous statement is admissible to rebut the doctrine of recent invention. If it is suggested that the witness has recently invented the story, it is permissible to prove, in rebuttal of the suggestion, that he told the same story at a time more nearly contemporaneous with the evidence to which he is now deposing. Such evidence, however, goes only to corroborate and should not be used as evidence of the truth of the fact stated.<sup>1</sup>

Principle.

**88.12.** Of course, the mere fact that a man had, on a previous occasion, made the same assertion as the present does not necessarily add to its truthfulness. One may persistently adhere to falsehood once uttered, if there is a motive for it. However, consistency could be a ground for belief in the veracity of the witness and it had long been the practice in India to treat it as corroborative evidence. This practice is illustrated by a number of judicial decision before the Act. The previous practice and statutory provisions have been simplified and reproduced in section 157.

<sup>1</sup>See

(a) *R. v. Bishonath Pal*, (1869) 12 W. R. Cr. 3;

(b) *R. v. Bissen Nath*, (1867) 7 W. R. Cr. 31.

<sup>2</sup>(a) *Muthukumaraswami Pillai v. R.*, (1912) I.L.R. 35 Mad. 397;

(b) *Massamat Naina Koer v. Gobardhan Singh*, A.I.R. 1919 Pat. 352 (Admissibility of entries).

<sup>3</sup>Cunningham, Evidence, section 156, and Markby, Evidence, pages 109-110, cited in Woodroffe.

<sup>4</sup>Markby, Evidence, 109, 110.

<sup>5</sup>*Moulvia Mahomed Ikramull Hug v. Wille*, (1907) 11 C.W.N. 946.

<sup>6</sup>*Hari Krishna v. R.*, (1915) 42 Cal. 734; see *R. v. Babar Ali Gazi*, I.L.R. 242 Cal. 789. (Corroboration of confession of co-accused).

<sup>7</sup>*Nominal Defendant v. Clements*, 104 Commonwealth Law Reports 476, 483, 495.

Other provisions relevant to previous statement.

**88.13.** The fact that a previous statement is admissible under section 157 as corroborative evidence does not, of course, mean that the provisions of any other section under which it may be relevant are excluded. For example, a statement by a girl, alleging that she was raped, if made immediately after the rape, becomes relevant under section 8, as showing the conduct of the victim of an alleged offence, which conduct is influenced by a fact in issue. The situation is expressly dealt with in section 8, illustration (j). The only refinement which may be mentioned here is that while a statement not in the nature of a complaint is outside section 8, it is within section 157:

"The distinction is of importance; because while a complaint is always relevant, a statement not amounting to a complaint will only be relevant under particular circumstances, for example, if it amounts to a dying declaration or can be used as corroborative evidence."<sup>1,2</sup>

Not substantive Evidence.

**88.14.** What becomes admissible under section 157 is not substantive evidence. The point became important in one of the earliest Calcutta cases<sup>3</sup>. X was tried for and convicted of an offence, and the depositions of witness given in a previous trial of Y, Z and others, charged with having been engaged in the same offence, were used against X. In the trial of X, the witnesses merely said: "I gave evidence before in this court and that evidence is true". Commenting on this procedure, the High Court had to point out that the proper procedure was to examine the witness afresh in the trial of X, using the depositions containing their statements in the earlier trial as corroborating the testimony given in the present trial.

English law.

**88.15.** It is of interest to note that section 157 departs from the common law rule. In England, corroboration must be by independent testimony and so no corroboration is afforded by mere reiteration by the same witness. The theory is that if it were otherwise, a liar could corroborate his lies merely by repeating them. Evidence of his conduct or statements made out of court may be used against him if they amount to admissions,<sup>4</sup> but not to confirm his evidence, for otherwise "every man, if he was in difficulty ..... would make declarations for himself."

As Hewitt L. C. J. observed<sup>5</sup>—"In order that evidence may amount to corroboration, it must be extraneous to the witness to be corroborated."

Position in England in criminal cases.

**88.16.** Thus, in England, previous statements are not, at common law, admissible. Even in criminal cases involving sexual offences, a mere complaint is not admissible, though conduct accompanied by complaint would be admissible. Thus, it was held on a charge of sexual attack upon a young girl that her complaint is not corroborative evidence on the charge, but her distressed condition is.<sup>6</sup> This distinction assumes importance in the light of the general rule in England, namely, that on a charge of rape and similar offences, it is the practice to instruct the jury that it is unsafe to base the charge upon an uncorroborated testimony of the victim.

<sup>1</sup>Norton, Evidence, page 114, cited in Woodroffe.

<sup>2</sup>See also *Ganga Dhar v. R.*, (1915) I.L.R. 43 Cal. 173.

<sup>3</sup>*R. v. Bisho Nath*, (1869) 12 Weekly Reports Criminal 13.

<sup>4</sup>Phipson, Manual of Evidence (1972), page 168.

<sup>5</sup>*Jones v. South Eastern & Chatham Ry.*, (1918) 87 L. J. K. B. 775; *Corke v. Corke & Cooke*, (1958) p. 93; *R. v. Beadle*, (1958) Crim. L. R. 44.

<sup>6</sup>*R. v. Hardy*, (1794) 24 How. St. Tr. 199 (per Eyre C. J.).

<sup>7</sup>*R. v. Whitehead*, (1929) 1 K. B. 99, 102 (per Hewitt, L. C. J.).

<sup>8</sup>*Redpath*, (1962) Criminal Law Review 491.



88.17. The principal object of the prohibition against corroboration by prior statement was to prevent the manufacture of self-serving evidence by a party witness and to prevent interruption by collateral issues and superfluous matters. Technically, then, there being no common law exception in general, a previous statement made by a person, including a self-serving statement by a party witness, would fall within the rule against hearsay. This rule has been changed in regard to Civil Evidence Act,<sup>1</sup> which provides that any statement made by a witness shall, if the leave of the court is obtained, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.

88.18. What we have stated above as to the common law was, of course, subject to certain exceptions meant for special situations even at common law. Chief amongst such exceptions<sup>2 3</sup> were previous consistent statements admissible as par of the *res gestae*; also, previous statements sometimes regarded as admissible where it was suggested in cross-examination that the witness has recently been won over and, in certain cases, pre-trial identifications by witness.<sup>4</sup> Exceptions at common law.

In England, the fact that a witness had made a previous statement similar to a witness's testimony in court was formerly admissible to confirm his testimony<sup>5</sup> later, but such evidence became inadmissible at common law. There were exceptions where under previous statements were receivable to show that the witness is consistent with himself,—but this was only in specified cases,—e.g. where the witness is charged with having *recently fabricated* the story.<sup>6</sup> There was also an exception as to sexual offences.

A change was made in the law by the Evidence Act, 1938 which provided that in any civil proceeding where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall be admissible as evidence of that fact under certain conditions<sup>7</sup>. The Civil Evidence Act, 1968 has now extended this to include former oral statements also. Section 3(1) of the Act of 1968 further lays down that where for the purpose of rebutting a suggestion of fabrication a previous consistent statement has been proved, it shall be admissible as evidence of the fact stated.

88.19. Even at common law, an exception is provided in England by the rule that complaints in sexual cases are sometimes admissible to show consistency between the complainant's conduct and her testimony.<sup>8</sup> Although the admission of such evidence may well enhance her evidence and make it more credible, nevertheless, in such cases, corroboration of the complainant's evidence is always required, and evidence of complainant will not be reckoned as such, because it does not come from some *independent source*.<sup>9</sup> Complaints.

88.20. It should also be stated that in England, by a recent statutory provision,<sup>10</sup> a previous statement of a witness, if proved, is to be evidence of the facts stated in certain cases, as already stated. The provision is quoted below— Statutory provision.

*"Witness's previous statement, if proved, to be evidence of facts stated."*

<sup>1</sup>Section 2(1), Civil Evidence Act, 1968.

<sup>2</sup>*Cox v. General Medical Council*, (1960) 3 All. E. R. 225.

<sup>3</sup>*Nominal Defendant v. Clements*, (1951) 104 Commonwealth Law Reports 476.

<sup>4</sup>See (1968) Cambridge Law Journal, 64.

<sup>5</sup>*Lutterell v. Reynell*, (1670) 1 Mad. 282, 283.

<sup>6</sup>*R. v. Coll*, 24 L.R. Ir. 522.

<sup>7</sup>See *Bhogilal v. S.*, A.I.R. 1959 S.C. 356.

<sup>8</sup>Phipson, Manual of Evidence (1972), page 45.

<sup>9</sup>(a) *R. v. Christie*, (1914) A.C. 545;

(b) *R. v. Whitehead*, (1929) 1 O.B. 99.

<sup>10</sup>Section 3, Civil Evidence Act, 1968 (C. 64).

## 3. (1) Where in any civil proceedings—

- (a) a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of sections 3, 4 or 5 of the Criminal Procedure Act, 1865 ; or
- (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that his evidence has been fabricated,

that statement shall, by virtue of this subsection, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(2) Nothing in this Act shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any civil proceedings in cross-examination on a document used by him to refresh his memory, that document may be made evidence in those proceedings ; and where a document or any part of a document is received in evidence in any such proceedings by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh his memory shall by virtue of this sub-section be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible."

## Rationale.

88.21. It was argued at common law that by offering a witness, a party is held to recommend him as worthy of credence, and warranting his veracity, corroboration is not permitted<sup>1</sup>, that former statements are no proof that entirely different statements may not have been made at other times and are therefore no evidence of constancy ; that if the sworn statements are of doubtful credibility those made without the sanction of an oath, or its equivalent, cannot corroborate them,<sup>2</sup> that a witness having given a contrary account, although not upon oath, necessarily impeaches either his veracity or his memory ; but his having asserted the same thing does not in general carry his credibility further than, nor so far as, his oath.<sup>3</sup>

Section 157 in our Act, however, proceeds upon the principle that consistency is a ground for belief in the witness's veracity.<sup>4</sup> Chief Baron Gilbert was of opinion that the party who called a witness against whom contradictory statements had been proved<sup>5</sup> might show that the witness had affirmed the same thing before on other occasions, and that he was therefore "consistent with himself".<sup>6</sup>

Position  
U.S.A.

in 88.22. The question of the use of prior statement of a non-party witness has often arisen in the U. S. A.

Wigmore, in his first edition, approved the "orthodox view". In the later editions, however, he said that "further reflection ..... has shown the persant writer that the natural and correct solution is the one set forth in the text above".<sup>7</sup>

<sup>1</sup>Best, Evidence, 11th Ed., pp. 580, etc. cited in Woodroffe.

<sup>2</sup>Wharton, Evidence, S. 570, cited in Woodroffe.

<sup>3</sup>Starkie, Evidence, 253, cited in Woodroffe.

<sup>4</sup>(a) *R. v. Malappa*, 1 (1874) 11 Bom. H.C.R. 196, 198:

(b) *R. v. Repin Biswas*, (1884) I.L.R. 10 Cal. 970, 973.

<sup>5</sup>This is not necessary under the section.

<sup>6</sup>Gilbert, Ev., 135, 136, cited in Woodroffe.

<sup>7</sup>Wigmore, Evidence (3rd Ed.), 1940, Vol. 3, article 1018, footnote 2 referred to in Annual Survey of American Law (1963), page 771.

Wigmore's final position<sup>1</sup> as to inconsistent statements was that a witness's prior inconsistent statement ought, on principle, to be admitted, not only to discredit witness's testimony, but also as "affirmative testimonial" evidence, because "by hypothesis the witness is present and subject to cross-examination". There are, however, certain dangers involved if this view is adopted as was noticed in the judgment in an American case discussed below.

88.23. In *Comer v. State*,<sup>2</sup> the defendant was charged with carnal knowledge of his daughter. Called by the prosecution, the daughter denied having sexual relations with her father. She admitted having given the prosecutor a signed statement to the contrary, but she testified that it was not true. There was no evidence of the crime, and her conviction was reversed. Although the Attorney General urged the Supreme Court of Arkansas to overrule its earlier decisions adhering to the orthodox rule that a prior inconsistent statement of a non-party witness is without substantive value, the court declined to do so. The court said that while it appreciated "the abstract logic of Wigmore's argument ..... there are objections to adopting his reasoning in its entirety." Under such a rule, the court thought, "an entire accusation, such as a charge or rape, "could be fabricated merely by first having the prosecutrix emphatically deny the truth of the charge and by then calling another witness to say that the prosecutrix had made a contrary statement on some other occasion." Moreover, said the court, "we are not persuaded that the opportunity to cross-examine months or years later is equally as valuable or equally as effective as the exercise of that privilege when the facts are much fresher in the memory of the witness". Doubtless there are arguments both ways, but "when the arguments are thus closely balanced, we think the advantage of certainty in the law should tip the scales in favour of the rule of *stare decisis*".

88.24. The Model Code of Evidence and the Uniform Rules of Evidence both adopt Wigmore's view. According to the Model Code,<sup>3</sup> "Evidence of a hearsay declaration is admissible if the judge finds that the defendant..... is present and subject to cross-examination". According to the Uniform Rules, "Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated is hearsay evidence and inadmissible except; (1) a statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject-matter, provided the statement would be admissible if made by declarant while testifying as a witness".<sup>4</sup> The Conference Committee commented as follows on this Uniform rule:

"When sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay".

88.25. By statutory provisions in the U.S.A. prior consistent statements are admitted in many jurisdictions. The following is a typical set of provisions<sup>5</sup> extracted from the California Evidence Code:

"S. 1236. *Prior consistent statement*

"Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with section 791.

<sup>1</sup>Wigmore, Evidence (3rd Ed.), 1940, Vol. 3, article 1018, referred to in Annual Survey of American Law (1953), page 771.

<sup>2</sup>*Comer v. State*, 257 S.W. 2nd 564 (Ark. 1953) noted in Annual Survey of American Law (1953), page 772.

<sup>3</sup>Model Code of Evidence (1942), Rule 503(b).

<sup>4</sup>Uniforms Rules of Evidence (1963), Rule 63(1).

<sup>5</sup>Sections 791 and 1236, California Evidence Code.

"S. 791, *Prior consistent statement of witness*. Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

- (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
- (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, notice for fabrication, or other improper motive is alleged to have arisen."

Judicial decisions  
in India.

**88.26.** It may now be convenient to refer to a few judicial decisions in India which illustrate the application of section 157 and its wide scope. We first refer to the judgment of the Supreme Court in *Ram Ratan*<sup>1</sup>. On 8th May, 1959, shortly before 3 p.m., while the grain of Sawanram was being weighed for sale at the shop of Roopram, the three appellants and two others (armed with guns) came up. One of the appellants Ram Ratan fired at Bhimsen, Hansraj fired at Jawanram, and Maniram also fired at Jawanram. Bhimsen died on the spot, and Jawanram and Lakhiram were injured. Thereafter, all the assailants ran away. Roopram had shut up his shop when the incident took place and he came out only when every thing was over. Jawanram asked him to send a telegram to the police station and told him the names of the five assailants. Thereafter, Jawanram started for the police station to make a report, but Ramsingh constable met him on the way. Thereupon Jawanram made a complaint then and there. When the complaint was being recorded, Rampratap (Jawanram's son) also turned up. The three appellants were tried and convicted by the Sessions Court, and then by the High Court. They came in appeal to the Supreme Court.

Contention of the counsel on behalf of the appellants was that the appellants had been implicated on account of enmity. The statement of Roopram was not admissible under sections 6 and 157. The solitary evidence of Jawanram was insufficient for conviction. Statements of Lekhram and Rampratap were not reliable.

**88.27.** The main question was whether the statements of Jawanram to Roopram were admissible or not under section 157, when deposed to by Roopram. In the opinion of the Supreme Court, there are two things which are essential for section 157 to apply. The first is that a witness should have given testimony with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place.

In this case, Jawanram had made the statement to Roopram, immediately after the incident to the effect that five persons (including the three appellants) had attacked Bhimsen, Lekhram and himself. This was therefore a prior statement of Jawanram at or about the time when the fact took place. This prior statement can be proved by the person (Roopram) to whom it was made and can be used as corroboration for the evidence of Jawanram. It is not necessary, on the admissibility of the statement of Roopram that Jawanram should also say, in his testimony in court, that *he told Roopram immediately after the incident, the name of the five assailants*. Of course, if Jawanram stated in the court that he had made the statement to Roopram after the incident, that would add to the weight of the evidence of Roopram.

<sup>1</sup>*Ram Ratan v. The State of Rajasthan*, A.I.R. 1962 S.C. 424.

Thus, the evidence of Roopram corroborated the statement of Jawanram in two ways. First, the incident took place in front of his shop, and secondly he proved the statement of Jawanram as to the persons who took part in the incident. Thus, it corroborated the statement of Jawanram under section 157. Therefore the evidence of Jawanram and Roopram was sufficient for conviction. Apart from this, the evidence of Lekhram and Rampratap also added to the weight of the prosecution case. Therefore, there was no force in the appeal.

88.28. In *Radha Kishan*,<sup>1</sup> the facts were as follows:—

In January, 1970, when Moju (victim) was returning home, Radhakishan the (appellant) and Rathoria met him at about 8.00 p.m. Radhakishan told Moju as to why he was flashing the torch light. Moju denied having done so. Then Radhakishan caught hold of Moju and took out his dagger and inflicted certain blows therewith on Moju. After that Moju was dragged upto the field where he was covered with a "chadar" and was left.

Next day Bhaguta arrived at the field. On his query, he (Moju) told him that Radhakishan and Rathoria had beaten him. After some time his (Moju's) brother Madan also reached the spot. Moju informed him that Radhakishan and Rathoria had beaten him.

Rathoria had absconded and Radhakishan had been convicted. This was an appeal by him.

Contention of counsel on behalf of the appellant was:

- (i) In the F.I.R., Madan stated that a Pharsi was used. In the trial court, Moju said that a dagger was used.
- (ii) The weapon of offence had not been recovered.
- (iii) The trial court had relied on the solitary testimony of Moju.
- (iv) There was no independent witness of the locality.

88.29. The Court held as follows:

The victim, Moju lost his balance of mind, and it was difficult for him to judge precisely whether the weapon of offence was a knife or a dagger or a pharsi. The discrepancy was of a minor nature. The prosecution had succeeded in proving to the hilt that a sharp edged weapon was used by Radhakishan. Therefore, there was no force in the first contention.

As to the second point, the recovery simply furnished a corroborative piece of evidence, and, where the direct and substantive evidence was available on the record, then want of such recovery would not weaken the case.

A careful perusal of the statement of Moju showed that the specified portions were not mutually inconsistent.

88.30. As to the admissibility of the statement of Madan under section 157, it was not necessary that the witness sought to be corroborated must also say in the court in his testimony that he had made the former statement to some one. In the present case, Moju had said that he had narrated the incident to his brother (Madan); that adds to the weight of the testimony of the person who gave evidence in corroboration.

So far as the question of local witness is concerned, it is every day experience that there is a general reluctance on the part of villagers to appear as witnesses and get themselves involve in a case. Apart from this, it does not injuriously affect the facts of the case.

In the circumstances, the court found no force in the appeal.

<sup>1</sup>*Radha Kishan v. The State*, (1973) Cr. L. J. 481.

Section 157—  
Meaning of  
“competent to in-  
vestigate”.

88.31. These decisions illustrate the significance and utility of the section, and its wide scope. They do not necessitate any amendment of the section. But we may refer to one point which requires consideration. This arises out of the expression “legally competent to investigate” used in the section. The term “investigation” is, according to the Code of Criminal Procedure,<sup>1</sup> confined to proceedings taken by the police or by *any person other than a Magistrate* who is authorised in this behalf. The Supreme Court in *H. N. Rishbud’s case*<sup>2</sup> enumerated the following as steps which would normally fall within the scope of “investigation” :

- (i) proceeding to the spot;
- (ii) ascertainment of facts and circumstances;
- (iii) discovery and arrest of suspected offender;
- (iv) collection of evidence.

The last mentioned step would include—

- (a) examination of persons (and recording their statements, if thought fit); and
- (b) search of place; seizure of things; and
- (c) formation of opinion as to whether the materials are enough for submitting a charge sheet and filing a report before the Magistrate in either case.

Investigation by  
Magistrate.

88.32. The precise question that arises is whether a Magistrate, while recording a statement of a witness before trial—i.e. during proceedings under section 159 of the Code of Criminal Procedure, 1898, or under section 164 of that Code or corresponding provision in the present Code—can be said to be an authority “legally competent to investigate the fact” within the meaning of section 157, Evidence Act. That section requires (as a condition precedent to the admissibility of a previous statement) that the previous statement should have been made either before an authority “legally competent to investigate the fact”, or at or near the time when the fact to which the statement relates took place.

In spite of the limited definition of the term “investigation” in the Code,<sup>3</sup> the Supreme Court has, in one case<sup>4</sup>, impliedly accorded a very extended meaning to the words “legally competent to investigate” as used in section 157. In that case, a prosecution witness, after his examination-in-chief before the sessions court was over, completely resiled in cross-examination. The point for consideration was whether the statement made before the committing Magistrate could be availed of to corroborate the evidence in examination-in-chief of the witness concerned. The Supreme Court answered the question in the affirmative.

88.33. In a Calcutta case<sup>5</sup>, the High Court held that a statement made by a witness before a Magistrate at a test identification parade can be said to have been made to an authority legally competent to investigate. After a review of the case-law, the High Court expressly held that the proceedings conducted by the Magistrate for the purposes of identification would certainly be proceedings by an authority legally competent to investigate, and any statement made by a witness to such authority can be used to corroborate his testimony in court.

<sup>1</sup>Section 2(b), Code of Criminal Procedure, 1973—Definition of “investigation”.

<sup>2</sup>*H. N. Rishbud v. State of Delhi*, A.I.R. 1955 S.C. 196, 201.

<sup>3</sup>Para. 88.31, *supra*.

<sup>4</sup>*Bhagwan v. State of Punjab*, A.I.R. 1952 S.C. 214.

<sup>5</sup>*Sarju v. State of West Bengal*, (1961) 2 Cr. L. J. 71 (Cal.).

88.34. It is clear that the holding of a test identification parade is a step towards the collection of evidence, and is, as such, a part of the investigation proceedings. But, in view of the limited definition of the term "investigation" in the Code, the holding of such a parade by a Magistrate is not, speaking technically, "investigation" in terms of the definition in the Code. This position, obviously, is anomalous. To cover the statements recorded under section 164 of the Code of Criminal Procedure or under other statutory provision by authorities other than the police (e.g. judicial Magistrates), an amendment of section 157 is desirable in view of the obscurity prevalent on the subject.

88.35. We, therefore, recommend that section 157 should be modified by a suitable amendment to provide for the above matter. In brief—this is not a draft—the amendment should bring within the fold of the section authorities<sup>1</sup> which are under law competent to *inquire into* a fact or to record statements.

Recommendation to add authorities competent to inquire.

88.35A. The meaning of "corroboration" has been the subject-matter of some controversy. In a Madras case<sup>2</sup>, the majority regarded section 157 as applicable to section 114, illustration (b), so as to be available for corroboration of an accomplice. But it is doubtful if it can legally amount to corroboration within the meaning of illustration (b) to that section. It is possible to hold that the prior statement of an accomplice is admissible, only for the purpose of showing *his consistency* and as disproving a suggestion that it was recently concocted by him. It would be dangerous to admit it to prove the truth of the evidence also. This is likely to defeat the object of the rule requiring independent evidence by way of corroboration. We may note that we are recommending addition of the test of independent evidence in section 114, illustration (b). The point will then become academic.

Meaning of corroboration.

It would appear that the "corroborate" is used in two different senses in section 114 and section 157. In the latter section, it is used to show the consistency of the witness, and only indirectly to show veracity. In the former section, stronger and independent corroboration is required.

88.36. It should be noted that section 157 is confined to corroboration by a prior statement of the very witness whom it is sought to corroborate. Witness X cannot be corroborated by the pre-trial statement of a person Y—barring those cases where the statement of Y becomes admissible under a special provision. Barring such special provisions, the use of such extra-judicial statement or out-of-court assertion would be excluded by the rule against hearsay, the maker of the statement not being before the court. This aspect seems to have been overlooked in an Orissa case. In that case, the wife, in defence to a suit for restitution of conjugal rights, pleaded, *inter alia*, that the husband was impotent and was guilty for cruelty. The following facts are taken from the judgment<sup>3</sup>—

Corroboration by the statement of another person not permissible.

"The trial Court on evidence accepted both the pleas of the wife and dismissed the suit. On the point of impotency the evidence of the wife also gets some corroboration from the report of the doctor which reveals that the husband had a small penis and the erection was negligible. Mr. Patnaik, learned counsel for the appellant mainly contended that the doctor should have been examined in the court and made available for cross-examination. It is admitted by the appellant that he was examined by the doctor in the presence of counsel for both sides. Though opportunities were given to the parties no effect was made by the appellant to summon the doctor as a witness. That being so, the request of the learned counsel to remand the case for examination of the doctor cannot be allowed.

<sup>1</sup>H. N. Rishbud v. State of Delhi, A.I.R. 1965 S.C. 196, 201.

<sup>2</sup>Muthukumaraswami Pillai v. King Emperor, (1912) I.L.R. 35 Mad. 397, 524.

<sup>3</sup>Khageswar Karna v. Aduti Karnani, A.I.R. 1967 Orissa 80.

"In any event, the doctor's report, though itself appears not to be much decisive, lends some support to the story of the wife that the appellant was incapable of performing sexual intercourse with her. That apart, the wife also alleged that she was assaulted by the appellant when she made allegation against the sorcerer who came to cure the husband of his impotency, but attempted to outrage her modesty".

With due respect, we may state that the report of the doctor was inadmissible, for the reasons, stated above. It was not covered by either by section 157 or by any other provision.

**Recommendation as to section 157.** **88.36A.** In the result, the only change required in section 157 is that already indicated<sup>1</sup>.

#### SECTION 157A

**Section 157A—  
Confirmation of  
Credit of a witness.**

**88.36B.** We have dealt with such provisions as exist on the subject of corroboration. We should now refer to one matter in respect of which a comprehensive provision is desirable. We have in mind the need for a provision regarding confirming the credit of a witness by independent evidence. At present, such confirmation can be made (i) by way of producing corroborative evidence under sections 156-157, or (ii) by cross-examining the witness produced to impeach the credibility, or (iii) by substantive evidence on the main issues. There is, however, no comprehensive provision permitting independent evidence to be given for confirming the credit of a witness, though there is a provision for impeaching credit. Curiously, section 158, which is limited to the very narrow situation of a declaration or statement made by a person who is now dead or unavailable as a witness, does permit evidence to be given, *inter alia*, to confirm the credit of the declarant. But there is no mention in the Act as to confirming the credit of a witness who has actually appeared before the court. Of course, confirmation is indirectly achieved when the witness stands the test of cross-examination, but it appears to us that there should be a right to confirm the credit of any witness who has given evidence in court. Since evidence impeaching the credit of a witness has been made the subject-matter of a specific provision in section 155, it is appropriate that a corresponding provision should be made regarding confirmation. We believe that no elaborate discussion is necessary to justify such a provision on the merits. If, for example, the credit of a prosecution witness is impeached in cross-examination under section 146, or by extrinsic evidence under section 155, fairness requires that there should be some machinery whereby the credit of the witness can be confirmed or—to use an expression often employed by academic writers—for "re-establishing" his credibility.

**Position  
England.**

**88.37.** This appears to be permissible in England. Phipson has, in his *Manual of the Law of Evidence*<sup>2</sup>, stated that when the reputation of a witness for veracity of his evidence has been attached, his credit may be re-established either by cross-examination of the impeaching witness or by general evidence *that the impeached witness is worthy of credit*<sup>3</sup> or by general evidence that the impeaching witness is unworthy of credit, that is, by general "recrimination".

**88.37A.** In the U.S.A., according to Rule 20 of the Uniform Rules of Evidence,<sup>4</sup> "Subject to rules 21 and 22, for the purpose of imparting or supporting the credibility of a witness, any party, including the party calling him, may

<sup>1</sup>See para. 88.35, *supra*.

<sup>2</sup>Phipson, *Manual of Law of Evidence* (1972), page 286.

<sup>3</sup>Emphasis supplied.

<sup>4</sup>Rule 20, Uniform Rules of Evidence.



examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issue of credibility”.

It is unnecessary to multiply legislative precedents, which are referred to here only to illustrate the practical utility of the suggested provision.

**88.38.** If the above reasoning is accepted, it would be appropriate to insert a new section on the following lines, and we recommend that it should be inserted: Recommendation

*“157A. (1) Where the credit of a witness has been impeached by any party, the adverse party may, notwithstanding anything contained in section 153, in order to re-establish his credit, introduce evidence concerning his accuracy, credibility or veracity or to show who he is and his position in life.*

*(2) When a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally good moral character.”*

## CREDIT OF DECLARANTS OTHER THAN WITNESSES — SECTION 158

89.1. We have so far been discussing provisions whereunder the credit of witnesses who give evidence in court can be impeached, or, in certain cases, confirmed. It was also necessary for the legislature to make a provision as to the *credit of persons who are not witnesses*. It may be recalled that two important sections of the Act—sections 32 and 33—provide for the relevancy of certain statements made by certain persons in special circumstances. These statements are made by persons who are now dead, or are not available to give evidence and technically they are not “witnesses”, so that the provisions discussed so far as to impeaching credit do not apply to them. When such statements become relevant, the credit of the persons who made the statements should be subject to impeachment or confirmation in the same way as the credit of a witness who appears in court.

It is on this principle that section 158 provides that whenever any statement relevant under section 32 or section 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

The practical utility of this section is demonstrated by judicial decisions. We shall refer to a few of them.

Deposition of deceased witness to be corroborated under section 158.

89.2. A Calcutta case<sup>1</sup> illustrates the aspect of confirmation. The deposition of a witness in a criminal case was, after his death, admitted in a subsequent civil suit under section 33. A witness under examination was then asked what information the deceased witness gave him soon after the occurrence. It was held that the question was admissible under this section in order to corroborate the deposition of the deceased witness.

89.3. Two Lahore cases illustrate the aspect of contradiction and also the fact that one has to read into the section certain other propositions.

Section 158, it was held, places a person whose statement has been used as evidence under section 32 in the same category as a witness actually produced in Court, for the purpose of contradicting his statement or corroborating him by a previous statement made by him. Therefore, a statement of A, admitted in evidence under section 32, may be contradicted by the previous statement of A made before the police officer during the investigation<sup>2</sup>. For the purpose of such contradiction of A by his statement before the police officer during investigation, A must be treated as a witness actually produced in court, and it must further<sup>3</sup> be assumed that his previous statement made before the police was put to him in cross-examination as required by section 145.

Other statutory provisions creating a bar.

89.4. Of course, the admissibility of a statement under section 158 is subject to any statutory provisions barring the use of particular statements for special reasons. Thus, it is not correct to say that a statement, otherwise falling

<sup>1</sup>*Fool Kissory v. Nobin Chunder*, (1896) LL.R. 23 Cal. 441.

<sup>2</sup>*Niamat Khan v. Emperor*, A.I.R. 1930 Lah. 409, 413 (Jailal and Abdul Kadir, JJ.).

<sup>3</sup>*Hari Ram v. Emperor*, A.I.R. 1926 Lah. 122, 124 (Harrison & Jailal, JJ.).

under section 162 of the Code of Criminal Procedure, would become admissible merely because it can be brought under section 158, Evidence Act. The provisions of section 162, Criminal Procedure Code, are specific provisions on the admissibility of statements made to the police. They control the general provisions contained in section 158, Evidence Act<sup>1</sup>.

This objection does not, however, apply to the First Information Report. In *Amrit Lal v. Emperor*,<sup>2</sup> it was suggested that list of property alleged to have been stolen, which is given to implement and complete the first information report, may be referred to under section 158 and proved under section 159.

The above discussion does not call for any amendment of the section.

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<sup>1</sup>*Bhodu v. Rex*, A.I.R. 1949 All. 364, 366-67.

<sup>2</sup>*Amrit Lal v. Emperor*, A.I.R. 1933 Lah. 927, 990 (Coldstream J.).

## REFRESHING THE MEMORY OF WITNESS — SECTION 159

Introductory.

90.1. In order that the knowledge of a witness may be available to the Court in its search for truth, the use of aids to memory is permitted by the law and, in certain cases, the use of previous memoranda is also allowed, in substitution for memory, under certain conditions. A witness may be honest and willing to speak the truth, and may claim personal knowledge of facts, and yet he may have no adequate *present recollection* of facts. Hence the need for such provision.

90.2. An important aid to exactness would be neglected if, human memory and inaccuracy being what they are, a witness cannot be at liberty to justify his recollection to facts by reference to written memoranda concerning him<sup>1</sup>. In the interests of truth, it would be desirable, as was pointed out by Field J.,<sup>2</sup> to recognise the full benefit of the recollection of the witness as to the whole of the facts. Writing is a more reliable means of preserving the truth than simple memory. It is on these assumptions that witnesses are permitted to refresh their memory by referring to certain writings, under specified circumstances.

This procedure is, of course, subject to certain safeguards—in particular, the right to cross-examine the witness on the document so used and the requirement of the production of the document in court for the purpose.

Scheme of section 159.

90.3. We begin with section 159. Section 159 deals with refreshing the memory of a witness. The section can be divided into two principal divisions, namely, the portion dealing with witnesses in general and the portion dealing with experts. In regard to witnesses in general, the first three paragraphs along with the proviso are relevant, while experts are dealt with in the fourth paragraph.

90.4. Under the first part of the section, a witness under examination may refresh his memory by reference to three kinds of "writings", namely—

- (a) any writing made by the *witness 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;
- (b) such writing made by *any other person* and read by the witness within the period aforesaid—in this case, the condition is that when he read it, he knew it to be correct;
- (c) a copy of such document, with the permission of the court—in this case, the condition is that the court should be satisfied that there is sufficient reason for non-production of the original.

Under the second part, an expert may refresh his memory by reference to professional treatises.

Sections 159 and 160.

90.5. This is the scheme of section 159. There is also a provision in section 160, for the use of a memorandum, *where the witness has no present recollection*. The two sections deal with two different situations, though the difference may be rather subtle.

<sup>1</sup>Cunningham, Evidence, page 377, cited by Woodroffe.

<sup>2</sup>Jhubbo, (1882) I.L.R. 8 Cal. 742, 744, 745.

90.6. Strictly speaking, in the case under section 159, the document is resorted to in order "to revive a faded memory"<sup>1</sup>, and the witness swears from the actual recollection of the facts which the document evokes. In the situation in section 160, memory is not revived.

Section 159 deals with the present recollection, while section 160 deals with the past recollection. "In section 159, it is not the memorandum that is the evidence, but the recollection of the witness." On the other hand, in the case of a writing admissible under section 160, the witness has no *specific recollection at the time when he gives evidence*, but he guarantees as correct the fact recorded in the writing. The witness, after referring to the writing under section 160, swears as to the fact, not because he remembers the fact, but because of his confidence in the correctness of his record<sup>2</sup>.

90.6A. Since the writing referred to under sections 159-160 would usually be an extra judicial statement, an interesting debate seems to have taken place in the U.S.A. on the question whether the situation where a previous statement or memorandum is used as "past recollection recorded" is or is not an exception to the rule against hearsay. Professor Morgan<sup>3</sup> is of the opinion that at least in the situation where the witness has no independent recollection, theoretically, the rule against hearsay is violated—though he does not question the wisdom of the exception. "How can his prior identical unsworn declaration be of equal probative value with his present sworn and examined testimony?" Posing this query, Professor Morgan points out that if the memorandum is received as evidence of the unremembered matter contained in it, it cannot be on the ground of refreshment of recollection. "If accepted at all, it must be as a substitute for present memory. This means, in short, the reception in evidence of an extra judicial statement as probative of the matter asserted in it. If this is not hearsay, it comes perilously close to it."

Question of hearsay.

On the other hand, Judge Lockwood is of the view that the objection on the score of hearsay is without foundation. "The recorded memory of the witness is thus as much a statement of that witness as to what he personally saw or heard as is his present independent recollection of the same fact". Since the person who witnessed the event testifies to the accuracy of the memorandum as made, that memorandum is just as much direct and not hearsay evidence as the language of the witness when he testifies to his independent recollection of what he saw.

So much as regards the theoretical aspects of the section; we now turn to some of the salient features of the section.

90.7. It is a condition precedent to the use of a record under section 159 that it must be contemporaneous. This is also the English law. Some of the cases cited by Cross<sup>4</sup> may be mentioned. In *Jones v. Stroud*<sup>5</sup>, it was held that a witness could not refresh his memory from a copy made six months after the original was brought into existence; but in *Burrough v. Martin*<sup>6</sup>, a witness was allowed to refresh his memory with regard to a voyage by reference to the ship's

Contemporaneity

<sup>1</sup>Goodeve, Evidence, page 209, 213, cited by Woodroffe.

<sup>2</sup>*Abdul Salim v. Emperor*, A.I.R. 1922 Cal. 107.

<sup>3</sup>Morgan, "Relation between Hearsay and Preserved Memory" (1927) 40 Harvard Law Review 709, 717, 718.

<sup>4</sup>*Kinsey v. State*, (1937) 49 Arizona 201 (Supreme Court of Arizona).

<sup>5</sup>Cross, Evidence (1974), page 201.

<sup>6</sup>*Jones v. Stroud*, (1825) 2 C. & P. 196.

<sup>7</sup>*Burrough v. Martin*, (1809) 2 Camp. 112; *R. v. Longton*, (1876) 2 Q.B.D. 296.

log book, the entries in which were compiled after the events to which they related. In *R. v. Simmonds*<sup>1</sup>, notes made by customs officers at the first convenient opportunity after returning to their office from lengthy interviews were held to comply with the condition of contemporaneity, and the officers were permitted to read them to the court. It was said to be a course constantly adopted by police officers giving evidence of a long interview or series of interviews with suspects; "our courts are not slaves to orality".<sup>2</sup>

Thus, it is not possible to lay down any mathematically precise rule as to how nearly contemporaneous with the fact recorded the memorandum must be.

The writing may have been made either by the witness himself, or by others, provided in the latter case that it was read by him when the facts were fresh in his memory and he knew the statement to be correct.<sup>3</sup>

Papers or books  
that may be re-  
ferred to for re-  
freshing.

90.8. Thus, a solicitor may refer to his diary<sup>4</sup>, or an ordinary witness may refer to a newspaper report read by him when the facts were fresh in his mind.<sup>5</sup> An official shorthand writer may refer to his notes at trial, even though copies of these may be privileged from production to a non-party who has sub-poenaed him.<sup>6</sup> And a workman's time-book may be used to refresh the memory of the cashier, who read it every fortnight, when paying the wages in accordance therewith.<sup>7</sup> A log-book kept by the mate of the ship and inspected by the captain a week afterwards, may be used to refresh the memory of either.<sup>8</sup> So, depositions taken before a Magistrate or Coroner may be referred to at the trial, either by the witness who signed,<sup>9</sup> or by the clerk who wrote them.<sup>10</sup> A person who gives information about records which it was his duty to keep may look at them to refresh his memory as to whether on a certain day they were kept accurately, but in general, if the witness knew the fact only from his document, record etc., the original document, record etc. must be put in the evidence, and properly proved by other means.<sup>11</sup>

Inadmissible do-  
cuments.

90.9. Since the writing used for refreshing the memory is only an aid, technical objection to its admissibility becomes immaterial. It seems to be settled in England that a writing which is not legally admissible for want of stamp or registration can still be used for refreshing the recollection, the assumption being that what is evidence is still *the oral evidence of the witness*, and not the writing. On the same principle, a document rejected by reason of a rule of procedure—for example, Order 13. Rule 2 of the Code of Civil Procedure, 1908—can still be used under section 159.<sup>12</sup>

Inadmissible do-  
cuments.

90.10. This is illustrated by an English case.<sup>14</sup> In an action for money lent, an insufficiently stamped promissory-note purporting to be signed by the defendant and expressed to be given for the money lent was put into the hands of the defendant by counsel for the plaintiff, for the purpose of refreshing his memory and obtaining from him an admission of the loan. It was held that the

<sup>1</sup>*R. v. Simmonds*, (1967) 51 Cr. App. Rep. 316, 329.

<sup>2</sup>Cross, *Evidence* (1974), page 203.

<sup>3</sup>*R. v. Mills, R. v. Rose*, (1962) 3 All. E. R. 288, 301.

<sup>4</sup>*R. v. Dexter*, 19 Cox 360; *R. v. Bass*, (1953) 1 Q.B. 680.

<sup>5</sup>*Dyer v. Best*, 4 H. & C. 189.

<sup>6</sup>*James v. James*, ex rel 21st May, 1919, per Roche, J.

<sup>7</sup>*R. v. Langton*, 2 Q.B.D. 296.

<sup>8</sup>*Anderson v. Whalley*, 3 C. & K. 54; *Burrough v. Martin*, 2 Camp. 112.

<sup>9</sup>*R. v. Williams*, 6 Cox. 343; *Wood v. Cooper*, 1 C. & K. 645.

<sup>10</sup>*R. v. Mann*, 49 J. P. 743.

<sup>11</sup>*R. v. Bryant and Dickson*, (1946) 31 Cr. App. R. 146.

<sup>12</sup>*Deo v. Perkins*, (1790) 3 T. R. 749.

<sup>13</sup>*Iltanlal v. Neelmani*, A.I.R. 1928 P. C. 80.

<sup>14</sup>*Birchall v. Bullough*, (1896) 1 Queen's Bench 325.

plaintiffs were entitled to use the note for that purpose, notwithstanding the provision of the Stamp Act that an instrument not duly stamped "shall not be given in evidence or be available for any purpose whatever".

It would, therefore, appear that in order to be useful for the purpose of refreshing the memory, a document need not be admissible as independent evidence.

**90.11.** Refreshing the memory is not mandatory on the part of a witness. If a witness refuses to refresh his memory, he cannot be compelled to do so—although such refusal may sometimes give rise to an adverse inference. In *Jhaku Mahton*,<sup>1</sup> it was observed that "the Sessions Judge was not bound to compel the witness to look at the so-called diary in order to refresh his memory". No compulsion.

**90.12.** The subjects dealt with in sections 159-160 have received detailed attention in the United States. We have already deferred<sup>2</sup> to the discussion in that country as falling under the doctrine of "present recollection revived" (section 159), or the doctrine of "past recollection recorded" (section 160). The latter doctrine comes into play when a witness is unable to sufficiently remember the circumstances of an event, which circumstances are described in a written statement. The former doctrine permits the witness to refer to the writing for the purpose of refreshing his recollection. Position in U.S.A.

**90.13.** It may be noted that a case of complete loss of memory is outside sections 159-160. English courts have not<sup>3</sup> had to deal with the problem of the amnesiac or near amnesiac witness. But we may refer to a British Columbian case—*R. v. Pitt*.<sup>4</sup> The accused was charged with attempt to murder her husband. The accused was suffering from functional amnesia and said in court that she could remember little of what happened. Her counsel then applied for leave to have her hypnotised in court, a hypnotist having given evidence that her memory might be refreshed by an hypnotic trance. The application was granted, the accused giving her evidence after she had emerged from the trance. The decision was partly based on the analogy of refreshment of memory, but reference was also made to the unfairness of not allowing the accused the benefit of the latest medical techniques. Loss of memory.

**90.14.** While the above discussion does not necessitate any changes of substance in the section, certain points of drafting should be mentioned. For the sake of facility of reading, it is, in our view, desirable to re-structure section 159 by dealing, in one sub-section, with witnesses, and in another sub-section, with experts. Incidentally, it has been held<sup>5</sup> that the word "writing" in the section includes also printed matter. It appears to be desirable to replace that word by "document"—an expression which is already used in the section in regard to copies and is wider than "writing". That expression will cover, for example, photographs. Recommendation.

As regards experts, it may be useful to allow reference to periodical literature which may not fall within "treatises".

**90.15.** We therefore recommend the substitution of the following section in place of section 159—

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<sup>1</sup>*Jhaku Mahton*, I.L.R. 8 Cal. 793.

<sup>2</sup>Para. 90.6, *supra*.

<sup>3</sup>Cross, Evidence (1794), page 202.

<sup>4</sup>*R. v. Pitt*, (1968) 68 D.L.R. (2d) 513. Cross, Evidence (1974), page 202.

<sup>5</sup>*Ram Chandra v. R.*, A.I.R. 1930 Lah. 371.

<sup>6</sup>See section 3, "document".

## REVISED SECTION 159

Refreshing  
memory.

me- 159. (1) A witness may, while under examination, refresh his memory by  
referring—

- (a) to any *document* made by the *witness 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;
  - (b) to any such *document* made by any other person, and *read or seen* by the witness within the time aforesaid, if, when he *read or saw* it, he knew it to be correct;
  - (c) with the permission of the Court, to a copy of *such document*; provided the Court be satisfied that there is sufficient reason for the non-production of the original.
- (2) An expert may refresh his memory by reference to professional treatises or articles published in professional journals.



**EVIDENCE WITH REFERENCE TO PAST MEMORANDA—  
SECTION 160**

**91.1.** We have, in our discussion of section 159, drawn attention to the two kinds of use of previous memoranda. First, there is the process of refreshing one's memory which is dealt with in section 159, and secondly there is the use of a past memorandum even where there is no present recollection of the facts recorded in the memorandum. The distinction between the two has been already discussed. It is now time to deal in detail with the section relating to the second situation, which reads as follows:—

Introductory.

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

The illustration takes the familiar case of a book-keeper. 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.

**91.2.** According to Markby<sup>1</sup>, section 160 deals with a case of the following kinds.

Witness when permitted to look to books.

"A, a grocer, sues B for the price of goods sold some time previously, in small quantities, on a great many different occasions in fact, on an ordinary running account. The shopman is called, who says that, though he knows B to be a customer, he has no recollection of the particular transactions, but they are all contained in a book which he holds in his hand. The book is not admissible in evidence, but if the conditions as to the writing and so forth of the entries in the book as stated in section 159 be satisfied, then under section 160 the witness may look at the book, and if he is prepared to state upon oath that the entries are correct, he may read them out of the book."<sup>2</sup>

**91.3.** Where a witness has to depose to a large number of transactions and those transactions are referred to or mentioned either in the account books or in other documents, there is nothing wrong in allowing the witness to refer to the account books and the documents while answering the questions put to him in his examination. He cannot be expected to remember every transaction in all its details, and section 160 specifically permits a witness to testify to the facts mentioned in the documents referred to in section 159 although he has no recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Substitution of memory under section 160.

Although this section refers to section 159, the situations were quite different, as already pointed out. The memory of a witness under section 160 is not revived at all. Having no specific recollection of the facts, he can only testify to the effect that he recorded correctly the events.

<sup>1</sup>Markby, Evidence, page 111, cited in Field.

<sup>2</sup>State of Andhra Pradesh v. Cheemalapati Ganeswara Rao, A.I.R. 1963 S.C. 1850, 1868.

Whether document is evidence.

91.4. Considerable discussion seems to have taken place in some of the judicial decisions as to whether the document referred to under section 160 itself becomes evidence. High Courts have discussed the matter inconclusively.<sup>1,4</sup> There is also a view that the document used in section 160 will not itself become evidence. The point is of not much practical importance for the purpose of the law of evidence, because whatever view is taken, the document must be produced and shown to the opposite party, if he requires it.<sup>5</sup> If the document is to be effectively utilised, witness will have to read out and dictate every word.

Section 159 deals with the case in which the witness really refreshes his memory. "He is sure not only that the facts were correctly recorded, but of the facts themselves, and (is) prepared to swear that they existed and this explains why in section 159, reference to a copy is allowed, but not in section 160."<sup>6</sup>

Witness to refresh memory when asked by Court.

91.5. In *Harkhu v. Emperor*,<sup>7</sup> a Sub-Inspector of Police was unable to remember the precise nature of the injuries on the persons of the accused when they were brought before him. When asked to consult any memorandum on the point he might have made at the time of his investigation, he refused to do so. It was held that if a witness suffers from a lapse of memory, which can be remedied by reference to any memorandum prepared by him at the time, and the Court invites him to refresh his memory with reference to the writing, the witness is under an obvious obligation to do so, this being part of the duty under which he lies to lay the whole truth before the Court to the best of his ability. A similar view was taken in *Mohiuddin Khan v. Emperor*<sup>8</sup> where it was held that the Court in such circumstances should require a witness to refresh his memory. On the other hand, there are two earlier cases, both of the Calcutta High Court<sup>9,10</sup> in both of which it was held that witness was not bound to refresh his memory.

In our view, having regard to the word "may" which is used in section 160, it is not reasonable to read into the section any obligation on the part of the witness to refresh his memory. It is true that a witness takes an oath to tell the whole truth. But it is to be borne in mind that his oath does not require him to enrich his recollection or to improve his information or knowledge or capacity to narrate the past before the court. While a witness ought to be encouraged to assist the court in its search for truth, that does not mean that one can read into section 160 an obligation which is not contained there in express words.

Whether party bound to put in evidence.

91.6. There is an old general rule<sup>11</sup> inadequately explored in the modern authorities, that, if a party calls for and inspects a document held by the other party he is bound to put it in evidence if required to do so.<sup>12</sup> But, "where a

<sup>1</sup>A.I.R. 1932 Lahore 7, 8.

<sup>2</sup>*Jagan Nath v. R.*, A.I.R. 1943 Mad. 542, 543.

<sup>3</sup>*R. v. Venkataran*, I.L.R. 32 Mad. 384.

<sup>4</sup>A.I.R. 1938 Rangoon 42, 43.

<sup>5</sup>Section 161.

<sup>6</sup>Markby, Evidence, Page 112, cited by Field.

<sup>7</sup>*Harkhu v. Emperor*, A.I.R. 1921 All. 86 (Piggott & Walsh, JJ.).

<sup>8</sup>*Mohiuddin Khan v. Emperor*, A.I.R. 1924 Pat. 829 (Adam, J.).

<sup>9</sup>*Empress v. Kalicharan*, (1881) I.L.R. 8 Cal. 154, (Prinsep & Wilson, JJ.).

<sup>10</sup>*Empress v. Jhabboo Mahton*, (1881) I.L.R. 8 Cal. 759. (Mc Donnell & Field, JJ.).

<sup>11</sup>Cross, Evidence (1974), page 206.

<sup>12</sup>*Warshaw v. Routledes*, (1805) 5 Egp. 233; *Calvert v. Flower* (1836) 7 C. & P. 386; *Palmer v. Mesleat and M' Grath*, (1858) 1 Sw. & Tr. 159; *Stroud v. Stroud*, (1963) 3 All. E.R. 859.

document is used to refresh a witness's memory, cross-examining counsel may inspect that document in order to check it, without making it evidence. Moreover, he may cross-examine upon it without making it evidence provided that his cross-examination does not go further than the parts which are used for refreshing the memory of the witness.<sup>1</sup> If, therefore, a witness refreshes his memory concerning a date or an address by referring to a diary, he may be cross-examined about the form or terms of the entries used to refresh his memory without there being any question of the right of the party calling him to insist that the diary should become evidence in the case. On the other hand, if the witness is cross-examined *about other parts* of the diary the party calling him may insist on its being treated as evidence in the case.<sup>2</sup>

We may note that section 160 uses the expression "document"—an expression which, according to our recommendation, would be substituted in section 159 also.

No further comments are necessary as to section 160.

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<sup>1</sup>*Senat v. Senat*, (1965) Probate 172, 177; (1965) 2 All. E.R. 505, 512.

<sup>2</sup>*Cross, Evidence* (1974), page 207.

**RIGHTS OF ADVERSE PARTY WITH REFERENCE TO WRITINGS USED  
AS AIDS TO OR SUBSTITUTES FOR MEMORY**

**Reasons.**

**92.1.** Under section 161, any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it, such party may, if he pleases, cross-examine the witness thereupon.

The reasons why the opposite party is permitted to inspect a writing under section 161, were thus enumerated in a Calcutta case<sup>1</sup>—

- “(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 ;
- (iii) to compare his oral testimony with his written statement.

The opposite party 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.”

**Effect of cross-examination.**

**92.2.** It would appear that, in England, if the adverse party cross-examines a witness upon any other part of the document, he thereby makes it his own evidence. In India, the section is silent on the subject. But, it would appear, on principle, that the right to cross-examine the witness under section 161 would be confined to those points on which he refreshes his memory by consulting the document. The right to cross-examine would be confined to points necessary to explain that part.

**Verbal change recommended.**

**92.3.** No changes of substance are required in section 161. A verbal point should be mentioned. In this section also, for the word “writing”, the word “document” should be substituted, in conformity with section 159, as proposed to be amended, and also in conformity with present section 160. We recommend accordingly.

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<sup>1</sup>*Empress v. Jhaboo Mehton* (1882) I.L.R. 8 Cal. 739.

## PRODUCTION OF DOCUMENTS — SECTION 162

93.1. Documents must be brought before the Court before they can be used for various evidentiary purposes. Certain matters concerning the production of documents are dealt with in section 162. The section comprises four matters.— Introductory.

- (a) The *duty* of a person who is summoned to produce a document, to bring it into court.
- (b) The *power* of the court to decide objections to its production (in evidence) or admissibility.
- (c) The *procedure* to be followed for the purpose of exercising the power referred to at (b) above; and
- (d) The *translation* of the document.

93.2. As regards the first topic<sup>1</sup>, it should be noted that there is a distinction between *bringing* the document in court and its production *in evidence*. When a person is summoned to “produce” a document,—the expression “production” is also used in the two procedural Codes—that person must bring it into court. This simple and elementary provision really gives rise to the important implication that even if a person has an objection to handing over the document for use in evidence, he must bring it into court. The physical production of the document is obligatory. Whether the objection to its legal production is on the ground that the document has no relevance to the suit or proceeding—an objection usually taken by a party to the protected from disclosure or whether it is on the ground that the document, though relevant, is inadmissible by virtue of a statutory bar, it is not for the person summoned to determine that objection for himself. Only the Court will decide the objection to production in this sense. Production in the physical sense is mandatory on the person called upon to do so by the Court. Duty to bring in-  
to court.

93.3. Even as regards physical production in the sense explained above, difficult questions could sometimes arise, where a witness who is summoned to produce a document raises the objection that the document is not in his power. In this context, the crucial words are—“Possession or power”. Where the witness is exclusively in control of the document and some one else claims control over it, no difficulty could arise by reason of the first part of section 162. But difficulty may arise when the witness is in joint possession with somebody else, who is not before the court. In such a case, in deciding whether the witness ought to be compelled to “produce” the document, normally the court will act on what is considered to be just in the circumstances. This aspect came up for consideration in a Bombay case<sup>2</sup>. On a review of English cases, it was observed that this matter would depend on whether the defendant, physically speaking, could produce this document and, legally speaking, ought to produce it, there being no other person having interest *distinct* from the defendant. Significance “pos-  
session Power”.

93.4. It is obvious<sup>3</sup> that a witness cannot be compelled to produce a document by a summons, unless such document is under his control or possession. Test of Control.

<sup>1</sup>Para. 93.1, *Supra*.

<sup>2</sup>*Haji Jaharia Kassim v. Haji Casim*, (1876) I.L.R. 1. Bom. 496, 499 (Bargest J.).

<sup>3</sup>Case law taken from Woodroffe.

<sup>4</sup>*Bank of Utica v. Hillard*, 5 Cow, 154 (Amer.); *United States Exp. Co. v. Handerson* 69 *Town*, 40 (Amer.) cited in Woodroffe.

So a mere clerk in a bank is under no obligation to produce its books when they are under the control of the cashier, nor can the secretary of a railway company, as he was only the employee of the directors,<sup>1</sup> nor are documents filed in a public office so in the "possession" of a clerk there, as to render it necessary, or even allowable, for him to bring them into court *without the permission of the head of the office.*<sup>2</sup> This is not because of any question of State privilege, but because of the fact that the possession or power is in the head of the office. But one having the actual custody of documents may be compelled to "produce" them even though the document is owned by others<sup>3</sup>—that is to say—he must bring it into court, and then raise the question of privilege regarding its production in evidence—where such privilege exists under section 131.

Privilege.

93.5. Under the first part of section 162 then, the document must be brought into court. The production of the document *in evidence* will, under the second part, be excused where it has been declared to be privileged from disclosure under the Act—for example, where it is the third party's title-deed,<sup>4</sup> (this is the present law)—or a confidential communication professionally made between a legal adviser and his client, or the like.<sup>5</sup>

(b) Court to decide objection.

93.6. Only the court can decide the validity of the objection. This is, in fact, expressly laid down in the second part of the section. The scheme in this regard, so far as section 162 itself is concerned, creates no problems. A disharmony is, however, introduced by section 123 (affairs of State), the last part whereof gives power to the head of the department to give or withhold permission "as he thinks fit". The decision of the head of the department ought not to overrule the power of the court. We have discussed this aspect while considering section 123.<sup>6</sup>

The amendment which we are recommending<sup>7</sup> in that section will remove the disharmony. The court's exclusive power of *adjudicating upon* objections to the production of documents will then have no exceptions, after the amendment recommended by us is carried out.

93.7. In order that the power of the Court to adjudicate upon matters of privilege (second part) can be properly exercised some machinery is needed. The third part of section 162, which has two branches, provides as follows—

- (i) The court may inspect the document unless it relates to "matters of State".
- (ii) The court may take other evidence for enabling it to decide the objection.

Taking up the first branch, we cannot help observing that it introduces a serious anomaly, according to four of us. This aspect has been discussed under section 123, but the important points may be reiterated. Having already emphasised the exclusive power of the court to decide the objection—(b) above—the section should have recognised the power of the court to inspect the document without any exception. But the section creates an exception precisely where the exception may work injustice. We say so because the expression "matters of State" is a vague one, and if the power of inspection is excluded merely because it is claimed that the document relates to matters of State,

<sup>1</sup>*Crowther v. Appleby*, L.R. 9 C. P. 27.

<sup>2</sup>*Thornhill v. Thornhill*, 2 J. & W. 347; *Austin v. Evans*, 2 M & Cr. 450.

<sup>3</sup>*Amoy v. Long*, 1 Camp. 17, 9 East, 473; *Car san v. Dubois* 1 Holt 239.

<sup>4</sup>Section 130.

<sup>5</sup>Sections 126-127 and sections 121-131.

<sup>6</sup>See discussion as to section 123.

<sup>7</sup>This is the majority recommendation.

then a very important, and almost indispensable, step for the exercise of the power would be taken out of the province of the court. What the section gives with one hand would be taken away with another. If the claim to privilege made on the ground of matters of State or affairs of State cannot be effectively adjudicated by the court, then virtually it comes to this—that the application of the law is left not to the judicial tribunal, but to an executive officer—however high he may be—who is not subject to any check by the tribunal and who is not even called upon—on the literal text of the law—to give reasons for withholding production. This would be a negation of the basic postulate of the rule of law.

**93.7A.** Fortunately, the construction of the section has not developed upon these lines. We have dealt with the case law in this regard in our consideration of section 123; the case law shows how the courts have felt constrained in the interests of justice to point out the need for leaving the ultimate decision to the court. It is unnecessary to repeat all that we have already stated; and at this state it is enough to repeat the view of four of us that the exception in section 162 for matters of State is unjustified and ought to be removed.

The assumption of the law is that it is unnecessary for the judge to have the right of inspecting any document of this character.<sup>1</sup> But, even now, he must necessarily have such right in the case of other privileged documents in order that he may judge as to their admissibility and obligatory production in evidence.<sup>2</sup> Our recommendation, subject to reservation by two of us—Shri Dhavan and Shri Sen-Verma as regards claims to privilege based on security of the State—as to the first branch of the third part of section 162 is to remove the exception for documents relating to affairs of State.

**93.8.** Under the second branch of the third part of the section, the court may also, in order to decide on the validity of the objection take other evidence to enable it to determine on its admissibility. All questions as to the admissibility of evidence are for the judge. Decision of such questions frequently depends on a disputed fact, in which case all the evidence adduced both to prove and disprove that disputed fact must be received by the judge, and however, complicated the facts or conflicting the evidence, such questions must be adjudicated on by him alone.<sup>3</sup> Thus, the judge must equally (for example) decide whether a confession should be excluded by reason of some previous threat or promise and whether a document is protected from disclosure as being a confidential communication or the like.<sup>4</sup> This branch is based on the above mentioned principle. Other evidence.

**93.9.** The last part of section 162 concerns the translation of documents, and needs no detailed comments. (d) Translation.

**93.10.** In the result, the only change which we recommend in section 162 is the removal of the present exception regarding inspection by the court of documents relating to "matters of State" — a recommendation which is subject to reservation by two of us as already stated. Recommendation.

<sup>1</sup>Cunningham, Evidence 380; cited in Woodroffe.

<sup>2</sup>Woodroffe.

<sup>3</sup>Taylor, Evidence, section 23A, cited in Woodroffe.

<sup>4</sup>Woodroffe.

DOCUMENTS PRODUCED AFTER NOTICE AND INSPECTED—  
SECTION 163

Introductory.

94.1. A summons to produce a document must be obeyed. Section 162, which we have already discussed, so provides. What happens in regard to the more particular case of a *notice* to produce a document is dealt with in two sections — sections 163 and 164.

Under section 163, 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.

Object.

94.2. This section is intended to prevent the somewhat “undignified squabbling”, which frequently takes place in England, as to whether a document which the other party has received notice to produce, should be put in.<sup>1</sup> The reason for this rule is that it would give an unconscionable advantage to a party to enable him to try into the affairs of his adversary,<sup>2</sup> without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties.

In *Wharton v. Routledge*,<sup>3</sup> Lord Ellenborough said:

“You cannot ask for a book of the opposite party and be determined on the inspection of it whether you will use it or not. If you call for it you make it evidence for the other side, if they think fit to use it.”

Rationale.

94.3. In *Lawrence v. Van Horne*,<sup>4</sup> Radcliffe, J., observed:

“A party who gives notice to produce a paper in evidence must be supposed to know its contents. If he does not, he ought not to be permitted to speculate through the forms of law and obtain from his adversary the inspection of any paper or document he may choose to demand. Such a privilege would be liable to abuse.”<sup>5</sup>

Conditions making the party to give opponent's document as evidence.

94.4. Let us analyse the section. A party is bound to give the opponent's document as evidence if three conditions are fulfilled. The first condition is that the document should be required by that party to be produced in evidence. The second condition is that it should be inspected by the party. The third condition is that the party producing the document should require the party calling for it to put it in evidence. All the three conditions must be satisfied. If only the first of these conditions has been satisfied, the document cannot be treated as evidence of the party called for it.<sup>6</sup> It is clear from the provisions of this section that the party inspecting the document is bound to give it as evidence only if the party producing the same requires it to do so.<sup>7</sup>

<sup>1</sup>Markby on Evidence, page 113, cited by Field.

<sup>2</sup>Taylor, Evidence, section 181, cited in Woodroffe.

<sup>3</sup>*Wharton v. Routledge*, 5 Esp. 235, cited in Woodroffe.

<sup>4</sup>*Lawrence v. Van Horne*, 1 Caines 276. See Field.

<sup>5</sup>Wigmore's Evidence, Vol. VIII, page 558.

<sup>6</sup>*Lila Dhar Ratanlal Vyas v. Holkarmal Sohanlal*, (1960) Bom. L.R. 439; A.L.R. 1959 Bom. 528, 529.

<sup>7</sup>*Shrinarain v. Chunilal*, A.L.R. 1957 Raj. 159, 161.



A person is not obliged to put in evidence the papers called for by him. If the party giving the notice declines to use the papers when produced, this, though a matter of observation, will not make them evidence for the adverse party.<sup>1</sup> For, if notice to produce invested<sup>2</sup> the instrument called for with the attribute of evidence, testimony incapable of proof might be brought into a case by such notice.

Of course, the position is otherwise (as the section says), if the papers are inspected by the party calling for them. Where a party calls for a document from the other party and inspects the same, he takes the risk of making it evidence for both parties.

It rests, however, upon the party who calls for and inspects a paper to adduce evidence of its genuineness, if that be not admitted.<sup>3</sup>

94.5. This section does not render proof of the document to be exhibited unnecessary or alter the normal incidence of burden of proof as detailed in other sections of the Act.<sup>4</sup> The documents admitted under this section must not be deemed to be conclusive evidence against the inspecting party, they become evidence for all they are worth.<sup>5</sup>

Evidentiary value of documents admitted under section 163.

94.6. The section does not expressly provide that it is confined to civil cases, and it would appear that the Calcutta view on the subject is that section 163 applies to criminal trials as well as to civil suits<sup>6-7</sup>.

Criminal cases.

94.7. The Calcutta view is based principally on the reason that no such limitation is to be found in the wording of the section itself. In both the Calcutta cases, notice to produce certain statements was given to the Crown by the defence, and the statements were produced by the Crown, inspected by the defence and used for cross-examination. It was held that the Crown was entitled to use the whole statements.

It was suggested to us that some of the reasons which justify the imposition of a prohibition, even if they apply, do not apply with the same force in criminal cases. To a large extent, section 163 is based on the consideration that it would give an unconscionable advantage to a party to enable him to try into the affairs of his adversary, without, at the same time, subjecting him to the risk of making whatever he inspects evidence for both the parties. In criminal cases, however, even if this consideration is regarded as applicable, there are other considerations which should be taken as overriding it. We have however not been convinced of the need for a change.

94.8. It is for these reasons that we do not recommend any change in section 163.

Recommendation.

<sup>1</sup>*Sayer v. Kitchan*, 1 Esp. 210, cited in Woodroffe.

<sup>2</sup>As to notice, see Order 11 R. 15 C.F.C.

<sup>3</sup>*Mahomed v. Abdul*, (1903) 5 Bom. L.R. 380.

<sup>4</sup>*Raja Gopal v. Ramanuja*, (1923) N.W.N. 292; 72 I.C. 459 (Mad.).

<sup>5</sup>*Ramadhin v. Ram Dayal*, 57 I.C. 973 (Oudh).

<sup>6</sup>*Government of Bengal v. Santiram Mandal*, A.I.R. 1930 Cal. 370.

<sup>7</sup>*Emperor v. Makhanlal Dutt*, A.I.R. 1940 Cal. 167, 168.

## DOCUMENTS NOT PRODUCED AFTER NOTICE — SECTION 164

**95.1.** The last section discussed was concerned with the document which is produced after notice and is inspected by the party giving notice. Section 164 deals with a situation where a document is *not* produced, though notice has been given. In the last section, the act was positive and the consequence of the act was also positive.

The document having been called for the inspection, the party calling for the same is bound to use it as evidence, if certain conditions are fulfilled. In section 164, on the other hand, the act of the party is negative, and so also is the consequence. When a party does not produce a document which he has had notice to produce, he cannot afterwards use the documents as evidence without the consent of the other party or the order of the court. This is what the section provides.

The illustration to section 164 takes the case where A sues B on an agreement and gives B notice to produce it (i.e. the document containing the agreement.) At the trial, A calls for the documents 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. Of course, the illustration assumes that the other party has not consented and that the court has not given permission for use of the document, thus relaxing the section.

**95.2.** The effect of this section is that where an opponent in possession refuses to produce a document on demand, he is also prohibited from producing it for contradicting the evidence which may have been tendered by the other party by way of permissible secondary evidence, or by way of proof of the fact to which the document relates. This provision may sound harsh; but, it has been explained<sup>1</sup> that while, in a sense, it is an appropriate "penalty" for unfair tactics, the original refusal may also be regarded as an admission, in advance, for the purpose of the particular judicial proceedings, of the correctness of the first party's evidence to this extent.

**95.3.** There is also the presumption that evidence which could be produced and is not produced would not be favourable to the party who withholds it. The principle was stated in an English case<sup>2</sup> in these terms:—

"You must either produce a document when it is called for, or never"

**Rationale.**

**95.4.** A party thus is not permitted, after declining to produce a paper, to put it in evidence after it has been proved by his opponent by parol. If he is to be allowed to do so, he would be able to hold back the paper, until he saw whether its parol rendering would be favourable or unfavourable to him, and thus to obtain an unjust advantage over his opponent. The same rule is applied when the party calling for the paper has proved a copy, in which case the holder of the paper cannot produce it and object to the reading of it without proof by an attesting witness. Nor can he after refusing to produce, put the

<sup>1</sup>Wigmore, cited in Field.

<sup>2</sup>*Doe v. Cockell*, (1834) 6 C. & P. 525, 528. (Alderson B.).

paper into the hands of his opponent's witness for the cross-examination of produce and prove it as part of his own case<sup>1</sup>.

He is, in effect, bound by any legal and satisfactory evidence produced on the other side<sup>2</sup>.

95.5. It would appear that the party who does not produce a document in his possession cannot be allowed to prove the contents by *secondary evidence* also. It was so held in a Madras case<sup>3</sup>. This, with respect, seems to be a correct view. When section 164 speaks of using the document "as evidence", it includes secondary evidence also. The party refusing can produce neither primary nor secondary evidence. In fact, it is the other party (which gave notice to produce) that becomes entitled to give secondary evidence—the illustration to the section would at least appear to assume this.

Secondary evidence.

It would be of interest to note that this principle was applied, in an early English case<sup>4</sup>, to a chattel, where a party was determined to keep back a chattel.

95.6. It remains now to refer to another provision<sup>5</sup> under which there is a presumption that a document called for and not produced after notice was attested, stamped and executed in the manner required by law.

95.7. The question whether this section applies to criminal proceedings<sup>6,7</sup> has been the subject matter of some discussion.

Section 164 —  
Applicability to criminal trials.

95.8. It was suggested to us that it may be better to add the words "to a civil proceeding" after the words "when a party" in section 164 and thereby to limit its scope. We do not, however, consider it necessary to make any such change.

<sup>1</sup>Wharton, Ev., S. 157; Taylor, Ev., S. 1818; Burr, Jones, Ev., SS. 117, 223, cited in Woodroffe.

<sup>2</sup>Norton, Evidence, page 252, cited in Woodroffe.

<sup>3</sup>Sivasubramania v. Tirthapathy, A.I.R. 1933 Mad. 451.

<sup>4</sup>Davies v. Hurlley, 7 C. & P. 405.

<sup>5</sup>Section 89.

<sup>6</sup>Woodroffe and Amir Ali, Evidence (1969), Vol. 3, page 1812.

<sup>7</sup>See discussion in Sham Das v. Emperor, A.I.R. 1933 Cal. 65, 66, (left-hand); I.L.R. 60 Cal. 341 (Panckridge, J.).

POWER OF THE JUDGE — SECTION 165

Introductory.

96.1. In order to elicit the truth or to get all facts necessary for a proper decision, the law gives certain powers to the court in section 165. If attention is confined to the proof brought forward by the parties, appropriate materials for decision may not be available and the truth may not always come out. Examination of witnesses may not have been conducted scientifically or skillfully, and things may have been left unsaid or obscure unintentionally, or as is sometimes seen intentionally<sup>1</sup>.

96.2. So, whenever the judge finds that the examination has not been conducted in a way as to unfold the truth, or that obscurities in the evidence should be made clear and intelligible, it is not only his right, but also his duty, to probe into matters that he deems important.<sup>2</sup> This the Act empowers the judge to do. He can put his own questions. But this power of interrogation is to be exercised within well-recognised limits by maintaining judicial calm and detachment and without assuming the functions of counsel. The judge may intervene by questions any time he considers necessary, but if extended examination is necessary, it is usually made after the counsel have finished their task.

The power conferred by section 165 is wide, in as much as the judge can put any questions which he considers fit for eliciting the truth. But there are certain limitations given in the section.

Section 165 —  
Gist.

96.3. Under the section, the judge may "in order to discover or to obtain proper proof of relevant facts ask any question he pleases, in any form, at any time, of any witness or of the parties about any fact, relevant or irrelevant". The history of the section<sup>3</sup> shows that it was enacted in that wide form, because, in 1872, it was thought that in many of the lower courts of the country, neither were cases properly prepared, nor were witnesses properly examined, so that it was necessary to vest the judge with an over-all power to get at the truth by asking any questions he liked. But although a great deal of time has since passed, the section has remained on the statute book and we cannot say that even in the present circumstances, the section is not needed.

The powers conferred by the section can, therefore, still be claimed and exercised. "It is obvious that the judge contemplated by the section is not a mere umpire at a contest between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost"<sup>3</sup> He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and, to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or wilfully avoided.

Object.

96.4. Explaining the object of the section, Stephen in his Introduction to the Evidence Act,<sup>3</sup> wrote: "When a man has to inquire into facts of which he report, and facts relevant in the highest degree to facts in issue may often be

<sup>1</sup>Sarkar, Commentary on section 165.

<sup>2</sup>Field.

<sup>3</sup>Stephen, Introduction to the Evidence Act.

extremely important for him to trace the most cursory and, apparently, futile report, and facts relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case, criminal or civil, would neglect his duty altogether if he shut his ears to everything which was not relevant within the meaning of the Evidence Act. A judge or magistrate in India frequently has to perform duties "which in England would be performed by police officers or attorneys. He has to sift out the truth for himself as well as he can and with little assistance of professional kind. Section 165 is intended to arm the judge with the most extensive power possible for the purpose of getting at the truth."

96.5. 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 inquire into every fact whatever. A judge may ask any question he pleases about any irrelevant fact, if he does so in order to discover or to obtain proper proof of the *relevant facts*.<sup>1</sup> It is, therefore, appropriate to say that the object of allowing the judge to ask irrelevant questions under this section is to obtain "indicative evidence" which may lead to the discovery of relevant evidence.<sup>2</sup>

Indicative evidence.

96.6. As regards the nature of the examination, the judge may question the witness either in the manner and with the object followed by the parties, or he may avail himself of the more extended power of interrogation which is given to him under the terms of this section. It has been a matter of juristic dispute whether a judge can, on his own motion, put to the witness questions independently of counsel, so as to bring out points which counsel designedly or undesignedly overlook. On one side, it has been urged, in conformity with the scholastic view, that the judge is confined to the proof adduced by the parties. On the other side, it is insisted that it is absurd for a judge with a witness before him not to do what he can to elicit the truth. So far as concerns the *abstract principle*, writers on the English common law repeatedly affirm the scholastic view that the judge must form his judgement exclusively on the proof brought forward by the parties. So far as concerns the *practice*,<sup>3</sup> judges, both in England and in the United States, do not hesitate to interrogate a witness at their own discretion, eliciting any facts they deem important to the case. Best has discussed the matter in these terms —

Nature of examination.

"Again, the judge has a certain latitude allowed him with respect to the rules of forensic proof. He may ask any questions in any form and at any stage of the cause, and to certain extent even allow parties or their advocates to do so. This, however, does not mean that he can receive illegal evidence at pleasure; for, if such be left to the jury, a new trial may be granted, even though the evidence were extracted by questions put from the Bench, but it is a power necessary to prevent justice being defeated by *technicality*, to secure *indicative* evidence and in criminal cases to assist in fixing the amount of punishment. And it should be exercised with due discretion."<sup>4</sup>

It is this latter object (the securing of indicative evidence) which is the main ground for the enactment of this section.

96.7. At the same time, there is a certain disadvantage to the judge when he examines a witness. One important drawback is that the judge may overlook the demeanour of the witness. This only shows the care to be exercised by the Judge.

Power to be exercised with care

<sup>1</sup>*Queen Empress v. Hari Lakshman*, I.L.R. 10 Bom. 185.

<sup>2</sup>*K. L. Krishna Ayyar v. T. Balakrishna Iyer*, A.I.R. 1934 Mad. 199(2), 201-2.

<sup>3</sup>Wharton, Evidence, section 281, cited in Woodroffe and Ameer Ali, Evidence,

<sup>4</sup>Best, Evidence, section 86.

## Recommendation.

96.8. We generally agree with what Best has said.<sup>1</sup> The section does not seem to need any change in point of substance. But by way of structural improvement, we recommend the following redraft.

## REVISED SECTION 165

Judge's power to  
put questions or  
order production

165. (1) *Subject to the provisions of sub-sections (3) and (4), the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing.*

(2) Neither the parties nor their agents shall be entitled —

- (a) to make any objection to any such question or order, *or*,
- (b) without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

(3) *Notwithstanding anything contained in this section, the judgment must be based upon facts declared by this Act to be relevant, and duly proved.*

(4) *Nothing in this section shall authorise the Judge—*

- (a) to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; or
- (b) to ask any question which it would be improper for any other person to ask under section 148 or 149; or
- (c) to dispense with primary evidence of any document, *except in the cases herein before excepted.*

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<sup>1</sup>Para 96.6, *supra*.

## CHAPTER 97

### JURY AND ASSESSORS — SECTION 166

**97.1.** Section 166 provides that in a case tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the judge, which the judge himself might put and which he considers proper. **Power of jury on assessors.**

**97.2.** The system of trial by jury has been abolished. Provisions for assessors are sometimes made in special laws, but are very rare. **Deletion of section 166 recommended.**

The section should therefore be deleted. If ever the system is revived, the section could be re-enacted. But since this system is not now in force, we do not think it necessary to retain the section.

**IMPROPER ADMISSION OR REJECTION OF EVIDENCE—SECTION 167****Introductory.**

**98.1.** Under section 167, the improper admission or rejection of evidence shall not be a ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

Section 167 is a verbatim reproduction of section 57 of the Evidence Act of 1855, and the rule has been adopted from the practice of the courts in England.

**Significance**

**98.2.** It is the duty of the courts to arrive at their decisions upon legal evidence only.<sup>1</sup> However, lest it should be argued that a breach of this duty by the judge renders the trial illegal and the judgment liable to be set aside, it becomes necessary to provide that the improper admission of evidence shall not be a ground *of itself* for (i) a new trial or (ii) a reversal of any decision in the case.

Similarly, since a court is bound to take on record all relevant evidence unless otherwise provided by a specific provision of law—an obligation which can, to some extent, be deduced from section 5—it could have been argued that if admissible evidence has been rejected, the trial is vitiated. Anticipating such an argument, the Legislature has, in section 167, also provided that the improper rejection of evidence shall not be ground *of itself* for a new trial or a reversal of any decision in the case.

**English law.**

**98.3.** Stephen Lush, in his *Common Law Practice*,<sup>2</sup> wrote — “Where evidence has been offered by one party at the trial and has been improperly rejected or admitted by the Judge after hearing the objections of the opposite party, a new trial, as a general rule, may be claimed on the ground that in so rejecting or admitting the evidence the Judge did not rule according to the law”. But, he also added that courts had not been in the habit of granting new trial where, even if the evidence rejected is admitted, a verdict for the party offering would be clearly against the weight of evidence or — to take the converse case — where, even without the evidence illegally received, there is enough to warrant the verdict.

**Stephen's view.**

**98.4.** Stephen in his *Introduction*<sup>3</sup> to this Act observed (with reference to the sections concerning relevancy), that “important as these sections are for purposes of study, and in order to make the whole body of law to which they belong easily intelligible to students and practitioners not trained in English Courts, they are not likely to give rise to litigation or to nice distinctions. The reason is that section 167 of the Evidence Act, which was formerly section 57 of Act II of 1855, renders it practically a matter of little importance whether evidence of a particular fact is admitted or not”. Of course, he had in mind those cases where the breach of the rules did not cause substantial miscarriage of justice.

<sup>1</sup>*Miller v. Madho Dass*, (1896) Law Reports 23 Indian Appeals 103.

<sup>2</sup>Stephen Lush, *Common Law Practice*, page 481, quoted by Field.

<sup>3</sup>Stephen, *Introduction*, page 73.



**98.5.** It may be noted that section 167 applies to civil as well as to criminal cases.<sup>1</sup> The word "decision", though generally used as applicable to civil proceedings, is by no means inappropriate to criminal cases. The words "in any case" in section 167 are wide, and were long ago interpreted to include criminal trials *by jury*.<sup>2</sup> The position is clear from section 1, which renders the Act applicable to all judicial proceedings, etc. (with certain exceptions), and by section 3, which declares that "Court" includes all Judges and Magistrates.<sup>3</sup> In short, the provision contained in section 167 applies to all judicial proceedings in or before any court, including jury trials.<sup>4</sup> Applicability

**98.6.** The significance of section 167 would be best understood if regard is had to the position regarding appeal. Where an appeal lies on points of law only, two questions relating to evidence may arise, namely, that the judge wrongly admitted or rejected evidence, or that there was no evidence upon which the judge could find as he did.<sup>5</sup> The first question is the one on which section 167 focusses attention. It prohibits reversal of judgement merely on the ground of a wrong admission or rejection of evidence if other evidence on record justifies the decision under appeal, or if inclusion of the evidence improperly rejected would have made no difference. Significance.

**98.7.** This does not, of course, mean that in no case would the improper admission or rejection of evidence affect the decision. To the saving provision in section 167, an important condition precedent has been annexed, namely, "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 Privy Council observed,<sup>6</sup> discussing this aspect:

"It was therefore the duty of the High Court in Appeal to apply its mind to the question whether, after discarding the evidence improperly admitted, there was left sufficient ground to justify the convictions. The Judges of the High Court did not apply their minds to this question because they considered that the evidence was properly admitted, and their Lordships propose therefore to remit the case to the High Court of Madras, with directions to consider this question. If the court is satisfied that there is not sufficient admissible evidence to justify the convictions, they will take such course, whether by discharging the accused or by ordering a new trial, as may be open to them".

**98.8.** In England, under the Rules of the Supreme Court—<sup>7</sup>

"(1) On the hearing of any appeal the Court of Appeal may, if it thinks fit, make any such order as could be made in pursuance of an application for a new trial or to set aside a verdict, finding or judgement of the court below.

<sup>1</sup>*The Queen v. Hurribole Chunder Ghose*, (1874) I.L.R. 1 Cal. 207, 217; *R. v. Havroji Dadabhai*, 9 B.H.C.R. 358, 375.

<sup>2</sup>*Queen Empress v. Ram Chandra Govind*, I.L.R. 19 Bom. 749, 762, *Soylimiya Miyabhai v. Empress*, A.I.R. 1944 Bom. 338, 343.

<sup>3</sup>*R. v. Pitamber Jina*, I.L.R. 2 Bom. 51, 65, 66.

<sup>4</sup>*Abdul Rahim v. Emperor*, A.I.R. 1945 P.C. 82, 84.

<sup>5</sup>Cockle, *Cases and Statutes on Evidence* (1963), page 405.

<sup>6</sup>*Kottava v. R.*, A.I.R. 1947 P.C. 67, 71.

<sup>7</sup>Order 58, R. 3, Rules of the Supreme Court.

(2) A new trial shall not be ordered on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court of appeal some *substantial wrong or miscarriage has been thereby occasioned*.

(3) A new trial shall not be ordered by reason of the ruling of any judge that a document is sufficiently stamped or does not require to be stamped".

No change.

98.9. We have no further comments on the section which needs no change.

## DISCRETION OF THE JUDGE

99.1. In this Chapter, we propose to consider in brief the question whether the Judge should be vested with a discretion to exclude evidence which is relevant and technically admissible, where its admission is regarded as necessary in the interests of justice. An examination of this subject has been considered necessary in the light of the query raised whether there is need for such discretion in order to promote the cause of justice by preventing harassment or oppression. The submission to be made after an examination of the position is that such an amendment should not be made. Scope of the Chapter.

In order to understand the scope of the present discussion, it will be convenient to discuss the subject under these heads—

- (a) Whether the Court in India has any such discretion according to the present law?
- (b) What is the English law on the subject?
- (c) Whether the vesting of such a discretion in the court in India would be desirable or feasible?

99.2. As to the first question, the correct answer should be in the negative. Present law in India. while courts in India do have jurisdiction—indeed, it is mandatory on their part—to exclude evidence which is irrelevant or inadmissible and to disallow questions which are prohibited by specific legislative provisions. They have no discretion to exclude evidence or to disallow questions permissible by law on the ground that serious prejudice might thereby result to any party or on the ground that embarrassment might be caused to a witness or that the evidence would be unfair. The powers of the Judge are limited to those expressly conferred by the Evidence Act or by the two procedural Codes or any special law. In the absence of a provision conferring such a discretion, courts do not act under any residual or general power to exclude evidence.

Certain sections of the Evidence Act to confer a power or impose an obligation on the Court to regulate the scope of questions in regard to particular matters or in particular forms. By way of example, reference may be made to section 148, whereunder the Court must consider how far the making of imputations on the character of a witness in cross-examination is justified having regard to the considerations mentioned in that section. But, in general, it cannot be said that evidence which is relevant and admissible and not excluded by a specific legal provision, if elicited in the proper form and manner, can still be excluded by the presiding officer on the ground that it would be unfair or oppressive or against public policy. This is true whether the proceeding be civil or criminal.

99.3. As to inherent powers under the Code of Criminal Procedure,<sup>1</sup> there is no authority recognising a power to exclude evidence that is unfair to the accused. Nor is there such power under the Civil Procedure Code. No inherent power.

The question of unfairness to the accused did come up in a case<sup>2</sup> before the Calcutta High Court. In that case, three persons were charged for an offence of murder under section 302, Indian Penal Code. After the close of

<sup>1</sup>Section 482, Cr. P.C. 1973.

<sup>2</sup>*Matla Goala & others v. The State*, (1970) 68 C.W.N. 260.

prosecution evidence, and before the examination of the accused, the trial judge decided to examine the Defence Counsel as a court witness, since one of the accused had been working in his house on a part-time basis when the offence was committed by him. All the three accused were convicted and sentenced to imprisonment for life.

The matter came up in appeal before the High Court. The High Court observed that "the Advocate's evidence was competent and even compellable. There was no privilege against the court. But the embarrassment to the accused was inevitable, the prejudice inescapable. To plead and to prove, to act as counsel and witness in the same case, even if permissible in any circumstance, was not an easy task. And the trial judge enabled the Advocate to play a dual role and combine the two functions by allowing the defence prayer and permitting the Advocate to address the jury. It is here, we think, that the learned judge misdirected himself. The court had the right to obtain his evidence but it failed in its duty to safeguard the interests of the accused. It mattered little if that course was taken on the prayer of the accused themselves."

The High Court held that the accused did not have a fair trial. It set aside the conviction and directed that the accused be retried in accordance with law.

This case can be explained on the ground that there was a serious defect in procedure. The decision is not relatable to any supposed discretion to exclude evidence on the ground of unfairness.

99.4. In support of the view put forth above as to the present law in India, it may be mentioned that in cases where evidence was obtained by the police by an illegal arrest or search, the Courts have almost universally held that the illegality does not affect the admissibility of the evidence. Not only have they held it to be admissible, but also they have taken such evidence into account in coming to a conclusion on the facts. Had there been a judicial discretion to exclude evidence on the ground of unfairness or prejudice, that aspect would most probably have come up for consideration, at least in some exceptional cases.

Secondly,—taking civil cases—in those judicial decisions where a claim for privilege was made but rejected,<sup>1</sup> one does not come across any discussion or mention of a residual discretion. It is therefore a reasonable view to take that our courts do not possess the existence of a judicial discretion, either in civil or in criminal cases.

Position in Eng-  
land.

99.5. As to the position on the subject in England, Cross & Wilkins, in the Outline of Evidence,<sup>2</sup> state it as follows as regards criminal cases:

"In every criminal case the judge has a discretion to disallow the evidence even if in law relevant, and therefore, admissible if admissibility would operate unfairly against the defendant."<sup>3</sup>

"The use of the discretion for this purpose is apparent in relation to confessions and illegally obtained evidence. The court has a discretion to exclude confessions although they were voluntary within the rules discussed in Article 46, and to reject evidence which is in law none the less admissible although improperly obtained. This discretion is exercised mainly in order to prevent the accused from suffering on account of having been unfairly induced to incriminate himself.

<sup>1</sup>Contrast the English position — para 99.6. *infra*.

<sup>2</sup>Cross & Wilkins, Outline (1975), page 248.

<sup>3</sup>Lord Parker, C.J. in *Callis v. Gunn*, (1964) 1 Q.B. 495; (1963) 3 All. E.R. 677, 680.

"Another basis of the exercise of the discretion is the protection of the accused from undue prejudice. Similar fact evidence is, as we saw in Article 76, liable to be rejected if the judge considers that its prejudicial propensity outweighs its probative value. This is a completely different basis for the exercise of the discretion from that illustrated by the exclusion of confessions; there can be no doubt about the probative value of a confession which complies with the rules governing voluntariness. The discretion to exclude statements made in the presence of the accused is also based on the danger of undue prejudice being caused by evidence of slight probative value.

"We saw on page 229, that, even though cross-examination is legally permissible under section 1(f) of the Criminal Evidence Act, 1898, it may be disallowed in the judge's discretion. This is an extension of the judge's discretionary control of any cross-examination. It is especially important in the case of an accused giving evidence on his own behalf, but there is a general requirement that the cross-examination must be fair to the witness. Fairness to witnesses also accounts for the discretion claimed by the courts to disallow questions on the ground that the answers would involve the disclosure of confidences, although those confidences are not the subject of a legally recognised privilege. This latter exercise of the discretion has only been mentioned in civil cases. In fact, it is possible that it would be held inapplicable in a criminal case on account of the public interest at stake."

99.6. It is in relation to claims to *privilege*<sup>1</sup> from answering questions in cross-examination that the courts' exclusionary discretion has been invoked in civil cases. The basis on which the discretion has been exercised has been that of balancing the competing interests of disclosure in furtherance of the administration of justice between the parties and non-disclosure in the interest of confidentiality. It seems that the trial judge has a discretion to uphold a witness's claim to be privileged from answering certain questions although no privilege exists as a matter of law, and even though the questions are relevant and necessary for the purpose of the particular proceedings.<sup>2</sup> The only reported cases concern claims to privilege by doctors and priests and journalists; but, in the context of the exclusion of evidence in the public interest, it has been recognised that the public has an interest in the preservation of confidentiality which must be weighed against the private interest of the parties and the importance of the due administration of justice between them.<sup>3</sup>

Civil Cases  
regular.

99.7. There is no English authority<sup>4</sup> suggesting that, in civil cases, the judge has a discretion to disallow improperly obtained admissions, or prejudicial evidence relating to misconduct on other occasions and, in each instance, there is Commonwealth authority to the contrary.<sup>5 6</sup>

99.8. It may be mentioned that where Cross & Wilkins have referred to the discretion in relation to cross-examination, they have in mind the power of the court to disallow questions which are needlessly offensive or embarrassing in form. This power is similar to that under section 151 of our Act.

<sup>1</sup>Cross, Evidence (1974), page 30.

<sup>2</sup>A. G. v. Mulholland; A. G. v. Pester, (1963) 2 Q.B. 477, (1963) 1 All. E.R. 767.

<sup>3</sup>Alfred Crompton Amusement Machines Ltd. v. Commissioner of Customs and Excise (No. 2), (1973) 2-2 All. E.R. 1169; Norwich Pharmacal Co. v. Customs and Excise Commissioners (1973) 2 All. E.R. 943.

<sup>4</sup>Cross, Evidence (1974), page 30.

<sup>5</sup>Ibrahim v. R., (1914) A.C. 599, 610.

<sup>6</sup>Manenti v. Malbourne Tramways (1954) V.L.R. 115, 118. Cross, Evidence (1974) p. 30.

Privilege.

99.9. As to situations involving an unsuccessful claim of privilege Donovan L.J. made these observations<sup>1</sup> in *A.G. v. Mulholland* "I agree. I add a few words only about the need for some *residual discretion* in the court of trial in a case where a journalist is asked in the course of the trial for the source of his information. While the journalist has no privilege entitling him as of right to refuse to disclose the source, so, I think, the interrogator has no absolute right to require such disclosure. In the first place the question has to be relevant to be admissible at all; in the second place it ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand — I prefer that expression to the term 'necessary'. Both these matters are for the consideration and, if need be, the decision of the judge. And, over and above these two requirements, there may be other considerations, impossible to define in advance, but arising out of the infinite variety of facts and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer.

"For these reasons, I think that it would be wrong to hold that a judge is tied hand and foot in such a case as the present and must always order an answer or punish a refusal to give the answer once it is shown that the question is technically admissible. Indeed, I understand the learned Attorney-General to concur in this view namely, that the judge should always keep an ultimate discretion. This would apply not only in the case of journalists, but in other cases where information is given and received under the seal of confidence, for example, information given by a patient to his doctor and arising out of that relationship. In the present case, where the ultimate matter at stake is the safety of the community, I agree that no such consideration as I have mentioned, calling for the exercise of a discretion in favour of the appellants, arises, and, that accordingly, their appeals fail and must be dismissed."

Whether  
needed. change

99.10. The next question is whether it is desirable that the courts in India should be vested with a judicial discretion to exclude evidence and, if so, on what grounds. Notwithstanding the English precedent, it appears to us that to confer such a discretion may lead to a certain amount of vagueness in the administration of the law. This is not to say that in regard to those sections which expressly confer a power on the court to exercise its sound judgment, there should be a modification of any substance by way of narrowing down their scope. They operate on definite matters. The question with which we are concerned is whether there should be recognised a "residual discretion"—to borrow a phrase from the judgment of Donovan L.J. in the English case of *Attorney General v. Mulholland*. The questions permissible in cross-examination are the subject matter of section 148. We are also recommending the insertion of a restrictive provision as to questions relating to the character of a person suing for defamation.<sup>2</sup> Those provisions of the Act which prohibit the putting of indecent or offensive questions will also continue to be in the Act. But, aside, from those provisions, it may not be feasible to vest a general discretion in the court to exclude evidence that may have been obtained by unfair means or may otherwise cause prejudice to a party. Such a provision might lead to undue vagueness and thereby render unpredictable the actual outcome in a large number of cases.

<sup>1</sup>*A. G. v. Mulholland*, (1963) 1 All. E.R. 767.

<sup>2</sup>Section 55 as recommended.

99.11. In regard to the view expressed by Donovan L.J. in the English case of *Attorney General v. Mulholland*, — 2265 to 2268 — Where he suggested that the court has, even in a civil case, a discretion to exclude a communication of a confidential nature even where the law does not recognise a privilege as such, the vesting of such a discretion in the courts in *India* might lead to want of uniformity.

99.12. We do not therefore recommend any change.

No change.

## CONCLUSION

Various aspects  
of the law of evi-  
dence.

100.1. By way of concluding our discussion of the Act, we would like to say a few words in this Chapter as to certain matters of general interest.

The query may be raised why an Act like the Evidence Act should require discussion at length. The law of evidence is often regarded as relating to matters purely of interest to lawyers, and in that sense, it is described as a technical branch of the law. It is true that the subject of evidence belongs to what is usually described as adjective law as distinguished from substantive law. To put the matter in a different form, it deals with the means permitted by the law for the ascertainment of truth by the judicial process, and not with the end of the law as an instrument of social justice. Nevertheless, the means would appear to be as important as the end. If the means be defective, the end cannot be fully achieved.

100.2. There are, in our opinion, certain other aspects also, which ought to be appropriately emphasised. In a decision of the House of Lords<sup>1</sup> reported in 1918, Lord Parker, while dealing with the status of foreign law, observed—

“Every legal decision of our courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence.”

When Lord Parker was speaking of “law”, he was not, of course, ruling out the law of evidence; what is more pertinent to be pointed out is that he laid emphasis on “appropriate evidence” and it is the function of the law of evidence to lay down whether a particular evidence should be regarded as appropriate or not.

100.3. An eminent English counsel and Editor of the All England Law Reports<sup>2</sup> has defined the judge’s task as, first to ascertain the facts, second, to ascertain the rule applicable thereto, and third, to apply that rule *to those facts*.

Human values

100.4. Apart from this legal aspect, we may also point out that several branches of the law of evidence deal with questions affecting human values. Rules relating to confessions are an example. The human element becomes relevant in a formulation of the rules of the law of evidence in relation to another topic of the law, namely, questions of privilege. Much of the law of evidentiary privilege is concerned with matters which are protected from disclosure having regard to eminently human considerations—considerations which involve a person’s conjugal rights, his dignity, his reputation for moral integrity, his dealings with those in whom he has placed confidence, and the like.

Foster’s view as  
to character

100.5. In discussion cases relating to character, Foster makes a statement which has subsequently been frequently quoted<sup>3</sup>—

“The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point of issue, is founded on sound sense and common justice. For, no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. And had not those concerned in state prosecutions, out of their zeal for

<sup>1</sup>*Dynamit Action-Gesellschaft v. Rio Tinto Co.*, (1918) A.C. 292, 302 (H.L.)

<sup>2</sup>R. Burrows, “Law Reporting” (1942) 58 L.Q.R. 96.

<sup>3</sup>Foster, Crown Law, 246.



the public service, sometimes stepped over this rule in the case of treasons, it would perhaps have been needless to have made an express provision against it in that case, since the common-law grounded on the principles of natural justice hath made the like provision in every other."

100.6. It may also be mentioned that the level of culture of a civilization may impose restrictions on the content of the law of evidence. For example, in criminal trials, involuntary confessions are excluded, not only because they may be false, but also because they are repulsive to the conscience of society. Culture.

Then, there is the intellectual appeal of the law of evidence, in so far as it touches on the field of logic and seeks to define what facts are to be considered as of probative value in the eye of the law — "relevant" as the expression goes.

Thus, the legal, moral and social importance of the law of evidence is much deeper than may appear at the first blush. That explains why the subject cannot be fully disposed of in a brief report.

100.7. Codification of the rules of evidence may not have a long history; but even so, it may be pertinent to point out that some of the rules of evidence are of great antiquity,<sup>1</sup> as was noticed by Kenyon C.J. This fact was emphasised by Best,<sup>2</sup> with reference to what he regarded as the primary and secondary principles of evidence. A primary principle, according to Best, is one related to a fact to be proved, while a secondary principle is one related to the means of proof. Antiquity.

One of these primary principles is that evidence must be relevant. This principle underlies some of the rules designed to exclude misleading facts from the consideration of the tribunal; and at least one of these rules, that the action of strangers to a litigation ought not to prejudice a party (*res inter alios acta alteri nocere non debet*) is to be found in a slightly different form in Justinian's Code.<sup>3</sup> According to another principle, the burden of proof lies on the party alleging a fact, of which the correlative rule is that he who alleges a matter must prove it, but he who denies it need not disprove it *cei incumbit probatio qui dicit non qui negat*. This maxim was attributed to Paulus<sup>4</sup>, while, as early as the second century A.D., a comparable adage was attributed to the rabbinical teacher Akiba.<sup>5</sup>

100.8. In India, Brihaspati remarked ages ago that "since people begin to entertain doubts (about a transaction) even in six months (from an occurrence or transaction), the Creator therefore created in the hoary past letters which are recorded on writing material".<sup>6</sup>

100.9. When success depended on such means as a judgement from God, the oath of the parties, wager of law (compurgation) or of battle and ordeals (ardalist), rules of evidence were not needed. Society has, however, long since passed these stages. Process of the law.

Essentially, rules of evidence regulate the process of fact-finding in a court of law. This process, whether it is or is not regulated by mandatory rules, is

<sup>1</sup>*R. v. Inhabitants of Eriswell*, (1790) 3 T.R. 707; *Baermann v. Radenius*, (1798) 7 T.R. 663, 667.

<sup>2</sup>Best, 94, 95, referred to by Nokes, Introduction to Evidence (1967), page 16.

<sup>3</sup>*Corpus Juris Civilis*, Code viii, 60, cited by Nokes, Introduction to Evidence (1967), page 16.

<sup>4</sup>*Corpus Juris Civilis*, Dig. xii, 3, 2.

<sup>5</sup>The Nishnah, Bekh. 2, 7, see also B.K. 3, 11, D.B. 9, 6 (1933) trs. Danby, 532, 336, 379.

<sup>6</sup>Brihaspati, quoted by Kane: History of Hindu Dharmashastra, Vol. 4, page 308.

different from the process of such finding in other finds of human activity. The difference has been lucidly brought out by two American authors,<sup>1</sup> one of whom is the Editor of Wigmore:

"The most conspicuous difference between the law's problems in determining historical facts and those of other disciplines lies in the procedure of decision. Other disciplines rely primarily on the method of inquiry, reflection, and report by trained investigators. In other disciplines the final conclusions as to key facts are drawn by experts, and the conclusions may be changed — if they are found later after further inquiry and reflection — to be wrong. The law, in contrast, depends in most formal proceedings upon presentation by the disputants in public hearing before an impartial tribunal, a tribunal previously unformed about the matters in dispute. And findings of facts by the tribunal are usually final so far as the law is concerned.

"Typical or such formal proceedings is the trial in court. A trial suffers from immobility. It suffers from shortage and inflexibility of time. It is dependent largely upon non-expert sources of information and upon non-expert evaluators of information (the jury). In addition, proof at a trial is rather strictly governed by procedural rules called rules of evidence."

100.10. The same authors have emphasised the element of contest in these words:

"A contested law suit is the society's last line of defence in the indispensable effort to secure the peaceful settlement of social conflicts. In the overwhelming majority of instances, the general directions of the law function smoothly with no controversy whatever. When controversies do arise, the overwhelming majority of them are settled informally or, if formally, without a contest, as by plea of guilty in a criminal case. In almost all these situations lawyers are likely to handle evidence in the same commonsense" fashion that anybody else would, unless special calculations are called for by a real possibility of formal litigation.<sup>2</sup>

"When a question has reached the point of contested trial, however, its whole context is changed. Victory, and not accommodation, is the objective of the parties. The adversary atmosphere and the delays of litigations naturally repel evidence, especially testimony and things under the control of disinterested persons, so that the litigants have available for use only the partisan and coerced residue after people with ingenuity have made themselves anonymous. That residue is culled by the parties with a view not to establishing the whole truth, as to winning the case. And the evidence which survives this attrition (and the exclusionary rules of evidence described below) is communicated to the trier of fact in an emotion-charged setting.

"In judging the law's handling of its task of fact-finding in this setting, it is necessary always to bear in mind that this is a last-ditch process in which something more is at stake than the truth only of the specific matter in contest. There is at stake also that confidence of the public generally in the impartiality and fairness of public settlement of disputes which is essential if the ditch is to be held and the settlements accepted peaceably."

What can be proved. 100.11. If one bears these aspects in mind, one immediately perceives the limitations flowing therefrom.

<sup>1</sup>Hart and McNaughten, *Evidence and Inference in the Law* (1938), pages 51, 56; Loiseil, *Evidence, Cases and Materials* (1972), pages 3, 4.

<sup>2</sup>Hart and McNaughten, *Evidence and Inference in the Law* (1938), pages 51, 56; reproduced in Loiseil and others, *Evidence Material and Proof* (1972), pages 2, 3.

Within these limitations, a well designed law of evidence always sets before itself certain objectives which it seeks to achieve, namely, limiting the range of inquiry, avoidance of delay, and the ascertainment of truth in the best possible manner.

Let us see how the Act secures the beneficial purposes which it seeks to achieve. The Act, in the first place, seeks to limit the range of evidence by defining the facts to which evidence can relate. One paramount principle controls the giving of evidence. Under section 5, evidence must be confined to facts in issue and relevant facts. This also saves time,—an aspect which is not often realised.

100.12. In general, the volume of evidence on relevant facts depends on the importance which the parties attach to proof of the particular facts, and the law does not restrict the volume. However, section 39 lays down the limits of evidence which is to be tendered when the statement forms part of a conversation, documents, books, or series of letters or papers. Only that much portion is admissible as is necessary for the full understanding of the nature and effect of the statement concerned. How much can be proved.

100.13. Then, there are rules as to the quality of evidence. Evidence, if oral, must be direct. If it is documentary, the contents of the document must be proved by primary evidence (section 61 to 64), i.e. by production of the original document, except as permitted by section 65. The superiority of documentary evidence over extrinsic evidence is recognised in section 91 and section 92 (the Parole Evidence Rules), which exclude extrinsic evidence in competition with documentary evidence, except under certain circumstances. Quality.

100.14. The underlying principle is that documentary proof is always regarded the better type of testimony. The Privy Council has observed—

*"It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents."*

Sections 56 to 58 of the Act, which dispense with proof of facts of which the court can take judicial notice or of facts which are admitted, also promote the purpose of avoiding delay.

100.15. We may also note that certain rules of evidence are intended to carry out, in the field of evidence, rules existing in the substantive law. For example, section 92 prevents the parties from substituting a new contract for that recorded in writing, and is, in that sense, ancillary to the substantive law. Rules in substantive law.

In short, rules of evidence are intended ultimately to ensure that truth shall come before the Court in a manner which secures justice and which is in conformity with the general principles of jurisprudence and the content and spirit of the legal system.

100.16. The Act recognises that truth need not be pursued at too high a cost. Wider considerations of public policy may, for example, justify the creation of exceptions to the ordinary rule that a witness must answer every question on a relevant fact.

It is elementary that the trial must be fair. The right to a fair trial is, in particular, promoted by a group of sections seeking to protect the legitimate interests of the accused — sections 24 to 26, 30 and 54 — as also by the

<sup>1</sup>*Dinomovi v. Roy*, (1879) L.R. 7 Indian Appeals 8 (P.C.).

provisions relating to confrontation of witnesses with their prior contradictory statements.

Finally, procedure is a handmaid of justice, and not an end in itself. On this principle, section 167 forbids a new trial or reversal of a judgement on the sole ground of improper reception or rejection of evidence.

Excellence of the present Act.

**100.17.** Bearing that these are the principal considerations underlying the Act, we have, in the preceding Chapters, gone through the Act, section by section, and have, wherever necessary, recommended amendments in the light of the experience gained in the working of the Act during the last one hundred years, and also in the light of the changed social conditions as well as conflict of judicial decisions and recent thinking on the subject. These amendments should not, however, be construed as detracting from the high quality of the content of the present Act as a legislative measure. They only show that no legislative measure can be so perfect as to retain its utility for a century without modifications rendered desirable by the passage of time.

In fact, we would like to pay a tribute to the excellence of the Act which, drafted as it was by Stephen — an eminent lawyer and one who is perhaps the most respected name in the field of criminal law — has stood the test of time. If — to borrow a phrase from Gilbert — the law is an embodiment of all that is truly excellent the Act does not fall much short of that ideal.

Role of the Judge.

**100.18.** We would, at this stage, point out that the Act gives enough indication of the importance which it attaches to the role of the judge in the process of trial. It is no accident that two of the important sections dealing with the role of the judge — sections 165 and 167 — appear at the end of the Act. Their placing, as well as their content, indicates that the principle underlying them should pervade the entire process and that this principle is to be read in each and every of the preceding sections, thus imbuing the trial at every stage. The role of the Judge, as the Act conceives it, is not a static one. That role is dynamic enough to enable the judge to maintain his grip over the proceedings so that vexation is minimised, delay is avoided, the proceedings are conducted with fairness as well as with expedition and justice is done in its procedural aspect. A Judge ought not to forget the heavy burden cast upon him by these two sections in particular, and by the scheme of the Act in general.

Cross-examination.

**100.19.** In this context, reference may be made to an important feature of trials, — the cross (—) examination of witnesses. Although cross-examination on relevant questions cannot be interfered with by the Judge, yet it must be noted that under section 151 of the Act, the Court has a *power* to forbid indecent and scandalous questions or inquiries and under section 152, it has a *duty* to forbid insulting or annoying questions or questions needlessly offensive in form. These two sections give sufficient indication of the legislative attitude as regards the proper sphere of cross-examination. They contemplate that the witness is not to be treated as a mere tool to be played with, or as a toy to be tossed from one counsel to another. He has a dignity of his own, and the fact that he is a witness cannot affect that dignity. The power of the judge to control the course of the trial is particularly expected to be utilised in regard to questions which violate the provisions of these two sections.

We would like to point out that these sections are very rarely invoked, so that injustice often results and the witness leaves the Court with an unfavourable impression about the quality of the machinery of justice. If the

judge uses his powers wisely and efficiently, justice will be done and the trial will be expedited. It will also preserve and improve public confidence in the administration of justice. Unless the question be relevant, it is one of the important functions of the court to see that scandalous matter is not introduced. In this sense, "the trial judge is not a mere automaton".<sup>1</sup>

**100.20.** Primarily, it is the duty of counsel to avoid scandalous questions. Counsel should not overlook the fact that while they owe a duty to the witness, they have a duty to the Court. If, however, in a particular case, counsel overlook that duty, the Judge should not regard himself as powerless.

In trial Courts, appearing as a witness is sometimes an agonising experience. Witnesses often have a fear of proceedings in courts. The Judge should therefore exercise the powers referred to above widely and effectively, in order that such apprehensions of witnesses may be allayed and citizens can come forward to render aid in the administration of justice without hesitation.

**100.21.** Even in England, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role.<sup>2</sup> Position in England.

No doubt, as Lord Bacon said — "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal." But obviously he did not wish to imply that the Judge should be a silent spectator. In this connection, it will be useful to quote what Burke said<sup>3</sup> in the *Trial of Warren Hastings*:

"A Judge is not placed in the high situation merely as a passive instrument of the parties. He has a duty of his own, independent of them and that duty is to investigate the truth."

**100.22.** The following comment<sup>4</sup> made as to the judicial function in general is not inapplicable to the field of evidence —

"It should not be supposed that because his (Judge's) jurisdiction is limited, because so much of his work goes unreported, because he is immersed in the detail of fact, the trial judge is clothed with *small responsibility* in relating law to justice. It is he who makes the law become a living teacher, as he transmits it from the legislature and the appellate court to the citizen who stands before him."

**100.23.** We would like to conclude this chapter by quoting the following view of Norton as to the function of the law of evidence: Function of the law of evidence.

"The law of evidence is, to the administration of the law, what logic is to all sciences. It is applicable to each and every case tried, whether civil or criminal, and on its being founded on sound principles, and practically understood by those who are concerned in the administration of justice — Bench and Bar — depends the right collection of materials on which each particular judgement and decision can alone be rightly founded."

<sup>1</sup>*Sultan Begum*, A.I.R. 1936 Lah. 183, 185.

<sup>2</sup>*Jones v. National Coal Board*, (1957) 2 All. E.R. 155, 157 (C.A.).

<sup>3</sup>Burke, quoted in *Rangaswami Naicker v. Muruga Naicker*, A.I.R. 1054 Mad. 169, 170.

<sup>4</sup>Cf. Jaeger, "Praise of Law", in *Interpretations of Modern Legal Philosophies*, 352, 360-61 (Sayre ed. 1947), quoted in 65 *Harvard Law Rev.* at page 1304.

"A judgement may be erroneous on a sound collection of facts relevant to the issue, through ignorance or misapplication of the substantive law applicable to the particular case. But no knowledge of the general substantive law can save a judgement from error, if he, whose business it is to collect the facts, has not a practical acquaintance with the law of evidence, which teaches him what facts he ought to gather together, and what to exclude, and why he should gather these and exclude those."<sup>1</sup>

We believe that the importance of the law of evidence and the role of the Judge could not be put in better words. We should also state that rules of evidence, however perfect they may be, cannot guarantee that truth will be known at the end of the trial. They are designed to ensure that the quest for truth is facilitated; that the process will be carried on in a business like manner; that the field of inquiry will be confined to certain facts; that the boundaries of that field will be defined with a reasonable amount of precision; and that certain essential elements of fairness will be constantly kept in mind.

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<sup>1</sup>Letter from J. B. Norton, Advocate General to the Government of Madras (19th Feb 1869), Evidence Act, file App. E.

## NOTE OF DISSENT OF SHRI SEN VARMA

### SHOULD THE WORD "ADMISSIBLE" BE SUBSTITUTED FOR THE WORD "RELEVANT" IN CERTAIN SECTIONS OF THE INDIAN EVIDENCE ACT, 1872 ?

I am sorry that I am unable to agree with the recommendations of my learned colleagues with regard to a few points mentioned below.

In the first place, I find it difficult to agree with the recommendations that in certain sections of the Indian Evidence Act, 1872, the word "admissible" should be substituted for the word "relevant" and that a definition of the word "admissible" should be given in the Act.

The recommendation is thus stated in Chapter 6.99 of the Report:—

"In view of the inaccuracy of the present terminology as discussed above, the better course, in our view, would be to avoid the term "not relevant" in those sections where what is meant is "not admissible". Whilst preserving the word "relevant" in sections 5-16, we should, therefore, substitute the word "admissible" for the word "relevant" wherever the former appears to be more appropriate,— a definition of "admissible" being added, in section 3, as meaning "admissible in evidence".

My disagreement with these recommendations are several. The Indian Evidence Act, 1872, has been now in existence for more than a century. But upto now lawyers, courts and judges have not experienced any difficulty in using the word "relevant" in various sections of the Act particularly wherever it occurs in sections 17-55 of the Act. When in practice not the least difficulty has been experienced in this regard and when all concerned know for all practical purposes the meaning of the word "relevant" and have become accustomed to it through long usage, we should, it is submitted, be slow and circumspect in changing the nomenclature on the view that there is some inconsistency, lacuna or inaccuracy in it. We should not forget that life of the law is not always a logical code but it is always grounded in experience. Human life and affairs of human life cannot always be based upon strict logic and logical reasoning and even logic and logical reasoning sometimes vary from time to time, from place to place, from individual to individual, from community to community for various factors and causes which are endless in their variety and formidable in their complexity. Thus even among the masters of logic, Aristotle's logic is different from the logic of John Stuart Mill and John Stuart Mill's logic is different from the present day symbolic logic represented by Bertrand Russell or Johnson. Then, there are differences between all these systems and Indian logic, ancient and modern: and there are differences between ancient Indian logic and modern Indian logic. Here it may suffice to say that we should go slow in changing words and expressions in law unless it is absolutely necessary to do so.

Immanuel Kant in his First Critique — The Critique of Pure Reason, (under the heading "Transcendental Logic, Second Division, Book I: Section I—"Ideas in General") issued a caution and warning in this respect, thus:—

"To coin new words is a pretension to legislation in language which is seldom successful: before recourse is taken to so desperate an expedient,

it is advisable to examine the dead and learned languages, with the hope and the probability that we may there meet with some adequate expression of the notion we have in our minds. In this case, even if the original meaning of the word has become somewhat uncertain, from carelessness or want of caution on the part of the authors of it, it is always better to adhere to and confirm its proper meaning—even although it may be doubtful whether it was formerly used in exactly in this sense—than to make our labour vain by want of sufficient care to render ourselves intelligible.”

More than one hundred and sixteen years ago John Austin in his *Lectures on Jurisprudence* while dealing with “Intention” in Lecture XIX observed almost in the same vein—“To discard established terms is seldom possible; and where it is possible, is seldom expedient. A familiar expression, however obscure, is commonly less obscure, as well as more welcome to the taste, than a new and strange one. Instead of rejecting conventional terms because they are ambiguous and obscure we shall commonly find it better to explain their meanings, or (in the language of Old Hobbes), “to snuff them with distinctions and definitions” (page 419 of Volume I of the 5th Edition, revised and edited by Robert Campbell).

The Special Committee on the Transfer of Property (Amendment) Bill, 1927, consisting of Mr. S. R. Das (then Law Member to the Government of India) Sir B. L. Mitter (subsequently Law Member to the Government of India), Sir D. F. Mulla (who also became the Law Member subsequently) and Justice S. N. Sen, in its Report submitted to the Governor General in Council observed in paragraph 10 as follows:—

“10. In the Bills submitted to us the policy which appears to have been followed was that no amendment should be attempted which would merely effect an improvement in wording, but that principles of importance which had been judicially recognised since the passing of the Act should be incorporated. In our opinion, it is a sound course to follow, particularly, in an Act which has been in force for forty-five years and to whose phraseology the general public and the legal profession have become accustomed. Again, it is not safe to alter any wording which has received judicial interpretation, when the interpretation has not led to any inconvenience in practice or miscarriage of justice. We also agree that the Act must be amended to embody new principles. In the amendments which we propose we have also endeavoured to remedy any defect which has led to inconvenience or anomalous results. We have also acted on the principle that it is undesirable to attempt to provide in detail for every possible contingency. No elaboration can be exhaustive and the only result of over-elaboration would be to cramp the action of the courts and to encourage technicalities. Where there has been a conflict of decisions we have endeavoured to set it at rest.”

On these pragmatic and practical considerations I think that in spite of the views to the contrary of some recent writers like Cross, Montrose and others, there is hardly any necessity for making any change of terminology as recommended by the majority in the Report. We may mention here that eminent old authorities like Taylor, Stephen and others did not find any difficulty in this respect.



In support of my objection to the recommended change I should also like to refer to the definition of the word "relevant" and to the provisions of section 5 of the Act so far as they are material for our purpose. The word "relevant" has been defined in section 3 as follows:—

*"Our fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts". (Italics mine)*

From this it is clear that the word "relevant" in the Indian Evidence Act, has not been used in its natural, ordinary or logical sense throughout. The words "*said to be*" and the words "*in any of the ways referred to in the provisions of this Act relating to relevancy of facts*", should be carefully marked in this connection; they show that the framers of the Act knew that the word "relevant" has not always been used in the Act in its natural, ordinary or logical sense and that in a few cases the word has been given an extended meaning to deal adequately with the multiplicity and variety of the facts, circumstances and problems which arise in judicial proceedings before the courts of law from day to day, so that even though somebody might not like the use of the word "relevant" in certain provisions of Chapter II of Part I of the Act, still when a fact is connected with another fact in any of the ways referred to in any of the sections 5-55 (both inclusive), then that fact is to be regarded (i.e., *said*) as relevant to the other fact.

This is exactly in consonance with what has been said in section 5 of the Act. The first paragraph of the section will make this clear.

*"5. 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. (Italics mine).*

The words in italics above are significant showing that evidence can be given not only of facts in issue as defined in section 3 but also of other facts which are *declared to be relevant* in the various sections of the Act. This clearly shows that even if a fact be not relevant from the standpoint of strict logic and reason still if by any provisions of the Evidence Act relating to relevancy, such a fact is *declared to be relevant*, then evidence can be given of that fact.

In view of the provisions cited above it is difficult to see how the use of the word "admissible" is more appropriate than the use of the word "relevant", in some of the sections of Chapter II of Part-I.

It is well known that the framers of the Indian Evidence Act drew heavily from Taylor's "A Treatise on the Law of Evidence" which even in the year 1872 acquired the status of a standard work on evidence. According to Taylor "*relevance*" is the test of admissibility. He has discussed this aspect of the matter in great detail in pages 211-251 of the 11th Edition (1920) and it eminently stands to reason that a fact which is not at all relevant to a fact in issue may not be admissible in evidence. How can a fact which is irrelevant can be made admissible to prove a fact in issue? Therefore it seems that Taylor was right when he laid down the proposition that relevance is the test of admissibility. At pages 222 *et seq* Taylor observed—

*"316. The rule confining evidence to the points in issue, not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings, but it limits the mode of proving even the*

issues themselves. Thus it excludes all evidence of collateral facts, which are incapable of affording any reasonable presumption of the principal matters in dispute, the reason being that such evidence tends needlessly to consume the public time, to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead. Moreover, the adverse party, having had no notice of such evidence, is not prepared to rebut it. The due application of this rule will occasionally tax to the utmost the firmness and discrimination of the Judge so that, while he shall reject, as too remote, every fact which merely furnishes a fanciful analogy or conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps an indirect and feeble, light on the question in issue. And here it will generally be found that the circumstances of the parties to the suit, and the position in which they stood when the matter in controversy occurred, are proper subjects of evidence. The change in the law enabling parties to give testimony for themselves, rendered this proof of 'surrounding circumstances' still more important than it was in former times. In accordance with this doctrine it has been properly held, that, in an action for money lent, the poverty of the alleged lender was a very relevant fact, the evidence of which was admissible for the purpose of disproving the loan.

317. The most important class of facts which are excluded on the ground of irrelevancy comprises the acts and declarations either of strangers, or of one of the parties to the action in his dealings with strangers. These are in the technical language of the law denominated *res inter alios actae*."

Then, Taylor cites cases after cases to show and prove that in every case relevancy is always the test of admissibility of evidence. In the index to the book Taylor clearly mentions in two places that relevance is the test of admissibility. Under the heading — "Admissibility" in the Index is mentioned "relevance as test of" and under the heading "Relevance", relevance is spoken of as essential to admissibility and in both these places he has referred to pages 211-251 of his book. — To prove this he has referred to a large number of cases to which it is unnecessary to refer here.

In view of what has been stated above it is difficult to agree with the thesis that there is a distinction and difference between admissibility of evidence and relevance of evidence. At least that does not appear to be the stand taken in the Indian Evidence Act, 1872. One may even agree with the proposition that a fact otherwise relevant may be excluded on practical considerations but it is very difficult to agree with the proposition that a fact not at all relevant may be admissible in evidence. In other words a fact which is relevant to another fact (FACT IN ISSUE) may be excluded on grounds of public policy but it is not possible to agree with the proposition that a fact having no relevance to the fact in issue can be admissible as evidence under the policy of the law. In each of the cases of hearsay, opinion character, etc., if we examine them carefully, we can, in a very limited number of cases, notice some rational, reasonable and fairly strong connecting thread between each of the cases mentioned above and facts in issue to prove which in such special cases hearsay, opinion character, etc. are used in evidence to prove a fact in issue. If on examination, a rational and reasonable connection is, in the opinion of the Judge, found to exist between a collateral fact and a fact in issue, and if the court believes on the proof such collateral fact that the fact in issue exists 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, then the court is justified in regarding the collateral fact as relevant

and in admitting it in evidence. This is substantially the definition of "Proved" as given in section 3 of the Act. In Article 2 of his Digest of the Law of Evidence, Stephen says "that the Judge may exclude evidence of facts which though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case."

This is exactly the reason for the exclusion except in a few exceptional cases, of hearsay evidence, opinion evidence, character evidence, etc. As Taylor says in paragraph 316 of his book (already quoted)—

"..... he (the Judge) shall reject as too remote, every fact which merely furnishes a fanciful analogy or conjectural inference, he may admit as relevant the evidence of all these matters which shed a real, though perhaps an indirect and feeble, light on the question in issue."

Hearsay evidence, opinion evidence and character evidence etc. have been excluded in the Act because each of them merely furnishes a fanciful analogy or a conjectural inference in relation to the facts in issue. But in the few exceptional cases where they are admitted in evidence, they are so admitted because, they shed a "real, though perhaps an indirect and feeble light on the question in issue." In other words, even in such special cases there is some streak of relevancy between the collateral fact and the fact in issue.

Hearsay with a few exceptions is excluded because of practical considerations on which the policy of the law is based, it is regarded as irrelevant. Such practical considerations are allowed to outweigh the principles dealing with logical relevancy. These practical considerations may be taken to be chiefly — a statement made by an absent person cannot be tested by cross-examination of that person; that very few people can be trusted to repeat a statement that they may have heard in any but the very simplest cases; that admission of hearsay would open an easy way to fraud, and would then prolong proceedings by the production of unimportant matters in a way which would cloud the real issue. *Moreover, in the case of hearsay evidence, opinion evidence, etc., the statement of the witness who gives such evidence does not represent his direct perception.*

It may be pointed out as already stated that the concept of relevance of one fact to another is not a static one. This concept like any other human concept varies from person to person, community to community, place to place and time to time. "In an anarchical state of society", says Holland in his Jurisprudence (Eleventh Edition — 1910) at p. 318, an injured person takes such compensation as he can obtain from a wrong doer, or, if strong enough, gets such satisfaction as may be derived from an act of revenge. A political society, in the first place, puts this rude self-help under stringent regulation and secondly, provides a substitute for it in the shape of judicial process. Self-help is indeed but unsatisfactory means of redress". Here what is relevant in relation to the redress of the wrong done to the injured person is the superior physical strength of the injured man to that of the wrong doer. Not only that, here the injured party being the judge in his own cause whatever he considers to be for his benefit, he regards as relevant for the purpose of deciding the issue. To suppress private revenge and to erect courts of justice and to compell everyone who is wronged to look to the courts for remedial rights is, however, task far beyond the strength of the State in this state of its formation. It is at this stage that the primitive savage, on being asked what was the difference between right and wrong, could say with a sense of pride that it was right when he eloped with his neighbour's wife but it was wrong when his neighbour eloped

with his wife. (See Paul Vinogradoff's *Common Sense in Law*, pp. 18-19). In a society where this is the standard of right and justice, the relevance of one fact to another (a fact in issue) is bound to be different from the concept of relevance in a more progressive society. We should not forget that the objects of the law of evidence, are, on one hand to limit the field of enquiry by the doctrine that certain classes of facts are already within judicial notice of the courts and by presumptions by which certain propositions are presumed to be sufficiently proved when certain other propositions have been established, on the other hand, to exclude certain kinds or facts as having *too remote a connection* with or too remote a bearing on the issue, or as incapable of being satisfactorily proved, or as coming from a suspicious quarter. For the last mentioned reason certain classes of person or persons occupying certain relative positions are rendered incapable of being witnesses. In considering the question of relevancy of one fact (a collateral fact or as Bentham called it, an evidentiary fact) to a fact in issue is not always based upon purely logical principles. Thus the disclosure of any communication made by a client to his advocate in the course of and for the purpose of his employment as such advocate may be very pertinent and relevant for deciding any issue in a suit or proceedings but however, relevant such disclosure may be, an advocate is not at any time permitted except with his client's express consent, to make such disclosure. There are many other similar provisions in the Evidence Act under which statements otherwise very relevant and pertinent for the determination of any issue in a suit are excluded from being put into evidence. They are excluded not because they are irrelevant but on grounds of the social policy of the law based upon larger moral and practical considerations.

I do not like to enter into a more elaborate and detailed discussions on this point. What I have already said will tend to show that the concept of relevancy of one fact to another fact is not an invariably absolute or static concept. It is liable to change and variation. What is regarded as relevant may in process of further evolution of our minds and thought, cease to be so and what is rejected as an irrelevant may be regarded as relevant. No definite hard and fast rule can be laid down in this behalf. Then there is nothing sacrosanct about the word 'relevant' or about the word 'admissible'. What we call a relevant fact was called by Bentham, as I have already mentioned, an evidentiary fact. He distinguished an evidentiary fact from a principal fact thus :—

"The term *evidence*, as has already been remarked is a relative term. Like other relative terms, it has no complete signification of itself. To complete the signification of it, to enable it to present to the mind a fixed and complete idea, the object to which it bears a necessary reference must be brought upon the stage. I have to produce evidence. Evidence of what? Evidence of a certain *fact* or *facts*. Facts, then, matters of fact, are the subject matter, the necessary subject-matter of evidence : facts in general, of evidence in general. Before we come to speak of evidence in detail, it will be necessary to say something of facts in general, considered as the subject-matter of evidence.

Of facts? Yes: but in what point of view considered? Not in every point of view, but in the particular point of view in which the contemplation of them is pertinent to the design and object of this treatise: not in a physical not in a medical, not in a mathematical point of view; *not in a barren, and purely speculative, logical point of view; not in any point of view, but a legal.* (Italics mine).

The facts then, or matters of fact, the species of facts, the individual facts, here under consideration, are those facts, and those only, concerning the existence or non-existence of which, at a certain point of time and place, a persuasion may come to be formed by a judge, for the purpose of grounding a decision thereupon.

Thus, then, the circle within which the class of facts in question is comprised, presents itself as a comparatively narrow one.

In the next view that requires to be given of it, the extent of it will appear boundless. Nor indeed does it admit of any other limits than those which are set to it by the nature of the end or purpose, with a view to which the word of facts is brought thus upon the stage.

Facts, then, considered as the subject matter of legal decision, and for that purpose of evidence may be distinguished in the first place into principal and evidentiary.

What is meant by the words *principal fact*, and *evidentiary fact*, has been seen in a former chapter. The question now is, what facts are to be considered principal facts, and evidentiary facts, with reference to a legal purpose.

By *principal* facts, I mean those facts which on the occasion of each individual suit, are the *facts sought*, for the purpose of their constituting the immediate basis or ground of the decision: in so much that, when a mass of facts of this description, having been sought, is deemed to have been found, the decision follows of course, whether any other facts be considered found or not.

By evidentiary facts, I mean such facts as are not competent to form the ground of a decision of themselves, nor otherwise than in as far as they serve to produce in the breast of the judge a persuasion concerning the existence of such and such other facts, of the description just given, viz. principal facts.

Here, then it is that the circle expands itself, and seems to break all bounds. Under the term 'principal facts' when the mass comes to be analyzed and divided, facts of a particular description, and that a limited one will be seen to be comprised. But under the description of *evidentiary facts*, all facts whatsoever—at least all facts that are capable of coming under human cognizance—will be seen to be included. For there is no sort of fact imaginable, to which it may not happen to serve as evidence with relation to some principal fact. It is only by the consideration of the purpose for which the mention of them is introduced, that the view we are called upon to take of them is circumscribed." (Bentham, Works, Vol. VI, pp. 214-15).

If thus a fact which may be put in evidence and proved for the purpose of proving and establishing a fact in issue, that fact must have some logical and pertinent relationship or connection with the fact to be proved. The idea of that relationship or connection may vary from place to place, community to community or age to age but there must be a pertinent and cogent relationship and that relationship may in a good number of cases, be direct and immediate and in other cases it may not be so direct or immediate or so pertinent but some sort of relationship between the two must be there. Therefore a fact which has no connection to a principal fact or fact in issue cannot be admissible in evidence, even though we may use the word "relevant" in connection therewith. The law by its fiat cannot make a fact admissible for the purpose of proving another fact, that is, a fact in issue unless there is

some sort of relationship, immediate or mediate, between the two. Therefore, in section 5 of the Evidence Act it has been laid down that evidence may be given in a 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. And this provision of section 5 is in consonance with the definition of the word "relevant" as given in section 3. I have already quoted that definition but it is worth repeating—"One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."

Then, a fact may be logically relevant but may not be legally relevant and therefore cannot legally be admissible in evidence, because its connection with the principal fact, that is, the fact in issue may be too remote or too feeble or because it would complicate the trial with the multiplicity of issues.

It is true that the relevance is essentially a matter of logic; but it is the logic of inference in a specialised form under the influence of law as a practical social study.

Apart from suits, proceedings and disputes before courts of law, even in matters and situations of life in general whenever we take a decision on the basis of facts we draw some inference from the facts which we consider to have been proved and from such inference we come to a conclusion. If we look at the definitions of 'relevant', 'facts in issue', 'evidence', 'proved' and 'disproved', it becomes clear to us that in order that an inference as to the existence or non-existence of one fact may be rationally drawn from the proof of another fact, the connection between the two must be a relevant one. Now what does this relevant connection mean? It means or it ought to mean that the relationship or connection between the two facts must be a logical relationship which in plain language means that it must be a casual connection or relationship. In other words, one fact must be related to the other as if it were either a cause or an effect of the other. Unless there is some casual relationship, we are not justified in calling one fact as being relevant to another fact. In the absence of a relevant connection between one fact and another in this sense, we cannot say that any result can necessarily follow the moment any relationship between the two is established. This is clear from the definition of the expression 'fact in issue'. It has been defined as 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*. The expression 'necessarily follows' in this definition is important as indicating a cause-and-effect relationship between the evidentiary fact and the principal fact. The definitions of 'proved', and 'disproved' also point to the same conclusion. 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.

A fact is said to be "disproved" when after considering 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. But proof of facts, inferences drawn from such facts and the conclusion as to any right, liability etc. based on such inference are based upon various causes and factors in life. Therefore in order that one fact may be regarded as 'relevant' that is, logically

relevant to another fact, there must be a causal relationship between the two. Now this relationship between one fact and another may vary. The relevancy of one fact to another or causal relationship of one fact or another to an ignorant tribal living in the jungle may be quite different from relevant relationship or causal connection between two facts to a civilised man. Various factors such as our heredity, our nature and our intelligence, our inherent mental structure, our environments, our traditions, our training and education, the level of our understanding, knowledge and culture, our virtues, our sense of *dharma*, our moral wisdom, all these may influence our concept of relevancy quite differently from an aboriginal who living in the forest, believing in animism may regard a fact as not following necessarily from another proved fact but as the effect of the wrath of some super-natural power etc. In this way instances may be multiplied. Thus the abstract proposition is that by the relevant relationship of one fact to another, what is meant is nothing but a causal relationship between the two and this may be called a logical relationship. Thus, concept of relevance and logical connection between an evidentiary (collateral) fact and a principal fact (fact in issue) is nothing but a causal relationship between the two so that from the proof of the one, a legitimate inference as to the existence or non-existence of the other *necessarily* follow i.e. follow as an effect from a cause.

There are three important stages in the trial of a case (civil or criminal) before a court. The first stage is the stage of evidence, oral, documentary or material etc. adduced in the case by the parties. In this stage the witness plays a prominent role. Even in the case of documentary and material evidence, the witnesses must formally produce them before the court. In this stage witnesses must testify to facts as perceived by them. But it is never their function to draw any inference from the facts stated by them. Secondly, after considering the matters before it on the basis of the evidence adduced, the court is to draw from such matters inferences regarding the existence or non-existence of fact or facts in issue involved in the trial. In this task the court is expected to be guided by the standard of behaviour of the average prudent man in the circumstances of the case before it. When this stage is over, the fact or facts in issue in the case is or are said to be "proved" or "disproved". Then, comes the third stage which is comparatively easy. From the fact or facts in issue thus proved or disproved, the court is to decide either by the fact in issue itself or the facts in issue themselves or in connection with other facts whether the law on the basis of which the relief is claimed in the case, applies to the case, in other words, whether the existence, non-existence, nature or extent of any right, liability or disability under the law, asserted or denied in the case *necessarily* follows, that is, follows as an effect or consequence from a cause.

Thus of the three principal stages of trial of a case before a court, the witnesses play a significant role in the first stage by testifying to facts, generally perceived by them with their senses, the second and third stages fall within the exclusive jurisdiction of the court.

From the above it is clear that the relevant relationship of one fact to another is in ultimate analysis a causal or logical relationship. We cannot fully know a fact unless we know the causes thereof. The facts in issue in a case are only truly known to exist when seen as connected with the surrounding body of facts which makes up the four causes (of which the exponent was Aristotle, the founder of Western Logic) giving the reason why the facts in issue exist. "The body of relevant facts exemplifies in its relationship to the

facts in issue every one of these four causes." According to Aristotle there is a combination of four types of causes or reasons. This is known as Aristotle's famous doctrine of Four Causes, Material cause, Formal Cause, Efficient Cause and Final Cause. The "material" cause is the general body of surrounding circumstances in which the actual facts in issue are a potential event which may or may not emerge. The "formal" cause is the general type of occurrence of which the actual facts in issue are a particular example. The "efficient" cause is the well-known "*causa causans*" of the law reports, that event the happening of which sets in motion the forces that produce the events under consideration—as for example—the fall of a tree in a storm causing the death of a man standing under it. The "final" cause is the motive of the agent or the state of things which he wants to realise, be it good or bad. "In a perfectly established case of causal inter-dependence we can reason both from effect to cause and from cause to effect; if one exists the other exists or in the language of Aristotle, their inter-dependence is reciprocal and convertible. So, in evidence we may infer the existence of the facts in issue by seeing them either as effects or as causes of the surrounding body a probative facts" (vide the Appendix to Stephen's—Digest of the Law of Evidence, pp. 235-236).

Causality plays an important role in the reasoning of substantive law—as for example in the discussion of proximate damages. It is also of great importance in the law of evidence as in the rules of relevancy. The facts in issue are only truly known to exist when connected with the surrounding body of facts which makes up the four causes giving the reason why the fact in issue exists. Thus 'relevancy' is simply the logic of inference in a specialised form. The above definition indicates just what is asked of proof by evidence. It aims at relating the fact in issue to a wide surrounding field and then showing that there is implicit in that field some general law of behaviour. These laws are extremely various and of widely differing certainty but in every case the principle is the same. The facts in issue are shown to be the conclusion which arises inferentially from the surrounding data; cogency of the inference arises from its revealing the operation in the particular case of some general law of behaviour. By exhibiting the facts in issue inferentially or as reasoned facts we justify our desire to have their existence believed in. Inference is of course, always at work in our thoughts, though with varying degrees of explicitness and elaboration and accordingly the presentation of a case always involves an inference but in varying degrees of prominence. (See pp. 237-238, *ibid.*)

The law prohibits a witness from giving what is called 'opinions'. He is only to state facts, because an opinion means any statement which does not represent direct perception; it may vary from mere belief founded on no grounds at all to the fully reasoned conclusion of the scientific experts. The law, therefore, rejects opinions, (excepting opinions of experts) not so much on the ground that they may be erroneous as because it wishes to know what are the premises on which the opinion is founded so that it may judge whether the witness knows those premises to be true and what is the strength of the inference arising from them. With regard to the expert, the law requires the data on which the inference is founded either to be the fruits of his own observation or to have been proved to exist by the direct i.e. (preceptual) testimony of some other witness. In matters of science and art, the expert witness states what inference arises from his data and the court then appraises its cogency. In the case of ordinary i.e. non-scientific facts, the witness only states the facts and



the court draws inference. Such is the theory of the law. It is perhaps fair to add that many logicians experience a difficulty in drawing such a hard and fast line between fact and inference as is done by lawyers.

It may therefore be fairly claimed that the operation of proving a case by evidence is simply specialised example of the process of claiming credit for a conclusion by exhibiting it as the inferential outcome of a set of data. The conclusion is the facts in issue and the data are the facts relevant to the facts in issue or probative facts. (see *ibid.*, pp. 239-40).

It must be remembered, however, that judicial inference, that is, the inference as to the existence or non-existence of principal facts or facts in issue from the probative or evidentiary facts cannot amount to the demonstrative certainty of the mathematician or physical scientist. Dealing with human life and its affairs in complex social and jural relations, the logical inference we seek and draw from the proof of probative facts in law must be the inference of a practical nature in relation to which it would be wrong to accept the certainty of the mathematician or physical scientist. This is why from the same set of proved facts in a case before the court, different judges may draw different inferences and conclusions. The reasons for this are not very far to see. Our passions and our inclinations towards, or our repulsions against, a particular point of view, our arrogance, our prejudices and other irrational and impulsive factors play an important role in this respect as in respect of every other aspect or department of our activities. Man's life is not pure logic and pure reason; man is compromise between passion and reason, between pride and prejudices on the one hand and intellect and knowledge on the other. The faculty of moral wisdom and *dharma* and the faculty of faith (*shraddha*), and the faculty of feeling which includes the good and the beautiful (*Shivam* and *Sundaram*) are developed in us only a rudimentary form if at all. The defect of logical reasoning is that it has no sure foundation to stand upon because as just now mentioned, different persons may come to different conclusion from the same premises. Not only in the field of enquiry into supreme and extra-phenomenal problems sometimes faced by man such as freedom of the will, immortality of the soul and existence of God, but in the field of mundane problems facing us in our day to day life and activities, arguments and reasoning cannot give us any correct, satisfactory and true solution. In relation to court proceedings also by which we try to solve one very important category of our mundane problems, we find that the decision which a lower court takes on the basis of the proved facts is sometimes strongly dissented from by the court of appeal on the basis of the same proved facts. In the case of *Brown v. Allen* (344 U.S. 443 at p. 540 (1953)), Jackson, J of the U.S. Supreme Court observed—"There is no doubt that if there were a super-Supreme Court, a substantial portion of our reversals of State courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final. Thus, from the same premises and proved facts, varying inferences and conclusions can be and are actually drawn depending upon various factors such as the personal equation i.e. the major inarticulate promises of the persons concerned or in some cases their better knowledge etc. K. N. Llewellyn one of the most powerful exponents of the Realist School of Jurisprudence in America said in his book "The Bramble Bush"—Never forget that there is an indefinite number of sides to any argument; Never despise an idea no matter how imperfectly or trivially presented or from what source it comes; Never be satisfied with any piece of work, yours or another's; because it can always be improved; Maintain your ideas with everything you have but without being dazzled by your own brilliance; you might conceivably be wrong; and Always be interested in everything.

He again tells us that *the law is not a self-contained set of logical propositions; that rules of law do not explain the result at law; that the stated reasons for a decision regularly mask inarticulate major promises i.e. the personality of the judge, that facts are slippery things, with a nasty habit of changing shape and colour, depending on who is looking at them; that judges are not automata who announce the law but human beings, possible neurotic; that juries are barely human; that the truth is not in the law books which should nevertheless still be studied, that we do not know yet where the truth is but it is somewhere — in economics or in sociology or in anthropology or psychology or in the murky reaches of Freudian theory.* These last words remind one of what Holmes declared in 1886 to the students of Harvard — “If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics and thus by several paths to your final view of life.”

Without further elaborating this thesis it may now be said that one fact can never be relevant to another fact unless there is some sort of causal relation (in the Aristotelian sense of the four types of cause) between the two. In this sense it can be safely asserted that a fact can never be admissible in evidence unless it is relevant to the fact in issue.

But from what has been discussed above it is also amply clear that legal relevance for various reasons noted already, sometimes parts company with logical relevance and introduces a set of rules (not strictly logical) based entirely on the practical social policy of the law. A very good example is that the bad character of an accused person is deemed to be irrelevant except in reply (section 54 of the Evidence Act). To a layman, the bad character of an accused person is regarded as highly probative of his present guilt but the law of evidence generally regards such bad character as irrelevant except in few cases. Of course there appears to be very good reasons that the law generally treats the bad character of a person as irrelevant in the trial of a subsequent criminal case against that person. The reason is that even a man of bad character may change. He may be reformed. No person is a born criminal. Modern criminology affirms this. When a person comes into this world, he comes like a pure flower. Thereafter his environments, bad company, training in such company and other facts join together in gradually converting him into a bad character and a criminal but even then a change may come in him, he may be reformed and may become a decent citizen and even a man of saintly character. Therefore, the policy underlying the law that bad character is generally irrelevant appears to be based on sound foundations. Be that as it may, it may be said however that rules not strictly logical in the law of evidence based on the practical social policy of the law and considered necessary for the fair and smooth operation of the judicial process, are not very numerous and form no obstacle. Regarding the subject in this light, hearsay evidence, opinion evidence, evidence as to character etc. are excluded (barring a few exception such as those enumerated in sections 32 and 33 etc. and the exceptions relating to opinions of experts and those relating to character in sections 45-55 and a few other minor exceptions) on cogent grounds because in such cases there is no direct perception by the witness of the probative facts to which a party to a suit or legal proceedings has called him as witness to depose.

Upon all these considerations I would respectfully submit that the word “admissible” should not be substituted for the word “relevant” in any of the provisions of the Indian Evidence Act. In order that a fact may be admissible in evidence for the purpose of proving another fact the fact in issue, it must be relevant but from this it does not necessarily follow that every fact which

is relevant shall in every case be admitted in evidence for the purpose of proving a fact in issue; all probative facts must be relevant facts but all relevant facts need not be probative facts; again, in a few cases under a set of rules, not strictly logical, facts not strictly relevant in the sense of logic, may be admissible in evidence as probative facts on grounds of practical social policy of the law as evolved out of the exigencies of human affairs and the felt necessities of the times; in that case such facts become relevant under the rules of the law, though not under the rules of strict logic. The definitions of the words "Relevant", "Facts in issue", "Evidence", "Proved" and "Disproved" in section 3, and the provisions of section 5, of the Indian Evidence Act lend support to this view. In other words, *legal* relevance need not always be *logical* relevance. This being so relevancy, that is, legal relevancy which means in the present context relevancy in accordance with the provisions of the Indian Evidence Act, 1872, is always the test of admissibility.

(S. P. SEN-VARMA) 26-4-77.

#### NOTE OF DISSENT

SHOULD A NEW SECTION, SAY, SECTION 26-A, BE INSERTED IN THE INDIAN EVIDENCE ACT, 1872, ENABLING AND REQUIRING INVESTIGATING POLICE OFFICERS TO RECORD CONFESSIONAL STATEMENTS OF ACCUSED PERSON?

The second point on which I have differed from the recommendations of the majority is with regard to the recording of confessions of an accused by a police officer. According to the majority view a new section may be inserted in the Indian Evidence Act after section 26 as section 26-A for the recording of such confession by a police officer. In support of this view it is stated in paragraph 11.16 *et seq* that a suggestion has been made in the 14th Report of the Law Commission on Reform of Judicial Administration Volume II, page 748, paragraphs 38 and 39, that as the superior officers of the police are today recruited from the same social strata as officers of other departments, a confession made to the officer of the status of the Deputy Superintendent of Police and above should be acceptable in evidence. This relaxation, was to be restricted to cases which such officers themselves investigate and should be introduced as an exceptional measure only in the Presidency Towns or places of like importance where investigations can be conducted by superior police officers and where the average persons would be more educated and conscious of their rights. The recommendation for introducing the change in the Presidency Towns at the initial stage was made because the magistracy there was directly under the control of the respective High Courts. In other areas, it was observed, it should be introduced only after the separation of the judiciary from the executive.

In a later report of the Law Commission on the Code of Criminal Procedure (48th Report of the Law Commission), the question of confessions made to the police was considered at length and the recommendations in the 48th Report were more or less on the lines of the recommendation made in the 14th Report. In the background of these two reports it is recommended by the majority in paragraphs 11.16—11.18 of the present report that in so far as these recommendations concern the Evidence a new section, say, Section 26-A in the Evidence Act.

With respect I am strongly opposed to this recommendation. Whatever the social strata from which superior officers of the police are recruited and whatever the background and educational attainments which such police officers may be supposed to have, the attribute of voluntariness which is the hall-mark and

*sine quo non* of a confessional statement under section 164 of the Code of Criminal Procedure is not likely to be present in an accused person when he is produced before a superior *investigating* police officer for making a confession under section 164 of the Code of Criminal Procedure, even though the accused person may have a counsel of his choice and such counsel is present when the confessional statement is recorded. It may be stated here in parenthesis that no change has been made in this respect in section 164 of the new Code of Criminal Procedure, 1973.

A police officer investigating a criminal case, however, high his status may be and however equal or superior may be his social stratum to the social strata from which officers of other departments are drawn, cannot be expected to possess and exhibit that attitude of mind and that spirit of detachment and impartiality while recording a confessional statement made by the accused in a case which is being investigated by himself, which a judicial magistrate by his training, occupation, temperament, attitude and independence generated by such occupation and other factors, always brings to bear when recording a confessional statement of an accused person. We should not forget that a man's approach and attitude to the affairs which he is required to deal with in his official career is to a large extent determined by the nature of the duties which he performs by virtue of his official career. An officer of the police develops a peculiar habit of mind which is very different from the habit of mind developed by a magistrate doing judicial work. We should not forget that since ancient times the essential function of the police has been maintenance of law and order which is *par excellence* an executive function of prime importance and the function of a judicial magistrate even while recording the confessional statement of an accused person, is *par excellence* a judicial function. The recording of a confession of an accused being essentially a judicial function, only the criminal judiciary (magistracy) may be expected to discharge it properly without fear or favour. These qualities cannot be expected from a police officer, specially when such officer is the investigating police. Being the investigating officer he will have a natural leaning and tendency to prove the guilt of the accused. There is very likely unconscious inclination on the part of an investigating police officer to regard an accused person as the guilty person and he will try in every possible way to involve him in the commission of the offence and to prove his guilt. If by his investigation he cannot prove the guilt of the accused, his efficiency as a police officer will suffer and dwindle and he will come to be regarded by his superior officers as a worthless officer. It is well known that the promotion of police officers not only in this country but in the United Kingdom also, depends to a substantial extent on the success of the investigating police officers in procuring conviction of the accused persons. It is difficult for such police officers to record a confessional statement made by an accused person in an absolutely detached and impartial manner. Human frailty being what it is, a police officer cannot take the risk of sacrificing his own personal interest when recording a confessional statement made by an accused person.

Moreover, the very presence in the law of such a provision as the one recommended, will lure and tempt the investigating police officer to shape and mould before hand the accused person by threat, inducement and promise and by extortion and oppression and by application of other third degree methods, in such a way that when he is produced before the very same investigating officer for making his confessional statement, he will make the confession as if he were making it absolutely voluntarily out of his own free will

when in fact and reality his moral backbone has already been completely broken and his voluntary will, atrophied and deadened. I am of opinion that the consequences of the introduction of the proposed provision in our statute law will be disastrous on the administration of criminal justice in this country.

The framers of the Indian Evidence Act, 1872, were men of great moral wisdom and circumspection and therefore they were cautious as regards the admissibility of statement made by an accused person before a police officer. The demands of impartial and independent and fair justice will be defeated and thwarted if the views of the majority are accepted.

We may state here that voluntariness on the part of an accused person is the basis of a Magistrate's jurisdiction to record a confession. Before recording a confession it is mandatory upon the Magistrate to ensure by questioning the accused that the statement about to be made by him is spontaneous and voluntary. The judicial magistrate cannot and must not record any confession unless after applying his judicial mind, he is fully satisfied about the voluntariness of the confession. This is imperative and is a matter of substance.

The reason which influenced the Legislature in excluding a confession made to a police officer will appear from the following extract from the first Report of the Indian Law Commissioners —

"The police in the province of Bengal are armed with very extensive powers. They are prohibited from enquiring into cases of a petty nature but the complaints in cases of the more serious offences are usually laid before the police. Darogah (now Sub-Inspector or Inspector) who is authorised to examine the complainant, to issue process of arrest, to summon witnesses, to examine the accused and to forward the cases to the Magistrate or submit a report of his proceedings accordingly as the evidence may in his judgement, warrant the one or the other course. The evidence taken by the Parliamentary Committees on Indian affairs during the sessions of 1852 and 1853, and other papers which have been brought to our notice, abundantly show that the powers of the police are often abused for purposes of extortion and oppression and we have considered whether the powers now exercised by the police might not be gradually abridged. In one material point we propose a change in the duties of the police by the adoption of a rule prohibiting any examination whatever of an accused party by the police, the result of which is to constitute a written document. This, of course, will not prevent a police officer from receiving any information which any one may voluntarily offer to him; but the police will not be permitted to put upon record any statement made by the party accused of an offence."

In 1876, Sir Richard Garth, C.J. in *R. v. Huribulle*, 1876 I.L.R. 1 Calcutta 207, observed —

"A confession made to a police officer *under any circumstance*, is not admissible in evidence against him and that section 26 is not intended to qualify the plain meaning of section 25; but means that no confession made by a prisoner in custody, to any person other than a police officer shall be admissible, unless made in the immediate presence of a magistrate. It is an enactment to which the court should give the fullest effect, and I see no sufficient reason for reading section 26 so as to qualify the plain meaning of section 25."

In the well known case of *Queen Empress v. Babu Lal* (1884 I.L.R. 6 All. 509)— it was observed

“to repeat a phrase I used on a former occasion, instead of working upto the confession they work down from it, with the result that we frequently find ourselves compelled to reverse convictions simply because, beyond the confession there is no tangible evidence of guilt. Moreover I have said, and I repeat now, it is incredible that the extraordinarily large number of confessions which come before us in the criminal cases disposed of by this court, either in appeal or revision, should have been voluntarily and freely made in every instance as represented. I may claim some knowledge of, and acquaintance with, the ways and conduct of persons accused of crime and I do not believe that the ordinary inclination of their minds, which in this respect I take to be pretty much the same with humanity all the world over, is to make any admission of guilt. I certainly can add, that during fourteen years’ active practice in the criminal courts in England, I do not remember half-a-dozen instances in which a real confession, once having been made, was retracted. In this country, on the contrary the retraction follows almost invariably as a matter of course, and though I am well aware how this is sought to be explained by a suggestion of the influence brought to bear upon the confessor by other prisoners in havalat, the fact remains as an endless source of anxiety and difficulty to those who have to see that justice is properly administered. I say it in no harsh sense of disparagement, but it is impossible not to feel that the average Indian police man, with the desire to satisfy his superiors before, and the terms of the Police Acts and Rules behind, him is not likely to be over-nice in the methods he adopts to make a short cut to the elucidation of a difficult case by getting a suspected person to confess. (per Mehmood J.)

Then as late as 1965 in the *Mohan Singh case* (A.I.R. 1965 Punjab 291) Dua, J. observed —

“The police investigating agency in our country has not yet acquired the reputation of being proof against the temptation of attempting to secure confessions by questionable methods.”

It is needless to refer to scores of other important decisions on the subject. But it is my duty to bring to the notice of all concerned the views expressed in this behalf by no less a person than the *world-renowned thinker, philosopher and mathematician, Bertrand Russell* in his essay on “Power”. Says Bertrand Russell —

“The gist of the matter is that a police man is promoted for action leading to the conviction of a criminal, that the courts accept confession as evidence of guilt and that, in consequence, it is to the interest of individual officers to forswear arrested persons until they confess. This evil exists in all countries in a greater or lesser degree. In India it is rampant.....For the taming of the power of the police, one essential is that a confession shall never in any circumstance be accepted as evidence.”

Should we ignore the view of the world-famous savant and philosopher?

Section 164 of the Code of Criminal Procedure should be read together with sections 24, 25, 26 and 29 of the Evidence Act and so read the following result follows :

- (1) confession shall not be made to a police officer ;

- (2) It must be made in the presence of a magistrate;
- (3) the Magistrate shall not record it unless he is, upon enquiring, satisfied that it is voluntary;
- (4) he shall record it in the manner laid down in section 164 read with section 281 of the Code of Criminal Procedure; and
- (5) only so recorded it will be relevant and admissible.

(vide *Saw Min's case*, A.I.R. 1939 Rangoon 219; *Nazir Ahmad's case*, A.I.R. 1936 P.C. 253).

With regards the recommendations of the present Law Commission in its 14th Report, it may be observed that even in England opinions have now been changing regarding statements or confessions made to the police. This is what Sarkar in his *Law of Evidence* 12th Edition says on p. 270 —

"In this connection it may be observed that a section of the thinking people in England is of the opinion that statements or confessions made to the police during the questioning of accused persons should not be made admissible in evidence as under the existing law there. Speaking generally, though the British 'Bobby' has a good reputation, his discreditable conduct of the same members of the police force from time to time in their zeal to secure conviction, evokes much public comment. A disclosure in 1963 of the use of third degree methods by the Sheffield C.I.D. to extort confession shocked the public. The Home Office tribunal's finding was that three defenceless victims were subject to "deliberate, unprovoked, brutal and sustained assaults". In an Address to Yorkshire magistrates in 1963, Lord Shawcross, the eminent lawyer and former Attorney General criticised "kid glove" methods of interrogating suspects. He suggested that the police sometimes found themselves unduly handicapped by Judges' rules governing the questioning of suspects. Alternatively he suggested that Britain might with advantage adopt something like the procedure under the Indian Evidence Act.

The Guardian (Formerly the Manchester Guardian) in an editorial approving the idea of following of the Indian Model, described its gist as giving the police unlimited powers to question a suspect unhampered by the judges' Rules observed in the English procedure but prohibiting statements or confessions made by suspects to the police from being heard in evidence at the subsequent trial proceedings; they can be used by the police only as clues which will lead them to further evidence; and to be admissible as evidence, a confession must be made before a magistrate. Mr. Dingle Foot, the Solicitor General at one time told that Labour Lawyers in 1963, that one of the troubles was confusion about powers. Not all confessions on which convictions were obtained were voluntary, he suggested that Britain should follow the procedure in the Indian Evidence Act, 1872, which restricts the use in court of confessions to a police officer".

Thus even in England a section of thinking people has been suggesting of late that Britain should follow the procedure in the Indian Evidence Act which restricts the use of 'confessions to a police officer'. We should, therefore, be very cautious in introducing any amendment in the Indian Evidence Act on the lines of the recommendations contained in the reports of the Law Commission. It may be noted here that section 164 of the new Code of Criminal Procedure, 1973, has not made any departure in this respect.

Lastly, in my humble opinion a reliance on social stratum from which a person comes as an indication of his superior moral character appears to be a relic of feudalism under which birth in a particular social stratum was regarded as a sign of superior culture and virtue. Such a view is not at all in consonance with the basic human dignity as referred to in the Preamble to the Constitution of India; such an approach is opposed to the spiritual and moral worth of man. History is full of instances of great men and great leaders and teachers of mankind who were born in so-called lower social strata. These appear to be back dated ideas which are not at all in consonance with basic and fundamental traits of manhood and opposed not only to advanced notions and ideas of the present day but also to the high ideals and heritage, which have come down to us from the Veda Samhitas, the Upanishads and the Shrimad Bhagavad-Gita.

Even now many instances of torture, extortion undue influence having been exercised by the investigating police agency upon suspects, and accused persons are reported not only in the newspapers but also in the Law Reports.

Upon all these considerations I am opposed to the recommendations of the majority in this respect. No new section should be inserted in the Evidence Act for the purpose. That will be a highly retrograde step and will defeat and thwart impartial, independent and fair administration of justice. In final analysis, such a step will be contrary to our cherished ideal of Rule of Law which we seek to make real in our social, economic, political and jurat relations in the shape of justice, social, economic and political.

"If the lamp of justice", said Lord Bryce, "goes out in darkness, how great is the darkness!"

(S. P. SEN-VARMA)

25-4-1977.



**NOTE OF DISSENT OF SHRI MITRA  
REGARDING RECOMMENDATIONS RELATING TO SECTION 23 AND  
SECTION 68 OF THE EVIDENCE ACT**

I regret my inability to agree with the recommendations of the majority of the Commission regarding proposed amendments relating to: (a) insertion of Explanation 2 to section 23 of the Act, and (b) section 68 of the Act. My dissent is based on questions of principle involved in the proposal to amend the sections noted above, and not merely because I take a different view with regard to the form in which the amendments have been proposed. I am recording my dissenting views after very careful and anxious consideration of the proposed amendments, and had it not been for the fact that in my view questions of principle are involved, I would have been happy to agree with the views of the majority of the Commission.

**SECTION 23**

Section 23 says that "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 that evidence of it should not be given." This means that if an admission is made either on an express agreement that evidence of such admission should not be given or the circumstances enable the court to draw an inference that the parties agreed together that evidence should not be given, such admission would not be relevant. In other words, where the parties have expressly agreed not to give evidence of any admission or the admission has been made in circumstances which would enable the court to draw an inference to that effect, evidence of such admission would not be given in court. The provision makes it clear that evidence of admission is to be excluded firstly when there is an express agreement and secondly where the court can draw an inference that there is an agreement between the parties to that effect. In all other cases, admission would be relevant. By the proposed Explanation 2, what is sought to be provided is that where an admission is made for the purpose or in course of settlement or compromise of a disputed claim, the parties should be deemed to have agreed that evidence of the admission shall not be given. In other words, whenever there is negotiation for compromise and an admission is made by one or both parties, they should be deemed to have agreed that evidence of admission shall not be given. It means that every case of negotiation for settlement or compromise will be hit by the explanation, provided of course admission is made by one or both parties. In every case of negotiation for settlement or compromise, the parties do make admission of various matters in dispute for the purpose of compromise. The suggested amendment would mean that whether the parties had agreed or not, whether the court can draw an inference or not, as provided in the original section, the parties shall be deemed by the court to have agreed that evidence of the admission shall not be given.

In my view, if the suggested explanation is included in the section, Order XXIII, Rule 3 would become altogether otiose and will be rendered infructuous. This rule says that "Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise—the court shall order such agreement, compromise or satisfaction to be recorded and shall pass the decree in accordance therewith so far as it relates to the suit." I shall refer to the amendment of the rule later. The first matter to be

noticed is that the adjustment between the parties may be with regard to the whole or part of a suit. The second matter to be noticed is that if the proposed Explanation is included, no application can ever be made to the court for the purpose of recording the compromise as required by the rule. It may be said that this rule can be invoked only when there has been a concluded agreement between the parties and in no other case. That is to say, that the rule can be invoked only when there is not only admission regarding the matters in dispute, but the negotiations have ultimately resulted in a concluded agreement in writing signed by the parties. In my view, however, the Rule can be invoked not only in a case of concluded agreement but can be invoked whenever there is a dispute between the parties that the agreement in writing signed by them is not a valid agreement between the parties. It must be noticed that the Rule is invoked only when there is a dispute between the parties as to whether there is an agreement adjusting the claims of the parties to the suit. Indeed, if there is no such dispute there would be no scope for invoking or attracting this Rule. Because, if there is no dispute with regard to the agreement, all that the parties have to do is to file a compromise petition regarding the terms of the agreement.

It is because disputes may and do arise between the parties, as to the validity and binding character of an agreement, that provision has been made by the Rule enabling parties to come to court for adjudication on the question whether there has been a valid binding agreement adjusting the claims between the parties.

If it is provided by law that in every case where the parties negotiate for a settlement of their disputes in the suit, they must be deemed to have agreed that evidence of admission made in the course of negotiations shall not be given, no application can ever be made under Order XXIII, Rule 3 of the Code. When parties negotiate for a settlement they may expressly agree that any admission made by either of them should not be given as evidence, or there may be circumstances which makes clear to the court that that was an agreement between the parties although there was no express stipulation of that effect. If that is so, then s. 23 would cover such cases. But where parties proceed to negotiate for a settlement and there is neither any express stipulation that evidence of admission would not be given, nor are there any circumstances to indicate that there was such an agreement between the parties, if a dispute arises between the parties at a later stage as to whether there has been a valid agreement or not, the parties would be debarred from making an application under Rule 3, even though they have a right to come to the court and seek the court's adjudication on the question as to whether there has been a valid agreement. In my view, inclusion of Explanation 2 would not only render Order XXIII, Rule 3 altogether nugatory, but the parties to the suit who have negotiated a settlement would be deprived of an valuable right to which they are entitled under the provisions of the Civil Procedure Code.

I will now turn to the amendment to the Code of Civil Procedure, and see if the amendment makes any difference to the situation I have mentioned above. The material amendment to Rule 3 of Order XXIII is as follows :—

“After the words ‘lawful agreement or compromise’ the words ‘in writing and signed by the parties’ shall be inserted.”

Therefore, the Rule after amendment would read as follows :—

“Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise

in writing and signed by the parties or where the defendant satisfies.....shall pass a decree in accordance therewith so far as it relates to the suit."

As I read it, the amendment noted above makes no difference to the position stated by me in the preceding paragraphs. All that the amendment requires is that the lawful agreement and compromise of the parties to the suit shall be in writing and signed by them. Prior to the amendment the alleged agreement or compromise could possibly have been either verbal, or could have been contained in a series of correspondence between the parties. That would no longer be possible. The agreement must be in writing and signed by the parties after the amendment. This, in my view, leaves the question of relevance of admissions made during the course of negotiations untouched. One example will make it quite clear :—

"A sues B for recovery of Rs. 20,000/- as damages for trespass to A's property. B defends the suit but thereafter enters into negotiations for settlement of the dispute in the suit. After protracted negotiations, in course of which B admits he wrongfully trespassed into A's property and agrees to pay to A Rs. 10,000/- as damages instead of Rs. 20,000/- claimed in the suit. The terms of settlement are drawn up as follows :—

1. B admits that he wrongfully trespassed into A's property.
2. B would pay to A Rs. 10,000/- as damages for the trespass.
3. Disputes between the parties are settled on the terms mentioned above and neither party has any further claim against the other. Each party to pay its own cost.

After the agreement mentioned above is drawn up, it is signed by both the parties. If after the agreement is signed by the parties there is no further dispute between the parties, all that remains to be done is to file an application in the court and have a decree passed on these terms. But supposing B disputes the agreement and refuses to sign a compromise petition for filing the terms. A then will have to file an application under Order XXIII, Rule 3 in which he should state that B has admitted the wrongful trespass and has agreed to pay Rs. 10,000/- as damages. He would also have to file a copy of the agreement in writing signed by the parties before the court. But if the proposed Explanation 2 becomes law, then B will be rightfully entitled to contend that evidence of the admission of trespass made by him in course of negotiations and subsequently reduced into writing in the terms of settlement cannot be given and the court should take no notice of the admissions made by him and recorded in the terms. If Explanation 2 becomes law, no other alternative course would be available to A whose application for recording the terms of settlement must necessarily fail. In this view of the matter, no application can ever be made under Rule 3, if the proposed Explanation 2 becomes law.

The written agreement or settlement between the parties in all probability may contain admissions and concessions by a party who ultimately agrees to settle the dispute, but such admissions can never be looked into by the court because no evidence of it can be given as the party would be deemed to have agreed not to give the evidence of the same.

For the reasons mentioned above, the proposed Explanation 2 to s. 23 of the Act should not become law.

## SECTION 68

I now turn to the proposed amendment of s. 68. The effect of the proposed amendment is that Wills apart, with regard to all other documents which are required by law to be attested, it will no longer be necessary to call an attesting witness in order to prove execution of the document as at present provided by the section. The section says that if the 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. The necessity of calling an attesting witness in the case of a document (other than a Will) to prove the execution of the document is now proposed to be dispensed with. It is to be noticed that the provisions of s. 68 are mandatory in nature and the document in question cannot be used as evidence, until the attesting witness is called for the purpose of proving the execution of the document.

What is now proposed is that with regard to all documents other than Wills, which are required to be attested, it will no longer be necessary to call the attesting witness.

My dissent to the recommendations is based on two grounds. The first is that the recommendation violates a cardinal principle of the law of evidence, namely, that the best evidence shall be produced before the court. In the case of a document required to be attested by law, the best evidence of execution of such a document is the evidence of the attesting witness. He alone is the person who in law can prove the execution of the document. According to the recommendations, he need not be called as a witness, but the document may be proved by the evidence of other witnesses, if necessary. In my opinion, this recommendation will have the direct effect of withholding from the court the best evidence relating to the execution of the document, namely the evidence of the attesting witness. It seems to me that there is no valid reason for providing that although the attesting witness is available, he need not be called by the party who is relying on the document and the execution of the document may be proved through other witness. I am of the opinion that such a provision would invade, as I said earlier, a basic principle of law of evidence, namely, that the best evidence should be produced before the court.

The second ground of objection is that attestation of documents, (the execution of which can be proved through witnesses other than the attesting witness), becomes useless. Attestation of a document is required by law to prove execution of the same. If such execution is allowed to be proved by witnesses other than the attesting witness, there will be no purpose behind the requirement as to attestation of documents. In fact, in my view, attestation of such documents becomes a meaningless formality and there is no reason why this meaningless formality should be allowed to continue. The requirement regarding attestation will be rendered altogether nugatory if proof of execution of the documents by the attesting witness is dispensed with.

To allow attestation of documents to be required by law and at the same time to lay down the attesting witness need not be called and the documents may be proved by any other witness who can prove execution of the same, would, in my view, be an unreasonable and illogical requirement of law. Such a provision would, in my view, be quite out of harmony with the requirement as to execution and attestation of certain documents.

For the reasons mentioned above, I dissent from the recommendation of the majority relating to s. 68 of the Evidence Act.

For the same reasons, I dissent from the recommendations of the majority relating to sections 69, 70, 71 and 72 of the Act, which are consequential upon the amendment proposed to s. 68 of the Act.

(B. C. MITRA)

19-1-1977.

We would like to place on record our warm appreciation of the valuable assistance we have received from Shri Bakshi, Member-Secretary of the Commission in the preparation of this Report.

P. B. Gajendragadkar	..... Chairman
P. K. Tripathi	..... Member
S. S. Dhavan	..... Member
S. P. Sen-Varma	..... Member
B. C. Mitra	..... Member
P. M. Bakshi	..... Member-Secretary

Dated New Delhi  
the 9th May, 1977.