PART I

# RELEVANCY OF FACTS

## CHAPTER I

## PRELIMINARY

[1]**S. 1. Short title.**—This Act may be called the Indian Evidence Act, 1872.

**Extent.**—It [2][extends to the whole of India except the State of Jammu and Kashmir] and applies to all judicial proceedings in or before any Court, including Courts-martial, [3][other than Courts-martial convened under the Army Act (44 & 45 Vic c. 58),] [4][The Naval Discipline Act (29 & 30 Vic. c. 109) or[5] * * * the Indian Navy (Discipline) Act, 1934,[6]] [7][or the Air Force Act (7 Geo. 5, c. 51)] but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator;

**Commencement of Act.**—and it shall come into force on the first day of September, 1872.

### SYNOPSIS



1. PAKISTAN.—In para. 1 "Indian" omitted by Pak. A.O. 1949. Para. 2 of the section reads: "It extends to the whole of Pakistan, and applies to all judicial proceedings..... or the Pakistan Navy (Discipline) Act, 1934..... an arbitrator:

   BURMA.—In para. 1 "Indian" and "1872" omitted by A.O. 1937. Para 2 of the section reads: "It applies to all judicial proceedings on or before any court, including Courts-martial other than Court-martial convened under any Act relating to the Army, Navy or Air Force, but not to affidavits presented to any court or officer, nor to proceedings before an arbitrator" (A.O. 1937 and A.O. 1948).

   CEYLON.—"1. This Ordinance may be cited as the Evidence Ordinance.

   2.(1) This Ordinance shall apply to all judicial proceedings in or before any court other than Courts-martial, but not to proceedings before an arbitrator." [For s. 2(2), see s. 2 *post*.]
2. Substituted successively by A.O. 1948, A.O. 1950 and by Part B States (Laws) Act, 1951.
3. Inserted by the Repealing and Amending Act 18 of 1919, s. 2 and Sch. I. See s. 127, Army Act (44 and 45 Vic. c. 58)
4. Inserted by the Amending Act 35 of 1934, s. 2 and Sch.
5. The words "that Act as modified by" repealed by A.O. 1950.
6. See now the Navy Act 62 of 1957.
7. Inserted by the Repealing and Amending Act 10 of 1927, s. 2 and Sch. I.

**Short Title.**—The full title throws lights upon the progress and scope of an Act, but the object of the short title is identification and not description [*National T Co Ld v. P M Genl*, 1913 AC 546 : 82 LJKB 1187; see *Debendra v. Jogendra*, 64 CLJ 212 : A 1936 C 593].

**The Law of Evidence is *lex fori*.**—Evidence is one of those matters which are governed by the law of the country in which the proceedings take place (*lex fori*) and not by that of the country where the contract sued upon were made, or in any other way the cause of action arose (*lex loci actus*). The *lex fori* determines all questions relating to the admission or rejection of evidence. The principle was thus laid down by LORD BROUGHAM : "The law of evidence is the *lex fori* which governs the courts. Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not—that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced and where the court sits to enforce it" [*Bain v. W & F Rail Co*, 1850 3 HL Cas 1, 19; see *Hamlyn & Co v. Talisker Distillery*, 1894 AC 202, 213]. In civil cases unless the parties consent, courts have no power to depart from the ordinary law of evidence [*Baerlien v. Chartered M Bank*, 1895, 2 Ch 488 CA]. The rule of the place of trial—has long been the fixed tradition of Anglo-American law. It is deemed determinative, on the general principle that procedure is governed by the rules of the form; and the law of Evidence is a part of the law of Procedure [Wigmore, s 5]. Where the question is one of proper method of proving the event which occurred in England (approval by Parliament of a proclamation), the law applicable is the Indian and not English law of Evidence [*Niharendu v. R*, A 1942 FC 22 : 1942 FCR 38]. In so far as the formalities of alienation or conveyances are concerned, the law applicable is that of the country where the land is situated [*Toomey v. Bhupendra*, 7 P-520 : A 1928 P 304 (*Adam v. Clutterbuck*, 10 QBD 403 **relied** on].

**The Act is a Consolidation of the English Law of Evidence.** *Per* GARTH CJ :— "I suppose it must be generally acknowledged that with some few exceptions, the Indian Evidence Act was intended to, and did in fact consolidate the English Law of Evidence" [*Gujju Lal v. Fatteh Lal*, 6 C 171, 188; see also *Parbhoo v. R*, A 1941 A 402 and SUBBA RAO, J, in *S v. Sodhi Sukhadev*, A 1961 SC 493, 525 : 1961, 2 SCR 371]. "The portions of the Evidence Act which I have quoted, merely reproduce the English Law on the subject; the Act itself, to use language of SIR JAMES STEPHEN, who framed it, is little more than an attempt to reduce the English law of Evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India" [*Per*, BAYLEY, CJ, in *Smith v. Ludhia*, 17 B 129, 141]. In drawing up the Evidence Act, chiefly from *Taylor on Evidence*, SIR JAMES FITZJAMES STEPHEN plainly intended to adopt in s 129 the principle contended for in ss 846, 847, of the work which he was condensing [*Munchershaw v. The New Dhurumsey S W Co*, 4 B 567, 581]. Taylor's Evidence with very slight alterations is produced in the I E Act [*per* LORD WILLAMS, J, in *Kishori v. R*, 39 CWN 986 988; SUBBA RAO, J, in *S v. Sodhi Sukhdev*, A 1961 SC 493, 526]. The true meaning of the sections which bear on the admissibility of confession against a co-accused can best be learnt from the beginning of Vol II of Taylor [*R v. Rama*, 3 B 12, 17]. In *In re Rami Reddi*, 3 M 48, 52, Taylor has been referred to in interpreting s 33 of the Act. It is true that, although the Code is in the

main, drawn on the lines of the English law of Evidence, there is no reason to suppose that it was intended to be a servile copy of it [*Ranchoddas v. Bapu*, 10 B 439, 442].

Norton has the following remarks on Stephen's condensation of Taylor's work : "It has been asserted that the hundred and sixty seven section of the Evidence Act contain all that is applicable to India, in the two bulky volumes of Taylor. This appears to me to be a mere figure of speech. A great mass of the principles and rules, which Taylor's work contains will have to be written back between the lines of the Code; the chief merit of which, unless I am wrong, consists in the perspicuity with which the line has been drawn and maintained between what is relevant and irrelevant; and in defining how that which is relevant is to be proved. The laborious assiduity with which Taylor has been boiled down into substantive propositions of law must also be admitted. The defect of the Code, I think is, that this process has been very arbitrarily applied, and with too niggard a selection" [Norton's Evidence, preface p v.] The Act is intended to be a complete Code, but it is not exhaustive.

**Extent and Application of the Act.**—Before independence the Act applied to what was then known as "British India" and "British Burma". Under the Independence Act (10 and 11 Geo. 6, c 30), as from the 15th August 1947 the Dominions of India and Pakistan emerged from what was formerly called India. The definition of "British India" was accordingly amended (see s 3(5) Genl. Clauses Act, 10 of 1897). As from the 26th January 1950 India declared herself a Sovereign Republic. Pakistan is also a Republic from 23rd March 1956. Burma was declared an Independent Republic on the 4th January 1948. The Dominion of Ceylon was brought into being on the 4th February 1948.

The Evidence Act extends to the whole of India except the State of Jammu and Kashmir, and to the whole of Pakistan. As to definition of "India", see s 3(28) Genl. Clauses Act, 10 of 1897 and s 3 Evidence Act. As to what comprises "the territory of India", see art 1(3) of the Constitution. It extends to the whole of the Union of Burma and to the Dominion of Ceylon where it is entitled "The Evidence Ordinance". The Ordinance is merely the application to Ceylon of the Indian Evidence Act [*Gabriel v. Eliatamby*, 52 IA 372 : A 1925 PC 229].

The Scheduled Districts Act, 1874, has now ceased to have any effect. Ordinarily an Act passed by Parliament shall apply to the whole of India unless any part is excepted (Art 245 Constitution). But para 5 of the 5th Schedule of the Constitution says that the Governor may by notification direct that any particular Act of Parliament shall not apply to a Scheduled Area or shall apply subject to such modification as he may specify. As to the list of Scheduled Areas, see The Scheduled Areas Orders.

[Under the former law the Act was extended to Berar by the Berar Laws Act, 4 of 1941 and was declared to be in force in the Sonthal Parganas, by the Sonthal Parganas Regulation, 1 of 1929; in the Khondmals District by the Khondmals Laws Regulation, 4 of 1936, s 3 and Sch; in the Angul District, by the Angul Laws Regulation, 5 of 1936, s 3 and Sch; also by notification under s 3(a) of the Scheduled Districts Act, 14 of 1874, in the following Scheduled Districts, namely the districts of Hazaribagh, Lohardaga (now the Ranchi District—see Calcutta Gazette, 1899, Pt 1, p 44), and Manbhoom, and Pargana Dhalbhoom and the Kolhan in the District of Singhbhum—see Gazette of India, 1881, Pt I, p 504 (the Lohardaga or Ranchi District included at this time the Palamau District, separated in 1894); the Tarai of the Province of Agra *ibid*, 1876, Pt I, p 505 and Ganjam and Vizagapatam—see Gazette of India, 1899, Pt I, p 720.

PAKISTAN—The Act was declared in force in the then British Baluchistan, subject to modification, by the British Baluchistan Laws Regulation, 2 of 1913, s 3 and Sch I Baluchistan Code; in the Chittagong Hill-tracts by the Chittagong Hill-tracts Regulation, 1 of 1900, s 4 and Sch].

**Judicial Proceedings.**—The term is not defined in the Act. Under s 4(*m*) Cr. P Code "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath. Judicial proceeding is "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence" [SPANKIE, J, in *R v. Gholam Ismail*, 1 A 1, 13]. An enquiry is judicial, if the object is to determine a jural relation between one person and another or a group of persons : or between him and the community generally; but even a judge acting without such an object in view, is not acting judicially—Distinction between a judicial and administrative enquiry explained and pointed out [*R v. Tulja*, 12 B 36. See also *Atchaya v. Gangayya*, 15 M 138, 143].

Criterion for deciding whether an order is a judicial or administrative order [*Md. Bux v. Govt.*, A 1953 A 739; *Basant v. Janak*, A 1954 A 447]. Tests for determining whether an act is judicial, administrative or ministerial [*Abdoola v. Corpn*, A 1950, C 36]. A proceeding which is subsequently found to be without jurisdiction cannot of course be a judicial proceeding [*In re Rami Reddy*, 3 M 48: *Sankappa v. Coraga*, 54 M 561; *Sudhindra v. S*; A 1953 C 339]. Courts have to discharge both administrative or executive and judicial duties. In order that it may be a judicial proceeding, the judge or the magistrate must act in a judicial capacity, *i.e.*, as a court. See the meaning of the word 'judicial' in *Dwarkins v. Lord Rokeby*, 8 QB 255.

Judicial proceeding means a proceeding in which judicial functions are being exercised. Delivery of possession by *nazir* is not a judicial proceeding [*Harcharan v. R*, 9 CWN 364 : 32 C 367; though see, *Bhola Nath v. R*, 10 CWN 55 and *Dakhineswar v. Harris*, 10 CLJ 450]. A preliminary enquiry held under s 476 (now s 340) Cr P Code is a judicial proceeding [*Abdulla v. R*, 37 C 52; see however *Dayanath v. R*, 37 C 72] or an inquiry under s 176 Cr P Code [*In re Laxminarayan*, A 1928 B 390] but not an investigation. Proceedings under the L A Act until the matter comes before the Land Acquisition Judge are only administrative and not judicial proceedings [*Best & Co. Ltd v. Dy Collr*, 36 IC 621 : 2 MWN 348]. Position of District Judge in proceedings under the Lunacy Act (4 of 1912) is partly judicial and partly administrative [*Jadunath v. Prithipal*, 36 IC 705 : 19 OC 353]. Enquiry under Legal Practitioners Act [*Nallasivam v. Ramalingam*, 32 MLJ 402] or an order under s 202 Bengal Municipal Act [*Nabadwip Munply v. Purna Ch*, 29 CWN 817] is a judicial proceeding. The enquiry under Mysore (Personal and Miscellaneous) Inams Abolition Act 1 of 1955 is not a judicial proceeding [*S v. P T Muniswamy*, A 1971 SC 1363]. Even if contempt proceedings are judicial proceedings they are outside s 1 [*Sheoraj v. Batra*, A 1955 A 638; *State of U.P. v. Radhey Shayam Tripathi*, 1983 Cri LJ 1153, 1162 (All) : 1983 All WC 465]. Departmental proceedings are not governed by strict rules of evidence [*K L Shinde v. S*, A 1976 SC 1080 (*S v. Shivabasappa*, A 1963 SC 375 : 1963, 2 SCR 943 **rel** on)].

**"Before Any Court".**—The word 'court' has been defined in s 3 of the Act [*See post*, s 3].

**Courts-martial etc.**—The Army Act, referred to is the English Army Act, 1881 (44 & 45 Vic c 58, ss. 127 and 128); see also ss 163-165 Army Discipline and Regulation Act, 1881. The Navy Discipline Act referred to is the English Naval Discipline Act.

Since independence Army Act (46 of 1950), Air Force Act (45 of 1950) and Navy Act (62 of 1957) have been passed containing provisions as to courts-martial. Under s 133 of the Army Act, 1950, s 132 of the Air Force Act, 1950 and s 130 of the Navy Act, 1957, the Evidence Act shall, subject to the provisions of these Acts, apply to all proceedings before a court-martial. See also the Indian Army and Air Force (Military Prison and Detention Barracks) Act (14 of 1943). The English Army Act (44 & 45 Vic c 58), the English Naval Discipline Act (29 & 30 Vic c 109) and the English Air Force Act (7 Geo. 5, c 51) have their counterparts in the Army Act 45 of 1950, the Navy Act 62 of 1957 and the Air Force Act 45 of 1950.

**Affidavits.**—Meaning of affidavit [s 3(3) Genl Cl Act, 10 of 1897]. Affidavits are not included in the definition of evidence in s 3 and are expressly excluded by s 1 [*Parkash v. J N Dhar*, A 1977 D 73]. They can be used as evidence if for sufficient reasons, court passes an order under Or 19, rr 1, 2 [*Shamsunder v. Bharat &c*, A 1964 B 38; [*Smt Sudha Devi v. M.P. Narayaan*, A 1988 SC 1381, 1383, 1988 Rajdhani LR 328; *Munir Ahmad v. State of Rajasthan*, 1989 Cri L J 845 : A 1989 SC 705, 710; *Jagdish v. Smt Premlata Rai*, A 1990 Raj 87, 90; *Radha Kishan v. Navratan Mal Jain*, A 1990 Raj 127, 130]. An affidavit filed by the party suo motu and not under the direction from the court is not 'evidence'. [*Delhi Lotteries v. Rajesh Aggarwal*, A 1998 Delhi, 332, 344]. In an application for consideration of delay the petitioner should prove the averments in the affidavit by producing the necessary documents [*Union of India v. M/s. Cavaliar Shipping Company, Madras*, A 1990 Mad 312, 313]. The Act does not apply to affidavits; but that does not mean that an affidavit by a living person can go in as evidence proprio vigore without necessity for him to enter the witness-box. In order to be admissible evidence it should be capable of being regarded as a statement in writing falling under s 32 [*Marneedi v. Masimukula*, A 1949 M 689]. Affidavit is not evidence under the Act unless it is permitted by Or 19, C P Code [*Gopikabai v. Narayan*, A 1953 N 135; *Parekh Bros v. Kartick*, A 1968 C 532; see *Shriram v. Narayan*, A 1953 N 288]. Affidavit sworn in Pakistan is not admissible in evidence before Custodian of Evacuee Property when no evidence is adduced before the Custodian to prove identity or signatures of persons swearing it [*Ghulam v. Badshah Begum*, A 1970 J & K 159]. Matters to which affidavit shall be confined are regulated by s 139 and Or 19, rr 1, 2, 3 of the C P Code, 1908; see also ss 295, 296, 297 Cr P Code, 1973. See Taylor, ss 1394-97. Affidavit evidence is generally used in interlocutory matters. When there was no order of the court under Or 19 r 1 the affidavits filed by the parties without giving an opportunity of cross-examining the deponents, cannot be treated as evidence [*Radhakrishnan v. Navraton Mal Jain*, A 1990 Raj 127, 130]. Contempt proceedings are usually decided on the basis of affidavits [*Sheoraj v. Batra*, A 1955 A 638].

The subject of affidavit has been treated in a separate chapter [See Appendix A, at the end of the book].

**Arbitrators.**—The principal object of submission to arbitration is to have a dispute decided by avoiding the elaborate procedure of a regular trial or its technicalities. After the arbitrator's award is given, judicial sanction is accorded in order that it may have the effect of a decree. The rules of the Act do not apply to proceedings before an arbitrator [*Haralal v. State Industrial Court*, A 1967 B 174]. Improper reception of document is not sufficient ground for setting aside an award. The arbitsator is not also a judicial tribunal (s 3). So the strict rules of evidence or technical rules of procedure are not applicable. The arbitrator should however decide in accordance with the rules of "natural justice". LORD HALSBURY observes : "We must not insist upon too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere

matter of form without any interference with the substance of their decision" [*Andrews v. Mitchell*, 1905 AC 78]. As to what is "natural justice", see observations of LORD SHAW in *Local Govt v. Arlidge*, 1915 AC 120, 138 : 30 TLR 672 : of LORD WRIGHT in *Genl Council of Medl Edcn v. Spackman*, 1943 AC 627; see *Union v. Varma*, A 1957 SC 882 : 1958 SCR 499; the classic judgment of LORD REID in *Ridge v. Baldwin*, 1964 AC 40; HWR Wade "Administrative Law" 2nd Ed the particular chapter.

In *Bd of Education v. Rice*, 1911 AC 179 : 27 TLR 378, LORD LOREBURN, LC said: "I do not think they are bound to treat such a question as though it were a trial. They had no power to administer an oath and need not examine witnesses. They can obtain information in any way they think, but always giving a fair opportunity to those who were parties to the controversy to correct or contradict any relevant statement prejudicial to their view". Proceedings before arbitrators are regulated by the Indian Arbitration Act, 10 of 1940.

The rule of law excluding offers made "without prejudice" is as much binding upon arbitrators as upon courts of justice [*Howard v. Wilson*, 4 C 231, 236; see s 23, post]. The word 'court' in this Act does not include an arbitrator (s 3). It is not a valid objection to the award that the arbitrators have not acted in strict conformity with the rules of evidence [*Suppu v. Govinda*, 11 M 85; *Mg Shwe v. Mi Nyan*, 3 R 387]. But they are bound to conform to the rules of natural justice [*Ganga v. Lekhraj*, 9A 253]. The Act does not apply to arbitration. An honest mistake as to what the law of evidence is, is not in itself a ground for setting aside an award. The arbitrators are not however to adopt any means of deciding the case which is contrary to natural justice. It is certainly not contrary to natural justice to act on materials on which ordinary and reasonable men would naturally act. And ordinary and sensible people do constantly act and decide important matters in their own lives on materials hopelessly inadmissible in a court of law [*Chandrabhan v. Ganapatrai & Sons*, 1943, 1 Cal 156 : A 1944 C 127]. An arbitrator ought not to hear or receive evidence from one side in the absence of the other side. If he does, without giving the other side affected by such evidence, the opportunity of meeting and answering it, the award will be avoided [*Cursetji v. Crowder*, 18 B 299, 311; *Md Afzal v. Abdul*, A 1925 L 570; *Venkatasubbiah v. Ramaiah*, A 1935 M 184; *Hari Singh v. Kankinarah Co Ld*, A 1921 C 657]; but if a party deliberately absents himself from the hearing, the award is not invalid or bad [*Haridas v. Baidyanath*, 21 CWN 895 : A 1918 C 644; *Damodarji v. Ramnath*, A 1916 A 278]. An arbitrator's refusal to examine witness produced by the parties, amounts to judicial misconduct, which will warrant a court in setting aside an award [*Rughoobur v. Maina Koer*, 12 CLR 564, 566]. Arbitrators ought only to take such evidence as is required by the terms of the agreement referring the question of dispute to arbitration [*Krishna Kanta v. Bidya Sundaree*, 2 BLR Ap 25]. As to the duty of an arbitrator in hearing evidence, see *Ganga v. Lekhraj*, 9 A 253, pp 264-65.

As to outside opinion on matters of law, it has been held that an arbitrator may take advice upon the general rules of law bearing upon the case without leaving to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon [*Dreyfus v. Arunachala*, 58 IA 381, 391 : A 1931 PC 289 : 35 CWN 1287; see also *Buta v. Munpl Committee*, 29 IA 168 : 29 C 854]. When a specific point of law is referred to arbitration, the award cannot be set aside if the arbitrator wrongly decides the point of law [*Br. Westing &c Co v. Underground & Co*, 1912 AC 673; *Govt of Kelantan v. Duff Dev Co*, 1923 AC 395; *Absalom Ltd. v. G W G V Society Ltd.*, 1933 AC 592; *Gopinath v. Salil*, A 1938 C 705 : 1938 2 Cal 349; *Durga Pd. v. Nardeyi*, 50 CWN 800 : A 1947 C 75]. *Absalom Ld v. G W G Society*

*Ld, sup* was **approved** in *Thanwardas v. Union*, A 1955 SC 468 : 1955 2 SCR 48. Where the question of construction of certain clauses in a document is referred to an arbitrator the award is purely on a point of law and it is not open to attack on the ground that the arbitrator has misconducted the proceedings. There is a well-known distinction between the decision of an arbitrator upon a pure question of law and a decision upon the dispute which rests incidentally upon, the decision on a question of law. In the former case the decision is not open to attack on the ground that it was wrong, while in the latter case it would be open to attack if an error of law was apparent on the face of the record, which formed the basis of the finding of the arbitrator [*Vellore E C Ld v. S*, A 1959 M 351].

As to evidence of arbitrator in any matter connected with the award, see notes under s 121 *post*.

**Administrative Tribunals**.—The increasing duties of a welfare State as the result of various social and other legislations have led to the establishment of many administrative tribunals which exercise judicial functions analogous to those of ordinary courts. While such tribunals are not bound by all the rules of evidence they have to conform to the cardinal rules of evidence in order to obviate injustice. [See *R v. Kingston-upon-Hull Rent Tribunal*, 65 TLR 209; *Moxon v. Minister of Pensions*, 1945 KB 940]. As to the applicability of rules of evidence to administrative tribunals, see Wigmore, ss 4a-4c 3rd ed 1940.

**Income-tax or Industrial Tribunal Proceedings etc. etc.**—It is only for a limited purpose that a proceeding before the Income-tax authorities is declared to be deemed to be a judicial proceeding. In all other matters the proceedings before them are not judicial proceedings and they are not debarred from relying on private source of information [*Gurmukh v. Commrs of IT*, A 1944 L 353 FB]. Ground of decision of a criminal court can furnish material for decision in income-tax proceedings [*Anraj v. Commrs of IT*, A 1952 Pu 46]. Income-tax authorities are not strictly bound by rules of evidence [*CIT v. East Coast Commercial Co Ld*, A 1967 SC 768].

The Evidence Act has been made applicable to the trial of an election petition [see s 90(*3*) of the Representation of the People Act] or to proceedings before the Railway Rates Tribunal, provided that in its discretion, any of its provisions may be relaxed (Rule 51 of Railway Rates Tribunal Rules, 1949).

In a domestic enquiry the strict and sophisticated rules of evidence may not apply. All materials which are logically probative for a prudent mind are permissible [*S v. Rattan*, A 1977 SC 1512].

The Act has no application to enquiries conducted by tribunals even though they may be judicial in character [*Union v. Verma*, A 1957 SC 882 : 1958 SCR 499 (**relying** on *New Prakash etc v. New Suwarna etc*, A 1957 SC 232 : 1957 SCR 98); *Central Bank of India Ld. v. Prakash*, A 1969 SC 983] and to departmental enquiries [*Amulya v. Bakshi*, A 1958 C 470 : 62 CWN 690]. The functions and duties of an Industrial Tribunal, however, are very much like those of a body discharging judicial functions, although it is not a court in the technical sense [*Bharat Bank Ld v. Employees*, A 1950 SC 188 : 1950 SCR 459]. It has been called a 'court' in the wider connotation of the term as defined in s 3 and must observe the rules of evidence [*Raghu v. Burrakar Coal Co Ld*, A 1966 C 504 (relying on *Bharat Bank Ld v. Employees*, *sup* and *Associated Cement Co Ld v. P. N. Sharma*, A 1965 SC 1595; *E M Industries Ld v. Industrial Tribunal*, A 1950 M 839 **disapproved**)]. In England tribunals are entitled to act on any material which is logically probative even though it is not evidence in a court of law [*per* LORD DENNING in *T.A. Miller Ld v. Minister of Housing*, 1968, 2 All ER 633].

The rules of natural justice would have to be observed in any case as pointed out so often (see cases *sup* and *infra*). When a previously prepared signed statement is read over to workmen in a few minutes and then they are asked to cross-examine witnesses then and there the rules of natural Dustice are not complied with [*Kesoram Cotton Mill Ld v. Gangadhar*, A 1964 SC 708]. Normally, evidence on which the charges are based must be led al such an Wnquiry in the presence of the workman himself and request of either party to admit evidence after the case has been fully argued should not be accepted [*Khardah & Co v. Workmen*, A 1964 SC 719; *Central Bank of India Ld v. Prakash*, *sup*]. Statements made behind the back of the person charged are not to be treated as substantive evidence [*Central Bank of India Ld v. Prakash*, *sup*]. If a work-man admits his guilt it will be open to the management to examine the workman himself in the first place but even then the examination should not savour of an inquisition [*Central Bank of India Ld v. Karunamoy*, A 1968 SC 266]. It is not an invariable rule of domestic enquiries that before a delinquent is asked anything all the evidence against him must be led. It may be more just to ask the delinquent whether he would like to make a statement first or wait till the evidence is over, but the failure to question him in this way would not *ipso facto* vitiate the enquiry unless prejudice is caused [*Employees of Firestone &c v. Workmen*, A 1968 SC 236].

As to the evidentiary value of balance sheets &c. see *Khandesh S & W Mills v. R G K Singh*, A 1960 SC 571 : 1960, 2 SCR 841; *Management v. N C T Mill Workers' Union*, A 1960 SC 1003; *P T R Dye Work Co v. Workers' Union*, A 1960 SC 1006: 2 SCR 906].

The proceedings of a commission under the Commissions of dInquiry Act, 1952 to which sub-ss. (2) to (5) of r 5 have been applied are not judicial and the provisions of the Evidence Act do not apply [*Allen Berry & Co v. Bose*, A 1960 Pu 86]; so also under the Jammu & Kashmir Commission of Enquiry Act 32 of 1962 [*S v. Anwar*, A 1965 J & K 75].

Strict rules of evidence do not apply to Contempt proceedings [*In re Basanta*, A 1960 P 430].

*Syed Norishah v. Director of Enforcement, New Delhi*, (1986) Cri LJ 677, 679, (AP); *The Deputy Director, Enforcement Directorate, Madras v. Mansoor Mohamed Ali Jinnah*, 1989 Cri LJ 2138, 2150 : 1989 Mad LW (Cri) 337. S 24-A Foreign Exchange Regulation Act, 1947, had application only to proceedings in Court and rule 3(*5*) had not the effect of rendering admissible, evidence which was irrelevant or inadmissible under the Evidence Act [*Shanti Pd, Director of Enforcements*, A 1962 SC 1764].

**Commissioner.**—A Commissioner appointed under the C P Code or the Cr P Code has the power to summon witness and the evidence (see Or 26, rr 16, 16A, 17; ss 284-89 Cr P Code) and the rules of evidence apply to proceedings before him. A Commis-sioner to ascertain mesne profits is entitled to base his report on his local inspection and also upon experiments conducted by him, but not on information obtained from certain persons whose evidence is not recorded by him under Or 26, r 10, as information given by witnesses which was not reduced to writing is not legal evidence on which the court can decide [*Ramakka v. Nagasam*, 47 M 800]. See notes to s 135 *post*, "*Evidence on Commission*".

**S. [1]2.** [*Repeal of enactments.*] *Repealed by the Repealing Act, 1938* (1 of 1938), *s. 2 and Sch.*

## SYNOPSIS



**Repeal of S. 2.**—As the provisions of s 2 were spent or became otherwise unnecessary, the section and the schedule of enactments repealed by it were repealed by the Repealing Act, 1 of 1938; and under s 3 of it the repeal shall not affect the operation of any provision in the repealed Act for the saving of rights, privileges, obligations or liabilities, acquired, accrued or incurred under that Act.

In spite of the repeal of s 2 its saving clauses remain unaffected by s 8 of the Repealing Act, 1938. The repeal of s 2 therefore makes no difference, because its repeal does not have the effect of re-enacting the rules which it had repealed [*King v. K*, A 1946 A 190]. See s 7 Genl Cl Act, 10 of 1897.

**—Repeal of Rules etc. By Repealed S. 2.**—S. 2 as it stood in the Act of 1872 repealed all rules of evidence not contained in any statute, Act or Regulation in force in any part of the country. By sub-sec (*1*) of the repealed section all rules of Hindu and Mahomedan law relating to Evidence were repealed [see *Parameshwar v. Bisheshar*, 1 A 53; *Dhondu v. Ganesh* 11 B 433; *Mazhar v. Budh*, 7 A 297 FB; *Md Alladad v. Ismail*, 10 A 289, 325]. As observed earlier the repeal of s 2 has caused no change in the law.

**Rules of Evidence in Other Acts Not Affected.**—The Proviso to the repealed s 2 saved all rules of evidence which were to be found in any Statute, Act or Regulation and not expressly repealed and those rules remain unaffected in spite of the repeal of s 2 (*v ante*). There are several provisions in Statutes, Acts or Regulations relating to the subject of evidence and some of these are to be found in the following among others:—

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1. **Repaled s. 2 stood thus: —**

2. *Repeal of enactments.*—On and from that day the following laws shall be repealed:

(1) all rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India;

(2) all such rules, laws and regulations as have acquired the force of law under the 25th section of the Indian Councils Act, 1861 (24 & 24 Vict. c. 67), in so far as they relate to any matter herein provided for; and

(3) the enactments mentioned in the schedule hereto to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

1. Sec. 2(2) of Ceylon Evidence Ordinance runs thus:—"All rules of evidence not contained in any written law so far as such rules are inconsistent with any of the provisions of this Ordinance, are hereby repealed."

(*1*) Reports of Civil Court Commissioners appointed for local investigations, to examine accounts, etc. (Or 26 C P Code).

(*2*) The Cr P Code which provides certain special rules regarding the depositions of medical witnesses, not called (s 291); reports of certain Government scientific experts &c (s 293); certified orders of previous convictions and acquittals; certificate of the jail officers; depositions taken in the absence of the accused when he had absconded &c.

(*3*) Ss 17, 49 and 50 of the Indian Registration Act which prescribe some rules regarding the admissibility of certain documents. S 60 of the Regulation Act makes endorsements of registering officer admissible [*Abdul Ghafur v. Kamaluddin*, 102 IC 155 : 49 A 689 : *Piara v. Fattu*, A 1929 L 711].

(*4*) Ss 17 and 18 of the Indian Limitation Act which prescribe certain rules of evidence.

(*5*) Ss 59 and 123 of the Transfer of Property Act which lays down certain rules regarding the execution and attestation of wills.

(*6*) Ss 59 and 123 of the Transfer of Property Act which lays down certain rules regarding the execution and attestation of mortgages and gifts.

(*7*) S 35 of the Indian Stamp Act which lays down certain rules regarding the inadmissibility of certain documents not duly stamped.

(*8*) S 8 of the Patni Regulation VIII of 1819 which prescribes certain rules as to the mode of proving service of notice.

(*9*) The express provisions of ss 7, 12, 14 Divorce Act 1896 are not over-ridden by s 58 Evidence Act (*Over v. Over*, 91 IC 20).

(*10*) Bankers' Books Evidence Act, 18 of 1891.

(*11*) Commercial Documents Evidence Act, 3 of 1939.

For a complete list of the provisions of Statutes, Acts or Regulations which relate to the subject of evidence, and which have been saved by the saving clause, see *Whitley Stoke's Anglo-Indian Codes*, Vol II.

Restriction and Detention Ordinance 3 of 1944, does not repeal any part of the Evidence Act and is not *ultra vires*. At most, what it does is that for the period of its own currency, it suspends any provision of the Evidence Act which would enable the detenue to place before the court the matters referred to in s 11 [*Basanta v. R*, A 1945 P 44 FB].

**The Act is Intended to be a Complete Code. [Act Not Exhaustive].**—The Act, as the preamble shows, is intended to be a complete code of the law of evidence [*R v. Kartick*, 14 C 721]. The Act is complete Code and does not permit the importation of any principle of English Common Law relating to evidence to the contrary [*Hira v. S*, A 1971 SC 44]. Its provisions are not however exhaustive of the rules of evidence and the court can invoke the aid of the principles of jurisprudence or of English law as supplementing and explaining the rules of evidence given in the Act [*Annavi v. R*, 39 M 449 : 28 MLJ 329]. The Act is not exhaustive. It does not contain the whole law of Evidence governing this country. The records of the German Court authenticated in the manner prescribed by ss 14, 15 of the English Extradition Act are admissible in evidence [*In re Rudolph Staliman*, 39 C 164 : 15 CWN 1053]. Courts cannot apply in matters of evidence the principles of equity, justice and good conscience if they are inconsistent with the Act [*Meer v. Chote*, 6 NLR 161]. The Evidence Act is a special law and therefore no rule about the relevancy of evidence in the Evidence Act is

affected by any provision in the Cr P Code unless it is so specifically stated in the latter Code [*Ramnaresh v. R*, A 1939 A 242] or it is clearly proved that it has been repealed or altered by another statute [*Rannun v. R*, 7 L 84 : 94 IC 901 : A 1926 L 88].

**Admissibility Must Be Determined With Reference to the Act.**—The Act having repealed all rules of evidence not contained in any statute or regulation, a party relying on some piece of evidence must show that it is admissible under some of its provisions [*Lekhraj v. Mahpal*, 7 IA 63, 70 : 5 C 744, 754 : *Dwijen v. Naresh*, 49 CWN 791 : A 1945 C 492]. The whole of the English common law on Evidence so far as it was in force in the country before the passing of the Evidence Act having been repealed, English authorities have no binding effect on the courts here and may be referred to only for the purpose of explaining or elucidating the meaning of the Act where its provisions are identical with English rules of Evidence. (*See ante* History of Law of Evidence). The view in the above Privy Council case that the Act prohibits the employment of any kind of evidence not specifically authorised by the Act itself and that the question of admissibilty must always be determined with reference to the provisions of the Act has been emphasised in many other cases. [*See Collr of Gorakhpur v. Palakdhari*, 12 A 1 11 FB; *R v. Abdullah*, 7 A 385, 388 FB; *Md Alladad v. Md Ismail*, 10 A 289, 325; *Hearsay v. Eva Foster*, 12 ALJ 285: 24 IC 165; *R v. Pitambar*, 2 B 61, 64; *R v. Panchu Das*, 24 CWN L01, 516 FB; *Abinash v. Paresh*, 9 CWN 402, 406; *R v. Ashutosh*, 4 C 483, 491 FB (*per* JACKSON, J.)]. Under s. 5 also evidence tendered must be relevant under the provisions of the Act.

In *R v. Abdullah*, 7 A 385, 401, MAHMOOD, J, however, observed : "I feel that although what I may call the principle of exclusion adopted by the Evidence Act, *i.e.*, the principle that all evidence should be excluded which the Act does not expressly authorise, is the safest guide in regard to admissibility of evidence, yet it should not be applied so as to exclude matters which may be essential for the ascertainment of truth." This mode of regarding the law of evidence was emphatically stated by the Judicial Committee to be unsound. Once a statute is passed which purports to contain the whole law, it is imperative. It is not open to any judge to exercise a dispensing power and to admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. Evidence not admissible under the Evidence Act must therefore be discarded for all purposes and in all circumstances [*Srish Ch. v. Rakhalananda*, 68 IA 34 : A 1941 PC 16 : 45 CWN 435, 440; refd to in *Chandu v. Khatemonnessa*, 1942, 2 Cal 299 : A 1943 C 76; *Miyana v. S*, A 1962 G 214; *Khedia v. Turia*, A 1962 P 420; see also *Kashyap v. R*, A 1945 L 23 FB]. So, hearsay evidence cannot be admitted because it would throw light upon the issue [*Mahani v. Paresh*, A 1954 Or 198]. But the judge may have recourse to irrelevant or hearsay evidence for the discovery or proof of relevant facts (see s 165 *post* and notes).

Though a document may not be legal evidence of a fact within the Evidence Act, yet it may be a document, which is to prove that fact by consent of parties [*Oriental Govt. S L Ass Co v. Sarat*, 20 B 99, 103].

**Evidence Admissible Under the Act Must Be Admitted Even Though the Parties Contract Otherwise.**—Thus, payment may be proved by a receipt although there is a stipulation in the bond that no evidence of payment will be entertainable by court unless it is endorsed on the bond [*Sago v. Ramjee*, A 1942 P 105]. The principle is that no one can contract out of his rights under the law.

**Use of English Case-laws as Authorities.**—When the Indian Legislature has deliberately rejected, or intentionally declined to follow the law of England upon a particular point, the English cases upon the subject are irrelevant to the interpretation

of the law of India [*R v. Ghulet*, 7 A 44, 50]. The practice of citing English authorities to consider Indian authorities which are not in *pari materia* has on many occasions been condemned as improper [*Raghunath v. Sarju*, 51 IA 101 : A 1924 PC 60 : 3 P 279; *Hansaraj v. Bejoy*, 57 IA 110 : A 1930 PC 64 : 57 C 1176; *Mg Sein v. Ma Pan*, 59 IA 247 : A 1932 PC 161 : 10 R 322]. The admissibility or otherwise of any evidence has to be determined with reference to our own codified Evidence Act and not with reference to any law of England [*Girdhar v. Ambika*, A 1969 P 218]. The Act though mainly based upon the English Law is by no means an exact reproduction of it. The English law of Evidence has never been codified, and judicial decisions may well have developed or expanded some of its principles since 1872. Caution is, therefore, necess-ary in the application of English authorities on the subject [*Niharendu v. R*, A 1942 FC 22: 1942 FCR 38 : 46 CWN 9]. But where the principle laid down in any English case does not depend upon any peculiarity in English law, such principle is applicable [*Nandi v. Sitaram*, 16 C 677, 683; see *Lekhraj v. Mahpal*, 7 IA 63 : 5 C 744 PC *ante*].

The English decisions may be referred to in elucidating the meaning of the Evidence Act, where such decisions have received legislative approval in India [*R v. Vajiram*, 16 B 414, 433]. The Legislature when it used the words "good faith" in s 53, of the T P Act, adopted the interpretation which had been put upon the term *bona fide* in the statute of Elizabeth; therefore reference to English authorities bearing on the interpre-tation of the expression '*bona fide*' for interpreting the term "good faith" is not only legitimate but essential [*Hakim v. Mooshahar*, 34 C 999, 1009 : 11 CWN 889]. Where cases arise for which there is no positive solution in the Act itself, there is excuse for and safety in adopting the English rules, in so far as they are in accord with the general tenor of the Act [*R v. Ashutosh*, 4 C 483]. Numerous instances may be cited where help was sought from extraneous sources for explaining and understanding the principles of the law of Evidence which, in the well-known words of LORD ERSKINE (23 How. St. Tr. 966) are founded in the charities of the religion—in the philosophy of nature—in the truth of history and in the experiences of common life. See also *In re, Imp. Bank v. Prov. Ins. Co Ltd*, A 1940 C 429. In 5 WR Cr 39, Best on Evidence, Gilbert on Evidence &c.; in 7 WR 338 FB, Austin's Jurisprudence, Goodeve's Evidence;—in *Framji v. Mohansing*, 18 B 264, 280, American case law; in 11 Bom HC 931, Russell on Crimes; in 14 B 335, Philip's Evidence; in *R v. Chaturbhuj*, 38 C 96, English and American authorities were referred to. In *Collr of Garakhpur v. Palakdhari*, 12 A 11, 12 EDGE, CJ observed: "No doubt cases frequently occur in India in which considerable assistance is derived from the law of England or of other countries. In such cases we have to see how far such law was founded on common sense and on the principles of justice between man and man and may safely afford guidance to us here." [Quoted with approval in *Parbhoo v. R*, A 1941 A 402]. "In case of doubt or ambiguity over the interpretation of any other sections of the Evidence Act we can with profit look to the relevant English common law for ascertaining their true meaning." [*per* SUBBA RAO, J, in *S v. Sukhdev*, A 1961 SC 493, 526 : 1961 2 SCR 371]. See *ante*, "History of Law of Evidence" at p. 18 *ante*: *"The Act is a consolidation of the English Law of Evidence"*. In considering the construction of a section in an Indian Act which is professedly based on an English enactment, the Indian courts are in practice, if not in theory, bound by the decisions of the English Court of Appeal [*In re Indian Companies Act*, 13 MLT 282: 18 IC 997]. The acceptance of a rule or principle of law adopted in or derived from English Law is not permissible if thereby the true and actual meaning of a Colonial Statute under construction, be varied or denied in effect [*Md Sydeol v. Veohoolyark*, 43 IA 256 : A 1916 PC 242 : 21 CWN 257].

**S. 3. Interpretation clause.**—In this [1][Act] the following words and expressions are used in the following senses, unless a contrary intention appears from the context—

**"Court".**—"Court" includes all Judges and Magistrates and all persons, except arbitrators, legally authorised to take evidence.

**"Fact".**—"Fact" means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious:

*Illustrations*

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

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

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

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

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

**"Relevant".**—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 [1][Act] relating to the relevancy of facts.

**"Facts in issue".**—The expression "facts in issue" means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

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

*Illustrations*

*A* is accused of the murder of *B*.

At his trial the following facts may be in issue:—

that *A* caused *B's* death;

that *A* intended to cause *B's* death;

that *A* had received grave and sudden provocation from *B*;

that *A*, at the time of doing the act which caused *B's* death, was, by reason of unsoundness of mind, incapable of knowing its nature.

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1. "Ordinance" substituted in Ceylon.

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

*Illustrations*

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

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

A caricature is a document.

**"Evidence".**—"Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters to fact under inquiry; such statements are called oral evidence;

(2) *[*all documents including electronic records produced for the inspection of the Court*];

such documents are called documentary evidence.

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

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

**"Not proved".**—A fact is said not to be proved when it is neither proved nor disproved.

[2]["India" means the territory of India excluding the State of Jammu and Kashmir.]

ψ[*The expressions "Certifying Authority", "digital signature", "Digital Signature Certificate", "electronic form", "electronic records", "information", "secure electronic record", "secure digital signature" and "subscriber" shall have the meanings respectively assigned to them in the Information Technology Act, 2000.*]

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* **Subs. by the Information Technology Act, 2000.**

2. Substituted by Part B States (Laws) Act, 1951 for the definitions of "State" and "States" inserted by A.O. 1950. Omit in Pakistan, Burma and Ceylon.

ψ **Ins. by the Information Technology Act, 2000.**

## SYNOPSIS

**Information Technology Act, 2000**

**Definition of evidence [S. 3].**—The definition of the term "evidence" has been expanded by including in the term "document", electronic records produced for the inspection of the court. The word "document" for the purposes of "documentary evidence" would include electronic records. Thus electronic records have been granted the status of documents.

**Additional clause in S. 3.**—Section 3 of the Evidence Act has found a new clause at its foot. The new clause says: "The expressions "Certifying Authority", "Digital Signature", "Digital Signature Certificate", "Electronic Form", "Electronic Records", "Information", "Secure electronic record", "Secure digital signature" and "Subscriber" shall have the meanings respectively assigned to them as in the Information Technology Act, 2000.

§ For text of the Information Technology Act, 2000, see Stop Press pages in Volume 1 after General Contents.

**Interpretation Clause ["Unless a Contrary Intention Appears"].**—Where a particular statute defines particular words, they must be given the meaning given to them by the Legislature unless by doing so any repugnancy is created in the subject or context [*Pratap v. Gulzari*, 1942 All 185 : A 1942 A 50; *Rambandhu v. Brahmanand*, A 1950 C 524]. While defining terms it is usual to find in modern stautes qualifying words like "unless there is anything repugnant in the context or subject"; but even if such words are not to be found, little weight is to be attributed to it, for some such words are to be implied in all statutes where the expressions which are interperted by a definition clause are used in a number of sections with meanings sometimes of a wide and sometimes of an obviously limited character [VISCOUNT MAUGHAM in *Knightbridge &c v. Byrne*, 1940 AC 613, 621 : 1940 2 All ER 401; **relied** on in *Khemankari v. Harshamukhi*, 47 CWN 582, 597 : A 1943 C 345; *Md Manjural v. Bissesswar*, 47 CWN 408 : A 1943 C 361].

Legislative definitions or interpretations, being necessarily of a very general nature, not only do not control, but are controlled by, subsequent and express provisions on the subject-matter of the same definition. An interpretation clause is not to receive so rigid a construction, that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances [*Uda Begum v. Imamuddin*, 2 A 74, 86]. The effect of the interpretation clause, is to give the meaning assigned by it to the word interpreted in all places of the Act in which that word occurs. It is by no means the effect of an interpretation clause that the thing defined shall have annexed to it every incident which may seem to be attached to it by any other Act of the Legislature [*Umachurn v. Ajadannissa*, 12 C 439, 433].

**Court.**—The definition given is framed only for the purpose of the Act itself and should not be extended beyond its legitimate scope [*R v. Tulja*, 12 B 36; *Haricharan v. Kanchi*, A 1940 C 286 : 1940, 2 Cal 14; *Brajnandan v. Jyoti*, A 1956 SC 66 : 1955, 2 SCR 955; *Gh Rasool v. Md Wani*, A 1980 NOC 166 (J & K) (FB)].

As to 'Judge', *cf* the C P Code (Act 5 of 1908) s 2; the I P Code (Act 45 of 1860) s 19, and 'District judge', the General Clauses Act, 1897 (10 of 1897) s 3 (17). As to 'Magistrate', *cf* General Clauses Act, 1897 (10 of 1897) s 3 (32), and Cr P Code, 1898 (5 of 1898).

**—What is a Court?**—The definition of 'Court' is not meant to be exhaustive. In a trial by a judge with a jury, it includes both the judge and the jury [*R v. Ashutosh*, 4 C 483, 493]. A Commissioner appointed under Or 26 r 17 (*l*) C P Code 1908 or a commissioner appointed under ss 284-290 Cr P Code 1973 is a court; therefore the provisions of the Act will apply to commissioners appointed under those Acts but not to examination of witness by the police nor to proceedings before European Courts Martial. The term 'Court' includes all magistrates [*R v. Alagu*, 16 M 421]. The Cr P Code contains no definition of

'court' but according to s 3 of the Act the word 'court' includes all magistrates [36 IC 171]. The definition of 'court' under s 3 does not apply to expression 'court' as used in Cr PC [*Ramrao v. Narayan*, A 1969 SC 724]. "Legally authorised" contemplates a positive authorisation. The right to receive evidence is not an incident of an appellate court; it receives evidence by virtue of an express enactment, *e.g.* Or 41, r 27; s 428 Cr P Code—Difference between court and tribunal [*S v. Ratan*, A 1956 A 258]. Domestic tribunals exercising *quasi*-judicial functions are not courts [*S v. Shivabasappa*, A 1963 SC 943]. Rent Controller under A P Buildings (Lease, Rent and Eviction) Control Act is a court [*G Bulliswamy v. C Annapurnamma*, A 1975 AP 270.

**—Meaning of the Word 'Court' Under Special Acts.**—A registering officer is not a court [*R v. Tulja*, 12 B 36; *R v. Subba*, 11 M 3 : *R v. Ram Lal*, 15 A 141; *R v. Subhandari*, 12 M 201 and *Manavala v. Kamarappa*, 30 M 326. But see *Atchayya v. Gangayya*, 15 M 138 FB; see also *Krishtanath v. Brown*, 14 C 176 and *In re Sardharee Lall*, 22 WR Cr 10 : 13 BLR Ap 40]. A registering officer is not a court for purpose of s 228 IPC [*Prabhat v. R*, A 1930 C 366 : 34 CWN 56]. A magistrate holding a preliminary enquiry under s 164 Cr P Code does not exercise the functions of a court and does not act in a judicial capacity [*R v. Bharma*, 11B 102]. A committing magistrate is a court [*Atchayya v. Gangayya*, 15 M 138 FB and *Abdulla Khan v. R*, 14 CWN 132 : 37 C 52]. A Collector or a Dy. Collector acting under LA Act, is neither a court nor a judicial officer [*Durga Dass v. R*, 27 C 820 and 985 : 5 CWN 131; *Ezra v. Secy of S*, 30 C 36 : 7 CWN 249; **affirmed** in 32 C 605 PC: 32 IA 93 : 9 CWN 454]. Authorised officer under Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 is a court [*Antony v. Authorised Officer*, A 1979 (NOC) 29 (M)]. A Dy. Collector holding an enquiry under the Bengal Land Registration Act for registering the names of rival claimants is a court [*Ram Singh v. Harakhud*, 47 IC 710]. Revenue officers dealing with mutation proceedings under the Bihar Tenancy Act is not a 'court' [*Depta Tewari v. State of Bihar*, A 1988 NOC 9 (Pat) : 1987 Pat LJR (HC) 1037]. Commissioners appointed under the Public Servant Inquiries Act 37 of 1850, is not a court [*Brajanandan v. Jyoyti*, A 1956 SC 66 : 1955 2 SCR 955]. Motor Accidents Claims Tribunal under Motor Vehicles Act, 1939 is a court [*Jullundar Municipality v. Romesh*, A 1970 Pu 137 : *Premier Ins Co v. Gitarani*, A 1975 C 239; *Hukumchand Ins Co v. Subashini*, 74 CWN 879].

**"Fact".**—Bentham has classified facts into *physical and psychological*. By "physical facts" are meant such as either have their seat in some inanimate being or if in one that is animate, then not by virtue of the qualities which constitute it such; while "psychological facts" are those which have their seat in an animate being by virtue of the qualities by which it is constituted animate. Thus, the existence of visible objects, the outward acts of intelligent agents, the *res gestae* of a law suit, &c range themselves under the former class; while to the latter belong such as only exist in the mind of an individual : as for instance, the sensations and recollections of which he is conscious, his intellectual assent to any proposition, the desires or passions by which he is agitated, his *animus* or intention in doing particular acts, &c. It was formerly considered that psychological facts were incapable of direct proof by the testimony of witnesses—and their existence could only be ascertained either by confession of the party whose mind is their seat, or by presumptive inference from physical facts. But it is now recognised that the state of a man's mind is as much the subject of evidence as the state of his digestion (see also *Sabapathi v. Huntley*, A 1938 PC 91 : 173 IC 19); and accordingly witnesses are permitted to testify directly as to their *own* mental condition, although not generally to that of *others*, [Best, 11th Ed s 12]. A man's mental condition may be indicated by his conduct or by assertions. The former evidence is circumstantial and the latter direct.

Best has also divided facts into two other classes *viz.*, (*i*) One is, that they are either *events or states of things*. The fall of a tree is 'an event', the existence of tree is 'a state of things' (*ii*) The other is, *positive or affirmative and negative*.

*"Fact"* is often understood as denoting some events which occurred or something which was done, as opposed to something said or some opinion or feeling of mind or body. This is not the sense in which it is used in the Act. Statements, feelings, opinions and states of mind are just as much facts as any other circumstances of which, through the medium of the senses or by our self-consciousness, we become aware; and all are equally admissible for the purpose of proving or disproving the matter to which they relate. Thus according to sec 45 and other sections contained in the same group, opinions are "facts" [Cunn p 8].

"All rights and liabilities are dependent upon and arise out of facts, and facts fall into two classes, those which can, and those which cannot be perceived by the senses. Of facts which can be perceived by the senses it is superfluous to give examples. Of facts which cannot be perceived by the senses : intention, fraud, good faith and knowledge may be given as examples. But each class of facts has, in common, one element which entitles them to the name of facts—they can be directly perceived either or without the intervention of senses" [See Draft Report of Select Committee, dated 21st March, 1871; Gaz of India, July 1, 1871, Pt V, p 273]. Anything which is the subject of perception or consciousness is a fact. Mental condition is a fact [*Anant v. S*, A 1967 B 109].

It is important to remember with respect to facts, that as all thought and language contain a certain element of generality, it is always possible to describe the same facts with greater or less minuteness and to decompose every fact with which we are concerned into a number of subordinate facts. Thus, we might speak of the presence of several persons in a room at one time, as a fact, but if the facts were doubtful or other circumstances rendered it desirable, their respective positions, the position of the furniture and many other particulars might be specified [Steph Ev p 16].

*Illustrations (a), (b), (c)* are illustrations of clause *(1)* and *(d), (e)* of clause (2). Bentham's classification of facts into *physical* and *psychological* has been adopted in framing the definition of 'fact'. Clause (1) refers to *physical* or external facts and clause (2) refers to *psychological* or internal facts.

'Facts' in the law of Evidence include the *factum probandum*, i.e., the principal fact to be proved and the *factum probans, i.e.*, the evidentiary fact from which the principal fact follows immediately or by inference [*Andhra S v. Sriramulu*, A 1957 AP 130].

The only sense, in which, in interpreting the statute, the word "fact" can be understood, is that given in the definition in s 3 [*R v. Abdulla*, 7 A 385, 399]. A misrepresentation as to the intention of a person (on stating the purpose for which consent is asked) is a misrepresentation of 'fact' within the meaning of s 3 [*R v. Soma*, 36 IC 850 : 17 PR (Cr) 1916]. The definition of 'fact' does not restrict a fact to something which can be exhibited as a material object [*R v. Ramanuja* 58 M 642 : A 1935 M 528].

**"Relevant".**—All facts are relevant which are capable of affording any reasonable presumption as to the facts in issue, or the principal matters in dispute. While a 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 those matters which shed a real, though perhaps an indirect and feeble light on the question in issue [Tay s. 316]. The Act does not give any definition of the word "relevant". It simply describes when one fact becomes relevant to another. One fact is relevant to another if they are connected with each other in any of the ways described in ss 5-55. Generally speaking facts relevant to an issue are those facts which are necessary for proof or disproof of a fact in issue. Such facts may be given in evidence directly or inferentially. Statement of witnesses that they heard from other persons at the scene immediately after the occurrence that the accused fired gun is admissible as a relevant fact [*Jetharam v. S*, A 1979 SC 22]. As to difference between Relevancy and Admissibility, see *post*, s 5, "*Relevancy and Admissibility*".

**—Relevant Means Admissible.**—The word 'relevant' in the Act means admis-sible [*Lakhmi v. Haider*, 3 CWN 268n, *per* LORD HOBHOUSE]. The Act does not appear to make any distinction between logical relevancy and legal relevancy (*post* s 5). The various ways in which one fact may be so related to another as to be relevant to it, are described in ss 5-55. The expressions "relevancy" and "admissibility" are often taken to be synonymous. But their legal implications are different and distinct. A piece of evidence may be relevant yet not admissible, e.g., privileged communications. A piece of evidence may be admissible and yet not relevant, *e.g.*, evidence to impeach the credit of a witness. *Ram Bihari Yadav v. State of Bihar*, AIR 1998 SC 1850 : (1998) 4 SCC 517.

**—Reasons for Rejection of Evidence as Irrelevant.**—Of all rules of evidence, the most universal and the most obvious is this that the evidence adduced should be alike directed and confined to the matters which are in dispute or which form the subject of investigation. Anything which is neither directly or indirectly relevant to those matters, ought at once, to be put aside. Evidence may be rejected as irrelevant for one or two reasons : *(1)* That the connection between the principal and eviden-tiary facts is too remote and conjectural, *(2)* that it is excluded by the state of pleadings or what is analogous to the pleadings; or is rendered superfluous by the admissions of the party against whom it is offered [Best, 11th Ed p 273].

**"Facts in Issue" and Relevancy.**—The expression "facts in issue" means the matters which are in dispute or which form the subject of investigation. When a case comes before a tribunal it is most important that the facts in controversy should first be determined, because the evidence offered must be relevant and pertinent to the points in issue. Evidence of collateral facts having no connexion whatever with the principal transaction must be excluded [see *post*, s 5 "*Facts in Issue*"]. "*Facts in issue*" sometimes called 'principal' facts are to be determined by the substantive law and by the pleadings. Facts relevant to the issue are evidentiary facts which render probable the existence or non-existence of a fact in issue or some relevant fact. They are described in s 5 *et seq.*

The "*facts in issue*" are facts out of which some legal right, liability or disability, involved in the enquiry, necessarily arises, and upon which, accordingly, a decision must be arrived at. Matters which are affirmed by one party to a suit and denied by the other may be denominated facts in issue; what facts are in issue in particular cases, is a question to be determined by the substantive law or in some cases by that branch of the law of procedure which regulates the law of pleadings, civil or criminal [Steph. Intro. pp. 12, 13].

A fact in issue cannot be held to be proved by secondary evidence of statements made by a person who is not called as a witness [*Bak Shah v. R*, 13 IC 220: 5 SLR 136]. As to hearsay, see s 60 *post*.

**—Facts in Issue in Criminal Cases.**—As regards criminal cases, the charge constitutes and includes the facts in issue (See Chapter xvii, Cr P Code, 1973).

**—Facts in Issue in Civil Cases.**—As regards civil cases, facts in issue are determined by the process of framing issue. [See Order 14, rr 1-7, C P Code, 1908].

**Explanation.**—Whatever the explanation may mean, it cannot be that facts which are subordinate and therefore ought not to be made the subject of distinct issues should rank as facts in issue for the purpose of this Act [Cunn p 9].

**Writing.**—includes printing, lithography, photography and other modes of representing or reproducing words in a visible form. *Cf* definition in s 3*(65)* of General Clauses Act (10 of 1897).

**"Document".**—The definition is similar to the definition given in s 29 of the I P Code, with the omission of the explanation attached to that section. See also the definition given in s 3*(18)* of the General Clauses Act (10 of 1897). Document includes books, maps, plans, drawings and photographs &c. The definition in the Evidence Act, applies to the word as used as in s 2*(6)* of the Press (Emergency Powers) Act, 23 of 1931 [*Satyawan v. R*, A 1934 A 1031]. This Act was repealed by the Press (Objectionable Matter) Act, 1951, which being enacted for a temporary period is no longer in force.

**—What it Includes.**—Under the term 'document' are properly included all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus the wooden scores on which bakers, milkmen, etc. indicate by notches the number of loaves of bread or quarts of milk supplied to their customers : the old exchequer tallies; and such like—are documents as much as the most elaborate deeds. Documents being inanimate things necessarily come to the cognizance of tribunals through the medium of human testimony; for which reason some old authors have denominated them *dead* proofs (*probatio mortua*), in contradistinction to witness who are said to be *living* proofs (*probatio viva*) [Best, 11th Ed ss 215, 216]. Stephen defines document as "Any substance having any matter expressed or described upon it by marks capable of being read" [Dig Art 1]. Letters imprinted on trees as evidence that they have been passed by Forest Ranger, are documents [*R. v. Krishtappa*, A 1925 B 327]. In *R. v. Daye*, 1908, 2 KB 333, a document has been defined as "any writing or printing capable of being made evidence no matter on what material it may be inscribed". A sealed packet is a document [*R. v. Daye, ibid*]. A writing which is not evidence of the matter expressed; may yet be a document, if the parties framing it believed it to be true and intended it to be evidence of such matter [*R. v. Shifait*, 2 BLR Cr 12 : 10 WR Cr 61]. For a definition in keeping with the times see the extensive one adopted in England by the Civil Evidence Act 1968. When parties make statements before the Court in writing and sign the same, such signed statements are covered by the definition of 'document' [*Smt. Raksha Rani v. Ram Lal*, A 1987 P & H 60, 63 (DB) : 1986 Pun LJ 639].

**—Computer printout.**—Information recovered on a computer without the intervention of a human mind is real evidence and not documentary evidence and, therefore, in the absence of evidence to the contrary, such a computer will be presu-med to have been order at the relevant time. The evidence of such a computer which recorded the telephone calls made by the person accused of drug smuggling from his hotel room was held to be relevant. [*R v. Spiby*, (1990) 91 Cr App R 186 A]. See also decision of Singapore High Court in [*Public Prosecutor v. Ang Soon Huat*, (1991) 1 MLJ 1].

**—Tape Record.**—Tape records of speeches are documents which stand on no different footing than photographs. Conditions of their admissibility stated [*Ziyauddin v. Brijmohan*, A 1975 SC 1788]. Regarding the evidence of a telephonic conversation which was recorded in a tape recorder, the party who produces such evidence must prove by competent witness the time, place and accuracy of the said tape-recordings. [*D.R. Punjab Montogomery Transport Co. v. Raghuvanshi (P) Ltd.*, A 1983 Cal 343, 350. Tape recordings [*Grant v. Sourth Western and County &c*, 1974, 2 All ER 465], and cinematograph films [*Senion v. Holdsworth*, 1975, 2 All ER 1009] are documents.

**Electronic Diary.**—The essence of a document is that it contains recorded information of some sort. It does not matter if the information has to be processed in some way such as translation, decoding or electronic retrieval. Electronic security mechanisms are no different to the lock on a locked diary, and do not mean that the latter is deprived of its status as a 'document'. The electronic diary clearly qualifies as a 'document' [*Rollo v. HM Advocate*, 1997 SLT 958 (High Court of Justiciary)].

**"Evidence"**, BENTHAM defines evidence as "any matter of fact, the effect, tendency or design of which when presented to the mind, is to produce in the mind a persuasion concerning the existence of some other matter of fact—a persuasion either affirmative or disaffirmative of its existence. Of the two facts so connected, the latter may be distinguished as the principal fact, and the former as the evidentiary fact.".

This definition is adopted by BEST:—"The word evidence signifies in its original sense, the state of being evident, *i.e.*, plain, apparent or notorious. But by an almost

peculiar inflection of our language it is applied to that which tends to render evidence or generate proof. Evidence, thus understood, has been well defined as, any matter of fact, the effect, tendency or design of which is, to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. The fact sought to be proved is termed *the principal fact*; the fact which tends to establish it, *the evidentiary fact*" [Best s 11].

TAYLOR uses the word 'evidence' to mean "all the legal means exclusive of mere argument which tend to prove or disprove any fact the truth of which is submitted to judicial investigation" [Tay s 1].

THAYER defines evidence as "Any matter of fact which is furnished to a legal tribunal otherwise than by reasoning, or a reference to what is noticed without proof, as the basis of an inference to some other matter of fact".

According to WIGMORE the term 'Evidence' represents: "Any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law, or of logic, on which the determination of the tribunal is to be asked" [Wig. s 1].

PHIPSON says: "Evidence means the testimony whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute".

A strictly scientific and logical definition of the term 'evidence' is hardly possible by exclusion of 'facts'. As pointed out above, Stephen has restricted the term to (*1*) statements of witnesses (oral evidence) and (*2*) documents (documentary evidence) and kept 'relevant facts' apart as things to be proved by 'evidence'. As to whether 'facts' can be excluded as evidence, PHIPSON remarks: "At the present day, however, the question can hardly be considered an open one, for the whole practice of the courts proceeds on the assumption that facts are 'evidence' both actually and technically. Thus, to take only one of innumerable instances, an action for breach of promise, the fact that the defendent was silent on a certain occasion has been held to be statutory 'evidence' corroborative of his promise to marry (*Bessela v. Stern*, 2 CPD 266 CA), though it would not fall within either Stephen's or Gulson's definition " [Phip 6th Ed, p 2].

**Judicial Evidence.**—*Judicial evidence* may be defined as evidence received by courts of justice in proof or disproof of *facts*, the existence of which comes in question before them. Judicial evidence is a species of the genus "evidence" and is for the most part nothing more than natural evidence restrained or modified by rules of positive law [Best on Ev ss 33, 34]. "Evidence in relation to law, includes all legal means, exclusive of mere arguments, which tend to prove or disprove any fact, the truth of which is submitted to judicial investigation. This term and the word *proof* are often used as synonyms; but the latter is applied by accurate logicians, rather to the effect of evidence, than to evidence itself" [Tay 11th Ed, p 1]. "A law of evidence properly construed would be nothing less than an application of the practical experience acquired in courts of law to the problem of enquiring into the truth as to controverted questions of the fact". (Speech in Council of Hon'ble Mr. Stephen).

**—"Evidence" as Meant in the Act.**—The fundamental rules of English law of evidence are—

(*1*) Evidence must be confined to the matters in issue.

(*2*) Hearsay evidence is not to be admitted.

(*3*) In all cases the best evidence must be given.

STEPHEN says: "Each of these rules is very loosely expressed. The word 'evidence' which is the leading term of each, is undefined and ambiguous. It some-times means the words uttered and the things exhibited by witnesses before a court of justice. At other times it means the facts proved to exist by those words or things, and regarded as the ground work of inference as to other facts not so proved. Again it is sometimes used as meaning to assert that a particular fact is relevant to the matter under enquiry" [Steph Intro., pp 3, 4].

In the Evidence Act the meaning is restricted to the first of these three senses. Stephen excludes facts as evidence and confines the term 'evidence' to (*1*) Statements permitted by court to be made by witness in relation to matters of fact under enquiry, *i.e.*, oral evidence; and (2) Documents produced for the inspection of the court, *i.e.*, documentary evidence. Thus used, the term 'evidence' in the Act signifies only the *instruments* by means of which relevant facts are brought before the court, such as witnesses and documents, a thing such as struggle in the case of a murder is not evidence in the sense in which the term is used in the Act, but a 'relevant fact' to be proved by 'evidence'. *i.e.*, the oral testimony of those who saw it [Nort p 95; *Gobarya v. R*, A 1930 N 242, 250 FB]. 'Evidence' as used in the Act is therefore the *instrument* by which the court, is convinced of the truth or otherwise of the matter under enquiry, *i.e.*, the actual words of witnesses, or documents produced and not the facts which the court considers to be proved by those words and documents [See Steph. Intro, p 14].

The best evidence rule does not preclude consideration by the Court of any inferior evidence produced by the parties. Evidence other than the best evidence which is admissible under the Act is bound to be considered by the Court [*Hardayan v. Gangadhar*, A 1963 C 500].

**—Divisions of Evidence and "Evidence" in the Act. [Direct and Indirect].**—"There are several divisions of evidence which, although in some degree arbitrary, it will be found useful to bear in mind. In the first place, then, evidence is either *direct or indirect* according as the principal fact follows from the evidentiary—the *factum probandum* from the *factum probans*—immediately or by inference. In jurisprudence, however, direct evidence is commonly used in a secondary sense, *viz*, as limited to cases where the principal fact, or *factum probandum*, is attested directly by witnesses, things or documents.

....."*Indirect evidence* known in forensic procedure by the name of *circumstantial evidence*, is either conclusive or presumptive: *conclusive*, where the connection between the principal and evidentiary facts—the *factum probandum*, and the *factum probans*—is a necessary consequence of the laws of Nature: *presumptive*, where it only rests on a greater or less degree of probability".

*Real and Personal.*—"Again evidence is either *real or personal.* By *real* evidence is meant evidence of which, any object belonging to the class of *things*, is the source, *person* also being included, in respect of such properties as belong to them in common with things. This sort of evidence may be either *immediate*, where the thing comes under the cognizance of our senses : or *reported*, where its existence is related to us by others. *Personal* evidence is that which is afforded by a human agent, either in the way of discourse or by voluntary signs. Evidence supplied by observation of involuntary changes of countenance and deportment comes under the head of *real* evidence."

**—Original and Unoriginal or Hearsay**—'The next division of evidence is that into *original or unoriginal*. The *original* is that which a witness reports himself to have seen or heard through the medium of his own senses. *Unoriginal*, also called derivative, transmitted, secondhand or hearsay, is that which a witness is merely reporting not what he himself saw or heard, not what has come under the immediate observation of his own bodily senses, but what he has learnt respecting the fact through the medium of a third person" [Best, 11th Ed, s 29]. The ordinary idea of *hearsay* to a lay mind is that which the term conveys—something that is heard from a third party by the witness before the court. This is of course one, if not the most common form of *hearsay*, but the term includes also writings as well as verbal statements—in fact all statements made behind the back of the party to be affected by them. Thus a letter which *A* writes to *B* concerning *C*, or his affairs, is excluded as having any effect on *C*, just the same as if the statement had been verbal" [Norton, Intro, p. 15]. As to 'hearsay' see s 60, *post*, : "*Meaning of Hearsay*".

There terms are not to be found in the Act, but are often met with in English and American text-books, and it is helpful to know their meaning. *Direct evidence* as the term indicates is the statement of a person who has himself seen or heard a thing or participated in it. It is the testimony given by a person as to what he has himself perceived by his own senses or done in regard to the fact under investigations. The actual production of a thing for purpose of proof is also direct evidence. *Indirect or circumstantial evidence* (also called inferential or presumptive evidence) means other facts from which another fact is inferred. But although a circumstantial evidence does not go to prove directly the fact in issue, it is equally direct. In other words circumstantial evidence has also to be proved by direct evidence of the circumstances [see notes to s 60 *post*. As to circumstantial evidence, see *post* separate heading]. By *real evidence* is meant the production of material things other than documents for the inspection of the court (*cf* the proviso to s 60). The term 'real evidence' is capable of being interpreted in different senses and is ambiguous. Gulson distinguishes between the facts and evidence and defines real evidence as "the evidence of immediate perception exercised upon the fact itself". According to him *perception* and not the facts perceived is the test of real evidence. He thus considers documents as real evidence because they are the subject of immediate perception by the court. Wigmore rejects the term 'real evidence' as inappropriate and substitutes 'Autoptic Preference' explaining that "a fact is evidence autoptically when it is offered for direct perception by the senses of the tribunal". It is according to him a preferable term as it "avoids the fallacy of attributing an evidential quality to that which is in fact nothing more or less than the thing itself".

**—"Evidence" as Used in the Act.**—The above classifications of 'Evidence' have been done away with in the Act in order to simplify matters and 'evidence' has been reduced to two heads : (*1*) *Oral evidence*; (2) *Documentary evidence*. In the draft report of the Select Committee, real evidence was introduced under a third head as *material evidence*, but it was omitted in the second report of the Select Committee. The reason for the omission as stated by Stephen is that though a third class might be formed of things produced in court, not being documents, such as the instruments with which a crime was committed or the property to which damage has been done, this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former; but the condition of material things other than documents is usually proved by oral evidence, so that there is no occasion to distinguish between oral and material evidence (Steph Intro, pp 14, 15). Under s 60 if oral evidence refers to the existence or condition of any material thing,

the court may require its production (*Cf* Or 18, r 18, C P Code). Real evidence, as described by Bentham may be either *immediate or reported*. It is *immediate* where the thing itself is present to the senses of the tribunal, *i.e.*, here the judge is the percipient witness. It is *reported* where its existence or condition is testified to before the judge by a person who has perceived it with his senses. In this case the person testifying is the percipient witness, but the existence of the thing is reported by him to the judge and so it comes under 'oral evidence' in s 3. The topic of real or material evidence has therefore been excluded from the Act, and 'evidence' has been made to include (*1*) oral evidence and (*2*) documentary evidence. The demeanour of witnesses, local investigation by judge (Or 18, r 18; Or 26, r 9), inspection or view by jury, &c. are real evidence.

It is necessary to know a few other terms regarding evidence. "By *competent evidence* is meant that which the very nature of the thing to be proved requires, as the fit and appropriate *proof* in the particular case, such as the production of a writing, where its contents are the subject of inquiry. By *satisfactory evidence*, which is sometimes called sufficient evidence is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt" [Greenleaf, s 2]. *Cumulative evidence* is additional evidence of the same kind to the same point [Burr Jones, s 8(*7*)]. *Corroborative evidence* is additional evidence of a different character, to the same point [California C P Code s 1839; see s 157 Evidence Act]. *Prima facie evidence* is evidence, which standing alone unexplained, will maintain the proposition and warrant the conclusion to support which it was introduced [*S. v. Lawlor*, 28 Minn 216]. *Indispensable evidence* is evidence without which a particular fact cannot be proved [California C P Code, s 1836]. As to *conclusive evidence*, see s 4; *Primary and Secondary evidence*, ss 62, 63; *Hearsay evidence*, s 60 *post*.

**—Definition of the Term "Evidence" is Incomplete.**—The meaning of the word 'evidence' as given in the Act is not complete. There are other matters which are also treated as 'evidence'. Thus the result of a local inquiry by a presiding officer does not come under the definition of 'evidence', but the definition has to be read with the word "proved" which comes immediately after, when determining what is 'evidence' within the Act [*Joy Coomar v. Bundhoo*, 9 C 363; *Dwarka v. Prosunno*, I CWN 682; *Aliar v. Jhingur*, 16 CWN 426]. Under s 3 a fact is said to be "proved" when, after considering the *matters before it*, the court believes it to exist. All relevant facts brought for purpose of proof other than oral testimony and documentary evidence, *i.e.*, the matters before the court, also come within the term 'evidence' as used in the Act [See next heading and *post*, "*Matters before it*"]. It seems to follow therefore that if a relevant fact is proved and the law expressly authorises its being taken into consideration, that is, considered for a certain purpose or against persons, in a certain situation, the fact in question is 'evidence' for that purpose, or against such persons, although the result has not been expressed in these words by the Legislature; and being evidence it must be used in the same way as everything else that is 'evidence' [*per* JACKSON J. in *R. v. Ashutosh*, 4 C 483, 492]. Meaning of 'evidence'—s 207A (6) Cr P Code, 1898 and s 3 Evidence Act [See *Ramnarayan v. S.* A 1964 SC 949]. S 207A (*6*) omitted in 1973 Act.

The depositions of witnesses and documents which only are included in the term 'evidence' as defined by the section are two principal means by which the material upon which the judge has to adjudicate are brought before him. The examination of witness is generally indispensable and by means of it all facts except the contents of document may be proved (s. 59). For the proof of a document as a statement made by the person by whom it purports or is alleged to have made, oral evidence is required

(ss 67-73). Documents as are produced and as are proved by the witnesses can only be regarded as 'evidence' [*Anupam Chakraborty v. State of Assam*, 1984 Cri LJ 733, 735 (Gauhati)].

**—Foundations of Evidence.**—The definition of the word 'Evidence' does not cover everything that the court has before it in arriving at a decision. Besides depositions taken in court and documents which come under the head of evidence, the Judge may have other matters on which to found his conclusions: *(1) Material objects* may be produced in court and so by s 60 it is provided that if oral evidence refers to the existence or condition of a material thing, other than a document, the court may require the production of it. *(2) The demeanour* and the appearance of the witnesses are facts which may properly be taken into account by the Judge. (See s 280 Cr P Code and Or 18, r 12 CP Code). *(3) Certain notorious facts* as are provided by ss 56 and 57 do not require proof. The court is said to take judicial notice of them. *(4)* When *admissions* are duly made in court by a party or his advocate, the fact is taken to be proved although there may be no statement made by a witness, and no writing such as is required by s 58. *(5) Local inspection* by the Judge (Or 18, r 18) or in criminal cases by the magistrate or by the jury or assessors, may supply material for a decision. *(6)* In criminal case *answers given by the accused* to questions put by the magistrate or judge under s 313 Cr P Code, may be used as evidence though in strictness, they are not evidence, not being made by a witness. They ought not to be used to fill up gaps in the evidence for the prosecution [*Basanta v. R*, 26 C 49]. (7) Under s 315*(1)* Cr P Code an accused is a competent witness. *(8)* A *confession* made by one prisoner may under s 30 be taken into consideration against another prisoner tried jointly with him for the same offence.

In addition to the deposition of witnesses and documents all these materials are matters which according to the last paragraph but two of s 3, the court has to consider in arriving at a conclusion.

**—Affidavit.**—Where contents of the affidavits were not assailed at the time when they were tendered in evidence and the defence counsel declined to cross-examine the deponent who were present in the court, the affidavits must be deemed to have been admitted *Krishan Lal v. State of Haryana*, 1996 Cri LJ 1401, 1403 (P & H); see also *Gopi Ram v. State of Punjab*, (1994) 2 Recent CR 355; *Raval Singh v. State*, 1988 (1) PLR 369; *State v. Nachhattaro*, (1994) 2 Recent CR 442; *Gurcharan v. State*, (1981) CLR 578; *Amarjit v. State*, 1981 CLR 608; *State v. Daulat Ram*, A 1980 SC 1314. Affidavit filed by the party suo motu and not under the direction from the court cannot be termed as evidence [*Delhi Lotteries v. Rajesh Aggarwal*, A 1998 Delhi 332].

**—"Evidence" Not Confined to Proof Only.**—The term 'evidence' is not necessarily confined to proof before judicial tribunal, but applies also to information acquired by any person, who undertakes an enquiry on any matter in question [*Srinivasa v. R*, 4 M 393, 395]. The word "evidence" includes statement of a witness which has not been tested on cross-examination [*Sivrani v. Suryanarain*, 1994 Cri LJ 2026, 2034 (All)]. Statements recorded under s. 161 Cr. P. C., statements recorded at the inquest, and confessional statements are not evidence under sec 3 [*R.C. Kumar v. State of Andhra Pradesh*, 1991 Cri LJ 887, 891 (Andh Pra); 1989 Cri LJ 600 (Raj) (FB) and 1985 Cri LJ 1238 (Pat) (FB) **dissented** from; *E.P. Narayanan Nambiar v. State of Kerala*, 1989 Cri LJ NOC 8 : 1987 Ker LJ 699 (Ker); *Smt. Paru Mrugesh Jaikrishna v. Collector of Customs, Preventive Dept., Bombay*, 1988 Cri LJ 963, 967 : (1988) 1 Bom LR 428 (Bom)]. Evidence should not be confused with proof. As soon as a document, an invoice in this case is produced for the inspection of the Court it becomes evidence, it could be acted upon, when it is proved, when it is found acceptable and then it is to be considered in conjunction with other items of

evidence. [*M/s. Parrys Confectionary Ltd. v. Food Inspector, Ulunderpet*, 1989 Cri LJ 642, 646 : (1989) 1 Crimes 88]. If a relevant fact is proved and the law expressly authorises, its being taken into consideration; that is, considered for a certain purpose or against persons in a certain situation (*e.g.* under s. 30), the fact is 'evidence' for that purpose or against such persons, notwithstanding that the Act has not so called it (*R. v. Ashutosh*, 4 C 483, 492; refd. to in *R. v. Dada Ana*, 15 B 452, 459]. As to whether confession of a fellow prisoner tried jointly for the same offence is 'evidence' within s 3, see *post*, s 30 : "*May take into consideration such confession*". A statement, made on affirmation before a magistrate, by an accused person during police investigation, is evidence within s 3 [*R. v. Alagu*, 16 M 421; but see *R. v. Bharma*, 11 B 702]. Paper cutting in respect of prevailing prices notified in the local newspapers is not evidence [*Ratan Kumar Tandon v. State of U P*, A 1996 SC 2710, 2712]. In *S.G. Sohatre v. State of Maharashtra*, 1997 Cri LJ 454, 460 (Bom) (DB), a Division Bench of Bombay High Court held that the history of assault contained in the medical papers is not substantive evidence and can only be used to contradict the person who has given it.

**Proof beyond reasonable doubt.**—In a criminal trial the degree of proof is stricter than what is required in a civil proceedings. In a criminal trial however intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubts and the requirement of proof cannot lie in the realm of surmises and conjectures. Although, the court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials placed on record. LORD DENNING in *Bater v. Bater*, (1950) 2 All ER 458, 459 : 66 TLR (Pt. 2) 589 has observed that the doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject-matter. State of *W B v. Orilal Jaiswal*, A 1994 SC 1418, 1429: 1994 Cri LJ 2104.

In *Gurbachan Singh v. Satpal Singh*, A 1990 SC 209 the Supreme Court laid down that the conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law. *State of W B v. Orilal Jaiswal*, A 1994 SC 1418, 1429 : 1994 Cri LJ 2104.

Criminal courts should not expect a set reaction on the part of eye-witnesses on seeing an incident like murder. *State of Karnataka v. R Yarappa Reddy*, AIR 2000 SC 185.

**Conviction Requires Proof of *Corpus Delicti*.**—*Corpus delicti* has no reference to corpses. It means that before seeking to prove that the accused is the author of the crime, it must be established that the crime charged has been committed. In theft that the property has been stolen; in murder that somebody has been killed. The strongest proof of *corpus delicti* in murder is the body of the victim or a vital part of the body by which he could be identified. In the absence of any such evidence direct evidence may

also come from a person who saw the killing, or the murderer may confess to the crime. SIR MATHEW HALE said: "I would never convict a person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead," Cases old and recent have established that circumstances may be sufficiently strong to prove *corpus delicti* in murder though the body has never been found. HALE'S statement must be interpreted as requiring either the body or satisfactory proof of death in its absence and such proof includes circumstantial evidence alone. Absolute certainty is seldom reached in human affairs. The fact of death should be proved by such circumstances as render the commission of the crime certain and leave no ground for reasonable doubt; the circumstantial evidence should be so cogent and compelling that upon no rational hypothesis other than murder can the facts be accounted for (see *R. v. Onufrejezyk*, 1955 1 All ER 247 : 1955, 1 QB 388 and case cited below).

The old rule enunciated by Sir Mathew Hale and Lord Coke is to the effect that nothing short of direct evidence is sufficient to establish '*corpus delicti*'. Sir Mathew Hale held the view "I will never convict any person of murder or manslaughter unless the facts were proved to be done or at least the body found." Lord Coke warns the danger of proceeding on 'bare presumptions'. As against this rule of strictness Sir John Stephen said: "If the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was so committed is as safe as any other inference." Straight, J. in *Empress of India v. Bhagirath*, (1881) 1 LR 3 All 383 departed from the rule of strictness and observed that such a rule once admitted would in some instances render the administration of justice impossible. Therefore the Court said:

> ".....it is not imperatively essential, in order to justify a conviction for murder, that the '*corpus delicti*' should be forthcoming."

The law as to the proof of "*corpus delicti*" has been laid down by the Supreme Court in *Sevaka Perumal v. State of Tamil Nadu*, A 1991 SC 1463 : (1991 Cri LJ 1845) thus:

> "In a trial for murder it is not absolute necessity or an essential ingredient to establish *corpus delicti*. The fact of death of the deceased must be established like any other fact. *Corpus delicti* in some cases may not be possible to be traced or recovered."

In the absence of direct evidence the court can rely on inferential evidence *Raveendran v. State of Kerala*, 1994 Cri LJ 3562, 3565 (Ker). Offence of murder can be established even in the absence of seizure or recovery of dead body. *S C Bahri v. State of Bihar*, A 1994 SC 2420: 1994 Cri LJ 3271.

The strongest possible evidence should be required as to the fact of the murder, if the dead body were not forthcoming [*Adu Shikdar v. R*, 11 C 635, 642]. The *corpus delicti* not being established, no conviction can be sustained either for culpable homicide, or for intentionally omitting to give information of an offence which has not been proved to have been committed [*R. v. Ram Ruchea*, 4 WR Cr 20, 30; see also *Bandhu v. R*, 81 IC 436; *R. v. Ahmed Ali*, 11 WR Cr 25]. The finding of the body is not absolutely essential when the prisoners confess [*R. v. Petta Gazi*, 4 W R Cr 19] or where the circumstances are such as it is impossible to suppose that the man is still alive [*R. v. Poorusoolah*, 7 WR Cr 14; *R. v. Onufrejezyk, sup; Arun v. S*, A 1962 C 504, see also *R. v. Bhagirath*, 3 A 383; *Rajkumar v. R*, A 1928 P 473; *Ram Ch v. S.*, A 1957 SC 381 : 1957 Cri LJ 599], or where death is proved by reliable evidence [*In re Maya Basuva*, A 1950 M 452]. As to the evidence of *corpus delicti* on a charge of murder, see *R. v. Davidson*, 25 Cr App R 21 and the observations of SIR HIDE VILLERS, CJ, at p 865 in Archbold Cr Pleadings, 31st ed. In *Ram Ch v. S., sup* the

Supreme Court was reluctant to come to the conclusion of murder on the confession alone of the accused. Where bodies were unrecognisable due to decomposition and the post-mortem could not determine the cause of death the Supreme Court refused to hold that the deaths were homicidal despite alleged extra-judicial confession [*S. v. Bhajan*, A 1975 SC 258]. Even if the *corpus delicti* is not found or traced, if there are compelling circumstances pointing to the accused as the murderer of the missing person, the accused can be convicted [*Kanta Chhagan v. The State of Gujarat*, 1982 Cri LJ 110, 117 : 1982 Guj LM 240 (Guj)].

**—Who can give evidence in court.**—It may be for filing the plaint or signing the plaint or signing the written statement an authorization may be necessary but to give evidence on oath, anybody who is acquainted with the facts of the case can come and give evidence in the court. No power of attorney or authorization is necessary for any witness to give evidence in court. *Central Bank of India v. Tarseema Compress Wood Mfg. Co.*, A 1997 Bom 225.

**"Proved".**—"The word 'proof' seems properly to mean anything which serves either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition; and the proofs of matters of fact in general are our senses, the testimony of witnesses, documents and the like" [Best, s 10]. Absolute certainty amounting to demonstration is seldom to be had in the affairs of life, and we are frequently obliged to act on degrees of probability which fall very short of it indeed. Practical good sense and prudence consist mainly in judging a right whether in each particular case, the degree of probability is so high as to justify one in regarding it as certainty and acting accordingly. A merchant receives intelligence that some firm is insolvent or that the rate of exchange will vary or that some change in the tariff will be introduced; a General gets some information about the movements or resources of the enemy; the success of either will depend on his judging soundly and well when he ought to act on the assumption that what he hears is true, or when prudence bids him assume it to be false. If he waited for absolute certainty, he would never act at all. In like manner all that a judge need look for is such a high degree of probability that a prudent man in any other transaction where the consequences of mistake were equally important would act on the assumption that the thing was true. The section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believes it to exist," and secondly, that in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence [Cunn p 11]. [*Vijayee Singh v. State of U.P.*, 1990 Cri LJ 1510, 1523 (SC); *J.P. Agarwala v. State of Orissa*, 1990 Cri L J 1193 (Orissa)]. Suspicion is no substitute for proof. In criminal law the prosecution has to prove the guilt beyond reasonable doubt. When offence alleged is murder, which visits the perpetrator of the crime with the minimum sentence of imprisonment for life, court would be justified in demanding full satisfaction before lethality of section 302 IPC can be used against anyone. [*Jagga Singh v. State of Punjab*, A 1995 SC 135, 137]. To drawn an inference that a fact in dispute has been established, there must exist, on record, some direct material facts or circumstances from which such an inference could be drawn [*R Puthunainar Alhithan v. P H Pandian*, A 1996 SC 1599, 1601].

**—Standard of proof.**—The Evidence Act applies the same standard of proof in all civil cases. It makes no difference between cases in which charges of a criminal character are made and cases in which such charges are not made. The court will, while striking the balance of probability, keep in mind the presumption of honesty or innocence or the nature of the crime charged. It is wrong to insist that such charges must be proved clearly and beyond reasonable doubt [*Gulabchand v. Kudilal*, A 1966

SC 1734]. The Act while adopting the requirements of the prudent man as an appropriate concrete standard by which to measure proof, is at the same time expressed in terms which allow full effect to be given to circumstances of condition of probability or improbability, so that when forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight, as a circumstance of improbability, though the standard of proof to the exclusion of all removable doubt required in a criminal case may not be applicable [*Prasannamayi v. Baikuntha*, A 1922 C 260: 49 C 132; *Gopessur v. Bissessur*, 39 C 245: 16 CWN 265]. The standard adopted is the requirements of the prudent man (which vary with each case). The conscience of the court can never be bound by any rule, but that which coming from itself dictates a conscientious and prudent exercise of its judgment [*Weston v. Peary*, 40 C 898, 916]. Absolute certainty is not required [*Ahibaran v. S*, A 1953 A 493]. It cannot be said that high degree of probability always satisfies the requirement of the definition of proof under s 3 [*Debendra v. Jhumur*, 43 CLJ 387 : A 1926 C 883]. The probative value of the proved circumstances must be considered with due regard to ordinary human conduct and on a pragmatic and realistic approach [*Shantosh v. State of Kerala*, 1991 Cri LJ 570, 582 (Ker)]. Before a witness is disbelieved on a fact it must be based on clear proved evidence that he has deposed a fact which is contrary to either admitted fact or proved fact which is in conflict with the testimony given by him. Merely casting aspersion on the possibility of a fact is not sufficient to disbelieve his testimony specially where deposition is made of a fact which is of a period more than 21 years back [*Smt. Manorama Srivastava v. Smt. Saroj Srivastava*, A 1989 All 17, 30].

In the definition of 'proof' no distinction is drawn between circumstantial and other evidence. In every case the court has to consider the whole matter before it and proceed with prudence before acting upon probabilities [*Miran v. R*, A 1931 L 529]. See the definition of 'proof' in *Thakar v. R*, 32 PR 1916 : 38 IC 759. In considering whether a fact is proved or not, a court must not expect evidence which cannot be produced or which it is unnecessary to produce [*Dukharam v. C.C. Corpn*, A 1940 O 35]. Where a court requires a standard of proof higher than that laid down by the Act it is an error of law or procedure [*Prakasarao v. Ramamurti*, 1937, MWN 188]. It is not open to the court or a tribunal determining a matter judicially to insist on a particular mode of proving that matter and to exclude all other modes of proof unless there is a law requiring it do so [*A. N. Saxena v. Dy. Regr*, 1989 ALJ 652]. The meaning of 'proof' in s 3 is not affected by the incidence of burden of proof [*Md Yunus v. R*, 50 C 318]. Strictly speaking proof means merely the effect of evidence [*Bhairon v. Laxmi*, A 1924 N 385] "The proper legal effect of proved facts is a question of law" [*Nafar v. Shukur*, 46 C 189, 195: 45 IA 183: *Dhanna Mal v. Motisagar*, 54 IA 178 : A 1927 PC 102; *Kamaj v. Nandalal*, A 1929 C 37].

**Probative value.**—The probative value of a piece of evidence means the weight to be given to it. This is something which has to be judged in accordance with the facts and circumstances of each case. *Ram Bihari Yadav v. State of Bihar*, AIR 1998 SC 1850 : (1998) 4 SCC 517.

**"Proved", "disproved", "not proved".**—The definitions of the words "proved", "disproved" and "not proved" simply describe the degree of certainty to be arrived at before a fact can be said to be proved, disproved or not proved. The definitions are mere embodiment of a sound rule of common sense. Under the Evidence Act 'a fact is said to be proved when the court considers its existence so probable on the available evidence that a prudent man ought to act upon the supposition that the fact exists [*Antoniswamy v. Anna*, A 1970 M 91 SB]. The concepts of 'proved', 'disproved' and 'not proved' defined in alluringly simple terms in the Act, compress a great deal of judicial wisdom with history and processes of evolution and development behind them which have not yet ended [*Rishikesh v. S*, A 1970 A 51, 82 FB—BEG J]. The Act has

drawn a clear distinction between the words "disproved" and "not proved". A fact is said to be "disproved" when the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought to act upon the supposition that is does not exist. On the other hand a fact is said to be "not proved" when it is neither proved nor disproved [*Shrikishan v. Bhanwarlal*, A 1974 Raj 96]. Merely because a person fails to prove his case, it cannot be said that his case has been disproved to equate the cases which are not proved with the cases which have been disproved in such an error of law which can cause disaster in the administration of justice particularly in those cases when the inability of citizen to prove his case is used as a circumstance for drawing unwarranted inferences against him. [*Amar Singh v. Doongar Singh*, 1997 AIHC 2065, 2067 (Raj)]. Making no allegation is something different as every fact cannot be known to the prosecution but making a lot of allegation and inability to prove would give rise to a situation that the prosecution is not coming up with clean hands. It would not be a mere case of not proved but a situation disproved. [*Harish Chandra v. State of U.P.*, 1991 Cri LJ 2815, 2828 (All)].

—***Prima facie* Evidence.**—Only means that there is ground for proceeding; it is not the same thing as 'proof' which comes later when the court has to find whether the accused is guilty. Because a magistrate has found a *prima facie* case to issue process, it is a fallacy to say that he believes the case to the true in the sense that it is proved [*Sher v. Jitendra*, 36 CWN 16]. *Prima facie* evidence is evidence which, if accepted, appears to be suffcient to establish a fact unless rebutted by acceptable evidence to the contrary. It is not conclusive.

**—Legal Proof and Suspicion.**—In dealing with a case depending largely on circumstantial evidence, the rules especially applicable must be borne in mind. There is always the danger in a case like the present that conjecture or suspicion may take the place of legal proof, and therefore it is right to recall the warning addressed by BARON ALDERSON to the jury in *R. v. Hodge*, 1838, 2 Lewis CC 227, where he said "the mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete" [*per* JENKINS, CJ, in *Barindra v. R*, 14 CWN 1114: 37 C 467; also **quoted** in *Palvinder v. S*, A 1952 SC 354 : 1953 SCR 94 and in *Hanumant v. S*, A 1952 SC 343 : 1952 SCR 1091]. In cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof [*Jaharlal Das v. State of Orissa*, A 1991 SC 1388, 1391]. When one is at the outset strongly impressed with the truth of a case as a whole, it is obviously all the more necessary to be on one's guard against approaching with prejudice or unconscious bias the respective cases of the individuals concerned and one must be very careful not to allow conjecture or suspicion to take the place of legal proof—*per* CARNDUFF, J in *ibid.* The suspicion which by itself would be ground for the court not pronouncing in favour of an alleged will, must be one inherent in the nature of the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction [*Gopessur v. Bissessur*, 16 CWN 265].

Suspicion though a ground for scrutiny of evidence cannot be made the foundation of a judicial decision [*Md v. Mandir*, 39 IA 184: 34 A 511: 17 CWN 49]. Conjecture is not a substitute for legal proof in a court of law [*Atar v. Thakur*, 35 IA 206: 35 C 1039 : 12 CWN 1049]. Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony [*Sreeman v. Gopal*, 11 MIA 28 *post*; *Krishna*

*v. Nagendra*, A 1921 C 435 : 66 IC 694; *Jasoda v. Balaram*, 35 CLJ 589: A 1922 C 488; *Mina Kumari v. Bijoy*, 44 IA 72 : A 1916 PC 238 : 44 C 662 : 21 CWN 585; *Luchiram v. Motilal*, 34 CLJ 107 : A 1922 C 267; *Bepin v. Jogeswar*, 26 CWN 36; *Maniklal v. Bijoy*, A 1921 PC 69 : 62 IC 356 : 25 CWN 409; *Motibai v. Jamsetjee*, A 1924 PC 28 : 29 CWN 45 : 80 IC 777; *Abdul Latifft v. Abdul Huq*, 28 CWN 62; *Pramoda v. Kalimohan*, 27 CWN 305]. Suspicion however strong cannot take the place of proof [*Sarwan Singh v. S*, A 1957 SC 637 : 1957 Pu 1602; *Gian Mahtani v. S*, A 1971 SC 1898; *S. v. Bhajan*, A 1975 SC 258; *S. v. Madhukar*, A 1967 B 61; *S. v. Gulzarilal*, A 1979 SC 1382; *Smt. Basanti v. State of H.P.*, A 1987 SC 1572, 1574: 1987 Cri LJ 1869; *Padala Veera Reddy v. State of Andhra Pradesh*, A 1990 SC 79, 84: 1990 Cri LJ 605 (SC); *Arjun Charan Jena v. State*, 1981 Cri LJ NOC 188 : (1981) 51 Cut LT 345]. Where the proof at best leads to strong suspicion, the benefit of doubt should be given [*In re Venkatasubba*, 54 M 931].

**—Suspicion or Supposition is not Evidence.**—A judge is not justified in deciding a case upon his own suspicions or upon mere suppositions after discarding the evidence produced by the parties or when there is no evidence to support a finding. In *Sreeman v. Gopal*, 7 WR 10 PC : 11 MIA 28 it has been observed: — "Undoubtedly there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made out by the applicant; but in matters of this description it is essential to take care that the decision of the court rests, not upon suspicion, but upon legal grounds established by legal testimony". [See also *Faez Bux v. Fakiruddin*, 9 BLR 456 : 14 MIA 234; *Brijbhusan v. R*, A 1946 PC 38: 73 IA 1; *Kali Ch v. Shib Ch*, 6 BLR 501 : 15 WR 12 PC and *Kuar Balwant v. Kuar Dowlut*, 8 A 315]. A finding cannot be made without evidence and upon a mere supposition [*Macnaghten v. Mahabir*, 10 IA 25, 30: 9 C 656, 662]. Mere conjecture or surmises on picking up some sentences from here on there would not be enough to hold the accused guilty of the offence. *Lakhwinder Singh v. State of Punjab*, 1998 Cri LJ 468 (P & H).

**—"Proved", "Legal Proof" and "Moral Conviction".**—Legal proof is neither more nor less than what is indicated by the definition of the word "proved" which is to be found in s. 3. "Given evidence on the record which is admissible, and excluding from consideration any that may have been wrongly admitted, I doubt whether it is possible to draw a distinction between 'legal proof' and 'moral conviction'." [*per* CARNDUFF J, in *Barindra v. R*, 14 CWN 1114, 1178 : 37 C 467]. There is but one rule of evidence applicable to both civil and criminal trials and that is contained in the definition of the terms "proved" and "disproved". The test of whether a fact in issue is proved or disproved is whether a prudent man after considering the matters before him, deemed it proved or not, and the courts can never be bound by any rule but by their judicial discretion [*Weston v. Peary*, 40 C 898 : 18 CWN 185]. Where there is sufficient evidence of a fact, it is no objection to the proof of it that more evidence might have been adduced [*Gopessuar v. Bissessur*, 39 C 245 : 16 CWN 265]. The reasonable course is to read the evidence of all the witnesses as a whole and to find out whether on the material aspect which alone will have an impact on the issue concerned was there corroboration [*Andalammal v. Rajeswari Vadachalam*, A 1985 Mad 321, 337 : (1985) 98 Mad LW 248; *Badhna Kharia v. State of Assam*, 1988 Cri LJ 1412, 1413 (Gauhati) (DB); *Haripada Parvi v. The State*, 1988 Cri LJ NOC 3 : (1988)1 Crimes 772 (Cal); *Kammo v. The State*, (1983)1 Chand LR (Cri) 660 : 1983 Cri LJ 694, 705 (Raj) (DB)]. If a piece of evidence which might reasonably have affected the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention [*Ayya alias Ayub v. State of U.P.*, A 1989 SC 364, 370 :

1989 Cri LJ 991]. The mere non-production of part or the whole of the case properly would not by itself vitiate the conviction of the accused. *Balraj Singh v. The State of Punjab*, 1982 Cri LJ 1374, 1379 : 1982 Cri LJ (Cri) 222 (Punj & Har)]. A judge in appeal held that in all probability the tenant defendant had paid an enhanced rent, but he declined to draw the inference that this rent was paid at the enhanced rate contracted for by the tenant as in his opinion it was absolutely impossible to determine what sum was paid; the finding involves an error of law as the test of proof applied, is one not embodied in s 3 [*Ganes v. Lachmi*, 23 CLJ 209].

When a dealer does not produce any evidence in response to notice under r 33(*1*) of MP General Sales Tax Act, the assessment made by the assessing authority is best judgment assessment and though not admitted by the assessee would be 'proved' within the meaning of the Evidence Act [*Esufali v. STC*, A 1969 MP 134, (*STC v. Kunte Bros*, ILR 1960 MP 14 **relied** on)]. Mere suggestions in cross-examination, however, ingenious are of no evidentiary value unless accepted by the witness or proved by other eivdence [*Gura Singh v. State of Rajasthan*, 1984 Cri LJ 1423, 1427 : 1984 Raj LR 447 (Raj) (DB); *Khimji Kurjibhai v. State of Gujarat*, 1982 Cri LJ NOC 211 : 1982 Guj LH 977 (Guj)].

**—Moral Conviction and Duty of the Judge.**—"The rules" of evidence cannot be departed from because there may be a strong conviction of guilt; for a judge "cannot set himself above the law which he has to administer or make it or mould it to suit the exigencies of a particular occasion" [*per* JENKINS CJ, in *Barindra v. R*, 14 CWN 1114, 1143; *R v. Baijoo*, 25 WR Cr 43 refd. to]. Convictions must be based on sufficient evidence not merely on moral convictions [*R. v. Sorab Roy*, 5 WR Cr 28; *Gunanidhi Sundara v. State of Orissa*, 1984 Cri LJ 1215, 1219 : (1984)1 Crimes 948 (Orissa)]. Judicial belief must be founded on reasonable grounds and must rest upon evidence and reasonable inferences therefrom [*In re Nobodoorga*, 7 CLR 387].

**"Matters Before It" [Local Inspection].**—The expression "matters before it" includes matters which do not fall within the definition of evidence in s 3. Therefore in determining what is evidence other than evidence within the phraseology of the Act, the definition of 'evidence' must be read with that of 'proved'. The result of a local enquiry by a presiding judicial officer although it does not come under clauses (*1*) and (2) of the definition of the word "evidence", falls within the meaning of the word 'proved' which comes immediately after. It would appear, therefore, that the Legislature intentionally refrained from using the word 'evidence' in this definition but used instead, the words *matters before it*. For instance, a fact may be orally admitted in court. The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter which the court before whom the admission was made, would have to take into consideration in order to determine whether the particular fact was proved or not [*Joy Coomar v. Bundhoo*, 9 C 363 : 12 CLR 490; **follld** in *Aliar v Jhingur*, 16 CWN 426; refd to in *Dwarka v. Prosunno*, 1 CWN 682; see also *Moran v. Bhagat*, 33 C 33 : 2 CLJ 100 *n*] (*v ante : "Definition of the term 'evidence' is incomplete"*). When the section speaks of "the matters before it" (the court) it means, of course, the matters properly before it : whence it follows that, if and when irrelevant matter has been admitted in evidence one must be careful—I would here refer to provisions of s 167 of the Evidence Act—to exclude it from consideration and refuse to be in any degree influenced by it [*per* CARNDUFF, J, in *Barindra v. R*, 14 CWN 1114, 1178 *ante*]. A written statement filed by an accused should be given due consideration, but it is not legal evidence within s 3 [*R. v. Tuti*, A 1946 P 373 : 25 P 33].

In deciding a matter of fact, no judge is justified in acting on his own knowledge and belief, or public rumour, without proper proof of it [*Mithan v. Bashir*, 11 MIA 213: 7 WR 27]. See *post*, s. 57 "*Personal knowledge of judge*" and s 167 "*Judge's knowledge of character of witness*".

Inspection is always allowed whenever it helps the court to come to a decision, *eg* inspection of a site where the offence was committed, or the condition of premises, or of goods in passing off or infringement cases &c, &c. The main object is to understand the evidence given. In an action for damages for bite of a dog, the dog was produced so that the jury might judge of its disposition [*Line v. Taylor*, 3 F & F 731].

The Evidence Act gives the court power to adjudge the existence of facts on "matters before it" as well as according as they are deposed to in evidence. There is nothing in the Cr P Code to prevent a magistrate from holding a local investigation for the purpose of elucidating any matter in dispute (see s 310), and in so far as it conforms to the provisions of the law of evidence, it cannot be excluded. He should place on record the results of the local investigation, but it is not a rule of positive law that a note thereof must be made on the spot [*Aliar v. Jhingur*, 39 C 476 : 16 CWN 426 : *Aziz v. Girish*, 68 IC 38]. The memorandum of local inspection should be made without unnecessary delay [*Jasim v. R*, 50 CWN 799 : A 1946 C 537]. The omission to place on the record the memorandum of a local inspection under s 539 B (2) [now s 310(2)] Cr P Code is an illegality vitiating the conviction [*Hriday v. R*, 52 C 148 : A 1924 C 1035; *Rajendra v. R*, 43 CWN 896 : A 1939 C 487; *Badal v. F.*, A 1939 C 304 : 43 CWN 392].

A sketch map prepared by a magistrate during local investigation cannot be used in evidence unless it is proved in the witness-box [*Rajendra v. R*, 43 CWN 896 : A 1939 C 487]. A magistrate can use the result of local inspection simply for the purpose of understanding the evidence adduced before him, not for the purpose of deciding the main issues in the case by becoming a witness himself and denying to the accused the right of cross-examination or a chance of explanation to clear up any possible illusion or misapprehension at the time of local inspection [*Skh Moinuddin v. R*, 2 PTL 455 : 61 IC 794; *Tirkha v. Nanak*, A 1927 A 350; *Badal v. R*, 43 CWN 392; *Laloo v. R*, A 1942 P 152]. It should never be sbstituted for evidence in the case. The party is greatly prejudiced and put to an cross-examining the magistrate. The danger is intensified by the magistrate holding the locl enquiry *ex parate* [*Ram Sahai v. Dwarka*, 61 IC 712 : 1 PLT 569]. Judgment should not be based upon local inspection without giving the parties an opportunity to rebut the magistrate's opinion [*Babbon v. R*, 37 C 430; *Jwala v. R*, A 1928 L 479; *Kader v. R*, A 1928 M 494; *Harendra v. S*, A 1951 P 285]. The object and scope is to understand and appreciate the topography of the land in dispute, but the local inspection cannot take the place of legal evidence [*Ramratan v. Tarak*, 77 IC 493].

As to the powers of civil court to inspect and to issue commission for local investigation see Or 18, r 18 and Or 26, r 9 of the C P Code of 1908. Or 18, r 18 is a new addition in the Code and it runs thus : "The Court may at any stage of a suit inspect any property or thing, concerning which any question may arise". There was no such provision in the C P Code of 1882. Proviso 2 to s 60 of the Evidence Act contains provisions for production and inspection of any material or thing other than a document Or 18, r 18 vests an absolute discretion in the munsif to make an inspection and the sanction of the District Judge is not necessary if he wishes to make an inspection without charges [*Nallabotta v. Chengama*, 26 MLJ 9 : 23 IC 297]. Under Or 18, r 18 read with Or 26, r 9, a judge may make a local inspection in

person at his discretion. The decisions in *Dwarka v. Makhulal*, 52 IC 241 and *Ananata v. Gokul*, 36 IC 344 are based on words omitted from the C P Code of 1908 [see *Sabapathy v. Perumal*, 44 M 640 : 62 IC 790 : A 1921 M 323].

A judgment based on the knowledge gained by the judge during local inspection is illegal. An inspection which a Judge makes should be used by him only to test the accuracy and value of the evidence let in. He should not without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question raised before him [*Ahmed v. Magnesite Syndicate Ld*, 39 M 501 : 29 IC 60; see *Municipal Council v. Velayudha*, A 1931 M 531; *Dwarka v. Makhulal*, A 1919 P 517; *Raj Chandra v. Iswar*, A 1925 C 170]. Where the judge does not make any notes of inspection and bases his judgment solely on impressions formed at the time of inspection, his decision cannot be upheld [*Padmasani v. Sabapathy*, 1939, 2 MLJ 284]. A judge is not entitled to put his own view on inspection in the place of evidence; it is to enable the tribunal to understand the question raised and to follow and apply the evidence [*London G O Co. Ld. v. Lavell*, 1901, 1 Ch 135]. The purpose is to understand the evidence. By "understanding the evidence" is not meant "contradicting a witness" by what the judge himself observed at the local inspection [*Abdul Baqi v. Fakhrul*, A 1937 P 333].

**Identification.**—As to whether identification proceedings are evidence, see s 9, *post*.

**Rules of Evidence in Civil and Criminal Cases and Their Effect [Standard of Proof].** —"It has been solemnly decided that there is no difference between the rules of evidence of civil and criminal courts. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases and in all civilized countries" *per* BEST J, in *R v. Burdett*, 4 B & Ald 95, 122; *per* GROVE J, in *R. v. Mallory*, 15 Cox Cr 460; *per* :LORD READING in *R. v. Christie*, 1914 AC 545, 564; *Weston v. Peary*, 40 C 898, 916]. The rules of admissibility are the same, but certain rules of evidence are applicable to criminal cases only because the relevant issues arise only in such cases, *e.g.*, confessions, dying declarations, character of accused, &c. There are in the Act special provisions relating to civil [*eg*, admissions (ss 18-20); character (ss 53, 54); estoppel (s 115 &c)] and criminal cases [*eg*, confessions (ss 24-30); character (ss 53, 54, &c)]. Although the rules of evidence are in general the same in civil and criminal courts, in English law in a criminal case the judge has a discretion to disallow relevant and admissible evidence if it would operate prejudicially against the accused [see *Harris v. DPP*, 1952 AC 694, 707; *Kuruma v. R*, 1955 AC 197, 204; *R. v. Cook*, 1959, 2 All ER 97; *R v. Flynn*, 1961, 3 All ER 58; *Selvey v. DPP*, 1968, 2 All ER 497 HL]. [For a criticism see *Livesey* 1968 Camb LJ 29]. In view of section 3 of the Evidence Act, absolute standard of proof is never insisted on by the court. But in a criminal trial, the degree of proof is stricter than what is required in a civil proceedings. In a criminal trial, however, intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubts and the requirement of proof cannot lie in the realm of surmises and conjectures. [*Jahed v. State*, 1995 Cri LJ 3451 (Cal)].

The probative effects of evidence in civil and criminal cases are not however always the same and it has been laid down that a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case. BEST says : There is a strong and marked difference as to the *effect* of evidence in civil and criminal proceedings. In the former a mere preponderance of probaility, due regard being had to the burden of proof, is a sufficient basis of decision: but in the latter, especially when the offence charged

amounts to treason or felony, a much higher degree of assurance is required. (BEST, s 95). While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond reasonable doubt [*Mancini v. DPP*, 1942 AC 1, 11; *Woolmington v. DPP*, 1935 AC 462]. For a discussion as to what is reasonable doubt see *H P Admn. v. Omprokash*, A 1972 SC 975, 981. A conviction cannot be sustained even if the prosecution story considered as a whole 'may be true' until it is found that it 'must be true'; but between 'may be true' and 'must be true' true is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence [*Sarwan v. S*, A 1957 SC 637, 645 : 1957 Pu 1602; *Hira v. S*, A 1960 MP 11; *Jaharlal Das v. State of Orissa*, 1991 Cri LJ 1809, 1815 (SC); *Natarajan Narayana Kurup v. The State*, 1982 Cri LJ NOC 69 (Ker)]. If, however, the burden of proving an issue is on the accused, *i.e.*, when the law presumes some matter against the accused "unless the contrary is proved" (*e.g.*, bringing a case within an exception in the Penal Code), it is no higher than on a party to a civil suit [*R. v. Car-Briant*, 1943 KB 607 and cases cited under s 105 *post*].

As to the standard of proof in civil or criminal cases, DENNING LJ, observed: "It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard ..... So also in civil cases ..... there may be degrees of probability" [*Bater v. B*, 1950, 2 All ER 458, 459]. Concurring with this HODSON, LJ, said : "Just as in civil cases the balance of probability may be more readily fitted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others" [*Hornal v. Neuberger P. Ltd*, 1956 3 All ER 970, 977]. The degree of probability depends on the subject matter and in proportion as the offence is grave so ought the proof to be clear [*Blyth v. B*, 1966, I All ER 524 (HL) **approving** DENNING LJ; **folld** in *Narayan v. Sucheta*, A 1975 SC 1534]. In civil actions other than matrimonial causes, the general rule is that an uncontested case may be established by a minimum of proof, and a contested issue may be established by a balance of probabilities [Halsbury, 3rd Ed Vol 15, Para 496].

Unlike criminal cases, in civil cases it cannot be said that the benefit of every reasonable doubt must necessarily go to the defendant [*Venkata v. Venkayya*, A 1943 M 38]. Distinction between civil and criminal proceeding—In a *quasi* criminal proceeding though it is for the prosecution to prove affirmatively the commission of the offence, *prima facie* proof is sufficient to shift the onus to the other side [*In re Narasingamuthu*, A 1949 M 116]. The fact that a party is alleged to have accepted bribe in a civil case does not convert it into a criminal case, and the ordinary rules applicable to civil cases apply. When bribery is to be inferred from circumstantial evidence it is not necessary that the circumstances must exclude any other reasonable possibility [*Gulabchand v. Kudilal*, A 1966 SC 1734 (*Raja Singh v. Chaichoo*, A 1940 P 201 **Overruled**)].

In a country where renunciation is worshipped and the grandeur and wild display of wealth frowned upon, it would be the traversity of truth if persons coming from humble origin and belonging to officewise, wealthwise lower strata of society are to be disbelieved or rejected as unworthy of belief solely on the ground of their humble position in society. The inner variations between the evidence of two witnesses and omissions of trivial details would not cause any dent in the testimony of the two witnesses [*Kishan Chand Mangal v. State of Rajasthan*, 1983 Cri LJ 1 (SC) : A 1982 SC 1511, 1515, 1517 ((1965) 1 Delhi Law Times 362 (Punj) **Overruled**)]. If it is

proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is *prima facie* assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary [*Raj Ballar Das v. Haripada Das*, A 1985 Cal 2, 11]. The fact of adoption must be proved in the same way as any other fact, but where there is a lapse of long period between the date of adoption and the time when it is being questioned, every allowance for the absence of evidence to prove such fact must be favourably entertained, as after the lapse of a long period, direct evidence to prove adoption may not be available [*Sauney Majhi v. Duli Dei*, A 1985 Orissa 22, 24 (DB)]. The entries in the account books of the seller are reliable evidence in respect of a contract of sale of goods [*Ramanathan Chettiar v. National Textile Corporation Ltd., New Delhi*, A 1985 Ker 262, 264]. In respect of a claim for recovery of advance under an agreement, the best evidence will be that of the executant of the agreement [*K.M. Jose v. D. Anantha Bhat*, A 1987 Kant 173, 177 (DB) : (1987) 1 Kant L J 16]. Though a document is marked by consent the contents of the same cannot be considered as evidence unless there is some proof of the same [*Suryakant v. Subramani*, A 1989 NOC 42 (Mad)]. If no explanation is forthcoming as to why the particulars about an oral gift were not given, there can be no doubt that the particulars were the result of an after-thought [*Imbichimoideenkutty v. Pathumummi Umma*, A 1989 Ker 150 (DB)]. Where in violation of an injunction order, the defendant constructed a road through the plaintiff's property, the disinterested neighbour's evidence could not be discredited on the only ground that they are chance witnesses [*Ayyapan v. S. V. FR. Thomas Viruthiyal*, A 1990 (NOC) Ker 48].

**Military Proceedings.**—The standard of proof applied in military proceedings is beyond reasonable doubt, whilst in civil courts the burden of proof is on the balance of probability. Therefore the decision by the court-martial has no bearing on civil proceedings [*Roshairee Bin Abdul Wahab v. Mejor Mustafa Bin Omar,* (1996) 3 Malayan LJ 337 (Kuala Lumpur HC)].

**—Rules of proof in Matrimonial Cases.**—The law relating to standard of proof is, to say the least, in a very confused state. So far as the law in India was concerned upto 1974 the consistent decision was that the standard was proof beyond reasonable doubt. The Supreme Court in *Bipin v. Prabhabati*, A 1957 SC 176 (suit for divorce for desertion under Bombay Hindu Divorce Act, 1947) and *Lachman v. Meena*, A 1964 SC 40 (suit for judicial separation for desertion under s 10 Hindu Marriage Act, 1955) took it as well settled that the desertion had to be proved beyond reasonable doubt. *White v. W*, A 1958 SC 441 (suit for dissolution for adultery under the Indian Divorce Act, 1869) **Followed** *Preston-Jones v. P*, 1951, 1 All ER 124 (HL) to come to the same conclusion and *Mahendra v. Sushila*, A 1965 SC 364 (suit for annulment on the ground that wife was pregnant by another man at the time of marriage) followed *White v. W., sup*. To seek corroboration to a fact alleged by a spouse to a marriage regarding the healthy or unhealthy character of their intimate relations which belong to the sacred and secret precincts of marital life, and which are known only to the spouses and which are not supposed to be known to any other living soul on the surface of the planet, would amount to shutting one's eye towards the facts of life and reality [*A v. B*, A 1985 Guj 121, 126 : 1984 Guj LH 939]. Mere recovery of articles after a long time, cannot be a clinching circumstance to hold that the person who came into possession of these articles could be the murderer [*Babuda v. State of Rajasthan*, 1992 Cri LJ 3451, 3453 (SC)].

The High Courts following the Supreme Court has also uniformly held that the standard was proof beyond reasonable doubt [*Agnes v. Lancelot*, A 1964 C 28 FB; *Subrata v. Dipti*, A 1974 C 61 SB; *Tulloch v. T*, A 1975 C 243 (all cases of adultery

under the Indian Divorce Act, 1869); *Vira Reddy v. Kistamma*, A 1969 M 235 (a case of judicial separation under s 10 Hindu Marriage Act, 1955 on the ground of sexual intercourse with another man); *Lilabati v. Kashinath*, 73 CWN 19; *Sachinda v. Nilima*, A 1970 C 38) adultery under Hindu Marriage Act, 1955).

In *Blyth v. B*, 1966, 1 All ER 524 the House of Lords differing from some dicta in *Preston-Jones v. P sup*, held that negation of the bars to matrimonial reliefs could be established on a balance of probability like any other civil case. LORD DENNING, LORD PEARCE, concurring went further to hold that grounds of divorce could also be proved similarly. Prof Cross advocated the adoption of this view (3rd ed pp 96, 97 which was **approved** in *Bastable v. B*, 1968, 3 All ER 701 CA).

In cases involving the legitimacy of the child the highest standard has been held to be applicable [*F v. F*, 1968, 1 All ER 242]. Cross thinks that it would be rash to make any general statement about the standard of proof in matrimonial cases (4th ed, p 103). Phipson has agreed with this (12th ed, p 55).

The English law, of course, has a lot of bearing on the cases under the Indian Divorce Act, 1869 since s 7 of the Act provides that in proceedings under the Act the Courts would apply the prevailing English law subject of course to the provisions of the Act. It could accordingly be argued with considerable force that *Blyth v. B, sup* had to be followed here notwithstanding the Indian decisions and in fact the decision in *White v. W, sup* was based on *Perston-Jones v. P, sup*. This argument, however would naturally hold in proceedings under other Acts.

Such was the state of law when *Narayan v. Sucheta*, A 1975 SC 1543 came before the Supreme Court. Although the case initially involved other points the question before the court was limited to one of judicial separation on the ground of cruelty under s 10 of Hindu Marriage Act, 1955. The Supreme Court held that proceedings under the Act were of a civil nature and accordingly 'satisfied' in s 3 must mean 'satisfied on a preponderence of probability' and not 'satisfied beyond a reasonable doubt'. Following *Blyth v. B, sup.* and *R v. Wright*, 77 CLR 191, an Australian decision, the court came to the conclusion that the charge of cruelty had to be proved only in a preponderence of probability and not beyond reasonable doubt. The concent of matrimonial offence was held to have no bearing on the standard of proof. The Supreme Court did not refer to or consider even one of the Indian decisions referred to above. The observation in *Blyth v. B, sup* was clearly obiter since that decision was concerned with condonation and not with the grounds of divorce. *White v. W. sup* had held that 'satisfied' in s 14 of the Indian Divorce Act, 1869 meant 'satisfied beyond reasonable doubt'. It appears that Narayan's case has made the earlier confusion worse confounded.

In England, of course, with the removal of the concept of the matrimonial offence by statute (see Matrimonial Causes Act, 1973) it is likely that the lower standard would be applied.

No direct evidence is necessary to prove the factum of adultery but circumstantial evidence must be sufficiently strong and conclusive [*Subarata v. Dipti*, A 1974 C 61 SB; [*J.M. Nazareth v. Mrs Philomina Marie Nazareth*, A 1985 Kant 135, 138 : (1984) 2 Kant 101]. In a case of cruelty, the wife alleged that her husband had committed theft from her parents' house. She could not be disbelieved merely because no complaint of theft was made to the police. [*Smt Veena v. Makhanlal*, A 1984 NOC 187 (Delhi) : 1984 Rajdhani LR 43].

**—Rules of Proof in Election Cases.**—The charge of corrupt practice is a serious and one of a *quasi*-criminal nature and should be proved beyond reasonable doubt

[*Baburao v. Govind*, A 1974 SC 405; *Razic v. Jeswant*, A 1975 SC 667; *Pratap v. Rajinder*, A 1975 SC 1045; *Suryakant v. Imamul*, A 1975 SC 1053]. Where there was strong and clear evidence justifying the conclusion that the candidate had consented to the publication of false statements in relation to personal character and conduct of his opponent which were reasonably calculated to prejudice the election prospects of his opponent there was no scope for giving 'benefit of doubt' [*D.P. Mishra v. Kamal*, A 1970 SC 1477]. While appreciating or analysing the evidence in election cases, the court must be guided by the following considerations (1) the nature, character, respectability and credibility of the evidence, (2) the surrounding circumstances and the improbabilities appearing in the case, (3) the totality of the effect of the entire evidence which leaves a lasting impression regarding the corrupt practices alleged [*Ram Saran v. Thakur Munneshwar*, A 1985 SC 24, 26]. It is unsafe to accept oral evidence in an election case at its face value without looking for assurance from some surer circumstances or unimpeachable documents. [*Habiba Kidwai v. Begum Khursheed Kidwai*, A 1985 NOC 44 (Delhi)].

—**Rules of Proof in Criminal Cases.**—When dealing with the serious question of the guilt or innocence of persons charged with crime, the following general rules have been laid down for the guidance of tribunals:—(*1*) The onus of proving everything essential to the establishment of the charge against the accused, lies on the prosecutor [see *post* notes under ss 101-104 "*Criminal cases*"]; (2) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused; (*3*) In matters of doubt it is safer to acquit than to condemn; for it is better that several guilty persons should escape than that one innocent person suffer; (*4*) There must be clear and unequivocal proof of the corpus delicti; (*5*) The hypothesis of delinquency should be consistent with all the facts proved [Best]. In spite of the presumption of truth attached to oral evidence under oath if the court is not satisfied, the evidence in spite of oath is of no avail [*Nemai v. S*, A 1965 C 89]. To tell the jury that "the law is that the more heinous is the offence the more rigid or stricter the proof shall be" is not to state the correct view of the law. The law is the same whether the offence is heinous or not, the standard of proof is exactly the same [*Lokhono v. R*, 21 P 685 : A 1943 P 163].

Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. It is not necessary that proof beyond reasonable doubt should be perfect in all criminal cases [*Inder. v. S*, A 1978 SC 1091]. The same standard of proof as in a civil case applies to proof of incidental issues involved in a criminal trial like the cancellation of bail which can be established by the prosecution by showing on a preponderance of probabilities that the accused has attempted to tamper with its witnesses [*S v. Sanjay*, A 1978 SC 961].

**Evidence obtained in other cases.**—An investigation is not vitiated only because evidence obtained in other cases was used. The germane question is not as to in what cases the evidence had come to light but whether the evidence is relevant and admissible to establish the charge in the present case. There was no submission in this case as to whether the evidence in question was or was not admissible. *Ronny v. State of Maharashtra*, AIR 1998 SC 1251 : (1998) 3 SCC 625.

—**Criminal Appeals.** (See *post* s 5; "*Criminal Appeal*".)

**Circumstantial Evidence.**—All judicial evidence is either *direct or circumstantial*. By 'direct evidence' is meant when the principal fact, or *factum probandum*, is attested *directly* by witnesses, things or documents. To all other forms, the term 'circumstantial evidence' is applied; which may be defined, that modi-fication of indirect evidence, whether by witnesses, things or documents, which the law deems sufficiently proximate to a principal fact or *factum probandum* to be receivable as evidentiary of it. And this also is of two kinds—*conclusive* and *presumptive* : 'conclusive' when the connection between the principal and eviden-tiary facts—the

*factum probandum* and *factum probans*—is a *necessary* consequence of the laws of Nature; '*presumptive*' when the inference of the principal fact from the evidentiary is only *probable*, whatever be the degree of persuasion which it may generate [Best, 11th Ed s 293]. Circumstantial evidence is evidence of circumstances as opposed to what is called direct evidence [*R v. Ali Cassim*, 4 Bur LT 97]. Evidence which proves or tends to prove the *factum probandum* indirectly by means of certain inferences of deduction to be drawn from its existence or its connection with other '*facts probantia*' it is called circumstantial evidence [*Chakuna Orang v. State of Assam*, 1981 Cri LJ 1661, 1662 (Gauhati)]. Authorship of a document can be proved like any other fact, by both direct as well as circumstantial evidence [*J.D. Aggarwal v. State*, 1983 Cri LJ NOC 155 (Delhi) : 1983 1 Crimes 1083]

Circumstantial evidence means the evidence afforded not by the direct testimony of an eye-witness to the fact to be proved, but by the bearing upon that fact or other and subsidiary facts which are relied upon as inconsistent with any result other than truth of the principal fact [Wills: Cir Ev 6th Ed p 6]. Circumstantial evidence may be best understood by comparison with direct evidence. It is not evidence direct to the point in issue, *e.g.*, the statement of a person that he saw another give a fatal blow to the deceased, but evidence of various facts other than the fact in issue which are so associated with the fact in issue that taken together they form a chain of circum-stances leading to an inference or presumption of the existence of the principal fact. In a sense circumstantial evidence is also direct as the testimony must be that of persons who saw, heard or perceived the series of other facts referred to before (see s 60 *post*). "Circumstantial evidence is merely direct evidence indirectly applied. And direct evidence, when closely analysed, is found to possess the inferential quality [Burrill : Cir Ev 231; Burr Jones, s 6(*b*)]. Circumstantial evidence is something from which facts in issue are to be inferred [See the Speech of the Hon'ble Mr Stephen when presenting the Report of the Select Committee]. [*Harish J. Mal v. The State*, 1982 Cri LJ 2123, 2128 (Delhi)]. It is not to be expected that in every case depending on circumstantial evidence, the whole of the law governing cases of circumstantial evidence should be set out in the judgment. Legal principles are not magic incontations and their importance lies more in their application to a given set of facts than in their recital in the judgment. The simple expectation is that the judgment must show that the finding of guilt, if any, has been reached after a proper and careful evaluation of circumstances in order to determine whether they are compatible with any other reasonable hypothesis [*Shankarlal Gyarasilal Dixit v. State of Maharashtra*, A 1981 SC 765, 770 : 1981 Cri LJ 325]. Circumstantial evidence means a fact on which an inference is to be founded. The facts must be closely knitted and must carry conviction to the mind of a Judge [*Kotari Suri v. State of Orissa*, 1984 Cri LJ NOC 121 : (1984) 1 Orissa LR 199 (Orissa)]. The dogs of the dog squad pointing towards the accused cannot be said to be a circumstance which can exclude the possibility of guilt of any person other than that of the accused or be compatible only with the hyposethis of guilt of the accused [*Surinder Pal Jain v. Delhi Admn.*, A 1993 SC 1723, 1732].

—**Tests.**—It is well settled that when a case rests on circumstantial evidence, such evidence must satisfy three tests: (*i*) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (*ii*) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (*iii*) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else [*S D Soni v. State of Gujarat*, A 1991 SC 917; *Padala Veera Reddy v. State of A P*, A 1990 SC 79; *Chandmal v. S*, A 1976 SC 917; *S.P Bhatnagar v. S*, A 1979 SC 826; *Charan Singh v. S*, A 1967 SC 520; *Hanumant v. S*, 1952 SCR 1091 : A 1952 SC 343; *Govinda Reddy v. S*, A 1960 SC 29 : 1960 Cri LJ 137; *Deonandan v. S*, A 1955 SC 801 : 1955

2 SCR 570; *Bhagatram v. S*, A 1954 SC 62 : 1954 Cri LJ 1645; *Palaniswami v. S*, A 1968 B 127; See *Kedar v. S*, A 1954 SC 660 : 1954 Cri LJ 1679; *Kutuhal v. S*, A 1954 SC 720 : 1954 Cri LJ 1802; *Pohalya v. S*, A 1979 SC 1949; *Rama Nand v. State of H.P*, A 1981 SC 738, 743 : 1981 Cri LJ 298; *S.S. Kulkarni v. State of Maharashtra*, A 1981 SC 34, 48 : 1981 Cri LJ 1292; *Shiva Sahai v. State of U.P.*, 1990 Cri LJ (NOC) 15 (All); *State of U.P. v. Ravindra Prakash Mittal*, A 1992 SC 2045, 2050; *V Ravi v. State of Kerala*, 1994 Cri LJ 162, 171 (Ker); *Kamala Sethi v. State*, 1994 Cri LJ 197 (Ori); *State of T N v. Vela*, 1993 Cri LJ 1635, 1639, para 10 (SC); *Laxman Naik v. State of Orissa*, A 1995 SC 1387 : 1995 Cri LJ 2692; *State of H P v. Diwana*, 1995 Cri LJ 3002, 3004 (HP); *Niranjan Lal v. State of Haryana*, 1995 Cri LJ 248, 251 (P&H); *Khem Singh v. State of H P*, 1992 Cri LJ 3948 (HP); *Sankarapandian v. State*, 1992 Cri LJ 3662 (Mad)]. In *Brijlal Prasad Sinha v. State of Bihar,* (1998) 4 Scale 25 at 35 (SC) PATTANAIK J of the Supreme Court reiterated the same approach and said : "In a case of circumstantial evidence the prosecution is bound to establish the circumstances from which the conclusion is drawn must be fully proved; the circumstances should be conclusive in nature; all the circumstances so established should be consistent only with the hypothesis of guilt and inconsistent with the innocence; and lastly the circumstances should to a great certainty exclude the possibility of guilt of any person other than the accused. The law relating to circumstantial evidence no longer remains *res integra* and it has been held by catena of decisions of this Court that the circumstances proved should lead to no other inference except that of the guilt of the accused, so that, the accused can be convicted of the offences charged. It may be stated as a rule of caution that before the court records conviction on the basis of circumstantial evidence it must satisfy that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused." See also *State of UP v. Nahar Singh,* 1998 Cri LJ 2006 (SC), where the circumstantial evidence was of clinching nature. To the same effect *Manik Bandu Gawati v. State of Maharashtra* 1998 Cri LJ 2246 (Bom-DB).

**Circumstantial proof of rape.**—Where there was sufficient circumstantial evidence of the fact that the accused committed rape upon four-year old girl, the Court said that the circumstances were sufficient in themselves to support conviction even if the testimony of the child witness (victim) was not taken into account [*Nagam Gangadhar v. State of AP*, 1998 Cri LJ 2200 (AP)].

Where the presence of the eyewitnesses could not be secured the prosecution can rely on other circumstantial evidence. *Jagjit Singh v. State of H P*, 1994 Cri LJ 233, 235 (SC). Even if the medical evidence is negative in the sense that it does not prove that the deceased had died of any poison, still if the circumstances warrant and unerringly point to the guilt and only to the guilt of the accused, then the court will be justified in convicting the accused on the basis of circumstantial evidence irrespective of the fact that the medical evidence in the case is negative. *State of Karnataka v. H. Koroji Naik*, 1995 Cri LJ 1964 (Kant); *Tanviben Pankaj Kumar Divetia v. State of Gujarat*, A 1997 SC 2193 : 1997 (2) Crimes 109, 135. The circumstantial evidence should be like spider's web, leaving no exist for the accused to slip away. The various links in the chain, when taken in isolation, might not connect the accused with the commission of the crime but when taken together may unmistakably point out the guilt of the culprit [*Makkanlal Masih v. State of Rajasthan*, 1984 Cri LJ NOC 177 : 1984 Cri LR (Raj) 329 (Raj) (DB); *Dhira Choudhury v. State of Assam*, 1982 Cri LJ 572, 575 : 1982 Cri LC 373 (Gau)]. The court has to

judge the total cumulative effect of all the proved circumstances, each of which reinforces the conclusion of the guilt of the accused [*G.V. Veerabrahman v. State of A.P.*, 1985 Cri LJ 1651, 1654 (AP) (DB)]. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused [*Jaswant v. S*, A 1979 SC 190; *Bhagdandas v. S*, A 1974 SC 898; *S v. V. C. Shukla*, A 1980 SC 1382]. In the case of conspiracy resting on circumstantial evidence, an inference of guilt need only be drawn when the circumstances are such as to be incapable of being reasonably explained on any other hypothesis than the guilt of the accused [*Hari Ram v. State of Himachal Pradesh*, 1982 Cri LJ 294, 297 : (1981) 8 Cri LT 383 (Him-Pra)]. It must be qualitatively such that on every reasonable hypothesis the conclusion must be that the accused is guilty; not fantastic possibilities nor freak inferences but rational deductions which reasonable minds make from the probative force of facts and circumstances [*Mohanlal v. S*, A 1974 SC 1144]. Circumstantial evidence which falls short of the required standard on all material particulars is not sufficient to convict a person [*Sardar Hussain v. State of Uttar Pradesh*, A 1988 SC 1766, 1768 : 1988 Cri LJ 1807]. Circumstantial evidence must be a combination of facts creating a network through which there is no escape for the accused because the facts taken as a whole do not admit of any inference but of his guilt [*Anant Chintaman v. S*, A 1960 SC 500, 523: 1960, 2 SCR 460; *Palaniswami v. S*, *sup*]. Circumstantial evidence should not only be consistent with the guilt of the accused, but should be inconsistent with his innocence [*Mangleshwari v. S*, A 1954 SC 715; 1954 Cri LJ 1797; *Rahman v. S*, A 1972 SC 110; *Abdul Ghani v. S*, A 1973 SC 264; *Umedbhai v. S*, A 1978 SC 424; *S v. Annappa*, A 1979 SC 1410; *Piar Chand v. State of Himachal Pradesh*, 1984 Cri LJ NOC 58 : (1983) 2 Chand LR (Cri) 646 (HP) (DB); *Dharambir v. The State*, 1982 Cri LJ NOC 4 : 1982 Chand LR (Cri) 31 (Delhi)]. In a murder trial death can be proved by circumstantial evidence provided that the jury are warned that the evidence must lead to one conclusion only, and that of the guilt of the accused [*R v. Onufrejeczyk*, 1955, 1 KB 388; *Kumar v. S*, A 1962 C 504]. There is however no rule that when the prosecution case is based on circumstantial evidence, the judge must as a matter of law give a further direction that the jury must not convict unless they are satisfied that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion [*McGreevy v. DPP*, 1973, 1 All ER 503].

In a case based on circumstantial evidence the court has to be on its guard to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof. *Balvinder Singh v. State of Punjab*, A 1996 SC 607 : 1996 Cri LJ 883, 885. While appreciating the circumstantial evidence, the mere fact that there is only a remote possibility in favour of the accused, it would not be legally justified to allow the accused to escape punishment. It is true that the principle of innocence of an accused must be kept in view while appreciating the circumstantial evidence, but simultaneously it must also be kept in view that guilty person should not be allowed to escape punishment only on a remote possibility of innocence in his favour. In such cases the judicial conscience of the court must be tested on the anvil of rational thinking man who could reasonably, honestly and conscientiously arrived on the same conclusion, long rope cannot be given to the subordinate courts to entertain untenable doubts about innocence of an accused on fanciful conjectures in a brutal crime committed in broad day light. If this is permitted the law and the law courts will not be able to protect the society from anti-social elements for whom the society has developed the concept of law and law courts from time immemorial. *Hans Raj v. State of Rajasthan*, 1995 Cri LJ 1004, 1008 (Raj). When the accused had slept in the verandah near the cot where the dead body of his wife was found; had

locked the collapsable door with the recovered lock before going to sleep and had himself been close to the dead body before the police came, the picking up of smell by the dogs and pointing towards the accused could not be said to be a circumstance which could exclude the possibility of guilt of any person other than that of the accused or be compatible only with hypothesis of guilt of the accused. The pointing out by the dogs could as well lead to a misguided suspicion that the accused had committed the crime. *Surinder Pal Jain v. Delhi Admn*, 1993 SC 1723, 1732. The circumstances must be complete and conclusive to be read as an integrated whole and not separately and must indicate guilt of the accused with certainty. *Kartik Sahu v. State*, 1994 Cri LJ 102, 104 (Ori). Where the entire case hinges on circumstantial evidence the court should catalogue the circumstances relied upon by the prosecution against the accused. *C. Chenga Reddy v. State of A P*, A 1996 SC 3390 : 1996 Cri LJ 3461, 3463. Where the prosecution case is based on extrajudicial confession as one of the circumstance but the same is of doubtful nature conviction cannot be sustained. *Kailash v. State of U P*, A 1994 SC 470 : 1994 Cri LJ 142. Court should adopt cautious approach for basing conviction on circumstantial evidence. *State of Haryana v. Ved Prakash*, A 1994 SC 468, 469 : 1994 Cri LJ 140. In poisoning cases prosecution must prove that the accused had opportunity to administer the poison. *Muppala Maheshwara Raju v. State of A P*, 1994 Cri LJ 814, 817 (AP). Corroboration to the evidence regarding demand and acceptance of bribe need not be direct. It can be by way of circumstantial evidence. *Ramesh Kumar Gupta v. State of M P*, A 1995 SC 2121, 2123 : 1995 Cri LJ 3656. Where the prosecution relies on circumstantial evidence, the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused [*Public Prosecutor v. Lin Lian Chen*, (1992) 2 Malayan LJ 561 (Malaysia SC); *Public Prosecutor v. Wong Wai Hung*, (1993) 1 SLR 927 (Singapore HC)].

In a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hyphothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt. Very often, circumstances which establish the commission of an offence in the abstract are identified as circumstances which prove that the prisoner before the court is guilt of the crime imputed to him. As a *priori* suspicion that the accused has committed the crime transforms itself into a *facile* belief that it is he who has committed the crime [*Pre Thakur v. State of Punjab*, A 1983 SC 61, 63].

In cases dependent on circumstantial evidence in order to justify the inference of guilt (1) all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt [*Hukam v. S*, A 1977 SC 1063; *Hurjee Mull v. Imam*, 8 CWN 278, 286; *Raghunandan v. R*, 59 IC 858: 1 PLT 684; *R. v. Jagatram*, 48 IC 167; *Saleh v. R*, 42 IC 129; *Kamal v. Nandalal*, 56 C 738: A 1929 C 37; *Chirajfuddin v. R*, 18 CWN 1141; *R. v. Basangouda*, 1941 Bom 315: A 1941 B 139; *Sher Md v. R*, A 1945 L 27; *Eradu v. S*, A 1956 SC 316: 1956 Cri LJ 559; *Manmohan v. S*, A 1969 Pu 275], *Earabhadrappa v. State of Karnataka*, A 1983 SC 446, 448 : 1983 Cri LJ 846; *State of UP v. Sukhbasi*, A 1985 SC 1224, 1227 : 1985 Cri LJ 1479; *Balwinder Singh v. State of Punjab*, A 1987 SC 350 : 1987 Cri LJ 330, 352; *Ashok Kumar Chatterjee v. State of M.P*, A 1989 SC 1890, 1896 : 1989 Cri LJ 2124; A 1982 SC 1157 : 1983 SC 446 : 1981 SC 738 : 1987 SC 1921 : 1983 SC 61 : 1987 SC 350; *Subhash Chandra v. State of Punjab*, 1981 Cri LJ (NOC) 43 (P&H), otherwise the accused must be given the benefit of doubt [*Awadhi v. S*, A 1971 SC 69; *Daulat v. R*, 77 IC 600] (2) the

circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefrom [*Jahura v. R*, 35 CWN 169; *Golam Mohiuddin v. S*, A 1964 C 503]. Where circumstances are susceptible of two equally possible inferences, the inference favouring the accused rather than the prosecution should be accepted [*Ramdas v. S*, A 1977 SC 1164; *Debiprasad Padhi v. The State*, 1982 Cri LJ 2214, 2225 (Orissa); *Mohammad Jasimuddin Ahmed v. State of Assam*, 1982 Cri LJ 1510, 1519 (Gau)].

There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused [*Khashaba v. S*, A 1973 SC 2474; *Abdul Ghani v. S*, A 1973 SC 264; *Gurdit v. R*, 1936 PLR 1909; *Balmakund v. Ghansham*, 22 C 391, 409; *Arajali v. R*, 30 CWN 376; *Sheo Narain v. R*, 58 IC 457; *Charan Singh v. S*, A 1967 SC 520]; and it must be such as to show that within all human probability the act must have been done by the accused [*Bakshish v. S*, A 1971 SC 2016]. *Laxmi Raj Shetty v. State of Tamil Nadu*, A 1988 SC 1274, 1284 : 1988 Cri LJ 1783. Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated [*Ram Avtar v. State (Delhi Admn)*, A 1985 SC 1692 : 1985 Cri LJ 1865]. While it is true that there should be no missing links in the prosecution case, it is not the law that every one of the links must appear on the surface of the evidence adduced. Some of these links may have to be inferred from the proved facts. These links are inferential links [*In re Virabhadrappa*, A 1962 My 138; *Mynat Hil Mathi v. State of Kerala*, 1983 Cri LJ NOC 25 (Ker) (DB) : (1983) 1 Crimes 429; *Raita Meenda v. State of Orissa*, 1985 Cri LJ 52, 54 : (1985) All AC (Cri) 19 (Orissa)]. It cannot be said that it is not open to a court as a matter of law to convict the accused of an offence (in this case murder) on circumstantial evidence of a particular character. The rule as to circumstantial evidence is to apply the criterion whether the evidence led is such as would satisfy the tribunal beyond reasonable doubt of the guilt of the accused [*Mangal v. R*, 64 IA 134: A 1937 PC 179: 41 CWN 805]. Circumstantial evidence, not infrequently indicates the truth more unerringly than direct evidence [*Kamla Kunwar v. Ratanlal*, A 1971 A 304]. Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though the party offers no explanation of them [*Md Ali v. R*, A 1929 L 61: 10 LLJ 525; *Sumanta v. R*, 20 CWN 166; *Promode v. Madan*, A 1923 C 228; *Aswini v. R*, 10 CWN 219]. When presumption of juvenile innocence is sought to be displaced by the prosecution on the basis of circumstantial evidence the circumstances must unmistakably prove the guilt beyond doubt [*Sakharam v. State of M.P.*, A 1992 SC 758, 759]. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted [*State of U.P. v. Ashok Kumar Srivastava*, A 1992 SC 840, 845]; surrender to the police without least possible delay can never be a circumstance against the accused. *Debhas Debnath v. State*, 1985 Cri LJ 1373, 1375 (Cal) (DB)]. If combined effect of all the proved facts taken together is conclusive in establishing guilt of accused, conviction would be justified even though any one or more of those facts by itself is not decisive [*S v. I B S Prasad*, A 1970 SC 648]. The finding as to whether the charge under sec. 302 IPC has been proved or not should be arrived at not on the basis of one circumstance or another considered in an isolated manner but on the basis of the total effect of all the facts and circumstances wholly proved by the prosecution. [*Narayan Chandra Dey v. State*, 1988 Cri LJ 387, 391 (Cal) (DB)]. Before a person could be found guilty with reference to mere circumstantial evi-

dence, each of the circumstances relied on must be clearly established [*Gopalan v. State of Kerala*, 1985 Cri LJ NOC 3 : 1984 Ker LT 774 (Ker) (DB)].

It was not intended by s 60 of the Act to exclude circumstantial evidence of things which could be seen, heard or felt though the wording of the section is undoubtedly ambiguous, and at first sight might appear to have that meaning [*Neel Kanto v. Juggobundhoo*, 12 BLR AP 18]. Circumstantial evidence of the strongest and most worthy character is improperly disregarded by mofussil jurors, though the facts constituting it be well-put together and their effect obvious to the trained judicial mind [*R v. Elahi Bux*, 5 WR Cr 80, 94: BLR Sup Vol 481, 482]. Circumstantial evidence must exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused [*Chirajfuddin v. R*, 18 CWN 114]. Meaning of "possibility" explained in *Thakurdas v. R*, 38 IC 759: 32 PR Cr 1916. *Crippen's* case is a remarkable instance in modern times, of how a great crime was traced by purely circumstantial evidence. See the book "Trial of Dr Crippen". As to the advantages and disadvantages of circumstantial evidence, see BURR JONES, pp 30-39. In a case based on circumstantial evidence, delay in filing the F.I.R is of considerable importance [*State of U.P. v. Aziz Ahmad*, 1983 Cri LJ NOC 167 (All) (DB)]. In a case of the murder of a girl, the father of the girl gave evidence that when he visited the village where his daughter was living, he learnt from somebody that his daughter has been killed by her husband and father-in-law. The brother of the deceased said that his sister's body has been concealed. He could not name the witnesses from whom he got the news. There are no other witnesses. These circumstances will not show that all the links convicting the accused with the crime have been established. [*Bakhara Chowdhary v. State of Bihar*, 1991 Cri LJ 91, 95 (Pat)].

—**Evidence of last seen together.**—The mere fact that the accused and the deceased were together in the field prior to the occurrence does not by itself lead to irresistable inference that the accused must have murdered the deceased [*Lakhanpal v. S*, A 1979 SC 1620; *Banarsi Dass v. State of Punjab*, 1981 Cri LJ 1235, 1238 (P&H); *Jogen Fangsa v. State of Assam*, 1981 Cri LJ NOC 226 (Gauhati); *Mahadeb Ghosh v. State*, 1983 Cri LJ 1854, 1860 (Cal) (DB); *Kishore Chand v. State of Him Pra*, 1990 Cri LJ 2289, 2293 (SC); *Chatru Alias Chatrubhuja Bhue v. State*, 1987 Cri LJ 1349, 1350 : (1987) 1 Crimes 110 (Ori) (DB); *Trilochan Panika v. State*, 1989 Cri LJ NOC 168 (Orissa) (DB) : (1988) 2 Orissa LR 603]. But see contra, *Farman Shah v. State*, 1981 Cri LJ (NOC) 53 (J&K) : 1981 Sim LC 67; but it could not be deemed to be conclusive unless it is further established that during the interval between the time when they were last seen together and the time at which the victim died every circumstance was inconsistent with the innocence of the accused [*G Gabriel v. State of Kerala*, 1982 Ker LT 772 : 1983 Cri LJ 94, 97 (Ker)(DB)]. Circumstance of last seen together alone would not be sufficient to bring home the offence to the accused particularly when there is no proof of motive. *Veerendra Kumar v. State*, 1996 Cri LJ 231, 240 (Del). Where the prosecution story of the accused being last seen with the deceased girl, extrajudicial confession and alleged cause of death by throttling was not proved from the oral and medical evidence on record the accused was entitled to the benefit of doubt. *Arungham v. State*, 1994 Cri LJ 520, 526 (Mad).

—**Motive.**—If the evidence shows that the accused having a strong motive had the opportunity of committing the crime and the established circumstances exclude the reasonable possibility of any one else being the real culprit then the chain of evidence can be considered to be complete as to hold the accused guilty [*Udaipal v. S*, A 1972 SC 54]. In the absence of clear and cogent evidence pointing to the guilt of an accused person, the proof of motive, however adequate, cannot, by itself, sustain a criminal charge [*Padan Pradhan v. State*, 1982 Cri LJ 534, 536 : 1984 Chand LR Cri

116 (Orissa)]. Where the prosecution relies on ocular testimony, motive does not have much role to play [*Baldev Singh v. The State*, 1982 Cri LJ 1087, 1092 : 1982 Kash LJ 194 (J&K)]. Motive place an important role in order to tilt the scale against the accused. [*Kamla Sethi v. State*, 1994 Cri LJ 197, 200 (Ori)]. But if the evidence of eyewitnesses is of an unimpeachable variety, absence of proof of motive is inconse quential. [*Kabiraj Tudu v. State of Assam*, 1994 Cri LJ 432, 436 (Gau)]. In a case which is based on circumstantial evidence motive assumes greater importance. *Tarseem Kumar v. Delhi Admn.*, A 1994 SC 2585, 2587. In circumstantial evidence, if motive has been relied upon as a circumstance it has to be proved beyond reasonable doubt. Where the prosecution has not relied upon the motive as one of the circumstances but other circumstances relied upon by it have been duly established, non-pleading of the motive or producing material in support of it is not fatal to the prosecution. *M. Jayanth Kumar Reddy v. State of A P*, 1993 Cri LJ 3875, 3878 (AP). In a bride burning case, when there was no quarrel between husband and wife and there is no suggestion that the husband got frustrated because they had no child, there cannot be any motive for the crime. [*Surendar Singh v. State*, 1990 Cri LJ (NOC) 170 (Delhi)]. When there is acceptable evidence of eye-witnesses to the commission of an offence the question of motive cannot loom large [*Babu Lodhi v. State of U.P.*, A 1987 SC 1268, 1271 : 1987 Cri LJ 1119; *Puthenthara Mohanan v. State of Kerala*, 1990 Cri LJ 1059, 1066 (Ker)]. Absence of motive may not be relevant in a case where the evidence is overwhelming but it is a plus point for the accused in a case where the evidence against him is only circumstantial [*Sakharam v. State of M.P.* A 1992 SC 758, 759].

—**Absconding.**—The act of absconding even if proved, is normally considered somewhat as weak link in the chain of circumstances utilised for establishing the guilt [*Raghubir v. S*, A 1971 SC 2156; *Adikanda Das v. State of Orissa*, 1988 Cri LJ 1884, 1886 : (1987) 3 Crimes 815 (Orissa); absconding from the scene for over a month, would establish the guilt of the accused and rule out hypothesis of innocence. *Jose v. State of Kerala*, 1984 Cri LJ 748, 753 : (1983) Ker LT 322 (Kerala) (DB).

—**Basic or primary facts.**—If the circumstances proved are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt [*see Bharat Commerce &c v. Surendra*, A 1968 C 388]. But in applying this principle it is necessary to distinguish between facts primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of a doubt [*Agarwal &c v. S*, A 1963 SC 200]. Where the accused, after being named in the FIR, absconds or remains away from the village and the proceedings under sections 82 and 83 CrPC were started against him and he appeared thereafter only, it is a circumstance against the accused if no plausible explanation is given by him for such absence. *Barkau v. State of U P*, 1993 Cri LJ 2954, 2962 (All).

—**Injuries on accused.**—The circumstances that the accused could not give trustworthy explanation about the injuries on his person and that he was present at the scene of offence are hardly sufficient to warrant a conviction [*Jagta v. S*, A 1975 SC 1545]. In a rape case failure on the part of the accused to explain as to how he got the injury on his penis and human blood on his pant is a circumstance which goes against him. *J V Wagh v. State of Maharashtra*, 1996 Cri LJ 803, 804 (Bom).

—**Recovery of crime articles.**—Mere recovery of various articles near the place of occurrence, including the sandal of the accused, does not link the accused with the

crime. *Kagan Bera v. State of W B*, A 1994 SC 1511, 1513. When not only the circumstance relating to recovery of ornaments on the basis of disclosure statement made by the accused could not be established conclusively by the prosecution, there were some other circumstances also in the prosecution case which militated against its correctness, the conviction of the accused has to be set aside. *Surinder Pal Jain v. Delhi Admn.*, A 1993 SC 1723, 1733. Finding of some article from the person or possession of an accused or from the house stained with human blood, by itself, cannot lead to the conclusion that the accused committed the crime [*Lakshmi Jain v. State*, (1986) Cri LJ 513, 516 (DB) Orissa : (1986) 1 Crimes 321]. It is unsafe to convict an accused merely on the basis of uncorroborated evidence regarding the recovery of the weapon [*State of Punjab v. Gurnam Singh*, A 1984 SC 1799 (1)]. The recovery of the weapon two weeks after the occurrence, and the weapon was embedded in sandy river bed. In such a case, the fact that the blood stains could be detected on chemical analysis would not arouse any suspicion since when exposed, blood would clot and stick to the surface of the weapon and need not necessarily disappear altogether when submerged in sand and water [*Dileep Kumar v. State of Kerala*, 1985 Cri LJ 114, 118 : 1984 Ker LJ 672 (Ker) (DB)]. It is not necessary in every case that the weapon of attack must have to be recovered in a case of murder and non-recovery of the weapon of attack would not affect the other evidence if found to be reliable and acceptable [*Mangal Hansada v. State*, 1985 Cri LJ 1589, 1590 : (1985) 1 Crimes 1032 (Orissa) (DB)]. Non-production of the weapons of offence for examination by the Court will render it improbable to find out if they were capable of being used for causing the injuries alleged to have been found on the person of the deceased [*Lala Ram v. State*, 1989 Cri LJ 572, 579 : (1988) 2 All Cri LR 995]. Recovery of the stolen articles shortly after the dacoity is a strong circumstance [*Chandan Singh v. State*, 1985 Cri LJ NOC 39 (Cal) (DB)].

**—Conjectures and surmises.**—Unlike direct evidence the indirect light circumstances may throw, may vary suspicion to certitude and care must be taken to avoid subjective pitfalls of exaggerating a conjecture into a conviction. Even evidentiary circumstance is a probative link, strong or weak, and must be made with certainty. Link after link forged firmly by credible testimony may form a strong chain of sure guilt binding the accused. Each link taken separately may just suggest but when hooked on to the next and on again may mancle the accused inescapably [*Dharamdas v. S*, A 1975 SC 241]. Circumstantial evidence must be of a conclusive nature and circumstances must not be capable of a duality of explanations. It does not however mean that the Court is bound to accept any exaggerated, capricious or ridiculous explanation which may suggest itself to a highly imaginative mind [*State of Maharashtra v. Champalal Punjaji Shah*, A 1981 SC 1675, 1679 : 1981 Cri LJ 1273]. In a case depending largely upon circumstantial evidence there is always the danger that conjecture or suspicion may take the place of legal proof [*Per* JENKINS, CJ, in *Barindra v. R*, 37 C 467 *ante*; see also *Hanumant v. S*, 1952 SCR 1091 : A 1952 SC 343; *Palvinder v. S*, A 1952 SC 354 : 1953 SCR 94; *Charan Singh v. S*, A 1967 SC 520 where the same warning addressed by BARON ALDERSON in *R v. Hodge* (1838, 2 Lewis CC 227) was repeated].

**—When two views are possible.**—If two views are possible on the evidence adduced in a case of circumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, the court should adopt the latter view favourable to the accused [*Harendra Narain Singh v. State of Bihar*, A 1991 SC 1842, 1844]. If the circumstantial evidence admits of two inferences, the one in favour of the accused must be accepted. [*Baboo Ram v. State*, 1996 Cri LJ 483, 486 (All)] The circumstances must be conclusively established and the chain of circumstances must be so

closely knit so as to exclude all the reasonable hypothesis of the innocence of the accused. The evidence must point only to the guilt of the accused and if the evidence leads to two interpretations, the interpretation in favour of the accused must be preferred. *N Rajendra v. State*, 1996 Cri LJ 257, 259 (Karn).

**—Absence of explanation or false explanation.**—False explanation of the accused can be taken into consideration as an additional link to the chain of events presented by the prosecution. *State of M P v. Ratan Lal*, A 1994 SC 458, 460 : 1994 Cri LJ 131. In a case where the various links have been satisfactorily made out and the accused did not offer any explanation consistent with his innocence, the absence of such explanation itself is an additional link which completes the chain [*Prakash Sen v. State*, 1988 Cri LJ 1275, 1282 : (1988) 1 Cal LT (HD) 360 (DB)]. The false explanation by the accused can be used by the court as an additional links to the chain of events. *Swarna v. State of H P*, 1994 Cri LJ 3656, 3661 (HP). An evasive answer by the accused in his statement under section 313 CrPC is a circumstance which can go against him. *J V Wagh v. State of Maharashtra*, 1996 Cri LJ 803, 804 (Bom).

**Probability.**—By probability is meant the likelihood of anything to be true, deduced from its conformity to our knowledge, observation and experience. When a supposed fact is so repugnant to the laws of nature that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible, or physically impossible. There is likewise moral impossibility, which, however, is nothing more than a higher degree of improbability. As the knowledge, observation, and experience of men vary in every imaginable degree, their notions of possibility and probability might naturally be expected to differ; and we continually find that not only are the most opposite judgments formed as to the credence due to alleged facts, but that a fact which one man considers both possible and probable, another holds to be physically impossible. There are two things which must never be lost sight of when weighing testimony of any kind : (*1*) The consistency of the different parts of narration; (2) The possibility or probability, the impossibility or improbability, of the matters related,—which afford a sort of corroborative or counter-evidence of those matters [Best, 11th Ed ss 24, 25, pp 14, 15]. Probability means "the appearance of truth or likelihood of being realised which any statement or event bears in the light of present evidence" [Murray's English Dictionary]. The concept of probability and the degrees of it cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must rest on a robust common sense and ultimately on the trained intuitions of the judge [*State of U.P. v. Krishna Gopal*, A 1988 SC 2154, 2161 : 1989 Cri LJ 288]. The non-sealing of the articles immediately after the seizure in the presence of the panchas is bound to affect the probative value of the findings of the chemical analyser [*Dasu v. State of Maharashtra*, 1985 Cri LJ 1933, 1942 : (1985) 2 Crimes 624 (Bom) (DB)]. Mere proof of the handwriting of a document would not tantamount to proof of all the contents or of the facts stated in the document. If the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence, *i.e.* by the evidence of these persons who can vouchsafe for the truth of the facts in issue [*Ramji Dayawala & Sons (P) Ltd. v. Invest Import*, A 1981 SC 2085, 2092 : (1981) 1 SCR 899 (1981) 1 SCC 80]. When there is doubtful oral evidence and suspicious evidence in the shape of school leaving certificate the court

should give all importance to the opinion of the radiologist regarding the bony age of the prosecutrix [*Kanchan Dass v. State*, 1991 Cri LJ 2036, 2038 (Delhi)]. When the court is not able to conclude as to whether the police dog scented the chappals, bahi (which is commonly known as part of a cot) or the chankath of the window, the alleged pointing out of the accused by the police dog becomes meaningless [*Jit Singh v. State of Punjab*, 1988 Cri LJ 39, 42 : (1988) 2 Reports 77 (P&H) (DB)]. In a murder case, when the only evidence is a dot of blood on the shirt of the accused and recovery of knife on his confession, such evidence is not sufficient to convict the accused [*Jagan Nath v. State of Himachal Pradesh*, 1982 Cri LJ 2289, 2291 : (1982) 9 Cri LT 225 (Him Pra)]. When the clothes of the accused recovered long after the occurrence are alleged to certain blood stains, it is unlikely that the accused would be wearing the clothes all this time without washing off the stains of blood [*State of Orissa v. Bishnu Charan Muduli*, 1985 Cri LJ 1573, 1588 (Orissa) (DB)]. The evidence about the blood group is only conclusive to connect the blood stains with the deceased and no reliance can be placed on that fact [*Kansa Behera v. State of Orissa*, A 1987 SC 1507, 1509 : 1987 Cri LJ 1857]. Even assuming that blood had fallen on the earth at the place of occurrence, failure to lead forensic evidence with regard to the same, though unfortunate, would not be fatal [*Bachittar Singh v. State*, 1991 Cri LJ 2619, 2626 (Delhi)]. It is the duty of the prosecution to produce the report of the chemical examiner or serologist indicating recovery of human blood from near about the house of the deceased [*Balbir Singh v. State*, 1991 Cri LJ 3080, 3086 (All)]. The find of human blood on the weapon and the pant of the accused lends corroboration to testimony of the eye-witness. Such evidence can be accepted [*Khujji v. State of AP*, A 1991 SC 1853, 1861]. Credibility of a witness should not be accepted merely because it is corroborated by the evidence of other witness, but such credibility, should be tested in the touch-stone of the broad probabilities of the case. It doubt arises with regard to any material fact in a criminal case, the accused is always entitled to the benefit of such doubt. [*Mangulu Kanhar v. State of Orissa*, 1995 Cri LJ 2036, 2038 (Ori)].

—**Value of Probability**.—Probabilities are important elements of consideration, where the evidence appears unreliable and is directly conflicting; but probabilities can seldom be safely had recourse to alone for the purpose of entirely invalidating direct evidence [*Lalla Jha v. Tulleb Matul*, 21 WR 436, 438]. Probability, or improbability of a transaction, no doubt forms a most important consideration in ascertaining the truth of any transaction relied upon. But it would, indeed, be most dangerous to say that where the probabilities are in favour of the transaction, we should conclude against it solely because of the general fallibility of the evidence tendered [*Bunwari v. Hetnarain*, 7 MIA 184 : 4 WR 128]. Where evidence given by both parties is imperfect, court can decide on probabilities [*Lal Singh v. Hira*, 84 PWR 1910 : 7 IC 352]. Evidence of only one party even when no evidence of rebuttal is led by opposite party need not necessarily be accepted. In assessing the value of the evidence Judges are bound to call in aid their experience of life and test the evidence on basis of probabilities [*Chaturbhuj v. Collr*, A 1969 SC 255]. A civil case may be decided on mere preponderance of probability, but in a criminal case a much higher degree of assurance is required.

The inability of the witness to reproduce any words of the altercation that was going on between the deceased and the accused is hardly a ground to dub him unreliable [*State of Maharashtra v. Krishnamurti Laxmipati*, A 1981 SC 617, 623 : 1981 Cri LJ 9]. Even if the dying declaration does not reproduce the exact words of the maker but if the substance of the statement has been correctly recorded and does not contain any infirmity, it may be accepted [*Dilli Rao v. State of Bihar*, 1986 Cri LJ

1483, 1487 (Pat) (DB)]. Delay of three days in examining the eye-witnesses by the Investigating officer is fatal [*Basudeb Salvee v. State*, 1985 Cri LJ NOC 29 : 1983 Cut LR (Cri) 340 (Orissa)]. When the injured was lying in the village for nine hours and only in the morning he was taken to the police station to lodge the complaint and the delay has not been explained the First Information Report loses its corroborative value [*Mahmood Ilahi v. State of U.P.*, 1990 Cri LJ 850, 853 : 1989 All LJ 468]. The fact that the confession of the approver which preceded the pardon as a result of which he became the approver was wholly exculpatory and the approver did not implicate himself in any way in the murderous assault on the deceased and that he falsely implicated three persons is sufficient to disbelieve the evidence of the approver. [*Joga Gola v. State of Gujarat*, A 1982 SC 1227, 1228 : 1982 Cri LJ 579]. In a case of death due to 100% burns, when the house was kept open and the watertap was nearly open it is a case of accidental fire while cooking food is ruled out [*State of Madhya Pradesh v. Sheikh Lallu*, 1990 Cri LJ NOC 127 (Madh Pra)]. Where the prosecution version is that the accused gave a thrust with a knife and fled, the presence of several injuries on the body of the deceased belie the prosecution story [*Nakul Chandra Kumbhakar v. State*, 1981 Cri LJ (NOC) 26 (Cal)]. In rural areas where quarrel takes place independent villagers are generally averse to give evidence because they are afraid of the fact that giving evidence may invite wrath of the assailant and may expose them to serious consequences [*Ram Chandra v. The State of Rajasthan*, 1982 Cri LJ 36, 39 : 1981 Raj LW 150 (Raj)]. If the house of the witness is adjacent to the place of occurrence, the possibility of his reaching the spot very promptly on hearing the gunfire cannot be ruled out [*Mahabir Prasad Akela v. State of Bihar*, 1987 Cri LJ 1545, 1550 (Pat) (DB)]. The very fact that the victim was subjected to manual strangulation as well as strangulation by ligature before she died, clearly show that the intention of the accused was to kill the victim [*Debar Kundu Rama Krishna Rao v. State of West Bengal*, 1988 Cri LJ 345, 354 (Cal) (DB)]. The invaders of forest and wild life usually take care that their poaching techniques go unnoticed by others including wild animals. They adopt devices to keep their movements undetected. Hence it would be pedantic to insist on the rule of corroboration by independent evidence in proof of offence relating to forests and wild life. [*Forest Range Office Chngathara II Range v. Aboobacker*, 1989 Cri LJ 2038, 2040 : (1989) 1 Ker LT 871]. The pendency of a partition suit between the accused and the eye-witnesses does not render their evidence inacceptable [*Sadek S.K. v. The State*, 1984 Cri LJ 29, 32 (Cal) (DB)].

Very often an accused has a close and loving relationship with the victim which love changes into hatred resulting in the murder. So motive cannot be insisted upon [*Parimal Banerjee v. State*, (1986) Cri LJ 220, 227 (DB) (Cal)]. Merely because of the entries in the names of the sons of the complainant in the revenue record were reviewed at the instance of the appellant does not mean the complainant would have a grudge against the accused. Merely because the witness belong to the place of the complainant does not mean that they would necessarily give evidence in favour of the complainant [*Sarapchand v. State of Punjab*, A 1987 SC 1441, 1442, 1443 : 1987 Cri LJ 1180]. When the evidence of eye-witnesses is reliable, the non-seizure of various items could only lead to lack of corroboration and nothing else [*Santosh Kumar Sarkar v. State*, 1988 Cri LJ 1828, 1834 : (1988) 92 Cal WN 918 (Cal)]. To call a witness who is related to both sides as a got up witness is not only to misread the evidence, but to read into evidence something which is not there [*Smt. Baby v. Jayant Mahadeo Jagtap*, A 1981 Bom 283, 290 : 1981 Mah LJ 614]. The fact that the attesting witness lived at a place six miles away from the residence of the parties could not be a ground for rejecting his testimony [*Asghar Ali v. Chidda*, A 1982 All 186, 191]. When the witnesses belong to a distant place and they had no axe to grind

against the accused, it is difficult to disbelieve their evidence [*Braja Gopal Bhuyan v. State of Orissa*, 1989 Cri LJ 1653, 1655 : (1988) 3 Crimes 854]. It is unlikely that the accused would continue to remain at the scene of occurrence after committing the 4 murders [*State of Uttar Pradesh v. Jageshwar*, A 1983 SC 349, 350 : 1983 Cri LJ 686]. When a witness himself was assaulted in the occurrence and received injuries, his presence at the place of occurrence is proved [*Yogendra Rawani v. State of Bihar*, 1984 Cri LJ 386, 389 (Patna) (DB)]. After stabbing the deceased at 9.30 PM inside the house of deceased, the accused ran away before the neighbours arrived there. Non-examination of these neighbours is not fatal [*Uthaman v. State*, 1984 Cri LJ NOC 112 : 1983 Ker LT 698 (Ker) (DB)]. The site plan did not show any visible signs of dacoity in the shape of scattered household articles etc. So there was no material to indicate commission of dacoity [*Bujjha v. State of U.P.*, 1985 Cri LJ 1829, 1832 (All) (DB)]. When the occurrence took place outside the house of a witness his presence on the scene of occurrence is quite natural and it is not open to any doubt [*Ajajal Singh v. State of Rajasthan*, 1986 Cri LJ 1495, 1501 (Raj) (DB) : 1986 Raj LR 325 : 1986 Raj LW 307]. The complaint was promptly given by the son of the victim and the names of 15 out of the 19 accused. Under such circumstance the evidence of the son of the victim should not be rejected merely because it did not conform to the sequence of events narrated by other witnesses [*State of U.P. v. Ranjha Rana*, A 1986 SC 1959, 1962 : 1986 Cri LJ 1906]. It is very much doubtful if doing domestic duties in the absence of servants may be considered as torture to make a housewife to prefer death to get away from it [*Smt. Shyama Devi v. State of West Bengal*, 1987 Cri LJ 1163, 1170 (Cal) (DB)].

From the mere suspicious movements, it cannot legally be assumed that a person had shared the common intention with the assailant of the deceased [*Domu Chopadi v. State*, 1987 Cri LJ 1481, 1483 : (1986) 1 Ori LR 668 : (1986) 2 Cri LC 261 (Ori) (DB)]. The evidence that the accused were found at odd hour near the public place where the telegraph wires were lying does not prove the guilt of the accused. [*Usman Gani Laskar v. State of Assam*, 1981 Cri LJ (NOC) 73 (Gau)]. The accused are men of locality. They also alleged that they had been implicated out of political rivalry. So the question of describing the accused otherwise than by name cannot arise [*Barka Rajwar v. State*, 1983 Cri LJ 1851, 1853 (Cal) (DB)]. In the case of dacoity the evidence that there was ample light in the glow of torches which were being used by the dacoits is certainly credible because such a dacoity carried for a length of time could not have been carried on in the dark [*Gofur Shiekh v. The State*, 1984 Cri LJ 559, 562 : (1983) 2 Crimes 174 (Cal) (DB)]. In a case against a police constable for disorderly behaviour the evidence of these police officers about the occurrence can be accepted since normally they would be considerate towards their colleague [*State (Delhi Admn) v. Sube Singh*, 1985 Cri LJ 1190, 1192 : (1984) 2 Crimes 109 (Del) (DB)]. When the eye witnesses speak only about some of injuries on the victim mentioned in the medical evidence and no explanation is offered regarding the other injuries, the prosecution story cannot be believed [*Ganpat v. State*, 1987 Cri LJ 6, 8 : (1986) Crimes 483 (Del)]. In case where the prosecution endeavours to introduce at the trial a new version or a version which is materially different from the original, as narrated in the F.I.R. the court is required to act with utmost care and circumspection in scrutinising the evidence [*Nirmal Singh v. State of H.P.*, 1987 Cri LJ 1644, 1647 (HP) (DB) : (1987) 14 Cri LJ 109]. The evidence of an approver must receive sufficient corroboration from reliable sources [*State of Orissa v. Nazrul Ali Sekh*, 1985 Cri LJ 1311, 1312 : (1985) 1 Crimes 458 (Orissa) (DB)]. Examination of eye-witness on the next day evening could not be rejected [*State of M.P. v. Krishan*, 1985 Cri LJ NOC 105 : (1984) 1 Crimes 647 (MP) (DB)]. When no cogent reasons were given to explain or explain away the lacuna in the prosecution evidence, that evi-

dence cannot be used to convict the accused [*Mulayam Singh v. State of Madhya Pradesh*, 1990 Cri LJ 2562, 2565 (Madh-Pra)]. The question of examining independent witnesses arises only when the court has some genuine doubt regarding the reliability of the witness already examined [*State of Gujarat v. Panubhai*, 1991 Cri LJ 2226, 2235 (Guj)]. When the oral dying declaration pointed to the guilt of the accused while the written declaration did not, the accused cannot be convicted [*Smt. Shakuntla v. The State*, 1984 Cri LJ NOC 76 : (1984) 25 Delhi LT 33 (Delhi) (DB)]. Where the defence is founded on a relevant and vital document seized from the custody of the accused (like a release order in respect of wheat) and not deliberately produced, the accused cannot be convicted [*Chittaranjan Choudhury v. State of Bihar*, A 1987 SC 856, 857 : 1987 Cri LJ 773]. If the accused chooses to lead evidence the court may base its order of conviction on that evidence even if the prosecution failed to prove the charge [*Lachman Singh v. State*, 1990 Cri LJ (NOC) 78 (Cal)]. The falsity of the defence can only be used to embellish the conclusion of guilt if established conclusively on the material placed by the prosecution [*Haji Mohamed Jgbal Ahmed v. State of Karnataka*, 1990 Cri LJ 179 (NOC) (Kant)]. The conduct of the mother of the deceased in not disclosing the fact of her seeing her son being killed and the fact that she was examined only a week later show that her evidence cannot be accepted [*Malsingh v. State of Rajasthan*, 1983 Cri LJ 1411, 1417 (Raj) (DB) : 1983 WLN 268]. The fact that the witness did not tell his wife of his seeing the occurrence till the matter was reported to the police throws a doubt about the prosecution case [*Kapil Kumar v. State of Assam*, 1983 Cri LJ NOC 66 (Gauhati) (DB)]. No reliance can be placed on the evidence of a witness who claims to have seen the commission of the offence and has not disclosed the occurrence to anyone and has been examined during the investigation after considerable delay [*Kailash Chandra Sahu v. The State*, 1984 Cri LJ 772, 774 : (1983) 55 Cut LT 472 (Orissa) (DB)].

The fact that the witness did not disclose the names of the assailants for 1½ days and did not mention about the theft of the articles till they were recovered throws suspicion about the testimony of that witness [*State of M.P. v. Deoki Nandan*, 1987 Cri LJ 1016, 1022 : 1987 MPLJ 61 (MP) (DB)]. The evidence should be free from infirmities and doubts. If no report is given to the police authorities till the sub-inspector himself came to the village it should be explained [*State of Assam v. Bhelu Singh*, A 1989 SC 1097, 1099 : 1989 Cri LJ 879]. Witnesses who arrive at the scene of occurrence after the deceased received the blow need not be examined [*Mandira Mallik v. State of Assam*, 1982 Cri LJ NOC 27 (Gauh)]. The evidence of a witness not examined by police during investigation cannot be brushed aside merely on that ground [*Laxminarayan Hansda v. State*, 1982 Cri LJ NOC 72 : 53 Cut LT 195 (Orissa)]. An informant is alleged to have given information to the D.S.P. that the accused will be following the truck which carried the prohibited liquor. When this informant is not examined, the evidence of the D.S.P. about the information received by him is not admissible [*Bhugdomal Gangaram v. State of Gujarat*, A 1983 SC 906, 910 : 1983 Cri LJ 1276]. If not a single person from the locality is brought to unfold the actual occurrence, the evidence of other witnesses will cast a doubt on the prosecution case [*State of U.P. v. Madan Mohan*, A 1989 SC 1519, 1521 : 1989 Cri LJ 1485]. The fact that the Investigating Officer did not record the statements of certain witnesses immediately does not discredit their evidence when they are otherwise reliable [*Mohammed v. State of Karnataka*, 1991 Cri LJ NOC 14 (Kant)]. When the disinterested witness was withheld, the court cannot act on the evidence of the interested witness alone [*Gopinath Pradhan v. State of Orissa*, 1982 Cri LJ NOC 124 (Orissa)]. Ordinarily the

evidence of a truthful eye-witness is sufficient without anything more, to warrant a conviction and cannot, for instance, be made to depend for its acceptance on the truthfulness of other items of evidence such as recovery of weapons etc., at the instance of the accused by the police [*Shrishail Nageshi Para v. State of Maharashtra*, A 1985 SC 866, 867 (DB) : 1985 Cri LJ 1173]. Merely because a person says that she also received injuries at the time of occurrence does not mean that the evidence has to be accepted when on other circumstances the prosecution story appears to be doubtful [*Bal Krishnan Sita Ram Pandit v. State*, 1987 Cri LJ 479, 482 : (1986) 29 Delhi LT 394 (Del)]. Statement given by the accused to the doctor as to cause of injuries amounts to admission [*Ammini v. State of Kerala,* 1998 Cri LJ 481 (SC)].

A mechanical approach to the oral evidence in an incident in which one man was jointly attacked all of a sudden by five persons is not justified [*Dasan v. State of Kerala*, 1987 Cri LJ 180, 184 : 1986 Ker LT 598 (Ker) (DB)]. When the evidence of a witness is found to be unreliable and unacceptable, it cannot be rendered credible simply because there is some corroborative evidence [*Purna Palai v. State*, 1987 Cri LJ 1406, 1410 : (1987) 2 Crimes 257 (Ori) (DB)]. Merely because witnesses volun-tarily appeared before the court, to give evidence, without any summons, their evidence cannot be disbelieved on that ground [*M/s. Ladies Corner v. State of Karnataka*, 1987 Cri LJ 2078, 2086 (Kant) (DB) : (1987) 1 Kant LJ 402]. When the offence committed by the accused is established by unimpeachable corroborative evidence *viz* the report lodged with the police and the medical evidence there was no need to go in search of elusive independent witnesses [*Vilas Jagannath Dere v. Ramesh Dnyandba Dere*, 1989 Cri LJ 1283 (Bom)]. Direct evidence always occupies top position [*Sardar v. State*, 1990 Cri LJ (NOC) 142 (Delhi)]. The witnesses have given a cogent and consistent version about the manner in which the accused committed the crime. Nothing was elicited in the cross-examination to discredit their evidence. Such evidence will inspire confidence in the mind of the Court [*In re Baskar*, 1991 Cri LJ 535, 543 (Mad)]. It would be hazardous to accept any part of the testimony of such witnesses who had no hesitation to falsely implicate a person who could not have been present on the scene of attack [*Bengali v. State of Orissa*, 1985 Cri LJ 580, 583 (Orissa) (DB)].

The prosecution must endeavour to elicit the opinion of the medical man whether a particular injury is possible by showing the weapon. But the omission to elicit such opinion cannot render the direct testimony of eye-witnesses weak [*Gurmej Singh v. State of Punjab*, A 1992 SC 214, 219]. Merely because for some reason the accused was seen running or working briskly, it does not follow that he was the culprit although a strong suspicion may arise against him [*Vinod Samual v. Delhi Administration*, A 1992 SC 465]. The omissions or misdescriptions regarding the number of shots fired or the injuries would not tell on the prosecution case or the statement of eye-witnesses when the F.I.R. was recorded most promptly within three hours of the occurrence [*Surjit Singh v. State of Punjab*, A 1992 SC 1389, 1392]. If in spite of being asked time and again the child witness did not answer but was seeing this way or the other and stood silent, the evidence of such a witness should not be accepted [*Nirmal Kumar v. State of U.P.*, A 1992 SC 1131, 1132]. The suspicion entertained by the defence could be of no consequences for that alone could not lead to discredit the eye-witnesses to the crime [*Kirtan Bhuyan v. State of Orissa*, A 1992 SC 1579, 1580]. The evidence of an attesting witness to an agreement of sale cannot be rejected merely on the ground of relationship [*Yohaman v. Harikrishnan Nair*, A 1992 Ker 49, 52]. Failure to join witnesses from the public when they are available

may cast a doubt [*Nanak Chand v State of Delhi*, 1992 Cri LJ 55, 56 (Delhi)]. When a solitary witness omits to state the material facts of the actual incident in his first report, his evidence becomes doubtful [*Bilaluddin v. State of Assam*, 1992 Cri LJ 161, 163 (Gauh)]. That much of the evidence of a hostile witness can be relied upon if that statement is in conformity with other evidence [*Ramchit Rajbhar v. State of W.B.*, 1992 Cri LJ 372, 377 (Cal)]. An ocular witness cannot be disbelieved merely because he has not deposed anything about the removal of the victim from the place of occurrence [*Purna Padhi v. State of Orissa*, 1992 Cri LJ 687, 689 (Ori)]. Any mistakes and discrepancies in the statement of a child witness are ascribed to innocence or failure to understand by the child and undue weight is given to what may merely be a well taught lesson [*Kumar Prasad v. State of M.P.*, 1992 Cri LJ 718, 721 (MP)]. The mere fact that the eyewitnesses are inimical is no ground for discarding their evidence altogether [*Chandrika Mishra v. State of U.P.*, 1992 Cri LJ 1777, 1786 (AQ)]. The particulars regarding the weapons in the hands of each of the accused persons is not such an omission which would amount to a material omission, contradiction so as to make his testimony in the court incredible [*Manoj Wasudeo Ingley v. State of Maharashtra*, 1992 Cri LJ 1970, 1982 (Bom)]. Failure to seize blood stained earth from the place of occurrence casts a serious doubt on the place of occurrence [*Satya Narain Bhagat v. State of Bihar*, 1992 Cri LJ 2156, 2160 (Pat)]. Different persons react differently to incidents they witness. A person may be dumb-founded on seeing a crime, another person may shout for help and a third person may go to the rescue of the victim and yet, another person may run away from the scene out of fear and may not reveal what he had seen to anyone. It is totally unrealistic for any court of law to lay down, as a principle of law of universal application that when a witness witnessed a crime he would definitely go out and disclose to others what he had seen [*Mukhera Belakota Reddi v. State of A.P.*, 1992 Cri LJ 2236, 2240 (AP)]. Non-examination of the person who could not give any material evidence is not fatal [*Ram Kumar v. State of U.P.*, 1992 Cri LJ 2421, 2423 (SC)].

**S. 4. "May presume".**—Whenever it is provided by this [1][Act] that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it:

**"Shall presume".**—Whenever it is directed by this [1][Act] that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved:

**"Conclusive proof".**—When one fact is declared by this [1][Act] to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

## COMMENTARY

**Presumption.**—The term 'presumption' in its largest and most comprehensive signification, may be defined, where in the absence of actual certainty of the truth or falsehood of a fact or proposition, an inference affirmative or disaffirmative of that truth or falsehood is drawn by a process of probable reasoning from something which is taken for granted. It is, however, rarely employed in jurisprudence in this

1. "Ordinance" substituted in Ceylon.

extended sense. Like "presumptive evidence" it has there obtained a restricted legal signification, and is used to designate an inference, affirmative or disaffirmative, of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning, from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal [Best, 4th Ed, p 406; 11th Ed, p 313]. Presumptions are drawn from the course of nature, for instance, that night will follow day, the seasons follow each other, death ensues from a mortal wound, and the like; or from the course of human affairs; from a familiarity with the ordinary springs of human action, from the usages of society, domestic relationship and transactions in business [Norton, p 97; *see post*, s 114]. Shortly speaking, a presumption is an inference of fact drawn from other known or proved facts. It is a rule of law under which courts are authorised to draw a particular inference from a particular fact, unless and until the truth of such inference is disproved by other evidence. The presumption under the Evidence Act are only the inferences which a logical and reasonable mind normally draws. The court can by reason of s 4 raise the presumption for purposes of proof of a fact. If it is not available in one section but is available in another section, the court can raise presumption under that section [*Ram Jas v. Surendra Nath*, A 1980 A 385 FB]. A presumption is not in itself evidence but only makes a *prima facie* case for party in whose favour it exists. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts, and circumstances [*Sodhi Transport Co. v. State of U.P.*, A 1986 SC 1099, 1105].

**—Divisions of Presumption.**—Presumption according to English text-writers are: (*a*) Presumptions of fact or natural presumption: (*b*) Presumptions of law (rebuttable and irrebuttable); and (*c*) Mixed presumptions.

*Presumptions of fact* or natural presumptions are inferences which are naturally and logically drawn from the experience and observation of the course of nature, the constitution of human mind, the springs of human action, the usages and habits of society. Those presumptions are generally rebuttable [Best, 4th Ed, p 414]. Clause (*1*) of the section appears to point at presumptions of fact. S 114 is a general section dealing with presumptions of this kind. *Gitika Bagchi v. Subhabrota Bagchi*, A 1996 Cal 246, 251.

Presumptions of law or artificial presumptions are inferences or propositions established by law,—the inferences, which the law peremptorily requires to be made whenever the facts appear which it assumes as the basis of that inference. The presumptions of law are in reality rules of law, and part of the law itself and the court may draw the inference whenever the requisite facts are developed in pleadings &c. Presumptions of law are based, like presumptions of fact on the uniformity of deduction which experience proves to be justifiable; they differ in being invested by the law with the quality of a rule, which directs that they *must* be drawn; they are not permissive like natural presumptions which may or may not be drawn; and presumptions of law again differ in their force, according as they are rebuttable or irrebuttable. As to the former, the presumption shall stand good only until it is disproved. The latter class, or irrebuttable presumptions, the law holds conclusive [Best, 11th Ed, s 304 *et seq* and Norton, p 97; Hals, 3rd Ed, Vol 15, *para* 619]. These presumptions

are also rebuttable and cl (2) of the section appears to point at rebuttable presumptions of law. As to presumptions of fact and rebuttable presumptions of law, *see* ss 79 to 90 and s 105, *post*. In case of presumption of law no discretion has been left to the court, and it is bound to presume the fact as proved until evidence is given by the party interested to rebut or disprove it. *Gitika Bagchi v. Subhabrota Bagchi*, A 1996 Cal 246, 251.

*Mixed presumptions* or, as they are sometimes called, "presumptions of mixed law and fact" and "presumptions of fact recognised by law" hold an intermediate place between the former two and consist chiefly of certain presumptive inferences which, from their strength, importance, or frequent occurrence, attract, as it were, the observation of the law [Best, 11 Ed, s 324].

*Conclusive presumptions* or irrebuttable presumptions are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong. *Fictions of law* are closely allied to irrebuttable presumptions of law. The law, for the advancement of justice, assumes as fact, and will not allow to be disproved, something which is false, but not impossible. On the whole, modern courts of justice are slow to recognise presumptions as irrebuttable, and are disposed rather to restrict than extend their number. By an arbitrary rule to preclude a party from adducing evidence, which if received would compel a decision in his favour, is an act which can only be justified by the clearest expediency and soundest policy, and some presumptions of this class ought never to have found their way into it [Best, 4th Ed, pp 416-18; 11th Ed, s 306 *et seq*; Hals, 3rd Ed, Vol 15, para 621]. See *Din Dayal v. S*, A 1956 A 520, 523 where this para quoted from Best has been reproduced.

Clause (*3*) of the section points at irrebuttable presumptions of law and the number of such presumptions are very few [see ss 41, 112, 113, *post* and s 82 of the I P Code]. *Irrebuttable presumptions* of *law* are almost the same as indisputable propositions of law, *eg*, the rule that nothing is an offence which is done by a child under seven [s 82 I P Code] is a part of the criminal law; or the presumption against ignorance of law. There is a tendency now to regard such irrebuttable presumptions of law as also rebuttable, *eg*, the presumption that a child born in wedlock is legitimate was formerly held as irrebuttable, but is now regarded as rebuttable (s 112).

*Rebuttable presumptions* of law relate to innocence, intention, death, due performance of official acts, validity of official documents, etc. etc. There is a presumption against misconduct. A man is presumed to be innocent, until the contrary is proved. A man is presumed to intend the natural and probable conse-quences of his acts. A man is presumed to be dead when it has been proved that he has not been heard of for seven years (s 107).

The Act does away with the distinction in English law between presumptions of fact and presumptions of law or mixed presumptions and all presumptions come under the three classes in s 4. It only distinguishes between cases when the court *may* presume and when the court *shall* presume.

**"May Presume".**—According to section 4, wherever the expression "may presume" has been used in the Act, a discretion has been given to the court to presume a fact or refuse to raise such a presumption. If the, court finds that it is a fit case for raising presumption, such fact stands proved unless and until, it is disproved by other side. According to this section, in cases where a discretion lies with the court and it refuses to exercise discretion, then it may call upon the parties to prove

the fact by leading evidence. In those sections where the expression has been used that the court "shall presume" in the event no discretion has been left with the court and there is a legislative command to it to raise a presumption and regard such fact as proved unless and until it is disproved. In such an eventuality, the question of calling upon the parties to formally prove a document does not arise. *Haradhan Mahatha v. Dukhu Mahatha*, A 1993 Pat 129, 132. The first and by far the largest class includes all those natural inferences which the 'common course of natural events', human conduct and public and private business suggest to us. Our experience of the world for instance, leads us to infer that a man, who is in possession of stolen goods shortly after the theft and can give no account of them, either is the thief or has received the goods knowing them to be stolen; our knowledge of the regularity with which the public business proceeds, leads us to infer that an official act has been regularly performed; our knowledge of human nature leads us to infer that a man who does not answer a question, could not answer it in a manner favourable to himself. The Act gives legal sanction to such inference, at the same time allowing the judge a discretion which like any other such discretion he should exercise in a judicial manner. Sections 86, 87, 88, 90 and 118 come under this head [Cunn, pp 12-14]. For the meaning of the words 'may presume' as used in these sections, see *Shafiqunnissa v. Shaban*, 26 A 581, 586; *Rangu v. Rambha*, A 1967 B 382. In respect of presumptions, the Act allows the judge a discretion in each case to decide whether the fact which under s 114 may be presumed has been proved by virtue of that presumption [*Raghunath v. Hotilal*, 1 ALJ 121]. Under s 4 it is open to the court upon proof of a marriage on a certain date, either to regard as proved the subsistence of the marriage on a subsequent date unless and until it should be disproved or else to call for proof of it [*Ismail v. Momin*, A 1941 PC 11 : 193 IC 209; *Chanda v. Khatemonnessa*, A 1943 C 76: 1942, 2 Cal 299: 46 CWN 729]. Once the factum of marriage is proved, everything necessary to validate such marriage, including the observation of essential ceremonies, shall be presumed, particularly where the legality and the validity of the marriage are not impugned either in the pleadings or in the evidence on the ground of non-performance of necessary ceremonies or otherwise [*Sridher Dey v. Kalpana Dey*, A 1987 Cal 213, 218 (DB) : (1987) 91 Cal WN 456]. The fact that the child was born during the continuance of a valid marriage between the husband and the wife is conclusive proof of fact that the child is the legitimate child of the husband, the effect of s 4 is that the Court could not allow evidence to be given that the husband did not in fact have the sexual intercourse with the wife on the date on which according to the wife the husband had sexual intercourse with her [*Prem Singh v. Smt Dilla Devi*, A 1984 All 129, 130 : 1983 All WC 952]. No presumption could be drawn from isolated statement of A in a proceeding under s 145 Cr PC when he is not examined in the suit for declaration [*Sadho Singh v. Rameshwar Singh*, A 1982 Pat (NOC) 89].

Under s 3 of the Commercial Documents Evidence Act, 30 of 1939, the court may presume the accuracy of the documents included in Part II of the schedule to the Act (See App D, *post*).

**"Shall Presume".**—The next class consists of those cases in which the court *shall* presume a fact. Here no option is left to the court, but it is bound to take the fact as proved until evidence is given to disprove it, and the party interested in disproving it must produce such evidence if he can. Presumptions of this sort arise chiefly as follows:—As for instance (*1*) the genuineness of a document purporting to be the Gazette of India, (2) A document called for and not produced was duly stamped, attested and executed (s 89) or that circumstances bringing an offence within the exception to the Indian Penal Code do not exist (s 105). The phrase 'shall presume' is

to be found in ss 79, 80, 81, 83, 85, 89 and 105. If the circumstances of execution of a gift-deed are suspicious, the endorsement of registration cannot be taken as conclusive proof of execution [*Smt Mallo v. Smt Bakhtawari*, A 1985 All 160, 163]. [Cunn, pp 13-14]. The meaning of the words "shall presume" in s 4 is given to these words for the purpose of that Act alone [*Waris Ali v. Parsotam*, 32 A 427 FB].

The presumption enjoined by s 201(*3*) of the Agra Tenancy Act 2 of 1901, is not conclusive even in a Revenue Court, but may be rebutted [*Dilkumar v. Udai Ram*, 29 A 148, 149]. The meaning of 'shall presume' in s 201 of the Agra Tenancy Act, and in s 4 of Evidence Act, discussed and explained [*Durga v. Hazari*, 33 A 799 FB]. The presumption laid down in s 4(2) of Madras Prohibition Act, 1937, is not repugnant to the Evidence Act [*In re Krishna*, A 1954 M 993]. S 4 of the Prevention of Corruption Act, 1949 is in *pari materia* with the Evidence Act and the words "it shall be presumed" there has the same meaning. It being a presumption of law, it is obligatory to raise it in every case under s 4 of the Prevention of Corruption Act [*S v. Vaidyanatha*, 1958 SCR 552: A 1958 SC 22; *Pub Pros v. Thomas*, A 1959 M 166]. The expression 'shall presume' carries with it the irresistible implication that such presumption is liable to be rebutted by evidence and notwithstanding such presumption, the competent authority under the Urban Land (Ceiling and Regulation) Act (33 of 1976) would be within its rights to inquire as to whether there are materials to rebut that presumption [*Birajananda Das Gupta v. Competent Authority*, (U.L (C&R) Act 1976)].

The court is not bound under s 8 of Act 7 of 1868 B C to presume conclusively that the provisions of s 6 of Act 11 of 1859, as regards the fixing of the date of sale had been complied with [*Bal Makoond v. Jirjudhan*, 9 C 217].

Under s 3 of the Commercial Documents Evidence Act, 30 of 1939, the court shall presume the accuracy of the documents included in Part I of the schedule to the Act (see App D, *post*). Even if a presumption in respect of a document is not available under s 90 it would be open to the courts to raise a presumption under ss. 4 and 14 [*Ali Hasan v. Matiullah*, A 1988 All 57 : (1888) 14 All LR 174].

**"Conclusive Proof".**—An artificial probative effect is given by the law to certain facts, and no evidence is allowed to be produced with a view to combating that effect [see *Parabu v. Jang*, 131 IC 555 : A 1932 A 80]. When the law says that a particular kind of evidence would be conclusive, that fact can be proved either by that evidence or by some other evidence which the court permits or requires. When such other evidence is adduced, it would be open to the court to consider whether upon that evidence the fact exists or not. On the other hand when evidence which is made conclusive is adduced, the court has no option but to hold that the fact exists. There is no difference between 'conclusive proof' and 'conclusive evidence' [*Somawanti v. S*, A 1963 SC 151]. These cases generally occur when it is against the policy of Government or the interests of society, that a matter should be further open to dispute. Thus judgments of certain courts are conclusive proof of the matters stated in them (s 41); a birth during a valid marriage is with certain exceptions, conclusive proof of legitimacy (s 112). In several instances certificates or other such documents are by special Acts, made conclusive evidence of the facts stated in them : *See* Companies Act, 1956, s 132; Succession Act, 1925, s 381; Christian Marriage Act, 1872, s 61; Madras Revenue Act, 1864, s 38; Oaths Act, 1873, [2]s 11 [Cunn, pp 13-14]. Certificate issued by the Director, Central Food Laboratory is conclusive proof of facts stated therein. Examination of the Directory is not necessary. The defence

2. Oaths Act, 1873 has been replaced by Oaths Act 44 of 1909 in which s 11 has been omitted.

cannot be permitted to disprove the facts contained in the certificate. *K V Baby v. Food Inspector, Wadakkanchery*, 1994 Cri LJ 3421, 3427 (Ker), See also *Mathukutty v. State of Kerala*, 1988 Cri LJ 898 (Ker). Similarly superimposition report issued by the Assistant Director (Biology) Forensic Science Laboratory is admissible in evidence without formal proof. *Raveendran v. State of Kerala*, 1994 Cri LJ 3562, 3566 (Ker). Certificate of registration given by the Registrar in respect of a Company is conclusive evidence that each subscriber wrote opposite his name the number of shares he took [*Collr v. Equity Ins Co Ld*, A 1948 O 197]. The words "conclusive evidence" in s 10 U P Pure Food Act, 32 of 1950, imports that the certificate of the public analyst need not be proved by formal evidence, but the presumption arising out of it is rebuttable [*Din Dayal v. S*, A 1956 A 520]. The statement in an order of the court is conclusive of what happened before the presiding officer of the court [*Ratanlal v. Nathulal*, A 1961 MP 108]. Voter's list drawn up under Gujarat Municipality Act is conclusive evidence of one's right to vote [*Md Hussein v. Onali*, A 1969 G 334]. When the essential and material case of one party was not put during the cross-examination of the two opposite party, it must follow that he believed that the testimony given by the opposite party could not be disputed at all [*Knittilrus Bhattacharya v. State of West Bengal*, A 1984 NOC 226 : (1984) 1 Cal LJ 161].

§ As to *presumptions see post* ss 79-90 and ss 112-114.

Where a statute makes certain facts as final and conclusive, evidence to disprove such facts is not to be allowed. *Calcutta Municipal Corpn. v. Pawan Kumar Saraf*, AIR 1999 SC 739 : (1999) Cri LJ 1125 : (1999) 2 SCC 400.