APPENDIX A

AFFIDAVIT

Affidavit.—An affidavit is a statement or a declaration in writing on oath or affirmation before a person having authority to administer an oath or affirmation. Ordinarily the evidence of witnesses shall be taken orally in open court in the presence and under the personal direction and superintendence of the judge (Or 18 r 4). An affidavit differs from a deposition in this that in the latter the opposite party has always an opportunity to cross-examine the deponent, but affidavit is always taken *ex parte*. There may, however, be cross-examination under the direction of the court (see Or 19 r 2). The Evidence Act does not apply to affidavits presented to any court or officer (see s 1 *ante*). In the absence of (*a*) agreement to take evidence by affidavit, (*b*) order to prove particular facts by affidavit, (*c*) order of examination by interrogatories, or before a commissioner, witnesses shall be examined *viva voce* in open court [*Warner v. Mosses*, 16 ChD 100 p 101].

Affidavit Evidence By Order of Court.—Matters relating to affidavit are regulated by the rules in the Code of Civil Procedure [see s 30(*c*)]. Or 19 r 1 runs thus:

Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that where it appears to the court that either party *bona fide* desires the production of a witness for cross-examination, and such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

This rule follows English Or 37 r 1. It empowers the court (*1*) to allow any fact to be proved by an affidavit or (2) to allow the affidavit of any witness to be read at the hearing. But if it appears to the court that either party desires the production of a witness for cross-examination and the witness is available, an order authorising evidence to be given by affidavit shall not be made. Under the first part of Or 19 r 1 the court has power to order any particular fact or facts to be proved by affidavit even if the parties do not wish it. Under the second part, the court has, subject to the proviso, the power to order the reading of an affidavit against the wish of one party.

The court may order particular facts to be proved by affidavit, or a particular affidavit to be used unless the opposite party desires the production of the deponent for cross-examination and the deponent can be produced [*Blackburn Union v. Brooks*, 7 CD 68, *Elias v. Griffith*, 46 LJ Ch 806]. The proviso at the end of the rule is of general application; and the court has now power to order an affidavit used on a previous application to be read at the hearing, when the other party desires the witness to be produced [*Blackburn Union v. Brooks, ibid*]. An application to read the evidence of a witness at the trial should be made before the trial [*per* BUTT J, in *Drewitt v D*, 58 LT 864]. The fact that an affidavit has been used on an interlocutory application gives no right to read it at the trial [*Perkins v. Slater*, 1 Ch D 83; *Blackburn Union v. Brooks, ibid*].

One view is that affidavit is not evidence under the law except where there is an agreement to that effect between the parties or there is an order by the court under Or 19 r 1 to prove a particular fact by it [*Marneedi v. Masimukhula*, A 1949 M 689;

Krishna v. Madhava, A 1921 M 381; *Fedl India Ass Co v. Anandrao*, A 1944 N 161; *Gopikabai v. Narayan*, A 1953 N 136]. The other view is that affidavit is evidence of the facts alleged therein. When the other party does not controvert the affidavit, it would be refining a technicality to order the filing of another affidavit [*Kanhaiya Lal v. Meghraj*, A 1954 N 260; *Srinivasa v. Pichumani*, A 1933 M 164; *Shib Sahai v. Tika*, A 1942 O 350].

S 45 of the Divorce Act empowers the court to allow the petitioner and her witnesses to give evidence by affidavit, but they will have to be present in court for cross-examination if so directed by the court [*per* BUCKLAND J, in *Stones v. S*, 38 CWN 969]. It is altogether undesirable and contrary to practice to accept evidence on affidavit in matrimonial suits [*per* COSTELLO J, in *Stones v. S*, 62 C 541: 52 CLJ 264, see *Kishore v. Snehaprobha*, A 1943 N 185 SB].

S 30 of the Arbitration Act (10 of 1940) empowers the court to decide the question raised on affidavit or upon other evidence also if the court so directs [*Deokinandan v. Basant*, 46 CWN 881].

When an affidavit has once been filed by a party, the opposite party is entitled to cross-examine (except that on interlocutory applications there is a discretion, see Or 19 r 2 *post*), whether a party or a mere witness and whether the affidavit has been withdrawn without being used or not [*Clarke v. Law*, 2 K & L 28; *Re Quartz Hill & Co*, 21 Ch D 642]. If the deponent does not appear for cross-examination where notice to cross-examine has been given, the affidavit cannot be read in his absence [*Re Bottomley*, 84 LJKB 820]. Cross-examination should not as a rule take place till the affidavit evidence is complete [*Muir v. Kirby*, 32 Sol Jol 139] though there is no hard and fast rule [*Re Davies*, 44 CD 253]. Court may refuse to act on an affidavit where the deponent cannot be cross-examined [*Shea v. Green*, 2 TR 533].

An affidavit by a railway employee cannot be used as substantive evidence. It can be used as an admission of the railway administration [*Dominion v. Rupchand*, A 1953 M 169].

Affidavit Upon Interlocutory Applications.—Or 19 r 2 says:

(*1*) Upon any application, evidence may be given by affidavit, but the court, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the court otherwise directs.

This rule is similar to R S C Or 38 r 1. The words in the English rule are "*Upon any motion, petition or summons*" instead of "*Upon any application*". The latter expression is comprehensive enough to include motion, petition, etc and all kinds of interlocutory or summary application. Interlocutory applications, *eg* for attachment before judgments, examination on commission, injunction, etc, etc are invariably supported by affidavits, and here the court has a discretion to order attendance for cross-examination, but as a rule cross-examination is not allowed in interlocutory proceedings as the delay involved would defeat the object of the applications. It is usual, however, to file counter-affidavits by the opposite party rebutting the allegations in the affidavit of the party moving.

In affidavits on interlocutory application under Or 19 r 2 there is a discretion to order cross-examination. There is no obligation on the court to make an order for cross-examination upon an affidavit filed on a motion [*La Trinidad v. Brown*, 26 WR 138]. In England attendance of an affidavit-witness for cross-examination may be secured by notice under Or 38 r 28 or by *subpoena* under Or 37 r 20. There can be no

cross-examination on an affidavit disclosing the names of the person constituting a firm under Or 30 rr 1, 2 C P Code [see *Abrahams v. Dunlop P Tyre Co*, 1905, 1 KB 46 CA]. When any party requests the court to summon the witness for cross-examination, it should do so [*Narayana v. Lakshmayya*, A 1939 M 927].

In England the rule ordinarily applies to interlocutory applications. It was also held in some cases here that Or 19 r 2 does not apply to applications of a substantive nature (*eg* those under Or 9 r 13; Or 21 r 90; Or 21 r 100; Or 33 r 2 &c) [*Fedl India Ass Co v. Anandrao*, A 1944 N 161; *Gopikabai v. Narayana*, A 1953 N 135]. Affidavits cannot be acted upon in execution petitions which are original proceedings and not interlocutory applications [*Seeli v. Bhupathi*, A 1963 AP 445 (*Saraswathamma v. Amruthamma*, ILR 1957 AP 165 and *Gopikabai, sup* **reld on**)]. A Division Bench has however held that it applies to all applications and no distinction can be made between interlocutory and substantive applications [*Kanhaiya Lal v. Meghraj*, A 1954 N 260].

Matters to which Affidavit Shall be Confined.—Or 19 r 3 says:—

(*1*) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statement of his belief may be admitted: provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.

This rule is analogous to R S C Or 38 r 3. The words used in the English rule are "*interlocutory motions*" and it was held by JESSEL MR, in *Re New Callao Co*, 30 WR 647 that they apply to all interlocutory applications, and not merely motions.

Every affidavit must be correctly entitled in the cause or matter in which it is sworn. As to Calcutta High Court Rules, see Civil Rules and Orders Vol I Ch 1 rules 25-40; as to Allahabad, see Or 19 rr 4-15 added under s 122 C P Code; as to Madras, see Civil Rules of Practice, rules 771-89. Affidavits shall be divided into paragraph and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject. Two or more persons may join in an affidavit; each shall depose separately to those which are within his own knowledge, and such facts shall be stated in separate paragraphs. In the case of an affidavit under the C P Code (*a*) any court or magistrate, or (*aa*) any notary appointed under the Notaries Act 1952, or (*b*) any officer or other person whom a High Court may appoint in this behalf, or (*c*) any officer appointed by any other court when empowered by the Local Government, may administer the oath to the deponent (s 139 C P Code).

Except in purely interlocutory matters affidavits must be restricted to matters within personal knowledge of the deponent. They must not be based on information or be expressions of opinion [*Brijlal v. S*, A 1954 A 393]. Affidavit shall be strictly confined to such facts as the deponent is able of his own knowledge to prove. It is only in interlocutory applications that statements as to belief are permitted. But in such cases the deponent must state the grounds of his belief and sources of information. But evidence on information and belief is not admissible on a proceeding which though interlocutory in form, finally decides the rights of the parties [*Bird v. Lake*, 1 H & M 118; *Gilbert v. Endean*, 9 Ch 259].

"The provisions of Or 19 r 3 must be strictly observed, and every affidavit should clearly express how much is a statement of the deponent's knowledge and how much

is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the court to judge whether it would be safe to act on the deponent's belief" [*per* JENKINS CJ, and WOODROFFE J, in *Padmabati v. Rasik*, 37 C 259: 6 IC 666]. These observations were approved and it was said that when not based on personal knowledge, the sources of information should be clearly disclosed. Verification of an affidavit to prove that certain order was validly made by Government should invariably be modelled on Or 19 r 3 [*S v. Purushottam*, A 1952 SC 317: 1952 SCR 674; see *Bisakharani v. Satish*, A 1956 C 496: 60 CWN 355]. The verification must state which particular paragraphs are true to the deponent's knowledge and those which are true to his information [*Motiram v. Union*, A 1965 Pu 318]. If deponents fail to distinguish and express clearly how much is a statement of their knowledge and how much is a statement of their belief, and to state the ground of belief, it would be taken to mean that they are swearing to facts within their own knowledge which will entail all its necessary consequences. In this case MILLER CJ, observed: "If litigants solemnly affirm that certain facts are true only to the best of their information and belief, it will be taken that they are swearing to facts deposed to as being facts within her own knowledge, and it will be no excuse if those facts should turn out untrue, to say "I did not intend it to be taken that I was swearing to things within my own knowledge. I merely intended to state what had been stated to me," [*Chandrika v. Haralal*, 73 IC 721: 5 PLT 124]. An affidavit which contains neither a specification as to which part is based on information and which on belief nor the grounds of belief, offends against Or 19 r 3 [*Durgadas v. Nalin*, 61 C 814: 38 CWN 771: A 1934 C 694]. As affidavit containing a verification that "Paras 1-3 above are true according to my own knowledge and according to my information received and believed to be true," is meaningless and infructuous as the identical facts cannot be verified both on knowledge and information [*Fedl India Ass Co, v. Anandrao*, A 1944 N 161].

Under Or 19 r 3 the ground for the belief of the deponent should be stated [*Gobinda v. Kunja*, 14 CWN 153 : 10 CLJ 414; *Satya Kumar v. Manager, Benares Bank*, 22 CWN 700: 46 IC 335; *Damodar v. Pannalal*, 9 Bom LR 540]. Where a declarant makes a statement of his belief or information, he must give details of the person from whom he got the information [*Kesho Pd v. Harihar*, 90 IC 703: A 1926 P 54]. A statement which merely recites facts "to the best of the information and belief" of the deponent, but does not state the source of his information is not an affidavit and cannot be used as evidence in any judicial proceeding [*Duraisami v. Govinda*, 23 IC 377: 15 MLT 377]. An affidavit is ordinarily not evidence unless it complies with the requirements of Or 19 [*Krishno v. Madhava*, 63 IC 258].

In practice the grounds of information and belief are not generally stated, but a party is entitled to object and statements on information and belief should be wholly disregarded [*Bidder v. Bridges*, 26 Ch D 1; see strong comments of JESSEL MR, in *Quartz Hill & Mining Co v. Beall*, 20 Ch D 508 and *Lumley v. Osborne*, 1901, 1 KB 532]. In *Young v. Young Mfg Co*, 1900, 2 Ch 753 CA RIGBY LJ, observed:—

"In the present day, in utter defiance of the order, solicitors have got into a practice of filing affidavit in which the deponent speaks not only of what he knows, but also of what he believes, without giving the slightest intimation with regard to what his belief is founded on. Or he says, "I am informed" without giving the slightest intimation where he has got the information. Now every affidavit of that kind is utterly irregular, and, in my opinion, the only way to bring about a change in that irregular practice is for the judge, in every case of that kind, to give a direction that the costs of the affidavit, so far as it relates to matters of mere information and belief, shall be paid by the persons responsible for the affidavit".

In *Gobinda v. Kunja*, 10 CLJ 414, the High Court commented on the considerable laxity in the matter and impressed on the necessity of the strict enforcement of the rule.

Affidavit stating facts upon information and belief without stating the source thereof is insufficient to grant an injunction [*Satyakumar v. Manager, Benares Bank*, 22 CWN 700: 46 IC 335]. The contents of an affidavit should be read to the deponent in a language which he understands and should be acknowledged by him to be correct [*Mangal v. R*, 36 A 13: 22 IC 740: 11 ALJ 986]. An affidavit as to points argued in a case and sworn by a person who cannot understand the language in which the argument was made has no value [*Akiyannessa, v. Abdul Gani*, 41 IC 1].

Affidavit should be confined to matters pertinent and material and they may be ordered to be taken off the file if scandalous and irrelevant matter is inserted [*Osmaston v. Assn of Land Financiers*, WN (1878) 101; *Kernick v. K*, 12 WR 335] or they may be expunged [*Warner v. Mosses*, WN (1881) 69. See also in *Re Jessop*, WN (1910) 128].

Under Or 6 r 16 court may strike out scandalous, frivolous or vexatious matter or which is otherwise an abuse of the process of the court from pleading. Allegations of dishonesty are scandalous, but "nothing can be scandalous which is relevant" [*per* COTTON LJ, in *Fisher v. Owen*, (1878) 8 Ch D 653]. The sole question is, as SELBORNE LC, said in *Christie v. C*, LR 8 Ch D p 503, whether the matters alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed. [Quoted with approval in *Govinda v. Kunja*, 14 CWN 153: 10 CLJ 414].

The court has inherent power to take an affidavit off the file for prolixity, *eg* an affidavit of documents of oppressive length [*Walker v. Poole*, 21 Ch D 835; *Hill v. Hart-Davis*, 26 Ch D 470].

Affidavit Evidence by Agreement.—Under the English rule, parties may agree to have a suit tried upon affidavit [see R S C Or 37 r 1; Or 38 rr 25-30]. There is no express provision in the C P Code in regard to affidavit evidence by agreement between parties, but there is nothing to prevent the parties from entering into such an agreement. It has been held that affidavits should not properly be acted upon unless both parties agree to have them treated as evidence [*Narayana v. Lakshmayya*, A 1939 M 927: 185 IC 421: *Marneedi v. Masimukhula*, A 1949 M 689]. An agreement to take evidence by affidavit is tantamount to an agreement to have an action tried without jury [*Brooke v. Wigg*, 8 Ch D 510]. Such an agreement must be in writing signed by the solicitors of all the parties [*New Westminster B Co v. Hanah*, 1 Ch D 278] or by the parties themselves if they have no solicitors (Tay s 1394).

The guardian *ad litem* of an infant [*Knatchbull v. Fowle*, 1 Ch D 604; *Fryer v. Wiseman*, 24 WR 205] or of a person of an unsound mind [*Piggott v. Toogood*, WN 1904, 130] may give the consent. It has been held that unless the agreement is that evidence is to be upon affidavit *alone*, a party may supplement affidavit evidence by *viva voce* evidence in court [*Glossop v. Heston & I Local Board*, 47 LJ Ch 536; see also *Att-Genl v. Pagham & Co*, 1876 WN 94]. But where the court finds affidavit evidence to be unsatisfactory, it has jurisdiction to exclude the affidavits and to direct the witnesses to be examined orally notwithstanding the agreement [*Lovell v. Wallis*, 53 LJ Ch 494; *Re Whiteley*, 1891, 1 Ch 559].

Admissions in Affidavits.—The form of an admission is immaterial. Statements made in an affidavit may be used as admissions under s 17 and the sections that follow, like statements made by a person in the written statement or in another suit.

Thus, an affidavit of one *D* that he was the manager of a company used by a person on reference before a master was received in a subsequent action as an admission of the agency of *D* [*Pritchard v. Bagshaw*, 11 CB 459: 20 LJCP 161]. So also admissions in affidavits in answer to interrogatories (Or 11 rr 8 and 22) or in affidavits of documents (Or 11 r 13) in the same or former proceedings are receivable without proof of signature or putting in the questions [*Fleet v. Perrins*, LR 3 QB 536. See Phip 11th Ed p 312]. In *Exp Hall*, 19 Ch D 583, JESSEL MR, said: "Any statement made by a man on oath may be used against him as an admission."

In an action between *A* and *B* an affidavit which *A* had in a former suit between himself and *C* knowingly used to prove a certain fact, is evidence against *A* of the same fact, though the deponent is present in court and might be called as a witness [*Brickell v. Hulse*, 7 A & E 454]. Affidavits by third persons used by *A* upon an interlocutory application in the same action is similarly receivable [*Campbell v. Rothwell*, 38 LT 33].

Affidavit of Persons Dead.—An affidavit of a witness who could not be produced for cross-examination by reason of death is admissible [*Abadom v. A*, 24 Beav 243; *Morley v. M*, 5 De G M & G 510; *Elias v. Griffith*, 46 LJ Ch 806; Phip 11th Ed p 648].

Evidence given by a person in a judicial proceeding may under certain conditions be used as evidence in a subsequent proceeding [see *ante* s 33 pp 400, 416]. An affidavit may under similar circumstances become evidence under s 33. Affidavit of dead person not subjected to cross-examination is not admissible under s 32 or 33 [*Doraiswami v. Balasundran*, A 1927 M 507]. As to the use of affidavit made in a previous suit, KINDERSLEY VC said in *Lawrence v. Maule*, 4 Dew 472:—"The general rule with regard to the admission of evidence is that where an issue has been raised between certain parties and evidence had been adduced upon that issue by one of those parties which could be used by him as against the other party, and in a subsequent proceeding the same issue is raised between the same parties and the witness who gave evidence in the former proceeding has died, the court will admit the evidence given by the deceased witness in the former as evidence in the subsequent proceeding; but the evidence is not admissible unless the issue is the same and the parties are the same in both proceedings".

Defective Affidavit.—Notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, the court may receive any affidavit sworn and may direct a memorandum to be made on the document that it has been so received (see R S C Or 38 r 14). Affidavits with the omission of the words "before me" [*Eddowes v. Argentine M A Co*, 38 WR 629], or, with an interlineation not initialled by the notary before whom it was sworn [*Re Cloake*, 61 LJ Ch 69], or with the name of the wrong judge [*Harlock v. Ashberry*, 28 Sol Jo 26] were received. In a case affidavits without title and in the third person were accepted [*Blamey v. B*, WN (1902) 138]. Affidavit not containing the seal of the officer before whom it was sworn is not inadmissible [*Peru Mal v. Bishen*, 101 IC 615 (L)]. Where an affidavit was in English but there was internal evidence that the deponent did not know English—*held* that it should be excluded from consideration [*Mohiuddin v. R*, 51 CLJ 352: A 1930 C 437].

Affidavit Evidence in Other Cases.—In uncontested proceedings under the Probate and Administration Act and the Indian Succession Act, court may direct any fact to be proved by affidavit (Calcutta High Court Rule No 2 of 1907; Civil Rules and Orders, Vol 1, Ch 15 r 301). Where attesting witness could not be traced, an affidavit made by the witness eight years before at the time of granting probate was

received in an action for revocation of probate [*Gournall v. Mason*, 12 PD 142; see also *Hayes v. Wills*, 1906, 75 LJP 86]. In a case proof of a will in solemn form by affidavit was refused, though the property was very small and none of the parties cited had appeared [*Cook v. Tomlinson*, 24 WR 851]. Ordinarily documents are not proved by mere *ex parte* affidavits [*Habib v. S Fitz & Co*, 89 IC 22: 22 ALJ 961]. It is doubtful whether an affidavit containing statement regarding age of a policy-holder would necessarily be receivable in a judicial proceeding as evidence to prove the age of the insured [*Kamakshya v. R*, A 1939 C 657].

Affidavits in Answer to Interrogatories.—In a suit the plaintiff or defendant may by leave of the court deliver interrogatories in writing relating to any matters in question for the examination of the opposite parties (Or 11 r 1). Rules 1 to 11 of Or 11 deal with the first branch of Discovery, *viz* by way of answers to *interrogatories*. The main object of interrogatories is to save expense of obtaining admission from the opponents [*Waghji v. Katro*, 10 B 167, 171]. Rules 12 to 19 of Or 11 deal with the second branch of Discovery as affecting *documents*.

Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the court may allow (Or 11 r 8). An affidavit in answer shall be in Form No 3 in Appendix C to the C P Code with such variation as circumstances may require (Or 11 r 9). No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the court (Or 11 r 10). If a person interrogated omits to answer or answers insufficiently, the party interrogating may apply for an order to answer further and an order may be made, requiring to answer or answer further either by affidavit or by *viva voce* examination, as the court may direct (Or 11 r 11).

In his affidavit a party must answer to the best of his knowledge, information and belief. He must state not only all information of which he has personal knowledge but also matters which are within the knowledge of his servants or agents if obtained in the course of their employment [*Bolckow v. Fisher*, 10 QBD 161, 164; *Ramsbotham v. Shropshire & Co*, 24 Ch D 110]. But he is not bound to obtain from his servants or agents information acquired otherwise than in the course of their employment [*Welsbach G L Co v. New Sunlight Co*, 1900, 2 Ch 10]. The court is not to enter into the question of the truth or otherwise of the answer; all that it is concerned with is whether it is sufficient [*Lyell v. Kennedy*, 27 Ch D 15, 16; *Parker v. Wells*, 18 Ch D 487]. See Or 8 rr 3-4 which are equally applicable to answers to interrogatories.

A roving cross-examination upon answers to interrogatories is not legitimate. The party should only be required to make such an answer as would have been sufficient if originally given in writing [*Litchfield v. Jones*, 51 LT 572].

Affidavits in Discovery and Inspection.—The court may on the application of any party without any affidavit, direct any other party to the suit to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in controversy in the suit (Or 11 r 12). The party directed shall specify the documents by an affidavit in Form No. 5 in Appendix C to the C P Code (Or 11 r 13). A party may then compel production of the documents specified (Or 11 r 14) and inspect (Or 11 rr 15-18).

A party directed to make discovery should set forth in his affidavit all documents which *are or have been* in his possession or power [see *Kalian v. Safar*, 8 A 265 p 267]. Documents in which he has any possession or property jointly with others, or in which he has no property but which are in his physical possession must also be

included in the affidavit. As to documents which *are not, but have been* in his possession, he must state where and with whom they are. The words "possession or power" in Or 11 r 12 do not bear the limited meaning attached to them in Or 11 r 14 for the purpose of an order for production.

The statement in an affidavit that he has no documents relating to the matters in question other than those set forth in it, is generally conclusive. But where the court is reasonably satisfied or it is reasonably certain from particular sources or where there is strong suspicion that a party has other relevant documents in his possession, it can require a party to make a further affidavit of documents [see *Lyell v. Kennedy*, 27 Ch D 20; *Hall v. Truman*, 29 Ch D 319; *Camp Financiare v. Peruvian Co*, 11 QBD 63; *Nicholl v. Wheeler*, 17 QBD 101].

Protection may be claimed by a party against whom an order of discovery has been made and in addition to the provisions in Or 11 rr 2, 11, 18 there are four grounds upon which it can be resisted as of right; (*a*) as being criminatory or penal (see *ante* s 132 Evidence Act; (*b*) as being within the doctrine of legal professional privilege [see *ante*, ss 126, 129]; (*c*) as disclosing the party's evidence; (*d*) as being injurious to public interests (see *ante*, ss 123, 124) [Bray's Digest of Discovery, Art 42]. Where either party claims to refuse production of documents on the ground that they relate solely to his own title and do not in any way tend to prove or support the title of the opposite party, the court cannot go behind his affidavit [*Vinayakrao v. Narotam*, 17 B 581]. The oath of a party as to facts on which a claim for privilege or protection is claimed is therefore conclusive, unless the court is reasonably certain or clearly satisfied that his statement is untrue (v *ante*). And for the purpose of deciding as to the validity of the claim or privilege, the court has power to inspect the document under Or 11 r 19. See also s 162 Evidence Act.

The affidavit of documents under Or 11 r 15 or 13 is ordinarily conclusive on the question whether they are in his possession or power, unless and until the other party makes an application under Or 11 r 19(2) supported by an affidavit for inspection of documents not mentioned in the pleadings or affidavits of his opponent [*Rameshwar v. Rai Khanath*, 58 IC 281: 5 Pat LJ 550. See also *Basanta v. Kumudini*, 38 C 428: 16 CWN 81].

Under Or 11 r 22 any party may, at the trial of a suit use in evidence any one or more of the answer of the opposite party to interrogatories.

The affidavit should set out the grounds of privilege. A party is entitled to put in a further affidavit in support of his claim of privilege [*Ambica v. Bengal Spinning Co*, 22 C 105]. Where there are several plaintiffs, all of them must join in making the affidavit unless specific reasons are shown to the contrary. The fact that some of them reside in England is no sufficient reason [*Ryrie v. Shivsankar*, 15 B 7]. When the affidavit is insufficient, a summons may be taken out to consider its sufficiency [*Oriental Bank v. Brown*, 12 C 265; *Kennelly v. Wyman*, 1 Ch 178; *Jabub v. Kanai*, 20 C 587]. If affidavit is insufficient, the party will be ordered to amend his affidavit [*Amarendra v. Kallykissen*, 2 CWN 17].

APPENDIX B

[1]THE OATHS ACT

Act No. 44 Of 1969

[26th December, 1969]

An Act to consolidate and amend the Law relating to Judicial Oaths, and for certain other purposes.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows:—

S. 1. Short title and extent.—(*1*) This Act may be called the Oaths Act, 1969.

(*2*) It extends to the whole of India except the State of Jammu and Kashmir.

Cf the Oaths Act, 1838 (1 & 2 Vic c 105), the Oaths Act, 1888 (5 & 52 Vic c 46) and the Oaths Act, 1909 (9 Ed VII Ch 39).

The Oaths Act does not deal with the competency of a person to give evidence. Its main object is to render persons who give false evidence liable to prosecution and another object obviously is to bring home to the witnesses the solemnity of the occasion and to impress upon him the duty of speaking the truth [*Dhanjai v. S*, A 1969 Or 105].

S. 2. Saving of certain oaths and affirmations.—Nothing in this Act shall apply to proceedings before courts martial or to oaths, affirmations or declarations prescribed by the Central Government with respect to members of Armed Forces of the Union.

Amendment.—This section corresponds to old s 3.

S. 3. Power to administer oaths.—(*1*) The following courts and persons shall have power to administer, by themselves or, *subject to the provisions of sub-section* (*2*) *of section 5*, by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties imposed or in exercise of the powers conferred upon them by law, namely:—

(*a*) all courts and persons having by law or consent of parties authority to receive evidence ;

(*b*) the commanding officer of any military, naval, or air force station or ship occupied by the Armed Forces of the Union, provided that the oath or affirmation is administered within the limits of the station.

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1 For Statement of Objects and Reasons, see Gaz. of India, Pt. II sec 2, Extraordinary p 1161 dated 27-11-1967. Received the assent of the President on 26-12-1969.

(2) Without prejudice to the powers conferred by sub-section (1) or by or under any other law for the time being in force, any court, Judge, Magistrate or person may administer oaths and affirmations for the purpose of affidavits, if empowered in this behalf—

(a) by the High Court, in respect of affidavits for the purpose of judicial proceedings; or

(b) by the State Government, in respect of other affidavits.

Amendment.—This section corresponds to old section 4 with addition in sub-s (1) of the words "*subject to the provisions of sub-section (2) of section 6.*" Sub-s (2) has been newly added.

All courts are authorised to administer oaths and affirmations in the discharge of their duties or in the exercise of their powers [*Abdul Aziz v. R*, 36 IC 171: 34 PR 1916 Cr]. Customs officers are not authorised to administer oath [*Maqbool Hussain v. S*, A 1953 SC 325: 1953 SCR 730; *Hira v. S*, A 1971 SC 44]. Affidavits sworn or affirmed before magistrates who are not in seisin of the case under [2]s 145 Cr P Code, could not be read in evidence under that section as courts and magistrates could administer oaths only "in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law" [*Chhotan v. Hari*, A 1977 SC 407 (*Ahmad Din v. Abdul*, A 1966 Pu 528; *Shambhu v. S*, A 1970 D 210 **overruled**]. Oaths Commissioners appointed under s 139(*b*) CPC are not authorised to administer oaths and affirmations other than those required under CPC or to do any other judicial act [*Ahmad Din v. Abdul*, A 1966 Pu 528; *Wahid v. S*, A 1963 A 256]. A commissioner appointed to record evidence cannot administer oaths under the circumstances referred to in [3]ss 8, 9, 14 [*Puran v. Chuhar*, 3 IC 621: 98 PR 1909; *Janimal v. Girdharidas*, A 1957 N 47]. Refusing to take oath or affirmation when duly required by a public servant legally competent to require is punishable under s 178 IP Code [see *R v. Bipin Ch Pal*, 7 CLJ 63]. Giving false evidence is punishable by ss 191, 193 I P Code.

The words "having authority to receive evidence" cannot be restricted to authority of court to receive evidence in any particular case to which evidence relates but refers to the jurisdiction and power of the court to receive evidence in any case, [*Ahmad Din v. Abdul*, A 1966 Pu 528; *Leithanthem v. Khanggrakpam*, A 1969 Man 3 (*Hemdan v. S*, A 1966 Raj 5 **Dissent**)].

S. 4 Oaths and affirmations to be made by witnesses, interpreters and jurors.—(1) Oaths or affirmations shall be made by the following persons, namely:—

(*a*) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(*b*) interpreters of questions put to, and evidence given by, witnesses; and

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2. The procedure of taking affidavit evidence under s 145 Cr P Code has been omitted in Act 2 of 1974.

3. S 8 is now proviso of s 6 of Act 44 of 1969 and ss 9 and 10 have now been repealed.

(*c*) jurors:

Provided that where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness, nor affect the obligation of the witness to state the truth.

(2) Nothing in this section shall render it lawful to administer in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Amendment.—This is old section 5.

S 4 forbids the administration of an oath to an accused person in a criminal proceeding, unless he is examined as a defence witness under s 315(*1*) Cr P Code. See *ante* s 118: "*Competency of accused to testify*". A person becomes an 'accused person' immediately after he is arrested by the police for an offence which forms the subject matter of investigation [*Karan Ilahi v. R*, A 1947 L 92]. Where a person, who acted as a carrier in a conspiracy to smuggle gold admitted her role to Customs Officials but instead of being sent up for trial was examined as a witness against her former associates the bar of s 5 (s 4 of Act 44 of 1969) does not apply because the person is not an accused in a criminal proceeding. The exclusionary clause in the section is to be interpreted as a whole and 'criminal proceedings' means a criminal enquiry or a trial before or a trial before a court and the 'accused' means a person actually arraigned that is, put on trial [*Laxmipat v. S*, A 1968 SC 938]. It is clear from the proviso that it is not necessary to administer oath to a lad of ten years who is incapable of appreciating the significance of oath [*Sheo Pd v. R*, 1941 OWN 1246]. Since an omission to take the oath does not by reason of s 13 (now s 7) affect the admissibility of evidence, an irregularity cause by failure to record the certificate as required by the proviso to s 5 (now s 4) cannot affect the admissibility either [*Dhansai v. S*, A 1969 Of 105]. As to oath to a child witness and effect of omission to administer oath, see *ante* s 118: "***Effect of omission to administer oath or affirmation***". As to acceptance of statements of lawyers engaged from their place at the bar without oath, *see ante s 118: "Competency of a lawyer to testify*".

S. 5. Affirmation by persons desiring to affirm.—*A witness, interpreter or juror may, instead of making an oath, make an affirmation.*

Amendment.—This section has been substituted in place of old s 6. In the old section only Hindus and Mahomedans could make affirmation instead of oath. Now everybody can make affirmation in lieu of oath.

S. 6. Forms of oaths and affirmations.—(1) *All oaths and affirmations made under section 4 shall be administered according to such one of the*

forms given in the Schedule as may be appropriate to the circumstances of the case :

Provided that if a witness in any judicial proceeding desires to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the class to which he belongs, and not repugnant to justice or decency and not purporting to affect any third person, the court may, if it thinks fit, notwithstanding anything herein-before contained, allow him to give evidence on such oath or affirmation.

(2) *All such oaths and affirmations shall, in the case of all courts other than the Supreme Court and the High Courts, be administered by the presiding officer of the court himself, or, in the case of a Bench of Judges or Magistrates, by any one of the Judges or Magistrates, as the case may be.*

Amendment.—The section has been substituted in place of old ss 7 and 8. Sub-ss (*1*) and (*2*) are new and the proviso corresponds to old s 8. Under the old section the High Courts could prescribe forms. Forms of oaths and affirmations have now been given in the Schedule, see *post*.

Asking whether a person would take oath and not recording the fact and not actually offering oath are irregularities vitiating the trial [*Afsar Khan v. Shabid*, A 1922 C 148]. Omission to administer oath would not invalidate the proceedings, or render inadmissible the evidence given [*Fati v. R*, 61 IC 705: 2 PLT 288. See *ante* S 118: "*Effect of omission to admissible oath or affirmation*"]. Oral evidence shall be given under the sanction of oath or affirmation. Children of tender years who cannot understand the nature of oath or affirmation need not be sworn (see *ante* s 118: "*Oath to child witness*"; Proviso to s 4 and s 7 *post*). Witness called merely to produce a document need not be sworn [*Perry v. Gibson*, 1 A & B 48. See *ante* s 139].

The Oaths Act cannot abrogate the provisions of the Evidence Act. A statement on special oath is admissible, but if what is deposed to is not admissible in evidence, the fact of a special oath will not make if admissible [*Shk Jamu v. Md Ibrahim*, 90 IC 378: A 1926 N 194]. An arbitrator has no power to administer an oath other than in the prescribed form [*Wali-ul-la v. Ghulam*, 1 A 535]. Under s 8 (now proviso to s 6) the initiative should come from the parties and not the court [*Kaludali v. Dasura*, 36 CWN 786: 139 IC 836].

In the absence of any express authorization it is the court alone which can act under s 8 (now proviso) [*Janimal v. Girdharidas*, A 1957 N 47].

"Party to Judicial Proceedings".—In the proviso does not include either the complainant or the accused in criminal case. S 8 (now proviso) does not apply to criminal proceedings [*R v. Morarji*, 13 B 389 (**relied on** in 13 IC 215: 5 SLR 129); *R v. Juman*, A 1947 S 66: 1946 Kar 437].

Form of Oath.—The form of the oath is immaterial. It was said by the Lord Chancellor in *Omy chand v. Barker*, 1744 Atk 22: "It is laid down by all writers that the outward act is not essential to the oath. It has been the wisdom of all nations to administer such oath as agreeable to the notion of the person taking". Relied on and quoted in *Indar v. Jagmohan*, A 1927 PC 165: 54 IA 301. It has however been held in a case that it is not necessary to specify beforehand the form of oath. It is sufficient if the oath is common among, and held binding by the class to which the parties

belong [*Ahmed Ali v. Hanuman*, 23 PR 1887]. Oath or affirmation on iman to a party acquires a special sanctity [*Janimal v. Girdharidas*, A 1957 N 47].

The oath was : "If I lie in saying that I did not strike the balance and had paid the debt, may my wife be considered to have been divorced from me"—*Held* that it was repugnant to decency and purported to affect a third person [*Nabi Baksh v. Ram Jawaya*, 7 IC 479: 66 PR 1910]. So also an offer to abide by the oath on *talak* of one of the witnesses for the plaintiff [*Gul Ahmad v. Abdul*, A 1940 Pesh 26].

The "oath or solemn affirmation" in s 8 (proviso to s 6 of Act 44 of 1969) is in its nature and essence quite distinct from the oaths and affirmations in s 5 (s 4 of Act 4, 1969). All that is required is that it may be "in any form..... not repugnant to justice or decency." It may be as infinitely alike in form and contents as racial custom or the dictates of any religious persuasion may within the prescribed limits, sanction or require. Neither invocation, nor an oath or affirmation in the technical sense is in any way an essential part of the oath or affirmation in s 8 (now proviso to s 6). In the case of special oath or affirmation under s 8 (now proviso to s 6) it is not necessary to administer in addition the ordinary oath, or affirmation in s 5 (now s 4). The use of the alternative expression "oath or *solemn* affirmation" as a description of the special ritual envisaged in s 8 (now proviso to s 6), is intended to indicate that the ritual is to be at least as solemn for the deponent and attended by the same consequences to him as in an ordinary oath or affirmation for and to an ordinary witness. The words were selected primarily to put it beyond the possibility of doubt that temporal consequences of corrupt falsehood would follow as inevitably for the one class of witness as for others [*Indar v. Jagmohan*, 54 IA 301: 31 CWN 1053: 53 MLJ 1: 29 Bom LR 1154; *Parasram v. Pannalal*, A 1954 N 56].

Oath Affecting Third Party.—An oath affecting a third party cannot under any circumstances be administered. But where such an oath has been actually administered, and the statement made, the evidence is conclusive proof of the matters stated [*Ramnarain v. Babu Singh*, 18 A 46].

Duty of Court.—No formalities are prescribed for a special oath. A record of statement of parties in the order sheet is sufficient [*Ratanlal v. Nathulal*, A 1961 MP 108].

Agreement to Abide by the Statement of a Third person. [Reference to Referee].—Where parties to an arbitration agree merely to abide by the statement of a referee, even though not on oath or solemn affirmation, s 8 (proviso to s 6 of Act 44 of 1969) would not apply [*Masita Bibi v. Khuda Baksh*, A 1923 A 65]. There is nothing in law to prevent the parties to a suit from agreeing apart from the Oaths Act to abide by the statement of a third person. It is an adjustment within Or 23, r 3 and each party is estopped from challenging the statement of the referee [*Suraj v. Beni*, A 1937, A 701: 171 IC 697; *Akbari Begam v. Rahmat*, 56 A 39: A 1933, A 861; *Bishunath v. Jamuna*, 164 IC 1116]. If referee's deposition does not fully cover the questions in issue, the case should be decided according to usual procedure [*Mahabir v. Dat Misr*, 13 A 386]. There is nothing in the Oaths Act that a referee who has once been examined cannot be recalled and re-examined if all points have not been put to him [*Radhakishun v. Kashi*, 92 IC 510: 48 A 276: A 1926, A 266].

The parties to a suit stated that they would be bound by the decision of a third person but before he was examined, the plaintiff stated that he would not be bound unless a special kind of oath was administered to him—*held* it was open to the party to resile from the agreement without assigning any reason, s 8 (proviso to s 6) of the Oaths Act not being applicable on the ground that the parties had in the first instance

never intended to administer any oath at all to the third person [*Ramdeo v. Naipal*, A 1933, A 184: 146 IC 569].

S. 7. Proceedings and evidence not invalidated by omission of oath or irregularity.—No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever *in the administration of any oath or affirmation or* in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Amendment.—This is old s 13 with the addition of the italicised words.

Omission to Administer Oath.—S 13 (now s 7) is quite unqualified in its terms and applies to all omissions accidental or deliberate [*Md Sugal v. R*, A 1946 PC 3: 50 CWN 98; *Rameshwar v. S*, A 1952 SC 54; *Dhansai v. S*, A 1969 Or 105; see *ante* s 118: "*Effect of omission to administer oath*"]. The unsworn testimony of a minor girl of about 12 was held admissible and the accused was convicted of rape on it [*Lalaram v. S*, A 1960 MP 59].

Evidence of a witness was taken on oath on commission in a foreign territory—*Held* it is admissible and s 13 (s 7 of Act 44 of 1969) has no application [*Kadambini v. Kumudini*, 30 C 934: 7 CWN 806].

Oath to Child Witness.—[See *ante* s 118: "*Oath to child witness*".]

S. 8. Persons giving evidence bound to state the truth.—Every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

Amendment.—S 8 corresponds to old s 14.

Cf S 191 of the Penal Code (Act 45 of 1860).

S. 9. Repeal and saving.—(1) *The Indian Oaths Act, 1873 is hereby repealed.*

(2) Where, in any proceeding pending at the commencement of this Act, the parties have agreed to be bound by any such oath or affirmation as is specified in section 8 of the said Act, then, notwithstanding the repeal of the said Act the provisions of sections 9 to 12 of the said Act shall continue to apply in relation to such agreement as if this Act has not been passed.

Amendment.—This section is new.

Repealed ss 9 to 12 of Act 10 of 1873 are reproduced below:

S. 9. Court may ask party or witness whether he will make oath proposed by opposite party.—If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section 8, if such oath or affirmation is made by the other party to, or by

any witness in, such proceeding, the court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation:

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

S. 10. Administration of oath if accepted.—If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or, if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

S. 11. Evidence conclusive as against person offering to be bound.—The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

S. 12. Procedure in case of refusal to make oath.—If the party or witness refuses to make the oath or solemn affirmation referred to in section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

The only effect of repeal of ss 9 to 12 of Oaths Act, 1873 is that the evidence given on such special oath would no more be conclusive proof of the matter stated in the deposition. But if the statement is found to have been made strictly in accordance with the offer made by one a party to the other it would be covered by s 20 of Evidence Act and the offerer would be bound by it [*Thakur Singh v. Inder*, A 1976 P&H 287]. Though s 11 has been repealed the statement made under special oath does not lose its status as evidence [*J A Munuswami v. Thyagaraya*, A 1977 M 273].

THE SCHEDULE

(see section 6)

Forms of Oaths Or Affirmations

Form No 1 (Witnesses):—

I do swear in the name of God that what I shall state shall be the truth, the whole truth
Solemnly affirm

and nothing but the truth.

Form No 2 (Jurors):—

I do swear in the name of God that I will well and truly try and true deliverance make
Solemnly affirm

between the State and the prisoner(s) at the bar, whom I shall have in charge, and a true verdic give according to the evidence.

Form No 3 (Interpreters):—

I do swear in the name of God that I will well and truly interpret and explain all ques
Solemnly affirm

tions put to and evidence given by witnesses and translate correctly and accurately all documents given to me for translation.

Form No 4 (Affidavits):—

I do swear in the name of God that this is my name and signature (or mark) and that
Solemnly affirm

the contents of this my affidavit are true.

APPENDIX C

'THE BANKERS' BOOKS EVIDENCE ACT

(Act XVIII OF 1891)

[1st OCTOBER, 1891]

An Act to amend the Law of Evidence with respect of Bankers' Books.

Whereas it is expedient to amend the Law of Evidence with respect to Bankers' Books; It is hereby enacted as follows:—

S. 1. Title and extent.—(1) This Act may be called the Bankers' Books Evidence Act, 1891.

(2) It extends to the whole of India [2][except the State of Jammu and Kashmir].

[3][(3)*****]

The Act has been made applicable to: (1) Books of Financial Corporation (Act 63 of 1951, s 44); (2) Books of Agricultural Refinance Corporation (Act 10 of 1963, s 36); (3) Unit Trust (Act 52 of 1963, s 33); (4) Industrial Development Bank (Act 18 of 1964, s 33); (5) Books of State Agricultural Credit Corporation (Act 60 of 1968, s 37).

S. 2. Definitions.—In this Act, unless there is something repugnant in the subject or context—

[5][(1)"company" means any company as defined in section 3 of the Companies Act, 1956, the includes a foreign company within the meaning of section 591 of that Act;

(1A) "corporation" means any body corporate established by any law for the time being in force in India and includes the Reserve Bank of India, the State Bank of India and any subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959].

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1. For Statement of Objects and Reasons, *see* Gazette of India, 1891 Pt V p 24 for Report of Select Committee, *see ibid* p 189 and for Proceedings in Council, *see ibid*, Pt VI, pp 15, 25, 117, 135 and 140.
2. Substituted by Act 3 of 1951 s 3 and Sch for "except Part B States".
   In Pakistan for sub-s (2) substitute: "It extends to the whole of Pakistan" (Ord 21 of 1960).
   In Burma sub-section (2) has been omitted (AO 1937).
3. Repealed by Act 10 of 1914 Sch II.
4. S 90A of the Ceylon Evidence Ordinance corresponds to s 2 with necessary adaptations and omission of cls (4), (5), (6) and (7).
5. Sub for cl (*1*) by State-Associated Banks (Miscellaneous Provisions) Act 56 of 1962. In Burma for sub-cls (1) and (1A) read the following:
   'Company' means a company incorporated or registered by or under the law of the United Kingdom, the Union of Burma, India or Pakistan or any British Possession". (AO 1937; AO 1948).

(2) "bank" and "banker" mean—

[6][(*a*) any company or corporation carrying on the business of banking].

(*b*) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided,

[7][(*c*) any post office savings bank or money order office];

[(3) "bankers' books" include ledgers, day-books, cash-books, account-books, and all other books used in the ordinary business of a bank whether kept in the written form or as printouts of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device.*]

(4) "legal proceedings" means any proceeding or inquiry in which evidence is, or may be given and includes an arbitration;

(5) "the Court" means the person or persons before whom a legal proceeding is held or taken;

(6) "judge" means a judge of [8][a] High Court;

(7) "trial" means any hearing before the Court at which evidence is taken; and

**(8) "certified copy" means when the books of a bank,—*

(*a*) *are maintained in written form, a copy of any entry in such books together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book is still in the custody of the bank, and where the copy was obtained by a mechanical or other process which in itself ensured the accuracy of the copy, a further certificate to that effect, but where the book from which such copy was prepared has been destroyed in the usual course of the bank's business after the date on which the cop had been so prepared, a further certificate to that effect, each such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title; and*

(*b*) *consist of printouts of data stored in a floppy, disc, tape or any other electro-magnetic data storage device, a printout of such entry or a copy of such printout together with such statements certified in accordance with the provisions of section 2A.*

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6. Subs by Act 56 of 1962.
7. Added by s 2 Bankers' books Ev Act, 1 of 1893.
* **Subs. by the Information Technology Act, 2000.**
8. In Burma "the" substituted.

A mere statement "certified as true copy" without regard to the statutory form is not a certified copy [*United Bank Ltd v. N S Bank*, A 1962 C 325]. Banker is not required to specify from what particular book the statement of account has been prepared [*Allahabad Bank v. Bharat Vegetables &c*, A 1979 (NOC) 15 (C)]. Paid cheques and pay-in-slips retained by a bank after the conclusion of a banking transaction to which they relate have been held to be not bankers' books within the meaning of the Act. [*Williams v. Williams*; *Tucker v. Williams*, (1987) 3 All ER 257 CA].

Microfilm.—For the purposes of the Bankers' Books Evidence Act 'Bankers' Books include a record of a customer's transactions and details of cheques recorded by a bank on microfilm and accordingly such microfilm may be used for the purpose of proving banking transactions in legal proceedings. [*Banker v. Wilson*, (1980) 2 All ER 81 QBD].

**[*S. 2A. Conditions in the printout.—A printout of entry or a copy of printout referred to in sub-section (8) of section 2 shall be accompanied by the following, namely:—*

(*a*) *a certificate to the effect that it is a printout of such entry or a copy of such printout by the principal accountant or branch manager; and*

(*b*) *a certificate by a person in-charge of computer system containing a brief description of the computer system and the particulars of—*

(*A*) *the safeguards adopted by the system to ensure that data is entered or any other operation performed only by authorised persons;*

(*B*) *the safeguards adopted to prevent and detect unauthorised change of data;*

(*C*) *the safeguards available to retrieve data that is lost due to systemic failure or any other reasons;*

(*D*) *the manner in which data is transferred from the system to removable media like floppies, discs, tapes or other electro-magnetic data storage devices;*

(*E*) *the mode of verification in order to ensure that data has been accurately transferred to such removable media;*

(*F*) *the mode of identification of such data storage devices;*

(*G*) *the arrangements for the storage and custody of such storage devices;*

(*H*) *the safeguards to prevent and detect any tampering with the system; and*

(*I*) *any other factor which will vouch for the integrity and accuracy of the system.*

(*c*) *a further certificate from the person in-charge of the computer system to the effect that to the best of his knowledge and belief, such computer system operated properly at the material time, he was provided with all the relevant data and the printout in question represents correctly, or is appropriately derived from, the relevant data.*]

** S. 2A inserted by the Information Technology Act, 2000.

[9]**S. 3. Power to extend provisions of Act.**—The State Government may, from time to time, by notification in the Official Gazette, extend the provisions of this Act to the books of any partnership or individual carrying on the business of bankers within the territories under its adminis-tration, and keeping a set of not less than three ordinary account-books, namely, a cash-book, a day book or journal, and a ledger, and may in like manner rescind any such notification.

The object of the Act was to apply the provisions of the Bankers' Books Evidence Act, 1897 (42 and 43 Vic c 11). Sub-sec (*1*) of s 2 was substituted by Act 12 of 1900 s 2 [see *R v. McGuire*, 4 CWN 433]. Cl (*c*) of sub-sec (2) of s 2 was added by Act 1 of 1893 s 2. For notifications by the Bombay Government, see Bombay Government Gazette, 1902 Pt I, p 1289 and by the Madras Government, see Madras Rules and Orders Vol I [List).

The Act has been declared to be in force in British Baluchistan by the British Baluchistan Laws Regulation, 1913 (2 of 1913) and in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (3 of 1872).

The words "bank" connotes the business of utilising money received for purposes of profit. The treasury receiving money from the District Board and respecting their orders does not constitute a bank [*Rangaswami v. Sankarlingam*, 43 M 816: 58 IC 893: 39 MLJ 377]. As to the meaning of "bank" and "banker" in the English Act, see s 9 of the Act (42 & 43 Vic c 11).

A certified copy should be a reproduction of all particulars in ledger entries. An extract prepared from the ledger, and signed by the sub-accountant is not certified copy within s 2(*8*) [*Fatima v. Offl Trustee*, 198 IC 564: A 1941 R 344].

S. [10]**4. Mode of proof of entries in bankers' books.**—Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall, in all legal proceedings, be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

The corresponds with s 3 of the English Act. Before the passing of the Bankers' Books Evidence Act, entries in Bankers' books were provable by production of the originals through the clerks who made the entries.

The expression "bankers' books" has been defined in s 2(*3*). It has been held that a book is "used in the ordinary business of a bank" whether it is in daily use or kept for occasional reference [*Asylum for Idiots v. Handysides*, 22 TLR 573 CA]. The Act applies to books in the custody or control of the successors to the bank, by whom the entries were originally made, *ibid*.

S 45-F Banking Companies Act, 1940 is not in derogation of the Bankers' Books Ev Act. It gives added facility to Banking Companies in liquidation to prove entries in books of account [*Calcutta N Bank Ltd v. Sonapur T Co Ltd*, A 1957 C 9].

A person is entitled to inspect and to get certified copies of entries in the Loan Register of the Bank of Bengal (now State Bank of India) under s 76 Evidence Act. *Quaere*—Whether the Register is a Bankers' book within the Bankers' Books Evidence Act [*Chandi v. Boistab*, 31 C 284: 8 CWN 125]. A copy of an entry in the book of a bank not within the definition of a "company" does not come within s 4 [*R v. McGuire*, 4 CWN 433]. Copies of entries are admissible in all legal proceedings for or against any one [see *Harding v. Williams*, 14 Ch D 197]. Evidence under the Act is *prima facie* evidence against all the world [*London & W Bank v. Button*, 1907, 51 Sol Jol 466].

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9. Corresponds to s 90B of the Evidence Ord Ceylon with necessary adaptations.
10. Corresponds to s 90C of the Evidence Ord Ceylon with necessary adaptations.

Court cannot reject copies as not true without directing the bank to produce the original books (*Venkatasubramania v. Srinivasa*, A 1959 M 445). Certified copy of the statement of accounts bearing the certificate of the General Manager of the Bank that entries were true copies of the entries in one of the ordinary books of the Bank and were made in the usual and ordinary course of business and that such books were still in the custody of the Bank becomes evidence under s 4 (*Kalipada v. Mahaluxmi Bank Ltd*, A 1961 C 191). Statement or account duly certified under the act is *prima facie* evidence of the amount due [*United I Bank v. G C Deb*, A 1974 C 151]. Mere entries in bank's book of account or mere copies thereof are not sufficient to charge person with liability except where person concerned accepts correctness of entries [*Chandradhar v. Gauhati Bank Ld*, A 1967 SC 1058; **folld** in *Allahabad Bank v. Bharat Vegetable &c*, A 1979 (NOC) 15 (C)]. Copies of entries are *prima facie evidence* of the entries or of the matters, transactions and accounts therein stated, upon proof—(*a*) that the book was at the time of marking of the entry one of the ordinary books of the banks, and (*b*) that the entry was made in the usual and ordinary course of business, and (*c*) that the book is in the custody or control of the bank (see ss 3, 4, or 42 & 43 Vic c 11). *Cf* s 34 Evidence Act which also requires that entries should be regularly kept in the course of business.

S. [11]5. Case in which officer of bank not compellable to produce books.—No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of the Court or a Judge made for special cause.

S. [12]6. Inspection of books by order of Court or Judge.—(1) On the application of any party to a legal proceeding, the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certifi-cate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank; and shall be served on the bank three clear days (exclusive of bank-holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3) The bank may, at any time before the time limited for obedience to any such order as aforesaid, either offer to produce their books at the trial, or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order.

S 5 corresponds with s 6 of the English Act and s 6 corresponds with s 7 of the Act.

A banker is only exonerated by s 6 from personal attendance when he craves the aid of and follows the provisions of ss 2-5 of Bankers' Books Evidence Act, 42 & 43 Vic c 11 [*Emmott v. Star Newspaper Co*, 62 LJQB 77]. In s 10 of the English Act "legal

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11. Corresponds to s 90D of the Evidence Ord Ceylon with necessary adaptations.
12. Corresponds to s 90E of the Evidence Ord Ceylon with necessary adaptations.

proceedings, has been defined as "any civil or criminal proceedings or inquiry in which evidence is or may be given and includes an arbitration". *Cf* definition in s 2(*4*) *ante*.

A stipendiary magistrate is a court within the meaning of the Act and can order inspection [*R v. Kinghorn*, 1908, 2 KB 949]. The court or a Judge may, on the application of any party to a legal proceeding, empower him to inspect and take copies of entries in the accounts of either of *parties or strangers*, provided such entries would have been admissible in evidence prior to the Act, [*Haward v. Beall*, 22 QBD 1; *South Staffordshire Co v. Ebsmith*, 1895, 2 QB 669; *M'Gorman v. Kierans*, 35 Ir LTR 84; *Re Marshfield*, 32 Ch D 499; *Lister v. Varley*, 89 LT Jo 232] but the power will only be exercised in respect of strangers with great caution, *Pollock v. Garle*, 1898, 1 Ch 1, in which the court of appeal refused to make such an order in the case of third person who were neither actual nor constructive parties to the case, *eg* as to the bank balance of a company, in an action against one of its directors for inducing a purchase of its shares by alleged misrepresentation as to such balance; and *cf L'Amie v. Wilson*, 1907, 2 Ir 130; Phip 11th Ed pp 495-96].

A police officer investigating a charge under s 420 Penal Code against a customer of the bank is entitled to ask for inspection of his accounts in the bank without an order of court, as the proceedings before him during investigation are not 'legal proceedings' within s 5 [*Price v. R*, A 1937 L 160: 17 L 593]. If it is proved satisfactorily that an account though nominally that of one not a party is really that of a party or that the party is so closely connected with it that the items in it would be evidence against him at the trial, the court may order inspection before trial, but great care must be taken in exercising the jurisdiction and the order should not be made without notice to the person [*South Staffordshire T Co v. Ebsmith*, 1895, 2 QB 669]. In *Pollock v. Garle*, 1898, 1 Ch 1 p 5, LINDLEY MR, said: "When an account is the account of a person who has nothing to do with the litigation, the court ought to look to the effect in practice of such an order on the rights of third parties, and to take care that this section is not made a means of oppression".

An order for inspection and copy may be made *ex parte*, but court should be cautious and must be satisfied that the entries in question are material and relevant to the cause [*Arnott v. Hayes*, 36 Ch D 731 CA; *L'Amie v. Wilson*, 1907, 2 Ir 130]. Where the account is of a person not a party and having no interest in the litigation, the court will see that the section is not oppressively used and will protect such person against a roving inspection of his account [*Pollock v. Garle*, 1898, 1 Ch 1 CA].

Bankers' Book Evidence Act being a special Act, the provisions of the Cr P Code do not in any way conflict with it. Thus, under s 6 the bank has a statutory right to object to any order directing inspection, though the order is made under s 94 Cr P Code. Therefore such an order of the court made without hearing the bank is not binding on it. It is not the practice of the court to allow inspection of bankers' books under the Act, unless a *prima facie* case is made out for thinking that there is some matter on which the books of the bank are bound to be relevant. Courts are always averse to giving anything in the nature of a roving or fishing commission to inspect documents [*Central Bank of India Ltd v. Shamdasani*, 1938 Bom 119: A 1938 B 33: 39 Bom LR 1187 SB. See in this connexion *Shamdasani v. Cooke and Ors*, 1938 Bom 31 which was discussed in the former case].

Where a party desires an order under s 6 on his own behalf, the court ought to grant is *ex parte*; but where he applies against the other party the court ought not to make the order without notice to the other party. Where, however, the court is not satisfied that the application is not for the purpose of obtaining inspection beyond what is allowed under the ordinary procedure, the court ought to refuse the applica-tion [*Tricumlal v. Lakshmidas*, 5 Bom LR 865; *Rustomji v. Byramji*, 34 Bom LR 743: A 1932 B 428]. The inspection should be limited to the period covered by the matters in dispute [*Arnott v. Hayes*, 36 Ch D 731]. As to scope of inspection, see *Agra Bank v. Kashiram*, 237 PLR 1900.

In order to have an inspection it is usual to require an affidavit, stating, (*1*) the nature of the proceedings (2) necessity for the inspection and for the copies, showing that the entries of which inspection is sought will be admissible in evidence at the trial of action

[*Howard v. Beall*, 23 QBD 2], and (*3*) the period over which it is proposed that the inspection should extend [Annual Practice].

As to inspection of business books, see Or 11 r 19 C P Code (Act 5 of 1908). A banker is bound not to disclose the state of a customer's accounts except upon a reasonable and proper occasion [*Hardy v. Veasey*, LR 3 Ex 107]. The plaintiff had accounts in the defendant bank. A third person who also had an account in the same bank drew a cheque in favour of the plaintiff who endorsed it in favour of a stranger who paid it for collection into a different bank. When the cheque came to the defendant bank for cashing, the manager enquired of the bank which had sent it to be cashed as regards the person in whose favour plaintiff had endorsed the cheque and got the information that he was a bookmaker. This information the defendant disclosed to third persons. *Held* by the majority (SCRUTTON LJ, dissenting), that the information having been acquired *qua* banker of plaintiff, the defendant bank ought not to have disclosed it to third parties [*Tournier v. National P and U Bank of England*, 1924, 1 KB 461 CA]. The duty on the party of a bank not to disclose the state of accounts of a customer to third parties is a legal one arising from contract and is not absolute but qualified. Such qualifications can be classified under four heads; (*a*) Where disclosure is under compulsion by law; (*b*) where there is; duty to the public to disclose; (*c*) where the interests of the bank require disclosure; (*d*) where the disclosure is made by the express or implied consent of the customer [*per* BANKES J, in *ibid*] Third party's documents ought not to be allowed to be produced unless very special circumstances are shown [*Satyanarayan v. Punjab N Bank*, A 1977 C 280].

There is no implied contractual obligation on the part of the banker that he should contest the application for a court order and probe the supporting evidence. This is so because the full responsibility for determining whether the conditions precedent to making the access order are fulfilled rests with the judge. Moreover, although the bank is free to disregard to request by the police not to inform its client of the appli-cation, the public interest in assisting the police in a criminal investigation means that there is no basis for an implied contractual obligation on the bank to act in a way which could hinder the investigation. Accordingly, where a client claims damages against his bank alleging that the bank was in breach of an implied contractual obligation to resist the access order to his account and to inform him of the police attempt, the action discloses no cause of action. [*Barelays Bank plc v. Taylor*, (1989) 3 All ER 563 CA].

S. [13]7. (1) **Costs.**—The costs of any application to the Court or a Judge, under or for the purposes of this Act and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2) Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself:

Provided that nothing in this sub-section shall be construed to derogate from any power which the Court or Judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs.

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13. Corresponds to s 90F of the Ceylon Evidence Ordinance with necessary adaptations.

APPENDIX D

THE COMMERCIAL DOCUMENTS EVIDENCE ACT[1]

Act No. XXX of 1939

[26th September, 1939].

An Act to amend the Law of Evidence with respect to certain commercial documents.

Whereas it is expedient to amend the Law of Evidence with respect to certain commercial documents;

It is hereby enacted as follows:—

S. 1. Short title and extent.—(1) This Act may be called the Commercial Documents Evidence Act, 1939.

*(2) It extends to the whole of India except [2][the territories, which immediately before the 1st November, 1956, were comprised in Part B States].

State Amendments

Gujarat. In sub-s (2) *add* the following proviso:—

"Provided that on and from the commencement of the Commercial Documents Evidence (Gujarat Extension and Amendment) Act, 1962, this Act shall extend to and be in force in, the Saurashtra area of the State of Gujarat". [Commercial Documents Evidence (Gujarat Extension and Amendment) Act, 32 of 1962].

Maharashtra.—In sub-s. (2) *after* the word "States" at the end, add "other than the Hyderabad area of the State of Maharashtra". [Commercial Documents Evidence (Maharashtra Extension) Act 20 of 1960].

S. 2. Statements of relevant facts in scheduled documents to be themselves relevant facts.—Notwithstanding anything contained in the Indian Evidence Act, 1872, statements of facts in issue or of relevant facts made in any document included in the Schedule as to matters usually stated in such document shall be themselves relevant facts within the meaning of that Act.

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1. For Statement of Objects and Reasons, *see* Gaz of India, 1937 Pt V. p 119; for the Report of Select Committee, *see ibid*, 1939 Pt V p 157.

* This Act has been applied to the Darjeeling district with effect from the 8th February 1940, by the late Bengal Government Notification No 361-J dated the 31st January 1940.

The Act has been extended to States merged in the State of Bombay and Madras [Bombay Merged States (Laws) Act 4 of 1950 and Madras Merged States (Laws) Act 35 of 1949]. It was extended to the whole State of Maharashtra by the Commercial Documents (Maharashtra Extension Act 20 of 1960; to the Union Territory of Pondicherry by Pondicherry (Extension of Laws) Act 26 of 1968; to the State of Gujarat by Gujarat Act 32 of 1962).

2. Substituted by ALO (No. 3) Order 1956.

In Pakistan substitute "the whole of Pakistan" (Ord 21 of 1960).

S. 3. Presumption as to genuineness of documents.—For the purpose of the Indian Evidence Act, 1872, and notwithstanding anything contained therein, a Court—

(a) shall presume, within the meaning of that Act, in relation to documents included in Part I of the Schedule, and

(b) may presume, within the meaning of that Act in relation to documents included in Part II of the Schedule,—

that any document purporting to be a document included in Part I or Part II of the Schedule, as the case may be, and to have been duly made by or under the appropriate authority, was so made and that the statements contained therein are accurate.

Notes.—Report of Court of Enquiry under R 75 Aircraft Rules, 1937 is not admissible under ss 2 and 3 of the Commercial Documents Act, nor it is evidence under s 35 Evidence Act [*Indian Airlines v. Madhuri*, A 1965 C 252].

S. 4. Definition.—In the Schedule the expression "recognised Chamber of Commerce" means a Chamber of Commerce recognised by the Government of its country as being competent to issue certificates of origin, and includes any other association similarly recognised.

THE SCHEDULE

(See sections 2 and 3)

PART I

Documents in relation to which the Court "SHALL presume".

1. Lloyd's Register of Shipping.

2. Lloyd's Daily Shipping Index.

3. Lloyd's Loading List.

4. Lloyd's Weekly Casualty Reports.

5. Certificate of delivery of goods to the Manchester Ship Canal Company.

6. Official log book, supplementary official log book and official wireless log kept by a British ship.

7. Certificate of Registry, Safety Certificate, Safety Radio-Telegraphy Certificate, Exemption Certificate, Certificate of Survey, Declaration of Survey, International Load Line Certificate, [3][Indian Load Line Certificate], Report of Survey of a ship provisionally detained as unsafe, Report of Survey to be served upon the master of a ship declared unsafe upon Survey, Docking Certificate, Memorandum issued under Article 56 of the International Convention for the Safety of Life at Sea, 1929.

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3. Substituted by Act 35 of 1950 s 3 and Sch II, for "British India Load Line Certificate". In Pakistan substitute "Pakistan" (AO 1949).

8. Certificates A and B issued under the Indian Merchant Shipping Act, 1923[4].

9. The following documents relating to marine insurance, namely, insurance policy, receipt for premium, certificate of insurance and insurance cover note.

10. Certificate concerning the loss of country craft issued by the appropriate authority under Department of Commerce, Mercantile Marine Department Circular No 2 of 1938.

11. Protest made before a Notary Public or other duly authorised official by a master of a ship relating to circumstances calculated to affect the liability of the shipowner.

12. Licence or permit for radio-telegraph apparatus carried in ships or aircraft.

13. Certificate of registration of an aircraft granted by the Government of the country to which the aircraft belongs.

14. Certificate of airworthiness of an aircraft granted or validated by, or under the authority of the Government of the country to which the aircraft belongs.

15. Licences and certificates of competency of aircraft personnel granted or validated by, or under the authority of, the Government of the country to which the personnel belongs.

16. Ground Engineer's Licence issued by a competent authority authorised in this behalf by Government.

17. Consular Certificate in respect of goods shipped or shut out, consular certificates of origin, and consular invoice.

18. Certificate of origin of goods issued (but not merely attested) by a recognised Chamber of Commerce, or by [5][an Indian or British Consular Officer, or by an Indian or British] Trade Commissioner or Agent.

19. Receipt for payment of customs duty issued by a Customs authority.

20. Schedule issued by a Port, Dock, Harbour, Wharfage or Warehouse authority, or by a Railway company, showing fees, dues, freights or other charges for the storage, transport or other services in connection with goods.

21. Tonnage schedule and schedule of fees, commission or other charges for services rendered, issued by a recognised Chamber of Commerce.

[6]22. The publication known as the Indian Railway Conference Association Coaching and Goods Tariffs.

23. Copy, certified by the Registrar of Companies, of the memorandum or the articles of association of a company, filed under the Indian Companies Act, 1913[7].

24. Protest, noting and certifying the dishonour of a bill of exchange, made before a Notary Public or other duly authorised official.

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4. See now the Merchant Shipping Act 44 of 1958.
5. Substituted for the original words by AO 1948.
   In Pakistan substitute "a Pakistan or British Consular Officer or Pakistan or British".
6. Item 22 omitted in Pakistan.
7. See now the Indian Companies Act, 1 of 1956.

PART II

Documents in relation to which the Court "MAY presume".

1. Survey Report issued by a competent authority—

(I) in respect of cargo loaded; or

(ii) certifying the quantity of coal loaded; or

(iii) in respect of the security of hatches.

2. Official log book, Supplementary Official log book and official wireless log kept by a foreign ship.

3. Dock certificate, dock chalan, dock receipt or warrant, Port Warehouse certificate or warrant, issued by, or under the authority of, a Port, Dock, Harbour or Wharfage authority.

4. Certificate issued by a Port, Dock, Harbour, Wharfage or other authority having control of acceptance of goods for shipping, transport or delivery, relating to the date or time of shipment of goods, arrival of goods for acceptance, arrival of vessels or acceptance or delivery of goods, or to the allocation of berthing accommodation to vessels.

5. Export Application issued by a Port authority showing dues paid, weight and measurement and shutting out of a consignment.

6. Certificate or receipt showing the weight or measurement of a consignment issued by the official measurer of the Conference Lines, or by a sworn or licensed measurer, or by a recognised Chamber of Commerce.

7. Reports and publications issued by a Port authority showing the movement of vessels, and certificates issued by such authority relating to such movements.

8. Certificate of safety for flight signed by a licensed Ground Engineer.

9. Aircraft Log Book, Journey Log Book and Log Book maintained by the owner or operator in respect of aircraft.

10. Passanger List or Manifest of Goods carried in public transport aircrafts.

11. Passanger ticket issued by a steamship company or air transport company.

12. Air Consignment Note and Baggage Check, issued by an air transport company in respect of goods carried by air, and the counterfoil or duplicate thereof retained by the carrier.

13. Aircraft Load Sheet.

14. Storage warrant of a warehouse recognised by a Customs, Excise, Port, Dock, Harbour or Wharfage authority.

15. Acknowledgment receipt for goods granted by a Port, Dock, Harbour, Wharfage or Warehouse authority or by a Railway or Steamship company.

16. Customs or Excise pass and Customs or Excise permit or certificate, issued by a Customs or Excise authority.

17. *Force majeure* certificate issued by a recognised Chamber of Commerce.

18. Receipt of a Railway or Steamship company granted to a consignor in acknowledgment of goods entrusted to the Company for transport.

19. Receipt granted by the Posts and Telegraphs Department.

20. Certificate or survey award issued by a recognised Chamber of Commerce relating to the quality, size, weight or valuation of any goods, count of yarn or percentage of moisture in yarn and other goods.

21. Copy, certified by the Registrar of Companies, of the Balance Sheet, Profit and Loss Account, and audit report of a company, filed with the said Registrar under the [8][Indian] Companies Act, 1913[9], and the rules made thereunder.

Notes.—Where the letters give the opinion as to whether the yarn examined should be classified under one item or another of "jute" in the second schedule relating to exports, the contention that the statements in them have been proved under s 3 read with Part II and item 20 of Part II cannot be accepted [*Hoare Miller & Co v. Union*, 65 CWN 1206].

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8. In Pakistan Omit "Indian" (AO 1949).
9. See now the Indian Companies Act 1 of 1956.

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NOTE : Pages 1 to 1444 relate to Vol. I and Pages 1445 to 2380 relate to Vol. II.

such use. After refusal to produce, he cannot make the document his own evidence or put it into the hands of his adversary's witness for cross-examination. If he were allowed to do so, he would gain an unfair advantage by withholding its production till he could judge whether the evidence adduced by the opposite party to prove it would be favourable or unfavourable to him. The party refusing to produce is bound by any secondary evidence given by the other party however unsatisfactory, as it was within the power of the other party to dispel all doubts by surrendering the original and he cannot rebut it by producing afterwards the document withheld; nor can he use it as his own evidence.

In *Doe v. Cockell*, 1834, 6 C & P 527, ALDERSON B, said: "You must either produce a document when it is called for or never". When a party does not produce a document after notice, he cannot, afterwards give the document in evidence without his opponent's consent [*Edmonds v. Challis*, 7 CB 413; *Doe v. Hodgson*, 12 A & E 135]. A provision similar to this section is to be found in Or 11 r 15 C P Code.

The judge may also under s 114 *illus* (*g*) [*ante*] presume that the document withheld is unfavourable to the party who does not produce it. Under s 89 [*ante*] there is a presumption that a document called for and not produced was attested, stamped and executed in the manner required by law. "It has been frequently declared as the rule that the mere non-production of books on notice has no other legal effect than to allow the other party to prove their contents by parol unless under special circumstances. But the weight of authority sustains the view that the court may properly instruct the jury that they may presume that the evidence withheld would have operated unfavourable to the one refusing to produce it" [*Clifton v. US*, 4 How (US) 242; Jones s 20].

If a party, after notice, declines to produce a document when formally called upon to do so, he will not afterwards be allowed to change his mind; and therefore, if he once refuses, he cannot, when his opponent had proved a copy, and is about to have it read, produce the original and object to its admissibility without the evidence of an attesting witness [*Edmonds v. Challis*, 7 CB 413, 439]. Nor, after such refusal, will he be permitted to put the document into the hands of his opponent's witness for the purpose of cross-examination [*Doe v. Cockell*, 6 C & P 527], or to produce and prove it as part of his own case [*Doe v. Hodgson*, (1840) 12 A & E 135; *Collins v. Gashon*, 2 F 47; Tay s 1818].

This section does not enable a party to call for the production of a document for inspection, that is to say, to have it produced and then use it or not use it as he thinks fit. What it contemplates is that one party should call upon another—in court to produce a document of which the first party has given the other notice to produce. In this case PANCKRIDGE J, expressed doubt whether s 164 applied in criminal proceedings [*Sham Das v. R*, 36 CWN 1127].

Notice to produce papers will not entitle the party who gives it, to cross-examine a witness as to their contents [*Graham v. Dyster*, 2 Stark 23] except after refusal to produce. If a party refuses he cannot afterwards use the original to contradict the secondary proof [*Doe v. Hodgson*, 12 A E 135]; or to show that there are attesting witnesses who ought to be called [*Jackson v. Allen*, 3 Stark 74]; or to refresh the memory of a witness [*Till v. Ainsworth*, Bristol. 1847 Wilde CJ, MS]; or it seems for any purpose [*Collins v. Gashon*, 2 F & F 47 Byles J]. He is in effect, bound by any legal and satisfactory evidence produced on the other side [*Shookram v. Ramlal*, 9 Suth WR 248; Nort p 252].

[*Ref Tay s 1818; Steph Arts 138, 139; Phip 8th Ed p 469; Hals 3rd Ed Vol 15 para 468; Wig s 1210; Jones s 20*].

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

Provided that the judgment must be based upon facts declared by this [1][Act] to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, [2][except in] the cases hereinbefore excepted.

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COMMENTARY

Principle and Scope.—This is a very important section. The judge may exercise all the privileges and powers which he has under the Act or any other statute of interrogating witnesses and requiring the production of evidence and yet they may be insufficient to elicit the truth or to get all facts necessary for a proper decision. The chief function of a judge is to see that justice is done between parties, and a too rigid adherence to set rules may sometimes embarrass the judge in the performance of his duties and defeat the ends of justice. If attention is confined to the proof brought forward by the parties, appropriate materials for a decision may not be available and

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1. In Ceylon "Ordinance" substituted.
2. In Ceylon "excepting" substituted.

the truth may not always come out. Examination may not have been conducted scientifically or skilfully, and things may have been left unsaid or obscure unintentionally or, as is sometimes seen, intentionally.

So whenever the judge finds that the examination has not been conducted in a way as to unfold the truth or that obscurities in the evidence should be made clear and intelligible, it is not only his right but his duty to probe further into matters that he deems important by his own questions. But this power of interrogation is to be exercised within well-recognised limits by maintaining judicial calm and detachment and without usurping the functions of counsel. He may intervene by questions any time he considers necessary, but if extended examination is necessary, it is usually made after the lawyers have finished their task (See *post*: "*Power of the Judge to interrogate*"].

This section is therefore intended to arm judges with a general power to ask *any question, in any form, at any time, of any witness or parties about any fact relevant or irrelevant.* The position of a judge is not that of a moderator between contestants in a game with no inclination to interfere till the violation of its rules. He has a much higher duty to perform. He has to see not only that the proceedings are conducted strictly according to law, but to administer justice and to find out the truth. He must therefore play an active part and it is not only his right but it is his duty to ask the witness any question in any manner, the answer to which in his opinion would aid in the discovery of truth. In order to attain this end and to discharge his grave duties, he may interpose to propound any question to the witness in any form, leading or otherwise about any fact relevant or irrelevant. The power to interrogate on any irrelevant fact must have the sole object of discovering or finding any clue to some relevant fact material to the decision of the case. It is well to recall here the eloquent and weighty words of BURKE:—

> "It is the duty of the judge to receive every offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance or corrupt collusion, should not bring it forward. A judge is not placed in that high situation merely as a passive instrument of parties. He has a duty of his own, independent of them, and that duty is to investigate the truth" [Report of Committee on Warren Hasting's Trial].

> LUMPKIN J, in *Epps v. S*, (1855) 19 Ga 118 (Am): 'We know of no limit to the right which belongs to the court of interrogating witnesses, either in civil or criminal cases, especially the latter. The life or death of a man may hang upon a full development of the truth. The presumption that this liberty will not be honourably and impartially exercised is not to be tolerated for a moment. When they see, therefore, that a material fact has been omitted which ought to be brought out, it is not only the right but the duty of the presiding judge to call the attention of the witness to it, whether it makes for or against the prosecution; his aim being neither to punish the innocent or screen the guilty, but to administer the law correctly." [Cited Wig s 784).

Limitations upon the extensive power of interrogation are to be found in the statement of the purpose to be attained and a judge must be depended upon to perform his solemn duties without fear or favour. "Counsel seek only for their client's success; but the judge must watch that justice triumphs" [*Epps v. S, ante*]. The object of the exercise of this power of interrogation must be "*to discover or to obtain proper proof of relevant facts.*" With this object, the judge may also direct the production of any document or thing. As to the production of any material thing, see

also s 60, proviso 2. It should not be supposed that judges have been given a *carte blanche* by which the rules of evidence may be relaxed or set at nought.

An improper or capricious exercise of the power may of course lead to undesirable results. But all discretionary powers must be used judicially and not capriciously or arbitrarily. It should be borne in mind that the aid of this section should be invoked only with the object of *discovering relevant facts or obtaining proper proof of such facts*. That being so, it cannot be said that the rules in the Act relating to relevancy or admissibility have in any way been disregarded or relaxed. He can therefore ask such questions as he considers necessary to elicit any relevant or material evidence. An irrelevant question may be asked by the judge for the discovery of relevant facts or to obtain proof of such facts [*R v. Hari Lakshman*, 10 B 185]. Such interrogation on irrelevant matters may result in the securing of *indicative evidence*, (which Bentham called evidence of evidence; see *post* p 1382) which may lead to the discovery of material and important facts. It has therefore been held that under s 165 the court cannot order the production by a party of any document or thing, no matter how irrelevant, into court unless the object is to obtain indicative evidence which may lead to discovery of relevant evidence of any fact in any matter then before the court [*Krishna v. Balkrishna*, 57 M 635].

A futher limitation of the power will be found in the first *proviso*, which lays down that judgments must be based on *relevant facts* which have been *duly proved*. It is clear therefore that the judge cannot in any case admit illegal or inadmissible evidence for basing his decision or place it before the jury for their verdict. In this respect the section is in accord with the English law (see *post*; Best s 86). So, the power under this section should not be used for the purpose of eliciting what the law expressly and deliberately forbids being admitted. For instance, it cannot be used for proving a confession to police which is shut out by s 25, or a confession made while in police custody except as mentioned in s 27, or for eliciting a statement which s 162 Cr P Code forbids for being used for any purpose at any enquiry or trial [*Pulamma v. R*, 1932 MWN 625]. S 165 cannot be used for the purpose of introducing evidence in contravention of the law [*Rahijaddi v. R*, 58 C 1009 *post*].

As to criminal cases, [3]s 298 Cr P Code distinctly says that if the duty of the sessions judge to prevent the production of inadmissible evidence whether or not objected to by the parties [see *Abbas v. R*, 25, 736; *Shk Abdul v. R*, 85 IC 830 (C); *R v. Panchkari*, 29 CWN 300]. A document prepared by the police during investigation does not become evidence merely because it is formally proved and exhibited [*Yaru v. R*, 99 IC 240 (L)]. Although no such specific direction has been laid down in regard to civil cases, there is no manner of doubt that it is equally the duty of a civil judge to exclude inadmissible evidence irrespective of any objection by any party (*ante* p 46). S 5 forbids the use of any evidence not declared relevant under the Act. An erroneous omission to object to evidence not admissible under the provisions of the Evidence Act does not make it admissible evidence irrespective of any objection by any party (*ante* s 5: "*Court shall exclude inadmissible evidence.....no objection is taken*"). S 5 forbids the use of any evidence not declared relevant under the Act. An erroneous omission to object to evidence not admissible under the provisions of the Evidence Act does not make it admissible [*Miller v. Madhodas*; 23 IA 106: 19 A 76; *Luchiram v. Radhacharan*, 34 CLJ 107; *Jagadis v. Harihar*, 40 CLJ 39. See *post* notes to *Proviso* (1)]. So also statements which are not admissible in evidence cannot be rendered admissible by consent of parties [*Ponnusami v. Sinagarama*, 41 M 731;

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3. Jury trial being abolished s. 298 has been omitted in Cr P Code, 1973.

Sundar v. Sham, 81 IC 235; see *ante* s 5: "*Waiver of objection or consent*", s 33 "*Waiver*" and s 58 "*Admissions or waiver in criminal cases*"]. The court is not bound to receive irrelevant testimony even though both parties consent [*Farmer's Bank v. Windfield*, 24 Wend (NY) 421].

The *second proviso* further forbids the judge to ask questions or to compel production of documents in contravention of ss 121-31, 148, 149. The last portion of the second proviso does not appear to be strictly necessary, as the first proviso expressly declares that judgments should be based on relevant facts "*duly proved*". Subject to these restrictions, the judge has ample and unfettered power to ask any question, in any form, at any stage and of any person. The fullest power has been given by this section to explore all avenues for the discovery of truth including the asking of questions about irrelevant facts with the purpose of getting any information which may lead to the discovery of relevant fact and to prevent justice being defeated by techincalities or rigid rules. It supplements similar powers of court under special enactments, *eg* Or 10 r 4(*1*); Or 11 r 14; Or 16 rr 7, 14; Or 18 rr 17, 18 C P Code; s 311 Cr P Code. The powers of a court under s 540 (now s 311) Cr P Code are also very wide [*R v. Satyendra*, 37 CLJ 173]. S 310 Cr P Code makes provision for local inspection by court. Under s 165 the judge may himself, in order to discover or obtain proof of relevant facts order the production of any document when Or 13 rr 1, 2 or s 151 C P Code does not serve his purpose [*Shankar v. Mahbub*, 70 IC 278 (O)]. S 540 (now s 311) Cr P C and s 165 Evidence Act, between them confer a wide discretion on the court to act as the exigencies of justice require [*Jamatraj v. S*, A 1968 SC 178—cases discussed].

Judge's Power to Put Questions.—The true meaning, scope and object of the section will be clear from the following extracts from the speeches and writings of SIR FITZJAMES STEPHEN, the framer of the Act, and other commentators:

> "Passing, however, from the case of English barristers, to the case of pleaders and vakils and the courts before which they practise, I would appeal to everyone who has experience of the subject, whether the observations referred to are not strictly true, and whether the main provision founded upon it there—the provision which empowers the court to ask what questions it pleases, is not essential to the administration of justice here. In saying that the Bench and the Bar in England play their respective parts independently, what I mean is that, in England, cases are fully prepared for trial before they come into court, so that the judge has nothing to do but to sit still and weigh the evidence produced before him. In India, in all enormous mass of cases, this neither is nor can be so. It is absolutely necessary that the judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matters in issue, but may lead to something that is, and it is in order to arm judges with express authority to do this that s 165, which has been so much objected to, has been framed." [Stephen's Speech on 12th March 1872 when presenting the Report of the Select Committee].
>
> "When a man has to enquire into facts of which he receives in the first instnace very confused accounts, it may and often will be extremely important for him to trace the most cursory and apparently futile report. And facts relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case, criminal or civil, would neglect his duty altogether if he shuts his ears to everything which was not

relevant within the meaning of the Evidence Act. A judge or magistrate in India frequently has to perform duties which in England would be performed by police officers or attorneys. He has to sift out the truth for himself as well as he can, and with little assistance of a professional kind. S 165 is intended to arm the judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that, in order to get to the bottom of the matter before it, the court will be able to look at and enquire into every fact whatever. It will not, however, be able to found its judgment upon the class of statements in question for the following reason:—If this were permitted, it would present a great temptation to indolent judges to be satisfied with second-hand reports. It would open a wide door to fraud." [Stephen's Introduction to the Evidence Act, pp 162, 163].

The English law on the subject is thus stated in Best on Evidence:—

The rules of evidence are of three kinds—(1) Those which relate to evidence *in causa*, *ie* evidence adduced to prove the questions in dispute, (2) Those affecting evidence *extra causam*, or that which is only used to test the accuracy of media of proof, (3) Rules of forensic practice, respecting evidence. Now it is to the first of these that the term 'rules of evidence' most properly applies,—much evidence which would be rejected if tendered *in causa*, being perfectly receivable as evidence *extra causam*; and there are few trials on which this sort of evidence does not play an important part. Again, the judge has a certain latitude allowed him with respect to the rules of forensic proof. He may ask any questions in any form, and at any stage of the cause, and to a certain extent even allow parties or their advocates to do so. This, however, does not mean that he can receive illegal evidence at pleasure; for if such be left to the jury, a new trial may be granted, even though the evidence were extracted by questions put from the Bench; but it is a power necessary to prevent justice being defeated by technicality, to secure indicative evidence and in criminal cases to assist in fixing the amount of punishment. And it should be exercised with due discretion. Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections. [Best s 86]. As to *indicative evidence*, Best says:—

"It may be objected, and indeed, Bentham's Treatise on Judicial Evidence is founded on the notion that by exclusionary rules like the above (referring to certain rules of evidence) much valuable evidence is wholly sacrificed. Were such even the fact, the evil would be far outweighed by the reasons already assigned for imposing a limit to the discretion of tribunals, in declaring matters proved or disproved. But when the matter comes to be carefully examined it will be found that the evidence in question need seldom be lost to justice; for however dangerous and unsatisfactory it would be as the basis of final adjudication, it is often highly valuable as 'indicative evidence'; *ie* evidence not in itself receivable, but which is '*indicative*' of better. Take the case of derivative evidence: a witness offers to relate something told him by *A*; this would be stopped by the court; but he has indicated a genuine source of testimony, *A*, who may be called or sent for. So a confession of guilt which has been made under promise of favour or threat of punishment is inadmissible by law [see s 24 *ante*]; yet any facts discovered in consequence of that confession—such, for instance, as the finding of stolen property—are good legal evidence (see s 27 *ante*]. Again no one would think of treating an anonymous letter as legal evidence against a party not suspected of being its author, yet the suggestions

contained in such letters have occasionally led to disclosures of importance. In tracing the perpetrators of crimes, also conjectural evidence is often of the utmost importance,' and leads to proofs of the most satisfactory kind, sometimes even amounting to demonstrations." [Best s 93].

Cunningham, who was at the time of the passing of the Evidence Act, Secretary to the Council of the Governor-General for making Laws and Regulations, has thus explained the section:—

> "It frequently happens that the parties do not, in their questions, elicit all the facts necessary to sound a view of the merits of the case. A plaintiff may have some weak points in his case which he is afraid of betraying and so dexterously avoids or a defendant may fail to perceive the import of some answers given and allow it to pass uncriticised: in any case it is highly important that the judge should be armed with full power enabling him to get at the facts. He may, accordingly, subject to conditions to be immediately noticed, ask any question he pleases, in any form, at any stage of the proceedings, about any matter relevant or irrelevant, and he may order the production of any document or thing. No objection can be taken to any such question or order, nor are the parties entitled, without court's permission to cross-examine on the answers given. This general power, however, is very closely restricted. In the first place, the judgement must be based on relevant facts and those relevant facts must have been duly proved; next the judge cannot compel a witness to answer any question, or to produce any document, which he (witness) would be entitled to refuse to answer or produce at the instance of the opposite party; nor may the judge ask any of the questions as to credit which would be improper if asked by the adverse party; nor can he dispense with primary evidence of a document unless the facts of the case show that secondary evidence is admissible. A judge accordingly, cannot, by the exercise of the powers conferred by this section import into the decision of the case any fact which is not relevant under the Act nor can he in any case dispense with the prescribed mode of proof, or ask questions to credit, except such as would be permitted if asked by the parties. Thus restricted, the power of asking questions is of obvious utility in a country like India, where in the vast majority of cases, no advocate is employed, but the judge has to make out the truth as best he can from the confused, inaccurate and often intentionally false accounts of ignorant, excited and mendacious witnesses," [Cunn Intro p Ixvii-Ixviii].

Markby explains and criticizes the section thus:—

> "This section is capable of two widely different interpretations. (1) It may mean that the judge may introduce into the case, without any restriction except those stated in the second proviso, any irregular evidence he pleases; that he might, for example, ask a witness what some respectable person had told him about the matter in dispute; evidence though properly speaking, inadmissible, might be quite trustworthy. But then what is the meaning of the first proviso? How is the judge to make use of the irregular evidence at all, if he is not allowed to base his judgment partly upon it. (2) The other possible construction of the section is that it only empowers the judge to ask irregular questions in order to discover or obtain proper, that is, regularly admissible evidence. For example, in a case of murder, where the weapon had not been found, a witness might state in answer to the judge that he heard that the accused had secreted it in a certain ditch. The statement being hearsay would be inadmissible, but the judge may, by means of it, be able to direct an inquiry which would lead to the

weapon being found. Upon the second of these two constructions of the section of the first proviso would present less difficulty. But then it is not easy to see why the last clause of the second proviso was inserted. This would be quite intelligible if the section were intended as a general relaxation of the rules of evidence, but why should not a judge who was merely hunting up evidence look at a copy in order to see whether it was worthwhile to endeavour to procure the original. It may further be observed that if that clause on the other hand refers to the evidence to be accepted in the case itself, it appears to be a mere surplusage, as the first proviso has already declared that the facts must be duly proved, *ie* where the fact is contained in a document, primary evidence of that document must as a general rule be given.

"It seems to me that every magistrate in India possesses already all the powers of seeking after evidence which this section, on the second construction of it, would give him. One of his regular functions is the discovery of crime, and necessary measures to ensure a conviction; functions which as Sir Fitzjames Stephen says, 'in England would be performed by police officers and attorneys', and it has never been supposed that in this part of his duties he is fettered by the rules of evidence. A sessions judge, or a judge trying a civil case, would be in a somewhat different position, but s 171 of the Cr P Code 1882 (Or XXVI r 14 C P Code, 1908), and s 540 (now s 311) of the Code of Criminal Procedure empower a judge of his own motion to summon any witnesses he may think proper, and I suppose that his power necessarily involves the further power of making such informal inquiries as would enable him to decide whether it was advisable to summon a particular person as a witness or not. In the second view, therefore, the section would add little, if anything, to the already existing law. In the first view it would modify the rules of evidence to a very considerable extent." [Markby pp 14-15].

[*Ref Tay s 1447; Best ss 86, 93; Phipson 8th Ed pp 39, 475; Wharton s 281; Ros Cr Ev 120; Wig ss 784-86, 2484; Jones s 815; Hals 3rd Ed Vol 15 804; Vol 10 para 778*].

Judge's Power to Interrogate Witness [English and Indian Law].—Although this section appears to give the judge a somewhat wider latitude than similar powers under the English law, the provisions of this section are in substantial agreement with that law. The judge has a discretionary power of putting to witnesses such questions as he thinks the interests of justice require [*Middleton v. Barned*, 1849, 18 LJ Ex 433; see also *R v. Hopper*, 1915, 2 KB 431; *R v. Remnant*, Rus & Rly 136; *R v. Watson*, 6 C & P 653]. Questions by a judge may be based, not only on matters arising in the case, but on his own local or scientific knowledge [*R v. Antrim*, 1895, 2 IR 603; *Cf Shortt v. Robinson*, 63 JP 295; Phip 11th Ed p 668]. As to the desirable limits of judicial intervention in the examination and cross-examination of witnesses, see *Yuill v. Y*, 1945, 1 All ER 183 CA and *Jones v. National Coal Board*, 1957, 2 All ER 155 CA *post*.

Section 165 of the Evidence Act confers vast and unrestricted powers on the trial Court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial Court to use the power whenever he deems *it necessary to elicit truth*. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the Court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question.

12. Reticence may be good in many circumstances, but a judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be about or combat between two rival sides with the judge performing the role only of a *spectator or even an umpire* to pronounce finally who won the race. A judge is expected to actively participate in the trial, elicit necessary materials from witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a judge felt that a witness has committed an error or a slip it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for trial judge to remain active and alert so that errors can be minimised [*State of Rajasthan v. Ani*, A 1947 SC 1023 : 1997 Cri LJ 1529, 1530, 1531].

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Section 165 can have no application in a situation where the evidence is concluded, prosecution has closed the case, the judgment has commenced and where it appears to the court at that point of time that the prosecution has failed on a material aspect. [*Om Prakash Shankarlal Sharma v. State of Maharastra*, 1993 Cri LJ 3175, 3177 (Bom)]. Unrestricted power of court to put any question to the witness cannot be curtailed merely because a party complains that a particular question put by the court would create apprehension in his mind. [*Vincent v. State of Kerala*, 1993 (2) Crimes 912, 915 (Ker)]. It is the duty of the prosecution to bring contradiction on record by confronting the witness with his previous statement made to the police and if the prosecutor fails to perform his duty then it is the duty of the court before whom the witness is being examined to put such questions as are necessary for ascertainment of truth to the witness under section 165. Under Section 165, the court can confront the witness with his statement made to the police under Section 161 CrPC. In *Raghunandan v. State of U P*, A 1974 SC 463 : 1974 Cri LJ 453 the Supreme Court observed : "In a criminal case the fate of the proceeding cannot always be left entirely in the hands of the parties. The court has also a duty to see that essential questions are not so far as reasonably possible, left unanswered. [*State of Rajasthan v. Bhera*, 1997 Cri LJ 1037, 1237].

It has been a matter of juristic dispute whether a judge can, on his own, motion put to the witness questions independently of counsel, so as to bring out points designedly or undesignedly overlooked. On one side, it has been urged, in conformity with

the scholastic view, that the judge is confined to the proof adduced by the parties. On the other side, it is insisted that it is absurd for a judge with a witness before him not to do what he can to elicit the truth. So far as concerns the abstract principle, writers on the English common law repeatedly affirm the scholastic view that the judge must form his judgment exclusively on the proof brought forward by the parties. So far as concerns the practice, judges both in England and in the United States, do not hesitate to interrogate a witness at their own discretion, eliciting any facts they deem important to a case [Wharton s 281. See also Best s 86 quoted *ante*].

Same: ["Any Question in Any Form At Any Time"].—The purpose being to secure complete justice by a full discovery of truth and an accurate knowledge of all the facts, the judge can put what questions he pleases in any form, at any time. The rules as to leading questions do not apply to him, the relation between a judge and a witness being quite different from the relation between an advocate and client. ELLENBOROUGH, LCJ, (answering criticism on the procedure of a Commission inquiring into charges against the Princes of Wales), said:—

> "Folly, my lords has said that in examining the witnesses we put leading questions. The accusation is ridiculous; it is almost too absurd to deserve notice....I have always understood, after some little experience, that the meaning of a leading question was this, and this only: That the judge restrains an advocate who produces a witness on one particular side of a question, and who may be supposed to have a leaning to that side of the question, from putting such interrogatories as may operate as an instruction to that witness how he is to reply to favour the party for whom he is adduced....But to say that the judge on the bench may not put what questions and in what form he pleases can only orignate in that dullness and stupidity which is the course of the age" [1813, 25 Hansard, Parl Deb 207, quoted in Wig s 784].

The power of the judge to interrogate a witness in any manner he pleases has never and nowhere been disputed. The maintenance and exercise of this power is of the utmost importance in the administration of justice. Hesitation in the exercise of the right and the tendency to interfere with it by some superior courts elicited the following observation from an American judge:—

> ".....It is natural that able and masterful attorneys should be intolerant and resentful of any participation by the judge in the examination and cross-examination of witnesses. Should the judge exercise his right, professional bias and zeal will always be able to make a strong showing of prejudice on appeal. The result is that too often in this country the lawyers have had their own way, and judges have been reduced to the level of important spectators of trials before them, much to the detriment of our criminal jurisprudence."

BURCH, J, in *S v. Keehn*, 1911, 85 Kan 765, 784:

> "There is nothing in the Constitution or statute of this State which fetters the efficiency of trial judges as a part of the legal machinery for developing and establishing the facts in criminal cases; and in the case the trial judge did not abuse his power." (Cited in Wig s 784).

If the provisions of Or 18, r 17 are read along with s 165 it is clear that the power to recall and re-examine a witness is exclusively that of the court. The parties cannot take any objection to the question but can suggest some questions to the court to be asked [*Altaf Hussain v. Nasreen*, A 1978 A 515].

"May Order the Production of Any Document or Thing."—This is subject to the restriction in ss 123 and 162 as to the production of State documents. See also the

court's power under Or 11, r 14 C P Code. The judge is not also authorised to compel the production of any document which a witness would be entitled to refuse to produce under ss 121-31. As to production of any material thing, see s 60 second proviso. See also Or 18, r 18 C P Code. As to view of place by jury or assessor, see s 283 Cr P Code.

Judge's Power to Call a Witness at His Own Instance. [Cross-examination Upon Answers in Reply to Questions By Court—Cross-Examination of Witness Called By Court].—The section lays down that the parties have no right, except with the leave of the Court, to cross-examine any witness upon any answers given in reply to *questions by court*. This rule applies where the court interrogates a witness already in the box who has been called and examined by a party, or whom a party has declined to examine [see *R v. Sakharam*, 11 BHCR 166; *Gopal v. Manick Lal*, 24 C 288, *post*]. The discretion has to be exercised judicially and ordinarily the requisite permission would be given if the answers are adverse to the party who seeks the permission [*In re Mukhesh*, 1957 AP 742: A 1958 A P 165]. This should be distinguished from a case where the court of its own motion *calls* a witness and examines him, as a judge has the power to call a witness at his own instance and to examine him. In *Coulson v. Disborough*, 1894, 2 QB 316, 318, LORD ESHER said:— "If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that the person is able to elucidate the truth, the judge in my opinion is entitled to call him; and I cannot agree that such a course has never been taken by a judge before".

S 165 does not appear to provide specifically for such a case, and if such a witness has said anything which is material and adverse to any of the parties, he may be cross-examined by them subject always to the discretionary powers of the court. It has been held in England that a witness called by the judge and examined may not as of right be cross-examined without the leave of the court, yet when material evidence is given against any party, it is usual to allow cross-examination [*Coulson v. Disborough*, 1894, 2 QB 316 CA; see also *R v. Cliburn*, 62 JP 323; *The Cardiff*, 78 LJP 110; *Re Enoch & Zaratsky &c*, 1910, 1 KB 327 CA, *per* FARWELL, J]. In *Coulson v. Disborough*, *sup*, ESHER, MR, said:—

> "The counsel of neither party has a right to cross-examine him without the permission of the judge. The judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted."

Once the summing up is concluded no further evidence ought to be introduced to the jury [*R v. Olden*, 1952, 2 All ER 1040] except in exceptional circumstances in favour of the defence [*R v. Sanderson*, 1953, 1 All ER 485].

In *R v. Sakharam Mukundji*, 11 BHC 166, WEST, J, remarked:—

> "When the counsel for the prisoner has examined or declined to cross-examine a witness, and the court afterwards, of its own motion, examined him, the witness cannot then, without the permission of the court, be subjected to cross-examination. When, after the examination of a witness by the complainant and the defendant, the court takes him in hand, he is put under a special pressure, as the

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4. Jury trial being abolished s 283 has been omitted in Cr P Code, 1973.

judge is empowered to put any question he pleases, in any form about any fact relevant or irrelevant; and he is therefore, at the same time placed under the special protection of court, which may at his discretion, allow a party to cross-examine him; but this cannot be asked for as a matter of right. The principle applies equally, whether it is intended to direct the examination to the witness's statements of fact, or to circumstances touching his credibility; for any question meant to impair his credit tends (or is so designed) to get rid of the effect of all his answers, and of each of them, just as much as one that may bring out an inconsistency or contradiction. It is then a cross-examination upon answers—upon every answer given to the court, and is subject to court's control".

It has been held in some cases that a witness called by the court is liable to be cross-examined by any of the parties. His examination is not to be confined to such questions as the court sees fit to put to him, but his knowledge as to the facts he states may be tested, as in the case of any other witness by questions put up by the parties [*Tarinicharan v. Sarada Sundari*, 3 BLR, AC 145, 158]. There is nothing in s 165 debarring or disqualifying a party to a proceeding from cross-examining any witness called by the court. All that s 165 says is that a party to a proceeding should not be allowed to cross-examine a witness, upon an answer given by him to a question put by the court, without the permission of such court [*Gopal v. Manick Lal*, 24 C 288]. When a party is examined after the close of the case, an opportunity should be given to cross-examine him [*Peary Lal v. P*, 19 CWN 903]. If a witness is called by court under s 540 (now s 311) Cr P Code, both sides have a right to cross-examine him freely [*R v. Pita & others*, 47 A 147: 85 IC 719]. On the accused's declining to examine a witness summoned by him, the court examined him as a court-witness, but refused to allow the accused to cross-examine him—*Held* that the accused should have been given opportunity to cross-examine [*Mohendra Nath v. R*, 29 C 387]. So, when a witness summoned on behalf of the prosecution is not called as a witness, but is called and examined by the court under s 165, the prisoner should be allowed to cross-examine [*R v. Girish Ch*, 5 C 614: 5 CLR 364; see however *R v. Stanton*, 14 A 522]. It has however been held in a case that s 165 applies to court-witnesses, the expression "any witness" appears to include such witnesses. Parties have no absolute right to examine a court-witness [*Makund v. Gafur-un-nissa*, 74 IC 108]. This view is in accord with the decision in *Coulsan v. Disborough, sup.*

Under Or 10 r 2 the court may examine any party appearing in person or present in court, or companion of party; under Or 10 r 4 C P Code, 1908 the court may direct any party to appear in person for examination and under Or 16 r 14, the court may of its own accord summon as witness any person including a party to suits. Court cannot compel a party to examine any particular witness [*Muncpl Corpn &c v. Pancham*, A 1965 SC 1008]. Or 18 r 17 empowers the court to recall any witness and examine him. The court may also under s 311 Cr P Code summon any person as a witness or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined.

The judge may at any stage of the trial either at his own instance or that of a party, recall a witness, for further examination or cross-examination [*R v. Sullivan*, 1923, 1 KB 47]; though after a party's case is closed, this will only be allowed under special circumstances [Phip 8th Ed p 475; Tay s 1477]. Where, after the summing up, a witness is allowed to be recalled and interrogated, the opponent has a right to cross-examine and give evidence in rebuttal [*R v. Howarth*, 13 Cr App R 99; Phip 11th Ed p 670].

See also notes to s 138 *ante* "*Right to cross-examine witnesses called by the court*".

Power of the Judge to Interrogate Under the Section.—Although this section says that questions may be put to a witness *at any time*, it is not intended that the conduct of the case shall be taken out of the hands of the parties or their pleaders. A judge may in the course of the examination by either party interpolate questions with a view to elucidating any particular matter. But the section does not justify him in submitting a witness to a general cross-examination until the pleaders on either side have exhausted their efforts on the witness. In a case, on the examination-in-chief being finished, the judge questioned almost all the witnesses at a considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed. The High Court condemned his procedure remarking:—"It is not the province of the court to examine the witness, unless the pleaders on either side have omitted to put some material question or questions; and the court should as a general rule, have the witnesses to the pleaders to be dealt with, as laid down in s 138 of the Evidence Act. The judge's power to put questions under s 165 is certainly not intended to be used in the manner, which we had occaion to notice in the present case" [*Noorbox Kazi v. R*, 6 C 279, 283: 7 CLR 385 (relied on in *In re Siva Subba*, 1951, 1 MLJ 207: A 1951 M 772: *Yusuf v. Bhagwandas*, A 1949 346].

The judge may always intervene to put a question in a clear form or to have an obscure answer clarified or to prevent a witness being unfairly misled, but if he does more and stop counsel again and again to put a long series of his own questions, he makes an effective examination-in-chief or cross-examination impossible [*Sunil v. S*, A 1954 C 305: 57 CWN 962]. See the observation of BIRKETT J, in *Harris v. H*, The Times, dated 8-4-1952 quoted in *Sunil*, *sup* (at pp 317-18) and refd to in *Jones v. National Coal Board*, (1957) 2 All ER 155 CA. In *Jones v. National Coal Board, sup* (where a new trial was ordered on account of interventions by the judge during examination and cross-examination of witnesses) DENNING LJ, observed:—

> "The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been over-looked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the rope of an advocate; and the change does not become him well" (p 159 *ibid*).

In a case in which a judge interfered not infrequently with the defendant's advocate's cross-examination of witnesses and asked too many questions to them, the manner in which the conduct of the examination of witnesses was taken over by the judge was condemned and RAJAMANNER CJ, quoted extracts from the judgment of DENNING LJ, in *Jones v. National Coal Board, sup* [see *In re Vasantha Pai*, A 1960 M 73].

Whenever it appears to the judge that all facts necessary for a proper determination of the points in issue have not been elicited, or that a party has avoided disclosure of matter which go against him or which may lead to the discovery of relevant facts pointing to the truth of the matter under enquiry, it is not only right but it is the duty of the judge to participate in the examination and ask any question he pleases, in any form at any stage of the proceedings. In *S v. Keehn*, (1911) 85 Kan 765, 784 (Am) BURCH J said:—

> "The purpose of a trial is to ascertain the truth about the matters charged in the indictment or information, and it is a part of the business of the judge to see

that this end is attained. He is not a dumb and mask-faced moderator over a contest between sensitive and apprehensive, or perhaps witty and ingenuous counsel".

"He is a vital and integral factor in the discovery and elucidation of the facts. He must have a full and accurate comprehension of each and all of the facts....Therefore, on his own account, he is not obliged to rest content with the modicum of evidence which counsel may dole out, or to accept as final their showing of knowledge, means of knowledge, and credibility on the part of witnesses. But beyond this it is the function of the judge to aid the jury in obtaining a comprehension of facts equal to his own, in order that a just verdict may be reached. Therefore, whenever in his judgment the proceeding is not being conducted in a way to accomplish the purpose for which alone it is instituted, the full development of the truth, or whenever he can effect a better accomplishment of that purpose, he not only has the right, but it is his duty, to take part," (Cited Wig s 784).

In a case the court remarked: "We have frequently observed that the persons actually employed (defence lawyers at the expense of the Crown) do their work very badly and conspicuous opportunities for cross-examination and obvious arguments are entirely ignored. In such circumstances also the trial judge should remember that he has the duty not only to prosecution but to the defence. He has the police diary in front of him and should use his greater experience to cross-examine the witnesses when he sees that the defence lawyer is incompetent. He should not do this unnecessarily but only when it is desirable in the interest of justice" [*Sarpan v. R*, A 1938 P 153; see also *Dikson v. R*, A 1942 P 90].

As to intervention by court, see *ante* s 138.

When statements of prosecution witness before the police were not put in evidence under s 162 Cr P Code and were not even proved as substantive evidence, they could not be used by the judge under s 165 for discrediting the witness [*Rahijuddi v. R*, 58 C 1009: 35 CWN 317: A 1931 C 189]. Such statements cannot be used by the court in order to show that the witnesses had made contradictory statements to the police officer [*Keramat v. R*, 42 CLJ 528: 92 IC 453; *Maung Htin v. Mg Po*, 4 R 471: A 1927 R 74: 90 IC 1019: 28 Cri LJ 219].

The judge can himself look into the previous statements of witnesses recorded in the police diary, even though the defence neither requested him nor applied for copies of such statements; and if the interests of judge demand, the judge may himself under s 165 put questions to witnesses to bring out discrepancies of vital nature between such statements and the evidence of those witnesses in court [*R v. Lal Mia*, (1943) 1 Cal 543]. The judge having the police diary before him can in the interest of the accused put to the police officer any question regarding the accused's statement to the police which goes in his favour [*In re Molagan*, A 1953 M 179]. The Motor Accidents Tribunal is obliged to find out from the evidence available or to get at the evidence as provided under S. 165 or give further opportunity for either side to produce necessary evidence, such documents that were prepared during the time of investigation. [*P Rajeswari v. Hotel Imperial*, A 1989 Mad, 34, 35].

S 165 and S 162 Cr P Code.—Ban imposed by s 162 Cr P C against use of a statement of a witness recorded by the police during investigation does not operate against the special powers of the court under s 165 to question a witness in order to secure the ends of justice [*Raghunandan v. S*, A 1974 SC 463].

PROVISO I: [Judgment to be Based on Relevant Facts Duly Proved].—The first proviso only serves to emphasize the width of the power of the court to question a witness [*Raghunandan v. S*, A 1974 SC 463]. The general power given by this section is restricted by this proviso, which declares that the judgment must be based on relevant facts, and those relevant facts must have been duly proved [*ante* "*Commentary*"]. The Evidence Act prescribes that the judgment of the court must be based upon facts declared by the Act to be relevant and duly proved, and it would be intolerable that the court should decide rights upon suspicions unsupported by testimony [*Mohan Bibi v. Saral Chand*, 2 CWN 18, 27]. In a trial by a sessions judge, he is exactly in the same position as the jury, in dealing with the evidence properly given before him, and he is bound to confine his attention solely to such evidence [*R v. Jadab Das*, 27 C 295: 4 CWN 129]. The defence in a case must be based upon facts relevant under the Evidence Act [*Ismail v. R*, 39 B 326]. It is improper for a court to receive any information of any kind in reference to a case, whether it be relevant or not other than such as comes before it in the way which the law recognises in the form of legal evidence [*Mahalal v. Sankla*, 6 Bom LR 789]. A judge has no right to test evidence given in court by material which had not legally been made evidence and it is improper to stigmatise a witness as perjured on such material [*Amarnath v. R*, 85 IC 143 (L)]. The function of a judge with regard to evidence is to decide all questions as to *relevancy* and admissibility. His duties, as Norton says, are of a threefold character: (*1*) To exclude, everything that is not legitimately evidence; (2) to ascertain clearly what the evidence is which he has before him; (*3*) to estimate correctly the probative force of that evidence [Nort Intro p 65]. As to duties of a judge in a trial by jury, see s 297 Cr P Code. Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony (*ante* s 5: "*Suspicion or supposition is not evidence*").

[5]S 298 of the Code of Criminal Procedure expressly makes it the duty of sessions judge in criminal cases to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties. In the case of *R v. Pittambar Sirdar*, 7 WR Cr 25 MARKBY J. said:—"The moment a witness commences giving evidence which is inadmissible he should be stopped by the court." "Under the old law, and almost as it were from the necessity of the thing, it was indicated on more than one occasion that the courts had an active duty to perform in respect of the admission and rejection of the evidence, and this wholly irrespective of objections emanating or rather falling to emanate from the parties or their pleaders" [Field Ev p 481]. The Calcutta High Court laid down the following rule on one point connected with the subject in a circular addressed to all courts, civil or criminal.—"It will be the duty of the judge to ascertain, by a few questions put to each witness at the proper time, whether he is speaking of matters within his own knowledge or merely of those which he has heard from others; and if the former what are his means of knowledge" (*Circular No 31 Civil side, dated 13th October* 1863).

The duty of a judge in civil cases has not been so distinctly laid down as in [6]s 298 Cr P Code, but it is abundantly clear from the various provisions in the Evidence Act that it is equally his duty to exclude all inadmissible evidence irrespective of any objection from a party see (*ante* ss 5, 60 and 64). The proviso to s 165 also says that the judge shall not dispense with primary evidence of a document except in the cases hereinbefore excepted.

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5. Jury trial being abolished ss 297, 298 has been omitted in Cr P Code, 1973
6. Jury trial being abolished ss 297, 298 have been omitted in Cr P Code, 1973

The act of sending for a document under s 105 or for a record under Or 13 r 10 does not *ipso facto* make it evidence. It must be duly proved [*Punja v. Bhodu*, 9 NLR 11: 18 IC 857]. It is not proper to base judgment on a confidential enquiry of an assistant settlement officer [*Baldeo v. Sheoraj*, 56 IC 807]. In a suit to enforce registration of a will, judgment was based on the evidence before the registering officer admitted by consent of parties, although the condition of s 33 were not fulfilled—*Held* that in view of s 165 the judgment was unsustainable as it was based on irrelevant evidence [*Ponnusami v. Singaram*, 41 M 731 MLJ 526. See however *Jainab v. Hyder*, 43 M 609: 56 IC 957 where it has been held that the provisions of s 33 may be waived (*ante* s 33: "*Waiver*"). A court of appeal cannot set right on appeal unless it is established that the intervention with question of a trial judge, with a view to clear up obscurities, to fill up lacuna, to supplement deficiencies and generally to elicit the truth, exceeded the bounds of s 165 and so impeded the legitimate work of counsel as to amount to a mistrial leading to failure of justice [*Surendra v. Ranee Dasee*, 47 C 1043: 24 CWN 860: 33 CLJ 34: 59 IC 814].

Personal Knowledge of Judge.—A judge cannot import into a case his personal knowledge of particular facts (see notes to s 57); but he can use his knowledge of the character of parties and witnesses (see *notes* to s 167 *post*).

PROVISO 2: [Prohibition to Ask Questions or to Compel Production of Documents Protected by Law].—[See *ante* "*Commentary*"].

The second proviso preserves the privileges of witnesses to refuse to answer certain questions and prohibits only questions improper under ss 148 and 149 [*Raghunandan v. S*, A 1974 SC 463]. This proviso prevents the judge from asking witnesses such questions which the parties or their pleaders are not entitled to ask under ss 121-31, 148 and 149; nor can the judge compel a third party to produce his title-deeds which the parties or their pleaders are not entitled to do under s 130 of the Act. It is the duty of the judge to protect and not to coerce the witness in any manner. Where in cross-examination before the court of sessions, a witness stated that when she was examined by the committing magistrate that officer addressing her said, "Recollect, or else I will send you into custody,"—it was held that the conduct of that officer was most improper and illegal [*R v. Ishri Singh*, 8 A 672, 675]. Under s 165 a judge has the power of asking irrelevant question to a witness, if he does so, in order to obtain proof of relevant facts, but if he asks questions with a view to criminal proceedings being taken against the witness, the witness is not bound to answer them and cannot be punished for not answering them, under s 179 of the I P Code [*R v. Hari Lakshman*, 10 B 185].

S. 166. Power of jury or assessors to put questions.—In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

COMMENTARY

Principle and Scope.—This section empowers the jury or assessors to put any questions to the witness, through or by leave of the judge which the judge himself might put and which the judge considers proper. "The privilege to examine witnesses has also been extended to jurors, when exercised to draw out or clear up some uncertain point [Jones s 815]. The jury may ask admissible and not inadmissible

questions [*R v. Lillyman*, (1896) 2 QB 167, 177]. Under [1]s 293 Cr P Code, if the court thinks that the jury or the assessors should have a view of the place of occurrence, it shall make an order to the effect. The assessors can only view the scene of the alleged offence, and cannot examine any witness on the spot, as under s 293(2) the officer conducting the jurors or assessors to the spot cannot suffer any other person to speak to them [*Chutterdharee v. R*, 5 WR 59]. "It is often desirable that the jury should have an opportunity of viewing the spot in controversy; since the knowledge derived by these means is far more satisfactory than any obtainable by the mere examination of maps or plans, which are often inaccurate and obscure, and may perhaps have been prepared with an express view to mislead" [Tay s 558]. But the making of statements by a *witness at the view*, or even the pointing out of the places by a witness or other unauthorised person at a view (which amounts to giving testimony) is a violation of the rule that jurors are not to receive out of court [Wig s 1802].

If a juror or assessor is personally acquainted with any relevant fact, he may be examined under [1]s 294 Cr P Code [see s 118 *ante*]. An assessor may also like the jury, be allowed to put question through the court to witness under examination [*R v. Terumal Reddi*, 24 M 523, 543]. Magistrates trying a criminal case, may themselves inspect the locality [see *In re Lalji*, 19 A 302. As to local inspection, see s 3 *ante*]. Under s 309 Cr P Code a judge has no power to question the assessors until they have delivered their opinions orally and he has recorded such opinions [*Najimuddin v. R*, 40 C 163]. Under [1]s 303 Cr P Code a judge may ask such questions to the jury as are necessary to ascertain their verdict, but he has no power to question the jury on reasons for their verdict [*R v. Ali Hyder*, 86 IC 712 (P); *Ramjag v. R*, 109 IC 114 (P)].

1. Ss 293-308 have been omitted in Cr P Code, 1973.

CHAPTER [1]XI

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE

S. 167. No new trial for improper admission or rejection of evidence.—The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

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COMMENTARY

Principle and Scope.—This section re-enacts the provisions of s 57 of the repealed Act 2 of 1855 and the principle on which it is founded is in accordance with the law prevailing in England [Tay s 1882]. In England *civil cases* are also tried by judge and jury and by judge alone in some cases. Formerly, where evidence had been improperly admitted or rejected, a new trial was granted, unless it was clear that the result would not have been affected. But this rule is reversed by the present Rules of the Supreme Court [RSC Or 39 r 6; Best, s 82]. In trials by judge and jury, if admis-

1. In Ceylon "XIII".

sible evidence has been rejected by the judge and *substantial* injustice thereby occasioned, the injured party is entitled to a new trial, *provided* he formally tendered such evidence and requested the judge to make a note of the point, or if that request be refused, to enter an exception upon the record [*Campbell v. Loader*, 34 LJ Ex 58; *Gibbs v. Pike*, 9 M & W 351]. The same relief is obtained if inadmissible evidence has been received by the judge, provided it was formally objected to [*Williams v. Wilcox*, 8 A & E 314]. In trials by judge alone, if admissible evidence has been rejected the same rule holds as above. If inadmissible evidence has been received (whether with or without objection), it is the duty of the judge to reject it when giving judgment; and if he has not done so, it will be rejected on appeal [*Jacker v. International Cable Co*, 5 TLR 13—Phip 8th Ed p 673]. In the High Court, the law as to new trial is regulated by R S C Or 39 r 6 which says that "a new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence....unless in the opinion of the court of appeal, some substantial wrong or miscarriage has been thereby occasioned....." From the court of appeal there is a further appeal to the House of Lords.

As to *criminal* cases, the powers and practice for new trials were abolished by the Cr Appeal Act, 1907, 7 Edw VII c 23 s 20(*1*). (See now Criminal Appeal Act 1968). At present there is a Court of Appeal (Criminal Division), and the 1968 statute lays down that a person convicted on indictment may appeal to that court—(*a*) on a question of law alone; and (*b*) with the leave of the Court of Cr Appeal, or upon the certificate of the judge who tried on question of fact alone, or on a question of mixed law and fact or on any other sufficient ground (s 1); and (*c*) with the leave of the Court of Appeal against the sentence, unless the sentence is one fixed by law (s 9-11); provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no *substantial miscarriage of justice* has actually occurred (s 2). Appeal also lies to the House of Lords with leave of the Court of Appeal or the House of Lords if the Court of Appeal certifies that a point of law of general public importance is involved (s 33). Under s 20 of the Cr Appeal Act, 1907, points of law may also be reserved under the Crown Cases Act, 1848, 11 and 12 Vic c 78.

In India there is no jury system in the trial of civil cases and both the functions are combined in the judge. The general provisions as to appeal in civil cases will be found in s 107 C P Code. The provisions as to appeals from original decrees are contained in ss 96-99 and in Or 41. Provisions as to appeals from appellate decrees are contained in ss 100-103 and Or 42. As to appeals to the Supreme Court, see ss 109, 112 and Or 45 as also Arts 133 and 136 of the Constitution. S 115 contains the revisional power of the High Court. In civil cases there is no provision for a new trial, but the court has ample power to remand the case (s 107; Or 41 rr 23, 25). There is also a provision for review of judgment (s 114; Or 47) and if an application for review is granted, the court may rehear the case. Under s 99 C P Code, no decree shall be reversed or substantially varied nor shall any case be remanded for error or irregularity not affecting the merits or jurisdiction.

The provisions relating to appeals in criminal cases are to be found in Ch 29 of Cr P Code, 1973. S 374 provides for appeals from convictions, and s 378 provides for appeals in cases of acquittals. S 379 provides for appeals to the Supreme Court against conviction by the High Court in certain cases, namely when the High Court reversing an order of acquittal sentences an accused to death or to imprisonment for life or of a term of 10 years or more. S 386 defines the powers of the appellate court. S 377 specifically provides for an appeal to the High Court by the Govt for enhance-

ment of sentence, and in s 386 the appellate court in an appeal for enhancement of sentence has been given also all the powers which an appellate court can exercise, namely, acquittal, discharge and retrial plus power to enhance or reduce the sentence. Under s 366 death sentence passed by court of session is to be submitted to High Court for confirmation. Under s 374 a provision has been made for appeal to the Supreme Court in the event of rare but possible cases of conviction by the High Court in its extraordinary original criminal jurisdiction. Under its extensive revisional powers under s 401, the High Court may exercise any of the powers of a court of appeal.

Before Independence there was no statutory right of appeal to the Privy Council in criminal cases, but it had the prerogative to entertain an appeal in cases of serious miscarriage of justice or gross denial of principles of natural justice. Now Art 134 of the Constitution gives a right of appeal to the Supreme Court in certain cases. S 379 has also given statutory right of appeal to the Supreme Court in certain cases. Art 136 confers discretion on the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal.

Improper Admission or Rejection of Evidence is of Itself No Ground for a New Trial.—This section recognises and affirms the principle which has been applied in several cases both before and after the passing of this Act. The rule laid down in this section is applicable to all judicial proceedings civil or criminal [*R v. Abdul Rahim*, A 1946 PC 82: 73 IA 77], and is based upon reasonable principle and commonsense. Where admissible evidence has been improperly rejected or in-admissible evidence has been admitted by the judge, that is, where evidence which should have been admitted, has been improperly rejected by the judge, or where evidence which according to the rules contained in this Act should have been rejected, has been improperly admitted, such improper reception or rejection of evidence shall not *of itself* be a ground for a new trial or reversal of any decision in any case, unless in the opinion of the court before which such objection is raised, *substantial wrong or miscarriage of justice* has been thereby occasioned; or, in other words, if the court before which such objection is raised considers that after leaving aside the evidence that has been improperly admitted, there was enough of evidence in the record to justify the decision of the lower court, or that if the rejected evidence were admitted the decision ought not to have been affected thereby, no court of appeal should set it aside. Generally speaking, the court of appeal upon a review of all the facts and circumstances and consideration of improper admission or rejection of evidence will not interfere unless it is of opinion that the decision is unreasonable or cannot be supported by the evidence or is legally wrong or there has been a miscarriage of justice.

It has been observed that it is difficult to apply s 167 to the improper rejection of evidence of a witness as the appellate court can have no ideas as to what that witness is going to say. In the case of a document however, it is possible for the appellate court to judge what effect, if any, the admission or rejection of that document would have on the result of the case; but one cannot often estimate the effect of the admission of oral evidence [*Crown Pros v. Ramanujulu*, A 1944 M 169: (1943) 2 MLJ 672]. As regards rejected evidence the question is not so much whether the evidence rejected would not have been accepted against the other testimony on record as whether that evidence "ought not to have varied the decision" [*Narayan v. S*, A 1959 SC 484: 1959 Supp 1 SCR 724].

Where inadmissible evidence has been received in the court of first instance without objection, the opposite party cannot afterwards raise any objection, unless it has

been admitted in direct contravention of an imperative provision of law [*Shib Ch v. Gour*, A 1922 C 160; *Miller v. Madho*, 23 IA 106: 23 C 335, 338; and cases under s 5 *ante*]. As regards civil cases, the section must be read with s 99 of the C P Code 1908, which provides that, no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action, or of any error, defect or irregularity in any proceedings in the suit not *affecting merits of the case*, or the jurisdiction of the court. For criminal cases similar provision is made by s 465 of the Code of Criminal Procedure, which enacts that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission, or irregularity in the proceedings before or during trial or in any sanction for the prosecution, unless a *failure of justice* has in fact been occasioned. See also s 385 Cr P Code.

S 167 applies to trials by jury. If in the case of a trial by jurors it appears that evidence has been improperly admitted or rejected, the appellate court should weigh the evidence which still remains on the record and determine whether the residue of the evidence is sufficient to support the finding and the sentence; and if it is found that the remaining evidence is sufficient to justify the decision and that error has not occasioned any substantial wrong or miscarriage of justice, then the appeal should be dismissed. (See *post*: "*Applicability of s 167 to Trials by Jury*"). On the contrary, if it appears that the improper reception or rejection of evidence has occasioned substantial wrong or miscarriage of justice, an acquittal or new trial should be ordered.

Same: Referring to the section in the Act regarding relevancy (see Ch II), Sir James Stephen says: "Important as these sections are for the purposes of study, and in order to make the whole body of law to which they belong easily intelligible to students and practitioners not trained in the English courts, they are not likely to give rise to litigation or to nice distinction. The reason is that s 167 of the Evidence Act which was formerly s 57 of Act 2 of 1855 renders it practically a matter of little importance whether evidence of a particular fact is admitted or not. The extreme intricacy and minuteness of the law of England on this subject is principally due to the fact that the improper admission or rejection of a single question and answer would give a right to a new trial in a civil case, and would upon a criminal trial be sufficient ground for the quashing of a conviction before the Court for Crown Cases reserved" (Steph Intro p 73). The right to new trial in criminal cases has now been abolished by 7 Edw VII c 23 s (1) v. *ante*. He further, says: "The improper admission or rejection of evidence in India has no effect at all unless the court thinks that the evidence improperly dealt with either turned or ought to have turned the scale. A judge, moreover, if he doubts as to the relevancy of a fact suggested, can, if he thinks it will lead to anything relevant, ask about it himself under s 165".

Commenting on the words "s 167 renders it practically a matter of little importance whether evidence of a particular fact is admitted or not," Markby observes: "I think these words have been written under some misconception. As the law stands, an error in the reception or rejection of evidence may have the gravest consequences" (Markby p 177). There can be no doubt that the improper admission or rejection of evidence may be productive of very great evil. It may hamper a litigant in more ways than one in the conduct of his case and may also bring in other irrelevant evidence with it or shut out other relevant evidence. But apparently Sir James Stephen did not use the expression in its loose or broad sense. Read with the context, it appears that he made a comparison with the then law in England, under which the improper admission or rejection of single piece of evidence, gave a right of new trial. What was intended to be conveyed was that as the mere fact of reception of inadmissible

evidence or rejection of admissible evidence did not give in India a right to a new trial or a reversal of the decision (as it did in England), if the conclusion arrived at was justified by the other admissible evidence on the record, the admission or rejection of evidence of a particular fact not affecting the decision on merits would be practically a matter of little importance in view of s 167.

Markby has the following to say:—"This section is sometimes rather a difficult one to apply. Where there is an appeal upon fact as well as law, any error in accepting or rejecting evidence can easily be set at right; the evidence improperly received can be set aside; the evidence improperly rejected can be admitted in the court of appeals. But there are appeals which are strictly confined to questions of law (special appeals). Now the wrongful reception or rejection of evidence is an error of law, and as such may be a ground of appeal. But what is to be done if the court of appeal thinks that an error has been committed. The section says that the court must inquire whether the decision would have been the same if the error had not been committed. But the inquiry into the fact is sometimes very troublesome and expensive, almost as much so as if there had been an appeal on facts as well as on law.

"In an appeal upon the ground of the wrongful reception or rejection of evidence some thing may turn on the attitude taken by the parties in the court below. If the question of admissibility has been clearly raised and decided, of course the decision may be complained of as illegal. But very often the evidence tendered is allowed to pass unchallenged, or the objection if made is withdrawn; and sometimes even both parties desire the evidence to be given, quite irrespective of whether it is legally admissible or not. How ought this to affect (if at all) the decision of the court of appeal?

"Something also will depend on whether the case is a civil or criminal one: if the case is a criminal one, then by [2]s 298 it is the duty of the judge in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties. But no such duty is imposed upon the judge in civil cases. (See however, *ante* s 5: "*Court shall exclude inadmissible evidence even though no objection is taken*".

"On the whole, I think the law is as follows:—

"(*1*) If the parties have both expressed their desire that the evidence should be given, neither party can afterwards object on appeal that it is inadmissible, whether the case be civil or criminal.

"(2) The party tendering evidence cannot object on appeal that it is inadmissible, whether the case be civil or criminal.

"(*3*) If the party objects to the evidence and then withdraws the objection, he cannot afterwards object on appeal that it was inadmissible, whether the case be civil or criminal.

"(*4*) If the evidence is admitted wihout any notice being taken of its illegality, the objection may be taken on appeal in a criminal case, but not in a civil one" [Markby pp 116-17].

[*Ref Tay ss 1881-82; Steph Art 143; Best s 82; Phip 8th Ed pp 673-76; Powell 9th Ed pp 703-04; Ros N P p 279*].

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2. S 298 has been omitted in Cr P Code, 1973.

"If It Shall Appear to the Court Before Which Such Objection is Raised."—The expression "the court before which such objection is 'raised'" includes the reviewing of appellate court [*R v. Pitambar*, 2 B 61]. The court mentioned in s 167, which is to decide upon the sufficiency of the evidence to support the conviction in the court of review and not court below [*R v. Hurribole*, 1 C 207 : 25 WR Cr 36].

S 167 applies only to improper admission or rejection of evidence, and, technically, the opinion of an assessor, which the judge is to take into consideration in arriving at his conclusion, cannot be regarded as evidence, any more than the confession of a co-accused affecting himself and others, jointly tried with him for the same offence [*R v. Tirumal*, 24 M 523, 541 : 2 Weir 340]. The words "*reversal of any decision*" indicate the applicability of the section to appeals inasmuch as courts of appeal have the power of reversing the decree from which the appeal is preferred (see Or 41 r 32).

The Section Applies to Both Civil and Criminal Cases.—S 167 applies to civil as well as to criminal cases [*R v. Hurribole, sup*; *R v. Navroji*, 9 BHCR 358, 375; *R v. Ramaswami*, 6 BHCR Cr 47; *R v. Pitambar*, 2 B 61, 65; *R v. Nand Ram*, 9 A 609; *R v. Ram Ch*, 19 B 749; *Savlimiya v. R*, A 1944 B 338; *R v. Alloomiya*, 28 B 129; *Subramanya v. R*, 28 IA 257 : 25 M 61 : 5 CWN 866 : 11 MLJ 233 : 3 Bom LR 540; *R v. Rama Sattu*, 4 Bom LR 434]. The section applies to all judicial proceedings in or before any court including jury trials [*R v. Abdul Rahim*, A 1964 PC 82: see *post*.

Improper Admission or Rejection of Evidence in Civil Cases.—In *Mohar Singh v. Ghuriba*, 8 BLR 495 : 15 WR 8 PC the Judicial Committee observed:—"It seems to their Lordships that giving full weight to all these objections, there is still sufficient and more than sufficient proof in the unsuspected evidence in the cause to support the decrees against which the appeal is brought.....But it is the duty of their Lordships who are judges of the fact in such a case as this, to consider whether, throwing aside such evidence, there still remains sufficient evidence to support the decrees. Their Lordships nevertheless, must express their regret that the court of first instance in the case before them should have been as lax as it has been in the admission of evidence. The improper reception of evidence is always to be deprecated, if only from its tendency to provoke appeal." [This case was relied on in *Kurba Sankara v. Killi Marappa*, 82 IC 283 : A 1925 M 245. See also *Goshain Tota v. Ruckminee*, 13 MIA 77 : 12 WR 32; *Wooma Kant v. Ganga*, 20 WR 384; *Md Bux v. Abdul Karim*, 20 WR 458; *Jagadindra v. Bhaba Tarini*, 5 BLR Ap 54 : 14 WR 19; *Bhansidhar v. Govt of Bengal*, 9 BLR 341 : 16 WR 11 PC; *Bommarauze v. Rangasamy*, 6 MIA 232; *Maharaja Koonwar v. Nund Lal*, 8 MIA 199 : 1 WR 51].

In the case *of first appeals, the appellate* court can under Or 41 r 27 C P Code, 1908 receive evidence improperly rejected or reject evidence wrongly admitted by the original court. The words "any other substantial cause" in the rule, give a very wide discretion to the appellate court in the matter of admission of additional evidence. It may also go to questions of fact. S 167 applies to second appeals, and not to first appeals where the facts are a matter of decision of the appellate court [*Bhabendra v. Ajoodhia*, A 1934 P 605]. In *second appeals* before the High Court, Or 42 declares that the rules of Or 41, shall apply, so far as may be, to appeals from appellate decrees. In *second appeals*, the High Court has also power to interfere, where a subordinate court in the exercise of its discretion refused to receive evidence which ought to have been admitted [see 12 CWN 312; 20 C 740; 23 C 179; 8 B 377; 8 M 373 and other cases noted below]. Except in the case mentioned in s 103, the High Court is by s 100 precluded, in second appeal from entering into questions of fact. In cases involving improper admission of evidence, the High Court would be able to

decide whether the remaining evidence is sufficient to warrant a certain finding instead of sending them in remand. Such a case is that of *Brajendra v. Mohim*, 31 CWN 32. There was a remand in this case on account of improper admission of evidence in view of s 167, but the judgment had not been signed. The provisions of the section being discovered afterwards, the appeal was finally disposed of. See also *Damusa v. Abdul*, 46 IA 140 : A 1919 PC 29 : 47 C 107 : 24 CWN 81 : 37 MLJ 36; *Chidambara v. Veerama*, 49 IA 286 : A 1922 PC 292 : 45 M 586 : 27 CWN 245.

When a second appeal is before the High Court, now only on a substantial question of law being involved by reason of s 100 C P Code as amended by 1976 Am Act, s 103 C P Code gives jurisdiction to the High Court to determine any issue of fact which obviously includes a mixed question of law and fact for final disposal of the appeal provided that there is sufficient evidence on the record for the determination of such issue when such an issue has not determined or has been wrongly determined by reason of a decision on such substantial question of law.

Where the findings of the lower appellate court are mainly based on what is irrelevant, and though that court has also referred to what is evidence, it is impossible to say that its conclusions proceeded upon proper consideration of that evidence alone, and the case must be remanded for retrial [*Palakdhari v. Manners*, 23 C 179]. So when judgment of the lower appellate court is vitiated by the admission of inadmissible evidence, it must be set aside and the case sent back in order that the appeal may be disposed of after excluding the improper evidence from consideration [*Ramani v. Mahantha*, 31 C 380. See also *Jagadis v. Harihar*, 40 CLJ 39; *Hemaraj v. Nihal*, 90 IC 678]. Under s 167 the improper admission of evidence is not ground of itself for reversal, if apart from it there is other evidence to support the decision. Ordinarily in such cases the case should be remanded to the trial court to exclude the evidence and give a fresh finding with reference to the rest of the evidence [*Kurba Sankara v. Killi Marappa*, 82 IC 283 : A 1925 M 245]. Where it was found in second appeal that two documents which were an important piece of evidence for the defence were inadmissible and the Court was asked to hold under s 167 that residue of the evidence was sufficient to support the findings of the lower court—*Held* that when such an important piece of evidence is taken away one could not accept the findings of the lower court on the rest of the evidence, findings which might have been coloured by inference from these two documents [*Alapati v. Ailoori*, A 1939 M 40 : 1938, 2 MLJ 883].

In cases where it is clear from the judgment that the court below has arrived at its findings independently of the improperly admitted evidence, there need be no remand [*Woomesh Ch v. Chundee*, 7 C 293 (24 WR 392 **dissented** from); *Jagadis v. Harihar*, 40 CLJ 39; *Kanta v. Basudeb*, 39 CWN 311]. Acceptance of inadmissible evidence is no ground for a new trial if there is other evidence to support the finding. And under s 103 C P Code, the High Court can in second appeal see whether there is such other evidence justifying the decision [*Gajadhar v. Nandlal*, A 1934 P 55; see *Hari Ahir v. Sri Sanghat*, A 1934 P 617]. It cannot be generally stated that improper rejection of evidence entitles an appellate court to reverse the decree and remand the suit for trial. Rejection of evidence in order to produce such a consequence must be found to have really and in fact restricted the trial of the suit [*Devorampoodi v. Goparaju*, A 1928 M 991 : 112 IC 1]. Admission of an inadmissible document for a collateral purpose cannot be said to vitiate the judgment so as to justify reversal or interference in appeal [*Khuda Baksh v. Lahori*, A 1935 L 560].

Where there is no error or defect in the procedure, the finding of the appellate court upon a question of fact is final, if that court had before it evidence proper for its

consideration in support of the finding. [*Durga Chowdhurani v. Jewahir*, 17 IA 122 : 18 C 23 (*Nivath v. Bhikki*, 7 A 649 FB; *Fattehma v. Md Ausar*, 9 C 309 overruled; see also *Ram Gopal v. Shamskhaton*, 19 IA 228 : 20 C 93].

Finding of fact on no evidence is a question of law [*Harendra v. Haridasi*, A 1914 PC 67 : 41 IA 110 : 18 CWN 817 : 41 C 972; see *Paul v. Robson*, 41 IA 180 : A 1914 PC 45 : 18 CWN 933 : 42 C 46]. A finding of fact arrived at on the ground that there is no evidence to the contrary can be challenged in second appeal if there is as a matter of fact evidence [*Rajeswari v. Pulin Behari*, 25 CWN 881 : 62 IC 647], or a supposed finding of fact when the finding is arrived at upon an erroneous supposition as to matters which are not on the record [*Abdul Samad v. Gunindra*, 82 IC 974].

The Privy Council (or the Supreme Court) will not interfere with concurrent findings on issues of fact [*Abdul Hafiz v. Abdul Halim*, A 1920 PC 87 : 24 CWN 494 : 59 IC 1; *Secy of S v. Raja of Vizianagram*, 49 IA 67 : A 1922 PC 105 : 45 M 207 : 26 CWN 348; *Bhugwan v. Ramkrishna*, A 1922 PC 184 : 26 CWN 722 : 74 IC 561 : (see *ante* s 5)]. Concurrent findings of fact will not be disturbed on the ground that inadmissible evidence was received, when the findings cannot on any reasonable view be regarded as based or dependent upon such evidence [*Keolapati v. Amar*, A 1939 PC 249 : 44 CWN 66].

When the lower appellate court left out of account an important portion of the evidence relied upon by the plaintiffs—*Held* that this was an error of law and ground of second appeal [*Hassan Kuli v. Nakchedi*, 33 C 200]. An erroneous view of evidence involves an error of law [*Iswar Ch v. Satish Ch*, 30 C 207 : 7 CWN 126]. The fact that the lower appellate court has misdirected itself as to the effect of evidence which has been admitted in a suit is an error of law affording a good ground for second appeal [*Ram Pd v. Raja Koer*, 5 CLR 94]. Where the lower appellate court's judgment was not based on the whole evidence on the record (it having left some important evidence out of consideration), the judgment was set aside in appeal and the case remanded for re-trial [*Shundhabeen v. Shurut Ch*, 23 WR 160; *Abdul Rahman v. Sofy Mikhayesh*, 24 WR 293; *Mohun v. Jughutty*, 24 WR 297]. The improper rejection of evidence affecting the decision of the case on the merits, is an error of law which may be set aside in special appeal [*Hurra Ch v. Govind Ch*, 17 WR 255]. Where the lower court presumably omitted to consider important portions of the evidence, the findings arrived at by it cannot be accepted [*Appakalga v. Mallu*, 16 B 477]. A complete disregard of evidence which, although not conclusive and an estoppel, is of such a nature that a judgment in opposition to it cannot be allowed to stand, and amounts to an error in law [*Heera Lal v. Kalee Das*, 23 WR 65. See also *Anunda Ch v. Ratnessur*, 25 WR 50]. It is a question of law for the court to decide on second appeal whether there is evidence before the court on which a court properly arrived at any given conclusion of fact [*Bidhumukhi v. Kejaytullah*, 12 C 93].

It is the duty of the court, when dealing with second appeals and in considering the conclusions at which the lower courts arrived, to consider whether or not these conclusions have been arrived at in due compliance with the law of the admissibility of evidence and burden of proof [*Wali Ahmed v. Ajudhia*, 13 A 537]. Where an appellate court ignores the great body of the evidence on the record and places reliance on what can be shown, either to be no evidence at all, or which points almost exclusively the other way, the High Court would be justified in considering such proceedings, as errors of law [*Roop Narainee v. Ressal Tewaree*, 24 WR 119]. A judgment which shows on the face of it want of due consideration of evidence and the introduction of foreign matters into the case, may be brought up by the High Court in special appeal [*Soorjkant v. Khoode*, 22 WR 9]. The High Court in second appeal can set aside the finding when

the lower appellate court wrongly excluded the settlement proceedings from the consideration and disregarded the evidence of the road-cess return filed by the tenants, and thereby committed errors of law [*Mohim Ch v. Kali Tara*, 11 CWN 1028].

It was held in a case that where the lower court has based its decision partly on irrelevant evidence, the High Court will not in second appeal decide whether the other evidence in the case is sufficient to support the findings arrived at. S 167 is not a bar to such a case being remanded [*Sumitra v. Ram Koer*, 5 PLJ 410 : 57 IC 561]. But since then the powers of the High Court in determining issues of fact in second appeal have been enlarged (see s 103 C P Code and *ante*: "*Improper admission or rejection of evidence in civil cases*") and therefore when a decision is based partly on inadmissible evidence, it is now open to the High Court to come to the conclusion that there was other evidence on the record to justify the finding [see *Soney Lal v. Darabdeo*, 14 P 461 FB : A 1935 P 167 : 16 PLT 199]. When a finding based partly on evidence the admissibility of which is questioned, may in the opinion of the court before which the objection is taken be supported on other evidence, such finding may be upheld under s 167 Evidence Act [*Bhagwan v. Mahesh*, A 1935 PC 199 : 69 MLJ 868 : 40 CWN 360]. The mere fact that inadmissible evidence was admitted does not vitiate the judgment [*Ambar Ali v. Lutfe Ali*, 45 C 159 : 21 CWN 996]. The exclusion of evidence in the lower court is not sufficient ground for reversing a decree of that court, unless the appellate court comes to the conclusion that the evidence refused, if it had been received, would have varied the decision [*De Souza v. Pestanji*, 8 B 408]. Where a court of fact acts partly on irrelevant evidence and it is impossible to say to what extent its mind was affected by such material, the case should be remanded [*Kalappa v. Bhima*, A 1961 My 160; *Pachakhan v. H D Gopalakrishna*, A 1975 Knt 179]. If document is improperly admitted, appellate court will not interfere unless the decision is wrong on merits [*Peddibotla v. Bezwada*, 1913 MWN 864]. A judgment on evidence not on record will be set aside in appeal [*Monilal v. Umacharan*, 19 CLJ 54].

In order that an alleged wrongful admission of evidence may be a ground for a new trial it must have caused substantial wrong or miscarriage of justice. Where certain evidence was admitted conditionally subject to proof of other matters, there was a sufficient direction that unless those conditions were fulfilled it was not evidence in the case, and no substantial wrong can be said to have occurred [*Stewart v. Hancock*, A 1940 PC 128 : 189 IC 321].

Additional Evidence in Appellate Court.—The appellate court may admit evidence improperly rejected by the lower court or it may allow additional evidence to be given when it is of opinion that it is required for a proper decision of the case (see s 107 : Or 41 r 27 C P Code). The legitimate occasion for admission of additional evidence is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, and not where a discovery is made, outside the court, of fresh evidence and the application is made to import it [*Kessowji v. G I P R.* 34 IA 115 : 31 B 381; *Garden Reach S Co v. Secy of S*, 42 C 675; *Bank of Bengal v. Lucas*, 54 C 185 : 28 CWN 497; *Krishnamachariar v. Narasinha*, 31 M 114; *Richpal v. Bansidhar*, 68 IC 370]. The rule is clearly not intended to allow a litigant who has been unsuccessful in the lower court, to patch up the weak parts of his case and fill up omissions in the court of appeal [*Parsotim v. Lalmohan*, 35 CWN 786 : A 1931 PC 143 : 58 IA 254]. See further, Sarkar's C P Code, 6th Ed, notes under Or 41, r 27.

In criminal cases additional evidence may be allowed by the appellate court under s 391 Cr P Code. It should be allowed only in exceptional cases and should never be allowed to fill up gaps left by prosecution [*Ramananda v. S*, 54 CWN 572]. See further, Sarkar's Cr P Code, 4th Ed. notes under s 391.

Effect of Improper Admission or Rejection of Evidence Without Objection.—When copies of documents are admitted in a court of first instance without objection, no objection to their admissibility can afterwards be taken in a court of appeal [*Akbar Ali v. Bhyea Lal*, 6 C 666 : 7 CLR 497; *Mahabir Das v. Lalla Rai*, 1 WR 12; *Gour Saran v. Kanhya*, 2 WR 237; *Kashi Nath v. Mohesh Ch*, 25 WR 168; *Chimnaji v. Dinkar*, 11 B 320; *Kishori Lal v. Rakhal Das*, 31 C 155 (26 C 53 : 2 CWN 649 **dissented** from); *Rhidoy v. Prosunna*, 28 C 142 (19 A 76 PC **distinguished**); *Shahazadi Begum v. Secy of S*, 34 C 1059 : 34 IA 194 : 6 CLJ 678 : 9 Bom LR 1192; and *Ram Pd v. Sham Narain*, 6 CLJ 22]. But a document which is *per se* inadmissible can be objected to at any time [*Dolgobind v. Maqbal*, 61 CLJ 588 and cases *ante*, pp 44-45].

An erroneous omission to object to the admissibility of evidence cannot render relevant and available as a ground of judgment such evidence which is irrelevant and inadmissible [*Miller v. Madho Das*, 23 IA 106 : 19 A 76; *Jagadis v. Harihar*, 40 CLJ 39; *Luchiram v. Radha Charan*, 34 CLJ 107].

[3]S 298 Cr P Code says that it is the duty of the judge to prevent production of inadmissible evidence whether objected to or not. From the general tenor of the language of the Evidence Act it would appear that it was the intention of the legislature that a civil court should not, irrespective of objections, allow inadmissible evidence to come in. It has been held that judgment based upon evidence not relevant under the Act must be set aside even though the parties consented to its being treated as the sole evidence [*Ponnuswami v. Singaram*, 41 M 731 : 34 MLJ 526 (38 M 160 **not folld**); *Sundar v. Sham*, 81 IC 235. See however *Jainab v. Haider*, 43 M 609 and other cases at p 404]. If anything inadmissible is said in the hearing of the jury, it is the duty of the judge to warn them that it should not be taken into consideration [*Kapur v. R*, 50 IC 481 : 98 PLR 1918]. If the parties accept the evidence recorded by the commissioner as evidence duly taken in the cause, it can be treated as evidence [*Sambhu v. Satish*, 25 CWN 369. See other cases *ante*, s. 5].

Reception of Unstamped or Improperly Stamped Document—Appellate Court's Power to Interfere.—The question of the admissibility of insufficiently stamped document once admitted as evidence by a court can form no valid ground of appeal. An appellate court has no right to refuse to admit on technical ground a document which has been received and read in the court below without objection [*Mahabir v. Lalla Ray*, 1 WR 12; *Gour Surn v. Kanhya*, 2 WR 237; *Crawley v. Maling*, 1 Agra 63; *Hur Ch. v. Woomasundaree*, 23 WR 170; *Rai Lachmiput v. Moshuruff Ali*, 25 WR 80; *Kasheenath v. Mohesh Ch.*, 25 WR 168; *Nem Roy v. Lal Mun.*, 25 WR 376; *Akbar Ali v. Bhyea Lal*, 6 C 666 : 7 CLR 497; *Kastur v. Appa*, 5 B 621]. The decision of the court of first instance as to the admissibility of a document subject to the payment of stamp duty is final and cannot be questioned in appeal and review by the appellate court [*Lakshmi Narayana v. Suppara*, 2 MHC 321; *Babulal v. Mohammad Sharif*, A 1996 MP 147; *Gurupadapa v. Narovithal*, 13 B 493; *Devachand v. Hirachand*, 13 B 449; *Enayetoolah v. Meanjan*, 16 WR 6; *Shiddapa v. Irava*, 18 B 737. Even when the court holds a document to be admissible in evidence subject to the payment of penalty, the order passed by the court would be the final determination of the question, even where the condition is not satisfied [*Hatimbhai v. Kanhaiyalal*, 1975 MP LJ 45 Note No. 76]. But see *Reference under Stamp Act*, (1879) 8 M 56]. Section 167 is concerned with improper admission or rejection of evidence. But statement under section 313 Cr PC is not strictly speaking evidence; it

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3. Due to abolition of jury trial s 298 has been omitted in Cr P Code, 1973.

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