CHAPTER[1] IX

OF WITNESSES

S. 118. Who may testify.—All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

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

SYNOPSIS

COMMENTARY

Principle and Scope.—In ancient times, intellectual weakness was not the only ground on which persons were held incompetent to give evidence. It may now appear strange that formerly, the rule existed in England at common law that in a civil action, not only the plaintiff or defendant but every person having the slightest interest in the result of the action was incompetent to testify. Husband or wife of a

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party was also incompetent to give evidence on behalf of that party. The evidence of some 'infamous' persons, *eg*, persons convicted of treason, felony, &c, and persons without any religious belief were also excluded. These and other disabilities were gradually removed by the Evidence Act, 1843 (Lord Denman's Act), and Evidence Act, 1851 (Lord Brougham's Act). In criminal cases, of course, the Criminal Evidence Act, 1898 stands out in this regard.

Under s 118, all persons are competent to testify, unless the court considers that by reason of tender years, extreme old age, disease, or infirmity, they are incapable of understanding the questions put to them and of giving rational answers. All grounds of incompetency have been swept away by this section, under which competency of witnesses is the rule and their incompetency is the exception. In civil or criminal proceedings the husband or wife of a party is also a competent witness (s 120). The effect of s 118 is to make the husband witness for all purposes, *eg*, to prove non-access [*Howe v. Howe*, 38 M 466 : 25 MLJ 594—CONTRA: *Sweeney v. S*, 62 C 1080. As to this see *ante*: "*Evidence of Parents to Prove Access or Non-access During Marriage &c*"]. Act 2 of 1855 s 14, limited incompetency to children and lunatics incapable of giving evidence. This section has enlarged the discretion of the Judge as to cases of incompetency; and does not recognise any, save that of an intellectual character.

The only incompetency that the present Act recognises is incompetency from immature or defective intellect. This may arise from (*i*) infancy, (*ii*) idiocy, deafness, dumbness, (*iii*) lunacy, (*iv*) illness &c. As to infancy, it is not so much the age as the capacity to understand which is the determining factor. No precise age limit can be given, as persons of the same age differ in mental growth and their ability to understand the question and give rational answers. The sole test is whether the witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking the truth. An idiot is a person who does not possess understanding from his birth. Such incapacity is permanent. Deaf or dumb persons are incompetent if they are unable to understand the questions put to them or to communicate their ideas by signs or writings (s 119). A lunatic is incompetent to testify on account of loss of reason, but his competency may be restored during a lucid interval. A monomaniac may depose as to other matters save the one. So a drunkard may become a competent witness after the disappearance of the effects of liquor [*Banks v. Goodfellow*, LR 5 QB 549; *R v. Hill*, 2 Den 254; *Spittle v. Walton*, LR 11 Eq 420]. Where a person is suffering from temporary incapacity, the judge may in a proper case postpone the hearing till its removal [*R v. Wade*, 1 Moo CC 86]. "The general rule is that the *capacity* of the person offered as a witness is *presumed*, *ie* to exclude a witness on the ground of mental or moral incapacity the existence of the incapacity must be made to appear" [Wig s 597].

Where the witnesses are rustics, their behavioural pattern and perceptive habits have to be judged. The too sophisticated approaches cannot be applied to them. Variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony, provided there is impress of truth and conformity to probability in the substantial fabric of testimony [*Shivaji v. S*, A 1973 SC 2622]. Even urban folk make mistakes about time when no particular reason to observe and remember existed [*Shivaji v. S, sup*). A lad of 13 years who has attained the measure of mature understanding, cannot be treated as a child witness. [*Sanjay Ramchandra Tarare v. State of Maharashtra*, 1996 CrLJ 713 (Bom)]. See also *Tehal Singh v. State of Punjab*, A 1979 SC 1317]. A boy of about 14 years of age can give a proper account of murder of his brother and if he has an occasion to witness the same and simply

because the witness was a boy of 14 years it will not be proper to assume that he is likely to be tutored. [*Prakash v. State of M.P.*, A 1993 SC 65, 70]. When the witness is not only a teenager but also eye-witness, her evidence has to be scrutinised with care and caution [*Shivji v. S*, A 1973 SC 55].

Competency and Compellability of witness.—*Competency* to give evidence should be distinguished from *compellability* to give evidence. Generally all witnesses competent to depose are compellable to give evidence but there are exceptions. Under s 5 of the Bankers' Books Ev Act (18 of 1891) no officer of the bank shall in any proceeding to which the bank is not a party be compellable to produce any banker's book or to appear as a witness, unless by order of the court for a special cause. In divorce and other matrimonial proceedings the parties are competent witnesses but not compellable (see Divorce Act 4 of 1869 sec 51, 52). Distinction should also be made between compellability to be sworn or affirmed and compellability when sworn to answer specific-questions. Thus, a witness though compellable to give evidence, may be privileged or protected from answering certain question (v ss 122, 124, 125, 129). Even if a witness be willing to depose about certain things, the court will not allow disclosure in some cases (v ss 123, 126, 127). Ss 118, 119 and 120 deal with competency of person to become witnesses and ss 121 to 132 deal with matters which the law says shall not be the subject of evidence in a court of justice; that is, the law excludes and dispenses with some kinds of evidence on grounds of public policy. In other words ss 121-32 exempt witnesses from the obligation to answer particular questions on the ground of public policy.

Admissibility of evidence is not solely dependent on competency of witnesses. A witness may be competent within s 118, yet his evidence may be inadmissible if he states his opinions or beliefs instead of facts within his knowledge (*ante*) or gives hearsay evidence [*Magan v. R*, A 1946 N 173]. Competency depends upon child's understanding and not upon his age [*Sidek Bin Ludan v. Public Prosecutor*, (1995) 3 Malayan LJ 178 (Johor Bahru HC)].

Under s 4 of the Oaths Act all witnesses are to take oaths or affirmation. The Proviso says that ss 4 and 5 of the Oaths Act shall not apply to a child witness under twelve years of age. Since the insertion of s 342A in the Cr P Code (by Act 26 of 1955) (now s 315) an accused has an option to give evidence for the defence and in such a case he should be given oath. It has been said that when once competency has been determined and examination has began, the court ought not to reverse its former decision [*Rampadarath v. R*, A 1941 P 513], but it is submitted that this rule cannot be adhered to rigidly, for the incompetency (*eg* in the case of an immature child) may come out and become more pronounced after he has been examined for some time. The proper time to object to the competency of a witness is when he is tendered for examination but, this does not mean that objection cannot be raised during argument [*R v. Har Pd*, 45 A 226 : 21 ALJ 42].

[*Ref Tay s 1342 et seq, ss 1375, 1381; Best s 132 et seq, s 183; Powell, 9th Ed p 196 et seq; Phip 11th Ed para 1471; Wig ss 492-631; Hals 3rd Ed Vol 15 paras 749-752*].

Child Witness. [Difference in English and Indian Law].—Under this section a child is competent to testify, if it can understand the question put to it, and give rational answers thereto. If he is under twelve years of age, he need not be sworn (v *ante*). In England, a child, to be a competent witness, must believe in punishment in a future state for lying. (Whitely Stokes Vol II p 831). The court will ascertain by examination whether the infant understands the nature of an oath or the consequences of falsehood [*R v. Brasier*, 1799, 1 Leach 199 : 168 ER 802]. In England a

child who is unable to understand the nature of an oath may however give evidence in certain proceedings, *viz* offence against a child under Cr L Amendment Act (1855, 48 & 49 Vic c 69), Offences under Prevention of Cruelty to Children Act (1904, 4 Edw VII v 15) &c, &c.

The requirement of corroboration of the testimony of a child witness has been abolished in England by S. 34(2) of the Criminal Justice Act, 1988. Hence the testimony of a child can be taken into account without corroboration [*R v. Pryce*, 1991 Crim LR 379 CA]. See also [*Garvock v. HM Advocate*, 1981 SC CR 593]. Conviction for indecent assault on identification by a child of 4 years.

Earlier to this Act, in [*R v. Morgan*, (1978) 3 All ER 13 CA], in a case involving indecent assault on an eleven year old boy, the evidence of the victim was supported by his 12 year old brother and a 16 year old youth, the judge emphasised the need for corroboration but did not interfere in the conviction because there had been no miscarriage of justice.

A 12-year-old boy was convicted of indecently assaulting a four-year-old girl contrary to the Sexual Offences Act 1956 (UK). On his appeal against conviction, it fell to be determined whether the evidence of the girl, who was by then aged five, was admissible. The court refused to view video tapes which had been made of interviews between the girl and the police, and decided that, by virtue of her age alone, the girl was not a witness on whom it could rely and therefore ruled that her evidence was inadmissible. It was held that while assessing whether the girl was capable of giving intelligible testimony, the court ought to have watched any video taped interviews that were available and asked various general questions of the girl to ascertain if she was able to understand questions and to answer them in a coherent and comprehensible manner. The extreme youth of the girl in this case was a matter which properly raised concern with regard to her competence to give evidence, but it did not, of itself, demonstrate that she was not so competent [*DPP v. M*, (1977) 2 All ER 749 (QBD)]. The court considered *R v. Z*, (1990) 2 All ER 971, CA (1990 Abr para 550), and *R v. Hampshire*, (1995) 2 All ER 1019, CA see to the same effect, *G v. DPP*, (1997) 2 All ER 755 (QBD). The court considered *Associated Provincial Picture Houses Ltd v. Wednesday Corpn*, (1947) 2 All ER 680 CA. The court has to have regard to the welfare of the child or young person and also, in a proper case, to take steps for removing him from undesirable surroundings, particularly in a criminal proceeding between the child's parents. No summons would be issued if the effect on the child was likely to be oppressive. Otherwise, a balancing act would be carried out to determine whether harm to the accused was overweighed by the interests of the child [*R v. Highbury Corner Magistrate's Court*, (1996) 161 JP 138 (QBD)].

Unsworn testimony of child.—The accused-appellant was convicted of incest on the evidence of his six year old daughter who was allowed to give her evidence unsworn by means of a video-link. The judge after questioning over the video-link, ruled that although the child was too young to take the oath, but that she was sufficiently intelligent and understood the duty of speaking the truth, allowed the evidence. The court said that the question in each case is whether having regard to the nature and circumstances of the case and the nature of the evidence that the child was called to give, the child possessed sufficient competence to justify the reception of her evidence and understood the duty of speaking the truth. Furthermore, the younger the child the more the care which has to be taken before admitting the evidence of the child [*R v. Z*, (1990) 2 All ER 971 CA : (1990) 3 WLR 940]. Oral evidence of a child aged 14 years must be received on oath or following affirmation

[*R. v. Sharman*, The Times December 18, 1997]. To be admissible the evidence of the child witness should be "intelligible testimony" *i.e.* capable of being understood [*Gibson v. DPP*, December 12, 1996 (QBD)].

Thus it must require exceptional characteristics to justify the reception of the evidence of a child of extremely tender years. This caution is to be found in the decision of the court of Appeal in [*R v. Wright; R v. Ormerod*, (1990) 90 Cr App R 91 CA]. A five-year old girl, left playing with a ball outside the home, disappeared and was found inside a house occupied by the accused. When the mother knocked at the door, the girl ran out with the ball and a 50 p coin. She was in distressed state and put to bed. Twenty four hours later she told her mother that the accused had behaved indecently towards her and a doctor found some redness and swelling inside labia of the vagina. The conviction for indecent assault was quashed because there was no evidence of it. As for the doctor's evidence which could have corroborated the version of the child, required warning to the jury and that was not done by the judge. In another case of the same kind the statements of a four-year old victim girl, whose private parts in a state of injury suggested sexual assault and there were also incriminating circumstances, was held to be good evidence [*Nagam Gangadhar v. State of AP*, 1998 Cri LJ 2200 (AP)].

Corroboration of a child's unsworn evidence need not be in the form of sworn evidence from an independent witness. The fact that the child has special knowledge which she could not possess unless her evidence was truthful may amount to corroboration [*R v. Mc Jnnes*, The Guardian, Oct 10, 1989 CA].

Value of Evidence of Child Witness.—In *Mohamed Sunal v. King*, A 1946 PC 3 it was laid down.

> "In England where provision has been made for the reception of unsworned evidence, from a child it has always been provided that the evidence must be corroborated in some material particulars implicating the accused. But in Indian Acts there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence court can Act upon it. It is sound rule in practice not to act on the uncorroborated evidence of a child, whether sworned or unsworned but, this is a rule of prudence and not of law."

The testimony of a child witness should only be accepted after the greatest caution and circumspection. The rationale for this is that it is common experience that a child witness is most susceptible to tutoring. Both an account of fear and inducement, he can be made to depose about things which he has not seen and once having been tutored, he goes an repeating in a parrot like manner what he has been tutored to state. Such witnesses are most dangerous witnesses.

Dr. Kenny Downing (Professor of Laws of England, Cambridge University) in his book Outlines of Criminal Law at page 386 Stated. "Children are most untrustworthy class of witnesses, for when of a tender age as our common experience teaches us, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others and greatly influenced by fear of punishment, by hope of reward and desire of notoriety." [*Narayan Kami Datavale v. State of Maharashtra*, 1997 Cri LJ 1788, 1793 Bom]. The court should receive a child's evidence unless it appears that the child was incapable of giving intelligible testimony [*DPP V. M. Gibson v. DPP*, (1977) 2 All ER 749 (QBD)]. Child witnesses are generally prone to tutoring and when something is repeated to them by their elders, they begin to imagining them and really feel them to be the truth. Their innocent brains are like blank papers and can retain anything written over them by repeated communication.

But that does not mean that they cannot remember anything. The memories of children are also better and what they see specially when under strain, they seldom forget for a long time unless it is overwritten by some effort. It is not that what they state is always result of imagination but is that the same may sometimes be on effect of imagination created by others. And for that one needs another to cast that imagination and then lastly the duty of court would be to work out portions improved and deal with them according to law. [*Radhey Shyam v. State of U.P.*, 1993 CrLJ 3709 (All)].

Simply because the witness was a boy of 14 years it will not be proper to assume that he is likely to be tutored. [*Prakash v. State of M.P.*, 1992 CrLJ 3703, 3708 SC]. Evidence of children is notoriously dangerous unless immediately available and unless received before any possibility of coaching is eliminated [*Darpati v. R*, A 1938 P 153, *Jalwanti v. S*, A 1953 P 246; *S v. Dukhi Dei*, A 1963 Or 144; see *Abbas v. R*, A 1933 L 667; *Shr Bahadur Sonar v. State of Assam*, 1981 Cri LJ NOC 143 (Gauh); *Naran Pradhan v. State of Orissa*, 1983 Cri LJ NOC 31 (Ori)(DB) : (1982) 54 Cut LT 527; *Sone Lal v. State*, 1985 Cri LJ NOC 37 : (1984) 3 Crimes 149 (All) (DB)]. When the trial judge had put preliminary questions to each of the witnesses who were children of the deceased and satisfying that they were answering questions intelligently without any fear whatsoever, proceeded to record the evidence, in the chief examination, each of the witnesses gave all the details of the occurrence and there had been a searching cross-examination and the witnesses withstood the same, there was no reason to doubt their evidence [*Baby Kandayanathil v. State of Kerala*, 1993 Cri LJ 2605, 2606 (SC)]. When a child witness mentions about the attack on his paternal uncle by mentioning his name instead of by mentioning him as paternal uncle, it is clear that is a tutored version [*Nakul Chandra Kumbhakar v. State*, 1981 Cri LJ (NOC) 26 (Cal)]. The child witness stated that she had been told by her elder sister to state in court that on the fateful night she was sleeping with her father and the accused came and killed her father with knife. There is some element of tutoring in this evidence [*Vijay Kumar v. State*, 1981 Cri LJ NOC 138 (Del)]. See notes to ss 137, 138 *post*: "*Child Witnesses*". For conviction on the basis of evidence of child witnesses in sexual offences see *Lee Kwang Peng v. Public Prosecutor*, (1997) 3 Singapore LR 278 (Singapore HC); *Tang Kin Seng v. Public Prosecutor*, (1997) 1 Singapore LR 46 (Singapore HC); *Public Prosecutor v. Norli Bin Jasmani*, Cri Case No. 17 of 1996 dt. 19.11.1996 (Singapore HC).

The mere fact that the child had been taken by the police to be produced as a witness, is not a ground to come to the conclusion that the witness must have been tutored but on examining the evidence and from the contents, court has to see whether there are any traces of tutoring. [*Mangoo v. State of M.P.*, A 1995 SC 946, 959 : 1995 CrLJ 1461, 1462]. Where the witness was only aged 6 years at the time of the occurrence and after the arrest of the accused he came to the custody of his grandmother and he was examined after a lapse of more than two months and he had also admitted that the police constable who was present in the court told him to speak as stated in the court that day and two other times previously, his evidence was unreliable. [*Pochammala Yellappa v. State of A.P.*, 1995 CrLJ 3187, 3168 AP]. When the prosecution case is solely resting on the evidence of a small child witness of tender age and it is tainted with infirmities of description, on the point of proper identification and when there is evidence to show that she was tutored, it is very unsafe to base conviction on such evidence in murder case. [*Sukhram v. State of M.P.*, 1995 CrLJ 595, 598 MP]. Where the testimony of the child witness was not challenged during the cross-examination and remained uncontroverted, the mere fact that she admitted being tutored by her father would not *ipso facto* wash her evidence

off the record. [*Sanjay v. State*, 1996 CrLJ 3347, 3350 Del]. Where the child witness gave minute details of occurrence in a murder case and his evidence is neither tutored nor tained one, his evidence can be relied on. [*Sanjay Ramchandra Tarare v. State of Maharashtra*, 1996 CrLJ 713, 718 Bom].

Where the minor daughter of the deceased not only connected her mother with the murder of her father but also described the role played by her and she also categorically stated that the deceased named the accused as offenders in his dying declaration, her version is credible. [*Kamala Sethi v. State*, 1994 CrLJ 197, 201 Ori]. Where the witness was related to the deceased as his grand daughter and was also a child witness and from the evidence it appeared highly improbable for her to have seen the incident and her testimony was also not natural, no reliance can be placed on the same. [*R. Kulandavelu v. State*, 1993 CrLJ 2574, 2587 Mad]. A child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring. [*Arbind Singh v. State of Bihar*, A 1994 SC 1068, 1069]. Where the child witness was made to give evidence in accordance with the earlier statement under s. 162 CrPC it is highly unsafe to place reliance on his evidence. [*Chhagan Dame v. State of Gujarat*. A 1994 SC 454, 456 : 1994 CrLJ 56]. *In Re Dake Abbayi*, ILR 1956 AP 203, a Division Bench of the A.P. High Court has approved the observations of the Division Bench made in *Jalwant Lodhin v. State*, (1953 ILR 32 Pat 217) : A 1953 Pat 246, to the effect that "Children in the age group of about seven, are in a stage of maturation and they are creatures of emotion and action". The Division Bench has also accepted the view of Dr. Hans Cross when he says that if a child which bears some conversation, it is engraved deeply on its own mind, and ultimately, the child believes it as if it has seen what the others have related. Therefore, the evidence of a child witness is most unsafe to be relied on. [*Pochammala Yellappa v. State of A.P.*, 1995 CrLJ 3187, 3188 AP]. Inconsistencies in the evidence of a ten year old complainer and the corroborating account of another girld did not render the conviction unsafe [*Young v. H.M. Advocate*, 1997 SCCR 405 (HCJ Appeal)].

Corroboration.—A child witness may or may not be fully matured. By virtue of his tender years he is susceptible to tutoring by persons interested in the case or by near relations. A child witness is susceptible to influence from such persons. It is therefore necessary that Court should examine the evidence of child witness with care or caution bearing in mind the susceptibility and possible immaturity of the child. In *Rameswar Kalyan Singh's* case, A 1952 SC 54 : (1952 Cri LJ 547) the Court was considering the evidence of a child who was subjected to rape and the question whether the evidence of the rape on the child require corroboration. VIVIAN BOSE, J. speaking for the Court observed at page 550 (of Cri LJ):

"In my opinion the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the Judge..... The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge..... before a conviction without corroboration can be sustained. The tender years of the child, *coupled with other circumstances appearing in the case*, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule or prudence must be present to the mind of the Judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand." The above observations were

made in a case where the prosecutrix is the child and not in a case of a child who merely happended to witness commission of the crime. In such a case prudence requires that the Court should be conscious of the susceptibility of the witness for tutoring and being subjected to extraneous influence. Having regard to the status of the witness, the nature of the evidence given by the witness, the manner in which he gave evidence and other circumstances obtaining in the case, it is open to the Court to regard the evidence as either trustwrothy in itself or as requiring corroboration. *Kabiraj Tudu v. State of Assam*, 1994 CrLJ 432, 436 (Gau).

In *Dattu Ramrao v. State of Maharashtra*, 1997(3) Mah LJ 452, 454 the Supreme Court laid down the rule of prudence and desirability of corroboration as under:

> "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witnesses can be considered under section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record".

Evidence of a child witness can be relied upon even in the absence of corroboration on all material particulars. [*Narayan Iranna Potkanthi v. State of Maharashtra*, 1994 CrLJ 1752, 1759 Bom]. It is only a sound rule in practice not to act on the uncorroborated evidence of a child witness, whether oath has been administered to him or not. This was first observed by LORD GODDRD in *Mohamed Sugal Esa v. The King*, A 1946 PC 3. This is more a rule of prudence than a rule of law. [*Kesavan v. State of Kerala*, 1993(3) Crimes 19, 21 Ker].

Mode of Ascertaining Competency of a Witness. [Child Witness].—The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or affirmed. In determining the question of competency, the court under s 118, has not to enter into inquiries as to the witness's religious belief or as to his knowledge of the consequences of falsehood in this world or the next. The court is at liberty to test the capacity of a witness to depose by putting proper questions. It has to ascertain, in the best way it can, whether from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established [*R v. Lal Sahai*, 11 A 183; *Nafar v. R*, 18 CWN 147, 152; *Ah Phut v R*, A 1939 R 402; *Purna Ch v. S*, A 1959 C 306]. Intellectual capacity being the only test, ignorance of child on religious beliefs &c is not necessarily equivalent to an inability to understand ordinary questions and give rational answers [20 Bom LR 365]. The only test of competency is capacity to understand questions and to give rational answers [*Ram Jolaha v. R*, 102 IC 349 : 8 PLT 594]. The child witness had developed sufficient understanding. After witnessing the occurrence, he could describe it and understood the questions and answers. His testimony which

gets corroboration from the other evidence also is reliable and inspired confidence [*Ram Achal v. State of UP*, 1990 Cri LJ 111, 117 (All); *Balvautappa v. State of Karnataka*, 1983 Cri LJ NOC 29 Kant (DB)].

The corroboration for the evidence of a child witness must come from independent source and may be direct or circumstantial [*Mobeni Mingim v. Union Territory of Arunachal Pradesh*, 1982 Cri LJ NOC 39 (Gau)]. There is no bar accepting the uncorroborated testimony of a child witness yet prudence requires that courts should not act on the uncorroborated testimony of a child witness [*Munna v. State*, 1985 Cri LJ 1925, 1925 : (1985) 2 Crimes 107 (All)]. The judge alone and not the jury is to decide the question of competency [*R v. Hosseinee*, 8 WR Cr 50; *Nafar v. R, sup*; *Purna Ch v. S*, A 1959 C 306], but questions framed with a view to ascertain the child's capacity may properly be put in the presence of the jury. The preliminary examination of the witness in order to determine competency is known as *voire dire*. The judge may also examine other witnesses for the purpose. If the incompetency of a witness is not discovered till after he has given evidence, his evidence may be rejected [*R v. Whitehead, infra*].

Whenever a witness appears before Court, the Court will proceed on the basis that he is competent to testify. When a witness is a person of tender years or extreme old age or a person who suffers from disease or other abnormality of the body or mind, the Court is alerted to test his competency. Similarly where a witness is a child the Court is alerted on the need to decide whether oath can be administered. Ordinarily this satisfaction is to be arrived at by preliminary examination of the witness by the Court. This does not mean that in the absence of preliminary examination the evidence becomes inadmissible since the general rule is in favour of the competency and satisfaction, if necessary, can be arrived in the course of the evidence. However, trial Courts would do well to conduct preliminary examination to satisfy themselves in regard to the competency under section 118 of the Evidence Act as well as under the proviso to section 4(1) of the Oaths Act. It is highly desirable to bring on record the questions and answers put to the witness and to make a record of the satisfaction of the Court. Even in the absence of specific record of preliminary questions or the satisfaction the appellate Court could examine the nature and tenor of the evidence recorded, the manner in which the witness faced in cross-examination and satisfy itself about the competency under both the provisions. [*Kabiraj Tudu v. State of Assam*, 1994 CrLJ 432, 435 Gau].

In the case of a child, it depends on the capacity of the child, his appreciation of the difference between truth and falsehood as well as his duty to tell the former. The decision of this question rests with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession, or lack of intelligence. The trial Judge may resort to any examination which will tend to disclose the capacity and intelligence and in the case of an oath, his understanding of the obligation of an oath. [See *Rameswar Kalyan Singh v. State of Rajasthan*, A 1952 SC 54 : (1952 Cri LJ 547); *George L. Wheeler v. United States*, 159 US 523; *Krishna Kahar v. Emperor*, A 1940 Cal 182; *Ram Hazoor Pandey v. State*, A 1959 All 409 : (1959 Cri LJ 796); *Basu v. State of Kerala*, (1960) ILR Ker 256; and *Ponnumani v. State of Kerala*, 1987 (2) Ker LT 1042. [*Kabiraj Tudu v. State of Assam*, 1994 CrLJ 432, 435 Gau].

When the trial Judge had put preliminary questions to each of the witnesses who were children of the deceased, and satisfying that they were answering questions intelligently without any fear, proceeded to record the evidence and in the chief examination, each of the witnesses had given all the details of the occurrence and there had been a searching cross-examination and the witnesses withstood the same,

there is no reason to doubt their evidence. They are the most natural witnesses who had been present in the house at the night time when the occurrence of murder had taken place. [*Baby Kandaynathil v. State of Kerala*, A 1993 SC 2275, 2276]. Evidence of a child witness recorded by the court without putting preliminary questions to satisfy as to his competency cannot render his testimony unreliable or inadmissible. [*Badi Guravaiah v. State of A.P.*, 1994(2) Crimes 886 AP]. Failure to hold a preliminary examination of a child witness does not introduce a fatal infirmity in the evidence. [*J.V. Wagh v. State of Maharashtra*, 1996 CrLJ 803, 804 (Bom). See also *Ram Hazoor Pandey v. State*, 1959 CrLJ 796 (All)].

Where the medical report and also the examination of the doctor showed that the witness was not capable of answering even the simplest question like as to when her marriage with the accused took place, the trial court ought to have given a finding whether the witness was competent to depose or not and that having not been done it was not justified in recording the evidence of that witness and also relying on it. [*State of Karnataka v. Shabuddin*, 1995 CrLJ 3237, 3240 Kant]. Non recording of questions put to the child witness in preliminary examination by trial judge would not introduce such an infirmity in the evidence which would render it unworthy of acceptance. Further, it only where the answers given by the child witness are either dubious or ambiguous or confusing that the non-recording of the evidence of the child witness in questions answers form may result in rendering the evidence unworthy of acceptance. [*State of Maharashtra v. Prabhu Barku Gade*, 1995 CrLJ 1432 Bom]. Where the victim, a girl of seven years had clear understanding and adequate intellectual capacity to narrate alleged act of rape, mere omission to record certificate that she understood her duty to tell the truth before the court does not affect admissibility of her statement. [*Narayan Iranna Potkanthi v. State of Maharashtra*, 1994 CrLJ 1752, 1756 Bom].

It is mandatory under section 118 of the Evidence Act that the Court should satisfy about the understanding of the questions by the witness and there is rationality in answering questions due to tender years, extreme old age, diseases, whether of body or mind, or any other cause of the same kind (p. 1797 Vol 2 Sarkar on Evidence 1994 reprint). In the absence of such a record, the Tribunal could not have dealt with the testimony of such a witness to draw inference against the same. [*Talasila Sandhya v. A.P. SRTC*, 1997 AIHC 1680 (AP)]. The evidence of a child witness recorded without putting a few preliminary questions to satisfy as to his competency cannot, as a matter of law, be treated as washed off the record altogether. When even on a careful examination of the answers given by the child witness in his cross-examination, the witness appears to be in a position to understand the questions put to him and in a position to understand the distinction between truth and untruth and he was able to give coherent answer, the omission of the trial Judge to put preliminary questions to such witness to satisfy himself whether the witness was able to understand the questions and given coherent answers and his failure to incorporate the preliminary questions and answers in the deposition would not render the evidence of the witness either inadmissible or unreliable. [*Badi Guravaiah v. State of A.P.*, 1993 CrLJ 3496, 3501 AP]. Non recording of the questions put to the child witness in preliminary examination by trial Judge would not introduce such an infirmity in the evidence which would render it unworthy of acceptance. Further, it is only where the answers given by the child witness are either dubious or ambiguous or confusing that the non recording of the evidence of the child witness in question answers form may result in rendering the evidence unworthy of acceptance. [*State of Maharashtra v. Prabhu Barku Gade*, 1995 CrLJ 1432 Bom].

Some cases have held that before a child of tender years is actually examined on any question bearing upon the *res gestae*, the court must form its opinion as to his or her competency to depose and should therefore test the witness's capacity to under-

stand and give rational answers and his capacity to understand the difference between truth and falsehood by appropriate questions [*Shk Fakir v. R*, 11 CWN 51 : 4 CrLJ 412; *Tulsi v. R*, A 1928 L 903; *Ah Phut v. R, sup*; *Karu v. R, post*; *Panchu v. R, post*]. It has however been said in others that such a broad proposition is not quite justified by the terms of s 118. The question whether a witness has intelligence enough to understand the import or significance of questions or to give rational answers is not the same as the question of competency to testify. The court has a discretion to form its own opinion whether a child witness has sufficient understanding to be qualified to be a witness, but in order to find this out it is not obligatory that a preliminary investigation should be made [*R v. Nafar*, 41 C 406 : 18 CWN 147; *R v. Krishna*, 43 CWN 1117 : 1939, 2 Cal 569; *Lakhan v. R*, 20 P 898 : A 1942 P 183]. The incompetency may come out during the examination of the witness [*R v. Whitehead, post*], although in order to save time in many cases it may be desirable to put appropriate questions before the actual examination commences with a view to testing the competency of a witness. The true rule appears to have been stated in *Wheeler v. U S*, 159 US 523 (cited in *Nafar v. R, ante*), *Ram Hazoor v. S*, A 1959 A 409 and *Shanker Lal v. Vijay*, A 1968 A 58 where BREWER J, said:—

> "The decision of this question (whether the child witness has sufficient intelligence) primarily rests with the trial judge, who sees the proposed witness, notices his manners, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligation of oath. As many of these matters cannot be photographed into the record, the decision of the trial Judge will be disturbed on review, unless from that which is preserved, it is clear that he was erroneous."

Although a preliminary examination is not obligatory for the purpose of ascertaining the child's capacity to understand and give rational answers, the court should always question the witness whenever it seems desirable that it should be done. The mere fact that the court did not interrogate the witness before his examination does not invalidate the trial [*R v. Nafar, ante*; *R v. Krishna*, A 1940 C 182 *ante*]. The object of the court putting questions to the child witness before examination is that the time of the court may not be wasted, if it is found afterwards that the child is not intelligent enough to give evidence. [*Nandeswar Kalita v. State of Assam*, 1983 Cri LJ 1515, 1517 (Gauh) (DB); *Safiuddin Mondal v. The State*, 1984 Cri LJ NOC 140 (Cal) (DB); *Samsul Hoque Laskar (Accused) v. State of Assam*, 1984 Cri LJ NOC 208 (Gauh)]. It is very desirable that the court should preserve on the record some questions and answers (other than its evidence) so that the appellate court might conclude whether the decision as to the competency of the child witness was right [*Ram Hazoor v. S, sup*; *Joseph v. S*, A 1960 K 30; *Govind Natha v. S*, A 1961 G 11; *Shanker Lal v. Vijay, sup*; *Santosh Mandal v. State*, 1983 Cri LJ 773, 776 (Cal) (DB); *Ratna Muda v. State*, 1986 Cri LJ 1363, 1365 (Ori) (DB)].

When there is no record that the child understands the questions put to him, it must be taken that the court considered the witness competent to testify [*S v. Machindra*, A 1964 Or 100]. The object of putting questions before examination is that the time of the court may not be wasted, if it is found afterwards that the child is not intelligent enough to give evidence. The absence of such a preliminary enquiry is a mere irregularity [*Karu v. R*, 20 P 893 : A 1942 P 159; *Lakhan v. R*, 20 P 898 : A 1942 P 1831]. The great importance of such preliminary examination to test the intelligence of a child witness and the desirability of recording that such a test had in fact been made have been emphasised in a few cases. It may turn out in the course of examination that the test has been fallacious and in such a case, it is always open to the judge to say that he

cannot accept the evidence. There is no obligation to make on the record any endorsement as to the child's capacity [*Panchu v. R*, 66 IC 73 : 3 PLT 649; *Ramsakhia v. R*, A 1934 P 651; *In re Raju*, A 1960 Mys 48; *Govind Natha v. S, sup*]. The Supreme Court is of opinion that the courts always record their opinion that the child understands the duty of speaking the truth [*Rameshwar v. S, infra*].

The addition of the Proviso to s 5 (now s 4) of the Oath Act by the Oaths Amendment Act 39 of 1939 does not seem to alter the situation except that it dispenses with oath. The proviso says that where the witness is a child under twelve years of age and the court "is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath of affirmation", the provisions relating to oath shall not apply. But the duty of ascertaining the competency of the child witness by suitable questions in proper cases is still there. Further, appropriate questioning may also be necessary to find out whether the child "understands the duty of speaking the truth." The Supreme Court has held that it is however desirable that judges should always record the opinion that the child understands the duty of speaking the truth and state why they think that, otherwise in some cases it may be necessary to reject the evidence. Where there is no formal certificate, whether the judge had the proviso in mind can be gathered from the circumstances, *eg* when the judge took evidence although he noted that the child does not understand the nature of an oath [*Rameshwar v. S*, A 1952 SC 54 : 1954 SCR 377].

If the court is of opinion that by reason of tender years and immaturity of intellect, a child is not competent to understand the questions put or to give rational answers, it should not be examined [*R v. Dhaniram*, 38 A 40; *Ghulam v. R*, A 1930 L 337; *Rasul v. R*, A 1930 S 120]. In a case the lower court refrained from examining a small boy on the ground that he was of tender years, but the High Court held that considering the importance of the witness, he ought not to have refrained from examining him, unless the judge considered that the boy was prevented from understanding the questions put to him, or from giving rational answers to those questions by reason of tender years [*R v. Ram Sewak*, 23 A 90]. If a person after having been sworn is shown to be incapable of understanding, the judge should strike out all his evidence [*R v. Whitehead*, LR 1 CCR 33]. The doctrine that an objection to competency of a witness ought to be taken before the examination-in-chief, has been disputed, and it has been held in conformity with some old decisions that the objection may be raised at any time during the trial and that too, whether the objector previously knew of the disqualification or not [*Needham v. Smith*, 2 Vern 463; *Ld Lavat's case*, 1746, 18 How St Tr 596; Tay s 1392; see *R v. Har Pd*, 45 A 226]. In trials for high treason, if the prisoner intends to object to a witness as being omitted from, or misdescribed in, the list furnished to him, he must do so before the witness is sworn in chief [Tay s 1392].

Mode of Recording Evidence of Child Witness.—Where the guilt or innocence of the accused depends wholly upon the evidence of one small boy, the court should take that evidence in the form of questions and answers [*R v. Haria*, A 1937 P 662]. Courts should, while permitting full scope for cross-examination of a child witness, be careful to see that they are not subjected to unnecessary confusion, harassment or unduly made conscious of the awe of formal court atmosphere and the public gaze [*Prem Shankar Sachhan v. State*, 1981 Cri LJ NOC 163 (Del)].

Oath to Child Witness.—An infant may be sworn in a criminal prosecution provided such infant appears on strict examination by the court to possess a sufficient knowledge of the nature and consequences of an oath; in other words a court has to ascertain from the answers to the questions propounded to such a witness whether he appreciates the danger and impiety of falsehood [*per* MOOKERJEE J, in *Nafar v. R*, 18

CWN 147 : 41 C 406 (*R v. Brasier*, 1 Leach 199 **folld**)]. The only cases in which oath or affirmation should not be administered are cases in which it clearly appears that the witness does not understand the moral obligation of an oath or affirmation or the consequences of giving false evidence [*Fatu v. R*, 6 PLJ 147 : 61 IC 705]. Unsworn testimony of a child aged seven could not be corroboration of the sworn testimony of another child, aged eight [*R v. E*, 1964, 1 All ER 205; see however, *R v. Campbell*, 1956, 2 All ER 272]. Administering or not administering an oath to a child witness does not effect the admissibility and competency of a child witness [*Babrubahan Jal v. State of Assam*, 1991 Cri LJ 278, 281 (Gauh)].

Oath or affirmation shall be made by all witnesses, the only exception being the case of a child under 12 years of age where the Court is of the opinion that though he understands the duty of speaking the truth he does not understand oath or affirmation. If the Court is so satisfied, oath will not be administered to the witness. The evidence will nevertheless be admissible. [*Kabiraj Tudu v. State of Assam*, 1994 CrLJ 432, 435 Gau]. Oath is to be administered to the child witness after recording an observation that the witness was able to understand the duty of speaking the truth. [*Pankaj Naik v. State of Orissa*, 1994 CrLJ 829, 831 (Ori)]. The trial court must treat the evidence of a sworn child with utmost caution and warn itself of the rule that his evidence must be corroborated by evidence which can reasonably confirm the truthfulness of the child's testimony [*Sidek Bin Ludan v. Public Prosecutor*, (1995) 3 Malayan LJ 178 (Johor Bahru HC)]. Acceptance of the unsworn testimony of a child should be subject to the same principles of rules of practice as apply to the acceptance of the evidence of accomplice [*R. v. Velayuthaw*, 1935 Malayan LJ 277 (Straits Settlements CA); *Muharam v. PP*, (1981) 1 Malayan LJ 222 (Kota Kinabalu FC)].

If the judge deliberately refrains from administering affirmation on the ground that the child cannot understand its nature, the deposition will be admissible [*R v. Kusha*, 5 Bom LR 551; see *Hari Ramji v. R*, 20 Bom LR 365 : 45 IC 497; *Syed Rasul v. R*, 120 IC 514; *Ah Phut v. R*, A 1939 R 402; *Fatu v. R, sup*; *In re China Venkadu*, 38 M 550; *In re Dasi Viraya*, A 1938 M 490 : 1938, 1 MLJ 289; *Hussain v. R*, 76 IC 1037 : A 1923 L 332]. The citations above have become largely unnecessary as under the proviso to s 4 Oaths Act (see App B), oath may be dispensed with in the case of a child under 12 years of age if the court thinks that it does not understand the nature of an oath. The provisions of the both Act read with sec. 118 Evidence Act indicate that one aged 12 years or above is normally expected to have attained a minimum faculty of under-standing so so as to engender a *prima facie* presumption of his testimonial competency [*Santosh Roy v. State of West Bengal*, 1992 Cri LJ 2493, 2496 (Cal)].

—Effect of Omission to Administer Oath or Affirmation.—Judicial opinion was not unanimous as to whether s 13 (now s 7) Oaths Act which cures the omission to administer oath or affirmation applies only to cases of omission due to accident or negligence, or also to deliberate omission. Cases of deliberate omission generally arise when a judge is of opinion that a child of tender years or a witness belonging to a backward community although capable of understanding the duty of speaking the truth does not appreciate the religious or moral obligation of an oath. In some cases it was held that "omission" includes both deliberate and accidental [*R v. Shew Bhogta*, 14 BLR 294 FB : 23 WR Cr 12; *R v. Itwaria*, 14 BLR 15 : 22 WR Cr 12; *Balchand v. Tarak*, 18 CWN 1323; *R v. Sashi*, 24 CWN 767 : 58 IC 817; *R v. Shava*, 16 B 359; *R v. Sahadeo*, 156 IC 849 : 1935 ALJ 618; *Dhaniram v. R*, 38 A 49; *Ah Phut v. R*, A 1939 R 402; *Sheo Pd v. R*, A 1942 O 193; *Ram Samujh v. R*, 10 OC 337; *Hussain v. R, sup*], while in others it was held to apply only to accidental omission [*R v. Maru*, 10 A 207; *R v. Lal Sahai*, 11 A 183; *Nandalal v. Nistarini*, 27 C 428, 440; *R v.*

Viraperumal, 16 M 105; *Deiya v. R*, 36 IC 468 : 9 Bur LT 133; *Deya v. R*, 46 IC 86, 9 LBR 88; *Fatu v. R, sup*]. The Judicial Committee has later held that s 13 (now s 7) is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission occurs *incurium* [*Md Sugal v. R*, 50 CWN 98 : A 1946 PC 3; *Rameshwar v. S*, A 1952 SC 54 : 1954 SCR 377; *Dhansai v. S*, A 1969 Or 105].

The question of admissibility of evidence of a child witness examined without oath can no longer arise in view of the proviso to s 4 Oaths Act.

Competency of a Lawyer in a Case to Testify.—Under s 118, counsels though engaged in the case are competent to testify whether the facts in respect of which they gave their evidence occurred before or after their retainer. At the same time, as a general practice it is undesirable, when the matter to which counsels depose is other than formal, that they should testify either for or against the party whose case they are conducting. If counsel knows or has reason to believe that he will be an important witness in a case, he ought not to accept a retainer therein [*Weston v. Peary*, 40 C 989; see *Lodd Govindass v. Rukmani*, 29 IC 135 : 17 MLT 382; *Sitaram v. Ram Lal*, A 1930 L 361; *Moolraj v. Manohar*, A 1938 L 204; *A I R v. Moghe*, A 1950 N 110 (cases reviewed); *Cobbett v. Hudson*, 1 E & B 11 **not following** *Stones v. Byron*, 4 Dowl & L 393]. A counsel or solicitors or advocates who are appearing as advocates in a case should not also act in the same case as witnesses [*R v. Secy of S*, 1941, 2 All ER 546 : 1941, 2 KB 169]. He ought to retire when he discovers afterward that he is a witness on a material question of fact [*Chandreshwar v. Bisheswar*, 5 P 777]. Whenever it is discovered that a pleader appearing in a case is in a position to give evidence, the proper course is to retire from the case [*In re Venkatachariar*, A 1942 M 691 : 1942, 2 MLJ 479]. If a pleader knows that he is a necessary witness and would be called but continues to act in the case actively, his conduct is deserving of condemnation [*In re a Pleader*, A 1948 M 273 FB]. Counsel who was a material witness was also allowed to address the jury. The embarassment was inestimable, the prejudice inescapable. The course adopted by the judge was fraught with the danger of defeating justice. The appellants were directed to be retried [*Matla Goala v. S*, 68 CWN 260].

In Halsbury's Laws of England it is mentioned that "a barrister should not act as counsel and witness in the same case and he should not accept instructions in a case in which he has reason to believe that he will be a witness, and if, being engaged in a case, it becomes apparent that he is likely to be a witness *on a material question of fact*, he should not continue to appear as counsel if he can retire without jeopardising his client's interests"(vide paragraph 511 at page 388—Volume 37 of the Fourth Edition).

The said code of conduct has been in vogue in India also. In *D. Weston v. P.M. Dass*, A 1914 Cal 396 : 231 C 25 it has been observed that "as a general practice, however, it is undesirable that when the matter to which counsel depose is other than formal that they should testify either for or against the party whose case they are conducting". BESUMONT, C.J. speaking for a Division Bench has observed in *Emperor v. Dadu Rama*, A 1939 Bom 150 that a party in a criminal proceeding is entitled to select the advocate whom he desires to appear for him and the other party cannot fetter that choice merely by serving a summon on the advocate to appear as a witness. V.R. SEN, J. in *All India Reporter v. Moghe*, A 1950 Nag 110 surveyed through a number of decisions and pointed out that if the object is to prejudice his opponent the application should be turned down. A duty was cast on the Court to closely examine the object of the party in citing the counsel as a witness.

Rule 13 of Chapter II of Part VI of Bar Council of India Rules provides "An advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact he should not continue to appear as an advocate if he can retire without jeopardising his client's interest".

Here, of course, the test is whether the advocate concerned would be "a witness on a material question of fact".

A Division Bench of the Kerala High Court in *N. Yovas v. Immanueal Jose*, A 1996 Ker 1 considered the implication of the said rules and approved the following observation of a single Judge of the same High Court made in *Marikag Motors Ltd. v. Ravikumar*, A 1989 Ker 244 at page 246. "If the court or the authority concerned, *after enquiry finds that an examination of the advocate as a witness is indispensable and* hence the disengagement of the advocate from the case would not jeopardise the interest of the party for which he appears, then the court or the authority concerned can ask the advocate to relinquish the vakalath".

Under Order XVI Rule 1(2) of the Code of Civil Procedure a party desirous of obtaining any summon for the attendance of any person shall file in court an application stating therein "the purpose for which the witness is proposed to be summoned." The object of disclosing such purpose is to enable the court to decide whether examination of such witness is of material benefit to decide the dispute. Court has to pass an order on the application and, therefore, a duty is cast on the court to consider whether the purpose of citing the counsel of the opposite party as a witness is to speak to any material fact. If the court is not so satisfied, the court is not obliged to issue summons to him, there is the need to make a judicial consideration before issuing summons to the counsel of the opposite party bearing in mind the possible utility of his evidence and also the consequences which entails not only to the counsel concerned but to the party who enaged him the court shall be greatly circumspect while deciding to grant permission to summon the counsel of the opposite party as a witness. [*N. Yovas v. Immanueal Jose*, A 1996 Ker 1, 3].

An important witness was tendered but refused by the trial court on the ground that he was engaged as a counsel in the case. His evidence was taken by the Appellate court and it was held that the evidence was rightly received. The fact that he was engaged in the case might be a good reason for returning his brief or ceasing to act as counsel, but that should not deprive the party of his evidence in the case [*Biradhimal v. Prabhabati*, A 1939 PC 152 : 1939 Kar 258 : 43 CWN 842]. A counsel who has advised the institution of the charge which led to a suit for malicious prosecution is a competent witness as to good faith [*Corea v. Peiris*, 14 CWN 86 PC : 5 IC 50]. It is improper for a court to allow the prosecution to put the defence counsel as witness for prosecution without allowing the accused an opportunity to engage some other counsel. A counsel will not conduct a case for the defence after having been called as a witness for the prosecution [*In re Mannargan*, 91 IC 65 : 49 MLJ 95].

"The evidence of counsel, when merely required to explain a case in which they have acted as such but not otherwise, may be given from their places and without oath [*Hickman v. Berens*, 1895, 2 Ch 638]; though they may waive their privilege and may be sworn, examined and cross-examined either in their places [*Wilding v. Sanderson*, 76 LT 346], or in the witness-box [*Oxley v. Pitts*, 1904 Times Dec 1]. The same rule applies to judges" [40 L J 415; Phip 11th Ed p 617]. The court would accept a statement from counsel from his place at the bar without burdening him with an oath [*Nistarini v. Nundolal*, 3 CWN 694], but in the same case on appeal it has been held that if the other side objects, it is doubtful whether the statement can be accepted

without oath [*Nundolal v. Nistarini*, 27 C 428 : 4 CWN 169]. A well recognised practice has grown up of accepting statement from the bar of practitioners with regard to matters in connexion with the very litigation in which they are engaged as practitioners. For that purpose they are officers of the court. It is not necessary to insist upon their making an affidavit [*Sutharsana v. Samarapuri*, A 1928 M 690].

Power of Attorney.—The holder of a power of attorney is not entitled to appear as a witness on behalf of the party appointing him. Power of Attorney Act (1 of 1982) s. 2 [*Ram Prasad v. Hari Narain*, A 1998 Raj 185 **following** *Dutt Shastri v. State of Rajasthan*, (1986) 2 WLN 713 (Raj)].

Disease of Body.—A witness may be in such extreme pain as to be unable to understand, or, if to understand, to answer questions; or he may be unconscious, as if in a fainting fit, catalepsy, or the like [Nort p 305].

Disease of Mind.—This applies to idiocy and lunacy. An idiot is one who was born irrational; a lunatic is one who was born rational but has subsequently become irrational. The idiot never can become rational; but a lunatic may entirely recover, or have lucid intervals (Nort p 305). The ways in which *insanity may appear* are four: (*1*) The general behaviour of the person, while in court and before taking the stand, may be such as to exhibit the derangement to the judge; (*2*) The person may be questioned on the '*voir dire*,' so that his condition appears at once; (*3*) Other witnesses to the derangement may be offered before the person's testimony is begun; (*4*) The examination or cross-examination may disclose clearly the incapacity, in which the preceding part of testimony may be struck out; or may disclose grounds of doubt, in which case a '*voir dire*' or other witnesses may be resorted to [Wig s 497].

"Or Any Other Cause of the Same Kind." [Intoxication]. ***eg*** **drunkenness.**—It must be *ejusdem generis*. The disability is only co-extensive with the cause; and therefore, when the cause is removed, the disability ceases. Thus a lunatic during lucid interval may be examined. The return of sobriety renders a drunkard competent [Nort p 305]. It follows from the modern theory of mental derangement that intoxication, even habitual, does not in itself incapacitate a person offered as a witness. The question is, in each instance, whether the witness was so bereft of his powers of observation, recollection or narration that he is thoroughly untrustworthy as a witness on the subject in hand [Wig s 499]. "The point of inquiry is the moment of examination; is the witness then offered so besotted in his understanding as to be deprived of his intelligence? If he is, exclude him; if he be a hard drinker, an habitual drunkard, yet if at that time he is sober and possessed of a sound mind, he is to be received" [*per* DUNCAN J, in *Gebhart v. Shindle*, 15 S & R 238 (Am)].

Mental patient with criminal conviction.—It has been laid down by the Court of Appeal in *R v. Spencer* and *R v. Smails*, (1985) 1 All ER 673 CA : (1985) 2 WLR 197 that the evidence of patients at a secure hospital does not fall in the category of evidence of witnesses where a full warning is necessary. The previous decisions of the Court of Appeal in [*DPP v. Kilbourne*, (1973) 1 All ER at 447] and [*R v. Bagshaw*, (1984) 1 All ER 971 not followed]. The matter had arisen out of the nursing staff of the hospital ill-treating patients. See also *R v. Neshet*, 1990 Crim LR 579 CA, where mental patients were so sick as to unable to move and their evidence as to theft by the accused was read over to the jury and it was held that their evidence was unreliable and should not have been allowed to go to the jury.

Unable to speak having seen crime.—A written statement is admissible when the court is sure on the criminal standard of proof that the witness was not able to speak because he was in fear as a consequence of the material offence or of some

thing said or done subsequently in relation to that offence and in relation to the possibility of the witness testifying as to it [*R v. Acton*, (1991) 92 Cr App R 96 DC].

Witness afraid to testify.—Under s. 69(*3*) of the [English] Criminal Justice Act, 1988, the statement of a witness may be admissible instead of full and oral evidence if he is afraid to testify as a result of the circumstances of the offence. The test of fear is not objective; the court need only be certain that the witness really is in fear, which need not have arisen as a matter of something that happened since the commission of the offence [*R v. Acton*, The Independent, May 4 1990 DC].

Defective Memory.—A witness is not to be excluded as incompetent by reason of the fact that his memory is somewhat defective, or because his means of knowledge may not be equal to that of other persons who might have been called as witnesses. Obviously these are objections which affect the credibility and not the competency of the witness [Jones s 724].

Competency of Accused to Testify. [Art 20(3) of Constitution].—Formerly the accused was not competent to testify on his own behalf and so could not be given oath [*Akshoy v. R*, 45 C 720], nor could he swear an affidavit. Since the insertion of s 342A in the Cr P Code (by Act 26 of 1955) [now s 315(*1*)] an accused has the option to examine himself as a witness for the defence and in such case he has to take oath. His position is like that of any other witness and he can be cross-examined (see Sarkar's Cr P Code, 4th Sd notes under s 315). S 313 Cr P C empowers the Court to put to the accused such questions as may be necessary with a view to enabling him to explain any thing in the evidence against him and the answers given by him may be taken into consideration in weighing the evidence. The taking into consideration of self-incriminatory statements in the answers does not infringe art 20(*3*) of the Constitution as the accused is not bound to answer any question by the Court, nor is there any compulsion. If he does so, it is a voluntary act and in no sense can it be called testimonial compulsion within art 20(*3*) [see *Banwarilal v. S*, A 1956 A 341; *In re Ram Kr*, A 1955 M 100; *In re Govinda Reddy*, A 1958 Mys 150].

Under art 20(*3*) "no person accused of an offence shall be compelled to be a witness against himself". "Offence" is defined in s 3(*38*) General Clauses Act, 1897. 'Offence' means criminal offence [*In re Central Calcutta Bank Ltd*, A 1957 C 520]. "Accused of an offence" does not mean an actual prosecution before a court in respect of an offence charged but the protection is available to any person against whom a formal accusation relating to the commission of an offence has been levelled (*eg* in an information to the police) which may result in prosecution [*Sharma v. Satish*, A 1954 SC 300 : 1954 SCR 1077; *Subedar v. S*, A 1957 A 396]. Explaining *Sharma's* case it has been held that the protection in art 20(*3*) is available to a person who must have stood in the character of an accused at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made [*S v. Kathi Kalu*, A 1961 SC 1808, 1817]. The phrase in art 20(*3*) being "to be a witness" and not "to appear as a witness", it means nothing more than to furnish evidence. A person can "be a witness" not merely by giving oral evidence but also by producing documents or by gestures [*Sharma v. Satish sup*]. The meaning of the phrase "to be a witness" was further clarified in *S v. Kathi Kalu*, A 1961 SC 1808, (see notes to s 73 *ante*: "*Mere Direction by the Court under s 73 to Give Writing &c Does Not Offend Art 20(3) &, &c*", where *Kathi Kalu's* case has been fully discussed).

In the case of an indictment against two or more persons, one prisoner may give evidence for the Crown against a co-prisoner in the following cases: (*1*) Where a

nolle prosequi has been entered..... (2) Where a verdict of acquittal has been given..... (3) Where the prisoner in question has pleaded guilty on arraignment or during trial..... (4) Where, though jointly indicted, he is not being tried with the prisoner against whom he gives evidence [Archbold Cr Pl p 441; see Tay s 1357; *R v. Grant & Ors*, 1944, 2 All ER 331].

Defendant.—A plaintiff can examine any witness he so likes—the witness may be a stranger, may be a man of his own party or party himself or may be a defendent or his man. Therefore, if a plaintiff wants to examine a defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that the said defendant has neither appeared in the suit nor upon appearance filed written statement nor prayer for filing written statement has been rejected. [*Awadh Kishore Singh v. Brij Bihari Singh*, A 1993 Pat 122, 128].

Evidence of Witnesses Produced by One Accused Whether Admissible Against Co-accused.—It is impossible to say that there is anything in the law of evidence or procedure which renders the statements of witnesses produced by one accused inadmissible against a co-accused, but there are obvious reasons for receiving such evidence with great caution, and indeed for regarding it with suspicion. Those reasons are:—*firstly*, that the evidence in question may not benefit the person who calls the witnesses and it may be introduced merely with the object of strengthening the case against the co-accused; *secondly*, that if witnesses are examined by the police, the co-accused is deprived of the chance of contradicting them by their former statements, since s 162 Cr P Code applies only to prosecution witnesses; *thirdly*, that the co-accused may be deprived of the benefit of s 342 (now s 313) Cr P Code, since it is not, under the terms of the section obligatory upon the court to give him an opportunity of making a statement about the evidence; and *fourthly*, that there can be no guarantee of good faith in the case of defence witnesses [*Shapurji v. Sorabji*, 60 B 148].

"Evidence against" means (1) evidence supporting the prosecution case against a co-accused in a material respect or (2) evidence undermining the co-accused's defence. Such evidence may be given either in evidence-in-chief or in cross-examination. The test is objective, the question being what is the effect of the evidence on the minds of the jury [*Murdoch v. Taylar*, 1965 AC 574].

Arbitrators.—[See s 121 *post*].

Examination of a Director.—Public examination of the Directors of a company cannot be held to be bad under art 20(*3*) because under s 45 G (*8*) of the Banking Companies Act 1949, the notes of the examination of the evidence may be used later in evidence against the person in any proceeding civil or criminal [*In re Central Calcutta Bank Ltd.*, A 1957 C 520].

Assessors and Jurors are Competent Witnesses.—If a juror or assessor is personally acquainted with any relevant fact, he is a competent witness and may be examined as such; see s 294[2] Cr P Code [*R v. Ram Churn*, 24 WR Cr 28]. A juryman giving evidence is not disqualified from continuing to sit as a juryman [*R v. Mookta Singh*, 5 BLR 15: 13 WR 60, 81, citing *Health's* case 1744, 18 St Tr 124; see also *In re Hurro Ch*, 20 WR Cr 76]. See *post* s 121.

If a juryman be personally acquainted with any special and material and particular fact, he is not permitted to mention the circumstance privately to his fellows, but

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2. Section 294 omitted in Act 2 of 1974.

must be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict [Tay s 1379].

Executor.—Executors are competent witnesses to prove the execution of the will. See s 68 Succession Act 39 of 1925 which is extended to Hindus, &c by s 57 and Schedule III of the Act.

Overseas witness.—In England the court has jurisdiction under RSC Ord 38 r 3 to order that an overseas witness can give evidence to an English court by means of a television linkage [*Garcin v. Amerindo Investment Advisors*, The Times, June 12, 1991].

Explanation.—This applies to the case of a monomaniac, or a person who is afflicted with partial insanity and his evidence will be admissible if the judge finds him upon investigation that he is aware of the nature of an oath or declaration and that he is capable of understanding the subject with respect to which he is required to testify [see *R v. Hill*, 1851, 2 Den 254; *Spittle v. Walton*, 1871, 11 Eq 420; Tay s 1375]. In *R v. Hill*, *ante* the witness believed that he had 20,000 spirits personally appertaining to him. On all other points he was perfectly sane. His testimony as to all other matters was received [Norton p 305].

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

COMMENTARY

Principle and Scope.—Persons deaf and dumb from birth were formerly in contemplation of law idiots; but this presumption is certainly no longer recognised, as person afflicted with these calamities have been found, by the light of modern science, to be much more intelligent in general, and to be susceptible of far higher culture, than was once supposed. Still, when a deaf-mute is adduced as a witness, the court, in the exercise of due caution, will take care to ascertain before he is examined, that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. When the judge is satisfied on these heads, the witness may be sworn and give evidence by means of an interpreter. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that, as the more satisfactory method [*Morrison v. Lennard*, 1827, 3 C & P 127]; but if his knowledge of that method is imperfect, he will be permitted to testify by means of signs [*R v. Rustom*, 1786, 1 Leach 408; *R v. Steel*, 1786, 1 Leach 452: Tay s 1376]. There must be a record of signs and not the interpretation of signs [*Kumbhar v. S.* A 1966 G 101]. Statement of a deaf and dumb witness was recorded on the basis of replies given in writing and by signs, it can be acted upon [*Daulat v. State*, 1981 Cri LJ (NOC) 88 (All): 1981 All Cri R 317]. Where a witness could not be examined because he became dumb due to ailment, no adverse inference can be drawn against the prosecution in not examining him. [*Kishan Singh v. State*, 1995 CrLJ 2027, 2034 (Raj)].

If a man is under a vow of silence, he is "unable to speak" and his evidence may be had in writing without forcing him to break his religious vow [*Lakhan v. R.* 20 P 898: A 1942 P 183]. The most natural and fluent mode of communication by deaf

person is signs. It has been held in America that a deaf-mute is taught to give ideas by signs which must be translated by an interpreter skilled and sworn [*Cowley v. People*, 83 NY 478]. A deaf and dumb witness should be examined only with the help of an expert or a person familiar with his mode of conveying ideas to others in day to day life [*Kadungothi Alavi v. State of Kerala*, 1982 Cri LJ 94, 99: 1982 Ker LT 287 (Ker)]. "If she had sufficient reason to have intelligence conveyed to her by *T* and to communicate facts to the understanding of *T*, although she was not able to talk or write, she could have sworn and testified through him by signs" [*per* JEWETT J, in *People v. McGee*, 1 Den 21]. As to the preliminary examination for ascertaining the competency of a witness to testify, see *ante* s 118].

Signs made by a dying woman in answering to questions put regarding the cirsumstances under which the injuries were inflicted on her, were admitted as statement [*R v. Abdullah*, 7 A 385 FB see *ante* s 32: "*Signs or motions are verbal statements*]. Where the sessions judge was satisfied that the deaf-mute could not understand the questions that were put to him, and for the most part, could not make his meaning intelligible, it was held that he was not a competent witness [5 OC 240]. Where a witness is so deaf and dumb that it is impossible to make him understand the question put to him in cross-examination, he cannot be a competent witness and his evidence if taken ought to be struck of [*Venkata v. R*, 1912 MWN 100: 14 IC 655]. Assuming that a body corporate, being 'unable to speak' may be branded as a dumb witness for the purpose of sec. 119 who can give evidence 'by writing', the 'evidence so given', even though in writing, 'shall be deemed to be oral' evidence [*Godrej Soap Ltd. v. State*, 1991 Cri LJ 828, 831 (Cal)].

S. *120. Parties to civil suit, and their wives or husbands. Husbands or wife of person under criminal trial.—In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

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* In Ceylon the substituted section is as follows:

"120 (1) In all civil proceedings the parties to the suit and the husband or wife of any party to the suit shall be competent witnesses.

(2) In criminal proceedings against any person the husband or wife of such person respectively shall be a competent witness if called by the accused, but in that case all communications between them shall cease to be privileged.

(3) In criminal proceedings against a husband or wife for any bodily injury or violence inflicted on his or her wife or husband, such wife or husband shall be a competent and compellable witness.

(4) In criminal proceedings against a husband or wife for any attempt to cause any bodily injury or violence on his or her wife or husband, such wife or husband shall be a competent witness for the prosecution.

(5) In criminal proceedings against a husband or wife for an offence punishable under s 362B or 362C of the Penal Code, the wife or husband of the accused shall be a competent witness for the prosecution.

(6) In criminal trials the accused shall be a competent witness in his own behalf, and may give evidence in the same manner and with the like effect and consequences of any other witness, provided, that so far as the cross-examination relates to the credit of the accused, the court may limit the cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness".

COMMENTARY

Principle and Scope.—Under s 113 *all* persons except those that suffer from intellectual weakness, are competent to give evidence. Competency is the rule and incompetency the exception. This section declares that the parties to the suit and their husbands or wives are competent witnesses in all civil proceedings and that in criminal proceedings against any person, the husband or wife of such person is a competent witness, whether for or against. The criminal proceeding may be by a third person against the husband or wife or it may be between the husband and wife. In criminal proceeding between married persons, the privilege of communication during marriage does not exist (see s 122).

Formerly under the rule which existed at common law, parties to the suit were incompetent witnesses on the ground of interest—*Nemo in propria causa testis esse debet* (No one can be a witness in his own cause). Husbands or wives were also incompetent to give evidence either for or against one another. These disabilities were swept away by the Evidence Act, 1843, the Evidence Act, 1851 and the Evidence Act, 1853. The last Act created a privilege in respect of communication between husband and wife during marriage (see s 122). S 16 Civil Evidence Act 1968 goes a step further and does away with the privilege in civil proceedigns. Strictly speaking this section is superfluous as these persons are competent witnesses under the general provision in s 118.

The latter part of s 120 making the husband or wife a competent witness for or against each other, if accused in criminal proceedings is not in accord with English Law. By s 1 (*c*) of the Cr Evidence Act, 1898 (61 & 62 Vic c 36) the wife or the husband of the accused may not save in the schedule mentioned therein be called as a witness, except upon the accused's application. By s 4, the wife or the husband of a person charged with an offence under any Act in the schedule may be called as a witness either by the prosecution or the defence and without the consent of the accused; but when so called communications during marriage are to be privileged. The exceptions under the above and other Acts are: Neglect to maintain, or desertion of wife; offences against women and girls under Cr Law Amendment Act 1885; theft by husband or wife of each other's property (see s 30 Theft Act 1968 *post*) etc. Under s 4(2) of the Cr Evidence Act 1898, nothing in that Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person, *eg* case of personal injury. The Evidence Act does away with the restrictions under the English law, and adopts the rule in *R v. Khairulla*, 6 WR Cr 21: BLR Sup Vol App 11 FB (overruling 1 WR Cr 17) where PEACOCK CJ, said "It is a general rule of English law, subject to certain exceptions, that in criminal cases a husband and wife are not competent to give evidence for or against each other. But English law is not the law of the mofussil." The provisions of this section should be read subject to s 122 (communications during marriage).

In Ceylon s 120 has been enlarged (see foot-note to s 120) and in criminal proceedings against any person, the position of the husband or wife of such person as a witness has been more fully stated. If he or she is called as a witness by the accused, all communications between them shall cease to be privileged (v s 122). S 120(6) makes the accused a competent witness in his own behalf. As to this see *ante* s 118: "*Competency of accused to testify*".

Proceedings under s 488 (now s 125) Cr P Code (Bastardy proceedings) are in the nature of civil proceedings within the meaning of this section and in such a procee-

ding a person sought to be charged is a competent witness on his own behalf [*Takee Bibee v. Abdul Khan*, 5 C 536: 5 CLR 458; Referred to in 17 CPLR 127. See also *Nur Md v. Bismulla*, 16 C 781 and *Hira Lal v. Saheb Jan*, 18 A 107]. In *Rozario v. Ingles*, 18 B 468, 473, it has been held that proceedings under s 488 (now s 125) of the Cr P Code, being proceedings of a civil nature, a wife can be examined to prove non-access during a married life. The effect of s 118 is to make the husband a witness for all purposes and he is competent to prove non-access [*Howe v. Howe*, 38 M 466 FB: 25 MLJ 594—CONTRA: *Sweeney v. S*, 62 C 1080 *ante*]. There is nothing in the Act to prevent the spouses giving evidence of non-access [*Vira Reddy v. Kistamma*, A 1969 M 235; see further *ante*, s 112: "*Evidence of Parents to Prove Access or Non-access During Marriage &c*"]. There is no inflexible rule that if a party gives testimony, he must be disbelieved. Such a rule would nullify s 120. His testimony must be scrutinised in the same way as that of any other witness [*Jogendra v. Kurpal*, 35 CLJ 175: 49 C 345]. For the meaning of 'interested evidence' see *Binani Properties v. Gulamali*, A 1967 C 390. In a suit for specific performance of contract of sale, when the wife purchaser pleaded that she was not aware of any previous contract but the wife had not appeared as a witness, and instead her husband appeared as a witness, the husband was a competent witness to speak about the details. Under section 120 the husband is a competent witness for the wife in civil proceedings. [*K. Saroja v. Valliammal Ammal*, 1997 AIHC 1959]. Accused's wife can be compelled to give evidence for the prosecution [*Public Prosecutor v. Abdul Majid*, (1994) 3 Malayan LJ 457 (Shah Alam HC)].

[*Tay ss 1348-72; Phip 8th Ed pp 443-446, 449; Jones ss 733, 734; Wig ss 600-620; Best ss 167-69; Steph Arts 168, 108, 108-A Cr P Code, s 488; Divorce Act ss 51, 52*].

Proceedings Under the Indian Divorce Act.—In proceedings for dissolution of marriage on the ground of adultery coupled with cruelty or desertion, the parties are competent witnesses, but they cannot be examined unless they offer themselves as witnesses or verify their cases by affidavit (ss 51 and 52 of Act 4 of 1869). A co-respondent in a suit by husband for dissolution of marriage on the ground of adultery, was summoned as a witness for the petitioner and examined. The court did not intimate him that he had the option to give evidence or not. He was sworn without objection and was asked whether he had sexual intercourse with the respondent. He enquired if he was bound to answer the question and on the court's saying that he was bound, answered it in the affirmative. It was held that under the circumstances, he had not "offered" to give evidence under s 51 *ibid*, and his evidence was inadmissible. Evidence of such matters given reluctantly or under protest is not admissible, and ss 120, 132 or any other section of the Evidence Act does not affect this rule [*De Bretton v. De Bretton*, 4 A 49].

In the special circumstances of the case the evidence of all witnesses including petitioner was allowed to be taken on commission in England [*Grant v. G*, A 1937, P. 82: 167 IC 743]. In a suit by a husband for dissolution of marriage on the ground of the wife's adultery, the respondent is competent to be examined as a witness. By s 52 she may be compelled to give evidence in the cases there supposed. In other cases her evidence is admissible if she offers herself as witness [*Kelly v. K*, 3 BLR App 6]. In a husband's petition for divorce on the ground of adultery, evidence of wife admitting adultery is admissible against the co-respondent. Wife's evidence does not require corroboration [*Spring v. S*, 1947, 1 All ER 886]. As to evidence of parents to bastardise or legitimise a child, see *ante*, s 112: "*Evidence of Parents..... or Bastardy Proceedings*".

S. 121. Judges and Magistrates.—No Judge or Magistrate shall, except upon [1][the special order of some Court to which he is subordinate], be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustration

(*a*) *A*, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate; *B* cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(*b*) *A* is accused before the Court of Session of having given false evidence before *B*, a Magistrate. *B* cannot be asked what *A* said, except upon the special order of the Superior Court.

(*c*) *A* is accused before the Court of session of attempting to murder a police-officer whilst on his trial before *B*, a Sessions Judge. *B* may be examined as to what occurred.

SYNOPSIS

COMMENTARY

Principle and Scope.—This and the following sections up to s 132 deal with the privilege of certain witnesses. S 121 refers to the privilege of persons connected with the administration of justice. It is against public policy or expediency to allow disclosures of matters in which judges or magistrates have been judicially engaged [*R v. Gazard*, 1938, 8 C & P 595; *Buccleuch v. Met Md of Works*, 1872 LR 5 HL 418]. S 121 enacts that a judge or magistrate cannot be compelled to answer questions: (*1*) as to his own conduct in court as judicial officer (v *illus a*) and (*2*) as to anything which came to his knowledge in court as such judicial officer (v *illus b*), unless ordered by a superior court. The privilege does not extend to other collateral matters or incidents occurring in his presence while acting as a judicial officer (v *illus c*). "Under head (*2*) would come not only things said but also the conduct of any party or witness in so far as it is connected with the proceeding before the judge. Thus *B* in illus (*b*) could not, it is submitted, be compelled to answer questions about the demeanour of *A* during his examination, unless he were specially ordered to do so by a superior court" [Cunn p 262]. S 121 empowers an appellate court to call for a report of the trial court in matters relating to the proceedings before him as well as the statements made by the counsel for the parties [*Banke v. Mahadeo*, A 1953 A 97].

The law excludes or dispenses with some kinds of evidence *on grounds of public policy*; because it is thought that greater mischiefs would probably result from requiring or permitting their admission, than from wholly rejecting them. It has reference to either (*a*) persons, or (*b*) matters. [So far as the rule relates to the persons, provisions have been made in ss 118-20, which refer to the competency of witness]. The matters which the law says shall not be the subject of evidence in a

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1 In ceylon "Special order of a Judge of a Superior Court" substituted.

court of justice are: (*1*) communications which have passed between husband and wife during marriage (s 122); (*2*) disclosures by a legal adviser of communications which have been made by a man to such adviser (ss 126 and 129); (*3*) evidence by judges or jurymen as to matters which have taken place while they were engaged judicially (s 121): (*4*) State secrets (ss 123 and 124); and (*5*) matters of which decency forbids the disclosure (s 151) [Tay ss 908-909].

Judges, arbitrators, and counsel from motives of public policy, enjoy certain privileges as to matters in which they have been judicially or professionally engaged; though, like ordinary persons, they may be called upon to speak to any foreign and collateral matters, which happened in their presence, while the trial was pending, or after it was ended. It is considered dangerous, or at least highly inconvenient to compel judges of courts of record to state what occurred before them in court [Tay s 938]. In *R v. Gazard*, 8 C & P 595 PATTESON,J, said: "It is a new point, but I should advise the grand jury not to examine (one of their number); he is the president of a Court of Record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court".

A judge, before whom a cause is tried, must conceal any fact within his own knowledge, unless he be first sworn; and consequently if he be the sole judge, it seems that he cannot depose as a witness, though if he be sitting with others he may then be sworn and give evidence. In the last case, the proper course appears to be that the judge, who has thus become a witness, should leave the bench and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony or weighing it against that of another [Tay s 1379].

[*Ref Tay s 938; Phip 8th Ed pp 16, 183; Steph Art 121; Best ss 183-188; Hals, 3rd Ed, Vol 15 para 754*].

Arbitrators.—In England the rule also applies to arbitrators, but the protection offered to them is somewhat narrower. Arbitrators have not been mentioned in this section and there is no definition of "arbitrator" in the Act. The definition of "court" in s 3 does not include arbitrators. Arbitrators therefore do not appear to come within this section. In *Amir Begam v. Badruddin*, 23 IA 625: 36 A 336: 19 CLJ 494, 500 LORD PARMOOR said: "An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence, which he can give, is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or a partiality, is not used for a different purpose; namely, to scrutinise the decision of the arbitrator on matters within his jurisdiction, and on which his decision is final. The limitations applicable to the evidence of an arbitrator as witness in a legal proceedings to enforce his award, are stated in the case of *Buccleuch v. Met Bd of Works*, 1872, LR 5 HL 418 (*post*), but where charges of dishonesty are made, the court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established." As to the matters on which arbitrators may give evidence, see also *Falkingham v. Victorian Rys Com*, 1900 AC 452; *Recher & Co v. North Br & Merc Ins Co*, 1915 3 KB 277; *A-G for Manitoba v. Kelly*,,1922, 1 AC 268, 279].

Where disputes arising out of a commercial transaction are referred to arbitration, but on account of differences of opinion among the arbitrators the matter was referred to an umpire, there is no rule of law which prevents one of the arbitrators from being called to give evidence [*Bourgeois v. Weddell & Co*, 1924, 1 KB 539]. When a

question arises as to the amendment of a decree on account of clerical or accidental slip or omission, the arbitrator may be examined for forming the court's opinion [*Narayanan v. Devaki*, A 1945, M 230]. When arbitrator gives evidence that he has taken into consideration all the material facts and matters, he may be cross-examined as to whether that is a true statement of the facts [*Recher & Co v. North Br & Mercantile Ins Co*, 1915, 3 KB 277, 287]. Where on a motion to set aside an award it is found impossible otherwise to ascertain the material facts of the case, the court can and will accede to an application by a party for leave to call the arbitrators as witnesses in regard to these facts [*Leiserach v. Schalit*, 1934, 2 KB 353].

An arbitrator is a competent witness in any action brought to enforce his award, or in any other action in which the award or the proceedings in the reference are in question, as to any matters which passed before him. He can, therefore, be questioned as to what were the matters in difference before him, so as to show over what matters he was exercising jurisdiction, as to what claims were put forward on one side and on the other, and as to which of them were admitted and which rejected; and as to what admissions were made by the parties on the one side and on the other; and as to what evidence, whether oral or documentary, was adduced before him, and generally as to what matters were presented to him for his considertion; all which matters, it will be observed, might equally be deposed to by any other witness who was present at the proceedings, and would appear upon the short-hand writer's note, if any..... But the arbitrator cannot be questioned as to what passed in his own mind when exercising his discretionary powers as to the matters submitted to him; nor as to the grounds of his award. The arbitrator may properly be asked as to the course which the argument before him took—what claims were made and what claims admitted. But there the right to ask questions of the arbitrator ceases. The award is a document which must speak for itself, and the evidence of the arbitrator is not admissible to explain or to aid, much less to attempt to contradict what is to be found upon the face of that written instrument [*Buccleuch v. Met Bd of Works, sup*; Tay s 938]. He may not be asked the grounds of his award, or what items (provided they are within the scope of reference) it included, or how a general sum was apportioned, or what were his intentions when giving it; for the award speaks for itself, and any evidence to explain, add to, or contradict it is inadmissible [*Buccleuch v. Met Bd of Works, sup*; *Re Whiteley*, 1891, 1 Ch 558; *O'Rourke v. Commrs*, 15 App Cas 371; Phip 11th p 568].

The arbitrator cannot be summoned merely to show how he arrived at the conclusions. If a party has a case of *mala fides* and makes out *prima facie* that the charge is not frivolous or has other reasonably relevant matters to be brought out the court may summon the arbitrator [*Union v. Orient Eng &c*, A 1977 SC 2445 (*Khublal v. Bishambhar*, A 1925 A 103 **apprd**)].

Jurors.—A juryman is under s 118 competent to depose as a witness if he be personally acquainted with any facts material to the case (see *ante*). But, is the evidence of a juryman or a person to whom admissions were made by him as to grounds of the verdict or the manner in which it has arrived at, admissible? In a case it has been held, following the English rule, that the sworn statements of jurors, and evidence of admission by them, as to the mode in which their verdict had been arrived at, are inadmissible. But the evidence of other persons as to the same is receivable. Here the allegation was that the verdict had been decided by casting lots [*R v. Harkumar*, 40 C 693]. An examination of jurors after verdict for the purpose of ascertaining the grounds of the verdict is not permissible under s 303 Cr P Code [*R v. Derajtulla*, 34 CWN 283; *R v. Kondiba*, 28 B 412; *R v. Karim Dai*, 35 CWN 407; *R v. Jagmohan*, A 1947 A 99, 103].

A person who is appointed an assessor under s 19 Land Acquisition Act, 1870, is incompetent to testify as a witness in the same proceedings [*Swamirao v. Coll of Dharwar*, 17 B 299. See also *Kashinath v. Coll of Poona*, 8 B 553].

No Judge or Magistrate shall be Compelled to Answer Any Question.—Judges of whatever court are competent to give evidence. As to compellability, the preponderance of authority indicates that while judges of the superior courts cannot be compelled to give evidence, the judges of the inferior courts can be compelled to do so (see *Phipson on Evidence* (14th edn. 1990) para 19-12, Cross and *Taper on Evidence* (5th edn. 1979) p. 530 and 17 *Halsbury's Laws* (4th edn) para 236). The textbook writers comments are not however unqualified. Thus, *Phipson* pp. 475-476 says there—

> 'is no objection to the judge of an interior court being called *in some circumstances, although it would seem highly undesirable to call such a witness unless there was absolutely no other means of proving some piece of evidence vital to the proceedings*'.

The earlier authorities on which the learning is based are far from impressive being founded neither on principle or precedent and consist of little more than of the cuff judicial reactions to particular situations (see as examples, *R v. Harvey*, (1858) 8 Cox CC 99 and the comment of BYLES J at Cornwall Assizes, which contains the only clear statement of what is said to be the position, and *R. v. Morgan*, (1852) 6 Cox CC 107). In the more recent case of *McKinley v. McKinley*, (1960) 1 All ER 476: (1960) 1 WLR 120 there is a detailed survey of what authority there is and Wrangham J applies the general approach to a magistrate's clerk.

The precedents of any judge actually being called to give evidence are very thin indeed. the most impressive authority is *Duke of Buccleuch v. Metropolitan Board of Works*, (1872) LR 5 HL 418 : [1861-73] All ER Rep 654. That case decided that arbitrators are compellable but should not be questioned as to their reasons for their award. In giving the answers of the judges to the questions posed. Cleasby B made this general statement.

> 'With respect to those who fill the office of judge it has been felt that there are grave objections to their conduct being made the subject of cross examination and comment (to which hardly any limit could be put) in relation to proceedings before them, and, as everything which they can properly prove can be proved by others, the Courts of law discountenance and I think I may say prevent them being examined. (See LR 5 HL 418 at 433: (1861-73) All ER Rep 654 at 657).

It will be observed the statement makes it distinction between different classes of judge.

Although there is a clear constitutional distinction between High Court and other judges and the High Court and other courts, it does not follow that this provides a reason for distinguishing between judges so far as compellability to give evidence is concerned. If there was such a distinction in the past between judges of superior and other courts as to the compellability to give evidence which is by no means clearly established then it was difficult to understand the principle on which it was then based and even more difficult to justify it today. [*Warren v. Warren*, (1996) 4 All ER 664 CA].

The exception to the principle of compellability only applies to the judge being required to give evidence of those matters of which he became aware relating to and as a result of his performance of his judicial functions. If therefore, to take the example considered in argument a murder is committed in the face of the court the

judge could be compelled to give evidence as to the murder, since although he would have observed the murder when acting as a judge, the murder did not relate to his functions as a judge. The position is no different from that which would apply if the murder had taken place in the presence of the judge outside the court. It would be a collateral incident (see *Duke of Buccleuch v. Metropolitan Board of Works*, (1872) LR 5 HL 418 at 433, [1861-73] All ER Rep 654 at 657 and Phipson para 19-12), the judge will remain competent to give evidence, and if a situation arises where his evidence is vital, the judge should be able to be relied on not to allow the fact that he cannot be compelled to give evidence to stand in the way of his doing so. [*Warren v. Warren*, (1996) 4 All ER 664 CA].

The privilege given by this section is the privilege of the witness, *ie*, the judge or magistrate of whom the question is asked. If he waives such privilege or does not object to answer the question, it does not lie in the mouth of any other person to assert the privilege. A sessions judge while trying a case, cannot compel a committing magistrate to answer questions as to his own conduct in court as such magistrate, except under the special orders of the court to which he is subordinate [*per* SPANKIE, J, in *R v. Chidda Khan*, 3 A 573, *D J Vaghela v. Kantibhai Jethabhai*, 1985 Cri LJ 974, 977 (Guj)]. A judge may waive the privilege and testify to the facts which transpired before him at a former trial [*Schumeri & Warfield v. Security Brewing Co*, 199 Fed 358]. While their notes are not evidence, such notes may be used to refresh their memory [*Huff v. Bennett*, 4 Sand (NY) 120]. For very obvious reasons, judges are not compelled to state the reasons for their decisions nor to give evidence as to that which transpires in the consulting room [Wharton Ev s 600; Jones, s 764]. For the meaning of the term "shall be compelled" in this section and in s 132 see *R v. Gopal Doss*, 3 M 271, 276: 2 Weir 781 and other cases noted under s 132 under "*Proviso: Meaning of the Words Compelled to Give &c*", *post*.

Judge as Witness in a Case Tried by Himself.—This section does not refer to the case of a judge giving his evidence in a matter being tried before him. Nor is there any section applicable to judges like s [2]294 Cr P Code which refers to the case of jurors. It was held in a case that a person having to exercise judicial functions may give evidence in a case pending before him, where such evidence can and must be submitted to the independent judgment of other persons, exercising similar judicial functions sitting with him at the same time. A sessions judge is a competent witness and the giving of evidence by him does not preclude him from dealing judicially with the evidence of which his own forms a part [*R v. Mukta Singh*, 13 WR Cr 60: 4 BLR Cr 15]. But it is "most undesirable that a judge should be examined as a witness in a case which he himself is trying, if such a contingency possibly be avoided" [*per* MACPHERSON, J, in *R v. Bholanath*, 2 C 23, 26 (of five trying magistrates, two were examined for prosecution)].

In another case it was held that a magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact. MARKBY, J, after reviewing *R v. Mukta Singh, sup* observed: "In the absence, therefore, of any authority for the proposition that a sole judge of law and fact may give evidence, and then decide a case in which he has been witness, I refuse to give any countenance to what appears to me to be a most objectionable proceeding. Every one admits that it is highly objectionable for a judge to give evidence even when there are other judges besides himself. For my own part, I consider these objections so formidable that I would gladly see the practice of

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2. S 294 omitted in Act 2 of 1974.

calling a judge as a wintess abolished in all cases, but these objections are greatly increased when the judge who testifies is a sole judge. The case is entirely in his hands. He has no one to restrain, correct or check him. If he gives evidence on any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross-examination, or contradict it by other testimony. I need say nothing of the indecency of such a proceeding—no one dare venture to defend it. The judge would, therefore, give his evidence without the usual safeguard against false testimony, a position which has been over and over repudiated. I am, therefore, of opinion that a judge who is a sole judge of law and fact cannot give his own evidence and then proceed to a decision of the case in which that evidence is given" [*R v. Donnelly*, 2 C 405, 414]. A single presiding judge, magistrate or referee cannot properly be a witness in a cause pending before him [*Dubney v. Mitchell*, 66 Ala 465 (Am); Jones s 764; see also *Ross v. Buhler*, 1824, 2 Marr NS 312]; but if he be sitting with others, he may then be sworn and give evidence [*Trial of the Regicides*, 1660 Kel 12]. In this last case, the proper course appears to be that the judge, who has thus become a witness, should take no further judicial part in the trial [*ibid*; Tay s 1379].

If the judge has any interest in the subject-matter of the case or takes any part in promoting the prosecution, he is disqualified from trying it [*R v. Bholanath*, 2 C 23; *R v. Pherozsha*, 18 B 442; *Wood v. Corpn of Calcutta*, 7 C 322: 9 CLR 193: *Aloo Nathoo v. Gagubha*, 19 B 608; *Laburi Domini v. Assam Rly Co*, 10 C 915, 917—*per* FIELD, J; see also *R v. Nadi Chand*, 24 WR Cr 1: *In re Huro Ch*, 20 WR Cr 76; *R v. Kashinath*, 8 BHCR 126]. See s 479 Cr P Code, 1973.

As to the duty of the judge to state to the accused the facts he himself observed, and the right of the accused to cross-examine him thereon, see *In re Hurro Ch*, 20 WR Cr 76. A judge cannot without giving evidence as a witness import his own knowledge into a case [*Kishore v. Ganesh*, 9 WR 252; *Rousseau v. Pinto*, 7 WR 190; *Kallonassa v. Ganga*, 25 WR 121; *Soorj Kant v. Khodee*, 22 WR 9; *R v. Donnelly*, 2 C 405; *Girish Ch v. R*, 20 C 857; *Haro Pd v. Sheo Dayal*, 3 IA 259, 286: 26 WR 55; *R v. Anderson*, 1680 How St 874]. It is not proper for a magistrate, in disposing of a case, to rely on statements made to him out of court [*R v. Sahadev*, 14 B 572 and *Sri Balusu v. Sri Balusu*, 22 M 427; see 16 IC 859]. A judge is not justified in acting chiefly on his own knowledge and belief and on public rumour [*Meethun Bibee v. Busheer Khan*, 11 MIA 213, 221]. A judge should not import personal knowledge of the state of the district or of the character of the accused into a case [*Satrughan v. R*, 50 IC 357. As to personal knowledge of judge, see *ante* s 57 and s 167 *post*].

In a case in which a deputy-magistrate took an active part in the capture of persons charged with having been members of an unlawful assembly and where he tried them on that charge, PHEAR J, said: "The prisoner who is being tried in this situation, has a right, if he thinks it desirable to cross-examine the judge who, under these circumstances and to this extent must be viewed as a witness, and his evidence be recorded. It is quite erroneous, in our opinion, to suppose on the contrary, as the deputy-magistrate appears to have supposed that he was bound to keep out of sight altogether the part which he has played in the matter, and to pretend (we cannot use any word other than that) that he knew nothing about the facts excepting so much as the witnesses told him in court..... The awkwardness of a criminal judge being the principal witness in the case which he had to try is no doubt, most apparent; this however, is reason for his declining to try the case, not for his endeavouring to assume an unreal character" [*In re Hurro Ch*, 20 WR Cr 76].

A magistrate who instituted proceeding under s 110 Cr P Code, and proceeded in some measure on his own knowledge of the character of the accused is not the proper person to proceed with the trial [*Alimuddin v. R*, 29 C 392: 6 CWN 595; referred to in 27 PR Cr 1904: 21 PLR 1904]. Where a magistrate took part in the dispersion of an unlawful assembly and had otherwise taken step to collect evidence against the accused person, he was not competent to try the accused and convict them [*Girish Ch v. R*, 20 C 857; **followed** in *Sudhama v. R*, 23 C 238; referred to in *R v. Chenchi Reddi*, 24 M 238; *R v. Fatick*, 1 BLR Cr 13. See also *R v. Manikam*, 19 M 263: 6 MLJ 143. See however *Anand Ch v. Basu Mudh*, 24 C 167 and 10 CWN 441]. A magistrate holding a local investigation and obtaining information from various sources, as regards the commission of an offence, is incompetent to try the case [*Hari Kishore v. Abdul Baki*, 21 C 920, referred to in *In re Lalji*, 19 A 302 and in 27 A 33: 1904 AWN 157]. The principle is that the same person should not be prosecutor and judge [*R v. Nadi Chand*, 24 WR Cr 1; *R v. Gangadhar*, 3 C 622; *R v. Deoki*, 2 A 806]. Where a magistrate took part in the police investigation and in all probability came to know of some facts in connection with the case, it was expedient that the case should be tried by some other magistrate [*Gaya Singh v. Md Solimun*, 5 CWN 864]. A district magistrate who has taken an active part in the initiation of the prosecution, has no jurisdiction to hear the appeal [*In re Het Lal*, 21 Wr Cr 75].

S. 122. Communications during marriage.—No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other[1].

SYNOPSIS

COMMENTARY

Principle and Scope.—It has been seen that husbands and wives are competent witnesses in all civil proceedings; and in criminal proceedings against an accused, his or her wife or husband is a competent witness, whether for or against (*ante* s 120). S 120 deals with competence or admissibility. But s 122 affects *compellability*, and

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1. In Ceylon "and except in cases mentioned in section 120(2)" added at the end of the section.

contains a rule of privilege protecting the disclosure of all communications, between persons married to one another, made during marriage, except in certain cases, *ie* in litigation between themselves. The provisions of the section may be summarised thus:—

(*1*) The privilege extends to all communications made to a person *during marriage*, by any person to whom he or she has been married, but not to communications *before* marriage.

(*2*) The communication need not be confidential. The rule applies to communications of *every nature*.

(*3*) The rule of privilege applies equally whether or not the witness on his or her spouse is a party to the proceeding. It extends to *all* cases, *ie* to cases between strangers as well as to suits or proceedings in which the husband or wife is a party.

(*4*) The privilege extends to communications made to a spouse and not to those made by a spouse. But the privilege is conferred not on the witness (unless the witness happens to be the spouse who made the communication), but on the spouse who *made the communication*; the witness cannot therefore waive it at his or her will, nor can the court *permit* disclosure even if he or she is willing to do it [*Nawab Howladar v. R*, 40 C 891, 804 *post*]. It is only the spouse who made the communication or his or her representative in interest who can consent to give up the privilege.

> [RANKIN says that "this latter form of privilege (*ie* except in litigation between themselves) appears to extend considerably the English rule [Evidence Amendment Act, 1853 (16 & 17 Vic c 83 s 3) and Criminal Evidence Act, 1898 (61 & 62 Vic c 36 s 1 (d)] and it is capable of creating problems which English law has not presented. On a joint trial of man and wife it might be important to the wife's defence that she should give in evidence some communication to her made by her husband and it might not be to the husband's interest to consent" (Background to Indian Law, p 132)].

(*5*) Wigmore observes that in cases of "disclosures voluntarily made to a third person by one spouse, relating a confidential marital communication of the other, the privilege still applies, for it belongs to the original communicating one" (s 2339; **folld** in *Ponnen v. Verghese*, A 1967 K 228)]. The Supreme Court, however, reversing the Kerala High Court, has held that this section only prevents disclosure in giving evidence by *the other spouse in court* of the communication made. It does not mean that no other evidence which is not barred under this section or other provisions of the Act are barred [A 1970 SC 1876; *Rumping v. DPP, inf*, **Approved**].

(*6*) The prohibition continues after the death of one of the parties to the marriage or divorce [*Nawab Howladar v. R, post*]. The obligation is to continue beyond the subsistence of the marriage. The fact that a motion for divorce or for declaration of nullity of marriage has been made does not stop the obligation from continuing. The admissibility in evidence of the communication will be adjudged in the light of the status at that date [*Verghese v. Ponnen*, A 1970 SC 1876]. It has been held in England that as the privilege in the English section (s 3 of the Evidence Am Act 1853) in terms relates only to husbands and wives, it does not exist after the marriage has come to an end [*Shenton v. Tyler, post*]. The words "husband" and "wife" which are used in the English section (see below) do not appear in s 122. Moreover when the section was framed the intention was to codify the then prevailing law in England which had been construed [see *Monroe v. Twistleton*; *O'Conner v. Marjoribanks*; *Doker v. Hasler, post*] to apply to widows, widowers or divorced persons. Further, it is probable that the words "husband" and "wife" were excluded from the Indian sec-

tion with a view to make it clear that the privilege continues after the death of one of the parties or divorce. The use of the words "representatives in interest" points to the same conclusion.

The latter part of the section states the *Exceptions* to the rule of privilege: *viz* (*a*) in suits between married persons (*ie* husband and wife), *ie* divorce proceedings or other cases, or (*b*) proceedings in which one of them is prosecuted for any crime against the other. In these cases there is no privilege.

In Ceylon if in a criminal proceedings against any person the husband or wife of such person is called by the accused as a witness, communication between them shall cease to be privileged [v s 120(*2*)].

Reason of the Rule.—This enactment rests on the obvious ground, that admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence, which is the most endearing solace of married life [Tay s 909]. The reasons assigned for this privilege, *viz* "to preserve the peace of families" [HARDWICKE LCJ, in *Barker v. Dixie*, Lee Cast Hardwicke, 264]: "Contrary to the legal policy of marriage" [BULLER J, Trials at NP 286] &c have been subjected to a searching criticism by Wigmore who considers them all "void of force" and characterises them as "merely appeals to a fiction, which cannot serve as a legislative reason". "The significance of the argument is that if Doe has committed a wrong against Roe, and Doe's wife' testimony is needed for proving that wrong, Doe the very wrong-doer is to be licensed to withhold it and thus to secure immunity from giving redress, because, forsooth Doe's own marital peace will be thereby endangered—a curious piece of folly, by which the wrong-doer's own interests are consulted in determining whether justice shall have its course against him" [Wig s 2228]. "There is a *natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life-partner" and this, says Wigmore, seems "to constitute the real and sole strength of the opposition to abolishing the privilege"..... "The law does not proceed by sentiment, but aims at justice. When a party appears in a court of justice, charged with wrong or crime, the unavoidable and solemn business of the court and the law is to find out whether he has been guilty of the wrong or the crime; the State and the complainant have a right to the truth; and this high and solemn duty of doing justice and establishing the truth is not to be obstructed by considerations of sentiment, in this respect any more than in others" [Wig s 2228].

English and Indian Law.—In civil cases in England the privilege was contained in s 3 of the Evidence Am Act, 1853 (16 & 17 Vic c 83) which provided that: "No husband shall be compellable to disclose any communication made to him by his wife during the marriage and no wife shall be compellable to disclose any communication made to her by her husband during the marriage". In Taylor (s 910), Halsbury (Hailsham Ed Vol 13 p 728 and note) and other English books it was assumed that the privilege also existed at common law before the Act of 1853, and that (relying upon *O'Connor v. Marjoribank; Doker v. Hasler, post* and *Monroe v. Twistleton*, 1802 Peake Add Cas 219, 221) it applied even after the marriage is severed by death or divorce. After an exhaustive survey of the nature and extent of the privilege, it was held that the old common law rule that communication between husband and wife were not admissible in evidence concerned solely with the *competency* (*ie* admissibility) and not *compellability* (*ie* privilege) and that the privilege is the creation of the statute of 1853. At common law there never was a separate principle or rule that

communications between a husband and wife are inadmissible in evidence on grounds of public policy; accordingly, unless the spouse is a witness and claims privilege communications between husband and wife are admissible [see *Shenton v. Tyler, inf*; *Rumping v. DPP*, 1962, 2 All ER 256 HL]. It was further held that the privilege does not continue after the marriage has come to an end, *ie* it does not apply to widow, widowers or divorced persons [*Shenton v. Tyler*, 1939, 1 All ER 827 : 160 LT 315]. The privilege has now been completely abolished in civil cases by the Civil Evidence Act 1968 [s 16(3)]. Some further changes hav been made by the police and Criminal Evidence Act, 1984 under which it has been held that a former wife is competent to give evidence against her *ex*-husband of events that occurred during their marriage and before the above Act cam into force. The words "any proceedings" were taken to mean any proceedings that took place after the section came into effect, even if the events were anterior to that date. [*R. v. Crutlenden*, (1991)2 WLR 921 CA; *R v. Mathias*, 1989 Crim LR 64 Southwalk Crown Ct].

Even apart from this the wife has always been regarded as a competent witness though not compellable and, therefore, she can of the own volunteer to give evidence in which case she will be treated as an ordinary witness and cannot refuse to answer questions on the ground of her non-compellability. She can be treated as a hostile witness if she does not co-operate with the prosecution. But she is entitled to exercise her choice of not testifying right up to the time of entering the witness-box. Her right of refusal is not lost only on the ground that she has previously made a written statement or given evidence at the husband's committal proceedings. [*R v. Pitt*, (1982) 3 All ER 63 CA **following** *Leach v. R*, 1912 AC 305 and *Hoskyn v. Commr of Police*, (1978) 2 All ER 136] where it was held that she is not compellable even on a charge of violence against her by her husband.

In criminal cases in England the privilege to the extent determined by the House of Lords in *Rumping v. DPP, sup* is preserved by the Criminal Evidence Act 1898 s 1(*d*), the provisions of which are similar to this section [*Verghese v. Ponnen*, A 1970 SC 1876].

The main points of difference between the English and Indian laws in criminal cases are : (*1*) In England the privilege does not apply to widows, widowers or divorced persons as in India. (2) There the privilege is conferred upon the witness alone, with the result that the other spouse has no right to object to the disclosure of the communications [*Rumping v. DDP, sup*]. Here it is the privilege of the spouse who made the communcation and there can be no disclosure unless he or she, or his or her representative in interest gives consent (*ante*).

In civil cases in England there is no privilege [s 16(*3*) Civil Evidence Act 1968]. But here the position is the same as in criminal cases.

In England a husband or wife is now compellable to give evidence of marital intercourse [s 43(*1*) Matrimonial Causes Act 1965 as repealed by s 16(*4*) Civil Evidence Act 1968].

It should be mentioned that in view of the statutes concerned the English precedents are often not of much assistance (see *Ponnen v. Verghese*, A 1967 K 228].

Nature and Extent of Privilege.—The prohibition enacted by the section rests on no technicality that can be waived at will, but is founded on a principle of high import which no court is entitled to relax [*per* JENKINS CJ, in *Nawab Howladar v. R*, 40 C 891, 894]. The rule applies whether the witness is a party to the action or a stranger and it extends to all communications "during marriage" of whatever nature whether strictly confidential or not [*O'Connor v. Marjoribanks*, 4 M & G 435; *Doker*

v. Hasler, Ry & M 198]. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. It is however, limited to such matters as have been communicated "*during the marriage*"; and consequenlty, if a man were to make the most confidential statement to a woman *before* he married her, and it were afterwards to become of importance in a civil suit to know what that statement was, the wife, on being called as a witness, and interrogated with respect to the communcation, would, as it seems be bound to disclose what she knew of the matter [Tay s 909A]. The protection would not extend to facts coming to knowledge during the marriage, but from extraneous sources [*O'Connor v. Marjoribanks, sup*; see *English v. Cropper*, 8 Bush 292; *Com v. Saph*, 1890, 21 Am St R 205: 90 Ky 580, 585]. The privilege applies to those only who profess to maintain towards each other the legal relation of husband and wife. There is no privilege to withhold the testimony of a mere paramour or mistress or of persons whose marriage is void [Wig s 2230].

It has been held that the section protects the individuals, *ie* the husband or wife from giving evidence and not the communication if it can be proved without putting into the witness-box for that purpose the husband or the wife to whom the communication was made [see *Verghese v. Ponnen*, A 1970 SC 1876]. Consequently a document, even though it contains a communication from a husband to a wife or *vice versa*, in the hands of third persons, is admissible in evidence; for in producing it, there is no compulsion on or permission to the wife or husband to disclose any communication. On a trial for the offence of breach of trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent by the accused to his wife at Pondicherry and had been found on a search of her house made there by the police—*Held* that the letter was admissible in evidence against the accused [*R v. Donaghue*, 22 M 1, 3]. In *R v. Pamenter*, 1872, 12 Cox 177, KELLY CB, rejected a letter from the prisoner to his wife entrusted to but opened by a constable [Phip 11th Ed p 248]; and in *Scott v. Com*, 42 Am St Rep 3371, a similar letter though voluntarily surrendered by the wife was excluded. In a recent case the appellant, the mate of a ship, made over on the day of the murder to a member of the crew, a sealed envelope addressed to his wife asking him to post it outside an English port. The appellant was later arrested. The seaman handed over the letter to the Captain of the ship who opened it at the request of the police. The letter was tantamount to a confession of murder by the appellant. *Held* that the letter was admissible in evidence. Unless the spouse is a witness and claims privilege communications between spouses is admissible in criminal proceedings *ie* a witness other than the spouse can give such evidence [*Rumping v. DPP*, (1962) 3 All ER 256 ER 256 HL; *R v. Pamenter; sup* was disapproved of].

It is worth referring to the powerful dissenting judgment of VISCOUNT RADCLIFFE in *Rumping's* case. He thought that the aim of the legal policy of marriage in relation to the law of evidence was the general one "to ensure conjugal confidence" and it rested on a much wider principle than that of excluding witnesses on the ground of interest in the subject-matter of the suit. "The court's concern was that no marriage relation, while it subsisted should be infected by the fear or suspicion that things said only by the reason of the special confidence might later become the material of legal evidence affecting the speaker". In *Duchess of Argyll v. Duke of A*, [1965] 1 All ER 612 it was held approving VISCOUNT RADCLIFFE'S view that the policy of the law favoured the view that confidential communications between husband and wife during coverture were within the scope of the court's protection against breach of confidence. In *Rumping's* case the House of Lords directed their observations only to the admissibility of such evidence in legal proceedings, and not to the different

question as to whether otherwise than for the purpose of such evidence communications were subject to the protection of the law. Accordingly when the plaintiff asked for an injunction to restrain the publication of such material it was granted. These it is suggested give the more sensible view that it is the communication itself which should be protected.

—Overheard Statements.—The privilege extend to all communications between husband and wife while they are alone or in the presence of children of tender years and also to communications which have been overheard by others. But under the English and American rule third persons are allowed to give evidence of communications between married persons made in their presence or overheard by them [*R v. Smithies*, 5 C & P 332; *R v. Simmons*, 6 C & P 540; *State Bank v. Hutchinson*, 62 Kan 9 (Am)]. Markby says that the protection is greater than that conferred by the English law, because in India the witness is not permitted to disclose the communication, so that the person making it, as well as the witness to whom it is made, is protected. In England the witness only is protected, at least so it appears from Steph Dig Act 110 [Markby p 93]. The law does not however appear to be otherwise in India and there is no reason why communications made in the presence or overheard by third persons should be protected from disclosure by those persons.

[*Ref Tay ss 909-909A; Steph Art 110; Best ss 180, 586; Ros N P 164, 169; Phip 11th Ed para 608; Wig ss 2227-31, 2332-41; Hals 3rd Ed Vol 15 para 758; Vol 10 para 877; Jones ss 735-41*].

"Any Communication".—The section speaks of '*any communication*' and so the privilege extends to all communication of whatever nature passing between married persons and is not confined to communication of a confidential character [see *R v. Ram Ch*, A 1933 B 153]. Wigmore is of opinion that "the essence of the privilege is to protect confidences only and if the communication is not intended to be a secret one, the privilege has no application to it. It would seem proper to hold that *all* marital communications are by implication confidential, and the contrary intention must be made to appear to the circumstances of a given instance" [Wig s 2336]. In England the privilege extends to communications of every nature [*O'Connor v. Marjoribanks, ante*] and in some jurisdictions in America it applies only to confidential communication [Wig s 2336; Jones s 735]. The words "any communication" are wide enough to embrace communications of every nature including ordinary conversations relating to business affairs which are not of a private or confidential character.

As a general rule, the privilege includes letters from one spouse to another [*Apkins v. Com*, 148 Ky 662]. But threatening letters by a husband to his wife while they are living apart in contemplation for a suit for divorce are not confidential communications [*McNamara v. M*, 99 Neb 9]. And to commit the communication to a third person to be transmitted to the wife, whether orally or in writing, destroys the element of confidence, nor is it a communication made by the husband to the wife [*S v. Young*, (NJ), 117 Atl 713]. Nor does the privilege accorded to communication between husband and wife extend to letters written by the wife's attorney by her authorisation, to the husband [*In re Sherin*, 28 SD 420; Jones s 735].

Protection Applies to "Communications" But Not "Acts".—The protection extends only to *communications, ie* utterances, *not acts*. The confidence, it may be argued, which the husband or wife desires, and the freedom from apprehension which the privilege is designed to secure, must be supposed to be equally desirable for conduct as for utterances. For example, a husband intending a secret journey must be equally desirous to prevent the disclosure of his preparations of accoutrement as

of his communications of plan. To be obliged, under pain of disclosure by legal process, to remain dumb as to his destination is no more incongruous with marital confidence than to be obliged to conceal his valise and his railroad-ticket and his travelling garb from wife's inspection. Must not the confidence be as desirable for the latter as for former?..... The difficulty with this argument is that it proves too much..... It follows, therefore, on the one hand that the privilege does not apply to domestic conduct as such. On the other hand, it is equally true that *any particular act or conduct may in fact become the subject of a special confidence* in the wife alone, *ie* may become a communication to her. For example, the husband bringing home a package of valuables, and calling his wife's attention. "Note that I place this in the fourth desk-drawer," in effect communicates to her not only the words but also the act of placing the package. While his domestic acts are ordinarily not to be treated as communications, nevertheless it is always conceivable that they may by special circumstances be made part of a communication. To formulate a precise test would perhaps be impracticable. It is clear, however, that the mere doing of an act by the husband in the wife's presence is not a communication of it by him; for it is done for the sake of doing, not for the sake of the disclosure. There must be something in the way of an invitation of the wife's presence or attention with the object of bringing the act directly to her knowledge [Wig s 2337].

The communication between a husband and his wife is not protected if it can be proved without their assistance. The section protects the individuals and not the communications of it—case law ref [*Appu v. S*, A 1971 M 194]. It can be proved by other evidence [*A Manibhushana v. Alapati*, A 1981 AP 58 (*Verghese v. Ponnen*, A 1970 SC 1876 **folld**)].

Statement of the wife that she saw the accused (her husband) on the early hours of 27-5-1952 (day of murder) while it was still dark coming down the roof of his house, that he went to the *bhusa kothri* and came out again and had a bath becoming naked and wore on the same dhoti, is not inadmissible as it has reference to his acts and conduct and not to any communication made to the wife [*Ram Bharosey v. S*, A 1954 SC 704: 1954 Cri LJ 1755]. The marital confidence and mutuality between the husband and wife end on the passing of the divorce decree. Any communication exchanged between them after that date could not be treated as protected by sec. 122 [*S J Choudhury v. State*, 1985 Cri LJ 622, 625; (1984) 2 Crimes 487 (Del)].

Privilege Can Be Waived Only By the Spouse Who Made the Communication, or his or her Representative in Interest.—Communication between persons married to one another cannot be disclosed except with the consent of the spouse who made the communication or his or her "representative in interest". The other spouse cannot waive it at his or her will. The prohibition also applies where one of the parties is dead or where there has been divorce. It has been held that where there is no "representative in interest" who can consent to the disclosure of communications made by a deceased husband to his wife during marriage, the wife cannot waive the privilege and disclose such communications, nor can the court allow disclosure even if she be willing. The widow of a dead person is not his "representative in interest" for the purpose of giving such consent [*Nawab Howladar v. R*, 40 C 891, 894: 23 IC 511].

Consent Must Be Express.—Before admitting evidence under s 122, the party against whom it is to be given must be asked by the court whether he or she would consent to the evidence being given. The consent must be expresss [*Bishan v. R*, 27 PR Cr 1913: 244 PLR 1913: 19 IC 1004]. Consent cannot be implied. It is incumbent upon the court to ask whether he or she would consent to the evidence being given. It makes no difference that no objection was raised at the trial [*Nga Tin v. R*, A 1937 R 347].

Admissibility of Communications Between Married Persons.—On a charge of killing her daughter, no statement of an incriminating nature made by an accused to her husband is admissible under this section [*Jhasanan v. R*, 81 IC 271: A 1923 L 40]. Statement by the accused to his wife that he would give her some jewels and that he had gone to the deceased's place to get them are inadmissible [*Ram Bharosey v. S, sup*]. A wife's confession of murdering her step-son to her husband is inadmissible under s 122. An offence 'against' a person in this section does not include an offence against a son though grief may be caused by it to the father [*Fatima v. R*, 10 PR Cr 1914: 25 IC 525: 216 PLR 1914]. It is not legal to admit the evidence of the wife of the accused as to certain communications between her and her husband [*Jowla v. R*, 34 PR Cr 1914: 27 IC 661: 226 PLR 1915; *Najab v. R*, A 1937 Pesh 71].

Where the accused when brought to his room by the police talked to his wife who went away and returned with a pistol, the wife cannot be compelled to disclose what she was told by the husband in her conversation with him [*Narendra v. S*, A 1951 C 140: 87 CLJ 58]. Statements alleged to have been made to his wife by the accused in respect of the offence with which he is charged are inadmissible without the consent of the accused or his representative in interest [*Milkhi v. R*, 19 IC 705: 218 PLR 1913]. Statements made by husband or wife at interview with probation officer are privileged. If husband or wife gave evidence as to them, the privilege is waived [*McTaggart v. M*, 1949 P 94 CA: 1948 2 All ER 754]. Communications betwen a marriage guidance counsellor and a spouse are privileged but the privilege attaches not to the marriage guidance counsellor but to the spouse [*Pais v. Pais*, 1970, 3 All ER 491].

Section 122 bars acceptance of communication made during marriage. The first part of the section speaks of a bar against compulsion of a wife or a husband to speak against the husband or the wife on communication made during marriage, except in a litigation between themselves. The second part of the section is very important as far as this case is concerned. It enunciates that no such husband or wife shall be permitted to disclose the communications received from the other spouse during marriage unless consented by him or her. Though under section 120, in a criminal proceeding the wife would be a competent witness against the husband but this alone may not save the situation for the prosecution and when the husband had never consented to disclosure of the communication alleged made by him to his wife, the court should not permit the wife to disclose the communication she received from her husband, such communications under the law may be of any nature and need not necessarily be confessions. Section 122 in terms is absolute. [*Fateh Singh v. State*, 1995 CrLJ 88, 89 All (HC)]. The communications between husband and wife cannot be permitted to be disclosed unless the spouse other than the one in witness-box has consented to such disclosure. [*Nagraj v. State of Karnataka*, 1996 CrLJ 2901, 2907 (Kar)]. Section 122 is not applicable to a mistress. [*Shankar v. State of T.N.*, 1994 CrLJ 3071, 3092 TN (HC)].

In an appeal from Jamaica in which both husband and wife were jointly tried for murder, objection was made to the admissibility of a statement by the wife implicating the husband which led to the discovery of some articles. The Judicial Committee in interpreting s 102 of the Evidence Ordinance 3 of 1901 (which is the same as s 122 Evidence Act) observed:—"A statement made outside the witness-box is obviously inadmissible against any one except the person making it, but the section cannot be intended to prevent the police or indeed any third person outside a court of law listening to the statement of a wife suspected of a crime or the wife from excusing herself or explaining the circumstances, even though the expla-

nation or excuse may implicate the husband. The section is dealing with evidence given in the witness-box, and means that marital disclosures cannot there be given in evidence against the accused. The statement under consideration was neither given in evidence nor disclosed as evidence against the husband. It was admissible for and against the wife, and was rightly used as evidence in her case. The appellant had no cause of complaint under the sections. The statement was not put in against him" [*Youth v. R*, A 1945 PC 140: 1945 ALJ 269]. It has been however, pointed out that the Judicial Committee did exclude the statement although the wife was not called as a witness and the case "is therefore clear authority for the position that a wife's disclosure out of court of what her husband told her cannot be proved in court against the husband" [*Ponnen v. Verghese*, A 1967 K 228, 232]. The Supreme Court however, reversing the Kerala High Court, has taken the same view [*Verghese v. Ponnen*, A 1970 SC 1876].

Communication made by an arbitrator to his wife shortly before his death admitting that he has accepted bribe from one party can be allowed to be given in evidence only if the requirements of s 122 have been fulfilled [*Kalikobad v. Khambatta*, A 1930 L 280: 11 L 342]. Communications between a marriage guidance counsellor and a spouse in the course of a counsellor's endeavour to effect a reconciliation of matrimonial difficulties are privileged, the privilege however attaches not to the marriage guidance counsellor but to spouse [*Pais v. P*, 1970, 3 All ER 491].

"Except in Suits Between Married Persons, or Proceedings..... for any Crime Against the Other".—The prohibition does not exist in any suit between married persons, *eg* under s 52 Divorce Act (see s 120 *ante*) and other litigations between them. It does not also apply in proceeding in which one married person is prosecuted for any crime against the other, *viz* offences against person, assault, bodily injury, wrongful confinement &c or any other form of offence *eg* theft &c by one of the spouse against the other. There may be also other forms of crime, but the gist of this exception is that it must be the crime committed by one married person against the other. The question whether an unlicensed pistol was in the possession of husband or wife does not involve any crime by one against the other and so the exception does not apply and neither of them can be compelled to disclose any communication between them on the subject [*Narendra v. S, sup*].

In England under s 4 of the Cr E Act 1898, the wife or husband of a person charged with an offence under any enactment in the Schedule to the Act may be called as a witness. But it has been held that sending a letter by husband to wife threatening to murder her is not a "personal injury" (within the Offences against the Person Act) to the wife and so she is not a competent witness and her evidence is inadmissible [*R v. Yeo*, 1951, 1 All ER 864]. A husband was charged with attempting to cause his wife to take a poison with intent to murder her, contrary to s 14 of the Offence Against the Person Act, 1861, *held* that the wife's evidence is admissible as the charge affected her person [*R v. Verolla*, 1962, 2 All ER 426 (*R v. Yeo, sup* **not folld**)]. Under s 30(2) of the Theft Act 1968 a person who prosecutes the other spouse for *any offence* is competent to give evidence for the prosecution and under s 30(*3*) if proceedings are brought against a person by someone, not being the other spouse, concerning *any offence* committed "with reference" to the wife or husband or property belonging to the wife or husband, the spouse is competent to give evidence for the prosecution or defence though not compellable to disclose any communication made by the accused during the marriage (unless compellable at common law).

S. 123. Evidence as to affairs of State.—No one shall be permitted to [1][give any evidence derived from unpublished official records relating to any affairs of State], except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit[2].

SYNOPSIS

COMMENTARY

Principle and Scope. [Delermination of the Privilege].—Disclosure of secret information contained in unpublished state papers, are privileged from production on the ground of public policy or as being detrimental to the public interest or service. On grounds of public policy, relating to *affairs of State* contained in *unpublished* official records are protected from disclosure except with the permission of the head of the department concerned [see *Raja of Coorg's case*, 20 Jur 407]. The section prohibits the disclosure of any evidence derived from unpublished official records relating to any affairs of State without the permission of the head of the department concerned, who has discretion to give or refuse such permission. The first essential condition for the application of the ban in the section is that the document from which evidence is sought to be given is an unpublished official record relating to any affairs of State. There can therefore be no privilege at all, nor can the question of claiming any privilege arise, so long as a document is not found by the court to be of the kind referred to in the section. That is the condition precedent and whenever any objection is raised on the ground of privilege, it is this all important preliminary question that has to be decided by the court. The head of the department concerned in whose possession the document is, is no judge of this question. If and when the court finds that the document in question relates to any affairs of the State, it will

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1. In Ceylon these have been substituted by "produce any unpublished official records relating to any affairs of state or, to give any evidence derived therefrom."
2. In Ceylon the words "subject, however to the Central of the minister", added after thinks fit."

then be for the departmental head to decide whether disclosure of its contents would be against public interest and his decision on the point is conclusive. If on the other hand the court holds that the document does not relate to any affairs of State, no question of privilege can arise.

Two questions are involved in the section:—

(*1*) Whether the document in respect of which privilege is claimed, is really a document (unpublished) relating to any affairs of State?

(*2*) Whether disclosure of the contents of the document would be against public interest?

In spite of there being any claim of privilege or any objection to the production or admissibility of the document, the person summoned to produce it must actually bring the document into court (see s 162 and notes) and then claim privilege in the proper way. The first question is for the court (see *post*). The affidavit of the head of the department as to the nature of the document being by no means conclusive, the court has to determine the first question upon a consideration of all available evidence on the point, though it cannot inspect the document for the purpose. Although inspection of the document itself is not permitted, the court may take "other evidence" for deciding the first question (see s 162, para 2). If the first question is decided by the court in the negative, there is no privilege and the evidence must be made available to the party desiring to have it. If it is answered in the affirmative, the validity of the privilege relating to any affairs of State is recognised and then the second question is solely for the head of the department concerned. He may allow disclosure of the evidence or may withhold permission on the ground that it would be against national interest. His decision is final and he is not bound to give any reason for it.

It being a matter of policy the discretion has been left to the head of the department concerned and the court has no concern with it. The gist of the law in s 123 and s 162 is that when any claim of privilege is made by the State in respect of any document the question whether the document belongs to the privileged class has first to be decided by the court. The next question whether disclosure would cause injury to public interest falls within the discretion of the head of the department, and this discretion is to be exercised by him solely on the test of injury to public interest and on no other consideration. The court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question [see *S v. Sodhi Sukhdev*, A 1961 SC 493: 1961, 2 SCR 371, *Samarendra Kumar Debnath v. Union of India*, 1981 Cri LJ NOC 144 (Gauh); *State of Maharashta v. O V Pawar*, 1986 Cri LJ 1467, 1471, (Bom) (DB): 1986 Tax LR 1342: 1985 Cri LR (Mah) 309; *V P S Gill v. Air India*, A 1988 Bom 415, 423: (1988) 90 Bom LR 88; *Subhasini Jena v. Commandant of 6th Battalion, O S A P Cuttack*, 1988 Cri LJ 1570, 1573: (1988) 65 Cut LT 551]. Privilege could be claimed in respect of a document on two alternative grounds *viz.*, (a) that the disclosure of the contents of the document would be injurious to the public interest by endangering national security or diplomatic relations and (b) that the document belonged to a class which should not be disclosed to secure the proper functioning of public service [*S P Gupta v. President of India*, A 1982 SC 149, 628]. The claim of immunity and privilege has to be based on public interest. Cabinet papers are protected from disclosure not by reason of their contents but because of the class to which they belong. Cabinet Papers also include papers brought into existence for the purpose of preparing submission to the cabinet. This privilege cannot be waived [*Ms Doypack Systems Pvt Ltd v. Union of India*, A 1988 SC 782, 798].

The section does not say who is to decide the preliminary question, *viz* whether the document is one that relates to any affairs of State, or how is it to be decided, but the clue is to be found in s 162. Under s 162 a person summoned to produce a document is bound to "bring it into court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court". It further says that "the court, if it seems fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility".

If the affidavit of the head of department gives an idea of the nature of the document as also an indication of the nature of the injury to public interest apprehended by its disclosure and is found to be clear and convincing, the court will ordinarily accept it. But if the statement is vague or indefinite, the question would arise whether the document really relates to any affairs of State. When privilege is claimed on the ground that disclosure would be against public interest and an objection is taken by the other side that the document does not relate to matters of State, the latter question has to be determined first by the court under s 162, as the opinion of the head of the department is not conclusive for this purpose although it is conclusive as to whether production would be contrary to the public interest [; see *Ijjatali v. R*, 1944, 1 Cal 410: 47 CWN 928; *Ibrahim, v. Secy of S*, A 1936 N 25; *Collr of Jaunpur v. Jamna*, 44 A 360; *Bhaiya Saheb v. Ramnath*, A 1938 N 358; *Bhalchandra v. Chanbasappa*, A 1939 B 237; *In re Mantubhai*, A 1945 B 122; *G-G in Council v. Peer Md*, A 1950 Pu 228; *Chamarbaghwalla v. Parpia*, A 1950 B 230; *Dinbai v. Domn*, A 1951 B 72; *Vythilinga v. Secy of S*, A 1935 M 342: 68 MLJ 396; *Harbans v. R*, 16 CWN 431; *Kaliappa v. R*, A 1937 M 492; *Pub Pros v. Damera*, A 1957 AP 486; *Tilka v. S*, A 1959 A 543; *Choudhury v. Changkakati*, A 1960 As 210; *Firm Ghulam v. S*, A 1961 J & K 20; *S v. Sodhi Sukhdev, sup*; *S v. Beg*, A 1963 J & K 30]. Under s 162, the *production* of the document, *ie* the actual bringing it to court, is compulsory even though privilege is claimed (see *post* s 162) and presumably it has this object that in the event of it being ruled that the document does not relate to any matter of State, it may be available for admission.

How then is the court to determine whether the document relates to any matter of State? The most natural way would be an inspection of the document by the court or a private perusal. But this course does not appear to be permissible as s 162 prohibits the inspection of a document referring to matters of State. It is rather difficult to conceive how an objection of this kind can be effectively disposed of unless the court has an opportunity of knowing the contents of the document. But although inspection of such document is not allowed, the court may under s 162 take "other evidence" to enable it to determine on its admissibility [*Ijjatali v. R; Bhaiya Shaheb v. Ramnath; In re Mantubhai, sup*; *S v. Sodhi Sukhdev*, A 1961 SC 493; *Sujit v. Union*, A 1970 A & N 131]. "Other evidence" on the point though admissible must be hard to obtain. Since other evidence is admissible, there does not appear to be anything to prevent the court from examining the head of the department or any other person having knowledge of the contents of the document as to what matters of State are involved. The Supreme Court observed:

> "If the document cannot be inspected its contents cannot indirectly be proved, but that is not to say that other collateral evidence cannot be produced which assist the court in determining the validity of the object" [*S v. Sodhi Sukhdev, sup*].

The Judicial Committee also held that the court has always had in reserve the power to enquire into the nature of the document and to require some indication of

the nature of the injury to the State which would follow its production [*Robinson v. State of South Australia*, A 1931 PC 254 *Infra*; apprvd in *Conway v. Rimmer*, 1968, 1 All ER 874 HL]. Apart from inspection of the document itself, there is no fetter on the Court's discretion to look at whatever materials are available to determine the nature of the document [*Chamarbaghwalla v. Parpia, sup*]. The affidavit of the head of the department that the document relates to affairs of State is not conslusive [*Pub Pross v. Damera*, A 1957 AP 486]. So, if his affidavit is unsatisfactory, the court may ask the Minister or the head of the department to submit to cross-examination [*Dinbai v. Domn, sup*; *S v. Sodhi Sukhdev, sup*]. If privilege is claimed through a subordinate, the head of the department may be required to file an affidavit or to make a statement before the court on oath. He is not absolved from satisfying the court that the privilege has been validly claimed and the court may put further questions to him for satisfying himself about the validity of the claim [*Lakhuram v. Union*, A 1960 P 192; *G-G in Council v. Peer Md*, A 1950 Pu 228 FB: *Sodhi Sukhdev v. S*, A 1960 Pu 407; on appeal A 1961 SC 493].

In deciding whether the claim made that the document relates to affairs of the State is justified, the court may have to investigate the matter. As it cannot inspect the document under s 162 the question has to be determined from other circumstances [*Choudhury v. Changkakati*, A 1960 As 210]. Following *Robinson's case, sup*, it has been held that some indication should be given to the court as to why privilege is claimed, what injury to the public is apprehended, or what affairs of State are involved in the matter [*Dinbai v. Domn*, A 1951 B 72; *Mohan v. R*, A 1950 L 217; see also *S v. Sodhi Sukhdev*, A 1961 SC 493]. Without such indication, the court may draw adverse inference from non-production [*Mohan v. R, sup*]. In some cases the very nature of the document may be sufficient to indicate that it cannot be a document relating to affairs of State (*eg* see *Harbans v. R*, 16 CWN 431; *Rukmali v. R*, 22 CWN 451; *Mohan v. R, sup*; *R v. Raghunath*, A 1946 L 459).

In order to claim immunity from disclosure of unpublished State documents, the documents must relate to affairs of State and disclosure thereof must be against interest of the State or public interest. The Bombay High Court has held that the documents to which reference was made in the show cause notice constituting material for forming opinion for an action under section 55-A of the Maharashtra Municipal Councils Act, 1965 cannot be said to be privileged documents. [*Baburao Vishwanath Mathpati v. State*, A 1996 Bom 227, 242; *R.K. Jain v. Union of India*, A 1993 SC 1769 **followed**].

The judges should scrutinise application for disclosure of details about informants with very great care. They will need to be astute to see that assertions of a need to know such details, because they are essential to the running of the defence, are justified. If they are not so justified, then the judge will need to adopt a robust approach in declining to order disclosure. Clearly, there is a distinction between cases in which the circumstances raise no reasonable possibility that information about the informant will bear upon the issues and cases where it will. Again, there will be cases where the informant is an informant and no more; other cases where he may have participated in the events constituting, surrounding, or following the crime. Even when the informant has participated, the judge will need to consider whether his role so impinges on an issue of interest to the defence, present or potential, as to make disclosure necessary. [*R. v. Turner*, (1995) 3 All ER 432 CA].

The fact that the court has power to take "other evidence" on the question also points to the conclusion that the determination of the question as to whether a document relates to matters of State rests with the court. But the position has been

made difficult by making an exception in s 162 in favour of State documents in the matter of inspection. It has been held that Or 11, r 19(2) cannot override the provisions of the Evidence Act forbidding inspection [*Lakhuram v. Union*, A 1960 P 192; *S v. Sodhi Sukhdev, sup*].

The policy behind the section is well-established. The State must have the prerogative of preventing evidence being given of matters that would be contrary to the public interest. The maxim *salus populi est supreme lex* means that safety of the people or public welfare is the supreme law. Obviously a private litigant cannot be given access to papers involving State secrets—national defence, for instance, or correspondence about diplomatic relations, or the minutes of a cabinet meeting—merely because he wants to use them as evidence against some one. But the difficult problem is how far the public interest ought to go, for the Government often refuses to disclose documents which appear to be of very little importance from the point of view of national interest and there comes a point where the hardship to the litigant outweighs the claims of secrecy.

An official's motive in claiming the privilege may be to shield his own wrongdoing or the vagaries of his department, or to protect the State from payment of heavy damages in regard to a broken contract. Must a mere allegation by an overzealous officer that a document relates to matters of State be enough to dispose of the question when justice to a litigant is involved? In order to justify the claim of privilege, there must be (in the words of RIGBY LJ, in *Att Genl v. Newcastle-upon-Tyne Corpn*, 1897, 2 QB 395) "some plain over-ruling principle of public interest concerned which cannot be disregarded" and the court will not uphold the privilege which is a narrow one, unless it is fully satisfied of the paramountcy of public interest. The question of privilege under the cover of "affairs of State" needs very careful examination, especially in commercial transactions with State or in connexion with matters relating to the trading or industrial activities of the Government which are being rapidly extended on account of State control or nationalisation of industries, so that it may not be difficult or impossible for a subject to substantiate his case against the Government by being deprived of facts or documents in possession of Government by the excuse of "Secrets of State." The Supreme Court observed: "Care has, however, to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provisions of s 123" [*S v. Sodhi Sukhdev, sup*].

Article 74(2) of the Constitution is no bar to production of the materials on which the ministerial advice is based, for ascertaining whether the case falls within the justiciable area and acting on it when the controversy, is found, justiciable, but that is subject to the claim of privilege under section 123. [*S.R. Bommai v. Union of India*, A 1994 SC 1918, 1997]. It should not be a prerogative of the bureaucrats to admit any student in professional courses on some pretext or other. The Government cannot claim privilege under sections 123 and 124 in such matters. [*Sajitha G. v. Secy. to Govt. of India, Ministry of External Affairs*, A 1994 Mad 204, 207]. Any communication which was made between the Chief Minister and the Governor of the State concerning the proceedings for acquisition of certain land, was a privileged communication and was not open to question before the court. [*Shree Swami v. State of Rajasthan*, A 1995 Raj 69, 72].

In England it has been held by the House of Lords that the court has jurisdiction to order the disclosure of documents for which Crown privilege is claimed, as it is the right and the duty of the court to hold the balance between the interests of the public in ensuring the proper administration of justice and the public interest in the

witholding of documents whose disclosure would be contrary to national interest; accordingly a Minister's certificate that disclosure of a class of documents (or the contents of particular documents) would be injurious to the public interest is not conclusive against disclosure, particularly where the privilege is claimed for routine documents within a class of documents, though in a few instances (*eg* cabinet minutes) the nature of the class of documents may suffice to resist the application for disclosure. [*Conway v. Rimmer*, 1968, 1 All ER 874 (*Robinson v. State of South Australia, and Glasgow Corpn v. Central Land Board, infra* **Applied**; *Duncan v. C Laird & Co Ld*, 1942 AC 624; 1942 1 All ER 587 **not folld**). See also *Merricks v. Nott-Bower*, 1964, 1 All ER 717; *Re Grosvenor Hotel, London*, (No 2) 1964, 3 All ER 354; *Wednesbury Corpn v. Minister of Housing and Local Govt*, 1965, 1 All ER 186; As a matter of interest the House of Lords inspected the documents and ordered their disclosure in *Conway v. Rimmer*, 1968, 2 All ER 304]. The Scottish law has always reserved to the courts the inherent power to inspect the documents and to override the certificate of the head of the department that production would be against the public interest. The theme on which stress has been laid in this case is that the interest of the Government for which the Minister should speak does not exhaust the public interest, for the impartial administration of justice in the courts of law is also a matter of public interest of higher order. [*Glasgow Corpn v. Central Law Board*, 1956 SC (HL) 1].

The principles deduced from the authorities were restated by the House of Lords in *Burmah Oil Co Ltd v. Bank of England*, (1979) 3 All ER 700 HL; on appeal from CA decision, (1979) 2 All ER 461. There is no rule of law that a claim by the Crown on the grounds of public interest for immunity from production of a class of documents of a high level of public importance is conclusive. If it is likely, or is reasonably probable or a strong positive case is made out, that the documents in question contain matter which is material to the issues arising in the case and if on consideration of the ministerial certificate claiming immunity there is a doubt whether the balance of the public interest lies against disclosure (and not merely where it is established that the certificate is probably inaccurate), the court has a discretion to review the Crown's claim that the withholding of the document is necessary for the proper functioning of the public service. In reviewing the Crown's claim to privilege in such a case the court has to balance the competing interests of preventing harm to the State or the public service by disclosure and preventing frustration of the administration of justice by withholding disclosure, and can inspect the documents concerned privately in order to determine where the balance of public interest lies. In this case certain information was given in confidence by businessmen to the Government that Bank of England should give financial help to a major private undertaking, which was necessary in national interest to save the undertaking from liquidation. Documents connected with this affair were sought to be produced. The Chief Secretary to Treasury claimed privilege in public interest on the ground that the documents related to Government policy. The undertaking, on the other hand, contended that the inspection was needed for the limited purpose of proving to the court that as a part of the financial assistance provided the undertaking was required to part with its valuable shares in favour of the bank unconscionably and at a low price and that the documents sought to be produced would help the court to decide that whether the transaction was unfair. Lord Wilberforce dissented from the above view and was of the opinion that the action was not concerned with the policy reasons for rescuing the undertaking but with the separate issue of whether the Bank had acted unconscionably in obliging Burmah to sell stock on terms dictated to Burmah. The disclosure of the attitude of the Bank would not be prejudicial to State policy. The court would inspect the documents before deciding whether to override crown's objections to their disclosure.

The oath of office of secrecy adumbrated in Article 75(4) and Schedule III of the Constitution does not absolve a Minister either to state the reasons in support of the public interest immunity to produce the State documents or as to how the matter was dealt with or for their production when discovery order nisi or rule nisi was issued. (*Per* K. RAMASWAMY, J.). [*R.K. Jain v. Union of India*, A 1993 SC 1769, 1788]. Disclosure of the contents of the case diaries may affect the criminal trial and investigation and the possibility, or communal tension re-emerging could also not be ruled out. [*CBI v. Kumher Inquiry Commission*, 1995 CrLJ 3917 (Raj)]. It is not necessary to disclose the contents of the relevant file on which decision regarding appointment of President of Customs, Excise and Gold Control Appellate Tribunal was made by the Govt. and the Govt. can claim privilege in respect of the same. [*R.K. Jain v. Union of India*, A 1993 SC 1769, 1774, 1797].

In an earlier case on the subject, namely, [*Waugh v. British Railways Board*, (1979) 2 All ER 1169 HL], the House of Lords had to take care of a similar balancing process. An accident report was prepared for two purposes, namely, for improving safety measures and for advice and use in litigation. The court in such cases is faced with two competing principles, namely that all relevant evidence should be made available for the court and that communications between lawyers and clients should be allowed to remain confidential and privileged. In reconciling these two principles the public interest is, on balance, best served by rigidly confining within narrow limits of the privilege of lawfully withholding material or evidence relevant to litigation. Accordingly, a document is only to be accorded privilege from production on the ground of legal professional privilege if the dominant purpose for which it is prepared is that of submitting it to a legal advisor for advice and use in litigation. Since the purpose of preparing the internal inquiry report in this case for advice and use in litigation was merely one of the purposes and not the dominant purpose, the Board's claim of privilege failed and the report would have to be disclosed.

Welfare Officers' Report.—A court welfare officers' report is confidential to the parties, but with the permission of the appropriate court, the information contained in it can be used in other proceedings. [*Brown v. Matthews*, (1990) 2 WLR 879 CA]. There is a strong tradition in the United States against allowing untramelled powers to the Government and so judges have sometimes rejected pleas of privilege and even ordered the production of departmental files for inspection. The practice in the States appears to vary but it recognizes the same principle as the Privy Council applied in *Robinson v. State of South Australia*, 1931 AC 704: 145 LT 408: 35 CWN 1121; A 1931 PC 254: 61 MLJ 943, that the judges ought to have some reserve authority and not to be left powerless whenever the Government chooses to claim privilege. Under the Indian law the State cannot put a ban on the disclosure of evidence by merely entering its claim of privilege, for the combined effect of ss 123 and 162 is that the determination of the question whether the document from which the evidence sought to be used relates to affairs of State or not rests with the judge. If he decides after a preliminary enquiry that the document in question does not concern any affairs of State, the foundation of the claim for privilege is gone and the document must be produced and given in evidence. If the document is held to relate to any affairs of State, the head of the department then becomes the sole judge of the question whether disclosure should be allowed or withheld in public interest (see *post*).

It may be observed that the privilege formerly recognised under the common law is now regulated by s 28 of the Crown Proceedings Act 1947. The Supreme Court observed that s 28 *ibid* read with the proviso confers on the courts specified by it powers which are much narrower than those conferred on the Indian courts under para 1 of s 162 of the Evidence Act [*S v. Sodhi Sukhdev*, A 1961 SC 493].

The provisions of ss 123-124 are not affected by s 94 (now s 91) Cr P Code [See s 94(*3*) [now s 91(*3*)] Cr P Code; and *Chandubhai v. S*, A 1962 G 290].

S 123 is not attracted when the High Court in exercise of its powers under Art 226 of Constitution calls for records as the court in so doing is not permitting anybody to give evidence from unpublished official records relating to any affairs of State within the meaning of s 123. The privilege under s 123 will not apply when no evidnce is sought to be given and all that the court does while issuing a Rule *Nisi* is to call for records. The question of using them as evidence does not arise—case law ref [*Rambhbtla v. Govt*, A 1971 AP 196]. Claim of privilege under sec. 123 can hardly prevail over the constitutional mandate of disclosure under Art 22(5) of the Constitution of India [*Mohmood Abubukar Marwari v. Union of India*, A 1982 Cri LJ 53, 56 : 1981 Cri LR (Mah) 445 (Bom)]. Sec. 123 is not at all relevant for the purposes of considering whether Sec 172(3) of the Criminal Procedure Code is unconstitutional or not, because these two provisions cater for two very different situations [*Subhash Chandra v. Union of India*, 1988 Cri LJ 1077, 1078: (1987)3 Crimes 159 (Raj)].

[*Ref Tay ss 939-48; Steph Art 112: Best s 578; Ros N P 18th Ed pp 172-73; Powell 9th Ed pp 242, 273; Phip 11th Ed para 562-565; Hals 3rd Ed Vol 15 para 756; Vol 10 para 877; Vol 12 (Discovery) paras 73, 74; Wig ss 2367-79; Ann Practice Or 31 r 1 notes*].

—Suggested Limits of the Privilege.—There is sometimes a tendency to extened the privilege beyond the "secrets" or "affairs of State". After examining the scope of the privilege in the light of logic and policy, Wigmore concludes as follows:—

"(1) Any *Executive* or *administrative* regulation purporting in general terms to authorize refusal to disclose official records in a particular department when duly requested as evidence in a court of justice should be deemed void.

(2) Any *statute* declaring in general terms that official records are confidential should be liberally construed to have an implied exception for disclosure when needed in a court of justice.

(3) The *procedure* in such cases should be : A letter of request from the head of the Court to the head of the Department (accompanying the subpoena to the actual custodian), stating the circumstances of the litigation creating the need for the document; followed (in case of refusal) by a reply from the Departmental-head stating the circumstances deemed to justify the refusal; and then a ruling by the Court, this ruling to be appealable and determinate of the privilage" (Wig s 379).

Privilege is a Narrow One—Its Foundation is Injury to Public Interest.—The foundation of the law behind ss 123 and 162 is the same as in English law. The reason for the exclusion from disclosure of documents is injury to public and national interest [*S v. Rajnarain*, A 1975 SC 865 (All English and Indian cases discussed)]. In England the matter was regulated by the old common law rule (see now S 28 Crown Proceedings Act 1947). In reaching a decision whether to order disclosure founded on the principle that for reasons of State and policy, information contained in documents which would otherwise be available by regular process but whose disclosure would be injurious to public interest, is not permitted to be disclosed. The principle is thus stated by Taylor: "One class of cases in which evidence is excluded from motives of public policy, comprises *secrets of State*, or matters the disclosure of which would be prejudicial to the public interest. These matters are such as concerned with the administration either of penal justice, or of government; but the principle of public safety is in both cases the same and the rule of exclusion is

applied no further than the attainment of that object requires. The protection of State papers afforded by this principle extends, it is almost needless to say, to applications for discovery, and there are many instances of such applications" [Tay s 939, citing *Hennessy v. Wright*, 57 LJQB 594]. Quoting Taylor *ante*, with approval, LORD BLANESBURGH observed:—

> "As the protection is claimed on the broad principle of State policy and public convenience, the papers protected as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official which alone is no reason for their non-production" [*Robinson v. State of South Australia*, 1931-AC 704: 145 LT 408: 35 CWN 1121: A 1931 PC 254: 61 MLJ 943].

The principle to be applied in every case is that document otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (*a*) by having regard to the contents of the particular document or (*b*) by the fact that the document belongs to a class which, on grounds of public interest must as a class be withheld from production [*Duncan v. C Laird & Co Ltd*, 1942 AC 624: 1942, 1 All ER 587]. The House of Lords, has recently held that the proper test, when privilege is claimed for a document as being one of a class of rountine documents which it will be injurious to the public interest to disclose, is whether the witholding of the document is really necessary for the proper functioning of the public service but the House declined to follow *Duncan v. C Laird* on the point that the Minister's certificate is conclusive and held that the court has power to order production (see *ante*).

In reaching a decision whether to order disclosure the court will give full weight to the Minister's view; and, if the considerations are of such a character as judicial experience is not competent to weigh, the Minister's view will prevail, but where the conditions are not of that character, the court will decide on balance whether the documents shall be disclosed to the parties, and for this purpose the judge will generally be right to inspect the documents, without their being shown to the parties [*Conway v. Rimmer*, 1968, 1 All WR 874 **disapproving** of *Beatson v. Skeene*, 1860, 29 LJ Ex 430 and *Ankin v. L & N E Ry Co*, 1929 All ER Rep 65 which had held that when an objection is taken in proper from by the Minister concerned that production of a document is contrary to public interest, it is the practice of the court to accept the statement as conclusive without looking at the document].

There have been cases before in which it has been held that the judge has authority to inspect the document in order to determine the validity of the objection. Documents in respect of which State privilege was claimed was inspected by SCRUTTON J, in *Asiatic Petroleum Co Ltd v. Anglo Persian Oil Co Ltd*, 1916, 1 KB 822, 826 and MACNAGHTEN J, in *Spigelman v. Hocken*, 1933, 150 LT 256. In *Hennesy v. Wright*, 1888, 21 QBD 509, 515. FIELD J, said: "I should consider myself entitled to examine privately the documents to the production of which he objected, and to endeavour by this means and that of questions addressed to him, to asertain whether the fear of injury to the public service was his real motive in objectng". In *Rowell v. Pratt*, 1936, 2 KB 226, 243 GREER LJ, said: "Privilege is governed by well-settled principles and the courts have always jealously safeguarded their powers of compulsion against encroachments by claims of privilege".

> In *Beatson v. Skene* POLLOCK CB said "..... The judge would be unable to determine it (whether production would be injurious to public interest) without

> ascertaining what the document was, and why the publication would be injurious to the public service—an inquiry which cannot take place in private, and which taking place in public, may do all the mischief, which it is proposed to guard against. It appears to us therefore, that the question whether the production of the document would be injurious to the public service must be determined not by the judge, but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion, the production of the document would be injurious to the public service, the judge ought not to compel the production of it".

Commenting on *Beatson v. Skene, ante* Wigmore says: "But the judge (urges the learned incumbent of the office, in *Beatson v. Skene*), would be unable to determine it without ascertaining what the document was",—surely an unavoidable process: 'which injury' however, it is added, 'cannot take place in private'—a singular assumption. It would rather seem that the simple and natural process of determination was precisely such a private perusal by the judge. Is it to be said that even this much disclosure cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally co-ordinate body of government share the confidence? ..... the truth cannot be escaped that a court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrong-doing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Court and this has been insisted upon by the higher judicial personages both in England and the United States" (Wig s 2379).

"It is urged to be sure (as in *Beatson v. Skene*), that 'the public interest must be considered paramount to the individual interest of a suitor in a court of justice'. As if the public interests were not involved in the administration of justice. As if the denial of justice to a single suitor were not as much a public inquiry as is the disclosure of any official record. When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight" [Wig s 2378*a*]. In *S v. Sodhi Sukhdev*, A 1961 SC 493, 501, GAJENDRAGADKAR, J, observed: "It may be pertinent to enquire whether fair and fearless administration of justice itself is not a matter of high public importance..... That is why courts are and ought to be vigilant in dealing with a claim of privilege made under s 123".

After an exhaustive survey of the rules governing the privilege, the Judicial Committee consisting of five Judges (LORD BLANESBURGH, WARRINGTON, ATKIN, THANKERTON and RUSSELL) unanimously held that it is the supreme duty of the court to protect the privilege when it exists; but in order to determine the validity of the objection the court has the power to inspect the document in appropriate cases [*Robinson v. State of South Australia, ante*]. LORD BLANESBURGH who delivered judgment in this case observed:—

> "The privilege is a narrow one, most sparingly to be exercised..... .... Its foundation is that the information cannot be disclosed without injury to the public interests and not that documents are confidential; which alone is no reason for their non-production..... Particularly must it be remembered in this connexion that the fact that the production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side is no such "plain over-riding principle of public interest" as to justify any

claim of privilege. The zealous champion of Crown rights may frequently be tempted to take the opposite view, particularly in cases where the claim against the Crown seems to him to be harsh or unfair. But such an opposite view is without justification. In truth, the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security."

(See also *Conway v. Rimmer, sup* for another exhaustive survey).

The observations of CHAGLA CJ, in *Dinbai v. Domn*, A 1951 B 72, may usefully be quoted:—

> "It is unnecessary to state that a privilege of this nature should be rarely claimed and should only be claimed after the responsible minister or the head of the department has fully satisfied himself that the document whose disclosure is being resisted is really a document relating to the affairs or State and whose disclosure will result in injury to public interests. The scales are always weighed against the subject who fights against Government and Government should be loath to throw against him more weight in the scales by refusing disclosure of documents which are relevant to the issues in the suit."

Public interest immunity—Criminal cases.—Millett J. remarked in *Re Barlow Clowes Gilt Managers Ltd.*, (1991) 4 All ER 385 at 397: (1992) Ch 208 at 223-224:

> 'If any of the transcripts should be found to constitute or contain material evidence and so be the proper subject of a witness summons, it will be necessary to balance the competing interests for and against disclosure. That exercise will have to be undertaken by the Crown Court, not (as some counsel submitted) this court. It may even become necessary for PHILLIPS J to inspect the transcripts of satisfy himself that the evidence is not peripheral or vestigial but of sufficient importance to the issues in the criminal trial to justify disclosure.

There have been relatively few authorities on public interest immunity in the criminal sphere, and most have concerned the public interest in preventing the disclosure of sources of information to the police. [*R. v. Chetenram Jutices*, (1977) 1 All ER 460]. In *R v. Governor of Brixton Prison*, (1992) 1 All ER 108 it was observed :

> There does not seem to have been any definitive pronouncement as to whether the doctrine of Crown privilege was applicable in criminal proceedings. In *Duncan v. Cammell Laird & co. Ltd.*, (1942) 1 All Er 587 at 591, (1942) AC 624 at 633 VISCOUNT SIMON LC said: "The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessrily the same." So far as I am aware, the matter rested there. The seminal cases in regard to public interest immunity do not refer to criminal proceedings, but the principles are expressed in general terms. Asking myself why those general expositions should not apply to criminal proceedings. I can see no answer but that they do. It seems correct in principle that they should apply. The reasons for the development of the doctrine seem equally applicable to criminal as to civil proceedings. I acknowledge that the application of the public immunity doctrine in criminal proceedings will involve a different balancing exercise to that in civil proceedings. I shall come in one moment to the concept of the balancing exercise. Suffice it to say for the moment that a judge is balancing on the one

hand the desirability of reserving the public interest in the absence of disclosure against, on the other hand, the interests of justice. Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed.

In *R. V. Clowes*, (1992) 3 All ER 440 PHILLIPS, J observed:

> I do not find easy the concept of a balancing exercise between the nature of the public interest on the one hand and the degree and potential consequences of the risk of a miscarriage of justice on the other. At the same time I would not readily accept that proportionality between the two is never of relevance. I believe that this is an area of law where it is easier to resolve the conflicting interests in the individual case than it is to formulate a test for reaching that decision.

In *R. v. Keane*, (1994) 2 All ER 478 it was observed:

> 'If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it.... when the court seized of the material, the judge has to perform the balancing exercise by having regard on the one hand to the weight of the public interest in non-disclosure. On the other hand, he must consider the importance of the documents to the issues of interest to the defence, present and potential, so far as they have been disclosed to him or he can foresee them.

In his judgment MANN LJ said [1992] 1 All ER 108 at 117-118, [1991] 1 WLR 281 at 290):

> 'I must deal with two other matters before departing from public interest immunity. We were referred to the well-known case of *Marks v. Beyfus*, (1890) 25 QBD 494 and to the cases which followed upon it. The latest of these is. I think, *Tipene v. Apperley*, (1978) 1 NZLR 761, although there have been later cases in this country dealing with the movement of *Marks v. Beyfus* into the field of surveillance posts. In those cases, which establish a privilege in regard to information leading to the detection of crime, there are observations to the effect that the privilege cannot prevail if the evidence is necessary for the prevention of a miscarriage of justice. No balance is called for. If admission is necessary to prevent miscarriage of justice, balance does not arise. I would regard those cases as constituting a group by themselves. They have ever been treated as a separate head of privilege, although they may be subsumed, with other heads of privilege, under the general heading of "public policy", that is to say a privilege which is required as a matter of policy. I believe, but I have not had the opportunity to look into the matter, that in certain of the textbooks these privileges are so subsumed and are separately treated within the head. I am fortified in my separate treatment by their genesis.'

In *Ex p Osman* MANN LJ had no difficulty in performing the necessary balancing exercise, for he held that the documents in issue were not material to the purpose for which it was sought to rely upon them.

Privilege How Determined And By Whom.—*Robinson's Case* is the leading authority on the principles governing the privilege, the extent of the privilege, the manner in which it should be claimed and the powers of the court in relation to the claim of privilege. Following *Robinson's case, sup* it has been held that where a public officer declines to produce certain documents, claiming privilege under ss 123

and 124, it is for the court in the first instance to satisfy itself that the documents relate to any State affairs or that their production will be detrimental to public interest and it is not for the public officer to decide whether the documents are privileged. The mere fact that their production is likely to prejudice the Crown's case is no reason for their non-production [*Ibrahim v. Secy of S*, A 1936 N 25: 161 IC 668; see also *Collr of Jaunpur v. Jamna*, 44 A 360; *Bhaiya Saheb v. Ramnath*, A 1938 N 358]. When privilege is claimed it is for the court under s 162 to determine whether the document really relates to affairs of State and a mere *ipse dixit* of any one on behalf of the State that it concerns affairs of State is not sufficient. Although it cannot under s 162 inspect the document in such a case, it has power to decide the question by taking other evidence (see *ante*). The very nature of the document will in many cases be enough to show that it cannot be a record relating to any affairs of State [*Ijjatali v. R*, 1944, 1 Cal 410: 47 CWN 928: A 1943 C 589; see also *Bhalchandra v. Chanbasappa*, A 1939 B 237: 41 Bom LR 391; *In re Mantubhai*, A 1945 B 122: 46 Bom LR 802; *Chamarbaghwalla v. Parpia*, 52 Bom LR 231; *G-G in Council v. Peer Md*, A 1950 Pu 229; *Dinbai v. Domn*, A 1951 B 72].

CONTRA.—In some cases, however, it was held that whenever a claim is made that the document relates to matter of State, the *ipse dixit* should be regarded as conclusive without any further enquiry as to its validity [*Nazir v. R*, A 1944 L 434; *Lall v. Secy of S*, A 1944 L 209; *R v. Raghunath*, A 1946 L 459; see also *Irwin v. Reid*, 48 C 304; *Secy of S v. Swaminatha*, A 1930 M 342; *Lala Tribhawan v. D C*, 47 IC 225: 5 OLJ 294] even if the head of the department falsely states that the document relates to affairs of State [*R v. Raghunath, sup*]. These decisions do not appear to show a correct appreciation of the law as contained in ss 123 and 162 and the view taken in imitation of some English decisions based on the common law rule is not sound. That would be abdicating the functions of the court on a question of admissibility of evidence in favour of the head of the department and the privilege is liable to be abused by an unscrupulous official. Since these observations were recorded, the Supreme Court has in 1961 overruled in view taken in *Irwin v. Reid and Lall v. Secy of S, sup* and similar other cases *ante* [*S v. Sodhi Sukhdev*, A 1961 SC 493].

The matter was discussed at length recently by the Supreme Court and in agreement with the cases cited above it has been held that the combined effect of s 123 and s 162 is that:

(i) It is for the court to determine the claim of privilege by giving a decision on the character or class of the document, *ie* whether it relates to any affairs of State or not.

(ii) In this enquiry which the court is bound to hold, it may well take other evidence in lieu of inspection to determine the character of the document. The jurisdiction conferred on the court to determine the validity of an objection to produce the document is not illusory or nominal. If the document cannot be inspected, its contents cannot indirectly be proved, but that is not to say that collateral evidence cannot be produced in determining the validity of the objection.

(iii) If the affidavit in support of the claim for privileges is found to be unsatisfactory, the Minister or the Secretary making the affidavit should be summoned to face cross-examination on the relevant points. It would be open to the opponent to put such relevant and permissible questions as may help the court in determining whether the document belongs to the privileged class or not. If it comes to the conclusion that the document does not relate to affairs of State, it should reject the claim for privilege and direct its production. If the conclusion is that the document relates to affairs of State, it should leave it to the discretion to the head of the

department to decide whether he should direct its production or not [*S v. Sodhi Sukhdev*, A 1961 SC 493; *Ramasrinivasan v. Shanmugham*, A 1969 M 378]. If the Court comes to the conclusion that a particular document relates to the affairs of State on the basis of the affidavit filed by the Head of the Department, the Court need not insist upon its production [*Sundaresan Thampi v. V. Ramachandran*, 1987 Cri LJ 108, 112 : 1986 Ker LT 1095 (Ker)].

Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. An objection is raised by an affidavit affirmed by the head of the department. The court may also require a minister to affirm an affidavit. If the court is satisfied with affidavit evidence the matter ends there but if it would yet like to satisfy itself it may inspect the document. Objection as to production as well as admissibility contemplated in s 162 is decided by the court in the enquiry [*S v. Rajnarain*, A 1975 SC 865].

The procedure to be adopted in determining whether a document is of State or not, when the State is or is not a party to the litigation has been discussed and pointed out in *Bhaiya Saheb v. Ramnath, sup.*

In *Duncan v. C Laird & Co*, 1942 AC 624: 1942, 1 All ER 587, *Robinson's Case, sup* was disagreed with but the law in England has now been brought in line with the rest of the commonwealth in *Conway v. Rimmer*, 1968, 1 All ER 874.

In India the decision of the Privy Council has been followed (see *Radha Kishen v. Bombay Co Ltd*, A 1943 L 295, 297; *Firm Karam v. Volkart Bros*, A 1926 L 116, 123; *Md Mehdi v. G-G in Council*, A 1948 Ss 100, 102). There is however this difference in law in India that an objection by the head of the department that disclosure would be against public policy is conclusive, although not the objection that the document relates to affairs of State. The last question is for the court to determine.

Order rejecting claim of privilege affirmed in revision. Question cannot again be raised on the principle of *res judicata* [*Gangaram v. Union*, A 1964 P 444].

—Summary of Law in Ss 123 and 162.—(*1*) Under the Evidence Act the foundation of the claim of privilege under s 123 is whether the evidence sought to be given is "derived from unpublished official records relating to any *affairs of State*." That is the condition precedent before any privilege can be claimed.

(*2*) S 162 makes it clear that this question is one for the *court* to decide and not the head of the department. The position therefore is that when the State or a public officer is summoned to produce a document in respect of which he desires to claim privilege on the ground that it relates to any affairs of State, he is bound first to appear and bring it to court under s 162 notwithstanding any objection that he may have as to its production or admissibility (see *post* notes to s 162) and then claim privilege for it in the proper way by an affidavit (*post*: "*How privilege is claimed*").

(*3*) It is for the court to decide whether the document in question relates to any affairs of State. In this enquiry which the court has to make, though it cannot inspect the document, it may take other evidence to determine the character or nature of the document (*ante*).

(*4*) If the court comes to the conclusion that the document does not relate to any affairs of State, the claim for privilege must be rejected and the document directed to be produced and given in evidence [*S v. Sodhi Sukhedev*, A 1961 SC 493 and cases cited *ante*].

(5) If on the other hand the court holds that the document is of the kind in regard to which privilege can be claimed, in other words, that it is an unpublished official record relating to any affairs of State, the question whether disclosure of contents would be against public interest and whether privilege should be claimed for it or not, must be left entirely to the discretion of the head of the department [see *Ijjatali v. R*; *Collr of Jaunpur v. Jamna*; *Bhalchandra v. Chanbasappa*; *In re Mantubhai*; *S v. Sodhi Sukhdev*, *sup* and cases *ante*].

Apart from the class of documents relating to public affairs, they can also be treated as privileged documents if and when the public officer to whom they are sent in official confidence considers that the public interest would suffer by their disclosure if they relate to matters relating to public policy [*S v. Appanna*, 1962, 1 And WR 256].

Grounds Which Do Not Justify Objection to Produce.—"It is not a sufficient ground that documents are "State documents" or "official" or are marked "confidential." It would not be a good ground that, if they were produced, the consequences might involve the department or the Government in Parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister or the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these consideration in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified *eg* where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service" [*per* VISCOUNT SIMON LC in *Duncan v. C Laird & Co Ltd*, 1942, 1 All ER 587, 596: 1942 AC 624 **approved** in *Conway v. Rimmer*, 1968, 1 All ER 874]. See *Gov-Genl in Council v. Peer Md*, A 1950 Pu 228 FB.

Discretion of the Head of the Department. [How to Exercise it].—If in the enquiry relating to the character or class of the document the court comes to the conclusion that it concerns any affairs of State, the section confers wide powers on the head of the department to claim privilege in order to protect from disclosure its contents on the ground of injury to public interest. This protection is founded on the broad ground of public policy. The principle is that the public interest must be considered paramount to that of individual interest. As observed by the Supreme Court: "It is well-settled and not disputed that the privilege should not be claimed under s 123 because it is apprehended that the document if produced would defeat the defence raised by the State.....It must be clearly realised that the effect of the document on the ultimate course of litigation or its impact on the head of the department or the Minister-in-charge of the department, or even the Government in power, has no relevance in making a claim for privilege under s 123. The apprehension that the disclosure may adversely affect the head of the department or the department itself or the Minister or even the Government, or that it may provoke public criticism or censure in the Legislature has also no relevance in the matter and should not weigh in the mind of the head of the department. The sole and the only test which should determine the decision of the head of the department is injury to public interest and nothing else" [*S v. Sodhi Sukhedev*, A 1961 SC 493, 504; see also *Amar Chand v. Union*, A 1964 SC 1658 *post*]. Identical observation will be found in *Robinson v. State of South Australia* (*ante*). The Chief Personnel Officer N E Rly is not the head of the department [*Union v. Indradeo*, A 1964 SC 1118].

Difference Between Ss 123 and 124. [See *post* s 124].

Production of Document in Court is Compulsory.—A person summoned to produce a document is bound to bring it actually to court or to send it through another in spite of any objection to its being produced or used in evidence (s 162). He can then at the time of production claim any privilege that he may have in respect of it and its validity will be determined by the Court [*Bhal Chandra v. Chanbasappa*, A 1939 B 237; *In re Mantubhai*, A 1945 B 122; *Pub Pros v. Damera*, A 1957 AP 486; *S v. Sodhi Sukhdev, sup*; and case cited *post* under s 162]. See *Narayanaswamy v. S*, A 1953 M 228 *post*.

S 91 Cr P Code.—The section provides that when any court considers the production of any document or other things necessary for the purpose of any investigation, inquiry or trial, it may issue a summon for its production. Sub-sec (*3*) says that "nothing in the section is to be deemed to affect the Indian Evidence Act, ss 123 and 124." The discretion under s 94 (now s 91) Cr P Code must be exercised judicially and in such a way as not to conflict with the policy in s 162 Cr PC and in ss 123-125 Evidence Act [*R v. Bilal Md*, 1940 Bom 768: A 1940 B 361; *Pulin v. S*, A 1965 Tri 33]. The court cannot by an order under s 94(*1*) [now s 91(*1*)] Cr PC set at nought the provisions ss 123 and 124 [*Chandubhai v. S*, A 1962 G 290]. S 94(*3*) [now s 91(*3*)] exempts documents which are protected under ss 123 and 124, but not under s 126. The production of such documents under s 162 Evidence Act is incumbent notwithstanding any objection which there may be to the production [*Pub Pro v. Menoki*, A 1939 M 914: 1930, 2 MLJ 634; *Gangaram v. Habibullah*, 58 A 364; *Chandubhai v. S, sup*].

"Concerned."—The use of the word "concerned" in relation to the head of the department shows that the affidavit must contain a sworn statement by the head of the department in whose custody the document happens to be [*Lall v. Secy of S*, A 1944 L 209].

"Unpublished Official Records."—The question whether the document relates to affairs of State for the purposes of ss 123 and 162, presupposes that it is an unpublished official record. The question of publication is therefore always relevant [*Raghunath v. R*, A 1946 L 459; see *Nazir v. R*, A 1944 L 434: 1945 Lah 219]. The privilege cannot be asserted in relation to documents the contents of which have already been published [*Robinson v. State of S Australia, ante*]. The question of publication being raised it was held that the circulation of a Report being limited, it did not amount to publication [*Duncan v. C Laird & Co, ante*]. Publication of parts of a document (in this case blue book being rules and instructions for the protection of the Prime Minister when on tour) which may be innocuous will not render the entire document a published one [*S v. Rajnarain*, A 1975 SC 865]. The word "unpublished" relates primarily to the person against whom privilege is claimed and if he has been permitted lawfully to see those papers and also to take copies, it will be futile to claim privileges under either s 123 or s 124 [*Union v. Sudhir*, A 1963 Or 111].

Claim of privilege cannot be rejected on the ground that copy of document was produced by the opposite party. Court should examine itself and decide whether claim is just [*Union v. Lalli*, A 1971 P 264].

—**"Unpublished Official Records Relating to Any Affairs of State."**—It is not possible to define "affairs of State." It includes any matter of a public nature with which the State is concerned or the disclosure of which will be prejudicial to the public service. The exclusion is not confined to official communications or docu-

ments, but extends to all others likely to prejudice the public interest. [See *Asiatic Petroleum Co v. Anglo-Persian Co*, 1916, 1 KB 822]. No catalogue can be compiled for the class of documents but some documents by their very nature fall into a class, *viz*, Cabinet papers, Foreign Office despatches, the security of the State, high level inter-departmental minutes and correspondence and documents pertaining to the general administration of the naval, military and air force services [*S v. Rajnarain*, A 1975 SC 865]. What are unpublished official records of affairs of State [*Iqbal v. S*, A 1954 Bhopal, 9]. The definition of "affairs of State" evolved by KHOSLA J, in *G-G in Council v. Peer Md*, A 1950 Pu 228, 233 and **relied on** in *Sodhi Sukhdev v. S*, A 1960 Pu 407 was not treated as exhaustive by the Supreme Court in *S v. Sodhi Sukhdev*, A 1961 SC 493. When the Act was enacted "affairs of State" may have had a comparatively narrow content, *eg* matters of political or administrative character relating to national defence, public peace and security and good neighbourly relations. But the inevitable consequence of the change in the concept of the functions of the State is that the State in pursuit of its welfare activities undertakes to an increasing extent activities which were formerly treated as purely commercial and documents in relation to such activities are also apt to relate to the affairs of State. As the Legislature has refrained from defining the term "affairs of State" it would be inexpedient to attempt to define it. The question as to whether any document answers to the description has to be determined on the relevant facts and circumstances adduced in each case [*S v. Sodhi Sukhdev, sup*, See also *Kotah Match Factory v. S*, A 1970 Raj 118; *Sujit v. Union*, A 1970 A & N 131].

Every communication from an officer of the State to another officer is not necessarily relating to affairs of State [*Chamarbaghwalla v. Parpia*, A 1950 B 230]. The notings in the departmental files by the hierarchy of officials are meant for the independant discharge of official duties and not for exposure outside. In a democracy, it is absolutely necessary that its steel frame in the form of civil service is permitted to express itself freely uninfluenced by extraneous consideration [*State of Bihar v. Kripalu Shankar*, 1987 Cri LJ 1860 : A 1987 SC 1554, 1563 (1986) Pat L J R (HC) 319 (Reversed)]. The privilege could not arise in respect of the posting register kept by the Custom Preventive Service, the entry in question being merely a note of the times when particular preventive officers were ordered to be at their stations. It did not refer to matters of State in ss 123 and 162. There may be other privileged entries in that book [*Rukumall v. R*, 22 CWN 451]. Where the documents relate to commercial activities of the State and they are the documents of a department of State which has been disbanded, the exercise of the power of the judge to inspect the documents is especially appropriate [*Robinson v. State of South Australia*, 35 CWN 1121: A 1931 PC 254 *ante*].

Where the State is a party to a litigation and documents relate to the commercial or contractual activities of the State, privilege can be claimed in respect of such documents, but privilege should not be claimed inadvisedly, lightly or capriciously. The law provides for the court to adjudicate on the merits of the claim. The Government must be loath to keep documents from the court unless it is clearly necessary in the public interest [*Firm Ghulam v. S*, A 1961 J&K 20]. Documents and letters relating to a contract with the Government for supply of goods are not matters as to affairs of State [*G-G in Council v. Peer Md*, A 1950 Pu 228]. In respect of supply of chrome ore, there was a difference between the parties regarding the price payable. So a meeting was called by the Secretary to the Government of Orissa, Ministry of Geology Department. The file relating to the said document is in respect of a commercial transaction and so no privilege can be claimed regarding the production of that file. [*Ferroy Alloys v. Development Corporation of Orissa*, A 1986

Ori 199, 203 : (1986) 61 Cut LT 270]. Probationary reports on a police officer including a report from the Police Training Centre are not documents the disclosure of which would be injurious to the public interest and accordingly an order for inspection will be made [*Conway v. Rimmer*, 1968, 1 All ER 874].

On the grounds of public policy, the official communications between the heads of departments of Government and their subordinate officers are in general treated as *secrets of State* and cannot be the subject of an action for libel [*Chatterton v. Secy of S*, 1895, 2 QB 189; *Hennessy v. Wright*, 57 LJQB 594]. Thus, communications between a colonial Governor and his attorney-general, on the condition of the colony or the conduct of its officers [*Wyatt v. Gore*, 1816 Holt NP 299], or between such governor and military officer under his authority [*Cooke v. Maxwell*, 1817, 2 Stark 183]; the report of a military commission of inquiry, made to the commander-in-chief [*Home v. Bentinck*, 1820, 2 B & B 130]; the report of a collision at sea, made by the captain of one of the ships of the Lords Commissioners of Admiralty; the report submitted to the Lord Lieutenant of Ireland by an Inspector-General of Prisons; and the correspondence between an agent of the Government and a Secretary of State [*Anderson v. Hamilton*, 1816 8 price 244*n*] or between the Directors of the East India Company and the Board of Control, under the old law [*Smith v. East India Co*, 1 Phill 50; *Rajah of Coorg v. East India Co*, 1856, 25 LJ Ch 345; *Wadeer v. East India Co*, 1856, 8 De G M & G 182]; or between an officer of the Customs and the Board of Commissioners [*Black v. Holmes*, 1822 Fox & Sm 28],—and despatches between a Secretary of State for the colonial Governor [*Hennesy v. Wright, supra*]; or a report of an officer of Inland Revenue [*Hughes v. Vargas*, 9 TLR 92] are confidential and privileged matters which the interests of the State will not permit to be revealed [Tay s 947].

"Affairs of State" may cover the case of documents in respect of which the practice of keeping them secret is necessary for the proper functioning of the public service. Report relating to individual with a view to take action under the Preventive Detention Act is a matter relating to affairs of State [*Choudhury v. Changkakati*, A 1960 As 210]. A resolution of Government censuring or reprimanding an officer, being an official communication, is absolutely privileged. In respect of such communications, no allegations of malice is allowed and no proof of malice takes away the privilege. No action, therefore, could be based on any libel, however, malicious, contained in the resolution [*Jehangir v. Secy of S*, 27 B 189: 5 Bom LR 30; 6 Bom LR 131]. Departmental notings contained in official files involving public interest are privileged [*S v. Jagannath*, A 1977 SC 2201]. Character rolls and confidential reports of Govt employee are privileged documents [*S v. Surjit*, A 1975 P&H 11]. Official file relating to grant of mining lease is privileged [*Durga Pd v. Parveen*, A 1975 MP 196]. A report to the Inspector-General of Prisons under the Jail Manual is an unpublished official record and privilege can be claimed [*R v. Nandha*, 89 IC 387 : 12 OLJ 450]. In a subsequent civil suit for malicious prosecution and damages, the report of an officer of the Scotland Yard (CID) in England was held privileged [*Auten v. Rayner*, 1958, 1 WLR 1300]. The diary of a foot-constable who was shadowing the movements of a suspect is not an affair of State [*Mohan v. R*, A 1940 L 217]. Departmental enquiry by Railway Administration as to fire in a truck at wayside station with a view to litigation which might arise is privileged [*Ne Rly v. Ramlal*, A 1960 P 489]. In a suit for injunction restraining Govt from diverting the water flowing into plaintiff's tank by construction of a dam or otherwise the correspondence between two State Govts was held privileged while the reports by subordinate officers and statements recorded by them were not privileged [*Md Yusuff v. S*, A 1971 M 468].

Speeches at public meetings transcribed by police officers under departmental instructions should not generally be held to relate to 'affairs of State' [*Ramasrinivasan v. Shanmugham*, A 1969 M 781]. Observations of notings made by officers by way of comment or opinion in reports of the speeches made at public election meetings are privileged but not rest of the reports containing factual data [*Kanwarlal v. Amarnath*, A 1975 SC 308]. Demi-official letters addressed to private contractor are not published official records [*Mehtab v. Secy of S*, A 1933 L 157]. Statements made by witnesses in the course of a departmental enquiry into the conduct of public officers who were subsequently put upon their trial on charges of taking illegal gratification are not privileged under ss 123, 124, 125 and the accused are entitled to cross-examine the witness under s 153 on the statements made by them at the departmental enquiry [*Harbans v. R*, 16 CWN 431: 13 Cri LJ 445; *Ibrahim v. Secy of S*, A 1936 N 25]; but statements by witnesses in a secret and confidential investigation by the CID for ascertaining whether there is a *prima facie* case for a departmental enquiry against a public servant, are privileged [*Bushi v. Collr*, A 1959 Or 152; see *Nazir v. R*, A 1944 L 424]. Records evidencing Government intervention unauthorised by law in a pending judicial or *quasi*-judicial matter is not an affair of State [*R v. Rasulbaksh*, 1944 Kr 175: A 1944 S 145]. In a suit for damages for recording libellous statement in the *zaildari* book, it was held that *zaildari* book and the application of the *zaildar* for deleting the statement are not unpublished official records and there is no privilege [*R v. Raghunath*, A 1946 L 459]. Documentary evidence of the steps taken for selection of Chief Secretary is not affairs of State [*N P Mathur v. S*, A 1972 P 93 FB].

A document containing order of termination of service is not privileged unless it is shown to be noxious [*Union v. Rajkumar*, A 1967 Pu 387]. Departmental enquiry papers are not unpublished documents relating to affairs of State. Consequently where the probity of the conduct of a public servant is a matter in issue the State cannot screen his conduct from the purview of the court [*Niranjan v. S*, A 1968 Pu 255]. Government employee seeking production of connected files and documents in a petition challenging his reversion from officiating post—*Held* non-disclosure of such documents necessary for proper functioning of public service [*H L Rodhev v. Delhi Administration*, A 1969 D 246]. Administrative instructions and guidance notes secretly given to various departments of Government are documents relating to affairs of State [*Sujit v. Union*, A 1970 A & N 131].

Where an open enquiry is made, statement recorded in that enquiry cannot be deemed to be confidential and similarly any application or complaint made by a person cannot be held to relate to 'affairs of State' [*Mahabirji &c v. Prem*, A 1965 A 494].

Privilege under s 123 was allowed in respect of the following documents: (*i*) Documents embodying the minutes of the meeting of the Council of Ministers and the advice given to the Rajpramukh or Governor. (*ii*) Advice tendered by the Public Service Commission to the Council of Ministers and its Report [*S v. Sodhi Sukhdev*, A 1961 SC 493]. (*iii*) Documents embodying the minutes of the discussion between a private party and State Minister and indicating the advice given by the Minister [*Kotah Match Factory v. S*, A 1970 Raj 118].

During an investigation the police seized some account books of a person and made copies of them in their diary. In another suit that person having denied the existence of the account books, the copies were called for by the other party and the police claimed privilege—*Held*, that they were not State documents for which privilege could be claimed [*Bhaiya Saheb v. Ramnath*, A 1938 N 358].

In a proceeding under art 226 Constn. challenging the appointment of a certain person as Government Pleader, Madras, an advocate filed an affidavit alleging that he believed that that person's name was sent up for appointment as a High Court Judge but it had been turned down on the ground that he lacked judicial experience and that he had been appointed as a Govt Pleader in order to accelerate his chances of being appointed as a High Court Judge. The Law Minister in a counter-affidavit said that he was not in a position to disclose any matter in connexion with the consultations for appointment of a High Court Judge and claimed privilege under s 123. *Held* that there is no duty on Govt to claim privilege in a case of this kind; but they have a duty to speak the truth and affidavits are not excepted from the scope of s 123. In what manner public interests will be injured or prejudiced by dealing frankly with the allegations of the advocate, it is very hard to see [*Ramachandran v. Alagiriswami*, A 1961 M 450]. The expression "affairs of State" has a wider connotation in art 309 Constn [*Chini Mazdoor Sangh v. S*, A 1971 P 273].

Questions referred to in this section are barred and should be disallowed [*Md Ally v. R*, 4 Bur LT 113: 10 IC 917]. Where an assistant employed under the Controller of Stationery said that certain stamp papers containing a particular water-mark came into existence after a certain date basing his knowledge not on personal experience, but on an entry in a record for which privilege was claimed, it was allowed [*R v. Jaffarul*, 59 C 1046 : 36 CWN 514]. This case was distinguished in a later case where the Dy Controller gave evidence that the cartridge paper was issued on a certain date under his order [*S M Basu v. S R Sarkar &c* noted under s 45]. When privilege is claimed in respect of a confidential unpublished register (in the Government Stationery Office) and allowed, the evidence of an officer given by a reference to that register is not admissible [*Souza v. Souza*, A 1958 C 440 (*R v. Jaffarul*, 36 CWN 514 folld)]. The record of a statement heard by a police officer in exercise of the power under s 161 Cr P Code and recorded either in the diary or separately in the course of investigation proceedings is an unpublished official record relating to an affair of State, evidence derived from which cannot be produced in a case to which the first proviso to s 162 Cr P Code is not applicable except with the permission of the head of the police department [*Baijnath v. Md Din*, 17 L 472].

In a prosecution under the Excise Act a petition filed against the accused to the Excise Commissioner by a third party and the report thereon as also an anonymous letter do not come within s 123 [*Ijjatali v. R*, 47 CWN 928]. Report of a conciliator regarding his findings on an industrial dispute is not a privileged or confidential document [*Haralal v. State Industrial Court*, A 1967 B 174].

The law in ss 123, 124 and 162 does not suggest that an accused is entitled to acquittal when privilege has been claimed with respect to unpublished official record relating to any affairs of State. The law is otherwise in America [*Harbhajan v. S*, A 1961 Pu 215].

—Army Records.—Privilege was claimed and allowed in respect of production of Army Medical Sheets [*Anthony v. A*, 35 TLR 559]. Regimental records are confidential Crown documents which the Crown could refuse to produce [*Pettit v. Lilley*, 1946, 1 All ER 593]. Regimental records have however been held admissible in civil cases to prove non-access by husband [*Andrews v. Gardiner*, A 1947, 1 All ER 777].

—Proceedings Under the Income Tax Act.—It was formerly held that returns submitted to the Income-tax Officer, statements before him or any order that may be made by him do not refer to matters of State (s 123) nor are they made in "official confidence" (s 124) and the officer concerned was bound to produce them when

summoned to do so [*Venkatachella v. Sampathu*, 32 M 62: 19 MLJ 263; *Jadabram v. Bulloram*, 26 C 281]. Under s 54 I T Act, 1922 (s 137 of Act 43 of 1961) it was enacted that statements made or returns, accounts, documents produced or evidence given before the Income-tax authorities shall be treated as confidential and disclosure thereof by any public servant is prohibited and not court shall require any public servant to produce any such document or to give evidence in respect thereof. Warrant, by magistrate to obtain possession of income-tax returns from I T Office is illegal in view of s 54[3] I T Act [*I-T Officer v. S*, A 1950 Pu 306]. Court cannot summon an Income-tax Officer to enquire whether a person was or was not assessed to Income-tax [*I T Officer v. Janki Devi*, A 1956 Pu 101].

If an application is taken out by a partner to call upon the Income-tax Officer to produce the book of the firm which is with him, he is entitled to refuse to produce it [*Rangaswami v. Raju*, A 1942 M 276(1)]. It has however been held in a case that s 54[3] only lays down a prohibition on the court, it does not confer any exemption on the Income-tax Officer who is subject to every process of the court [*Varadarajam v. Kanakayya*, A 1939 M 546: 1939, 1 MLJ 791; see also notes to s 162 and *Venkatachella v. Sampathu, surpa*, where it has been held that when summoned to produce document the Collector is bound to produce it under s 162 notwithstanding any objection that he may have to offer against its admissibility]. The prohibition of disclosure in s 54[3] does not mean that such a document is not admissible if it is otherwise admissible under the Evidence Act, *eg* a certified copy of an income-tax return [*Ram-Rao v. Venkataramayya*, 1940, 2 MLJ 257: A 1940 M 768 FB], or a certified copy of a statement on oath made by a partner before the Income-tax Officer or the certified copy of an assessment order given to a partner containing statements by other partner [*Venkataramana v. Varahalu*, A 1940 M 308—CONTRA: *Pramatha v. Nirode*, 43 CWN 1169]. The direction to treat it as confidential is a direction to the officials of the I T Department and it is open to the assessee to waive that right [*Buchibai v. Nagpur Univ*, A 1946 N 377]. There is nothing in s 54[1] I T Act to justify the extreme view that all documents referred to in that section are made inadmissible in evidence. The section provides, first that the documents specified shall be treated as confidential and secondly that no court shall require a public servant to produce them. If a document can be given in evidence without requiring a public servant to produce it, there is nothing in the section to prohibit it. So a document seized by the police from the income-tax authorities is admissible in evidence. "Public servant" in s 54[3] refer to the public servant to whom disclosure had been made under the I T Act and not any public servant [*R v. Osman*, A 1942 B 289: 44 Bom LR 618]. Income-tax officer may in a proper case claim the privilege under ss 123 and 124 [*Kaderkutty v. I T Officer*, A 1961 K 32]. As to whether income-tax assessment orders are public documents, see *ante* s 77 and as to the admissibility of income-tax returns, see s 74 *ante*: "*Income-Tax Returns or Assessment Orders*".

Verbal or Secondary Evidence.—When the privilege is established, the same principle must also apply to the exclusion of verbal evidence which if given would jeopardise the interests of the community [*Duncan v. G Laird & Co Ltd*, 1942, 1 All ER 587, 595]. Unlike the rule in cases of private privilege (see ss 122, 126-132), the exclusion when allowed, is here absolute, so that in the case of privileged documents no secondary evidence is admissible [*Hughes v. Vargas*; *Chatterton v. Secy of S*, *post*—Phip 11th Ed p 243; Tays 947; *Jehangir v. Secy of S*, 27 B 189; *Abdul Razak v. Gaurinath*, 5 PWR Cr 1910: 5 IC 714; *Irwin v. Reid*, 48 304; *R v. Jaffarul*, 36 CWN 514 (obiter)]. As no document relating to affairs to State can be inspected by the

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3. See now s 137 of Income Tax Act 43 of 1961.

court under s 162, its contents cannot indirectly be proved; but other evidence as to the character of the documents can be given under that section [*S v. Sodhi Sukhdev* and cases cited *ante*]. Where secondary evidence (copies of tahsildar's report) had been admitted in the trial court without objection by Government on the ground of privilege, no objection can be raised in appeal [*Rathnamasari v. Secy of S*, A 1923 M 332: 72 IC 214].

Disçovery as to State Papers.—Where the State is not only sued as defendant under the authority of statute, but is in the suit bound to give discovery, there seems little if any reason why the court in relation to this privileged class of its documents, should have any less power than it has to inspect any other privileged class of documents, provided of course that such power be exercised so as not to destroy the protection of the privilege in any case in which it is found to exist [*Robinson v. State of South Australia*, 1931 AC 704: A 1931 PC 254: 35 CWN 1121; see also *Bhaiya Saheb v. Ramnath*, A 1938 N 358. In *Robinson's case* reliance was also placed on Or 31 r 14(2) of the Rules of the Supreme Court, Australia which is identical with Or 31 r 19A(2) of the English RSC and Or 11 r 19(2) of the C P Code. The view in *Robinson's case* was not agreed to in *Duncan v. C Laird & Co Ltd*, 1942, 1 All ER 587 but was approved in *Conway v. Rimmer*, 1968 1 All ER 874]. An order for discovery can be made against the State under Or 11 as it does not stand on a higher footing than a subject in regard to discovery [*Md Mehdi v. G-G in Council*, A 1948 S 100 FB: *Dinbai v. Doma*, A 1951 B 72]. In England discovery against the Government is now regulated by the Crown Proceedings Act of 1947 (see *ante*). Where a privilege is claimed at the stage of inspection under Or 11 and the court is required to adjudicate upon the validity of the claim, the relevant provisions of the Evidence Act as well as s 162 are equally applicable and if the document concerns any affairs of State the court cannot inspect it though it can take "other evidence" in order to determine the nature and class of the document. Or 11 r 19(2) must therefore be read subject to s 162 Evidence Act [*S v. Sodhi Sukhdev*, A 1961 SC 493].

Privilege How Claimed [Grounds To Be Stated].—It is not proper for an authority to claim privilege without considering particular papers and then coming to a decision whether privilege should not be claimed [*Chandra v. Dy Commr*, A 1939 O 65]. Further, in *Robinson's case* (*supra*) the Privy Council observed that there should be some indication on the nature of the suggested injury to the interests of the State or public by the disclosure. So it has been held that the head of the department should have the document before him and give careful attention before claiming privilege and his affidavit should contain an indication as to the nature of the document, as to why privilege is claimed, what injury to public interests is apprehended, or what affairs of State are involved, otherwise the court is entitled to draw an adverse inference from non-production [*Mohun v. R*, A 1940 L 217; *Dinbai v. Domn*, A 1951 B 72]. A mere statement that "in my opinion the disclosure would be against public interest" is not enough. He should indicate the nature of the suggested injury to the interests of the public [*Chamarbaghwalla v. Parpia*, A 1950 B 230]. He must apply his mind to the question whether public interests are likely to suffer by disclosure [*Bhal Ch v. Chanbasappa*, A 1939 B 237: 41 Bom LR 391; *Lakhuram v. Union*, A 1960 P 192]; and it is desirable that a statement should be put in saying that he has considered the document carefully and has come to the conclusion that it cannot be produced without injury to public interests [*Tularam v. R*, A 1946 N 256 : 1946 Nag 385].

When claiming privilege it is desirable but not indispensable that the records in question should be sent to the court in a sealed cover [*Narayanaswamy v. S*, A 1953 M 228: 1952, 2 MLJ 375]. The privilege may be claimed after service of the rule

although the documents had been annexed to the petition. The court may adopt judicial blindness to the documents and proceed in accordance with law and unless the petitioner urges the production of the originals no question of taking collateral evidence to determine validity of objection arises [*Sujit v. Union*, A 1970 A & N 131].

In order to claim privilege, the grounds on which the claim is based must be set out by a Minister or at least Secretary to the Government in an affidavit [*R v. Rasulbaksh*, 1944 Kar 175: A 1944 S 145 (*Robinson v. State of South Australia, post* **relied on**)]. The claimant must state reasons within premissible limits [*S v. Kailaswati*, A 1979 Raj 221]. Privilege should be claimed generally by the Minister-in-charge of the department—Meaning of head of department [*Union v. Sudhir*, A 1963 Or 111]. Affidavit by the Secretary to the Govt-in-charge of the department to which the document in question belongs should be sufficient and affidavit by Minister-in-charge should not be insisted upon [*Lall v. Secy of S*, A 1941 L 209; *Dinbai v. Dominion*, A 1951 B 72; *S v. Syed Abdur*, A 1954 M 926; *Pub Pros v. Damera*, A 1957 AP 486; *Choudhury v. Changkakati*, A 1960 As 210]. If any objection is taken through as subordinate, the head of the department will not be absolved from the objection to appear in person and satisfy the court that the objection is valid. The court may require him to give an affidavit or a statement on oath and may put any further questions to him for satisfying itself that the privilege has been validly claimed [*Lakhuram v. Union*, A 1960 P 192; *G-G in Council v. Peer Md*, A 1950 Pu 228 FB].

In agreement with the view in some of the cases cited above the Supreme Court has held that: (*i*) The privilege should be claimed generally in the form of an affidavit by the Minister-in-charge; if not, the Secretary who is the head of the department. (*ii*) When the affidavit is by the Secretary, the court may in a proper case require an affidavit of the Minister himself. (*iii*) The affidavit should show that each of the documents in question has been carefully read and considered and the deponent is satisfied that its disclosure would lead to public injury. (*iv*) The affidavit should also indicate briefly within permissible limits reasons why it is apprehended that the disclosure would lead to injury to public interest. This last requirement would be very important when privilege is claimed in regard to documents which *prima facie* suggest that they are documents of a commercial character having relation only to the commercial activities of the State [*S v. Sodhi Sukhdev*, A 1961 SC 493; see also *Amar Chand v. Union*, A 1964 SC 1658 *post*]. Relying on *Sodhi's* case it was held that either the Railway Minister or the Secretary of the department should claim privilege by filing an affidavit and not 18 other officers designated as heads of departments [*Union v. Indradeo*, A 1963 P 129].

Objection may be taken by the head of the department, orally or by affidavit [*Re Hargreaves*, 1900, 1 Ch 347]; or by a subordinate or counsel instructed by him to object [*A G v. Nottingham*, 20 TLR 257]; or by the party interested in excluding the evidence or the judge himself [*Hughes v. Vargas*, 9 R 661 CA; *Chatterton v. Secy of S*, 1895, 2 QB 189; Phip 11th Ed p 242; *Duncan v. C Laird & Co Ltd, infra*]. It is for the witness himself to claim or to waive the privilege, as he sees fit; the counsel in the cause cannot argue the question in favour of the witness [*Thomas v. Newton*, M & M 48n; *R v. Adey*, 1 M & Rob 94], perhaps in the case of official communications [see s 124]. The witness may claim his privilege at any part of the inquiry, and he does not waive it altogether by omitting to claim it as soon as he might have done so [*R v. Garbett*, 1 Den cc 258 overruling *East v. Chapman*, M & M 46]. The time for the witness to make the objection is after he is sworn [*Boyle v. Wiseman*, 10 Exch 647; Ros N P p 174]. In *Hennessy v. Wright*, 21 QBD 509 WILLS J, observed: "No sound distinction can be drawn between the duty of the judge when objection is

taken by the responsible officer of the Crown, or by the party or when no objection being taken by any one, it becomes apparent to him that a rule of public policy prevents the disclosure of the documents or information."

The court is entitled to prescribe in any particular case the manner in which the claim of privilege shall be made if the claim is to be allowed. It may, in one case, if thus advised, accept the unsworn statement of a responsible Minister. It may in another case, where the circumstances seem so to require, call for an affidavit from him (see *Kain v. Farrer*, 1878, 37 LT 469). Where the State is a party litigant and bound to give discovery it seems clear that the particular privilege should normally like any other, be claimed under the sanction of the oath, the oath being that of a responsible Minister of State whose mind has been directed to the question; as a matter of guarantee that the statement and opinion of the Minister, which the court is asked to accept, is one that has not been expressed inadvisedly or lightly or as a matter of mere departmental routine, but is one put forward with the solemnity necessarily attaching to a sworn statement [*Robinson v. State of South Australia*, A 1931 PC 254: 35 CWN 1121]. The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced [*Duncan v. C Laird & Co Ltd*, 1942, 1 All ER 587]. Privilege should generally be claimed by the Minister-in-charge of the department concerned and the affidavit should show that each document has been carefully read and considered and the maker of the affidavit is *bona fide* satisfied that its disclosure would lead to public injury. Claim of privilege was rejected on the ground that the document signed by the Home Minister did not satisfy the requirements of the affidavit [*Amar Chand v. Union*, A 1964 SC 1658 (A 1962 HP 43 reversed)]. If there are series of documents in file it should appear from affidavit that they were individually read and considered [*Joti Pd v. Addl Civil Judge*, A 1968 A 42]. The objection cannot however to given effect to unless it be taken by the proper officer of the Government [*Hughes v. Vargas, sup*; see *Kain v. Farrer*, 1878, 37 LT 469 where the court, before being satisfied, required the responsible minister's oath]. Meaning of 'head of the department' and the form in which objection should be taken [*G-G in Council v. Peer Md*, A 1950 Pu 228, 237]. Secretary, Secondary Edn Board is not the proper officer to claim privilege when a document is called for from the President of the Board [*Debojyoti v. Nalinaksha*, A 1954 C 216].

The court cannot hold an enquiry into the possible injury to public interest from the disclosure of the document that matter being left to the head of the department (*S v. Sodhi Sukhdev*, 1961, 2 SCR 371 reld on), but the court can hold a preliminary enquiry and determine the validity of the objection to its production and that necessarily involves an enquiry into the question as to whether the document relates to affairs of State. In view of the wide powers on the head of the department the court in the aforesaid case took the precaution of sounding a warning that heads of departments should act with scrupulous care and should never claim privilege only or even mainly on the ground that disclosure of the document may defeat the defence raised by the State. Considerations relevant in claiming privilege on the ground that affairs of State may be prejudiced by disclosure must always be distinguished from considerations of expediency on the ground that production of the document will defeat the defence made by the State [*Amar Chand v. Union*, A 1964 SC 1658].

Immunity available in criminal cases also.—The doctrine of public interest immunity exists in criminal cases as it does in civil cases, where the interests of justice must be weighed against the claimed public interest [*R v. Governor of Pentonvile Prison*, The Times, November 28, 1990 DC, considering *Amand v. Home Secy*, 1943 AC 147].

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

SYNOPSIS

COMMENTARY

Principle and Scope.—Ordinarily no privilege is created in law by the mere fact that a communication is made to a person in express confidence. No pledge or oath of secrecy can protect a communication from disclosure in a court when it is necessary for elicitation of truth or in the interests of justice. "A confidential communication to a clerk, to a trustee, to a commercial agency, to a banker, to a journalist, to a broker or to any other person not holding one of the special relations recognized in law is not privileged from disclosure." (Wig s 2286). But policy requires that certain communications between persons having special relations should be privileged, *eg* official communications, communications between husband and wife (s 122), lawyer and client (s 126) &c, &c.

As in s 123 public policy also requires that communications made to a public officer in "official confidence" should not be disclosed or as being detrimental to the public interest or service. (See Hals 3rd Ed Vol 15 para 756). The communication may be oral or in writing. The confidence reposed, may be express or implied. This section is not confined to unpublished record as in s 123. S 124 contains no restriction of that kind, but it is difficult to see how a confidential communication or report once published can be protected. As to "public officer" see s 2(*17*) C P Code, 1908. In s 123 the word "permitted" has been used, whereas in this section "compelled" has been used. Unlike s 123, the discretion as to whether disclosure should be made rests with the public officer to whom the communication is made in official confidence and not the head of the department. The only ground on which privilege may be claimed is prejudice to public interest. Privilege on a different ground, *eg* to prevent scandal in the office will not be allowed [*Bidhu v. Harinath*, 7 CWN 246, *infra*]. S 124 should in no event be resorted to as a cloak to shield the truth from the court [*Excelsior Film Exchange v. Union*, A 1968 B 322]. It rests exclusively with the public officer concerned to withhold or give permission, as he is the sole judge as to whether the public interest will or will not suffer by the disclosure of the communication [*Bidhu v. Harinath sup*; *Nagaraja v. Secy of S*, 39 M 304: 26 IC 723; *Collr of Jaunpur v. Jamna*; *Ibrahim v. Secy of S, infra*; *In re Makky*, A 1943 M 278; *Vythilinga v. Secy of S*, A 1935 M 342]. Citizen has a right to know about the activities of the State, the instrumentalities, the departments and the agencies of the State particularly in the matter of sanitation and other allied matters, every citizen has a right to know how the State is functioning and why the State is withholding such information in such matters. [*L K Koolwal v. State of Rajasthan*, A 1988 Raj, 2, 4]. A

memo from the State Government which merely informs the Accountant-General about the scale of pay to a trained Graduate teacher is not a privileged communication [*State of Madhya Pradesh v. Saradarmal*, A 1987 MP 156, 159].

The opinion of the public officer is conclusive only when he claims the privilege that the public interest would suffer and not when it is claimed on any other ground [*S v. Appanna*, 1962, 1 And WR 256]. The report made by one public officer to another in the discharge of his official duties would come both in s 123 and s 124 [*S v. Appanna, sup*]. As in all such cases the discretion must be used on well-established principles and not arbitrarily (*ante* s 123). As s 123 applies only to evidence derived from unpublished official records relating to affairs of State and s 124 applies to all communications made in official confidence, s 124 is wider in its amplitude than s 123 [*Firm Ghulam v. S*, A 1961 J&K 20].

The privilege extends only to a communication upon the subject with respect to which the privilege extends and the privilege can be claimed in exercise of the right or safeguard of the interest which creates the privilege [*Chamanlal v. S*, A 1970 SC 1372].

Determination of the Privilege.—But the occasion for claiming privilege under s 124 arises only when the evidence sought to be given is a communication made to a public officer "in *official confidence*". That is the condition precedent before privilege can be claimed. So long as this condition is not fulfilled there can be no claim of privilege. The important question to be decided first is whether or not the communication was "made to him in *official confidence*" and the public officer concerned is no judge of this question. As in s 123 (*ante*: "*Principle and Scope*") this preliminary question is to be decided by the judge under s 162 and it is not for the public officer to decide whether the document containing the communication is privileged [*Collr of Jaunpur v. Jamna*, 44 A 360; *Ibrahim v. Secy of S*, A 1936 N 25 : 116 IC 668; *Vythilinga v. Secy of S*, A 1935 M 342; *Ijjatali v. R*, 47 CWN 928; *Bhaiya Saheb v. Ramnath*, A 1938 N 358; *Bhalchandra v. Chanbasappa*, A 1939 B 237; *In re Mantubhai*, A 1945 B 122; *Pub Pros v. Damera*, A 1957 AP 486; *S v. Sodhi Sukhdev*, A 1961 SC 493, 503] and for that purpose the court is empowered under s 162 to order production and to inspect the document with a view to determine whether the communication was or was not made in official confidence [*In re Suryanarayana*, A 1954 M 278; *Debajyoti v. Nalinaksha*, A 1954 C 216; *Pub Pros v. Damera, sup*; see also *Venkatachella v. Sampathu*, 32 M 62, 66 and *post* notes under s 162]. As the Supreme Court has observed, it is clear that in dealing with an objection against the production of a document raised under s 124, the court would have first to determine under s 162 whether the communication in question has been made in official confidence. If the answer to the said question is in the negative then the document has to be produced; if the said answer is in the affirmative then it is for the officer concerned to decide whether the document should be produced or not [*S v. Sodhi Sukhdev*, A 1961 SC 493, 503; *Lakshmandas v. S*, A 1968 B 400]. Where a document falls within s 124 the court must inspect it and determine whether the communication was made in official confidence [*Gangaram v. Union*, A 1964 P 444]. In respect of documents falling within s 124 the court stands in a better position than documents under s 123, as s 162 empowers the court to inspect all documents other than documents relating to affairs of State (*ie* falling within s 123).

It follows therefore that the questions involved are:—

(*1*) *Whether the communication in question was made to the public officer in official confidence?*—The court is the sole judge of this question. For the purposes of deciding this question the court has the power to inspect the document as also to take

"other evidence" under s 162. If it determines that the communication was not made "in official confidence," the occasion for claiming privilege is non-existent and the objection made must be overruled.

(2) *Whether public interest would suffer by its disclosure?*—The public officer is the sole judge of this question. If the court holds that the communication was made in official confidence, it rests exclusively with the public officer concerned to withhold or allow disclosure according as he is of opinion whether or not public interest would suffer.

Same: [Communication Made in Official Confidence].—The privilege has been given not for the benefit of the person making the communication but for protection of the public interest alone. The dominant intention in the section is to prevent disclosures to the detriment of the public interest and it is settled that the decision as to such detriment is to be with the officer, to whom the communication is made, and does not depend on the special use of the word "confidential" [*Nagaraja v. Secy of S, sup* (*Venkatachella v. Sampathu*, 32 M 62 **folld**)]. The informants when they give information to Customs Officials about the commission of any offence relating to revenue, do so, with the object of making the customs officials take action either to prevent the crime or if the crime is committed to set the law in motion against the offenders, such communications are made in official confidence [*Assistant Collector of Central Excise, Mad v. T.K. Prasad*, 1989 Cri LJ NOC 28 : 1988 Mad LVV (Cri) 338 (Mad)]. The words "official confidence" seem to indicate that the section applies to communication from one officer to another public officer received through their official duties and not to communications to such officer by outsiders. So, it has been held that letters by a private individual to the Postmaster-General containing libellous statement in a complaint against the conduct of a postal official, are not protected [*Blake v. Pilford*, 1 M & Rob 198; *In re Barjorji*, A 1932 B 196 *post*]. The section applies to communications from one public officer to another public officer in official confidence [*S v. Appanna*, 1962, 1 And WR 256]. Whether a statement is made in official confidence or not is a question of fact [*Srinivasan v. Bramhatantra*, A 1960 Mys 180].

A communication under s 124 necessarily involves the wilful confidence of secrets with a view to avoid publicity by reason of the official position of the person in whom trust is reposed [*per* WASSODEW J, *Bhal Ch v. Chanbasappa*, A 1939 B 237]. "Communication in official confidence" import no special degree of secrecy and no pledge or direction for its maintenance, but include generally all matters communicated by one officer to another in the performance of their duties. An easier and more probable explanation of the phrase "official confidence" is afforded by comparison with the reference to "professional confidence" in s 126 [*Nagaraja v. Secy of S, sup*]. If a document is produced or a statement is made under the process of law it would be difficult to say that it was made in official confidence. If on the other hand statement is made in a confidential departmental enquiry, it would be so [*In re Suryanarayana*, A 1954 M 278; *Srinivasan v. Bramhatantra*, A 1960 Mys 180].

When a communication is made to a public officer and that officer forwards it to another officer for further action, the communication should be held to have been addressed to the latter officer and an affidavit from that officer that public interest would suffer by disclosure would be sufficient [*Union v. Sudhir*, A 1963 Or 111].

Under the Income-tax Act, 1896, it was held that statements made and documents produced by assessees under process of law before Income-tax Officers do not refer to matters of State and such statements cannot be said to be made in "official confidence" within s 124 and in any case the Collector when summoned to produce such

documents is bound to produce them under s 162 Evidence Act to enable the court to inspect them to decide on the validity of the objection that may be offered for withholding them (*Venkatachella v. Sampathu*, 32 M 62; *Jadobram v. Bulloram*, 26 C 281). See however now s 137 of Income-tax Act, 1961 and *ante*: "*Proceedings Under the Income-tax Act*".

The valuation statement given by the Revenue Inspector on the basis of which the award was passed could not be said to be a communication made in official confidence [*Kunjanam v. S*, A 1964 K 274]. Cable addresses and cables sent to those addresses are not communications to public officer in official confidence and hence privilege from production cannot be claimed [*Hussain v. Dalipsinghji*, A 1970 SC 45].

Two matter are involved in this section: (*1*) Whether a particular document for which privilege is claimed within it, *ie* whether the document is a communication made to a public officer in official confidence. This is for the court to decide, (2) Whether the public interest would suffer by its disclosure. As to this, the public officer is the sole judge [*Vythilinga v. Secy of S*, 159 IC 577: A 1935 M 342; *Collr of Jaunpur v. Jamna*, 44 A 360 *post*; *In re Suryanarayana*, A 1954 M 278]. His opinion is conclusive only when he claims privilege on the ground that public interest would suffer, but not when it is claimed on any other ground. Thus, when a head sorter in the Mail service made an official report to his superior against a sorter containing defamatory statement, privilege was negatived because the claim to it was made on the ground that it "might cause a scandal in the office" and not that public interest would suffer [*Bidhu Bhusan v. Harinath*, 7 CWN 246].

Difference Between Ss 123 and 124.—S 124 is confined to public officer. S 123 embraces every one. In s 124 the public officer concerned is the judge as to whether a disclosure will or will not be against public interest. In s 123 this discretion rests with the head of the department concerned. But in both the sections, the court is the judge as to whether the document in respect of which privilege is claimed is a State document (s 123) or whether the communication was made in official confidence (s 124). If a document comes within s 123 the court cannot inspect it though it can take other evidence to determine the character attributed to the document. If the document falls within s 124, the court can inspect it to determine the claim of privilege (see s 162 *post*). See *ante* under "*Principle and Scope*".

How Privilege is Claimed. [See *ante* s 123 p 1174].—The privilege should be claimed by the official concerned. When he has not directly claimed any protection, no foundation is laid for claiming the privilege [*Srinivasan v. Bramhatantra*, A 1960 Mys 180].

"Public Officer" See s 2(*17*) C P Code.—It would normally include all officers including clerks of superior offices and might also apply to non-officials to whom such papers were disclosed on the understanding, express or implied, that the knowledge should go no further [*Chandra v. Dy Commr*, 14 Luck 35: A 1939 O 65]. "Public officer" has not the same meaning as assigned in s 2 C P Code. In the absence of a definition, the term must be given its ordinary dictionary meaning. The Vice-Chancellor of a University is a public officer. Receipt of emoluments is not the sole test [*Univ of Punjab v. Jaswant*, A 1946 L 220: 48 PLR 16]. An agent of a Railway Co is not a public officer and he cannot object to produce documents under s 124 [*Agent A B R v. Surendra*, 1939, 2 Cal 46: 43 CWN 644]. Officer of the Court of Wards is public officer [*Chandra v. Dy Commr sup*]. In a court martial trial for the offence of theft and conspiracy, the reports of security officer and C.B.I. are privileged documents and the accused has no right to inspect them. [*Trichan Joshi v. Union of India*, 1983 Cri LJ NOC 109 (Del) : (1983) 1 Cri MES 1025]. The grant of

a liquor licence is not a matter of right but merely in the nature of privilege. The Deputy Commissioner is head of administration of the district and is conversant with the local situation and has secret sources of information. The report of the Deputy Commissioner regarding the grant of a liquor licence is confidential in nature [*Bishnu Ram Borah v. Parag Saikia*, A 1984 SC 898, 904].

"Disclose."—Means the first disclosure of communications made in official confidence and does not apply to disclosure in a court of law of what has already been disclosed outside it. So where the plaintiffs were already allowed to inspect some official documents out of court, privilege cannot be claimed [*Chandra v. Dy Commr, sup*].

Secondary Evidence.—Secondary evidence of the contents of written communications made in official confidence is inadmissible [*Abdul Razak v. Gauri*, PWR Cr 1910 : 5 IC 714]. See *ante* s 123.

Privilege As to Communications in Official Confidence.—During a police investigation an excise inspector in reply to queries by the police wrote a letter stating what he knew of an alleged offence—*held*, that the inspector was a private person by whom the communication was made and not a person to whom it was made [*In re Barjorji*, A 1932 B 196]. Where a proprietor wants his estate to be taken over by the court of wards, statements made to the Collector showing financial position liability &c are privileged [*Collr of Jaunpur v. Jamna*, 44 A 360: 66 IC 171; see *Ibrahim v. Secy of S*, A 1936 N 25; *In re Makky*, A 1943 M 278]. A magistrate came across a document during trial and confiscated it as a document of State. His action was held to be proper [*Wamanrao v. R*, 94 IC 899: A 1926 N 304].

Accident register is not a privileged document [*In re Adagalla*, A 1940 M 240]. Confidential report of a departmental railway enquiry is privileged [*R v. Mir Md*, 28 SLR 274]. Record at police station about the activities of a person and the reports about him by police officers to superior officers are not privileged [*Teja Singh v. R*, A 1945 L 293]. Statements made by the defendant in a confidential departmental enquiry about black marketing allegation against the plaintiff are made in official confidence [*In re Suryanarayana*, A 1954 M 278]. Statements made by witness in the course of a departmental enquiry into the conduct of police officers, who were afterwards put on their trial are not privileged [*Harbans v. R*, 16 CWN 431: 13 Cri LJ 445 *ante*]. Statements of witnesses in proceedings against a police officer under s 7 Police Act, 1861 are not communications in official confidence [*Tilka v. S*, A 1959 A 543]. The depositions at the departmental enquiry are only admissible either to corroborate or contradict evidence. In this case privilege was allowed in respect of proceedings in a departmental enquiry into the conduct of certain police officers [*Weston v. Peary*, 40 C 898, 918: 18 CWN 185, 230]. In a prosecution under s 21(*f*) Madras Forest Act, an accused moved for the production of certain statements recorded by the Forest Officer in the course of his investigation from certain other accused—*Held*, there was no privilege under ss 123 and 124 [*Kaliappa v. R*, A 1937 M 492]. Communications made by railway employees to station master who was enquiring into a case of theft from goods truck are not protected [*R v. Bhagwat*, A 1930 O 543]. A resolution of Government containing opinion of Government officers and legal adviser on a question of land tenure was held to be privileged [*Sursingh v. Secy of S*, 28 Bom LR 1213: A 1926 B 590: 99 IC 293]. As for official communications, see also *Jehangir v. Secy of S*, 27 B 189: 5 Bom LR 30; LR 131 noted under s 123 and *R v. Ramdhan*, 2 Bom LR 329 noted under s 125. Communications made by one officer to another in matters arising out of commercial relations which subsist between the State and a private

citizen are not made in official confidence [*Tirath v. Govt Jammu*, A 1954 J & K 11; *S v. Midland Rubber &c*, A 1971 K 288]. A party to an action who has made a communication to the Government or a head of the department is entitled to ask for its production. No privilege can be claimed in respect of it [*Firm Ghulam v. S*, A 1961 J & K 20].

In English law the privilege as to production of public documents extends even to those which pass from hand to hand, in a public office, in the usual course of business, with no special mark of secrecy upon them [*Nagaraja v. Secy of S*, 39 M 304]. In a prosecution for perjury, an affidavit was made in the High Court that the accused was being prosecuted in pursuance of the direction of the district magistrate and that the trying magistrate used to hold private consultation with the prosecution before every hearing. The affidavit was sent to the district magistrate for his explanation, who pleaded ss 123-25 and sent his explanation to the Commissioner. It was held that the section had no bearing on the question and the practice of holding private consultation with the prosecution agency was very strongly condemned [*Taj Md v. R*, A 1928 L 125: 107 IC 100].

The correspondence between superior authorities about the confirmation or non-confirmation of a Government servant in a post of a confidential nature to which the Govt can claim privilege, though it must give material facts in the affidavit filed in reply and make the documents available for the inspection of the court, so that only the confidential part of the correspondence is not brought on the record and the remaining material is used for the decision of the case, and at the same time judgment is based on true facts [*Har Pd v. S*, A 1963 A 415]. Files and documents in connection of a Govt employee's reversion from officiating post is privileged [*H L Rodhey v. Delhi Administration*, A 1969 D 246]. Observations of the High Court removing a judicial officer from service would be a privileged document [*Md Ilyas v. S*, A 1965 B 156].

Statement of Witness to the Police.—Statement to police officer by witness during an investigation under Cr P Code is not made in official confidence and no privilege can be claimed [*Apparao v. Suryaprakasa*, A 1951 M 664: 1951, 1 MLJ 526; *R v. Rasulbux*, A 1942 S 122: 1942 Kar 252; *Mahabirji &c v. Prem*, A 1965 A 494]. Where a police report about the antecedents of a Govt employee whose services were terminated on the basis of that report is produced in court without prejudice to the claim of privilege under ss 123, 124 the court would be competent to refuse the petitioner access to the report [*Dasan v. S*, A 1965 K 63].

[1][**S. 125. Information as to commission of offences.**—No Magistrate or [2]Police-officer shall be compelled to say whence he got [3][any] information as to the commission of any offence, and no Revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue[4].

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1. Substituted for the original s 125 by the I E (Am) Act 3 of 1887.
2. *All the privileges which a police-officer has under s 125 of this Act have been conferred on a Commandant or Second-in-Command of military police in Burma [see the Burma Military Police Act (15 of 1887), s 13] and in Bengal [see the Bengal Military Police Act (5 of 1892), s 12].*
3. In Ceylon "the" substituted.
4. In Ceylon "or the excise laws" added after "public revenue".

Explanation.—"Revenue-officer" in this section means any officer employed in or about the business of any branch of the public revenue[5].

SYNOPSIS

COMMENTRY

Principle and Scope.—On grounds of public policy, the source of information of offence against the laws should not be divulged. If the names of the informers and the channel of communication are not protected from disclosure, no one would be forthcoming to give such information. This privilege is necessary for creating confidence and offering encouragement to informants. "It is the duty of every citizen to communicate to his Government any information which he has of the commission of an offence against the laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among secrets of State..... Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the Government" [*per* GREY CJ in *Worthington v. Scribner*, 109 Mass 487, 489 (Am)]. In *R v. Hardy*, 24 How St Tr 808 EYRE LCJ said:—

> "It is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it, but it does not appear to me that it is within the ordinary course to do it."

The section entitled a police officer to refuse to disclose the source of his information as to the commission of any offence, while public policy demands that no adverse inference be drawn against the prosecution for withholding an information from the witness box [*S v. Randhir*, A 1959 A 727].

Similar principle is to be found in ss 162, 172 Cr P Code. The rule in this section applies to both criminal and civil cases.

In England the protection is afforded to all witnesses of the Crown in public prosecutions. S 125 merely speaks of "magistrate" or "police officer" and "revenue-officer". It has however been held, following the English rule, that it is settled law that witnesses for the Crown in criminal prosecution undertaken by the Government are privileged from disclosing the channel through which they received or communicated information. So, the defence is not entitled to elicit from individual prosecution witnesses whether he was a spy or informer, and also discover from police officials the names of persons from whom they had received information. But a detective

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5. In Ceylon "or in or about the business of any Government farm" added after "public revenue."

cannot refuse on grounds of public policy to answer a question as to where he was secreted [*Amritalal v. R*, 42 C 957, 1025: 19 CWN 676].

Statements made in the course of a judicial proceeding are absolutely privileged (see s 132 *post*). But information given or report made to the police does not come within this principle. The report may or may not lead to a judicial proceeding, but it is a preliminary step taken before any judicial proceeding is commenced. A report made at a police station though not within the rule of absolute privilege is *prima facie* privileged, that is to say, the person making it has a right to make it if he honestly believes it, and the person receiving has a duty to receive. But qualified privilege provides only a qualified protection and the person charged with defamation must prove that he used the privilege, honestly believing the truth of what he said or in other words having reasonable grounds for making the statement; and the *onus* of establishing that lies upon him [*Majju v. Lachman*, 46 A 671: 22 ALJ 579: 87 IC 702].

Nature and Extent of the Privilege.—The section says that no magistrate or police officer "shall be compelled to say," but there is nothing to prohibit him from saying if he be so willing. So the discretion as to whether he will say or not has been left with the magistrate or police officer. Under the English law, the protection does not depend upon a claim being made, for it is the duty of the judge, apart from objection taken, to exclude such evidence if it is detrimental to public interest [*Marks v. Beyfus*, 25 QBD 494 CA; *Hennesy v. Wright*, 21 QBD 509]; but if the judge is of opinion that strict enforcement of the rule would result in miscarriage of justice, he may relax it *in favourem innocentine* [*per* BOWEN LJ, in *Marks v. Beyfus, sup*]. The English rule has been approved in a Calcutta case where WOODROFFE J, observed: "Though the section (s 125) does not in express terms prohibit the witness, if he be willing, from saying whence he got the information, both the English authorities from which the rule is taken and a consideration of the foundation to the rule show that the protection should not be made to depend upon a claim of privilege being put forward, but that it is a duty of the judge, apart from objection taken, to exclude the evidence. *A fortiori* if objection is taken, if cannot, since the law allows it, be made the ground of adverse inferences against the witness" [*Weston v. Peary*, 40 C 898, 920]. In a suitable case the court may compel disclosure in order to avoid false testimony or to secure justice. In *Mark v. Beyfus, sup* p 498 LORD ESHER MR, said:—

"I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show that prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail." See also the remarks of COCKBURN CJ, in *R v. Richardson*, 1863, 3 F & F 698.

In England the rule applies to public prosecution, informations for fraud committed against the revenue laws, or civil proceedings arising out of either. This section applies when evidence is given on the prosecution side and it makes no difference between public and private prosecutions. In the English law, however, the rule does not apply to private prosecutions, where the information, if material, should be disclosed [*R v. Richardson*, 3 F & F 693; *Marks v. Beyfus, sup*; Steph Art 113]. In a case before the passing of the Evidence Act it was held that the rule which lays down that witness cannot be examined as to information given by them to the Government for the discovery of offenders, is confined to offences against the State or for breach of the revenue laws, and it does not apply to cases where the information has been

communicated to a magistrate, and acted upon by him in his capacity as magistrate [*In re Mohesh Ch*, 13 WR Cr 1, 10]. The relaxation of the rule in ordinary private prosecutions, is undoubtedly necessary to promote the ends of justice. Taylor says that "it may well be doubted whether this rule of protection extends to ordinary prosecution [*Att-Genl v. Briant*, 15 M & W 169; *R v. Richardson, sup*]; and even when it applies,—as unquestionably it does whenever the Government is directly concerned,—it may sometimes, if rigidly enforced, be productive of great individual hardship.....On the other hand, it is absolutely essential to the welfare of the State, that the names of parties who interpose in situations of this kind should not be divulged; for otherwise—be it from fear or shame, or the dislike of being publicly mixed up in inquiries of this nature,—few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequence would be that many great crimes would pass unpunished [*Home v. Bentick*, 1820, 2 B & B 162; Tay s 941]. In this behalf the law in India is the same as in England, quoting *Home v. Bentinck, sup* [*S v. Randhir*, A 1959 A 727].

What is prohibited under the section is disclosure of "any information as to the commission of any offence." Under the English law the rule protects not only the names of the persons by or to whom the disclosure was made, but the nature of the information given, and any other question as to the channel of communication of what was done under it [*R v. Hardy*, 24 How St Tr, 808, 816; *R v. Watson*, 32 How St Tr 82; *Marks v. Beyfus, sup*]. Thus, the witness cannot be asked whether he himself was the informer [*A G v. Briant*, 15 M & W 169]; or even by whom he had been advised to communicate his information to the authorities [*R v. Hardy, sup*]; nor can a police constable be cross-examined as to what passed between himself and his superior officer [*R v. Herlihy*, 32 Ir LT Jo 38]; or as to inquiries made in the course of his duties [*R v. Carpenter*, 156 Sess Pap CCC 298, *per* CHANNEL, J]. A witness may, however, be asked whether the person to whom he made the communication was a magistrate or not (*ibid*); and a constable has been compelled to disclose in which house he was secreted whilst watching licensed premises kept open after hours [*Webb v. Catchlove*, 3 TLR 159; Phip 11th Ed p 244]. The law does not appear to be otherwise in India. 'Information' must necessarily include not only names of persons but also the nature and source of information. It includes all questions to the channel through which the detection is made. If information is confined to names only, the rule would be infructuous. But the privilege does not apply to the *contents* of the statement, for the contents of the communication must necessrily be disclosed while prosecuting the offender.

In *R v. Hallet*, (1986 Cr LR 462) the issue was whether the trial judge had rightly excluded evidence of the identity of police informants It was held that if the judge does come to the conclusion that the lack of information as to the identity of the informer is going to cause a miscarriage of justice, then he is under duty to admit the evidence. If the defence is manifestly frivolous the trial judge may conclude that it must be sacrificed to the general public interest in the protection of informer [*R v. Agar*, (1990) 2 All ER 442].

Police officers were not permitted to be questioned about the secret places in adjoining houses where they posted themselves in a locality known for drug dealing and thus saw the accused selling drugs. His counsel wanted to cross-examine police officers on the exact location of the observation posts so that he could test the police evidence by reference to their distance from the alleged sale transactions, their angle of vision and possible obstructions to their line of sight. This was not allowed. This would have exposed persons who provided their premises and endangered their safety [*R v. Johnson*, (1989) 1 All ER 121 CA].

Where, in another case, evidence was obtained through agents provocateurs and the accused contended that the crime would not have been committed but for their activities, it was held that a judge at a criminal trial has no discretion to exclude evidence tendered by the prosecution because it had been obtained illegally, unfairly, by trick or by other misrepresentation, except where the actions of the prosecution amount to an abuse of the process of the court and are oppressive, which was not the case here [*R v. Edwards*, 1991 Crim LR 44 CA; *R v. Edwards*, 1989 Crim LR 358 CA, where it was held to be irrelevant that the accused was indebted to the agents provocateurs.

But where the police informer was himself a witness and had laid a trap for the accused and the latter could not have exposed without asking the police to disclose the identity of their informant, it was held that the police was compellable in the circumstances to make the necessary disclosure. The Court of Appeal said: Notwith-standing the special rule of public policy which inhibited the disclosure of the identity of informants, the public interest in ensuring a fair trial for an accused person outweighs the public interest in protecting the identity of a police informer if the disclosure of the informer's identity is necessary to enable the accused to put forward a tenable case that he had been trapped by the police and the informer acting in concert [*R v. Agar*, (1990) 2 All ER 442 CA].

The protection afforded by this rule will be equally upheld, though the witness, in his examination-in-chief, has admitted that suggestions have been made to him on the part of the Government [*R v. O'Connell*, 1843 Arm & T 178, 179] and the doctrine has been even carried so far, that where a witness believing the views of certain parties to be dangerous to the State, had consulted a private friend as to what steps he should pursue, and the friend advised him to communicate the information to Government, a majority of judges held that the name of his friend could not be disclosed [*R v. Hardy*, 24 How ST 808-20—EYRE, CJ; Tay s 940].

[*Ref Tay ss 939-41; Best, s 578; Phip 8th Ed p 183; Ros Cr Ev 136; Steph Art 113; Wig ss 2374-77; Hals, 3rd Ed, Vol 10, para 877*].

Limitations of the Rule.—"The privilege is subject to certain limitations:—

(*1*) It applies only to the *identity* of the informant, not to the contents of his statement as such, for, by hypothesis the contents of the communication are to be used and published in the course of prosecution. Much less the privilege applies to prevent merely the proof of contents which have already been *de facto disclosed*,—as in an action against the informer for libel [See *Majju v. Lachman*, 46 A 671, *sup*]. The Police, Magistrate and the Revenue Officer can claim privilege from disclosing the name of the informant in respect of offence under the Customs Act, without any other consideration coming in [*Assistant Collector of Central Excise, Madras v. T K Prasad*, 1989 Cri LJ NOC 28 : 1988 Mad LW (Cri) 338 (DB)].

(2) If the identity of the informer is *admitted or known*, then there is no reason for pretended concealment, and the privilege of secrecy would be merely an artificial obstacle to proof.

(*3*) The privilege applies to communications to such officers only as have a *responsibility* or *duty to* investigate or to prevent public wrongs, and not to officials in general. This ordinarily signifies the *police*, and officials of *criminal* justice generally. But it may also include *administrative officials* having a duty of inspection or of law enforcement in their particular spheres [See s 125 which includes 'Revenue-officer'].

(*4*) Even where the privilege is strictly applicable, the *trial court may compel disclosure*, if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony" [Wig s 2374]. See *Marks v. Beyfus, sup.*

The source of information as to the commission of an offence is only prohibited and not the custody of any document or other material objects that might have been seized and tendered in evidence [*Pub Pro v. Govindaraja*, A 1954, M 1023]. The privilege contemplated is merely in respect of the source of the information [*Munna Singh Tomar v. State of MP*, 1989 Cri LJ 580, 586 (MP)].

Judge.—"A judge of any court who as such receives information upon a matter criminal or civil, from a person, whether party or not, confessing his own offence or liability or reporting the offence or liability of another person, is privileged to withhold testimony to such information, if received in confidence, when called as a witness in any proceeding not tried before himself. Whether a judge may in a given case with propriety receive such information at all, or receive it with a pledge of confidence, is a matter of judicial ethics, but when once received, the privilege applies" [Wig s 2376]. *Cf* s 121.

Privilege Regarding Information as to Commission of Offence.—Statements made to the police are in their nature confidential and s 162 Cr P Code illustrates the limited purposes for which their production should be required. Under s 125 Evidence Act a police officer cannot be compelled to say whence he got any information as to the commission of any offence. Therefore the discretion under s 94 (now s 91) Cr PC to order production of a document should be exercised in such a way as not to conflict with the policy in s 125 [*R v. Bilal Md*, 1940 Bom 768]. The accused was convicted of criminal breach of trust in respect of three gold bangles. The evidence went to show that the accused insured a parcel in the post office as containing these gold bangles, but, shortly after delivery to the addressee, the parcel was found to contain only a piece of steel. One of the witnesses deposed that he sold the steel to the accused. The accused's counsel asked the Superintendent of Post Offices the name of the person who had informed him about the sale of steel to the accused, but the sessions judge refused to allow the question to be put—*Held* that neither s 124 nor s 125 had any application to the case and that the question should have been allowed [*R v. Ramdhan*, 2 Bom LR 329 (**fold** in *Harbans v. R*, 16 CWN 431)]. Questions mentioned in ss 121, 124, 125 are not barred. The witness has simply a privilege of refusing to answer them and a magistrate may warn the witness of his privilege but he cannot disallow such questions [*Md Ally v. R*, 4 Bur LT 113: 10 IC 917]. This section rests upon public policy and protects the name of a spy or informant, and the nature of the information and it has no application to an informant who lays sworn information and thereby initiates criminal proceedings [*Liladhar v. R*, 8 SLR 309: 29 IC 79]. Examination of spy or informant of the police is neither necessary nor desirable [*S v. Dhanpat*, A 1960 P 582].

S. 126. Professional communications.—No [1][barrister, attorney, pleader or vakil] shall at any, time be permitted, unless with his client's express consent, to disclose any communication made to him in the course

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1. In Burma these words have been substituted by "legal practitioner" (AO 1937) and in Ceylon by "advocate, proctor, or notary."

In Ceylon para 1 has been numbered sub-section (1) and the two provisos have been designated (*a*), and (*b*). The next para has been numbered sub-section (2).

and for the purpose of his employment as such [1][barrister, pleader, attorney or vakil,] by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any [2][illegal] purpose;

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

It is immaterial whether the attention of such [1][barrister, [3](pleader,) attorney or vakil] was or was not directed to such fact by or on behalf of his client.

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

Illustrations

(*a*) *A*, a client, says to *B*, [4][an attorney]—"I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(*b*) *A*, a client, says to *B*, [4][an attorney]—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

The communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(*c*) *A*, being charged with embezzlement, retains *B*, [4][an attorney], to defend him. In the course of the proceedings, B observes that an entry has been made in *A's* account book, charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

SYNOPSIS

1. In Burma these words have been substituted by "legal practitioner" (AO 1937) and in Ceylon by "advocate, proctor, or notary."

   In Ceylon para 1 has been numbered sub-section (1) and the two provisos have been designated (*a*), and (*b*). The next para has been numbered sub-section (2).
2. Substituted for the original word "criminal" by s 10 I E Act (Am), Act, 18 of 1872.
3. This word was inserted by I E Act (Am) Act, 18 of 1872, s 10.
4. In Ceylon "a proctor" substituted.

COMMENTARY

Principle and Scope.—Ss 126-29 deal with the law relating to professional communications between clients and legal advisers or their clerks. A lawyer is under a moral obligation to respect the confidence reposed in him and not to disclose communications which have been made to him in professional confidence, *ie*, in the course and for the purpose of his employment, by or on behalf of his clients, or to state the contents of conditions of documents with which he has become acquainted in the course of his professional employment, without the consent of his client. This section gives legal sanction to this obligation.

The foundation of this rule, is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. (Though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers). But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare

to tell his counsellor half his case" [*per* BROUGHAM, LC, in *Greenough v. Gaskell*, 1 My & K 98, 102].

> JESSEL, MR, in *Anderson v. Bank*, 1876 LR 2 Ch D 644, 649: "It is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman and whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled property to conduct his litigation. That is the meaning of the rule."

If such communications were not protected, no man, would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights; and no man could safely come into a court, either to obtain redress, or to defend himself. The exclusion of such evidence is for the general interest of the community and therefore to say that, when a party refuses to permit professional confidences to be broken, everything must be taken most strongly against him, what is it but to deny the protection, which for public purposes the law affords him, and utterly to take away a privilege; which can thus only be asserted to his prejudice [*per* BROUGHAM, LC, in *Bolton v. Corp of Liverpool*, 1 Myl & K 88 p 94 : 1 LJ Ch 166]. The rigid enforcement of this rule no doubt occasionally operates to the exclusion of truth; but if any law reformer feels inclined to condemn the rule on this ground, he will do well to reflect on the eloquent language of the late KNIGHT BRUCE, LJ, who felicitously observed:—"Truth, like all other good things, may be loved unwisely,—may be pursued too keenly,—may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself" [*Pearse v. P*, 1846, 16 LJ Ch 153; Tay s 915].

The rule of privilege contained in this section has been stated thus by Wigmore: (*1*) Where legal advice of any kind is sought, (*2*) from a professional legal adviser in his capacity as such, (*3*) the communications relating to that purpose, (*4*) made in confidence, (*5*) by the client, (*6*) are at his instance permanently protected, (*7*) from disclosure by himself or by the legal adviser, (*8*) except the protection he waived [Wig s 2292]. This phrasing represents all the essentials of the general principle grouped in natural sequence. The interdict provided in Ss 126 & 127 and the protection of the communication embodied in s 129 of the Evidence Act are intended to keep the communications confidential as between the advocate and client. In ordinary law of agency the above protection is not afforded either to the agent or to the principal [*P R Ramakrishnan v. Subbaramma Sastrigal*, A 1988 Ker 18, 22 : 1988 Cri LJ 124].

The Privilege and its Nature and Extent.—The rule is established for the protection of the client, not of the lawyer, and is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing full and unreserved intercourse between the two [*Jones v. Great Central Ry*, 1910 AC 4, 5; *Lyell v. Kennedy*, 9 App Cas 81, 86; *Wheeler v. Le Merchant*, 17 Ch D 675, 681-82; Phip 11th Ed, p 249].

There are some inhibitions to be observed when a consel of one of the parties is to become a witness in a case. One such inhibition is that the counsel cannot be permitted to divulge anything which he gathered from his client in view of the interdict contained in Sec. 126 of the Evidence Act. He is debarred from stating the contents of any document with which he has become acquainted in the course of his professional employment. Nor could he disclose any advice which he gave to his client. Outside the parameters of such inhibitions what is the use of his testimony? There is a practical consequence when the counsel is made a witness. Then he would normally be obliged to relinquish his engagement in the case. This was earlier a norm of professional ethics and now this has been transformed into a rule of conduct under Rule 13 of Chapter II of Part VI of the Bar Council of India Rules [*N. Yovas v. Immanueal Jose*, A 1996 Ker 1, 3].

In *N. Yovas* case (*supra*) the advocate of the opposite party was sought to be summoned as a witness to prove (1) that one of plaintiffs sent a letter to him after the commencement of the legal proceedings between the same parties and (2) to prove that the said advocate suggested some compromise proposal to the plaintiffs. The Court observed thus:

> "We think that it is not necessary to examine the said advocate as a witness if the purpose is what is shown above. What could be elicited from such a witness by using the pigeonholes contained in Sec. 126 of the Evidence Act would be of little use in the case. What may thus ultimately result in is the consequence that much hardship would be inflicted to the opposite side by depriving him of the professional services of the counsel engaged by him."

Failure to raise objection to the advocate's disclosure before court as to what transpired between him and his client would not remove the lid of confidentiality attached to such communication between the advocate and his client. The privilege embodied in section 126 of the Evidence Act is not liable to melt down on the principle of waiver or acquiescence. This can be more understood from section 128 of the Act which says that by giving evidence, a party shall not be deemed to have consented to such disclosure as is mentioned in section 126. It is only when the party calls such advocates as a witness that the party shall be deemed to have consented to such disclosure, that too only if the questions the witness about it. Section 126 uses strong language in imposing the prohibition. No advocate "shall at any time be permitted" to disclose such communication "unless with his client's express consent". A failure on the part of the client to claim privilege cannot be stretched to the extent of amounting to "express consent" envisaged in the provision [*Mandesan v. State of Kerala*, 1995 Cri LJ 61, 63 (Ker)]. Evidence by a practising lawyer that he is residing half a kilometer away from the place of occurrence and that the accused alone came to his house on the intervening night does not fall under section 126 [*V. Ravi v. State of Kerala*, 1994 Cri LJ 162, 169 (Ker)].

Legal professional privilege will be treated as waived in relation to documents created to further fraudulent or criminal purposes, provided that bad faith or impropriety is pleaded [*Nationwide Building Society v. Various Solicitors*, The Times, February 5, 1998]. References to privileged matters in experts' reports or witness statements do not necessarily involve a waiver of privilege [*Vista Maritimeinc v. Sesa Goa*, 1997 CLC 1600 (QBD)].

The rule in s 126 applies to interpreters and clerks or servants of lawyers (s 127). The privilege is the privilege of the client and not of the legal adviser (*post*). The latter is therefore bound to claim the privilege unless it is waived by the client expressly (under s 126) or impliedly (s 128), *eg*, by examining the legal adviser as to

the privileged communication. The legal adviser or the solicitor cannot waive it [*R v. Leverson*, 11 Cox 152, *Lyell v. Kennedy*, 27 Ch D 1; *Wilson v. Rastall*, 4 TR 758; *Kay v. Poorun Chand*, 4 B 631]. A party cannot also be compelled to disclose any confidential communication made to his legal adviser unless he offers himself as a witness (s 129). The privilege applies to all communications made to the legal adviser in the course of and for the purpose of his employment though there need not be actual or prospective litigation [*Peace v. Foster*, 15 QBD 114].

The communication must have been made during the subsistence of the relation of legal adviser and client [*Minter v. Priest*, 1930 AC 558, 566, 568]. No formal engagement or retainer or payment of fee is necessary. But the communication must be made with the lawyer in his capacity as a professional adviser [*Wallace v. Jefferson*, 2 B 452] and not as a friend [*Smith v. Duniell*, 44 LJ Ch 189]. The privilege continues for the purpose of future litigation [*Bullock v. Corrie*, 3 QBD 356] and also when the client dies [*Bullivant v. Att-Genl, Victoria*, 1901 AC 196]. But there is no privilege to communications made before the creation of the relation of adviser and client or after its termination [*Greenough v. Gaskell*, 1 Myl & K 101]. The protection under this section is confined to legal advisers, and does not apply to communications to other persons, *eg*, clergymen, friends, medical men, &c.

The communication to legal adviser, must be of a private or confidential nature (*post*). The law relating to professional communications is the same in India as in England. S 126 is taken from Taylor s 832 and in interpreting it, the court may refer to English cases [*Framji Bhikaji v. Mohan Singh*, 18 B 263]. Provisos (*1*) and (2) point out that communications in furtherance of illegal purpose or facts showing the commission of any fraud or crime is not protected. It is not a lawyer's duty to assist his client in the furtherance of an illegal purpose or to break the law or to perpetrate fraud. When disciplinary action is taken for violation of the rule in this section, the rule should be brought on for hearing as quickly as possible, and where the court has not been moved at the instance of the Incorporated Law Society, the rule should also be served upon that Society in order that they may have an opportunity of representing to the court, if so advised, the point of view of the profession [*In re an Attorney*, 28 CWN 170 : 84 IC 353 FB]. As to procedure, see, *In re an Attorney*, 41 C 113 : 19 IC 993.

As regards professional communications, the rule is now well settled, that where a barrister or solicitor is professionally employed by a client, all communications which pass between them in the course and for the purpose of that employment, are so far privileged, that the legal adviser, when called as a witness, cannot be permitted to disclose them, whether they be in the form of title-deeds, wills, documents, or other papers delivered, or statements made, to him, or of letters, entries, or statements, written or made by him in that capacity, and this even though third persons were present. After stating the rule in this general form, it seems almost needless to add that the opinions of counsel thereon, stand upon precisely the same footing as other professional communications from client to the counsel and solicitor, or to either of them, or from the counsel and solicitor, or from either of them, to the client. The privilege is the privilege of the client, and not of the professional adviser; the adviser, therefore, is bound to claim the privilege unless the client has waived it, which it is open for him to do [Tay. s 911].

As disclosure of instructions of client is debarred, he cannot be convicted on his lawyer's evidence as to instructions on which he put defamatory questions to a witness [*Korrapaty v. Talla*, A 1950, M 537; *Palaniappa v. R*, 1935 MWN 460; *Saukhi v. Uchit*, A 1948, P 56]. Disagreeing with the case it has been held that s 126

is not infringed if an advocate who asks a defamatory question on the information of his client deposes to that effect when his client is sued for defamation or when his reply to that effect to a notice to him is allowed to be produced [*Ayesha Bi v. Peerkhan*, A 1954 M 741; *K C Sonrex v. S*, A 1963 A 33; *Antony v. Naidu*, A 1967 M 395; *Deepchand v. Sampathrai*, A 1970 My 341].

Where a publication of imputation concerning a third person is made by a lawyer in the presence of his client for all the world to hear, no question of protection under s 126 can arise [*Rebecca v. R*, 50 CWN 545 : A 1947 C 278].

[*Ref Tay ss 911-13; Best, s 581; Phip 8th Ed, pp 188-96; Hals, 3rd Ed, Vol. 10 para, 877; Powell, 9th Ed, pp 231-41; Steph Arts 115-16; Ros N P, 171-94; Ros Cr Ev 133-35; Wig ss 2290-329; Jones, ss 748-56; Annual Practice, Or 31, r 1 notes*].

S 91 Cr P Code.—A 94(*3*) [now s 91(*3*)] Cr PC exempts documents which are protected under ss 123 and 124 Evidence Act, but not under s 126; therefore in criminal cases the protection under s 126 afforded to communications by client to lawyer cannot be availed of against an order to produce the document; the document must be produced, and then, under s 162, it will be for the court, after inspection of the document if it deems fit, to consider and decide any objection regarding its production and admissibility [*Gangaram v. Habibullah*, 58 A 364; *Pub Pros v. Menoki*, A 1939, M 914; *Chandubhai v. S*, A 1962, G 290].

Rule Confined to Legal Advisers.—The section enumerates four kinds of legal advisers, *viz*, barristers, attorneys, pleaders, and vakils. A case decided under s 24 of Act 2 of 1855 held that according to the wording of the section these four are alone included within the rule and [5]*mukhtears* are not included [*R v. Chunderkant*, 1 BLR Cr 8: 10 WR Cr Let 10 p 14]. In *Abbas Peada v. R*, 25 C 736: 2 CWN 484, it was held that s 126 must be construed as applying to all persons who came in within the category of "pleader" as defined in Cr P Code s 4(r) [(now s 2(*q*)] and includes [6]*mukhtears*:

The protection afforded by this section does not apply to communications to other person though made confidentially, *eg*, friends [*Wheeler v. Le Marchant*, 17 Ch D 675] doctors [*R v. Gibbons*, 1 C & P 97; *Wheeler v. Le Marchant, sup*; *Hardless v. H*, 55 A 134]; stewards [*Earl of Falmouth v. Moss*, 11 Price, 455]; clergymen [*Normanshaw v. N*, 69 LT 468]; agents [*Slade v. Tucker*, 14 Ch D 824, 824]; patent agents [*Moseley v. Victoria Rubber Co*, 55 LT 482] &c, &c. In *Wilson v. Rastall*, 4 TR 753, BULLER, J, expressed regret that the privilege is not extended to communications made to medical men while attending in their professional capacity.

In England however the privilege now extends also to embrace communications made for the purpose of any pending or contemplated proceedings under the Patents Act, 1949 between the patent agent of a party and that party or any other person and between the party and a person other than his patent agent for information that the party is seeking with the object of submitting to his patent agent. Persons acting on behalf of either are also included [s 15 Civil Evidence Act, 1968].

A qualified privilege is given to Bankers' (see s 5 Bankers' Books Evidence Act, 18 of 1891 in Appendix C, *post*).

Privilege is the Client's Not the Attorney's Nor the Party's.—As the privilege is established, not for the benefit of the solicitor, but for the protection of the client [*Herring v. Clobery*, 1 Phil 96; *Anderson v. Bank of Br Columbia*, 2 Ch D 649), it

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5. *Mukhtears* have been abolished.

would seem to extend to an executor in regard to papers coming to his hands as the personal representative of the solicitor [*Fenwick v. Reed*, 1816 1 Mer 114, 120 arg; Tay s 922]. It is as client, *not as party to the cause*, that he is entitled; for the reason of the privilege applies to all clients as such, whether or not they are parties when the disclosure is sought from them. Hence, the privilege equally forbids disclosure by the attorney of a client not in any way concerned in the case. Conversely when the client is not a party, then on general principle the party cannot invoke the privilege [Wig s 232]. The priviledge can be waived by the client or his representative in interest (see s 128, *post*). If a privileged document is referred to in the pleading of a litigant, he may be ordered to give particulars of it [*Milbank v. M*, 1900, 1 Ch 376 CA]. The privilege enures for the benefit of successors to title to the party to an action, at any rate when the relevant interest subsists [*Schneider v. Leigh*, 1955, 2 All ER 173].

Judge to Determine Privilege.—When privilege is claimed it is for the judge to determine whether the facts are such that it ought to be allowed. In *Lyell v. Kennedy*, LR 27 Ch D 1, 21, COTTON, LJ, said: "The court must be satisfied, clearly satisfied, either from admission or from other documents, that the oath of the defendant by which he claims his protection cannot be really available for the purpose of which he puts it forward".

No Privilege Against Court.—Instructions to counsel are only privilege in the sense of being protected from disclosure to the opponent. There is no privilege as against the court. The judge can ask counsel whether he makes a charge on instructions and if so on whose. He cannot use them as evidence in the case, and for the purpose of the trial would have to treat them as confidential, but they could be called for then and there and be used after the trial for determining whether disciplinary action should be taken against counsel [*per* WOODROFFE, J, in *Weston v. Peary*, 40 C 898, 929: 18 CWN 185]. See *post*, notes to ss 149-50.

Duration of Privilege. ["At Any Time"].—The section says that the legal adviser shall not be permitted *at any time* to disclose professional communications. It is said that a communication once privileged is "always privileged" [*per* COCKBURN, CJ, in *Bullock v. Corrie*, 3 QBD 356; *per* LINDLEY, J, in *Calcraft v. Guest*, 1898, 1 QB 759, 761]. The Explanation to the section points out that the obligation continues after the employment has ceased. This privilege extends to communications made before the termination of employment but it does not apply to communications made after the employment has ceased [*Greenough v. Gashell*, 1 MyL & K 101]. The obligation of secrecy imposed by s 126 continues even after the employment has ceased; and has nothing to do with the question whether at the time the communications were made there was any pending litigation or any prospect of it [*In re an Attorney*, 84 IC 353: 26 Bom LR 887 (*Minet v. Morgan*, 1873, LR 8 Ch 361: 42 LJ Ch 627 **follo**)].

The protection does not cease with the termination of the suit or other litigation or business, in which the communications were made; nor is it affected by the party's ceasing to employ the solicitor, and retaining another, nor by any other change of relation between them, nor by the solicitors being struck off the rolls, nor by his becoming personally interested in the property, to the title of which the communication related [*Chant v. Brown*, 7 Hare, 79], nor even by the death of the client [*Bullivant v. Att-Genl*, 1901, AC 196]. The seal of the law once fixed upon the communications, *remains for ever* [*Wilson v. Rastall*, 4 TR 759], *unless it be removed either by the party himself* [*Marie v. More*, 1836, Ry & M 390] in whose favour it was placed, or perhaps, in the event of his death, by his personal representative [*Doe v. M of Hertford*, 87 RR 548], and therefore if the client becomes bankrupt his trustee cannot waive the privilege without his particular permission [*Bowman v. Norton*, 5 C

& P 177; Tay s 927]. It has been held, however, that the principle only applies where the parties and the subject-matter are the same, or where the communications are between solicitor and client [*Kerry Council v. Liverpool Assen*, 38 Ir LT 7 CA; Phip 11th Ed p 253]. The privilege coutinues for purpose of future litigation [*Bullock v. Corrie, sup*]. "The privilege continues even after the *end of the litigation* or other occasion for legal advice and even after the *death of the client*. If follows, also on another aspect of the principle, that even after the *death of the attorney* the client could not be compelled to disclose the communications" [Wig s 2323].

"Unless with his Client's Express Consent". [Waiver].—The privilege is that of a client; he may expressly waive the privilege under s 126 or impliedly under the latter part of s 128 by calling the barrister, pleader, etc, as witness and questioning him on matters which, but for such question, he would not be at liberty to disclose. But he does not lose the privilege, if he gives evidence in the suit either at his instance or at the instance of the opposite party (see s 128 *post*). As to waiver of privilege, see *Kay v. Poorun Chand*, 4 B 631, where it has been held that the fact that portions of certain letters had been read to the defendant's solicitor was a waiver as to those portions but not as regards the parts which were not read.

"An executor or administrator may waive the privilege. This view is accepted with practical unanimity. It is further generally agreed that in testamentary contents the privilege is *divisible*, and may be waived by the executor, the administrator, the heir, the next of kin, or the legatee" [Wig s 2329]. A waiver at one stage of a trial should be final for further stages, and a waiver at a *first trial* should suffer as a waiver for a later trial, since there is no longer any reason for preserving secrecy. Where the consultation was had by *several clients jointly*, the waiver should be joint for statements and neither could waive for the disclosure of the other's statements; yet neither should be able to obstruct the other in the disclosure of the latter's own statements. Where the client's interest has been *assigned*, it seems proper to say that the privilege is transferred to the assignee, for the purpose of waiver, so far as the communications affect merely the realization of the transferred interest; but it remains with the client so far as they affect any liability or right remaining in him" [Wig s 2328]. Failure on the part of a client to claim privilege while under cross-examination does not amount to express consent [*Bhagwani v. Deooram*, A 1933, S 47: 143 IC 345].

"In the Course And For the Purpose of his Employment". [Scope of Employment and Extent of Privilege].—The privilege extends to all communications between client and legal adviser *in the course and for the purpose of his professional employment*. If the communication is not made to a legal adviser in the course of professional employment, it does not matter if it was made under seal of secrecy. A mere gratuitous communication is not protected, it must be made to a person as professional adviser. Consultation as a friend is not sufficient. The privilege does not apply to communications made *before* the existence of the relationship or *after* it has ceased [*Greenough v. Gaskell*, 1 Myl & K 101].

> LORD ELLENBROUGH in *Gainsford v. Grammar*, 2 Camp. 10: "I fully accede to the doctrine laid down in *Cobden v. Kendrick*, 4 TR 431 and *Wilson v. Rustall*, 4 TR 759 which is no more than this, that communications, by the party to the witness, whether prior or subsequent to the relation of client and attorney subsisting between them, are not privileged. But this relation may be formed before the commencement of any suit. The attorney may be retained and confided in as such, in contemplation of a suit, and shall it be said that he is bound to disclose whatever has been revealed to him previous to the suing out of or the service of the writ".

It is immaterial whether the communications were or were not made when litigation was pending or contemplated [*Minet v. Morgan*, LR 8 Ch App 361]. In *Wheeler v. Le Marchant*, 17 Ch D 782, JESSEL, MR, said: "A communication with a solicitor for the purpose of obtaining legal advise is protected, though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that prupose".

If a man goes to a solicitor, as a solicitor, then though he may not eventually be engaged, the interview is a privileged occasion. The relationship being once established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure. The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, may be fairly referable to the relationship, but outside that boundary the mere fact that a person speaking is a solicitor, and the person to whom he speaks is his client affords no protection [*Minter v. Priest*, 1930 AC 558]. It is not, however, required that there should have been any regular retainer, or any particular form of application or engagement, or the payment of any fees; it is enough if the legal adviser be, in any way, consulted in his professional character [*Foster v. Hall*, 1831, 12 Pick, 89 (Am)]. It would also seem that if a person be consulted confidentially, under the erroneous supposition that he is a lawyer, he cannot be compelled to disclose the matters communicated [*Challey v. Richards*, 1854, 19 Beav 401, questioning *Fountation v. Young*, 1807, 6 Esp. 123; Tay s 923]. A mere student of law, aspiring to future entrance to the profession, is without the privilege however much legal skill he may possess in comparison with some of those who are within it [Wig s 2300].

The privilege applies to a communication made under the *bona fide* but mistaken impression that the solicitor had agreed to act in the matter [*Smith v. Fell*, 2 Cut 667] or to communication made to a solicitor who ultimately refuses a retainer [*Cormack v. Heathcote*, 2 B & B 4]. The privilege is not lost if the solicitor had, unknown to the client, become disqualified [*Calley v. Richards*, 19 Beav 401]. The privilege also extends to all knowledge obtained by a solicitor which he would not have obtained if he had not been consulted professionally by the client [*Greenough v. Gaskell, sup*].

The mere fact that the client's name had been communicated to him in the course and for the purpose of his employment as solicitor by another client, affords no excuse, unless it was communicated to him confidentially, on the express understanding that it was not to be disclosed. But a solicitor is not at liberty, without his client's express consent, to disclose the nature of his professional employment. S 126 protects from publicity not merely the details of the business, but also its general purport, unless it be known *aliunde* that such business falls within proviso (*1*) or (*2*) to the section. At an interview between a solicitor and a client, the solicitor took down a certain statement made by a person named *A B* who was in his client's company, and whose name was communicated to him in the course and for the purpose of his professional employment. *A B* was afterwards tried for defamation, and the solicitor was examined by the prosecution with reference to the statement made to him by the accused at the above interview. The solicitor was asked whether the person who had made the statement had given his name as *A B*. The solicitor declined to answer the question on the ground of privilege—*Held* that the solicitor was bound to answer the question unless *A B's* name was communicated to him by his client in confidence with a view to its not being disclosed [*Framji v. Mohan*, 18 B 263].

A widow when adopting a son employed an attorney who drew up the deed of adoption. The deed was approved by an independent firm of attorneys on behalf of the boy to be adopted. In a suit by a Bank in the Zanzibar Court to recover money

wherein the Bank alleged that the adoption was invalid, the attorney was examined on commission and he produced papers including the draft of the deed of adoption and made statements connected with the instructions from the widow—*Held* that (*1*) if the attorney was acting for the widow alone, the disclosures made by him were contrary to s 126; (2) even if it be assumed that the attorney was engaged jointly by the widow and the adopted boy, it was not be open to the attorney to disclose the facts relating to the documents in the suit brought by a third party against the widow's husband's firm and the adopted boy; (*3*) that the presence of a friend of the widow in the negotiation for adoption did not relieve the attorney from his obligation; (*4*) s 126 prohibits disclosure not only of any advice given by the attorney in the course and for the purpose of his employment, but also advice given to the attorney by another person such as a barrister, etc [*In re an Attorney*, A 1925, B 1: 84 IC 353 FB: 26 Bom LR 887].

Communications From Third Persons to the Legal Adviser or Client for Purpose of Litigation. (See *post*, s 129).

Communications Must be Confidential and Necessary or Relevant to the Purpose.—Not only should the communication be made to the legal adviser in the course of and for the purpose of his employment it must also be of a private and *confidential* nature. The words appearing in this section are "any communication", while the words "confidential communication" have been used in s 129. It may therefore be argued that the section does not require that the communication should be confidential. The word 'disclose' used in connection with "communication" in s 126 suggests that the communication should be of the same nature as in s 129, where also the word "disclose" has been used. Even under statutes not expressly using the word "confidential" (*eg* in the California Code s 1881 where the words used are "any communication"), it has been held that the privilege extends to communications made with the intention of confidentiality [*Hager v. Spindler*, 29 California 47, 63; Wig s 2311]. The communication must be made with the intention of confidentiality but no special request for secrecy is necessary. Whether the communication was intended to be confidential must depend on the facts of each case.

Whatever a man says to his legal adviser about his private affairs with a view to obtaining professional advice is presumed to have been said in confidence and the object is to protect all such confidential communications. The law relating to professional communication between a solicitor and client is the same in India as in England [*Framji Bhikaji v. Mohan*, 18 C 262] and there the communication to be privileged must be necessary and confidential [*Gardner v. Irvin*, 4 Ex D 49; *O' Shea v. Wood*, (1891) P 286, 290]. "The moment confidence ceases, privilege ceases" [*per* LORD ELDON in *Parkhurst v. Lowten*, 2 Swanst 194, 216]. "Where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure" there is no privilege [*Greenough v. Gaskell*, 1 Myl & 104].

It is not every communication made by a client to an attorney that is privileged from disclosure. The privilege extends only to communications made to him confidentially and with a view to obtaining professional advice [*Framji Bhikaji v. Mohan, sup*]. To be privileged it must be of a confidential or private nature [*Memon Hajee v. Abdul Karim*, 3 B 91; *Bhagwan v. Deooram*, 143 IC 345]. The section has no application where the statement is made not as confidential but for the purpose of communication [*R v. Rodrigues*, 5 Bom LR 122. See also *Oriental Bank Corpn v. Brown & Co*, 12 C 265]. "It is not sufficient for the affidavits to say that the letters are a correspondence between a client and his solicitor: the letters must be

professional communication of a confidential character for the purpose of getting legal advice" [*Gardner v. Irvin, sup*].

Advocate summoned to prove sending of notice to the defendant cannot claim privilege under s. 126. There is nothing confidential in the contents of notice which was communicated to the other side [*P.G. Anantasayanam v. Miriyala Sathiraju*, A 1998 AP 335, 336; *P. Rajamma v. Chintaiah*, 1997 (2) An WR 253].

"No express request for secrecy, to be sure, is necessary, but the mere relation of attorney and client does not raise a presumption of confidentiality, and the circumstances are to indicate whether by implication the communication was of a sort intended to be confidential. One of the circumstances, by which it is commonly apparent that the communication is not confidential, is the *presence of a third person*, not being the agent of either client or attorney ..... It follows, of course, 'a *fortiori*', that communications *to the third person* in the presence of the attorney are not within the privilege" [Wig s 2311].

The communication must not only be confidential but it must also be necessary or relevant to some purpose of the employment. In *Gillard v. Bates*, 1840, 6 M & W 547, it has been said that "the test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the attorney is employed". "It should be clear on the one hand, that the actual necessity of making a particular statement, or the materiality to the cause of a particular fact, cannot determine the answer; for the client cannot know what is necessary or material, and the object of the privilege is that he should be unhampered in his quest for advice. On the other hand, when he knowingly departs from that purpose and interjects other matters not relevant to it, he is in that respect not seeking legal advice and the privilege does not design to protect him" [Wig s 2310].

"Communications" Distinguished From "Acts."—The privilege applies to any '*communication*' verbal or documentary, but does it extend to acts of the client observed by the legal adviser? Opinions do not seem to be unanimous. In *Robson v. Kemp*, 5 Esp 52, 55: 8 RR 831, ELLENBOROUGH, LCJ said: "The act (of destroying a power of attorney) cannot be stripped of the confidence and communication as an attorney, the witness being then acting in that character. One sense is as privileged as another. He cannot be said to be privileged as to what he hears, but not to what he sees, where the knowledge acquired as to both has been derived from his situation as an attorney." But in *Brown v. Foster*, 1 H & N 736, POLLOCK CB, said: "A legal adviser may give evidence of a fact which is patent to his senses" and MARTIN, B, in the same case said: "With respect to matters which the counsel sees with his own eyes, he cannot refuse to answer."

While it is true a legal adviser may testify to any fact seen by him, a client's act may under certain circumstances be the subject of communication and of confidence. If the act be such as was observable by all other persons without the legal adviser's attention being drawn by the client, he can testify to it, *eg*, a client seen in a state of intoxication in a street. But if the act or conduct be such as there was an invitation to the legal adviser's presence or attention, it becomes the subject of communciation and confidence. It has been held that for the purpose of s 126, it is immaterial, whether the communication which is sought to be protected was verbal, that is by word of mouth, or by demonstration. In a suit by one firm for the revocation of a patent granted to another firm, the question was the formation and the process of the working of a stove. A vakil was tendered in evidence by the plaintiff, who had been employed by the other firm to defend them against a charge of creating nuisance by smell in preparation of *Bansalochan*. In his capacity as vakil, he visited the premises, at their invitation in order to make himself acquainted with the working of the stove—*Held* that the knowledge acquired amounted to a communication by his client in the course and for the purpose of his employment and the evidence is not *admissible* [*Gopilal v. Lakhput*, 41 A 135: 48 IC 605: 16 ALJ 987]. In another case it

has been held that the privilege extends also to facts observed by the pleader in the course of and for the purpose of his employment [*Hakam v. R*, A 1934 L 269].

"On the one hand, those data which would have come to the attorney's notice in any event, by mere observation, without any action on the client's part—such as the colour of his hat or the pattern of his shoe—and those data which become known by such acts as the client would ordinarily have done in any event, without any purpose of communicating them to the attorney as his adviser,—are not any part of the communications of the client ..... On the other hand, almost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such" [Wig s 2306].

Protection If Extends to Documents.—S 126 does not refer to the production of documents which are in the possession of a legal adviser but to stating the contents or condition of any of the document with which he has been acquainted in the course of and for the purpose of his employment. The protection does not, therefore, refer to the production of documents, as against which the client himself is not protected [*Gangaram v. Habibullah*, 58 A 364: 159 IC 524; *Pub Pros. v. Menoki*, A 1939 M 914]. See *post*: "*Production of Documents in Possession of Legal Adviser*".

Temporary Confidentiality. [Execution of a Will or Deed].—The fact of *execution of a deed* has commonly been declared to be without the privilege, partly because it was not a subject of communication at all, and partly because, if a communication, it was not impliedly a confidential one. On the other hand the *contents* of the deed are generally within the privilege. But for *wills* a special consideration comes into play. Here it can hardly be doubted that the execution and especially the contents are impliedly desired by the client to be kept secret during his lifetime, and are accordingly a part of his confidential communication ..... After the *testator's death* the attorney is at liberty to disclose all that affects the execution and tenor of the will" [Wig s 2314].

"By or On Behalf of his Client."—Under s 126 the privilege extends to all communications made to the legal adviser in the course of professional employment by *the client* or by other persons, *eg*, his agent, servants, &c on behalf of the client. It does not apply to knowledge acquired from third person. In *Wheeler v. Le Merchant*, 17 Ch D 682, JESSEL, MR, said: "The actual communication to the solicitor is of course protected whether it is made by the client in person or is made by agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction." A communication by *any form of agency employed* or set in motion by the client is within the privilege. This includes communications *originating with the client's* agent and made to the attorney [Wig s 2317].

"Or to State the Contents or Condition of Any Document."—The privilege applies to all communications oral or documentary made between client and the legal adviser in professional confidence. It forbids the legal adviser to state the contents of documents belonging to a client but in the possession of his adviser. There can be no distinction between the communication of a fact made orally and the same communication made by delivery of a document. As to protection of title-deeds generally, see ss 130, 131. "A solicitor cannot be compelled to disclose the contents of documents professionally entrusted to him, and which he is acquainted with only by virtue of professional confidence" [*per* PARKE, B, in *Dwyer v. Collins*, 7 Ex 639]. An attorney is not obliged to answer questions as to the contents of deed, etc, placed in his hands

by a party for the purpose of the action [*Lynch v. O'Hara*, 6 CP 259]. An documents procured by a party's solicitor of his own motion for the purposes of the action are privileged; as well as those that have come into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or enabling him to defend the action [*Thomson v. Maryland Casualty Co*, 11 OLR 44: 7 OWR 15; Best 11th Ed, pp 569-70].

A solicitor will not be allowed to disclose the date when, or purpose for which his client's documents were entrusted to him [*Turquand v. Knight*, 2 M & W 98] or the person from whom he received them [*Re London & N Bank*, 1902, 3 Ch D 73, 74, 87]; nor their condition while in possession, *eg*, whether stamped, indorsed or bearing erasures [*Wheatley v. Williams*, 1 M & W 533. See other cases cited in Phip 11th Ed, pp 255-56]. Where, it an affidavit of documents, privilege is claimed for correspondence on the ground that it contains instruction and confidential communications for the client (the plaintiff) to his solicitor, it must appear not merely that correspondence generally contains instructions, etc, but that each letter contains instruction or confidential communications to the attorney with reference to the suit [*Oriental Bank Corpn v. Brown & Co*, 12 C 265 (*Bewicks v. Graham*, 7 QBD 400 **folld**)]. A draft prepared by a lawyer of statements made by complainant which were meant to be incorporated in a petition or complaint, is privileged [*Miajan v. R*, 37 CWN 68]. The register maintained by a lawyer containing instructions given by the client for the purpose of cross-examination is a privileged document and the lawyer is entitled to refuse to show that register to the court [*Supdt. & Remembrancer, Legal Affairs, W B v. Satyen Bhowmick*, A 1981 SC 917, 924: 1981 Cri LJ 341].

—Production of Documents In Possession of Legal Adviser.—As to the *production* of the client's documents in the possession of his legal adviser—(*1*) The answer depends upon the other privileges of the client *irrespective of the present privilege*. The attroney is but the agent of the client to hold the deed; if the client is compellable to give up possession, then the attorney is; if the client is not, the attorney is not ..... It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law; or as a third person claiming title, or as exempt from self-crimination [see ss 130, 131 Evidence Act], the attorney having possession of the document is not bound to produce..... Where the document already had an independent existence and the communication consists in bringing its contents to the *attorney's knowledge*, that *knowledge* is not to be disclosed by his testimony; but *the* physical possession of the document is distinct from that knowledge, and to compel production of the document is not to compel the disclosure of the communication; (2) Where the document is itself the client's written communication, *coming into existence merely as a communication to the attorney*, the situation is obviously different. This communiction itself is not to be disclosed whether it was made by the client by word of mouth or by writing [Wig s 2302]. It is, however, worth noting that if the communication were made as a part of an expedient to avoid production (as, if the client should show the document to the attorney and then destroy it), the privilege ought not to be conceded [Wig s 2308].

Letters written by one accused to another accused alleged to be in the possession of latter's lawyers are not privileged under s 126 [*Pub Pros v. Menoki*, A 1929 M 914: 185 IC 419].

Where the Privilege Does Not Exist.—(*1*) Where the knowledge was not acquired by the solicitor *solely* by his being employed professionally, but was in some measure obtained by his acting as a party to the transaction, and the more especially so, if this transaction was fraudulent [see *Follett v. Jeffery*, 89 RR 1]; (2)

where the communication was made *before* the solicitor was *employed* as such, or *after* his employment had *ceased*; (*3*) where, though consulted by a friend because he was a solicitor, he had refused to act as such, and was therefore, only applied to *as a friend*; (*4*) where the information was obtained, not exclusively from the client, but also from other independent source [*Lewis v. Penington*, 1860, 29 LJ Ch 670; *Marsh v. Keith*, 1860, 30 LJ Ch 127]; (*5*) where it could not be fairly stated that any communication had been made; as where, for instance, a fact something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being solicitor, but of which fact *any other man*, if there, would have been *equally cognisant* [*Brown v. Foster*, 1857, 26 LJ Ex 249]; (*6*) where the matter communicated was *not in its nature private*, and could in no sense be termed the subject of a confidential disclosure [*Doe v. M of Hertford*, 1850, 19 LJQB 526]; (*7*) where it had *no reference to professional employment*, though disclosed while the relation of solicitor and client subsisted [*Goodall v. Little*, 1851, 20 LJ Ch 132]; (*8*) where the solicitor, having made himself a *subscribing witness* and thereby assumed another character for the occasion, adopted the duties which it imposes, and became bound to give evidence of all that a subscribing witness can be required to prove [Tay s 930]. The above eight classes of cases have been separately discussed in detail in Taylor 10th Ed, ss 931-37, pp 633-38]. What is stated in a reply notice by a lawyer is evidently what he has disclosed to others and more particularly to the opponent's lawyer and so it cannot continue to have the protection afforded by s 126 [*Rev Fr Bernard Thattil v. Ramachandran Pillai*, 1987 Cri LJ 739, 740: (1987)1 Crimes 27 (Ker)].

A pleader cannot claim the privilege against disclosing statement made to him by a person, if the same is not made to him in the course and for the purpose of his employment as a pleader; and the fact that the pleader has been acting as a professional adviser to the party makes no difference [*R v. Baladarona*, 4 Bom LR 460; see also *R v. Rodrigues*, 5 Bom LR 122].

Joint Interest.—No privilege attaches to communications between solicitor and client as against persons having a *joint interest* with the client in the subject-matter of the communication, *eg*, as between partners [*Re Pickering*, 25 Ch D 247; *Gouraud v. Edison*, 59 LT 813]; a company and its shareholders [*Woodhouse v. W*, 30 TLR 559 CA]; trustee *and cestui que trust* [*Talbot v. Marshfield*, 2 Dr & S 549; *Re Mason*, 22 Ch D 609]; a lessor and lessee as to production of the lease [*Doe v. Thomas*, 9 B & C 288]; reversioner and tenant for life as to common title [*Doe v. Date*, 3 QB 609]: two persons stating a case for their joint benefit [*A G v. Berkley*, 2 J & W 291]; or a husband and wife who are not genuinely but only collusively, in contest [*Ford v. De Pontes*, 5 Jur (NS) 993]. Nor does any privilege attach as between joint claimants under the *same client*—*eg*. between claimants under a testator as to communications between the latter and his solicitor [*Russell v. Jackson*, 9 Hare 387; see however, *Curtis v. Beaney*, (1911) P 181]. But where the communications relate to matters *outside* the joint interest, they are privileged, even as against a person bearing the expense of the communication—*eg*, communications between a plaintiff corporation and its solicitors as againt a defendant rate-payer as to matters not connected with the rates [*Bristol Corp v. Cox*, 26 Ch D 678]; or between a company and its solicitor consisting of confidential advice to the former in an action against a shareholder [*Woodhouse v. W, sup*; Phip 11th Ed, p 252].

Common Solicitor Employed by two Parties.—*Where two parties employ the same solicitor*, the rule is that communications passing between either of them and the solicitor, in his *joint* capacity must be disclosed in favour of the other—*eg*, a proposition made by one, to be communicated to the other [*Baugh v. Cradocke*, 1 M & G 192; *Perry v. Smith*, 9 M & W 681]; or instructions given to the solicitor in the

presence of the other [*Shore v. Bedford*, 5 M & G 271]; though it is otherwise as to communication made to the solicitor in his exclusive capacity [*Perry v. Smuh, sup*; Phip 11th Ed, p 250]. Where *the same attorney acts for two parties* having a common interest, and each party communicates with him, the communications are clearly privileged from disclosure at the instance of a third person. Yet they are not privileged in a controversy between the two original parties, inasmuch as the common interest and employment forbade concealment by either from the other. On other hand, a communication to the *opposing party's* attorney, as such, is clearly without the privilege, since no confidence is reposed, nor if reposed, could be accepted [Wig s 2312]. Where an attorney is engaged by two persons, he cannot disclose any communication made to him in the course and for the purpose of his employment by or on behalf of his clients, or to state the contents or condition of any document without the consent of both. As between the two parties who engage an attorney—there can be no secrecy or privilege, but as between a third party and any of the two parties who engaged him his lips are sealed with respect to communication made to him in the course of and for the purpose of his employment as a solicitor [*In re an Attorney*, 84 IC 353 FB: 28 CWN 170 FB].

Where two persons, having a dispute about a claim made by one of them upon the other, went together to a solicitor when one of them made a statement admitting the amount, and instructed the solicitor to write a letter to a third party on the subject of the claim,—it was held that, in a subsequent action between these two persons, both the statement and the letter were admissible [*Shore v. Bedford*, 12 LJCP 138; see *Kalikumar v. Rajkumar*, 58 IC 1379]. In respect of a Motor Accident, there was an attempt to compromise the matter with the Insurance company. The file relating to the compromise cannot be ordered to be produced because the communication between the counsel for the claimant and the Insurance company is also privileged and nobody can be compelled to disclose the communication [*R Ramalingam v. P R Thakur*, A 1982 Del 486, 487]. In all these cases the question would seem to be, was the communication made by the party to the witness in the character of his own *exclusive* solicitor? If it was, the bond of secrecy is imposed upon the witness: if it was not, the communication will not be privileged [*Perry v. Smith*, 11 LJ Ex 269; *Reynell v. Sprye*, 1846, 16 LJ Ch 117; Tay s 926].

To be privileged under s 126, a communication by a party to his attorney must be of a confidential or private nature. Where defendants at an interview at which the plaintiff was present, admitted the partnership to their attorney who was then also acting as attorney for the plaintiff—*held*, that the attorney was not precluded by s 126 from giving evidence of the admission to him: First, because the defendant's statements, having been made in the presence and hearing of the plaintiff, could not be regarded as confidential or private; secondly, because those statements did not appear to have been made to the attorney exclusively in his character of attorney for the defendants, but to have been addressed to him also as attorney for the plaintiff [*Memon Hajee v. Abdul Karim*, 3 B 91].

Third Persons Overhearing.—Since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third person who obtain knowledge of the communication. One who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy [Wig s 2326]. It is the same where the third person is the defendant [see *Butler v. Board of Trade*, 1970, 3 All ER 595]. See *post*: "*Communication by solicitor in violation of duty.*"

PROVISOS: Communication For Illegal Purposes Not Protected.—The provisos enumerate the exceptions to the rule in s 126. Communications made in furtherance of an *illegal purpose* or any fact coming to the knowledge of the legal adviser since the commencement of his employment showing that any crime or fraud has been committed, are not protected. The object is obvious. The existence of an illegal purpose, it is now clearly settled, prevents the privilege from attaching; for it is not the duty of a solicitor to advise his client how to break the law, or contrive a fraud [*R v. Cox*, 14 QBD 153; *Russell v. Jackson*, 21 LJ Ch 146; *Kelly v. Jackson*, 13 Ir Eq R 129; *D. Verasekaran v. State of Tamilnadu*, 1992 Cri LJ 2168, 2180 (Mad); Tay s 912]. In English law the words "criminal purpose" have been generally used when stating the rule. The word "*illegal*" was substituted for "criminal" by s 10 of the Evidence Am Act 18 of 1872. The phrase "illegal purpose" has been used by Taylor (*v ante*) as well as in *Russell v. Jackson*, 9 Hare 392: 21 LJ Ch 146, where TURNER LJ said: "I am very much disposed to think that the existence of an *illegal purpose* would prevent any privilege attaching to the communications. Where a solicitor is a party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading law." The substitution of "illegal" for "criminal" carries the principle further and is an improvement. It is in conformity with the view in *Russell v. Jackson, ibid*, and the word "illegal" includes fraud as well criminality. Consultations with a view to commit fraud upon creditors come within the rule. There seems to be another reason for substitution of the word "illegal" for "criminal". In England adultery is not a criminal offence. (See ss 497 and 498 I P Code).

In *Gartside v. Outram*, 26 LJ, Ch 115, Wood, VC, said: "I should first beg leave to consider where an attorney may be examined to any matter which came to his knowledge as attorney. If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it. No private obligation can dispense with that universal one which lies on every member of the society, to discover every, design, which may be formed contrary to the laws of the society, to destroy the public welfare. For this reason, I apprehend that, if a secret which is contrary to the public good, such as design to commit treason, murder or perjury, comes to the knowledge of an attorney, even in a case where he is concerned, the obligation to the public must dispense with the private obligation to the client." *R v. Cox and Railton*, 1884, 14 QBD 153 is the leading case on the point, where after an elaborate examination of cases and overruling *Doe v. Harris*, 1833 C & P 592 the principle laid down in the proviso, was affirmed. In *R v. Cox, ibid*, STEPHEN, J, said:—

> "In each particular case the court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime, for the purpose of being guided or helped in committing it."

It is necessary to show that the professional advice was in furtherance of the crime or fraud. Relevance to the charge alone is not sufficient [*Butler v. Board of Trade*, (1970) 3 All ER 595; *O'Rourke v. Darbishire*, 1920 AC 581 **folld**]. Communication made to an advocate by his client in furtherance of illegal purpose is not protected [*Gurunanak Provision Stores v. Dulhonumal Savanmal*, A 1994 Guj 31, 36]. It has to be shown *prima facie* not merely that there is a *bona fide* and reasonably tenable charge of crime or fraud but that the communications in question were made in preparation for or in furtherance or as part of it [*Butler v. Board of Trade, sup* at 598].

Illustration (*a*) makes it clear that the defence of a man known to be guilty is not a criminal purpose. The privilege applies to injured persons or to persons who have *already committed wrongs* and seek legal advice for defence, but not to *future wrongdoers*. The General Council of the Bar were asked whether counsel may defend prisoners after confession of guilt, and the following report was adopted (An St 1915, p 14):—

> "If the confession has been made before the proceedings have been commenced, it is most undesirable that an advocate to whom the confession has been made should undertake the defence, as he would most certainly be seriously embarrassed in the conduct of the case and no harm can be done to the accused by requesting him to retain another advocate".
>
> "Other considerations apply in cases in which the confession has been made during the proceedings, or in such circumstances that the advocate retained for the defence cannot retire from the case without seriously compromising the position of the accused".

Illustration (*b*) explains clause (*1*) of the proviso; and *illustration* (*c*) explains clause (*2*) of the proviso and it is based upon *Brown v. Foster*, 1 H & N 736: 26 LJ Ex 249: 3 Jur NS 245.

The three clauses of this proviso are to prevent the privilege becoming a shield for fraud. There are confidences which are no confidences. In *Gartside v. Outram*, 3 Jur NS 30: 26 LJ 115, WOOD. VC, said "there can be no confidence in an iniquitous secret" [Nort p 312].

Communications in furtherance of fraud or crime are not privileged, whether the solicitor was a conspirator or ignorant of the illegal purpose, and he is not excused from answering although by doing so he may incriminate himself [s 132; see *R v. Cox*, 14 QBD 153; *R v. Downer*, 14 Cox 486; *Williams v. Quebrada Rly*, 1895, 2 Ch 751; *Postlethwaite v. Rickman*, 33 Ch 722; *Re Arnott*, 66 LT 109].

The immunity from disclosure under s 126 is not absoulte, but is restricted in its scope by the two provisos and the privilege could be claimed only by those clients who have already completed the crime and seek legal advice for defence, but it is not open to those who commit subsequent crimes which may be described as future wrong doing. Whether the lawyer exceeded the commisssion or was a conspirator or was ignorant of the illegal prupose, and became a dupe of the client will make no difference and in such a case proviso (*1*) would apply [*Saxena v. S*, A 1963 A 33].

The legal adviser can be asked whether the conference between him and his client was for a lawful or unlawful purpose [*R v. Cox, sup*, **overruling** *Deo v. Harris*, 1833, 5 C & P 594; *R v. Farley*, 1846, 2 C & K 313]. If either from his admission or from independent evidence it should clearly appear that the communication was made by the client for a fraudulent or criminal purpose,—as, for instance, if the solicitor was questioned as to the most skilful mode of effecting a fraud, or committing an indictable offence, even if there is a definite charge that the solicitor had been consulted for an illegal purpose [*Bullivant v. A-G*, 1901 AC 196], the privilege does not exist and he is bound to disclose such guilty project [*Follet v. Jeffreys*, 1850, 18 LJ Ch 389; Tay s 912]. In order to displace the *prime facie* privilege there must be a definite charge of illegality or fraud established by sufficient evidence [*Bullivant v. A-G*, 1901 AC 196].

Where there is no allegation that so long as his employment continued, the pleader observed any fact showing that an offence or fraud had been committed but the

offence of fraud, if any, having been committed after his employment ceased, proviso 2 does not come into play [*Bhagwani v. Deooram*, A 1933, S 47: 143 IC 345].

In order to determine whether a communication between a solicitor and his client is not privileged because its purpose was the furtherence of crime, the court is entitled to look at the document in question without requiring the party who objects to the claim for privilege to prove by evidence that the document came into existence for the purpose of furthering crime [*R v. Governor of Pentonville, ex p Osman*, (1989) 3 All ER 701 QBD].

A strong *prima facie* case against the claim of privilege was made out where it was shown that communications passed between the defendant and his solicitor for creation of trusts and transfer assets to them. The plaintiff claimed proprietary interest in those assets and sought a disclosure of the communications. The court noted that generally courts are very slow to deprive a party of the important protection of a legal privilege on an interlocutory application and would judge each case on the facts, striking a balance between the important considerations on which the legal privilege is founded and the gravity of the charge of fraud that was made, nevertheless, since the creation of the trusts and transfer of assets to them were steps taken in furtherence of the initial fraud alleged, in the sense that they were taken to conceal or render irrecoverable profits to which the plaintiffs had asserted a proprietary claim, the plaintiffs have established a strong *prima facie* case of fraud and as a result were entitled to the disclosures sought [*Derby & Co Ltd v. Weldon*, (1990) 3 All ER 161 Ch D].

Where a person has made a false statements in an application for legal aid to pursue a civil action for damages for assault, that application is an item subject to legal privilege and hence is not liable to be produced on a charge of attempting to pervert the course of justice [*R v. Crown Court at Snares Book*, (1988) 1 All ER 315 QBD].

Proceeds of drug trafficking.—Laundering proceedings of drug trafficking to relatives in order to enable them to purchase properties, files connected with one such purchase transaction and which was in the possession of a solicitor was held to be not protected against disclosure. It was immaterial that the solicitor was not aware of the illegal purpose. The intention of furthering a criminal purpose may be that of the person holding the documents or that of any other person [*Francis & Francis v. Central Criminal Court*, (1988) 3 All ER 775 CA]. This ruling was applied in [*R v. Guildhall*, (1989) 2 WLR 841 DC].

Communications between Solicitor and Expert Witness.—In *Harmony Shipping Co. SA v. Davis*, LORD DENNING MR explained the position as follows (1979) 3 All ER 177 at 181 : (1979) 1 WLR 1380 at 1385:

> "Many of the communications between the solicitor and the expert witness will be privileged. They ae protected by legal professional privilege. They cannot be communicated to the court except with the consent of the party concerned. That means that a great deal of the communications between the expert witness and the lawyer cannot be given in evidence to the court. If questions were asked about it, then it would be the duty of the judge to protect the witness (and he would) by disallowing any questions which infringed the rule about legal professional privilege or the rule protecting information given in confidence, unless, of course, it was one of those rare cases which come before the courts from time to time where in spite of privilege or confidence the court does order a witness to give further evidence. Subject to that qualification,

it seems to me that an expert witness falls into the same position as a witness of fact. The court is entitled, in order to ascertain the truth, to have the actual facts which he has observed adduced before it and to have his independent opinion on those facts."

Archbold's Criminal Pleading Evidence and Practice (45th edn., 1993), para 12-18 is to the same effect:

> "The rule in civil proceedings that legal privilege attaches to confidential communications between solicitors and expert witnesses but not to the expert's opinion or the chattels or documents upon which the expert has based his opinion applies also in criminal proceedings. Accordingly, no such privilege attaches to a document in the possession of a handwriting expert which emanated from a defendant and was sent by him to his solicitors for examination by the expert. [*R v. King*, (1983) 1 All ER 929 : (1983) 1 WLR 411 CA. See also *Harmony Shipping Co. S.A. v. Saudi Europe Line Ltd.* (*sub nom Harmony Shipping Co. SA v. Davies*, (1979) 3 All ER 177 at 181 : (1979) 1 WLR 1380 at 1385 CA] [Cited in *R v. R*, (1994) 4 All ER 261 (CA)].

The rule of evidence that legal professional privilege attaches to confidential communications between a solicitor and an expert but not to the expert's opinion or the chattels or documents on which he has based his opinion applies to criminal as well as civil proceedings. Accordingly, in a criminal trial, the crown is entitled to call a witness, a handwriting expert, whom the defence has consulted but does not wish to call him as a witness, and is further entitled to production of documents sent to the expert by the defence for examination and on which the expert has based his opinion, provided the documents are not protected by legal professional privilege [*R v. King*, (1983) 1 All ER 929 CA, **following** *Harmony Shipping Co SA v. Davis*, (1979) 3 All ER 177].

Communication by Solicitor in Violation of Duty.—As the privilege is established, not for the benefit of the solicitor, but for the protection of the client, it would seem to extend to an executor in regard to papers coming to his hands as the personal re-presentative of the solicitor [*Fenwick v. Reed*, 1816 1 Mer 114, 120 *arg*]. If, however, an instrument in the hands of a solicitor which is privileged from production, come accidentally into the hands of a stranger who makes a copy of it; or if a solicitor, in violation of his duty, voluntarily communicates to a stranger the contents of an instrument with which he was confidentially interested, or permits him to take a copy, the secondary evidence so obtained is admissible in case of notice to produce the original being duly given, and the production resisted on the ground of privilege [*Calcraft v. Guest*, 1898, 1 QB 759 CA; *Cleave v. Jones*, 21 LJ Ex 106: *Lloyd v. Mostyn*, 12 LJ Ex 1 (CONTRA: *Joyce v. J*, 1909 Times April 30 *per* DEANE J, cited in Phip 8th Ed p 189)]. This is because the court in restraining the third party have to accept the power of the trial court to *subpoena* such third party to produce the copy and the obligation to comply with that order; if the defendants could *subpoena* a witness to produce the copy, they ought to be permitted to tender it in evidence themselves where the copy is in their possession [*Butler v. Board of Trade*, 1970, 3 All ER 595]. See *Ashburton v. Pape*, 1913 2 Ch 469 CA where an order was made for the return of copies of documents improperly obtained and an injuction granted restraining the use of them. The situation is clearly different where the defendant is a department of the State and the evidence is being used in a public prosecution [*Butler v. Board of Trade, sup*]. If the client sustains any injury from such improper disclosure being made, an action will lie against the solicitor [*Taylor v. Blacklow*, 3 Bing NC 235].

Indeed, it has more than once been laid down, that the mere fact that papers and other subjects of evidence have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, constitutes no valid objection to their admissibility, provided they are pertinent to the issue. For the court will not notice whether they are obtained lawfully or unlawfully, nor will it raise an issue to determine that question [*Legatt v. Tollervey*, 14 East 301; *Does v. Date*, 3 QB 619; Tay s 922]. Illegal obtainment of evidence is no bar to its admissibility (*ante*, s 5 p 46; see Wig s 2183). This however, will not apply where the right to retain or use the privileged documents is the very subject-matter of the action [*Ashburton v. Pape, sup*; Phip 11th Ed p 248].

Communication Held to be Privileged.—Cases laid before counsel on behalf of a client and their openings thereon, stand upon precisely the same footing as other professional communications [Tay s 911; *Reece v. Tyre*, 9 Beav 316; *Pearse v. P*, 75 RR 4; *Munchershaw v. N D S & Co.* 4 B 576; *Yangtse I A Ltd v. B I S N Co. Ltd*, 8 Bur LT 274; 30 IC 974].

A widow applied for succession certificate through her pleader and it was granted without production of the will. Subsequently *B* applied for letters of administration to the estate of the deceased. As the pleader became acquainted with the will in course of and for the purpose of professional employment, his refusal to disclose the contents of it when examined as a witness was privileged [*Baikanta v. Bhailal*, A 1929 B 414: 31 Bom LR 1046].

An admission by a person to his pleader that he is a *benamdar* for another is inadmissible if the statement is made without his client's consent [*Bakaulla v. Debiruddi*, 16 CWN 742]. The solicitor is not protected from disclosing that he got a letter from his client, though he is not bound to disclose its contents [*McNair v. Campbell*, 42 IC 532]. A solicitor cannot divulge his client's address if communicated confidentially [*Re Arnott*, 60 LT 109; *Re Campbell*, 5 Ch App 703], or on the express understanding that his name and residence should not be disclosed. Ordinarily a legal adviser does not learn his client's name and residence in the course of his employment, but before the employment begins, and therefore a solicitor is not warranted in refusing to answer the question as to where his client was residing [*Framji v. Mohan Singh*, 18 B 263]. The mere presence of friends of client specially when such friends occupy more or less the same position as he himself, does not destroy the privilege although it may be evidence of the communication not having been made in confidence [*Bhagwani v. Dooram*, A 1933 S 47: 143 IC 345].

Notes of professional interviews and communications, whether made by solicitor [*Ward v. Marshall*, 3 TLR 578] or client [*Woolley v. N L Ry*, LR 4 CP 692]; solicitor's confidential letters to client for obtaining information as to legal proceedings [*Ainsworth v. Wilding*, 1900, 2 Ch 315]; solicitor's or client's knowledge derived solely from privileged communications [*Lyell v. Kennedy*, 9 App Cas 81]; name of party's witnesses before trial [*Marriott v. Chamberlain*, 17 QBD 154]; draft pleadings in same or former action [*Walsham v. Stainton*, 2 Hem & M 1; *Lamb v. Orton*, 22 LJ Ch 713]; statements of facts drawn up by client for submission to solicitor and documents prepared by him for the purpose of providing the solicitor with evidence and information to conduct his case [*Southwark v. Quick*, 3 QBD 315; *Birmingham & M M O Co v. L WN Ry Co*, 1913, 3 KB 850; *Fruerheerd v. L G O Co*, 1918, 2 KB 565: 88 LJKB 15 CA]; admission of adultery by a wife to a solicitor when he was acting as common adviser of husband and wife [*Harris v. H*, (1931) P 10]; opinion given by the Law Secretary or Legal Remembrancer regarding plaintiff's claim against the State [*Tirath v. Govt Jammu*, A 1954 J & K 11]; documents containing the purport of

interview with, and of advice received from the plaintiff's solicitors and counsel as to plaintiff's position in regard to the claim and as to the steps to be taken in regard thereon [*Ryrie v. Shivashankar*, 15 B 7] are privileged. It has been held however that the statement in a case drawn up by an attorney for the opinion of a pleader is admissible in evidence [*Chandreshwar v. Bisheswar*, 5 P 777].

Letter written by agent of a company giving details of claim for the express purpose of laying it before company's solicitor is privileged and inspection cannot be granted [*Yang Tsze Ins A Ltd v. B I S N Co*, 8 Bur LT 274: 30 IC 974]. Letters between solicitors of various plaintiffs were held to be privileged and it was held that the fact that portions of them had been read to the defendant's solicitor, was no waiver of the privilges as regards the parts which were not ready [*Kay v. Pooran Chand*, 4 B 631]. Although a document may not be such as passed directly between the legal adviser and the client, if it is of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, then, the court will not compel the production of such a document [*Vishnu Yeshawant v. New Life Ins Co*, 7 Bom LR 709].

Conversation between one of several defendants and plaintiff's pleader about compromise of suit is admissible in evidence as there was admittedly no express condition that evidence of interviews should not be given [*Meajan v. Alimuddin*, 20 CWN 1217: 44 C 130]. As to admissions 'without prejudices,' see *ante* s 23.

Communications Held Not to be Privileged.—S 24 of Act 2 of 1855 does not warrant a vakil's exclusion from the witness-box, though it may excuse his answering certain questions relating to communication between him and his client [*Doolar Jha v. Runjeet*, 15 WR 340]. Communication between a prosecutor in a criminal case and his attorney, and between attorney and his clerk with respect to the case, are not privileged [*R v. Belilios*, 20 WR Cr 61: 12 BLR 249; *Bhagwani v. Deoram*, A 1939, S 47: 143 IC 345]. Letters written by one of the defendant's servants to another for the purpose of obtaining ..... formation with a view to possible future litigation are not privileged even though they might, under the circumstances, be required for the use of the defendant's solicitor. In order that a privilege may be claimed, it must be shown on the face of the affidavit that the documents were prepared or written merely for the use of the solicitor [*Bipro Das v. Secy of S*, 11 C 65. See also *Umbica v. Bengal S & W Co*, 22 C 105]. Communication by a client to his pleader expressly for the prupose of incorporation in the pleading are not confidential and privileged [*Bibi Sona v. Mir Abdul*, 6 SLR 1: 16 IC 641]. Client's name [*Bursell v. Tanner*, 16 QBD 1]; opinion of counsel, the effect of which is set out in pleadings [*Bristol Corpn v. Cox*, 26 Ch D 687], communications to a solicitor regarding matters of fact as distinguished from legal advice [*Sawyer v. Birchmore*, 3 My & K 572] are not privileged.

No Hostile Inference From Claim of Privilege.—No hostile inference arises from refusal to allow confidential communications to be disclosed. If such communications were not protected no man could safely come to a court either to obtain redress or to defend himself. See remarks of LORD BROUGHAM, in *Bolton v. Corp of Liverpool*, 1 Myl & K 88 p 94 (*ante*: "*Principle and scope*"). The privilege is the privilege of the client and no adverse presumption arises from his not waiving it. It is a different thing when evidence is improperly withheld [*Wentforth v. Lloyd*, 10 HL Cas 589]. When a document is in fact privileged, no adverse inference can be drawn from its non-production, for to allow this would be to destroy the privilege [*per* WOODROFFE, J, in *Weston v. Pearymohon*, 40 C 898, 919. See also *Dulhin v. Harnandan*, 30 MLJ 624 : 20 CWN 617 : A 1916 PC 157].

Litigation Between Attorney and Client.—It has frequently been held that the rule as to privileged communications of attorneys does not apply when litigation arises between attorney and client, and when their communications are relevant to the issue [*Naive v. Baird*, 12 Ind 318]; and if it is claimed that the attorney has an interest in the pending litigation, for instance that his fee is contingent on the result, he may be required to state such fact, and the communications with his client relating thereto [*Eastman v. Kelly*, 1 NYS 866]. And when an attorney, though acting professionally, receives at his client's request a deed of land and conveys it to a third party, no consideration being paid, he may be compelled to disclose the facts [*Hager v. Shindler*, 29 California 47; Jones, s 754].

S. 127. Section 126 to apply to interpreters, etc.—The provisions of section 126 shall apply to interpreters, and the clerks or servants of [1][barristers, pleaders, attorneys and vakils.]

COMMENTARY

Principle and Scope.—The privilege given by s 126 to legal advisers is by the provisions of this section extended to interpreters and the clerks or servants of barristers, pleaders, attorneys, and vakils. As it is not possible for lawyers to transact all their business in person and they have to employ clerks or agents, the privilege necessarily extends to facts coming to their knowledge in the course of their employment. The protection extends to all the necessary organs by which such communications are effected and therefore an interpreter, or an intermediate agent is under the same obligations as the legal adivser himself. The rule also extends to a solicitor's town or local agent [Tay s 920]. It has never been questioned that the privilege protects communications to the attorney's clerks and his other agents for rendering his services [Wig s 230]. The extension of the protection to interpreters is particularly important in a country like India, in which there are so many races speaking different languages and in which the most important portion of the administration of justice is conducted in a foreign language [Field, p 415].

S 127 extends to a communication made to the pleader's clerks the same confidential character that attaches to a communication to a pleader direct, under s 126 [*Kameshwar v. Amanutulla*, 26 C 53 : 2 CWN 649]. Statements made to the clerks of the *mukhtear*, who was acting as the pleader of the accused are privileged as those to their employers [*Abbas Pedda v. R*, 25 C 736]. Where a plaintiff at the instance of his solicitors, sent out a gentleman to India, for the express purpose of acting as the solicitor's agent in the collection of evidence respecting a pending suit, letters written by the agent either to the plaintiff himself or to his solicitors on the subject of the evidence, have been regarded by the court as privileged communication [*Steele v. Stewart*, 1843, 1 Phil 471; Tay s 920]. The interdict provided in ss 126 and 127 and the protection of the communication embodied in s 129 are intended to keep the communications confidential as between the advocate and client. In ordinary law of agency the above protection is not afforded either to the agent or to the principal [*P R Ramakrishnan v. Subbaramma Sastrigal*, 1988 Cri LJ 124 : A 1988 Kerala 18, 22].

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1. In Burma "legal practitioners" substituted (AO 1937).
In Ceylon "advocates, proctors and notaries" substituted.

S. 128. Privilege not waived by volunteering evidence.—If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such [1][barrister, (pleader[2]), attorney or vakil] as a witness, he shall be deemed to have consented to such disclosure only if he questions such [3][barrister, attorney or vakil] on matters which, but for such question, he would not be at liberty to disclose.

COMMENTARY

Principle and Scope.—The privilege is the privilege of the client and not of the legal adviser, and therefore he alone can waive it. S 126 permits disclosure when it is waived *expressly*. This section refers to *implied* waiver, and says that the privilege is not waived if a party to a suit gives evidence therin at his own instance or otherwise. Under s 24 of Act 2 of 1855, a party by tendering himself as a witness was deemed to have waived the privilege. This section further says that the privilege is not also lost by merely calling the legal adviser as a witness unless a party questions him on the particular point. The client does not waive his privilege by calling a solicitor as a witness, unless he also examines him in chief to the matter privileged; and even in that case, it has been held in Ireland, that the cross-examination must be confined to the point upon which the witness has been examined in chief [*M'Donnell v. Conry*, 1843, Ir Cir Rep 807; Tay s 927].

Wigmore is of opinion that a privileged person cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point, his election must remain final [Wig s 2327]. Fairness demands such a course. A party to a suit does not by tendering himself as a witness, lose the benefit of the privilege given by s 126; nor does he lose the privilege by calling his legal adviser as a witness on his behalf, unless he questions him on matters which, but for such question, he would not be at liberty to disclose, and even then the cross-examination must be confined to the point upon which the witness has been examined in chief. The section does not prevent a legal adviser from being examined in the case, though it may excuse his answering certain questions relating to communications between him and his client [see *Doolar Jha v. Ranjeet*, 15 WR 340].

Waiver by Implication.—What constitutes a *waiver by implication*? *Judicial* decisions give no clear answer to this question. As a fair canon of decision, Wigmore suggests the following distinctions:—

(*1*) The client's offer of his *own testimony in the cause at large* is not a waiver, for the purpose either of cross-examining him to the communications or of calling the attorney to prove them.

(2) The client's offer of the *attorney's testimony* in the cause at large is not a waiver so far as the attorney's knowledge has been acquired casually as an ordinary witness, but otherwise it is waiver.

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1. In Burma "legal practitioner" substituted (AO 1937).
   In Ceylon "advocate, proctor, or notary" substituted.
2. Inserted by s 10 IE Act (Am) Act 18 of 1872.
3. In Burma "legal practitioner" substituted (AO 1937). In Ceylon "advocate, proctor, or notary" substituted.

(*3*) The client's offer of his *own testimony* as to *specific* facts about which he has happened to communicate with the attorney is not a waiver, for the same reason as in (*1*), *supra*; but his offer to the *attorney's testimony* as to such specific facts is waiver, for the same reason as in (*2*), *sup*.

(*4*) The client's offer of his own or the attorney's testimony as to *specific communication* to the attorney is a waiver as to all other communications to the attorney on the same matter; for the privilege of secret consultation is intended only as an incidental means of defence, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.

(*5*) The client's offer of his own or his attorney's testimony as to a *part of any communication* to the attorney is a waiver as to the whole of that communication on the analogy of the principle of completeness [Wig s 2327].

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

COMMENTARY

Principle and Scope.—Ss 126, 127, 128 prevent a legal adviser or his clerk, servant, &c, from disclosing confidential communications made in the course of professional employment. A similar protection is afforded to the client by this section which says that no one shall be compelled to disclose confidential communication which has taken place between himself and his legal adviser, unless he himself offers as a witness; in which case he can be compelled to disclose any such communication which the court thinks necessary to explain the evidence which he has given, but no others. The protection granted by s 126 would be illusory if the client also were not protected from disclosure of such communications, for the privilege could be destroyed by compelling the client to disclose that which his legal adviser is not allowed to divulge. Hence the necessity of s 129 which confers the privilege equally on the client's own testimony.

The privilege extends to all communications, oral or written whether they were made before or after the commencement of the litigation. The principle contended for in ss 846 and 847 of Taylor's Evidence has been adopted in this section with this qualification that if a party becomes a witness of his own accord, he shall, if the court requires it, be made to disclose everything necessary to the true comprehension of his testimony, and shall be bound to produce such confidential writing or correspondence as would be necessary for the said purpose. The principle of protection herein advocated is founded on the exigencies of human affairs. To enable a counsel or solicitor to nip litigation in the bud by timely warning or suggestion, an exact knowledge of the fact is necessary; but if professional communications be embarrassed by any fear of disclosure, advice would have to be given on maimed and distorted statements [*Munchershaw v. N D Co*, 4 B 576].

In *Munchershaw v. N D Co, sup*, it was contended that though a client could not, under this section, be compelled to disclose to the court a case, submitted by him to his counsel for opinion, yet the other party was entitled to demand inspection under s

130 of the C. P. Code, 1882 (Or 11, r 14, C P Code). WEST, J, however, declined to order the production of the paper and observed: "A compulsory disclosure of confidential communications is so opposed to the popular conscience on that point that it would lead to frequent falsehood as to what had really taken place. The rule of protection seems to me to be one which should be construed in a sense most favourable to bringing professional knowledge to bear effectively on, the facts out of which legal rights and obligations arise, and disclosures made under s 129 should not be enforced in any cases except where they are plainly necessary. I decline, therefore, to order the production of the paper."

Inspection was allowed of documents obtained for the purpose of the litigation, but not shown to have been obtained at the instance of the solicitor, or with the view of being submitted to him [*Umbica v. B S & W Co*, 22 C 105; see also *Biprodas v. Secy of S*, 11 C 655]. Documents containing the purpose of interviews with and of answers received from, the plaintiff's solicitors and counsel as to plaintiff's position in regard to the claim and as to the steps to be taken in regard thereto are privileged. Documents regarding the steps taken by the plaintiffs from time to time to prosecute their claim against the defendant are not privileged. There is no privilege as regards opinion upon, or steps taken in reference to a suit in which the plaintiffs and defendants are putting forward opposite contentions, because they cannot relate solely to the case of the plaintiffs only [*Ryrie v. Shivshankar*, 15 B 7].

In s 129, "compelled" cannot mean "subpoenaed," and it uses the word 'compelled to disclose" with reference to the case when a man has offered himself as a witness, and must refer to some force put upon the witness after he is in the witness-box [*Moher Shk v. R*, 21 C 392].

With regard to court's power to order production and inspection of documents, see Or 11, rr 12-23 C P Code, 1908. On the subject of discovery and inspection, see the cases of *Biprodas v. Secy of S*, 11 C 665 and *Oriental Bank Corp v. Brown & Co*, 12 C 266, noted under s 126.

Communications From Third Persons to the Client or Legal Adviser for the Purpose of Litigation.—Ss 126-29 refer exclusively to communications between clients and their legal advisers or clerks, servants of such legal advisers. Such communications are wholly privileged. The confidential communications between client and advocate have protection from compulsory disclosure. Neither the advocate nor the client is under any obligation to spell it to a third person [*P R Ramakrishnan v. Subbaramma Sastrigal*, 1988 Cri LJ 124 : A 1988 Kerala 18, 22]. There is no special provision in the Act for the protection of similar communications *for the purpose of litigation* between the client and persons other than legal advisers or between third persons and legal advisers. Such communications are also protected from disclosure and the discretion rests with the court. It has been held that s 130 does vest the discretion and it is to be exercised according to the pratice of the court. And although a document may not be such as passed directly between the legal adviser and the client, yet if it is of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, then the court will not compel the production of such document [*Vishnu v. New York L I Co*, 7 Bom LR 709]. Communication whether it is made by the client in person or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction is protected. Again, the evidence obtained by the solicitor or by his direction or at his instance, even if obtained by the client, is protected, if obtained after litigation has been commenced

or threatened, or with a view to the defence or prosecution of such litigation [*Wheeler v. Le Marchant*, 17 Ch D 682—*per* JESSEL, MR]. In *Anderson v. Bank of Br Columbia*, LR 2 Ch D 644, JAMES, LJ, said: "You have no right to see your adversary's brief and no right to see the materials for the brief."

In *Wolley v. N L Ry Co*, LR 4 CP 602, 612, the law has been thus explained by BRETT, J: "Any report of communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish his claim or defence in an existing litigation, is privileged, and will not be ordered to be produced; but, if the report or communication is made in the ordinary course of the duty of the agent or servant whether before or after the commencement of the litigation, it is not privileged and must be produced. The time of which the communication is made is not the material matter, nor whether it is confidential, nor whether it contains facts or opinions. The question is whether it is made in the ordinary course of duty of the servant or agent, or for the instruction of the master or principal as to whether he should maintain or resist litigation."

In *Chartered Bank v. Rich*, 4 B & S 73 : 32 LJQB 300 COCKBURN CJ, observed:—"If a man writes a private letter to an agent or friend asking him to obtain information for him on a matter as to which he is about to engage, or has engaged, in litigation, I doubt whether a discovery or inspection of the answer to that letter would be ordered by any of the learned judges in equity to whose decisions reference has been made, and I will not be a party to establishing such precedent."

In the case of *Bustros v. White*, LR I QBD 423 : 34 LT 865, it has been held that the protection though confined to communications between a client and his legal adviser extends to all necessary organs by which such communications are effected; and therefore, an interpreter or an intermediate agent is under the same obligation as the legal adviser himself; and if the legal adviser has communicated with such person, he will be as much bound to silence as if he had communicated directly with his client. [Tay s 920]. The English case cited above has been followed in this country in the case of *Wallace v. Jefferson*, 2 B 453, where SARGENT, J, observed:—"The mere circumstance that communications are confidential does not render them privileged as pointed out by the Master of the Rolls in *Anderson v. Bank of British Columbia*, (LR 1 QBD 139). They must be, to use his words, confidential communications with a professional adviser and this view of the law was confirmed by the court of appeal consisting of LORDS JUSTICE JAMES and MELLISH. Nor would it be possible having regard to the position in which Richardson stood to the plaintiffs, to treat him as a deputy of the solicitors in Bombay, even if the plaintiffs had, at the time, been in communication with professional advisers, which does not appear on the affidavit to have been the case. LORD JUSTICE MELLISH, in the case of *Anderson v. Bank of British Columbia*, suggests that the privilege may perhaps extend to cases in which an agent, as distinguished from a solicitor, is employed in communicating evidence to be used in the trial. But it is not suggested that the letters from Mr. Richardson were of that nature. The documents as shown by Mr. Richardson's affidavit, are of the same nature as those of which production was ordered in *Anderson v. Bank of British Columbia*, Production must be ordered."

Anonymous letters sent to the solicitor or counsel with reference to and for the purpose of a trial are privileged; but anonymous letters to the client in reference to the litigation are not privileged [*Re Hollowway*, 12 P D 167].

Communications frpm third person for purpose of litigation fall under two heads:—(*1*) Communications *called into existence by the client* for the purpose of submission to the legal adviser, either for his advice or for the conduct of litigation; and (2) communications *called into existence by the legal adviser*.

Oral or documentary information from third persons which has been *called into existence by the client for the purpose of submission to the solicitor, either for advice or for the conduct of litigation* (and whether submitted or not) *eg*, shorthand notes of interviews held between the chairman of a company and an employee, or between a superior and subordinate employee, in order to obtain information on a subject of expected litigation, for submission to the company's solicitors [*Ankin v. L & N E Ry*, 1930, 1 KB 527 CA; *Southwark Co v. Quick*, 3 QBD 315; *Birmingham Co v. L & N W Ry*, 1913, 3 KB 850 CA]; reports obtained by a party from his subordinates for a similar purpose [*London & Tilbury Ry v. Kirk*, 28 Sol Jo 688; *Haslam v. Hall*, 3 TLR 776] are privileged [Phip 11th Ed, p 258].

Oral or documentary information obtained by the client *otherwise than for submission to the solicitor—eg*, reports made by agent to principal in the ordinary course of business, even though litigation be anticipated [*Wooley v. North L Ry*, LR 4 CP 602; *Worthington v. Dublin Ry*, 22 LR Ir 310]; or facts and names of witnesses submitted by member of Trade Union to Council of latter, to enable them to judge whether they would take up his case [*Jones v. Great C Ry*, 1910 AC 4]; or an answer to letter from principal stating that certain claims had been made, and asking the agent as to the facts [*Anderson v. Bank of Columbia*, 2 Ch D 644]; or reports made to the principal to be submitted "in the event of litigation" to the solicitor [*Cook v North M T Co*, 6 TLR 22; *Westinghouse v. Mid Ry*, 48 LT 462] are not privileged [Phip 11th Ed p 259]. Reports made by the servant of a party (defendant) to the latter with regard to the subject-matter of the suit are not privileged [*Central I S W M Co Ld v. G I P R*, 102 IC 425 : A 1927 B 367 : 29 Bom LR 414].

Oral or documentary information from third persons, which has been *called into existence by the solicitor*, (or by his direction, even though obtained by the client *for the purposes of litigation*, *eg*, information to be embodied in proofs of witnesses; reports made by medical men at the request of the solicitors of a railway company, as to the condition of a person threatening to sue the company for injury from a collision [*Wooley v. N L Ry*, LR 4 CP 602; *Friend v. L C & D Ry*, 2 Ex D 437]; reports by servant of company made for use of the company's solicitor and in reasonable apprehension of a claim against the company [*Collins v. London G O Co*, 68 LT 831] are privileged [Phip 11th Ed p 258].

Oral and documentary information from third persons not called into existence by the solicitor, though obtained by him for purposes of litigation, *eg*, copies of letters written before action by third person to the client [*Chadwick v. Bowman*, 16 QBD 561]; or called into existence by the solicitor, though not for the purpose of litigation, *eg*, a report made by a surveyor, at the solicitor's request, as to the state of a property upon which the client was about to lend money [*Wheeler v. Le Marchant*, 17 Ch D 675]; or as to matters in respect of which litigation was not at the time contemplated, although it afterwards arose [*Westinghouse v. Midland Ry*, 48 LT 462] are not privileged [Phip 11th Ed p 259].

Note or Statement From a Witness.—In a will case, for the purposes of the propounder's brief, a note had been obtained from a witness (subsequently examined at the trial) of the evidence that he could give—*Held*, that the note was privileged from production and the caveators were not entitled to see it, and the judges should not have allowed their minds to be influenced in considering the evidence by the fact that the note was not produced [*Dulhin v. Harnandan*, 20 CWN 617 : 33 IC 700 : A 1916 PC 157]. Statements of witnesses made for the special purpose of being shown to a legal adviser with a view to ascertaining whether there is a good case to go to the court are privileged under this section [*Dinbai v. Fromroz*, 43 IC 71 : 6 LW 757].

S. 130. Production of title deeds of witness, not a party.—[1]No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

SYNOPSIS

COMMENTARY

Principle and Scope.—The section lays down that a witness who is *not a party* to a suit, *ie*, a stranger, shall not be compelled to produce (*1*) his title-deeds or documents in the nature of title-deeds, *eg*, documents of pledge or mortgage, or (*2*) any document the production of which might tend to criminate him, unless he has agreed in writing to produce them. The reason for the rule is protection from the mischief and inconvenience that might result from compulsory disclosure of title [*Pickering v. Niyes*, 1 B & C 263; *Doe v. Date*, 3 QB 609; *Phelps v. Prew*, 3 E & B 441—*per* EARLE, J]. This section should be read with s 131 which prohibits the production of document in the possession of a person, which any other person would be entitled to refuse to produce if they were in his possession.

According to Best, the rule that witness will not be compelled to produce documents which he swears are his muniments of title, is in a great degree the offspring of necessity, being based on the immediate and irrepairable mischief which would ensue from an erroneous decision of the judge as to the nature of the documents. Still we apprehend that if it could be clearly shown that the statement of the witness as to their character was untrue, the judge could compel their production [Best, ss 128, 128A]. Nor can a witness, if a *party*, be compelled to produce documents which he swears relate solely to his own *title* or *case*, and do not tend to support the title or case of his adversary [*Morris v. Edwards*, 15 App Cas 309; *Milbank v. M*, 1990, 1 Ch 376; *Miller v. Kirwan*, 1903, 2 IR 120; *Chowood v. Lyall*, 1929, 2 Ch 406—Phip 11th Ed p 259]. He need not also swear that they contain nothing to impeach his own case [*Morris v. Edwards, sup*]. But if they are material to his opponent's case he must disclose them, even when the deponent is a purchaser for value without notice [*Ind. Coope & Co v. Emmerson*, 12 App Cas 300—Powell, 9th Ed, p 634]. In England this rule is now abolished as far as civil proceedings are concerned and a party can now

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1. In Ceylon this is sub-section (*1*) and two other sub-sections have been added, *viz.*, "(2) No witness who is a party to the suit shall be bound to produce any document in his possession or power which is not relevant or material to the case of the party requiring its production.

(3) No bank shall be compelled to produce the books of such bank in any legal proceeding to which such bank is not a party, except as provided by section 90D."

be compelled to produce such documents (See s 16(2) Civil Evidence Act 1968) even if they relate solely to his own case.

The title-deeds to land were in England always a secret of extraordinary importance before the modern system of title registration. The safety of landed interests was a paramount object. Now, under any title-system not founded on compulsory public registration, the secrecy of the title-instruments comes to be a vital consideration for the occupants of the land. But under a system of compulsory public registration of titles or of conveyances there is in such a privilege neither necessity nor utility. Those who do not register their deeds are few in number; they voluntarily take the risk of loss; and their situation does not justify special protection. Those who do record or register their deeds have no need for such protection; their title, in general, stands or falls by what is publicly recorded, not by what they privately possess. Accordingly, in the United States, this exceptional privilege has not been judicially sanctioned [Wig s 2211]. The Law Reform Committee in England also thought it best to abolish this privilege in relation to civil proceedings (16th Report, 1967, Cmnd 3472) and s 16(1) Civil Evidence Act 1968 implements their view making it possible to compel persons other than a party to produce any deed or other document relating to his title to any land.

Upon principles of reason and enquiry, judges will refuse to compel either a witness or a party to a cause to produce either his title-deeds, or any document the production of which may tend to criminate him, or any document which he holds as a mortgagee or pledgee. But a witness will not be allowed to resist a *subpoena duces tecum* on the ground of any lien he may have on the document called for as evidence [*Hunter v. Leathley*, 10 B & C 858], unless the party requiring the production, be himself the person against whom the claim of lien is made [*Kemp v. King*, 2 M & R 437; Tay s 458]. The mere circumstance that the production of the document may render the witness liable to a civil action, does not entitle him to withhold it [Tay s 460].

Same.—S 130 does not apply to parties to a suit, nor does it appear to apply to persons who are called as witness in criminal cases, as the word used in the section is "*suit*" (*cf R v. Daye*, 1908, 2 KB 233). S 130 differs from the English law in this respect that it does not excuse a witness from producing a document which might expose him to a penalty or forfeiture; whereas the English rule does excuse. But both according to the English (Steph. Dig. Art. 118) and Indian Law, a witness is not excused from producing a document on the ground that the production might render him liable to a civil action. Under s 130 a witness not a party, cannot be compelled to produce a document which might criminate him. But under s 132 a witness shall not be excused from answering any question as to any relevant matter although the answer might criminate him. It is reasonable to suppose that this does not include any question relating to the contents of the criminating document which he is not bound to produce under s 130. If this is not so, the protection would be illusory [see *post*: "*Evidence of Contents of a Document which a Witness Cannot Be Compelled to Produce*"].

Under Or 16, r 6 of the C P Code, 1908, any person may be summoned to produce a document, without being summoned to give evidence; while s 162 of this Act says that a witness summoned to produce a document must bring it to court, notwithstanding any objection which there may be to its production and the validity of any such objection shall be decided by the court. Reading all these sections together, it seems clear that a witness summoned to produce a document must bring it to court, *ie*, actually produce in the literal sense of physical production; and if he claims

privilege under this section, and objects to its production, the validity of his objections shall be decided by the Court. [See *post*, notes to s 162]. Under s 165 a judge is not authorised to compel a witness to produce any document which he would be entitled to refuse to produce under ss 121-31.

In a case to which s 130 would apply it would be entirely optional for the witness to produce the title-deeds and to raise any objection whatever and the section would apply if he objected to produce his title-deeds [*R v. Moss*, 16 A 88, 100]. As to mortgagee's right to withhold production of title-deeds before satisfaction of claim, see *Beattie v. Jetha Dungarsi*, 5 BHC 152 (OCJ). On plaintiff's application the court directed a person not a party to the suit to produce a box containing documents, who objected on the ground that it contained documents of her husband and the plaintiff and the primary court overruled the objection. It was held that it is doubtful whether s 130 applied to a case where a witness who is asked to produce title-deeds not solely interested in the property to which these relate [*Dhirabala v. Tincouri*, 31 CWN 80*n*]. As to joint possession, see *post*, s 131.

Applications for discovery or inspection of documents in the possession of a witness who is a party to a suit, are regulated by Or 11, C P Code. A party cannot be compelled to produce or to allow inspection of documents which constitute exclusively the evidence of his *case of title* [*Morris v. Edwards*, 15 App Cas 309; *Budden v. Wilkinson*, 1893, 2 KB 432; *Frankenstein v. Gavins Co*, 1897, 2 QB 62; *Att-Genl v. Mayor*, 1899, 2 KB 478; *Brooks v. Prescott*, 1948, 1 All ER 967 CA; *Dinajpur T & B Co v. Prabhat*, 56 CLJ 940]. The privilege must be properly claimed by stating in an affidavit that the documents constitute exclusively evidence of his own case or title [*Att-Genl v. Emerson*, 10 QBD 191; see *Balamoney v. Ramaswami*, 30 M 230, 231]. As to the discovery of documents which are alleged to relate solely to a party's case, KNIGHT-BRUCE, VC, said in *Combe v. Corp of London*, 1 Y & CCC 631: "If it be with distinctness and positiveness stated in an answer that a document forms or supports the defendant's title and is intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence or forming or supporting the plaintiffs' title or the plaintiffs' case, that document is, I conceive, protected from production, unless the court sees upon the answer itself that the defendant erroneously represents or misconceives its nature; but where it is consistent with the answer that the document may form the plaintiffs' title or part of it, may contain matter supporting the plaintiffs' title or the plaintiffs' case, or may contain matter impeaching the defence, then I apprehend the document is not protected, nor I apprehend is it protected if the character ascribed to it by defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness."

[*Ref Tay ss 458-59, 918-19; Best, ss 128-128A; Ros N P 156-57; Steph Art 118-19; Phip 8th Ed p 196; Wigmore, s 2211; Hals, 3rd Ed, Vol 15, para 759*].

Title-Deeds.—The word "title" produces confusion because in many cases it is not a question of title at all, and the proposition ought to be that a plaintiff is not entitled to see any document that does not tend or make out his case [*per* KINDERSLEY, VC, in *Jenkins v. Bushby*, 35 LJ Ch 400. See *Bewick v. Graham*, 7 QBD 400; *Morris v. Edwards*, 23 QBD 287]. It has been said that the oath of the witness is conclusive as to the nature of the document, and in *Fisher v. Ronalds*, 12 CB 762 : 17 Jur 393 JERVIS, CJ, and MAULE, J, laid down in the most unequivocal terms that the court is bound by the statement on oath of the witness. But the whole question was discussed in *Reg v. Boyes*, 30 LJQB 312, and the *dicta* in *Fisher v. Ronalds* were **overruled**. In that case it has been laid down that to entitle a party

called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer and that the danger to be apprehended must be real and appreciable [Best, ss 128, 128A]. In a case an executor of defendant's lessor was compelled to produce a rent-book and DENMAN, LCJ, said: "[He] possessed it in the character of the executor of the tenant for life; when produced, it proved the fact of payment of rent to the testator ..... Such a paper was not a title-deed, nor within the protection of the rule which exempts witnesses from producing documents in the nature of title-deeds" [*Doe v. Date*, 3 QB 608, 617].

Where a stranger present in court being called upon under Or 16, r 7 to produce a document which was his own title-deed stated that the document was not in his possession then, but offered to produce it the next day and the court thereupon drew up proceeding under s 476 (now s 340) Cr P Code, held it was not justified. Before any proceedings could be taken the nature of the document should be determined. If it was his own title-deed or of any other person who would be entitled to refuse to produce it, he could not be compelled to produce the document under the provisions of ss 130 and 131 [*Bhagabai v. R*, 14 CLJ 120, 11 IC 794].

Secondary Evidence of Documents which a Witness Cannot Be Compelled to Produce.—[See s 65 *ante*]. A lessee is not bound to produce his original title-deed. Consequently if after service of summons, he did not produce the original, the plaintiff became entitled to use the certified copy as secondary evidence [*Amrit Chamar v. Sirdhari*, 15 CLJ 6; 17 CWN 108].

Evidence of Contents of a Document which a Witness Cannot Be Compelled to Produce.—Whenever a party is justified in refusing to produce an instrument, he cannot be forced, to disclose its contents; and although some few *dicta*, or even decisions, to the contrary may be found, the rule as above may now be considered as established. ALDERSON, B, in *Davies v. Waters*, 11 LJ Ex 214, remarks: "It would be perfectly illusory for the law to say that a party is justified in not producing the deed, but he is compellable to give parol evidence of its contents; that would give him, or rather his client through him merely an illusory protection, if he happens to know the contents of the deed, and would be only a roundabout way of getting every man an opportunity of knowing the defects there may be in the deeds and titles of his estate." [Tay s 918A]. See also *Few v. Gappy*, 13 Beav 457. It has been held however, that a party is entitled to interrogate on facts directly in issue, *eg*, particulars of a *hundi* [*Baijnath v. Raghunath*, 41 C 6 (*Ali Kader v. Gobind Das*, 17 C 840 **distd**)].

Lien.—A witness cannot withhold production, as distinguished from delivery-up, of a document on the ground that he has a lien upon it as against a *stranger* [*Re Hawkes Ackerman v. Lockhart*, 1898, 2 Ch 1]. That he can withhold production where the lien is against the *party requiring the production*, appears now to be settled [*Re Hawkes, sup*; *Re Jones*, 21 TLR 352—CONTRA: Steph Art 118, n 2], unless the rights of third parties would be prejudiced thereby, as in the case, *eg*, of Bankruptcy [*Re Winslow*, 16 QBD 696]; Administration [*Re Boughton*, 23 Ch D 169]; Winding-up [*Re Capital Fire Assoc*, 14 Ch D 408]; or Partition action [*Boden v. Hensby*, 1892, 1 Ch 101]. It has been held that the witness cannot withhold production even where the third party *claims through* the person against whom the lien exists [*Lockett v. Cary*, 10 Jur NS 144; but see *Re Hawkes, sup*; Phip 11th Ed, p 260]. Where a person holds a document not his own, but subject to a *lien* which would be lost by his surrender of possession, or owns or holds document, such as a bill of exchange, whose *continued possession is necessary* for the enforcement of his right under it, he

may fairly claim not to be compelled to surrender it for evidential purposes in litigation between other parties. The privilege however, it will be observed, it not to withhold disclosure of contents, but only to *retain* possession. Nevertheless, there is one situation in which with propriety the court may decline even to compel disclosure, namely, the case in which the litigant party seeking to compel it is the *person against whom the lien* of the witness runs [Wig s 2211].

"Unless He Has Agreed in Writing to Produce Them".—This evidently refers to cases where the seller (*1*) does not sell all the properties comprised in his title-deeds, but sells only a portion of the property included in them; or (2) where the whole of the property comprised in his title-deeds is sold to different purchasers. In case (*1*) the seller cannot deliver the title-deeds to the buyer of the part of his property but is entitled to retain them all, under the proviso to s 55(*3*) of the T P Act of 1882; and in case (2) the buyer of the lot of the greatest value is entitled to all the documents. In all such cases an agreement in writing is made by the parties to produce the title-deeds when required by any one of the buyers. For instance, *A* purchased several properties by one kobala and subsequently sold one of the properties, included in that kobala to *B*; *A* cannot in that case deliver the title-deed to *B*, the purchaser of a part of the property only; but is entitled to retain the document himself, under the proviso to s 55(*3*) of the T. P. Act. Again where the whole of the property comprised in A's kobala is sold to different purchasers, in such case, the kobala cannot be given to all the purchasers, but the purchaser of the plot of the greatest value is entitled to the title-deeds. In all such cases, the parties generally make agreements in writing to produce the title-deeds when required by any one of the buyers.

*[*S. 131. Production of documents or electronic records which another person, having possession, could refuse to produce.—No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession or control,*[1] *unless such last mentioned person consents to their production.*][2]

COMMENTARY

Information Technology Act, 2000

Production of documents [S. 131].—Section 131 has been substituted for the purpose of accommodating electronic records alongwith documents. The new section says that no one shall be compelled to produce documents in his possession or electronic records under his control which any other person would be entitled to refuse to produce if they were in his possession or control unless he consents to their production.

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

Principle and Scope.—S 130 relates to the case when the document is the title-deed of the witness (not a party); while s 131 refers to documents of another person in the possession of the witness, *ie*, documents which though physically in the possession of the witness are the property of another person who has a right to object to their production. It extends to the agent, *ie*, the possessor of the document, the same privilege which is enjoyed by the person whose property it is. This section is introduced for the protection of person whose title-deeds and other documents happened to be in possession of his

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* **S. 131 subs. by the Information Technology Act, 2000.**

1. In Ceylon after "possession" add "(except for the purpose of identification.)."
2. In Ceylon after "production" add "nor shall any one who is entitled to refuse to produce a document be compelled to give oral evidence of its contents."

attorney, mookhtear, agents or servants, trustees and mortgagees, etc. The extent of the obligation of the person having interest in the document is the determining factor. If that person is compellable to give up possession, the custodian of the document is; if that person is not, then the custodian is not. In such a case the consent of the owner of the documents would be necessary before a person can be compelled to produce them, or in other words, the consent of the owner is a condition precedent to the production of the documents. If the owner gives consent, the witness cannot refuse to produce the document, unless he, in his own right, can claim privilege by bringing the case within s 130. In the case of documents in the possession of a solicitor, he may have another privilege under s 126. It has been held that in criminal cases the document must be given up, notwith-standing any instructions from the depositor [*R v. Daye*, 1908, 2 KB 333].

The prohibition under this section is not expressed in the same terms as in s 126 for it says that "no one shall be compelled to produce". The court cannot compel production, but the witness may be permitted to produce, if he chooses to do so. The discretion rests with the witness. A witness is not entitled to refuse to produce a document in his possession only because its production may expose him to a civil action.

The protection exists where documents called for are in the hands of solicitors for the trustees of bankrupts [*Laing v. Barclay*, 3 Stark 42]. In such cases, if the client or principal would have been entitled had he been called as a witness, to withhold the document, the solicitor, agent or steward cannot be compelled, though he will be permitted to produce it [*Hibberd v. Knight*, 2 Ex 11]; but if both the client and the solicitor, or the principal and the agent, concur in refusing to produce a document, the party calling for it, may, in such an event, give secondary evidence of its contents [*Ditcher v. Kenrick*, 1 C & P 161; *R v. Hunter*, 3 C & P 591; Tay s 919]. See s 65 *ante* p 617.

Where a person, having possession of a deed in the character of trustee to the defendant, had first obtained a knowledge of its contents while acting as his solicitor, the knowledge thus obtained was held to be privileged [*Davies v. Waters*, 11 LJ Ex 214]; and where a solicitor became a trustee under a deed for the benefit of his client's creditors, subsequent communications made to him by the client were held privileged [*Pritchard v. Foulkes*, 1837, 1 Coop 14; Tay s 931].

Documents of a Principal in the Possession of Another Person.—Where a principal would be entitled to refuse production of a document, it cannot be compelled from his solicitor, trustee or mortgagee [*Bursill v. Tanner*, 16 QBD 1], except for the purpose of identification, which must not extend to a perusal of its contents [*Volant v. Soyer*, 13 CB 231; *Phelps v. Prew*, 3 E & B 430]. In *Hibbert v. Knight*, 2 Ex 11, however it was held that though a solicitor cannot be compelled to disclose the contents of his client's deed which he refuses to produce, yet if he disclose them voluntarily the court will admit the evidence; *sed qu* without the express consent of the client. The rule does not apply where the title of the witness would not be affected by production—*eg*, an abstract of title supplied by him in connection with a purchase which subsequently fell through [*Doe v. Landon*, 12 QBD 711; *Lee v. Merest*, 39 LJ Ecc 53—Phip 8th Ed, pp 196-97].

The secretary of a company cannot as a rule be compelled to produce the documents of his company if the directors do not consent. It is otherwise if the company or directors be defendants. In *Clinch v. Financial Corp*, LR 2 Eq 271, 273, PAGE WOOD, VC, said: "But these documents, though in substance they may be the property of the bank, are in the possession or power of the directors who are the only persons who cannot give an order for their production. The attempt has often been made in one way or the other to escape the personal order for production, on the group of ownership of the documents being in a corporate or partnership body ..... But it has always been decided that the parties must give all the information in their power, even if the documents be not in their possession in this sense, that they cannot be produced without an order for the purpose, because they are in the joint possession of the directors and others. The court says, if you have any possession—that is enough. There may be grounds for not producing; but even then you must give discovery" [Powell, 10th Ed, p 560].

As to the privilege of a party and his right to object, when discovery and inspection are sought by his opponent, see the provisions of Order 11 of the C P Code, 1908. See also notes and cases under s 130 *ante*.

Where an agent for the party against whom the application is made possesses the documents jointly with other persons, no order to produce will be made, but the party will be compelled to disclose by answer the information which may be obtained by inspecting the documents. And the same rule applies where the documents are in the possession of the party jointly with others [Powell, 9th Ed, p 639]. In *Taylor v. Rundell*, Cr & Ph 104, LORD COTTENHAM said:

> "It is true that the rule of court, adopted from necessity, with reference to the production of documents, is, that if a defendant has a joint possession of a document with somebody else who is not before the court, the court will not order him to produce it, and that for two reasons: one is, that a party will not be ordered to do that which he cannot or may not be able to do; the other is, that another party not present has an interest in the document which the court cannot deal with. But that rule does not apply to discovery, in which the only question is, whether as between the plaintiff and the defendant, the plaintiff is entitled to an answer to the question he asks; for if he is, the defendant is bound to answer it satisfactorily, or, at least, show the court that he has done so as far as his means of information will permit."

When joint ownership is pleaded as the ground for non-production, the party must satisfy the court as to the nature of the joint-ownership [*Bovill v. Cowan*, LR 5 Ch 495]. See *Dhirabala v. Tincouri*, 31 CWN 80*n*, *ante*.

A company against which a prosecution is started cannot be required by virtue of Art 20(*3*) to produce incriminating documents. It can under s 131 object to its own employees producing such documents without its consent [*S v. Nagpur E L R Co*, Ld, A 1961, B 242].

[*Ref Tay ss 458-59, 918-19; Steph Art 118, 119; Phip 8th Ed, p 196-197; Powel, 9th Ed, pp 638-41; Ros N P, 156-58; Halls, 3rd Ed, Vol 15, para 773*].

Discovery against persons not parties to proceedings.—Where a party to any proceedings in which a claim is made in respect of a person's personal injuries or death applies under s. 32(*1*) of the [English] Administration of Justice Act, 1970 for an order that a person who is not a party to the action produce 'to the applicant' documents in his possession, custody or power which are relevant to an issue arising out of that claim, then the court may order the production of such documents [*McIvor v. Southern Health and Social Services Board*, (1978) 2 All ER 625 HL; *Dunning v. Board of Governors of United Liverpool Hospitals*, (1973) 2 All ER 454; *Davidson v. Lloyd Aircraft Services Ltd*, (1974) 3 All ER 1 and *Deistung v. South Western Metropolitan Regional Hospital Board*, (1975) 1 All ER 573 **overruled**.

Discovery in the nature of a fishing operation is not permissible. There is the need to specify the documents with sufficient particularity [*Rio Tinto Zinc Corpn v. Westinghouse*, (1978) 1 All ER 434 HL]. The privilege against self-incrimination being also available to such a party, he can refuse production if he has a reasonable ground to believe that the document would expose that he is a member of a cartel which is prohibited by EEC law and, therefore, he would run the risk of proceedings being brought against him. This would be so notwithstanding that the commission already had knowledge of the cartel and had not taken any action in respect of it, because the production would have made the risk of proceedings greater. *Ibid*.

S. *132. Witness not excused from answering on ground that answer will criminate.—A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso.—Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

SYNOPSIS

COMMENTARY

Principle and Scope.—Under this section a witness cannot refuse to answer a question which is *relevant* to the matter in issue in any suit or in any civil or criminal proceeding simply on the ground that the answer will tend to criminate him or expose him to a criminal charge, penalty or forfeiture. The privilege existed here formerly, but was withdrawn by s 32 of Act 2 of 1853 which is reproduced alomost

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* In Ceylon para 1 has been numbered sub-section (1) and the following has been added at the end of it: ", or that it will establish or tend to estabish that he owes a debt, or is otherwise subject to a civil suit at the instance of His Majesty or of any other person."

The Proviso has been omitted and in its place sub-secs. (2) and (3) added, *viz.*:

"(2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer.

(3) Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate such witness, the court shall explain to the witness the purport of the last preceding sub-section."

toidem verbis in this section. The legislature, while depriving the witness of the privilege has in order to remove any inducement to falsehood, added a proviso to the section declaring that if a witness is compelled by the court (in spite of his objection) to answer, such incriminating answers will not subject the witness to any arrest or prosecution or be proved against him in any criminal proceedings except in case of a prosecution for giving false evidence. The protection, of course, is afforded to encourage the witness to come forward and help in the administration of justice. The privilege still exists in English law and has recently been extended in civil proceedings to cover incrimination of a spouse by s 14 Civil Evidence Act, 1968.

Art 20(*3*) of the Constitution says that "No person accused of any offence shall be compelled to be a witness against himself." This protection against self-crimination applies only to a person accused of an offence and has not been extended to witnesses. So the law in s 132 relating to the answering of relevant questions by a witness in a civil or criminal proceeding, even though such answer will criminate him, remains unaffected by Art 20(*3*) (See also *Subedar v. S*, A 1957 A 396; *Peoples Ins Co v. Sardul*, A 1962 Pu 101). So long an accused was incompetent to testify on his behalf, but a new situation has been created by the insertion of s 342A in the Cr P Code (by Act 26 of 1955) [now s 313(*1*)] enabling him to give evidence for the defence. It has been held that an accused can "be a witness" not merely by giving oral evidence but also by producing document or a thing [*Sharma v. Satish*, A 1954 SC 300 : 1954 SCR 1077; **explained** in *S v. Kathi Kalu*, A 1961 SC 1808 : 1962, 3 SCR 10]. The question arises whether an accused who elects to give evidence as a witness can be asked criminating question under s 132 and also whether such a procedure would offend against Art 20(3) of the Constitution. The matter has been discussed under a separate heading (*post*: "*Criminating Questions to accused &c*").

As a witness, a person cannot claim protection beyond what is contained in the proviso to s 132. Such answers as a witness is compelled to give cannot be proved against him in a criminal proceeding, but they may not save him against a prosecution for perjury. Art 20(*3*) is narrower in scope than the analogous law in England and America [*Peoples Ins Co v. Sardul*, A 1962 Pu 101].

In England (and also in America) the witness was privileged both from answering questions or producing documents, the tendency of which is to expose the witness (or his husband or wife) to any criminal charge, penalty or forfeiture [*Spokes v. Grosvenor Hotel*, 1897, 2 QB 124]. In England the Civil Evidence Act, 1968 abolishes the privilege relating to the exposure to forfeiture except in relation to criminal proceedings (s 16). The privilege relating to the recovery of a penalty has been extended to include spouses (s 14). The maxim is *nemo tenetur seipsum prodere*—No one is bound to criminate himself and to place himself in peril. As to the history of the rule and criticism of the privilege, see Phip 11th Ed, pp 261-63; Wigmore says: "Indirectly and ultimately it works for good—for the good of the innocent accused and of the community at large. But directly and concretely it works for ill,—for the protection of the guilty and the consequent derangement of civic order. There ought to be an end of judicial cant towards crime. We have already too much of what a wit has called 'justice tampered with mercy'. The privilege therefore should be kept within limits the strictest possible." [Wig s 2251].

In *Smith v. Director of Serious Fraud Office*, (1992) 2 All ER 456, 463 LORD MUSTILL identified six rights of silence which the law recognises. One of those right of silence is a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them. NEILL, L.J. made some reference to the history of this general

immunity in *A.T. & T. Istel Ltd. v. Tully*, (1992) 2 All ER 28 : 1992 QB 315. LORD TEMPLEMAN pointed out in *A.T. & T. Istel v. Tully*, (1992) 3 All ER 523, however, Parliament has recognised that the privilege against self incrimination is profoundly unsatisfactory when no question of ill-treatment or dubious concessions is involved.

Where a claim for privilege against discovery on the ground of incrimination is put forward in a civil case, the court has to consider whether the questions to be answered would tend to expose the person concerned (X) to proceedings for an offence or offences, and, if so, what offence or offences. In deciding whether the claim for privilege should be upheld, the court will have to examine: (1) Whether there is a clear link between the answers and the offences. Thus, in some cases the evidence available may suggest that a number of possible offences have been committed, but that to some of these offences the answers ordered will have no relevance. (2) Whether any of the possible offences are offences in respect of which the privilege against incrimination has been removed and replaced by a more limited protection provided by statute. An example of such offences would be Theft Act offences. (3) The relationship between the possible offences, and whether the fact that answers to the ordered questions may tend to expose X to proceedings for one offence or group of offences may affect the extent to which those answers would tend to expose X to proceedings for other offences. The matter must be looked at realistically. If there is only one possible offence which might be revealed, the test of a tendency to expose to proceedings may be easily satisfied. It will then be necessary to see whether the offence is one to whih some special statutory rule applies. But if there are several possible offences—A, B, C, D and E—the fact that the answers would clearly tend to expose X to proceedings for offences A, B and C may reduce to almost vanishing point the tendency of the answers to expose X to proceedings for offences D and E. It may be that this is what STEPHENSON LJ had in mind when he said in *Khan* that the court should consider the substance of the proceedings [*Renworth Ltd. v. Stephansen*, (1996) 3 All ER 244 (CA)].

Many judges have pronounced against the retention of this privilege which has out-lived its usefulness. In *Ex parte Reynolds*, 1882, 15 Cox Cr 118, 115. JESSEL, MR, said: "Perhaps our law has gone even too far in that direction" and in *S v. Wentworth*, 1875, 65 Me 234, 241 (Am) APPLETON, CJ, said: "It is the privilege of crime; the interests of justice would be little promoted by its enlargement."

The privilege against self-incrimination cannot be claimed on an affidavit by a solicitor on behalf of his client [*Downie v. COE*, The Times, November 28, 1997 (CA)]. Privilege against self incrimination is not applicable when there is the risk that the witness can face criminal sanctions under the law of a foreign country in respect of prior conduct or the giving of evidence [*Brannigan v. Davison*, (1996) 3 WLR 859 (PC)].

A sensible compromise has, however, been adopted in several statutes by compelling the disclosure, but indemnifying the witness in various respects from its results [Phip 11th Ed, p 265], *eg*, s 1(*e*) Cr Evidence Act 1898 (61 & 62 Vic c 36); s 17 of Bankruptcy Act 1883 (46 & 47 Vic c 52]; s 15(*1*)(*8*) of Bankruptcy Act 1914 (4 & 5 Geo V c 59) & s 31 Theft Act, 1968. The recent Civil Evidence Act, 1968, however, extends the privilege in civil proceedings, to cover incrimination of a spouse (s 14).

The protection against self-incrimination was claimed by a person who was called upon to give details of whereabouts of proceeds of cheque and how they were applied and the defendants claiming that such disclosure would expose him to risk of criminal prosecution for theft and forgery. The court, however, allowed the tracing

order because, in any event, compliance with the tracing order would not expose the defendants to, or materially increase, the risk of criminal proceedings against him because the first defendant was already exposed to such a risk by the circumstances in which he had handed over the cheque for £40,000 to the second defendant and any disclosure regarding the subsequent disposal of the proceeds of the cheque could not materially add to that existing risk [*Khan v. Khan*, (1982) 2 All ER 60 CA].

The privilege which is founded on the above wholesome rule was withdrawn as the legislature thought that the existence of the privilege "in some cases tended to bring about a failure of justice, for the allowance of the excuse when the matter to which the question related was in the knowledge solely of the witness, deprived the court of the information which was essential to its arriving at a right decision" [*per* TURNER, CJ, in *R v. Gopal Doss*, 3 M 271, 279, 280]. The rigour of the rule was mitigated by the addition of the proviso which protects him from any prosecution in consequence of any answer that he is thus compelled to give, except a prosecution of giving false evidence by such answer.

It should be borne in mind that all criminating questions do not come within the scope of the section. It refers only to questions as to *any matter relevant to the matter in issue*, and these only, a witness shall not be excused from answering. The court has no option under this section to disallow a question as to any matter relevant to the matter in issue. When the answer to a question may tend to criminate a witness, he may raise an objection that the question is not as to any matter relevant to the matter in issue, or that if relevant, it is relevant only as affecting his credit. In the former case, if the question is insisted on, the court will compel the witness to answer it and it has no option. In the latter case, s 148 gives it an option to compel or excuse an answer to a question as to a matter which is material to the suit only in so far as it affects the credit of the witness. The word "compelled" in the proviso applies only where the court has compelled or forced the witness to answer in spite of his objection. If however, he voluntarily answers the question, the protection is taken away and the answer is admissible against him on a criminal charge (see *R v. Gopal Doss, supra* and other cases cited, *post*).

Breach of confidence and privilege against self-incrimination.—Where secret and confidential documents were smuggled out from the files of a company whose employees were on strike and delivered to a broadcasting company who used them in producing a programme on the strike, it was held that such company was compellable to disclose the source-man even at the cost of self incrimination. The court said: "Although the courts have an inherent wish to respect the confidentiality of information obtained as a result of a particular relationship, including a relationship between a journalist and his sources, journalists and the information media have no immunity based on public interest protecting them from the obligation to disclose their sources of information in court if such disclosure is necessary in the interests of justice. The 'newspaper rule' is confined to libel actions and does not extend to actions based on breach of confidence and hence does not operate to confer on newspapers and broadcasting authorities a general immunity from disclosure of their sources" [*British Steel Corpn v. Granade Television Ltd.* (1981) 1 All ER 417 HL]. Their Lordships applied on this point the principles of law laid down in *McGuinness v. AG of Victoria*, (1940) 63 CLR 73; *AG v. Clough*, (1963) 1 All ER 420 and *AG v. Mutholland*, (1963) 1 All ER 767]. They were under a duty to disclose the identity of the persons who brought the documents because by using them they became involved in the tortuous act of removing them without authority. Applying on this point the principles laid down in *Norwich Pharmacal Co v. Customs and Excise Commrs*, (1973) 2 All ER 943]. The company was not seeking discovery for mere gratification

of curiosity, but had suffered a wrong for which they had a real and unsatisfied claim against the informant and could not bring any proceeding against him until Granada revealed his identity. The conditions for granting the remedy sought therefore existed. The Granada were not entitled to rely on the defence that the disclosure might tend to incriminate them because they had already stated in evidence all the matters which might disclose an offence. Further, they could not be accused only on the basis of their disclosure. It would require further investigation in any case [*British Steel Corpn v. Granada Television Ltd*, (1981) 1 All ER 417 HL].

Self-incriminating statements made by a bankrupt during his public examination can be used against him in criminal proceedings. He is not protected by privilege against self-incrimination [*R v. Kansal*, (1992) 3 All ER 844 (CA)].

Crown's right to recover secret document for discovering informant's identity.—A memorandum classified 'secret' was prepared by the Ministry of Defence concerning the handling of publicity relating to the installation of nuclear weapons at a Royal Air Force base. The original of the document was sent to the Prime Minister and six copies were circulated to senior members of the Government and to the cabinet secretary. A photostat copy of the memorandum was leaked by an unknown informant to the defendant newspaper, which subsequently published it. The Crown requested the return of the photostat copy so that it could attempt to identify the informant from markings made on the document. It was held that on its true construction the effect of s 10 of 1981 Act (Contempt of Court Act, 1981) was to restrict the court's inherent jurisdiction relating to the disclosure of documents by permitting the court to order disclosure only where it is necessary in the interests of justice or national security or for the prevention of disorder or crime. On the facts, the Crown was entitled to the return of the document because it had satisfied the court that there was a risk to national security unless the informant could be found [*Secretary of State for Defence v. Guardian Newspaper*, (1984) 1 All ER 453 CA. Affirmed by the House of Lords, (1984) 3 All ER 601 HL : 1985 AC 339 : (1984) 3 WLR 986].

Investigation under the Companies Act.—In [*R v. Seeling*, (1991) 4 All ER 429]. In the matter of investigation of the affairs of a company, the Companies Act empowers inspectors to require information from officers and agents of the company inspected. The inspectors interviewed them and obtained statements from them. At the criminal trial of the officer in question the prosecution sought to adduce the evidence of the statements made by the accused to the inspectors' questions. The accused objected to the admissibility of these statements. The court saw no grounds for excluding the evidence or for considering its admission as undermining the fairness of the criminal trial. The decision was upheld by the Court of Appeal. Again in [*London United Investments plc Re*, (1992) 2 All ER 841 : 1992 BCLC 285], it was held that the officers of a company whose affairs are under investigation cannot refuse to answer questions of inspectors on the ground that the answers may incriminate them.

Where, on the other hand, the person sought to be examined is not an officer or agent of the company, who is under a fiduciary obligation to give information, but some other person, for example, the company's banker, the request of sworn information may be regarded by the court as oppressive. The court said: "It is oppressive to require someone suspected of wrong doing to prove the case against himself on oath before any proceedings are brought." The court of Appeal reached the conclusion that the liquidator's interests did not justify inflicting this kind of oppression on the company's banker (BCC1). [*Cloverbay Ltd v. Bank of Credit and Commerce International*, (1991) 1 All ER 894].

Another case that deals with a request for information from a person under the risk of self-incrimination is *O (dissolution order) Re*, (1991) 1 All ER 330]. The Criminal Justice Act, 1988 makes provision for the confiscation of property representing the proceeds of crime and for this purpose it may become necessary to seek disclosure from the accused person as to his assets and their location. The appellants objected to the disclosure on the ground that the information required from them (concerned with the proceeds of the crime) exposed them to the risk of self incrimination. Any such disclosure would abrogate the common law principle that no man shall be subject to an order compliance with which might tend to incriminate him and, therefore, in order to reconcile these two conflicting demands the court held that a disclosure order should contain the provision that no disclosure made in compliance with this order shall be used as evidence in the prosecution for an offence alleged to have been committed by the person required to make the disclosure or by any spouse of that person.

[*Ref Tay ss 1453-68; Best, ss 126-28; Steph Art 120; Phip 8th Ed, pp 198-200; Ros N P, 163, 169; Powell, 9th Ed, pp 212-28; Wigmore, ss 2250-82; Hals, 3rd Ed, Vol 15, paras 760-63*].

Extent of Privilege of Witness in Answering Criminating Questions.—As to the meaning and scope of the section TURNER, CJ, in *R v. Gopal Doss*, 3 M 271, 277-79 FB, said:—

> "It does not in terms deal with all criminatory questions which may be addressed to a witness, but only with questions to matters relevant to the matter in issue. Irrelevant questions should not be allowed, and it may be implied from limitation in this section that a witness should be excused from answering questions tending to criminate as to matters which are irrelevant ..... If any such question relates to a matter relevant to the suit or proceeding, by which I understand no more than was meant relevant to a matter in issue, the provisions of s 132 are by s 147 declared applicable to it. If the question is as a matter relevant only in so far as it affects the credit of the witness by injuring his character, the court is by s 148 directed to decide whether or not the witness is to be compelled to answer and may (I presume if it does not think fit to compel him to answer) warn the witness that he is not obliged to answer it. ..... The terms of s 132, especially when read with the rest of the Act, impel me to the conclusion that protection is afforded only to answers to which a witness has objected or has been constrained by the court to give. ..... At the same time, if the witness, being entitled to the privilege, did not claim it, but voluntarily answered the question addressed to him, his answer could be used against him in any subsequent proceeding. A witness was not bound to criminate himself; but if he thought fit to do so, his admission on oath was equally admissible in evidence against him as any other admission."

Under the English law, on grounds of public policy, a witness in court is absolutely privileged, and no action lies against him in respect of his statement in the witness-box [*Dawkins v. Rokeby*, LR 7 HL 744: *Seaman v. Netherclift*, 2 CPD 53; *Royal Aquarium v. Parkinson*, 1892, 1 QB 431, 451].

A witness has no privilege beyond the immunity conferred by s 132, but even if he has any, it cannot be claimed and allowed before he takes his stand, and before the question, whether incriminatory or otherwise, is considered by the court in the light of the surrounding circumstances. The emphasis is on a compulsory disclosure of a guilt by an accused in a criminal matter and the right does not extend to a proceeding which does not involve punishment for the commission of a crime [*Peoples Ins Co v. Sardul*, A 1962 Pu 101].

R v. Gopal Doss, supra was **followed** in *R v. Ganu Sonba*, 12 B 440. Under s 132 a witness is not excused from answering incriminating questions as to any matter *relevant* to the matter in issue, but under the proviso no answer shall subject him to any criminal charge except a prosecution for giving false evidence [*R v. Durant*, 22 B 213, 220]. The courts do not appear to be unanimous on the question whether a witness is liable to be tried for defamation in respect of his testimony in court. The trend in Bombay was to hold in favour of absolute privilege. It was held that a witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding [*R v. Babaji*, 17 B 127; **follld** in *R v. Balkrishna*, 17 B 573; see also *Nathji v. Lalbhai*, 14 B 97]. *In re Nagarji Trikamji*, 19 B 340, 347, however, JARDINE & FARRAN, JJ, said that "the extent of witness's privilege is not as yet so clearly settled. ..... The legislature has enacted a general exception in favour of judges, to wit s 77 I P Code, and in s 132 of the Evidence Act has gone a certain length in protecting witnesses against the criminal law; it may be assumed that it had no intention of going further." The matter was referred to a Full Bench in the case of *Rahim v. Aaron* [Cr R N 336 of 1907], but it did not come up for hearing as the case was compromised. The matter again came up before a later Full Bench and it was held following *Satish v. Ramdayal*, 48 C 388 : 24 CWN 982 : 59 IC 143 SB that there was no absolute privilege [*Bai Shanta v. Bai Umarao*, 50 B 162 FB : 28 Bom LR 1 : 93 IC 151].

The Madras High Court following the principle in *Seaman v. Netherclift, sup* held that the statements of witnesses in court are absolutely privileged; if false, the remedy is by indictment for perjury and not for defamation [*Manjaya v. Sesha Shetti*, 11 M 477. The decision was **followed** in *Re Alrajaa Naidu*, 30 M 222; see also *Pachaiperumal v. Dasi Thangam*, 31 M 400; *Adapula v. Rabala*, 1910 MWN 155; *Murugesan v. Pabathi*, 1 Weir CCP 612]. A Full Bench held that when a person charged with an offence was asked by the magistrate "What have you to say?" and he made a statement defamatory of another person, it is absolutely privileged. Although the English doctrine of absolute privilege is not expressly recognised in s 599 I P Code, it does not necessarily follow that it was the intention of the legislature to exclude it [*In re Venkata Reddi*, 36 M 216 FB]. In a later case, however, it has been held that a witness has no absolute privilege, but it is qualified under exception 9 or exception 1 to s 499 PC [*Peddabba v. Varada*, 52 M 432 : 56 MLJ 570 : A 1929, M 236 (11 M 477 **not follld**); see also *Gopal v. R*, 46 M 605]. *In re Venkata Reddi, sup* was **overruled** in *Tiruvengada v. Tripurasundari*, 49 M 728 : A 1926, M 906 holding that defamatory statements in complaints to magistrates are not absolutely privileged.

The opinion in Calcutta is not in favour of absolute privilege. It has been held that a witness, who being actuated by malicious motives made a *voluntary* and *irrelevant* statement not elicited by any question put to him while under examination, to injure the reputation of another, commits an offence punishable under s 500 PC. He cannot claim the privilege allowed to witness by this action [*Haidar Ali v. Abru Mia*, 32 C 576 : 9 CWN 911 : 2 CLJ 105]. With regard to a defamatory statement in a written statement filed in a judicial proceeding it was held (referring to *Royal Aquarium v. Parkinson*, 1892, 1 QB 431, 451) that the English rule of absolute privilege is no longer of any effect in India as the I P Code has expressly made all defamatory statements the subject of criminal prosecution, unless they fall within the exception to s 499 PC [*Sandyal v. Bhabha Sundari*, 14 CLJ 31]. In *Kalinath v. Gobind*, 5 CWN 293, it was held (**following** *Angoda v. Nemai*, 23 C 867) that statement by parties in *pleadings* are not privileged.

In *Woolfun v. Jesarat*, 27 C 262, it was held that where the statements were made as witnesses in a court and were *relevant* to the issue, there could be no prosecution

for defamation. See *Crowdy v. Reilly*, 17 CWN 554. In Calcutta therefore the prevailing opinion appears to be that the question of privilege is to be determined by the terms of s 499 PC (v 14 WR Cr 27; 23 C 867; 5 CWN 293). In a later case it has been held that s 499 is exhaustive and if a defamatory statement does not fall within its exceptions, it is not privileged. The doctrine of absolute privilege does not apply. A defamatory statement made in bad faith by an accused, against whom a trial is pending and contained in a petition to the district magistrate for transfer of the case, is punishable under s 499 [*Kari Sing v. R*, 40 C 433; see also *Satish v. Ramdayal*, 48 C 388 SB : 24 CWN 982 : 32 CLJ 94 : 59 IC 143].

A Full Bench at Allahabad held that if a witness whilst giving evidence makes a statement defamatory of a third party, he may be convicted of defamation, unless he can show that his statement falls within any of the exceptions to s 499 PC, or that he is protected from prosecution by the proviso to s 132. If it had been the intention of the legislature to extend to communications made by witnesses in the witness-box, the privilege of freedom from being made the subject of civil or criminal trial, they could or would surely be amplified by s 132. The absence of the enactment is conclusive that it was omitted from the Code of set purpose (*per* KNOX, CJ, and AIKMAN, J). But RICHARDS, J, (**dissenting**)—*held* that a prosecution for defamation under s 499 I P Code will not lie against a witness in respect of any statement made by him in the course of giving evidence even if such statement may be irrelevant to the matter under inquiry [*R v. Ganga Pd*, 29 A 685 : 4 ALJ 605 : 1907 AWN 235].

There is no statute in India dealing with civil liability for defamation and in questions of this kind, the English common law under which statements made in the course of judicial proceedings are absolutely privileged, must be held applicable in India [*Chunilal v. Narsingh*, 40 A 341, FB : 45 IC 540 (**followed** in *Ma Mya Shwe v. Maung Mg*, 84 IC 977); see *Crowdy v. Reilly*, 17 CWN 554, 560-61].

A witness who during his examination in court makes a statement which is *prima facie* defamatory may plead one or other of the exceptions to s 499 PC or claim the protection of the proviso to s 132. But in the latter case he must show that he was *compelled* by the court to make the statement inspite of his objection [*Kallu v. Sital*, 40 A 271 : 16 ALJ 201]. A witness who actuated by malice makes a voluntary and irrelevant statement, not elicited by any question commits an offence under s 500 PC and he cannot claim privilege under s 132 [*Surajmal v. Ramnath*, A 1928, N 58]. A judge asked the plaintiff why he was suing for his money to which he replied that he did not want to leave it with defendant who was a *budmash* and a thief—*Held*, that the witness was compelled to answer by the court under s 132 and proceedings for defamation could not be taken [*Ganga Sahai v. R*, 42 257 : 18 ALJ 112. This case was **not followed** in *Peddabba v. Varadu*, 52 M 432, *post*. In Rangoon it has been held that s 132 overrides the provisions of the Penal Code, and it gives complete protection if a witness is compelled to answer, but the protection must be claimed by him directly or indirectly [*Rasool v. R*, A 1939 R 371].

It would thus appear that in Calcutta, Allahabad, and also in Bombay, it has been held that there is no absolute privilege, while the view in Madras leans in favour of absolute privilege (see however *Peddabba v. Varada, sup*). The Punjab High Court appears to be in agreement with the view in Calcutta and Allahabad [see *R v. Maya Das*, PR No. 14 of 1893; *Phundi Ram v. R*, 7 PWR 1911 Cr; *Miran v. R*, 31 PWR 1912. See also *Meer Baksh v. Mg Alape*, (1918) 3 UBR 101]. The doctrine of absolute privilege in cases of determination does not apply in India [*McCil v. Bryne*, 13 IC 217: 5 SLR 133]. A complainant who deliberately makes a defamatory statement when asked by a magistrate to state his grievances does not enjoy the protection given to an ordinary witness [*Dinshaw v. Jehangir*, 47 B 15].

Where an accused person applies for the transfer of his case supporting his application by an affidavit, he cannot or at least ought not to be prosecuted under s 193 PC in respect of statement made therein [*R v. Bindeshri*, 28 A 331]. Nor can an accused making defamatory allegation against the trying magistrate in an application for transfer be prosecuted under s 182 PC. He may be prosecuted under s 500 PC [*R v. Mattan*, 33 A 163]. In a later case SHADI LAL CJ, held that the law does not confer on an accused immunity from prosecution in respect of a false statement in any such affidavit and that the only provision which confers immunity is in s 342(*2*) [now s 313(*3*)] Cr P Code [*R v. Pirquadir*, 6 L 34]. Now that an accused is a competent witness for the defence under s 342A [now s 315(*1*)] Cr P Code, he is subject to all the rules applicable to any other witness if he chooses to take the witness-stand.

Witnesses cannot be sued in a civil court for damages, in respect of evidence given by them upon oath in a judicial proceeding. This maxim is based on public policy. The ground of it is this that it concerns the public and the administration of justice, that witnesses giving their evidence on oath in a court of justice should not have before their eyes the fear of being harassed by suit for damages; but the only penalty which should incur if they gave evidence falsely should be indictment for perjury [*Ganesh v. Mugneeram*, 11 BLP 321 PC; see *Luckumsey v. Hurbuns*, 5 B 580; *Golapjan v. Bholanath*, 38 C 880].

Taking a thumb-impression of a witness by the court is not equivalent to asking a question and receiving an answer within the purview of the proviso to s 132, and therefore such a thumb-impression may be proved against the person giving it in a criminal trial. Taking a thub-impression is merely observing a characteristic feature of man's body. The proviso to s 132 does not apply unless the witness objected to answer the question. It applies again only to questions asked in the course of the trial [*Tunoo Miah v. R*, 16 CWN 503: 15 CLJ 299: 39 C 348]. As to the taking of finger print of accused, see s 73 *ante*, p 674.

In a proceeding against a managing director under s 468 of the Companies Act, 1956, he cannot claim privilege under Art 20(*3*) Constitution as he was an accused person [*Peoples Ins Co v. Sardul*, A 1962, Pu 101]. If the Lokayukta is deemed to be a civil court, the protection under the proviso will apply to a witness who has been compelled to answer any question during the investigation [*Rajendra Manubhai Patel v. State*, A 1992 Guj 10, 22].

Documents.—In England the privilege extends to documents which have a tendency to expose the witness to any criminal charge, penalty or forfeiture. It would seem that the same privilege exists here if the answer involves the production of any document which has a similar tendency.

Statements Under s 161 Cr P Code.—Defamatory statements by a person in answer to questions during police investigation under s 161 are not protected under s 132 [*Haji Ahmed v. S*, A 1960, A 623 (eariler cases not relied on on account of change of law in s 161)].

Statements under Customs Act.—Statements made to interrogations by a Customs Officer exercising powers under s 171-A Sea Customs Act does not attract s 132 [*Hira v. S*, A 1971 SC 44].

PROVISO: Meaning of the Words, "Compelled to Give" and "Voluntary Answer". [Whether a Formal Objection or Protest is Necessary].—The mere summoning of a witness or ordering him to go into witness-box does not compel him to give any particular answer or to answer any particular question [*Moher Shk. v. R*, 21 C 392]. The answer given by a witness in a court, whose presence is required by

the court either by issuance of summons or by other means cannot be equated with the answer given by a party in a civil litigation or the statement of an accused as a witness in a criminal case [*M P Gangadharan v. State*, 1989 Cri LJ 2455, 2457: (1989)2 KR LJ 148 (DB)]. The words "*shall be compelled to give*" in s 132, apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question. The wording of ss 129, 130, 131, 148 compared and discussed. The terms of the section when read with the rest of the Act afford protection only to answers to which a witness has objected to give or which he has asked to be excused from giving and which thereafter he has been compelled by the court to give. But if he does not claim the privilege and *voluntarily* answers, there is no protection and the answer could be used against him in a subsequent charge [*R v. Gopal Doss*, 3 M 271; see also *R v. Moss*, 16 A 88]. Agreeing with *R v. Gopal Doss, sup*, it has been held that s 132 makes a distinction between those cases in which a witness *voluntarily* answers and those in which he is *compelled* to answer in spite of his objection, and gives him protection in the latter of these cases only. (BIRDWOOD, J, dissenting, held that s 132 read with s 14 of the Oaths Act compels a witness to answer criminating questions and that he is protected by the proviso to s 132. The compulsion is operative, whether he asks to be excused or gives the answer without so asking) [*R v. Ganu*, 12 B 440]. TARAPOREWALA, J, expressed himself in favour of the dissenting judgment of BIRDWOOD, J, *sup*, and it was held that a statement made on oath before a coroner cannot be used against him in a trial for a charge based on such evidence as a statement tending to prove his guilt [*R v. Kazi Dawood*, 50 B 56: 93 IC 225].

Protection of proviso to section 132 can be applied to a private witness who has been compelled to answer any question during the investigation [*Rajendra Manubhai Patel v. State*, A 1992 Guj 10, 22].

Compulsion is a question of fact. It by no means follows that a witness is compelled to answer every question put by counsel, but he may be compelled to do so in particular cases and in such cases the section is clearly applicable. On the other hand compulsion does not involve the necessity of a formal objection and an order made at the time compelling the witness to answer [*R v. Banarasi*, 46 A 254: A 1924 A 381; see also *Chatur v. R*, 43 A 92: A 1921 A 362 where it has been held that formal protest is not necessary and a witness who answers a question by court or counsel, specially on a point relevant to the issue comes under the protection of the proviso]. In *R v. Ganga Sahai*, 42 A 257 WALSH J, observed that a witness may also be compelled to answer "by the situation in which he finds himself and the force of circumstances, and indeed by the rule of ordinary decency and the respect which he owes to the court". In the Patna case (agreeing with *R v. Banarasi, sup*) it has been held that s 132 does not require that the witness must first ask to be excused from answering the question. Questions which are allowed by the court in spite of objection by the pleader must be deemed relevant, so far as the witness is concerned and he is bound to give answer. Answer so given is an answer which he is "compelled to give" within s 132 [*Sheokaran v. Bandi*, A 1943 P 117: 21 P 778].

In some cases, however, the view taken is that a witness must claim the benefit of the protection directly or indirectly in some way or other and show that he was compelled by the court in spite of his objection or protest [*Rasool v. R*, 1939 Rang LR 479: A 1939 R 371; *Kallu v. Sital*, 40 A 271; *Ganga Sahai v. R*, 42 A 257; *Ramdayal v. R*, 146 IC 438; *Chotkan v. S*, A 1960 A 606 (cases reviewed); *Hemraj v. Babulal*, A 1962 MP 241]. In Calcutta also it has been held that the proviso does not apply unless the witness objected to answer the question. It applies again only to question asked in the course of the trial [*Tunoo v. R*, 16 CWN 503: 39 C 348]. In

Bombay too it has been held that the protection does not apply when the witness has not objected to answering the question put [*Bai Shanta v. Bai Umrao*, 50 B 162 FB: A 1926 B 141; see also *R v. Cunna*, 22 Bom LR 1247 FB: 59 IC 324]. In Lahore the view is that the proviso applies only to answers given to *particular questions*. In order to substantiate the privilege he must object to the particular questions which are put to him, if he desires that answers to them be not used against him in any subsequent criminal proceedings. A general objection is not sufficient [*Ramchand v. R*, A 1926 L 385]. Where courts simply make notes of the deposition of a witness, it is difficult to know whether witness voluntarily made a statement or was "compelled" to make it in answer to a relevant question [*Surajmal v. Ramnath*, A 1928 N 58].

In Madras it has been held that the 'compulsion' is something more than being put into the witness-box and being sworn to give evidence. The compulsion refers to compulsion by court and not compulsion under law. The witness, of course, need not ask in so many words the protection of the court. The compulsion may be implied or explicit, and in every case it is a question of fact whether there was or was not compulsion, but a witness who answers a question without objecting to it, is not entitled to protection. But if the witness answers *voluntarily* without making any protest, there is no compulsion and consequently his answers may be proved against him in a criminal proceeding. When a court asks a question, it may be inferred that it insists upon an answer; but that by itself would not be sufficient to bring the witness within the proviso. If he hesitates to answer or if he says "I cannot answer or I won't answer" without actually asking the protection and if the court says "You must answer" and he answers, he is within the exception [*Peddabba v. Varada*, 52 M 432: A 1929 M 286: 56 MLJ 570; see also *Ghansamdas v. Nenumal*, A 1934 S 114]. Where the question the answer to which had laid open the witness to a prosecution under s 500 I P Code had been put by the court itself in a criminal trial, the court having considered it relevant and pertinent for the decision in the case, the witness must be deemed to have been compelled to answer [*Jagannath v. R*, A 1934 O 386].

The precedents above show that judicial opinion is not unanimous as to what is or is not 'compulsion' to answer. It seems that the better opinion would be that in order to come under the protection of the proviso some sort of formal objection or protest should be made by the witness, though not necessarily express. Although the benefit of the protection may not be claimed in so many words, there ought to be something to show that the witness was compelled by the court to answer in spite of his protest or unwillingness. At the same time the fact should not be lost sight of that most witnesses are ignorant of their rights under s 132. No witness other than a person fully conversant with the rules of evidence is expected to be aware of his rights under the section, far less in an ordinary witness able to determine whether a question is or is not relevant to the matter in issue and hence an objection by his lawyer should be enough for the purpose. The position has been made clearer in Ceylon by insertion of sub-section (*3*) to s 132 which says that before compelling a witness to answer a criminating question, "the court shall explain to the witness the purpose of a last preceding sub-section (see *ante* footnote to s 132). Courts here would be well-advised to follow this procedure.

[Under the Larceny Act, 1916, 6 & 7 Geo V c 50, s 42(*2*) no person shall be liable to any conviction of an offence against ss 6, 7(*1*), 20-22 of the Act, in respect of any act done by him if he has first disclosed such act on oath in consequence of any compulsory process of any court of law. It has been held that evidence given voluntarily by a witness in a proceeding under the Larceny Act in a court of law is not given in consequence of a compulsory process of a court and he cannot claim

exemption from being prosecuted for any offence disclosed by such evidence (*R v. Noel*, 1914, 3 KB 848. See also *R v. Mirams*, 55 L Jo 155)].

A revenue officer was charged with attempting to receive a bribe from certain raiyats who gave evidence for the prosecution and he was convicted. Subsequently he charged the raiyats with having conspired to bribe him, and in their trial their depositions in the previous bribery case were tendered in evidence for the prosecution—*Held*, that the depositions of the raiyats given in the bribery case against the officer, in which they *voluntarily* made statements incriminating themselves, were admissible in evidence [*R v. Samiappa*, 15 M 63]. The accused verified a written statement in a certain suit. Subsequently in another suit, in which he was the defendant, he gave evidence and was cross-examined with a view to show that certain statements, which he had made in the written statement filed in the first suit, were false. His pleader objected when the questions were put but the objection was overruled, and the accused admitted that those statements were false, and on the strength of that admission he was prosecuted and convicted—*Held* that the accused was "*compelled to answer*" the question within s 132 and that the answers could not be proved against him on a charge of having made false statement in the verified written statement filed by him in the first suit, and that the conviction was bad [*Dy Supdt v. Pramatha*, 14 CWN 957: 37 C 878. See however, *R v. Zamiran*, BLR Sup Vol 521]. As to the power of the Judge to question the witness, see *R v. Hari Lakshman*, 10 B 185, where it has been held that though under s 165 of the Evidence Act, a judge has the power of asking a witness irrelevant questions, in order to obtain proof of relevant facts; but if he asks questions with a view to criminal proceedings being taken against him, the witness is not bound to answer them and cannot be punished for not answering them, under s 179 of the I P Code.

Persons examined by police officers investigating cases under Chapter XII of the Cr P Code are excused from answering criminating questions, (see sections 161 and 175 of the Code). A witness refusing to give evidence or produce documents may be punished under Or 16 r 10 of the C P Code, 1908; or may be sued for damages under s 25 of Act 19 of 1853. The proviso to sec 132 clearly protects a witness from being prosecuted on the basis of the answers given by him in a criminal proceeding which tend to criminate him directly or indirectly. He is absolutely protected from criminal prosecution on the basis of the evidence as an approver [*State v. Jagjit Singh*, 1989 Cri LJ 986: A 1989 SC 598, 602].

Proviso and the 8th Exception to S 499 Penal Code.—The 8th Exception to s 499 PC excludes a statement from the definition of defamation altogether whereas the proviso to s 132 excludes prosecution for defamation when a witness is compelled by the court to answer a question which gives rise to a charge for defamation. The proviso will apply even though the statement is not made in good faith [*Chotkan v S*, A 1960 A 606]. A statement made by a witness in answer to a question which he is compelled to answer will not subject him to prosecution under sec 500 I.P.C. even if the answer is defamatory of some person. In the absence of such compulsion, the proviso to Sec. 132 will not apply and he will not be protected thereunder [*Shamsher Singh v. H.K.S. Malik*, 1982 Cri LJ NOC 167 (Delhi)].

Admissibility of Voluntary Statements in a Previous Deposition on a Charge for Giving False Evidence.—On a charge for forgery or giving false evidence against an accused, statements made by him voluntarily while deposing in a previous suit is admissible [*R v. Gopal Doss*, 3 M 271; *R v. Banarsi*, 46 A 256 *sup*; *In re Perry*, 46 C 996; *Perry v. Offl Ass*, 47 C 254; *Md Khudabax v. R*, A 1949 N 303].

Co-accused.—A person who is tried for an offence under s 3 Gambling Act has every right to cite as his witness another person who is a co-accused with him for an offence under s 4 in a separate trial. The co-accused's position is sufficiently protected by s 132 [*Rajaram v. R*, 73 IC 521: 5 LLJ 429]. When the case of an accused jointly charged with another is separated so that he could be examined as a prosecution witness in the case of the other accused, he is entitled to the benefit of the proviso [*In re Kandaswami*, A 1957 M 727].

Where Proviso Is Not Applicable.—In proceedings under s 196(5)[1] Companies Act there is no contest between the two parties and the proviso does not confer any special privilege on the persons so examined [*Ramchand v. R*, A 1928, L 385].

Criminating Questions to Accused When he is a Witness for Defence.—The accused was not competent to appear as a witness even in his own defence. Since the insertion of s 342A Cr P Code (by Act 26 of 1955) [now s 315(1)] he has been given the right to examine himself as a witness. The question arises whether when he elects to testify, he can be asked any question tending to criminate him. S 1(*e*) of the English Criminal Evidence Act, 1898, expressly provides that an accused offering himself as a witness "may be asked any question in cross-examination notwith-standing that it would tend to criminate him as to the offence charged". S 315(*1*) does not, however, contain any such specific provision.

An accused has the right not to answer any question concerning the charge (s 313 Cr P Code). He is not also bound to offer himself as a witness, nor can there be any presumption against him under the statute for not taking the witness stand [s 315(1)]. His position as an accused is quite distinct from his position as a witness. When, therefore, of his free will he avails himself of the option of testifying for the defence, he subjects himself to the same rules applicable to other witnesses and under s 132 no witness is excused from answering any question on any relevant matter on the ground that the answer will criminate him. He could have stood mute. His initial act of electing to give evidence is an implied waiver of his rights as an accused, for he knew well enough that when he came as a witness no relevant fact relating to the charge against him could be inquired into without asking him criminating questions. He cannot therefore complain. Compelling any accused to answer any question tending to criminate him may look hard, but it is the inevitable consequence of his electing to testify—a risk which he vountarily undertakes. Evidence used for the satisfaction to invoke S 318(1) Criminal Procedure Code cannot be used for convicting a person made an accused under that provision. Evidence taken from him as an accused alone could be used against him [*Paulose v. State of Kerala*, 1990 Cri LJ 100, 103, (Ker)].

Apart from s 132, the question may be considered from another point of view—Whether the asking of criminating questions to an accused witness offends art 20(*3*) of the Constitution? The answer should also be in the negative, for by voluntarily exercising the option to testify he waives the privilege conferred by art 20(*3*) and invites criminating questions by willingly submitting himself to all the obligations of a witness without any compulsion from anyone. As observed by Wigmore "the privilege is merely an option of refusal, not a prohibition of inquiry". (Wig 3rd Ed, Vol 8, p 388).

It should be remembered that unlike the provision in s 132 the protection against self-crimination extends even to witnesses in England and America. But as an

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1. See now s 478(5) of Companies Act 1 of 1956.

accused waives the privilege against self-crimination by voluntarily taking stand in the witness-box, a broad statutory exception has been made to the privilege of a witness by permitting criminating question to an accused under s 1(*e*) of the English Criminal Evidence Act, 1898. He cannot refuse to answer on the ground that it would criminate a co-prisoner or some other person [*R v. Paul*, 1920, 2 KB 183; *R v. Minihane*, 16 Cr App R 38]. In America the privilege is regarded as waived when accused volunteers to testify [*Harrison v. US*, 392 US 219; see Wig s 2276. In *State v. Wentworth*, 1875, 65 Me 234, 243, APPLETON, CJ, said:—

> "He was not obliged to testify. He does testify. ..... He exonerates himself. He denies the commission of the offence charged. He is subject to cross-examination, as the necessary result of his assuming the position of a witness..... If he discloses part, he must disclose the whole in relation to the subject matter about which he had answered in part. Answering truly in part with answers exonerative, he cannot stop midday, but must proceed, though his further answers may be self-criminative".

It should be remembered that comments on the part of the prosecutor and trial judge to the effect that the jury may draw adverse inferences against the accused because of his failure to testify violates his privilege against self-incrimination [*Fontaine v. California*, 390 US 593]. But the performance of an unlawful act, even if there exists a statutory condition that its commission constitutes a waiver of the privilege does not suffice to deprive the accused of the privilege's protection [*Haynes v. US*, 390 US 85].

The privilege under art 20(*3*) is waived by an accused by voluntarily answering questions, or by voluntarily taking stand in the witness-box or by failure to claim the privilege [*Subedar v. S*, A 1957 A 396; *Peoples Ins Co v. Sardul*, A 1962 Pu 101]. An accused who volunteers to be a witness under s 342A [now s 315(*1*)] Cr P Code will be subject to the usual duties, liabilities, limitations, rights and privileges of ordinary witnesses. In his cross-examination questions tending to criminate him may be put [*Peoples Ins Co v. Sardul, sup*].

As to criminating questions to the accused when he offers to give evidence in his case, see further Sarkar's Cr P Code, 4th Ed. notes under s 315.

Quaere.—How far an accused giving evidence under s 342A [now s 315(*1*)] Cr P Code can claim benefit under the proviso to s 132 (*In re Kandaswami*, A 1957 M 727].

S. 133. Accomplice.—An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

SYNOPSIS

COMMENTARY

Principle and Scope.—This section deals with the law relating to accomplice evidence. The first part says that an accomplice, *ie*, a guilty associate in crime, shall be a competent witness. This was not strictly necessary, as under s 118 all persons are competent witnesses, except those who suffer from disqualification of an intellectual character. The second part lays down that conviction is "not illegal" merely because it is based on the uncorroborated testimony of an accomplice. This also is covered by s 134 which does not require any particular number of witnesses for the proof of any fact. But without any specific section relating to accomplice evidence there was a chance of the law being misunderstood or misapplied if the only thing left in the Act were illustration (*b*) to s 114 (a general section dealing with all kinds of presumptions) which says that "an accomplice is unworthy of credit, unless he is corroborated in material particulars." It would seem therefore that it was considered necessary to place the law of accomplice evidence on a sounder basis by saying in clear terms by way of caution that a conviction is "*not illegal* (*ie*, not unlawful) *merely because*" it is based on the uncorroborated testimony of an accomplice, while declaring that an accomplice is a competent witness. The intention was to draw pointed attention to illus. (*b*) to s 114 and to emphasis that the rule there and in s 133 are parts of one and the same subject and neither can be ignored in the exercise of judicial discretion, except in cases of a very exceptional nature.

Although there is no rule of positive law that the evidence of an accomplice cannot be acted upon, it is the settled practice to require corroboration of the evidence of an accomplice and the rule of practice has now virtually assumed the force of a rule of law (*post*, p 1243).

No distinction is made between an accomplice who is or is not an approver (a person who turns witness for the State) and both being equally untrustworthy, the rule of corroboration applies to both. The State may enter *nolle prosequi* against an accused and call him as a prosecution witness, or the police may refrain from prosecuting a person with a view to call him as a witness against his confederates in the offence. All are accomplices. [See *Laxmipat v. S*, A 1968 SC 938; *Sirajuddin v. S*, A 1968 M 117].

Accomplice evidence is admitted from necessity as it is generally impossible to get sufficient evidence of many heinous and diabolical crimes, unless one of the participators is disposed to disclose the circumstances within his knowledge on account of the tender of pardon. The greatest offenders would go unpunished, if accomplice evidence were to be rejected. "Accomplices," says Taylor, "are usually interested, and always infamous witnesses, and whose testimony is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the principal offenders to justice" [Tay s 967]. ABBOTT, LCJ, in his charge to the Grand Jury in March 1880, 33 How St Tr 689 said:—

"If it should ever be laid down as a practical rule in the administration of justice, that the testimony of accomplices should be rejected as incredible, the most mischievous consequences must necessarily ensue; because it must not only happen that many heinous crimes and offences will pass unpunished, but great encouragement will be given to bad men, by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt, and thereby universal confidence will be substituted for that distrust of each other, which naturally possesses men engaged in wicked purposes, and which operate as one of the most effectual restraints against the commission of those crimes to which the concurrence of several persons is required. No such rule is laid down by the law of England or of any other country."

Though accomplice evidence is admissible against a co-accused, being a participator in crime and therefore an infamous witness, his testimony is regarded with the greatest distrust and the fullest corroboration in material particulars is required for a conviction. "The reasons which have led to the distrust of an accomplice's testimony are not far to seek. He may expect to save himself from punishment by procuring the conviction of others. It is true that he is also charging himself, and in that respect he has burned his ships. But he can escape the consequences of this acknowledgment, if the prosecuting authorities choose to release him provided he secures the conviction of his partner in crime" [Wig s 2057].

LORD ABINGER, CB, in *R v. Farler*, 8 C & P 106: "The danger is that when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others."

SIR JOHN BEAUMONT in *Bhuboni v. R*, A 1949 PC 257, 261: 76 IA 147: 53 CWN 609: "The real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence, and the story may be true in all its details as to eight of them, but untrue as to the other two, whose names have been introduced because they are enemies of the approver."

This section lays down in clear terms that a conviction is *not illegal* merely because it is based on the uncorroborated testimony of an accomplice and to say that corroboration is absolutely necessary is to ignore the words of the section [*R v. Maganlal*, 14 B 115; *R v. Lachmi*, 19 MR Cr 43; *R v. Kallu*, 7 A 163: *R v. Gobardhan*, 9 A 528; *Ramaswami v. R*, 27 M 271; see *post*: "*Conviction on accomplice evidence without corroboration*"]. S 133 is the only absolute rule of law as regards the evidence of accomplices. But there is a rule of guidance in *illus* (*b*) to s 114 to which the court also should have regard. S 114 enacts a rule of presumption, and, read with s 4, it indicates that this is not a hard and fast presumption, incapable of rebuttal, a *presumption puris et de jure*. The right to raise this presumption as to an accomplice is sanctioned by the Act, and it would be an error of law to disregard it; what effect is to be given to it must be determined by the circumstances of each [*R v. Srinivas* and *R v. Naro Bhaskar*, 7 Bom LR 969: 3 Cri LJ 32]. It is well established that except in circumstances of an especial nature, it is the duty of the court to raise the presumption in s 114 *illus* (*b*), and the legislature requires that the court should make the natural presumption in that section [*per* ABDUR RAHIM J, in *Muthukumareswamy v. R*, 35 M 397].

In civil actions for damages for fraud it has been laid down by every code or evidence, that the testimony of a professed accomplice requires to be carefully scrutinised with anxious search for possible corroboration [*Macdonald v. Latimer*, A

1929 PC 15: 112 IC 375]. The rule as to accomplice evidence is applicable to *civil actions* for penalty [*R v. Aylmer*, 1839, I C & D 116], but to civil cases generally [*R v. Neal*, 7 C & P 168; Wig s 2058].

In an election case a finding of guilty on a charge of corrupt practice should not normally be based on the uncorroborated testimony of an accomplice [*Gurunath v. Seshiah*, A 1966 AP 331]. In election cases a receiver of a bribe in relation to the giver being an accomplice he is unworthy of credit unless corroborated in material particulars [*Subba Rao v. Brahmananda Reddy*, A 1967 AP 155].

Ss 133 and 114, illus (b) are to be Read Together. [Law in India and in England is Identical]. STRAIGHT, J, in *R v. Ramsaran*, 8 A 306, 310, said:—

> "The law in this country as expressed in ss 133 and 114 *illus* (*b*) of the Evidence Act, is in no respect different from the law of England. It simply reproduces a rule of practice which the English courts have recognized, time out of mind and which, I may add, their tendency of late years has been to apply with great strictness. The rule is this: A conviction based on the uncorroborated testimony of an accomplice is not *illegal*, *ie*, it is not *unlawful*. But experience teaches us that it is not safe to rely upon the evidence of an accomplice unless it is corroborated, and hence it is the practice of the judges, both in England and in India, when sitting alone, to guard their mind carefully against acting upon such evidence when uncorroborated; and when trying a case with a jury to warn a jury that such a course is unsafe". See also *R v. Maganlal*, 14 B 115.

"It is satisfactory to find that in a matter of this sort, the law and practice in England and India runs upon precisely the same lines" [*per* RICHRDSON, J, in *Jamaldi v. R*, 28 CWN 536: 51 C 160: 81 IC 712; see also *Nag Aung v. R*, 1937, Rang 110] though the rule of prudence may be said to be based on the interpretation placed on the phrase "corroborated in material particulars" in *illus* (*b*) to s 114 [*Bhuboni v. R*, A 1949 PC 257]. The law was the same even before the passing of the Evidence Act [*R v. Elahee Buksh*, 1866, 5 WR Cr 80].

Markby says: "I do not quite know why this section was inserted. It was not necessary, as s 118 makes all persons competent to testify except those there enumerated. Nor is there any rule which requires that evidence of an accomplice should be corroborated. But the emphatic statement in this section might lead persons to suppose that the legislature desired to encourage convictions on the uncorroborated evidence of an accomplice. This, however, cannot have been the case, because in s 114 we find given as one of the presumptions based on the common course of human conduct, the presumption 'that an accomplice is unworthy of credit unless he is corroborated in material practiculars'..... It would, therefore, have been better to omit this section. The law on the subject would then have been the same as it is now, and the awkwardness of appearing to sanction a practice as universally condemned would be avoided". [Markby, p 98].

It would thus appear that the law in India as expressed in ss 133 and 114 *Illus* (*b*) is, in no respect, different from the English Law. But the difficulty in understanding the combined effect of the above two sections proceeds largely on account of their different positions in the Act. *Illus* (*b*) is attached to s 114 in Chapter VII and s 133 is inserted in Chapter IX of the Act. The English text-writers, however, have stated the whole law on the subject in one place. It would seem that the insertion of an explanation to s 133 in terms of *illus* (*b*) to s 114 would have been of more help in understanding the true meaning of s 133. In India the magistrates are recruited from inexperienced youths without any previous legal training and judges on the civil side called upon to do criminal work, as sessions judges, rather late in life; it is therefore

not at all surprising that difficulty is felt in grasping the true meaning and scope of 133 and it is not infrequently misapplied or misunderstood.

The emphatic statement in s 133 that a conviction is *not illegal* (*ie*, *not unlawful*) merely because it proceeds upon the uncorroborated testimony of an accomplice may at first sight lead inexperienced and untrained persons "to suppose (in the words of Markby) that the legislature desired to encourage convictions on the uncorroborated evidence of an accomplice." That can never be so, and we find that the law in s 133 is qualified by the rule of caution and prudence in *illus* (*b*) to s 114, where it is declared that an accomplice is unworthy of credit unless he is corroborated in material particulars. This rule of caution has now almost acquired the force of law (see *post*: "*The rule as to corroboration.....now virtually a rule of law*").

The rule in s 114 *illus* (*b*) and that in s 133 are parts of one subject and neither section can be ignored in the exercise of judical discretion [*R v. Chagan*, 14 B 331, 344]. The legislature did not intend to say more than that in certain circumstances of a wholly exceptional character, a court might sometimes be justified in convicting on the uncorroborated testimony of several accomplices [*Nawal Kishore v. R*, 22 P 27]. In the absence of the special circumstances of the nature indicated in the two further illustrations to *illus* (*b*), an accomplice is to be presumed unworthy of credit. It has been pointed out that the two further illustrations given to *illus* (*b*) of s 114 are not exhaustive. They are given by way of guidance only, and in order that a court may test the facts of a particular case to see whether anything has emerged to show that the evidence of an accomplice need not be corroborated in material particulars [*R v. Nag Myo*, A 1933 R 177 FB]. As to the principles that are to be applied when a question has to be decided under ss 133 and 114, *illus* (*b*), see *R v. Nga Myo, sup*].

Gist of Law Relating to Accomplice Evidence. [Combined Effect of S 133 and S 114, illus (b)].—The result of the combined operation of ss 133 and 114 *illus* (*b*) and the rule deducible from authoritative decisions may be stated as follows:—

(*1*) That the law as expressed in ss 133 and 114 *illus* (*b*) is precisely the same as the law of England.

(*2*) That the uncorroborated evidence of an accomplice is admissible in law and there can be a legal conviction (*ie*, a conviction which is not *illegal* or not *unlawful*) upon the uncorroborated evidence of an accomplice if believed to be true. This is so, especially where there is in question the evidence of a person who is not so much an accomplice as a victim (see *R v. Ridge*, 1923, 17 Cr App R 113).

(*3*) That although the uncorroborated testimony of an accomplice is strictly admissible, and a conviction based on it is *not illegal*, yet experience teaches us that an accomplice being always an infamous person, it is extremely unsafe to rely upon his evidence unless it is materially corroborated, and that it is the long established and universal practice both in India and England for judges to guard their minds carefully against acting upon such evidence when uncorroborated. The rule as to corroboration has become a settled rule of practice of so universal an application that it has now assumed the force of a rule of law (*post*).

> "So long-established a rule of practice, cannot without great danger to society be ignored by the magistrates and sessions judges, simply because s 133 declares that a conviction is not illegal .... accomplice" [*per* JARDINE, J, in *R v. Chagan*, 14 B 331, 344]. "The broad principle upon which the English practice has always proceeded is as plain and necessary as it ever was" [*per* RANKIN, CJ, in *Ambika v. R*, 35 CWN 1270, 1274].

(*4*) *That* (*a*) it is the duty of the judge to warn the jury that it is dangerous to convict on the uncorroborated testimony of an accomplice, and (*b*), in his discretion he may advise them not to do so, although (*c*) he should point out to the jury that it is within their legal province to convict upon uncorroborated testimony, if believed by them. *Omission to warn is misdirection.* Items (*a*) and (*c*) are mandatory but item (*b*) is something which the court may do, but is not bound to do (*post*).

(*5*) That the courts may give proper effect to the long experience of the ways of rogues embodied in s 114 *illus* (*b*) "*that an accomplice is unworthy of credit unless he is corroborated in material particulars.*" The *illus* (*b*) is, however, the rule, and when it is departed from, the court should show, or that it should appear, that the circumstances justify the exceptional treatment of the case. It is not enough for a court to state the rule *pro forma* and merely as a reason to evade it; the courts must act up to it [*per* JARDINE, J, in *R v. Chagan*, 14 B 331, 344; PEACOCK, CJ, in *R v. Elahee Buksh*, 5 WR Cr 80; *Kailash v. R*, A 1931 P 107].

> [So, the presumption must as a rule be raised and corroboration demanded, though conviction without corroboration is not illegal. Judges are entitled to lay down a rule that although the legislature has given the court the discretion to make a particular presumption or not, according to the circumstances, the proper course for the court to follow is to make the presumption unless there be special occasion for not doing so [*per* SUNDARA AYYAR, J, in *Muthukumaraswami v. R*, 35 M 397, 507]. On the other hand, if the judge after making due allowance for the circumstances which render the evidence of an accomplice untrustworthy, and also considering his character, position and the probabilities of his story considers that the evidence of the accomplice, though uncorroborated is true and that his evidence if believed establishes the guilt of prisoner, he may then convict the accused relying upon s 133 alone. But such a case may occur in *rare* and *exceptional circumstances*. The probabilities, his story, the character and the position of the accomplice, the nature of the crime and the circumstances in which it was committed must be such as would be sufficient to rebut the presumption of untrustworthiness which generally arises under s 114 *illus* (*b*)].

(*6*) That the corroboration, when considered necessary, must be (*a*) as to the crime and (*b*) the identity of each one of the accused (*post*).

(*7*) That the corroboration required must be *independent evidence*, *ie*, reliable evidence of another kind, so that one accomplice cannot corroborate another (*post*).

(*8*) That the corroboration need not consist of evidence which is sufficient by itself to sustain the conviction.

The combined effect of these two provisions was stated by the Supreme Court as under:

> "A combined reading of the two provisions that in section 133 and *illustration* (*b*) of section 114 of Evidence Act goes to show that it was considered necessary to place the law of accomplice evidence on a better footing by stating in unambiguous terms that according to section 133 a conviction is "not illegal or in other words not unlawful" merely because it is founded on the uncorroborated testimony of an accomplice while accepting that an accomplice is a competent witness. But at the same time the Legislature intended to invite attention to *illustration* (*b*) of section 114 of the Evidence Act with a view to emphasise that the rule contained therein as well as in Section 133 are parts of one and the same subject and neither can be ignored in the exercise of judicial

discretion except in cases of very exceptional nature. However, the difficulty in understanding the combined effect of the aforementioned two provisions arises largely due to their placement at two different places of the same Act. It may be noticed that *illustration* (*b*) attached to Section 114 is placed in Chapter VII of Evidence Act while section 133 is inserted in Chapter IX of the Act. The better course was to insert *illustration* (*b*) to Section 114 as an explanation or in any case as a proviso to Section 133 of the Act instead of their insertion at two different places and that too in different chapters of the Evidence Act. In any case since an approver is a guilty companion in crime and, therefore, *illustration* (*b*) to section 114 provides a rule of caution to which the courts should have regard. It is now well settled by a long series of decisions that except in circumstances of special nature it is the duty of the court to raise the presumption in Section 114 *illustration* (*b*) and the Legislature requires that the courts should make the natural presumption in that section as would be clear from the decisions which we shall discuss hereinafter." [*S.C. Bahri v. State of Bihar*, A 1994 SC 2420 : 1994 Cri LJ 3271].

Ordinarily combined effort of sections 133 and 114 of Evidence Act is that conviction can be based on uncorroborated testimony of as an approver but as a rule of prudence, it is unsafe to place reliance on the uncorroborated testimony of an approver [*Niranjan Singh v. State of Punjab*, 1996 (2) Crimes 251, 256 (SC)].

Where there was no material to corroborate the testimony of the approver as to a particular accused about his participation in the crime, he was acquitted, but sufficient corroboration being available against another accused, the testimony of the accomplice was accepted. The court said that though there is no legal hurdle against acting on the testimony of an accomplice, it would be imprudent to base a conviction on such a testimony unless it is corroborated in material particulars. *Ramprasad v. State of Maharashtra*, AIR 1999 SC 1969 : 1999 Cri LJ 2889. The court further said that though the confessional statement of the accomplice made for securing pardon can be used as corroboration, not much weight can be attached to it because it is a former statement of an accomplice. (*Ibid*). Failure to disclose the name of one of the co-criminals before becoming an approver would be inconsequential when in the confessional statement he included that person alongwith others and himself. (*Ibid*).

—Summary of Law in Ss 133 and 114 illus (b). To Sum up.—There is no absolute rule of law that accomplice evidence must be corroborated. This is s 133. But as MARTIN, B, said (in *R v. Boyes*, 9 Cox CC 32) "there is a rule of practice which has become so hallowed as to be deserving of respect. I believe these are the very words of LORD ABINGER—it deserves to have all the reverence of the law." This rule of guidance is to be found in s 114 *illus* (*b*). Both the sections are parts of one subject and should always be considered together. In *Nga Aung v. R*, A 1931 R 209, 210: 1937 Rang 110, ROBERTS, CJ, said:—

> "The rule of law says that he (accomplice) is competent to give evidence, and the rule of practice says that it is almost always unsafe to convict upon this testimony alone. But the rule of law to this extent triumphs over the rule of practice that if special circumstances exist which render it safe, in an exceptional case to act upon the uncorroborated testimony of an accomplice and upon that alone, the court will not merely for the reason that the conviction proceeds upon such uncorroborated testimony say that the conviction is illegal. This is the plain meaning of s 133."

On the whole, the combined result of two sections [ss 133 and 114 *illus* (*b*) says PHEAR, J, (in *R v. Sadhu Mandal*, at 21 WR Cr 69, 79):—

"Appears to be that the legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person, *ie*, so far as his testimony implicates an accused person, unless he is corroborated in material particulars in respect to that person; that it is the duty of the court which in any particular case has to deal with an accomplice's testimony to consider whether this maxim applies to exclude that testimony or not; in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case; though at the same time the court may rightly in exceptional cases, notwithstanding that maxim, and in the absence of this corroboration, give credit to the accomplice's testimony against the accused, if it sees good reasons for doing so upon grounds other than, so to speak, the personal corroboration."

In *Bhuboni v. R*, 76 IA 147 : 53 CWN 609: A 1949 PC 257 where the attention of the Privy Council was drawn to *In re Rajagopal*, (ILR 1944 Mad 308) where conviction was based upon the evidence of an accomplice supported by the statement of the accused, it observed:

"Their Lordships... would nevertheless observe that courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused....."

The clearest and most authoritative statement of the law relating to accomplice evidence will be found in the case of *R v. Baskerville*, 1916, 2 KB 658: 86 LJKB 28 (*post*) where five judges heard the appeal and reviewed the entire case-law on the subject and the judgment was delivered by READING, LCJ.

The Supreme Court in *Biva Doulu v. S*, A 1963 SC 599 relying on the obser-vations of MARTIN B, in *R v. Boyes*, and LORD ABINGER (quoted *ante*) of LORD READING in *R v. Baskerville* (quoted *post*) and also of the Privy Council in *Bhuboni v. R* (quoted *sup*) observed:—

"The combined effect of ss 133 and 114, *illus* (*b*) may be stated as follows: According to the former, which is a rule of law, an accomplice is, competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal, yet the courts will, as a matter of practice not accept the evidence of such a witness without carroboration in material particulars."

As to tender of pardon to accomplice, see s 306 of Cr P Code 1973; as to power to direct pardon, see s 307, *ibid* and as to commitment of persons to whom pardon has been tendered, see s 308, *ibid*. In India judges and magistrates are competent to tender pardon under s 306 *ibid*, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence under enquiry on condition of his making a full and true disclosure of the circum-stances within his knowledge. Every person accepting a tender, becomes a witness under s 306(2). In England, judges and magistrates have no power to tender pardon. There the accused is told that he will be recommended to the Crown for mercy, and he gives evidence in anticipation of a pardon. In India he becomes a witness only after the grant of pardon. A local Government in India has no power to tender a conditional pardon to an accomplice [*Banu Singh v. R*, 33 C 1353: 10 CWN 962; see *Alladad v. R*, 9 PR 1906 Cr].

[*Ref Tay ss 967-71; Phip 8th Ed, pp 477-80; Best, ss 170-71; Powell, 9th Ed, pp 520, 521; Archbold, Cr Pl, pp 455-57; Hals, 3rd Ed, Vol 10, paras 844-848; Wigmore, ss 526-26, 2056-62; s 114, illustration (b); R v. Baskerville, 1916, 2 KB 658*].

"Competent Witness," But Still an Accused.—Provided that an accomplice is not a co-accused under trial in the same case, an accomplice is a competent witness and may be examined on oath [*Joseph v. R*, 3 R 11 : 86 IC 236]. But such competency, which has been conferred on him by a process of law does not divest him of the character of an accused. Until by fulfilment of his undertaking he secures his discharge, he remains a *participes criminis* [*Kundan v. R*, A 1931 L 353: 131 IC 625; see however, *R v. Umada*, 9 PR Cr 1911: 10 IC 340]. When the approver explains the reasonableness of the circumstances under which he resiled from his earlier statement, his evidence can be accepted. [*Jagjit Singh v. State*, 1986 Cri LJ 1658, 1660 (Del) (1959 Cri LJ 852 **Dissented**)].

Custody of Approver.—There is no difference between an approver and an accused as regards the nature of custody. During an inquiry or trial he must be detained in judicial custody, *ie*, confinement in prison. There is no question of convenience [*Kundan v. R*, A 1931 L 353]. An approver cannot be detained in the custody of the police. An approver's position is that of a witness so long as he has not forfeited the pardon [*In re Khairati Ram*, A 1931 L 476: 132 IC 519; *R v. Ranbir*, A 1931 L 480].

Who Are Accomplices? [Accessories After the Crime].—The term (accomplice) in its fullness includes in its meaning all persons who have been concerned in the commission of a crime, all *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact; Fost Cr Cas 341; 1 Russ, Cr 21; 4 Bla Com 331; 1 Phil Ev 28; *Merlin, Repert Complice* [*Bouvier's Law Dictionary*].

"An accomplice is a person who has concurred in the commission of an offence" [*per* MAULE, J. in *R v. Mullins*, 3 Cox Cr 526]. The new Oxford Dictionary says that "accomplice" may be spelt as "a complice" meaning a partner in crime, an associate in guilt. The term "accomplice" signifies a guilty associate in crime; or when the witness sustains such a relation to the criminal act that he could be jointly indicted with the accused, he is an accomplice [*per* SUBRAMANIA AYYAR, J, in *Ramasami v. R*, 27 M 271 : 14 MLJ 226; see *In re Sattar*, A 1939 M 283]. This definition is based on *U.S. v. Neverson*, 14 Century Dig Col 1279 and *White v. Com*, 14 Century Dig Col 1280 which were also **relied** on in *Kailash v. R*, A 1931 P 195 : 129 IC 535. *Ramasami v. R, sup, and Hafizuddi v. R, post*, were **relied** on in *Ghudo v. R*, A 1945 N 143. The primary meaning of accomplice is any party to the crime charged and someone who aids and abets the commission of crime [*Shesamma v. S*, A 1970 SC 1330].

In two cases, however, persons who are not *participes criminis* have been held to be accomplices, namely (i) receivers of stolen property have been held to be accomplices of the thieves from whom they receive goods, in a trial for theft, and (ii) where a person has been charged with a particular offence and evidence of other similar offences by him has been admitted as proving system and intent and negativing accident persons who had been accomplices in the previous offences. The classes of accomplices should not be extended further [*Davies v. Director of Public Prosecutions*, 1954 AC 378: 1 All ER 507 (**relied** on in *Dalmia v. Delhi Admn*, A 1962 SC 1821]. As to admission of evidence of similar offences on this ground, see *ante*; s 14 "*Principle of rejection of evidence of similar facts*"].

The word "accomplice" has not been defined by the Act and should therefore be presumed to have been used in the ordinary sense. An accomplice means a guilty associate or partner in crime, or who, in some way or other is connected with the offence in question, or who makes admissions of facts showing that he had a conscious hand in the offence [*Jagannath v. R*, 17 Luck 516: A 1942 O 221; *R v. Burn*, 11 Bom LR 1153: 10 Cri LJ 530; *R v. Ghulam Rasul*, A 1950 L 129]. When a person under threat of death or other forms of pressure which he is unable to resist commits a crime along with others, he is not a willing participant in it but a victim of it. Such a person can hardly be called an accomplice [see *Srinivas Mull v. R*, A 1947 PC 135: 51 CWN 900: 26 Pat 460; *Papa Kamal v. R*, A 1935 B 230 : 59 B 486 *post*].

It is well settled that all accessories before the fact, if they participate in the preparation for the crime are accomplices, but if their participation is limited to the knowledge that crime is to be committed, they are not accomplices. Whether a person is or is not an accomplice therefore depends upon the facts in each particular case considered in connection with the nature of the crime [*Nagain v. R*, 63 CLJ 191].

Under the common law in England there were two categories of offences—felonies and misdemeanours. In the case of felony there were four classes of offenders—*principals of the first and second degrees* and *accessories before and after the fact*. In misdemeanours the first three were all treated as principal offenders (Accessories and Abettors Act 1861 s 8) while the fourth did not exist. The term accomplice generally included all the four classes. S 1 Criminal Law Act 1967 abolishes all distinctions between felony and misdemeanour providing that the previously existing law and practice in relation to misdemeanour shall apply to all offences (except treason) and s 2(*1*) makes a new category of "arrestable offences" which are those for which the sentence is fixed by law, or for which a person may be sentenced to more than five years imprisonment and an attempt to commit such offence. Accordingly the four classes of offenders disappear. The Criminal Law Revision Committee (7th Report, Cmnd 2659 para 24) did not think their retention useful. S 4 of the Act replaces the old offence of being an accessory after the fact with the one of being an "assisting offender" for assisting a person who has committed an arrestable offence. The term "accomplice" would normally naturally include both the classes.

In the penal laws of this country ordinarily two classes have been recognised: Persons who are principals (*ie*, directly or indirectly concerned in the offence) and abettors or instigators (*ie*, privy to the offence). The term "accomplice" obviously includes principals in the first and second degrees as also abettors. An accessory after the fact is one who knowing a felony to have been committed receives, relieves, comforts, assists, harbours or maintains a felon. (As to accessories after the fact, see ss 130, 136, 157, 201-4, 212-216B, 410-414 PC). In a case it was doubted whether an accessory after the fact is an accomplice [*R v. Chutterdharee*, 5 WR Cr 59: see also *Nga Pauk v. R*, A 1937 R 513] but the Judicial Committee has held that he is [*Mahilikilili v. R*, A 1943 PC 4: 44 Cri LJ 1: *Mahadeo v. R*, A 1936 PC 242: 40 CWN 1164; see *Ismail v. R*, A 1947 L 220]. An accessory after the fact being not concerned in the original offence for which the accused is tried, may not in the strict sense come within "accomplice", but even in such cases there are exceptions, *eg*, the possessor of stolen property soon after theft may be presumed to be the thief [v. ill (*a*) to s 114] and he is an accomplice in the case against the thief. All accessories after the fact are not of the same degree of criminality, as so much depends on the particular facts of each case. In many cases the question whether an accessory after the fact is or is not an accomplice in law may assume an academic form, the principal point to which consideration is applied being whether corroboration of his evidence is required. Whether an accessory after the fact does or does not come technically within the category of "accomplice", he is on the same footing as an accomplice and his evidence is no better. The presumption of untrustworthiness equally attaches to his evidence and on the same principle as that of an accomplice, the sounder rule would be to require corroboration [see *Alimuddin v. R*, 23 C 361 *post*; *R v. Kallu*, A 1937 O 259; *Shyam Kumar v. R*, A 1941 O 130; *Brijpal v. R*, A 1936 O 413; *Turab v. R*, A 1935 O 1; *Sundar Lal v R*, A 1934 O 315; *Nawab v. R*, A 1923 L 391; *Bahawala v. R*, A 1925 L 432; *Hayatu v. R*, A 1929 L 540; *Ismail v. R*, A 1947 L 220; *Ashutosh v. S*, A 1959 Or 159 and cases *post*], except when it can be dispensed with in the special circumstances of a case. In such cases the real question is the degree of credit to be attached to the evidence of these witnesses who as accessories are concerned with the accused in some other offence arising out of the original offence.

A person helping the accused in concealing the dead body of a murdered man or omitting to give information of it, should not be regarded as an accomplice, but is

liable to be charged under s 201 I P Code [*Ramaswami v. R*, 27 M 271: 15 MLJ 226; *Jehana v. R*, A 1923 L 345: 73 IC 506]. Agreeing with this view it has been held that a man who does not abet a crime cannot be regarded as an accomplice [*Nga Pauk v. R*, A 1937 R 513]. But where certain witnesses took an active part in carrying away the person after he had been grievously assaulted and was in a helpless condition and then left him in a field where he was subsequently found dead, their evidence was held to be no better than that of an accomplice [*Alimuddin v. R*, 23 C 361]. In other cases also it has been held that witnesses who admittedly witnessed the crime, assisted in concealing the evidence or connived at such being done, are accomplices [*Hayutu v. R*, A 1929 L 540]. So, where a witness admits that he is cognisant of the crime to which he testifies, and took no means to prevent or disclose it [*R v. Chando*, 24 WR Cr 55; *Umed v. R*, 30 CWN 816: 45 CLJ 581; *Bihari v. S*, A 1957 Or 260; see also *Ishan v. R*, 21 C 328; see however *Hafizuddi v. R*, 38 CWN 777], or when he sees a murder committed and gives no information [*Nawab v. R*, A 1923 L 391 : 76 IC 824; *In re Veeral*, A 1970 M 298] his evidence is no better than that of an accomplice. Where the witness, who was accused's paramour, accompanied him to the scene of murder and waited outside when the murder was committed and then assisted him in putting the dead body on bed and covering him with a *chadder*, she was to all intents and purposes an accomplice [*Bahawala v. R*, 88 IC 854: A 1925 L 432]. Person keeping watch to see whether the police were coming at the time of commission of a crime is an accomplice [*Dhanapati v. R*, A 1946 C 156].

Mere death of the husband in the presence of an intriguing wife does not make her an accomplice unless she shared with the accused his intention to kill [*In re Addanki*, A 1939 M 266]. The mere fact that a person witnesses a murder and does not give information of it to any one does not of itself render him an accomplice [see *Vemireddy v. S*, 1956 SCR 247: A 1956 SC 379: 1956 ALJ 389 *post*].

Persons who sign false declarations as owners of currency notes for perpetration of fraud are accomplices [*Cohen v. R*, A 1949 C 594]. A person should not be treated as an accomplice on mere suspicion [*R v. Burn, sup*]. But a suspected participator in crime appearing as a prosecution witness is on the same basis as an accomplice [*Rustom v. R*, 1 OLJ 95: 24 IC 146]. Every participation in a crime does not make a person an accomplice, so as to require his testimony to be confirmed. Much depends on the nature of the offence and on the extent of the complicity of the witness in it [*R v. Chutterdharee*, 5 WR Cr 59]. In *R v. Ramsadoy*, 20 WR Cr 19 GLOVER J, said:—

> "I understand an accomplice witness to be one who is either being jointly tried for the same offence, makes admissions which may be taken as evidence against a co-prisoner and which makes the confessing accused *pro hac vice* a sort of witness, or one who has received a conditional pardon on the understanding that he is to tell all he knows and who may at any time be relegated to the dock if he fails in his understanding."

Accomplices are those who are in some way or other connected with the offence in question [*Yacoob v. R*, A 1933 R 199]. An accomplice includes one who poses as an accomplice [*Golam v. R*, A 1932 C 295]. In a conspiracy case, it has been held approving Wigmore on Evidence, s 2060, that "a mere detective or decoy or paid informer is not an accomplice, nor an original confederate who betrays *before* the crime's committal; yet an accessory *after* the fact would be, if he had before betrayal rendered himself liable as such [*Pulin v. R*, 16 CWN 1105, 1149. See *post*: "*Spy. Detective, Decoy &c*"].

It has been held in the United States that even if there is reason to conclude that some members of a union will use their positions to bring about political strikes it

cannot automatically be inferred that all members share their evil purpose or participate in their illegal activities [*US v. Archie*, 381 US 437].

In an election case the allegation was that the respondent in pursuance to an agreement entered into with Harijan voters through their leaders *S* and *M* paid Rs. 1,500 to them for building *dharamsala* for the community. *Held* leaders are accomplices and their evidences have to be independently corroborated [*Trilochan v. Karnal*, A 1968 Pu 416 FB; *Held per* HARBANS SINGH J—The corroboration, however need not be by direct evidence. It was sufficient if it was merely circumstantial].

Same.—A witness is none the less an accomplice, because at the time of his giving evidence, he has already been convicted on his own confession [*R v. Ramsadoy*, 20 WR Cr 19]. A person who from his own testimony is found to be privy to the crime is no better than an accomplice [*Nur Md v. R*, A 1925 L 253: 6 LLJ 529]. To constitute an accomplice there need only be the intention of assisting in the commission of a crime but he need not know exactly what crime was being committed (*per* HUDA J). An indication of the meaning of the word accomplice may be found in s 337 Cr P Code [*per* NEWBOULD J, in *Suryakanto v. R*, CWN 119: 58 IC 674]. A person who knowingly aids in the disposal of stolen property is an accomplice [*In re Mayuthalayan*, A 1934 M 721; *Chetumal v. R*, A 1934 S 185]. A receiver of stolen property is not necessarily an accomplice. Where a person received stolen property for safe custody but subsequently realising the danger informed the police, he is not an accomplice [*Kundan v. R*, A 1948 S 65].

Three persons *O*, *M* and *G*, went out armed at night, into a house from which they took some property; they used at other house violence to persons found there, and all of them carried off the deceased at dead of night from his house and took him to the tank. While there he was shoved into the tank by *O*, *G*, being close by, and though not aiding, and only so far as his presence might tend to intimidate the deceased from making resistance, not interfering to prevent the deceased from being so treated. *O* murdered him within three yards of *G* by a gun....*held*, that *G* was an accomplice and it was the duty of the judge to advise the jury not to act on his evidence without corroboration [*R v. O'Hara*, 17 C 642].

Where a person was convicted of a different offence before a trial and had nothing to gain or lose by the evidence he gave in court, he could not be said to be an accomplice in law. Other persons who were directly concerned in the crime as principals might be considered as accomplices, even though convicted [*Priyanath v. R*, 15 CLJ 692].

How to Decide Whether a Witness is an Accomplice. [Burden of Proof].—The term accomplice covers persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanour). As to who is to decide or how is it to be decided whether a particular witness was "*participes criminis*" in the case in hand, the question is in most cases answered by the witness himself by confessing to participation, by pleading guilty to it, or by being convicted of it. In the case of witnesses outside these straightforward categories, the judge can properly rule that there is no evidence that the witness is a participant. But where there is evidence it is for the jury's decision: and the judge should direct that if they consider on the evidence that the witness was an accomplice it is dangerous to act on his evidence without corroboration [*Davies v. DPP*, 1954 AC 378, 402: 1954, 1 All ER 507, 514; *Hussain v. Dalipsinghji*, A 1970 SC 45]. As to the charge to the jury, see *post*: "*Judge's duty in charging the jury*".

The burden of *proving* the witness to be an accomplice is of course upon the party alleging it for the purpose of invoking the rule, namely, upon the defendant. Whether the witness is in truth an accomplice is left to the jury to determine, and if they conclude him to be such, then and then only are they to apply the rule requiring corroboration. If they are in doubt and unable to decide, the rule is not to be applied, but they need only believe by preponderance of evidence [Wig s 2060]. Ordinarily the burden of proving that a witness is an accomplice is on the body alleging it, though it is the duty of the prosecution to bring the accomplice character of the evidence to the notice of the court [*Jagannath v. R*, 17 Luck 516].

—Bribery Cases.—A person who offers bribe to a public officer is an accomplice in the offence of taking an illegal gratification. When bribery is the offence charged, the giver of the bribe is the accomplice of the receiver [*R v. Chaqan*, 14 B 331; see also *R v. Magan Lal*, 14 B 115; *R v. Deodhar*, 27 C 144; *R v. Malhar*, 26 B 193: 3 Bom LR 694; *In re Jesudas*, A 1945 M 358; *Sajdar v. R*, A 1941 L 82; *R v. Khurshid*, A 1947 LJ 410; *Md Yusuf v. R*, A 1929 N 215; *Balkrishna v. R*, A 1948 N 245; see *Huntley v. R*, 1944 FCR 261: A 1944 FC 66; *Chari v. S*, A 1959 A 149; *Gandhi v. S*, A 1960 Mys 111]. Persons who actually pay bribe or co-operate in payment or are instrumental in the negotiations, are also accomplices of the persons bribed. And a person who with knowledge, that the bribe has to be paid, advances money is clearly an abettor and as such an accomplice [*Md Usaf v. R*, A 1929 N 215: 111 IC 457; *Mangal v. R*, 34 PLR 836]. A distinction was drawn in a case between an accused who takes money and one who gives bribe, as they could not be jointly tried for the same offence [*R v. Mathews*, A 1929 C 822]. Wigmore says that in bribery or subornation, the other participator is not an accomplice [*People v. Coffey*, 1912, 161 California 433]. Demanding a bribe; the person paying it is not an accomplice [*S v. Durham*, 1898, 73 Minn 150; Wig s 2060]. In a bribery case payer's testimony carries little conviction in the absence of re-assuring support [*Raghubir v. S*, A 1974 SC 1516]. In bribery cases the persons who pay the bribe and those who act as intermediaries are the only persons who can ordinarily be expected to give evidence about it [*Papa Kamal v. R*, 59 B 486; see *Deonondan v. R*, 33 C 649; *Bhattacharjya v. R*, 48 CWN 632; *Safdar, v. R*, A 1941 L 82]. Even if corroboration is considered desirable, a less strict standard may be applied in the case of a giver of bribe than an accomplice [*S v. Samuel*, A 1961 K 99]. A police officer laying a trap and accepting a bribe only to bring to book the giver, is not an accomplice [*Mahadeo v. S*, A 1952 B 435]. As to trap witnesses in bribery &c see *post*.

A person who pays money to a public servant to get an advantage stands in position of an accomplice. His evidence requires corroboration [*Gopal Minz v. State of Orissa*, 1992 (1) Crimes 350, 351 (Ori)]. A person, who paid bribe to a public servant in order to expose his conduct and to bring him to book as directed by police, cannot be treated as an accomplice [*Rajasingh v. State*, 1995 Cri LJ 955, 960 (Mad)]. Where the accused acting in consort offered bribe to a Minister for a favour but the Minister informed the Anti Corruption Bureau and the accused persons were arrested in a trap, it was an unusual case inasmuch as the demand or request to do the illegal act emanated from members of the public *viz.*, the accused persons and the public servant *viz.* the Minister had complained about the illegality. In such a case the complainant cannot be equated with the position of an accomplice [*C.R. Mehta v. State of Maharashtra*, 1993 Cri LJ 2863 (Bom)].

Witnesses to bribe who are compelled to take hush money are not accomplices [*Pandita v. R*, A 1950 N 1]. When bribe is extorted and the giver is not a willing participant but a victim, rule of corroboration does not strictly apply as he is not really an accomplice [*Papa Kamal v. R, sup* (approved in *Sriniwas Mull v. R*, A 1947

PC 135); *Narayanaswami v. S*, A 1957 K 134; see *Bhattachariya v. R*, 48 CWN 632; *Narayan v. R*, A 1948 N 342; *Kamini v. S*, A 1971 Tri 26 and *post*: "*Bribery*"]. It seems that a distinction can well be drawn between cases where a person offers a bribe to achieve his own purpose and where one is forced to offer bribe under threat of pecuniary loss or harm or coercion. Persons under the last category who are thus victimised can hardly be called accomplices. Persons giving illegal gratification under coercion and fear of being harassed are not accomplices [*Dalpat v. S*, A 1969 SC 17].

Persons who accompanied another who carried the money intended to be given as a bribe to the head-constable with knowledge that it was to be so paid and assist in such payment are accomplices [*Rajani v. Asan*, 2 CWN 672]. Where after the amount of the bribes had been settled with the head-constable, the persons went home for the money and next day they took the two witnesses with them to the *thana* and made the payment, the witnesses who accompanied the bribe-givers were no better than accomplices [*Jogendra v. Sangal*, 2 CWN 55]. A person who bribes a public servant to avoid pecuniary injury, personal molestation or to have the business done promptly and well, is an accomplice. So a person who actually pays bribe to a public servant under the orders of his master, is an accomplice [*R v. Smither*, 26 M 1 (14 B 115 **follD**); see also *R v. Obhoy Churn*, 3 WR Cr 19 and *R v. Samiappa*, 15 M 63]. Evidence of acceptance of marked currency notes from decoy witness should be corroborated [*R v. Anwar*, A 1948 L 27]. See also *post*: "*Who are Not Accomplices*".

—Accomplices in Various Offences.—In *Knowing receipt of stolen goods*, the thief is not an accomplice. In dealing with *intoxicating liquor*, the buyer is an accomplice, in *sexual* crimes, the other person—usually the woman—may or may not be an accomplice, according as she is, by the nature of the crime, a victim of it or a voluntary partner in it. Thus in *adultery*, the other party may well be deemed an accomplice; and so also perhaps, in *incest*, and in *pandering or pimping*. But the woman is not an accomplice in *rape, rape under age, seduction, or abortion*; nor the participant in *sodomy* [Wig s 2060; see *Harendra v. R*, 44 CWN 830. In India the woman is not punishable in adultery]. In *R v. Tate*, 1908, 2 KB 680 (a boy of 16) participant in sodomy held an accomplice; see also *Bal Mukunda v. R*, 39 CWN 1051, 1052—CONTRA: *R v. Jellyman*, 1938, 8 C & P 604.

—Persons in the Nature of Accomplices.—There is nothing in law to justify the proposition that evidence of a witness who happens to be cognizant of a crime or who made no attempt to prevent it, or who did not disclose its commission should only be relied on to the same extent as that of an accomplice. It may not be possible to place much reliance on the evidence of such persons, but they are not accomplices and it leads to confusion of thought to treat them as "practically accomplices" and then apply the rule as to their credibility, instead of judging their credibility by a careful consideration of all the particular facts of the case affecting the evidence [*Hafizuddi v. R*, 38 CWN 777].

—Who Are Not Accomplices.—The mere fact that a person did not reveal his knowledge of the intended crime to the authorities does not make him an accomplice [*Nurul Amin v. R*, A 1939 C 335: 1939, 1 Cal 511; *Narain v. R*, 63 CLJ 191: 161 IC 289; *In re Sattar*, A 1939 M 283; *Ismail v. R*, A 1947 L 220—CONTRA: *Shahrah v. R*, 20 PR Cr 1919: 49 IC 607]. Where an informer was upon his own statement cognizant of the commission of an offence, and omitted to disclose it for six days, the court was not prepared to say that he was an accomplice, but held that his testimony was not such as to justify a conviction except where it was corroborated [*Eshan Ch v. R*, 21 C 328]. Mere fact that a person of low intelligence being struck with terror

made no report of a crime does not make her an accomplice [*R v. Sree Narayan*, A 1949 O 48].

The Supreme Court has held that the mere fact that a person witnesses a crime and does not give information of it to any one else out of terror does not warrant the extreme proposition that he is an accomplice. "If A happens to be present at a murder and takes no part in it, nor endeavours to prevent it, or to apprehend the murderer, this course of conduct will not of itself render him either principal or accessory." (Russell on Crimes). But the evidence of such a man should be scanned with much caution and corroboration on material particulars is necessary [*Vemireddy v. S*, A 1956 SC 379: 1956 SCR 347: 1956 Cri LJ 777 (Russell on Crimes 10th Ed p 1846 **apprd**)]. As to how to decide whether a witness is an accomplice, see *ante*.

If the money paid as bribe is provided by a police officer, it is not the law that all the witnesses become accomplices [*Ramanlal v. S*, A 1960 SC 961: 1960 Cri LJ 1380].

In an offence under R 35 of the D I Rules, persons cannot be treated as accomplices only because they happened to be present in the mob and fully aware of the persons who committed the offence but did not disclose it to the authorities [*Gopilal v. R*, A 1945 N 186]. A witness stating that he saw the commission of a murder but not giving any information thereof cannot be said to be an accomplice, but his evidence is not free from suspicion [*Turab v. R*, 152 IC 473; *Sundar v. R*, A 1934 O 315].

The mere presence of a person on the occasion of giving a bribe and the omission to inform the authorities promptly does not constitute him an accomplice unless it can be shown that he somewhat co-operated in the payment [*R v. Deodhar*, 27 C 144 (**folld** in *R v. Deonandan*, 33 C 649: 10 CWN 669)]. Persons present at the giving of bribe are not accomplices, but the case is different if they have co-operated or taken some part in it [*Khadam v. R*, 15 PWR Cr 1919: 50 IC 18 (33 C 649 **folld**); see *ante*: "*Bribery cases*" *and post*: "*Bribery*".

Where a person charged with others is acquitted, his evidence so far as it inculpates them may not be the evidence of an accomplice but only that of an interested witness [*R v. Eckersley*, 1953 Times 18th June CCA and see *R v. Barnes*, 1940, 2 All ER 229. (Hals 3rd Ed Vol 10 para 845 p 460]. Person paying money to sub-registrar for early return of document is not an accomplice, but an interested witness and some corroboration should be required [*Moogappa v. S*, A 1961 Mys 44]. Where some persons were compelled by the bribe taker to take Rs 10 each as hush money which they returned on informing the police, they were not accomplices [*Pandita v. R*, A 1950 A 1].

Where money was paid to a police sub-inspector by a money-lender, for obtaining the release of person wrongfully confined—*held* that such payment was not an illegal gratification, but a case of extortion and that the money-lender advancing the money could not be regarded as an accomplice [*Akhoy v. Jugal*, 27 C 925: 4 CWN 755; **approved** in *R v. Deonandan, sup*]. A mere eye-witness to the giving of the bribe, or person who made entries in account book subsequent to the transaction, may be tainted witnesses, but they are not accomplices [*R v. Smither*, 26 M 1].

A person charged with an offence by the police but discharged by the magistrate after examination is not an accomplice [*Nga Moung v. R*, LBR (1893-1900) 467]. The mere fact that the thief has asked a woman to pawn a stolen watch for him, does make her an accomplice [*R v. Kirkham*, 73 JP 406]. There is no assumption that the prosecutrix in a rape case is an accomplice [*Harendra v. R*, 44 CWN 830: A 1940 C 461].

The mere fact that a witness of the election petitioner printed the offending leaflet cannot make him an accomplice [*Virendra v. Vimal*, A 1976 SC 2169].

Mistake in Commitment Order.—When an approver was mentioned in the commitment order as an accused, but at the trial the sessions judge corrected the mistake by removing the accused person from the dock to the box, his evidence is not admissible [*Haji Ayut v. R*, 31 CWN 72*n*: 54 C 539].

Difference Between Testimony of an Accomplice and Confession of Co-accused.—[See *ante* s 30: "*Difference between the confession of the co-accused..... respective value*".

Spy, Detective, Decoy, Paid Informer, Trap-Witness etc Associating With a Wrong-doer for Discovery and Disclosure of an Offence, When Not an Accomplice.—To one class of persons, *apparently accomplices*, the rule requiring corroborative evidence does not apply; namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance, or an original determination to frustrate the enterprise have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their confederates, till the matter can be so far matured as to insure their conviction. The early disclosure is considered as binding the party to his duty; and though a great degree of disfavour may attach to him for the part he has acted as an informer, yet his case is not treated as that of an accomplice [*R v. Despard*, 1803, 28 How St Tr 489; Tay s 971]. It has been held in America that one who only enters into communication with criminal without any criminal intent himself, and solely for the purpose of detecting them in a criminal act, is not an accomplice [*Com v. Downing*, 4 Gray, 29 M; *S v. Meckean*, 1873, 36 Iowa 349 Am]. In any case to be an accomplice, one must be indictable as a participator in the offence [*Com v. Wood*, 1858, 11 Gray 85 Am; *Com v. Boynton*, 1874, 11 Mass 343 Am].

The distinction between an accomplice and an informer, spy or detective has been thus drawn by Wigmore (s 2060): "When the witness has made himself an agent for the prosecution before associating with the wrong-doers or before the actual preparation of the offence, he is not an accomplice; but he may be, if he extends no aid to the prosecution until after the offence is committed. A mere detective or decoy or paid informer is therefore not an accomplice; nor an original confederate who betrays before the crime's committal; yet an accessory after the fact would be, if he had before betrayal rendered himself liable as such." This statement of law was approved in *Pulin v. R*, 16 CWN 1105, 1148. In *R v. Mullins*, 1848, 3 Cox Cr Cas 526, 531 MAULE J, laid down a similar test:—

> "An accomplice is a person who has concurred in the commission of an offence information so as to prevent those who are disposed to break out from effecting may be an honest man; he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, I can see no impropriety in his taking upon himself the character of an informer. The Government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrator. Under such circumstances they are entirely distinguished, in fact and in principle, from accomplices, and although their evidence is entirely for the jury to judge of, I am bound to say that they are not such persons as it is the practice to say require corroboration.....

"An accomplice is a person who has concurred in the commission of an offence .....spies, that is, persons who take measures to be able to give to the authorities information as it may purchase immunity for his offence. A spy, on the other hand, their purpose.....In the case of an accomplice, he acknowledges himself to be a criminal, in the case of these men, they do not acknowledge anything of the kind".

ERLE J, in *R v. Dowling*, 1849, 3 Cox Cr Cas 509, 515: "If he only lent himself to the scheme for the purpose of convicting the guilty, he was a good witness and his testimony did not require confirmation as that of an accomplice would do."

LORD ELLENBOROUGH in *R v. Despard, sup*: "Persons entering into communication with the conspirators with an original purpose of discovering their secret designs, and disclosing them for the benefit of the public do not partake of the criminal contamination of an accomplice."

R v. Mullins, sup was approved in *R v. Bickley*, 1909, 2 Cr App Rep 53: 73 JP 239, where it has been held that the rule of corroboration does not apply to persons who have joined in or even provoked the crime as police spies. In *Bickley's* case with a view to trap a suspected abortionist, a police spy, such as a woman who was not pregnant asked the prisoner to supply her with a noxious drug to cause miscarriage. No is a woman an accomplice, on whose earnings as a prostitute the prisoner is charged with living [*R v. King*, 1914, 10 Cr A Rep 117: 111 LT 80]. The judge is justified in warning the jury not to accept without corroboration the evidence of a woman living such a life (*R v. King, sup*) Hals 3rd Ed Vol 10 para 945 p 460].

The point for determination appears to be whether the witness entered into the conspiracy with the sole object of detecting and betraying it or whether he is a person who concurred fully in the criminal designs of his co-conspirators for a time and joined in the execution of those till out of fear or for some other reasons he withdrew from the conspiracy and gave information to the authorities. If he extends no aid to the prosecution until after the offence has been committed, he would be an accomplice. If he originally joined the conspiracy with the sole object of taking part in the crime, he cannot change his position to that of an informer by subsequently giving information of the crime [see *Karim v. R*, 9 L 550; *Pulin v. R*, 16 CWN 1105, 1148; *R v. Chaturbhuj*, 38 C 96 *post*; *Mohan Lal v. R*, A 1947 N 109].

It may sometimes be necessary to employ spies or decoys for detection of offences which cannot be detected in any other way but the practice is looked upon with much disfavour and in their enthusiasm these men soon degenerate into *agent provocatures* instigating or provoking the commission of crimes. (See the observations of LORD ALVERSTONE in *King v. Mortimer*, 1911, 1 KB 70). The authorities indicate that if a man makes himself an agent for the prosecution before associating with the wrong-doers or before the offence is committed, or if with a view to protect his own interest or that of others pretends to associate with such persons with the object of preventing the commission of an offence by giving timely information to the authorities, he is not an accomplice. But however good the motive may be, if such a person or a spy or an informer in the exuberance of his entusiasm actually instigates another to commit a crime even if it be for detection of offence or to get the credit of having him arrested, he is an abettor under the penal law and his position cannot be anything other than that of an accomplice [see *R v. Jhavi Charan* and *In re Koganti Appaya, post*; *Lakshminarayana v. R*, 1917 MWN 831: A 1918 M 738; *R v. Dinkar*, 55 A 654; *S v. Minaketan*, A 1952 Or 267; *Nityanand v. S*, A 1954 Pu 89]. So, when officials lay a trap and incite bribery, the officials and bribe givers would be in the

position of accomplices [*In re Chandrasekhara*, Cr P C No 333 of 1950: 1951, 1 MLJ p 45 notes].

The Supreme Court severely condemned the action of the police authorities in supplying the bribe money to the giver in order to entrap accused and secure the commission of the offence. It is the duty of the police to prevent crimes being committed and not to provide the instruments of the offence [*Shiv Bahadur v. S*, A 1954 SC 322: 1954 SCR 1098; *S v. Basawan*, A 1958 SC 500: 1959 SCR 195; see also *Ramjanam v. S*, A 1956 SC 643, 651]. In *Ramjanam v. S, sup* BOSE J, observed: "Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; and more particularly by those who are the guardians and the keepers of the law. However regrettable the necessity of employing *agents provocatures* may be .....it is one thing to tempt a suspected offender to obvert action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which has been finally and firmly decided shall not be done. The very best of men have moments of weakness and temptation and even the worst, times when they repent of an evil thought....." Held, that this was not a case of laying a trap in the usual way, for a man who was demanding a bribe but of deliberately tempting a man to his own undoing after his suggestion about breaking the law had been finally and conclusively rejected with considerable emphasis and decision (*Shiv Bahadur v. S, sup* **reld on**).

In *Brannan v. Peek*, 1947, 2 All ER 572: 63 TLR 592, LORD GODDARD CJ, observed:

> "The court observes with concern and disapproval the fact the police authority at Derby thought it right to send a police officer into a public house to commit an offence.....It cannot be too strongly emphasised that.....
>
> It is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected.....I hope the day is far distant when it will become a common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against some one; if they do commit offences, they ought also to be convicted and punished for the order of their superior would afford no defence."

The observations of LORD GODDARD above were quoted with approval with the substitution of the words "did an act of prostitution" for "to commit an offence" in a case under Suppression of Immoral Traffic in Women and Girls Act, 1956, where a lewd person and a school boy were employed by the police and provided with a marked note to entrap a woman into committing an offence under the Act [*Kamalabai v. S*, A 1962 SC 1189].

The officers of anti-corruption department must seriously endeavour to secure really independent and respectable witnesses of raid [*Raghbir v. S*, A 1976 SC 91].

Great disapprobation was expressed of the practice of requisitioning the service of magistrates as witnesses of police traps [*Mitra v. S*, A 1951 C 524; see also *In re Jacob*, A 1961 M 482]. The independence and impartiality of the judiciary require that magistrates should not be relegated to the position of partisan witnesses by the requisition of their services as witnesses to police traps. The principles on which magistrates are employed as witnesses of police traps have hardly any application where the magistrates are executive magistrates or officers of Anti-Corruption

Accomplice.

Department [*S v. Basawan*, A 1958 SC 500]. It is not necessary that executive magistrates should always keep away from operations to catch the criminal red-handed. He is not so strongly motivated to get a suspect somehow or other punished. Where no *de novo* temptation nor bribe money was offered by the police in the trap and the executive magistrate merely sought to do his public duty of intercepting a crime which was in the process of fulfillment, the veracity of his testimoney cannot be discredited [*Raghubir v. S*, A 1974 SC 1516 (*S v. Basawan*, A 1958 SC 500 rel on)]. Though the detection of crimes by laying traps is not deemed commendable and may be justified in cases of peculiar difficulty and though a mere spy or detective or decoy may not be an accomplice in law, the evidence of such a person or an *agent provocature* is looked upon with suspicion and cannot be relied upon for a conviction without corroboration [*Hazura v. R*, A 1929 L 436 : 118 IC 544; see *Venkatarao v. R*, 5 DLR (Cut) 23; *R v. Anwar Ali*, A 1948 L 27; *Nityanand v. S*, A 1954 Pu 89; *R v. Rogers*, 1926, 4 DLR (Canada) 609; *R v. Tommy*, 1930, 1 DLR (Canada) 973; *S v. Minaketan*, A 1952 Or 267; *Pub Pro v. Thomas*, A 1959 M 166; *Bahal v. S*, A 1960 Pu 641].

A court may well be justified in acting upon the uncorroborated testimony of a trap witness if the court is satisfied from the facts and circumstances of the case that the witness is a witness of truth [*Jadunath Khatna v. The State*, 1982 Cri LJ 954, 959 (Orissa)]. The evidence of trap witnesses should be scrutinised carefully [*Balaram Singh v. State of Orissa*, 1984 Cri LJ NOC 21 : (1983) 56 Cut LT 372 (Ori)]. In a trap case, the evidence of the complainant decoy cannot be accepted without independent corroboration [*Sadashiv Mahadeo Yavaluje & Gajanan Shripatra Solokhe v. The State of Maharashtra*, A 1990 287, 290 : 1990 Cri LJ 600 (SC)]. In a trap case, the panch witness was not known to the complainant earlier and he was not secured by the complainant. His evidence can be accepted [*State of Gujarat v. Monabhai Jethabhaj Vaghela*, 1982 Cri LJ 1317, 1322 : (1982) Guj LH 271 (Guj)]; the weight to be attached depends on the character of each individual witness [*R v. Chaturbhuj, post*]. While assessing the evidence of a trap witness the approach should not be with a tainted eye and an innate prejudice. Every minor detail or omission should not be magnified to falsify or throw a doubt on the prosecution evidence. If such a harsh touchstone is prescribed to prove a case it will be difficult for the prosecution to establish any case at all [*State of Maharashtra v. Narsingrao Gangaram Pimple*, A 1984 SC 63 : 1984 Cri LJ 4]. Independent corroboration of the evidence of the accomplice does not mean a corroboration of every detail of what the witnesses of the raiding party in a trap case have stated and all that is required even in respect of evidence of an accomplice is that there must be some additional evidence rendering it probable that the story of the accomplice is true and it is reasonably safe to act upon it. Corroboration need not be direct evidence and even circumstantial evidence in that regard would be sufficient [*Ramnarayana Patnaik v. State*, 1989 Cri LJ 172, 174 : (1988) 1 Crimes 903 (Ori)]. A distinction has sometimes been drawn between "legitimate" and "illegitimate trap", in the latter case persons taking part in tempting the accused are all accomplices [*In re Mohiddin*, A 1952 M 561; *In re Jacob sup*; *Cherian v. S*, A 1968 K 60]. A trap laid for staging an offence is reprehensible but not a trap to detect payment of bribe in the normal course of business [*S v. Har Pd*, A 1958 A 334]. A habitual bribe giver to secure his own object subsequently becomes a trap witness is in the position of an accomplice [*In re Venkatarama*, A 1957 AP 441]. It is imprudent to employ a constable as a decoy for purchase of contraband opium, as the evidence of such witness is likely to be looked at with suspicion [*S v. Kanhaiyalal*, A 1964 MP 11].

The evidence of witnesses not willing party to the giving of bribe, but who are only actuated with the motive of trapping the accused cannot be treated as that of

accomplices. Nevertheless their evidence being that of partisan witnesses cannot be relied upon without independent corroboration [*Shiv Bahadur v. S*, 1954 SC 322; *Ram Kr v. Delhi State*, A 1956 SC 476 : 1956 SCR 182]. Though the court rejects the evidence of such witness in regard to some events on account of inconsistency with other parts, the court can accept the evidence given in regard to other parts when it is corroborated by disinterested witnesses [*Barsay v. S*, A 1961 SC 1762 : 1962, 2 SCR 195].

Shiv Bahadur v. S, 1954 SCR 1098 : A 1954 SC 322 did not lay down any inflexible rule that the evidence of a raiding party must be discarded in the absence of independent corroboration. The correct rule is that if such witnesses are accomplices who are *participes criminis*, their evidence must be treated in the same way as that of accomplices; if they are not accomplices but are partisan or interested witnesses concerned in the success of the trap, their evidence must be treated in the same way as other interested evidence by the application of diverse considerations and in a proper case the court may even look for independent corroboration [*S v. Basawan*, A 1958 SC 500; *Bhanuprasad v. S*, A 1968 SC 1323; *Ramprasad v. S*, A 1973 SC 498]. To convict upon such partisan evidence is neither illegal nor imprudence, but inadvisable [*Ramchand v. S*, A 1956 B 287; see also *Banuprasad v. S, sup*; *Dalpat v. S*, A 1969 SC 17] for the hazard of holding a man guilty on interested, even if honest, evidence may impair confidence in the system of justice [*Somparkash v. S*, A 1974 SC 989]. In a trap case police officials cannot be discredited merely because they are police officials, nor can other witnesses be rejected because they have been prosecution witnesses in the past. The court has to view the evidence in the light of the probabilities and the intrinsic credibility of witnesses [*Gian Singh v. S*, A 1974 SC 1024]. If the position of a witness is analogous to that of an accomplice, corroboration in material particulars would be required [*Vemireddy v. S*, 1956 SCR 347 : A 1956 SC 379; **explained** in *Ramratan v. S*, A 1962 SC 424, 428 : 1962, 3 SCR 590]. It cannot be said that the evidence of every panch witness who takes part in the laying of a trap in case of bribery can be regarded as evidence of partisan witness. Whether or not he is a partisan witness would depend on the circumstances of each case [*Jairamdas v. S*, A 1956 B 426 : 1956 Cri LJ 725; *Ambalal v. S*, A 1961 G 1]. Though it may be acted upon, the value of the evidence of a spy or decoy depends upon the character of the person employed. Where, however, the spy or the police goes beyond the limit of collecting evidence and instigates or solicits the commission of a crime, he would be guilty of abetment. He is no better than an *agent provocatuer*. His evidence cannot be proof of the fact without corroboration [*S v. Minaketan*, A 1952 Or 267].

Same.—Accused No 2 was charged with receiving stolen property (railway tickets) knowing the same to be stolen from accused No 1 a ticket-collector. A spy and informer instigated the offence by offering to buy some of the tickets from him—*Held* that the action of a spy and informer in suggesting and initiating a criminal offence is itself an offence, the act not being excused or justified by any exception in the Penal Code, or by the doctrine which distinguishes the spy from the accomplice. But the act of a detective in supplying marked money for the detection of a crime cannot be treated as that of an accomplice [*R v. Javi Charan*, 19 B 363; see also *R v. Mona Puna*, 16 B 661; *R v. Javi Charan* is opposed to the later case of *R v. Bickley, sup*]. At the instigation of the Excise Deputy Collector a student supplied with money purchased several phials of cocaine from accused—*Held* that the student was not an accomplice but a spy or detective and his evidence could be acted upon without corrobration. A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence, either

before associating with wrong-doers or before the actual perpetration of the offence, is not an accomplice but a spy, detective or decoy whose evidence requires no corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission, is an accomplice requiring corroboration [*R v. Chaturbhuj*, 38 C 96: 15 CWN 171 (*R v. Bickley, sup* **folld**); see also *Mohan v. R*, A 1947 N 109; *R v Singh Rai*, A 1951 Or 297; *S v. Hiralal*, A 1952 N 58; *Bhuneswari v. R*, A 1931 O 172; *Mangat Rai v. R*, A 1928 L 647; *Abujam v. S*, A 1954 M 326]. Although in *R v. Chaturbhuj* and in *R v. Javi Charan, sup* both the Calcutta and Bombay High Courts relied upon the principle in *R v. Mullins, sup* different conclusions were arrived at].

Even if the object of a person who instigates another to commit a crime is to catch him in the act of committing the crime, instigation by him nevertheless amounts to an abetment and he must be regarded as an accomplice when the object of the instigation is to make the offender commit the offence and the person instigated actually commits offence [*In re Koganti Appayya*, A 1938 M 893: 1938 MWN 825].

A detective supplying marked money and placing bets with the accused for detection of crime cannot be treated as an accomplice [*Govinda Balaji v. R*, A 1936 N 245]. A policemen or other person procuring an illegal sale of liquor in order to obtain a conviction is not an accomplice [*R v. Bastin*, LBR (1893-1900) 365 (LBR 1872-92, 146 **overruled**); *R v. Nga Swe*, UBR 1897-1901 Vol 1, 176]. A person was present when the plans for a decoity were hatched up and was invited to join. He agreed to go to the meeting-place armed, but went unarmed and remained there with the conspirators for six hours and took part in the preparations for the time. It was ultimately decided to postpone the dacoity till the moon had gone down and when he was sent to town to get food for some of the offenders, he sent information to the police—*held* he was an accomplice and his evidence needed corroboration [*Karim v. R*, A 1928 L 193: 9 L 550 : 109 IC 593. **Relied** on in *Mangat v. R*, A 1928 L 647].

In a single judge decision in Madras it has been observed that the evidence of informer or decoys requires corroboration, but there is no reference to any authority [*In re Sethuram*, 1951, 1 MLJ 586]. In Oudh also it has been held that evidence of spy requires corroboration like that of an accomplice [*Surat v. R*, 81 IC 896 : 11 OLJ 640—CONRTA: *Bhuneswari v. R*, A 1931 O 172]. Bogus punters who are police agents are accomplices and they must be corroborated by independent evidence [*R v. Harilal*, A 1937 B 385: 1937 Bom 670; *Hormazdyar v. R*, A 1948 B 250: 50 Bom LR 163; *Tarsem v. S*, A 1960 Pu 72]. Punter's evidence should be accepted with caution [*S v. Shambhudayal*, A 1957 MP 17].

Accomplice is Unworthy of Credit—Its Reasons.—An approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility [*Ravinder v. S*, A 1975 SC 856]. The testimony of a man of the very lowest character who has thrown to the wolves his erstwhile associates and friends in order to save his own skin and who is a criminal and has purchased his liberty by betrayal, must be received with very great caution [*Amar v. R*, A 1931 L 406; *Indar v. R*, A 1931 L 408]. The principal reasons for holding accomplice evidence to be untrustworthy, are:—(*1*) because an accomplice is likely to swear falsely in order to shift the guilt from himself; (2) because an accomplice being a participator in crime, and consequently an immoral person, is likely to disregard the sanction of an oath; (*3*) because an accomplice gives his evidence under the promise of a pardon, or in the expectation of an implied pardon; if he discloses all he knows against those with whom he acted criminally, and this hope would lead him to favour the prosecution [*per* SCOTT

J, in *R v. Maganlal*, 14 B 115; *Md Usaf v. R*, A 1929 N 215]. The statements of approvers are always regarded as tainted and not entitled to the same weight as the evidence of ordinary witnesses [*R v. Bepin*, 10 C 970, 975; *Rajani Kanto v. Asan Mullick*, 2 CWN 672; *Kamala v. Sital*, 5 CWN 617; *R v. Naro Bhaswar*, 7 Bom LR 969]. The term 'accomplice' signifies a guilty associate in crime or one who sustains such a relation to the criminal act that he can be jointly indicted with the principal [*Mohammed Sardar v. State of H P*, 1988 Cri LJ NOC 80 : (1988)2 SIM LC 104 (HP)]. Apart from corroboration, the evidence of the accomplice is at variance with the evidence of another witness on a material point as to who gave that witness the pocket of brown sugar. So the evidence of the accomplice cannot be accepted [*Nafiz Ahmed v. State*, 1989 Cri LJ 1296, 1298 (1988) 3 Crimes 187 (Bom)]. Sec 133 incorporates the rule of prudence because an accomplice who betrays his associates is not a fair witness and it is possible he may to please the prosecution, weave false details into those which are true and his whole story appearing true, there may be no means at hand to sever the false from that which is true [*Godrej Soap Ltd v. State*, 1991 Cri LJ 859, 866 (MP)]. Sometimes an accomplice would have acted under pressure. Such person, though technically be turned as accomplice, may not really evince suspicion in the mind of the court about his role; the witness in the case lent his taxi car for transporting the dead body, without even knowing that it was the dead body of a murdered person. At the last stage when he was told that the deceased happened to die accidently in sexual intercourse, he became panic-stricken and could not help since his part was by then over. There is no legal taboo in using his testimony as a piece of corroborative evidence [*Sathyaseelan v. State*, 1991 Cri LJ 2941, 2945 (Ker)].

Conviction on Accomplice Evidence Without Corroboration.—Conviction does not become illegal because it is based on uncorroborated testimony of an accomplice. However, s 133 read with s 114 *illus* (*b*) requires that the court should seek as a rule of prudence for corroboration. The court should first evaluate the approver's evidence and if the same is uninspiring and unacceptable corroboration would be futile [*Ramnarain v. S*, A 1973 SC 1188: *Ravinder v. S*, A 1975 SC 856; *Dagdu v. S*, A 1977 SC 1579; *G S Bakshi v. S*, A 1979 SC 569]. Does the evidence of an accomplice require corroboration in material particulars, before it can be acted upon? It was held (by BENSON, WALLIS & MILLER JJ), that s 133 read with s 114 *illus* (*b*) lays down that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon and that it is open to the court to convict upon the uncorroborated testimony of an accomplice if the court is satisfied that the evidence is true. There is nothing in *illus* (*b*) which overrides or renders nugatory the plain and explicit declaration in s 133—*per* BENSON J. The illustrations in s 114 are all presumptions which may naturally arise but the legislature has by the use of the word "may" instead of "shall" both in the body of the section and in the illustrations, shows that the court is not compelled to raise them, but is to consider whether in all the circumstances of the particular case, they should be raised [*per* WALLIS J, in *Muthukumaraswamy v. R*, 35 M 397. See also *R v. Ramaswami*, 1 M 394; *In re Elahee Buksh*, 5 WR Cr 80; *R v. Kunjan*, 1 MLJ 397; *R v. Hanmant*, 6 Bom LR 443; *R v. Kuberappa*, 15 Bom LR 288; *Balchand v. R*, 49 A 81: A 1927 A 90; *Joseph v. R*, 3 R 11: 85 IC 236; *Abdul Waheb v R*, 47 A 39; *R v. Nilkant*, 35 M 247; *Balmokand v. R*, 17 PR 1915 Cr; *Barkat v. R*, 2 PR 1917 Cr; *Rattan v. R*, 8 P 235: A 1928 P 630; *Daulat v. R*, A 1930 N 97; *Raghunath v. R*, A 1933 P 96; *In re Rajagopal*, A 1944 M 117]. These and other similar cases state the well-known principle that accomplice evidence is legal evidence and court may act on it if believed. But the equally well-known rule of practice demands corroboration in material particulars before it is acted upon save in exceptional cases (see *post*).

Though there is no legal necessity to seek corroboration of accomplice's evidence it is desirable that court seeks reassuring circumstances to satisfy the judicial conscience that the evidence is true [*State of T.N. v. Suresh*, 1998 Cri LJ 1416 (SC)]. The evidence of the approver should not only be corroborated generally but also *qua* each accused. However, independent corroboration of every particular circumstance from independent source is not necessary [*A. Deivendran v. State of T.N.*, 1998 Cri LJ 814 (SC)]. If the evidence of the accomplice is not totally bereft of reassuring circumstances, the accused can be convicted on the basis of such evidence [*State of T.N. v. Suresh*, A 1998 SC 1044].

If the judge after making the allowance for the consideration and probabilities of the story, comes to the conclusion, that the evidence of the accomplice, although uncorroborated, is true, and the evidence if believed estiblishes the guilt of the accused, it is his duty to convict [*R v. Gobardhan*, 9 A 528; see *Lalan v. R*, 16 CWN 669, *Mohan Wahi v. State*, 1982 Cri LJ 2040, 2043 : (1982) 22 DLT 138 (Del), *State of Maharashtra v. Chandraprakash Kewal Chand*, A 1990 SC 658, 663]. Where the prosecution relies on the evidence of an accomplice and where (in contrast with the instant case) the independent evidence capable of providing corroboration is not by itself sufficient to establish guilt, it will have become obvious to the jury in the course of the trial that the credibility of the accomplice is at the heart of the matter and they can only convict if they, believe him [*Attorney-General of Hong Kong v. Wong Muk Ping*, (1987) 2 AER 488, 495 (PC)]. 'May' is not 'must' and no decision of court can make it 'must'. The court is not obliged to hold that an accomplice is unworthy of credit and must be corroborated. Therefore in law the evidence of an accomplice stands on the same footing as any other evidence [*R v. Mathews*, A 1929 C 822; *Jagannath v. R*, 17 Luck 516: A 1942 O 221; *Jagdish v. R*, A1942 O 163; *Debidayal v. R*, A 1942 O 435; *R v. Nga Myo*, 1938 Rang LR 190 FB]. It is not imperative that in every case there should be corroboration though it is generally desirable to have such corroboration [*Sarat v. R*, A 1934 C 719 FB; *S v. Anil*, A 1952 C 534].

The degree of suspicion which will attach to accomplice evidence must, however, vary according to the nature and extent of the complicity; sometimes the accomplice is "not a willing participant in the offence but a victim of it". When the accomplices act under a form of pressure which it would require some firmness to resist, reliance may be placed on their uncorroborated testimony [*Sriniwas Mall v. R*, A 1947 PC 135: 51 CWN 900]. Although it is unsafe to convict on accomplice evidence without corroboration, it must be remembered in applying the maxim that all persons technically coming within accomplices cannot be treated as on precisely the same footing [*R v. Malhar*, 26 B 193; *Md Usaf v. R*, A 1929 N 215: 114 IC 457].

There is no positive legal bar to taking the evidence of an accomplice supported only by the confession of a co-accused, or an approver's evidence as a basis for conviction, but it has long been a rule of practice and prudence not to act upon it without independent and substantial corroboration [*Bhuboni v. R*, A 1949 PC 257; *Mg Lay v. R*, 77 IC 429; *R v. Jamaldi*, 51 C 160; *Partap v. R*, 96 IC 127: A 1926 A 705; *Barkati v. R*, 103 IC 49: A 1927 L 581; *Lale v. R*, A 1929 O 321; *Musa v. R*, A 1929 N 233; *Samunder v. S*, A 1965 C 598. *See post*: "*The Rule as to Corroboration Has Became a Rule of Pratice, &c*"]. A conviction will not be disturbed on the mere ground that the said rule of practice has not been adhered to by the court which has convicted, unless there are exceptional circumstances calling for the exercise of the revisional jurisdiction in the interests of justice [*R v. Lallubhai*, 11 Bom LR 858].

—Bribery.—The rule of corroboration, if it applies at all, applies with very little force to cases in which accused is charged with extorting bribe from persons, as the

giver of bribe is not a willing participant but a victim of the offence [*Papa Kamal v. R*, 59 B 486 (approved by the PC in *Srinivas Mall v. R, sup*; *Narayan v. R*, A 1948 N 342)]. In cases of bribe given on account of threat or fear, conviction can be based on accomplice evidence if believed. Even if corroboration is considered desirable, a less strict standard may be accepted [*Biswabhusan v. S*, A 1952 Or 289].

The consideration that an accomplice is likely to swear falsely in order to shift the guilt for himself, hardly applies to the evidence of one who testifies that he has bribed the accused, for by his own testimony so far from shifting the offence from himself, he in fact thereby fastens it upon himself, for it is by making out to be a briber that he shows another has been bribed [*R v. Srinivas Krishna* and *R v. Naro Bhaskar*, 7 Bom LR 969]. Conviction for bribery on uncorroborated testimony of the person who paid the bribe (who is in a sense accomplice) if believed is legal [*Bhattacharya v. R*, 48 CWN 632; see *Deonandan v. R*, 33 C 649]. See also *ante*: "*Bribery cases*".

Necessity For Corroboration.—Necessity and test for corroboration indicated [*Ravinder v. S*, A 1975 SC 856; *Public Prosecutor v. Sarjeet Singh*, (1994) 2 Malayan LJ 290 (Taiping HC)]. Where the evidence of an accomplice is received, *the agree of credit* which ought to be given to his testimony is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence; and without doubt great caution in weighing such evidence is dictated by prudence and reason. But no positive rule of law exists on the subject; and the jury may, if they please, act upon the evidence of the accomplice, even in a capital case without any confirmation of his statement [*R v. Stubbs*, 25 LJMC 16; *R v. Hastings*, 7 C & P 152]. It may be regarded as the settled course of practice, not to convict a prisoner, except under very special circumstances upon the uncorroborated testimony of an accomplice [Tay s 967]. When a person is concerned in a crime and has been discovered, he is likely to swear falsely in order to shift the guilt from himself. A participator in crime, being a person of bad character, his evidence is open to suspicion; and thirdly, evidence given in expectation of any hope of pardon is sure to be biased in favour of the prosecution. For these reasons, although the law declares that a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice, the courts have held that ordinarily speaking the evidence of an accomplice should be corroborated in material particulars and the practice which has been laid down has become, one may say a part of the law itself; at the same time, it is quite clear from the cases that the amount of criminality is a matter for consideration [*Kamala v. Sital*, 5 CWN 617: 28 C 393; see *Mannalal v. R*, 75 IC 753]. Consideration of possible self interests [*Sagar v. Public Prosecutor*, (1995) 1 Singapore LR 660 (Singapore CA)].

The testimony of an accomplice can be accepted only if corroborated by independent evidence either direct or circumstantial [*Mohan v. State*, 1996 Cri LJ 48, 53 (Mad)]. Testimony of accomplice can be made the basis for conviction if it is corroborated in material particulars [*Rampal Pithwa Rahidass v. State of Maharashtra*, 1994 Cri LJ 2320, 2324 (SC)]. Evidence of accomplice need not be corroborated on all circumstances of the case or every details of the crime. It would be sufficient to have corroboration as to material circumstance of crime and of the identity of the accused [*Vinit v. State of Maharashtra*, 1994 Cri LJ 1791, 1798 (Bom)]. There is no rule of law that one accomplice cannot corroborate another [*R v. Cheema*, (1994) 1 All ER 639]. Although it is not always safe to rely on the evidence of an accomplice, but it is not the law that under no circumstances the evidence of an accomplice shall be relied on. "Even in respect of evidence of an accomplice, all that is required, is that there must be some additional evidence requiring it probable that

the story of the accomplice is true and that it is reasonably safe to act upon it. Corroboration need not be direct evidence that the accused committed the crime, it is sufficient even though it is merely circumstantial evidence." [*Vasudevan v. State*, 1993 Cri LJ 3151 (Ker). See also *State of Bihar v. Basawan Singh*, A 1958 SC 500 : 1958 Cri LJ 976]. The evidence of an accomplice being that of an interested witness or tainted one, caution requires that there should be corroboration from an independent source in some material aspect not only commission of crime but also his involvement in it, before its acceptance [*Vinit v. State of Maharashtra*, 1994 Cri LJ 1791, 1798 (Bom)]. Testimony of the approver about the injuries caused on the person of the deceased corroborated with medical evidence cannot be discarded on the ground of absence of injuries caused by the blunt weapon of lathi in his testimony. Hence, the conviction of the accused was held, proper [*Balbir Singh v. State of Rajasthan*, A 1997 SC 1704 : 1997 Cri LJ 1179].

As it is tainted evidence an approver's evidence has to satisfy a double test: First his evidence must be reliable and that is a test which is common to all witnesses. If this test is satisfied, the second test which still remains to be applied is that it must be sufficiently corroborated. This test is special to the cases of weak or tainted evidence like that of an approver [*Sarwan Singh v. S*, A 1957 SC 637: 1957 Pu 1602; **folld** in *Lachhi Ram v. S*, A 1967 SC 793; *Seshamma v. S*, A 1970 SC 1330]. The Supreme Court pointed out that the observations (regarding the double test) were made in the special circumstances for the case when dealing with the approver Sarwan Singh who had been found to be a wholly unreliable witness. "It is important to observe that this court stated (in *Sarwan's* case) that the approver's evidence must show that he is a reliable witness and that is the test which is common to all witnesses" [*Jnanendra v. S*, A 1959 SC 1119: 1960, 1 SCR 126)]. Explaining *Sarwan's* case further it has been observed that the Supreme Court could not have intended to lay down that the evidence of an apporver and the corroborating pieces of evidence should be treated in two different compartments. In *Sarwan's* case the evidence of the approver was so thoroughly discrepant that he was considered wholly unreliable. But in most cases the said two aspects (evidence of approver and corroborating evidence) would be so inter-connected that it would not be possible to give a separate treatment, for as often as not the reliability of an approver's evidence, though not exclusively, would mostly depend upon the corroborative support it derives from other unimpeachable pieces of evidence [*Barsay v. S*, A 1962 SC 1762: 1962, 2 SCR 195; *Saravanabhavan v. S*, A 1966 SC 1273].

The utmost caution is necessary in admitting or using the evidence of an approver. It not only requires corroboration in material particulars for its use, but its evidentiary value depends considerably upon the circumstances under which his evidence is tendered [*Banu Singh v. R*, 33 C 1353: 10 CWN 962]. Though absence of corroboration is not fatal to conviction, it is enough to cast doubts upon its justice and the accused is entitled to the benefit of the doubt [*Allauddin v. R*, 52 IC 49: 20 Cri LJ 561]. An accused cannot be convicted unless the evidence of the accomplice is corroborated in some material and satisfactory manner [*R v. Nanho*, 9 WR Cr 28; *Dhannu v. R*, 2 Pat LT 757; *Sardare v. R*, 63 IC 612; *Feroz Khan v. R*, 86 IC 401: 6 LLJ 608; *Hulas v. R*, 44 CLJ 216; *Jang v. R*, 96 IC 262; *R v. Satish*, 54 C 721: 31 CWN 554: *Ram Pd v. R*, A 1927 O 369; *Chanan v. R*, 99 IC 929: A 1927 L 78; *Barkati v. R*, 103 IC 49: A 1927 I 581; *Surendra v. R*, A 1932 C 377; Dangers of convicting without corroboration indicated [*Mohamed Hassan v. Public Prosecutor*, 1952 Malayan LJ 5 (Kota Bharu HC); *Rauf v. Public Prosecutor*, 1950 Malayan LJ 190 (Perak HC); *Koay Chooi v. R*, 1955 Malayan LJ 209 (Penang HC); *Daimon Bin Banda v. Public Prosecutor*, 1951 Malayan LJ 11 (Kuala Lumpur HC)].

It is the duty of the prosecution, to bring the accomplice character of the evidence to the notice of the court and then to invite belief by reference to corroborative evidence. It cannot be urged in appeal that it was never suggested in the trial court that a witness was an accomplice. The accused can keep quiet and take advantage of flaw in evidence [*Md Usaf v. R*, A 1929 N 215].

The rule of corroboration of accomplice evidence can have no application where the evidence is led only for the purpose of proving that the complainant was in possession of some property alleged to be stolen [*S v. Basappa*, A 1956 B 341].

Same: [Nature and Extent of Corroboration].—Ordinarily an approver's statement has to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony [*Ravinder v. S*, A 1975 SC 856]. But although in ordinary criminal trials, it is the settled practice to require other evidence in corroboration of that of an accomplice; yet the *manner and extent of the corroboration* required are not so clearly defined; but it should be substantial [*R v. Tate*, 1908, 2 KB 680]. Some judges have deemed it sufficient, if the witness be confirmed in any material part of the case; others have been satisfied with confirmatory evidence as to *corpus delicti* only; but others, with more reasons, have thought it essential that corroborative proof should be given of the prisoner having actually participated in the offence: and, when several prisoners are tried, the confirmation should be required as to all of them, before all can be safely convicted [*R v. Stubbs*, 1855, 25 LJMC 16]. The last is undoubtedly now the prevailing opinion; the confirmation of the witness, as to the commission of the crime, being considered no confirmation at all, as it respects the prisoner. For, in describing the circumstances of the offence, he may have no inducement to speak falsely, but on the contrary every motive to declare the truth, if he wishes to be when he shall afterwards endeavour to fix to declare the truth, if he wishes to be believed when he shall afterwards endeavour to fix the crime upon the prisoner [*R v. Farler*, 8 C & P 106; *R v. Wilkes*, 7 C & P 272; *R v. Moores*, 7 C &P 270; Tay s 969]. In the leading case of *R v. Baskerville* (*post*) it has been held that the better point of the law is that stated in *R v. Stubbs, sup*. It is also the rule here that corroboration must relate to the crime, identity of each prisoner, material circumstances &c (*post*: "*Summary of law as to corroboration*").

There is nothing to suggest that the word "corroboration" in India has a specified and different meaning from that which it bears in other countries. Corroboration means independent testimony. The nature of the corroboration required is not mere evidence of a tainted kind but fresh evidence of an untainted kind [*Nga Aung v. R*, 1937 Rang 110: A 1937 R 209]. LORD ABINGER said in *R v. Farler, sup*:—

> "In my opinion that corroboration ought to consist in some circumstance that affect *the identity of the party accused*. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break upon a house and put a knife to your throat, and steal your property, it would be no corroboration that he had stated the facts correctly, that he had described how the person did put a knife to the throat, and did steal the property. It would not at all tend to show that the party accused participated in it..... .....The danger is, that when a man is fixed, and knows that his guilt is detected, he will purchase immunity by falsely accusing others." [See also, *Ambika v. R*, 35 CWN 1270: A 1981 C 697 SB].

The corroboration required is corroboration in *material particular* [v s 114 *illus* (*b*)] connecting or tending to connect each of the accused with the offence [*Hachuni v. R*, 34 CWN 390; *Rebati v. R*, 32 CWN 945]. Testimony of an accomplice cannot be accepted in any material particular in the absence of corroboration from reliable sources [*S v. V. C. Shukla*, A 1980 S 1382]. It is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused [*R v. Baskerville*, 1916, 2 KB 658; see *Jamiruddin v. R*, 29 C 786, *post*]. Corroboration of an approver in a trial under s 400 I P Code must connect the accused with the offence, *viz*, the association of a gang for the business of habitually committing dacoity [*Kader Sardar v. R*, 16 CWN 69].

There should be corroboration on material particulars and qua each accused. One of the prosecution witness said that the approver had made a confession of his participation in the murder. The other witness stated that the knife was prepared by him at the instance of the accused nine weeks before the murder. The statement of the first witness was no corroboration of the approver, nor was the statement of the other witness a corroboration as the time gap was great. The finding of the knife at the instance of the first accused was also no corroboration of the approver's story [*Bhiva Doulu v. S*, A 1963 SC 599].

The corroboration need not be of a kind which proves the offence against the accused. It is sufficient if it connects the accused with the crime [*Swaminathan v. S*, A 1957 SC 340]. The corroboration need not consist of evidence which standing alone would be sufficient to justify the conviction. All that is required is that there should be sufficient corroborative evidence to show that the approver is speaking the truth with regard to the accused whom he seeks to implicate [*Bishnupada v. R*, A 1945 C 411; *Autar Singh v. S*, A 1960 Pu 364; *Rameshwar v. S*, A 1952 SC 54; see *Swaminathan v. S, sup*; *Ambika v. R*, 35 CWN 1270].

It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case apart from the testimony of the complainant or the accomplice should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it [*Rameshwar v. S*, A 1952 SC 54 : 1952 SCR 377; *Haroon v. S*, A 1968 SC 833]. Independent corroboration does not mean that every detail must be corroborated by independent witnesses. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice is true. Corroboration need not be direct; it may be circumstantial [*S v. Basawan*, A 1958 SC 500: 1959 SCR 195; *Ramanlal v. S*, A 1960 SC 961; *Tribhuvan v. S*, A 1973 SC 450]. In a conspiracy case if there is corroboration not only of the general facts of the existence of conspiracy but also of the participation in it of any particular accused, corroboration of all the specific acts would not be necessary unless the evidence of the accomplice is intrinsically open to suspicion [*Satyanarayan v. R*, 22 P 681: A 1924 P 67]. If there be any suspicion of false implication the confession must be discarded as of no probative value. It is only when false implication is excluded after scrutiny that confession of a co-accused can be used to lend assurance to other evidence [*Haroon v. S*, A 1968 SC 832]. When the approver's evidence makes a deep impression of veracity, the minimum of corroboration is necessary [*Gopaldas v. R*, 1944 Kar 456: A 1945 S 132].

Independent corroboration need not cover the whole of the prosecution story or even all the material particulars. For that would render the evidence of the accomplice wholly superfluous. On the other hand corroboration in major particulars or

incidental details does not afford the necessary assurance [*Sarwan Singh v. S*, A 1957 SC 637].

The judge should give a broad indication of the sort of evidence which the jury, if they accept it, may treat as corroboration, but he is not expected to refer in the summing up to every piece of evidence which is capable of amounting to corroboration [*R v. Goddard &c*, 1962, 3 All ER 582].

As to the nature of corroboration and the circumstances in which it should be sought, when a person is accused of a crime and the evidence against him is partly or wholly that of an accomplice or accomplices, the following propositions have been laid down in *R v. Nga Myo*, A 1938 R 177 FB:—

> *1st*: Provided that it has been established by extraneous evidence or matters appearing on the record that the accomplices are not acting in collusion with one another, the cumulative effect of the evidence of two or more of them may be sufficient to remove the *prima facie* presumption of the individual unworthiness of credit of their statements, and if this be the case, a conviction may legitimately be recorded upon their statements alone, if the court is convinced of their truth. The same observation applies to the cumulative effect of the evidence of an accomplice and the confession of a co-accused when presumption of their unreliability has, in the special circumstances, been rebutted.
>
> *2ndly*: that evidence from a source which is not *prima facie* unworthy of credit may prove a fact which displaces in a particular case the presumption that an accomplice is unworthy or credit.
>
> *3rdly*: that corroboration must proceed from a source extraneous to the person whose testimony it is sought to corroborate. But it may consist of extraneous proof of a fact relating to that very person's prior conduct. What has been said of accomplices applies to approvers and *vice versa* (*dicta* in *Aung Hla v. R*, 9 R 804 and *Nga Aung v. R*, 1937 Rang 110 superseded is so far as they differ from the conclusion above).

The view that before reliance on his evidence an approver must appear to be penitent is not legally correct. Whether his evidence should be accepted or not will have to be determined by applying the usual tests, such as probability of truth of what he said, whether he made a full and complete disclosure, whether his evidence is merely self-exculpatory and so on. In addition it has to be ascertained whether his evidence has been corroborated in material particulars [*S v. Nageswara*, A 1963 SC 1850].

Where the chain of the circumstantial evidence proved against the accused was not explainable on any other hypothesis except that of guilt of murder, the circumstantial evidence constituted substantial and sufficient corroboration of the approver's statement in material particulars [*Maghar v. S*, A 1975 SC 1320].

Same: [*R v. Baskerville*, 1916, 2 KB 658].—The fullest, clearest and the most authoritative exposition of the law is to be found in *R v. Baskerville*, 1916, 2 KB 658: 86 LJKB 28: 80 JP 466: 115 LT 543, where all the leading authorities, some of which are conflicting, were reviewed and the principles applicable were stated in the clearest possible terms by the Court of Appeal consisting of five judges (READING LCJ, SCRUTTON, AVORY, ROWLATT and ATKIN, JJ). This is unquestionably the *locus classicus* of the law of approver's evidence. The facts of the case may be shortly stated: Baskerville was charged of an offence under s 11 Cr Law Am Act, 1885, (acts of gross indecency) with two boys and convicted. The only corroboration of their

statements was to be found in a letter sent by the accused to one of the boys enclosing a note for ten shillings. The words of the letter were capable of innocent construction. The letter was held to be sufficient corroboration and the conviction was upheld. The law was thus laid down in the judgment:—

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law (*R v. Attwood*, 1787, 1 Leach 464). But it has been long a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice, and, in the discretion of the judge, to advise them not to convict upon such evidence, but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence (*R v. Stubbs*, Dears 555; *In re Meunier*, 1894, 2 QB 415).

"As the rule of practice at common law was founded originally upon the exercise of the discretion of the judge at the trial, and, moreover, as it is anomalous in its nature, inasmuch as it requires confirmation of the testimony of a competent witness, it is not surprising that this rule should have led to differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. For example, 'confirmation' does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary (*R v. Mullins*, 3 Cox CC 525, 531—*per* MAULE, J). Indeed if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony. Again, the corroboration must be by some evidence other than that of an accomplice and therefore one accomplice's evidence is not corroboration of the testimony of another accomplice (*R v. Noakes*, 1832, 5 CP 326).

"After examining these and other authorities to the present date, we have come to the conclusion that the better point of the law upon this point is that stated in *R v. Stubbs*, (*supra*) by PARKE, B, namely, that the evidence of an accomplice must be confirmed, not only as to the circumstances of the crime, but also to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime; as we have already stated, that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime. PARKE, B, gives this opinion as a result of twenty-five years practice. It was accepted by the other judges and has been much relied upon in later cases. In *R v. Wilkes*, (1834, 7 C & P 272) ALDERSON, B, said: "The confirmation which I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only if you can safely rely on his testimony, but I advise juries never to act on the evidence of an accomplice unless he is confirmed as to the particular person who is charged with the offence."

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect the accused with the crime. In other words, it must be evidence which implicates him, that is which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether

the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed by the accused.

"The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime."

The law defined in *Baskerville's* case was restated in *R v. Beebe*, 1925, 133 LT 736 *post* and **reaffirmed** in *Davies v. DPP*, 1954 AC 378: 1954, 1 All ER 507 *post*. The principles stated above have been acted upon and reproduced in various judgments of the Superior Courts [*Ram Pd v. R*, A 1927 O 369: 196 IC 721; *Barkati v. R*, A 1927 L 581; *Wazir v. R*, A 1928 L 30; *Rabati v. R*, 32 CWN 945; *Bachhu v. R*, A 1930 O 455; *In re Venkaasubba Reddi*, 54 M 931; *Dalip v. R*, A 1933 L 294; *Nur Md v. R*, 38 CWN 108; *Madhusudan v. R*, 37 CWN 934; *Khadim v. R*, A 1937 S 152 (for a long extract from the judgment of READING LCJ see this case); *Safdar v. R*, A 1941 L 82; *Ramdayal v. R*, A 1942 P 271; *Bishnupada v. R*, A 1945 C 441: 1944, 2 Cal 327; *In re Padmaraja*, 1948, 2 MLJ 428; *In re Chinnasami*, A 1960 M 462; *Rameshwar v. S*, A 1952 SC 54: 1952 SCR 377; *Vemireddy v. S*, A 1956 SC 379 : 1956 SCR 347; *Jnanendra v. S*, A 1959 SC 1199 : 1960, 1 SCR 126].

As to corroboration of accomplice evidence, see also Hals 3rd Ed Vol 10 paras 844-848.

—Guiding Rules Relating to Corroboration in *R v. Baskerville, ante*.—The nature and extent of corroboration must necessarily vary with the circumstances of each case and it is not possible to enunciate any hard and fast rule. But the guiding rules laid down in *R v. Baskerville, ante* are clear beyond controversy. They are:—

(1) It is not necessary that there should be independent confirmation in every detail of the crime related by the accomplice. It is sufficient if there is a confirmation as to a material circumstance of the crime.

(2) The confirmation by independent evidence must be of the identity of the accused in relation to the crime, *ie* confirmation in some fact which goes to fix the guilt of the particular person charged by connecting or tending to connect him with the crime. In other words, there must be confirmation in some material particular that not only has the crime been committed but that the accused committed it.

(3) The corroboration must be by independent testimony, that is by some evidence other than that of the accomplice and therefore one accomplice cannot corroborate the other.

(4) The corroboration need not be by direct evidence that the accused committed the crime, it may be circumstantial.

The rules propounded in *R v. Baskerville* were restated by the Supreme Court with the declaration that the law is exactly the same in India [*Rameshwar v. S, sup*; see also *Vemireddy v. S, sup*]. Elaboration of the rules will be found in the pages that follow.

Corroboration Must Be in Material Particulars by Independent Testimony. [*Corpus Delicti*, Identity of each Prisoner, Circumstances of the Crime etc, etc].—Before the testimony of an approver can be acted on, it must be corroborated in

material particulars. The nature and the extent of this corroboration is well-settled; there must be corroboration not only as to the *crime*, but also as to *identity* of the each one of the accused. This is not technical rule, but one founded on long judicial experience [*R v. Lalit & Ors*, 38 C 559: 15 CWN 593]. Corroboration must be in respect to material particulars and not with respect to each and every item however minor or insignificant it may be [*Chonampara v. S*, A 1979 SC 1761]. As said in *R v. Farler*, 8 C & P 106 *post*; *R v. Elahee Bux*, 5 WR Cr 80 FB and other cases, a man who has been guilty of a crime himself will always be able to relate the facts of the case and if the confirmation be only on the truth of that history, without identifying the persons, that is no corroboration at all. As observed in *R v. Baskerville, ante*, it is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused. The corroboration indicated is s 114, *illus* (*b*) is corroboration in material particulars and these particulars must be such as to connect or identify each of the accused with the offence [*Hussain v. Dalipsinghji*, A 1970 SC 45; *Rebati v. R*, 32 CWN 945: A 1929 C 57; *Jagwa Dhanuk v. R*, 5 P 63: A 1926 P 232]. The evidence must confirm that part of the testimony which suggests that the crime was committed by the accused [*Sheshanna v. S*, A 1970 SC 1330].

"The case of each of the appellants must be taken on its merits and independent corroborative testimony must be sought for in every instance. It is not enough to find such corroboration as regards the presence and participation in the crime by several of the appellants and then to conclude that the evidence of the accomplices must be true so far as it implicates the rest" [*per* ROBERTS CJ, in *Nga Po v. R*, A 1937 R 264, 265; see also observation of SIR JOHN BEAUMONT in *Bhuboni v. R*, A 1949 PC 257, 261 (*ante* "*Principle and scope*").

Corroboration in Sexual Offences.—As to what type of corroboration to the evidence of the prosecutrix in a rape case may be required when the court is of the opinion that it is not safe to dispense with that requirement, vary with the circumstances of each case [*Bijoy Kumar Mohapatra v. The State*, 1982 Cri LJ 2162, 2170 (Ori)]. Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled an accusation of sexual assault on account of the instinct of self-preservation [*Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, A 1983 SC 753, 757: 1983 Cri LJ 1096]. Even though a victim of rape cannot be treated as an accomplice, on account of a long line of judicial decisions rendered in our country over a number of years the evidence of the victim in a rape case is treated almost like the evidence of an accomplice requiring corroboration [*Sheikh Zakir v. State of Bihar*, A 1983 SC 911, 914: 1983 Cri LJ 1285]. Evidence of the prosecutrix in a rape case without any corroboration can be accepted [*Babu v. State of Rajasthan*, 1984 Cri LJ NOC 74: 1984 Raj Cri Cl 21(2) (Raj)]. See notes to s 134 *post*: "*Sexual Offences etc*".

Where the accused appealed against his conviction for rape on the ground that the judge did not give him the opportunity to cross-examine the prosecutrix as to her sexual relation with another man, it was held that leave to cross-examine on the sexual experience of a complainant with a person other than the defendant was not to be given unless relevant to an issue in the case. In the present case, the judge was correct in refusing leave to cross-examine the witness in question as the support for the proposed questions was uncertain and imprecise, and because cross-examination of her at that stage would have been premature. Reasonable grounds were needed to justify asking questions, and those that amounted to a roving inquiry would not be allowed. Accordingly, the appeal would be dismissed [*R v. Howes*, (1996) 2 Cr App Rep 490 (CA)].

—Summary of Law as to Corroboration.—It has been held over and over again that the corroboration must be by *independent* testimony which affects the accused by connecting or tending to connect him with the crime, though such evidence need not always be direct; it may be circumstantial. But it must show not merely that the *crime* has been committed, but that it was committed by the accused (*ie identity*). The corroboration must be by reliable evidence in regard to *material particulars*. In short the evidence of the accomplice must be corroborated in some material particulars not only bearing upon the facts of the crime but upon the accused's implication in it [*Mahadeo v. R*, 40 CWN 1164: 163 IC 681: A 1936 PC 242; *Bhuboni v. R*, A 1949 PC 257: 53 CWN 609; *Jnanendra v. S*, A 1959 SC 1199: 1960, 1 SCR 126; *Netai v. R*, A 1937 C 433 SB; *Dhoju v. R*, A 1933 P 112; *Madhusudan v. R*, 37 CWN 934; *R v. Shankar Set*, A 1933 B 482; *Jiwan v. R*, 34 PLR 866; *R v. Wazir*, A 1933 P 500; *Hariram v. R*, 15 L 673; *Shibdas v. R*, A 1934 C 114; *Hafizuddi v. R*, 38 CWN 777; *Gorakh v. R*, A 1935 A 86; *Abdul Majid v. R*, 39 CWN 1082; *Ambika v R*, 35 CWN 1270, 1274; *Kartar v. R*, 17 L 518; *Nga Po v. R*, A 1937 R 264; *Rattan v. R*, 8 P 235; *Raju v. S*, A 1953 B 297; *S v. Srilal*, A 1960 P 459; *Khagendra Gohan v. The State*, 1982 Cri LJ 487, 490: (1981) Cut LR (Cri) 286 (Ori); *Harihar Samal v. The State of Orissa*, 1982 Cri LJ 1156, 1158 (Ori); *State of Kerala v. Thomas Cherian*, 1982 Cri LJ 2303, 2310 : ILR (1982) 2 Ker 752 (Ker); *B K Kutty v. The State*, 1984 Cri LJ 1289, 1296: (1984)2 Crimes 183 (Ori); *State of Orissa v. Bishnu Charan Muduli*, 1985 Cri LJ 1573, 1578 (Ori)·(DB); *Balwant Kaur v. Union Territory of Chandigarh*, A 1988 SC 139, 145 : 1988 Cri LJ 398; *Ujir Ali Sk v. State*, 1988 Cri LJ NOC 50 (Cal); *Tul Mohan Ram v. State*, 1981 Cri LJ NOC 223 (Del); *State of Orissa v. Nagrul Ali Sekh*, 1985 Cri LJ 1311, 1312: (1985) 1 Crimes 458 (Ori) (DB); *Chandan v. State of Rajasthan*, A 1988 SC 599 601: 1988 Cri LJ 842; *Mohamed Ali v. Public Prosecutor*, (1965) 1 Malayan LJ 261 (Kuala Lumpur HC)]. While looking for corroboration of the approver's evidence, we must first look at the broad spectrum of the approver's version and then find out whether there is other evidence to lend assurance to that version. The corroboration need not be of any direct evidence that the accused committed the crime. The corroboration even by circumstantial evidence may be sufficient. But such evidence as to corroboration must be independent and must not be vague or unreliable [*Ranjet Singh v. State of Rajasthan*, A 1988 SC 672, 674 : 1988 Cri LJ 845; *Abdul Sattar v. Union Territory of Chandigarh*, A 1986 SC 1438, 1439: 1986 Cri LJ 1072; *Union Territory of Arunachal Pradesh v. Laa Tagum*, 1982 Cri LJ 1519, 1525 (Gau)].

In corruption cases a person is no longer presumed to be unworthy of credit merely because he had made an improper payment. If he has taken some infamous part in the transaction, that presumption will be applied [*Ghazali Bin Salleh v. Public Prosecutor*, (1993) 3 CLJ (Taiping HC)]. In corruption cases evidence of accomplice does not require corroboration. Where the witness is a mere payor no special caution is required [*Garmaz v. Public Prosecutor*, (1995) 3 Singapore LR 701 (Singapore HC); *Tan Khee Koon v. Public Prosecutor*, (1995) 3 Singapore LR 724 (Singapore HC)]. Corroboration of an accomplice's evidence need not be independent corroboration in respect of every factor of the case against the accused. It is sufficient if it corroborates some material part of his evidence [*Public Prosecutor v. Sarjeet Singh*, (1994) 2 Malayan LJ 290 (Taiping HC)]. If the approver is found to be unreliable the question of corroboration does not arise [*Public Prosecutor v. Sarjeet Singh*, (1994) 2 Malayan LJ 290 (Taiping HC)]. The court must scrutinize uncorroborated testimony of an accomplice carefully before acting on it [*Ramchandran v. Public Prosecutor*, (1991) 1 Malayan LJ 267 (Singapore CA)].

In an approver the tendency to include the innocent with the guilty being peculiarly prevalent, as emphasised in *Bhuboni v. R*, 76 IA 147, 157: 53 CWN 609,

614, "the only real safeguard against the risk of condemning the innocent with the guilty lies in insisting upon independent evidence which in some measure implicates each accused. This aspect of the matter was well expressed by SIR GEORGE RANKIN in *Ambica's case*" (*post*). Stress was also laid on these observations by the Supreme Court in *Kashmira v. State*, A 1952 SC 159: 1952 SCR 526: 1952 Cri LJ 839.

—Identity of Each Accused.—It is upon the identity of the acccused persons as participators in the crime that corroboration of the approver's story requires most careful consideration [*Manohar v. R*, 53 CLJ 58: A 1930 C 430]. The prosecution must prove not only that the approver had an accomplice but that he was the accused and no other [*Amar v. R*, A 1931 L 406; *Indar v. R*, A 1931 L 408]. When witnesses cited failed to corroborate in this way, it is no use saying that they were gained over or were suppressing the truth [*Venkatasubba v. R*, 54 M 931].

Not only is it necessary that evidence should be corroborated in material particulars, but the corroboration should extend to the *identity* of the accused person. The accomplice must be corroborated, *not only as to one, but as to all*, of the persons affected by the evidence, and because he may be corroborated in his evidence as to one prisoner, it does not justify his evidence against another being accepted without corroboration [*R v. Ram Saran*, 8 A 306; *Hachuni v. R*, 34 CWN 390; *R v. Govinda*, A 1921 N 39; *Rattan v. R*, A 1928 P 630: 8 P 235; *Daulat v. R*, A 1930 N 97; *Sheo Barhi v. R*, A 1930 P 164; see also *R v. Baldeo*, 8 A 509; *Wazir v. R*, A 1928 L 30; *R v. Ganu*, 56 B 172; *Gehna v. R*, 137 IC 95; *Khadim v. R*, A 1937 S 162; *Abdul Kasim v. R*, 1 ALJ 110; *Jnanendra v. S*, A 1959 SC 1199]. His testimony should be confirmed, not only as to the circumstances of the case, but also as to the *identity* of all the prisoners, and any *prisoner* as to whom his testimony is not supported should be acquitted [*R v. Imam*, 3 BHC 57 58; *Kaltu v. R*, A 1927 L 10: 98 IC 190]. The moment there is corroborative evidence connecting or tending to connect an accused with the crime, such corroborative evidence relates to the identity of the accused in connection with that crime. It is this corroborative evidence which determines the mind of the court or jury [*Jnanendra v. S, sup*].

The judge should tell the jury that the sort of corroboration required is corroboration in material particulars tending to connect *each* of the accused with the offence [*Hachuni v. R*, A 1930 C 481: 34 CWN 390; *Hakam v. R*, A 1929 L 850]. Corroboration must affect the identity of the accused, although it need not cover every act ascribed to him and need not be sufficient in itself to prove his guilt [*Ambika v. R*, 35 CWN 1270, 1274: A 1931 C 697 SB; *Bishnupada v. R*, A 1945 C 411; see also *Abdul Majid v. R*, 39 CWN 1082]. It is useful to remember the warning below in the judgment of RANKIN CJ, in *Ambika v. R, ibid* reproduced from an English case:—

> "A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without *identifying* the person that is no corroboration at all. We have always been careful, lest the names of the individual accused are introduced into the texture of the story the outline of which is true enough." The reference in RANKIN CJ's judgment is to the observation of LORD ABINGER CB in *R v. Farler*, 8 C & P 106 (*ante*: "*Nature and extent of corroboration*").

It is an established rule of practice that an accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches. The accomplice may know every circumstance of the crime, and while relating all the other facts truly, may in order to save a friend, or gratify an animosity, name some person as one of the criminals who was innocent of the crime [*R v. Krishna Bhat*, 10

B 319; see also *R v. Malapa*, 11 BHC 196: *R v. Budhu Nanku*, 1 B 475]. Corroboration must go to the guilt of each separately [*Sheo Narain v. R*, 89 IC 261: 12 OLJ 429]. The evidence of an accomplice against two prisoners corroborated as to one prisoner's participation in the crime but not as to the other, cannot be regarded as corroboration with regard to both [*R v. Baskerville*, 1916, 2 KB 658 (*R v. Jenkins*, 1 Cox CC 177 **approved**); *Ramrao v. R*, A 1951 N 237]. Where corroborative evidence consisted of statement that he identified certain accused persons but omitted to give their names in the first information report, it is no corroboration [*Ladya v. R*, A 1929 N 222].

—What is "Independent" Testimony? [Can an Accomplice Corroborate Another Accomplice?].—The corroboration of the evidence of an approver should arise from other evidence relative to facts which implicate the prisoner in the same way as the story of the approver does [*R v. Bykant*, 10 WR Cr 17: 3 BLR Cr 3 note]. "Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect the accused with the crime" [see *R v. Baskerville, ante*]. The corroboration "should be corroboration derived from evidence which is *independent* of accomplices and not vitiated by the accomplice-character of the witness, and further, should be such as to support that portion of the accomplice's testimony which makes out that the prisoner was present at the time when the crime was committed, and participated in the acts of commission" [*R v. Mohes Biswas*, 1873, 19 WR Cr 16: 10 BLR 455 note]. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it [*Barkati v. R*, 103 IC 49: A 1927 L 581]. The evidence requisite for the corroboration of the testimony of an accomplice must proceed from an *independent and reliable source*; and previous statements made by the accomplice himself, though consistent with the evidence given by him at the trial, are insufficient for such corroboration. The confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the other [*R v. Malapa Bin*, 11 BHC 196; see also *R v. Bajjoo Chaudhury*, 25 WR Cr 43. See, however, *Muthu Kumaraswamy v. R*, 35 M 397 cited *post*]. Statement by approver under s 164 Cr P Code plainly does not amount to corroboration [*Bhuboni v. R*, A 1949 PC 257]. Corroboration must be in material particulars which must be independent of the accomplice or of the confessing accused [*Sheroo v. R*, A 1925 N 78]. Statement of a raped girl to her mother has been held to be independent corroboration [*Rameshwar v. S*, A 1952 SC 54].

Corroboration must be by some evidence other than that of an accomplice. If, therefore, two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required as if they were but one [*R v. Baskerville, ante*; *R v. Noakes*, 5 C & P 326; *Shahrah v. R*, 20 PR Cr 1919: 49 IC 607; *Kishan v. R*, 67 IC 343: A 1922 N 172; *Md Usaf v. R*, A 1929 N 215; *Latafat v. R*, 33 CWN 58; *Parbhu v. R*, A 1933 L 946; *Hafizuddi v. R*, 38 CWN 777; *Bachha v. R*, A 1935 A 162]. The fact that one approver spoke to incidents connected with the murder and the other approver spoke to incidents connected with the disposal of the body does not make any difference. The evidence of one cannot be taken as corroboration of the evidence of the other [*Venkataramanna v. R*, A 1933 MWN 1129].

The evidence of one approver cannot be said to corroborate another except where both have at the earliest opportunity and before any chance of collaboration deposed to the same acts having been committed by a particular accused person [*Narain Das v. R*, 3 L 144]. Although the evidence of one accomplice is not sufficient corroboration of that of another to justify a conviction, yet there may be circumstances, such as

where previous concert by the informers is highly improbable, in which the agreement in their stories cannot have been arranged between them beforehand, must be taken into account [*R v. Nimgappa*, 2 Bom LR 610. But see *R v. Dwarka*, 5 WR Cr 18, where it has been held that the testimony of two or more accomplices requires confirmation equally with one; and further their corroboration must be on matters directly connecting the prisoner with the offence of which he is accused]. Testimony of an accomplice is of little value as a piece of corroborative evidence. The testimony of an approver can be used for corroboration if the taint is removed to such an extent that the court is prepared to believe it in the same way as the testimony of an ordinary witness [*Hakam v. R*, A 1920 L 850].

Same: [Accomplices Do Not Corroborate Each Other].—In a Full Bench in Rangoon it has been stated that the combined effect of ss 3, 30, 114 *illus* (*b*) and 133 is:

(*1*) that an accused person can legally be convicted upon the uncorroborated evidence of an approver;

(*2*) that whether an accused person should or should not be convicted upon such evidence is left to the prudence and good sense of the tribunal after considering all the circumstances of the case;

(*3*) that *prima facie* the evidence of an approver, being tainted evidence, is unworthy of credit unless it is corroborated in some material particulars tending to show that the accused committed the offences with which he is charged;

(*4*) that it is for the court to determine in the particular circumstances of each case whether the "matter" before it tending to corroborate the evidence of the approver (which may or may not be evidence strictly so called and as defined in the Evidence Act) is worthy of credence and is sufficiently reliable to be treated as evidence against the accused, and acted upon;

(*5*) that the evidence of an approver may be corroborated by the evidence of another approver or by the confession of a person who is being tried jointly with the accused for the same offence, implicating both himself and the accused;

(*6*) that it is the duty of the court to scrutinise with care such corroboration as that mentioned in (*5*) but that whether it is to be treated as evidence against the accused or not is to be determined by the court, having regard to the circumstances of the case [*Aung Hla v. R*, 9 R 404 FB. See also *Nga v. R*, A 1933 R 116; *Mg Tha v. R*, A 1935 R 491; *Nga Nyein v. R*, 11 R 4; *Nga Tun v. R*, A 1937 R 116].

All the above propostitions, except No (*5*) relating to the corroboration of one accomplice's evidence by the testimony of another accomplice, have been firmly established by a long series of decisions of all the High Courts, old and later. As to (*5*) until *Aung Hla's case, ante*, it was generally held by the courts in accord with the case of *R v. Baskerville, ante*, that accomplices do not corroborate each other. In a case, the Calcutta High Court (**dissenting** from similar view in *Hafizuddi v. R*, 38 CWN 777) and **following** *Aung Hla* approved of the proposition in (*5*) [see *R v. Nirmal*, 39 CWN 744: 62 C 238]. The same view was taken in Madras [*In re Sattar*, A 1939 M 283; see also *Darya v. R*, 77 IC 984 (L)]. In a latter Calcutta case [*Bimal v. R*, 39 CWN 761: 62 C 819]. HENDERSON J, who was a party to the decision in *R v. Nirmal, ante* reiterated his approval of proposition (*5*); but GHOSE J, who was apparently reluctant to subscribe to the proposition that accomplices may corroborate each other in so many words, said that he did not understand *Aung Hlas's case* to lay down anything more than this that it is not illegal to base a conviction upon accomplice evidence if it is corroborated by other accomplice

evidence. He added: "But that is not tantamount to saying that independent corroboration is not necessary.....We are here not merely to record conviction which is not illegal, but we are here to record a conviction that is properly based.....he fact remains that an accomplice is an accomplice and more or less, having regard to the circumstances of each case, he ought to be corroborated by other evidence" [*Bimal v. R, ibid*]. In a previous case RANKIN CJ used identical words ("We are not here merely to record a conviction that is not illegal. We have to be satisfied that the conviction is properly based") and referred to *R v. Baskerville, ante* as the case where "the traditional English practice on the question of corroboration of approvers and accomplices has been very carefully laid down" [*Ambika v. R*, 35 CWN 1270, 1274 (**Approved** in *Bhuboni v. R*, A 1949 PC 257].

It is submitted that the traditional and safe rule of *independent* corroboration stated in *R v. Baskerville* (*ante*) will still prevail in the actual decision of cases and rank as the soundest opinion. To hold that one accomplice may corroborate another is to deviate altogether from the salutary rule of '*independent*' corroboration which has for all practical purposes become as good as a rule of law. Corroboration of his evidence is required because an accomplice's evidence from its nature is most unreliable. So the corroboration of one tainted evidence by another tainted evidence can in no sense be called *independent corroboration*. Corroboration is defined in Wharton's Law Lexicon, 13th Ed as "evidence in support of principal evidence". "Independent corroboration" in its true sense must necessarily mean reliable evidence of *another kind, ie* from a fresh source. The opinion expressed in R *v. Nirmal, ante* may be treated as *obiter* as there was evidence other than accomplice evidence which was held to be corroborative. So also in *Bimal v. R, ante* where accomplice evidence was considered suspicious and was not accepted as corroborative evidence. [It has since been held in *Cohen v. R*, A 1949 C 594 that the dictum of HENDERSON J, in *Bimal v. R*, is contrary to the view in *Mahadeo v. R*, 40 CWN 1164: A 1936 PC 242].

Since the above was written, it is satisfactory to find that the Judicial Committee had so soon an occasion for considering the matter and dispelling the doubt created by the few cases (*ante*). While reaffirming the rule of independent corroboration and referring to the "well settled" rules in *R v. Baskerville, ante* it has been repeated that the evidence of one accomplice is not available as corroboration of another. SIR SYDNEY ROWLATT who delivered the judgment of the Board observed that the rule "is now virtually a rule of law, and in a case like the present it is a rule of the greatest possible importance" [*Mahadeo v. R*, 1936, 3 All ER 813: 163 IC 681 PC; see also the later cases *Bhuboni v. R*, A 1949 PC 257; *Tumahole v. King*, 1949 AC 253]. In a later case in Rangoon, ROBERTS CJ, declined to follow the 5th proposition in *Aung Hla's case*, (*ante*) as mere *obiter* and held with emphasis that the law in s 133 is entirely at one with the English common law and that the evidence of one accomplice cannot be corroborated by that of another. Corroboration means independent testimony. It is, he said, a misuse of word to say that one accomplice (whose evidence is tainted) can corroborate another [*Nga Aung v. R*, 1937 Rang 110: A 1937 R 209]. The same view was taken in subsequent cases [*Nga Po v. R*, A 1937 R 264; *Nitai v. R*, A 1937 C 433 SB; see also *R v. Nga Myo*, A 1938 R 177 FB (*ante*) which superseded the contrary dicta in *Aung Hla v. R*, and *Nga Aung Po v. R, ante*] except in *Purnananda v. R*, 1939, 1 Cal 1: A 1939 C 65 which, having ununderstandably approved *Aung Hla v. R*, and *R v. Nirmal, ante* after the clear pronouncement by Judicial Committee in *Mahadeo v. R, sup* must be ignored.

It is now firmly established that accomplices do not corroborate each other [*Mahadeo v. R, sup*; *Nawal Kishore v. R*, 22 P 27: A 1943 P 146; *Mallu v. R*, A 1933 N 352; *Sharif v. R*, A 1944 L 472; *Cohen v. R*, A 1949 C 595; *Kunjbehari v. S*, A 1951 P 84; *In re Thiagaraja*, A 1946 M 271] Singapore High Court has also held that one accomplice cannot corroborate another [*Goh Chong Ying v. Public Prosecutor*, (1989) 2 Malayan LJ 334 (Singapore HC)] and the Privy Council has reaffirmed it in *R v. Bhuboni, sup* and Supreme Court in *Hussain v. Dalipsinghji*, A 1970 SC 45. It may be argued that if in the special circumstances of a case there may be a conviction under s 133 on accomplice evidence alone (without corroboration), why cannot the evidence of one accomplice be available for corroboration of another accomplice. It seems to involve a fallacy, for when in an exceptional case a conviction is made to stand on accomplice evidence alone, the presumption of untrustworthiness is displaced and corroboration by another accomplice is without any necessity or meaning. The same accomplice evidence sought to be used as corroboration may be depended upon for conviction. A conviction on the evidence of two accomplices is all the same a conviction upon accomplice evidence alone without corroboration.

While agreeing with the rule in *Bhuboni's case* (*ante*) it has been observed that "the testimony of an accomplice can in law be used to corroborate another though it ought not to be used save in exceptional circumstances and for reasons disclosd" [*per* BOSE J, in *Kashmira v. State*, A 1952 SC 159, 161: 1952 SCR 526]. The question in this case was as to corroboration by the confession of a co-accused (who no doubt is also an accomplice), or more properly, the use of confession of an accused against a co-accused. The emphasis on "exceptional circumstances" can only mean that these are special cases where the accomplice evidence is believed to be true and s 133 alone is applied without raising the presumption of untrustworthiness in s 114, *Illus* (*b*). In such cases corroboration by another accomplice evidence is hardly needed to be brought into requisition. In any case it is simply doubling the quantity of the same evidence.

As it is settled law that one accomplice cannot corroborate another, it may be said that if this be the law, conviction would be very difficult to secure in some cases. Some solution for that state of affairs is to be found in s 133. A plurality of accomplices may be found useful in this way: They have to be considered independently and the courts might, while not losing sight of s 114, *illus* (*b*), still be able to rely on the uncorroborated testimony of one or more out of a number either on the same or on different points [*In re Surajpal Singh*, A 1938 N 328: 1933 NLJ 185. Possibly this observation has reference to the special facts referred to in the two further illustrations to *illus* (*b*)]. Where the approver states that he helped the accused to kill the deceased, what is required is not separate proof of the fact of murder but sufficient evidence to corroborate the approver's statements [*R v. Ram Singh*, A 1948 L 24]. If several accomplices simultaneously and without previous concert give a consistent account of the crime implicating the accused the court may accept the several statements as corroborating each other [*Hussain v. Dalipsinghji*, A 1970 SC 45; *Haroon v. S*, A 1968 SC 832, 837].

Can the Confession of a Co-accused be Accepted as Corroboration?.—The confession of a co-accused does not stand higher than accomplice evidence. A co-accused who confesses is plainly an accomplice and so on the same principle that accomplices do not corroborate each other (the ground being that one tainted evidence cannot corroborate another), it cannot be accepted as corroborative of approver's evidence though in view of s 30 it may be put into the scale and "taken into consideration" along with other evidence. In this respect there can be no difference between a retracted and unretracted confession [*In re Padmaraja*, A 1951 M

746: 1949, 2 MLJ 428; *R v. Mohiuddin*, 25 M 143: 2 Weir 800; see *R v. Jaffir Ali*, 9 WR Cr 57; *R v. Udhan*, 19 WR Cr 68; *R v. Baijoo Chaudhury*, 25 WR Cr 43; *R v. Bepin*, 10 970; *Dhanapati v. R*, A 1946 C 156: 1944, 2 Cal 312; *Latafat v. R*, 33 CWN 58: A 1928 C 745; *R v. Malapa Bin*, 11 BHCR 196; *R v. Budhu Nanku*, 1 B 475; *R v. Mohanlal*, 4 A 46; *Debidayal v. R*, 11 ALJ 73: 18 IC 672; *Nazir v. R*, 55 A 91: A 1933 A 31; *Daulat v. R*, A 1930 N 97; *Prov Govt v. Raghuram*, A 1942 N 127; *Naraindas v. R*, 3 IC 144; *Faqir v. R*, A 1939 L 429; *Sharif v. R*, A 1944 L 472; *Beni Madho v. R*, A 1930 O 355; *R v. Maqbool*, A 1932 O 317]. In a case however, seemingly the confession of a co-accused was regarded as corroborative evidence, but it would be more correct to say that it was not intended to lay down any such principle, but that it was "taken into consideration" [*In re Rajagopal*, A 1941 M 117 FB: 1943, 2 MLJ 634. See the comment on this case in *Re Padmaraja, sup*].

The statement of the Privy Council (in *R v. Bhuboni*, 53 CWN 609, 615 that "such a conviction (as in *Rajagopal's* case) is justified in law under s 133", merely refers to the rule in that section applicable in exceptional cases where the presumption of untrustworthiness is not given effect to, and does by no means intend to lay down or approve that the confession of a co-accused is available for corroboration of accomplice evidence. This would appear from the fact that in the same context it has been stated that courts should be slow to depart from the rule of "*Independent*" corroboration and further SIR JOHN BEAUMONT having observed earlier that confession of a co-accused is "a much weaker type of evidence than the evidence of an approver" (p 613 of Report) could not have certainly lent any countenance to the proposition that such a confession can corroborate accomplice evidence. Approving *Bhuboni's case* and without qualifying or deviating from the principles laid down there it has been observed in a later case that as a conviction can in law be based on the uncorroborated testimony of an accomplice, it follows that the testimony of an accomplice can in law be used to corroborate another though it ought not to be used save in "exceptional circumstances and for reasons disclosed" [*Kashmira v. S*, A 1952 SC 159, 161]. As stated before (*ante*) when the court having the rule of prudence in mind disregards it in an "exceptional case" by not raising the presumption of untrustworthiness under s 114; *illus* (*b*) and a conviction is made to stand on accomplice evidence by believing it to be true, the rule in s 133 alone is applied and the question of its corroboration by his previous statement or by confession of another accomplice becomes quite otiose.

—Retracted Confession For Corroboration.—Retracted confession of an accused may be sufficient corroboration of the approver's story as against himself but not against a co-accused [*Pallia v. R*, 12 PWR Cr 1919: 20 Cri LJ 188; *Rahmat v. R*, 113 IC 65 (L); *Gehna v. R*, A 1932 L 180: 137 IC 95] though it may with other facts be taken into consideration against a co-accused under s 30 [*Lalan v. R*, 16 CWN 669, 674]. It has very little weight against the other accused and cannot of itself be independent evidence of corroboration of the statement of the approver [*Hubba v. R*, 12 OC 418: 4 IC 884]. A retracted confession of a co-accused is not the testimony of an accomplice and so the question of its relevancy under s 133 does not arise [*Moyez, v R*, 40 CLJ 551]. Merely because the statement of the co-accused recorded under s 108 of the Customs Act is retracted subsequently, it cannot be said that it is no evidence. Conviction can be based by the court even on such retracted statement, provided that the court is satisfied that the said statement is otherwise reliable and trustworthy. *Haji Abdulla Haji Ibrahim Mandhra v. Supt. of Customs, Bhuj*, 1992 Cri LJ 2800, 2802 (Guj).

As to retracted confession, see s 24 (*ante*).

—Can the Previous Statement of an Accomplice Legally Amount to Corroboration of his Evidence at the Trial?—It was held in several cases that previous statements of an accomplice cannot legally amount to corroboration of his evidence at the trial [*R v. Malapa Bin*, 11 Bom HCR 196; *In re Baji Krishna*, 6 Bom LR 481 (CHANDAVARKAR, J); *R v. Bepin Biswas*, 10 C 970; *In re Ram Saran*, 8 A 306; *In re Vyasa Rao*, 21 MLJ 283 (ABDUR RAHIM, J); *In re Jesudas*, A 1945, M 358 (MOCKETT, J); *Khairo v. R*, A 1937 S 221)—CONTRA: Previous statement of accomplice can legally amount to corroboration under s 157 [*Muthukumaraswamy v. R*, 35 M 397 (BENSON, WALLIS & MILLER, JJ.—CONTRA: SUNDARA AYYAR & ABDUR Rahim, JJ); *R v. Nilkanta*, 35 M 247 (WHITE, CJ & AYLING, J—CONTRA: SANKARAN NAIR J]. Since the decision in *R v. Baskerville, ante* which states very clearly what is meant by corroborative evidence, there is hardly any doubt that the previous statement of an accomplice cannot be held to corroborate his later testimony, though technically it may fall within s 157. The Judicial Committee recently held that the statement of approver under s 164 Cr P Code does not amount to corroboration in material particulars which the courts require, though regard may be had to the fact that he had made a previous statement in the same sense. An accomplice cannot corroborate himself; tainted evidence does not lose its taint by repetition [*Bhuboni v. R*, 53 CWN 609, 611: A 1949 PC 257]. It has however been subsequently held by the Supreme Court that the previous statement of an accomplice or complainant "at or about the time &c" is legally admissible as corroboration under s 157 though its weight of course in another matter [*Rameshwar v. S*, A 1952 SC 54].

—Corroboration by Circumstantial Evidence.—It has already been said that the corroboration need not be direct evidence of commission of crime. It may be circumstantial [*R v. Baskerville, ante*; *S v. Basawan*, A 1958 SC 500; *Hussain v. Dalipsinghji*, A 1970 SC 45; *Lale v. R*, A 1929 O 321; *Kishan v. R*, A 1922 N 172; *Daulat v. R*, A 1930 N 97; *Hakam v. R*, A 1929 L 850; *Hazari v. R*, A 1930 O 353; *Venkatasubba v. R*, A 1931 M 689; *Dhaju v. R*, A 1933 P 112; *Hariram v. R*, 15 L 673; *Gorakh v. R*, A 1935 A 86; *Sher Singh v. R*, A 1933 L 621 (production of certain ornaments of the deceased by the accused); *Ramdayal v. R*, A 1942 P 271; see also *Maghar v. S*, A 1975 SC 1320].

—Corroboration by Silence, Conduct, Demeanour, etc.—It has been held in England that the jury is entitled to consider whether silence of accused when charged with the offence is or is not some corroboration [*R v. Felghenbaum*, 1919, 1 KB 431: 88 LJKB 551]. It should be remembered that in England since August 1898 (Cr Evidence Act, 1898, 61 & 62 Vic c 36) accused has the option to give evidence in his own defence and a prisoner's neglect to go into the witness-box to explain his conduct is sometimes adversely commented upon by judges. Following the above case it has however been held that the evidence of an accused's conduct is corroboration [*Chatru v. R*, A 1928 L 681: 111 IC 435; see also *Anna Champat v. R*, 19 NLJ 221]. The authority of *R v. Feighenbaum, sup* appears to have been shaken by the later decision in *R v. Whitehead*, 1929, 1 KB 99 and *R v. Keeling*, 1942, 1 All ER 507; and it has subsequently been held that silence on the part of accused or non-denial of charge affords no corroboration [see *Tumahole v. R*, 1949 AC 253: A 1949 PC 172; *S v. Kunjbehari*, A 1951 P 84]. S 342A [now s 315(*1*)] Cr P Code now permits the accused to give evidence on oath, but his failure to do so shall not be the subject of any comment by the parties or the court. The Supreme Court has said that corroboration may consist of circumstances like the conduct of the person against whom it is required [*Sheshanna v. S*, A 1970 SC 1330].

Demeanour cannot be a substitute for corroboration. It would be wholly unsafe to treat a piece of circumstantial evidence which is widely dissociated from the *corpus*

delicti as a material particular to be of any corroborative value to the evidence of an accomplice. The favourable impressions on the judge's mind as to the demeanour of an accomplice are too ephemeral to take the place of corroboration in material particulars [*Mannalal v. R*, 75 IC 753: 27 OC 40: A 1925 O 1].

Same: Gist of Law Relating to Corroboration of Accomplice Evidence.—It is now settled law that accomplice evidence must be corroborated in material particulars although such evidence need not be sufficient by *itself* to prove the guilt of the accused [*Ambika v. R*; *Abdul Majid v. R*; *Bishnupada v. R*, *ante*; *Swaminathan v. S*, A 1957 SC 340]. The result of the decisions appears to be that—

(*1*) There must be corroboration as to—(*a*) the commission (*corpus delicti*) and circumstances of the crime; (*b*) the *identity* of each one of the accused; and (*c*) *actual participation* of each of the accused in the crime, *ie*, "the confirmation should be as to some matter which goes to connect the prisoner with the transaction [*per* GURNEY B, in *R v. Dyke*, 8 C & P 261].

(*2*) Where there are *several prisoners*, the corroboration must be not only as to one, but as to *all* of the persons affected by the evidence. If there is corroboration as to one of them, the rest should be acquitted.

(*3*) Evidence necessary for corroboration must proceed from an *independent* and reliable source and therefore evidence of one accomplice is not available as corroboration of another.

(*4*) Confession of a co-accused cannot be accepted as corroboration though it "may be taken into consideration" under s 30.

(*5*) Corroboration need not be direct evidence of commission of crime, it may be circumstantial.

(*6*) Corroboration must be in regard to material particulars [s 114, *illus* (*b*)], *ie*, it is not enough if it shows that the accomplice told the truth in matters unconnected with the guilt of the accused [*R v. Baskerville, sup*].

(*7*) Evidence of an accessory after the fact must be corroborated in the same way as the evidence of an accomplice [*Mahadeo v. R*, A 1936 PC 242].

These no doubt are the requirements, but be it identity of the prisoner, or participation in crime, or anything else, the *real thing* is that the evidence must be fully trustworthy without any taint of suspicion. The jury or the judge must feel convinced that the evidence is true and can safely be acted upon.

Corroboration of Accomplice Evidence Under S 156.—Under s 156 facts though not directly relevant may in the discretion of the court be admitted if it is of opinion that such evidence would corroborate the testimony of the witness as to any relevant fact. So, if any witness gives evidence of any relevant fact, he may be asked about other surrounding circumstances or facts or events at or near to the same time or place at which the relevant fact occurred for corroborating his testimony as to the relevant fact (See notes to s 156 *post*).

Facts Held Corroborative.—Fact that shortly after the date of the conspiracy to murder, the accused helped the approver in obtaining murderous weapons was held sufficient corroboration [*Tota v. R*, 69 IC 462]. Approver's statement that shortly after the dacoity they met a particular person some distance from the scene of dacoity was borne out by the person referred to by him. The accused were arrested a few hours after the dacoity travelling with the approver and possession of three tickets all from one place to another bearing consecutive numbers was proved—*held*, that there was

corroboration [*Hakim v. R*, 84 IC 647: A 1923 L 153]. The fact that the deceased was last seen alive in the company of the accused and the approver is strong corroboration [*Ata Md v. R*, 157 IC 626]: Accused having been seen in company with victim shortly before crime may not always amount to corroboration, but it may, if they were seen under extraordinary circumstances [*Ramdayal v. R*, A 1942 P.271].

Where the only evidence against a person charged under s 395 I P Code is that he has produced stolen property out of a place not in his possession, it is not sufficient to convict, but is evidence against the person producing it and it is material corroboration of an accomplice who has deposed that person joined him in committing dacoity, etc. [*Khushal v. R*, 76 IC 698: A 1923 L 335; *Muhammad v. R*, 111 IC 447]. In a dacoity case find of a large amount of stolen property in the possession of one of the accused is sufficient corroboration of the evidence of an approver [*Mauladud v. R*, 86 IC 69: A 1925 L 426].

Verification proceedings held in connexion with confessions cannot be regarded as corroboation and are open to criticism in other respects [*R v. Lalit & Ors*, 15 CWN 593; see however *Ledu Mollah v. R*, 52 C 525: 42 CLJ 501].

When an approver is corroborated by an accused against whom the case was withdrawn and who was later examined as a prosecution witness, the conviction based on such evidence is not illegal [*In re Achanta & Ors*, A 1944 M 503]. The weight of evidence is not affected if some accused are acquitted for want of corroboration of approver's evidence [*Murli v. R*, 89 IC 836: 27 OC 385]. Raising money for giving bribe and the merits of the case, to decide which in favour of the bribe-giver, a judge accepts illegal gratification, are sufficient evidence to corroborate the former who is really an accomplice [*Harsukh v. R*, 3 PWR Cr 1919]. Where police officers conspired to demand and receive bribe, the testimony of accomplices who are victimised by them to offering bribes require a much slighter degree of corroboration [*R v. Ring*, A 1929 B 296: 31 Bom LR 545; *Deonandan v. R*, 33 C 649; see *R v. Papakamal Khan*, 59 B 486; see however *Anna Champat v. R*, 19 NLJ 221].

It cannot be said that as a point of law the evidence of witnesses who support the statement of an approver is not corroborative evidence, because the evidence was known to the police before the approver was examined by them. But it might be urged that he might have been tutored by the police to give evidence fitting in with the evidence of the other witnesses [*In re Ibrahim*, 42 CLJ 496: A 1926 C 374: *Kesar v. S*, A 1954 Pu 286]. When an approver's statement is abundantly corroborated by reliable evidence, such statement is enough for his conviction when he turns hostile and forfeits pardon [*Aziz Begum v. R*, A 1937 L 689]. Corroborative statement of the accused himself is the most powerful form of corroboration provided it definitely commits him to be present at the murder [*Khusalia v. R*, A 1938 L 339: 175 IC 548].

Facts Held Not Corroborative.—The circumstance that an accessory said nothing about the crime when he returned home is no corroboration of history in the witness-box as to the manner in which the deceased came by his death [*Mahadeo v. R*, A 1936 PC 242]. The mere fact that accused were seen with approver a few days before the dacoity is not material corroboration [*Hazara v. R*, 82 IC 707: A 1924 L 727; *Mauladad v. R*, 86 IC 69: A 1925 L 426]. Statement of a witness that he saw the accused with the deceased a short time before the occurrence is not material corroboration [*R v. Ram Karan*, 88 IC 453: A 1925 L 600]. The exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence such as courts ordinarily require to make it safe to convict any particular prisoner [*R v. Bepin*, 10 C 970; *Ambika v. R*, 35 CWN 1270].

Where the statements ascribed to the accused are in general terms, and represent only the impression conveyed by what might have been said to the minds of the witnesses, they should not be accepted as sufficient corroboration of the approver's evidence [*R v. Mohan Lal*, 4 A 46]. Where confessions are obtained from a large number of persons, one after the other, it is likely enough that the confessions should agree. The fact of any particular person having been named in the confession of more than one of the co-accused is not a sufficiently reliable corroboration of the statement of an approver [*Lala v. R*, 34 PLR 1922: 23 Cri LJ 158]. Where approver's testimony was not sufficiently corroborated by the evidence as to the recovery of articles which were incapable of identification, there should be no conviction [*Shah Alam v. R*, 84 IC 1052: 6 LLJ 280]. Evidence of finding of articles of an ordinary character and their identification is not sufficient [*Nathu v. R*, A 1929 L 680].

Mere fact of production of a spear and *dang* from field by approver and a statement that the spear was used, or the fact that it was stained with blood, is not corroboration [*Chaman v. R*, A 1927 L 78: 8 LLJ 610]. Finding of deceased's cloth on the statement of approver, or the finding of a common instrument in accused's house with nothing to connect him with them, is not corroboration [*Bhuboni v. R*, A 1949 PC 257]. Evidence relating to the recovery of alleged stolen articles in a search of accused's house when he was given no opportunity of checking the results of the search and which is itself suspicious cannot be treated as corroboration [*Saudagar v. R*, 77 IC 895: 5 LLJ 572].

Merely because the approver tells a probable story [*In re Talayari*, A 1939 M 469: 183 IC 564], or the mere fact that there was animosity against the deceased providing motive for the crime [*Dhannu v. R*, 2 PLT 757], is not sufficient corroboration. Clear proof of motive of murder and discovery of minute blood spots on accused's shirt are not material corroboration [*Jit Singh v. R*, 86 IC 811: A 1925 L 526]. Facts which do not show the connection of the prisoner with the commission of the offence with which he is charged, are no corroboration in the sense in which the word is used in such cases although they may tend to show that certain portion of what the accomplice says is true [*R v. Nawab Jan*, 8 WR Cr 19]. Where material discrepancies occur between the statements of the corroborating witnesses before the police and their deposition in court, either of inquiry or trial, there is no corroboration [*Amar Das v. R*, 36 PWR 1910].

The testimony of the wife of an accomplice will not be considered corroborative of the evidence of her husband [*R v. Neal*, 1835, 7 C & P 168]. This case was discussed by the court of criminal appeal in *R v. Payne*, 1913, 29 TR 250, where it was pointed out that the decision only was that the wife's evidence could not be accepted "in a case like this". See also *R v. Willis*, 1916, 1 KB 933; Tay s 970]. That wife's evidence cannot be regarded as independent corroboration has also been held in a case here [*Sultan v. R*, 33 PLR 13]. The more so if the wife is a consenting party to the crime and therefore is in the position of an accomplice [*Ali Md v. R*, A 1934 L 171; *Phuttu v. R*, A 1936 L 731]. It is unsafe to convict on evidence of approver corroborated only by his son [*Mehr v. R*, A 1929 L 587: 30 PLR 422]. On a charge under s 377 PC the fact that other boys had been visiting the accused is no corroboration [*Bal Mukunda v. R*, 39 CWN 1051].

Amount of Corroboration Necessary in Weighing Accomplice Evidence.— The amount of corroboration required depends on the circumstances, particularly on the nature of the crime charged and the degree of the accomplice's complicity. No general rule can be laid down on the subject [*R v. Malhar*, 26 B 193: 2 Bom LR 694; *R v. Kuberappa*, 15 Bom LR 288; *Barkati v. R*, A 1927 L 581; *Sher Jang v. R*, A

1931 L 178]. In dealing with the question what amount of corroboration is required, the court must exercise careful discrimination and look at all the surrounding circumstances, in order to arrive at a conclusion, whether the facts deposed to by the person alleged to be an accomplice are borne out by those circumstances, or whether the circumstances are of such a nature that the evidence should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by that accomplice [*Kamala v. Sital*, 28 C 339: 5 CWN 517; see *Naraindas v. R*, 9 L 144: 68 IC 113]. The minimum corroboration ordinarily required is at least one material fact pointing to the guilt of the accused [*R v. Jamuna*, A 1947 P 305].

The courts should follow the English practice as to the amount of corroboration required to support the evidence of an accomplice [*R v. Imam Valad*, 3 BHC 57; *R v. Gambhira*, 1882 AWN 13]. In *R v. Baskerville*, 1916, 2 KB 659, the opinion of PARKE B, in *R v. Stubbs*, Dears 555 was approved and it was said: "It is sufficient if there is confirmation as to a material circumstances of the crime and of the identity of the accused in relation to the crime. PARKE B, gave his opinion as a result of 25 years' experience". "This court will certainly not hold that the evidence of a number of accomplices needs any less corroboration than that of one accomplice" [*Gay's case*, 2 Cr App 327].

The true rule probably is this, if the court is satisfied that the witness is speaking the truth in some material part of his testimony, in which it is seen that he is confirmed by unimpeachable evidence, there may be just ground for believing that he also speaks the truth in other parts as to which there may be no confirmation [*R v. Kala Chand*, 11 WR Cr 21]. A judge is not bound to rely on such statement only as are corroborated by other reliable evidence. Once a foundation is established for the belief that the witness is speaking the truth, because he is corroborated by true evidence on material points, he is at liberty to come to a conclusion as to the truth or falsehood of other statements not corroborated [*R v. Bhimrao*, 27 Bom LR 120: 86 IC 72; *Shyam v. R*, A 1941 O 130]. Corroboration as regards every single statement of approver is not necessary. On uncorroborated points he can be believed, if the jury thought it reasonable [*Ledu Molla v. R*, 52 C 595: 87 IC 925; *Gafoor v. R*, A 1936 R 373].

The rule of corroboration applies with very little force to a case in which the accused is charged with extorting a bribe from other persons. In such case the persons who pay the bribe and those who act as intermediaries are the only persons who can ordinarily be expected to give evidence about it [*Papa Kamal Khan v. R*, 59 B 486; see *Bhattacharjya v. R*; *R v. Srinivasa Krishna, ante* ("*Bribery*"); *Ambadal v. S*, A 1961 G 1]. Recovery of very common articles which are not capable of definite identification is no corroboration, but the recovery of identifiable ornaments will be sufficient [*Kartara v. R*, A 1934 L 525]. Tender age is no ground for applying a lenient standard of corroboration [*Wazir v. R*, A 1928 L 30]. The mere fact that the accomplice is a girl of 12 years does not make her an innocent accomplice, if it appears that she is a ready liar [*Kailash v. R*, A 1931 P 107].

The corroboration offered in this case was the statement of two men who apparently knew something about the matter from the beginning but refused to make any statement until the third day of the police investigation. Long delay must be regarded with suspicion [*Fatta v. R*, 2 Lah LJ 296]. When an accomplice is coerced and threatened into submission to commit an offence, the corroboration necessary will be less than if his complicity in the offence had been voluntary and spontaneous [*Md Ponah v. R*, A 1934 S 78]. So when accomplices act under pressure making them a victim of the offence instead of a willing participant, reliance may be placed

on their uncorroborated testimony [*Sriniwas Mall v. R*, A 1947 PC 135: 26 P 460 *ante*].

When an approver changes his story, very strong corrobortion is required [*Faqir v. R*, A 1939 L 429]. See also *ante*: "*Nature and Extent of Corroboration*".

The rule as to Corroboration Has Become a Rule of Practice of so Universal Application that it is Now Virtually a Rule of Law.—The leading authority is the Full Bench case of *R v. Elahee Buksh*, 1866 BLR Sup Vol 459: 5 WR Cr 80, decided before the Evidence Act was passed. The law on this point was fully discussed by PEACOCK CJ, who said:

> "I am of opinion that a conviction upon the uncorroborated testimony of an accomplice is legal. This is not new law, not founded upon new principle. The point was decided in England so far back as the 10th December 1862, after conference with all the judges."

After review of all English cases the law as laid down in the Full Bench case is as follows: A conviction upon the uncorroborated evidence of one or more accomplices is valid in law; but the danger of acting on the uncorroborated evidence of accomplices is very great, and judges and juries ought not to pay any respect to the testimony of an accomplice, unless he is corroborated not only as to the circumstances of the crime, but also as to the person of the prisoner. S 133 and s 114 *illus* (*b*) have been framed in accordance with the view expressed in the above case and the law in these sections is the same as in England (*ante*). See also *Haroon v. S*, A 1968 SC 832; *In re Taluri Narainsami*, 9 MLT 503: 9 IC 978.

It is now fully recognised to be an established practice virtually equivalent to a rule of law, to require corroboration of the evidence of an accomplice by independent evidence on some material particular going to the offence itself and implicating the accused [Archbold's Cr Pleadings, 25th Ed p 441; Tay s 967; Phip 11th Ed p 676; Wig s 2057]. In *R v. Baskerville, ante* LORD READING LCJ said: "*The rule of practice has become virtually equivalent to a rule of law*". It makes no difference that there are more accomplices than one. The evidence of a number of accomplices need no less corroboration than that of one accomplice [*Nawal Kishore v. R*, 22 P 27].

This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law [*Haroom v. S, sup*; *Ramaswami v. R*, 27 M 271: 14 MLJ 226; *R v. Maganlal*, 14 B 115]. See the observations of STRAIGHT J, in *R v. Ram Saran*, 8 A 306; of JARDINE J, in *R v. Chagan*, 14 B 331, 344; of MARTIN B in *R v. Boyes*, 9 Cox CC 32, quoted *ante* under "*Commentary*". This salutary rule of practice is particularly necessary in cases of conspiracy to commit crimes where the crime of criminal conspiracy is established the moment an agreement between the accused person to commit such crimes is proved [*Bachha v. R*, A 1935 A 162: 155 IC 369].

In *R v. Chagan Dayaram*, 14 B 331, BAYLEY J, observed:—

> "The rule in s 114 and that in s 133 are part of one subject, and neither section is to be ignored in the exercise of judicial discretion. The illustration (*b*) is however, the rule and when it is departed from, I think the court should show, or it should appear that the circumstances justify the exceptional treatment of the case. As I said in *Maganlal's case* (14 B 115 *ante*), it has been held by two eminent judges, now members of the Judicial Committee of the Privy Council, that it would certainly be unsafe to depart in India from the established practice in England in the application of the rule requiring corroboration. These are the

words of COUCH CJ, in *R v. Imam*, 3 BHC 59, and they pervade SIR BARNES PEACOCK'S decision in *Elahee Buksh's case*, 5 WR Cr 80. It is not enough for a court to state the rule *pro forma*, and merely as a reason to evade it; the court must act upon it."

Corroboration of accomplice evidence is a rule of practice founded on experience and failure to raise the presumption under s 114 *illus* (*b*) is an error of law [*Madan Garu v. R*, 73 IC 963: 4 PLT 382]. The rule cannot be departed from on the ground that the approver had no enmity against the accused [*Shib Dhan v. R*, A 1933 L 838]. It is not rendered inapplicable by the personal conduct and antecedents of the approver or by the absence of motive on his part or on the part of the investigating agency to implicate the individual accused [*Bimal v. R*, A 1934 L 583].

Although under this section, the conviction of a prisoner on the uncorroborated testimony of an accomplice is not illegal (*ante*: "*Conviction on accomplice evidence without corroboration*") the court, having reference to *illus* (*b*) of s 114 of the Act, may consider that the accomplice is unworthy of credit [*R v. Lachmi*, 19 WR Cr 43; *R v. Ram Saday*, 21 WR 69; *R v. Godai Rout*, 5 WR Cr 11; *R v. Koa*, 19 WR Cr 48; *R v. Chatterdharee*, 5 WR Cr 59]. As to the mode of weighing accomplice evidence, see *R v. Gobardhan*, 9 A 528; *Laxman Padma v. S*, A 1965 B 195. There may be, however, cases of an exceptional character, in which the accomplice evidence alone convinces a judge of the facts required to be proved, and s 133 would support him if he acts on that conviction without the corroboration usually insisted on. In such cases the revisional court ought not to interfere, in the absence of other circumstances showing want of exercise of sound judicial discretion [*R v. Magan Lal*, 14 B 115]. The rule of law triumphs over the rule of practice only in exceptional cases where special circumstances render it safe to act upon the uncorroborated testimony of an accomplice [*Nga Aung v. R*, A 1937 R 209: 1937 Rang 110 *ante*].

Where the High Court convicted the accused under s 467 PC on the evidence of the accomplice uncorroborated by any other evidence, *held* that the court erred in law and the conviction was set aside [*Chari v. S*, A 1962 SC 1573].

—Summary.—There is no absolute rule of law that an accomplice cannot be believed unless his evidence is confirmed and that a conviction cannot be recorded on the testimony of an accomplice alone. S 133 itself says that such a conviction is *not illegal*; but the established rule of practice, founded on the judicial experience of generations which says that it is dangerous to act exclusively on such evidence and requires corroboration of accomplice evidence by some untainted evidence has become virtually equivalent to a rule of law [*Haroom v. S*, A 1968 SC 832; see *Davies v. D P P*, 1954 AC 378: 1954, 1 All ER 507; *R v. Baskerville, ante*; *Mahadeo v. R*, A 1936 PC 242; *Bhuboni v. R*, A 1949 PC 257; *S v. Basawan*, A 1958 SC 500; *Siar Nonia v. R*, 18 CWN 550: 24 IC 174; *Amardas v. R*, 36 PWR 1910; *R v. Bajikrishna*, 6 Bom LR 481—*per* CHANDAVARKAR J; *Naraindas v. R*, 3 L 144: 68 IC 113; *Tota v. R*, 69 IC 462 (L); *Madan Garu v. R*, 4 PLT 381: 73 IC 963; *R v. Jamaldi*, 51 C 160; *Hakam v. R*, A 1929 L 850; *Venkatasubba v. R*, A 1931 M 689; *Manak v. R*, 133 IC 545; *Raghunath v. R*, A 1933 P 96; *Madhusudan v. R*, 37 CWN 934; *Mangal v. R*, A 1934 L 346; *Matilal v. R*, 39 CWN 754; *Bal Mukunda v. R*, 39 CWN 1051; *Bachha v. R*, A 1935 A 162; *Ata Md v. R*, 157 IC 626; *Nawal Kishore v. R*, 22 P 27; *In re Thiagaraja*, A 1946 M 271; *Cohen v. R*, A 1949 C 594]. Actually the requirement of corroboration is a rule of evidence which the courts have followed for satisfying the test of the reliability of an approver and has now been crystalized into a rule of law [*Chonampara v. S*, A 1979 SC 1761]. The evidence of an approver deserves to be scrutinised closely and carefully and in the absence of corroboration in regard to material aspects of the case, the Court would be reluctant to accept his

testimony [*Lal Chand v. State of Haryana*, A 1984 SC 226, 228: 1984 Cri LJ 164; *Rehman Waqor v. State*, 1981 Cri LJ NOC 125: 1981 Kush LJ 260 (J&K); *Ram Lal Narang v. State*, 1981 Cri LJ NOC 225 (Delhi); *Bharatkumar Jayamanishankar Mehta v. State of Gujarat*, 1982 Cri LJ 1314, 1317 : (1982) Guj LJ 249]. When it is said that the rule of practice is virtually a rule of law, it is meant that the practice laid down must be followed with the same precision as if it were rule of law; not that the rule of law has been obliterated by the rule of practice, but that both must be observed with equal care [*Nga Aung v. R*, 1937 Rang 110; A 1937 R 209].

The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it [*per* READING LCJ, in *R v. Baskerville*, 1916, 2 KB 658: 115 LT 453]. See also the following cases in which it has been held that the testimony of an accomplice is not sufficient unless materially corroborated; *R v. Warren*, (1909) 25 TLR 633; *R v. Mullins*, (1848) 3 Cox CC 526; *R v. Tate*, (1908) 2 KB 680; *R v. Kirkham*, (1909) 25 TLR 656; *R v. Bickley*, (1909) 73 JP 239: *R v. Barrett*, 1908, 1 Cr App Rep 64; *R v. Everest*, 1909, 73 JP 269; *R v. Jacobs*, 1908, 1 Cr App Rep 216; *R v. Lewis*, 1937, 4 All ER 360.

The practice of the Allahabad High Court is clear that there can be no conviction solely upon the evidence of an approver. It must be corroborated in material particulars [*Mathuri v. R*, 58 A 695: A 1936 A 337].

Value of Approver or Accomplice Evidence.—The probative value of the evidence of an accomplice is practically the same as the confession of a co-accused [*Narayana Aiyar v. R*, 1915 MWN 363: 24 IC 153]. The utmost caution is necessary in admitting or using the evidence of an approver [*Banu Singh v. R*, 10 CWN 962; *Bakare v. R*, 11 CrLJ 441: 7 IC 185; *Ram Singh v. R*, 52 PLR 1916; *Mannu v. R*, 3 PWR Cr 1911; *Lakhan v. R*, 19 PWR Cr 1912; *R v. Nanigopal*, 15 CWN 593; *Govind v. R*, 18 Bom LR 266]. The evidence of an accessory after the fact cannot be put on a higher level than that of an approver [*Shyam Kumar v. R*, A 1941 O 130]. A person who is convicted on his confession remains an accomplice and his evidence must be viewed with suspicion [*R v. Komoruddin*, A 1928 C 233]. It has been observed in a few cases that an accomplice after conviction stands on a higher footing than an approver [*R v. Hussain*, 25 B 422; *Md Usuf v. R*, 58 C 1215] but all the same he remains an accomplice—an infamous person—whose evidence is tainted evidence. The distinction is of little practical importance, if any.

If approver's evidence is discarded, it must be discarded as a whole and the defence cannot base arguments on it any more than the prosecution [*Sheo Barhi v. R*, A 1930 P 164]. It has however been also held that the question whether it should be accepted in part or totally rejected, depends on the circumstances of each case [*Bhola v. R*, A 1939 A 567; see *Bachinta v. R*, 7 PWR Cr 1916: 32 IC 833]. The omission in the police statement made by an approver by itself would not necessarily render his evidence unreliable. The court would have to consider whether taken as a whole and in the light of the facts and circumstances of the cases it was a credible version or not [*Madanmohan v. S*, A 1970 SC 1006]. The statement of an accomplice is of course subject to suspicion, but in certain cases it is of great value and should not be completely discarded. But such a statement unless supported by reliable evidence of another kind to corroborate it, is not sufficient in itself to form the basis of a conviction [*Mohan v. R*, A 1935 A 477; see cases under the headings above]. The uncorroborated statement of an approver taken at the end of the trial is of no value [*Sundar v. R*, 56 IC 667: 21 CrLJ 507].

As to the difference between testimony of an accomplice and confession of co-accused, see s 30 *ante*.

Rule of Corroboration Applies Equally to the Case of Accessories and Convicted Co-accused.—The testimony of accessories after the crime must be corroborated in the same way as the evidence of an accomplice [*Mahadeo v. R*, A 1936 PC 242; see *Brijlal v. R*, A 1936 O 413; *R v. Kallu*, A 1937 O 259]. The same caution is necessary in the case of testimony of one of the accused who pleaded guilty, was convicted and then put into the witness-box against the co-accused [*R v. Allisab*, 34 Bom LR 1453]. See *ante*: "*Who are accomplices?*".

When Corroboration is Not Necessary.—Where the accomplice evidence is called by the prosecution and the jury are not asked by the prosecution to act upon it, the question of warning or the corroboration of accomplice evidence does not arise [*R v. Barnes*, 1942, 2 All ER 229 CCA. In this case two of the accused who were jointly tried gave evidence on their own behalf under the Cr Evidence Act 1898. Since the insertion of s 342A Cr P Code (by Act 26 of 1955) [now s 315(*1*)] an accused may also give evidence here].

Judge's Duty in Charging the Jury. [Caution Against Danger of Acting Upon Uncorroborated Accomplice Evidence].—In spite of the fact that an accomplice has always been a competent witness, that a conviction on his evidence though uncorroborated is sustainable, and that a judge can properly direct a jury that they are entitled to convict upon such uncorroborated evidence, it has been the custom since a very long time for the judges to warn the jury that it is dangerous to act upon such evidence without corroboration. This warning was in some earlier cases regarded as discretionary. "Judge in their discretion, will advise a jury not to believe an acomplice unless he is confirmed" [(*per* LORD ELLENBOROUGH in *R v. Jones*, 2 Camp 130, 133; see *R v. Tate*, 1908, 2 KB 680; *R v. Moore*, 28 Cr App R 111; *R v. Farler*, 8 C & P 107]. But in later decisions what was no more than a "practice" gradually assumed the hard lineaments of a rule of law and the warning became a solemn duty of the judge. The conviction would be quashed if there is failure to warn [*R v. Baskerville*, 1916, 2 KB 658; *R v. Davies*, 1950, 22 Cr App R 33; *R Lewis*, 1937, 4 All ER 360; *R v. Md Farid*, 1945, 30 Cr App R 168: 173 LT 68; *Davies v. DPR*, 1954 AC 378: 1954, 1 All ER 507]. In the last case it was pointed out that the observations (that in the absence of warning the conviction must be quashed) in *R v. Baskerville* were *obiter* as what consequences would follow from the omission to warn was not the point in issue in that case. Nevertheless the rule enunciated in *Baskerville's case* being the correct law was affirmed in *Davies v. DPP, sup*. The law as to the warning to be given to the jury is the same in India.

The English law relating to corroboration of accomplice evidence has been thus stated: "There is no doubt that uncorroborated evidence of an accomplice is admissible in law and that a jury can convict the prisoner on it, especially where there is in question the evidence of a person who is not so much an accomplice as a victim. If, however, a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict on his evidence, it is dangerous to do so unless it is corroborated: and this rule, although a rule of practice, now has the force of a rule of law. It is never the duty of the judge to advise the jury to convict on uncorroborated evidence [*R v. Beebe*, 19 Cr A Rep 22 (cited *post*); *R v. Clive*, 1930, 22 Cr A Rep 19]. Corroboration is not required where the evidence of an accomplice is not called by the prosecution" [*Davies v. DPP, sup*, Hals 3rd Ed Vol 10 para 844].

The evidence of accomplices should not be left to the jury without such directions and observations from the judge as the circumstances of the case may require, pointing out to them the danger or impropriety of trusting to such uncorrobrated evidence. The omission to do so is an error in law, and is on appeal a ground for setting aside the conviction, when the appellate court thinks that the prisoner had been prejudiced by such omission, and that there has been a failure of justice [*R v. Elahee Buksh*, BLR Sup Vol 459: 5 WR Cr 30, 88; *R v. Bykunta*, 3 BLR Cr 3 note: 10 WR 17; *R v. Nawab Jan*, 8 WR 19, 21; *R v. Kutab Sheikh*, 6 WR 17; *R v. Karoo*, 6 WR Cr 44; *R v. Mohima Ch*, 6 BLR App 168; *Re Proceedings*, dated 20th March 1968, 4 MHCR App 7; *R v. Sadhu Mandal*, 21 WR Cr 69; *R v. O'Hara*, 17 C 642; *R v Bepin Biswas*, 10 C 970; *R v. Mohesh Biswas*, 19 WR 16: 10 BLR 155 note; *R v. Kalachand*, 11 WR Cr 21; *R v. Fateh Chand*, 5 BHC Cr 85; *R v. Ramsaran*, 8 A 306; *R v. Arumuga*, 12 M 19; *Rattan v. R*, 8 P 235: A 1928 P 630; *Lokhono v. R*, 21 P 865: A 1943 P 163].

The judge must tell the jury that they may, if they choose, convict on the uncorroborated evidence of an accomplice alone, if believed, but that it is dangerous to act upon such evidence unless it is corroborated in material particulars by reliable evidence. If such warning be not given, the conviction will be quashed [*Madhusudan v. R*, 37 CWN 934; *R v. Wajid*, A 1933 P 500; *Shibdas v. R*, A 1934 C 114; see *Rameshwar v. S*, A 1952 SC 54: 1952 SCR 377; *S v. Basawan*, A 1958 SC 500]. He must tell the jury clearly and emphatically that it is a rule which has practically the force of law and that they ought not to convict on accomplice evidence without corroboration. A verdict of jury in disregard of the rule is illegal [*Mata Pd v. R*, A 1943 B 74: 45 Bom LR 64]. The warning must be given in such terms as could leave no possible doubt in the minds of the jury as to its import [*R v. Cleal*, 1942, 1 All ER 203, 205, *post*].

As to who is to decide or how is it to be decided whether a particular witness is or is not an accomplice, see *Davies v. DPP*, 1954, 1 All ER 507 *ante*: "*How to decide whether a witness is an accomplice*".

Where a judge is sitting without a jury, he must apply the same rule by treating himself as a jury [*Shibdas v. R, sup*; *Motilal v. R*, 39 CWN 754]. Where an offence is tried without jury, it is necessary that the judge should give some indication in his judgment that he had this rule of caution in his mind and should proceed to give reasons why in the particular case he considered it unnecessary to require corroboration [*Rameshwar v. S*, 1952 SCR 377, 385: A 1952 SC 54; *S v. Basawan*, A 1958 SC 500].

If in spite of the warning the jury convict, the court, on appeal, will quash it if the verdict is considered unreasonable or cannot be supported having regard to the evidence [*R v. Baskerville*; *R v. Bebee, infra*; *R v. Lewis*, 1937, 4 All ER 360 *post*; *R v. Cleal, sup*; *Mata Pd v. R, sup*].

On a charge of receiving stolen goods the prosecution evidence rested largely on the evidence of accomplices though there was some independent evidence of corroboration implicating the prisoner in a material particular. The presiding judge omitted to give warning as to the danger of convicting on accomplice evidence without corroboration—*Held* that although the Criminal Court of Appeal might affirm a conviction despite the absence of warning in a case where the corroborative evidence was of such a convincing, cogent and irresistible nature that the jury must have reached the same conclusion even if they had received the proper direction as to accomplices, yet the corroborative evidence in the particular case fell short of that standard, and the failure to warn the jury was, accordingly fatal to the conviction [*R v. Lewis*, (1938) 158 LT 454: 26 Cr Ap R 110].

In *R v. Baskerville*, 1916, 2 KB 658, LORD READING LCJ, observed:—

> "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice at the common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and in the discretion of the judge to advice them not to convict upon such evidence:—but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. The rule of practice has become virtually equivalent to a rule of law.....and in the absence of such a warning by the judge, the conviction must be quashed."

In a later case, objection was taken to the direction of the judge on two grounds: first, that the judge in warning the jury had at the same time added that it was generally dangerous to act on such evidence alone; and secondly, that he had directed them to the effect that if in fact they were satisfied with the evidence and believed the same to be true they ought to convict, notwithstanding the absence of corroboration. The Court of Criminal Appeal quashed the conviction and the LORD CHIEF JUSTICE summarised thus the points of direction when the only evidence is the uncorroborated testimony of an accomplice:—

> "There is a distinction drawn between the three different things which the jury are to be told—that it is within their legal province to convict: that in all cases it is dangerous to convict and they may be advised not to convict. It is quite clear, when one looks at the enumeration of the various courses, that nowhere is there to be found, directly or indirectly, and reference to a case in which it may be the duty of the learned judge to advise the jury in such a case that they ought to convict." [*R v. Beebe*, 1925, 41 TLR 635, 636: 133 LT 736: 19 Cr App R 22].

The position as defined by *R v. Baskerville, sup* and restated in *R v. Beebe, sup*, has been summed up thus by HILBERY, J, in *R v. Cleal*, 1942, 1 All ER 203, 204-205 CCA:—

> "It is for the court (*i*) to tell the jury that it is within their legal province to convict upon such uncorroborated evidence, (*ii*) (and this is a rule to be observed and applied in all cases) to warn the jury of the danger of convicting a person on the uncorroborated testimony, and (*iii*) in the exercise of its discretion to advise the jury not to convict. This last is something which the court may do, but is not bound to do."

Judge Should Also Tell the Jury that They May Disregard the Caution and Convict on the Unconfirmed Evidence, if Believed.—A judge should warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice and in his discretion advise them not to convict upon such evidence; but he should at the same time point to the jury it is within their legal province to disregard the caution and to convict upon unconfirmed evidence if believed by them [*R v. Stubbs*, 1855, 25 LJMC 16; *R v. Atwood*, 1 Leach, 464; *Re Meunier*, 1894, 2 QB 415 (*per* CAVE, J, at p 418); *R v. Farler*, 1837, 8 C & P 106; *R v. Baskerville*, 1916, 2 KB 658, *sup*; *Madhusudan v. R*; *R v. Wajid, sup*; *Matilal v. R*, 39 CWN 754; *Khadim v. R*, A 1937 S 162; *R v. Cleal, sup*.

RUFFIN, CJ, in *S v. Hardin*, 1837, 2 Dev & B 407, 411 (Am) said:—

> "The evidence of an accomplice is undoubtedly competent, and may be acted on by the jury as a warrant to convict, though entirely unsupported. It is, however, dangerous to act exclusively on such evidence; and therefore the Court

may properly caution the jury and point out the grounds for requiring evidence confirmatory of some substantial part of it. But the court can do nothing more; and if the jury really yield faith to it, it is not only legal, but obligatory on their consciences, to found their verdict upon it."

Absence or Presence of Corroborative Evidence to be Pointed Out.—A jury may convict on the uncorroborated testimony of an accomplice, but the judge ought not to leave the case without warning them that such evidence must be regarded always with grave suspicion and they ought not to convict unless it is corroborated. Further he ought to point out whether there is any corroborative evidence, and if there is none, he should tell the jury, so [*R v. Feigenbaum*, 1919 1 KB 431 *post*]. It would be an error in summing up, if a judge, after pointing out the danger of acting upon the uncorroborated evidence of an accomplice, were to tell the jury that the evidence of accomplice, was corroborated by evidence of a fact which did not amount to any corroboration at all [*per* BAYLEY, J, in *R v. Magan Lal*, 14 B 115]. The judge must not tell the jury that such or such witness does in fact corroborate. That is the province of the jury and depends upon whether they believe the witness or not [*per* LORT WILLIAMS, J, in *Rebati v. R, post*]. Where the judge has given an adequate warning on corroboration and explained what is meant in law by corroboration, it is unnecessary to point out to the jury the items of evidence which can amount to corroboration [*Zielinski v. R*, 1950, 34 Cr App R 193: 1950, 2 All ER 1114*n*].

Even in a case where there is some evidence of an apparently corroborative character but inconclusive, the warning must be given and the judge should further explain to the jury the nature and real value of the corroborative evidence [*Sikandar v. R*, 41 CWN 641 (a case of indecent assault, but the rule applies equally to corroboration of approver's evidence)].

The question as to what is or is not, what amounts or does not amount to corroborative evidence in law, is a question of law to be decided by the judge. It is the duty of the judge to direct the attention of the jury to those portions of the evidence confirming or corroborating the accomplice's story which do or do not fulfil the requirements of law, *viz*, corroboration of the accomplice's story in *material particulars* connecting or identifying each of the accused [*Rebati v. R*, 23 CWN 949-50; *Hachuni v. R*, 34 CWN 390]. The judge should tell the jury the *kind* of corroboration required, *viz*, corroboration in material particulars tending to connect each of the accused with the offence [*Hachuni v. R*, 34 CWN 390] and it is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused [*R v. Baskerville*, 1916, 2 KB 658].

When there is a general charge of conspiracy to commit dacoity against several accused, and also a charge against the accused for having committed dacoity, it is most necessary that in summing up the judge should distinguish what is evidence against each of the accused on the charge of conspiracy and what is evidence against each of the accused on the charge of having committed dacoity—particularly in cases where the main evidence is that of an approver. A general warning as to the necessity of corroboration without classifying the evidence is not sufficient [*Rezak v. R*, 42 CWN 870]. The discrepancies in the uncorroborated evidence should be explained to the jury, and this is even more important when there has been a considerable interval of time between the giving of that evidence and the summing up to the jury [*R v. Cleal, sup*].

Drawing Attention to Cases or Reading From Text Books.—It is undesirable and indeed improper for the judge when charging a jury to invite their attention to the decisions of cases reported in Law Reports [*Janak v. R*, A 1942 P 444; *Govt of*

Bombay v. Sakur, A 1947 B 28], or to read out passages from text books without reference to the fact of the case [*Anilesh v. S*, A 1951 As 122].

Text of Charge to the Jury.—An ideal instruction to the jury is contained in the following passage of DARLING, J, in *R v. Feigenbaum*, 1919, 1 KB 431:—

> "The boys were undoubtedly the accomplices of the appellant. It is a rule of law that a jury may convict on the uncorroborated evidence of an accomplice, and therefore, a judge is not justified in directing the jury, at the close of the case for the prosecution, that they must acquit the prisoner because, in his opinion the only evidence against him is the uncorroborated evidence of an accomplice. But it has been laid down in many cases, that the judge ought not to leave the case to the jury without warning them firmly that the evidence of an accomplice must always be regarded with grave suspicion, and that they ought not to convict unless the evidence of accomplice is corroborated; further, he ought to point out to the jury what corroborative evidence there is, if any, or if, in his opinion, there is no corroborative evidence, he should tell the jury so. Practically this differs little from saying that a judge may direct an acquittal if there is indeed no corroboration of the accomplice's evidence, but a difference does exist, though it may be very slight. In the words of Browning:
>
> 'Oh the little more, and how much it is!
> And the little less, and what worlds away'."

Similar instruction is to be found in the following observations of LORT WILLIAMS, J, in *Rebati v. R*, 23 CWN 945, 949-50:—

> ".....Just as it is the duty of the judge to direct the jury as to what portions of the evidence amount to evidence in accordance with law, and to lay before them such evidence only and to direct them to reject any evidence which may have been given, but which does not amount to evidence in accordance with law, similarly it is the duty of the judge to direct the attention of the jury to those portions of the evidence confirming or corroborating the accomplice's story which do or do not fulfil the requirements to which I have already referred. But the judge must not tell the jury that such or such witness does in fact corroborate the accused. That is the function of the jury and depends upon whether they believe the witness or not. And though an omission to direct the attention of the jury to those portions of the corroborative evidence which amount to corroborative evidence in law would only be non-direction—it is a misdirection if the judge points out to the jury certain portions of the evidence as fulfilling the requirements already stated, when in fact they do not do so".

The following observations of PRINSEP and STEPHENS, JJ, in *Jamiruddi v. R*, 29 O 786, 787 (**approved** in *Rebati v. R, ante*) make the point clear:—

> "In laying the evidence before the jury, the sessions judge told them: 'If you think that the approver's story is worthy of credit in itself, you have to consider whether it has been corroborated on material points'. He then described what in his opinion were 'the points of corroboration', and he told the jury that 'the above are points on which the evidence has been corroborated and that corroboration is full and complete, if you believe it; you have to consider these points and decide whether the approver has been corroborated in material points; and if you find that to be so then you have in his story sufficient evidence to connect all three with the crime....'
>
> "This was not a proper way to place the case before the jury. The sessions judge should have told the jury that, although the law permits them to convict

on the uncorroborated evidence of an accomplice, it is not the practice of our courts, which have consistently held that it is not safe or proper to convict on such evidence without corroboration sufficient to connect each of the accused with the offence committed. With this caution, the sessions judge should have laid before the jury the evidence corroborating the statement of the accomplice. In regard to the nature of the corroborative evidence, it must be confirmatory of some of the leading circumstances of the story of the approver as against the particular prisoner. Facts which do not show the connection of the prisoner with the commission of the offence with which he is charged are no corroboration in the sense in which the word is used in such cases, although they may tend to show that certain portion of what the accomplice says is true."

The following passage in the charge to the jury by GARROW, B, in *Tidd's Trial*, 33 How St T 1483, contains an ideal instruction:

"It may not be unfit to observe to you here that the confirmation to be derived to an accomplice is not a repetition by others of the whole story of the accomplice and a confirmation of every part of it; that would be either impossible or unnecessary and absurd;.....and therefore you are to look to the circumstances to see whether there are such a number of important facts confirmed as to give you reason to be persuaded that the main body of the story is correct.....You are, each of you, to ask yourselves this question: Now that I have heard the accomplice and have other circumstances which are said to confirm the story he has told, does he appear to me to be so confirmed by unimpeachable evidence, as to some of the persons affected by his story or with respect to some of the facts stated by him, as to afford me good ground to believe that he also speaks the truth with regard to other prisoners or other facts, with regard to which there may be no confirmation? Do I, upon the whole, feel convinced in my conscience that his evidence is true and such as I may safely act upon?".

When Co-accused is a Competent Witness. [Ss. 306, 308 and 321 Cr P Code—Pardoned and Discharged Accused].—An accomplice by accepting a pardon under s 306 Cr P Code becomes a competent witness and may, as any other witnesses, be examined on oath; the prosecution must be withdrawn and the accused formally discharged under s 494 (now s 321) Cr P Code before he would become a competent witness [*Banu Singh v. R*, 33 C 1353: 10 CWN 962]; but although there is omission to record discharge, an accused becomes a competent witness on withdrawal of prosecution [*Sheorati v. R*, 18 CWN 1213; see *Peiris v. R*, A 1954 SC 616: 1954 Cri LJ 1638]. An accused also becomes a competent witness after withdrawal from prosecution under s 494 (now s 321) Cr P Code. Pardon under s 337 (now s 306) *ibid* is a judicial act and action under s 494 (now s 321) *ibid* is a general executive discretion subject to the consent of the court [*Bawa Fakir v. R*, 42 CWN 1252: A 1938 PC 266]. See Sarkar's Cr P Code 4th Ed, notes to ss 306 and 321. Under Art 20(*3*) of the Constitution no accused shall be compelled to be a witness against himself. But as a co-accused accepts a pardon of his free will on condition of a true disclosure, in his own interest, and is not "compelled" to give self-incriminating evidence, the law in ss 306 and 308 Cr P Code is not affected. So a pardoned accused is bound to make a full disclosure and on his failure to do so he may be tried of the offence originally charged and his statement may be used against him under s 308.

The C P Government notified that no prosecution would be instituted against any person who came forward to give evidence against a public officer who was charged with taking bribes and two persons being undoubtedly accomplices gave evidence—

held, that the evidence was admissible. It is not necessary in order to make an accomplice a competent witness that the procedure in s 337 (now s 306) Cr P Code should be invariably made use of [*R v. Har Pd*, 45 A 226; *Nga Thein v. R*, A 1939 R 361]. S 337 (now s 306) does not suggest that the only method of obtaining the evidence of a co-accused against another is by tendering him a pardon; another way is to withdraw prosecution. S 494 (now s 321) stands by itself and the effect of the section is that as soon as the accused is discharged, he becomes under the general principles of law a competent witness against his co-accused [*Raman v. R*, 56 C 1023: A 1929 C 319: 33 CWN 468; see also *Kasem v. R*, 47 C 154]. A later Full Bench case affirmed *Raman's* case holding that the court may consent to the public prosecutor withdrawing from the prosecution of any person under s 494(*a*) [now s 321(*a*)] Cr P Code, for the purpose of obtaining his evidence against others placed on trial along with him and can do so even in a case to which s 337 (now s 306) applies. But when the latter section is applicable, the better course is to proceed under that section [*Harihar v. R*, 1937, 1 Cal 711: 40 CWN 876 FB]. In this connexion see *R v. Hussein Haji*, 25 B 422 where an attempt has been made to reconcile the provisions of ss 337 and 494 (now ss 306 and 321) Cr P Code. As to whether a discharged co-accused is competent to testify or not, see *R v. Mona Puna*, 16 B 661; *Aung Min v. R*, 4 LBR 362: 9 Cri LJ 370 and 7 WR Cr 44. The co-accused against whom the charge has been unconditionally withdrawn is a more reliable witness than the accomplice who is examined under conditional pardon, although proper corroboration is necessary in the case of both [*Sudam v. R*, A 1933 C 148]. The competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case [*Laxmipat v. S*, A 1968 SC 938]. See *ante* s 118; "*Evidence of witnesses produced by one accused whether admissible against co-accused*".

The evidence of an approver is admissible where the pardon given was in respect of an offence exclusively triable by sessions court, but the offence for which the accused is tried and convicted is not exclusively triable by sessions court. A pardon once given is not affected by subsequent proceedings [*Kauromal v. R*, 81 IC 881 (S)].

An accused was tendered pardon by local Government, but there was no formal order of discharge and he was examined as an approver. His name did not appear among the accused actually challenged—*held* he was not an accused and was competent witness [*Durga v. R*, 77 IC 948 (L)]. Though the statement of an approver may be given in evidence against him under s 339(2) [now s 308(2)] Cr P Code, it cannot be said that the operation of s 24 of the Evidence Act is altogether excluded [*R v. Cunna*, 22 Bom LR 1247: 59 IC 324].

Evidence of the person who bribes is admissible against the person bribed [*R v. Obhoy*, 3 WR Cr 9; see *ante*: "*Bribery cases*" and "*Bribery*"].

The withdrawal of prosecution against an accomplice relegates him from the position of a co-accused to his original position of an accomplice. His evidence is not independent [*Md Usuf v. R*, A 1929 N 215]. Evidence of an accomplice who has accepted the pardon should be viewed with great care and caution and it is not safe to act upon his testimony unless corroborated in material particulars [*Mahadeo v. R*, 9 Luck 355]. "If there is any fear in the witness's mind that failure to establish the case for the prosecution will result in his own prosecution, it is not likely to lead to truthful evidence being given by such a witness" [*per* LORT-WILLIAMS, J, in *Abdul Majid v. R*, 39 CWN 1082, 1084: 60 C 652]. The evidence of a witness not charge-sheeted by the police ought to be received with great caution and may be given more or less weight according to the facts and circumstances of each case [*Lakshmandas v. S*, A 1968 B 400].

The confession of an accused who is dead, implicating himself and an accomplice in a crime, is admissible under s 32(3) of the Evidence Act. Not only that part of the statement which is against interest, is admissible, but all those parts of it, which relate to connected facts, including the share taken by others in crime [*Nga Po Yin v. R*, UBR Evidence 3 : 5 Cri LJ 30].

An accused person was convicted on the basis of his confession. His statement was corroborated by the statements of his co-accused recorded under S. 108 of the Customs Act. It was held that the evidence of such co-accused could be acted upon. *Bhanu Khalpa Bhai Patel v. Collector of Customs*, AIR 1998 SC 1487.

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

SYNOPSIS

COMMENTARY

Principle and Scope.—This section lays down in clear terms that no particular number of witnesses is necessary for proof or disproof of a fact. It applies to both civil and criminal cases. The result is that in any case, the testimony of a single witness, if believed, is sufficient to establish any fact. The section follows the maxim that evidence is to be weighed and not counted, and has altered the law in s 28 of Act 2 of 1855, which like the law in England required in the case of treason, two witnesses. There is no rule of law that the uncorroborated testimony of a witness cannot be accepted. The rule, if any, is a rule of prudence and its adoption or not depends on the circumstances of each case [*Bankim v. S*, A 1956 P 384; see *Vadivelu v. S*, A 1957 SC 614: 1957 SCR 981; *Ramratan v. S*, A 1962 SC 424].

Law does not insist on plurality of evidence. Even the evidence of solitary witness can be believed for the conviction of the accused [*Krishnappa v. State of Karnataka*, 1996 AIHC 1030, 1032 (Kar)]. Plurality of evidence is not required for bringing home the guilt of the accused and it the quality of the witnesses which is significant in appraisal of evidence [*Jitendra Mohan Gupta v. State*, 1992 Cri LJ 4061, 4069 (Del). See also *Rameshwar v. State*, 1987 Cri LJ 442 (All)]. Plurality of evidence is not at all required for the bringing home the guilt of the accused. It is the quality of the evidence and not the plurality of witnesses which is important in the appraisal of evidence. Even single witness testimony can be sufficient to prove the guilt of the accused, if found entirely reliable. Evidence has to be weighed and not counted [*Barkau v. State of U.P.*, 1993 Cri LJ 2954, 2960 (All). See also *Rameshwar v. State of U.P.*, 1987 Cri LJ 442 (All)]. The testimony of a single witness, if believed is sufficient to establish any fact. Section 134 follows the maxim that evidence is to be weighed and not counted. Any hard and fast rule that a particular number of witnesses should be required to prove a particular offence would hamper the administration of justice, as in many cases it may not be practicable to get more than one witness. All that court is concerned with, is the quality and not quantity of the

evidence [*Kanhaisingh Nayak v. State*, 1993 Cri LJ 2812, 2814 (Ori)]. Conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony in material particulars, before recording conviction. It is only when the courts find that the single eye-witness is a wholly unreliable witness that is testimony is discarded *in toto* [*Anil Phukan v. State of Assam*, A 1993 SC 1462, 1464].

There is no rule of evidence that no conviction can be based unless a certain minimum number of witnesses have identified a particular accused as member of unlawful assembly. It is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence but the quality that matters. Even testimony of one single witness, if wholly unreliable, is sufficient to establish the identification of an accused as member of an unlawful assembly. All the same, when the size of the unlawful assembly is quite large (as in this case) and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouch safe the indentification of an accused as participant in the rioting [*Binay Kumar Singh v. State of Bihar*, A 1997 SC 322, 331 : 1997 Cri LJ 362, 369 following *Maralti v. State of Uttar Pradesh*, A 1965 SC 202]. Indeed, conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insists upon some independent corroboration of his testimony, in material particulars before recording convictions. It is only when the courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded *in toto* and no amount of corroboration can cure that defect [*Anil Phukan v. State of Assam*, A 1993 SC 1462 : 1993 Cri LJ 1796, 1798]. Conviction on the basis of testimony of a single witness is not bad [*Badnayina Bheemanna v. State*, 1996 Cri LJ 3095, 3097 (AP) : *Shyamrao Vishnu Patil v. State of Maharashtra*, 1998 Cri LJ 3446 (Bom)]. The quality of the evidence matters and not the quantity [*Poolin Haldar v. State*, 1996 Cri LJ 513, 522 (Cal)]. In case of the sole ocular witness the courts should be on their tiptoe and guard and must scrutinise the evidence with greater care and caution [*Islam-ud-din v. State*, 1996 Cri LJ 2613, 2615 (Del)]. The court will not be justified in insisting upon plurality of witnesses when evidence of one witness is satisfactory and acceptable and free from infirmity [*S.G. Gundegowda v. State*, 1996 Cri LJ 852, 863 (Kant)].

Any hard and fast rule that a particular number of witnesses should be required to prove a particular offence, would hamper the administration of justice, as in many cases it is not possible to get more than one witness. If any such rule were strictly adhered to, many crimes would go unpunished. In secret murders even one witness to the crime is not obtainable and in many cases courts have to depend upon only circumstantial evidence. The discretion of the judge has been left unfettered. If a single witness is entitled to full credit, it is sufficient for a decision. It is not infrequent to find the evidence of a single witness more trustworthy than the testimony of half a dozen men who swear against him. All that the court is concerned with is the *quality* and not *quantity* of the evidence. [*Maqsoodan v. State of UP*, A 1983 SC 126, 128 : 1982 All LJ 1524 : 1983 Cri LJ 218 (S); *Lalman v. State of UP*, 1983 Cri LJ NOC 86 (All) (DB) : 1983 All Cr R 377; *Dhruba Charan Lenka v. The State*, 1984

Cri LJ 769, 771 : 1983 CUT LR (Cri) 349 (Orissa); *Pravakar Behera v. State of Orissa*, 1985 Cri LJ NOC 6 : (1984) 58 CUT LT 42 (Orissa); *Rameshwar v. State of UP*, 1987 Cri LJ 442, 444 : (1986) 3 Crimes 98 (All) (DB); *Gaital v. State*, 1988 Cri LJ 960 : (1988) 1 Crimes 900 (All) (DB)]. In order that a decision may be based on the evidence of a single witness it is not correct that his testimony must be true on all points, for part of it may be true and part false and it is the duty of the judge to separate the truth from the falsehood. *Falsus in uno, falsus in omnibus* is not adhered to by courts now see (*ante* s 5).

If the evidence is open to doubt or suspicion, the judge will require corroboration. This section does away with the exceptions (see *post*) still found in English law. Whenever there are circumstances of suspicion, or the testimony of a witness is challenged by cross-examination, or otherwise, corroboration is required either by law or well-established rule of practice. On the other hand, the courts have inherent power to check an undue multiplicity of witnesses as well as to prevent their oppression in various respects [Phip 11th Ed p 674; Best, ss 47-48; Wigmore, s 1906].

In England also, the general rule is that courts may act on the testimony of a single witness [*Wright v. Tatham*, 5 C & F 592]. On the other hand it must also be said that in the application of the general rule, the greatest caution should be exercised, and this section should not be used as a peg to hang on it every decision which is based upon the testimony of a single witness. It should be very carefully guarded that in the eagerness to vindicate justice, this section is not interpreted as a direction to convict on the testimony of a single witness, as some judicial officers are sometimes disposed to do. Undoubtedly there are many advantages where there is a plurality of witnesses, and the most important among them is that an opportunity is afforded for weighing the evidence, and finding out the discrepancies between the stories given. But offences of a certain kind are committed in such circumstances that it would almost be impossible to expect any witness other than the complainant. It would therefore be unwise and against public policy to insist on the production of more witnesses than one, in every case. Each case must be judged by its own peculiar circumstances. There may be instances of grave injustice by acting on the testimony of a single witness; at the same time crimes would go unpunished if complainant is not believed merely because there is no other witness to corroborate. If the law is misapplied, you cannot blame the law itself. Happily such cases are extremely rare.

The following remarkable case is to be found in Best. Brooks mutilated himself, whether from insanity or malice is not quite clear, but more probably the former, and stated that his injuries were inflicted by four men. Two he identified, and they were convicted and sentenced to ten years' penal servitude at the Staffordshire Assize upon his evidence alone. About two years after shortly before his death, Brooke confessed his crime, and the men received a free pardon. They were given £500 each by way of compensation from the Treasury. That a case of this kind should give rise to a demand for the introduction of the *unus nullas* rule is not to be wondered at [Best, s 597].

[In England certain exceptions are still to be found to the general rule above, and the law or universal practice requires corroboration in certain cases.

In criminal proceedings, the law forbids conviction on the testimony of a single witness in the following cases:—

(*i*) Perjury (Perjury Act, 1911, 1 & 2 Geo V c 6, s 13).

(*ii*) High treason or misprision of treason (1800, 39 & 40 Geo III, c 93; as amended and extended by the Treason Act, 1945 (8 & 9 Geo 6 c 44), ss 1, 2 Schedule).

(*iii*) Bastardy (1845, 8 & 9 Vic c 10, s 6; 1872, 35 & 36 Vic c 65, s 4).

(*iv*) Offences against Women and Girls under the Cr Law Amendment Act (1885, 48 & 49 Vic c 69, ss 1, 2-4).

(*v*) Offences under the Children and Young Persons Act, 1933, 23 Geo, V. c 12, s 38.

(*vi*) Offences under the Prevention of Cruelty to Children Act, 1904, 4 Edw VIII, c 15, s 15 (*1*).

(*vii*) Representation of the People Act, 1949 (12, 13 & 14 Geo 6 c 68), s 146 (*5*).

(*viii*) Offences under Motor Car Act, 1903, 3 Edw VII, c 36, s 9 (*1*) and 1930, 20 & 21 Geo V c 43, ss 2 (*3*), 10 (*3*) as to the rate of speed.
&c &c &c &c

Among civil cases the law requires that the testimony of plaintiff should be corroborated in actions for Breach of Promise (1869, 32 & 33 Vic c 68, s 2).

The above exceptions are not recognised by the Act, but there is no reason why the courts here should not as a general rule follow the English law in appropriate cases. The rule that no decision in the above cases should be based on the testimony of a single witness is founded on prudence and experience and it would be unsafe and against public policy to depart from it except on very strong and just grounds. For instance in perjury cases, the opinion has been expressed that the rule of English law may be followed as a safe guide [*R v. Lalchand*, 5 WR Cr 23; *R v. B G Tilak*, 28 B 479, 498: 6 Bom LR 327, *post*]. In sexual offences corroboration of the evidence of the complainant though not essential is generally required as a rule of prudence (*post*: "*Sexual offences etc*").

In England, it is a rule of practice and not of law to require corroboration of the evidence of an accomplice (the rule is the same here, see s 133, *ante*) and also in respect of claims to the property of deceased persons [*In re Finch*, 23 Ch D 267; *Vavasseur v. V*, 25 TLR 250; see *Rawlinson v. Scholes*, 79 LT 350 where the rule appears to have been relaxed a little]. The rule that confession of a co-accused must be corroborated in order to sustain a conviction has also assumed the force of law (v s 30 *ante*)

Whether the evidence of the solitary eye-witness inspires confidence or not? A Division Bench of the Bombay High Court in *S.G. Sohatre v. State of Maharashtra*, 1997 Cri LJ 454 (Bom)(DB). This view was fortified in *Kartik Malhar v. State of Bihar*, A 1995 SCW 4540 observed as follows:

> "In view of the provision contained in section 134 of the Indian Evidence Act which provides that "No particular number of witnesses shall in any case be required for the proof of any fact", it is permissible for a court to record sustain a conviction on the evidence of a solitary eye-witness. This provision is based on the principle that evidence is to be weighed and not counted. But the same can only be done if evidence is cogent, implicit, reliable and in tune with probabilities."

[*Ref Phip 8th Ed, pp 476-80; Tay s 952 et seq; Best, 596 et seq; Powell, 9th Ed p 514 et seq; Wig s 2061 et seq*].

Quantity of Evidence Required for Judicial Decisions.—Evidence of one witness, if believed, is sufficient to establish any fact to which the witness speaks directly [*Prosonno v. Ramonee*, 10 WR 236; *Nemai v. S*, A 1966 C 194]. When the prosecution case rests mainly on the sole testimony of an eye-witness, it should be

wholly reliable [*Kathi Odhabhai Bhimabhai v. State of Gujarat*, A 1993 SC 1193, 1195 : 1993 Cri LJ 189 (SC); *Subhash Dhondiba Pandit v. State of Maharashtra*, 1996 Cri LJ 4194, 4197 (Bom). See also *Kartik Malhar v. State of Bihar*, (1995) 4 Crimes 516 (Bom); *Patel Chela Viram v. State of Gujarat*, A 1994 SC 1250, 1253]. Conviction can be recorded on the basis of a single eyewitness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the court is convinced that he is a truthful witness [*Kartik Malhar v. State of Bihar*, 1996 Cri LJ 889, 891 (SC)]. A conviction can be maintained on the basis of the evidence of sole witness. Acceptability of evidence and not numerological sufficiency of witnesses is material. The evidence has to be weighed, number of witnesses is not to be counted. Mere non-examination of some persons does not affect the credibility of the prosecution case [*Kedar Behera v. State*, 1993 Cri LJ 378, 383 (Ori)]. If the High Court thinks it unsafe to convict any accused on the uncorroborated evidence of a single eye-witness, it does not mean that the evidence of the witness stands castigated. It is no stigma against the evidence of any eye-witness if the court only wanted reassurance from yet other sources [*Balo Yadav v. State of Bihar*, A 1997 SC 2678, 2679 : 1997 Cri LJ 3395, 3396]. In riot cases it would be extremely hazardous to convict on the testimony of a single eye-witness. In such cases, the rule of prudence requires that courts should insist on plurality of eye-witness account [*Babu Hamid Khan v. State of Maharashtra*, 1995 Cri LJ 2355, 2356 (Bom)]. Evidence of sole eye-witness who is shifting his stand about identity of the accused, place and manner of incident is not reliable [*Kishan Singh v. State of Rajasthan*, 1994 Cri LJ 3503, 3509 (Raj)].

It is not correct to reject the prosecution story merely because it is based on oral testimony of only one eye-witness while other three eye-witnesses had been declared hostile by the prosecution agency if the case made out is otherwise true and acceptable and corroborated by medical evidence. Ballistic Expert opinion and other circumstantial evidence [*Ganpat Ram v. State of Rajasthan*, 1995 Cri LJ 1466, 1469]. There is no rule of law that the testimony of a single witness cannot be accepted [*Vahula Bhushan Alias Vehuna Krishna v. State of Tamil Nadu*, A 1989 SC 236, 238 : 1989 Cri LJ 799; *Chandrase Kharan v. State of Kerala*, 1987 Cri LJ 1715, 1719 (Ker) (DB); *Mohanan Nair v. State of Kerala*, 1989 Cri LJ 2106, 2110 : (1989) 11 Ker LJ 467; *E P Narayanan Nambiar v. State of Kerala*, 1989 Cri LJ NOC 8 : 1987 Ker LJ 699 (Ker); *Balvauta Pa v. State of Karnataka*, 1983 Cri LJ NOC 29 (Kant)(DB). It is the weight of the evidence and not the number of witnesses which the court has to consider [*Vadivelu v. S*, A 1957 SC 614; *Kewal v. R*, A 1925 O 473; *Sahdeo v. R*, A 1942 O 356; *Malik Abdul Salem v. State of Orissa*, 1985 Cri LJ 1871, 1873 (Orissa) (DB); *State of Orissa v. Abdul Whid*, 1990 Cri LJ (NOC) 136 (Orissa)]. A conviction upon the statement of a complainant alone is lawful [*Kulum v. Bhowani*, 22 WR Cr 32; *Veerappa v. R*, A 1928 M 1186 FB]. The innocence of a person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the cases for the prosecution [*Vadivelu v. S, sup*]. Where a criminal court has to deal with evidence relating to an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that conviction can be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. This test may be described as mechanical [*Masalti & Ors v. S*, A 1965 SC 202].

A judge may believe one witness in preference to three others, if he sees reasons to do so, and it is not legally necessary that he should detail his reasons [*Govind v. Narain*, 24 WR Cr 18]. There is no rule that the court must necessarily reject a claim against a deceased person's estate merely because it is supported only by the uncor-

roborated evidence of the claimant [*Rawlinson v. Scholes &c*, 1898, 79 LT 350; see *Hiralal v. Rajkumar*, 12 CLJ 470, 476; *Rupchand v. Madan*, 66 CWN 92]. Non-examination of few more witnesses for the occurrence is not fatal to the prosecution case. [*Rankanath Das v. State of Orissa*, 1990 Cri LJ (NOC) 64 (Orissa)]. Mere non-examination of another person who received injuries in the same occurrence cannot cast any doubt on the prosecution case. [*State of Gujarat v. Panubhai*, 1991 Cri LJ 2226, 2236 (Guj)].

Conviction can be recorded on the basis of the statement of single eye-witness provided his credibility is not taken by any adverse circumstance appearing on the record against him and the court, at the same time, is convinced that he is a truthful witness. The court will not then insist on corroboration by any other eye-witness particularly as the incident might have occurred at a time or place when there was no possibility of any other eye-witness being present [*Kartik Malhar v. State of Bihar*, 1996 Cri LJ 878 : 1995 (4) Crimes 516, 520 (SC)]. In every case when application is made in terms of Order 16 Rule 1 CPC court has to apply its mind and restrict the number of witnesses to an extent which should cater the requirement of the case. The approach of the court should neither defeat the ends of justice nor cause undue delay in litigation. The court should not leave the number to the whims and the fancies of the party producing the witnesses. Because a party interested in causing delay in a suit shall in that case be granted a premium for misusing the law of procedure. In determining the number of witnesses a court should take into account the following guidelines : (a) Nature of the litigation; (b) Number of issues required to be proved; (c) Nature of the issue; (d) The fact as to on whom has the onus been laid; (e) The specified purpose for which a particular witness is required to be produced. [*Yashpal Sawhney v. Gandotra Traders*, A 1995 J&K 32, 34]. Though the court should be slow in recording sustaining a conviction on the testimony of a solitary eye-witness, but there is no impediment in doing so if evidence of such witness inspires implicit confidence [*Gopal Mahadeo Tambada v. State of Maharashtra*, 1997 Cri LJ 2425, 2427 (Bom)]. Where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident [*Masalti v. State of U.P.*, A 1965 SC 202. **Relied** on in *Binay Kumar Singh v. State of Bihar*, A 1997 SC 322].

The evidence of the sole eye-witness has to be scrutinised with caution and circumspection. If on such scrutiny the evidence is acceptable, the accused can be convicted on that basis [*Barla Ganga Reddy v. State of A.P.*, 1993 Cri LJ 1998, 2001 (AP)]. When the prosecution case rests mainly on the sole testimony of an eye-witness, it should be wholly reliable. Even though such witness is an injured witness and his presence cannot be doubted but when his evidence is in conflict with medical evidence, the view taken by the trial court that it would be unsafe to convict the accused on his sole testimony cannot be said to be unreasonable [*Kathi Odhabhai Bhimabhai v. State of Gujarat*, A 1993 SC 1193 : 1993 Cri LJ 187, 189]. The evidence of the sole witness, *viz.* the accused's wife, when inspires implicit confidence, can by itself be sufficient to convict the accused [*Lalya Dharma Khadkya v. State of Maharashtra*, 1995 Cri LJ 564, 567 (Bom)]. It would not be safe to convict an accused on the lone testimony of an eye-witness particularly when his name was not mentioned either in the earliest report or during the inquest [*Nallamsetty Yanadaiah v. State of A.P.*, A 1993 SC 1175, 1178 : 1993 Cri LJ 408]. Section 134 does not make any clean sweep in adjudging the guilt in a criminal trial. Its application in irresistible only when the evidence does not suffer from any rents and fissures excepting some minor wear and tear [*Sambhunath Adhikari*

& Anr. v. The State of W.B., 1993 (1) Crimes 711, 715 (Cal)]. Where the witness, who alone claimed to have seen the occurrence and lodged the FIR, had omitted to mention in the FIR the vital details about the manner of assault or the occurrence and had enquired from the deceased after the occurrence as to how it happened, it is clear that he had not seen the occurrence and he was falsely introduced as an ocular witness in the case [*Govid Narain v. State of Rajasthan*, A 1993 SC 2457 : 1993 Cri LJ 2598, 2600]. Regarding non-examination of some persons it has to be seen, how far that is material. A conviction can be maintained on the basis of the evidence of sole witness. Acceptability of evidence, and not numeralogical sufficiency of witnesses, is material. The evidence has to be weighed; number of witnesses is not to be counted [*Kedar Bihara v. State*, 1993 Cri LJ 378, 382 (Ori)].

Where there was nothing to show that there was another witness than the one produced, to the occurrence, conviction could be based on the testimony of the sole witness if it inspire confidence. The evidence of eye-witnesses actually examined cannot be discarded only because some other persons present nearby were not examined. *Sheelam Ramesh v. State of A.P.*, 1999 (8) JT 537 : (1999) 8 SCC 369. Where the evidence of the eye-witness was acceptable, the fact that her eight-year old son who was sleeping with her in the room in which the incident occurred, was not examined, was held to be not fatal to the prosecution case. *Jinnat Mia v. State of Assam*, AIR 1998 SC 533.

Single Witness and Corroboration.—(*1*)As a general rule a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character. Where the prosecution rests on the sole testimony of an eye-witness, the same should be wholly reliable. That does not mean that each and every type of infirmity or minor discrepancies would render the evidence of such witness unreliable. [*Jayaram Shiva Tagore v. State of Maharashtra*, A 1991 SC 1735, 1736; *Mudhan Paryeng v. State of Assam*, 1982 Cri LJ 241, 242 (Gau); *State of UP v. Satish Chandra*, 1985 Cri LJ 1921, 1922 (SC) (DB); *Ramashish Rai v. State of Bihar*, 1989 Cri LJ 336, 350 : 1988 BLJR 720].

(*2*) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence that corroboration should be insisted upon, for example, in the case of a child witness, or of an accomplice or of an analogous character. The court can act on the testimony of a single witness unless the statute requires corroboration as in the case of an accomplice. [*State v. Ramasamy (M)*, 1983 Cri LJ NOC 178 (Mad) : 1983 Mad LW (Cr) 59].

(*3*) Whether corroboration is or is not necessary, must depend upon facts and circumstances of each case [*Vadivelu v. S*, 1957 SCR 981, 991 : A 1957 SC 614; **folld** in *Dinkar v. S*, A 1970 B 439]. None of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits when they have alleged to have identified in the dacoity nor did the witnesses gave any identification marks *viz*, stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In the absence of any such description it will be impossible to convict any accused on the basis of a single identification, in which case the reasonable possi-bility of mistake in identification cannot be excluded. [*Wakil Singh v. State of Bihar*, A 1981 SC 1392, 1393 : 1981 Cri LJ 1014]. If there are discrepancies in the testi-mony of a sole witness, it cannot be accepted. [*Pema Dukpa v. State of Sikkim*, 1981 Cri LJ 276 (Sikkim)]. The evidence of a single eye-witness can be accepted when there is corroboration from the medical evidence and the evidence of another witness who arrived at the spot immediately after the occurrence. [*Thangavel v. State*, 1981 Cri LJ NOC 210 (Mad)]. The credible witness may outweigh the testimony of a number of other witnesses of indifferent character. Such evidence of a solitary witness must be clear, cogent and convincing and should be of an unimpeachable character. [*Sidha Dehury v. State*, 1982 Cri LJ 500, 503 : (1981) 52 CUT

LT 512 (Ori)]. Mere absence of some likely witnesses may not always be looked upon with suspicion particularly when the evidence on record is by itself sufficient to bring home the charge. [*Santosh Mandal v. State*, 1983 Cri LJ 773, 777 (Cal) (DB)].

The witnesses are to be believed or disbelieved on the basis of their own testimony and merely because the prosecution produced more than one witness to prove one point, all cannot be disbelieved if some are disbelieved. Even from the testimony of one witness, he can be believed for a part of the prosecution case and can be disbelieved for another part. [*Kammo v. The State*, (1983) 1 Chand LR (Cr) 660 : 1983 Cri LJ 694, 701 (Raj) (DB)]. A child-witness (aged 13 years) was subjected to a lengthy, weary, tortuous and gruelling cross-examination but nothing could be elicited from her which may damage her testimony. She withstood the test of cross examination nicely and acquitted herself with success. So her evidence can be safely accepted. [*Mangal Singh v. State of Rajasthan*, 1985 Cri LJ 602, 611 : (1984) Rajasthan LR 953 (Raj) (DB)]. When the attack and counter attack by the R.S.S. and communist party factions created terror in the minds of the people living in the locality and they would be naturally hesitant to give evidence, non-examination of local witness is not fatal to the prosecution case. [*Appukuttan v. State*, 1989 Cri LJ 2362, 2371 (Ker) (DB)]. In a case under Narcotic Drugs and Psychotropic substances Act, non-joining of public witnesses puts the court on its guard to examine the statements of the prosecution witnesses with bit more care and a caution. [*Waisuddin v. State*, 1991 Cri LJ 134, 136 (Del)]. Non-examination of eye-witness, who has no axe to grind against the accused, is material. [*Dambarudhar Mahanta v. State*, 1984 Cri LJ NOC 67 : 1983 CUR LR (Cr) 321 (Ori)].

When the evidence of the witnesses examined before the court are believable, the non-examination of some other witnesses or the investigating officer will not lead to any adverse inference. [*Mahipalpur Co-op Society Ltd v. Smt Prabhati*, A 1986 Del 94, 98 : 1986 Rajdhani LR 102]. The confessional statement of a co-accused will not normally inspire confidence. It if is a statement of an accomplice turned approver it is of a very little evidentiary value. [*Sheo Nandan Paswan v. State of Bihar*, A 1987 SC 877, 921 : 1987 Cri LJ 793]. The prosecution is not bound to examine all the wit-nesses in a case. It may choose to examine such of the witnesses whom it considers relevant and material for the purpose of unfolding its case. [*State of Orissa v. Dullipkumar Chand*, 1987 Cri LJ 1242, 1251 : (1987) 1 Ori LR 555 (Ori) (DB)].

The evidence of every witness is to be judged on its own merits and if there is nothing in his evidence or in the evidence of other witnesses to discredit him, it cannot be disbelieved on the ground that there is only one witness on the point and no other witness has been examined to support him [*Ram August v. Bindeshwari*, A 1972 P 142]. Even where there is only a sole eye-witness of a crime, a conviction may be recorded against the accused concerned the court which hears such witness regards him as honest and truthful. [*Ramji Surjya v. State of Maharashtra*, A 1983 SC 810, 815 : 1983 Cri LJ 1105; *Madan Naik v. State*, 1983 Cri LJ NOC 47 (Ori); *Bindr Singh v. State of Rajasthan*, 1984 Cri LJ NOC 178 : 1984 Raj LR 285 (Raj)(DB); *Rama Chandra Jena v. State of Orissa*, 1985 Cri LJ NOC 64 : (1984) 2 Crimes 402 (Orissa) (DB); *Ratna Munda v. State*, 1986 Cri LJ 1363, 1365 (Ori) (DB)]. The uncorroborated testimony of the sole identifying witness in a dacoity case cannot be accepted when he could identify the accused only in the second identifi-cation parade and not in the earlier identification parade. [*Gofurshiekh v. The State*, 1984 Cri LJ 559, 562 : (1983) 2 Crimes 174 (Cal) (DB)].

—Murder Cases.—The contention that plurality of witnesses should be insisted upon in a murder case is too broadly stated and there is no such exception in s 134. It is not seldom that a crime has been committed in the presence of only one witness and if more witnesses are insisted upon, such crimes would go unpunished. If the testimony of the single witness is found to be entirely reliable there is no legal impediment to conviction. Another danger of insisting on plurality of witnesses will be indirect encouragement of subornation [*Vadivelu v. S*, 1957 SCR 981 : A 1957 SC 614; (*Md Sugal v. R*, 50 CWN 98 : A 1946 PC 3 refd to); *Kochan v. S*, A 1961 K 8; *S*

v. Kochara, A 1961 G 20; *Ramratan v. S*, A 1962 SC 424: 1962, 3 SCR 590; *Jose v. S*, A 1973 SC 944; *Badri v. S*, A 1976 SC 560; *Satya Vir v. S*, A 1958 A 746]. In murder cases it is primarily for the prosecutor to decide which witness he should examine in order to unfold the prosecution story. If a large number of persons have witnessed the incident, it would be open to the prosecutor to make a selection of those witnesses but the selection must be made fairly and honestly and not with a view to supress inconvenient from witness-box. [See *Darya Singh v. State of Punjab*, A 1954 SC 328].

A Public Prosecutor may give up witnesses during trial to avert proliferation of evidence which could save much time of the court unless examination of such a witness would achieve some material use. If examination of a witness would only have helped in duplication of the same category of evidence, the Public Prosecutor cannot be blamed for adopting the course of not examining him [*Harpal Singh v. Devinder Singh*, A 1997 SC 2914 : 1997 Cri LJ 3561, 3566]. Conviction in murder case can be based even on the testimony of a single eyewitness if the same is found acceptable after subjecting his testimony to a critical and objective test by the court in the light of various principles laid down by the courts [*Mahendra Singh v. State of Rajasthan*, 1998 Cri LJ 1314, 1319 (Raj)]. Corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused and tends to confirm that he is guilty of the offence [*Ah Mee v. Public Prosecutor*, (1967) 1 Malayan LJ 220 (Kuala Lumpur HC)].

—Divorce Cases.—In actions for divorce, although the court may act on the uncorroborated testimony of the petitioner, it will generally require corroboration [*Ginger v. G*, LR 1 P & D 37; *Getty v. G*, (1907) P 334; *Weinberg v. W*, 27 TLR 9]. The rule as to corroboration may be relaxed in defended cases, if the testimony of the parties is believed [*Curtis v. C*, 21 TLR 676]. Unsupported admissions should be received with the utmost circumspection and caution. If after looking at the evidence with all the distrust and vigilance it ought to be regarded, the court considers that it is trustworthy and that it amounts to a clear, distinct an unequivocal admission of adultery the court ought to act upon such evidence [*Robinson v. R*, 1859, 1 Sw & Tr 362 pp 393, 394. See *Williams v. W*, 13 LT 610; *Arnold v. A*, 38 C 907]. Under s 7 of the Divorce Act, courts in India should follow the English rule and the uncorroborated testimony of the husband or wife should never be accepted [*Payne v. P*, 42 MLJ 526 FB: *Pendurti v. P*, 43 MLJ 441 FB: 68 IC 931; *Premchand v. Hira*, A 1927 B 594 (*Cf* s 50 proviso)]. But it has also been held that uncorroborated confession of adultery by husband or wife may be accepted if the court is satisfied that it is true and there is no collusion [*Arnold v. A, sup*; *Smith v. Ma Pwa Shin*, 11 Bur LT 197: 49 IC 305; *Antoniswamy v. Anna*, A 1970 M 91; see *Spring v. S*, 1947, 1 All ER 886 (*ante* s 120: "*Proceedings under Indian Divorce Act*"). It is only exceptional circumstances that could justify acceptance of uncorroborated testimony [*Over v. O*, 49 B 368: 91 IC 20]. An adulterer who gives evidence of his or her adultery is an accomplice and the evidence requires corroboration [*Fairman v. F*, 1949. 1 All ER 939: 1949 P 341; *Galler v. G*, 1954, 1 All ER 536]. In a proceeding for nullity on the ground of impotency when only the testimony of one of the spouses is available corroboration is not essential, if it is reliable [*Suvarnabahen v. Rashnikant*, A 1970 G 43].

—Perjury Cases.—It seems that formerly two witnesses were necessary in England in proof of perjury. In *Champany's case*, 2 Lew CC 258. COLERIDGE J, said: "One witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed LORD TENTERDON CJ, was of opinion that two witnesses were necessary to a conviction." In recent times the rule has been relaxed to this extent that the corroborating evidence may not be the testimony of a second witness. Any strong

corroborating circumstances may be sufficient [*R v. Parker*, Car & Marsh 646; *R v. Yates*, Car & M 132; *Champney's case ibid*]. An attorney was charged with perjury in an affidavit made in connection with his bill of costs. The bill of costs was put in as corroborative evidence and LORD DENHAM CJ, said: "I have quite made up my mind that the bill delivered by defendant is sufficient evidence; or that even a letter, written by defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness" [*R v. Mayhew*, 6 C & P 315].

In perjury cases though the law here does not provide that there must be corroboration to support a conviction, the English law which is based on substantial justice may be followed as a safe guide [*R v. B G Tilak, sup*; *R v. Lal Chand*, BLR Sup Vol 417 FB: 5 WR Cr 23; *R v. Bakhoree*, 5 WR Cr 98; *R v. Ross*, 6 MHC 342; see however, *Arjun v. R*, 53 A 598: A 1931 A 362]. A safeguard is provided in our law in s 195 of the Cr P Code under which a written 'complaint' of the court is now necessary to institute a prosecution for perjury. Under the old section a private party could apply for 'sanction' to prosecute, but it has been found unsafe to leave the matter to a private party who is often actuated by feelings of revenge.

Where a witness intentionally gives false evidence and it is doubtful whether the false statement was made before the magistrate or the sessions judge, the witness may be convicted of the offence of giving false evidence upon an alternative finding [*R v. Zamiran*, BLR Sup Vol 521 FB: 6 WR Cr 65; *R v. Mahomed H Shaikh*, 13 BLR 324 FB: 21 WR Cr 72 FB; *Habibuliah, v. R*, 10 C 937; *Sadhu Sheikh v. R*, 10 C 405 : *R v. Ghulam*, 7 A 44 (5 All 17 **overruled**), *R v. Nathu Sheikh*, 13 C 405; *R v. Utar Narain Singh*, 8 WR Cr 79; *R v. Dina Nath*, 9 WR Cr 52; *R v. Sundar*, 9 WR Cr 25; *R v. Bedu*, 12 WR Cr 11; *R v. Matabadal*, 15 A 392; *R v. Khen*, 22 A 115; *R v. Ramji*, 10 B 124; *R v. Bharma*, 11 B 702; *R v. Mugapabin*, 18 B 377].

—Bribery Cases.—See *ante*, s 133.

—Will Cases.—Where an instrument required by law to be attested is subscribed by several witnesses ordinarily one attesting witness at least shall be called for proof of execution; but it may be necessary to call more than one attesting witness when he is not in a position to prove attestation by another witness (*ante* s 68: "*Until one attesting witness at least has been called*" and "*Attestation of wills*").

In the case of wills, the practice of English courts is to require that all the witnesses available and capable of being called should be examined. In the case of wills it is desirable that all capable of being called should be examined to remove all suspicion of fraud [*Surendra v. Rani Dasi*, 47 C 1043]. Where all attesting witnesses are examined, the mere non-examination of the writer does not render the attesting witnesses unworthy of credit [*Kristo Gopal v. Baidya*, 1938, 2 Cal 173: A 1939 C 87]. A probate case is not singular as regards the application of the general principles of proof as contained in ss 3 and 101 of the Evidence Act [*per* WOODROFFE J, in *Gopessur v. Bissessur*, 16 CWN 265]. It is very difficult to rely on parol evidence to prove a will made several years before the death of testator [*Brajabala v. Nityamoyee*, 57 CLJ 447].

—Dead Man's Estate.—When an attempt is made to charge a dead man's estate in a matter in which if he were alive he might have answered the charge, the law is not that the court should not proceed on the uncorroborated testimony of a litigant, but that it will examine the evidence with great care and suspicion. But the suspicion must not be allowed to prevail if in the end the truthfulness of the witness makes it perfectly clear and apparent [*Hiralal v. Rajkumar*, 12 CLJ 470; *Rupchand v. Madan*, A 1960 C 351 (**following** *Garnett v. Macaulay*, 1885, 31 Ch D 1); see also *Rawlinson v. Scholes &c*, 1898, 79 LT 350 *ante*].

—Sexual Offences etc.—"No principle of law forbids a conviction on her uncorroborated testimony, though she is wanting in chastity, if the jury are satisfied of its truth. Her testimony should be cautiously scrutinised, and court and jury should diligently guard themselves from the undue influence of the sympathy in her behalf which the accusation is apt to excite" [*per* BRICKELL CJ, in *Boddie v. S*, 1875, 52 Ala 395, 398 (Am)]. It is however, unsafe to act on the uncorroborated testimony of the complainant in sexual offences [*R v. Graham*, 1910, 4 Cr App R 218; *Maung Ba Tin v. R*, A 1927 R 67: 97 IC 180; *Gangaram v. R*, A 1950 N 9]; or of a woman on a charge of procuring abortion [*R v. Bickley*, 1909, 73 JP 239] or of young children [*R v. Pitts*, 1912, 8 Cr App R 126]. In no cases is it more difficult to arrive at a confident verdict as to whether evidence is false or true than in cases in which women allege that they have been outraged. There is possibility of unintentional misstatements produced by hysterical conditions [*Sadullah v. R*, 81 IC 629: A 1924 A 411]. In the case of rape of an innocent girl of tender age, her evidence is of great value specially when she makes a statement immediately after the occasion [*Soosalal v. R*, 82 IC 142: A 1925 N 74].

As such accusation can be easily made, there are statutes in England and America requiring corroboration. Although the lone testimony of the lady victim of rape can be made the sole basis for conviction and no corroboration is necessary in case the same is accepted as true and free from suspicion, yet where because of inherent defect in presenting the prosecution case the same is not free from doubt, conviction cannot be founded on the sole testimony of the prosecutrix. All that is required is that there must be some circumstance which should support the version of the victim lady by way of corroboration [*Sanya v. State of Orissa*, 1993 Cri LJ 2784, 2786 (Ori)]. To amount to corroboration, the evidence must conform in some important respect to the girl's evidence that it took place without her consent and that it was the accused who committed the offence [*Public Prosecutor v. Emran Bin Nasir*, (1987) 1 Malayan LJ 166 (Bandar Seri Begawan HC)]. Medical evidence is sufficient to corroborate the evidence of the girl [*Syed Abu Tahir v. Public Prosecutor*, (1988) 3 Malayan LJ 485 (Kuala Lumpur HC)].

Some earlier cases held that conviction on uncorroborated testimony of complainant being extremely dangerous and permissible only in exceptional cases, the jury must be sufficiently cautioned [*Nur Md v. R*, 62 C 527: 38 CWN 108; *Surendra v. R*, 38 CWN 52 (in this case it was found that the girl had intercourse before and that she was intimate with a prostitute connected with the accused)] and the want of caution vitiates in law to a considerable degree the charge [*Sarat v. R*, 65 CLJ 83: A 1937 C 463; *Taser v. R*, 44 CWN 835; *Kalu v. R*, 44 CWN 622; *Chamuddin v. R*, A 1936 C 18; *Sikandar v. R*, 41 CWN 641; see *R v. Graham, sup*; *R v. Pitts*, 1912, 8 Cr App R 126; *R v. Lovell*, 1923, 129 LT 638 CA; *R v. Ross*, 1924, 18 Cr App R 141:. In Patna want of clear warning was held to amount to a serious misdirection vitiating the trial [*Sachindra v. R*, 18 P 698: A 1939 P 536; *Baldeo v. R*, A 1946 P 426].

The rule in the above case that the jury must be cautioned in such cases was based on the direction in English cases (see *R v. Jones*, 1925, 19 Cr App R 40 which was a case of indecent assault; and *R v. Freebody*, 25 Cr App R 69) that in the absence of such a warning the conviction may be quashed [*R v. Salman*, 1924, 18 Cr App R 50; *R v. Killick*, 1924, 18 Cr App R 120]. It has been ruled in Bombay and Nagpur that the rule requiring corroboration is restricted to cases of rape only and should not be extended to other cases of a sexual nature [*R v. Banubai*, 54 Bom LR 281: A 1943 B 150; *Motiram v. S*, A 1955 N 121].

As to what is corroboration, see the principle enunciated in *R v. Baskerville* (*ante*) and as to the nature of corroboration, see *R v. Mahadeo*, A 1942 B 121 FB. Under

the English law the corroboration should come from another person altogether [per LORD HEWART in *R v. Whitehead*, 1929, 21 Cr App R 23: 139 LT 640]. But under the Act the statement of the outraged girl shortly after the offence is corroboration under s 157 (see *post*) and it is not required that it should always come from another source.

The rule of cautioning the jury emphasised in certain cases (*supra*) appears to have been imported from England where social conditions are different. The requirement of corroborative evidence in such cases for a conviction is a salutary rule, but it is submitted that it would be unwise to adhere too rigidly to this counsel of caution in every case in this country where the customs, habits and manners of the people differ widely from the customs, habits and manners of people of other countries and where women who live in complete seclusion are brought up under entirely different conditions of life. It is satisfactory to note that this view has found expression in later cases where it has been observed that the aforesaid decisions relating to sexual offences must be taken to be applicable to the particular facts of those cases only and it was never intended that any rule of general application should be laid down. The absence of the usual caution does not therefore necessarily vitiate the verdict [*Abdul Gafar v. R*, 1938, 1 Cal 636; *Parbati v. S*, A 1952 C 831]. It has been observed in a case that whether the rule of caution imported from England is really necessary in India is a debatable question [*Bechu v. R*, A 1949 C 613]. The too rigid insistence in some cases (*eg*, *Surendra v. R*, *Sikandar v. R*; *Nur Md v. R*, *ante*) that there should not be any conviction unless the prosecutrix was corroborated in material particulars like that of an accomplice came to be regarded as equivalent to the proposition that in every case of abduction, indecent assault, rape, &c the position of the prosecutrix was of the nature of an accomplice and that the want of the requisite warning vitiated the conviction.

The matter was gone more fully into in a subsequent case in which it has been held that there is no presumption of law which differentiates the evidence of the complainant in a rape case from that of the complainant in any other offence. There can be no assumption in the absence of evidence, that she is an accomplice. Accordingly it is not the law that in every case of rape, the judge must direct the jury that they should not convict the accused on the testimony of the prosecutrix unless corroborated in the same manner as an accomplice; and it is not the law that in the absence of such warning, the charge, in every case would be bad. It was pointed out in this case that *Surendra v. R, sup*, is not an authority for the head-note in the Calcutta Weekly Notes that "where no such warning is given, the conviction must be set aside" [*Harendra v. R*, 1940, 2 Cal 180: 44 CWN 830]. In other jurisdictions also it has been subsequently held that there is no rigid rule that there must be corroboration before conviction [*Budhu v. R*, A 1947 P 416: 25 P 733; *Md Abzal v. R*, A 1950 L 150; *Gangaram v. R*, A 1959 N 9; *In re Boya Chinnappa*, A 1951 M 760]. The rule of warning and insistence on corroboration in the earlier cases appear to have been founded on the erroneous assumption that the prosecutrix was an accomplice; but her position is not ordinarily that of an accomplice (see *Sidheswar v. S*, A 1958 SC 143: 1958 SCR 749).

A woman who has been raped is not an accomplice; she is the victim of outrage. The Supreme Court has settled the question by ruling in *Rameshwar v. S*, (*infra*), that the law as to the nature and extent of corroboration is the same as in England as decided by LORD READING in *R v. Baskerville* (*ante*); its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear." In sexual offences corroboration is not essential before conviction, but the necessity of corroboration as a matter of prudence, except where the circumstances make it

safe to dispense with it, must be present in the mind of the judge, and injury cases he must similarly point out the advisability of corroboration and also tell them that it may be dispensed with if they are satisfied that it is safe to do so [*Rameshwar v. S*, 1952 SCR 377: A 1952 SC 54; *Sushil Kumar Pati @ China v. The State*, 1993 (2) Crimes 800 (Cal)]. (complaint to mother by raped girl held independent corroboration); see *Gopi Shanker v. S*, A 1967 Raj 159]. As a rule of prudence court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of abduction or rape has not been falsely implicated [*Gurcharan v. S*, A 1972 SC 2661; *Madhoram v. S*, A 1973 SC 469]. The law appears to be the same in England also. "In cases of rape and other sexual offences against women, girls and boys the jury may convict on the uncorroborated evidence of the prosecutrix or prosecutor, but the judge should warn them that it is dangerous to do so". [Hals 3rd Ed Vol 10 para 850 p 462].

A victim of rape is generally speaking not an accomplice. The jury may be warned that the rule of prudence required corroboration of her evidence, but that it is open to them to convict even without corroboration if in the particular circumstances of the case they came to the conclusion that corroboration was not essential [*Sidheswar v. S*, A 1958 SC 143; see *Motiram v. S*, A 1955 N 121; *S v. Sheodayal*, A 1956 N 8; *Shamshere v. S*, A 1956 P 404]. Accused was convicted of rape on the only unsworn testimony of a minor girl of about twelve [*Lalaram v. S*, A 1960 MP 59].

The nature and extent of corroboration in a rape case must necessarily vary with the circumstances of every case. Presence of spermatozoa in vaginal swabs is corroborative evidence even though identity of spermatozoa with that of accused is not proved [*Khan v. S*, A 1962 C 641]. In sexual offences or in the case of an approver, the oral testimony is by its very nature, suspect. But in the absence of exceptional reasons, it becomes the duty of the court to convict if it is satisfied that the evidence of a single witness is entirely reliable [*Vadivelu v. S*, A 1957 SC 614 : 1957 SCR 981; *Ramratan v. S*, A 1962 SC 424: 1962, 3 SCR 590].

Statement of complainant at or about the time of occurrence being *res gestae* is corroborative evidence [*Santabala v. S*, A 1953 C 332]. In some cases corroboration may be essential [*Arabinda v. S*, A 1953 C 206]. Where medical evidence showed that the prosecutrix had been used to sexual intercourse, her statement that she was compelled, threatened or otherwise induced to go with the appellant should be corroborated in material particular from some independent source [*Ram Murti v. S*, A 1970 SC 1029]. As to conviction without corroboration, see *Bhagwant v. S*, A 1956 A 22].

For more case law on corroboration in sexual offences see *Mohamed Kunju v. P.P.*, (1966) 1 Malayan LJ 271 (Kuala Lumpur FC); *Augustine v. P.P.*, (1990) 2 Malayan LJ 225 (Brunei CA); *Ah Mee v. P.P.*, (1967) 1 Malayan LJ 220 (Kuala Lumpur FC); *Brabakarn v. P.P.*, (1966) 1 Malayan LJ 64 (Ipoh FC); *Pritam Singh v. P.P.*, (1970) 2 Malayan LJ 239 (Kuala Lumpur HC); *Sabli v. P.P.*, (1978) 1 Malayan LJ 210 (Kota Kinabalu FC); *Din v. P.P.*, 1964 Malayan LJ 300 (Ipoh FC); *Lim Hung Ton v. P.P.*, 1964 Malayan LJ 336 (Singapore HC).

Injuries and distressed condition as corroboration.—One of the accused persons raped the complainant while his companion held her down. Both went away but came back some time later and this time the companion raped her while the other was away. The judge identified five pieces of potentially corroborative evidence, namely, marks on the complainant's thigh, marks on her shoulder, marks on her arms, an injury to her nose and the distressed condition. Both were convicted. Their appeal against conviction was dismissed. The evidence of injuries etc might be less

likely to be corroborative, it was still capable of being corroborative. [*R v. Pountney*, 1989 Crim LR 216 CA].

Evidence of the distress of the victim of a sexual offence soon after the incident can be regarded as corroboration [*Public Prosecutor v. Emran Bin Nasir*, (1987) 1 Malayan LJ 166 (Bandar Seri Begawan HC)]. In another case, [*The People (DPP v. Mulvey*, 1987 IR 502 CCA], where the distressed condition of the victim of rape was taken as corroborative evidence, the explanation submitted by the accused that, though there was consent, she was nevertheless distressed because of the unexpected loss of virginity and the consequent rejection by the accused, was held to be not acceptable. His conviction was sustained.

In a case, [*R v. Franklin*, 1989 Crim LR 499 CA], involving two rapists, one used violence which was compatible with forcible penetration and secondary trauma which were found on the person of the victim and corroborating his involvement and sustaining conviction, the other had the benefit of passive subsmission arising out of the distressed condition and had to use no violence. It was held that the injuries were not capable of corroborating his involvement.

Interested witness.—The court had to consider the evidence of a person who had a purpose of his own to serve and whether in such cases the same kind of corroboration is necessary as in the case of an accomplice witness. The court laid down: Although a judge is obliged to advise a jury to proceed with caution where there is material to suggest that the evidence of the witness is bound to be tainted by an improper motive, he is not bound to give an accomplice warning in respect of that witness's testimony unless there are grounds for believing that he was in some way involved with the crime which is the subject-matter of the trial.

Explaining the nature of the corroboration that would be needed, the court said: Corroborative evidence need not relate to particular incidents spoken by a particular witness. It is merely independent testimony which confirms in some material particular not only the evidence that a crime has been committed but also that the defendant has committed it. [*R v. Beck*, (1982) 1 All ER 807 CA].

—Talab-i-ishad.—The Mahomedan Law of evidence being superseded, no particular number of witnesses is now required for proof of *talab-i-ishad* [*Imammuddin v. Md Raisul*, A 1931 A 736: 52 A 1005].