CHAPTER [1][X]

OF THE EXAMINATION OF WITNESSES

S. 135. Order of production and examination of witnesses.—The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

SYNOPSIS

COMMENTARY

Principle and Scope.—This section says that the order of production and examination of witnesses shall be regulated by the rules of law and practice relating to civil and criminal procedure. Primarily it is the lawyer's privilege to determine the order in which witnesses should be produced and examined; but the court has always a discretion in the matter (*post*: "*Advocate's privilege as to order of production .....—Court's discretion*"). The arrangement of testimony is a matter of experience and skill. Ordinarily, events should be presented in chronological order and intelligent witnesses should be examined first in order to create a favourable impression. Some are of opinion that one of the best witnesses should be examined last, for the finishing touch. It has been held that though counsel has discretion, the court has power under s 135 to direct the order in which witnesses shall be examined [*per* JENKINS, CJ]. In the same case WOODROFFE, J, observed: 'The court has always the power to do this under s 135 of the Evidence Act" [*Gopessur v. Bissessur*, 16 CWN 265: 39 C 245; *Achyutana v. Pitchaiah*, A 1961 AP 420]. The subject lies chiefly in the discretion of the judge before whom the cause is tried, it being, from its very nature susceptible of but few very positive and stringent rules [Greenleaf, s 431]. In

1. In the Ceylon Evidence Ordinance "XII"

Bastin v. Carew, 1824 Ry & M 127 ABOTT LCJ said. "I mean to decide this and no further. That in each particular case there must be some discretion in the presiding judge, as to the mode in which examination shall be conducted, in order best to answer the purposes of the justice." (See *post*).

[*Ref Tay ss 1394, 1400-02, Jones ss 807-12; Phip 8th Ed pp 457-59; 35-43*].

Witness Wherefrom to Give Evidence.—It is not desirable that witnesses, whether they are Government officers or not, should give their evidence on the *dais* by the side of the court. All witnesses without distinction should give their evidence in the witness-box, or other place in the court room that is set apart for this purpose [*per* MARTINEAU J, in *Wadhawa v. R*, 63 IC 461 : 22 Cri LJ 669].

It is highly undesirable to allow witnesses seats on the *dais* [*In re Ramchand*, A 1953 A 712] and criminal courts should not give such exceptional treatment to a police officer, as giving him a seat on the *dais* [*Nathu v. R*, 88 IC 362 : 8 NLJ 95]. In a transfer application it was alleged that the public prosecutor and the court sub-inspector used to sit with the deputy-magistrate on the *dais*. The explanation of the court was that they came to *dais* to peruse the file and that was the practice in the mofussil. The High Court said that this should not be allowed [*Surendra Nath Maitra v. R*, AB Patrika, Aug 15, 1928—GHOSE & JACK JJ]. It is inadvisable to offer a seat on the *dais* to a private gentleman while the court is hearing cases. Court of law is not a place of amusement [*per* STUART CJ, in *Ganpat v. Koshalendra*, 93 IC 962].

Right to Begin. [Civil Cases].—The rule governing the production of evidence and the order in which the witnesses are to be produced and examined, depends upon the principle which govern the question as to who has the privilege or duty (as the case may be) of the *right to begin*. The right to begin is obviously an advantage to a party with a strong case, for he gets the privilege of making the first impression. If evidence is tendered by the opponent, it gives him a right to reply. But, if he has a weak case, the right to begin, not unoften proves a burden. As to the right to begin, Best says—"It is sometimes said that as the plaintiff is the party who brings the case into court, it is natural that he should be first heard with his complaint; and in one sense of the word, the plaintiff always begins; for, without a single exception, the pleadings are opened by him or his counsel, and never by the defendant or his counsel. But, as it is agreed on all hands that the order of proving depends on the burden of proof, if it appears on the statement of the pleadings that the plaintiff has nothing to prove,—that defendant has admitted every fact alleged, and takes on himself to prove something, which will defeat the plaintiff's claim,—he ought to be allowed to begin, as the burden of proof then lies on him. (See Or 18 rr 1-3, C P Code, 1908). The authorities on the subject present almost a chaos. This much only is certain, that if the *onus* of proving the issues or any one of the issues, however numerous they may be, lies on the plaintiff, he is entitled to begin [*Wood v. Pringle*, 1 Moo & R 277; *Curtis v. Wheeler*, 4 C & P 196] and it seems that if the *onus* of proving all the issues lies on the defendant, and the damages which the plaintiff could legally recover are either nominal or mere matter of computation, here also the defendant may begin" [*Flower v. Coster*, 1 Moo & M 241; Best ss 637-39 see also Tay s 378; Hals 3rd Ed Vol 15 para 494]. As to opening plaintiff's case, see Sarkar's Hints on Modern Advocacy, 3rd Ed p 77 *et seq* and as to opening defendant's case, see p 87 *ibid*.

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning, may at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party [see Or 18 r 3, C P Code, 1908].

Right to Begin. [Criminal Cases].—In criminal trials the prosecution always begins. If the prisoner is defended, the counsel for the prosecution opens the case; if undefended and there is no peculiarity in the facts, an opening statement is often omitted; when there is no prosecuting advocate, there can be no opening, since the prosecutor not being a party, is never allowed to address the jury, or act as advocate [*R v. Brice*, 2 B & Ald 606; *R v. Gurney*, 11 Cox 414, 422*n*; Phip 11th Ed p 678]. As to the guiding principles for opening the prosecution case, see Sarkar's Cr P Code, 4th Ed, s 226.

Where in a sessions trial the judge convicts the accused but reserves the question of admissibility of the evidence objected to for the opinion of the Full Bench, the counsel for the accused should begin and have right to reply before the Full Bench [*R v. Panchu*, 24 CWN 501 : 31 CLJ 402]. As to opening of case and the mode of trial in summons cases, see ss 251-59 Cr P Code; in warrant case instituted on a police report, see ss 238-43 and 248 Cr P Code; in any other warrant case, see ss 244-49 Cr P Code; in sessions cases, see ss 225-37 Cr P Code.

Right to Reply in Criminal Cases.—The English practice is that if any witness other than the defendant is called for the defence or any document is put in evidence for the defence, the prosecution has the right to reply (28 & 29 Vic c 18 s 2; 61 & 62 Vic c 36 s 3). Even if no witnesses are called by the accused, yet if his counsel has at any time during the trial put in any document or even without formally putting it in, cross-examined upon and read parts of it to the jury, the prosecution has the right to reply [*R v. Hale*, 1924, 1KB 602; Archbold Cr Pl 24th Ed p 223; Phip 8th Ed pp 41-42; Roscoe Cr Ev 13th Ed p 186]. The same view was taken in Madras and Allahabad in decisions under the s 292 of old (1882) Cr P Code [See *R v. Hayfield*, 14 A 212: 11 M 339; also see *R v. Moss*, 16 A 88—CONTRA: *R v. Grees*, 10 C 1024; *R v. Kali Prosunna*, 14 C 245; *R v. Solomon*, 17 C 930; *R v. Sreenath*, 43 C 426; *R v. Krishnaji*, 14 B 436].

Prosecution has right of reply even when only one of several accused adduced evidence [*R v. Sadanand*, 18 B 364]. If the newspaper report of the previous trial including the deposition of the witness, is put in by the accused during cross-examination of that prosecution witness, the Crown has a right of reply [*R v. Manuel*, 4 LBR 5 : 6 Cri LJ 116]. When accused puts in deposition of witness before committing magistrate, prosecution has no right to reply [*R v. Stewart*, 31 C 1050: 8 CWN 528]. When oral or documentary evidence is adduced by the defence through the mouth of the prosecution witness, it is for the court to decide in each particular case whether the prosecution is taken by surprise and it assigns him the right to reply [*R v. Bhuro*, 8 Cri LJ 215].

The prosecution has no right of reply when counsel for accused has during cross-examination of a prosecution witness and before the close of the case for Crown, put certain letters, which do not form part of the record, to such witness and then tendered and had them admitted in evidence [*R v. Sreenath*, 43 C 426]. The decisions under the old Cr P Code should be read subject to the provisions of Act 2 of 1974.

It has been held in a case in England that where by leave of the judge the accused read a portion of document to the jury, but document was not properly admissible in evidence and was not exhibited, the prosecution has no right to make a second speech [*R v. Hales*, 1924, 1 KB 602].

In summary cases, no right of reply is allowed to either side (Summary Jurisdiction Act, 1848, 11 & 12 Vic c 43 s 14).

S 234 of Act 2 of 1974 relates to right of reply. When the examination of witnesses (if any) for the defence is complete, the prosecutor sums up his case and the

accused is entitled to reply. When any point of law is raised by the defence the prosecution may give a reply only with regard to such point of law with the permission of the court. An erroneous decision as to right of reply is a mere irregularity [*Kunden v. R*, 32 Cri LJ 944]. See further Sarkar's Cr P Code, 4th Ed.

—Appeal.—The appellant is entitled to reply to the prosecution arguments [*Promoda v. R*, 11 CWN 43*n*]. S 421 [now s 384(*a*)] Cr P Code is not very precise. "Reasonable opportunity of being heard" must be taken to include the possible right of reply, if necessary [*Amanat v. Nagendra*, 38 C 307; see 1917 PR 21]. It has been held in Oudh that there is no right of reply but the privilege should not ordinarily be refused [*Prag v. R*, 82 IC 33; *Bhahar v. R*, 82 IC 37].

Attendance of Witnesses to Testify or to Produce Documents—Penalty For Disobedience etc.—It is the duty of every good and law abiding citizen to come as a witness and to help in the administration of justice by testifying to facts within his knowledge or by producing documents in his possession or power. The Procedure Codes provide for processes from court to compel attendance of witnesses or production of documents. *Subpoena* is of two kinds: (*i*) *subpoena ad testificandum*, *ie* the process directing a witness to attend and testify; (*ii*) *subpoena duces tecum*, *ie* the process ordering the production of documents in the possession or power of a witness. In India they are usually known by the name of *summons*.

Ss 30-32 and Or 16 C P Code deal with the procedure for summoning and attendance of witnesses, production of documents by witnesses &c. As to discovery and inspection, see s 30; Or 16 rr 10-13, 17, 18 provide for penalties for disobedience to summons. Refusal to give evidence renders a witness liable to a suit for damages (s 26 of Act 19 of 1853 which is in force in Bengal and s 10 of Act 10 of 1855 which is in force in Bombay and Madras; see *Roy Dhunput v. Prem*, 24 WR 72). Witnesses cannot be sued in a civil court for damages or prosecuted in a criminal court (other than on a charge of perjury) in respect of evidence given by them upon oath in a judicial proceeding [*Ganesh Dutt v. Mugneeram*, 11 BLR 321 PC *ante*; *Bishonath v. Ramdhone*, 11 WR 42; *Bhikumber v. Becharam*, 15 C 264; *R v. Babaji*, 17 B 127; *R v. Balkrishna*, 17 B 57; *Templeton v. Lawrie*, 25 B 230 *ante*]. As to how far witnesses are protected in respect of statements made during examination, see *ante* s 132.

Or 5 C P Code deals with the issue and mode of service of summons. Any person may be summoned to produce a document without being summoned to give evidence and he may send the document without producing it personally (Or 16 r 6; s 139 Evidence Act). A witness summoned to produce a document is bound to bring it to court notwithstanding any privilege that he may claim. The validity of the objection shall be decided by the court (s 162 Evidence Act). Omission to produce a document which a person is legally bound to produce when ordered by court is an offence under s 175 I P Code [*R v. Seshayya*, 13 M 24; *Ashmatulla v. R*, 2 CLJ 621].

Witnesses are to be examined orally and in open court (Or 18 r 4). Witnesses are exempted from personal attendance by reason of residence outside certain limits (Or 16, r 19; ss 75-78, C P Code). Women who according to the customs and manners of the country do not appear in public (s 132) and certain persons of rank (s 133) are exempt from personal appearance in court. Such persons and persons who are unable to attend court on account of sickness or infirmity may be examined on commission (see Or 26 and ss 75-78). As to examination of witness about to leave jurisdiction, see Or 18, r 16, witnesses acting in obedience to summons are exempt from arrest under civil process while going to or returning from court (s 135).

As to criminal proceedings, summonses to compel appearance are regulated by ss 61-69 Cr P Code. As to processes to compel the production of documents &c see ss 91, 92 and as to search warrants for the purpose, see ss 93, 94 and 101. As to penalty for non-production, see s 175 I P Code; s 349 Cr P Code.

Except as otherwise expressly provided, all evidence taken under chapters 18-21 Cr P Code shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader (s 273). As to dispensing with personal attendance see ss 115, 205, 273, 317. As to examination of witnesses on commission, see ss 284-288 and in the case of an absconding accused, see s 299, Cr P Code.

Ordering Out of Court.—Where collusion among witnesses is suspected or there is reason to believe that any of them will be influenced or when required in the interests of justice, the court will *proprio motu* or on the application of either party, order all the witnesses to withdraw except the one under examination. Such an order, although not absolutely a matter of right, is rarely witheld [*Southey v. Nash*, 7 C & P 632]. The order does not usually extend to a witness who is also a party, as his presence is necessary for proper conduct of the case. But when there are more than one plaintiff or defendant and all of them are intended to be examined, the rule should be applied. The rule does not generally apply to a solicitor in the action, nor to scientific witnesses. Experts or professional witnesses may remain in court while the particular class of evidence commences, but then, they will have to withdraw and to come one by one. As parties are competent witnesses, they like other witnesses may be excluded from court during the examination of any other witness [*Outram v. O*, WN 1877, 75; *Achyutana v. Pitchaiah*, A 1961 AP 420]. A witness who disobeys the order is guilty of contempt [*Cobbet v. Hudson*, 1 E & B 14, but his evidence cannot be excluded on that ground, though the value of his testimony will be a matter for observation [*Chandler v. Horne*, 2 M & Rob 423: 62 RR 819]. Relying on *Chandler's* case it has been held that the court cannot refuse to examine a witness (here a defendant) on the ground that he was present when his witnesses were previously examined and had done something which was not desirable [*Subhkaran v. Kedar*, 1941 All 612: A 1941 A 314].

The rule as to exclusion does not apply to counsel appearing for parties. There may be circumstances which may make it desirable to force counsel cited as a witness in the case not to appear, but they do not render his appearance illegal [*Vemureddi v. R*, 44 M 916 : 41 MLJ 158: 62 IC 88]. Witnesses ordered out should be kept separate and already examined should remain in court till the others have testified. [Best, s 636; Tay ss 1400-02; Powell, 9th Ed p 524; Phip 11th Ed pp 621-22; Hals 3rd Ed Vol 15 paras 793-94].

Neither the Evidence Act nor the Codes of Civil or Cr Procedure contain any rule for ordering witnesses out of court, although the rule is substantially followed as a matter of practice. The court has inherent power to regulate the business of the court in the way it thinks best, or to make any order that may be necessary for the ends of justice. In the absence of any specific rules, courts should, in the exercise of the discretion given by the section, follow the practice of the English courts. This view has also been taken in a case where it has been observed that the court has power under s 151 C P Code to order that no witness who is to give evidence should be present when the deposition of a previous witness is being taken. Such presence is an abuse of the process of court [*Lalmani v. Bejai*, A 1934 A 840; *Achyutana v. Gorantla*, A 1961 AP 420; *Kasi v. S*, A 1966 K 316].

Where a party is also a witness, the court can require him to give evidence before he examines his other witnesses. If he is not willing to do so, the court can order him out of the court hall when his other witnesses are giving evidence. If the party himself is conducting his case without the aid of counsels he can easily examine himself first and then examine his other witnesses [*Achyutana v Gorantla, sup*]. By C P Code (Am) Act, 1976 a definite rule r 3A in Or 18 has been inserted (see below) with the object of stopping the practice of litigants giving evidence at the end so as to fill in any blank or lacuna in the evidence given by witnesses.

Order of Production and Examination of Witnesses: [Right to Begin and Right of Reply in Civil Cases].—The order in which witnesses are produced and examined is regulated by the Procedure Codes, (the Civil and Criminal Procedure Codes). Order 18 of the C P Code of 1908 contains the rules relating to the order of production and examination of witnesses. Rule 1 of Or 18 provides that the plaintiff has the right to begin unless the defendant admits all the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. Rule 2 of the Code provides that the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. The other party shall state his case and produce his evidence and then address the court generally on the whole case. The party beginning may then reply generally on the whole case. R 2(*4*) inserted by 1976 Am Act empowers the court to direct or permit any party to examine any witness at any stage for reasons to be recorded. Rule 3 provides that when there are several issues and the burden of proving some of them lies on the defendant, the plaintiff may either produce his evidence or reserve it by way of answer to the evidence produced by the other party. Newly inserted r 3A provides that where a party himself wishes to appear as a witness he shall so appear before any other witness on his behalf has been examined unless the court for reasons to be recorded permits him to appear as his own witness at a later stage. Rule 4 provides that witnesses in attendance are to be examined orally in open court. Rule 5-14, contain the mode of taking and recording evidence of witnesses. Rule 15 contains the mode of dealing with the evidence taken before another judge. Rule 16 empowers the court to examine immediately witness about to leave the jurisdiction of the court. Rule 17 empowers the court to recall and examine witnesses; and Rule 18 empowers the court to inspect any property or thing. See also s 60 Evidence Act.

The examination on commission of persons who are beyond the limits of the jurisdiction or are exempt from attendance or are unable to attend as witnesses, is provided for in, Or 26, rr 1-8 of the C P Code of 1908.

Where a defendant admits only *some* of the allegations in the plaint, he has not the right to begin [*Aghore v. Premchand*, 7 CLR 274]. Where the interests of two or more sets of defendants are identical, the rule is that after the close of plaintiff's case all of them should state their case before evidence is given by either of the defendants [*In re Duksina*, 29 C 32]. Where of several defendants, some support plaintiff's case, the plaintiff or such of the defendants as support his case, wholly or in part, must address the court and call their evidence first, and then the other defendants should address and call their evidence [*Haj Bibi v. Sultan*, 32 B 599].

Where defendant raises a preliminary issue that the suit is barred by *res judicata*, he has the right to begin [*Fatwabai v. Aishabai*, 12 B 454]. The practice in the Bombay High Court is that when respondent raises a preliminary issue that the suit is barred, the appellant has the right to begin [*Rustomji v. Kessowji*, 8 B 287]. In a suit

for restitution of conjugal rights by husband, the wife admitted marriage but pleaded coercion—*Held* that defendant had the right to begin [*Tuvuriammal v. Santiago*, 7 Bur LT 128 : 23 IC 242]. Counsel for appellant having cited new cases in reply, respondent's counsel was allowed to address on the new cases [*Kernot v. Walton*, 9 C 14, 22]. Where a defendant applied for recovery of mesne profits after success in appeal, in the inquiry before the commissioner he was bound to let in evidence first [*Ramakka v. Negasam*, 47 M 800].

In departmental proceedings if witnesses are not examined in the order laid down in Evidence Act rules of natural justice are not violated if no prejudice is caused [*B Bhimrajee v. Union*, A 1971 C 336].

Advocate's Privilege as to the Order of Production and Examination of Witnesses—Court's Discretion.—It is no duty of the court to direct a party as to the order in which he is to lead his witnesses [*Lakshmi v. Mukta*, 92 IC 1006 (L)]. But the court has always power to direct the order in which witnesses shall be examined [*Gopessur v. Bissessar*, 39 C 245, *ante*; *Achyutana v. Pitchaiah*, A 1961 AP 420]. The proffered testimony will not be received out of its regular order, if, in the discretion of the court, the ends of justice will not thereby be subserved [*Hart v. U S*, 84 Fed 799]. At the close of the examination-in-chief of the plaintiff's attorney who was the first witness called, counsel for the defendant stated that as the plaintiff should have been first called and given his account of the transaction the cross-examination of the attorney be deferred until after the examination-in-chief of the plaintiff by his counsel, submitting that the word "*examined*" in this section included cross-examination under s 136—*Held*, that the court should be very slow to interfere with the discretion of counsel, as to the order in which the witnesses should be examined, that the ordinary practice should regulate the order of examination and that the witness should be cross-examined at the close of his examination-in-chief [*Kedar Nath v. Bhupendra*, 5 CWN xv].

The ruling of the trial judge upon these matters is not, as a rule, reversible for error. The rules relating to the order of introducing evidence are for the most part mere rules of practice; they are under the control of the court and subject to be varied in the exercise of a sound judicial discretion, so that a departure from the ordinary rule or a refusal to grant indulgence to a party cannot properly be made a ground of error [*Philadelphia & Ry Co v. Simpson*, 14 Peters (US) 448; Jones s 811]. Subject to the general rule that each party should in his turn, produce all the testimony tending to support his claim or defence, the order of time for the introduction of evidence to support the different parts of an action or defence should be generally left to the discretion of the party and his counsel [*Moody v. Peirano*, 4 California App 411; Jones, 812].

It is not only illegal but improper and unfair for courts to permit the defendant at the very outset of the case, to be put in the witness-box, nominally as the plaintiff's witness to be cross-examined in the presence and hearing of the plaintiff before the plaintiff is even called upon to go into the witness-box and tell his story. It is certainly in accord with justice and equity that a party who has to defend a suit should hear what his opponent has to say, before he is called upon for an answer and it is only under exceptional circumstances that the opponent should be called at all as witness of the party who may be there putting his case before the court [*Max Mink v. Shankar Das*, 116 PWR 1908]. No mode of procedure can be more unsatisfactory than that of allowing the principal defendant in a suit to give his evidence before the plaintiffs' case has been opened or the evidence of their witnesses given [*Satish v. Satish*, 28 CWN 327, 332 : 73 IC 391 : A 1923 PC 73].

The plaintiff wanted to examine the defendant as his witness before his evidence was led—*Held*, that defendant's examination should be postponed till the evidence on plaintiff's side was closed [*Ram Narayan v. Bishwanath*, 48 CLJ 131]. If after a party's witness is examined in part a new witness is allowed to be examined, the court should first dispose of the objection of the opponent by recording an order giving reasons for adoption of the unusual course [*Saraswati v. Bahadur*, A 1939 C 183 : 68 CLJ 28].

—Criminal Cases.—The public prosecutor should be required to examine the witnesses in their proper order so as to bring out facts in their logical sequence, and particularly the expert witnesses, such as the medical witnesses ought not to be examined at an early stage of the trial, when it is impossible to realise on what points their opinion is necessary [*Shwe Pru v. R*, 1941 Rang LR 346 : A 1941 R 209]. In a case it was held that a magistrate did not exercise his discretion properly by refusing the prayer of the accused to cross-examine some prosecution witnesses before cross-examining the complainant on the ground of complainant's illness [*Moosa Haji v. R*, 37 CWN 288]. When witnesses are not summoned at the instance of the accused for cross-examination, but are summoned for examination in a *de novo* trial, the order in which these witnesses are to be examined in chief rests at the discretion of the prosecution [*Shk Ibrahim v. R*, A 1934 N 209].

Multiple Examiners.—It has long been a tradition that but *one counsel* should question during a single stage in the examination (direct or cross, or re-direct) of a single witness. This tradition rests on a wise policy of protecting the witness from undue and confusing interrogation, as well as of securing system and brevity by giving the control of the interrogation into a single hand. The rule is of course subject to reasonable exceptions allowable in the trial court's discretion; moreover it ought not to apply to the examination of another witness, or of the same witness at another stage or by a separate party in the same stage, nor to any process but that of putting the question to the witness. [Wig s 783]. When there are more lawyers than one on a side, the senior has the conduct of the case. He can however put the conduct of the case into the hands of a junior and can resume control with the leave of the court. For obvious reasons it is eminently desirable that one advocate should act throughout, specially during the examination of a single witness. "Convenience certainly requires that the examination of a witness should be carried on entirely by the gentleman who begins it; and several counsel clearly cannot be permitted to put questions to the same witness, one after another, in the manner apprehended. But I think the leading counsel has a right in his discretion to interpose, and to take the examination into his own hands ....." [ELLENBOROUGH, LCJ in *Doe v. Roe*, 2 Camp 280]. In a case where two defendants relied on the same defence, GIBBS, CJ, said: "The interests of the defendants being the same, I can only hear one counsel ..... the witnesses are to be examined by the counsel successively, in the same manner as if the defence were joint and not separate" [*Chippendale v. Masson*, 4 Camp 174]. "After one counsel has brought his examination to a close, no other counsel on the same side can put a question to the same witness" [Chitty's Genl Prac, 2nd Ed, 111, 891*a*, quoted in Wig s 783].

Examination of Witnesses in Civil Cases. [Duty of Court to Examine All Witnesses].—As to the mode of examination or taking evidence, see Or 18, rr 4-14. As to the effect of non-compliance with the provision in Or 18, r 5 as to the reading over of deposition, see *ante* s 80. By 1976 C P Code (Am) Act the words "when completed shall be read over in the presence of the Judge and of the witness, and the judge shall, if necessary, correct the same and sign it" have been omitted in Or 18, r 5. See comments in Sarkar's C P Code, 6th Ed., notes under Or 11, r 5.

The parties have a right to insist upon having all the advantages which attach to a public hearing of the whole case, and the examination of all the witnesses in open court [*Soorendra v. Nandan*, 21 WR 196]. It is not the business of the court to determine what witnesses shall be examined. The parties must select their own witnesses, and call upon the court to examine such of them as they may offer for examination [*Sarno Moyee v. Bheem Kumar*, 6 WR 231; *Deen Dayal v. Danee*, 13 WR 185]. Every party to a suit is entitled to have all the witnesses whom he desires to call, and whom he is ready at the trial to produce, heard by the court, whatever opinion the court may form by anticipation as to the probable value of the evidence when it shall be given [*Looloo Singh v. Rajendra*, 8 WR 364; *Paran Ch v. Gopeenath*, 8 WR 505; *Chaudhry Khoorgo v. Shib Tohul*, 17 WR 172]. As a general rule, all the witnesses brought forward by a party ought to be examined. But when an objection is taken in special appeal that the judge below has omitted to examine certain witnesses, it ought to be shown that the evidence of those witnesses would have been material to the case [*Nilkanth v. Soosela*, 6 WR 324]. In order to establish such a plea as that he was not allowed an opportunity to adduce evidence, a party must show that he tendered witnesses or other evidence and that his tender was rejected [*Buksh Ali v. Joyanut*, 11 WR 248; *Chunder Nath v. Anundamoyee*, 11 WR 289. See also *R v. Tolaram*, 11 WR Cr 15]. The fact of a witness not having been named in the plaintiff's list of witnesses, is no ground for refusing to examine him when produced at the proper time [*Rakhal v. Protap*, 12 WR 455].

The courts refused to examine 28 out of 54 witnesses on the ground that it was unnecessary as they were going to prove the fact deposed to by those already examined. The Judicial Committee remanded the case as the refusal was irregular [*Jeswant Singjee v. Jet Singjee*, 2 MIA 424 : 6 WR 46 PC. See also *Copee Ojha v. Hurgobind*, 12 WR 299]. It is the bounden duty of the judge to receive all the evidence tendered, unless the object of summoning a large number of witnesses clearly appears to be to impede the adjudication of that case, or otherwise to obstruct the ends of justice [*Ram Dhun v. Rajbullab*, 6 BLR Ap 10]. A court cannot refuse to examine witnesses tendered by the parties [*Ibrahim v. Suleman*, 9 B 146, 149]. Where the lower court refuses to examine all the witnesses tendered by a party, they may be examined by the appellate court [*Parameshari v. Md Syed*, 6 C 608, 611 : 7 CLR 504]. Where the first court considering it unnecessary to examine certain witnesses for the defence, dismissed the suit, and the appellate court upon the recorded evidence, reversed the decree and allowed the plaintiff's claim—*Held* that the lower appellate court before reversing the decree ought to have allowed the defendant an opportunity to give the evidence which the first court declined to take [*Arjun v. Sunkar*, 22 B 253; *Khuda Buksh v. Imam Ali*, 9 A 339; *Durga Dihal v. Anoraji*, 17 A 29, 32 : 14 AWN 190. See *Pabitra Kunwar v. Maharaja of Benares*, 30 A 397; *Brij Soondar v. Kaimoonnissa*, 23 WR 63].

In civil proceedings, it is in the discretion of the court of the first instance to allow the plaintiff to call further witnesses after his case is closed [*Rakhal v. Protap*, 12 WR 544].

Evidence on Commission.—Evidence taken under commission becomes evidence even though not formally tendered and read [see *Nistarini v. Nandlal*, 26 C 591; *Dhaniram v. Murli*, 13 CWN 525 : 36 C 566; *Mangobinda v. Sashindra*, 35 C 28; *Dwarka v. Ganga*, 8 BLR Ap 102; *Brajendra v. Pramatha*, 37 CWN 666; *Rai Rambilas v. Surajmal*, A 1936 P 6—CONTRA: *Kusum v. Satya*, 30 C 999 : 7 CWN 784 and *Hemanta v. Banku*, 9 CWN 794].

As to when evidence taken under commission may be read as evidence, see Or 26 r 8. Although evidence has previously been taken on commission, it should only be

permitted to be used at the trial when the witness is proved to be too ill to give his evidence in court then or is absent for sufficient reason [*Satish v. Satish*, 28 CWN 327 PC : A 1923 PC 73; *Mohim v. Naba*, 30 CWN 120n: 44 CLJ 228 : A 1927 C 43; *Phanindra v. Pramatha*, 32 CWN 128]. Evidence taken on commission can only be put in on behalf of a party provided the court in its discretion dispenses with proof of any of the circumstances mentioned in Or 28 r 8(*a*) [*Mahitosh v. Malin*, 63 C 934]. Where a commissioner nominated by the parties is appointed with their consent, evidence taken under the commission is admissible even though the conditions and limitation laid down in Or 26 rr 1-8 are not fulfilled. But the opinion of the commissioner who was not examined on oath is not admissible [*Gopal Das v. Jagannath*, 1938 All 370].

Examination of Witnesses in Criminal Cases: [Duty of Court].—As to the order of production and examination of witnesses in summons cases, see Ch XX (ss 251-259), in warrant cases, Ch XIX (ss 238-249), in summary trials Ch XXI (ss 260-65), in trials before Courts of Sessions, Ch XVIII (ss 225-237) Cr P Code; see also s 313. As to mode of taking and recording evidence see ss 272-283. As to the effect of non-compliance with the provisions of s 278 see *ante* s 80.

A magistrate called to prove the identification of accused in jail instead of stating the details merely referred to certain documents in which he stated that his evidence was to be found. They were marked exhibits. This procedure offends against the most elementary principles of evidence [*Lalsingh v. R*, 5 L 396]. A prisoner on trial is entitled as a matter of right, to have any witnesses named in the list which he delivered to the magistrate, summoned and examined [*R v. Prosonno*, 23 WR Cr 56]. The Cr P Code does not give any magistrate discretion to dispense with the examination of witnesses summoned by the prosecution [*R v. Parasurama*, 4 M 329].

It is irregular to allow a witness to be examined on behalf of the prosecution after the prisoner has made his defence, when the witness is not one to contradict any new case set up by the prisoner [*R v. Chotey*, 2 NWP 271; *R v. Shamkishore*, 13 WR Cr 36]. The spectacle of prosecution examining and cross-examining in order to discredit in advance witnesses whom the defence might call was strongly condemned [*Re Biswanath*, 100 IC 365].

In a proceeding under s 110 Cr P Code the magistrate declined to examine on behalf of the defence more than the same number of witnesses as were examined for the prosecution—*Held*, that it was wrong to put such an arbitrary limit [*Amirulla v. R*, 22 CWN 408].

It was held in several cases that it is *prima facie* the duty of the prosecution to call all witnesses who are able to prove their connection with the transaction in issue and if such witnesses are not called the court may properly draw an adverse inference. The only thing that can relieve the prosecution from calling such witnesses is the reasonable belief, that, if called, they would not speak the truth [*R v. Dhunno Kazi*, 8 C 121; see *R v. Ram Sahai*, 10 C 1070; *R v. Stanton*, 14 A 521; *R v. Kali Prosunno*, 14 C 245; *Md Yunus v. R*, 50 C 318; *Nagendra v. R*, 27 CWN 820 : 38 CLJ 203 and cases *ante* under s 114(*g*): "*Presumption from not calling witnesses ..... Possession of evidence*". It was pointed out in *Ramranjan v. R*, 42 C 422, 427 that the words "in his *favour*" in *R v. Dhunno Kazi*, 8 C 121, 128 have been wrongly printed for "in his *power*"].

In a case LORD-WILLIAMS, J, observed that the statement of law in *Dhunno Kazi's case* is too wide and approved of the proposition stated in Archbold's Cr Pleading, 27th Ed p 496: "Although in strictness it is not necessary for the prosecutor to call

every witness whose name is on the back of the indictment (or in India "whose deposition has been taken"), it has been usual to do so, so that the defendant may cross-examine them" [*Nayan v. R*, A 1930 C 134 : 34 CWN 170]. It has been held in Madras that fair course would be to put forward to definite case and to refrain from calling witnesses whom prosecution regards as false or unnecessary [*In re Muthaya*, 100 IC 531; see also *R v. Reed*, 49 C 227; *R v. Durga*, 16 A 84 FB; *Doraisami v. R*, 75 IC 987 : 45 MLJ 846]. The broad rule laid down in *Ramranjan v. R*, 42 C 422 that the prosecution must call all available eye-witnesses irrespective of considerations of number and of reliability was disapproved by the Judicial Committee in *Seneviratne v. R*, 41 CWN 65 : A 1936 PC 289. The court cannot normally compel the prosecution to examine a witness which it does not choose to [*Sardul v. S*, 1958 SCR 161 : A 1957 SC 747]. See further *ante* s 114(*g*).

A judge in a criminal trial has power to recall prosecution witnesses for the purpose of rebutting the case set up by prisoner in his evidence and of meeting a suggestion made by counsel for the prisoner in his speech to the jury [*R v. Sullivan*, 1923, 1 KB 47]. A court cannot be forced to call a witness on its behalf on the ground that the witness would be hostile and it is desirable to cross-examine him [*Gulai v. R*, A 1928 P 277]. Examining a prosecution witness after whole of the defence evidence has been recorded, is against law and vitiates the trial [*Karam v. R*, 111 IC 396 (31 CWN 271 PC and 25 M 61 PC **relied on**)].

As to the duty of a criminal court to examine an important witness on commission who alleges himself to be unable to attend on account of illness, see *Jamuna v. R*, 3 P 591 : 82 IC 253.

Evidence in Reply and Rebuttal.—Evidence in reply or rebuttal, whether oral or by affidavit, must as a general rule, be strictly confined to rebutting the defendant's case, and must not merely confirm that of the plaintiff [*Gilbert v. Comedy Co*, 16 Ch D 594; *Trimlestown v. Kemmis*, 9 C & F 749, 781]. The judge, however, has a discretion to admit further evidence, either for his own satisfaction or where the interests of justice require it [*Doe v. Bower*, 16 QB 805; *Budd v. Davison*, 29 WR 192]; and confirmatory evidence in rebuttal will generally be allowed when the party tendering it has been misled [*Barker v. Furlong*, 1891, 2 Ch 172; *Rogers v. Manley*, 42 LT 585], or taken by surprise [*Bigsby v. Dickenson*, 4 Ch D 34]. A similar rule obtains in criminal cases. Whenever the accused in defence, gives evidence of fresh matter which the prosecution could not foresee whether it be an *alibi* [*R v. Froggatt*, 4 Cr App R 115], lawful excuse, good character (v s 54 *ante*), insanity [*R v. Smith*, 47 LJ 689], or merely some collateral fact impeaching an opposing witness, the prosecution, is entitled to contradict it, provided such evidence be not merely confirmatory of the original case, for then it should have been tendered first [Phip 6th Ed p 40; Hals 3rd Ed Vol 15 para 495; Arch Cr Pleading, 199-200]. As in civil cases, however, the judge may, when the interests of justice require it, admit such evidence although it was available in chief [*R v. Crippen*, 1911, 1 KB 149].

Recalling Witnesses.—In civil proceedings, it is in the discretion of the court of first instance to allow the plaintiff to recall further witnesses after his case is closed [*Rakhal v. Protap*, 12 WR 455]. Plaintiff's counsel examined a witness on behalf of the plaintiff but he was not cross-examined by the other side. Defendant's counsel wanted to recall him as a witness in chief and the judge refused, observing that the leave should have been asked for when the first examination was over [*Mackintosh v. Nobinmoney*, 2 Ind Jur NS 160; see *Sreenath v. Goluck*, 15 WR 348]. Under Or 18 r 17 the court may at any stage of a suit recall any witness who has been examined and put such questions as it thinks fit. Under Or 16 r 7 any person present in court may be required by the court

to give evidence. As to power of the judge to ask any question he pleases, see s 165 *post*. As to recall of witnesses in criminal cases, see ss 217, 243(2), 246(4), (5), 247 Cr P Code. As to the right of accused to recall witness for the prosecution, see *post*. As to recrimination, see *post* s 155: "*Re-establishing Credit and Recrimination.*"

[1][**S. 136. Judge to decide as to admissibility of evidence.**—When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(*a*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(*b*) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(*c*) *A* is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of possession to be proved before the property is identified.

(*d*) It is proposed to prove a fact (*A*) which is said to have been the cause or effect of a fact in issue. Three rare several intermediate facts (*B*, *C* and *D*) which must be shown to exist before the fact (*A*) can be regarded as the cause or effect of the fact in issue. The Court may either permit *A* to be proved before B, C [2][and] *D* is proved, or may require proof of *B*, *C* and *D* before permitting proof of *A*.

COMMENTARY

Admissibility to be Determined By the Judge. [Power to Ask Questions For the purpose].—Questions of admissibility are questions of law and are determinable by the judge. If it is the duty of the judge to admit all relevant evidence, it is no less

---

1. In Ceylon the three paras have been numbered as sub-sections (1), (2) and (3) respectively.
2. In Ceylon "or" substituted.

his duty to exclude all irrelevant evidence. S 5 declares that "evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no others" (*ante* s 5). It follows from this, that a party to a suit or proceeding is entitled to give evidence of facts only which are declared relevant under the provisions of this Act. The judge is empowered to allow only such evidence to be given as is, in his opinion, relevant and admissible and in order to ascertain the relevancy of the evidence which a party proposes to give, the judge may ask the party proposing to give evidence, in what manner the alleged fact, if proved, would be relevant, and he may then decide as to its admissibility. See also the judge's power to put questions under s 165. Relevancy and admissibility are not always the same thing. Relevancy is determined by logic, but admissibility is governed by rules of law. As to relevancy and admissibility, see *ante* s 5. Relevant facts are described in ss 5-16.

Questions of relevancy of evidence cannot be decided before issues have been framed, nor can issues be framed merely for the purpose of determining in advance what evidence may or will have to be given or allowed. What evidence will or will not be allowed is not to be anticipated or decided under cover of framing issues, but is to be determined in accordance with the provisions of s 136, if and when evidence is offered [*Dandi Swami v. Srijib*, 48 CWN 635].

In ordinary cases the question of *onus* is not of great importance in appeal when both parties have produced the whole of their evidence upon an issue (see *ante* ss 101-104: "*When burden of proof becomes immaterial*"). But when witnesses have been disbelieved upon inadmissible evidence, as for example, certified copies of judgments put in without examining the witness under s 136, the effect is that the decision is vitiated [*Sohan v. Santa*, A 1923 L 491 : 83 IC 768].

The question of relevancy are questions of great nicety, and sometimes great difficulty is felt by judges in deciding the questions of relevancy; therefore, in doubtful cases the judge should admit rather than exclude documents (*ante* s 5: "*Duty of court in cases of doubtful admissibility*"). Moreover under the Evidence Act admissibility is the rule and exclusion the exception [*R v. Mona Puna*, 16 B 661, 668; *ante* s 5]. Questions as to admissibility of evidence (oral or documentary) should be determined immediately they arise (*ante* s 5).

Court shall exclude inadmissible evidence even though no objection is taken by any party (*ante* s 5). Consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant, but consent or want of objection to the wrong manner in which relevant evidence should be brought on record of the suit disentitles parties from objecting to such evidence in a court of appeal [*Prakasarayanim v. Venkata*, 38 M 160 (19 A 79, 92 PC folld). See other cases *ante* s 5].

In criminal cases tried by jury, it is duty of judge to decide—all questions of law including relevancy of facts and admissibility of evidence and to exclude all irrelevant evidence whether or not objected to by the parties; upon construction of documents; upon all matters of fact which may be necessary to prove in order to enable evidence of particular matters to be given &c (s 298 Cr P Code). See *Sheik Abdul v. R*, 85 IC 830 : A 1925 C 887; *R v. Panchkari*, 29 CWN 300; *Phekan v. R*, A 1931 P 345 and *post* s 165: "*Judgment to be based on relevant facts duly proved.*"

As to objection to production or admissibility of documents see s 162.

---

3. S. 298 omitted in Act 2 of 1974.

When Facts Proposed to be Proved Are Admissible Upon Proof of Other Facts.—Para 2 is to be read with s 104 and the illustrations attached therein. Illustration (*b*), attached to this section, and illustrations (*a*) and (*b*) attached to s 104 clearly explain the meaning of this clause. Illustration (*b*) attached to s 136 and illustration (*b*) attached to s 104 are almost similar. An undertaking by the party or his lawyer to give proof, at any convenient stage, of some fact upon which depends the admissibility of the act proposed to be proved enables the party to prove the latter fact. If the undertaking is not observed the evidence should be expunged.

It often happens that an agent, for instance, to carry a message and bring back an answer, or to do some other act, is put into the box before his agency or authority is proved. Thereupon an objection is taken by the opposing counsel that the evidence is not receivable, because the agency &c is not proved. An undertaking is usually then given that the evidence to prove the agency will be forthcoming at a later period, whereupon the case proceeds. If the proof of agency should break down, the whole of the alleged agent's evidence is expunged from the judge's notes. It would often be highly inconvenient to interrupt the witness in his story, and call another witness in the middle of his examination, to prove agency. It is to meet such a state of things that this clause is proved [Nort p 319].

It has often been declared that the relevancy of testimony need not always appear at the time when it is offered, since it is "the usual course to receive, at any proper and convenient stage of trial, in the discretion of the judge, any evidence which the counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently thus connected with the issue, it is to be laid out of the case" [Greenleaf, s 51(*a*)]. But if the testimony is apparently irrelevant, before counsel can claim the indulgence of the court in this manner to introduce evidence, otherwise incompetent, he should state what he expects to prove, or in some other way satisfy the court that the evidence will be made competent [*Abney v. Kingsland*, 44 Am Dec 491]. But on cross-examination much more latitude is necessarily allowed counsel [*Campau v. Dewey*, 9 Mich 422; Jones s 813]. "Where the case is one of delicacy and importance, and the evidence is nicely balanced and the scale liable to be affected by slight circumstances, the court will be exceedingly vigilant in preventing any extraneous or irrelevant matter from being brought before the jury. In such cases, it is proper to require counsel to state the substance of what they expect to prove, in order that if irrelevant or improper, the evidence may not be given. Where the lines of the case are more broadly marked, less caution is necessary" [*People v. White*, 14 Wend (NY) 115 cited in Jones s 813].

When Relevancy of Fact Alleged Depends Upon Proof of Another Fact.—Para 3 is exemplified and explained by illustrations (*c*) and (*d*). The relevancy of two facts being interdependent, the court may in its discretion allow the first to be proved before the second and *vice versa*.

The combined effect of paragraphs (2) and (3) is to give the court a wide discretion in the matter dealt with in them. A strict adherence to the rules of evidence would prevent admission of evidence of a relevant fact before proof of the fact on which its relevancy depends. Such a course would necessitate interruption of one witness during his examination by calling another witness, involving loss of time. The object of the section is to obviate this inconvenience. "It is the general rule that it should be left to the discretion of the presiding judge to determine whether he will require proof of connecting or preliminary facts before deciding the question of relevancy or whether he will admit the testimony on the statement of counsel that he expects to show the relevancy by other facts" [Jones s 173]. As to improper admission or rejection of evidence, see s 167.

Ordinarily, before corroborative evidence is admissible, the evidence sought to be corroborated must have been given. To allow a witness to be corroborated before he is examined, is not only inconvenient but likely to cause the judge to give undue weight to hearsay statements of the corroborative witness. It is not clear that such a discretion is given to s 136 [*Shwe Kin v. R*, 3 LBR 240 : 5 Cri LJ 411; see further *post* s 157].

As to the proper time to object to the admissibility of evidence and effect of not doing so, see notes to s 5 *ante*.

[*Ref Greenleaf 51(a); Jones ss 173, 813*].

[1][**S. 137. Examination-in-chief.**—The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.—The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.—The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

[2][**S. 138. Order of examinations.**—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

SYNOPSIS

---

1. In Ceylon the three paras have been numbered as sub-sections (1), (2) and (3) respectively
2. In Ceylon the three paras have been numbered as sub-sections (1), (2) and (3) respectively and sub-section (4) has been added, *viz.* :—

"(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if he does so the parties have the right of further cross-examination and re-examination respectively."

COMMENTARY

Order of Examination of Witnesses.—The evidence of witnesses shall be taken in open court in the presence and under the personal direction and superintendence of the judge (Or 18 r 4). Witness may also be examined by commissioners appointed by court. After a witness is sworn or affirmed, he is first examined by the party calling him. This is known as *examination-in-chief* or direct examination. It should be remembered that witnesses must speak to facts not to opinions, inferences or beliefs (v *ante* s 45; s 60). The object of this examination is to get from the witness all material facts within his knowledge relating to the party's case. The adverse party has

then the right to examine the witness. This is called *cross-examination*. If there are two or more opponents, the order of their cross-examination is a matter which rests on the discretion of the judge.

Best, however, puts a somewhat wider interpretation on the terms and defines cross-examination or examination *ex adverso* as "the interrrogation by an advocate of a witness hostile to his cause, without reference to the form in which the witness comes before the court". The object of cross-examination is to shift the evidence, to impeach the testimony and to weaken the adversary's case. It is one of the most powerful and efficacious tests for the discovery of truth, provided, it is conducted with skill. Next, the party calling the witness, may re-examine him for the purpose of explaining or rectifying the evidence already given. New matter may be asked in re-examination with the permission of the court and the adverse party may further cross-examine upon that matter. The court may also permit to recall any witness at any stage of the trial. He may then be again examined and cross-examined. The court may record remarks respecting the demeanour of the witness while under examination (Or 18 r 12). It is not however necessary that notes on demeanour should be made while witnesses are actually under examination. The court may record remarks and demeanour in the judgment and the absence of a separate note is immaterial, specially when judgment is written before the recollection of the judge has become dim [see remarks of LORD ATKIN during argument in *Sitalakshmi v. Venkata*, 34 CWN 593 PC].

S 138 deals not with the rights of the party but only provides the order in which proceedings are to be conducted [*R v. Mathews*, A 1929 C 822 : 50 CLJ 333]. It does not deal with the admissibility of evidence at all. It only lays down the three processes of examination to which a witness may be subjected [*Laxman v. R*, 52 CWN 401]. Disagreeing with *Mathews, sup* it has been held that examination in s 137 means a witness's examination-in-chief, cross-examination and re-examination. The Evidence Act deals with the right of a party to examine or cross-examine. S 138 also regulates the order in which witnesses shall be examined [*Banwari v. S*, A 1956 A 385].

The examination-in-chief and cross-examination must relate to relevant facts. Questions irrelevant in examination-in-chief may be relevant in cross-examination. The cross-examination need not be confined to facts narrated in examination-in-chief. Leading questions may be put in cross-examination (s 143). Questions irrelevant to the matter in issue, or not directly relevant, but tending to impeach the witness's credit are allowed in cross-examination (s 146). As to court's discretion in the matter, see s 148.

[*Ref Phip 8th Ed pp 459-75; Best s 649 et seq; Powell 9th Ed p 524 et seq; Steph Art 62 et seq; Tay ss 567, 1404, 1414-78; s 816 et seq; Wig ss 1882-900; 1367-71; Hals 3rd Ed Vol 15 paras 796-804; Vol 10 Title Cr Law, paras 827-833*].

Examination-in-Chief. [Object and Scope].—It has been seen that the object of this examination is to elicit from the witness all the facts or such of them as he can testify in order to prove the case of the party calling him. Every question is to be framed with some object in view. It is sometimes thought that to examine a witness in chief, is an easy affair. It is not so. Much depends on the examination-in-chief, and the examiner should not only make himself thoroughly acquainted with the entire facts of the case, but also with the particular facts which the witness has come to depose, the nature and character of the witness and the degree of his intelligence. The eccentricities or idiosyncrasies of each witness should not be left out of consideration and questions should be framed in a manner that suits every witness best. The timid

witness, the stupid witness, the talkative witness, each must be handled in a careful and different manner.

The faculty of interrogating witness, says Best, is unquestionably one of the arcana of the legal profession, and, in most instances at least, can only be attained after years of forensic experience. In direct examination although mediocrity is more easily attainable, it may be a question whether the highest degree of excellence is not even still more rare. For it requires mental powers of no inferior order so as to interrogate each witness, whether learned or unlearned, intelligent or dull, matter-of-fact or imaginative single-minded or designing, as to bring his story before the tribunal in the most natural, comprehensible and effective form [Best s 663].

The cross-examination of every witness should follow his examination-in-chief according to S. 138 of Evidence Act of 1872. It is both irregular and inconvenient to allow all the witnesses to be examined one day and to reserve the cross-examination to a subsequent date. The accused is therefore, not entitled as of right to postponement of cross-examination. The court may, however, grant such a postponement on reasonable grounds, as for instance, where the accused was undefended the first day and put only a few questions and applied the next day for cross-examination by his pleader explaining why he was not engaged before or, where the counsel appointed to defend the accused who had no instruction till then, requested the court to postpone the cross-examination of the prosecution witnesses till the next day after examination-in-chief were over. [*Jayaker v. State of Karnataka*, 1997 (1) Crimes 237, 238, 239 (Kar)].

It is the duty of counsel to bring out clearly and in proper chronological order every relevant fact in support of his client's case to which the witness can depose. The task is more difficult than may at first sight appear. The timid witness must be encouraged; the talkative witness repressed; the witness who is too strong a partisan must be kept in check. And yet counsel must not suggest to the witness what he is to say. An honest witness, however, should be left to tell his tale in his own way with as little interruption from counsel as possible. In criminal cases, the duty of counsel for the prosecution is wider. It is the practice, and probably the duty, of a prosecuting counsel to ask a witness questions favourable to the prisoner; for he must lay all the material evidence before the court whether it tells in favour of the prisoner or not, and not unduly press for a conviction [Powell 9th Ed p 526]. As to public prosecutor's duty, see *Ramranjan v. R*, 42 C 422 and *Brahamdeo v. R*, 54 IC 251 (*ante* ss 101-104: "*Criminal cases*", s 114(*g*), "*Same*: [*criminal case*]", s 135: "*Examination of witness in criminal cases*").

The witness should as far as possible be allowed to tell his story "in his own way" and the order of time should also be generally observed. If the witness is not intelligent, it may not be advisable to allow him to tell the story in his own way. He would be often inclined to drift into irrelevant matters, and a stupid or a discursive witness may be best proceeded with by suggesting helpful questions. Leading questions or questions pregnant with suspicion that the object is to lead, should never be asked in examination-in-chief (see ss 141, 142). Witness cannot be asked any question about the contents of a document without production of the document (ss 91, 144). Whenever a witness is examined as to the contents of a document made by him or read by him shortly after it was made, he should always be allowed to speak with the document before him (s 159). Questions tending to corroborate evidence of relevant fact are admissible (see s 156). Whenever any statement relevant under ss 32 and 33 is proved, all matters may be proved in order to contradict or to corroborate it, or to impeach or confirm the credit of the person by whom it was made which might

have been proved if that person had been called as a witness (s 158). Previous testimony of a witness may be proved to corroborate his later testimony to the same effect; (see s 157). As to opinion evidence see ss 45-51. When the original consists of voluminous documents, their general result may be stated by witness [s 65 cl (*g*) *ante*].

When the prosecution declined to call in the sessions court a prosecution witness who had been examined in the committing magistrate's court and such witness was therefore placed in the witness-box by the defence—*Held* that the counsel for accused was not entitled to commence his examination by questioning the witness as to his deposition in the Magistrate's court. Questions as to his previous deposition were under the circumstances only admissible by way of cross-examination with the permission of the court, if the witness proved hostile [*R v. Zaur Hossein*, 20 A 155 see s 154 *post*].

Facts showing any special means of knowledge, opportunities of observation, reasons for recollection or belief, or other circumstances increasing the witness's competency to speak of the particular case, may be elicited in chief, as well as impugned in cross-examination [Phip 11th Ed p 629].

Questions which assume facts to have been proved which have not been proved or that particular answers have been given, which have not been given, will not at any time be permitted [see *Hill v. Combe*, (1818) cited 1 St Ev 188(*n*); Tay s 1404]. A party is not generally allowed to impeach his own witness's credibility or general reputation for veracity by general evidence of bad character. But if the witness turns hostile and takes him by surprise, he may *with the leave of the court* be allowed to cross-examine or to impeach his credit see ss 154, 155, *post*). Evans says: "It is a general rule that a party cannot call witnesses to the discredit of others, whom he has before examined; but if a witness proves facts in a cause which make against the party who calls him, that party as well as the other, may call other witnesses to contradict him as to those facts."

Paul Brown's Rules.—David Paul Brown, of the Philadelphia Bar, has laid down certain rules for examination-in-chief and they are acknowledged by competent authorities to be safe guides. They are reproduced below:—

PAUL BROWN'S "GOLDEN RULES"

(*1*) If they are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner towards them which may be calculated to repress their assurance.

(2) If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue; as, for instance—Where do you live? Do you know the parties? How long have you known them? and the like. And when you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential feature of the case, being careful to be mild and distinct in your approaches, lest you again trouble the fountain from which you are to drink.

(*3*) If the evidence of your witnesses be unfavourable to you (which should always be carefully guarded against), exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel.

(*4*) If you perceive that the *mind* of the witness is imbued with prejudices against your client, hope but little from such a quarter—unless there be some facts which are essential to your client's protection, and which that witness alone can prove; either do not call him, or get rid of him as soon as possible. If the opposite counsel perceive the bias to which I have referred, he may employ it to your own ruin. In judicial inquiries, of all possible evils, the worst and the hardest to resist is an enemy in the disguise of a friend. You cannot impeach him you cannot cross-examine him—you cannot disarm him—you cannot indirectly, even, assail him; and if you exercise the only privilege that is left to you and call other witnesses for the purposes of explanation, you must bear in mind that instead of carrying the war into the enemy's country, the struggle is still between sections of your own forces, and in the very heart, perhaps of your own camp. Avoid this, by all means.

(*5*) Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross-examination—take from your opponent the same privilege it thus gives to you—and, in addition thereto not only render everything unfavourable said by the witness doubly operative against the party calling him, but also deprive that party of the power of counteracting the effect of the testimony.

(*6*) Never ask a question without an object nor without being able to connect that object with the case, if objected to as irrelevant.

(*7*) Be careful not to put your question in such a *shape* that, if opposed for informality, you cannot sustain it, or, at all events, produce strong reason in its support. Frequent failures in the discussion of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result.

(*8*) Never object to a question from your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it either indicates a want of correct perception *in making them*, or a deficiency of real or of moral courage in *not making them good*.

(*9*) Speak to your witness clearly and distinctly as if you were awake and engaged in a matter of interest and make *him* also speak distinctly and to your question. How can it be supposed that the court and jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep?

(*10*) Modulate your voice as circumstances may direct. "Inspire the fearful and repress the bold."

(*11*) Never begin before you are *ready* and always finish when you have *done*. In other words, do not question for question's sake, but for an *answer*.

Subject-matter of Examination-in-Chief.—(*1*) *Relevant Facts.*—The examination-in-chief be confined to facts in issue or facts relevant to the issue. As to relevant facts see s 3 and s 5. The facts deposed to must be within the personal knowledge and recollection of the witness, and hearsay is ordinarily excluded (*ante* s 60). Oral evidence should be direct (s 60 *ante*). Again the questions should be confined to matters of facts (v s 3) and not of law. Inferences, opinions or beliefs (unless they come within ss 45-51) of witnesses are to be excluded. As to proof of motive and intention, see ss 8, 14, 15. Witnesses are not permitted to state their views on matters of moral or legal obligation, or on the manner in which other persons would probably have been influenced, had the parties acted in one way rather than another. To put it briefly, a witness may not, on other than scientific subjects, be asked to state his opinion upon a question of fact which is the very issue for the jury, as, for instance,

whether a driver is careful; a road dangerous, or an assault or homicide justifiable. Nor may be asked whether a clause in a contract restricting trade is reasonable or unreasonable, for this is question for the judge (see Tay ss 1404-27; Hals 3rd Ed Vol 15, para 796].

As to documents, witnesses may in general be asked about the execution and identity but not about their contents which must be proved by the production of the documents (ss 61, 91). Secondary evidence is admissible only in the circumstances mentioned in ss 65 and 66. Evidence is not generally admissible to vary or contradict the terms of documents (s 92). Oral admissions as to contents of documents are not admissible (s 22). When the originals consist of voluminous documents, their general result may be stated to save time [s 65 (*g*)]. A witness may refresh his memory by referring to any writing made by him at the time of the transaction or soon after it or read by him when it was made (ss 159, 160).

(2) *Leading Questions.*—Leading questions are not ordinarily allowed in examination-in-chief. The rule, however, is not inflexible and the court has a very large discretion in the matter. As to exceptions to the rule, see notes to ss 141, 142 *post*.

(3) *Discrediting one's own witness.*—Ordinarily a party is not allowed to impeach the credit of the witness called by him, but it may sometimes be done with the consent of the court (v *ante* and *post* s 155).

Objections to Deposition.—Objections to questions should be made at the earliest possible opportunity, and the court's decision should be given then and there (*ante* s 5). For evidence contained in a *specific question*, the objection must ordinarily be made *as soon as the question is stated*, and before the answer is given; unless the inadmissibility was due, not to the subject of the question, but to some feature of the answer [Wig s 18]. The person objecting must be prepared to state his reasons for objection. Failure to object at the proper time, *ie*, when the evidence is tendered may operate as waiver. If evidence clearly inadmissible has been admitted in contravention of law, it may be challenged at a later stage, even though no objection was made before [*Sudhanya v. Gour*, 35 CLJ 473]. But consent or want of objection to the wrong manner in which relevant evidence should be brought on the record, disentitles a party from objecting in appeal [*Prakasarayanim v. Venkata*, 38 M 160 **following** 19 A 76, 92 PC; see *ante* s 5]. The rule of waiver is generally inapplicable in criminal cases (*ante* s 5). A prisoner cannot forego his ordinary rights nor can he consent to anything (*ante*, s 58: "*Admission or waiver in criminal cases*").

When evidence is rejected at the trial, the party proposing it should *formally tender* it to the judge and request him to make a note of the fact. If this has not been done, and the judge has no note on the subject, the counsel cannot afterwards complain of the rejection of the evidence [*Gibbs v. Pike*, 1842, 9 M & W 351; *Penn v. Bibby*, 1867, LR 2 Ch 127, Tay s 1892]. The court may itself or on the application of a party take down any particular question and answer or any objection to any question (Or 18 r 10). Where a question is objected to and the court allows it to be put, the judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the court thereon (Or 18, r 11). When evidence tendered is rejected or is ruled irrelevant, the general practice is to file an application stating the facts, on which the court records an order stating grounds of rejection. When the questions of the cross-examining pleader are disallowed, the records should show what those questions are and the reasons of disallowing them [*Rameswar v. R*, 55 IC 593 : 21 Cri LJ 321; *Deiva v. R*, 9 Bur LT 153 : 36 IC 468]. It is most desirable that when a question is disallowed by a formal ruling, a note of the ruling should be recorded by the Judge if so desired by an advo-

cate. Unless the exact question is known by the appellate court, it is difficult to judge whether the question was properly disallowed [*Brahmaya v. R,* A 1938 A 442, 446].

Cross-Examination. [Object and Scope].—After a party examines his witness-in-chief, his opponent has the right to cross-examine him. The cross-examination follows immediately upon the examination-in-chief, unless the court for some reason, postpones it. In sessions trial and in warrant cases instituted on a police report the court may permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined [see s 231(*2*) and s 242(*3*)]. In warrant cases instituted otherwise than a police report there is no such provisions. [See s 246(*4*)]. In *Meer Sujad Ali v. Kashee Nath*, 6 WR 181, pp 182-83 NORMAN, J, made the following remarks on the object and importance of cross-examination:

> "The essence of cross-examination is, that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admissions favourable to his cause or to discredit him. Cross-examination is the most effective of all means for extracting truth and exposing falsehood ..... We think it not out of place to refer to a celebrated passage of Quintilian on the subject of cross-examination, of which we have given a free translation. [The passage in Latin is quoted in Best on Evidence, 4th and 11th Eds s 653 from his *Inst Orata-lib*, 5, c 7 and also in Taylor, 10th Ed, pp 1032-1033 footnote].
>
> "He says: "In dealing with a witness who is to be compelled to speak the truth against his will, the greatest success consists in drawing out what he wishes to keep back. This can only be done by repeating the interrogation in greatest detail. He will give answer which he thinks do not hurt his cause; and afterwards from many things which he will have confessed, he may be led into such a strait that what he will not say he cannot deny. For, as in a oration, we generally collect scattered proofs, which singly do not appear to press on the accused, yet by being put together prove the charge, so a witness of this sort should be asked many things as to what went before ..... what came after ..... as to place, time and persons and other things, so that he may fall upon some answer after which he must necessarily either confess what is desired or contradict his former statements. If this does not happen, it may become apparent that he will not speak, or he may be drawn out and detected in some falsehood foreign to the cause; or by being led on to say more than the matter required in favour of the accused, the judge may be led to suspect him, which will damage his cause not less than if he had spoken the truth against the accused. It sometimes happen that the testimony given by a witness is inconsistent with itself. Sometimes (and that is the more frequent case) one witness contradicts another. A skilful interrogation may produce by art that which usually happens accidentally. Apart from the cause witnesses are usually asked many questions, which may be useful, as to the lives of other witnesses, as to their own character and position, any crimes they have committed, their friendship or enmity to the parties,—in the answers to which, they may either make some useful admission, or be detected either in a falsehood or the desire of injuring the opposite party. The faculty of interrogating witnesses effectively is one which requires a careful study and a considerable knowledge of human nature. It is one of the highest arts of an advocate, and can only be acquired after years of observation and experience."

Cross-examination is directed to (1) the credibility of the witness; (2) the facts to which he had deposed in chief, including the cross-examiner's version thereof; and (3) the facts to which the witness has not deposed but to which the cross-examiner

thinks he is able to depose. [Hals, 3rd Ed, Vol 15, para 801]. The object of cross-examination is two-fold—to weaken, qualify, or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses [Phip 11th Ed p 648]. The objects are to impeach the accuracy, credibility, and general value of the evidence given in chief, to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party [Powell, 9th Ed p 532). The exercise of this right is justly regarded as one of the most efficacious tests, which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description are all fully investigated and ascertained and submitted to the consideration of the jury, who have an opportunity of observing his demeanour, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on a court or jury: for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances, to which a cross-examination may be extended (Tay s 1428). As to the duty of counsel in connexion with the cross-examination of witness, see Hals, 3rd Ed, Vol 3, pp 67-68.

Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It is beyond any doubt the greatest legal engine ever invented for the discovery of truth. "You can do anything", said Wendell Phillips, "with a bayonet—except sit upon it". A lawyer can do anything with a cross-examination,—if he is skilful enough not to impale his own cause upon it. He may, it is true, do more than he ought to do; he may "make the worse appear the better reason, to perplex and dash maturest counsels",—may make the truth appear like falsehood. But this abuse of its power is able to be remedied by proper control [Wig s 1367]. A conspiracy case (known as Alipore Conspiracy Case) decided on the 17th April, 1924 in which 7 persons were charged under ss 120-B, 392, 395, 396, 302, I P Code and in which innumerable witnesses were examined on the prosecution side, resulted in the acquittal of all after a protracted trial of nine months. The approver and all other witnesses were subjected to elaborate and searching cross-examination and the sessions judge, Mr S K GHOSE (afterwards a judge of the Calcutta High Court) in acquitting the accused observed "this case illustrates the value of testing evidence by cross-examination".

When cross-examination by an opponent is contrasted with proof by other witnesses called by him, (*a*) the first advantage secured is that the cross-examination *immediately succeeds* in time the direct examination. In this way the modification or the discredit produced by the facts is more readily perceived by the tribunal. (*b*) But chiefly, the advantage is that the cross-examined witness *supplies his own refutation*. Cross-examination, then will do things that cannot be done by questioning other witnesses (Wig s 1368).

Every party must be given a fair chance to cross-examination the witness [*Pyarelal Sakseria v. Devishankar Parashar*, A 1994 MP 115]. The trial court, in its discretion, may permit the cross-examination of any witness to be deferred until any witness is examined or re-called for cross-examination [*Hazari Ram v. State of Rajasthan*, 1994 Cri LJ 3758, 3759 (Raj)]. Where the Motor Accident Claims Tribunal adopted a summary procedure by proceeding with the case on affidavits and the respondents while challenging the truthfulness of the averments made in the petition by the petitioners applied for cross-examination of the petitioners, the mere fact of adoption

of the summary procedure by the Tribunal would not deprive the respondents to cross-examine the petitioners [*Kalpanaben M Shah v. Navinchandra Jeevanlal Acharya*, A 1995 Guj 176, 177].

Provisions of S.138 of Evidence Act and S. 311 of Cr P Code are complementary and not conflicting with one another [*G.H. Iyer v. State*, 1998 Cri LJ 1821 (Ori)].

Manner of Cross-Examination.—One way of starting cross-examination is to approach the witness cautiously and courteously with a view to create an atmosphere favourable to the elicitation of facts tending to support the opponent's case. The other method is to go straight at the point and attack the witness directly. Sir Charles Russell, one of the England's greatest advocates generally followed the direct method. I said to Russell, 'Your methods are altogether different, you don't as a rule', manoeuvre, you go straight at the witness..... You take him by the throat and drag him there'. He said, 'In dealing with an English jury it is better to go straight to the point; the less *finesse* the better' ". (Obrien's Life of Lord Russell, 2nd Ed, p 100). It is acknowledged by many that the first method is by far the most successful. If from the attitude and expression of the cross-examiner, the witness at the commencement suspects that his veracity is doubted, he will be at once put on his guard and will prepare himself fully for sticking to his story in examination-in-chief and embellishing it by subsequent answers.

What is the secret of the cross-examination? HAWKINS, J, (afterwards LORD BRAMPTON), is said to have given the answer in one word—*Patience*. "It is building a brick wall round a man. You ask your question, and the answer enables you to plant one brick here. Then another question—and another brick, in quite a different place. If you ask your questions politely, very likely he will place half a dozen bricks in position himself. They are scattered all over the place, but you have your plan. By degrees the ring is complete. The wall rises. And he finds he cannot get out". That is the patient and dogged way. The *direct attack* is quite another method. It succeeds only in the hands of counsel of commanding personality, and even then it is not safer unless they are sure of their ground. Otherwise the attack recoils.

"This method of cross-examination by direct attack", says Walsh, "is as a rule the least successful. It is certainly the least pleasant to hear, and the least edifying. The insidious, half-friendly, half-confidential method is usually the more successful, merely because if a witness is attempting to deceive, it is more apt to put him off his guard" [Walsh's Advocate, p 146). Every man has his own style of cross-examination; but what is needed most is an unruffled temper and courtesy to both court and witness. Bullying and blustering or thumping the table are out of place in a court of justice and seldom succeed. Good manner and good temper are indispensable requisites of a good advocate. "Few men", says Walsh, "ever had such perfect command of themselves, and such imperturbability in the face of unfair opposition as Rufus Issacs, now better known as LORD READING, the Lord Chief Justice of England. His management of his tribunal, whether in success or in adversity was almost perfection. It may be safely said that at the Bar he never had an enemy" (Walsh's Advocate, p 125).

In a speech delivered in London on cross-examination SIR WALTER SCHWABE, KC, formerly Chief Justice of Madras, said: "Cultivate a pleasant manner and get on as friendly terms as possible with the witness. Reproving, lecturing, bullying were methods now recognized as belonging to a first generation. One should bring out the unpleasant facts with an air of condolence and regret rather than with an air of triumph, which might raise sympathy and one should never lose one's temper with a witness.' One of the arts of the cross-examiner if he is skilful and accomplished, is to

show that little credit can be attached to the testimony of a witness and the cross-examiner does that not only by means of a direct attack but by means of eliciting from the witness's mouth answers calculated to show that he is not a person who has spoken the truth [*Ambar v. R*, 48 CLJ 473: 33 CWN 55].

A good advocate should be a good actor. The most cautious cross-examiner will often elicit a damaging answer. He should observe the greatest self-control, while examining a witness. He should not allow himself to be swayed by his feelings but remain unmoved whether he achieves a triumph or commits a mistake. If he shows by his face that the unfavourable answer of the witness hurts him, he may lose his case by that one point alone. Cross-examiners in our courts are often seen to lose equanimity of mind by such an answer. They pause, perhaps blush, and thus lose their control of the witness. With the really experienced lawyer, such answer, instead of appearing to surprise or disconcert him, will seem to come as a matter of course, and will fall perfectly flat. He will proceed with the next question as if nothing had happened, or even perhaps give the witness an incredulous smile, as if to say, "Who do you suppose would believe that for a moment" [Wellman, pp 28-29].

Scott, a dramatic critic sued Sampson, the editor of the *Referee*, for libel. "Russel's cross-examination of Sampson", says an eye-witness, 'was ferocious'. Russell asked Sampson a question which he did not answer. 'Did you hear my question? said Russell *in a low voice*. "I did", said Sampson. "Did you understand it?" asked Russell *in a still lower voice*. "I did", said Sampson. "Then", said Russell, *raising his voice to the highest pitch*, and looking as if he would spring from his place and seize the witness by the throat. "Why have you not answered it? *Tell the jury* why have you not answered it". A thrill of excitement ran through the court. Sampson was overwhelmed, and he never pulled himself together again [O'Brien's Life of Lord Russell, 2nd Ed, p 148]. Speaking of Russell's success as a cross-examiner, his biographer says: "It was a fine sight to see him rise to cross-examine. His very appearance must have been a shock to the witness—the manly, defiant bearing, the noble brow, the haughty look, the remorseless mouth, those deep-set eyes widely opened, and that searching glance which pierce the soul. 'Russell,' said a member of the Northern Circuit 'produced the same effect on a witness that a cobra produces on a rabbit" [O'Brien's Life of Lord Russell, 2nd Ed, p 101].

Sir Charles Russell, Lord Russell of Killowen, was altogether the most successful cross-examiner of modern time. Lord Coleridge said of him that 'Russell was the biggest advocate of the century'. It has been said that his success in cross-examination, like his success in everything was due to his force of character. It was his striking personality added to his skill and adroitness, which seemed to give him his overwhelming influence over the witness whom he cross-examined. Russell's maxim for cross-examination was, *Go straight at the witness and the point; throw your cards on the table, mere finesse English juries do not appreciate* [Wellman's Art of Cross-examination, pp 184-85].

—Paul Brown's Rules.—"Among the American advocates, Rufus Choate was the foremost and ranked as 'the first orator of his time in any quarter of the globe where the English language was spoken, or who was ever seen standing before a jury panel'. He had little of Russell's natural force with which to command his witness; his efforts were to magnetise, he was called the 'wizard of the court-room'. He employed an *entirely different method* in his cross-examinations. He never assaulted a witness as if determined to browbeat him. He had a profound knowledge of human nature, of the springs of human action, of the thoughts of human hearts. To get at these and make them patent to the jury, he would ask only a few telling questions—

very few questions but, generally every one of them was fired point-blank, and hit the mark. His motto was: 'Never cross-examine any more than is absolutely necessary. If you don't break your witness he breaks you'. He treated every man who appeared, like a fair and honest person on the stand as if upon the presumption that he was a gentleman; and if a man appeared badly, he demolished him, but with the air of a surgeon performing a disagreeable amputation—as if he was profoundly sorry for the necessity. Few men, good or bad ever cherished any resentment against Choate for his cross-examinations of them. His whole style of address to the occupants of the witness-stand was soothing, kind and re-assuring. When he came down heavily to crush a witness, it was a calm resolute decision, but no asperity, nothing curt, nothing tart". [Wellman pp 185-86].

PAUL BROWN'S GOLDEN RULES FOR CROSS-EXAMINATION

(*1*) Except in indifferent matters, never take your eye from that of the witness; this is a channel of communication from mind to mind, the loss of which nothing can compensate.

> "Truth, falsehood, hatred, anger, scorn, despair,
> And all the passions—all the soul is there".

(2) Be not regardless, of the *voice* of the witness; next to the eye, this is perhaps the best interpreter of his mind. The very design to screen conscience from crime,—the mental reservation of the witness,—is often manifested in the tone or accent or emphasis of the voice. For instance, it is becoming important to know that the witness was at the corner of Sixth and Chestnut Streets at a certain time; the question is asked—Were you at the corner of Sixth and Chestnut Street, at six o'clock? A frank witness would answer—perhaps—I was near there. But a witness who had been there, desirous to conceal the fact, and to defeat your object, speaking to the letter rather than the spirit of the inquiry, answer. No; although he may have been within a stone's throw of the place, or at the very place within ten minutes of the time. Common answer of such a witness would be,—I was not at the *corner*, at *six o'clock*.

Emphasis upon both words plainly implies a mental evasion or equivocation, and gives rise with a skilful examiner to the question: "At what hour were you at the corner", or, "At what place were you at six o'clock? And in nine instances out of ten it will appear, that the witness was at the place about the time, or at the time about the place. There is no scope for further illustration—but be watchful. I say, of the voice, and the principle may be easily applied.

(*3*) Be mild with the mild—shrewed with the crafty—confiding with the honest—merciful to the young, the frail, or the fearful—rough to the ruffian, and a thunderbolt to the liar. But in all this, never be unmindful of your dignity. Bring to learn all the powers of your mind, not that *you* may shine, but *virtue* may triumph, and your cause may prosper.

(*4*) In a *criminal* especially in a *capital case*, so long as your cause stands well, ask but few questions; and be certain never to ask any, the answer to which, if against you, may destroy your client, unless you know the witness *perfectly well*, and know that his answer will be favourable *equally* well; or unless you will be prepared with testimony to destory him, if he plays traitor to the truth and your expectations.

(*5*) An equivocal question is almost as much to be avoided and condemned as an equivocal answer; and it always *leads* to, or *excuses* an equivocal answer. Singleness of purpose, clearly expressed, is the best trait in the examination of witnesses, whe-

ther they be honest or the reverse. Falsehood is not detected by cunning, but by the light of truth, or if by cunning, it is the cunning of the witness, and not of the counsel.

(6) If the witness determines to be witty or refractory with you, you had better settle the account with him at *first*, or its items will increase with the examination. Let him have an opportunity of satisfying himself either that he has mistaken *your* power, or his *own*. But in any result, be careful that you do not lose your temper; anger is always either the precursor or evidence of assured defeat in every intellectual conflict.

(7) Like a skilful chess-player, in every move, fix your mind upon the combinations and relations of the game—partial and temporary success may otherwise end in total and remediless defeat.

(8) Never undervalue your adversary, but stand steadily upon your guard; a random blow may be just as fatal as though it were directed by the most consummate skill; the negligence of one often cures, and sometimes renders effective the blunder of another.

(9) Be respectful to the court and to the jury—kind to your colleague—civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening defence towards *either*.

The following passage from Cox's "The Advocate: His Training, Practice, Right, and Duties", contain invaluable advice:—

"In concluding these remarks on cross-examination, the rarest, the most useful and the most difficult to be acquired of the accomplishments of the advocate, we would again urge upon your attention the importance of calm discretion. In addressing a jury you may sometimes talk without having anything to say, and no harm will come of it. But in cross-examination every question that does not advance your cause injures it. If you have not a definite object to attain, dismiss the witness without a word. There are no harmless questions here: the most apparently unimportant may bring destruction or victory. If the summit of the orator's art has been defined to consist in knowing when to sit down, that of an advocate may be described as knowing when to keep his seat. Very little experience in our courts will teach you this lesson, for every day will show to your observant eye instances of self-destruction brought about by imprudent cross-examination. Fear not that your discreet reserve may be mistaken for carelessness or want of self-reliance. The true motive will soon be seen and approved. Your critics are lawyers, who know well the value of discretion in an advocate; and how indiscretion in cross-examination cannot be compensated by any amount of ability in other duties. The attorneys are sure to discover the prudence that governs your tongue. Even if the wisdom of your abstinence be not apparent at the moment, it will be recognized in the result. Your fame may be of slower growth than that of the talker, but it will be larger and more enduring". All the questions which are asked with a view to challenge the evidence-in-chief are permissible. There is no provision of law which says that cross-examination should be confined to what is volunteered by the witness and cannot be directed to challenge or clarify the answers given in reply to the questions put by his own advocate in examination-in-chief [*P v. P*, A 1982 Bom 498, 504]. When prosecution wanted a person to be arrayed as an accused after the evidence of two prosecution witnesses were recorded, the right of that person to cross-examination would flow only after the witnesses are 'reheard', since the proceedings have to commence 'afresh' as against him [*Ram Niwas v. State of U P*, 1990 Cri LJ 460, 463

: 1989 LJ 72 (All)]. Where a witness is sought to be examined by a party on commission by written interrogatories, the other side has a choice before it, either to file written interrogatories or to insist upon an opportunity being given to him to cross-examine the witness orally [*Chulam Rasool Khan v. Wali Khan*, A 1983 J&K 54, 55].

Liability to And Right of Cross-Examination.—If a witness be called merely for the purpose of producing a document, which either requires no proof or is to be identified by another witness, he need not be sworn, and if unsworn, he cannot be cross-examined [*Summers v. Moseley*, 2 Cr & M 477; see s 139]. So if a witness be sworn under a mistake, whether on the part of counsel or of the officer of the court, and that mistake be discovered before the examination-in-chief has substantially begun, no cross-examination will be allowed [*Wood v. Mackinson*, 2 M & R 273]. Neither has the adverse party any right to cross-examine a witness whose examination-in-chief has been stopped by the judge, after his having answered a merely immaterial question [*Creevy v. Carr*, 7 C & P 64]. But, on the other hand, it is by the no means necessary that the witness should have been actually examined in chief; for if he has been intentionally called and sworn, the opposite party has, in strictness, a right to cross-examine him though the party calling him has declined to ask a single question [*R v. Brooke*, (1819) 2 Stark 472; *R v. Ishan, post*]. Where witnesses are simply called to speak to the character of the prisoner, it is not usual to cross-examine them, excepting under special circumstances [*R v. Hodgkiss*, 7 C & P 298]; but no rule of law expressly forbids this course. Where any person, whether he be a party to the proceedings or not, has made an affidavit, which has been filed for the purpose of being used before the court, he becomes liable to cross-examination and he cannot be exempted from such liability by the subsequent withdrawal of the affidavit [*Re Quartz Hill Co*, 21 Ch D 642; Tay s 1430]. When a person is sworn and admits his signature on a document, he becomes a witness and is liable to be cross-examined as to the whole of the case [*Onkar v. Balmukund*, A 1957 MB 135]. Where defendant's counsel failed to take part in framing issues he cannot be said to have abandoned issues and hence right to cross-examine cannot be denied on such failure [*Haridas v. Indian Cable Co*, A 1965 C 369].

In Bankruptcy proceedings there can be cross-examination on an affidavit filed, only if it is read [*Exp Child Re Ottoway*, 20 Ch D 126 CA]. As to cross-examination of witness called to produce a document, see s 130; as to cross-examination of witnesses called by court; see *post* and s 165; as to cross-examination of co-accused's and co-defendant's witnesses, see *post*. As to the duty of the prosecution to call essential witnesses, see *Seneviratne v. R*, 41 CWN 64 PC and cases cited *ante* under s 114 (*g*): "*Criminal cases*" and *post* s 135: "*Examination of witnesses in criminal cases*". As to cross-examination of witnesses examined before the committing magistrate but not called in the sessions court, see *post*.

The right of cross-examination belongs to an adverse party and parties who do not hold that position should not be allowed to take part in cross-examination. A purchaser from a person who subsequently is adjudicated an insolvent is not a necessary or proper party to the proceedings under cl 18 of the second schedule to the Presy. T Insol Act and has no right to intervene and cross-examine the applicant for establishing the claim against the Insolvent's estate [*Jarwa Bal v. Pitambar*, 24 CLJ 149; 36 IC 689]. Where it was alleged that defendant No. 1 borrowed money in his capacity as the partner of the firm and the other partner in his written statement stated that defendant No. 1 had no right to do so without his consent such other partner is adverse party to defendant No. 1 and therefore, he has right to cross-examine him. [*B.S. Balaji v. T. Govindaraju*, 1996 AIHC 2484, 2487 (Kar)]. Where a witness called by one of the parties is a competent witness, the opposite party has the

right to cross-examine him, though the party calling him has declined to ask a single question [*R v. Ishan Dutta*, 6 BLR Ap 88: 15 WR Cr 34].

Medical Officers like other persons are bound to attend court on receipt of summons and give evidence and to answer all questions in cross-examination leaving it to the court to determine whether the fact sought to be elicited is relevant or not [*Chauthi v. R*, A 1937 A 768].

Right to Cross-Examine is Not Enough : There Must be Opportunity to Exercise the Right. [Opportunity is Equivalent to Actual Cross-Examination].—"The rule of the common law is that no evidence shall be admitted but what is or might be under the examination of both parties. But if the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined. Here then the question is whether the defendant had an opportunity of cross-examining" [*per* ELLENBOROUGH LCJ, in *Cazenove v. Vaughan*, 1 M & S 6]. The same rule is stated in Hals 3rd Ed Vol 15 para 800: "No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination". It is certainly implied by s 138 that a party must have had an opportunity to cross-examine and it does not mean that merely a right to cross-examine a witness without an opportunity being offered for cross-examination is sufficient compliance with the requirements of law [*Moti Singh v. Dhanukdhari*, 73 IC 339: A 1923 P 53: 24 Cri LJ 595].

The doctrine requiring a testing of testimonial statements by cross-examination has always been, understood as requiring, not necessarily an actual cross-examination, but merely an *opportunity to exercise the right to cross-examine* if desired. The reason is that, wherever the opponent has declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that the testimony could not or need not be disputed at all or be shaken by cross-examination. This doctrine is perfectly settled. By the present doctrine, testimony never actually tested at all, in consequence of the carelessness, fraud, or incompetence of counsel, or of privity in interest is admitted, if merely the opportunity so to test it had existed. But room should be allowed for the exceptional instances which will certainly occur. The trial court should have a discretion [Wig s 1371]. The same importance of 'right and opportunity' is to be found in bold relief in the second proviso to s 33 (*ante*).

All witnesses examined in chief or sworn are subject to cross-examination. To make evidence admissible against an accused person, the fact that he had full opportunity of cross-examination, if not admitted, must be proved [*R v. Ram Ch*, 19 B 749]. When a co-accused who was discharged under s 321 Cr P Code was examined as a witness against the other accused and was subsequently withdrawn from the witness-box and again made an accused, so that the other accused were thereby prevented from cross-examining him—*Held*, that they were deprived of a fundamental right given them by law and the conviction could not on that ground alone be upheld [*Harihar v. R*, 40 CWN 876 FB]. A suit was decided *ex parte* in the absence of the defendant, who had therefore no opportunity to cross-examine the plaintiff's witnesses. The suit was readmitted and reheard, and at the re-hearing the plaintiff's witnesses were not recalled and again the court gave a decree for the plaintiff—*Held*, that the court of the first instance should have recalled the plaintiff's witnesses and given an opportunity to the defendant to cross-examine them [*Ram Baksh v. Kishore*, 3 BLR 273: 12 WR 130, 131].

As a general rule evidence is not legally admissible against a party, who at the time it was given had no opportunity to cross-examine the witness or of rebutting their testimony by other evidence [*Gorachand v. Ram Narain*, 9 WR 587; *Radha*

Jiban v. Taramoni, 12 MIA 380; *Meer Sujad v. Lalla Kashinath*, 6 WR 181; *Gurdial v. Suknandan*, A 1929 A 230; *Neminath v. Jamboorao*, A 1966 Mys 154]. It is the right of every litigant in a suit, unless he waives it, to have an opportunity of cross-examining witnesses whose testimony is to be used against him [*Chattoo Kurmi v. Rajaram*, 11 CLJ 124, 130 FB, see *Motiram v. Lalit*, 5 PLJ 545]. Where at a sessions trial, the defence counsel applied after the examination-in-chief of the first prosecution witness, for postponement of the cross-examination of the witnesses till the next day, on the ground of his unpreparedness, and the result of the refusal was that four witnesses were not cross-examined and the rest were inefficiently cross-examined—*Held*, that the accused were prejudiced and there should be a retrial by another judge [*Sadasiv v. R*, 41 C 299].

Opportunity may be denied in other ways. If on a certain point statements of witnesses recorded under s 162 Cr P Code were the only material for cross-examination and they were not available to the accused on account of destruction, it must be said that there was no opportunity to cross-examine and the evidence on the point would not be admissible [*Baliram v. R*, 1945 Nag 151: A 1945 N 1 (**expld** in *Manganlal v. R*, 1946 Nag 126: A 1946 N 173); see *post* s 145: "*Unavailability of Statement Under s 162 Cr P Code &c*"].

Death, Illness, etc Between Examination-in-Chief and Cross-Examination. —When a witness dies after examination-in-chief and before cross-examination, the evidence is admissible, but its probative value may be very small and may even be disregarded [*Maharaja of Kolhapur v. Sundram*, 48 M 1: A 1925 M 497; *Mangal Sen v. R*, A 1929 L 840; *Ahmed v. Jyoti*, A 1944 A 188 : 1944 All 241; *Srikishen v. R*, A 1946 P 384; *Horil v. Rajab*, A 1936 P 34; see also *Morley v. M*, 1858, 43 ER 1007; *Abadom v. A*, 1857, 53 ER 351]. The evidence of a witness who could not be subjected to cross-examination due to his death before he could be cross-examined, is admissible in evidence, though the evidentiary value will depend upon the facts and circumstances of case. [*Food Inspector v. James N.T.*, 1998 Cri LJ 3494, 3497 (Ker)]. If the examination is substantially complete and the witness is prevented by death, sickness or other causes (mentioned in s 33) from finishing his testimony, it ought not to be rejected entirely. But if not so far advanced as to be substantially complete, it must be rejected [*Diwan v. R*, A 1933 L 561]. Deposition of a witness whose cross-examination became impossible can be treated as evidence and the court should carefully see whether there are indications that by a completed cross-examination the testimony was likely to be seriously shaken or his good faith to be successfully impeached [*Horil v. Rajab*, A 1936 P 34]. In a divorce case, the cross-examination of a witness for the wife who is the uncle of the husband was interrupted to enable the witness to effect a compromise. No compromise was effected. The witness did not turn up thereafter. The husband did not take steps to compel the witness to appear for further cross-examination. The reading of the evidence of this witness cannot be objected, on the ground that the cross-examination is not completed [*R v. S*, A 1984 (NOC) 145 All].

Evidence is admissible if cross-examination is not evaded or deliberately prevented [see *Davis v. Otty*, 1865, 55 ER 875]. Where owing to the refractory attitude of a witness who obstinately refused to answer questions the court is constrained to terminate cross-examination, the evidence of such witness is not legal testimony [*Ramkumar v. R*, A 1937 O 168]. Affidavit of a person was rejected where he departed from the country without giving any chance to the other side to cross-examine [*Dunne v. English*, 1874 LR Eq 524]. Death or illness before cross-examination makes the evidence in chief admissible though its weight may be slight [*R v. Doolin*, Jebb CC 123; *People v. Cole*, 43 NY 508]. But absence from the country [*Bingley v. Marshall*, 6 LT 682], or temporary illness [*Nason v. Clamp*, 12 WR 973], has been held insufficient, the proper course being to adjourn the trial or issue a commission; though FARWELL J, rejected in *toto* the evidence of a plaintiff

who fainted and was unable to be cross-examined [45 Sol Jo 569; *sed qu*; Phip 11 Ed p 648; see Tay s 1496]. As to failure of cross-examination on account of death, illness and other causes, see *ante* s 33, Prov (2). As to duty of court with regard to the evidence of a witness who was not sufficiently cross-examined, see *Dwarka v. Sant Baksh*, 18 A 92.

How Long Does The Right to Cross-Examine Continue?—It has been suggested that when a person is once entitled to cross-examine a witness, the right continues through all the subsequent stages of the case, so that, if he afterwards recalls the same witness, he may interrogate him by leading questions and treat him as the witness of the party who first called him [Greenl s 447]. There is divergence of opinion upon this point. The above view is based on the theory that every witness is favourably disposed towards the party calling him. Taylor is of opinion that this principle is scarcely applicable to a case where a person is equally the witness of both sides; and in common fairness each party should alternately have the right of cross-examining such a witness as to his adversary's case, while both should be precluded, in the course of the respective examinations-in-chief from putting leading questions with regard to their own [Tay s 1433]. Thus it was held in a case that a plaintiff may cross-examine any of his own witnesses, on their being afterwards called on behalf of the defendant [*Malone v. Spillessy*, 1842 Ir Cir R 504; *Lord v. Colvin*, 24 LJ Ch 517; *Re Woodfine*, 26 WR 678—CONTRA : *Dickinson v. Shea*, 4 Esh 67 **doubted** in Tay].

Jones says that a party should be precluded from cross-examining a witness, whom he called in his own behalf, except in those cases where the witness betrays some bias or prejudice [Jones s 825]. The better opinion is that the right to cross-examine does not survive and he cannot be asked leading questions on his second examination and this rule appears to have been adopted in the Evidence Act. If the adversary again called the same witness who has been examined by the other side and cross-examined by him, he could clearly examine him in chief [Field p 630]. The general rule in the Act is that the party calling a witness can only examine him in chief (s 137). Cross-examination may however be allowed with the leave of the court under s 154 when the witness proved adverse. Recalling a witness for cross-examination after a delay of one month is not proper [*Charan Singh v. State of U P*, 1990 Cri LJ 165 (NOC) (All)].

When Witness May Not be Cross-Examined.—(*1*)A witness summoned merely to produce a document (*post* s 139); (*2*) a witness sworn by mistake [*ante* and *post* s 139]; or (*3*) a witness whose examination has been stopped by the judge before any material question has been put [*Creevy v. Carr*, 7 C & P 64] is not liable to cross-examination. (*4*) A witness giving replies in answer to questions by the court can only be cross-examined with leave (s 165 *post*). (*5*) A witness who has given no evidence in chief, may not be cross-examined as to credit [*Bracegirdle v. Bailey*, 1 F & F 536]. (*6*) The court may disallow cross-examination used simply to oppress and not for the purposes of justice [*Re Mundell Fenton v. Camberlege*, 48 LT 776, where an affidavit witness was not allowed to be subpoenaed for cross-examination the object of the cross-examination being to injure her for having employed a particular solicitor. (*7*) Witnesses to character, though liable to be, are in fact rarely cross-examined [Phip 11th Ed pp 647-48; s 140 *post*]. Under section 299 of Cr PC, 1973 and subject to the circumstances specified in it a person can be made an accused person on the basis of the testimony of a witness who has not been cross examined [*Ashok Kumar v. State of UP*, 1998 Cri LJ 2777, 2781 (All)].

Latitude in Cross-Examination: [Questions Permissible].—Considerable latitude is allowed in cross-examination. It need not be confined to facts elicited in examination-in-chief, or to strictly relevant facts. The accused are entitled to cross-examination to elicit facts in support of their defence from the prosecution witnesses, wholly unconnected with the examination-in-chief [*Amritlal v. R*, 42 C 957]. Questions irrelevant in examination-in-chief may be relevant in cross-examination. The cross-examining advocate may undertake to show at some subsequent stage that questions apparently irrelevant are really relevant (see s 136). S 138 says that both examination-in-chief and cross-examination must relate to *relevant* facts. "Relevant facts" in cross-examination must necessarily have a wider meaning than the term when applied to examination-in-chief. For instance, facts though otherwise irrelevant may involve questions affecting the credit of a witness, and such questions are permissible in cross-examination. (See generally ss 146-53). But questions manifestly irrelevant or questions not intended to contradict or qualify the statements in examination-in-chief, or which do not impeach the credit of a witness are not allowed in cross-examination.

There is no rule of law which renders hearsay evidence more admissible in cross-examination than in examination-in-chief [*Ganauri v. R*, 16 C 206, 2121]. The moment a witness commences giving hearsay evidence, he should be stopped by the court. It is not safe to rely on a subsequent exhortation to the jury to reject the hearsay evidence and to decide on the legal evidence alone [*R v. Pitamber*, 7 WR Cr 25]. As to hearsay, see s 3 and s 60. A witness cannot be asked whether a third person had admitted that he and not the party charged was the person liable, for such evidence would be hearsay [*Watts v. Lyons*, 6 M & F 1047]; but he may be asked whether such third person is the person to whom credit was given, or who was dealt with as the party primarily liable, and it seems that he may be asked such questions as the foregoing, in order to test his memory or credibility [*Hollingham v. Head*, 4 CB n s 388; Powell 9th Ed p 534].

Cross-examination is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case; and therefore if a plaintiff calls a witness to prove the simplest fact connected with the case, the defendant is at liberty to cross-examine him on every issue, and by putting leading question to establish, if he can, his entire defence. So far has this doctrine been carried, that, even where it was requisite that the substantial, though not the nominal, party in the cause should be called by his adversary, for the sake of formal proof only, it was held that he was thereby made a witness for all purposes, and might be cross-examined as to the whole case [*Morgan v. Brydges*, 2 Stark 314; Tay s 1432; Steph Art 127; Phip 11th Ed p 649]. This English rule is followed in some jurisdictions in America. But the Federal rule introduced by STORY J, in 1840 "that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him to other matter, he must do so by making the witness his won, and calling him as such in the subsequent progress of the suit" [*Philadelphia & T R Co v. Stimpson*, 14 Pet 448, 461], now prevails in most States [see Jones s 820; Wig 1885-90]. See also *R v. Ishan Dutt*, 6 BLR Ap 88: 15 WR Cr 34. *In re Woodfine*, 47 LJ Ch 832, where the issues on a claim and counter-claim were separately tried, FRY J, directed the defendent to recall plaintiff as his own witness and not to cross-examine him on the matters raised by the defendant by the counter-claim.

Where a wife was charged with adultery on certain specified occasion, she could be asked in cross-examination whether she had ever committed adultery [*Barber v. B*, 1949 (P) 169].

Limits Within Which Cross-Examination Must be Confined.—The rule which confines evidence to the points in issue, and excludes all proof of such collateral facts as afford no reasonable inference with respect to the principal matters in dispute, is not usually applied in cross-examination with the same strictness as in examination-in-chief; but great latitude of interrogation is sometimes permitted, when, from the temper or conduct of the witness, or from other circumstances, such course seems essential to the discovery of truth; or where the cross-examiner will undertake to show, at some subsequent stage of the trial, by other evidence, the relevancy of the question put (see s 136). On this head it is difficult to lay down, or rather to apply, any precise general rule. Still, one or two subsidiary rules have been clearly established and they define with tolerable certainty the limits which questions on cross-examination must be confined [Tay s 1334]:—

First, "the judge may in all cases disallow any question put in cross-examination of any party or other witness which may appear to him vexatious and not relevant to any matter proper to be inquired into the cause or matter" [Tay s 1434-A. This is now embodied in England in Or 36 r 8. The combined effect of s 5; s 138 para 2; s 145 and s 152 points to the same rule].

Secondly, the answer of a witness put in cross-examination respecting any fact irrelevant to the issue, with the exception of an answer to question whether the witness has been convicted of a felony or misdemeanour, is conclusive, and evidence cannot be called on the other side to show that the answer is untrue; neither can an irrelevant question be put to a witness on cross-examination for the purpose of impeaching his credit by contradicting him [Tay s 1435. See s 153 *post* and the two Exceptions there]. A witness may however be cross-examined and contradicted on all matters directly relevant to the issue [see s 5; *illus* (*c*) to s 153 *post* and *ante*, under "*Commentary*"]. If the question asked is directly relevant, the witness is not protected from answering even if the answer tends to criminate him [see ss 147 and 132].

Thirdly, with the view of impeaching the character of a witness, he may always be asked on cross-examination,—though he is not always compelled to answer [see s 148]—questions with regard to alleged crimes or other improper conduct on his part [see ss 146, 148] and here, if the fact inquired into be relevant to the issue, it may be proved by other evidence although denied by the witness; but, if it is irrelevant, the answer of the witness, when he makes any, must at common law be regarded as conclusive; and whether he answers or not, no independent proof can be given to establish the truth of the imputation [Tay s 1436; see s 153].

Fourthly, with respect to all questions put to a witness on cross-examination for the purpose of directly testing his credit, it may be broadly laid down, that if the questions relate to relevant facts, the answers may be contradicted by independent evidence; if too irrelevant, they cannot [Tay s 1438; see s 153, Excep 2]. The rule is well-settled that a witness cannot be contradicted on matters not relevant to the issue. He cannot be interrogated on irrelevant matters merely for the purpose of contradicting him by other evidence. If questions relating to such irrelevant matters are answered, there can be no contradiction. There are two exceptions to the rule disallowing contradiction on irrelevant matters—*viz*, (*i*) Bias or Partiality and (*ii*) Previous conviction [s 153 Excep].

Witnesses to character may be cross-examined (s 140). *Leading questions* may be asked in cross-examination (see s 143). As to cross-examination to *previous statements in writing* with a view to contradict, see s 145. As to impeaching credit by previous *oral* statements, see s 155(3). As to additional questions lawful in cross-

examination, see s 146. A witness is not always compellable to answer all questions in cross-examination (v ss 147, 148). He may be cross-examined and contradicted on all matters directly relevant to the issue. As to matter relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, though the witness may be cross-examined, he cannot be contradicted except in two cases (see s 153). As to the ways in which the credit of a witness may be impeached in cross-examination, see s 155. Court may permit a party to cross-examine his own witness if he turns hostile (s 154). As to evidence relating to matters in writing, see s 144. As to cross-examination of a witness called to produce a document, see s 139. Court may exclude indecent, scandalous or annoying questions (ss 151, 152).

Cross-Examination and power of court to keep the identity of witness secret.— The identity of the witness is necessary in the normal trial of cases to achieve the objects of cross-examination and the right of confrontation is one of the fundamental guarantees so that he could guard himself from being victimised by any false and invented evidence that may be tendered by the adversary party. Notwithstanding the provisions of the Evidence Act and the procedure prescribed under the Criminal Procedure Code, there is no imposition of constitutional or statutory constraint against keeping the identity and address of any witness secret if some extraordinary circumstances or imperative situations warrant such non-disclosure of identity and address of the witnesses [*Kartar Singh v. State of Punjab*, 1994 Cri LJ 3139, 3210 (SC)]. The constitution Bench of the Supreme Court while examining the constitutional validity of section 27(1) of Bombay Police Act, 1902 in *Gurbachan v. State of Bombay*, A 1952 SC 221 : 1952 Cri LJ 1147 gave its finding with regard to the non-disclosure of the identity and address of the witnesses on whose evidence the proceedings for externment were started, thus:

"In our opinion this by itself would not make the procedure unreasonable having regard to the avowed intention of the legislature in making the enactment. The law is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitutes a menace to the safety of the public residing therein. This object would be wholly defeated if a right to confront or cross-examine these witnesses was given to the suspect.

.....It is true that a procedure different from what is laid down under the ordinary law has been provided for a particular class of persons against whom proceedings could be taken under Section 27(1) of the City of Bombay Police Act, but the discrimination if any is based upon a reasonable classification which is within the competency of the legislature to make."

In *Hira Nath Mishra v. Principal R.M. College*, A 1973 SC 1260 it was observed:

"The very reasons for which the girls were not examined in the presence of the appellants, prevailed on the authorities not to give a copy of the report to them. It would have been unwise to do so.....

Rules of natural justice cannot remain the same applying to all conditions. We know of statutes in India like the Goonda Acts which permit evidence being collected behind the back of the goonda and the goonda being merely asked to represent against the main charges arising out of the evidence collected. Care is taken to see that the witnesses who gave statements would not be identified. In such cases there is no question of the witnesses being called and the goonda being given an opportunity to cross-examine the witnesses. The reason is obvious. No witness will come forward

to give evidence in the presence of the goonda. However unsavoury the procedure may appear to a judicial mind, these are facts of life which are to be faced."

In this connection observation made by Chandrachud, C.J. speaking for the constitution Bench in *A.K. Roy's case*, A 1982 SC 710 may be recalled, which is a follows:

"Whatever it is, Parliament has not made any provision in the National Security Act, under which the detenu could claim the right of cross-examination and the matter must rest there.

We are therefore of the opinion that, in the proceedings before the Advisory Board, the detenu has no right to cross-examine either the persons on the basis of whose statement the order of detention is made or the detaining authority."

Under section 16(2) of the 1987 Act, the Designated Court is given only a discretionary authority to keep the identity and address of any witness secret on certain contingencies but the right of cross-examination is not taken away. In order to ensure the purpose and object of the cross-examination the identity, names and addresses of the witnesses may be disclosed before the trial commences but it should be subject to an exception that the court for weighty reasons in its wisdom may decide not to disclose the identity and addresses of the witnesses especially of the potential witnesses whose life may be in danger [*Kartar Singh v. State of Punjab*, 1994 Cri LJ 3139, 3212 (SC)].

Tendering a witness for cross-examination only.—Permitting the prosecution to tender a witness for cross-examination only would be wrong and the effect of their being tendered only for cross-examination amounts to the failure of the prosecution to examine them at the trial [*Tej Prakash v. State of Haryana*, 1996 Cri LJ 394, 399 (SC)]. Section 138 envisages that a witness would first be examined in chief then subjected to cross-examination and for seeking any clarification the witness may be rexamined by the prosecution. There is no meaning in tendering a witness for cross-examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does to choose to examine him in chief. However, the practice of tendering witnesses for cross-examination in Sessions Trials had been frequently resorted to since the enactment of the Code of Criminal Procedure, 1898 [*Sukhwant Singh v. State of Punjab*, A 1995 SC 1601, 1603 : 1995 (2) Crimes 148, 151].

Cross-Examination of Complainant in Libel Action.—The defendant in a defamation case is entitled to give general evidence of the complainant's bad reputation. The same rule applies to cross-examination designed to the same end; (see Hals 3rd Ed Vol 24 para 196). Where a judge prosecuted the accused for defamation for alleging that he was in the habit of abusing suitors by filthy language, questions put to him about having used similar expressions for suitors on other occasions were allowed as relating to what was the reputation which defendant is said to have harmed [*Laidman v. Hearsay*, 7 A 906; see *Devi Dayal v. R*, A 1928 L 225; *Munnalal v. Singh*, A 1950 A 455—CONTRA: *Devrata v. Krishna*, A 1954 P 84].

Cross-Examination of a Party's Own Witness.—A party cannot in general cross-examine his own witness though he may contradict him by independent evidence relevant to the issue and thus indirectly discredit him, *eg* when an attesting witness denies his own signature [see also s 155 *post* and *ante*. "*Commentary*"]. But when such witness turns round and proves adverse, he may be cross-examined with the permission of the court (see s 154). A person allowed to cross-examine his own

witness may discredit him by other evidence, *eg* previous inconsistent statements [ss 145, 155(*3*)]. As to whether the right to cross-examine survives if the cross-examiner afterwards calls his opponent's witness to prove his own case, see *ante*: "*How long does the right to cross-examine continue?*"

The credit of a party's witness may also in certain cases be impeached with the leave of the court [s 153 *post*].

Questions Not Permissible in Cross-Examination. [Misleading or Composite Questions, Unfair Practice, Repetition, etc].—Questions which assume facts to have been proved which have not been proved, or that particular answers have been given contrary to the fact are not allowed [*Hill v. Coombe*, 1818 and *Handley v. Ward*, 1818 cited Starkie, Ev 4th Ed 197; Tay s 1431; Hals 3rd Ed Vol 15 para 802]. A question which *assumes a fact* that may be in controversy is leading, when put on direct examination, because it affords the willing witness a suggestion of a fact which he might otherwise not have stated to the same effect. Conversely, such a question may become improper *on cross-examination*, because it may by implication put into the mouth of an unwilling witness, a statement of fact which he never intended to make and thus incorrectly attribute to him testimony which is not his [Wig s 780]. The court should disallow such "located" questions without waiting for objections. "It is an established rule, as regards cross-examination, that a counsel has no right, even in order to detect or catch a witness in a falsity, falsely to assume or pretend that the witness had previously sworn or stated differently to that fact, or that a matter had previously been proved when it had not. Indeed, if such attempts were tolerated, the English Bar would soon be debased below the most inferior of society" [Chitty's Pr of Law 2nd Ed III, 901]. Another improper way in which by insinuation testimony may be incorrectly attributed to a witness is that of asking him to *refresh his recollection* by a paper and then say whether he still persists in his statement [Wig s 780].

When a witness is asked a question about a matter which he had no opportunity to know or on which he is not competent to speak, it may be properly disallowed [*Tan Bug v. Collr*, A 1946 B 216, 225]. It is the judicial function of a judge to insist that the witness shall understand the question put before an answer is obtained or before an answer is recorded [*Harilal v. R*, 14 P 225]. A party should put to each of its opponent's witness so much of his case as concerns that particular witness. If no such questions are put, the Court presume that the witness account has been accepted [*Mohant Mela Ram v. S.G.P. Committee Amritsar*, A 1992 P&H 252, 255].

Another inveterate abuse is the grouping of several questions admitting of different answers into one long composite question and a demand of a categorical answer—'Yes', or 'No'. Even a cool witness is puzzled and misled. Such composite or ensnaring questions should never be allowed. The remedy for the trick as proposed by Aristotle is that "several questions should be at once decomposed into their several parts. Only a single question admits of a single answer". The following anecdote illustrates the evil: "Sir Frank Lockwood was once engaged in a case in which Sir Charles Russel (the late Chief Justice of England) was the opposing counsel. Sir Charles was trying to browbeat a witness into giving a direct answer, 'Yes', or 'No'. 'You can answer *any* question Yes or No', declared Sir Charles. 'Oh, can you?' retorted Lockwood: "May I ask if you have left off beating your wife?" [Green Bag Vol XIII, p 671]. To such a composite question: "Did you throw the born child into the well as the result of which he died of drowning?"—a direct anwser "Yes" or "No" is impossible. From the accused girl's answer "Yes', it cannot be inferred that she admitted that the child was born alive [*Hassan Pari v. R*, A 1914 Pesh 22].

In cross-examination, it is admitted on all hands, that leading questions may in general be asked; but this does not mean that the counsel may go to the length of putting the very word into mouth of the witness, which he is to echo back again [*R v. Hardy*, 1794, 24 How St Tr 704; see notes to s 143 *post*].

The *repetition* of a question or a topic may or may not be objectionable according to its purpose. (*1*) Repeating an unanswered question *upon an inadmissible point, already ruled out by court*, is of course an impertinence to the court. (2) Repeating an *allowable question already once answered or covering the same ground of facts* in other questions, on the *direct examination*, is ordinarily superfluous and therefore improper. Nevertheless, circumstances may arise which make it desirable to emphasize certain facts anew; and the trial court's discretion should control. (*3*) Repeating the same testimonial matter of the direct examination, by *questioning the witness anew on cross-examination* is a process which often becomes desirable in order to test the witness's capacity to recollect what he has just stated and to ascertain whether he falls easily into inconsistencies and thus betrays falsification. (*4*) Repeating precisely the *same allowable question on cross-examination*, in order by sheer moral force to compel a witness to admit the truth, after an *original false answer or refusal to answer*, is a process which not only savours of intimidation and browbeating, but also tends to waste time. Nevertheless, when used sparingly and against a witness who in the cross-examiner's belief is falsifying, there ought to be no judicial interference [Wig s 782].

As to intimidating, insulting or annoying questions, see s 152 and as to indecent questions, see s 151. Where a witness is intimidated or browbeat with the object of forcing him to make some admission, the judge ought to afford immediate protection without waiting for an appeal which can seldom come from unsophisticated witnesses unused to the bar of courts. "Browbeating", says Bentham, "is the sort of offence which can never be committed by any advocate who has not the judge for his accomplice". The dignity of a court is best maintained by the presiding judge invariably treating the witnesses with courtesy and insisting on counsel doing so [*Bakhori v. Abdul*, A 1941 P 362].

Insulting Observations During Examination.—Questions should not be accompanied by insulting or annoying observations although counsel is at liberty to make comments at the time of argument. In *Hardy's Trial* (24 How St Tr 754), Mr Erskine during his cross-examination relating to the proceedings of an alleged seditious meeting asked: "Then you were never at any of those meetings but in the character of a spy"—"As you call it so, I will take it so". "If you were not there as a spy, take any title you choose for yourself and I will give you that", EYRE LCJ, observed: "There should be no name given to a witness on his examination. He states what he went for, and in making observations on the evidence, you may give it any appellation you please". On a similar occasion, he again said: "I think it is so clear that the questions that are put are not to be loaded with all the observations that arise upon all the previous parts of the case, they tend so to distract the attention of everybody, they load us in point of time so much; and that that is not the time for observation upon the character and situation of a witness is so apparent that as a rule of evidence it ought never to be departed from". Running comments should not also be made on the value or effect of a witness's testimony or his character during his examination. They should be reserved for the address. Nor should the cross-examiner enter into any discussion with the witness on any point by raising purely hypothetical questions. As to offensive questions, see s 151.

When Question is ruled Out By Court.—When any question is excluded by the court as irrelevant or objectionable after all submissions, the examiner should accept the

court's ruling without demur or display of temper. JEFFERIES CJ, said: "It has always been the practice heretofore, that where the courts have delivered their opinion the counsel should sit down and not dispute it any further" [*Case of Titus Oates*, 1865, 10 How St Tr 1186]. "..... A word as to the duty and the privilege of counsel appearing on behalf of the party whose evidence had been excluded. The court is entitled to expect a loyal acceptance of its ruling on the part of the counsel, without any attempt to get behind the ruling or to raise the question again and again, after it has once been decided. It may be advisable for counsel to put in a statement in writing showing clearly the matters on which he desires to adduce evidence that is being excluded. But, though, as I have already said, we are all apt to err, counsel cannot directly or indirectly force the hands of the court by suggesting, in whatever disguise, that a court of appeal might take a different view, and insinuating that the court is taking undue responsibility upon itself by shutting out any evidence. It is, in my opinion, a responsibility that the court must take upon itself, though it must do so with care and caution" [*per* TYABJI J, in *Bal Rajaram v. Manek Lal*, A 1932 B 136, 151].

Questions On the Effect of Evidence Given By a Witness Himself or By Others.—It is not infrequently found that a witness is embarrassed by being put questions as to the *effect of evidence* given by himself or other witnesses. Such questions are not proper nor do they serve any useful purpose. A witness is to state only facts within his knowledge and he should not be drawn into a controversy and allowed to venture his opinion on the effect of evidence. This matter formed the subject of comment in the case of *R v. Baldwin*. The Law Journal made the following apposite remarks on the case:—

> "In the case of *Rex v. Baldwin*, reported in the *Times* newspaper of Tuesday last, the court of criminal appeal addressed some elementary, but much-needed remarks to the world at large as to the inaptitude, to say the least of a particular type of question very frequently put to witnesses these days. The reference was to the interrogation which invites a witness to state, not facts within his cognizance, but the effect of evidence already given, whether by himself or by others; and a typical form of it was quoted: "Is your evidence to be taken to suggest .....?" Apart from the special class of witnesses known as "expert", it is, of course, a first and universally recognised rule that the function of the witness is to state facts within his knowledge; it is no more his function to review his own or anybody else's evidence than it is to comment upon the law applicable to the case. Nevertheless, witnesses are incessantly being invited, as the court pointed out, to embark upon arguments, the motive of the invitation being consciously or unconsciously, to initiate and profit by a discussion between a skilled, professional controversialist (the advocate) and an unskilled amateur (the witness). The invitation should, of course, be politely but firmly refused, but not every witness knows that he may so refuse and not many of those, who know, dare refuse. The observation of the court of criminal appeal deserve the most careful consideration of all concerned. If the observations are universally read, marked, learnt, inwardly digested and acted upon, a noticeable difference will be observed in the methods of some of the best known advocates of the day, and even learned judges to a large extent will mend their ways with witness".—(*Law Journal*, p 360 Mar 21, 1925).

Effect of Omitting or Not Cross-Examining a Witness on Essential Points. [Suggestions].—The skilful cross-examiner must hear the statements in examination-in-chief with attention, and when his turn comes, he should interrogate the witness on all material points that go against him. If he omits or ignores them, they may be taken as an acceptance of the truth of that part of witness's evidence. Gene-

rally speaking, when cross-examining, a party's counsel should put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which he had a share. Thus, if a witness speaks about a conversation, the cross-examining lawyer must indicate by his examination how much of the witness's version of it he accepts and how much he disputes, and to suggest his own version. If he asks no questions, he will be taken to accept the witness's account [*Flanagan v. Fahy*, 1918, 2 IR 361, 388-89 CA; *Browne v. Dunn, infra*; see Odgers' Pleading, 13th Ed p 261; Powell 9th Ed p 531: Wig Vol. 2 para 1371; Phipson, 11th Ed p 649; see also *Chunilal v. H F Ins Co.*, A 1958 Pu 440; *Babulal v. Caltex (India) Ld*, A 1967 C 205]. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice [*Carapiet v. Derderiem*, A 1961 C 359. In this case P B MUKHARJI J, relied on and quoted the observations of LORDS HERSCHELL and HALSBURY in *Browne v. Dunn*, 6 R 67, 76-7, reproduced under s 146 *post* under heading: "*Testing veracity and impeaching credit*"; *S v. Bhola*, A 1969 Raj 220]. Therefore an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination, would lead to the inference that the evidence is accepted, subject of course to its being assailed as inherently incredible or palpably untrue [See *Sachindra v. Nilima*, A 1970 C 38, 63]. According to the plaintiff consignor, the claim was made by the consignor on behalf of the plaintiff at plaintiff's request. There is no cross-examination of the plaintiff's witness on his evidence on this point. No suggestion was put that the claim was not lodged on behalf of the plaintiff which was a must. Without such a suggestion, no argument could be advanced that no claim was made on behalf of the plaintiff. [*Traders Syndicate v. Union of India*, A 1983 Cal 337].

Whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed [*State of Himachal Pradesh v. Thakur Dass*, 1983 Cri LJ 1694, 1701 (HP): (1983) 10 Cri LT 370]. If there is no cross-examination of a prosecution witness in respect of certain facts it will only show the admission of that fact [*Motilal v. State of Madhya Pradesh*, 1990 Cri LJ NOC 125 MP). Where however, several witnesses are called to prove the same point, it is not always necessary that they should all be cross-examined.

"Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, *eg* if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character [*Browne v. Dunn, sup*; (quoted in *Sukhraji v. STC*, A 1966 C 620)] or the abstention arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases, or when counsel indicates that he is merely abstaining for convenience, *eg* to save time" [Phip 11th Ed p 649].

If there is anything in a witness's statement which is questionable or which requires explanation, and the opponent consistently avoids questions on those particular matters in cross-examination, it must be assumed that the evidence in chief must be accepted, unless of course there are inherent improbabilities [*Karnidan v. Sailaja*, 19 P 715: A 1940 P 683; *Jayalakshmidevamma v. Janardhan*, A 1959 AP 272]. A party's counsel cross-examining a witness as to whether an event happened thereby be held to commit himself to an assertion that such an event took place [*Mir Syed v. Taiyaba*, 26 IC 547: 1 OLJ 591]. Suggestion in cross-examination which is denied by witness, is no evidence at all [*Binapani v. Rabindra*, A 1959 C 213]. Once the right to cross-examine a witness is foregone, it is not open to a party to make any grievance about it [*Shyamsingh v. Dy IG*, A 1965 Raj 140].

A few days before his release from prison, Hart who was serving a term of imprisonment, threatened a warder Jackson: "I will do you in for this". Two days after his release he was convicted of doing bodily harm to Jackson. His defence was *alibi* and he examined three witnesses in support of it, but none of them was cross-examined by the prosecutor. Held, that if on a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness called for the defence, it is right and proper that counsel for prosecution ought to cross-examine the witness or, at any rate to make it plain, while the witness is in the box, that the evidence is not accepted. The conviction was quashed [*R v. Hart*, 1932, 23 Cr App Rep 202].

There may perhaps appear to be a slight difficulty in applying the principle to criminal cases in view of the cardinal rule that the burden of proving the guilt of the accused beyond reasonable doubt is on the prosecution and an accused may keep his mouth shut. Even so, if the accused takes a particular line of defence and produces witnesses in support, if the veracity of his witnesses is not challenged by cross-examining them, it is not easy to see how the evidence of his witnesses can be given the "go by" without cross-examining them, unless of course their evidence is found to be incredibly absurd or demonstrably false. "It is not infrequently supposed that a sworn testimony is necessarily proof..... testimony which no sensible man believes—goes for nothing" [MARSHALL J, in *Bourda v. Jones, ante* s 5]. The court is not precluded from assessing the veracity of a witness, even if he is not cross-examined [*Ambika v. S*, A 1961 A 38]. The same inevitable conclusion may have to be drawn if prosecution witnesses on a crucial or vital point are cross-examined on behalf of the accused. It is absolutely essential that where it is intended to suggest that a witness is not speaking the truth on a particular point his attention must first be directed to the fact by cross-examination to enable him to have an opportunity of making any explanation which is open to him [*per* LORD HERSCHELL in *Browne v. Dunn, sup*; see the observation of LORD HALSBURY in the same case quoted under s 146 *post*].

Two police officers were sued for malicious prosecution. In reference to the Act under which they had started the prosecution, only one of them was cross-examined and he denied the allegations contained in the questions. The other was not examined on the point. It was held that the allegations in the questions were not properly substantiated. *Ravinder Kumar Sharma v. State of Assam*, 1999 (6) JT 565 : (1999) 7 SCC 435. Where there was some delay in lodging the FIR and on this point the first informant was not cross-examined and thus the first information report remained unchallenged, it was held that it must be believed. *State of U.P. v. Nahar Singh*, AIR 1998 SC 1328 : (1998) 3 SCC 561.

Art of Cross-Examination. [Incautious Cross-Examination—Its Innutility and Dangers].—Of all tests known or invented for the discovery of truth and exposure of falsehood, cross-examination is the most powerful and efficacious. The object can be achieved if only the cross-examiner can handle the weapon skilfully. The witness in his direct examination will naturally say things favourable to the party calling. But he may not have disclosed all the qualifying circumstances known to him,—his motive and many other things which would make his evidence untrustworthy. He may have deliberately concealed facts within his knowledge which constitute part of the opponent's case. The art of cross-examination consists in ascertaining what can be got from the witness and in interrogating him in a manner which would make it impossible for him to circumvent or conceal the truth. This faculty of cross-examining witnesses successfully, is one which requires profound knowledge of human nature, thorough acquaintance with the facts of the case, considerable tact, patience and study. It is an art which can be acquired after much experience. From the situation and the circumstances, the cross-examiner has to infer whether anything favourable can be extracted from the witness. And herein lies the danger, for misjudgment resulting in needless interrogation is apt to cause mischief.

Wigmore says: "The cross-examiner may already know what is there waiting for disclosure. But if he does not, he is faced by a contingency. He *may* extract the most confirming circumstances for the proponent's own case, which have somehow been left unmentioned. He *may* demonstrate that the credit of the witness is greater, not less, than was supposed. The great axiom, then, of the art of cross-examination, as dependent in the theory, is that *it is a contingency whether the facts that will actually be extracted will be favourable or unfavourable to the cross-examiner's purposes*. It is here that the art (that is, the technical skill) or cross-examination enters. On this hang all the lesser rules of the art. Hence it is that it must call to its aid so many other elements than mere knowledge of law. Experience of human nature, judgment of chances, knowledge of the case, tact of manner,—all these things and more, have to do with the art. Yet the theory of the process underlies and influences at every point. *To cross-examine*,—that is the fundamental question, which springs from the essential nature of the process and arises anew for every part of every witness' testimony. The gratest cross-examiners have always stated this as the ultimate problem" [Wig s 1368].

Same.—As pointed out before (*ante*: "*cross-examination*"), the objects of cross-examination are principally three:—(*1*) To destroy or weaken the force of the testimony of the witness regarding the facts in issue. (*2*) To elicit facts in your favour from the answer of the witness. (*3*) To show that he is unworthy of belief by impeaching the credit of the witness. Questions should always be framed with these objects in view. Random question or fishing questions should be avoided, for an incautious or reckless cross-examination, may let in facts which were not brought out or which would have been inadmissible in examination-in-chief, and which would damage your case. The reckless asking of questions, in the hope of getting some favourable answer, might often proudce the opposite result. Mr Baron Alderson once told a counsel, "Mr—you seem to think that the art of cross-examination is to examine crossly".

Questions should not be asked for questions' sake.—If the witness has said no-thing injurious to your client, the better course would be not to disturb or provoke him by pointless cross-examination on the off chance of getting some favourable answers on another point. The answer may recoil on you. It is a matter of common experience that young or unskilful lawyers always labour under the idea, that it is their duty to cross-examine every witness who is sworn. They seem to think that if they do not cross-examine at length any and every witness, it will be interpreted by their clients as want of competence. Such aimless and unnecessary cross-examination generally elicits answers which go against the cross-examiner's client and results in the development of theories which the other side never thought of before. It invariably brings out damaging answers. This would never have happened, if silence had been observed.

After a witness has been examined in chief, the cross-examiner should ascertain whether he has testified to anything which goes materially against him and take stock of all the circumstances. This will enable him to determine whether any cross-examination is at all necessary and if, so, on which point, 'Never cross-examine any more than is absolutely necessary', is another sound rule. When you apprehend that the answers may be unfavourable to you, or you have no idea one way or the other, it is better to ask too little than too much. When the evidence in the examination-in-chief is clear and unimpeachable, it is not advisable to make any attempt to mend matters by cross-examination. Such a course will not infrequently make your opponent's case stronger. The witness will only get a chance of repeating his story with emphasis and if the transaction deposed to really occurred, constant interrogation will have the effect of reminding him of many details which he had forgotten, Injudicious attacks upon the credit of witnesses at the dictation of a party, do more harm than good. A party is in most cases actuated by bitter feelings against his opponent, and he is always anxious to seize upon the opportunity of heaping insults on him or his witnesses in the box, unmindful of the

result of the case. If unfounded suggestions are thrown out and incidents that took place decades ago and do not affect or affect very remotely the credibility of the witness on the matter to which he testifies, are raked up, they irritate the judge and make the jury unsympathetic.

Best says: But if cross-examination is a powerful engine, it is likewise an extremely dangerous one, very apt to recoil even on those who know to use it. The young advocate should reflect, that, if the transaction to which a witness speaks really occurred, so constant is the operation of the natural sanction of truth that he is almost sure to recollect every *material* circumstance by which it was accompanied; and the more his memory is probed on the subject, the more of the circumstances will come to light, thus corroborating instead of shaking his testimony. And forgetfulness on the part of witnesses, of *immaterial* circumstances not likely to attract attention, or even slight discrepancies in their testimonies respecting them so far from impeaching their credit, often rather confirms it. Nothing can be more suspicious than a long story, told by a number of witnesses who agree down to the minutest details. Hence it is a well-known rule that a cross-examining advocate ought not, in general, to ask questions the answer to which, if unfavourable, will be conclusive against him; as, for instance, in a case turning on identity, whether the witness is sure, or will swear, that the accused is the man of whom he is speaking. The judicious course is to question him as to surrounding or even remote matter; his answers respecting which may show that, in the testimony he gave in the first instance, he either spoke falsely or was mistaken. Under certain circumstances, however, perilous questions must be risked; especially where a favourable answer would be very advantageous and things already press so hard against the cause of the cross-examining advocate, that it could scarcely be injured by an unfavourable one" [Best s 660].

An instance of futile cross-examination strengthening the witness's credit and bringing discomfiture on the advocate may be given here. "Jeffreys, the afterwards notorious Chief Justice and Chancellor was retained in a trial in the course of which he had to cross-examine a sturdy countryman clad in the habiliments of the labourer. Finding the evidence of the witness telling against his client, Jeffreys determined to disconcert him". So he exclaimed in his own bluff manner: "You fellow in the leathern doublet, what have you been paid for swearing?" The man looked steadily at him, and replied: "Truly, sir, if you have no more for lying than I have for swearing, you might wear a leathern doublet as well as I" [Jeaffreson, Law and Lawyers, I, 180 quoted in Wig s 1368].

Right to Cross-Examine When the Plaintiff Calls a Defendant as Witness.—When a plaintiff calls one of two defendants as his witness, counsel for that defendant has no right to cross-examine him, but it is in the discretion of the court to allow to do so or not [*Tedeschi v. Singh*, 1948, 1 Ch 319]. See also s 154 *post*: "*Can a Party Courting his Opponent to be Called as a Witness Cross-examine him ?*".

Right to Cross-examine Co-Accused's and Co-Defendant's Witnesses.—Sections 137 and 138 of the Evidence Act do not specifically refer to cross-examination of co-defendant's witnesses. But the court have to adopt a golden rule that no evidence shall be received against and co-defendant or co-accused who had no opportunity of testing it by cross-examination; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross-examine witness called by one whose case was adverse to his, or who has given evidence against him. Where it is shown that the interest between the defendants *inter se* conflict each other, the other defendant has necessarily to be treated as an adversary and he is certainly entitled to cross-examine the other or his witnesses. [*Mohd. Ziaulla v. Sorgra Begum*, 1997

AIHC 2628 (2629-2630).(Kant)]. When two or more persons are tried on the same indictment and are separately defended, any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony to criminate them [*R v. Burdett*, 1855 Dears CC 431]. The counsel, too, for the other prisoners are entitled in such a case to reply upon the evidence [*R v. Burdett, sup*]. Where two prisoners are tried together, and one gives evidence affecting the other, the other prisoner has a right of cross-examining him [*R v. Hawden*, 1902, 1 KB 882; *R v. Paul*, 1920 WN 121]. So in *Lord v. Colvin*, 1855, 24 LJ Ch 517, 3 Drew 222, KINDERSLEY VC, after consulting all the Equity Judges, held that before an examiner in Chancery, one defendant might cross-examine another defendant's witness [Tay s 1430 and fn]. The same right exists between respondent and co-respondent in divorce cases [*Allen v. A*, 1894 P 248], provided either is hostile to the other, for if friendly, *eg* where both deny the adultery, each can only be examined as the other's witness and not cross-examined [*Dunhill v. D*, 29 L Jo 368; Phip 11th Ed p 647]. A defendant may cross-examine his co-defendant who gives evidence (*Allen v. A sup*), or any of his co-defendant's witnesses (*Lord v. Colvin, sup*) if his co-defendant's interest is hostile to his own [*Dunhill v. D, sup*; *Sadhu v. Satnarain*, A 1978 P&H 319; Hals 3rd Vol 15 para 800]. In an eviction application impleading alleged sub-tenants, right of one of them to cross-examine witnesses produced by another cannot be refused merely on the ground of common defence [*Desraj v. Puranmal*, A 1975 D 109].

No special provision is made in the Evidence Act for the cross-examination of the co-accused's or co-defendant's witnesses. But the procedure to be adopted may be regulated by the well-known rule that no evidence should be received against any co-defendant or co-accused who had no opportunity of testing it by cross-examination; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross-examine a witness called by one whose interest was hostile to his own, or who has given evidence against him. If a co-defendant's interest is not hostile to that of the other defendant, or if nothing has been said by the defendant to affect the interest of a co-defendant, there cannot be any right of cross-examination. The paragraph was quoted in *Sohanlal v. Gulab*, A 1966 Raj 229, 232. As to co-accused evidence see now s 315(1) Cr P Code and notes to s 132 *ante*: "*Co-accused*".

A co-defendant who is not interested in a question between the plaintiff and his co-defendant, is not entitled to cross-examine such co-defendant [*Re Wagstaff*, (1907) 96 LT 605]. But a defendant may cross-examine a co-defendant who has given evidence against him, though there is no issue joined between them [*Re Wagstaff, sup*; *Dryden v. Surrey CC*, 1936, 2 All ER 535]. One co-defendant whose interests are separately represented may cross-examine another [*Narasimha v. Kistnama*, 1 MHC 456].

Where a witness called by an accused states that he saw the co-accused striking the deceased with a stick, it is admissible against the co-accused [*Aung Than v. R*, A 1937 R 540 (*Chaturbhuj v. R*, 12 L 385 **distd**)].

Several defendants were charged with conspiracy to steal cars. One *H* made a statement to the police voluntarily which was admissible in evidence against him. It was, however, so prejudicial to other defendants that the prosecution did not tender it as part of their case. In cross-examination of *H* counsel for the crown had before him *H's* statement and, without putting the statement as such to *H*, questioned him from it, with the consequence that *H* gave evidence on oath to the like effect as his statement, and that evidence implicated co-defendants. *Held*: a voluntary statement made by one of several co-defendants could be used in cross-examining him as a tool

to extract on oath all that he has formerly said in the statement against a co-defendant [*R v. Rice*, 1963, 1 All ER 832].

In a case TREVELYAN and RAMPINI, JJ, observed: "We think that there might be many cases of failure of justice if a co-accused were not allowed to cross-examine witnesses called by a person whose case was adverse to his, for the effect might be practically that a court might act upon evidence which was not subject to cross-examination. The Evidence Act gives a right to cross-examine witnesses called by the adverse party" [*Ramchand v. Hanif*, 21 C 401; see *Chaman v. R*, 1940, Lah 521: 188 IC 440; see however, *R v. Suroop Chondra*, 12 WR Cr 75, which was decided before the passing of the Evidence Act.

An accused is entitled to put further questions to a prosecution witness by way of cross-examination in respect of what he has stated in reply to questions put to him in cross-examination by the other accused. There is nothing in ss 137 and 138 to bar the accused from exercising his right of cross-examination afresh if and when the prosecution witness makes a further statement of facts prejudicial to him [*Muniappan v. S*, A 1961 SC 175].

Right of Accused to Recall and Cross-Examine Witnesses for the Prosecution.—The ordinary rule in the Evidence Act is that examination-in-chief, cross-examination and re-examination are to be a continuous process. There is no express provision for postponing the cross-examination till all the prosecution witnesses are examined. There is a special provision in the Cr P Code permitting the accused to have the cross-examination of prosecution witness to be deferred in sessions trial and in warrant cases instituted on a police report [see ss 231(*2*); 243(*3*) *ibid*]. The privilege does not exist in the trial of warrant cases instituted otherwise than on a police report [s 246(*4*)]. See Sarkar's Cr P Code, 4th Ed notes on ss 231(*3*), 246(*4*)]. When an accused in murder case was provided with Amicus Curiae and subsequently on appointing a private counsel application was made by him for re-examining the witnesses already examined by Amicus curiae, then in such a situation the application should be granted by the court in the interest of justice and also since it is a question of life and death for the accused. [*Ramashanker v. State of U P*, 1997 Cri LJ 103, 1102].

Tendering For Cross-Examination. [Cross-Examination of Witnesses Examined Before the Committing Magistrate But Not Called in the Court of Sessions By the Prosecution].—In a sessions trial, the prosecution is not bound to call any witness called before the magistrate, for cross-examination. The prosecution cannot be forced to put forward a witness on whose evidence no reliance can be placed. It would be sufficient if the prosecution makes such witnesses to be present in the court, so that the defence can call them if they like [*R v. Kali Prosunno*, 14 C 245]. Similar view seems to have been taken in *R v. Stanton & Glyn*, 14 A 521 and in *R v. Durga*, 16 A 84 FB. See *ante* s 114: "*Criminal cases*" and s 135: "*Examination of Witnesses in Criminal Cases*". Ordinarily when a witness for the prosecution is not called by the prosecutor at the sessions trial, he is placed in the witness-box in order that the defence may have an opportunity to cross-examine him [*R v. Girish Ch*, 5 C 614: 5 CLR 354; *Nagendra v. R*, 27 CWN 820]. Where any witness known to the prosecution is able to swear to facts very material to the case, the proper procedure is to ask him to give evidence as to the several facts known to him though other witnesses might have spoken to the same facts. Merely "tendering him for cross-examination is not a practice which should be encouraged, especially in murder cases, as it would be very unfair to the accused" [*Veera Koravan v. R*, 53 M 69: A 1929 M 906; (*R v. Ram Shai*, 10C 1070 rel on); *Thazhathethil v. S*, A 1967 K 16].

The practice of tendering witnesses for cross-examination was condemned in a later case as very irregular. It is inconsistent with s 138. The practice should only be adopted in the case of witnesses of secondary importance, *eg*, when the prosecution has already got sufficient evidence on a particular point. Strictly speaking the prosecution with the leave of the court and consent of the defence should ask the witness if his evidence in the lower court is true. If he gives a general answer as to its truth, he can be cross-examined on that. But he must in some way be examined in chief before he can be cross-examined [*Sadeppa v. R*, 1942 Bom 115: A 1942 B 37; *R v. Kasamali*, 1942 Bom 384: A 1942 B 71 FB; *Keser v. S*, A 1954 Pu 285; *Sailendra v. Tripura*, A 1959, Tri 1]. Two things are involved: (i) Where a witness of secondary importance is not examined at the sessions trial. When such a witness is tendered for cross-examination, there must be some examination-in-chief though by a single question whether his statements before the committing magistrate were true. (ii) Where the prosecution discards a witness who is not likely to tell the truth. It is tantamount to the prosecutor declaring a witness hostile and in such a case the examination by the defence is really examination-in-chief. The prosecution cannot cross-examine him without obtaining the court's leave under s 154 [*Dhirendra v. S*, A 1952 C 621]. Where a witness is "tendered" by the prosecution and oath is administered, he should be deemed to have been called by the prosecution although no question is put and the court does not act illegally in allowing him to be cross-examined under s 154. Tendering witness for cross-examination is almost tantamount to giving up a witness [*Chhoto Singh v. S*, A 1964, Pu 120]. The practice of tendering witness leads to considerable confusion and is to be deprecated—Authorities discussed and four propositions laid on the question [*Manzural v. S*, A 1958 P 422].

Intervention by Court During Cross-examination. [Cross-Examination by Court].—S. 165 gives a very wide power in the judge to ask a witness any question in any form, at any stage of the proceedings. It is recognised that these privileges should be used with caution. There should be no undue interference with the rights of the parties. If the interests of justice require, the court should exercise the power. "On no account", says Walsh, "should interruption be allowed under any circumstances, so long as the cross-examination is being fairly conducted. If the cross-examiner is misrepresenting by his question the effect of evidence which has already been given, or misinterpreting the statements of the witness himself, or putting to the witness as an established fact to one-sided view of a document, or challenging the witness upon the contents of a document without putting it into his hand, his opponent is entitled to object. It is the duty of the court to protect the witness, and the parties against unfair treatment or misrepresentation" [Walsh's Advocate, p 148].

"It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out answers to awkward question; ..... the very gist of cross-examination lies in the unbroken sequence of question and answer .....Excessive judicial interruption inevitably weakens the effectiveness of cross-examination ..... for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue and to which it is by no means easy, sometimes to return". Function of Judge at trial of civil action stated—New trial granted for plaintiff's counsel being unduly hampered in his task of cross-examination by the Judge's constant interruptions [*Jones v. National Coal Board*, 1957, 2 All ER 155 *post* cited under s 165].

While it is unobjectionable for a judge to caution a witness to speak the truth, it is wholly wrong to tell him that no matter what evidence is given by him no action

would be taken against him [*R v. Mahna*, 9 IC 436: 65 PLR 1911]. It is not the province of the court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s 138 of the Evidence Act. The procedure of the sessions judge in questioning the witnesses, at the close of the examination-in-chief, at great length upon points, certain to be dealt with in cross-examination by the pleaders, is irregular and unfair. In this case GARTH CJ, and MACLEAN J, observed: "We find that, on the examination-in-chief being finished, the judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed. The result of this, of course, was to render the cross-examination by the prisoner's pleaders to a great extent ineffective, by assisting the witnesses to explain away in anticipation the points which might have afforded proper ground for useful cross-examination" [*Noor Bux Kazi v. R*, 6 C 279, 283: 7 CLR 385; **relied** upon in *In Re Sivasubba*, A 1951 M 772: 1951, 1 MLJ 207. See *Janki v. Thakur*, 82 IC 154: 11 OLJ 333].

Although the Judge can put any question at any time, the time generally considered proper for an extended examination is when the lawyers have finished their questions or at least when the lawyer examining at the time is passing on to a new subject. But if he does more and stops counsel again and again to put a long series of his own questions, he makes an effective examination or cross-examination impossible, [*Sunil v. S*, 57 CWN 962: A 1954 C 305]. Where the trial judge took the witnesses out of hands of counsel and examined and cross-examined him himself, the course was deprecated [*Yusuf v. Bhagwandas*, A 1949 B 346]. Where the judge actually forbade the further cross-examination of a witness on the ground that she was embarrassed the trial was badly conducted [*Ma Aye v. Chew Chene*, A 1941 R 334].

The law of procedure entrusts the courts with powers for obtaining the truth of cases and for examining the witnesses themselves, when suits are conducted by incompetent persons. In this case PEACOCK, CJ, remarked—"And I may add that it is another great misfortune of litigants in the mofussil in this country that the witnesses who are called to prove the facts of the case are not properly examined, through the incompetency of those who have the management of the suits, and the judges do not make up for that incompetency by themselves examining the witnesses or exercising those powers for obtaining the truth with which they have been entrusted by the law of procedure" [*Ramgutty v. Mamtaj Beebee*, 10 WR 280, 282]. Although a judge could not be acting strictly according to the rules of judicial practice if he were to take the work of examining and cross-examining witnesses in his own hand, yet certainly it is his duty and privilege to put questions to witnesses in order to get at the truth [*Khadija v. Nisar*, A 1936 L 887]. In *Meer Sujad Ali v. Kasheenath*, 6 WR 1891, NORMAN, J, said: "We have constantly to regret that witnesses have not been cross-examined in the lower courts in the mofussil". The truth of PEACOCK, CJ's remarks, must be apparent to every one connected with the administration of justice. If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. Any questions put by the Judge must not be so as to frighten, coerce, confuse or intimidate the witnesses. [*Ram Chander v. State of Haryana*, 1981 Cri LJ 609 : A 1981 SC 1036, 1037].

Witnesses are in many cases, either cross-examined too much on irrelevant matters or too little. It is not infrequent to find unskilful handling of cases. The difficulty is enhanced by the fact that cases are seldom prepared for trial before

they come to court. See the remarks of MEARS, CJ in *Shibdayal v. Jagannath*, 68 IC 812 (*ante*, s 58). The High Court had occasion to comment on the manner in which a capital case was conducted by counsel. It was said that the prosecution witnesses should have been cross-examined more fully. MUKHERJI, J, also condemned strongly the conduct of the defence counsel in interviewing the trial judge in his chamber before the hearing in order to bargain with him as to the sentence to be passed on the accused should he be advised to plead guilty [*Barendra v. R*, 28 CWN 170]. It frequently happens that the persons actually appointed to conduct defence at Crown's expense do their work very badly and conspicuous opportunities for cross-examination, and obvious arguments are entirely ignored. In such circumstances the judge should remember that he has the duty not only to the prosecution but to the defence, and he should use his greater experience to cross-examine the witnesses with he sees that the defence lawyer is incompetent [*Dikson v. R*, A 1942 P 90].

Right to Cross-Examine Witnesses Called by the Court.—A witness called by the court is liable to be cross-examined by any of the parties [*Tarini v. Saroda*, 3 BLR 145: 11 WR 468; *Gurudas v. Greedharee*, 11 WR 110; *Shurfaraz v. Dhanno*, 16 WR 257; *R v. Girish Ch*, 5 C 614; *Gopal Lall v. Manick Lal*, 24 C 288]. When the counsel for the prisoner has already examined or declined to cross-examine a witness, and the court afterwards of its own motion, examined him the witnesses cannot then be subjected to cross-examination without the leave of the court [*R v. Sakharam*, 11 BHC 166, 168. See further s 165 *post*, "*Cross-Examination Upon Answers in Reply to Questions By Court—Cross-Examination of Witnesses Called By Court*]. If a witness called by court gives evidence against the complainant he should be allowed an opportunity to cross examine. The right to cross-examine a witness who is called by a court arises not under the provision of Sec. 311 CPC but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court would not be termed a witness of any particular party, the court should give the right of cross-examination to the complainant. [*Pradeep Kumar Agarwal v. State*, 1995 Cri LJ 76, 78 (Ori)]. The complainant and not the accused has a right to examine a court witness summoned at the stage of taking cognizance under section 190 Cr PC [*S K Siraj v. State of Orissa*, 1994 Cri LJ 2410, 2417 (Ori)].

Length of Time in Cross-Examination. [Judge's Power to Interfere].—It is not always safe that a judge should freely interfere with the discretion of counsel, while cross-examining the witnesses. But when the privilege is abused, it seems but right that the judge should exercise some control over cross-examinations assuming inordinate length. Examination of witnesses must not be protracted beyond reasonable limits, even if the question put be logically relevant [4 CWN cxxi (*Golden River Mining Co v. Buxton Mining Co*, 97 Fed Rep 414 Am cited)]. In *Vassiliades v. R*, A 1945 PC 38 LORD WRIGHT said:—

> "..... but the Judge has always a discretion as to how far it (cross-examination) may go or how long it may continue. A fair and reasonable exercise of his discretion by the Judge will not generally be questioned by an appellate court".

Abuse in the matter of cross-examination which enormously increases the costs of litigation without any corresponding benefits to the parties should be checked and it would appear to be clearly within the powers of the High Courts to direct an enquiry with a view to disciplinary action against the lawyers in flagrant cases [*Rajkumar v. Ramsundar*, 55 CLJ 120: A 1932 PC 69: 136 IC 102 PC]. It is well to bear in mind

the observations of SANKEY LC, in *Mechanical & G I Co Ltd v. Austin Motor Co Ltd*, A 1935 AC 346: 104 LJKB 403:—

> "Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion, and with due regard to the assistance to be rendered by it to the court, not forgetting at the same time the burden that is imposed upon the witness".

Where examination appears to be unduly protracted and irrelevant the court has power to control the cross-examination apart from the Evidence Act or the Cr P Code [*Yeshpal v. Rasiklal*, A 1955 B 318; *R v. Rahimatalli*, 22 Bom LR 166, 178: A 1920 B 402]. A judge has power "to put questions to the witnesses", either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a judge felt that witness has committed an error or slip it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination." [*State of Rajasthan v. Anil*, A 1997 SC 1023, 1025 : 1997 Cri LJ 1529].

While it is the duty of the court to keep cross-examination within legitimate bounds, it must be careful in the discharge of that duty, not to exercise too effective a control so as to unduly curtail legitimate cross-examination. Undue interference has, more often than not, the result of robbing the cross-examination of its efficacy [*Saligram v. R*, 1936 AWR 967: A 1937 A 171]. Where the examination of a witness is needlessly protracted, it is within the discretion of the court to arrest it [*Woodfolke v. S*, 85 Ga 69; *Allen v. Kirk*, 81 Iowa, 658]; and the judge may properly interfere on objection made or of his own motion [*S v. McGee*, 36 La Ann 206]. So the court may stop repetition of questions already answered [*People v. Rader*, 136 California 253; Jones S 814]. The *length* of time occupied in questioning may of course fitly be the subject of reasonable limits, fixed beforehand if possible; and a mutual agreement as to the time is often made [Wig s 783]. Cross-examination of a single witness *held* limitable in discretion to three hours [*Munro v. Stowe*, 175 Mass 169, cited Wig s 784]. Abuse in regard to examinations on commission has led the Calcutta High Court to issue instruction that a court should limit a number of hours as being sufficient for the purpose and beyond the time so fixed, the commissioner shall not sit without further order from the court [Rule 295(*1*) Civil Rules and Orders].

In *Brahmaya v. R*, A 1938 R 442, 444 ROBERTS CJ, said:—

> "When irrelevant topics are pursued at great length and persistence is shown in going over the same ground again and again in the hope of making the witnesses appear discrepant, some limit must be placed on the latitude given. Continued irrelevancies and repetitions are not to be endured indefinitely. If after several warnings an advocate persists in abusing his position in this way, he may be directed to resume his seat, but only when the judge has enquired what are the material matters on which he still desires to cross-examine and is satisfied that no satisfactory reply has been forthcoming from the advocate and that no legitimate questions by him have been shut out".

In *Mechanical & G I Co Ltd v. Austin Motor Co*, 1935 AC 346, 360 LORD SANKEY LC, said: "A protracted and irrelevant cross-examination not only adds to the cost of litigation, but it is a waste of public time." He added that such a cross-examination may become indefensible.

Courts have full power to prevent any abuse of the rights of cross-examination in any manner appropriate to the circumstances of the case [*Banke v. Kanhaiya*, A 1922

O 124]. An order of a magistrate fixing arbitrary limit of time, *viz* three minutes [*Saligram v. R*, A 1937 A 171] or five minutes for the cross-examination of a witness is illegal [*R v. Asiruddin*, 62 IC 412: A 1921 C 118: 22 Cri LJ 524; *R v. Abed*, 34 CLJ 172]. It is wrong of a magistrate not to allow more than such cross-examination as he thought to be necessary [*Radhe v. R*, 1936 AWR 295: 1936 ALJ 667].

The court in appointing a commissioner should in each case give him instructions so as to make it clear that he is not so powerless as it is imagined. Whenever it appears to him that the pleader is abusing his position and exceeding the limits of propriety, he should stop proceedings for the purpose of taking the direction of the court [*Bibi Kaniz v. Mobarak*, A 1924 P 284: 72 IC 748]. If it is proved to the satisfaction of the court, that there has been prolonged and unnecessary cross-examination of a witness on commission, the court may order such cross-examination to be closed within a reasonable time [*Saraj Prosad v. Standard L I Co*, 30 625. See the remarks of JENKINS CJ, in *Gopessar v. Bissessur*, 39 C 245: 16 CWN 265].

MODE OF DEALING WITH PARTICULAR WITNESSES.—A few hints as to the mode of dealing with particular witnesses may be helpful. The reader is also referred to Author's Hints on Modern Advocacy and Cross-examination, 3rd Ed Chapter 17 p 228 *et seq*.

—Lying Witnesses.—Exposure of falsehood and discovery of truth is one of the most principal objects of cross-examination. But the task is more difficult than it first appears, specially when dealing with intelligent witnesses who have come to support a party's cause by deliberate perjury. The cross-examiner must first make himself sure that the witness intends perjury. His demeanour should be carefully watched, and his manner of giving evidence should be studied with care. It must be ascertained what portion of his testimony is false. A witness whose testimony is partially false is more difficult to deal with than a wholly lying witness. Avoid giving witness cause for suspicion, as the witness is apt to be put on his guard and to be cautious in his answers, if he suspects that you doubt his veracity.

Wellman says: "It is often useful, as your first question to ask him to repeat his story. Usually he will repeat it in almost identically the same words, as before, showing he has learnt it by heart. Of course it is possible, though not probable, that he has done this and still is telling the truth. Try him by taking him to the middle of his story, and from there jump him quickly to the beginning and then to the end of it. If he is speaking by rote rather than from recollection, he will be sure to succumb to this method. He has no facts with which to associate the word of his story; he can only call it to mind as a whole, and not in detachments. Draw his attention to other facts dissociated with the main story as told by himself. He will be entirely unprepared for these new inquiries, and will draw upon imagination for answers. Distract his thoughts again to some new part of his main story and then suddenly, when his mind is upon another subject, return to those considerations to which you had first called his attention, and ask him the same questions a second time. He will again fall back upon his imagination and very likely will give a different answer from the first—and you have him in the net. He cannot invent answers as fast as you can invent questions, and at the same time remember his previous inventions correctly; he will not keep his answers all consistent with one another. He will soon become confused and, from that time on, he will be at your mercy. Let him go as soon as you have made it apparent that he is not mistaken but lying" [Wellman 52-53].

Cox says:—"An excellent plan is to take the witness through his story, but not in the same order of incidents in which he told it. Dislocate his train of ideas, and you put him out; you disturb his memory of his lesson. Thus begin your cross-

examination at the middle of his narrative, then jump to one end, then to some other part the most remote from the subject of the previous question. If he is telling the truth this will not confuse him, because he speaks from impressions upon his mind; but if he is lying, he will be perplexed and will betray himself, for speaking from the memory only, which acts by association, you disturb that assocation, and his invention breaks down".

Bullying a witness or showing teeth or questioning in a manner which assumes that the witness is lying seldom succeeds. The examiner must be always patient and approach the witness in an artful manner. Cox says: "When you are satisfied that the witness is drawing upon his invention, there is no more certain process of detection than a rapid fire of questions. Give him no pause between them; no breathing place, nor point to rally. Few minds are sufficiently self-possessed as, under such a catechising, to maintain a consistent story. If there be a pause or a hesitation in the answer, you thereby lay bare the falsehood".

—Female Witnesses.—As the chief motive for exaggeration springs from an innate love of the marvellous, and as this love, like all others, is most remarkable in the softer sex, a prudent man will, in general, do well to weigh with some caution the testimony of *female witnesses*. This is the more necessary, in consequence of the extensive and dangerous field of falsehood which is opened up by mere exaggeration; for, as truth is made the ground work of the picture and fiction lends but light and shade, it often requires much patience and acuteness than most men possess, or are willing to exercise, to distinguish fact from fancy, and to repaint the narrative in his proper colours. In short, the intermixture of truth disarms the suspicion of the candid and sanctions the ready belief of the malevolent. Having pointed out this proneness to exaggerate as a feminine weakness, it is only just to add, that in other respects, the testimony of women is at least deserving of equal credit to that of men. In fact, they are in some respects superior witnesses; for first, they are, in general, closer observers than men; next, their memories, being less loaded with matters of business, are usually more tenacious; and lastly, they often possess unrivalled powers of simple and unaffected narration" [Tay s 54]. In India female witnesses generally present peculiar difficulties, on account of thier habits of seclusion and observance of strict *purda*. Considerable allowance should be made in their case, and the judge and the lawyer must first make sure that they have understood the questions thoroughly. As they do not appear before the public, their sense of shame and embarrassment stand in the way of giving clear answers.

—Child Witnesses.—"Sir William Balckstone appears to have thought, that less credit was due to the testimony of a *child than* to that of an adult; but reason and experience scarcely warrant this opinion. In childhood, the faculties of observation and memory are usually more active than in after life, while the motive for falsehood are then less numerous and powerful. The experience and artlessness which, in a great measure, must accompany tender years, render a child incapable of sustaining consistent perjury, while the same causes operate powerfully in preventing his true testimony from being shaken by the adroitness of counsel. Not comprehending the drift of the questions put to him in cross-examination, his only course is to answer them according to the fact. Thus, if he speaks falsely, he is most inevitably detected; but if he be the witness of truth, he avoids that imputation of dishonesty, which sometimes attaches to older witnesses, who, though substantially telling the truth, are apt to throw discredit on their testimony, by a too anxious desire to reconcile every apparent inconsistency" [Tay s 55].

Children can be easily tutored or threatened, and so in spite of the fact that they possess unsophisticated minds and have hardly any motive to deceive their evidence should be received with caution. But they are not very difficult to handle as witnesses of tender age break down very soon in cross-examination, when lying. The great danger in regard to child witnesses is that on account of their tender age and immature faculty it is impossible to expect any very precise narrative of what they actually witnessed and when leading questions are put to their mouth in cross-examination they are liable to give affirmative answers without understanding exactly what they were being questioned about. As to the value of the evidence of child witness it has been observved in a case (quoting with approval a passage from Kenny's Criminal Law) that children are a most untrustworthy class of witnesses [*Abbas v. R*, A 1933 L 667: 34 Cri LJ 606]. LORD ROCHE observed: "Evidence substantially true not infrequently assumes too perfect a form and witnesses such as children not infrequently get a story by heart which is none the less a true story" [*Bhojraj v. Sitaram*, 40 CWN 257, 261: 160 IC 45: A 1936 PC 60]. LORD GODDARD stated that while no coroboration is needed in Indian law for the evidence of a child witness, it is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of Law [*Md Sugal v. R*, 50 CWN 98: A 1946 PC 3; *Bharvad v. S*, A 1971 SC 1064; *Ş v. Dukhi Dei*, A 1963 Or 144; *Panchhi v. State of U.P.*, (1998) 4 SCALE 603, 605, 606 (SC)]. As to corroboration, [see *Rameswar v. S*, A 1952 SC 54]. Evidence is to be approached with great caution [*Caetano v. Union*, A 1977 SC 135]. It is more a rule of caution. If after scrutiny no infirmities are found and there is an impress of truth, there is nothing in the way of acceptance of the evidence of a child witness [*In re Shk Umar*, A 1957 AP 343]. Minor discrepancies or contradictions in testimony of child witnesses are the proof of their truth rather than a badge of falsehood [*Dharam v. S*, A 1971 HP 17 (*Mohansingh v. S*, A 1965 Pu 291 **folld**)].

Where the very statment of the child could form the basis of the conviction, no corroboration is necessary [*Dharam v. S, sup*]. Corroboration of the sworn evidence of a child is not necessary as a matter of law, but a jury should be given the usual warning though the jury may act on the uncorroborated evidence if they believe it to be true [*R v. Campbell*, 1956, 2 All ER 272]. For a case in which a young man was convicted of rape on a young girl which resulted in her death and in which the principal witness was a girl of about 9 or 10 years, see *Sambhu v. R*, 3 P 410. Testimony of an adopescent cannot be discarded on ground of delayed disclosure of crime [*State of M P v. Samay Lal*, 1994 Cri LJ 3407 (MP)]. When the evidence of a young boy of 13 years, who was a natural witness, had not suffered from any infirmity in cross-examination, nor was there anything to show that he had been tutored and his evidence was corroborated by other circumstances, there was no reason to discard his testimony as being an evidence of child. *Shayam Narain Singh v. State of Bihar*, 1993 Cri LJ 772, 814 (Pat)].

—Police Witnesses.—With respect to *policemen, constable*, and others employed in the suppression and detection of crime, their testimony should usually be watched with care; not because they intentionally pervert the truth, but because their professional zeal, fed as it is by an habitual intercourse with the vicious, and by the frequent contemplation of human nature in its most revolting form, almost necessarily leads them to ascribe actions to the worst motives and to give a colouring of guilt to facts and conversations, which are perhaps, in themselves consistent with perfect rectitude. "That all men are guilty, till they are proved to be innocent" is naturally the creed of the police; but it is creed which finds no sanction in a court of justice [Tay s 57]. The caution is all the more necessary in India, where the police are possibly more corrupt than in other countries. In the first Report of the Indian Law

Commissioners it was stated that "the evidence taken by the Parliamentary Committee on Indian Affairs during the session in 1852 and 1853, and other papers which have been brought to our notice abundantly show that the powers of the police are often abused for purposes of extortion and oppression". Things have not much improved since then and the conduct of the police is occasionally the subject of strong comment in various decisions.

The following extracts from Harris' Hints on Advocacy, 14th Ed will prove helpful:—

> They are dangerous persons. They are *professional witnesses*, and in a sense that no other class of witnesses can be said to be so. Their answers generally may be said stereotyped. Don't imagine that you are going to trip him up upon the path where his beat has been for many a year. He will perceive you coming while you are a long way off, and in all probability go out and meet you. Perhaps before you were born he answered the question you have just put. But try him with something just a little out of the common line by way of experiment. You see he looks at you as though you have got the sun in his eyes. He cannot quite see what you are about. And you must keep him with the sun in his eyes if you desire to make anything of him. Without accusing him even by implication of having no reverence for the sanctity of an oath, I must say, that if he sees the drift of your question, the chances are against your getting the answers you want, or in the form in which you would like them. He thinks it his duty to baffle you, and if you do not get an answer you don't want, it will probably be because the policeman is as young and inexperienced as you are. To be effective with the policeman your question must be rapidly put. Although he has a trained mind for the witness-box, it is trained in a very narrow groove: it moves as he himself moves, slowly and ponderously along its particular beat, it travells slowly because of its discipline, and is by no means able to keep pace with yours, or ought not to be. You should not permit him to trace the connection between one question and another when you desire that he should not do so (pp 104, 105).
>
> Unless certain of the answer, never under any circumstances, ask a policeman as to character. The highest character he can give a respectable person will be that he "does not know anything against him". Furthermore it is dangerous to put "fishing" questions to this class of witness (p 106).
>
> The police constable is not below human nature generally. The parent of many of his faults is the fact that subordinate judges as a rule, think he must be protected by *an implicit belief* in his veracity. As a natural consequence he falls into the error of believing in his own infallibility (p 107).

Expert Witnesses.—'As a general thing, it is unwise for the cross-examiner to attempt to cope with a specialist in his own field of enquiry. Lengthy cross-examinations along the lines of the expert's theory are equally disastrous and should rarely be attempted. Many lawyers undertake to cope with a medical or handwriting expert on his own ground,—surgery, correct diagnosis, or the intricacies of penmanship. In some rare instances (more especially with poorly educated physicians) this method of cross-questioning is productive of results. More frequently, however, it only affords an opportunity for the doctor to enlarge upon the testimony he has already given, and to explain what might otherwise have been misunderstood or even entirely overlooked by the jury. A physician should rarely be cross-examined on his own speciality unless the importance of the case has warranted so close a study by the counsel of the particular subject under discussion as to justify experiment; and then

only when the lawyer's research of the medical authorities, which he should have with him in court, convinces him that he can expose the doctor's erroneous conclusions, not only to himself but to a jury who will not readily comprehend the abstract theories of physiology upon which even the medical profession itself is divided".

"On the other hand, some careful and judicious question, seeking to bring out separate facts and separate points from the knowledge and experience of the expert, which will tend to support the theory of the attorney's own side of the case, are usually productive of good results. In other words the art of the cross-examiner should be directed to bring out such scientific facts from the knowledge of the expert as will help his own case, and thus tend to destroy the weight of the opinion of the expert given against him".

"Another suggestion which should always be borne in mind is that no question should be put to an expert which is in any way so broad as to give the expert an opportunity to expatiate upon his own views, and thus afford him an opportunity in his answer to give his reasons, in his own way, for his opinions, which counsel calling him as an expert might not otherwise have fully brought out in his examination [Wellman pp 74-75].

"When the cross-examiner has totally failed to shake the testimony of an able and honest expert, he should be wary of attempting to discredit him by slurring allusions to his professional ability as in such cases there is always the danger of giving the expert a good chance for retort" [Wellman p 104].

As to the examination of Experts, see *ante* s 45; Sarkar's Hints on Modern Advocacy, 3rd Ed p 232. As to the value of their opinion, see *ante* s 45.

Re-Examination.—The right to re-examine a witness arises only after the conclusion of cross-examination and as s 138 says, it shall be directed to the explanation of any part of his evidence given during cross-examination which is capable of being construed unfavourably to his own side. The object is to give an opportunity to reconcile the discrepancies, if any, between the statements in examination-in-chief and cross-examination or to explain any statement inadvertently made in cross-examination or to remove any ambiguity in the deposition or suspicion cast on the evidence by cross-examination. Where there is no ambiguity or where there is nothing to explain, questions put in re-examination with the sole object of giving a chance to the witness to undo the effect of a previous statements, should never be allowed. Leading questions should not be asked in re-examination (s 142). S 154 is wide in its scope and court can permit a person calling a witness to put questions in the nature of cross-examination at the stage of re-examination, provided it takes care to give further opportunity to the adverse party to cross-examine the witness in such case [*Dahyabhai v. S*, A 1964 SC 1563]. The re-examination should be confined to matters arising out of the cross-examination, and ordinarily the counsel will not be allowed to question the witness on matter which could have been asked in examination-in-chief. If it is desired to introduce new matter in re-examination, the counsel should in every instance seek the permission of the court. The judge, however, may in his discretion allow such a question to be put [*per* CAVE J, in *Scott v. Sampson*, 8 QBD 506]. In *Queen's Case*, 2 B & B, pp 284, 297, LORD TENTERDON said:—

> "I think that counsel has a right upon re-examination to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in them-

selves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce matter new in itself and not wanted for the purpose of explaining either the expressions or the motives of the witness".

See also *R v. Woods*, 1 Craw & D 439 and *R v. St George*, 9 C & P. 483. Thus where a certain conversation had been admitted in cross-examination, re-examination as to distinct matters occurring in that conversation will not be allowed [*Prince v. Samo*, 7 A & E 627]. If however, new matter is allowed to be introduced in re-examination by the court, the opposite party has the right to further cross-examination, upon that matter.

"But no questions may be asked in re-examination which introduce wholly new matters, except by leave of the court which is given subject to cross-examination on the new matter. Where, however, questions asked in cross-examination let in evidence which would not have been admissible in chief, the witness may be re-examined upon it" [Hals 3rd Ed Vol 15 para 803].

If new matter is introduced in re-examination without objection the court must be deemed to have permitted the question and adverse party has a right to further cross upon the matter [*Daulatram v. Bharat Ins Co*, 1973 D 180].

Even if inadmissible matters are introduced in cross-examination, the right to re-examine on those matters remains [*Blewett v. Tregonning*, 3 A & E 554 [but see *R v. Cargill*, 1913, 2 KB 271 where it has been said that the rebuttal of irrelevant evidence will not be allowed)]. "If a witness has testified to unfriendly feelings towards a party he may be asked in re-examination as to the nature and extent of that feeling [*People v. Hanifan*, 98 Mich 32]. But this does not necessarily admit the reasons for his animosity or the details of the trouble with such party. If facts are called out on cross-examination which tend to impeach the integrity or character of the witness, he may, on re-examination make explanations showing that such facts are consistent with credibility as a witness, although such testimony would be otherwise irrelevant" [Jones s 872].

After a witness has been cross-examined, the party who called him has a *right to re-examine* him, and to ask all questions which may be proper to draw forth an *explanation* of the meaning the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive, or provocation which induced the witness to use those expressions; but he has no right to go further, and to introduce matter new in itself and not suited to the purpose of explaining either the expressions or the motives of the witness. It is settled law, that proof, on cross-examination, of a datached statement made by or to a witness at a former time, does not authorise proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way connected with the statement proved [*Prince v. Samo*, 7 A & E 627; Tay s 1474]. If counsel chooses to cross-examine the witness as to *facts which were not admissible in evidence*, the other party has a right to re-examine him as to the evidence so given [Tay s 1475; Hals 3rd Ed Vol 15 para 803].

When the cross-examination of a witness begins on one day and is completed only the next day, the party calling the witness is entitled to re-examine the witness on the whole field covered by the witness and not merely on the matters arising in cross-examination on the second day. If the matter elicited in re-examination gives rise to any suspicion that it has been the result of tutoring with regard to any matter covered on the first day, it would be open to the judge to comment on the oppor-

tunity for preparation given by the lapse of time [*Bakhori v. Abdul*, A 1941 P 362: 195 IC 107].

When in cross-examination a witness admits that previous statement of his is false, he should be asked in re-examination by the prosecution or at any rate by the court why he made the false statement. The mere fact that the previous statement is acknowledged to be false is no justification for rejecting it if on other grounds the court concludes that it is in substance true [*Sushil v. R*, 51 IC 449: 6 OLJ 210].

Re-Cross-Examination.—No doubt cases may arise in which a re-direct examination may make relevant certain new evidence for which there was no prior need or opportunity, and for this purpose a re-cross-examination becomes proper; in such cases it is sometimes said to be a matter of right. But for other matters there is ordinarily no such need, and the allowance of a re-cross-examination depends in such cases on the consent of the trial court [Wig s 1897].

Recall for Re-Examination-in-chief.—Under ordinary circumstances it is not necessary or permissible to allow a witness once examined and dismissed by a party to be recalled, for it is expected that the advocate will interrogate him on all material points touching his case. Unforeseen situation may however develop and there may also be inadvertent omissions. In such cases, the court may in its discretion allow a witness to be recalled. But surprise or prejudice to the other party should be guarded against, as when the other party has dismissed his witnesses after the close of the case of both parties. Nor should a party be allowed to fill up lacuna in evidence under the pretext of a recall. In *Carren v. Connery*, 5 Binn 488, TILGHMAN CJ, said: "It may be necessary, in order to come at the truth of the case, to examine him as to new matter, and after that there may be a second cross-examination. The court at their discretion may permit a witness to be examined by either party over and over again at any time during the trial. But they will take care to exercise this discretion, so as not to suffer any advantage to be gained or trick or artifice. If the plaintiff should declare that he had finished his testimony, in consequence of which the defendant should dismiss some of his witnesses, and then the plaintiff should offer to produce new testimony, which might perhaps have been contradicted by the witnesses who have been dismissed, the court would not suffer him to avail himself of such disingenuous conduct". The judge will seldom, however, except under special circumstances, permit a plaintiff, after his case is closed, to recall a witness to prove a material fact [*Murray v. Sheriffs of Dublin*, 1841 Arm M & O 130]; though the application will in general be entertained, if made before the closing of the plaintiff's case [*White v. Smith*, 1841 Arm M & O 171]. If a question has been omitted in examination-in-chief, and cannot in strictness, be asked on re-examination as not arising out of the cross-examination, it is usual for the counsel to request the judge to make inquiry, and such a request is generally granted [Tay s 1477].

The right to recall a witness who has already given evidence is not the personal right of a particular judge, but is the right of the court which is properly seized of the matter when the question arises [*Fallon v. Calvert*, 1960, 1 All ER 281].

The court has always the power to recall a witness at any stage of the proceedings (Or 18 r 17 C P Code) and to put any question it pleases, in any form (s 165). The judge's power to recall witness, is seldom interfered with by appellate court [*Middleton v. Burned*, 4 Ex 243]. If the examination of the witness has been conducted unskilfully, the court usually examines a witness at the close of his examination, *i.e.*, after re-examination. There is no right of re-examination after the interrogation by court.

Re-examination is not confined to clarification of ambiguities arising in cross-examination. Re-examination can travel beyond examination-in-chief and cross-examination but with the permission of the court. The courts are generally liberal in granting such permission so long as at least the questioning remains within the range of relevancy of facts. *Rammi v. State of M.P.*, 1999 (8) JT 321 : (1999) 8 SCC 649.

Recall for Re-Cross-Examination.—A re-call for re-cross-examination will ordinarily be unnecessary, except in the rare cases where the direct examination of an intervening witness has brought out new facts upon which the prior witness may throw light, and for this the matter can always be left in the hands of the trial court [Wig s 1899]. This is second cross-examination, a matter which rests entirely with the discretion of the court. The re-cross-examination after re-examination is another matter (*ante*).

S. 139. Cross-examination of person called to produce a document.—A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

COMMENTARY

Principle and Scope.—A person may be summoned to produce a document without being summoned to give evidence, and he does not become a witness by the mere fact of production of a document in obedience to a summons; and any person summoned merely to produce a document shall be deemed to have complied with the sommons, if he causes such document to be produced instead of attending personally to produce the same. [See Or 16 rr 6, 15 C P Code, 1908 and s 91(2) Cr P Code; *Parmeshwari v. S*, A 1977 SC 403]. A process issued merely for the purpose of producing a document is known as *subpoena duces tecum*.

A witness summoned merely to produce a document cannot be cross-examined unless and until he is called as a witness. A person summoned simply to *produce* a document in his possession need not be sworn. So his personal attendance is not necessary and the summons is obeyed, if he sends the document in question through some other person. But if the person is to speak about its proper custody, or the course of business in the office with regard to the document, &c, &c or any other matter, he should be sworn. In the latter case, he should be called as a witness, as something more than mere production of the document is required. The phrase "until he is called as a witness" means until he is summoned to depose and is sworn. When a witness is sworn it gives the opponent a right of cross-examination, although he may not be examined in chief after administration of oath. But a witness called and sworn under a mistake and whose evidence is not substantially begun is not liable to be cross-examined [*Wood v. Machinson*, 2 M & Rob 273; *Clifford v. Hunter*, 3 C & P 16]. But the mistake must arise from the erroneous belief that the witness knew something of the transaction when as a matter of fact he knew nothing and not a mistake as to the impropriety of calling him as a witness [*Wood v. Mackinson, ibid*; see Hals 3rd Ed Vol 15 para 800 and *ante*: "*Liability to and Right of Cross-Examination*"].

The observation is *Sharma v. Satish* (1954 SCR 1077: A 1954 SC 300) that s 139 has no bearing on the connotation of the term "witness", is not entirely well-founded in law. That section is meant to regulate the right of cross-examination. The word "witness" must be understood in its normal sense, *ie* as referring to a person who furnishes evidence [*S v. Kathi Kalu*, A 1961 SC 1808]. Even if a body corporate, which is accused in a case, is summoned to produce documents, it would not thereby become a witness and if it could not become a witness, the question of its being compelled to be a witness cannot obviously arise [*Godrej Soap Ltd. v. State*, 1991 Cri LJ 828, 831 (Cal)].

This section should be read with s 162 *post*. As to the particulars that a summons to produce a document should contain, see Or 16 r 5. Or 16 rr 10, 12, 18 contain the procedure to be followed if the summons is not obeyed.

Omission to produce a document when ordered by a court is an offence under s 175 of the I P Code [see *R v. Seshayya*, 13 M 24]. The jurisdiction of the court to punish a witness under rr 10-13, 17 18 of Or 16 of the C P Code, 1908 exists only in the case of a witness who not having attended on summons, has been arrested and brought before the court [*In re Prem Chand*, 12 B 63]. As to criminal prosecution of a witness who being in possession of a document fails to produce it. See s 175 I P Code and s 345 Cr P Code. If a witness summoned to produce a document, denies on oath possession of the document, and if his statement is found to be false, he may be prosecuted for perjury.

There cannot be cross-examination on the written statement which can be styled as objection. The parties should have been examined-in-chief and then there should have been cross-examination [*Yallappa v. Murahari*, 1998 AIHC 1652 (Kant)].

S. 140. Witnesses to character.—Witnesses to character may be cross-examined and re-examined.

COMMENTARY

According to English practice it is not usual, except under special circumstances, to cross-examine witnesses simply called to speak to the character of the prisoner; but no rule of law forbids this course—[Tay s 1429]. If an accused calls witnesses as to his good character, the prosecution has right to rebut it by cross-examination of the witness or by independent evidence (*ante* s 54). The former course is not usually employed. In *R v. Hodgkiss*, 1836, 7 C & P 268, ALDERSON B, said: "It is not usual to cross-examine witnesses to character, except you have some definite charge to which to examine them". The rule embodied in this section is not a deviation from the English rule, as the word used is 'may'. The right has been given and when an accused calls witnesses to prove his previous good character they should, in proper cases, be cross-examined.

Best has the following observations to make on the subject:—Witnesses to the characters of parties are in general treated with great indulgence,—perhaps too much. Thus, it is not the practice of the bar to cross-examine such witnesses unless there is some specific charge on which to found a cross-examination, or at least without giving notice of an intention to cross-examine them if they are put in the box. The judges also discourage the exercise of the undoubted right of prosecuting counsel to reply on their testimony; and the most obvious perjury in giving false characters for honesty, etc., is every day either overlooked, or dismissed with a slight reprimand. But surely this is mercy out of place. If mendacity in this shape is not to be discouraged, tribunals will naturally be induced either to look on all character evidence with suspicion, or to attach little weight to it. Now there are many cases in which the most innocent man has no answer to oppose to a criminal charge but his reputation; and to deprive this of any portion of the weight legitimately due to it, is to rob the honest and upright citizen of the rightful reward of his good conduct [Best s 262].

Under s 53 *ante*, in all criminal proceedings, the good character of the accused is relevant. As to the object of giving evidence as to character and the weight to be given to it, see s 53. As to when character of prosecutor is relevant see *ante* s 54. As to character when impeaching credit, see *post* s 146; "*Character*".

S. 141. Leading questions.—Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

COMMENTARY

Principle and Scope.—This section defines what is known as "leading question". It is a question framed in such a manner that it throws a hint as to, or suggests directly or indirectly, the answer which the examiner desires to elicit from the witness, *eg* when a witness called to testify to an alleged assault on *A* by *B* is asked "Did you see *B* take a stick and strike *A*?" or "Did you not hear him say this?" Leading questions, says Taylor, are questions which suggest to the witness the answer desired or which, embodying a material fact, admit of a conclusive answer by a simple negative or affirmative [*Nicholls v. Dowding*, 1815, 1 Stark 81; Tay s 1404]. A question that calls for a simple "yes" or "No" answer is not leading. It is a question assuming expressly or impliedly a material fact not testified to, which points out the desired answer to enable the witness to affirm such fact.

It is sometimes said that the test of a leading question is, whether an answer to it by "Yes" or "No" would be conclusive upon the matter in issue; but although all such questions undoubtedly come within the rule, it is by no means limited to them. Where "Yes" or "No" would be conclusive on any part of the issue, it would be equally objectionable; as if, on a traverse of notice of dishonour of a bill of exchange, a witness was led either as to the fact of giving the notice, or as to the time when it was given. So leading questions ought not to be put when it is sought to prove material and proximate circumstances. A question is objectionable as leading when it suggests the *answer*, not when it merely directs the attention of the witness to the *subject* respecting which he is questioned; *eg* on a question whether *A* and *B* were partners, it has been held not a leading question to ask if *A* has interfered in the business of *B* [*Nicholls v. Dowding*, 1 Stark 81] ..... It should never be forgotten that "leading" is a relative, not an absolute term. There is no such thing as "leading" in the abstract,—for the identical form of question which would be leading of the grossest kind in one case or state of facts, might be not only unobjectionable but the very fittest mode of interrogation in another [Best s 641]. The test of "Yes" or "No" is a very fallacious test even in the most critical parts of an inquiry. On the other hand it is sometimes said that the objection that the question is leading may be got over by putting it in the alternative; but it is obvious that nothing would be easier than to suggest in this way a whole conversation to a dishonest witness [Ros N P p 166].

Bentham defines a leading question to be one when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you not reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him? It is clear that under this form, every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the question to be put to him; and the examiner, while he pretends ignorance and is asking for information, is in reality giving instead of receiving it [Benth Rationale of Jud Ev].

Questions may legitimately suggest to the witness the *topic* of the answers; they may be necessary for this purpose where the witness is not aware of the next answering topic to be testified about, or where he is aware of it but its terms remain dormant in his memory until by the mention of some detail the associated details are revived and independently remembered. Questions, on the other hand, which so suggest the *specific tenor of the reply as desired by counsel* that such a reply is likely

to be given irrespective of an actual memory, are illegitimate [Wig s 769]. The following passages indicate the scope of the rule: "A question is leading which instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, as was here done, or plainly suggests the answer which the party wishes to get from him" [*per* FOWLER J, in *Page v. Parker*, 40 NH 63]. "The proper signification of the expression is a suggestive question,—one which suggests or puts the desired answer into the mouth of the witness" [*per* LIDDON J, in *Coogler v. Rhodes*, 38 Fla 240]. "The real danger is that of collusion between the witness interrogated and the counsel interrogating, that the counsel will deliberately imply or suggest falsely facts with the expectation on his part and with an understanding on the part of the witness that he will assent to the truth of the false facts suggested" [Chief Justice Appleton, Ev 227 quoted Wig s 769]. The *form* of the question is immaterial. "There is no form of question which may not be leading the court being constantly compelled to look beyond the form to the substance and effect of the inquiry" [*Steer v. Little*, 44 NH 616].

S. 142. When they must not be asked.—Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

[1][The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.].

SYNOPSIS

COMMENTARY

Principle and Scope.—The general rule is that leading question should not be asked in examination-in-chief or re-examination. It is the business of the advocate to help the court in the administration of justice by eliciting facts within the knowledge of his witness, and not to prompt him. The reason for exclusion of leading questions in examination-in-chief or re-examination is simple. A witness has a natural or sometimes unconscious bias in favour of the party calling and he will therefore be too ready to say "Yes" or "No, as soon as he realises form the from of the question that the one or the other answer is desired from him. A hint conveyed-by the interrogator as to the sort of answer he would like, would be welcome to a witness who did not know what exactly to say, and in the case of a collusion between the witness and the interrogator, the scope of mischief is infinite.

---

1. In Ceylon this para has been omitted.

Another reason is "that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove; and that consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole" [Best s 641]. The rule therefore is that on material points a party will not be allowed to lead his own witnesses but leading questions are allowed in cross-examination (s 143). To an honest or intelligent witness who has come to speak the truth, a leading question may make no difference in his reply; but a witness who is dull or headless or confused, or who has no recollection or who is seeking a hint as to what reply should be given, is apt to give a reply in the manner suggested, without considering the question properly. When a question is ruled out on the ground that it is suggestive and improper, the same may be allowed to be put in another form but where the mischief created by the putting of a leading question is irretrievable, there can be no complaint if the court disallows the question even in other shape. The whole subject of leading question is left entirely to the *discretion* of the court. The latter part of the section permits the putting questions on introductory or undisputed matters. "The second part of s 142 goes further than English law and requires the judge to give permission in certain cases" [*per* RANKIN CJ, in *Prafulla v. R*, 35 CWN 731, 744].

Leading question would of course be dangerous to a dishonest witness. In some cases of critical inquiries also, it is very desirable to get the witness's own impression, which the most veracious witness might not, after another view had been once suggested to him, be able to recall. The objections therefore to leading questions apply by no means with equal force to all witnesses and to all parts of an inquiry. Some witnesses will adopt anything that is put to them, whilst others scrupulously weigh every answer. There is no distinction recognised by law between questions which are and which are not leading. To object to a question as leading is only a mode of saying that the examination is being conducted unfairly. It is entirely a question for the presiding judge to say, in his discretion, whether or not the examination is being conducted fairly [Roscoe, NP, p 166].

The rule that leading questions must not be asked in an examination-in-chief is not an inflexible one. A question cannot be objected to as leading, if it is introductory to that which is material or if it relates to matters about which there is no dispute, or which have been sufficiently proved. This becomes necessary in certain cases, in order to enable the judge and the jury to understand the position of the parties and the circumstances, connected with the whole case and to prevent waste of time (*vide* the latter part of the section). After this object is attained and the advocate comes to the real matters in issue, he should ask such questions as "What followed next?", "Who were present?" "What did you see?" &c.

[*Ref Tay ss 1404-05; Best ss 641-62; Step Art 128; Phip 8th Ed pp 460-61; Ros N P 166-67; Powell 9th Ed pp 527-29; Wigmore s 769 et seq*].

"If Objected to By the Adverse party".—If the objection is not taken at the time, the answer will be taken down in the judge's notes, and it will be too late to object to the evidence afterwards on the scope of its having been elicited by leading question. Sometimes the judge himself will interfere to prevent a leading question or series of leading questions being put; it is the duty of the opposing counsel to take the objection; and it is only through want of practical skill that the omission occurs. At the same time, it is to be observed that if evidence is elicited by a series of leading questions unobjected to, the effect of the evidence so obtained is very much weakened, for it can scarcely escape the notice of the judge [Nort p 325]. The

undesirability of leading questions being put in undefended divorce case was stressed in *Perry v. P*, 1952, 1 All ER 1076.

The section says that leading questions *must not, if objected to by the adverse party, be asked* in examination-in-chief. The objection should be taken at the earliest opportunity, *ie* when the question is put, or is in course of being put. If the opposite party's objection is well founded and the court in its discretion permits the question to be put by disallowing the objection, it is advisable to ask the court to note the question so that the effect of the evidence may be judged by the higher court, should there be any appeal; or it may be ascertained afterwards whether the question was really objectionable. When questions are objected to and allowed by the court, the judge shall take down the question, the answer, the objection &c (Or 18 r 11 C P Code). The proper way to exclude evidence obtained by leading questions is to disallow the questions [*Tukeya v. Tupsee*, 15 WR Cr 23 p 24]. Leading questions such as can properly be put in cross-examination of a hostile witness cannot be put by the public prosecutor in examination-in-chief [*Dhannu Beldar v. R*, 2 Pat LT 757].

In practice, leading questions are allowed to pass without objection, sometimes by express, and sometimes by tacit consent. This latter occurs when the questions relate to matters which, though strictly speaking in issue, the examining counsel is aware are not meant to be contested by the other side; or when the opposing counsel does not think it worth his while to object. On the other hand, however, very unfounded objections are constantly taken on this ground [Best s 641].

Court May in Its Discretion Permit Leading Questions in Examination-in-Chief.—The section says that leading questions must not be asked, if objected to, except with the permission of the court. As "the objection to leading questions is not that they are absolutely illegal, but only that they are unfair" [*per* PETHERAM CJ, in *R v. Abdullah*, 7 A 385, 397; see also *Exp Bottomley*, 1909, 2 KB 14, 16), the court may in its discretion allow leading questions to be put in proper cases.

Exceptions to the Rule.—The following are exceptions to the general rule that leading question shall not be asked in examination-in-chief.

(1) Introductory or Undisputed Matter.—The court shall permit leading questions as to matters which are introductory or undisputed or which have been sufficiently proved (s 142 2nd para). The rule that leading questions should not be asked in examination-in-chief "must be understood in a reasonable sense; for if it were not allowed to approach the points at issue by such questions, examination would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on that length and may recapitulate to him the acknowledged facts of the case, which have been already established. The rule, therefore, is not applied to the part of the examination, which is merely introductory of that which is material" [Tay s 1404]. It is therefore not only permissible but proper to lead on matters introductory or undisputed. It saves much time.

(2) Identification.—The attention of a witness may be directly pointed to some persons or things, for the purpose of identifying them. For instance, it is usual to ask a witness if the accused is the person whom he refers to. This form of question is obviously unsatisfactory and the testimony does not carry much weight. "In the present day it is considered the proper method for counsel merely to ask, Do you see the person in court? and leave the witness to identify the prisoner" [Powell 9th Ed pp 528-29]. It is advisable not to lead under such circumstances. Although it would be perfectly regular to point to the accused and ask a witness if that is the person to

whom his evidence relates, yet if the witness can, unassisted, single out the accused, his testimony will have more weight [Best s 643]. As to identification evidence, see *ante* pp 88-89.

(3) Contradiction.—A witness may be asked leading questions in order to contradict statements made by another witness, *eg* if A has said that *B* told him so and so; *B* may be asked, Did you ever say that to *A*?.

Where one witness is called to contradict another as to expressions used by the latter, but which he denies having used, he may be asked directly,—Did the other witness use such expressions? The authorities are not quite agreed as to the reason of exception; and strongly contend that the memory of the second witness ought first to be exhausted by his being asked what the other said on the occasion in question [Best s 642]. The witness may be asked not merely what was said, but whether the particular expressions were used, since otherwise a contradiction might never be arrived at [*Edmonds v. Walter*, 3 Stark 7; *Courteen v. Touse*, 1 Camp 43]. Where, however, the conversation is not proved merely for the purpose of contradiction, the latter question is improper [*Hallet v. Cousens*, 2 M & R 238; Phip 11th Ed p 632].

(4) Helping Memory.—The rule will be relaxed where the inability of a witness to answer questions put in the regular way obviously arises from defective memory [Best s 642]. Thus, where a witness has on account of illness, illiteracy, old age or failing memory, or other cause apparently forgotten a fact or a name, and all attempts to recall it to his mind by ordinary questions have failed, his attention may be drawn to it by a question in leading form. The object is to revive or refresh his memory by drawing his attention to a particular *topic* without suggesting the answer. Thus, where a witness stated that he was unable to remember the names of the members of a firm, but that he could recognise and identify them if they were read to him, LORD ELLENBOROUGH allowed it to be done [*Acerro v. Petroni*, 1 Stark 100]. To prove a slander imputing that "A was a bankrupt whose name was in the Bankruptcy List, and would appear in the next Gazette", a witness who had only proved the first two expressions was allowed to be asked, "Was anything said about the Gazette?" [*Nicholls v. Dowding*, 1 Stark 81]. All open questions, every question short of a leading one, may fail to quicken a witness's memory and bring him to express the fact of which he has knowledge. Nothing, for instance, is more common than to forget a person's name, and without hearing it again, to be quite unable to call it in mind. We constantly hear people say, "If I heard his name, I should know it directly". [Ram on Facts, p 139]. Leading questions are sometimes allowed to a woman or child on the above ground (see Wig s 778).

The court will, too, sometimes allow a pointed or leading question to be put to a witness of tender years whose attention cannot otherwise be called to the matter under investigation [*Moody v. Powell*, 17 Pick 498 (Am)].

(5) Hostile Witness.—If a witness called by a party appears to be hostile or interested for the other party, and exhibits a desire to suppress the truth, the court may in his discretion allow leading questions to be put, *ie* allow him to be cross-examined (see s 154 *post*).

(6) Complicated Matter.—The rule will be relaxed, where the inability of a witness to answer question put in the regular way arises from the complicated nature of the matter as to which he is interrogated [Best s 642].

The above six exceptions must not be taken as exhaustive. The court has always a wide discretion in the matter, and it will allow leading questions to be put wherever it considers necessary in the interests of justice. Indeed the judge has, says Taylor, a

discretionary power—*Not controllable by the court of appeal* see [*Lawdon v. L*, 5 Ir CLR 27]—of relaxing the general rule, whenever, and under whatever circumstances and to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require [Tay s 1405].

It is the court, and not the counsel for the Crown, who can determine whether leading questions should be permitted, and the responsibility for the permission rests with the court [*Barindra v. R*, 37 C 467: 14 CWN 114].

S. *143. When they may be asked.—Leading questions may be asked in cross-examination.

COMMENTARY

Principle and Scope.—The purpose of cross-examination being to elicit truth from the tangled mass of evidence adduced, greater latitude of interrogation is allowed and the rule that evidence must be confined to the points in issue does not apply to cross-examination with the same strictness as in examination-in-chief. The reasons for excluding leading questions in examination-in-chief do not exist when a witness is under cross-examination as the witness is generally adverse or at least not friendly to the party cross-examining. This section therefore says that leading questions may be asked in cross-examination. The objects of cross-examination being to impeach the accuracy, credibility, and general value of the evidence given in chief, to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit supposed facts which will support the case of the party cross-examining, an adverse witness may on cross-examination be asked leading questions [*per* EYRE LCJ, in *R v. Hardy*, 24 How St Tr p 755].

The rule that leading questions may be asked in cross-examination is not unrestricted in its scope. When the witness under examination is favourable to him, the court will sometimes refuse to allow the cross-examiner to lead his adversary's witness. In Hardy's trial (24 How St Tr p 659), a prosecution witness was asked a leading question by the defence counsel on his evincing a favourable disposition towards the prisoner; BULLER J, disallowed the question saying:—"You may lead a witness upon cross-examination to bring him directly to the point as to the answer; but you cannot go to the length of putting into the witness's mouth the very words which he is to echo back again". But in *Parkin v. Moon*, 1836, 7 C & P 498, ALDERSON B, said: "I apprehend you may put a leading question to an unwilling witness, on the examination-in-chief, at the discretion of the judge; but you may put a leading question in cross-examination, whether a witness be unwilling or not". Yet when a vehement desire is betrayed to serve the interrogator, it is certainly improper and greatly lessens the value of the evidence, to put the very words into the mouth of the witness which he is expected to echo back [*R v. Hardy*, 1794, 24 St Tr 755].

---

* The section as amended in Ceylon runs thus:

"143. (1) Leading questions may be asked in cross-examination, subject to the following qualifications:—

(*a*) the question must not put into the mouth of the witness the very words which he is to echo back again; and

(*b*) the question must not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact.

(2) The court in its discretion may prohibit leading questions from being put to a witness who shows a strong interest or bias in favour of the cross-examining party".

As the purpose of the cross-examination is to sift testimony and weaken its force, in short to weaken the direct testimony, it is well-settled that on cross-examination of opponent's witness, ordinarlily no question can be improper as leading. Yet where the reason ceases, the rule ceases also; thus, when an opponent's witness proves to be in fact biased in favour of the cross-examiner, the danger of leading questions arises and they may be forbidden [Wig s 773].

These principles have obtained legislative recognition in the Ceylon Ev Ordinance and s 143 in its modified form says that the question must not be put into the mouth of witness the very words which he is to echo back again; and the court in its discretion may prohibit leading questions when a witness shows a strong interest or bias in favour of the cross-examining party.

There is no doubt that the party asking leading questions will often weaken his case, when the witness cross-examined has betrayed a leaning towards him. Leading questions in such a case are neither proper nor just and the court should not allow them [see Tay s 143; Powell 9th Ed p 532; Phip 8th Ed p 468; Steph Art 128]. Provided the questions are relevant to the matters in issue, they need not be confined to the subject matter of the evidence already given by the witness in chief; and it seems that where one party has examined a witness in chief, who is afterwards called by the other party as his own witness, he is nevertheless liable to be cross-examined by the party who first called him [*Lord v. Colvin*, 1855, 3 Drew 222; see CONTRA: *Dickinson v. Shee*, 1801, 4 Esp 67; Hals 3rd Ed Vol 15 para 802]. Leading question is particularly obnoxious when the question is composite or confusing (*ante* ss 137, 138: "*Questions not permissible in cross-examination ..... Repetition, etc*"), and it is a common experience that ordinary witnesses who are either dull or helpless are easily apt to serve their interrogators by a convenient 'Yes' or 'No' without thought or consideration or without fully understanding the impact of the question. The danger is greater in the case of friendly or dishonest witness. In America, the judge may in his discretion, prohibit leading questions from being put in cross-examination to an adversary's witness, who shows a strong interest or bias in favour of the cross-examining party and needs only an intimation to say whatever is most favourable to his cause [*Moody v. Rowell*, 1835, 17 Pick 490 (Am)].

An abuse of this liberty is thus noticed by LORD CAMPBELL:—"At this time (reign of James II) leading questions were not allowed to be put in cross-examination more than in examination-in-chief and I am not sure that the old rule is not the best one when I consider monstrous abuse sometimes practised in putting words into the mouth of a friendly witness, necessarily called by the side he is opposed to" [Lord Campbell's Lives of the Chief Justice, Vol II, p 50*n* quoted in Ram on Facts p 140].

It has been held that the accused are entitled in cross-examination, to elicit fact in support of their defence from the prosecution witness, though the facts thus elicited are wholly unconnected with facts testified in examination-in-chief. It is also plain that in course of cross-examination of this character, the defence are entitled in view of the generality of the provision of s 143 to ask leading questions. And under s 154 the court has the discretion to permit the prosecution to test, by way of cross-examination, the veracity of their own witness with regard to the (unconnected) matters elicited by the defence in cross-examination [*Amritalal v. R*, 42 C 957, 1023: 19 CWN 676]. Undue interference by the court in course of cross-examination amounts to denial of fair trial and hearing [*Sanjib Kumar Das v. State of Tripura*, 1994 (3) Crimes 411, 412 (Gau)].

Misleading Questions—are not allowed in cross-examination. A question which falsely assumes a fact or contains actual misstatements is not allowed whether in

direct examination or cross-examination. The subject has already been discussed (*ante* under ss 137, 138: "*Questions not permissible in cross-examination ..... Repetition. etc*".).

As to questions permissible in cross-examination, their limit and extent, see *ante* s 138.

S. .144. Evidence as to matters in writing.—Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustrations

The question is, whether *A* assaulted *B*.

C deposes that he heard *A* say to *D*—"Bwrote a letter accusing me of theft, and I will be revenged on him". The statement is relevant, as showing *A's* motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

COMMENTARY

This section refers both to examination-in-chief and cross-examination. It merely points out the manner in which the provisions of ss 91 and 92 as to the exclusion of oral by documentary evidence may be enforced by the parties to the suit. "Document which in thi opinion of the court ought to be produced" would of course, include the cases referred to in s 91, when the law requires a matter to be reduced to the form of a document. The explanation may be read in connection with s 14 [Cunn p 295]. When a statement is a fact in issue, the proof of it is not to be regarded as the proof of the document and thus oral testimony in such a case does not contravene ss 64 and 65 of the Act. Explanation 3 of s 91 makes it clear. A witness is permitted to refresh his memory in the course of his evidence by reference to documents made by him or any other person and read by him (see s 159).

When the witness in answer to a question is about to make a statement as to the contents of a document, which in the opinion of the court ought to be produced, the adverse party may object to the evidence. In criminal cases, [1]s 298 Cr P Code declares it to be the duty of the judge "in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties" [see *R v. Panchkari*, 20 CWN 300]. There is no such express provision as to civil cases, but here also the judge may undoubtedly of his own motion prevent the admission of inadmissible evidence. It is always the duty of the court to reject all irrelevant or inadmissible evidence. [See *ante* ss 5, 136 and *post* s 165 under *Proviso* (1)]. Where

---

1. S 298 omitted in Cr P Code, 1973 (Act 2 of 1974).

a piece of evidence not proved in the proper manner, has been admitted without objection, in direct contravention of an imperative provision of law, it is open to the opposite party to challenge it at any later stage [*Sudhanya v. Gour*, 27 CWN 134: 68 IC 86: 35 CLJ 473]. As to objections to the admissibility of evidence, see *ante* s 5.

A most regularly kept private diary containing record of facts contemporaneously made may be used for contradicting or corroborating a witness or refreshing his memory and the like under ss 144, 157, 159 but such user does not make the document itself evidence [*Mu undaram v. Dayaram*, 110 NLR 44: 23 IC 893].

S. *145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

SYNOPSIS

---

* In Ceylon the section has been numbered sub-sec (1) and sub-section (2) has been added, *viz*:—

"(2) If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceedings in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statements, proof may be given that he did not in fact make it; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such a statement".

COMMENTARY

Principle and Scope.—This section re-enacts the provisions of s 34 of Act 2 of 1855 and lays down the procedure by which a witness may in cross-examination be contradicted by confronting him with his previous statement in *writing or reduced into writing*. It consists of two parts:

(1) A witness (whether a party or not) may be asked in cross-examination whether he made any previous statement in writing or reduced into writing, *relevant to the matters in question*, different from his present statement, without such writing being shown to him or being proved, in the first instance (see *post "Duly proved"*), nor can the witness demand this before he answers [*North Australian Co v. Goldsborough Co*, 1893, 2 Ch D 381, 385-86]; and if a denial is given or there is no distinct admission, he may be contradcted by showing that he made such a statement. This rule will apply where a witness is not a party to the suit and would not apply when a party to the suit is examining himself as a witness [*Tapan Dass v. Sosti Dass*, A 1986 Cal 390, 392: (1986) 90 Cal WN 1018].

(2) If it is intended to *contradict* such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. This is an essential condition.

The object is to give him a chance of explaining the dis°repancy or inconsistency and to clear up the particular point of ambiguity or dispute. This section applies to both civil and criminal cases. The credit of a witness may be impeached by proof of former statement (verbal or written) inconsistent with any part of his evidence which is liable to be contradicted (see s 155 cl 3). A party's own witness may be similarly discredited or contradicted, with the consent of the court (s 155), or if he proves adverse (s 154).

It should, however, be remembered that no question respecting any fact irrelevant to the issue can be put to a witness for the mere purpose of contradicting him. A witness cannot be contradicted on collateral matters.

"The credit of a witness can be impeached by proof of any statement which is inconsistent with any part of his evidence in Court. This principle is delineated in S 155(3) of the Evidence Act and it must be borne in mind when reading S. 145 which consists of two limbs. It is provided in the first limb of S. 145 that a witness may be cross-examined as to the previous statement made by him without such writing being shown to him. But the second limb provides that if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those part of it which are to be used for the purpose of contradicting him. There is thus a distinction between the two vivid limbs, though subtle it may be. The first limb does not envisage impeaching the credit of a witness, but it merely enables the opposite party to cross-examine the witness with reference to the previous state-

ments made by him. He may at that stage succeed in eliciting materials to his benefit through such cross-examination even without resorting to the procedure laid down in the second limb. But if the witness disowns having made any statement which is inconsistent with his present stand his testimony in Court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of S. 145." [*Binay Kumar Singh v. State of Bihar*, A 1997 SC 322]. Section 145 enables cross-examination of a witness as to previous statements in writing. There is no rule of law that an earlier statement shall be treated as correct and the subsequent contrary statement shall be discarded [*Thumallapally Koti Reddy v. State of A P*, 1993 (2) Crimes 179, 182 (AP)].

S 145 does not say that the writing must be shown before the cross-examination, but that, if it is intended to put in such writing to contradict a witness, his attention must be called to those parts of it, which are to be so used. This is, not that he is to be allowed to study his former statement and frame his answers accordingly, but that, if his answers have differed from his previous statements reduced to writing, and the contradiction is intended to be used as evidence in the case, the witness must be allowed an opportunity of explaining or reconciling his statement, if he can do so. And if this opportunity is not given to him, the contradictory writing cannot be placed on the record as evidence [*Tukheya Rai v. Tupsee Koer*, 15 WR Cr 23; see *R v. Ram Ch*, 13 WR Cr 18].

S 145 does not curtail the right of cross-examination without showing the witness his previous statement in writing. What it enacts is that if it is intended to *contradict* him, his attention should be called to the writing [*Kanu v. S*, A 1971 SC 2256: 1971 Cri LJ 1547: 1971 Civ Ap R 181 (SC); *Ramakka v. Negasam*, 47 M 800: A 1925 M 145: 48 MLJ 89: 92 IC 792]. Before proof may be given to *contradict* the witness, he must be told about the circumstances of the supposed statement and he must be asked whether or not he has made such statement. This is an essential step, the omission of which contravenes not only general principles but the specific provisions of s 145 and is likely to cause grave injustice [*Bal Gangadhar Tilak v. Srinivasa*, 42 IA 236: 39 B 441: 19 CWN 729: A 1915 PC 7]. His attention must be pointedly drawn to the terms of the relevant passage in the previous statement which is contradictory to the present statement. The requirements of s 145 are not satisfied by merely asking generally whether he made some other statement on a previous occasion [*R v. Rahenuddin*, 1943, 2 Cal 381; *R v. Ajit*, A 1945 C 159]. There is no hard and fast rule. All that is required is that the witness must be treated fairly and be afforded reasonable opportunity of explaining the contradictions after his attention has been drawn to them in fair and reasonable manner. The matter is one of substance and not of mere from [*Bhagwan v. S*, A 1952 SC 214: 1952 SCR 812]. Previous admitted statements of a witness can be used to contradict in the cross-examination when he gives evidence and that part of the statement which has been put to him does not constitute substantive evidence [*Somnath v. Union*, A 1971 SC 1910; *Kanu v. S*, A 1971 SC 2256].

There is nothing in the Evidence Act to show that a document, which is meant to contradict a witness or impeach his credit, must come from proper or legitimate custody [*R v. Rajaram*, 146 IC 83: A 1934 N 35].

Under this section a witness cannot be contradicted by previous inconsistent statements *not of himself* but of a third party [*Bobba Bhavamma v. Bobba Ramamma*, 78 IC 176: A 1924 M 537]. He cannot accordingly be told what *third persons* have said or deposed and asked if he contradicts them [*North Australian Co v. Goldsborough Co sup*]. Previous statement (*eg* under s 164 Cr P Code or before

committing magistrate) of prosecution witnesses may be used for purpose of contradiction but it cannot be used as substantive evidence [*Bishen v. R*, A 1927 A 705: 25 ALJ 994; *R v. Nirmal Das*, 22 A 455; see also *R v. Cherathi*, 26 C 191; *Niamat v. R*, A 1930 L 409]. As to contradiction of statements of dead persons relevant under ss 32, 23 see *post* s 158].

A witness cannot be contradicted by first supposing that a certain thing must have taken place in a manner not deposed to by the witness and then to find that was not consistent with the statement made by that witness [*Dalmia v. Delhi Admn*, A 1962 SC 1821].

It should be noted that s 145 deals with contradiction of a witness during his cross-examination by the previous inconsistent statemnet. A previous statement (*eg* an admission) of a party who has not appeared in the witness-box can be used against him under s 21 [*Malik Desraj v. Piara Lal*, A 1946 L 65 FB]. But if the party has appeared as a witness, his admission in a previous proceeding or in any document must be put to him before it is used against him [*Daulat v. Bishan*, A 1934 L 150; *Secy of S v. Akbar*, A 1934 L 753; *Baldev v. Nemi*, A 1950 Pu 291]. Supreme Court has held that a previous admission duly proved is admissible without being put to the witness in the box [*Bharat v. Bhagirathi*, A 1966 SC 405; (*Malik Desraj v. Piara Lall, sup* disapproved; *Ajodhya v. Bhawani*, A 1957 A 1 FB **apprd. folld** in *Punjab University v. Prem*, A 1971 P&H 177); *Biswanath v. Dwarka*, A 1974 SC 117: *Arjun v. Monda*, A 1971 P 215; *Veerabasavaradhya v. Devotees &c*, A 1972 My 283]. Mere proof of admission after the person whose admission it is alleged to be, has concluded his evidence cannot be utilised against him [*Sitaram v. Ram*, A 1977 SC 1712]. Where a document is admitted by counsel "subject to all just exceptions" (Or 12 r 2), such admission did away with formal proof but not with the requirement of s 145 [*Videshwar v. Budhiram*, A 1964 A 345]. When the writer of a letter marked as an exhibit gives evidence, any endorsement on its back making a statement contradictory to the one made in court, cannot be used unless the witness's attention is drawn to it [*Ram Pratap v. S*, A 1963 P 153]. See further *ante* s 21.

A certified copy of the deposition of a witness in a criminal court cannot be used as substantive evidence, *ie*, as an admission in a civil suit [*Gaya Muzaffurpur Roadways v. Fort Gloster &c*, A 1971 C 494 (*Bal Gangadhar v. Shrinivas*, A 1915 PC 7; *Bhagwan v. S*, A 1952 SC 214 **rel on**)]. If there are omissions in previous statements which do not amount to contradictions but throw some doubt on the veracity of what was omitted, the uncertainty or doubt may be capable of removal by questions in re-examination [*Laxman v. S*, A 1974 SC 308].

Previous Contradictory Statements in Writing.—The rule in this section reproduces the rule in the Criminal Procedure Act, 1865, 28 & 29 Vic c 18 s 5 which superseded the old rule on the subject. The witness may be cross-examined as to his previous statement without showing or proving the writing in the first instance: but if it is intended to contradict him, his attention must first be called to the parts that are to be used for that purpose and the deposition must be put in [*R v. Riley*, 4 F & F 964; *R v. Wright*, 4 F & F 967]. S 5 of that statute is practically the same as this section with the addition of a proviso which runs thus: "Provided always that it shall be competent for the judge at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit". Though s 145 does not contain any such proviso, a similar provision is to be found in s 165 *post* and also in Or 11 r 14, C P Code

The object and effect of the rule in this section has been thus stated by ALDERSON B, in *Att-Genl v. Hitchcock*, 1 Ex R 91, 102:—

> "A witness may be asked any question which, if answered, would qualify or contradict some previous part of that witness's testimony, given on the trial of the issue, and, if that question is put to him and answered, the opposite party may then contradict him..... You may ask him any question material to the issue, and if he denies it, you may prove that fact, as you are at liberty to prove any fact material to the issue".

Where the magistrate found that the former statement of the witness neither carried any signature nor seal of office, it was held that it could not be said that the statement in question was that of the witness. The witness was also not confronted with that part of the statement with which the defence wanted to contradict him. The requirements of the section were thus not complied with. *Rajendra Singh v. State of Bihar,* 2000 Cri LJ 2199 (SC).

[*Ref Tay ss 1445-50; Phip 8th Ed pp 471-72; Hals 3rd Ed Vol 15 para 808; Powell 9th Ed pp 536-37; Jones ss 847-49*].

"Previous Statements Made By Him in Writing or Reduced into Writing".— The term 'statement' is not defined anywhere in the Act. It has a wider connotation. The section itself contemplates a statement which is either written by the witness himself or which was reduced into writing by some one else. Statements which are not fully recorded or statements which are recorded in the form of memorandum are statements within the ambit of s 145 [*President SVB Mandal v. Yellaiah*, A 1969 AP 148; *Tahsildar v. S*, A 1959 SC 1042, 1027; *R v. Najibuddin*, A 1933 P 589; *R v. Ajit*, A 1945 C 159]. Such writings may be letter, account-book, deed, written statement, deposition, petition, admission, affidavit, statements of witnesses before the police (see *Dahyabhai v. S*, A 1964 SC 1563 *post*) &c, &c. The post-mortem report of a doctor is his previous statement based on the examination of the dead body and can be used only to contradict him under s 145 or to corroborate him under s 157 or refresh his memory under s 159 [*Hadi v. S*, A 1966 Or 21]. 'Writing' refers to a tangible object that appeals to the sense of sight. Previous inconsistent statement recorded on tape recorder is admissible for contradiction [*Rupchand v. Mahabir*, A 1956 Pu 173; see *Pratap v. S*, A 1964 SC 72; *Ram Reddy v. V V Giri*, 1970, 2 SCC 340 (cited *post* under s 155(3)].

"Without Such Writing Being Shown to Him".—The writing containing the inconsistent statement need not be shown to the witness before cross-examination. If, however, it is intended to contradict him by the writing his attention must be drawn to those parts of it for such purpose. "A witness may also be cross-examined as to a previous statement made by him in writing, without the writing being shown to him [*North Australian &c v. Goldsborough & Co*, 1893, 2 Ch 381 CA); but if it is inten-ded to contradict him by such writing, his attention must be called to those parts of the writing which are to be used for that purpose (see *R v. Yousry*, 1914, 11 Cr App R 13, 18), and the judge may at any time during the trial require production of the writing for his own inspection, and he may thereupon make use of it for the purposes of the trial as he thinks fit. It seems that if the writing is not in the possession of the party cross-examining, he may interpose evidence out of turn, either to prove it or to give secondary evidence of it". [Hals 3rd Ed Vol 25 para 808]. It has been per-missible in every criminal and civil trial to cross-examine a witness as to any previous inconsistent statement made by him in writing or reduced to writing subject, where the inconsistent statement is said to be in writing, to his attention first being called to those parts of any writing which were to be used to contradict him [*Lui Mei-Lin v. R*, (1989) 1 All ER 359, 362 (PC)].

Previous Contradictory Verbal Statements.—This section refers only to previous statements made in writing or reduced into writing. The same principle applies to previous verbal statements or admissions which may be used for purpose of contradiction and here also the statement should be put to the witness fairly so that he can have an opportunity to give an explanation (see *ante* s 21: "*Whether previous admission should be put before use*"). The mode of contradicting previous verbal statements is pointed out in s 155(3) (v *post*).

Right to Inspect Documents Shown to Witness While Under Cross-Examination.—The decisions on the question, whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross-examination by his opponent, are somewhat conflicting, but the practice seems to be as follows:—If the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, his adversary will have no right to see the document; but that if the paper be used for the purpose of refreshing the memory of the witness, or if any question be put respecting its contents, or as to the handwriting in which it is written [*Peak v. P*, 21 LT 670] a sight of the document may then be demanded by the opposite counsel. But such opposing counsel has no right to read such a document through, or to comment upon its contents, till so used or put in by the cross-examining counsel. If it be not put in, its absence may be remarked upon by the counsel on the other side. The counsel on the other side will, moreover, have a right (even where it is not put in) to ask questions upon it in re-examination, without himself putting it in [*R v. Ramsden*, 31 RR 703; Tay s 1452]. The above section of Taylor was quoted with approval by WOODROFFE J, in *Copessur v. Bissessur*, 16 CWN 265, 286: 39 C 245.

Denial Not Necessary For Allowing Contradiction.—It is not necessary that there should be a denial of the previous statement when it is put to the witness. In order to admit the previous inconsistent statement, it is sufficient if it is not distinctly admitted or if the witness pleads failure of memory or gives an evasive answer; otherwise the witness might save himself from self-condemnation by pretending that he does not remember having made the statement. [*Cf* sub-section (2) of s 145 of Ceylon Evidence Ordinance, *ante*, in to s 145].

Admission.—As to whether previous admissions can be used against a party without putting it to him under s 145 and giving him an opportunity of explaining, see *ante* s 21.

Mode of Contradicting Previous Statements in Writing. [Previous Depositions etc.].—One of the modes in which the credit of a witness may be impeached, is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted; and s 145 gives the right to cross-examine a witness on previous statements made by him and reduced into writing, when these previous statements are relevant to the matter in issue [*R v. Mannu*, 19 A 390 pp 421-22]. The right of contradiction is not confined only to previous statements on oath [*Sharmanand v. Supdt*, A 1960 MP 178]. Although part of a statement, deposition, or other writing may be received for the purpose of impeaching the witness, of course those other parts which tend to explain inconsistencies or remove discrepancies should also be received if offered [*Lowe v. S*, 97 Ga 792; Jones s 848]. When a letter is put to a witness to contradict his statement, it cannot be used as substantive evidence [*Melappa v. Guramma*, A 1956 B 129]. When a retrial is ordered for non-compliance with the provisions of s 360 (now s 278) Cr P Code, statements of witnesses in the previous trial may be used in the subsequent trial for the purpose of contradiction [*Fazlud v. R*, 6 P 478 : 104 IC 100: A 1927 P 315]. At a *de novo* trial the statement of witnesses examined at the previous trial cannot be admitted merely by asking them if they had made those statements at the previous trial, without observing the provision of ss 145 and 155 [*Salig Ram v. S*, A 1956 A 138]. Where the purpose of the production of the document must have been understood by the witness and from the record of his deposition it was manifest that after being shown the document, he was directly asked whether it was not a fact that he was not at a particular place on the alleged date as was clear from the document and where on re-examination no attempt was made to elicit an explanation—*Held*, that the witness was properly contradicted

[*Baikuntha v. Prasannamoyi*, 27 CWN 797: A 1922 PC 409 : 72 IC 286: 24 MLJ 699].

The witnesses in their statements before the police attributed a clear intention of the accused to commit murder, but before the court they said that the accused was insane. It was therefore necessarily implied in the previous statements before the police that the accused was not insane at the time of the commission of the murder. In this view the previous statements before the police could be used to contradict the version in the court [*Dahyabhai v. S*, A 1964 SC 1563 (*Tahsildar v. S*, A 1959 SC 1012 **reld on**)].

The witness should be informed of those parts of his statement which are to be used to contradict him. It is not enough to say whether a particular exhibit is his previous statement [*Samuel v. R*, A 1935, A 935; *Raghuraj v. R*, A 1934 A 956]. Where depositions of witnesses in a former trial are used to contradict the witnesses, but without giving them an opportunity to tender their explanation or to clear up the particular points of ambiguity or dispute, the procedure is contrary to general principles and to the specific provisions of s 145 [*Bal Gangadhar Tilak v. Srinivas*, 42 IA 135: 19 CWN 729: 39 B 441: *Iqbal v. R*, 1942, ALJ 637; see *Bhagwan v. S*, A 1952 SC 214; *Ramaswami v. Jugannadha*, A 1962 AP 94; *Jatindra v. Sushilendra*, A 1965 C 328]. Unless the particular matter or point in the previous statement is placed before the witness sought to be contradicted for explanation, the previous statement cannot be used in evidence [*Upendra v. Bhupendra*, 21 CWN 280; *Muharram v. Barkat*, A 1930 L 695; *Panji v. S*, A 1965 Or 205]. The witness should be questioned about each separate fact point by point and passage by passage. When the previous statement is a long one and only one or two small passages in it are used for contradiction, a mere reading out of the whole statement may confuse a witness and not be a fair method [*Bhagwan v. S*, A 1952 SC 214, 218; *Inder Deo v. S*, A 1959 A 238]. Witness in sessions court when confronted with his statement in committal court which was read over to him in extenso admitted it to be true record but said it was false having been made under police pressure—*held* there was sufficient compliance with s 145 and it would have been pointless to draw his attention to each sentence and ask his explanation because the explanation would have been the same [*S v. Kartar*, A 1970 SC 1305].

A witness cannot be disbelieved without his attention being drawn to the documents inconsistent with his deposition even though the documents were produced after examination. In such a case he should be called for further cross-examination [*Nabakumar v. Rudranarayan*, 28 CWN 589 PC : A 1923 PC 93 : 77 IC 141]. It is the duty of the prosecution to confront the witness with those statements made before police during investigation or before magistrate under s 164 Cr PC or get them marked as exhibits so that the witness might get an opportunity to explain or deny them [*Saibanna, In re* A 1966 Mys 248].

Where a person who made statement during investigation of a complaint is subsequently accused of the offence his statement cannot be used either to contradict or corroborate him or other accused [*Mohar v. S*, A 1968 SC 1281 (*Nisar v. S*, A 1957 SC 366 **folld**; *Faddi v. S*, A 1964 SC 1850 **dist**)].

A statement of a witness abstracted in a judgment cannot be made use of for contradiction in lieu of the original statement in the deposition [*Saradamba v. Pattabhiramayya*, A 1931 M 207: 53 M 952]. A counsel for the prisoner is not entitled to refer to the deposition given by a witness before the committing magistrate in order to contradict a witness before a sessions court without having drawn the particular witness's attention to the alleged contradiction in his deposition, and with-

out having given him opportunity of explaining it [*R v. Zawar Rahman*, 31 C 142 FB: 6 CWN ccli (6 CLR 390 **overruled**); *R v. Najibuddin*, A 1933 P 589]. The duty of drawing attention is compulsory [*Lakshmana v. R*, 17 Bom LR 590 : 31 IC 354; see also *Amir Begam v. Begam*, 127 PLR 1914]. The previous statement must be put to him and he must be asked when explanation can be given [*Abdul Jalil v. R*, A 1930 A 746; *Ghulam v. Nagina*, A 1930 L 991; *Mahla v. R*, A 1931 L 38]. Where a witness was generally cross-examined as to the circumstances under which he made previous statements, without putting each individual statement, the evidence was held admissible as it did not result in any miscarriage of justice [*Ayub Ali v. R*, A 1942 C 277 : 74 CLJ 547].

A judge is bound to put to the witnesses, whom he proposed to contradict by their former statements, the whole or such portion of their depositions as he intended to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they had made any statement and so forth [*R v. Dan Sahai*, 7 A 862, 863; see *Abdul Gafoor v. Kali*, A 1934 R 273].

A prevjous statement can be put even to an illiterate witness. He does not require to read it himself [*Muzaffar v. R*, 20 L 509 : A 1939 L 268]. A document cannot be admitted under this section simply because the witness does not go to the witness-box [*Gajadhar v. Nandalal*, A 1934 P 55].

When the previous inconsistent statement amounts to an admission duly proved, it can be used without being put to the witness for explanation [*Bharat v. Bhagirathi*, A 1966 SC 405 and cases *ante* under s 21].

When a magistrate conducts a test identification parade, his test identification memo not being a record of a witness in a judicial proceeding is not evidence and is not usable for contradicting him under s 145 or s 155 [*Ram Sanchi v. S*, A 1963 A 308; apprd in *Sheoraj v. S*, A 1964 A 290 FB].

Even if evidence taken on commission is not read as evidence in suit it would be available as previous statement for purposes of s 145 [*Abdul Sovan v. Rafikan*, A 1972 Or 213].

In an inquiry under the Commission of Inquiry Act, 1952, the statements made by prosecution witnesses before the Commission can be used by the defence for the purpose mentioned in s 145 [*Sohanlal v. S*, A 1965 B 1].

When the court does not give the accused the benefit of contradiction by the previous statement of witness which is on record, the defect leads to a miscarriage of justice [*Kalipada v. S*, A 1958 C 186].

In a suit for ejectment alleging monthly tenancy the defendant tenant on the basis of an unregistered and unstamped document contended that the tenancy was for a fixed period of 20 years. The defendant could use the previous statement in the document for the purpose of the first part of s 145 without bringing into play s 91 and s 49 of Registration Act. But in case the second part was to be made use of, s 49 of the Registration Act would step in [*Remington Rand v. Lilawati*, A 1974 P&H 350].

The section permits the use of former statements for the purpose of contradicting a witness. The defence may request the court for recalling a witness for further cross-examination where the former statement comes on record subsequently to the conclusion of cross-examination. *State of Rajasthan v. Teja Ram*, AIR 1999 SC 1776.

Previous Statement Must Be Voluntary.—A confession after tender of pardon was retracted by the accused and the pardon withdrawn. He was not tried jointly with the other accused but was examined as a prosecution witness and on his denying anything about the confession, he could not be contradicted by his previous con-fession which was not voluntary. Before contradiction it must be shown that the statement sought to be used for the purpose was voluntary [*Nayab v. R*, 38 CWN 659 : 61 C 399].

Only Contradictory Portion to be Proved.—Only those passages in the previous statements should be proved, which clearly contradict some portion of the testimony of the witness before the court. The whole of the depositions should not be put in without marking the particular passages upon which reliance is placed for purpose of contradiction [*R v. Ajit*, A 1945 C 159; *A H Abdulla v. State of Kerala*, 1981 Cri LJ (NOC) 55 : ILR (1981) 1 Ker 508; *Kaveri Venkteswarlu v. State of AP*, 1981 Cri LJ NOC 133 (AP); *Annasaheb Melappa Pattanshetty v. State of Karnataka*, 1982 Cri LJ 1553, 1556 : (1982) 1 Kant LJ 433 : 1982 Cr LR (Guj) 433 (Kant); *Kehar Singh v. State*, A 1988 SC 1883, 1901 : 1989 Cri LJ 1; *Puthenthara Mohanan v. State of Kerala*, 1990 Cri LJ 1059, 1064 (Ker); *Thankappan Mohanan v. State of Kerala*, 1990 Cri LJ 1477, 1482 (Ker)].

Judge Should Compare And Find out the Contradiction.—A judge should compare the statements of the witnesses recorded by the magistrate at the preli-minary investigation with the evidence of the same witnesses at the sessions [*R v. Brindabun*, 5 WR Cr 54]. If the Sessions Judge finds that the statements of the witnesses in his court differ materially from those previously made by the same witnesses, it is his duty to examine them as to the discrepancies, and this is more specially his duty when the prisoners are undefended and contradictory testimony is given for the prosecution [*R v. Arjun Megha*, 11 BHC 281]. Instead of rejecting a hostile witness outright court should normally look for corroboration of his evidence [*Karuppanna v. S*, A 1976 SC 980]. In order to see whether there is a contradiction by omission it is necessary to find out whether the two statements cannot stand together. If they cannot stand together and the statement in the court is such that the witness would necessarily have made at the time of his earlier statement, then alone omission thereof can be considered to be a contradiction [*Dasu v. State of Maha-rashtra*, 1985 Cri LJ 1933, 1938 : (1985) 2 Crimes 624 (Bom) (DB)].

For the purpose of contradicting a witness it is not sufficient to show that there were some minor variations between the present statement of the witness and his former statement. Inconsistency between the two statements is a matter of appreciation of evidence and it is for the court to examine the same. *Rammi v. State of M.P.*, 1999 (7) JT 247 : (1999) 8 SCC 649.

Use of Depositions Before Committing Magistrate Under [1]S 288 Cr P Code.—S 288 Cr P Code (as amended by Act 18 of 1923) runs thus:—

> "The evidence of a witness *duly recorded in the presence of the accused under Ch XVIII*, may, in the discretion of the presiding judge, if such witness is produced and examined, be treated as evidence in the case *for all purposes subject to the provisions of the Indian Evidence Act, 1872*."

The italicised portions were substituted and added by the Cr P (Am) Act 18 of 1923. S 288 Cr P Code empowers the Sessions Judge to treat the evidence of a prosecution witness taken before the committing magistrate as substantive in the sessions trial before him if such witness is examined. It is not meant that the previous deposition of a witness should be used in every case to find out discrepancy with his evidence before the Sessions Judge. The discretion conferred by the section is to be used very sparingly and in those cases only where there is reason to believe that a witness is deliberately departing from his evidence before the magistrate [*Abdul Jalil v. R*, A 1930 A 746; *R v. Dodo*, A 1942 S 139; *Gopal v. S*, A 1949 C 597] or when it appears that the statement before the judge is substantially false and the previous statement is substantially true [*Manghan v. R*, A 1937 C 61; *Deorao v. R*, A 1946 N 321]. It should be used only in exceptional cases, *eg*, when a witness resiles entirely or to a great extent from his previous statement or where he has forgotten a great deal of what he said previously [*R v. Rahenuddin*, A 1944 C 323; *Heramba v. R*, 1945, 1 Cal 376; *Amalesh v. S*, A 1952 C 618; *State v. Ramzan Wani*, 1985 Cri LJ 987, 991 : 1984 Kash LJ 286 (J&K)].

---

1. Committal proceedings being abolished s 288 has been omitted in Cr P Code, 1973.

It has been held in some cases that previous depositions cannot be used under s 288 Cr P Code unless the contradictory portions are put to the witness under s 145 by the opposite party or by the Judge [*Ajit v. R*, A 1945 C 159; *Radhanath v. S*, A 1953, C 602; *Punia v. R*, A 1947 P 146; *Deorao v. R*, A 1946 N 321] and this view was agreed to by the Supreme Court [*Tara Singh v. S*, 1951 SCR 729 : A 1951 SC 441], but distinguishing this case the same court held that where there is no need to resort to s 145, the deposition can be used even if the formalities in s 145 are not observed, *eg*, when the witness admitted in examination-in-chief his previous statement, but gave a different version in cross-examination [*Bhagwan v. S*, 1952 SCR 812 : A 1952 SC 214].

"For all purposes" in s 288 mean that the previous statement can be treated as substantive evidence even as the basis of finding a verdict and not only for purposes of corroboration or contradiction [*Abdul Gani v. R*, 53 C 181; *Fakira v. R*, 64 IA 183; 41 CWN 741: A 1937 PC 119; *Bhagwan v. S, sup*]. "Subject to the provisions of the Indian Evidence Act" mean that the evidence can be used so long as it is relevant and admissible evidence within the Evidence Act [see *R v. Jehal*, 3 P 781; *R v. Tafiz*, A 1930 C 228; *Amir Zaman v. R*, 6 L 199]; see further Sarkar's Cr P Code 3rd Ed, notes under s 288 and also notes to s 157, *post*: "*Deposition before committing magistrate*".

Police Diaries. [S 172 Cr P Code].—Diary of proceedings in police investigation is privileged. But if it is used by the police officer who made it to refresh his memory or by the court for contradicting such police officer, the provisions of s 161 or s 145 shall apply [s 172 (2) Cr P Code]. Under s 172 police diary is to contain "proceedings" of the police officer. It does not provide for the recording of statements of witnesses. Any statements of witnesses recorded, in whatever form, are recorded under s 161 Cr P Code and they cannot be protected from the demand for inspection or copy by accused for use under ss 145 and 159 Evidence Act entering them in police diary [*Sheru Sha v. R*, 20 C 642; *Bhikao Khan v. R*, 16 C 610; *Md Ali v. R*, 16 C 612 note; *Sadhu Skh v. R*, 32 CWN 280; *Sulaiman v. R*, 6 R 672 : A 1929 R 87; *Nga Lun v. R*, 13 R 570 FB]. The case diary can be used by the Police Officer to referesh his memory [*Gurcharan Singh v. State*, 1985 Cri LJ NOC 56 : ILR (1984) 2 Delhi 627 (Del) (DB)]. S 173 (*4*) as amended by Act 26 of 1955 now makes it obligatory on the police to supply to the accused a free copy of statements of witness examined by them whom they propose to examine at the trial. The entries of case diary can only be used for contradicting the prosecution witness. They cannot be relied upon by the prosecution as substantive evidence. Therefore, if the entries of the case diary are not put to a witness whose statement is sought to be contradicted, then those entries of the case diary cannot be relied upon by the prosecution against the accused. [*Bandhu v. State of U P*, 1997 Cri LJ 3010, 3014 (All)].

S 172 Cr P Code does not deal with the recording of any statement by witnesses. What is intended to be recorded is what the sub-inspector did—the place where he went, the people he visited, what he saw &c. No statement can be recorded under s 172 which would be a privileged one [*Mafizuddi v. R*, 31 CWN 940: A 1927 C 644; see also notes under s 160 *post*].

The special diary is absolutely privileged. The accused is not entitled to see it for any purpose unless it has been used by the police officer who made it to refresh his memory (v s 161) or, by the Court for the purpose of contradicting him (v s 145). It cannot be used to contradict any witness other than the police officer who made it. S 145 of the Evidence Act does not either control or extend the provisions of s 172 of the Cr P Code. The power of the Criminal Court to use the special diary is not

limited to the use of it for enabling the police officer who made it to refresh his memory or for the purpose of contradicting him. The court may also use the diary not as evidence of any date, fact or statement referred to in it, but as containing indications of sources and lines of enquiry and as suggesting the names of persons whose evidence may be material for the purpose of doing justice between the Crown and the accused. If the diary is used, the accused is entitled to see the particular entry which has been referred to for either of the above purposes and so much of the diary as in the opinion of the court is necessary in that particular matter to the full understanding of the particular entry so used, and no more [*R v. Mannu*, 19 A 390 FB : 17 AWN 174; *R v. Nga Lun*, 13 R 570 FB; *Deolal v. R*, A 1933, P 440; *Ahmed v. R*, A 1944 C 243; *Dadan Gazi v. R*, 33 C 1023: 10 CWN 890; *R v. Dharam*, A 1933 L 498]. *Mannu's* case was approved by the Privy Council and it was held that diaries may be used not as evidence in a case, but to aid the court in such enquiry or trial. It was observed that "the judges went on to test that testimony still further by reading the earlier statements of these witnesses made to the police and entered in the police diary. In other words they treated what was thus entered as evidence which would be used at all events for the purpose of discrediting these witnesses. In their Lordships' opinion this was plainly wrong. It was inconsistent with the provisions of s 172 of the Criminal P Code" [*Dal Singh v. R*, 44 IA 137 : A 1917 PC 25 : 44 C 876 : 21 CWN 818].

The police diary cannot be used by any court as a substantive evidence but is intended to be used only for the purpose of assisting the court in the appreciation of the evidence and to clear up any doubtful point. The Code further permits the court to use the diary for the limited purpose of contradicting the police officer and not for the purpose of corroborating him [*Acchaibat v. R*, 2 PLT 223 : 61 IC 230; *Ram Charita v. R*, 3 Pat LJ 568; 45 IC 272; see *Nawab v. R*, 76 IC 824; *Rajaram v. R*, 99 IC 342; *R v. Salik*, A 1937 O 201; see also notes to s 157 *post*].

Before the court uses the police diary for contradicting the police officer, it must comply with s 145 and call the witness's attention to the relevant parts [*R v. Mannu*, *sup*; *Dharam v. R*, 34 Cri LJ 464; *Municipal Committee v. Mukand*, A 1926 L 365]. The right procedure when a prosecution witness is contradicting himself, is to ask the judge to look into the diary and decide whether the accused should not have a copy of the statement. If such copy is granted, the witness's attention must be called to the same, before the investigating officer is called to prove the record made by him [*Kashiram v. R*, A 1928 A 280: 26 ALJ 139 (*Bal Gangadhar Tilak v. Srinivasa*, 39 B 441 PC refd to), see *Yusuf Mia v. R*, A 1938 P 579].

It is true that an accused is not entitled to call for the police diaries unless a police officer uses them to refresh his memory (see s 160 *post*) or the court uses them for contradicting a witness. But it is not open to a witness to decide for himself whether or not he should disclose a material fact which might turn the scale in deciding whether any accused was guilty or innocent, when he is in a position to clear up a point by reference to the diary. If he suffers from a lapse of memory he may be compelled by the court to refresh his memory with reference to the writing [*Fatnaya v. R*, 1942 Lah 470 : A 1942 L 89].

It is only what is written in the police diaries that can be used under s 145 to contradict the witness, and what the police officer stated that a witness said or did not say, is inadmissible. The way to prove those portions of the written statement of a witness which have been specially put to him in order to contradict him is for the accused to mark the passage or passages in the copy from the police diaries given to him and then to ask the writer of the statement to say that it is a true copy [*Dharam v.*

R, A 1928 L 507 : 108 IC 162]. A sessions judge cannot rely on police proceedings or put the same to the jury, without examining police officers as witnesses, so as to explain such proceedings. The police diaries cannot be placed before the jury; as provided by s 172 Cr P Code, they are useful, not as evidence, but to aid a court in the trial, so as to enable it to make a thorough enquiry on all material points and to elicit, in the examination of witnesses, and specially of police witnesses, the real facts of the case [*R v. Jadab Das*, 4 CWN 129].

As to police diaries, see further Sarkar's Cr P Code, notes under s 172 and also s 160 *post*.

Impeaching Credit By Statements Made to the Police and Recorded Under S 162 Cr P Code.—S 161 Cr P Code empowers the police to examine witnesses in the course of investigation and to record their statements if they desire to do so. S 162 prescribes the mode in which the statements of witnesses recorded by the police may be used at the trial. Under s 207 it is the statutory duty of the magistrate to furnish the accused among other things free copies of statements recorded under s 161 of persons whom the prosecution proposes to examine as witnesses at the trial. S 162 Cr P Code lays down that when any witness who was examined by the police is called for the prosecution at an inquiry or trial in respect of any offence under investigation, his previous statement or record thereof shall not be used for any purpose except (1) the contradiction of such witness by the accused under s 145 Evidence Act; (2) the contradiction of such witness also by the prosecution but with the leave of the court and (3) the re-examination of the witness if necessary.

S 162 absolutely bars the use of statements of witnesses before the police except for the limited purpose of contradiction of prosecution witnesses as stated above. They cannot be used for corroboration of prosecution witnesses or for contradiction of defence witnesses (*Sat Paul v. Delhi Admn.*, A 1976 SC 294; *R v. Vithu*, A 1924 B 510; *Bahadur v. R*, 7 L 264; *R v. Ibrahim*, A 1928 L 17; *Madari v. R*, 54 C 307; *In re Packiriswami*, A 1942 M 288; *Saibanha, In re*, A 1966 Mys 248] or for corroboration of defence witnesses [*R v. Najibuddin*, A 1933 P 589]. The statement cannot be used for corroboration of a prosecution or a defence witness or even a court witness. Nor can it be used for contradicting a defence or a court witness [*Tahsildar v. S*, A 1959 SC 1012: 1959 supp 2 SCR 875; *Laxman v. S*, A 1968 SC 1390]. When a witness whose statement was recorded by the police is called as a defence witness, he cannot be corroborated by the former statement, nor can he be contradicted by the police by that statement [*R v. Sheo Shankar*, A 1953 A 652]. The defence cannot also use it for corroboration when the person is examined as a court witness [*Bhupal v. R*, 44 CWN 451]. Where a prosecution witness is not allowed to be cross-examined on a material point with reference to his earlier statement made before the police his evidence cannot be accepted as corroborating the evidence of other witness [*Badri v. S*, A 1976 SC 500]. See *Muthu Naicker v. S*, A 1978 SC 1647 for proper manner of using police statement under s 162 in cross-examination. See also Sarkar's Cr P Code, 4th Ed notes under s 162. Statements of witnesses recorded by a police officer under s 162 Cr P Code can be used in a civil proceeding under s 145 to contradict them [*Suryarao v. Janakamma*, A 1964 AP 198].

Statement recorded by the police in connection with another case can be used for cross-examining prosecution witness concerned [*Sundran v. State*, 1994 Cri LJ 464, 466 (Ker)]. Statement made to the police cannot be used for corroboration of the evidence of a witness in court. [*M. Srinivasulu Reddy v. State*, 1992 (1) Crimes 1130 (AP)]. Statement made to the police by a witness is not admissible in evidence. Such a statement can be used only for the purpose of contradicting the witness. [*Satish*

Kumar v. State, 1996 Cri LJ 265, (Del)]. Statement made to the I.O. while conducting inquest can only be utilised for contradicting the witness in the manner provided by section 145. [*Babu Singh v. State*, 1996 Cri LJ 2503, 2505 (P&H)]. Statement made to the police by a witness can be used only to contradict him [*Satish Kumar v. State*, 1996 Cri LJ 265, 268 (Del)].

The words "statement made by *any person*" (in s 162 Cr P Code) include person accused of the offence under investigation and not merely prosecution witnesses [*Pakala Narayana v. R*, 43 CWN 473: A 1939 PC 47] "*Whether* S 157 *is controlled by S 162 Cr P Code?*".

Statement before investigating officer can be used for contradiction but only after strict compliance with s 145, *ie* by drawing attention to the parts intended for contradiction *Gopichand v. R*, A 1930 L 149: *Narayana v. R*, 1932 MWN 801; *Mohanlal Gangaram Gehori v. State of Maharashtra*, A 1982 SC 839, 842 : 1982 Cri LJ 630 (2)]. Sec. 6 of the Commissions of Enquiry Act does not inhibit use of the statement made by a witness before a commission in a subsequent civil, criminal or other proceeding for the purpose of contradicting the witness. The use of the statement for corroboration is not visualised by sec. 145 [*The State of Assam v. Suprabhat Bhadra*, 1982 Cri LJ 1672, 1974 (Gau)]. The question whether the witness had told the police that he informed anybody at the place of occurrence as to his having seen the accused, escaping with the gun, is not a mere omission but a contradiction [*State of Kerala v. Thomas Chrian*, 1982 Cri LJ 2303, 2311 : ILR (1982) 2 Ker 752 (Ker); *Natarajan Narayana Kurup v. The State*, 1982 Cri LJ NOC 89 (Ker); *Osman Gani v. State of Assam*, 1982 Cri LJ NOC 169 (Gau); *Punya Prasad Sankota v. Balvadra Dahal*, 1985 Cri LJ 159, 161 : (1984) 3 Crimes 304 (Sikkim); *Ratha Jena v. State of Orissa*, (1986) Cri LJ 490, 492 (Orissa) : (1985) 60 Cut LT 497 : (1986) 1 Crimes 299; *Prakash Sen v. State*, 1988 Cri LJ 1275, 1279 : (1988) 1 Cal LT (HC) 360 (DB); *Ganakanta Das v. State of Assam*, 1990 Cri LJ 219, 225 (Gau); *Dharamvir v. State of U.P.*, 1990 Cri LJ 839, 845 (All) : 1989 All LJ 454]. (See *ante* "*Mode of contradicting previous statements in writing*"). The witness must be given an opportunity or reconciling his statement. If the cross-examiner does not do so, the prosecution may in re-examination give that opportunity or the court itself should do so [*Iqbal v. R*, 1943 A 49 : 1942 ALJ 637]. Only those portions of statements of witnesses before the police as have been actually used under s 162 for purpose of contradiction are parts of the record and evidence in a case. The other parts of the statement cannot be relied upon by the prosecution or defence [*Sabhai v. R*, A 1930 L 449: 121 IC 66]. The Court should faithfully record the contradictions brought out in the evidence of the witnesses and there is no question of recording the gist of the statement which will create more confusion than serving the purpose for which clear provisions have been made [*Malik Abdul Salem v. State of Orissa*, 1985 Cri LJ 1871, 1875 (Ori) (DB)].

As to the procedure for contradiction, it was held by a majority of the Supreme Court that the proviso to s 162 Cr PC only enables the accused to use the statement of a witness recorded by the police to contradict him in the manner provided in the second part of s 145. The statement cannot be used for the purpose of cross-examining a witness within the meaning of the first part of s 145 to establish a contradiction between one statement and another [*Tahsildar v. S*, A 1959 SC 1012]. See Sarkar's Cr P Code 4th Ed notes under s 162.

Statements made by prosecution witnesses before investigating police officer being the earliest statement of the occurrence are valuable material for testing their veracity when they are examined in court. But if the police record becomes suspect or unreliable because it was deliberately perfunctory or dishonest, it loses much of its value [*Baladin v. S*, A 1956 SC 181].

A statement to an investigating officer may be said to be "reduced to writing" even when the statement has not been recorded in full but the gist has been noted [*R v. Najibuddin*, A 1933 P 589]. It is immaterial whether the statement is recorded in the actual words of the witness. It is sufficient if it is written in the form of a memorandum [*Mafizuddi v. R*, 31 CWN 940; *R v. Ajit*, A 1945 C 159]. It is very undersirable to record the statement of one witness and then to note that he is corroborated by others without recording their statements separately [*Ramsewak v. R*, A 1945 P 109] and it is with a view to stop this bad practice that sub-s (3) of s 161 Cr P Code was added by Act 2 of 1945. There must be a separate record for each witness examined and not a boiled or condensed version of all witnesses in a lump so that defence may use the statement of each witness for purpose of contradiction [*Bejoy v. R*, 54 CWN 447; *Shyama v. R*, A 1949 N 260; *Venkataratnam v. S*, 1951, 1 MLJ 430].

S 162 is no bar to the admissibility of a statement before the investigating police officer when it is evidence of *res gestae* [*Jogesh v. Surendra*, 35 CWN 838 (*ante* s 6 p 58)]. Statements made by third party to the police in the course of their investigation are admissible to contradict under s 145, provided the person who made the statement is called as a witness [*R v. Azimaddy*, 44 CLJ 253: A 1927 C 17; *Inchan v. R*, A 1943 C 647]. Accused are entitled to get copies of statements recorded under R 254(b) Police Regulations for cross-examination. Statements made to police during inquest under s 174 Cr P Code fall within s 162 [*Abdul Majid v. R*, A 1950 C 165; *Hansraj v. R*, 16 L 345]. It is questionable how far inquest report is admissible except under s 145 [*Pandurang v. S*, A 1955 SC 216: 1955 SCR 1083].

S 145 is controlled by s 162 Cr P Code. Consequently statements of court witnesses cannot be used by the prosecution under s 162 to contradict them, even though they were cited as prosecution witnesses [*In re Vajrala*, A 1960 AP 76]. The proviso to s 162 does not apply in the case of a witness summoned by the court at the suggestion of the defence [*Gurditta v. R*, 104 IC 4444: A 1927 L 713].

Where a witness made contradictory statements which were recorded under S.162 Cr PC, it was held that the earlier statement could not be discarded unless the subsequent one was proved to be true [*K K Sharma v. State of Rajasthan*, (1998) Cri LJ 2609 (Raj)]. The court **followed** the Supreme Court decision in *Tahsildar v. State of UP*, A 1959 SC 1012 : 1959 Cri LJ 1231.

As to contradiction of prosecution witnesses by their former statements to the police, see Sarkar's Cr P Code, 4th Ed p 225 *et seq*. As to contradiction by omission in the statement to the police, see Sarkar's Cr P Code, 4th Ed p 234. As to the consequence of unavailability of the statements of witness for contradiction on account of destruction or refusal to give copy to the accused or for recording statements in a boiled form, see Sarkar's Cr P Code, *ibid* p 231 *et seq*.

—Refreshing Memory.—On the report of a sub-inspector to the district magistrate that a person was about to take bribe he deputed a magistrate who witnessed the transaction and made over his report to the district magistrate to the investigating officer. The use of his report by the magistrate during his examination for refreshing his memory is not barred by s 162 [*Shyamlal v. R*, A 1949 A 483]. As to refreshing memory, see s 159.

Same: [Use by Court].—The court cannot *suo motu* make use of statements to police not proved and ask question with reference to them which are inconsistent with the witness's present testimony [*Rahizaddi v. R*, 35 CWN 317; *R v. Ahmad*, A 1928 L 114; *R v. Girdhari*, A 1940 P 605; *R v. Ram Rang*, A 1928 L 820, see however *R v. Lal Mia*, 47 CWN 336: A 1943 C 521: 1943, 1 Cal 543].

First Information Report—does not come within ss 161 or 162 Cr P Code.—First Information Report is not substantive evidence and can only be used to corroborate the maker under s 157 or to contradict him under s 145. It cannot be used against the maker if he becomes an accused, nor to corroborate or contradict other witnesses [*Nisar Ali v. S*, 1957 SCR 657: A 1957 SC 366; *Aghnoo v. S*, A 1966 SC 119; *Hasib v. S*, A 1972 SC 283; *Nankhu v. S*, A 1973 SC 491; *Shanker v. S*, A 1975 SC 757; see *Md Ibrahim v. R*, A 1929 N 43; *Autar v. R*, 17 CWN 1213; *Gaman v. R*, A 1928 L 913; *R v. Azimaddy*, 31 CWN 410; *R v. Ibrahim*, 8 L 605; *Maganlal v. R*, A 1946 N 173; *Khan v. S*, A 1962 C 641; *Baghirathi v. S*, A 1965 Or 99]. But for the purpose of contradiction it is essential that the attention of the witness should be pointedly drawn to that portion of the contradictory statement which is intended to be used against him, so that he may have an opportunity to furnish a suitable explanation. The requirement is not satisfied by asking whether he made some other statement to the police. His attention must be expressly drawn to the relevant passage in his previous statement [*R v. Rahenuddin*, 1943, 2 Cal 38: A 1944 C 323; *Mohna v. R*, A 1925 L 328: 68 IC 406; *R v. Ajit*, A 1945 C 159; *S v. Hiralal*, A 1964 G 261; *Mehr Vajsi v. S*, A 1965 G 143]. FIR cannot be used for contradicting witnesses other than the informant [*R v. Rahenuddin, ante*; *Abdui Latif v. R*, A 1941 C 533; *Rangilal v. State of M.P.*, 1991 Cri LJ 916, 920 (All)]. Before use, the court should be clear about the relevancy of the first information report [*Ram Naresh v. R*, A 1939 A 242]. It would be better that omissions sought to be elicited in the statements of witness with reference to F.I.R. and case diary statement are put separately to the witness and putting questions about omissions with reference to two documents at the same place could lead to confusion [*Ghanshyam v. State of M.P.*, 1990 Cri LJ 1017, 1019 (MP)]. As to First Information, see further notes under s 157 *post*.

"In the Course of an Investigation".—As to the meaning of these words in s 162 Cr P Code, see this heading in the notes to s 157 *post*.

"If Duly Proved".—These words in s 162 Cr P Code clearly show that the record of the statement of witness cannot be admitted in evidence straightway, but they must be duly proved for purpose of contradiction either by eliciting admission from the witness during cross-examination, or through the cross-examination of the investigating officer or by calling, or in any other way, *eg* calling some one who was present when the record was made [*R v. Ajit*, A 1945 C 159; *R v. Osman*, A 1928 B 23: *Madari v. R*, 54 C 307; *Vithu Lala v. R*, A 1924 B 510]. See further Sarkar's Cr P Code 4th Ed notes under s 162.

Statement Under S 164 Cr P Code—cannot be used as substantive evidence. The statement can be used only to cross-examine the witness who made it and to discredit the evidence given by him in court [*Mamand v. R*, A 1946 PC 45: 50 CWN 353; *Brij Bhusan v. R*, A 1946 PC 38: 73 IA 1: 50 CWN 348; *Bhuboni v. R*, 63 CWN 609: A 1949 PC 257: 76 IA 147]. It may be used to contradict a statement made in court in the manner provided by s 145 [*Manik v. R*, A 1942 C 36; *Bisipati v. S*, A 1969 Or 289]. Statements made by witnesses at identification parades can be used for contradicting them [*Kanai v. S*, A 1950 C 413; *Abdul Aziz v. R*, A 1950 L 167].

When the evidence of a witness before the sessions court conflicts with his evidence before the committing magistrate put in under s 288 Cr P Code, a statement by him recorded by a magistrate under s 164 Cr P Code is admissible in evidence to corroborate his evidence before the committing magistrate. Such a statement can be put in by the prosecution under s 145 without declaring the witness

---

2. Commitment being abolished s 288 has been omitted in Cr P Code, 1973.

hostile and without cross-examining him. A statement recorded under s 164 Cr P Code cannot however, be put before the jury in its entirety under s 145 or any other provision of law when there is no evidence put in under s 288 Cr P Code which is susceptible of corroboration [*Manarali v. R*, 37 CWN 1066].

Previous Statement Recorded Without Jurisdiction.—S 145 does not lay down that the writing to be used for cross-examination must be by a person having jurisdiction to reduce the statement in writing [*Ram Kishan v. R*, A 1946 P 82: 24 P 623]. A statement by an informant to a person not legally competent to investigate the fact within s 157 being a former statement can be used for contradiction under s 145 and for impeaching his credit under s 155 [*S v. Pareswar*, A 1968 Or 20]. When a tribunal is held not to be competent to try a case, s 80 does not apply to the deposition of witnesses recorded by it. But this does not mean that there are no other means of proving the statements for purpose of s 145 [*Anwar Ali v. S*, A 1955 C 533].

Presumption If Witness is Not Confronted With Previous Statement to Police.—It may be assumed that a witness's statement to the police at the previous enquiry was in accord with the evidence he gave at the trial, if he is in no way confronted with it as being in any way in conflict with his evidence as then given [*Bhogilal v. Royal Ins Co*, 6 R 142: 32 CWN 593: 30 Bom LR 818: A 1928 PC 54].

Other Cases of Previous Contradictory Written Statements.—A document executed by plaintiff's witness can be produced by the defendant for contradiction even though the plaintiff was not a party to such document [*Das Mal v. Sunder*, A 1937 L 408]. When a person got his account books written up by a clerk on information furnished by him either orally or from loose memoranda, such entries were held inadmissible under s 145 as previous statements made by the clerk in writing to contradict him, as the statements were not really made by the clerk but by his employer, under whose instructions the clerk had written them [*Minchershaw Bezonji v. N D S & Co*, 4 B 576].

Former statements made by a witness, in a different case, incriminating the accused in his absence, can only be used for the purpose of contradicting the statements now made by them, and they cannot be treated as independent evidence of the guilt or innocence of the accused for the simple reason that they were not made in the presence of the accused [*Alimuddin v. R*, 23 C 361].

Depositions of witnesses in former cases, who were also examined in the case under trial, were held to be no evidence, except when put in to contradict them [*R v. Nobokristo*, 8 WR Cr 87]. The former statements of a witness can only be used in cross-examination, under s 145 for the purpose of contradicting the witness, but they cannot be used to corroborate the testimony of a witness [*Oriental Govt L A Co v. Narasimha*, 25 M 183] or, as evidence against an accused [*Rakkia v. R*, 157 PLR 1911 : 10 IC 119]. The statement of a witness before the magistrate trying the case cannot be used to discredit the evidence which he gave later, unless his previous statement has been brought into evidence in cross-examination [*Sawan v. R*, 90 IC 657: 26 PLR 811].

In a trial for giving false evidence, the record of a previous deposition given by the accused is relevant and necessary evidence. Such record is not inadmissible under s 145, which has no application to the case, nor because the actual vernacular words were not taken down [*Govt of Bengal v. Gannoo Mahto*, 9 CLJ 378]. Evidence taken in the summary case may be admissible upon the conditions and for the purposes described in ss 33, 145 [*Nga Seik v. Nag Pu*, UBR (1913) 3rd Qr 181: 22 IC 676]. A statement made by a witness before a coroner is admissible at the trial of the accused

for impugning the credit of the witness even though the accused had no opportunity to cross-examine him [*R v. Raghoo*, 97 IC 37 : A 1926 B 404].

As to whether statements of witnesses submitted to pleaders showing what they do or do not know, come within section, see *Jordon v. R*, 5 Bur LT 38: 14 IC 763. A document bears the endorsement of the counsel to the effect 'formal proof dispensed with'. This is a complete endorsement and there is no necessity of formal proof of either the signature of the contents of that document. [*Daya Shankar v. Smt. Bachi*, A 1982 All 376, 383]. A witness implicated the accused in the chief-examination. During the cross-examination he stated that a person like the accused assaulted him and as he was not in a proper state of mind when he was stabbed, he was not in a position to identify the assailant. This evidence during the cross-examination cannot be brushed aside. [*Gunanidhi Sundara v. State of Orissa*, 1984 Cri LJ 1215, 1218 : (1984) 1 Crimes 948 (Orissa)]. The statement of a person recorded by a Commissioner does not cease to be his statement merely because the court which ordered the Commissioner to record the statement had no jurisdiction over the subject matter of the suit. [*State of Punjab v. Vishwajit Singh*, A 1987 P&H 126, 132]. A photographic picture cannot be relied upon as proof in itself of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportions of such objects except by evidence of personal knowledge or scientific experience to demonstrate accurately the facts sought to be established. [*State of Gujarat v. Bharat Alias Bhupendra*, 1991 Cri LJ 978, 980 (Guj)].

When the Writing Has Been Lost or Destroyed.—The Evidence Act says nothing as to whether a copy can be used instead of original where the document has been lost or destroyed or for any other reasons not forthcoming. The following is the English procedure. If it should appear from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been lost or destroyed, the provision that the judge may require its production, will, of course, become inoperative. It is apprehended that in such cases the witness might be cross-examined as to the contents of the paper notwithstanding its non-production; and that if it were material to the issue, he might be afterwards contradicted by secondary evidence. Still the question remains, as to whether the cross-examining party might first interpose evidence out of his turn, to prove the loss or destruction of the document or to show that it is in the hands of the opponent, that he had notice to produce it, and that he refused to do so; and might then cross-examine the witness as to its contents. [Tay s 1447; Ros N P 180; see Hals 3rd Ed Vol 15 para 808 quoted *ante* under heading "*Without such writing being shown to him*".

S. 146. Questions lawful in cross-examination.—When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

[1](1) to test his [2][veracity],

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might

---

1. In Ceylon these clauses have been designated (*a*), (*b*), (*c*) respectively.
2. In Ceylon "accuracy, veracity, or credibility" substituted for "veracity".

expose or tend directly or indirectly to expose him to a penalty or forfeiture.

**[Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character.].*

SYNOPSIS

COMMENTARY

Principle and Scope.—This section gives the cross-examiner a wider power of interrogation than is allowed by s 138 para 2, and says that *in addition* to the questions that may be asked under the latter section, the witness may be further asked the questions mentioned in this section. In s 138 it has been said that the cross-examination must relate to relevant facts. The two sections should be read together. But this section relaxes the strict enforcement of that rule and permits the putting of questions relating to the trustworthiness of witnesses. A witness, therefore, under the section may be cross-examined not only as to the facts of the case but also as to matter not material to the issue, with a view to impugn his credibility and thus shake his whole testimony.

The questions must be relevant for the purpose of impeaching credit, though not to the issue. However irrelevant it might be to the matter in issue, the question may be asked in cross-examination if the answer to it tends to affect the witness's credit. But even in cross-examination under the garb of shaking credit, grossly irrelevant or vexatious questions will not be allowed if they do not really impeach the credit of a witness or do not challenge the evidence given in examination-in-cheif relating to the matter under enquiry. Cf RSC Or 36 r 38 which says: "The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into the cause or matter." Even in regard to questions whose relevancy consists only in affecting the credit, the section is hedged in by the provisions of s 148 which gives the court a discretion to decide whether or not the witness shall answer such questions. Section 146 must therefore be read along with s 148 which lays down a rule of guidance for the exercise of the court's discretion.

If the question asked is directly relevant, *ie* if it relates to matters which are the points in issue, the witness is not protected from answering even if the answer tends to criminate him [see ss 147 and 132]. Under the English law, however, a witness is not bound to answer questions which tend to criminate him (*ante* s 132). But if it is relevant only as tending to impeach the witness's credit, it lies with the judge to decide whether the witness shall be compelled to answer it or not (see s 148). But if the witness does answer such question, he cannot as a rule be contradicted by other evidence except in the two cases provided for by the exceptions to s 153. Thus, when the prosecutrix in a case of rape is cross-examined as to her alleged immoral acts with persons other than the accused and she denies them, she cannot be contradicted by other witnesses [*R v. Holmes*, LR 1 CCR 334 *post*], though evidence of her general immoral character may be given under s 155(4).

---

* Ins. by the Indian Evidence (Amendment) Act, 2002 (4 of 2003), s. 2, (w.e.f. 31-12-200-

As a general rule, if the questions relate to *relevant* facts, the witness must answer whether or not his answer will criminate him or tend directly or indirectly to expose him to penalty or forfeiture unless protected by public policy (ss 123, 124, 125) or privilege (ss 126, 129); and the witness might be contradicted as to such fact, by the admission of evidence. But if the questions relate to facts relevant only as tending to impeach the witness's credit, it is in the discretion of the court to compel him to answer or not (s 148) and he will not be generally allowed to be contradicted except in the cases provided in s 153. Ss 132, 146, 147, 148 embrace the whole range of questions, which can properly be addressed to a witness [*R v. Gopal Dass*, 3 M 271, 278] and they should be read together. Cross-examination is not the only mode by which the credit of a witness may be impeached. The credit of a witness may also be impeached by independent evidence (see s 155). Anything which is permissible to be put under ss 146-153 cannot be punishable under s 500 I P Code [*Rebecca v. R*, A 1947 C 278].

Same: [Testing Veracity and Impeaching Credit].—Under s 146(*1*) questions may be put to a witness in cross-examination to test his veracity and, under s 153, Exception 2 a witness may be contradicted when he denies any question tending to impeach his impartiality [*Rama Reddy v. V V Giri*, A 1971 SC 1162].

The language of s 146 coupled with that of ss 138 and 147 looks as if the words "additional" facts spoken of in s 146 were considered as not relevant. But of course this could not be the case. It would be an absurd waste of time to enquire into facts which were irrelevant. As is indicated in s 148, these facts are relevant as tending to show how far the witness is trustworthy; and the only object of classing these facts apart from other relevant facts is in order that special rules may be laid down as to whether they may be contradicted and when a witness may be compelled to answer them [Markby p 107].

Cross-examination to credit is necessarily irrelevant to any issue in the action; its relevancy consists in being addressed to the credit of the witness in the box so as to show that his evidence for and against the relevant issue is untrustworthy. It is most relevant in a case where everything depends on the judge's belief or disbelief in the witness's story given in oral evidence [*Bombay C M Co v. Motilal*, 42 IA 110: 19 CWN 617: 17 Bom LR 455: 39 B 386: A 1915 PC 1. See also *Panda v. Abdul Kader*, 5 NLR 138: 65 IC 693]. One *J* instituted proceedings against one *S* under s 133 Cr P Code for removal of a fencing on a public road and drain. Pleader for complainant asked *S*, a witness for the opposite party who was vice-chairman of a municipality—"Who supplied the bricks for the drain? and the witness replied, "I supplied". Thereupon the court and the opposite party's muktear said: "What is the relevancy of this question?" The pleader said—"I am going to prove that he is an unscrupulous vice-chairman". *S* then brought a case against the pleader for defamation—*Held*, that the question came within s 146 [*Jyotish v. Haridas*, 24 CWN 23*n*]. The veracity of a witness cannot be tested and established by the judge's notes [*R v. Balach Khan*, 4 SLR 38: 7 IC 601].

The general rule is that whenever it is intended to impeach the witness's credit, his attention must first be called to the discrediting facts so that he may have an opportunity of explaining them. (See s 145). In *Browne v. Dunn*, 1893, 6. The Reports, 67, 70 LORD HERSCHELL, thus stated the rule as to impeaching the credit of a witness:—

> "I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by

some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses."

In the same case LORD HALSBURY observed at p 76:

"To my mind nothing would be more absolutely unjust than not to cross-examine witness upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation and an opportunity very often to defend their own character." (There observations have been relied on and quoted in *Carapeit v. Derderian*, A 1961 C 359).

[*Ref Tay ss 1426-27; 1445; 1459-67; Phip 8th Ed pp 535-39; Hals 3rd Ed Vol 15 para 805; Vol 10 paras 827-831; Powell 9th Ed 535-39*].

—Tape Recorded Statement—is admissible under s 146(*1*), s 153, Exception 2 and s 153(*2*) and also for corroboration [*Rama Reddy v. V V Giri*, A 1971 SC 1162].

Credit.—The credibility of a witness depends upon (*1*) his knowledge of the facts he testifies; (*2*) his disinterestedness; (*3*) his integrity; (*4*) his veracity; and (*5*) his being bound to speak the truth by oath or affirmation. Proportioned to these is the degree of credit his testimony deserves from the court and jury [Arch Cr Pl 24th Ed 469-70]. A witness is not discredited merely because the cross-examiner asked some questions impeaching his character, when the answers are satisfactory [*Ragho v. R*, A 1929 P 180: 118 IC 233].

Modes of Impeaching Credit.—The credit of a witness may be impeached in various modes:—

(*1*) by cross-examination as to his knowledge of the facts deposed to, opportunities of observation, powers of memory and perception, disinterestedness &c (s 138); his character (s 140); his veracity, position in life, injury to character by criminating questions (ss 146, 147, 132); his errors, omissions, antecedents, mode of life, &c (ss 146, 148);

(*2*) by confronting him with his previous inconsistent statements, written (s 145) or oral [s 155 cl (*3*)]. As to this see *infra* (*4*);

(*3*) by evidence of persons showing that the witness bears a general reputation for untruthfulness [s 155 cl (*1*)], or by proof that the witness has been bribed, or has accepted the offer of a bribe [s 155 cl (*2*)];

(*4*) by calling witnesses or offering other evidence [*eg* under s 145 or s 155 cl (*3*)] to contradict the witness on all *relevant matters*, but not on irrelevant matters. When the questions put to a witness in cross-examination for discrediting him relate to facts directly relevant to the matters in issue, his answers may always be contradicted by any evidence [see *illus* (*c*) to s 153]. For under the fifth section, evidence may always be given of any facts relevant to the issue. This is really disproving his testimony on a fact material to the issue of offering counter evidence; but it is in a sense impeaching

his credit in an indirect manner. If the question in cross-examination is relevant only in so far as it affects the credit of a witness, but is otherwise *irrelevant*, the answer cannot be contradicted except in the case of (*a*) previous conviction, (*b*) bias [s 153 Exceptions 1, 2].

It should be remembered that when it is intended to suggest that the witness is not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation [*Brown v. Dunn*, 6 R 67 *sup*]; and this probably applies to all cases in which it is proposed to impeach the witness's credit [Phip 11th Ed p 649; Tay s 145]; see observations of PATTESON, J, in *Carpenter v. Wall*, *post* p 1341. Former contradictory or inconsistent statement of a witness can be used under s 146 to shake his credit or test his veracity [*Bhagwan v. S*, A 1952 SC 214]. With regard to previous inconsistent statement, the law expressly requires that the witness's attention must first be drawn to such statements used for the purpose of contradiction [v ss 145 and 155 cl (*3*)]. There is nothing in Evidence Act to show that a document which is meant to contradict a witness or impeach his credit must come from proper or legitimate custody [*R v. Rajaram*, 146 IC 83: A 1934 N 35].

Character.—In ss 52, 53, 54 and 55, 'character' includes both general reputation and disposition [*ante* s 55], but what evidence of character may be given for testimonial impeachment? Evidence of reputation or disposition of a witness would serve little, if any, useful purpose for shaking his credit. What we are concerned with is the inference from character as to whether he is likely to tell the truth. Character, therefore, in questions affecting the credit of a witness ought necessarily to be character for *veracity*, [Cf s 155(*1*) where it is allowed to impeach credit by giving independent evidence of persons that the witness from their knowledge is unworthy of credit].

Wigmore says: "The first question is, What kind of character is relevant? Since the argument is to be against or for the probability of his now telling the truth upon the stand, it is obvious that the quality or tendency which will here aid in his quality or tendency as to truth-telling in general, *ie* his *veracity*, or, as more commonly and more loosely put, his *character for truth*. This must be, and is universally conceded to be, the immediate basis of inference. Character for truth is always and everywhere admissible" [Wig s 922]. But may not evidence of *bad moral character* impair a man's regard for truth? Should a man who is of lewd character or who possesses vicious moral principles be entitled to the same credit as a virtuous man? There is a body of opinion that evidence of moral character is helpful in determining the credibility of a man. But a different opinion is entertained by other judges and not without reason. "No one is entirely virtuous or entirely vicious.....A person therefore, whose general character is bad, may notwithstanding possess such a degree of veracity as to entitle him to credit upon oath; and whether he does so or not can only be ascertained by inquiry into his character for truth" [*per* BOYLE CJ, in *Noet v. Dickey*, 3 Bibb 269, cited Wig s 922].

The various aspects of the argument against the former view, is summarised by Wigmore:—(*1*) that, as a matter of human nature, a bad general disposition does *not* necessarily or commonly involve a lack of veracity; (2) that the estimate of an ordinary witness as to another's bad general character is apt to be formed loosely from uncertain data and to rest in large part on personal prejudice and on mere differences of opinion on points of belief or conduct; and

(*3*) that the incidental unpleasant feature of witness-box are largely increased when the way is opened to this broad and loose method of abusing those who are called as witnesses [Wig s 922]. Wigmore says that there is little doubt that the latter argument represents the better side and this may be unhesitatingly endorsed. Taylor has some weighty observations on the question [see ss 1459-62; *post* s. 148]. As to relevancy of present or prior character, see *post* s 148 "*Matters so remote in time*".

Bias. [Relationship, Expressions and Conduct].—Among the commoner sorts of circumstances are all those involving some *intimate family relationship* to one of the parties by blood or marriage or illicit intercourse, or some such relationship to a person *other than a party*, who is involved on one or the other side to the litigation, or is otherwise prejudiced for or against one of the parties. The relation of *employment* present or past, by one of the parties, is also usually relevant. [Wig s 949]. As to expressions and conduct as evidence of bias among the commonest sorts are the witness' expressions of a *desire to have the opponent defeated* in the present proceeding and of conduct indicating a partisan feeling either in the present or in other legal proceedings [Wig s 950]. As to contradiction to questions tending to impeach impartiality, see s 153, Excep 2 which and s 146(*1*) deal with different aspects although s 146(*3*) may have to be read with s 153 [*Rama Reddy v. V V Giri*, 1970, 2 SCC 340 : A 1971 SC 1162].

Abuse of Cross-Examination to Credit.—There is a general wail from persons who have to go to the witness-box that the privilege of cross-examination to credit is very frequently abused by counsel and that they are unnecessarily and wantonly disgraced by being asked numerous questions in regard to their family lives, private affairs, past errors, long forgotten improprieties of conduct and a thousand other things which can have no bearing whatsoever upon their veracity or the points in issue. Unfortunately, however, the complaint is not without foundation. True, the judge has the power to protect the witness and to disallow improper questions in the exercise of his discretion. But the mischief is done, the moment the cross-examiner throws out the offensive question and it is little consolation that the judge ultimately protects the witness from answering it. The discretion therefore really rests with the cross-examiner in the first instance. His good sense and sense of honour coupled with the respect for his profession, ought to dictate whether the question should in all conscience be asked. It has not infrequently been seen that even a witness who has been called to prove a minor fact not really disputed, or which is of very little importance, is not spared the humiliation. He is treated with a volley of questions regarding many transactions in his past life, or private affairs pregnant with suggestions of a sinister kind and very often without any foundation. A sort of almost cruel delight is felt in exposing a witness to such wanton attacks and the occasion is seized upon by the opponent in paying off old scores. The cross-examiner who allows himself to become a tool in the hands of an unscrupulous litigant fails miserably in his duty and inflicts an incalculable injury for which the witness cannot seek any redress.

No question attacking a witness's honour should be put, unless and until counsel by inquiry has satisfied that the damaging fact is well-founded, and this he ought to do before he comes into court [*In re a Vakil*, 47 A 729 FB; *Deepchand v. Sampathraj*, A 1970 Mys 34]. See in this connexion ss 149-152 which confer on the court a large discretion to prevent the abuse of the privilege of cross-examination to credit. It can forbid needlessly offensive questions and enquire whether the imputation conveyed is well founded.

Wellman writes.—It is to be regretted that this right of cross-examination as to credit is now-a-days generally abused almost in every country. The counsel not being able to get anything from the witness in his favour, or being unsuccessful in his attempt to throw any doubt on his trustworthiness, turns and takes recourse to the unfair practice of torturing him by interrogating him on subjects which are totally irrelevant, under the guise of cross-examination as to credit. Questions regarding improprieties of conduct, his family life, private affairs and a thousand other things are asked, which merely tend to degrade the witness personally, and which can have no bearing whatever upon his veracity. The sanctity of private life is torn as under with a zeal and vehemence which is altogether unjstifiable. Recourse is also taken to this reprehensible practice only for the purpose of satisfying his client's desire for revenge. To justify such questions they must at least tend to impeach his general character and his credibility as a witness. Such tactics to disgrace and humiliate the witness, as well as to prejudice him before the judge and jury may sometimes succeed. But often the contrary happens and a feeling of sympathy is invoked, by the merciless and wanton attack of the opposing counsel on an innocent man. Such counsel are sometimes called "forensic bullies." This practice has been the subject of much criticism in recent years. Lord Bramwell however was a supporter of this broad licence in cross-examination to credit, on the ground that "it is well for the sake of truth that there should be a wholesome dread of cross-examination." "Women who carry on illicit intercourse, and whose husbands die of poison, must not complain at having the veil that ordinarily screens a woman's life from public inquiry rudely torn aside." "None but the sore feel the probe." "A judge's sentence for a crime, however much repented of, is not the only punishment, there is the consequent loss of character in addition which should confront such a person whenever called to the witness stand." "It should not be understood to be a trivial matter but rather looked upon as a trying order." [Article in the 19th Century, Feb 1892, quoted in Wellman, pp 176-177].

LORD CHIEF JUSTICE COCKBURN took the opposite view of the question. He wrote:

> "I deeply deplore that members of the Bar so frequently unnecessarily put questions affecting the private life of witnesses, which are only justifiable when they challenge the credibility of a witness. I have watched closely the administration of justice in France, Germany, Holland, Belgium, Italy and a little in Spain, as well as in the United States, in Canada, and in Ireland, and in no place have I seen witnesses so badgered, brow-beaten, and in every way so brutally maltreated as in England. The way in which we treat our witnesses is a national disgrace and a serious obstacle, instead of aiding the ends of justice. In England the most honourable and conscientious men loathe the witness-box. Men and women of all ranks shrink with terror from subjecting themselves to the wanton insult and bullying misnamed cross-examination in our English courts. Watch the tremor that passes the frames of many persons as they enter the witness-box. I remember to have seen so distinguished a man as Sir Benjamin Brodie shiver as he entered the witness-box, I dare say his apprehension amounted to exquisite torture. Witnesses are just as necessary for the administration of justice as judge or jurymen, and are entitled to be treated with the same consideration, and their affairs and private lives ought to be held as sacred from the gaze of public, as those of the judges or the jurymen. I venture to think that it the duty of a judge to allow no question to be put to a witness, unless such as are clearly pertinent to the issue before the court, except where the credibility of the witness is deliberately challenged by counsel, and that the credibility of a wit-

ness should not be wantonly challenged on slight grounds" [Ir LT 1874, quoted in Wellman, p 178].

CHIEF BARON POLLOCK once presided at a case where a witness was asked about a conviction years gone by, though his (the witness's) honesty was not doubted. The BARON burst into tears at the answer of the witness [Wellman p 181].

An incident relating to the abuse of the right of cross-examination to credit is narrated in Walsh's Advocate (p 168). "A witness gave evidence of what he saw while sitting on a bridge. The defence counsel, whose method with the witness was merely to suggest that they were a kind of inferior being whose testimony was necessarily worthless, asked in cross-examination, 'What were you doing loafing on the bridge?' The witness who was a perfectly respectable groom and had been enjoying the morning sun by a peaceful brook during some portion of his daily rest, was considerably taken aback. After some hesitation, he looked his man hard in the face, and answered, 'Who are you calling a loafer?'. There was a distinct movement of sympathy in the jury-box, and the court naturally enough intervened with a request that the witness should be treated with civility."

SIR JAMES FITZJAMES STEPHEN says:

> "I shall not believe, unless and until it is so decided upon solemn agreement, that by the law of England a person who is called to prove a minor fact not really disputed, in a case of little importance, thereby exposes himself to having every transaction in his past life however private, inquired into by persons who may wish to serve the basest purposes of fraud or revenge by doing so. Suppose for instance, a medical man were to prove the fact that slight wound had been inflicted and been attended to by him would it be lawful under pretence of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs extending over many years and tending to expose transactions of the most delicate and secret kind, in which the fortune and character of other persons might be involved? If this is the law, it should be altered" [Steph Digest, pp 196, 197].

Whether the attack upon the credit of witness can be justified or not depends almost entirely upon the particular circumstances of the particular case. I remember losing a client because I absolutely refused to put to the conductor of a public carriage, who was called to speak to what he saw in a street accident, the fact that he was at that moment undergoing imprisonment for peculation from his employers. He was called by the employers, it was true, and it was suggested that he might, although he had left their employment for jail, have hopes of re-purchasing his employment by perjuring himself on their behalf. But this view seemed to me to be too far-fetched. He was present on the occasion. His evidence might or might not fit in with the rest of the story. If it did not, it went for very little; if it did, the fact that he was a convicted thief had really no bearing upon it. To put the question seemed to be a piece of superfluous brutality, and likely to do the man needless injury to no real purpose [Walsh's Advocate p 27].

As to questions which are proper or improper, see s 148 and the extracts from Taylor, *post*.

As to questions generally allowed in cross-examination, see *ante* notes to s 138 : *Latitude in cross-examination*". See also notes to ss 147, 148. As to questions which are proper or improper see ss 148, 149. As to cross-examination to credit, see further notes to ss 149-52.

S. 147. When witness to be compelled to answer.—If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

COMMENTARY

The word "*such*" in "if any such question", it is presumed, refers to the last clause of the preceding section (s 146), and not to the word "any" in the earlier part of that section. None but relevant questions can be asked in cross-examination (see s 138 para 2). But relevancy is of a two-fold character; it may be *directly* relevant in the bearing on, elucidating, or disproving, the very merits of the points in issue. In such a case, the witness is not protected from answering, notwithstanding the answer may criminate him. For s 132 is made applicable to this case. There is another kind of relevancy which is *collateral* to the issue. Such is the character of the witness, which is always relevant; because if he is dishonest, no faith can be put in the story he utters. Where questions are put to a witness, not for the purpose of proving or disproving the point in issue, but exclusively and merely to show what is the character of the witness—the court is to decide whether the question is to be answered or not [Nort p 328].

When the question relates to a matter relevant to the suit proceeding, s 132 has been made applicable by this section, *ie* in such a case the witness shall not be excused from answering it on the ground that the answer will criminate him. The judge has no option in the matter (*ante* s 132). The witness is of course not compellable to answer it protected by public policy (ss 123, 125) or privilege (ss 122, 126, 127, 128-31). But when it is relevant only in so far as it affects the credit of the witness, the court is to decide under s 148 whether he shall be compelled to answer it or not and may warn the witness that he is not obliged to answer. The judge has the option in such a case either to compel or excuse. The witness may here claim the privilege, but if he voluntarily answers, his answer may be used against him in a subsequent criminal proceeding [see *R v. Gopal Doss*, 3 M 271 and other cases noted under s 132; "*Proviso*" and s 148].

S. *148. Court to decide when question shall be asked and when witness compelled to answer.—If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warm the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

---

* In Ceylon the section has been split up into two sub-sections. Sub-section (1) ends with "obliged to answer it". The rest is sub-section (2); cls (1), (2), (3), (4) have been designated (*a*), (*b*), (*c*), (*d*) respectively.

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

SYNOPSIS

COMMENTARY

Principle and Scope.—This section contains a very wholesome provision. S 132 declares thap a witness shall not be excused from answering any question relevant to the matter in issue in any suit or in civil or criminal proceeding upon the ground that the answer may expose him to a penalty or forfeiture. So, a witness cannot object to the asking of questions contemplated in s 146(*3*) which tend to shake his credit by injuring his character. This right to cross-examination may turn an engine of oppression in the hands of an unscrupulous cross-examiner, and a witness may be subjected to the grossest insult or annoyance by being made to answer a series of questions affecting the sanctity of his private life or character or improprieties of conduct of a very distant date, no matter howsoever remote their bearing may be, under the guise of cross-examination to credit. A witness called to prove a formal or an unimportant matter might be wantonly oppressed by such improper questions under the pretence of impeaching his credit. It is with the object of preventing such abuse that s 148 and ss 149-53 have been framed. These sections have reference to questions which are relevant only in so far as they affect the credit of the witness. S 146 too covers the same ground. The judge also cannot ask any question which it would be improper for any other person to ask under s 148 or 149 (s 165).

S 148 therefore lays down that if any such question is not directly material to the issue, but is relevant to the matter *only in so far as it affects the credit* of the witness by injuring his character, it is for the court to decide whether or not the witness shall be compelled to answer it, and it may in its discretion warn the witness that he is not obliged to answer it. The protection afforded by the section by investing the court with very large powers, will however, be of little effect unless the advocate behaves honourably and keeps himself within bounds without allowing himself to become a tool in the hands of his client who very often finds delight in torturing or humiliating his adversary's witnesses. The mischief is done the moment the cross-examiner throws out the offensive question, and it is little consolation that the judge ultimately protects him from answering it.

In questions affecting the credit of the witness, the court has been given the delicate and responsible task of deciding whether or not it shall compel the witness to answer them. It has the option to allow the question or to exclude it, and the discretion to be exercised must of course be judicial and not capricious. Clauses (*1*), (*2*) and (*3*) lay down some rules as to how the discretion is to be exercised. In deciding whether questions affecting credit are proper or improper the court should consider:—

(*1*) Whether the truth of the imputation conveyed would *seriously affect* its opinion as to the trustworthiness of the witness *on the matter to which he testifies*. Thus it would be preposterous to ask a woman who has been brought to speak to something of which she was an accidental spectator, whether she is a common prostitute. But in cases of rape, the prosecutrix may be cross-examined as to her acts of immorality not only with the accused but with other persons (see s 155).

(*2*) Whether the imputation conveyed relates to improprieties or errors of conduct or other transactions of so *remote a date*, or of such a character that it would, if at all, affect in a *slight degree* the court's opinion as to the witness's veracity *on the matter to which* he testifies. Thus, "if a woman", said Sir Stephen, "prosecuted a man for picking her pocket, it would be monstrous to enquire whether she had an illegitimate child ten years before, although circumstances might exist which might render such an enquiry necessary" [Stephen's Genl View of Cr Law].

(*3*) Whether there is a *great disproportion* between the importance of the imputation conveyed and the importance of the witness's evidence. Thus, if a medical man is called to depose about the injuries of a man attended by him it would be preposterous if he were asked whether he was prosecuted on a charge of assault or defamation for hitting or abusing a man who had grossly insulted him.

(*4*) In the last clause it is provided that if the witness refuses to answer, the court *may*, if it sees fit, draw the inference that the answer would be unfavourable. The word "may" clearly shows that it is not bound to do so; but considering all the circumstances, it may or may not draw the inference. Cl (*4*) is similar to *illus* (*h*) to s 114 (*ante*).

The General Council of the Bar in England has laid down some rules for observance by members during cross-examination to credit. The rules in AS 1917 p 7 contain substantially the provisions to be found in ss 148-152.

It has been stated more than once, that if the witness declines to answer, no inference of truth of the fact can be drawn from the circumstance [*Rose v. Blakemore*, 1826 R & M 383; *R v. Watson*, 2 Stark 158]; but the soundness of this rule is very questionable; and although it would be going too far to say that the guilt of the witness must be implied from his silence, it would seem that in accordance with justice, and reason, the jury should be at full liberty to consider that circumstance, as well as every other, when they come to decide on the credit due to the witness. A perfectly honourable but excitable man may occasionally repudiate a question, which he regards as an insult and to infer dishonour from his conduct would, of course, be unjust; but generally speaking, an honest witness will be eager to rescue his character from suspicion, and will at once deny the imputation, rather than rely on his legal rights, and refuse to answer an offensive interrogatory [Tay s 1467].

When a witness has answered any question referred to in s 148 *ie* any question relevant to the inquiry only in so far as it affects his credit, he shall not be contradicted by any evidence except in two cases (see s 153).

Same: Consideration that Should Weigh When Question Asked is Not Relevant to the Issue, But Put Only to Injure the Character of the Witness.—The object and meaning of ss 146, 147, 148 will be better understood from the following extracts from Taylor, on which they are evidently based:

It would seem to be clear that where the transaction, to which the witness is interrogated, forms any material part of the issue, he will be obliged to give evidence, however strongly it may reflect on his own conduct. Indeed, it would be alike unjust and impolitic to protect a witness from answering a question, merely because it would have the effect of degrading him, when this testimony might be necessary for the protection of the property, the reputation, the liberty, or the life of a fellow-subject or might at least be required for the due administration of public justice [Tay s 1459].

Where, however, the question is not directly material to the issue, but is only put for the purpose of testing the *character*, and consequent *credit*, of the witness, there is much more room for doubt. Several of the older dicta and authorities tend to show, that in such a case the witness is not bound to answer; but this privilege, if it still exists, is certainly much discountenanced in the practice of modern times ..... No doubt cases may arise, where the judge, in the exercise of his discretion would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transaction of a remote date, might, in general, be highly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance, at the pleasure of any future litigant. So, questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked [Tay s 1460].

But the rule of protection should not be further extended; for, if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury, or to destroy his own reputation; but, on the other hand, it is obviously most important, that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause [Tay s 1461].

It seems to be generally conceded, that where the answer, which the witness may give, will not immediately and certainly show infamy, but will only indirectly tend to disgrace him, he may be compelled to reply. With respect, however, to questions which have a tendency to degrade the witness, as involving the fact of his previous bankruptcy, it seems that an objection may perhaps be taken on the ground that such a fact can only in strictness be proved by the production of the record. Still, in practice, it cannot be denied that questions of this nature are very frequently allowed to be put, and where the object is to discredit a witness, he is constantly asked in cross-examination whether he has not been an insolvent, or has taken the benefit of the Bankruptcy Act [Tay s 1462].

The provisions of ss 148-53 are restricted to questions relating to facts which are relevant only in so far as they affect the credit of the witness by injuring his character; whereas some of the additional questions enumerated in s 146 do not necessarily suggest any imputation on the witness's character. Nevertheless, I think it

was the intention of the Act, and I believe it to be the practice to consider all the questions covered by s 146 to be governed by the provisions of ss 148-53. Ss 148-52 were intended to protect the witness against being improperly cross-examined; a protection which is often very much required. But the protection afforded by s 148 is not very effectual, because an innocent man will always be eager to answer the question and a guilty man by claiming protection almost confesses his guilt as is indicated by the last para of the section [Markby pp 106-107].

General evidence of character to impeach the veracity of the witness is, however, sometimes receivable, not so much to shake the credit of the witness, as to show directly that the act in question has not been committed. Thus on prosecutions for rape, evidence may be given that the prosecutrix was of generally immoral character [Tay s 363: see *post* s 155(*4*)]. As to relevancy of character of prosecutor, see *ante* s 54: "*Character of prosecutor if relevant*".

"Matters So Remote in Time."—When evidence of character is let in with a view to affect the credit of a witness [see *ante* s 146: "*Character*"] it is a question whether regard should be had to character at the time of giving testimony, *ie present character*, or *past character*. The question is beset with some difficulty as character at some distant period may not be logically used to show the probability of his speaking truthfully or otherwise now and yet prior character is not irrelevant to show present character. As to this, Wigmore says: "The correct solution seems to be that prior *character at any time may be admitted* as being relevant to show present character, and therefore, indirectly, to show the probability as to truth-speaking. The only limitation to be applied is that the character must not be so distant in time as to be void of real probative value in showing present character; this limitation is to be applied in the discretion of the trial court, [Wig s 928]. This limitation is to be found in clause (2) of this section.

According to the principle embodied in s 148, a magistrate should refuse to allow a question as to a previous conviction to be put, upon the ground that it related to a matter which had happened 30 years before and was so remote in time that it ought not to influence his decision as to the fitness of a surety [*R v. Ghulam Mustafa*, 36 A 371, 347].

[*Ref Tay ss 1459-62; Phip 8th Ed pp 470-71; Powell 9th Ed p 533 et seq*].

Cases.—In the Full Bench case of *R v. Gopal Doss*, 3 M 271 ss 132 and 146-48 have been fully considered and the meaning of the words "*compelled*" in the proviso to s 132 and "*compel*" in s 148 have also been explained (*ante* s 132: "*Proviso*"). For the meaning of the expression "compelled to answer," see *Dy Supdt v. Pramatho*, 14 CWN 957 and other cases noted under s 132. The judge has to decide whether the question is relevant to the matter in issue, and upon that determination, partly depends the obligation to answer [*Moher Shk v. R*, 21 C 392, 400].

It is not that a witness can be asked any questions at any time as to whether he is a man of substance, as if only a rich man can be believed on anything. Questions as to character must be relevant to the case and unnecessarily provocative or merely harassing questions must be disallowed [*Pillai v. Thumby*, A 1940 R 133]. Evidence of the particular estimate formed by a judge in another case of the credit to be attached to the testimony of a witness, who is cross-examined in a subsequent trial is inadmissible; but evidence may be given of facts in connection with the earlier case such as:—that the witness has brought or defended actions which have been dismissed or decreed against him, that the witness gave his evidence in such action, that he has made false charges and so forth [*In re Pasumarty Jaggappa*, 4 CWN 684]. See *post* s 155: "*Witness not believed in another case*".

S. 149. Question not to be asked without reasonable grounds.—No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations

(*a*) [1][A barrister] is instructed by [2][an attorney or vakil] that an important witness is a [3][dakait]. This is a reasonable ground for asking the witness whether he is a [3][dakait].

(*b*) A [4][pleader] is informed by a person in Court that an important witness is a [5][dakait]. The informant, on being questioned by the [4][pleader], gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a [5][dakait].

(*c*) A witness, of whom nothing whatever is known, is asked at random whether he is a [3][dakait]. There are here no reasonable grounds for the question.

(*d*) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a [3][dakait].

S. 150. Procedure of Court in case of question being asked without reasonable grounds.—If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any [6][barrister, pleader, vakil or attorney], report the circumstances of the case to the [7][High Court] or other authority to which such [6][barrister, pleader, vakil or attorney] is subject in the exercise of his profession.

S. 151. Indecent and scandalous questions.—The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

S. 152. Questions intended to insult or annoy.—The court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

---

1. In Ceylon "An advocate" substituted.
2. In Ceylon "a proctor" substituted.
3. In Ceylon "thief" substituted.
4. In Ceylon "proctor" substituted.
5. In Ceylon "professional gambler" substituted.
6. In Burma "legal practitioner" substituted (A.O. 1937). In Ceylon "advocate or proctor" substituted.
7. In Ceylon "Supreme Court" substituted.

SYNOPSIS

COMMENTARY

Principle and Scope.—Ss 148-52 were intended to protect the witness from molestation by being improperly cross-examined, a protection which is often very much required. But as pointed out by some, the protection afforded by s 148 is not very effectual, because an innocent or honest man will shudder at the imputation and will generally be eager to clear his character by at once denying it, rather than claim protection by refusing to answer an offensive question; while a guilty man will by claiming protection almost confess his guilt, by allowing the court to draw an adverse inference from refusal to answer (v cl 4 of s 148). Nor does it seem that the sort of threat contained in ss 149 and 150 carry the matter much further [see Markby p 107; Tay s 1467]. The mischief is done the moment the cross-examiner throws out the offensive question, and it is little consolation that the judge ultimately protects the witness from answering it. The discretion therefore really rests with the advocate in the first instance. His good sense and sense of honour coupled with his respect for his profession ought to dictate whether the question ought in conscience to be asked. The illustrations in s 149 indicate on what "reasonable grounds" counsel may base their questions. It is not enough to plead instructions. Counsel are not justified in making charge of fraud and crime, unless they are personally satisfied that there are reasonable grounds for putting them forward [*Weston v. Peary*, 18 CWN 185 : 40 C 898; see also *In re a Vakil*, 47 A 728 FB *ante*].

Under s 149 no question should be asked without reasonable grounds, and it is by no means necessary before the question is asked that the person asking it should be in a position to establish the truth of the imputation beyond all doubt [*Rebecca v. R*, A 1947 C 278]. Counsel for prisoner should not state as alleged existing facts, matters which he had been told in his instruction, on the authority of the prisoner but which he does not propose to prove by evidence or suggest in cross-examination of prosecution witnesses [*R v. Nagendra*, 19 CWN 923 : 21 CLJ 396 : 30 IC 128]. If the court is of opinion that any such question was asked by any advocate without reasonable grounds, it may report the matter to the authorities for disciplinary action (s 150).

Ss 151 and 152 empower the court to forbid indecent, scandalous, or insulting and annoying question. The mere indecency of disclosures does not suffice to exclude them, where the evidence is necessary for the purpose of civil or criminal justice; as, on an indictment for a rape; or on a petition for dissolution of marriage; or upon the legitimacy of one claiming as lawful heir, or for damages on the grounds of adultery. [Tay s. 949].

With reference to ss. 149 and 150, Sir James Stephen made the following remarks in his speech before the Council on the passing of the Bill:—"The Bill as originally drawn provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the court, without written instructions; that if the court considered the question improper, it might

require the production of the instruction; and that the giving of such instructions should be an act of defamation subject of course, to the various rules about defamation laid down in the Penal Code. To ask such questions without instructions was to be a contempt of court in the person asking them, but was not to be defamation. This proposal caused a great deal of criticism, and in particular produced memorials from the bars of the three Presidencies." It was for these reasons that the present sections were substituted for the proposed sections.

SIR JAMES FITZ-JAMES STEPHEN said:—

> "The object of these sections (ss 149, 150, 151, 152) is to lay down, in the most distinct manner, the duty of a counsel of all grades in examining witnesses with a view to shaking the credit by damaging their character. I trust that this explicit statement of the principle according to which such questi lay down, in the most distinct manner, the duty of a counsel of all grades in examining witnesses with a view to shaking the credit by damaging their character. I trust that this explicit statement of the principle according to which such questi themselves, and that they will be admitted to be sound by all honourable advocates and by the public". [See *Proceedings in the Legislative Council*].

As to cross-examination to credit, see notes to s 146 *ante*.

[*Ref Tay s 949; Phip 8th Ed pp 470-71; Powell 9th Ed p 227; Ss 132, 146, 148*].

Rules by the General Council of the Bar.—In England the rules lay down that a barrister instructed by solicitor that in his opinion the imputation is well-founded or true and not merely instructed to put the question, is entitled *prima facie* to regard such instructions as reasonable grounds for so thinking and to put the questions accordingly. The statement of no other person should be accepted as conclusive without ascertaining so far as is practicable in the circumstances, that such person can give satisfactory reasons for the imputation. In all cases it is the duty of the barrister to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person (see AS 1917 p 7 reproduced in Ann Prac 1949 Vol 2 p 3685).

Deplorable Condition of Persons Obliged to Appear in Court as Witnesses.—The following lamentation which has found its way into public print, is well worth quoting:—

Of all unfortunate people in this world, none are more entitled to sympathy and commiseration than those whom circumstances oblige to appear upon the witness-stand in court. You are called to stand and place your hand upon a copy of the scriptures in sheep-skin binding, with a cross on the one side and none on the other, to accommodate either variety of the Christian faith. You are then arraigned before two legal gentlemen, one of whom smiles at you blandly because you are on his side, the other eyeing you savagely for the opposite reason. The gentleman who smiles, proceeds to pump you of all you know, and having squeezed all he wants out of you, hands you over to the other, who proceeds to show you that you are entirely mistaken in all your suppositions; that you never saw anything you have sworn to; that you never saw the defendant in your life; in short, that you have committed direct perjury. He wants to know if you have ever been in state prison, and takes your denial with the air of a man who thinks you ought to have been there. asking all the questions over again in different ways; and tells you with an awe-inspiring severity, to be very careful of what you say. He wants to know whether you meant something else. Having bullied and scared you out of your wits, and convicted you in the eye of the jury of prevarication, he lets you go. By and by everybody you have fallen out with is

put on the stand to swear that you are the biggest scoundrel they ever knew, and not to be believed under oath. Then the opposing counsel, in summing up, paints your moral photograph to the jury as a character fit to be handed down to time as the type of infamy—as a man who has conspired against innocence and virtue, and stood convicted of the attempt. The judge in his charge tells the jury if they believe your testimony, &c indicating that there is even a judicial doubt of your veracity; and you go home to your wife and family, neighbours and acquiantences, as a suspected man,—all because of your accidental presence on an unfortunate occasion [Wellman pp 168-70]. See also the remarks of COCKBURN LCJ quoted in notes to s 146 *ante*. It was to prevent the growth in his country, of what in England has on many occasions been described as a grave scandal that ss 149-52 have been enacted. It may, however, be doubted whether the desired result has been achieved.

Privilege of Lawyers.—It was held that "an advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as advocate" [*Sullivan v. Norton*, 10 M 28 FB (observations of the Master of Rolls in *Munster v. Lamb*, 1883, 11 QBD 588 folld)]. This doctrine of absolute privilege to advocates in India has not been upheld in subsequent decisions [see 48 C 388 SB; 3 R 524; 49 M 728 FB and cases *ante* under s 132] but it has been held that good faith is to be presumed. *Sullivan v. Norton, sup* was however in *Anwaruddin v. Fathim Bai*, A 1927 M 379: 100 IC 537 by reason of the peculiar circumstances of the case.

The pleader for the defence in commenting on some of the witnesses for the prosecution called them loafers. Thereupon, one of those witnesses prosecuted the pleader for defamation—*Held* that in the case of an advocate, where express malice is absent, a court having due regard to the public policy, would be extremely cautious before depriving him to the protection of exception 9 to s 499 of PC [*In re Nagarji Trikamji*, 19 B 340]. Following this case it has been held that when a pleader is charged with defamation in respect of words spoken to or written while performing his duty as a pleader, the court ought to presume good faith and not to hold him criminally liable, unless there is satisfactory evidence of actual malice, and unless there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose. A pleader, especially in the mofussil of this country, where instructions are very commonly inaccurate and misleading, would certainly be at least as much justified in acting on his own recollection as on specific instruction in putting question to a witness on cross-examination; and because he has merely drawn a wrong inference from a fact recollected, that, of itself, in the absence of express malice, should not take him out of the 9th exception to s 499 of PC [*Upendra Nath v. R*, 36 C 375: 13 CWN 340, see *Shiva Kumari v. Becharam*, 25 CWN 895: 66 IC 604; *Bhaisankar v. Wadia*, 2 Bom LR 3 FB]. There is a presumption of good faith on the pleader's part, and in order to make him liable for defamation there must be convincing evidence that he was actuated by improper motive personal to him [*Nikunja v. Harendra*, 41 C 514]. Where counsel puts defamatory questions imputing unchastity to a woman the presumption is that they were put on instructions and it is only on proof of the contrary that the court can hold that there was no instructions [*Ayesha Bi v. Peerkhan*, A 1954 M 741].

It has been held by a Special Bench in Calcutta that the common law doctrine of absolute privilege does not apply to the law of defamation in s 499 PC [*Satish v. Ramdayal*, 48 C 388: 24 CWN 982; see also *Santabai v. Umrao*, A 1926 B 141; *Mc Donnell v. R*, 3 R 524: 92 IC 737]. The application to the criminal law in India of the English Common Law doctrine of absolute privilege was also doubted in *Tiruvengada v. Tripurasundari*, 49 M 728 FB: A 1926 M 906; see *Ayesha Bi v. Peerkhan*, A 1954 M 741 where cases have been reviewed. Advocates in India did

not enjoy such unqualified privilege in respect of questions put to a witness in cross-examination as advocates in England. Good faith is to be presumed. While counsel had privileges, they had their responsibilities too and they ought not to abuse their position [*Benerjee v. R*, 46 CLJ 227: 104 IC 717]. If a pleader puts defamatory statements in utter recklessness and without seeing whether there is any truth, with a view to injure the reputation of a witness publicly, he acts in bad faith and there is no privilege [*Fakir v. Kripasindhu*, 54 C 137: 101 IC 600; *Gendan v. Banarsi*, A 1948 A 409]. An advocate may take instructions directly from a suitor [*Bakhtwar v. Sant Lal*, 9 A 617].

It is unprofessional on the part of counsel to cross-examine a witness as to facts within his personal knowledge. When counsel in the course of cross-examination makes a charge against a witness or third parties, the court is entitled to ask whether he made the charge on instructions and if so, on whose. Instructions to counsel are privileged only in the sense of being protected from disclosure to the opponent. There is no privilege as against the court. It is not sufficient for counsel in such cases even to plead instructions. They have a responsibility in the matter and are not justified in making charges of fraud and crime, unless they are personally satisfied that there are reasonable grounds for putting them forward [*per* WOODROFFE and COX, JJ, in *Weston v. Peary*, 40 C 898: 18 CWN 185].

The question whether a counsel has exceeded the license given him for the purpose of conducting his client's case, is one that can only be dealt with by a Full Bench [*Peary v. Weston*, 16 CWN 145]. The court's disciplinary power over advocates in relation to question put in cross-examination is not confined to questions reflecting on the witness personally, but extends to questions reflecting on third parties as well [*Peary v. Weston, sup*]. As to asking defamatory or scandalous questions, see *Upendra v. R*, 36 C 375: 13 CWN 340; *Fakir v. Kripasindhu, ante*; *Banerji v. Anukul*, 55 C 85; *Mesaric v. Ramani*, 42 CWN 1113. As to the extent of the privilege of speech accorded to counsel and advocates, see *R v. Kashi Nath*, 8 BHC Cr 126.

Readers are recommended to go through the judgment of JENKINS, CJ, in *Gopessur v. Bissessur*, 16 CWN 265: 39 C 245. The observations there should have the wholesome effect of keeping counsel within proper bounds in the examination and cross-examination of witnesses and conducting their cases with due regard to their responsibility to the public and to the court.

Duty of Counsel of all Grades in Cross-examining Witnesses to Credit.—The following extracts from Wellman's Art of Cross-examination will be found useful and instructive:—"Cross-examination as to credit has its legitimate use to accomplish, *viz*, the development of truth and the exposure of fraud; but this powerful weapon for good has almost equal possibilities for evil. It is proposed here to demonstrate that cross-examination as to credit should be exercised with great care and caution, and also to discuss some or the abuses of cross-examination by attorneys, under the guise and plea of cross-examination to credit.

"Questions which throw no light upon the real issue in the case, upon the integrity or credit of the witness under examination, but which expose misdeeds, perhaps long since repented of and lived down, are often put for the sole purpose of causing humiliation and disgrace. Such inquiries into private life, private affairs or domestic infelicities, perhaps involving innocent persons who have nothing to do with the particular litigation and who have no opportunity for explanation nor means of redress, form no legitimate part of the cross-examiner's art. The lawyer who allows himself to become the mouth-piece of the spite or revenge of his client may inflict

untold suffering and unwarranted torture. Such questions may be within the legal rights of counsel in certain instances, but the lawyer who allows himself to be led astray by his real or by the solicitations of his client, at his elbow, ready to make any sacrifice to humiliate his profession and surrenders his self-respect for which an occasional verdict, won from an impressionable jury by such methods, is a poor recompense.

"To warrant an investigation into matters irrelevant to the main issues in the case, and calculated to disgrace the witness or prejudice him in the eyes of the jury, they must at least be such as tend to impeach his general moral character and his credibility as a witness. There can be no sanction for questions that tends simply to disgrace the witness personally, and which can have no possible bearing upon the veracity".

"In all that has preceded we have gone upon the presumption that the cross-examiner's art would be used to further his client's cause by all fair and legitimate means, not by misrepresentation, insinuation or by knowingly putting a witness in a false light before a jury. These methods doubtless succeed at times, but he who practises them acquires the reputation, with astounding rapidity, of being 'smart', and finds himself discredited not only with the court, but in some almost unaccountable way with the very juries before whom he appears. Let him once get the reputation of being 'unfair among the habitues of the court house', and his usefulness to clients as a trial lawyer is gone for ever. Honesty is the best policy quite as much with the advocate as in any walks of the life".

"Counsel may have in his possession material for injuring the witness, but the propriety of using it often becomes a serious question even in cases when its use is otherwise perfectly legitimate. An outrage to the feelings of a witness may be quickly resented by a jury and sympathy take the place of disgust. Then, too, one has to reckon with the judge, and the indignation of a strong judge is not wisely provoked. Nothing could be more unprofessional than for counsel to ask questions which disgrace not only the witness, but a host of innocent persons, for the mere reason that the client wishes them to be asked" [Wellman, pp 171-73. See also s 146 *ante* pp 1316-18].

Indecent and Scandalous Questions, etc.—Indecent and scandalous questions may be put either to shake the credit of a witness or as relating to facts in issue, or to determine whether or not a fact in issue existed. If they are put merely to shake the credit, the court has complete dominion over them and may forbid them even though they may have some bearing on the question before the court. But if they relate to facts in issue or are necessary to determine whether the facts in issue existed, the court has no jurisdiction to forbid them [*Md Mian v. R*, 52 IC 54 : 20 Cri LJ 566]. The court cannot forbid indecent or scandalous questions if they relate to the facts in issue [*Razario v. Ingles*, 18 B 468, 470].

"What is relevant cannot be scandalous" [SUBRAMANIA IYER, J, in *Zemindar of Tuni v. Benayya*, 22 M 155, 159]. In a suit by a husband against wife for dissolution of marriage there was a letter by the wife to a friend of the husband which was of an amorous nature. It was in such terms that could furnish the husband good grounds for suspecting her fidelity. The plaintiff's counsel when cross-examining the wife suggested that the contents of the letter justified the inference of misbehaviour with the friend and was castigated by the Appeal Court for putting such questions suggesting sexual intercourse with the plaintiff's friend. The Supreme Court held that the letter was "clearly unworthy of a faithful wife" and observed that the criticism was not justified [*Bepin v. Prabhavathi*, A 1957 SC 176, 186-87: 1956 SCR 838]. An

advocate in the discharge of his duties must not be hampered by any fear of offending the opposite party or any witness. There are cases in which questions will have to be asked which cannot be fit for drawing room or which may appear to be scandalous [*In re Vasantha Pai*, A 1960 M 73].

A witness is entitled to claim privilege in relation to any information or evidence on which the prosecution might wish to rely not only in establishing guilt but also in making their decision to prosecute. [*Den Norske Bank ASA v. Antonatos*, (1998) 3 All ER 74 (CA)].

During the examination of one of the defendants by the plaintiff, she was asked whether she was made pregnant by a certain person. If the plaintiff's case was that she did not inherit her husband's property by reason of her unchastity during his lifetime, then the question would be relevant. If, however, it was asked for impea-ching her credit as a witness the court will have to consider the provisions of ss 146 and 148-52 [*Subala v. Indra*, 65 IC 692: A 1923 C 315; see also *Panda v. Abdul*, 65 IC 693: 5 NLJ 138]. The trial judge is not a mere automaton and it is one of his important functions to see that scandalous matters are not introduced into the record unless they are relevant for its proper decision of the case [*Md Sultan v. Serajuddin*, A 1936 L 183]. When a question in cross-examination reflects not on the witness but on a third party, s 150 which must be referred back to s 146 can have no application [*Peary v. Weston*, 16 CWN 145, 9 IC 509].

S. 153. Exclusion of evidence to contradict answers to questions testing veracity.—When a witness has been asked and has answered any question which is relevant to the inquiry only, in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations.

(*a*) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fradulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b*) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c*) *A* affirms that on a certain day he saw *B* at [1][Lahore].

A is asked whether he himself was not on that day at [2][Calcutta]. He denies it.

Evidence is offered to show that *A* was on that day at [2][Calcutta].

The evidence is admissible, not as contradicting *A* on a fact which affects his credit, but as contradicting the alleged fact that *B* was seen on the day in question in [1][Lahore].

---

1. in Ceylon "Jaffna" substituted.
2. In Pakistan "Chittagong" substituted; In Ceylon "Colombo" substituted.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

[3](*d*) *A* is asked whether his family has not had blood feud with the family of *B* against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

COMMENTARY

Principle and Scope.—When a witness has been asked in cross-examination a question which is directly *relevant* to the matter in issue, and he gives a denial or a certain reply, he may of course be contradicted by independent evidence on all matters directly, relevant to the issue [v. s 5 and *illus* (*c*)] and also by his previous contradictory statements, oral [s 155 (*3*)] or written (s 145). *Illus* (*c*) shows that the admissibility of the testimony does not depend on the cross-examination of the witnesses to be contradicted. So, the statement of a witness for the defence, that a witness for the prosecution was at a particular time at a particular place, and consequently could not have been at another place, where the latter states he was and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point [*R v. Sakharam*, 11 BHC 166, 169]. The reason is clear, the evidence in this case is admitted not for the purpose of contradicting the witness on a fact affecting his credit, but for the purpose of contradicting the fact which materially affects the question at issue, *ie* the accused's guilt or innocence.

But where the question relates to a fact which is *collateral* to the issue, *ie* where a question is asked *merely for discrediting a witness* and the witness gives an answer, the section says that he cannot be contradicted. He cannot be contradicted on *irrelevant* matters and his answers to them will be conclusive. This is exemplified by *illustrations* (*a*) and (*b*). *Illustrations* (*a*) and (*b*) point at the first part of the section and they show that when the fact inquired after is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, the cross-examiner must be content with the answer which the witness chooses to give him, that is, if the witness denies the imputation, the answer is conslusive for the purposes of the suit, and the matter ends there, as no evidence is admissible to contradict the answer. The only remedy suggested is a prosecution for giving false evidence. When a question relates to a matter not relevant to the issue, the answer cannot be contradicted whether the matter is brought on record in examination-in-chief or in cross-examination [*Rambali v. S*, A 1952 A 289].

The reason of the rule is obvious. The primary object of a trial is to confine our attention to the points in issue. Questions asked with the sole object of shaking the credit of a witness bring in their train many matters irrelevant or foreign to the enquiry, and if the parties are allowed to adduce evidence to contradict them, it is bound to draw away the mind from the points in issue and to protract the investi-

---

3. In Ceylon *Illus* : (*d*) has been omitted and in its place the following illustrations have been inserted.—

(*d*) *A* is tried for a rape on *B*. *B* is asked in cross-examination whether she has not had illicit intercourse with *C* and *D*. She denies it. Evidence is offered to show that she has had such intercourse with *C* and *D*. The evidence is not admissible.

(*e*) *A* is asked whether he has not said that he would be revenged on *B*, against whom he gives evidence. He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

gation to an embarrassing and dangerous length. There will be no end of proving collateral issues, and the real points in dispute will be lost sight of. Hence it has been ruled that no evidence shall be given to contradict answers to questions affecting the credit of a witness. Thus where a witness said that he was at the spot of the accident because he was carrying a message from a bank to *J*, evidence that *J* had not operated upon his bank account on that day to show that the witness was lying, was not admitted [*Piddington v. Benett & Wood &c*, 63 Canadian LR 533; See *Rambali v. S, sup*].

In the course of cross-examination a witness may be asked any question tending to impeach his character or credit; but unless such questions are also relevant to the matters in issue, the witness's answers are conclusive and cannot be contradicted by other evidence, save in the cases referred to below. It is often a matter of some difficulty to decide whether a question relating to a witness's character is also relevant to an issue. Thus, on a charge of rape the prosecutrix may be contradicted if she denies previous connexion with the prisoner, for that may be material to consent [*R v. Martin*, 1834, 6 C & P 562; *R v. Holmes*, 1871 LR I CCR 334]; but her answer is conclusive if she denies connexion with other men, for then the question only goes to her character and credit [*R v. Hodgson*, 1812 Russ & Ry 211; Hals 3rd Ed Vol 15 para 807). As to evidence of general immorality of prosecutrix in rape cases, see s 155(*4*) *post*].

The rule limiting the right to call evidence to contradict witnesses on collateral questions, excludes all evidence of facts, which are incapable of affording any reasonable presumption or inference, as to the principal matter in dispute; the test being whether the fact is one which the party proposing to contradict would have been allowed himself to prove in evidence [*Kazi Ghulam v. Aga Khan*, 6 BHCR 93, 96]. The principles laid down in s 153 must be regarded in the examination and cross-examination of witnesses examined on commission [*Surendra v. Ranee Dasee*, 47 C 1043: A 1921 C 677].

The questions referred to in this section are those embraced by s 146 and their only relevancy consists in this that they tend to shake the credit of the witness. The range of questions on bias is infinite—the relations of the witness with the party calling him or with any one on his side, his status, family, his feelings expressed by words or conduct towards the party against whom he has come to depose, his employment, present or past by one of the parties &c. There may be re-examination of the witness in order to explain any circumstances of conduct or expression.

There are however two Exceptions to the above rule disallowing contradiction which are also to be found in the English law. They are embodied in the two Exceptions which are:—

(*1*) If a witness is asked in cross-examination whether he has been convicted of any crime and if he denies the fact or does not admit it, his previous conviction may be proved. (The mode of proof is to be found in s 298 Cr P Code). A similar provision is to be found in Cr Procedure Act 1865 s 6 (28 & 29 Vic c 18).

(2) The second exception relates to bias or partiality of a witness. Evidence may be given to contradict when a witness denies his impartiality or that for some reason or other he has a bias in favour of or against one of the parties. If a witness is asked any question tending to impeach his partiality (*eg* whether he has expressed feelings of hostility or revenge towards the plaintiff; or whether he is a near relation of his); or whether she is the kept mistress of the party calling her [*Thomas v. David*, 1836, 7 C & P 350 *post*] and he denies the facts suggested, he may be contradicted. Illustration

(*d*) explains exception (*2*) although s 146(*3*) may have to be read along with s 153, s 146(*1*) and this exception deal with different aspects [*Rama Reddy v. V V Giri*, 1970, 2 SCC 340: A 1971 SC 1162].

[*Ref Tay ss 1439-44; Steph Art 130; Phip 8th Ed pp 471-73; Powell 9th Ed pp 537-38; Ros N P 182-83; Hals 3rd ED Vol 15 paras 807, 809; Vol 10 para 826*].

Where there was a loan transaction between the accused and the husband of the eye-witness and that affected the impartiality of the witness yet no questions were asked to her about the transaction, her evidence was not allowed to be contradicted by citing the statements of other witnesses about the transaction. *State of Karnataka v. R. Yarappa Reddy*, AIR 2000 SC 185.

Same: [Contradiction of Answers to Questions Impeaching Impartiality].— English authorities are not unanimous as to whether evidence may be given under the second exception, but the Legislature has accepted the opinion expressed in *Att-Genl v. Hitchcock*, 1847, 16 LJ Ex 259: 1 Ex 91, that a witness might be asked any question tending to impeach his impartiality, and that his answers might be contradicted by other witnesses. It has been held in this case that the fact that a witness has *accepted* a bribe in order to give evidence *may* be proved, if denied by him; but if he is asked whether he has said that he has been *offered* a bribe, and he denies it, no evidence is admissible to contradict him. "Where the witness in question has merely offered a bribe, no inference of any sort as to the witness's testimony can be drawn; rejection of the bribe deprives the offer of all its force in that respect" [Wig s 962]. In *Yewin's case*, in which Yewin was charged with theft, his apprentice who was a witness against him was asked whether he had not said that he would be avenged on his master, and would fix him in gaol. He denied and he was allowed to be contradicted. He was also asked whether he had not been charged with robbing his master, but on his giving denial, he was not allowed to be contradicted on this point [*R v. Yewin*, 181, 2 Camp 638].

Plaintiffs sued an Insurance company for recovery of Rs. 1,76,000 the value of a parcel alleged to have contained diamonds insured with the company and lost in transit through the post office. One *B* who was actively interested in the preparation of the defendants' case appeared to have obtained from *M*, an important witness of plaintiff's side, a promise that he would for Rs. 50,000 make a statement supporting defendants' charge of fraud. *B* was taken to the manager of the company and his offer was rejected, not because it would have been dishonourable to enter into any such corrupt bargain, but really because there was no certainty as to what the purchased evidence would be, while the price asked for it was exorbitant. Had *M* been willing to accept Rs 10,000 previously offered by the company for information as to the diamonds, the bargain would have been struck. To *M* all these were put in cross-examination and it was also suggested that in connection with the preliminary police enquiry he attempted to bribe the butler and that he told one *L* that the whole case of the plaintiffs was a swindle. *M* denied them all and the defendants sought to contradict these denials by substantive evidence adduced under s 155(*3*). It was held that the evidence of *B* and the manager on this issue was not improperly received, but the section was stretched beyond its true purport in admitting the evidence of the butler and *L*. LORD BLANESBURGH observed:—

> "Ss 153 and 155 of the Indian Evidence Act must, in their Lordships' judgment, be strictly construed and narrowly interpreted if the courts governed by that statute are to be spared the task in many suits of prosecuting, on most imperfect material, issues which have no bearing upon that really in contest between the parties. S 153 does not go far beyond, if it goes at all beyond, the case of *A-G v. Hitchcock*, 1847, 1 Ex 91 on which doubtless it was based" [*Bhogilal v. Royal Ins Co*, A 1928 PC 54: 32 CWN 593: 54 MLJ 545: 26 ALJ 377: 6 R 142: 39 Bom LR 818].

If a witness is asked whether he had suborned false witnesses against the opposite party, and he denies it, he may be contradicted [*Queen's case*, 2 B & B 311]. Facts showing that the witness has been bribed or has accepted the offer of a bribe &c may, if denied, be proved under s 155(2).

In Halsbury's Laws of England, 3rd Ed Vol 15 para 808 (second part) another exception has been mentioned where a witness's answer in cross-examination may be contradicted. This is dealt with in the Evidence Act s 145 (*ante*) and s 153(3), *post*.

As observed before, English authorities are not agreed as to whether a witness should be allowed to be contradicted under Exception (2). The following extract from Taylor will show the position: Whether questions respecting the *motives*, *interest*, or *conduct* of the witness, as connected with the cause or with either of the parties, are irrelevant, is a point on which the authorities differ. On the one hand, it has been held relevant to the guilt or innocence of a person charged with a crime, to inquire of the witness for the prosecution, in cross-examination, whether he had not expressed feelings of hostility towards the prisoner [*R v. Yewin, ante*]; and the like inquiry has been made in a civil action [*Atwood v. Welton*, 1828, 7 Conn 66]. On an indictment for rape, or for an attempt to commit that crime, the prosecutrix may, on cross-examination, be asked whether she had not on former occasions consented to the prisoner's embraces [*R v. Riley*, 1887, 18 QBD 481]. In all these cases, if the witness under cross-examination denied the fact imputed, he was exposed to contradiction by other witnesses. So, on the trial of Lord Stafford for high treason, he was allowed to adduce proof that one of the witnesses for the prosecution had attempted to suborn several persons to give false evidence against him [1680, 7 How ST 1400], and in the *Queen's case*, the judges appear to have considered such a course unobjectionable, provided the witnesses were first cross-examined upon the subject. In an action on a promissory note, the making of which was denied, the attending witness was asked whether she was not the plaintiff's mistress, and upon her denying the suggestion the defendant was allowed to call witnesses to contradict her [*Thomas v. David*, 1836, 7 C & P 350; Tay s 1440].

On the other hand, it has been several times ruled that, if a witness denies that he has tampered with the other witnesses, evidence to contradict him cannot be received [*R v. Lee*, 1838, 2 Lewin CC 154]. So, where a witness called to character, denies having ever said that the prisoner should be acquitted if it cost him £20, the court decided that the counsel for the prosecution must be satisfied with the answer [*R v. Lee, sup*; Tay s 1441]. A lawyer who was really anxious to promote the interests of truth and justice, would on most occasions feel inclined to follow the former, rather than the latter class of cases..... No doubt it is an object of great importance to confine the attention of the jury as much as possible to the specific issues; but it seems highly essential to the discovery of truth, that those who are to determine the respective value of conflicting testimony, should be enabled to discriminate between the interested and disinterested witnesses; and no test of interest can be more sure than that which is afforded by the conduct of the witness himself [Tay s 1442].

Assuming, however, that a witness may in all cases be cross-examined, and, if necessary, contradicted, for the purpose of showing that his mind is not in a state of impartiality as between the two contending parties, it must clearly appear, before the contradictory evidence can be admitted, that the questions answered had a direct tendency to prove that the witness was under the influence of a undue bias. The doctrine was established by the case of the *Att-Genl v. Hitchcock*, 1847, 16 LJ Ex 259; 74 RR 592; [Tay s 1443].

When a witness denied having connexion with some cases or that he was under police surveillance or that there was a history sheet in the thana against him as an

active criminal, no evidence to contradict him will be admissible [*Kamal v. S*, A 1959 C 342].

On a charge of rape the prosecutrix may be contradicted if she denies previous connexion with the prisoner, for, that may be material to consent [*R v. Martin*, 1834, 2 C & P 562; *R v. Holmes*, 1871 LR 1 CCR 334]; but her answer is conclusive if she denies connexion with other men, for then the question only goes to her character and credit [*R v. Hodgson*, 1812 Russ & Ry 211; Hals 3rd Ed Vol 15 para 807].

Where a witness is to be contradicted for impeaching his impartiality, it is necessary that there should be a background in which an impeaching question was put to him and he denied it. Evidence may then be given to contradict him. In this case evidence was offered to show a quarrel between the accused person and the husband of the lady eye-witness. This was not allowed. She was never questioned as to such quarrel in the course of her cross-examination. She had not denied any such quarrel and, therefore, there was no occasion of contradicting her on a point which she had never vouchsafed before. *State of Karnataka v. K. Yarappa Reddy*, 1999 (8) JT 10 : (1999) 8 SCC 715.

Contradiction Allowed on a Fact Which is the Foundation of the Case and Not a Fact Directed to the Credit of the Witnesses.—The appellant was charged with incest with his daughter *B* and the case for the prosecution rested mainly on the evidence of *B* and her younger sister *I*. Some months previously the appellant had been convicted of indecently assaulting *B*, and *I* had given evidence against the appellant on that occasion. The defence to the present charge was that the charge was a fabrication and that the two children had been schooled by their mother, with whom the appellant was on bad terms, into giving false evidence against him. Counsel for the appellant put to each of the children in turn the suggestion that each of them had on separate occasions admitted to another person that their mother had told them what to say in their evidence on the previous trial and that their evidence was not true. Each of the children denied the suggestion. Counsel of the appellant sought to call as witnesses for the defence the two persons to whom the above alleged admis-sions by the children were said to have been made, but the judge refused to admit their evidence—*Held*, that as the question in cross-examination had been directed not to the credit of the witness, but to the very foundation of the appellant's answer to the charge, the evidence of the two persons to whom the alleged statements by the children inconsistent with their evidence at the trial had been made ought to have been admitted [*R v. Phillips*, (1937) 26 Cr App R 17: 156 LT 80: 101 JP 117]. The provision in sec. 153 cannot be overcome by anticipating denial and giving evidence before-hand on matters capable of shaking the credit and injuring the character of a witness, who is yet to be examined [*Bhaskaran Nair v. State of Kerala*, 1991 Cri LJ 23, 26 (Ker)].

Evidence affecting the veracity of a witness can be adduced irrespective of his character. The accused can offer evidence showing that person produced as an eye-witness was at a different place at the material time than at the place of occurrence. It is of no consequence that the inquest report showed his presence at the site of occurrence. *Vijayan v. State*, AIR 1999 SC 1311 : 1999 Cri LJ 2037.

S. 154. Question by party to his own witness.—The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

SYNOPSIS

COMMENTARY

Principle and Scope.—The rule prohibiting the asking of leading questions to a party's own wintess, has its foundation on the assumption that a witness is always biased in favour of the party calling him (v s 142 *ante*). This rule must of necessity be relaxed when the witness exhibits an opposite feeling, *viz* when he by his conduct, *eg* attitude, demeanour, &c or unwillingness to give answers, or to disclose the truth shows that he is hostile or unfriendly to the party calling him. The court in such a case, *may*, in its discretion, permit a party to put any questions to his own witness which might be put in cross-examination by his opponent, *ie* may permit him to lead. This in effect means that the court may in a fit case permit a party to cross-examine his own witness, although the putting of leading questions does not always amount to cross-examination. The section does not use the word "cross-examine" but says that the court may permit "to put any question to him which might be put in cross-examination", the reason apparently being that "cross-examination" being examination by the adverse party (v s 137) the use of the term would be a sort of contradiction.

Section 154 confers a judicial discretion on the court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion. However, such discretion must be judicial and properly exercised in the interests of justice. A party could not normally be allowed to cross-examine its own witness and declared such witness as hostile, unless the court is satisfied that he has resiled from a material statement which he made before an earlier authority or that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth.

It is rather difficult to lay down a rule of universal application as to when and in what circumstances the courts will be entitled to exercise its discretion under section 154. The discretion to be exercised will depend upon the facts and circumstances of each case. Before a court exercises its discretion in declaring a witness hostile, there must be some material to show that the witness has gone back his earlier statement or is not speaking the truth or has exhibited an element of hostility or has changed sides. [*Shanmuganathan v. Vallaiswamy*, 1997 AIHC 2716 (2718-2722) (Mad)]. When a witness has been treated as hostile it is not open to the court to accept as true only that part of his evidence which is in favour of the prosecution and disregard that is unfavourable [*Lim Eng Lock v. R*, 1957 SCR 39 (SC Sarawak)].

It is noticeable that this discretion of the court to permit the putting of leading questions, or in other words to permit cross-examination, is absolute and is independent of any question of "hostility" or adverseness. It may be given in all cases. Judicial attitude on the point may be gathered from the following passages: "S 154 read with s 143 provides that the court may allow the party to put leading questions to his own witnesses. But that I do not think necessarily means that he must declare the witness hostile and cross-examine him. It is only when he declares the witness hostile and cross-examines him that he cannot rely on his evidence" [*per* CUMING J, in *Bikram*

v. R, 50 CLJ 467: A 1930 C 130—CONTRA: "Ss 143 and 154 read together do not give power to the prosecution scope to put leading questions to their own witnesses even with the assent of the judge. The meaning of s 154 is that they may, with the permission of the court, treat a witness as hostile and cross-examine him. The wording of s 154 shows that the legislature did not intend to distinguish the law in this country from the law which obtains in England" [*per* LORT-WILLIAMS, J, in *ibid*]. Upon this, RANKIN CJ, observed in a later case that the explanation for the use of the phrase "put any questions to him which might be put in cross-examination by the adverse party" instead of "cross-examine" is, that it would in strictness be a contradiction in terms, cross-examination being examination by the adverse party and that while in the mere putting of a question in a leading form is not necessarily tantamount to cross-examination, there is no doubt as to the power of the judge to give leave to put a leading question to one's own witness [*Prafulla v. R*, 35 CWN 731, 744 FB: A 1931 C 401; see also *Sivhamurthy v. Agodi*, A 1969 Mys 12]. When the discretion allowed by this section is exercised, the reason should be recorded because ordinarily it is not open to a party to test his witness's credit or impeach his truthfulness [*R v. Suar*, A 1934 P 533].

It is neither desirable nor permitted by ss 154 and 155 of the Ceylon Ordinance No 14 of 1895 (the same as ss 154 and 155 of Evidence Act) that evidence of what a prosecution witness had said previously should be given by the prosecution to contradict him without previous cross-examination of the witness as to such statements [*Seneviratne v. R*, 41 CWN 65: A 1936 PC 289].

S 154 does not in terms, or by implication confine the exercise of the discretionary power under it before the examination-in-chief is concluded or to any particular stage of the examination. It is wide in scope and the discretion can be exercised when the circumstances demand it. Such discretion can be exercised by the court at the stage of re-examination and in such a case the adverse party must be given further opportunity to cross-examine the witness [*Dahyabhai v. R*, A 1964 SC 1563]. Merely because some witnesses have turned hostile would not be sufficient to discard the evidence of other witnesses [*State of Karnataka v. Mehaboob*, 1987 Cri LJ 940, 946 : (1987) 1 Crimes 286 (Kant) (DB)].

English and Indian Law.—In England, the matter is regulated by the Criminal Procedure Act, 1865, 28 & 29 Vic c 18, [replacing the Common Law Pro Act, 1854, 17 & 18 Vic c 125 s 22 which was repealed by the Statute Law Revision Act, 1892, 55 & 56 Vic c 19] s 3 (applying both for civil and criminal cases) of which provides: "A party producing a witness shall not be allowed to impeach his credit by *general* evidence of bad character, but he may, in case the witness *in the opinion of the judge* prove adverse, contradict him by other evidence, or *by leavē of the judge*, prove that he has made at other times a statement inconsistent with his present testimony: but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement".

In interpreting s 154 reference has in many decisions been made here to the English statute and the meaning of "adverse" or "hostile" as explained in several English decisions. But it should be remembered that the English statute differs substantially from the law as embodied in s 154. The English statute deals with impeaching the credit of one's own witness and contradicting him by proof of former inconsistent statement. These are the subject-matter of s 155 [see cls (*1*), (*3*)]. Contradiction by previous inconsistent statement in writing is dealt with in s 145. Next, under the English law a party is not allowed to impeach the credit of his own witness by general evidence of bad character. The means by which the credit of such witness can be impeached here are contained in s 155. Then, under the English statute, evidence of self-contradiction is allowed only by leave of the judge and when he considers the witness "adverse". The last condition does not appear in s 155 and contradiction may be allowed apart from any question of adverseness.

"Adverse" Witness.—Putting leading questions to one's own witness or rather cross-examining him, is different from discrediting or contradicting the witness and the former is dealt with in s 154, although the latter may be done by cross-examination without giving independent evidence under s 155. S 154 gives the judge full discretion to permit a party to put leading questions to his own witness or in other words to cross-examine him when the witness by his conduct shows that he is hostile or adverse to the party or even apart from any question of hostility or adverseness. The rule embodied in s 154 giving the court unqualified discretion in the matter is therefore in advance of the English law and it is conceived that the object was to steer clear of the conflict which had existed in England over the meaning of the words 'hostile' and 'adverse'. Further, under the English statute a party is not allowed to im-peach the credit of his own witness by general evidence of bad character, but here, he may under s 154 by obtaining the permission to cross-examine, put the questions referred to in s 146.

The exact meaning of the word "adverse" has been the subject of many conflicting decisions in England. Some judges took the view that a witness is adverse also when his testimony is unfavourable to the party calling him, while others were of opinion that 'adverse' had the sense of exhibiting hostile feeling. In *Dear v. Knight*, 1859, 1 F & F 433, EARLE J, apparently regarded a witness as 'adverse' simply because he made a statement contrary to what he was called to prove; see also *Pound v. Wilson*, 4 F & F 301; *Amstell v. Alexander*, 16 LT 830; *R v. Little*, 15 Cox 391; *R v. Williams*, 29 TLR 128. In *Coles v. C*, 1866 LR 1 P & D 70, 71 WILDE JO, said: "An *adverse* witness is one who does not give the evidence which the party calling him wished him to give. A *hostile witness* is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the court" (**quoted** with **approval** in *Luchiram v. Radhacharan*, 49 C 93). In *Greenough v. Eccles*, 1859, 5 CB, NS 786 [WILLIAMS & WILLES JJ, dubit COCKBURN CJ] it has been laid down that by 'adverse' witness is meant not one whose testimony turns out to be 'unfavourable', but one who shows a mind 'hostile' to the other party calling him. It is now settled that a party who calls his opponent, cannot as of right treat him as hostile, the matter being solely in the discretion of the court [*Price v. Manning*, 1889, 42 Ch D 372 (CA) overruling, *Clarke v. Saffery*, 1824 Ry & M 126].

Taylor states the English law thus:—The judge in his discretion, will sometimes allow leading question to be put in a direct examination; as for instance, where the witness, by his conduct in the box, obviously appears to be hostile to the party producing him or interested for the other party, or unwilling to give evidence or where special circumstances render the witness rather the witness of the court than of the party. Where a litigant is called as a witness by the opposite party the latter is not entitled as a matter of right to cross-examine him as a hostile witness [Tay s 1404].

[*Ref Tay s 1404, 1426; Steph Art 131; Phip 8th Ed pp 461, 464-65; Powell 9th Ed p 529; Best ss 642, 645; Hals 3rd Ed Vol 15 paras 805-06*].

What is a "Hostile" or "Adverse" Witness? [Discretion of Court to Permit Cross-Examination of a Party's Own Witness].—It would appear from the above that English authorities are not unanimous with regard to the meaning of the words: "adverse", "unwilling" or "hostile", and the draftsman of the Evidence Act has, it is conceived, in view of the conflict, refrained from using any of those words and left the matter entirely to the discretion of the court. There is nothing in s 154 as to declaring a witness hostile, but it provides that the court may *in its discretion permit* a person who calls a witness, to put any question to him which might be put in cross-examination [*Baikuntha v. Prasannamoyi*, 27 CWN 797, 799 PC: 72 IC 286: A 1922 PC 409; *S v. Mohan*, A 1960 G 9]. The discretion is unqualified and untramelled, and is quite apart from any question of the hostility or otherwise of the witness. It is to be liberally exercised [*Sat Paul v. Delhi Admn*, A 1976 SC 294; *Ammathayar v. Offl*

Assignee, 56 M 7; *Deodhari v. R*, A 1937 P 34]. The discretion must be judiciously and properly exercised in the interests of justice [*Rabindra v. S*, A 1977 SC 170]. It is improper for the Public Prosecutor to tell the judge that he had information that the witnesses had turned hostile. That inference could be drawn only from the answers given by the witnesses [*Pub Pros v. Subramanya*, 1937 MWN 557 FB; *In re Inja Vengala*, A 1956 AP 26]. Mere presentation of an application that a certain witness has been won over is not conclusive of the allegation. The witness can be produced by the accused for cross-examination which would elicit correct facts [*S v. Jaggo*, A 1971 SC 1586]. When a prosecution witness turns hostile by stating something which is destructive of the prosecution case, the trial court must allow the witness to be treated as hostile [*G S Bakshi v. S*, A 1979 SC 569]. When a witness introduces new case during the cross-examination contrary to his statement to the police, he can be treated as hostile witness and re-examined by the prosecution, [*A.P. Rao v. State*, 1990 Cri LJ (NOC) 29 (Andh Pra); *State of Orissa v. Ashok Kumar Panigrahi*, 1990 Cri LJ (NOC) 1 (Orissa): (1989) 68 Cut LT 97].

If exhibition of hostile *animus* were the sole test of declaring a witness adverse, the object would be frustrated in many instances. A shrewd and composed witness might, by concealing his real sentiments or hostile attitude, give unfavourable evidence and make statements contrary to the facts, known to him and what the party calling him expected him to say. Merely giving unfavourable testimony cannot also be enough to declare a witness adverse, for he might be telling the truth which goes against the party calling him. He is hostile if he tries to injure the party's case by prevaricating or suppressing the truth. The court has by this section been given a very wide discretion and is at liberaty to allow a party to cross-examine his witness: (*1*) when his temper, attitude, demeanour, bearing, &c in the witness-box show a distinctly antagonistic feeling or a mind hostile to the party calling him, or (*2*) when concealing his true sentiments he does not exhibit any hostile feeling, but makes statements contrary to what he knew and was called to prove or what he had deliberately told before and by his manner of giving evidence and conduct shows that he is suppressing the truth, or that he is not desirous of giving evidence fairly and telling the truth to the court with a view to help the other party. Whether he shows himself so hostile as to justify his cross-examination by the party calling him, is a matter entirely for the discretion of the judge. [See defination of WILDE JO, in *Coles v. C, sup*; *Greenough v. Ecclas, sup*; *Parkin v. Moon*, 7 C & P 408; *R v. Ball*, 8 C & P 745; *Dear v. Knight*, 1 F & F 433; *Surendra v. Ranee*, 47 C 1043, 1057; *Luchiram v. Radhacharan*, 34 CLJ 107, 112; *R v. Kalachand*, 13 C 53, 56 *post*; *R v. Satyendra*, 37 CLJ 173; *Tulshiram v. R C Pal*, 89 CLJ 127; *Sat Paul v. Delhi Admn*, A 1976 SC 294].

A witness is not necessarily hostile, if in speaking the truth his testimony happens to go against the party calling him [*Tulshiram v. R C Pal*, A 1953 C 160; *Krutibas v. Madhab*, A 1916 Or 48; *S v. Raju Shetty*, A 1961 Mys 74; *Saraswathamma v. Bhadramma*, A 1970 Mys 157] and the fact that he has become hostile has to be established by eliciting information such as could give an indication of hostility [*Saraswathamma v. Bhadramma, sup*].

The right to permit cross-examination is not restricted to those cases only where the witness displays an obviously hostile or unfriendly attitude. Nor is the mere permission to cross-examine equivalent to an expression of opinion by the court that the witness is a witness of untruth. The object of the permission to cross-examine is to test the veracity of the witness when he unexpectedly makes statements which were not expected of him or when he displays a tendency to conceal the truth. Whether the testimony of such a witness should be rejected in whole or accepted in

part depends entirely on the result of the cross-examination. [See *post*: "*Effect of Cross-examining a Party's Own Witness*"].

The witness must show himself to be not only adverse but hostile to the party calling him by his testimony given. The witness's interestedness, his desire to suppress truth, his unwillingness to give answers to questions demonstrated by his temper, bearing, demeanour, &c, &c and all other circumstances must be taken into consideration and it is for the court to determine in each case, whether the witness has shown himself so hostile or adverse as to justify the exercise of its discretion to permit the witness to be cross-examined. It has been held that the mere fact that the interest of the witness is necessarily adverse to that of the party calling him (*eg* when a litigant is called by his opponent) does not permit cross-examination as a matter of right [*Price v. Manning*, 1889, 42 Ch D 372 CA; of *Tedeschi v. Singh*, 1948 Ch 319]. When there is great variance between the previous statement and the evidence in court, the witness can be declared hostile. [*State of Assam v. Upen Chandra Saikia*, 1982 Cri LJ NOC 26 (Gauh)].

A hostile witness is one who from the manner in which he gives his evidence (within which is included the fact that he is willing to go back upon previous statements made by him) shows that he is not desirous of telling the turth [*Panchanan v. R*, 34 CWN 526: A 1930 C 275: 51 CLJ 203]. The matter as to whether permission should or should not be given to cross-examine one's witness however hostile he may appear to be, is eminently one in the discretion of the trial judge and his decision except in very exceptional circumstances is not open to appeal [see *Rice v. Howard*, 1886, 16 QBD 681; *R v. Williams*, 29 TLR 128 and *Price v. Manning sup*, which have been referred to with **approval** in *Amritlal v. R*, 42 C 957, 1025: 19 CWN 676].

Before allowing a witness to be declared hostile it would have been usual for a judge to look into the statement before the investigating officer to see whether the witness was actually resiling from the position taken during investigation. A party must lay a foundation for cross-examining its own witness [*Lalu v. S*, A 1960 C 775]. In order to obtain leave to cross-examine all that is necessary is that the witness's testimony should have been adverse to the party calling him and secondly that the value of the witness's testimony is to be judged in the light of the results of the cross-examination. It is unreasonable that the good or bad faith of a witness instead of being judged by the test of cross-examination should be held to be prejudged by the mere fact that cross-examination is permitted [*R v. Haradhan*,. A 1933 P 517: 146 IC 993; *Sarjug v. S*, A 1959 P 66]. The grant of permission to cross-examine is not equivalent to an adjudication or an expression of opinion by the court adverse to the veracity of the witness. It is merely a permission to test the veracity of the witness which can hardly be refused when any witness makes an unexpected statement adverse to the party calling him [*Sachhidananda v. R*, A 1933 P 488: 146 IC 936]. In a later Patna case the opinion was expressed that there is no legal objection to the permission being freely granted, although it is preferable to avoid the use of the words "declared hostile" which have a misleading significance [*Nebti v. R*, 19 P 369: A 1940 P 289].

An entry by the court at the end of deposition of a prosecution witness that he has been "declared hostile" has absolutely no significance in law and the defence is perfectly entitled to rely upon the testimony. If the party calling the witness wanted to challenge his veracity, the procedure in s 154 should have been resorted to [*Baijnath v. R*, A 1946 P 109]. See further *below*: "*When is cross-examination of a party's own witness allowed*".

As to whether the right to cross-examine survives if the cross-examining party afterwards calls his opponent's witness to prove his case, see *ante* s 138: "*Right to cross-examine is not enough*".

Mode of Obtaining Permission to Cross-examine.—Before the procedure of s 154 can be adopted, it is necessary either for permission of the court to be obtained or for it to be given by the court without its being sought. Such permission should be signified if not in words, by some other action of the court indicating its permission during the cross-examination of the witness by the calling him [*Ammathayar v. Offl. Assignee*, 56 M 7]. The mere presentation of an application by the prosecution that a certain witness had been won over is not conclusive. The witness can be produced for cross-examination which would elicit correct facts. [*Ashim Das v. State of Assam*, 1987 Cri LJ 1533, 1537 (Gau) (DB)]. Leave should be formally asked for to cross-examine the offending witness [*Samar Ali v. R*, A 1936 C 675 *post*]. It is always possible for the party who calls the witness, to ask the court for permission to put leading questions to him without such witness being declared hostile [*Heramba v. R*, 78 CLJ 217]. Although the party seeking permission to put questions in the nature of cross-examination need not declare his witness hostile, he should give sufficient reasons for it to enable the court to exercise its discretion [*S v. Mohan*, A 1960 G 9]. Reasons should be recorded before declaring a witness as hostile [*Madanlal v. State*, 1981 Cri LJ 514 (Delhi): 1981 Chand LR (Cri) 305]. The reasons for becoming hostile need not be restricted to relationship only and it is difficult for the court to analyse the reasons [*Administrator, Municipal Board, Gangapur City v. Om Prakash*, 1982 Cri LJ 1398, 1400: 1982 Raj LW 189 (Raj)].

Witness Tendered But Not Examined.—In order the permission may be granted under this section, the witness must be called. Where the prosecution merely tenders witness as 'gained over' without examining him, he cannot be allowed to be cross-examined by the prosecution [*Ramjag v. R*, 7 P 55 : 109 IC 114: A 1928 P 203; *Abdul Latif v. R*, A 1941 C 533]. When a witness examined in the committing court is merely tendered in the sessions court for cross-examination by defence and he is again cross-examined by the prosecution without leave under s **154**, it is not legal evidence [*Dhirendra v. S*, A 1952 C 621]. See *ante* ss 137, 138: "*Tendering for cross-examination*".

Witness Treated Hostile in Lower Court.—Where a prosecution witness was treated as hostile in the committing magistrate's court, no universal rule can be laid down as to whether the prosecution should examine him in the sessions court. The public prosecutor cannot be compelled to examine as his witness one who has in his opinion committed perjury. The proper course for him is to see that the witness is present in court and for the court, if he is really important, to examine him as a court witness and allow both sides to cross-examine him [*In re Peria Guruswami*, 1942 Mad 77: A 1941 M 765]. A prosecution witness who was declared and permitted to be cross-examined by the prosecution in the committing court, cannot be treated at once as a hostile witness and cross-examined by the prosecution in the sessions court without being examined in chief [*Abdul Latif v. R*, 45 CWN 763: A 1941 C 553]. See *ante* ss 137, 138: "*Tendering for cross-examination*"

When is Cross-Examination of a Party's Own Witness Allowed: [Procedure to be Followed].—The mere fact that at sessions trial a witness does not adhere to or tells a different story from that told by him before the magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions giving to the whole texture of the story is, not that the witness is hostile to this side or that, but that witness is one who ought not to be believed, unless supported by other satisfactory

evidence. A witness is hostile, if he tries to defeat the party's case by suppressing the truth [*Kala Chand v. R*, 13 C 53, 56; *R v. Satyendra*, 37 CLJ 173: 71 IC 657; *Nga Nycin v. R*, 11 R 4; *Nayeb v. R*, 61 C 399]. That the witness's answer to certain question is in direct conflict with the evidence of prosecution witnesses is not and can never be any reason for allowing the witnesses to be treated as hostile and permitted to be cross-examined [*Ratnasabhapati v. Pub Pros*, 59 M 904: A 1936 M 516].

A witness is considered adverse when in the opinion of the judge he bears a hostile *animus* to the party calling him and not merely when his testimony contradicts his proof [*Surendra v. Ranee Dassi*, 24 CWN 860: 47 C 1043]. A witness who is unfavourable, is not necessarily hostile, for a hostile witness has been defined as one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the court [*Luchiram v. Radhacharan*, 49 C 93: 34 CLJ 107 (*Coles v. C*, LR I P & D 70, *ante* **approved**]. The discretion to permit cross-examination is not confined to those cases only where the witness is simple enough to display an obivously hostile attitude [*Mohun v. R*, A 1933 N 384].

The court will properly allow cross-examination when a witness unexpectedly turns out to be hostile to the party who calls him, or is manifestly interested for the other party or is unwilling to give evidence; or if the witness stands in a situation which naturally makes him adverse to the party who desires his testimony as for example, a defendant called as the plaintiff's witness [*Radha Jiban v. Taramoni*, 12 MIA 380, 393]. Where one's own witness unexpectedly makes statements adverse to his interest, it is common fairness that the judge should permit such statements to be tested by cross-examination; if the evidence is to be relied upon, and if cross-examination be disallowed, the evidence is of no value [*Kalaguria v. Yarlagadda*, 6 CWN 513 PC; see *Nayeb v. R*, 61 C 399]. Ordinarily, if it is made to appear that a witness has resiled from his statement made during investigation, cross-examination should be permitted [*S v. Balchand*, A 1960 Raj 101].

It is not open to the prosecution in a criminal trial to cross-examine their own witness unless the court declares him to be a hostile witness [*Jogdeo v. R*, 1 P 758: 71 IC 117: 25 CLJ 69]. Unless there is something in the deposition of a witness which conflicts with the earlier statements made by him which will afford ground for thinking that he has been gained over by the defence, the prosecution is not entitled to declare him hostile [*Parameshwar v. R*, 99 IC 705: A 1926 P 316]. It is the established practice that a court would not allow a party to question him under s 154 until it is satisfied that there is some hostility or adverseness displayed by the witness to the very party who has called him [*In re Kalu Singh*, A 1964 MP 30]. It is not right for the public prosecutor to declare a prosecution witness hostile. The only way in dealing with witnesses who go back on their statements or testify in a way which is frankly against the interest of the party calling them lies with the judge. It is the duty of the public prosecutor to formally ask the leave of the court to cross-examine the offending witness both in regard to the evidence he has already given which is complained about and also, if necessary, to put questions to him to discredit his testimony generally [*Samar Ali*, 166 IC 323: A 1936 C 675]. Before granting permission to treat a witness as hostile, there must be some material to show that he is not speaking the truth or has resiled from his earlier statement [*Gopal Krishnan v. State*, 1981 Cri LJ NOC 160 (Delhi)].

A witness is not necessarily hostile because in an absent-minded moment he admits the truth. Before a prosecution witness can be declared hostile, there must be good ground for believing that the statement he made in favour of the defence is due

to enmity to the prosecution [*Fouzder v. R*, 3 Pat LJ 419: 44 IC 33]. Where the accused applied for an adjournment to enable them to cross-examine the witnesses for the prosecution which was refused and thereupon the witnesses were summoned as witnesses for the defence—*Held* that the mere fact that the accused had been compelled to treat the witnesses for the prosecution as their own did not change their character. The magistrate was wrong in refusing to allow their cross-examination [*Sheoprakash v. Rawlins*, 28 C 594, 596]. A witness must be made available for the cross-examination by the accused even if the prosecution makes an application to treat the witness as hostile [*Indra Mohan Brahma v. State of Assam*, 1982 Cri LJ NOC 127 (Gau)].

Under s 154 the court has the discretion to permit the prosecution to challenge, by way of cross-examination, the testimony of their own witnesses with regard to matters not related to the facts testified in examination-in-chief and which were elicited by the defence in cross-examination [*Amritlal v. R*, 42 C 957, 1024]. In the re-examination no question in the nature of cross-examination can be put [*State of West Bengal v. Methur Pal*, 1989 Cri LJ NOC 129 (Cal)]. S 154 gives a very wide discretion to the courts and the proper course is to give permission to the prosecution to ask the witness a leading question and then to read out the evidence before the committing magistrate and so obtain an admission or denial of its truth [*Motiram v. R*, 75 IC 125]. Where the discretion under s 154 was properly exercised after perusal of the statement by the court, appellate court should not lightly interfere with such discretion [*Munsar v. Union*, A 1964 Tri 45]. The prosecution cannot ask an appellate court to look with suspicion that evidence of their own witnesses when during the whole trial they were not treated by them as hostile witnesses [*Abinash v. R*, 63 C 18].

A witness who gives one account of the subject of his testimony to his attorney, and gives a different account while in the witness-box, may be asked by the party calling him whether he had given a different account, stating it, to the attorney [*Melhuish v. Collier*, 1850, 19 LJQB 493; see *Faulkner v. Brine*, 1858, 1 F & F 254; see also Hals 3rd Ed Vol 15 paras 805-06]. In the unreported cases of *Barlow v. Chunilal*, SCC transfer suit No. 15 of 1899, 3rd Jan 1901 and *McLeod v. Sirdarmull*, Suit No. 833 of 1900, 13th Aug 1901 (cited in Woodroffe, 9th Ed, p 1012) the court allowed cross-examination, it appearing that the witness had made a statement to the attorney of the party calling him.

Although the cross-examination of a witness by the party producing him is permissible when that witness proves adverse, such a witness cannot be cross-examined by the other complainants who had not called him as their witness [*Girraj v. S*, A 1965 A 131]. Offence under s 5A Prevention of Corruption Act—Illegal investigation does not render statements recorded therein by police officer illegal—witness resiling from such statement can be cross-examined [*Bhanuprasad v. S*, A 1968 SC 1323]. A witness who turned hostile was not treated as hostile immediately. After the examination of one more witness, the other witness cannot be recalled and permitted to be cross-examined [*The Food Inspector v. A.K. Ahammod*, 1984 Cri LJ NOC 82: 1983 KR LT 189 (Kerala)].

Attesting Witnesses.—With regard to attesting witnesses, the old rule in England was that these being necessary witnesses whom it was compulsory to call, and who might therefore be considered rather the witnesses of the court than of the party, could be cross-examined and discredited by their own side [*Bowman v. Bowman*, 2 M & R 501; *Jackson v. Thomason*, 1 B & S 745; *Coles v. C*, LR 1 P & D 70], and this has since been confirmed [*Jones v. J*, 24 TLR 839, *per* BARNES, P]; though in the

earlier case of *Phillips v. Davis*, 1907 Times, Dec 13; *per* DEANE J, leave of the judge so to treat them was assumed to be now necessary and the case of *Price v. Manning, sup*, seems to favour the latter rather than the former view. In Bankruptcy, a party calling the *debtor* may as of right elicit from him any previous contradictory statement [*Re Cunnigham*, 80 LT 503; *Re Marsden, Jacobs v. Lloyd*, 1944, 1 All ER 597] [Phipson, 11th Ed p 638].

It has been held here that there is no distinction on principle between an attestor whom a party is obliged to call and another witness he may cite of his own choice; but the court may, in the exercise of its discretion, under s 154, be more easily persuaded in the former cases than in the latter to permit the person who calls a witness to put any question to him which may be put in cross-examination by the adverse party [*Surendra v. Ranee Dassi*, 24 CWN 860: 47 C 1043. The English cases cited above (2 M & R 501; 1 B & S 745; LR 1 P & D 70) were held to be inapplicable in India in view of s 154].

Effect of Cross-Examining a Party's Own Witness.—It was held in *Surendra v. Ranee Dassi*, 47 C 1043: 24 CWN 860 (**relying** on *Faulkner v. Brine*, 1858, 1 F & F 254), where, however, the earlier case of *Bradley v. Ricardo*, 1831, 8 Bing 57 was not cited that when a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. This view was affirmed in a series of decisions [see *R v. Satyendra*, 37 CLJ 173: 71 IC 657; *Khijiruddin v. R*, 53 C 372: A 1926 C 139: 27 Cri LJ 266 (**approved** in *Jagir v. S*, A 1975 SC 1400); *Maqbul v. R*, 32 CWN 872: 56 C 145; *Bikram v. R*, 50 CLJ 467; *Panchanan v. R*, 57 C 1266: 34 CWN 526] and it was held that omission to tell the jury to reject the evidence altogether amounted to misdirection. The above doctrine was based on the view that the object of cross-examination of a party's own witness was to discredit the witness and amounted to an admission that he was not a witness of truth. But the only object of cross-examination is not to impeach the credit of a witness but also to compel him to make admissions favourable to the cross-examiner and to find out the truth, although in certain circumstances it may have the effect of discreditng the witness altogether. In *Bradley v. Ricardo, sup*, TINDAL CJ, said: "It has been urged as an objection that this would be giving credit to the witness on one point after he had been discredited on another; but difficulties of the same kind occur in every cause where a jury has to decide on conflicting testimony". *Bradley v. Ricardo*, was not cited in any of the above cited cases. See further, *Summer Lelversley v. Brown & Co*, 1909, 25 TLR 745.

Hostile witness is not necessarily a false witness. [*Shatrughan v. State of M P*, 1993 Cri LJ 120, 122 (MP)]. Merely describing a person as hostile witness does not completely efface his evidence [*Duli Chand v. State of Rajasthan*, 1992 Cri LJ 3397, 3401 (Raj)]. The mere fact that a particular witness has not chosen to support the party who brings him forward by itself is not a reason to discard the tetimony of such a witness *in toto*. The testimony of such a witness is to be assessed for whatever value it is [*Jai Pal Singh v. State*, 1996 Cri LJ 4097, 4101 (Del)]. Simply because a witness has turned hostile his statement is not to be discarded and ignored *in toto*. If the court finds something is there in the evidence of a hostile witness worth placing the reliance it will be free to do so [*Zamir Ahmed v. State*, 1996 Cri LJ 2354, 2357 (Del); *Raj Bahadur v. State*, 1996 Cri LJ 2364 (Del)]. The evidence of the police witnesses cannot be thrown away merely on the ground that they are police personnel and interested in the positive result of the case. It is the duty of the prosecution to call for the independent Motbir witnesses to the recovery and to produce them in the court. If the Motbir witnesses have been won over by the accused-appellant or they are not supporting the pro-

secution case in its entirety then merely on that ground the evidence of the police personnel cannot be discarded and the whole prosecution case cannot be thrown away [*Chhotu Ram v. State of Rajasthan*, 1995 Cri LJ 819, 823, 824 (Raj)]. Although the High Court had observed that evidence of a PW, though hostile, could be relied on, but he did not speak anything about the occurrence and only deposed that he saw the four accused going away, and when the evidence of another PW was of doubtful nature regarding the participation of all the four accused and there was no other direct evidence, the evidence of the hositle witness cannot be of any use [*Kathi Odhabhai Bhimabhai v. State of Gujarat*, A 1993 SC 1193, 1196 : 1993 Cri LJ 187]. Merely because one part of the statement of the witness was not favourable to the party which called him, the court should not conclude that he was suppressing the truth or that his testimony was adverse to the party which called him [*K. Kusuma Kumari v. G. Surya Bhagawan*, 1996 AIHC 2627, 2633 (AP)]. Simply because a witness has been declared hostile that does not mean that his whole evidence most be rejected; such of the portions of the evidence of the said witness which inspires confidence to be acted upon can be relied on [*Haneefa v. State*, 1993 Cri LJ 2125, 2127 (Ker)].

The testimony of witness is not completely effaced merely because he was declared hostile. Such part of testimony of a hostile witness, as inspires confidence can be accepted by the court. Partly hostile witness can corroborate [*Kunwar v. State of UP*, 1993 Cri LJ 3421 (All)]. See also *Ravindra Kumar Dey v. State of Orissa*, 1977 Cri LJ 173 and *Satpal v. Delhi Administration*, A 1976 SC 294 : 1976 Cri LJ 295, 309]. Evidence of hostile witness corroborated to the extent of presence of the accused can be relied upon [*Om Prakash v. State of Haryana*, 1994 Cri LJ 3351, 3360 (P&H)]. The court is not precluded from taking into account the statement of a hostile witness altogether and it is not necessary to discard the same *in toto* [*Gulshan Kumar v. State*, 1993 Cri LJ 1525 (Del)]. See also *Sat Paul v. Delhi Administration*, 1976 Cri LJ 295; *Rabindra Kumar Dey v. State of Orissa*, 1977 Cri LJ 173 and *Bhagwan Singh v. State of Haryana*, 1976 Cri LJ 203]. Though the evidence of a hostile witness can be relied upon but when he did not speak anything about the occurrence and only deposed that he saw the accused persons going away and when the evidence of the eye-witness is of doubtful nature regarding the participation of all the accused and there was no direct evidence, the evidence of the hostile witness cannot be of any use [*Kathi Odhabhai Bhimabhai v. State of Gujarat*, 1993 Cri LJ 187, 189 (Guj)].

Turning hostile of one set of the family member/witness by itself cannot be permitted to destroy the other set of dependable prosecution evidence which is otherwise sufficient enough to hold the accused guilty for the offence alleged against him [*State of Gujarat v. Balubhai Madhabhai Zala*, 1995 Cri LJ 2588, 2591 (Guj)]. The evidence given by a witness who has been declared hostile deserved to be scrutinised carefully not only at the time of writing the judgment but even at the time when the witness is in the witness-box and being examined. It is the duty of the prosecution to put questions to the hostile witness which are relevant for the purpose of ascertaining whether he is speaking the truth or for upholding the prosecution version and in case where the statement given by the witness in the court is contradictory with the statement given by the witness to the police under section 161 Cr PC [*State of Rajasthan v. Bhera*, 1997 Cri LJ 1237, 1245, 1246 (Raj)]. The mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him an unreliable witness so as to exclude his evidence from consi-deration altogether [*Meena Gopalkrishna Mudiliyar v. State of Maharashtra*, 1993 Cri LJ 3634 (Bom)]. See *Bhagwan Singh v. State of Haryana*, A 1976 SC 202 : 1976 Cri LJ 203, 204].

The view that discrediting a hostile witness on certain points amounts to discrediting the witness *in toto* was not accepted in *R v. Cama*, 29 Bom LR 996, 1005: 106 IC 100: A 1927 B 501. The next protest came from TERRELL, CJ, in 1929 who approved of *R v. Cama, ante*, and observed that the theory that a party having discredited his own witness is not entitled to rely upon any part of his evidence as fallacious. The main purpose of cross-examination is to obtain admission, and it would be ridiculous to assert that a party cross-examining a witness is therefore prevented from relying on admission and to hold that the fact that the witness is being cross-examined implies an admission by the cross-examiner that all the witness's statements are falsehood [*Shohrai v. R*, 9 P 474: A 1930 P 247]. "The better opinion is (citing *Bradley v. Ricardo, sup*) that where a party contradicts his own witness on one part of his evidence, he does not thereby throw over all the witness's evidence, though its value may be impaired in the eyes of the court" [Halls, 3rd ED, Vol 15, para 805].

The matter was the subject of an exhaustive inquiry by a Full Bench where five judges came to the same conclusion. The main judgment was delivered by RANKIN, CJ, [*Prafulla v. R*, 58 C 1404: 35 CWN 731: 53 CLJ 427: A 1931, C 401]. It was observed that :—

> The fact that a witness is dealt with under s 154, even when under the section he is "cross-examined" to credit in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence, or that the party who called and cross-examined him can take no advantage of any part of his evidence. Either party may rely on the evidence of a witness who is cross-examined by the party calling him. There is moreover no rule of law that if a jury thinks that a witness has been discredited on one point, they may not give credit to him on another. The rule of law is that it is for the jury to say. The evidence of such witness is not to be rejected either in whole or in part. It is not also to be rejected so far as it is in favour of the party calling a witness, nor is it to be rejected so far as it is in favour of the opposite party.
>
> The whole of the evidence so far as it affects both parties favourably or unfavourably must go to the jury for what it is worth, subject to the following conditions:
>
> (1) If the previous statement is the deposition before the committing magistrate and is put in under [1]s 288 Cr P Code, so as to become evidence for all purposes, the jury may in effect be directed to choose between the two statements.
>
> (2) But in other cases, the jury cannot be so directed, because *prima facie* the previous statement of the witness is *not evidence at all* against the accused of the truth of the facts stated therein. The proper direction to the jury is that before relying on the evidence given by the witness at the trial, the jury should take into consideration the fact that he made the previous statement, but that they must not treat the previous statement as being any evidence at all against the prisoner of the facts therein alleged. This is good law whether the previous statement be admitted by the witness or proved in spite of his denial under s 155.
>
> Apart from special cases (*eg*, when the previous statement of the witness is used as corroboration under s 157 of his testimony in the witness-box on the

1. S 288 has been omitted in Cr P Code, 1973.

conditions therein laid down), the unsworn statement, so far as the maker in his evidence does not confirm and repeat it, cannot be used at all against the accused as proof of the truth of what it asserts.

The above Full Bench case has overruled the contrary decisions cited above and the same view has been adopted in later cases [*Wahid v. R*, 36 CWN 356; *Annamathayar v. Offl Assignee*, 56 M 7; *Nebti v. R*, 19 P 369; *Ramesh v. N T Co*, 44 CWN 999: A 1940 C 536; *Purustam v. Chakradhary*, A 1959 Or 19; *Rema v. S*, A 1965 Or 31; *Saibanna, In re*, A 1960 Mys 248]. When a witness is cross-examined and contradicted with the leave of the court by the party calling him, his evidence cannot be washed off altogether. The judge may, after reading and considering the evidence as a whole, with due caution and care, accept, in the light of other evidence on the record, that part of his statement which is creditworthy [*Sat Paul v. Delhi Admn*, A 1976 SC 294 (*Prafulla v. R*, A 1931 C 401 FB **apprd**). *Shankarlal v. State of Madhya Pradesh*, 1982 Cri LJ 254, 255: 1981 MPLJ 736 (Madh Pra); *Jay Prakash Alais Kaku v. State of Sikkim*, 1982 Cri LJ NOC 196 (Cal); *Upendra Mahakud v. State*, 1985 Cri LJ 1767, 1769: (1985) 1 Crimes 729 (Orissa) (DB); *State of U.P. v. Girja Shankar Misra*, 1985 Cri LJ NOC 19 (Delhi) (DB); *Laxman Sahu v. State of Orissa*, 1990 Cri LJ 821, 822 (Orissa); *Bhagatram v. State of M.P.*, 1990 Cri LJ 2407, 2411 (MP); *Rangilal v. State of UP*, 1991 Cri LJ 916, 920 (All); *K.P. Rajan v. State of Kerala*, 1991 Cri LJ 1859, 1862 (Ker)]. When a witness declared hostile and cross-examined with the permission of the court the evidence remains admissible and there is no legal bar to have a conviction upon his testimony if corroborated by other reliable evidence [*Bhagwan v. S*, A 1976 SC 202]. The position is this that the evidence of a hostile witness is evidence in the same manner and to the same extent as that of any other witness [*Deodhari v. R*, A 1937 P 34]. A party is not bound by the evidence of a witness produced by him. Nor is there any rule of law that a party is not able to say that a witness produced by him is not speaking the truth upon some particular point unless he makes a written application to say that the witness is hostile [*Baburam v. R*, A 1937 A 754]. Permission to cross-examine one's own witness does not change the examination-in-chief to cross-exami-nation [*S v. Mohan*, A 1960 G 9]. Even if a witness is declared hostile and cross-examined, the value of his evidence would depend upon all the circumstances and would not, merely because of the cross-examination, become suspect [*In re Kalu Singh*, A 1964 MP 30].

The testimony of a hostile witness is usable to the extent to which it supports the prosecution case. *Koli Lakhmanbhai Chanabhai v. State of Gujarat*, AIR 2000 SC 210.

Can a Party Causing His Opponent to be Called as a Witness Cross-Examine Him?—In *Kishorilal v. Chunilal*, 36 IA 9: 31 A 116: 13 CWN 370: 9 CLJ 172, LORD ATKINSON observed:—"It would appear from the judgment of the High Court that in India it is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as witness, and thus give the counsel for each litigant the opportunity for cross-examining his own client. It is a practice which their Lordships cannot help thinking all judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarrass judicial investigation as it has done in this instance". See also *Venkata v. Pappaya*, 1913 MWN 828: 21 IC 737. In *Lal Kunwar v. Chiranji Lal*, 37 IA 1: 32 A 104: 114 CWN 285, LORD ATKINSON condemned it as a "vicious practice unworthy of a high-toned or reputable system of advocacy".

It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Her non-appearance as a witness, she being present in court, would be the strongest possible circumstances going to discredit the truth of her case. "It sometimes takes the form of a manoeuvre under which the counsel does not call his own client, who is an essential witness, but endeavours to

force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's own witness. This is thought to be clever, but it is a bad degrading practice" [*per* LORD SHAW in *Gurbaksh v. Gurdial*, A 1927 PC 230: 32 CWN 119: 105 IC 220]. The practice of calling the defendant as plaintiff's witness to give evidence was again condemned by the Judicial Committee and it was observed that in such a case the plaintiff must be treated as a person who puts the defendant forward as a witness of truth [*Satrughan v. Bawa Sham*, A 1938 PC 59: 172 IC 633].

It is an objectionable practice for one party to call the opposite party as his own witness. There is no objection whatever to an advocate seeking to prove his case out of the mouth of the opposite party; but if he puts the opposite party into the witness-box, he takes the risk of making statements by him part of his own evidence. It is possible that in a proper case the court would be satisfied from the witness's demeanour that he was hostile and might in such circumstance even allow the advocate to cross-examine him; but that very rarely happens. It is irregular for a court to allow one party to call the other party as his witness on the ground that it is desirable to elicit some facts from the said witness before the court hears any other evidence in the suit [*Kommineni v. K*, 92 IC 813: A 1926 M 526; see *Max Mink v. Shankar Das*, 116 PWR 1908 *ante*].

Where a witness stands in a situation which naturally makes him adverse to the party desiring his testimony, the party calling the witness is not of right entitled to cross-examine him, the matter being solely in the discretion of the court under s 154 to permit the person calling the witness to put any questions to him which might be put in cross-examination by the adverse party [*Luchiram v. Radhacharan*, 49 C 93: 66 IC 15]. To the same effect is the decision of the court of appeal in England where it has been held that where a litigant is called as a witness by the opposite party, the latter is not entitled as a matter of right to cross-examine him as a hostile witness; but it is a matter in the discretion of the judge [*Price v. Manning*, 42 Ch D 372 AC]. If a party insists on examining the opponent party as his own witness, the court should be careful not to allow him to cross-examine his own witness, because unless the evidence is declared hostile there is no such right [*Puran v. Mathra*, A 1934 L 126].

A party calling his opposite side as a witness is not bound by his statement [*In re Rangaswami*, 21 IC 781: 1913 MWN 998]. Where a defendant is contesting a suit not on his own behalf but on behalf of another defendant, it is not proper to permit him to be examined on his own behalf and allow the other defendant to cross-examine him and to elicit answers in his favour [*Kirmany v. Aga Ali*, 109 IC 170: A 1928 M 919]. Where a plaintiff closes his case without calling the defendant as a witness and the defendant does not appear as a witness to support his own case, the plaintiff will not be allowed after the close of the defendant's case to call the defendant unless there has been some misleading representation by the other side that the defendant would be examined in support of his own case [*Allen v. A*, (1894) P 248].

As to whether the right of cross-examination survives if the cross-examiner afterwards calls his opponent's witness as the witness, see *ante* s 138: "*How long does the right to cross-examine continue*".

S. [1]155. Impeaching credit of witness.—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:—

---

1. In Ceylon Cls (1), (2), (3), (4) have been designated (*a*), (*b*), (*c*), (*d*) respectively.

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has [2][accepted] the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

*[(4) * * * * *]

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(*a*) *A* sues *B* for the price of goods sold and delivered to *B*. *C* says that *A* delivered the goods to *B*.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to *B*.

The evidence is admissible.

(*b*) *A* is indicted for the murder of *B*.

C says that *B*, when dying, declared that *A* had given *B* the wound of which he died.

Evidence is offered to show that, on a previous occasion, *C* said that the wound was not given by *A* or in his presence.

The evidence is admissible.

SYNOPSIS

---

2. Substituted for the original word "had" by s 11 of the I E (Am) Act 18 of 1872.

* **Clause (4) omitted by the Indian Evidence (Amendment) Act, 2002 (4 of 2003), s. 3, (w.e.f. 31-12-2002). Prior to its omission it stood as under :**

"(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character."

COMMENTARY

Principle and Scope.—The foregoing sections (see ss 138, 140, 145-48, 154) contain provisions for impeaching the credit of a witness by cross-examination. The various methods of impeaching credit of a witness have been stated before (*ante* s 146) methods of impeaching credit of a witness have been stated before (*ante* s 146). This section deals with another mode of impeaching credit, *viz* by giving *independent evidence*, in addition to the modes of discrediting the testimony of a witness by cross-examination as pointed out in the previous sections or by contradiction as pointed out in the Exceptions 1 and 2 of s 153, the credit of a witness may be impeached under s 155 by the adverse party, or *with the consent of the court*, by the party who calls him, in the following manner:

(*1*) by evidence of persons that the witness bears a general reputation for untruthfulness; but not evidence of particular facts from which the inference of untruthfulness might be drawn (*R v. Brown &c*, 1867 LR 1 CCR 70: 16 IT 364);

(*2*) by proof of misconduct connected with the proceeding, *eg* that the witness has been bribed or has accepted the offer of bribe, or has received any other corrupt inducement to give evidence;

(*3*) by proof that the witness had made a previous statement on matters relevant to the issue, which is inconsistent with his present testimony;

(*4*) by evidence of general immoral character of prosecution in prosecution for rape or attempt to ravish.

Under s 155 a party can impeach the credit of his opponent's witness as a matter of right, but as to his own witness it can be done only with the leave of the court and good cause must be shown for such leave.

This section shows that cross-examination is not the only mode of impeaching credit of a witness, and it may also be done by giving independent evidence, *eg* testimony of other witnesses. There is no specific provision in any section about impeachment of credit by contradiction of facts stated by a witness which are relevant to the issue and this raised some doubt in a case as to whether the law in the Evidence Act is co-extensive with the law in England [see the observation in *R v. Sakharam*, 11 BHCR 169]. But under s 5 evidence may always be given of the existence or non-existence of any fact in issue or fact relevant to the issue. So, when the facts stated by a witness are *relevant to the issue*, independent evidence may always be given to contradict them. Or, when the questions put to a witness in cross-examination for discrediting him relate to facts directly relevant to the matters in issue, his answers may also be contradicted by any evidence [see *illus* (*c*) to s 153]. Such contradictory evidence is really disproving the testimony of the witness on a fact material to the issue by offering counter-evidence, although it is in a sense impeaching his credit in an indirect manner (*ante* s 153). There is no reason to think that the provisions in the

Act as to contradiction of witnesses are not the same as in England. As observed by Field, "the Evidence Act assumes that where the facts are relevant, evidence may be given to contradict" and further the question of contradiction upon facts relevant to the issue is more a rule of procedure than a rule of evidence [Field 651, 652].

S 145 enables a witness to be cross-examined and contradicted with reference to his previous statements in writing. This is one method of impeaching the credit of a witness. S 155 deals generally with the impeaching of the credit of a witness and enumerates different methods of contradicting a witness. One of the methods [cl (*3*)] is by proof of former inconsistent statements and in this sense the whole of the ground covered by s 145 is included in s 155 [*Md Sarwar v. R*, A 1942 L 215: 202 IC 340].

In absence of any inherent vice, no presumption adverse to a witness should be drawn on any matter unless it is put to him and he is given an opportunity to explain it [*Sachindra v. Nilima*, A 1970 C 38]. When impeaching the credit of a witness by proof of previous contradictory statement, his attention must first be drawn to it and the same opportunity should be given to the witness of explaining the discrepancy or inconsistency as in s 145, although s 155 has not specifically embodied a similar provision. The circumstances of the statement should be mentioned to the witness so that he may recall the occasion in his memory and offer explanation, if any [see *post*: "*Clause (3)*"]. The principle involved is the same in both the sections and in English law the procedure is identical in the case of all previous contradictory statements whether verbal or in writing (v *post*). In *Carpenter v. Wall*, 1840, 3 P & D 457: 52 RR 513. PATTERSON J, said—

> "I like the broad rule that when you mean to give evidence of a witness's declarations for any purpose, you should ask him whether he ever used such expressions".

It has been seen that this section deals with the impeachment of credit of a witness by a mode other than cross-examination. The effect of impeaching credit may or may not be achieved in cross-examination. It may also be necessary to impeach the credit of a witness on a point on which there was no cross-examination. In such cases, the credit of a witness may be impeached by offering independent evidence under s 155. The arrangement generally adopted in English books on the subject of the impeachment of credit has not been followed in the Evidence Act. The subject has been treated under three heads; (*i*) Cross-examination (ss 138, 140, 145-52, 154); (*ii*) Contradiction (s 153. Sec 145 also deals with contradiction by cross-examination as to previous statements in writing. (See also s 5); (*iii*) Impeaching credit (s 155). A distinction has been made between contradiction and impeachment of credit, though contradiction by independent evidence or previous inconsistent statement is indirectly discrediting a witness.

The witnesses who are hostile to the prosecution may be confronted with their earlier statement to the police [*Prakash v. S*, A 1979 SC 400].

The evidence of a witness who is hostile to the Crown may be impeached by reference to the police diary [*Ram Charita v. R*, 3 Pat LJ 568: 45 IC 272. As to police diaries see *ante* s 145 and s 160 *post*].

This section specifies certain kinds of evidence which may be given to impeach the credit of a witness. It does not say that such evidence is relevant, but of course it must be taken to be so. The importance of the section lies in this, that it, by implication, restricts the evidence which may be given (otherwise than in exceptional

cases mentioned in s 153) to impeach a witness's credit to that specified in the section [Markby p 109].

With regard to the mode of throwing discredit on the testimony of a witness, Taylor says:—After a witness has been examined in chief, his credit may be impeached, not only by means of cross-examination, but in various other modes. *First*, witnesses may be called to disprove such of the facts stated by him, whether in his direct or cross-examination, as are material to the issue, *next*, proof may be given, under certain restrictions before pointed out, of statements made by the witness inconsistent with the testimony at the trial; and *thirdly*, evidence may be adduced reflecting on his character for veracity. But here the evidence must be confined to his general reputation, and will not be permitted as to particular facts [Tay s 1470]. It is also permissible with a view to impeaching a witness's credit to bring forward evidence of his general reputation for untruthfulness, though not of particular facts from which the inference of untruthfulness might be drawn; and in any event, such evidence must be given by persons well acquainted with the witness, and not by a stranger who has merely made inquiries as to the witness's reputation among his neighbours [Hals 3rd Ed Vol 15 para 809].

As to whether the credit of an accused can be impeached when he exercises his right to come as a witness for the defence, see *post*: "*Accused as a witness*"..

Same: [Difference With English Law].—Under the English law a party is not permitted to produce general evidence to discredit his own witness. It is to be seen that under this section, a party may, *with the consent of the court*, discredit his *own witness*. The provision is analogous to the rule in s 154 about a witness who turns 'hostile' or adverse. The discretion to be exercised in granting permission is of the same nature as in s 154 and the same consideration apply in determining whether leave should or should not be granted.

This section substantially agrees with the English law; but there are a few points of difference. Under that law a party discrediting his own witness "shall not be allowed to impeach his credit by general evidence of bad character" (28 & 29 Vic c 12 s 3 (*ante* s 154). No such restriction has been imposed by the section in cl (*1*). So under that clause a party when discrediting his own witness may, with the leave of the court, give proof of general reputation in respect of the witness's untrustworthiness. Next, the requirement of drawing previous attention of the witness to the inconsistent statements which is laid down in the English statute is not to be found in cl (*3*) of s 155. But as submitted before there is hardly any doubt that in spite of the omission, the same rule applies here as in the case in s 145 [v *post* notes to cl (*3*) *post*]. Thirdly, in England, evidence of self-contradiction is admissible by leave of the judge and in case of a witness deemed adverse by the judge. But the latter condition does not appear in s 155. The court may in its discretion allow evidence of self-contradiction apart from any question of hostility or otherwise.

The law regarding previous inconsistent statements of a witness is now substantially different in England in civil cases. By S 3 Civil Evidence Act 1968 the statements if admitted can be used as evidence of the facts stated and does not merely go to his credibility.

[*Ref Tay ss 1470-72, 1445; Steph Arts 131, 133, 134, 146, Phip 8th Ed pp 470-72, 474, 177; Powell 9th Ed pp 536-38; Wig s 1982; Hals 3rd Ed Vol 15 para 809*].

CLAUSE (1): Evidence of General Reputation for Untruthfulness.—Whether the enquiry into the general character of a witness shall be restricted to his *reputation for veracity*, or may be made in general terms, *involving his entire moral character*

and estimation in society, is a point not definitely settled..... It certainly appears reasonable that the question as to reputation should be put in the most general form, the opposite party being at liberty to inquire whether notwithstanding the bad character of the witness in other respects, he has not preserved his reputation for truth [Tay s 147]. In most of the jurisdictions in America the enquiry is confined to general reputation for truth and veracity [Jones s 860]. The view is also sustained in America that the enquiry may relate to the witness's entire moral character and there are statutes in several States to the effect [Jones s 861]. It is not, however, enough that the impeaching witness should profess merely to state what he has heard "others" say; for those others may be but few. He must be able to state what is generally said of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only which constitutes his general reputation. And, in ordinary cases, the witness should himself come from the neighbourhood of the individual whose character is in question; for if he be a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries. The impeaching witness may, however, be asked on cross-examination the names of the persons he has heard to speak against the character for veracity of the witness impeached [Tay s 1472].

It would not be legitimate to draw an inference against the credibility of a witness in the manner contemplated by s 155(*1*) without anybody going into the witness box [*Dinkar v. S*, A 1970 B 438].

Under cl (*1*), the evidence must be of persons who from their knowledge of the witness can testify that they believe him to be unworthy of credit. In theory such evidence is confined to general reputation for untruthfulness, and the witness is not to state his personal opinion; but in practice the question is put in this way—"From your knowledge of the witness, would you believe him on his oath?" [*R v. Brown &c*, 1867 LR 1 CCR 70; *Toohey v. Commer of Metropolitan Police*, 1965 AC 595, 606]. Whether the inquiry is confined to general reputation for truthfulness or extends to general moral character, evidence cannot be given of particular acts of falsehood or immorality or wrongdoing. *Cf* Expln to s 55. "When the credit of a witnesss is objected to, general evidence that he is not to be believed on oath is admissible but specific evidence that at some period he had committed a particular crime is not admissible " [*per* BAYLEY J, in *May v. Brown*, 1824, 3 B & C 126].

The law is correctly stated in Art 146 of Stephen's Digest (Cl 1 and Explanation are the same as Art 146). In order to show that the evidence of a prosecution witness was unreliable, evidence of a doctor that he had examined him and that he was suffering from a disease of mind is inadmissible [*R v. Gunewardene*, 1951, 2 All ER 290].

The *Explanation* which is in accord with the English rule, says that the witness may not give reasons for his belief in examination-in-chief (see *R v. Gunewardene, ante*), but he may in cross-examination be asked as to his means of knowledge, his feelings of hostility, his reasons for believing a witness to be unworthy of credit and similar questions, and like the general rule in s 153, his answers cannot be contradicted. The reasons for not permitting him to contradict are the same (*ante* s 153: "*Contradiction of answers to questions impeaching impartiality*"). The impeaching witness cannot, in direct examination, give particular instances of other's falsehood or dishonesty, since no man is supposed to come prepared to defend all the acts of his life. But, upon cross-examination he may be asked as to his means of knowledge of the other witness, his feelings of hostility towards him, or whether, in spite of bad character in other respects, the impeached witness has not preserved his reputation

for truth; and the answers to these questions cannot be contradicted. The impeaching witness should come from the locality of the other and not be a stranger sent expressly to learn the latter's reputation" [*Mawsom v. Heartsink*, 4 Esp 103—Phip 11th Ed p 661; Tay s 147; Steph Art 133]. See s 146 *ante*: "*Character*". This section does not allow evidence of witness's general bad character to be brought in [*Mg San v. R*, 1930 Ind Rul Ren 91].

In *R v. Longman*, 1968, 2 All ER 761, EDMUND DAVIES LJ, summarised the position: "1. A witness may be asked whether he has knowledge of the impugned witness's general reputation for veracity and whether (from such knowledge) he would believe the impugned witness's sworn testimony. 2. The witness called to impeach the credibility of a previous witness may also express his individual opinion (based on his personal knowledge) whether the latter is to be believed on his oath and is *not* confined to giving evidence merely of general reputation. 3. Whether, however, his opinion as to the impugned witness's credibility be based simply on the latter's general reputation for veracity or on his personal knowledge, the witness cannot be permitted to indicate during his examination in chief the particular facts, circumstances or incidents which formed the basis of his opinion, although he may be cross-examined as to them". [at p 764].

In *R v. Crown Court*, (1994) 1 All ER 315 evidence was given by the complainant's husband, who had a recent conviction which was not disclosed to the defence. It was held that his previous conviction was a relevant consideration. It was he who, and for the first time in the Crown Court, sought to corroborate his wife's evidence by claiming that his wife had a red mark on her face. In a case in which there was a serious dispute of fact between him and his wife on the one hand and several witnesses, including independent witnesses, on the other, his credibility was very much in issue. He gave evidence additional to that given on the magistrate's court. Had the court known of his recent conviction for dishonesty, its members may well have taken a different view of his credibility and that would have been likely in turn seriously to affect the credibility of the complainant.

—Witness Not Believed in Another Case.—The question whether a witness is entitled to credit or not must be decided by a court on the evidence before it, and not on what another court thought of the witness in other case. So the judgment of another court disbelieving the witness cannot be put in for impeaching his credit. It is not also admissible under s 158 [*Chandreshwar v. Bisheshwar*, A 1927 P 61: 5 P 777: 101 IC 289; *Mir Jawali v. R*, 162 IC 300]. Evidence of the particular estimate formed by a judge in another case of the credit to be attached to the testimony of a witness who is cross-examined in a subsequent trial, is inadmissible [*In re Pasumarty Juggappa*, 4 CWN 684, 685].

Questions as to disparaging comments made by the court on the witness's conduct or testimony in other trials are not admissible [*Seaman v. Netherclift*, 2 CPD 53, *per* BRAMWELL and AMPHLETT JJ; *R v. Bottomley*, 1893 Times Feb 7 *per* HAWKINS J, though such questions are often put without objection; Phip 11th Ed p 655].

—Re-establishing or Re-habilitating Credit and Recrimination.—Where a witness's credit has been directly impeached by giving evidence of general reputation for untruthfulness under the first clause, he may *re-establish his credit either* (*a*) *by cross-examining* the impeaching witness as to his reasons, means of knowledge, hostile feeling, &c (v *Explanation*) or (*b*) by re-examining the impeached witness or (*c*) by giving independent *general* evidence either to support the character of the first witness, or to attack in their turn the general reputation of the impeaching witness. How far this plan of recrimination may be carried, is not yet formally determined.

though the practice is said by some lawyers to be, that a discrediting witness may himself be discredited by other witnesses, but no further witnesses can be called to attack the characters of these last [Tay s 1473; Phip 11th Ed p 662; Steph Art 133]. It seems doubtful how far independent evidence of the latter description is admissible where merely *particular discrediting facts* have been elicited in cross-examination or proved against a witness [Phip 11th Ed p 662]. General evidence of good character and reputation is admissible subsequent to the cross-examination of the witness where his character for untruthfulness has been impugned; but does not become admissible if the cross-examination goes no further than to show that the witnesses contradict one another. [*Bishop of Durham v. Beaumont*, 1808, 1 Camp 207]. Where however, it has been suggested in cross-examination that the witness's testimony is an invention, he may be asked, and evidence given to prove, when he first made the impugned statement [*R v. Benjamin*, 1913, 8 Cr App Rep 146; Hals 3rd Ed Vol 15 para 810].

Whether independent evidence should be allowed to be offered to rehabilitate the credit of the impeached witness depends on the manner in and the extent to which the witness's credit has been impeached. Evidence of good character for veracity may not be given until the witness's moral character is directly brought into question and attacked. Whether there has been such an attack on the witness's character to justify evidence of good character depends on the nature of the impeaching evidence. If the impeachment tends directly to shatter the character of the witness for truth, the opposite party can no doubt rehabilitate his witness by testimony of his good character. In the case of mere insinuations, denial may be sufficient. When there is evidence of misconduct by cross-examination, the witness may in some cases explain it away in re-examination. There is no occasion for evidence of good character in bias and interest, as they do not involve character.

Impeachment of a witness by his own self-contradictory statement made on a former occasion does not generally require rehabilitation by testimony to good character for he might have been in error for failure of memory. If however, the inconsistent statement is such that it affects the credibility of the witness, there may be a case for establishing credit by evidence of good character.

CLAUSE (2): Evidence of Misconduct Connected With the Proceedings. [Acceptance of Offer of Bribe etc].—The words "*has accepted the offer of bribe*" in this clause, have been substituted for the word "*has had the offer of bribe*" by Act 18 of 1872 adopting the opinion expressed by POLLOCK CB, in *Attorney-General v. Hitchock*, 1 Ex 91 where he observed:—"It is totally irrelevant to the matter in issue that some person should have thought fit to offer a bribe to the witness to give an untrue account of a transaction; and it is of no importance whatever if that bribe was not accepted. It is no disparagement to a man that a bribe is offered to him; it may be disparagement to the person who makes the offer." See notes to s 153, Exception 2 and *Bhogilal v. Royal Ins Co*, 32 CWN 593: A 1928 PC 54: cited *ante*.

CLAUSE (3): Evidence of Former Inconsistent Statements. [Attention to be Drawn For Purpose of Contradiction].—A witness may be discredited by proof of his former statements inconsistent with his present testimony. S 145 which also refers to discrediting by former contradictory statements is applicable to statement made by him in *writing or reduced to writing*, with which a witness is confronted in *cross-examination*. But s 155(*3*) being expressed in general terms it may apply to previous statements both oral and written, though it appears to refer principally to previous oral statements. There is the further difference that the witness may be discredited by proving such previous statements by *independent* evidence. *Illustrations* (*a*) and (*b*)

explain its meaning. See [*R v. Jarvis and Jarvis*, 1991 Crim LR 374 CA], where it was not kept in mind that inconsistent out of court statements could not be evidence save in so far as the makers adopted any part of them as true and that an inconsistent statement of the victim of a sex assault is relevant and could be taken into account when considering her credibility; [*R v. Funderbunk*, (1990) 2 All ER 482 CA], where the complainant of a sexual offence was not permitted to be questioned about her former inconsistent statements and the trial was held to be vitiated.

Contradiction by previous inconsistent statement must, however, be confined to matters *relevant to the issue*, as no contradiction is allowed on irrelevant matters, except in the two cases mentioned in s 153. That the previous inconsistent statement must relate to matters relevant to the issue is borne out by the expression "inconsistent with any part of his evidence *which is liable to be contradicted*." As pointed out by WILSON J, an irrelevant matter requires no contradiction, as it is not admissible in evidence under s 5. The expression "which is liable to be contradicted" in s 155(*3*) is equivalent to "which is relevant to the issue" [*Khadija Khanam v. Abdul Kareem*, 17 C 344]. The Supreme Court however, has said that this proposition is too broad and the various clauses in s 155 do not warrant such an interpretation [*Rama Reddy v. V V Giri*, 1970, 2 SCC 340, 349]. The third Sub-clause refers to a former statement which is inconsistent with the statement made by the witness in evidence in the case and it is permissible that the witness be contradicted about that statement [*Kehar Singh v. State*, A 1988 SC 1883, 1901 : 1989 Cri LJ 1].

S 145 says that if it is intended to contradict the witness by the writing, his attention must be called to those parts which are to be used for the purpose. But although there is no mention of any such thing in this clause, there can be no manner of doubt that it is fair and just that the same rule should be adhered to [see *R v. Madho*, 15 A 25; *Sham Lall v. Anuntee*, 24 WR 312]. The reason in s 145 applies with equal force to contradiction under s 155(*3*). For instance, if a witness *A* is intended to be discredited by the evidence of another person *B*, to whom *A* is alleged to have made a former inconsistent statement, *A* should first be asked in his cross-examination whether or not he made such statement to *B* on a particular occasion. This course would furnish the witness with an opportunity to admit or deny the statement or to offer explanation. There can be no distinction on principle between a statement in writing (s 145) and an oral statement for purpose of impeaching his credit and the same reasons apply in both cases with equal force. Under the English Statute (28 & 29 Vic c 18 s 3) before proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion should be mentioned to the witness, and he should be asked whether or not he has made such statement. As was expected, this view has been recognised judicially and it has been held that under s 155 a witness cannot be contradicted by his previous statement, if his attention has not been drawn to it as required by s 145 [*Amir Begum v. Mt Begam*, 127 PLR 1914: 22 IC 86; *Misri v. R*, A 1934 S 100; *Arnup v. Kedar*, 30 CWN 835, 837; *S v. Minaketan*, A 1952 Or 267—*per* NARASIMHA J]. S 155(*3*) does not render nugatory the clear and explicit provisions of s 145 [*Mahla v. R*, A 1931 L 38; see *Kashiram v. R*, 109 IC 120 (A); *Amrit v. Gur*, A 1934 A 266]. In a case it has been pointed out that s 155(*3*) does not lay down the manner in which the former statement is to be proved. The mode of proof for purpose of contradiction is provided in s 145 which controls s 155 [*Gopichand v. R*, 11 L 460: A 1930 L 491]. Where witnesses make statements contradictory to their previous statements, the court ought to draw their attention to the contradiction [*Sham Lall v. Anuntee*, 24 WR 312].

It has however been held in some cases that as s 145 makes no mention of oral statements, it cannot control s 155. Hence questions about former oral statements

made to certain witnesses by other witnesses may be asked although the court may refuse to place any reliance on them on the ground that they had not been put to these witnesses for explanation [*Muktawandas v. R*, 1939 Nag 109; A 1939 N 13; *Ramratan v. S*, A 1956 Raj 196]. Where statement was said to be made by a witness who declined to affix his thumb impression it could not be used for contradicting the testimony [*S v. Harpal*, A 1978 SC 1530]. The credit of a witness can be impeached by proof of any statement which is inconsistent with any part of his evidence in court. This principle is delineated in section 155(*3*). *Binay Kumar Singh v. State of Bihar*, A 1997 SC 322, 326 : 1997 Cri LJ 362.

Same: [Contradiction by Former Inconsistent Statements].—If a person giving the date of birth in a guardianship application makes a different statement of age in a subsequent case, his credit may be impeached by the recital in the application [*Prahlad v. Ramsaran*, 38 CLJ 213]. Where the previous deposition of a witness is relied on to impeach the credit of a witness, the contradictory statements alone can be admitted in evidence [*Imambundi v. Motasuddi*, 15 CLJ 621]. Deposition of an attesting witness in a prior proceeding if he is alive and examined in a subsequent proceeding can be used only to contradict or corroborate his present statement under s 155 and s 157 [*Ponnuswami v. Kalyanasundara*, A 1930 M 770: 125 IC 231]. A statement by a witness in another case subsequent to his examination in the trial court cannot be admitted in the appellate court under s 155(*3*) as it is not a "former" statement. It may possibly be used by re-examining the witness at the appellate stage [*U Po Saing v. Kyi Maung*, 104 IC 377: 6 Bur LJ 86: A 1927 R 247].

If a witness denies a fact in the course of his evidence and it is proved that on a previous occasion he made a statement admitting it, that does not prevent his deposition from going in as evidence in the case, though it weakens its value so far as to make it unsafe to act upon it without corroboration [*Homeshwar v. Kameshwar*, 39 CWN 1130: A 1935 PC 146]. A letter written by a witness is no evidence of the facts therein stated, and the only legitimate use to which it could be put is to use it in cross-examination for discrediting him if what he had written was inconsistent with his evidence [*Judah v. Isolyne*, A 1945 PC 174; *Mrs Abba Astavans v. Suresh Astavans*, A 1984 NOC 131 (Del)]. The statement of a person recorded by a Commissioner does not cease to be his statement merely because the court which ordered the Commissioner to record the statement had no jurisdiction over the subject matter of the suit [*State of Punjab v. Vishwajit Singh*, A 1987 P&H 126, 132].

If the statements made to a police officer during an investigation be actually reduced to writing, the writing itself cannot be treated as part of the record or used as evidence, but may be used for the purpose of refreshing the memory under s 159. Consequently the person making the statements may properly be questioned about them, and with a view to impeach his credit, the police officer himself, or any other person in whose hearing the statements were made, can be examined on the point under s 155 [*R v. Uttam Chand*, 11 BHC 120; see also *R v. Sitaram*, 11 B 657; *R v. Madho*, 15 A 25; *R v. Taj Khan*, 17 A 57, 60; *R v. Jagardeo*, 27 A 469: 1905, AWN 64; *Nag Pye v. R*, 18 Cri LJ 844: 41 IC 668: 15 M 25. These and other cases should be read in the light of the new provisions in s 162(*1*) Cr P Code. See *ante* s 145: "*Impeaching credit by statements made to the police and recorded under s 162 Cr P Code*", and *post*: "*S 162 Cr P Code and this section*]. As to police diaries, see *ante* s 145.

Where it is alleged that the statement made by the witness to the court was not made before the police officer, it is useless to refer to the record in the case-diary at all, as the case-diary is not intended to be a complete record. The only way to prove

the statement is to ask the police officer himself when he is in the witness box [*In re Bangaruraju*, A 1942 M 58]. Statements made by complainant before a police officer and taken down in writing are admissible at the trial under s 155(*3*) to show that he had made statements which were inconsistent with the evidence given before the magistrate subject only to this that the provisions of s 145 had been complied with [*Arnup v. Kedar*, 30 CWN 835, 840 : A 1925 C 1017].

Where the examination of witnesses has been reduced by an investigating officer to writing, it is undesirable to permit the accused's counsel to ask the officer if a certain witness made a particular statement to him although the language of s 155(*3*) is wide enough to permit of such questions. The officer cannot be expected to remember all that many witnesses told him. If he is refreshing his memory by looking at the diary, the procedure is outside the scope and intent of s 159. In the circumstances the written record by the police officer is the only proper and right thing to prove to discredit the witness. If the written record (police diary) be used, the provisions of s 145 and s 162 Cr P Code will have to be borne in mind. A copy of the statement made before the police cannot be used against the witness till he has been confronted with it. The right procedure, then, when a prosecution witness is contradicting himself, is to ask the judge to look into the diary and decide whether the accused person should not have a copy of the statement. If such copy be granted, the witness's attention must be called to the same, before the investigating officer is called to prove the record made by him [*Kashiram v. R*, 26 ALJ 139: A 1928 A 280].

Written records of statements made by witnesses to the police during an investigation can only be used to impeach his credit under certain conditions [*Bhulai v. R*, 13 OC 7: 5 IC 357].

Statements of witnesses made to the police during investigation were adhered to before the committing magistrate, but were retracted at the sessions court. The judge used the former statements to negative the statements made at the trial—*Held* that s 155 rendered the former statements relevant only to contradict or negative the statements in the sessions court [*R v. Maruti*, 46 B 97: 63 IC 332].

Previous statement of a witness under s 164 Cr P Code can be used for impeaching credit but it cannot be used as substantive evidence [*Bishun v. R*, 50 A 242; see *R v. Sekandar*, A 1941 C 406]. Oral statements made to the police cannot be admitted except for contradicting witnesses on behalf of the defence [*R v. Mir Mazar*, 57 B 400]. Statements of a witness made to a police officer may be used in court by the prosecution for discrediting him if he tells there a different story under s 155 and s 162 Cr P Code is no bar [*Ram Charita v. R*, 3 Pat LJ 568: 45 IC 272]. An excise officer is not a police officer for purpose of s 162 Cr P Code. A confession made by an accomplice to an excise officer may be used for impeaching his credit when he is examined as a witness on behalf of the other accused [*Kerat v. R*, 61 C 967: 38 CWN 1005].

First information report may be relied on by the defence to impeach the informant's credit. Statements made by third parties to the police during their investigation are admissible to impeach credit, provided the persons who made the statements are called as witnesses [*Azimuddy v. R*, 54 C 237: 44 CLJ 253; *Ramnaresh v. R*, 1939 All 377: A 1939 A 242].

Where certain statement relating to the commission of an offence was made by *I* to another *H* who reported at the *thana* and it was recorded—*Held* that though the evidence given in the case by *J* could be contradicted by the evidence of *H* proving the statement to him by *J*; it could not under this clause, be contradicted by what the

police recorded as the first information [*R v. Dina Bundu*, 8 CWN 218]. Two persons made statements to the effect that *C* and another had robbed them and caused hurt while doing so. One statement was made to their employer and the other to the head constable. *C* was charged and these two persons were called as witnesses for the prosecution, but they then denied that *C* was one of them who had assaulted them. Their previous statements were filed as evidence against the accused—*Held* that the former statements referred to and which implicated the accused could be used only under this clause for discrediting their evidence and not as substantive evidence against the accused [*R v. Cherathi Choyi*, 26 M 191; *Bishen v. R*, A 1927 A 705; *Puttu v. R*, 17 OC 363; *Niamat v. R*, A 1930 L 409]. Statement made under s 164 Cr P Code behind the back of the accused cannot be used against him [*Manni v. R*, A 1930 O 406; *Puttu v. R*, 17 OC 363].

An advocate was charged for professional misconduct in advising his client to bribe a witness. The client denied it, but two other witnesses proved the statements made to them by the client about bribing—*Held* that their evidence was inadmissible for the purpose for which it was used or as against the advocate. Even if it was admissible for the purpose of impeaching the credit of the client witness under s 153(*3*), it might be proved that that said client was an unreliable witness who said one thing, one day and another thing another day; but it would not prove the truth of his own unsworn statement or make it evidence against a third person [*Bomanjee Cowasjee v. Judges of Chief Court*, 34 IA 55: 11 CWN 370: 9 Bom LR 3 : 34 C 129: 17 MLJ 67]. Statements made to village *monegar* after occurrence were retracted at the sessions trial. Not being made in the presence of the accused nor on oath, they could not be used as substantive evidence [*In re Malaya Goundan*, 42 MLJ 278: 66 IC 326]. The statement can be used to contradict and sometimes to corroborate him, but it is not substantive evidence by itself [*Shiam Sundar v. R*, 76 IC 572].

Where two accused are alleged to have strangled one to death and some of the prosecution witnesses say that the eye-witness immediately after the offence did not implicate one of the accused as having helped to strangle, their evidence is admissible under s 155(*3*) to discredit the eye-witnesses [*Nanak v. R*, A 1931 L 189].

A statement by an informant to a person not legally competent to investigate under s 157 can be used for impeaching his credit [*S v. Pareswar*, A 1968 Or 20].

Even when photographs are rightly admitted in evidence, their evidentiary value is almost nil. This evidence of photographs, ordinarily cannot be used to contradict the eye-witness account and the evidence of panch as well as investigating officer [*State of Gujarat v. Bharat alias Bhupendra*, 1991 Cri LJ 978, 980 (Guj)].

—Statement on Tape Recorder.—Previous inconsistent statement recorded on tape recorder is admissible for contradiction [*Rupchand v. Mahabir*, A 1956 Pu 173; *Rama Reddy v. V V Giri*, 1970, 2 SCC 340]. The fact that the statements were recorded on a tape without the knowledge of a party interested is by itself no objection to its admissibility. The statements in the tape recorder can be admitted after proof that they were made and accurately recorded [*Manindra v. Biswanath*, 67 CWN 191]. The Supreme Court has also held that statements recorded on tape recorder are not admissible on the ground that they may be tampered with wiping of portions. If there is any proof that the tape recording has been tampered with it would be a ground for discounting the evidence [*Pratap v. S*, A 1964 SC 72 (*Pratap v. S*, A 1963 Pu 298 **reversed**)]. The prosecution sought to rely upon certain conversation alleged to have taken place between the accused and the complainant which was recorded on a tape recorder. *Held*: that the conversation did not attract the applicability of s 162 Cr P Code and was admissible [*Yusufalli v. S*, A 1968 SC 147].

Same: [Evidence By the Prosecution Side of Former Inconsistent Statements of Prosecution Witnesses].—It is neither desirable nor permitted by ss 154 and 155 of the Ceylon Ordinance No. 14 of 1925 (the same as ss 154 and 155 Evidence Act) that evidence of what a prosecution witness had said previously should be given by the prosecution to contradict him without previous cross-examination of the witness as to such statements [*Seneviratne v. R*, 41 CWN 65: A 1936 PC 289]. Previous deposition of prosecution witnesses cannot be used by prosecution to contradict what the witnesses state in their cross-examination in the present trial [*Jamal v. R*, 86 IC 153: A 1925 P 381]. Statements of a prosecution witness under s 164 Cr P Code may only with the permission of the court be used for impeaching the credit of the witness at the subsequent trial [*R v. Sekendar*, A 1941 C 406].

First Information Report.—It is well settled that unless a First Information Report can be tendered in evidence under any provision in Ch 2 of the Act, such as s 32(*1*) or s 8, it can ordinarily be used only for the purpose of corroborating, contradicting or discrediting (under ss 157, 145 and 155) its author, if examined, and not any other witness [*Shanker v. S*, A 1975 SC 757].

S 162 Cr P Code and This Section.—S 162(*1*) Cr P Code modifies this section. So far as the latter section permits the prosecution to impeach the credit of his own witnesses by proof of former statements made to an investigating officer and inconsistent with his testimony given at the trial, it is by implication repealed by s 162(*1*) Cr P Code. But the right of the defence to prove for the purpose of impeaching the credit of a prosecution witness a statement made by a witness to the investigating officer and inconsistent with the testimony of the witness given at the trial is saved by the proviso to s 162(*1*) [*R v. Najibuddin*, A 1933 P 589: 15 PLT 543. See *ante* s 145 p 1310].

[3]S 288 Cr P Code and This Section.—The deposition of a witness admitted under s 288 Cr P Code is to be treated as evidence in the case for all purpose; its use is not limited to the purpose of cross-examination within s 155 [*Fakira v. R*, 64 IA 148: A 1937 PC 119 : 41 CWN 741: 1937 Bom 711]. See *ante* s 145 p 1308.

CLAUSE (4): Evidence of General Immorality of Prosecutrix in Rape Cases.—This clause is in accord with the English law on the point [*post*, Tay s 363]. As originally drafted, the Act contained a separate section in terms of cl (*3*), in the chapter relating to the relevancy of Character. But it was afterwards thought advisable to include it in s 155. In a rape case, the consent of the complainant to the act being the material matter in issue, the moral character of the woman is of considerable value, Hence, evidence that the prosecutrix was of generally immoral character is admissible. Such evidence of general bad character is receivable not only under cl (*1*) to show that she is unworthy of credit but also, and probably with stronger reason, on the question of consent. This evidence is therefore admissible whether she be, or be not, cross-examined [*R v. Clarke*, 2 Stark 241; *R v. Gibbons*, 31 LJ MC 38, 100]. "It is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed" [*per* GAROUTTE J, in *People v. Johnson*, 1895, 106 California 289 (Am)]. So, to show consent, the prosecutrix may be cross-examined as to other immoral acts *with the prisoner*, and if she denies these, they may be independently proved [*R v. Riley*, 1887, 18 QBD 481]. She may also be cross-

---

3. S 288 has been omitted in Cr P Code, 1973.

examined as to such acts with *other men*, but she may decline to answer, and if she deny them they cannot be independently proved [*R v. Cockroft*, 1870, 11 Cox CC 410; *R v. Holmes*, 1871, LR 1 CCR 334; Phip 11th Ed p 236; Tay s 363 *post*; see s 153 *ante*].

On indictments for rape, or an attempt to commit that crime, while evidence of general bad character is admissible to show that the prosecutrix, like any other witness, ought not to be believed upon her oath, proof that she is a reputed prostitute would go far towards raising an inference that she yielded willingly to the prisoner's embraces. General evidence, therefore, of this kind will be received, though the woman be not called as witness, and though, if called, she be not asked, on cross-examination, any questions tending to impeach her character for chastity [*R v. Clarke*, 1817, 2 Stark R 241]; but it seems that the counsel for the defence cannot go further, and prove specific immoral acts with the prisoner, unless he had first given the prosecutrix an opportunity of denying or explaining them [*R v. Cockeroft, sup.* See *R v. Martin*, 1834, 6 C & P 562; *R v. Robins*, 1843, 2 M & Rob 512; Tay s 363; Hals 3rd Ed, Vol 10, paras 826, 1441]. On a charge of rape the prosecutrix may be contradicted if she denies previous connexion with the prisoner, for that may be material to consent [*R v. Martin, sup*]; but her answer is conclusive if she denies connexion with other men, for then the question only goes to her character and credit [*R v. Hodgson*, 1812 Russ & Rly 211; see Hals 3rd Ed Vol 10 para 826].

On a charge of *carnal knowledge* of a girl under 16, where it had improperly, but without objection, been opened, and proved by the prosecutrix, that she was seduced by the defendant, and the defendant in cross-examination put to her that she was of loose character and had connection with other named men, he was not allowed to call these men in rebuttal, since the evidence was only relevant to credit and not to the issue, and he had not objected, as he might have, to her evidence in chief on this point [*R v. Cargill*, 1913, 2 KB 271: 108 LT 816, cited in Phip 11th Ed p 236].

In rape cases, evidence of general immoral character of the woman is admissible [*Keramat v. R*, A 1926 C 320: 42 CLJ 524]. Clause (*4*) refers to such evidence as that her general reputation was that of a prostitute or that she had the general reputation of going about and committing immoral acts with a number of men. It is not enough to show that she ran away with a man once or twice or that she had on specific occasions done something immoral [*Wahid v. R*, 36 CWN 356].

Cross-examination of victim as to sex with other men.—In a prosecution for rape, the victim was sought to be cross-examined about her consensual sexual encounters with another man at her flat (where the rape was alleged to have taken place some two weeks later) and on the question whether such questioning should have been allowed, the Court of Appeal laid down that the test was whether the jury might reasonably take a different view of the complainant's evidence if the cross-examination was allowed. The cross-examination was relevant directly to the victim's credibility and to her evidence that she would have allowed no one to stay the night and also to the issue of consent and that, therefore, the questioning should have been allowed [*R v. Redguard*, 1991 Crim LR 213 CA].

A similar approach was adopted in [*R v. Viola*, (1982) 3 All ER 73 CA]. The accused was charged with rape. The accused was acquainted with the complainant. During the night in question he was able to get access to the complainant's flat saying that he was having trouble with the police over the driving of a car. While the complainant alleged that the accused committed rape, the accused stated

that she had consented to sexual intercourse with him. The accused sought permission to cross-examine her regarding two incidents concerning her sexual relations with other men shortly before and shortly after the alleged rape. It was held by the Court of Appeal that in all the incidents regarding the complainant's sexual relations with other men were relevant to the issue of consent and could not be regarded as so trivial or of so little relevance to that issue that the judge was entitled to conclude that no injustice would be done to the accused if cross-examination about them was excluded.

Where the questions as to credit are sufficiently related to the subject-matter of the charge, the defence ought to be allowed to cross-examine and, if necessary, call rebuttal evidence. This proposition was laid down in [*R v. Funderburk*, (1990) 1 WLR 587 CA]. The accused, who was charged with unlawful sexual intercourse with a 13-year old girl, pleaded to be not guilty. The girl gave evidence that until the incident with the accused in which she lost her virginity, she had only innocent relationships with boys. The defence wanted to question her that she had told a person of two other prior incidents of intercourse and, if she denied it, permission to call that person as a witness. The permission was not granted and the accused was convicted. Allowing his appeal against conviction, the court said that the proper test to follow is whether her answers to those questions might have reduced her standing as a witness. Because this would have been so, permission should have been granted.

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)].

Evidence of Consent.—In a charge of rape alleged to have been committed at gun point in the room of a girl friend of the accused when she was absent from the room, the evidence of the girl friend as to consent and as to possession of gun at the moment was rejected [*R v. Williams*, 1990 Crim LR 409 CA].

Inference of consent from promiscuity.—A person accused of raping the complainant wanted to cross-examine her about her sexual relations with other men as evidence of promiscuity which went to consent. The defence was one of consent. The judge ruled that as the defence was consent and not that the accused believed that the complainant consented, the question of promiscuity was not relevant and excluded the evidence. The accused appealed. Dismissing his appeal, the court said that the question is whether, on the facts, the complainant's attitude to sex could be material upon which a jury could reasonably rely to conclude that the complainant may have consented despite her evidence to the contrary. Here the evidence of promiscuity was not so strong or so contemporaneous in time to the event for that to be the case. [*R v. Brown*, 1988 Crim LR 828 CA].

As to relevancy of character of prosecutrix, see *ante*, s 53.

Accused as a Witness.—S 315(*1*) Cr P Code permits an accused to testify for the defence, if he so wishes. The question arises if the defence, if he so wishes—a right so long denied. The question arises if the credit of an accused offering as a witness can be impeached in the same way as that of an ordinary witness. An accused who chooses to testify occupies the dual capacity of a defendant and that of a witness. As an accused his character is not subject to attack unless he himself opens the question (see s 54). By electing to testify in his own behalf, he is entitled in his capacity as a witness to the same rights and is subject to the same rules as any other witness. The accused is not compelled to testify; the failure to testify shall not be commented upon or give rise to any presumption against the accused [see s 315(*1*) Cr P Code]. In offering himself as a witness, the accused voluntarily submits himself to the same tests which are legally applied to other witnesses with a view to impeach their credibility and he must therefore put up with such risks (see also s 146).

The character of a witness can be attacked with a view to impeach his credibility (ss 146 and 155) and so there does not appear to be any reason why facts which are usable to impeach any witness should not be used in the case of an accused who chooses to examine himself as a witness for his defence.

If, however, any such question is not directly material to the issue but is relevant only in so far as it affects the credit of the witness, the court has the power to decide whether the witness shall be compelled to answer it (see notes to s 148). So, inquiries into transactions of a remote date or which has little or no bearing on the credibility should be disallowed by the court. The court has therefore ample power to protect the accused-witness against unreasonable or oppressive cross-examination.

When the credit of an accused-witness is attacked, the legitimate effect of impeaching his credibility is that he may be considered unworthy of belief as a witness, but this unworthiness must not be taken into account in determining the guilt of the accused in respect of the offence charged. As a witness he may or may not be credible; but his incredibility as a witness must not be used to infer his bad character and accordingly his guilt as an accused. It is important to bear this mind. A jury cannot be expected to appreciate this vital distinction and it is essential that they should be warned of it.

"Of the arguments on the first question (May a defendant on the witness-stand be cross-examined like any other witness by offering facts impeaching his credibility?) there is no hesitation in accepting those of the affirmative. The law is that a defendant taking the stand as a witness may as a witness be impeached precisely like any other witness".

".....As an accused his character was not subject to attack unless he opened the question. As a witness, his position was different, his credibility was subject to attack.....As a defendant, his character could not be impeached, that issue not having been opened by him. As a witness, it could be impeached, as the character of any witness may be subjected to that test. In other words, he may be unworthy of belief, but this unworthiness is not to be considered in determining whether or not he is guilty."

The circumstances in which under the [English] Criminal Evidence Act, 1898 an accused person can be questioned as to his previous convictions, it has been held that the purpose of such cross-examination is only to attack the credibility, it was not right for the cross-examination to go further and to seek to draw evidence of his disposition to violence or bad language [*R v. Khan*, 1991 Crim LR 51 CA].

S. 156. Questions tending to corroborate evidence of relevant fact, admissible.—When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

COMMENTARY

Principle and Scope.—This section provides for the admission of evidence given for the purpose, not of proving a relevant fact, but of testing witness's truthfulness. There is often no better way of doing this than by ascertaining the accuracy of his evidence as to surrounding circumstances, though they are not so immediatly connected with the facts of the case as to be themselves relevant. While, on the one hand, important corroboration may be given in the case of a truthful witness, a valuable field for cross-examination and exposure is afforded in the case of a false witness. In order to prepare the ground for such corroboration, it is necessary to elicit these surrounding circumstances in the first instance from the witness himself, and for this the section makes the provision [Cunn p 316]. This section in effect declares evidence of certain facts to be admissible. If this section had not been inserted, the judge would have had to determine the relevancy of these facts by reference to ss 7 and 11 and he might perhaps have been influenced by the practice in England, which has been against the admission of such evidence [Markby pp 109-10].

It is impossible to treat statements by witness as corroborating his own evidence: those being merely parts of that very evidence itself. When a portion of the plaintiff's evidence was inadmissible but was not objected to by defendant's counsel, the appellate court cannot regard it as corroborative evidence that which is fit to be rejected as hearsay [*Lim Yam v. Lam Choon*, 107 IC 457: A 1928 PC 127: 56 MLJ 88]. The meaning of the section is that for the purpose of corroborating the testimony of a witness as to any relevant fact, he may be asked about other surrounding circumstances or events observed by him *at or near to the same time or place*. Independent evidence of such facts may be given in order to corroborate the evidence of the witness as to the fact in issue. [Compare s 11(2)]. For an identical purpose verification proceedings take place with regard to confessions (*ante* s 24). The illustration explains the section. This section explains the meaning of the expression *state of "things"* and *"relation of things"* in s 3(*1*) of the Evidence Act. Evidence of similar facts although in general inadmissible to prove the main fact (*ante* s 14) may be received for purpose of corroboration [*R v. Kennaway*, 1917, 1 KB 25: *R v. Chilson*, 1909, 2 KB 945].

Facts which tend to render more probable the truth of a witness's testimony on any material point, are admissible in corroboration thereof, although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated [*Wilcox v. Godfrey*, 26 LT 481; *Cole v. Manning*, 2 QBD 661]. But facts which are

equally consistent with the truth of such testimony, or the reverse are inadmissible for this purpose [*Finch v. F*, 23 Ch D 267, 272: Phip 11th Ed p 684].

It is not incumbent on a party to give corroborative evidence of statement not challenged by the other party [*Md Ikramul v. Wilkie*, 11 CWN 946]. Where the greater part of the prosecution evidence is untrustworthy, it is dangerous to convict on the residue without corroboration [*Hari Krishan v. R*, 19 CWN 300 *post*].

Even where the evidence of the complainant in a corruption case is quite credible, no conviction can be based on such evidence unless it is corroborated by independent materials [*M G Thatte v. State of Maharashtra*, 1993 Cri LJ 2878, 2881 (Bom)].

S. 157. Former statements of witness may be proved to corroborate later testimony as to same fact.—In order to corroborate the testimony of a witness, any former statement made by such witness[1] relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

SYNOPSIS

COMMENTARY

Principle and Scope.—The object of S.157 is to admit statements made at the time when the mind of the witness was so connected with the events as to make it probable that his description of them would be accurate [*Public Prosecutor v. Paneerselvan*, (1991) 1 Malayan LJ 106 (Penang HC)]. Under ss 145 and 155(*3*) former statements of a witness may be used for the purpose of contradicting him. This section says that a witness's former *statements* may be proved in order to *corro-*

---

1. In Ceylon after "such witness" the words, "whether written or verbal," have been added.

borate his present testimony [see *Jamal Momin v. R*, 86 IC 153 (P)]. The former statement admissible for corroboration may be oral or written. S 157 cannot be invoked to let in statements made by somebody else for corroborating a witness examined in the case [*Ambika v. Kumud*, A 1928 C 893: 110 IC 521]. The words "former statement" mean a previous statement of the witness who is to be corroborated made on another occasion, *ie* an occasion other than that at which the subsequent statement requiring corroboration is made [*Harendra v. R*, 66 CLJ 196: A 1938 C 125]. It is however required that the former statement must relate to the *same fact*, *ie* the fact under inquiry and it must have been made (*a*) *at or about the time when the fact took place*; *or* (*b*) before any *authority legally competent to investigate the fact*. This section is based on the principle that if there is consistency between the previous statement and present statement of a witness, it may be considered a ground for believing him [*R v. Malapa Bin*, 11 BHCR 196, 198; *R v. Bepin Biswas*, 10 C 970, 973]. The principle on which the section is founded was suggested by Lord Romilly's Commission.

It is ordinarily said that a witness cannot corroborate himself [*R v. Nag Myo*, A 1938 R 177 FB; *R v. Christie*, 1914 AC 545, 557; see *Lim Yam v. Lam Choon*, A 1928 PC 127 cited under s 156], for corroboration in its true sense must come from an independent source. But as the former statement of a witness contemporaneous with the fact under inquiry may confirm or contradict his subsequent testimony in court or may tend to prove the consistency of his story; in this sense a witness may corroborate himself. The value of such corroboration by a witness's own previous statement must however depend on the peculiar circumstances of each case. The witness may have had sufficient interest in making false assertions in the past, and a man may be consistently untruthful with a purpose. The requirement of proximity in point of time between the occurrence of the fact and the making of the statement, affords some check against concoction. [*Cf Illustration* (*a*) to s 6 and *Illustrations* (*j*), (*k*) to s 8].

In England a witness's previous statement similar to the one made in court is not generally admissible for the reason that "even if it is an improbable unworthy story it is not made more probable by any number of repetitions of it" [Wig s 1124]. There is much force in the argument. Chief Baron Gilbert was however of opinion that the party who called a witness against whom contradictory statements had been proved might show that he had "affirmed the same thing before on other occasions, and that he was therefore consistent with himself". [Gilbert Ev 6th ed 1801 pp 135-36]. S 31 of Act 2 of 1855 was based on this view, and the present section corresponds with that section. In making it admissible, the condition has been laid down that such statement must have been made *at or about the time* of the event.

Though previous consistent statements have been made admissible by this section, such statements when offered on examination-in-chief, are neither helpful nor of any value. Its use, if any, is when it is offered after the testimony is challenged by contradiction. The former statement admissible under the section may be on oath, or otherwise and may also be verbal or in writing. Such statement may have been deliberately made previously from improper motive; and the safeguards provided in the section are that the former statement must have been made at or about the time when the fact took place; or, it must have been made before any competent authority who had occasion to investigate the fact. In *Jones v. S E & C Ry Co*, 1918, 87 LJ, KB 775 SWINFEN EADY LJ, said: "It would be easy to manufacture evidence by telling your various friends and then calling them as witnesses to prove what you told them."

Two things are essential: (*i*) The witness should have given testimony with respect to some fact. (*ii*) He should have stated earlier the same fact at or about the time when the

fact took place or before any authority legally competent to investigate the fact. The witness to be corroborated need not state in his testimony in court that he had made that former statement to the witness who is corroborating him. Of course, if he also says so in his testimony that would add to the weight of the evidence of the person who gives evidence in corroboration [*Ramratan v. S*, A 1962 SC 124 (*Misri v. R*, A 1934 S 100; *Nazar v. S*, A 1951 Pepsu 66 **overruled**); *S v. Pareswar*, A 1968 Or 20].

Though the statement given to a magistrate by someone under expectation of death ceases to have evidentiary value under Section 32 of the Evidence Act if the maker thereof did not die, such a statement has, nevertheless, some utility in trials. It can be used to corroborate this testimony in Court under Section 157 of the Evidence Act which permits such use being a statement made by the witness "before any authority legally competent to investigate". The word "investigate" has been used in the section in a broader sense. Similarly the words "legally competent" denote a person vested with the authority by law to collect facts. A magistrate is legally competent to record dying declaration "in the course of an investigation" as provided in Chapter XII of the Code of Criminal Procedure, 1973. The contours provided in Section 164(1) would cover such a statement also vide *Maqsoodan v. State of U P*, A 1983 SC 126. However, such a statement, so long as its maker remains alive, cannot be used as substantive evidence. Its user is limited to corroboration or contradiction of the testimony of its maker [*Gentela Vijayavardhan Rao v. State of A P*, 1996 Cri LJ 4151 : 1997 (3) Crimes 197, 202, 203 (SC)]. It is only a contradiction between statement of a witness under section 161 CrPC and his testimony in court which can be legally proved but an omission in the statement made under section 161 need not be proved [*Mohd. Islam v. State of U P*, 1993 Cri LJ 1736, 1749 (All)]. The statement of the witness that he was in the *gali* (lane) when he heard the alarm and sound of gun fire and when he reached near the door of his house, his niece came out in a very disturbed condition and said that the accused had shot his wife, was admissible under Illustration (a) of section 6. [*Mohd. Islam v. State of U P*, 1993 Cri LJ 1736, 1745 (All)].

This section refers to corroboration of a witness's testimony by any former consistent *statement of his*. It does not refer *to conduct*. Where a person's conduct or statements are evidence *per se*, *eg* as part of *res gestae* [*ante* s 6], or, as relevant under other sections, *eg* ss 8, 9, 11, they may be used either to corroborate or contradict his subsequent testimony, independently of s 157. Compare illustrations (*i*), (*k*) to s 8 *ante*. This section does not make hearsay evidence admissible as corroboration [*Seneviratne v. R*, 41 CWN 65, 78: A 1936 PC 289].

Self-Corroboration.—In England the fact that a witness had made a previous statement similar to a witness's testimony in court was formerly admissible to confirm his testimony [*Lutterell v. Reynell*, 1670, 1 Mod 282, 283]; but such evidence is now generally inadmissible. There are exceptions and previous statements are sometimes recievable not to prove the *truth* of the facts asserted, but merely to show that the witness is consistent with himself; *eg* (*1*) where the witness is charged with having *recently fabricated* the story, *eg* from some motive of interest or friendship, it may be shown both by the witness himself and the person to whom it was addressed, that he had made a similar statement before such motive existed [*R v. Coll*, 24 LR Ir 522]. (*2*) On charges of *rape* and similar offences against females, the fact that the prosecutrix made a complaint shortly after the outrage is admissible to confirm her testimony and disprove consent [Phip 11th Ed p 685]. The latter is also admissible in India [*ante* s 6: "*Rape*"; § 8, *illus* (*j*) and: "*Rape or criminal assault*"]. A change has however been made in the law of England by the Evidence Act 1938 which provides that in any civil proceeding where direct oral evidence of a fact would be admissible,

any statement made by a person in a document and tending to establish that fact shall be admissible as evidence of that fact under certain conditions [; see *Bhogilal v. S*, A 1959 SC 356, 359: 1959 Supp 1 SCR 310]. The Civil Evidence Act 1968 has extended this to include former oral statements also (see *ante* p 350). S 3(*1*) of the Act further lays down that where for the purpose of rebutting a suggestion of fabrication a previous consistent statement has been proved it shall be admissible as evidence of the fact stated.

It has long been the practice in India to receive this kind of corroborative evidence. Under s 31 of Act 2 of 1855 which was similar to this section, such evidence was received [*R v. Bissho Nath*, 12 WR Cr 3; *R v. Bissen Nath*, 7 WR Cr 31]. Evidence that the witness has on former occasions made statements similar to the present statement is admitted for the purpose of corroborating the witness's testimony, *ie* for showing its truth. But care must be taken not to consider all previous statements as really corroborative evidence. The circumstances under which it was made, the motive and all other attending facts must be carefully scrutinised in each particular case. The witness may have had sufficient motive for making untrue assertions in the past. He may have done so with the distinct object of creating evidence. It has been pointed out that the corroborative value, however, of such previous statements is of a very varying character, dependent upon the circumstances of each case, and a person may equally persistently adhere to falsehood once uttered, if there be a motive for it [*R v. Malapa Bin*, 77 BHCR 196, 198. See the remarks of NANABHAI HARIDAS J, in this case quoted *post*]. A person after injuring a child on a collision with his motor car went to a police station and after being cautioned by the constable said that the accident was due to the fault of the child. In a subsequent action against him for damages, the statement was held to be not admissible as after the caution the defendant must have contemplated the possibility of procedings being taken against him [*Robinson v. Stern*, 1939, 2 All ER 683: 1939, 2 KB 260. This is a ruling under s 1(*3*) of the Evidence Act 1938, 1 & 2 Geo 6 c 28 referred to above].

This section also declares certain facts to be relevant. Perhaps the former statement might, but for this section, have been objected to as hearsay, though it does not fall within the words of the rule [Markby p 110]. In India perhaps more particularly than in any other countries, the statements made by those who have knowledge of the circumstances connected with the commission of an offence, immediately after the occurrence and before they can be tampered with by the police or others, are important to the ascertainment of truth [Field p 470]. The mere fact of a man having on a previous occasion made the same assertion adds, but infinitesimally to the chances of its truthfulness; and judges should distinguish it from really corroborative evidence [Cunn p 311].

"Fact" in this section does not mean merely "event" but also a continuing fact, such as possession, and documents proving possession are admissible under this section [*Muthualagiri v. Pappi Naicken*, 25 IC 510].

[*Ref Tay s 1476; Phip 8th Ed p 480*].

"Statement".—The word 'statement' in this section and in ss 17, 21, 32, 39 and 145 has not been defined and hence its dictionary meaning of 'something that is stated' should be given to it. To be a statement it is not necessary that the maker should communicate it to another person. Thus notes of conversation prepared by a solicitor soon after attending to certain persons are 'statement' within s 157 and are admissible to corroborate his evidence [*Bhogilal v. S*, A 1959 SC 356 (*Powe v. Barclays Bank Ld*, 195, 3 All ER 448 refd to)]. "Statement" means 'something that is

stated' and the element of communication to another person is not included in it [*Public Prosecutor v. Paneerselvan*, (1991) 1 Malayan LJ 106 (Penang HC)].

"Former Statement"—means a previous statement of the witness to be corroborated made by him (*ie* that same person) on another occasion. In a case of conspiracy to murder, *S* gave evidence that a week before the murder the accused approached him to secure men to kill the deceased. The corroboration was sought to be found in the evidence of *B* who said that on the morrow of the murder *S* gave out in the presence of others that he had been approached by the accused with that object. This is no corroboration of the above statement in the evidence of *S*. It might be corroboration of the fact that *S* had made such a statement in the presence of others should there be any evidence that *S* had made any previous statement regarding this matter anywhere [*Harendra v. R*, 66 CLJ 196: A 1938 C 125]. There is nothing in sec. 157 which requires that before the corroborating witness deposes to the former statement the witness to be corroborated must also say in his testimony in court that he had made the former statement to the witness who is corroborating him [*Lakhoo v. State of MP*, 1985 Cri LJ 569, 570 : (1984) 1 Crimes 932 (MP) (DB)].

"Authority Legally Competent to Investigate".—The word "investigate" in s 157 is not to be understood in the narrow sense it is used in Cr P C. It must carry its ordinary dictionary meaning in the sense of ascertainment of facts, shifting of materials, search for relevant data [*S v. Pareswar*, A 1968 Or 20; *Sarju v. S*, 1961, 2 Cri LJ 71]. The words "legally competent" mean having power under some law statutory or otherwise [*R v. Kumar Muthu*, 1919 MWN 199: 50 IC 834]. Statement made 27 years after fact before authority not legally competent to investigate is not provable [*Dwarka v. Lalchand*, A 1965 SC 1549]. Statement before Collector not authorised to investigate the fact cannot be used [*Thakurji v. Parmeshwar*, A 1960 A 339]. A statement by an informant to a person not legally competent to investigate the fact within s 157 being a former statement can be used for contradiction under s 145 or for impeaching his credit under s 155 [*S v. Pareswar, sup*]. As to whether a statement recorded under s 162 Cr P Code comes within the official duty of a police officer, see *Isab Mandal v. R*, 28 C 348 and *Muthu Kumaraswami v. R*, 35 M 397 FB (*ante*, s 35: "*Statement to police officer under s 102 or s 154 Cr P Code*"). See also *post*: "*First information report*".

Whether the statement of a witness made at an identification parade and recorded by a magistrate under s 164 Cr P Code is one made before an authority legally competent to investigate was left undecided [*Shk Pinju v. S*, A 1952 C 491]. Two things are required for this section to apply. The first is that a witness should have given testimony with respect to some fact and the second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact [*Shyam Nandan Singh v. State of Bihar*, 1991 Cri LJ 3350, 3353 (Pat)].

The report of a receiver to the district judge that he was wrongfully confined and obstructed in his duties by several persons submitted twenty-four hours after the occurrence is not admissible under s 157 at the instance of the prosecution as the judge had no power to investigate the matter, but it was open to the defence to have it used under s 155 to impeach the credit of the reviewer [*R v. Ram Ch*, 55 C 879: A 1928 C 732: 111 IC 327]. The statement of a person recorded by a Commissioner does not cease to be his statement merely because the Court which ordered the Commissioner to record the statement had no jurisdiction over the subject-matter of the suit [*State of Punjab v. Vishwajit Singh*, A 1987 P&H 126, 132].

"At or About the Time".—S 157 provides an exception to the general rule excluding hearsay evidence and in order to bring a statement within the exception, the duty is cast on the prosecution to establish by clear and unequivocal evidence the proximity of time between the taking place of the fact and the making of the statement [*Mangat v. R*, A 1928 L 647]. The expression "at or about the time when the fact took place" should be understood in the context according to the facts and circumstances of each case. The mere fact that there was an intervening period of a few days, in a given case, may not be sufficient to exclude the statement from the use envisaged in s.157 [*State of T.N. v. Suresh*, 1998 Cri LJ 1416, 1422 (SC)]. Evidence of witnesses who came several hours after the event should be excluded [*Bhupati v. R*, A 1950 C 327]. The words "at or about the time" must mean that the statement must be made at once or at least shortly after the event when a reasonable opportunity for making it presents itself. What is a 'reasonable time' is a question of fact in each case [*Public Prosecutor v. Paneerselvan*, (1991) 1 Malayan LJ 106 (Penang HC). *In re Jesudas*, A 1945 M 358, 1 MLJ 197].

Philosophy of the section is that when mind of the witness is so connected with events as to make it probable, any statement made by him then would be true and ac-curate. The words "at or about the time" must mean that the statement must be made at once at least shortly after the event [*Rajan v. State of Kerala*, 1992 Cri LJ 575, 578 (Kerala)].

The words "about the time" unmistakeably postulate some interval between the fact and the statement and as pointed out in several decisions it must depend on the special circumstances of each case what interval may be regarded as "the first reasonable opportunity which appears itself" [*Re John Lee*, 1911, 7 Cr Ar 31], or as LORD GODDARD CJ, said in a case of rape as speedily after the acts complained of as could be reasonable expected" [*R v. Cummings*, 1948, 1 All ER 551 CCA (complaint on the day after the rape)]. The time factor is, if anything, more important in regard to the relevancy of declarations accompanying acts (*res gestae*, see *ante* s 6) and there also what is required is substantial though not literal contemporaneousness (*ante* s 6). The statement of a girl to her father about ten days after her abduction when she escaped from confinement and returned home was held not admissible for corroboration [*R v. Tobarak*, 54 CWN 8. The rule appears to have been applied too strictly without regard to its spirit as the girl being under confinement of the accused it was impossible for her to communicate with any one before she was emancipated and the earliest opportunity came only when she escaped and returned home]. The expression "at or about" means "as early as can reasonably be expected in the cir-cumstances of the case" (in the special circumstances of the instant case, report of rape after about hours was admissible and complaint to mother was held "inde-pendent" corroboration) [*Rameshwar v. S*, A 1952 SC 54: 1952 SCR 377] and before there was opportunity for tutoring or concocting [*Dinkar v. S*, A 1970 B 438].

Statement that she was raped some time or shortly after the crime though not admissible under s 6 is admissible under s 157 for corroboration [*Md Afzal v. R*, A 1950 L 151; *Bechu v. R*, A 1949 C 613 (not following *Chamuddin v. R*, A 1936 C 18; *Sikandar v. R*, 41 CWN 641: *Taser v. R*, 44 CWN 835: *Nur Md v. R*, 38 CWN 108; *S v. Pichika*, A 1963 Or 58); see *ante* s 134: "*Sexual Offences &c*" and also s 8 *illus* (*f*)]. In English law such evidence is admissible though not for corroboration (*ante*: s 8 "*Rape or criminal assault*").

The time interval between the incident and the fact of the witness recording his statement about the happening should be so short that an opportunity for tutoring or concoction should not arise. In this case, on hearing the gunshots in a house, his neighbours rushed out and reached the injured persons in minutes. The injured man and wife then and there told the names of the assailants. This statement of the injured person was allowed to be used for corroborating his earlier statements. There was close proximity of time between the incident and the statement. *Nathuni Yadav v. State of Bihar*, AIR 1997 SC 1808.

Where the statement is made to an authority competent to investigate the fact, then the lapse of time, even if very long, between the happening and the making of the statement is immaterial. The perpetrator of an incident of rape and murder told his brother-in-law after

about fifteen days the whole truth of the matter. This was held to be usuable under the section. *State of T.N. v. Suresh*, AIR 1998 SC 1044 : (1998) 2 SCC 372.

Previous Statement May Be Otherwise Admissible Irrespective of Time Limit.—Although a particular statement may not come within s 157, it may be ad-missible as relevant evidence in corroboration of another's evidence. Thus, a sale-deed by one *N*, in favour of *B* in 1910 recited that a year ago he asked his uncles and step-brothers to effect a partition which was refused. Though the statement does not fall within s 157, not having been made at or about the time of *N's* alleged interview with his uncle in 1909, the deed was admissible as corroboration of the evidence given by *N* and others on the issue whether a partition was demanded in 1909 [*Radhoba v. Abu Rao*, 56 IA 316: 53 B 699: 33 CWN 1006: A 1929 PC 231].

On a question which arose in 1944 whether *A* and *B* were partners of a business started in 1936, *A* deposed that he was employer and *B* was an employee. In 1936 *A* had handed over to *B's* lawyer a document in which the relation was stated to be that of employer and employee. *A's* evidence being discredited the High Court held that the document being corroborative evidence by himself had no probative value—*Held* that plainly a document of 1936 could not corroborate evidence given eight years later and that it was a most important contemporary document which correctly stated the terms agreed between the parties [*James v. Ghulam*, A 1949 PC 151 : 1949 Bom 284].

At What Stage Corroborative Evidence May Be Given?—It is doubtfull whether s 136 gives the court discretion to allow evidence to corroborate witness to be given under s 157 before the witness himself is examined. But, in any case, such evidence can be admitted only very rarely and for special reasons to be recorded by the judge [*Ml Myin v. R*, 5 LBR 4: 9 Cri LJ 576]. Although ordinarily, before corroborative evidence is admissible, the evidence sought to be corroborated must have been given, yet the court has no doubt a discretion to allow evidence under s 157 to be given out of order. Such discretion should be rarely used. The course is not only inconvenient but likely to cause the judge or jury to give undue weight to the hearsay evidence of corroborating witness [*Shwe Kin v. R*, 3 LBR 240 : 5 Cri LJ 411; *Nistarini v. Nando Lal*, 5 CWN xvi]. If necessary, a witness will be allowed to be recalled to give evidence under this section, after the person sought to be corroborated has given his evidence [*Nistarini v. Nundo Lal, sup*]. In a case corroborative evidence given before the giving of evidence sought to be corroborated, was ruled out [*Muthu Goundan v. Chinniah*, A 1937 M 86]. Where corroborative evidence was put in first, it was pointed out that only parts of such statements as were necessary to corroborate or contradict when witnesses were exa-mined could have been put in. The admission wholesale of these statements at the very commencement of the trial, subject to the deponents being examined as witnesses were not warranted by s 157 [*Hakima v. Jiandi*, A 1927 S 209 : 103 IC 870].

Where the statement of a prosecution witness examined earlier to another prosecu-tion witness who is examined later, is sought to be made use of by the prosecution, without the earlier prosecution witness having been asked about it in his examination, the earlier prosecution witness to whom the statement is ascribed must be given an opportunity to explain it. The witness should at least be recalled for the purpose. In the absence of such opportunity, the statement of the earlier prosecution witness is inadmissible in evidence [*Awadh v. S*, A 1956 SC 758; *Kanbi v. S*, A 1968 G 11]. So far as corroboration is concerned, it is none of the purposes of the defence to corroborate the evidence on the basis of the previous statement [*Kehar Singh v. State*, A 1988 SC 1883, 1902 : 1989 Cri LJ 1].

Whether S 157 is Controlled By S 162 Cr P Code?—In a case decided under s 162 Cr P Code, 1882 it was held that the general provisions of s 157 Evidence Act were overriden by the special provisions of s 162 [*R v. Bhairab*, 2 CWN 702]. So it was held that when a police officer by making use of some writing to refresh his memory deposes to a statement said to have been made to him by a witness, the court which accepts that statement, whether it be upon the basis of s 157 or otherwise, is really using that writing against the accused [*Rustam v. R*, 7 ALJ 467 (see judgment

of KNOX J) : 6 IC 101 : 11 Cri LJ 235. Similar view was also taken in other cases [*Bhulai v. R*, 13 OC 7 : 5 IC 357; *R v. Akbar Badu*, 34 B 599 : 12 Bom LR 633 (Cr); *R v. Narayan*, 32 B 111 FB; *Cf R v. Balaji*, 9 Bom LR 966; 22 B 596; 1919 MWN 199]. In *R v. Narayan, sup* it has been remarked that the 'distinction between the *writing* and the *statement* is a distinction of form rather than of substance. The point arose again in a Calcutta case where it was held that s 162 does not control s 157 which allows oral evidence to be given of the statement made to the police by a witness in order to corroborate the witness at the trial. It was pointed out that the amended section 162 made a distinction between the writing and the oral statement and made the former inadmissible. This is a decision under s 162 of the Code of 1898 [*Fanindra v. R*, 36 C 281 : 13 CWN 197]. A Full Bench in Madras agreed with this view [*Muthu Kumaraswami v. R*, 35 M 397; see also *R v. Nilkantha*, 35 M 247— CONTRA: *R v. Kumaramuthu*, 1919 MWN 199 : 50 IC 839]. The same view was taken in Bombay [*R v. Hanmareddi*, 39 B 58]; Patna [*Baldeo v. R*, 6 PLR 241 : 61 IC 785], and Punjab [1886 PR 15]. It is now not worthwhile discussing which of the views is correct as the language of the present section 162 Cr P Code has been materially altered by Act 18 of 1923.

S 162 in its present form (as amended by Act 15 of 1923 and Act 26 of 1955 which is the same in Act 2 of 1974) has substantially altered the law as regards the right of the accused to make use of the statements of witnesses taken down by the police. It does not appear to make any distinction between the *writing* and the *statement* embodied in the writing. It should be remembered that s 162 Cr P Code is a special law which affects the provisions of ss 145 and 157 Evidence Act inasmuch as the use of all previous statements of witnesses to the police are barred by it for any purpose except the one stated in the proviso to s 162 *viz* that the statement of the person examined by the police or any record thereof shall not be used for any purpose except for the limited purpose of contradicting a prosecution witness by the accused or by the prosecution with the permission of the court under s 145. It cannot be used for corroboration of a prosecution witness or contradiction of a defence witness. The controversy as to the admissibility of the statement embodied in the writing by oral evidence for any other purpose has been set at rest by the amended section.

It is not merely the use as evidence of the statement made to the police during investigation or of the record thereof that is prohibited by s 162(*1*), but use of it *for any purpose*, unless such use comes within specific provisions of the Code in that regard [*Badri v. R*, 92 IC 874 (P)]. So s 162(*1*) Cr P Code by such express prohibition repeals by implication of s 157 so far as it concerns statements made by a police officer in the course of an investigation [*R v Najibuddin*, A 1933 P 589 : 14 PLT 543]. The main object of the legislature was to prohibit the use of the statements of prosecution witnesses as corroboration under s 157 [*Jagwa Dhanuk v. R*, 5 P 63 : 93 IC 884 : A 1926 P 232].

The statement of witnesses that the accused were mentioned by the prosecution witnesses to the police is entirely inadmissible. Such a statement cannot be used to corroborate the evidence of the witnesses or to meet a suggestion of the defence [*Ramyad v. R*, 95 IC 273 : A 1926 P 221; *Ganga v. R*, A 1930 S 60]. A statement of a witness that she identified the accused before the sub-inspector is inadmissible even though made in cross-examination [*Bhola v. R*, 43 CWN 1180].

The authorities show clearly that the general provisions of s 157 Evidence Act are controlled by s 162 Cr P Code as now amended and statements to police officers whether oral or any record thereof are not admissible for purpose of corroboration.

They are admissible for the purpose of contradicting the prosecution witnesses in the manner stated in the proviso to s 162 Cr P Code. (See Sarkar's Cr P Code, 4th Ed notes under s 162). It is therefore of first importance to determine whether an information is really a first information which can be used under s 157 or it is hit by s 162 Cr P Code [*In re Rangarajulu*, A 1958 M 368].

Two overriding considerations have to be noticed in connection with s 162: (1) that it does not affect any statement as to the cause of death under s 32(*1*); (2) that it is dealing with "statement", not with conduct in the sense of s 8 but with mere statements [*Azimaddy v. R*, 54 C 237 : 44 CLJ 253].

"In the Course of Investigation".—The words "in the course of" do not refer merely to that period of time which elapses between the beginning and end of the investigation. They import that the statement must be made as a step in a pending investigation to be used in that investigation. So a report to the *thana* by a person quite independently of, and in no relation to, the investigation which had already started after the lodging of the first information report, is not affected by s 162 and is admissible to corroborate the evidence of that person [*R v. Aftab*, A 1940 A 291 : 1940 ALJ 206 (*R v. Lalji*, A 1936 P 11 **relied** on; *Manimohan v. R*, 58 C 1312 **not follld**)]. Any part of a statement of a witness before the investigating officer can be brought on record only by way of contradiction [*Hamidulla v. State of Gujarat*, 1988 Cri LJ 981, 982 (Guj) (DB)]. In order that a previous statement should also fall under sec. 162 Cr.P.C. it must be a statement made to a Police Officer and must have been made in the course of investigation [*V.A. Abraham v. Supdt of Police Cochin*, 1988 Cri LJ 1144, 1149 : (1988) 1 Ker LT 379 (Ker)]. So the statement of the accused to the police before the starting of investigation on a prior first information is not hit by s 162 [*R v. Suba*, A 1950 P 44]. It was, however, decided by the Privy Council in *Thambiah v. R*, 1965, 3 All ER 661 that "in the course of the investigation" means any time between the beginning and end of the investigation and a statement is inadmissible in evidence notwithstanding that it was not made during the actual interrogation [*R v. Ramasamy*, 1965 AC 1].

A sub-inspector on getting information of a shooting from a constable went to find out the truth of the matter and took down the statement of a witness. It is not affected by the prohibition in s 162 inasmuch as it was not recorded in the course of an investigation of an offence [*In re Mylaswami*, A 1939 M 66 : 1938, 2 MLJ 750 (*Pub Pro v. Chidambaram*, A 1928 M 791 **relied** on)]. Investigation begins when the police take first step towards ascertainment of offence and not when first information is lodged. List of stolen properties handed over to police by complainant after first information is admissible and not covered by s 162 [*Bhondu v. R*, A 1949 A 364]. See further Sarkar's Cr P Code, 4th Ed notes under s 162.

Statement Under S 164 Cr P Code.—A statement by a witness recorded by a magistrate under s 164 Cr P Code is admissible in evidence to corroborate the statement made by that witness before the committing magistrate from which statement the witness resiled in the sessions court [*Manarli v. R*, 37 CWN 1066 (*Vellaiah v. R*, 45 M 766 **reld** on); *R v. Lalji*, 16 PLT 730; *Manik v. R*, A 1942 C 36; *Bisipati v. S*, A 1969 Or 289; *Vellaiah v. R*, was **dissented** from in *S v. Hotey Khan*, A 1960 A 521]. Such a statement can only be used to corroborate the statement of a witness. When it is sought to contradict a witness by such statement, and the witness stands contradicted thereby, the statement cannot be used as substantive evidence against an accused person [*R v. Sanika*, A 1935 P 19].

Statement under s 164 Cr P Code is not substantive evidence, but it can be used to support or challenge evidence given by the person who made the statement [*Bhuboni*

v. R, A 1949 PC 257 : 67 IA 147]. The statement recorded under s 164 Cr PC can be relied on for corroborating the statement in the committal court [*Dhanabal v. S*, A 1980 SC 628]. Thus, statement by witness at identification parade can be used for corroboration [*Abdul Aziz v. R*, A 1950 L 167]. Where offence is committed at Cawnpore, the statement of a witness under s 164 to a Madras magistrate is not admissible under s 157 [*In re Cases*, A 1948 M 489].

Statements made before a magistrate during test identification are admissible under s 157. S 164 Cr P Code covers the case where a magistrate acts under this section and records a statement made to him [*Samiruddin v. R*, 32 CWN 616 : A 1928 C 500].

Identification.—Identification by pointing out with finger or by nodding of head in answer to a question is as much a verbal statement as a statement by word of mouth. So also identification of stolen property during investigation [*Shk Khabiruddin v. R*, 48 CWN 356 : A 1943 C 644]. Approving this case the Supreme Court held that it is clear that identification by finger, touch, nod or assent in answer is a statement express or implied and comes within the ban of s 162 Cr P Code [*Ramkishan v. S*, A 1955 SC 104 : 1955 SCR 903; *Santa Singh v. S*, A 1956 SC 526; see Sarkar's Cr P Code 4th Ed notes under s 162]. The prosecutrix in a rape case is not corroborated by the fact that she subsequently identified the accused [*R v. Bhola*, 43 CWN 1180].

As to identification evidence see s. 9 *ante*.

Statements by Third Parties to Police.—Statements by third parties to the police in the course of investigation can be used as corroboration under s 157 or in contradiction under s 145, or to impeach credit under s 155, provided the person who made the statement is called as a witness. This applies to prosecution and defence-indifferently under the Evidence Act [*Azimaddy v. R*, 54 C 237 : 44 CLJ 253].

A witness had been asked by the defence whether he had made a particular statement to the police and the sub-inspector had also been asked whether the witness did make the particular statement, but neither the witness nor the sub-inspector was asked what statements they made—*held* there is nothing to prevent the prosecution from asking the witness simply whether he made that statement to the police or when a witness has made a statement in his evidence, from asking the sub-inspector whether in fact the witness has made that statement to him. In doing this there is no use of statement recorded by the police during investigation under s 162 [*Guhi Mian v. R*, 93 IC 988 : 4 P 204].

Police, General and other Diaries.—Police diaries may be used for the limited purpose of contradicting the police officer and not for the purpose of corroborating him [*Achhaibat v. R*, 2 PLT 233 : 61 IC 230; *Ram Charita v. R*, 3 Pat LJ 568 : 45 IC 272]. Statements in police diaries can be used in favour of an accused person but not against him [*Rajindar v. R*, 77 IC 489 (L). See notes to s 145 *ante*]. S 162 Cr P Code forbids reference to police diaries or to their use as evidence for or against an accused person and a consent or desire on the part of the defence counsel cannot legalise such reference or use [*Mannalal v. R*, 75 IC 753 : A 1925 O 1]. As to the use of Police Diary, see Sarkar's Cr P Code, 4th Ed notes under s 172.

There is nothing improper in the magistrate's use of the complainant's statement recorded in the General Diary to corroborate his case that he made the same remark then as he does now in the court [*Asoke v. R*, 34 CWN 651 : A 1950 C 802].

The entries in a diary maintained in a solicitor's office may become admissible under s 157 for corroboration [*Md Yusuf v. D*, A 1968 B 112].

Deposition Before Committing Magistrate.—The object and effect of [1]s 288 Cr P Code is to place the deposition in the committal enquiry on the same footing as the deposition in the sessions court. Such a deposition is testimony within s 157 Evidence Act and is admissible for the purpose of corroborating such testimony [*Vellaiah v. R*, 72 IC 529 : 45 M 766 : 43 MLJ 22 (*R v. Dorasami*, 24 M 414 **folld**); *Manarali v. R*, 37 CWN 1066 : 60 C 1339; *Narayan v. S*, A 1959 B 552; see also *Sarwar Khan v. R*, 55 IC 273 : 21 CLJ 257. The contrary opinion in *R v. Akbar*, 34 B 599, 602 is no longer good law since the amendment of [1]s 288 Cr P Code in 1923]. Statement of witness to the police recorded by the magistrate and retracted before the sessions judge is 'testimony' within s 157 for corroboration [*Mamchand v. R*, 5 L 324: 82 IC 129].

As to corroboration, it is unnecessary for the prosecution to corroborate their witnesses by previous statements until the statements are challenged [*Abdul Jalil v. R*, 128 IC 593 : A 1930 A 746]. There is nothing in [1]s 288 itself to show that there need be corroboration of evidence so recorded. Such evidence is precisely the same as any other evidence. It has to be examined with care like other evidence [*Narinjan v. R*, 17 L 419]. As to use of deposition before committing magistrate under [1]s 288 Cr P Code, see *ante* s 80 and s 145].

First Information Report.—First information falls within s 35 and is simply a relevant fact. It is not substantive evidence. It can only be used for corroboration under s 157, or contradiction under s 145 [*Nisar Ali v. S*, A 1957 SC 366 : 1957 SCR 657; *Aghnoo v. S*, A 1966 SC 119; *Bhagirathi v. S*, A 1965 Or 99; see *R v. Chittar*, 47 A 280 : 85 IC 650; *Gajadhar v. R*, 7 Luck 552; *Sankaralinga v. R*, 53 M 590; *Nga Tun v. R*, A 1934 R 60; *Azimaddy v. R*, 54 C 237; *Ram Naresh v. R*, 1939 All 377; *Inchanu v. R*, A 1943 C 647; *Choghatta v. R*, A 1926 L 179; *Maganlal v. R*, A 1946 N 173; *S v. Sher*, A 1962 Raj 3 and cases *ante*, s 35: "*First information*" and s 145: "*First Information report*"] its maker and not of other witnesses [*Haisb v. S*, A 1972 SC 283] and for certain other limited purposes [*Damodar v. S*, A 1972 SC 622]. See *Shanker v. S*, A 1975 SC 755 in s 155 under heading "*First Information Report*". First information report can be used for corroboration or contradiction of the maker, but not for corroboration of any other witness or for the case of prosecution in general [*Gunadhar v. S*, A 1952 C 618]. Use of first information report as substantive evidence is illegal [*Sheo Karan v. R*, A 1938 L 923] and to treat it as substantive evidence in charge to the jury is a grave misdirection [*Jasim v. R*, A 1946 C 537; *Gunadhar v. S, sup*].

The first information report, putting aside wholly the question of its use under s 145 or s 155, if proved may be of value as *res gestae* [*Mahla v. R*, A 1931 L 38; *Azimaddy v. R*, 44 CLJ 253 : 54 C 237]. The first information report, unless the man who made it dies, is not admissible evidence of any fact contained in it; it merely proves that this was the original story which set the police in motion [*R v. Mg Po Thi*, A 1938 R 282 : 176 IC 683]. A first information report cannot be used as against the maker at the trial if he himself becomes an accused. [*Padan Pradhan v. State*, 1982 Cri LJ 534, 537 : 1982 Chand LR Cri 116 (Orissa)].

The statement of a witness examined by an investigating police officer cannot be used as a 'first report' especially when a "first report" has already been made by a *chaukidar* sent from the scene of occurrence for that purpose [*R v. Chittar; Gajadhar v. R, sup*]. Statement made to police after investigation is commenced is not first information and is inadmissible except for the purpose of s 162 [*Habib v. R*, 110 IC

---

1. S 288 has been omitted in Cr P Code, 1973.

584 : A 1928 P 634; *Gansa v. R*, 2 P 517; see also *Keshwar v. R*, 1 PLT 491; *Chandrika v. R*, 1 P 401]. Whether a statement made to a police officer in the course of investigation comes under s 162 Cr P Code or is made by way of complaint as first information report, is a question of fact. Where after the record of first information report, the accused made a report to the police by way of evidence or reply, it is not inadmissible [*Osman v. R*, A 1930 C 130; *Qamrul v. R*, A 1942 A 60; *R v. Bhagi*, A 194] O 359]. A *ruqa* sent by a police officer from spot during investigation embodying substance of complainant's report made previously and some result of investigation neither signed nor thumb-marked by complainant is not a first information [*Choghhatta v. R*, A 1926 L 179 : 91 IC 697].

The first information that can be used under ss 157 and 158 to corroborate or impeach the testimony of the person lodging the first information becomes valueless if drawn up by some person other than the proper informant. As the first information which related to a charge of criminal conspiracy at Midnapore was drawn up by a police officer employed in the C I D in Calcutta and settled by an attorney, it was of no value [*Peary Mohan v. Weston*, 16 CWN 145, 178]. A statement made to a police officer not being a first information under s 154 Cr P Code can be proved only by the police officer [*Salim v. R*, 61 IC 650 : 22 CLJ 410. See *In re Thachrath*, 75 IC 695 : 45 MLJ 279]. The person who lodged the first information report became hostile. He testified that he had not made any such statements to the police and that he had only signed on dotted lines. It was held that such first information report could not be used to corroborate the first informant or to discredit other prosecution witnesses before whom the deceased had made a dying declaration. *George v. State of Kerala*, AIR 1998 SC 1376 : 1998 Cr LJ 2034.

The first information report against the accused is not a statement within s 162 Cr P Code and it is not made in the course of an investigation. The first informations do not prove themselves and have to be tendered under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant and the first information is to be tendered as corroboration under s 157; but it could also be tendered in a proper case under s 32(*1*) as a declaration as to the cause of the informant's death or as part of the informant's conduct of the *res gestae* under s 8. Theoretically the defence could prove the first information to impeach the infor-mant's credit under s 155 or to contradict him under s 145 [*Azimaddy v. R*, 54 C 237 : 44 CLJ 253 : 99 IC 227].

A first information given a few hours after the commencement of some enquiry by the police, is one falling under s 154 Cr P Code. The enquiry could not be an investigation under Ch XII Cr P Code, since before investigation there must be information to a police officer and reduced to writing by him [*Dargahi v. R*, 52 C 499]. A telegram sent by the complainant cannot be treated as a first information report. But when the investigating officer on receipt of the telegram goes and records the statement of the informant, it becomes available to the accused under s 162 Cr P Code [*Kochi v. Seraj*, 39 CWN 403]. It has however been held that a telephonic message of cognizable offence may be recorded and signed by the writer as a first information report. Subsequent statements to the police in the course of investigation fall within s 162 [*Shwe Pru v. R*, A 1941 R 209].

List of stolen properties handed to a police officer in the course of investigation is not admissible in evidence. Where names of certain persons are sent to the police as being names of those who are suspected of an offence, it is in the nature of a first information report and if the evidence of the person who supplied the names is challenged, the list is admissible to corroborate him [*Kalla and Ors v. R*, 85 IC 723]. A counter-information against the complainant or his party by a member of the accused's party who is not himself an accused comes under s 154 Cr P Code and must be reduced to writing and signed and cannot come within s 162. Its admissibility depends upon the circumstances and must be decided under the Evidence Act.

The police cannot treat such statements as information unless they come truly and properly under s 154 [*Azimaddy v. R, sup*].

Where an accused has murdered *R* and *T* and caused grievous hurt to *A* and separate first information reports are lodged, the references in the first information report to the assault upon *A* are clearly inadmissible in a trial for the murders of *R* and *T*. The same observations apply to any reference to the assault upon *A* which may occur in the confession made by the accused [*R v. Afsaruddi*, A 1939 C 32 : 42 CWN 1235 : 67 CLJ 580].

Tape Recorded Statement—is admissible for corroboration [*Rama Reddy v. V V Giri*, A 1971 SC 1162].

Previous Statement of Co-Accused to Whom Pardon Granted.—At a sessions trial, a pardon was granted to one of the accused and her previous statement and confession before the magistrate that some powder was given to her by the other accused and that she under the impression that her husband would love her mixed it with his food, etc are admissible under s 157 and they cannot be regarded from the standpoint of confession of a co-accused [*Amode Ali v. R*, 58 C 1228].

Rape Cases.—Statement of ravished girl alleging that she was raped made immediately after or shortly after the event is admissible as corroborative evidence under s 157 and also as conduct under s 8 (see, illus *f*) [*Soosalal v. R*, 82 IC 142; *Harendra v. R*, 44 CWN 830; *Parbati v. S*, A 1952 C 831; *S v. Pichika*, A 1963 Or 58; *Radhya Sham v. State of J and K*, 1988 Cri LJ 447, 451 : (1987) 3 Crimes 443 (J&K)]. 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 a rape case, in the case of a grown up and married woman it is always safe to insist on corroboration. Wherever corroboration is necessary it should be from an independent source but it is not necessary that every part of the evidence of the victim should be confirmed in every detail by independent evidence. Such corroboration can be sought from either direct evidence or circumstantial evidence or from both. [*Sheikh Zakir v. State of Bihar*, A 1983 SC 911, 915 : 1983 Cri LJ 1285]. Such a previous statement at or about the time can be a powerful piece of corroboration [*Rameshwar v. S*, A 1952 SC 54]. See *ante*, "*At or about the Time*", and s 6: "*Rape*"; s 8 "*Rape or criminal assault*". As to need for corroboration, see s 134. "*Sexual offences*", *ante*.

Other Cases of Former Statements to Corroborate Later Testimony.—Where a statement is admissible under s 157, it may be proved by any one to whom it was made [*Heymerdinguer v. R*, 58 IC 344 : 21 Cri LJ 760]. In order that s 157 may apply, the statement must either be made before any person legally competent to investigate the fact, or it must be made at or about time when the fact took place [*Oriental Govt Life A Co v. Narasimha*, 25 M 183, 210]. Statements made by witnesses before a sub-deputy magistrate deputed under ss 157, 159 Cr P Code to hold an investigation are admissible under s 157 [*Harendra v. R*, 40 CLJ 313 : A 1925 C 161]. A deputy superintendent of police is an officer legally competent to investigate the facts of a murder and dacoity within s 157 [*In re Thachrath*, 75 IC 695 : 45 MLJ 279]. Statement made by a witness before his brother-in-law about his version of the occurrence can be treated as corroborative evidence [*State of T.N. v. Suresh*, A 1998 SC 1044].

In *R v. Malapabin*, 11 BHCR 106, NANABHAI HARIDAS J, observed: "S 157 of the Evidence Act no doubt, provides that any former statements made by a witness at or about the time when the fact in issue took place, or before any competent authority,

may be proved to corroborate his testimony; and accordingly the sessions judge has made use of Murgia's statements made on different occasions to his parents and to police officers, shortly after the murder. But such corroboration, we think hardly suffices. It can scarcely be said to answer the purpose for which juries are advised by judges to require the evidence of an accomplice to be confirmed."

Earlier statements cannot be let in under s 157 if there is nothing in the present deposition to corroborate [*Khijiruddin v. R*, 43 CLJ 504]. Evidence of witness cannot be corroborated by his statement in the complaint when he admits that he has no personal knowledge of the facts stated therein [*Motising v. S*, A 1961 G 117]. Oral statements by witness in police investigation which do not corroborate their evidence at the trial are inadmissible [*Venkatasubbah v. R*, 48 M 640 : 86 IC 209].

The record of a test identification memo cannot be regarded as evidence of a witness in a judicial proceeding and so the presumption under s 80 is not applicable to it [*Ram Sanchi v. S*, A 1963 A 308; **apprd** in *Sheoraj v. S*, A 1964 A 290 FB (*Asharfi v. S*, A 1961 A 153 **overruled**)].

Where a person making a dying declaration chances to live, his statement cannot be admitted under s 32. But it may be relied on under s 157 to corroborate the testimony of the complainant when examined in the case [*R v. Rama Sattu*, 4 Bom LR 434; *Maqsoodan v. State of U.P.*, A 1983 SC 126, 129 : 1982 All LJ 1524 : 1983 Cri LJ 218 (SC). see *ante* s 32(*1*)]. Under this section the deposition of a witness given at a previous trial, when the accused person was absconding, but with regard to whom the magistrate had omitted to record that he was absconding, was admitted in corroboration of the witness's evidence given at the subsequent trial [*R v. Ishri Singh*, 8 A 672]. Previous deposition of witnesses examined for prosecution in a criminal trial can be admitted to corroborate the present story. But it cannot be used to contradict what the witnesses state in their cross-examination in the present trial [*Jamal v. R*, 86 IC 153 : A 1925 P 381]. A former statement by a witness can be used in certain circumstances to corroborate or contradict him, but it cannot be used as substantive evidence in a subsequent proceeding [*Oates v. R*, 38 CLJ 163, 171 : 76 IC 416; see *Shiam Sundar v. R*, A 1923 A 469]. An unsigned statement recorded by an investigating agency under S.162 of Cr PC, 1973, was held to be usable during examination of the witness, either for the purposes of contradiction or corroboration [*Peethambaram Prasad v. State of Kerala*, 1998 Cri LJ 2122 (Ker)]. If the writer of a letter appears as witness, the letter can be used to corroborate his testimony but not as substantive evidence. If however he says in general way in his examination-in-chief that the contents of the letter are true that may be substantive evidence regarding its contents [*Balabhadra v. Nirmala*, A 1954 Or 23].

Where an advocate was charged with professional misconduct for having advised his client to bribe a witness and the charge was founded on conversations with another counsel, who was examined as a witness in support of the charge, he was corroborated by three persons; and it was held that the evidence of those three persons was admissible, as it tended to support the credibility of the witness [*Bomanji Cowasji v. Judges of the Chief Court*, 34 IA 55 : 34 C 129 : 11 CWN 370 : 17 MLJ 67 : 9 Bom LR 3].

A petition put in by a client for adjournment on the ground that pleader's attendance could not be secured on account of "hartal" is admissible in a proceeding under the Legal P Act to corroborate the evidence which the witness had already given at the time when his attention was directed to its contents and when he said that the contents were true to his knowledge [*R v. Rajani Kanta*, 49 C 732 : 26 CWN 589 : 35 CLJ 356]. Where the plaintiffs sought to establish their pedigree by proving *inter*

alia that *A* and *B* were brothers,—*held*, that a statement to that effect, made by one of the plaintiffs, in deposition given long before the controversy in suit arose, was admissible in evidence [*Jadu Nath v. Mohendra Nath*, 12 CWN 266].

The statement to a headman can only be used in the manner provided for in ss 145 and 157 [*Mirchoke v. R*, A 1933 R 119]. Entries in a chowkidar's diary may be corroborative evidence under s 157 or s 159 [*Nainakoer v. Gobardhan*, 37 IC 424 : 2 PLJ 42; *Baldeo v. Abhoyram*, 12 ALJ 945 : 24 IC 540; see *ante* s 32(2): "*Chowkidari or Police diary*" and s 35: "*Registers of births and deaths*]. So also admission registers of pupils in schools in which their ages are entered [*Krishnama v. Veeravelli*, 38 M 166 : 24 MLJ 517]. A *Kanungoe's* report upon enquiry is admissible to corroborate his sworn testimony [*Achambit v. Sarada*, 12 Cri LJ 480 : 12 IC 88].

In proceedings under s 107 Cr P Code *sanchas* or reports made by prosecution witnesses against the accused are not substantive evidence, but they may be used to corroborate their evidence in court [*Mahabir v. Samratha*, A 1940 P 252].

When the executant of a document containing recitals of boundaries of adjacent lands is examined, the document is admissible in evidence under s 157 to corroborate the oral testimony [*Shk Ketabuddin v. Nafar*, 44 CLJ 582 : A 1927 C 230 : 99 IC 907 (**dissented** from in *Ambika v. Kumud*, A 1928 C 893); *Thyagaraja v. Narayana*, A 1940 M 450; *Komirineni v. Munnamgi*, A 1947 M 345]. The same view was taken in Patna [*Ramnandan v. Laley*, A 1933 P 693]. But in Lahore it has been held that recital of boundaries in documents not *inter partes* is not admissible for corroboration even though the executant is called as a witness [*Ramdas v. Maya*, 34 PLR 917 : 146 IC 192]. As to admissibility of recitals of boundaries in documents not *inter partes*, see *ante* s 13: "*Recitals in boundaries not inter partes*". A person in order to corroborate his statement cannot refer to statements in a deed to which he was not a party [*Kheman v. Chottu*, A 1938 L 635].

In a dispute about land, recitals in sale deeds produced by witnesses lend corroboration to their statements in court and so the sale deeds are admissible in evidence under s 157 [*Abdul Ali v. Harija*, A 1972 Gau 52].

A *panchanama* is not evidence of the statements contained therein and it should be proved and exhibited as relevant evidence of those statements [*R v. Misri*, 5 SLR 31 : 12 IC 209; see however *Valibhai v. S*, A 1963 G 145].

A former verified petition by a guardian giving the ward's date of birth is admissible for refreshing memory [*Harchand v. Dewan*, A 1929 A 550; *Gopinath v. Satish*, A 1964 A 53]. When the guardian is examined as a witness, the statement made by him in his application for guardianship as to the minor's age long before the present dispute, is admissible to corroborate his evidence [*Kishori v. Adhar*, A 1942 C 438 : 199 IC 10]. A complainant narrated to her three colleagues about all that transpired on a particular date when her superior abused her by cracking indecent jokes. Though such a narration may not be *res gestae* and inadmissible under sec. 6 the same when corroborated by the three witnesses is clearly admissible under sec. 157. [*Smt. Chander Kala v. Ram Kishan*, 1985 Cri LJ 1490 : A 1985 SC 1268, 1270]. Using a photofit for the purpose of refreshing memory may be regarded as a step in the right direction. The photofit is a sketch by a police officer making a graphic representation of a witness's memory as another form of the camera at work. The photograph, the sketch and the photofit are in a class of evidence of their own to which neither the rule against hearsay nor the rule against the admission of an earlier consistent statement applies. [*R v. Cook*, (1987) 1 All ER 1049, 1053, 1054 (CA)].

The post-mortem report of a doctor is his previous statement based on his examination of the dead body and not substantive evidence. It can be used only to corroborate his statement under s 157 or to refresh his memory under s 159 or to contradict him under s 145 [*Hadi v. S*, A 1966 Or 21; *Govind v. S*, A 1967 G 288].

A statement during investigation of a complaint by a person who is subsequently accused of the offence cannot be used either to contradict or corroborate him or statement made by co-accused in FIR [*Mohar v. S*, A 968 SC 1281 (*Nisar v. S*, A 1957 SC 366 **folld**; *Faddi v. S*, A 1964 SC 1850 **dist**].

Inadmissibility, of Former Statements for Corroboration.—Where a dispute between *A* and *B* is whether *A* had agreed to make a purchase from *B* on a certain date, a statement in support of *B's* allegation in a letter by *B* to a third party is inadmissible for purpose of corroboration [*Gillie v. Posho Ltd*, 1939, 2 All ER 196 : A 1939 PC 146].

S. 158. What matters may be proved in connection with proved statement relevant under section 32 or 33.—Whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

COMMENTARY

Principle and Scope.—This section deals with certain statements made by persons who are dead or who from some unavoidable cause cannot be produced as witnesses and which have been declared as relevant under ss 32 and 33 of this Act. The object of this section is to expose statements to every possible means of contradiction or corroboration in the same manner as that of a witness before court under cross-examination. The person making the statement is open to impeachment and discrediting in the same way as ordinary witnesses. The reason being that statements admissible under ss 32 and 33 are exceptional cases and it is but just and reasonable that such statements should as far as possible be subject to the various modes of attacking or corroborating them. No sanctity attaches to the statement simply because a person is dead. His credibility may be impeached or confirmed in the same manner as that of a living witness (see Steph Dig Art 135). All the safeguards for veracity applicable to witnesses before the court apply to the statements of persons declared relevant under ss 32 and 33.

Take, for instance, the case of an entry in a deceased trader's book; any former entry or statement, corroborative or contradictory, or any fact, tending to show that the person making it was untrustworthy or partial, which might have been proved if he had been cross-examined, may be proved for the purpose of increasing or diminishing the importance to be attached to the entry. The various methods of attacking or supporting the evidence of a witness are by this section made applicable to the statements for which provision is made in ss 32 and 33. Although the maker of such statement not being a witness cannot be cross-examined, his statement may be contradicted just as if he had been cross-examined. For instance, if as in illustration (*c*) to s 153 the statement of *A*, admitted under s 32 or s 33, is to the effect that he saw *B* at Lahore on a certain day, evidence to prove that *A* was in Calcutta on that

day could be given. Similarly evidence to impeach the credit of *A* might be given in the manner described in s 155. On the other hand *A's* statement may be corroborated by the production of a former statement such as is described in s 157 [Cunn Intro Ixv and p 312].

Contradiction or Corroboration of Statements by Dead Persons.—A prosecution was instituted by *S*, against *N* at the instance and on behalf of *F* for criminal trespass in respect of a certain house, and on his own behalf for assault and insult. *S* gave evidence at the trial in support of these charges. *F* subsequently brought a civil suit for possession of the same house under s 9[1] of the Specific Relief Act. *S* died before the institution of the civil suit and his former deposition in the criminal court was tendered by *F* as evidence on the issue of possession, and was held admissible under s 33. A witness under examination was then asked what information *S* had given him on the day next after the date of dispossession, and it was held that the question was admissible under this section to corroborate the deposition of *S* in criminal trial [*Foolkissory v. Nobin Ch*, 23 C 441]. Where the evidence given in a previous trial by a witness, since deceased, was read to the jury, proof that the witness had stated after the trial that such statement was untrue was held receivable [*Craft v. Com*, 81 Ky 252 (Am)].

When the previous statement of a witness is used under ss 32 and 33, then any other statement made by that witness can be used under s 158 for contradicting that witness as if such witness had appeared and was cross-examined on such previous statement and on questions being asked had denied the facts mentioned in the same [*Niamat v. R*, 127 IC 850 : A 1930 L 409]. If there is a discrepancy between a confession and a prior statement to the police, but the person died before trial, it must be assumed that the person was actually produced in court and the previous statement put in her cross-examination [*Hariram v. R*, 89 IC 897 : 26 Cri LJ 1425]. Statements made before the sub-registrar by the deceased attestors to a will are admissible under s 32(7) taken with s 158. Under s 158 even prior statement of deceased persons can be admitted both for contradiction and corroboration [*Sudarsanna v. Seetha-ramamma*, 1933 MWN 1148].

A list of stolen things given by informant to supplement the first information report is admissible under s 158 and can be proved under s 159 [*Amrit v. R*, A 1933 L 987].

S. 159. Refreshing memory.—A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.—Whenever a witness may refresh his memory by reference to any docu-

---

1. See now s 6 of Specific Relief Act 47 of 1963.

* In the Ceylon Evidence Ordinance paras 1, 2, 3 and 5 have been numbered as sub-sections (1), (2), (3) and (4) respectively.

ment, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

SYNOPSIS

COMMENTARY

Principle and Scope.—Ordinarily a witness deposes to facts from the recollection but memory fades and it is therefore very necessary that he should be allowed to assist his memory by looking at documents containing an account of them if there be any. This is known as *refreshing memory*. A reference to the written memoranda has the effect of reviving in his mind a recollection of the facts recorded therein. A witness may through lapse of memory, be honestly making a statement contrary to what is contained in the written memorandum. He is allowed to refresh his memory because a witness should not suffer from a mistake, and may explain an inconsistency [*per* MONTAGUS SMITH J, in *Halliday v. Holgate*, 17 LT 18]. The word 'writing' includes also printed matters [*Ram Ch v. R*, 120 IC 798 : A 1930 L 371]. As to the difference between this section and s 160 see *post* s 160. A witness cannot be allowed to refresh his memory by referring to his earlier statement given to the police under section 161 Cr PC [*Simon v. State of Kerala*, 1996 Cri LJ 3368, 3371 (Ker)].

In order that the document or memorandum allowed to be looked at for the purpose of refreshing memory, may be reliable, certain conditions have been laid down in s 159:—(*1*) The writing must have been made by *the witness himself contemporaneously* with the transaction to which he testifies or so soon afterwards that the facts were fresh in his memory, or (2), if the writing is made by some one else, it must have been *read* by the witness within the aforesaid time *and known by him to be correct, ie* he must have read it when the facts were fresh in his memory and recognised its accuracy.

"There are two sorts of recollection which are properly available for a witness,—*post recollection and present recollection*. In the latter and usual sort, the witness has either a sufficient clear recollection or can summon it and make it distinct and actual

if he can stimulate and refresh it, and the chief question is as to the propriety of certain means of stimulating it—in particular, of using written or printed notes, memoranda, or other things as representing it. In the former sort the witness is totally lacking in present recollection and cannot revive it by stimulation, but there was a time when he did have a sufficient recollection and when it was recorded, so that he can adopt this record of his then existing recollection and use it as sufficiently representing the tenor of his knowledge on the subject" [Greenleaf, s. 439(*a*)].

S 159 has reference to present recollection and s 160 dealt with past recollection. A witness may not have any independent recollection of facts, even after looking at a document, yet if he is sure that the facts were correctly recorded, it may be used for testifying to facts mentioned therein. This is dealt with in s 160. As to the scope of ss 159 and 160, see notes to s 160. A writing used for refreshing memory under s 159 is not in itself evidence, but the recollection is. "It is not the memorandum that is the evidence, but the recollection of the witness" [*per* ELLENBOROUGH LCJ, in *Henry v. Lee*, 2 Chitty 124]. A witness is permitted to refresh his memory in the course of his evidence by reference to documents or memoranda. By doing so he does not usually make them evidence. It is immaterial that they would not in fact be admissible in evidence if tendered as such, *eg* an unstamped receipt [*Jacob v. Lindsay*, 1 East 460; Hals 3rd Ed Vol 15 para 797]. But in the case of a writing under s 160 (record of past recollection) of which the witness has no specific recollection, but which he guarantees and accepts as accurate, it becomes his testimony. These memoranda should however be distinguished from books of account which are admissible as evidence (*ante* s 34).

It should be remembered that it is not necessary that a document should be legally admissible before it may be used to refresh memory, *eg* an invalid lease [*Bolton v. Tomlin*, 5 A & E 836] or an unstamped document [*Birchall v. Bullough*, 1896, 1 QB 326] may be used for the purpose. These cases are not authorities for the proposition that a document which is inadmissible in evidence can be indirectly used as a piece of evidence. They indicate that they may be used for the purposes of refreshing memory and obtaining from a witness certain statements in cross-examination [*Tribhuban v. Ram Ch*, 14 P 233; see *post*: "*Refreshing Memory by Inadmissible Documents*"].

It is not necessary for purpose of s 159 that the writing used to refresh memory should have been admitted in evidence. So, a document not produced in proper time and rejected under Or 13 r 2 may nevertheless be used to refresh memory [*Jewan Lal v. Nilmoni*, 55 IA 107 : A 1928 PC 80 : 7 P 305 : 30 Bom LR 305 : 32 CWN 565 : 107 IC 337 PC]. The third para of the section settles a point regarding which English decisions do not appear to be unanimous. It says that where the right to refresh memory exists, the court if satisfied about the non-production of the original, may permit the witness to refer to a copy. Under the last para an expert may refer to professional treatises, as their opinion is founded mostly on authoritative books. Instead of deposing orally, a witness may put in notes of "speech" taken by him. S 159 does not exclude that [*Om Prakash v. R*, 127 IC 209 : A 1930 L 867]. If the witness has become *blind*, the document may be read over to him [*Catt v. Howard*, 1820, 3 Stark 3; *Vaughan v. Martin*, 1796, 1 Esp 440].

This section follows in substance the English law on the subject, which is stated thus: A witness is sometimes permitted to refresh and assist his memory by the use of written instrument, memorandum or, entry in a book. But this course,—except in the case of scientific witness referring to professional books as the foundation of their opinion,—can only be adopted where the writing has been made, or its accuracy

recognised, at the time of the fact in question, or, at furthest, so recently afterwards, as to render it probable that the memory of the witness had not then become defective [Tay s 1406]. The practice must be governed by the peculiar circumstances of the cases; but, perhaps, if the witness will swear positively, that the notes, though made *ex post facto*, were taken down at a time when he had a distinct recollection of the facts there narrated, he will in general be allowed to use them, though they were drawn up a considerable time after the transactions had occurred. If, however, the memoranda were prepared subsequently to the event at the instance of the party calling the witness, or of his solicitor, they can in no case be permitted to be used, for otherwise a door might thus be opened to the grossest fraud [Tay s 1407]. The Civil Evidence Act, 1968 makes no change in the law of refreshing one's memory but it makes the document admitted by virtue of this rule admissible as evidence of any fact stated therein [S 3(2)].

During a robbery trial, a Crown witness was called to give evidence of a conversation that took place between him and the accused, in which admissions were made. In the witness-box, he could not remember the details of the conversation. The judge allowed him to withdraw and to read his former statement to refresh his memory. It was held that the trial judge had the discretion to allow a witness to read his statement in this sort of case before giving evidence either by withdrawing to do so or by reading in the witness-box. [*R v. Da Silva*, (1990) 1 WLR 31 CA].

It is likely that a childs memory would fail quite quickly over time and therefore the child should be given the opportunity to refresh the memory by referring to earlier statement [*R v. Thomas*, 1996 Crim LR 654 (CA)].

[*Ref Tay s 1406-13; Steph Art 136, Best, s 224; Powell, 9th Ed, pp 169-72; Phip 8th Ed, pp 461-63; Hals, 3rd Ed, Vol 15, para 797; Jones ss 874-83; Wig ss 726-74*].

Difference Between S 159 and S 160.—[See *post* s 160].

"While Under Examination."—The words "*while under examination*" in s 159 evidently mean, that the witness may refresh memory, at the time of his examination in court. But the words do not seem to debar a witness from referring to any such writing before his examination. Although it is usual and reasonable that the document should be produced at the trial, a strict adherence to this rule does not appear to be necessary under the English law [*Kensington v. Inglis*, 8 East 273, 289; *Burton v. Plummer*, 2 A & E 341]. But in s 161, the provision as to his production and showing to the adverse party is imperative.

"Any Writing": [What Kinds of Document May Be Used].—The words "*any writing*" in s 159 refer to every kind of writing. It is immaterial therefore, what the document is, whether, it be a book of account, letter, bill of particulars of articles furnished, including such items as dates, weights, and prices, way-bills, notes made by the witness, or any other document whatsoever which is effectual to assist the memory of the witness [Cunn pp 313-14]. A party may look at his accounts, provided he kept or checked them himself at the time of entry, contemporaneously with the facts to which they refer, notwithstanding he may have neglected to file his accounts with his plaint or other pleading as substantive evidence [Nort p 339]. A writing can be used by the witness to refresh his memory regarding the facts deposed by him if the writing be made either at the time of, the transaction or shortly after the transaction namely the occurrence. [*Indra Mohan Brahma v. State of Assam*, 1982 Cri LJ NOC 127 (Gau)].

A document not included among the documents produced with the plaint may be used for refreshing memory [*Ramji v. Ramgayya*, 1 MHCR 168. See also Or 7, r

18(2) C P Code 1908]. The document used for refreshing memory is not a probative document, and should not be rejected simply because it was not in the list under Or 7, r 14, *eg*, a horoscope made at the time [*Banwari v. Mahesh*, 45 IA 284 : 41 A 63 : 23 CWN 577 : A 1918 PC 118]. Account books not produced in time were not admitted in evidence, but court may under s 159 allow a witness to refresh his memory by reference to such account books [*Jewan Lal v. Nilmoni*, 55 IA 107 : A 1928 PC 80].

Plaintiff in order to show that his father died before the property had been acquired, produced a mortgage bond which had been executed by him on 28-10-1892 in which he was described as the son of *K M A* deceased. The deed was admissible to refresh memory as to when the father died [*Sayeruddin v. Samruddin*, 72 IC 985 : A 1923 C 378]. A copy of statement of injuries recorded in the register of medico-legal cases may be used by the medical witness for the purpose of refreshing his memory but it cannot be used as evidence [*Malsadiq v. R*, A 1926 L 51]. Statement of an injured person recorded by a *patel* is not to be proved by the written record. The proper method is that given in s 159 [*R v. Akia*, A 1927 N 222]. A person making a record of dying declaration may refresh his memory by referring thereto [*Nga Mya v. R*, A 1936 R 42]. The document must not contain any of the elements of hearsay, and it will therefore be inadmissible if it appears to be the statement of a third person [*Anon*, Abbler, 252 cited in Powell, 9th Ed, p 172]. See also notes to s 160, *post*.

A *panchanama* containing confession is inadmissible under s 26, but if there is anything in it of which evidence can lawfully be given, the witness may be allowed to refresh his memory with it [*Baloch v. R*, A 1933 S 220; 144 IC 722]. *Panchanamas* prepared by the police about information given by the accused of clothes worn by him or of recovery of clothes are substantive evidence although they may be used for refreshing memory [*In re Kolli*, A 1939 M 766]. A horoscope can be used to help in proving the date of birth stated in it only under s. 159 or 160 [*Savitri Bai v. Sitaram*, A 1986 Madh Pra 218, 220 : 1986 MP LJ 25].

—Post-mortem Notes etc.—It is extremely undesirable that post-mortem notes of medical examination should be put in evidence *en bloc* through the medical officer. Ss 159, 161 only permit a limited use being made of them for refreshing memory or for contradicting the witness who made it [*Md Yusuf v. R*, A 1929 S 225; *R v. Jadab Dass*, 27 C 295 : 4 CWN 129]. It is the doctor's statement in court which is substantive evidence and not the report which can be used only for refreshing his memory [*R v. Jadab Das*, *ante*: *In re Rangappa*, 59 M 349; *Raghuni v. R*, 9 C 455; 11 CLR 569; *Hadi v. S*, A 1966 Or 21; see also 2 WR Cr Letters P 14 and 6 WR Cr Letters p 3] or to contradict whatever he might say in witness-box, but it cannot by itself be substantive evidence [*In re Ramaswami*, A 1938 M 336]. The practice of the court referring to statements in the first information reports, medico-legal reports, &c, as if they were evidence is not justified by law. The proper course is for the witness to refer to the document which he has prepared at the time under s 159 and state in court everything material [*Mohammad v. R*, A 1937 L 475].

Investigating Officer refreshing memory by his record.—An investigating officer was asked during his examination-in-chief about what happened on the fateful day. He could not recall and, therefore, wanted to look at his record. Objections by the defence council were held to be not tenable. Records made by such officers are contemporaneous entries and, therefore, they are always available for refreshing memory. It is also advisable to look at such records before answering questions. *State of Karnataka v. R. Yarappa Reddy*, AIR 2000 SC 185 : (1999) 8 SCC 715.

—Account Books.—When a witness has to depose to a large number of transactions in books of account, he may be permitted to refer to those books while answering the questions put to him. S 160 specifically permits such a course [*S v. Nageswara*, A 1963 SC 1850].

Refreshing Memory By Writing [By Whom Documents May Be Written].—It has been seen that the writing may be made by the witness himself or by one under his direction, or by any other person, provided that in both cases they were made shortly after the transaction in question; and if made by another person it must have been read by the witness within the aforesaid time and recognised by him as correct (*ante* p 1361). So, a witness cannot use a document written by another and read by him soon after, unless he also knew it to be correct. "If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is the evidence, but the recollection of the witness" [ELLENBOROUGH, LCJ, in *Henry v. Lee*, 2 Chitty, 124]. If a witness wants to refresh his memory by referring to notes taken by another of a speech made at a meeting, it is not necessary that such notes should have been read by him immediately after the meeting and not merely read to him [*R v. Khurshid*, 44 PLR 167].

A witness will always be allowed to look at the document itself, if he has checked an entry made by another person [*Burton v. Plummer*, 2 A & E 341]; or has actually seen money paid and receipt given [*Rambert v. Cohen*, 1803 4 East 213]; or has read a memorandum to party who has assented to its terms [*Bolton v. Tomlin*, 1836, 5 A & E 856]. A person who has prepared *jamawashilbaki* papers on receiving payment of rent may refresh his memory by looking at such papers when giving evidence about the rent payable [*Akhil v. Naya*, 10 C 248; *Kheromani v. Bejoy*, 7 WR 533]; so also collection papers [*Md Mahmud v. Safar*, 11 C 407, 409]. As to whether such papers are corroborative evidence or independent evidence, see *ante* s 34: "*Entries in books are corroborative evidence*" and "*Different kinds of books*". A memorandum kept by a witness can be used in evidence not by itself but as corroborating a witness or refreshing his memory [*Keyarsosp v. Garbad*, 120 IC 224: A 1930, N 24; *Mukundram v. Dayaram*, 10 NLR 44, 47].

It is not necessary that notes used by a witness called to prove a conversation, speech, etc, should contain a verbatim account of all that was said, *e.g.*, a shorthand writer may refer to a partial note taken by him [*R v. O'Connell*, 1843 Arm & Tr 165, 167]. In a case under s 124-A Penal Code, it has been held that although it is best that the notes should contain the actual words used so that they may be embodied in the charges, the requirement of the law is satisfied if the charge states the words with substantial though not absolute accuracy [*Mylapore Krishnasami v. R*, 32 M 384 (SANKARAN NAIR, J, dissenting held that exact words are necessary, and if notes of speeches are taken in parts, the parts should be taken down verbatim. He pointed out that in *O'Connel's case*, *sup*, parts of the speech was taken down *verbatim*)].

Accused was a time-keeper. Every fortnight the pay-clerk read the entries in the time-book at the time of payment of wages in accordance with the entries—*held* that the pay-clerk could refresh his memory from the book [*R v. Langton*, 46 LJMC 136]. A solicitor can refresh his memory from his diary [*R v. Dexter*, 19 Cox 360]. Where a witness for the prosecution gave an answer different from what he had previously sworn before the magistrate, he was allowed to refresh his memory from his deposition signed by him [*R v. Williams*, 1853, 6 Cox 343]. A seaman was allowed to refer to a log-book which though not written by himself, was examined by him from time to time while the facts were recent [*Burrough v. Martin*, 1809, 2 Camp 112; *Anderson v. Whalley*, 1852, 3 C & K 54]. For many other cases see Tay s 1410]. It should be open to the Judge, in the exercise of his discretion and in the interest of Justice, to permit a witness who has begun to give evidence to refresh his memory from a statement made near to the time of events in question, even though it does not come within the definition of contempo-raneous, provided he is satisfied (1) that the witness indicates that he cannot now recall the details of events because of the lapse of time since they took place, (2) that he made a statement much nearer the time of

events and that the contents of the statement represented his recollection at the time he made it, (3) that he had not read that statement before coming into the witness-box and (4) that he wished to have an opportunity to read the statement before he continued to give evidence [*R v. Da Silva*, 1990 1 All ER 29, 33 (CA)].

An age certificate given by a medical man can be used by him to refresh his memory [*Venkata v. Subraya*, 33 IC 142]. The outer foil of the Land R Register may be used by the official making the entry and he may give oral evidence of the report which is not signed by the person making it [*Ma Dun v. Lee Q*, 5 LBR 40: 2 IC 535]. When the witness whose deposition is recorded under s 512 (now s 299) Cr P Code appears and does not remember what he said, his previous deposition may be read out under s 159 [*Bhika v. R*, 76 IC 31]. Lists of discovery of stolen property can be used by persons who actually wrote them in order to refresh their memory, but it is erroneous to think that they are themselves evidence [*Hazara v. R*, 82 IC 707 (L)]. Discovery lists (under s 27) or panchanamas are not themselves evidence. They can only be used by person who made or singed them to refresh memory [*Bhagirath v. S*, A 1959 MP 17].

δ See other cases noted under s 160.

Refreshing Memory By Newspaper.—A witness may refer to a newspaper report to refresh his memory, if he read it at the time when he had a recollection of the statements therein contained and knew them to be true [*Topham v. McGregor*, 1 C & K 320]; but a newspaper report is not generally admissible as evidence of the facts therein recorded [*Lord Rossmore v. Mowatt*, 1850, 15 Jur 238; Hals 3rd Ed, Vol 15, para 741]. A witness who heard a speech may refresh his memory by referring to a newspaper account which he read at or near the time of the transaction. It is the fact that he had known it to be correct when he read it that is his justification for doing so. It is immaterial that the document was not printed by him or in his presence [*Ram Ch v. R*, 120 IC 798: A 1930 L 371].

Time of Preparation of Documents.—It is plain that no precise time limit is possible. The law does not require that the writing must have been made the moment the transaction took place. If it is not possible to make it contemporaneously with the transaction, it must be made so soon afterwards that it may be reasonably inferred that the facts were fresh in the mind. Whether the interval between the two, is such as to justify the presumption that memory became impaired, is a matter depending on the circumstances of each case and the retentive faculty of each witness. The section gives the court a discretion and if it considers it probable that the facts were fresh in the witness's mind when the writing was made, it will decide in favour of the document. In the case of a document written by another, it must be read and its accuracy recognized by the witness within the aforesaid time.

The condition of contemporaneousness can have no application to a deposition which was not recorded at the time of the transaction referred to therein, and witnesses have been allowed to refresh their memory from previous deposition [*R v. Williams, ante*; *Smith v. Morgan*, 2 M & R 257; *Bhika v. R, ante*]. Depositions are read and signed by witnesses or are read out to those who are illiterate and so s 159 ought to apply. It may be said that this would make the witness repeat his former testimony after reading it and would help in the evasion of the rule as to contradiction. But the judge has full discretion to stop such abuse. Taylor suggests that if the witness will swear positively, that the notes, though made *ex post facto*, were taken down at a time when he had a distinct recollection of the facts there narrated, he will in general be allowed to use them though they were drawn up a considerable time after the transaction had occurred [*R v. Kinloch*, 25 How ST 934; *Wood v. Cooper*, IC & K 645; Tay s 1407]. But, if there are any circumstances casting sus-

picion upon the memorandum, the court should hold otherwise, as where the subsequent memorandum is prepared by the witness at the instance of an interested party or his attorney [*Steinkeller v. Newton*, 9 C & P 313; *Bergman v. Shoudy*, 9 Wash, 331], or if the memorandum has been revised or corrected by such party or attorney [*Anon*, cited by LORD KENYON in *Doe v. Perkins*, 3 TR 752, 754; Jones, s 879].

On the facts it was held that before a doctor can be allowed to refresh his memory from a slip of paper supplied by a pleader, it must be shown that the writing was made at the time when he examined the complainant or soon after [*Pannalal v. Nanigopal*, A 1949 C 103].

The witness should swear that the writing was made at a time when he had a distinct recollection of the facts [*Burrough v. Martin*, 2 Camp 112]. In a case witness was not allowed to refer to notes, prepared by him some weeks after the transaction had occurred and when he had reason to believe that he should be called to give evidence [*R v. Kinloch*, 25 How St Tr 937]. In *R v. Langton* cited *supra*, the delay was that of a fortnight and the document was allowed to be used. Where the subsequent writing is made by the witness for the party calling him of the solicitor for the purpose of the trial, it should not be used [*Steinkeller v. Newton*, 9 C & P 313].

Documents Which May Be Used For Refreshing Memory Under Ss 159 and 160.—[See *post* s 160].

Refreshing Memory by Inadmissible Documents.—Documents which are independently inadmissible may be used under this section for refreshing memory, and such use does not make it evidence in the case, *eg*, *jamawashilbaki paper* [*Akhil v. Naya*, 10 C 248, *sup*], or an unstamped document [*Maugham v. Hubbard*, 8 B & C 14] or an insufficiently stamped document [*Tribhuban v. Ram Chandra*, 14 P 253]. In *Maugham's case*, *ante*, LORD TENTERDON explained the principle thus: "In order to make the paper itself evidence of the receipt of the money, it ought to have been stamped. The consequence of its not having been stamped might be, that the party who paid the money, in the event of the death of the person who received it, would lose his evidence of such payment. Here the witness, on seeing the entry signed by himself, said that he had no doubt that he had received the money. The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh memory; and, when he said that he had no doubt he had received the money, there was sufficient parol evidence to prove the payment". Similarly unregistered documents may be used for refreshing memory. A note of evidence taken by a clerk in the course of abortive arbitration proceedings is not admissible. The proper procedure is to question the clerk as to what was said at the time, allowing him to refresh his memory by reference to the note [*Ma Aung v. Mg Thet*, 23 IC 940].

Where during a police investigation a magistrate who was present does not record the admission of the accused under s 164 Cr P Code but makes a memorandum of the conduct and admissions of the accused, ordinarily the memorandum is not admissible though the magistrate while giving evidence can refresh his memory by referring to it. In such a case it must be shown to the adverse party and the witness may be cross-examined on it [*Abdulla v. R*, 14 L 290: 145 IC 467].

A statement otherwise falling under s 162 Cr P Code would not become admissible merely because it can be brought under s 158 or s 159 Evidence Act [*Bhondu v. R*, A 1949 A 364]. A memorandum of facts prepared after the occurrence by a witness and handed over to the investigating officer is a statement under s 162

Cr P Code and cannot be used by the witness to refresh his memory while giving evidence at the trial [*Supdt & Rem v. Zahiruddin*, A 1946 C 483].

Use of a Copy for Refreshing memory.—There is some doubt in English law as to whether a copy can be used [Tay s 1408], but there are cases in which such use has been allowed. "It seems that copies of documents may not be used to refresh the memory unless the original is lost or destroyed, or cannot for sufficient reason be produced" [Hals, 3rd Ed, Vol 15, para 798]. The third para of the section settles the point. A copy can under this section only be used for refreshing memory when the non-production of the original is accounted for to the satisfaction of the court [*Cf* s 65 cl (*c*)] and it must of course be also proved that the copy is a true copy. The section does not say what sort of copy is required, and presumably any copy verified by the witness or proved to be correct may be used. It is stated in Taylor, that it should appear that the copy was made by the witness himself, or by some one is his presence or at least in such a manner as to enable the witness to swear to its accuracy [Tay s 1408]. The Act does not require that the copy of such document, shall have been made by the witness himself, or in his presence, or so as to enable him to swear to his accuracy. Nothing is said in s 160 as to the use of a copy of such document [Whitely Stokes, Vol II, p 932]. If the witness has no independent recollection as in s 160, it is conceived that the original must be used.

A sale was allowed to be proved by a clerk who refreshed his memory from a ledger copied under his supervision from a waste-book kept by himself [*Burton v. Plummer*, 2 A & E 341]; and a surveyor has been allowed to refer to a printed copy of a written report made by him to his employers, which report was substantially but not literally transcribed from rough notes taken by himself at the time [*Horne v. Mackenzie*, 6 C& F 628—CONTRA: *Murray v. Mahon*, 18 Ir TLR 8; Phip 11th Ed p 634].

A witness who was present at the arbitration, and had compared the draft and fair copy of the minutes was allowed under s 159 to refresh his memory as to what occurred at the arbitration by reference to the fair copy of the minutes made by the arbitration clerk [*Nistarini Dassi v. Nunda Lal*, 5 CWN xvi *n*].

Right of Inspection and Cross-Examination.—The adverse party has the right to inspect documents used for refreshing memory and to cross-examine thereupon [*post*, s 161].

Reference to Text-Books etc by Experts.—Under the last para, an expert may refer to professional treatises for refreshing his memory. As experts are called to give opinion on scientific and other subjects requiring special knowledge or skill, it is necessary that they should be allowed to refer to appropriate books in order to confirm or correct their opinion. An expert may base his opinion upon an authoritative pronouncement in some book, and under s 51 when the opinion is relevant, the grounds on which the opinion is based are also relevant. A doctor may refer to medical books, an engineer to books on engineering, a valuer to price lists, &c (see Tay s 1422; *Collier v. Simpson*, 5 C & P 73; *Buerger v. New York L A Co*, 1927, 96 LJKB 939: 43 TLR 691; s 45 *ante*: "*Reference to textbooks by experts*"). As to use by court of books in which opinions of experts are expressed see s 60 proviso 1.

Refreshing Memory of Judge.—When in doubt, or when his memory is at fault, the judge may refer to appropriate sources of information, *eg*, to almanacs, dictionaries, histories, Acts &c. Under s 57 the court shall take judicial notice of some facts. It is not possible to have all such facts in memory and a judge may always refer to suitable books (*ante* s 157). See also s 60.

S. 160. Testimony to facts stated in document mentioned in section 159.—A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

SYNOPSIS

COMMENTARY

Principle and Scope.—It has been seen that the previous section (s 159) deals with cases where a reference to the writing revives in the witness's mind a recollection of the facts relating to the transaction, *ie*, as soon as he looks at the writing he remembers the facts. But it may be that even a perusal of the document does not refresh his memory, *ie* it does not revive in his mind a recollection of the facts. S 160 extends the rule in s 159 to cases of past recollection with which it deals (*ante*). Under it, it is not necessary that the *witness* after looking at the written instrument should have an *independent* or *specific recollection* of the matters stated therein. They may have wholly slipped through his memory. Even then, he may testify to the facts referred to in it, if he recognises the writing or signature and feels *sure* that the contents of the document were correctly recorded. Although he has no independent recollection after seeing the document, yet he must be able to say with certainty that the facts are accurate and really occurred. Thus an attesting witness of an old document may say that he has no specific recollection of the facts, but his signature is there and that he has therefore no manner of doubt that he signed after witnessing the execution of the document [see *Maugham v. Hubbard*, 1828, 8 B & C 14]. So where an agent, who had made a parol lease, and entered a memorandum of the terms in a book, states that he had no memory of the transaction but from the book, though on reading the entry he entertained no doubt that the fact really happened, it was held sufficient [*R v. St Martin's Leicester*, 1834, 2 A & E 210; Tay s 1412; Hals, 3rd Ed, Vol 15, para 797]. On an objection being made to the admissibility of shorthand notes and typed transcript of some speeches, it was held that where no attempt is made by a witness to state before the court, what the accused in the case is alleged to have said, nor does he state before the court, that although he had no specific recollection of the facts themselves, he was sure that the facts were correctly reported by him in his report, the evidence of such witness is inadmissible [*Sodhi Pindi v. R*, A 1938 L 629: 40 PLR 872; *Jagannath v. R*, A 1932 L 7].

The Supreme Court has recently held **overruling** the two cases that it is not necessary that a witness should specifically state that he has no specific recollection of the facts and that he is sure that the facts were correctly recorded in the document, before the document can be used. It is enough if it appears from his evidence that these conditions are established [*Kanti v. Purshottamdas*, A 1969 SC 851. Some USA cases referred].

It is conceived that the words "any such document" in s 160 include documents not written by the witness, provided he can give the necessary guarantee of its accuracy. But as in the case contemplated in s 160 the recollection of the witness is revived, the fact that the witness was not the writer of the document may induce the court in a proper case to doubt the guarantee. As the recollection of the witness is not revived, it cannot be called "refreshing memory". That is why s 160 says that a witness may "*testify to facts*" and not "refresh his memory" as in s 159. The distinction was pointed out in *Lord Talbot v. Cusack*, 17 Ir CL 213 where HAYES, J, said: "[To refresh the memory of the witness'], that is a very inaccurate expression; because in nine cases out of ten the witness's memory is not at all refreshed; he looks at it again and again, and he recollects nothing of the transaction; but, seeing that it is in his own handwriting, he gives credit to the truth and accuracy of his habits, and, though his memory is a perfect blank, he nevertheless undertakes to swear to the accuracy of his notes" [Cited Wig s 735].

When a written record brings to the mind of a witness neither any recollection of the facts mentioned in it nor any recollection of the writing itself, but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing the writing which he knows to be genuine, the witness may be allowed to refresh his memory by looking at the record [*Abdul Salim v. R*, 49 C 573: 26 CWN 680: 69 IC 145].

S 160 is silent as to whether a copy to such writing as is mentioned in s 159, para 3, can be used in those cases where the witness has no specific recollection of the facts themselves. It seems that in words "any such document" in s 160 refer to the words "any writing" in s 159 and copy of such document is perhaps excluded. It will be seen that the "permission of the court" in para 3 of s 159 is not to be found in s 160. Under the English rule "if the witness has no independent recollection of the facts narrated therein, the original must be used" [Tay s 1409]. Cunningham, Woodroffe and Markby are of opinion that a copy can hardly have been intended to be included. S 159 on the other hand deals with a case in which the witness really refreshes his memory. He is sure not only that the facts were correctly recorded but of the facts themselves, and is prepared to swear that they existed, and this explains why in s 159 reference to a copy is allowed, but not in s 160 [Markby, p 122]. Norton however says that s 159 read with s 160 would admit the copy [Nort, p 339].

Same:—Ss 159 and 160 contemplate two kinds of cases. But there is a third case. Although a writing revives neither a recollection of the facts, nor of a former conviction of its accuracy, it satisfies the witness that the memorandum would not have been made unless the facts it reports had usually occurred [*Dupuy v. Truman*, 2 Y & C Ch 341]. This is an extreme case, for it allows a witness to depose to facts of which he even now has no recollection [*R v. St Martin's Leicestor*, 2 A & E 210; (Powell, 9th Ed, p 170)]. This appears to be analogous to the case in s 160. There, although an attesting witness has no independent recollection of facts, he says that he is sure that the party executed it; and here he says that he is satisfied that he would not have attested, unless it had been properly executed.

Markby has explained the section by an illustration : *A*, a grocer, sues *B* for the price of goods sold sometime previously, in small quantities, on a great many diffe-

rent occasions—in fact, on an ordinary running account. The shopman is called, who says that though he knows *B* to be a customer he has no recollection of the particular transactions, but they are all contained in a book which he holds in his hand. The book, as we know, is not admissible evidence, but if the conditions as to writing and so forth of the entries in the book as stated in s 159 be satisfied (*ie* made contemporaneously with the fact which it records), then under s 160 the witness may look at the book, and if he is prepared to state upon oath that the entries are correct, he may read them out of the book. The section says he may "*testify to the facts*" mentioned in the book. But having no independent recollection of them it is obvious that he cannot "testify" to them in any other way. What then is really the evidence before the court: Practically I think it is the entries in the shop-book. Not, of course, any shop-book, but a shop-book the correctness of which is specially confirmed, not by any independent evidence, but only by the *opinion* of the shop-man. And, as a matter of fact, in such a case as this the shop-book itself is frequently handled in. Moreover, in strictness, in such a case as I have put, the witness does not really refresh his memory. He substitutes for his memory the shop-book which contains the entries [Markby, pp 111-12].

"If He Is Sure".—The degree of conviction cannot be treated as equivalent to any on which the witness may choose to say that he is sure, whether or not it is too fantastic or illegal to commend itself to reasonable men. The expression means that the witness must satisfy the court with reference to ordinary probabilities, of his right to be sure that the record is correct [*Yesuvadiyan v. Subba Naicker*, 52 IC 704; *Abdulla v. R*, 14 L 290]. It is not necessary for a witness to state specifically that he has no specific recollection of the facts and that he is sure that the facts were correctly recorded. It is enough if it appears from his evidence that these conditions are established [*Kanti v. Purshottamdas*, A 1969 SC 851; *Partab v. R*, A 1926 L 319; *Krishnappa v. R*, A 1931 M 430: *Dharma v. S*, A 1966 Raj 74].

A person who has no specific recollection of the statements made and recorded in a dying declaration may testify to the facts mentioned in the document if he is sure that the facts were correctly recorded by him. It is not necessary for the witness to read out his statement and for the court to record what the witness read out. The witness may be said to testify to the facts mentioned in the document if he produces the document and swears that all that is written therein was actually stated by the deceased. If the document is thus put on record it does not become in the strict sense substantive evidence, but it forms part of the testimony of the person who recorded it. A "dying deposition" comes on the record under s 160 and not as a written statement made by the deceased under s 32(*1*) [*Nga Mya v. R*, A 1936 R 42: 160 IC 597].

The usual phrase requires the witness to affirm that "he knew it to be true at the time". The witness's readiness to affirm this may rest on one of two reasons: (*1*) He may *distinctly recollect his state of mind* at the time of making or first seeing the record and may thus now remember that he then passed judgments upon and knew the record's correctness. Such verification is satisfactory: (2) or, he may now actually recollect nothing of the occasion of making the record and of his then state of mind; nevertheless he may know, from his *general practice* in making such records, or from other indication on the paper,—check-mark, or merely the genuineness of his handwriting,—that he *must have passed judgment upon and known the correctness of the record*. This certainty is of a lower quality, though still satisfactory for most practical purposes [Wig s 747].

Difference Between Ss 159 and 160.—Under s 159 the witness refreshes his memory by looking at the document and gives his evidence in the ordinary way. The

document is not in itself evidence nor is it tendered. But under s 160 his memory is not refreshed and although he has no specific recollection, he guarantees that the paper contains a true record of facts. Here the document itself is tendered and it is evidence [v *ante*, s 159 under "*Principle and Scope*", *Dharma v. S*, A 1966 Raj 74]. In either case the fact that the declaration was not read over to the deponent and admitted to be correct does not affect the admissibility of the record, though where such a procedure has been adopted, it would certainly enhance the value of the statement [*Krishnappa v. R*, 54 M 678]. Section 160 permits a witness to testify the facts mentioned in the document referred to in section 159, although he has no recollection of facts themselves if he is sure that facts were correctly recorded in the document and horoscope in this case [*Savitri Bai v. Sitaram*, A 1986 Madh Pra 218, 220: 1986 MPLJ 25].

Under s 159 it is not necessary that the witness must be sure, that what was reduced to writing by him is a correct record. It is enough if, on reading it, the true facts are recalled to his memory. But if he does not actually recollect himself what the appellant said, if the words are not recalled to his memory, then the notes of a speech may be admitted under s 160, if he is sure the facts were correctly recorded in the notes. If the words of the speaker have not been correctly recorded, but only the writer's impressions of those words then the notes will be inadmissible under s 160 [*per* SANKARAN NAIR J; in *Re Mylapore Krishnasami*, 32 M 384, 395: 5 MLT 393: 9 Cri LJ 456]. Where the witness does not give a resume of a speech said to have been delivered, nor does he state that he is unable to state what was said or that the notes taken by him contain a correct record but admits that the notes contain impression of the speech delivered, the notes of the speech do not become primary evidence of the speech [*Mohan v. Bhanwari*, A 1964 MP 137].

Documents Which May Be Used For Refreshing Memory Under Ss 159 and 160.—Where the plaints in suits upon bonds having been destroyed by fire while under court's custody through no fault of the plaintiff, the suits were re-instituted and the duplicate copies of the plaints were prepared from a register kept by the plaintiff's *gomosta* in which the names of the executants, the quantity of rice lent to them, its price, the instalments in which the price was to be paid and the names of the attesting witnesses to the bonds were entered in tabular form—*Held* that though the register was not secondary evidence of the contents of the bonds, yet it was a document which might be referred to by a wintess for the purpose of refreshing his memory under s 159 and if so, he might be able, by the aid of the register, to give evidence both as to execution and the contents of the bond upon which the court could act and pass a decree in favour of the plaintiff [*Taraknath v. Jemat Nasya*, 5 C 353]. In a suit for damage for negligence in supervising a building, an engineer's report is admissible to prove quantity for damages, provided that the engineer makes the contents of the report a part of his deposition by using it to refresh his memory [*Nagendra v. N*, 43 CLJ 479: 97 IC 200]. Full shorthand transcripts made by those who heard the speeches can be used to refresh their memory [*Ziyauddin v. Brijmohan*, A 1975 SC 1788; *Kanti Pd v. Purushottamdas*, A 1969 SC 851], and cannot be inadmissible merely because the adverse party cannot decipher [*Laxminarayan v. Returning Officer*, A 1974 SC 66].

Police Diaries Etc.—If police diaries of a case are used by the police-officer who made them, to refresh his memory, or if the court uses them for the purpose of contradicting such police officer, the provisions of s 161 or s 145 Evidence Act, as the case may be, shall apply (s 172 Cr P Code). The special diary may be used by the police officer who made it and by no witness other than such officer for the purpose of refreshing memory [*R v. Mannu*, 19 A 390, 405 FB; *ante* s 145: "*Police diaries*".

(**Approved** in *Dal Singh v. R*, 44 IA 137: A 1917 PC 25: 44 C 876: 21 CWN 818); see also *Dadan Gazi v. R*, 33 C 1023; *R v. Jadab Das*, 4 CWN 129]. Defence is entitled to inspection of only portion of the diary which is referred to by the police officer [*Lachmi v. R*, 2 P 74].

It is very doubtful whether a police officer can refresh his memory as to statements recorded by him under s 161 Cr P Code unless the writing is already in court and had been put to the witness who is alleged to have made the statement [*Dadan Gazi v. R*, 33 C 1023: 10 CWN 890]. There is no authority for saying that a police officer can be compelled to refresh his memory from any document made by him, unless the document is either in the possession of the party who desires to put it to the witness, or is at least such as he can insist of having produced [*R v. Kalichurn*, 8 C 154, 156: 10 CLR 51; *Raghuni v. R*, 9 C 455: 11 CLR 569; see *In re Jhubboo Mahton*, 8 C 739, 745: 12 CLR 233].

Where a witness testifies to facts of which a written memorandum was made by him at a time when the details were fresh in his mind, it is always a sound rule to require him to look at the paper, although he might assert that he does not want his memory to be refreshed. Sometimes police officers decline to make use of their diary, with the sole object of preventing a disclosure of facts damaging to the prosecution. Such cases must be looked upon with suspicion. Statements which should be recorded under s 162 Cr P Code and should not find place in the police diary kept under s 172, are sometimes entered in the police diary with the object of giving them the seal of absolute privilege [see *Dadan Gazi v. R*, 33 C 1023 *post*]. If a police officer suffers from a lapse of memory which can be remedied by referring to the diary made by him and the court asked him to look at the writing, he is bound to do so [*Fatnaya v. R*, 1942 Lah 470: A 1942 L 89]. The author was told by a Sub-Deputy Magistrate of a case in which a police officer, who had previous to the trial got by heart some portions of his diary expressed his unwillingness to look at it although pressed by the defence, saying that he remembered perfectly everything in the diary. The sessions judge in the exercise of his discretion directed the witness to consult his diary which was produced with the result that serious discrepancies, &c were found in it and the accused several in number were all acquitted.

A sessions judge is not bound to compel a witness to look at the so-called diary in order to refresh his memory; and it is wholly within the discretion whether he should do or not [*In re Jhubboo Mahton*, 8 C 739, 745: 12 CLR 233]. A general order by a sessions judge, that in every case committed to his court the police diaries shall be submitted simultaneously with magistrate's record, is however illegal [*R v. Mannu*, 19 A 390 FB]. If there is a lapse of memory and the court invites the witness to refresh his memory with reference to the writing (police diary), the witness is under an obligation to do so, it being his duty to lay the whole truth [*Harkhu v. R*, 19 ALJ 76; *Fatnaya v. R*, A 1942 L 89 *supra*]. When a police officer does not remember what the witness stated at the investigation and refuses to refresh from the diaries, the court should compel him to look into diaries [*Mohiuddin v. R*, A 1924 P 829].

A statement reduced to writing by a police officer during an investigation may be used by him to refresh his memory under s 159 [*R v. Sitaram Vithal*, 11 B 657; *Raghuni v. R*, 9 C 455, 458; see also *R v. Uttam Chand*, 11 BHCR 120; *R v. Ismail Valad*, 11 B 659; *R v. Kali Churn*, 8 C 154; *Bhikao Khan v. R*, 16 610; *Md Ali v. R*, 16 C 612*n*; *R v. Stewart*, 31C 1050; *R v. Samiruddin*, 8 C 211]. Reading over of the police statement to the witness before he enters the box does not amount to contravention of the prohibition in s 162(*1*) Cr P Code though the fact of reading

over of the statement may affect the probative value of the evidence of the witness [*Nathu v. S*, A 1978 G 49 FB].

Statements of witness taken down by a police officer under s 161 Cr P Code are not privileged, and s 172 of the Code is not intended to include such statements, and a police officer cannot by entering statements in his diary protect them from such use as the law allows under ss 145 and 159 of the Evidence Act [*Sheru Sha v. R*, 20 C 642]. The practice was strongly condemned in a later case where MITRA and HOLMWOOD J], observed: "By a curious and rather perverted ingenuity it became the practice of the police officers in the mofussil to incorporate oral statements made to them (to be taken down under s 162 Cr P Code) by witnesses in the special diary under s 172 in the belief that by so doing those statements could be kept from the knowledge of the accused..... We think that an executive order giving effect to the law would have a salutary effect". Such statements even though entered in the diary are admissible under s 162 Cr P Code for the purpose stated therein [*Dadan Gazi v. R*, 33 C 1023].

—Reports of Medical Men.—[See s 159 *ante*: "*Post-mortem Notes &c*]".

—Notes on Barrister's Brief.—If a barrister is called to prove that a witness had materially varied in his accounts since the last trial, though he has no independent recollection of what took place on the former occasion, he may refer to the notes on his brief to refresh his memory [*R v. Guinea*, 1841 Ir Cir R 167].

Effect of Refreshing memory by Referring to a Privileged Document.—Where a witness during cross-examination is asked to refresh his memory by referring to a privileged document, he may be told that the consequence of his referring to the document, would be to allow the other side to have a look at the document [*Nemai Chand v. Wallace*, 10 CWN 107: 4 CLJ 268]. See s 161.

S. 161. Right of adverse party as to writing used to refresh memory. —Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

SYNOPSIS

COMMENTARY

Principle and Scope.—This section deals with the adverse party's right as to production, inspection and cross-examination, when a document is used to refresh a witness's memory. "Any writing referred to" in ss 159, 169 evidently means documents used for the purpose of refreshing memory "*while under examination*" (see s 159) in court. Documents by which memory may have been refreshed before trial and not brought into court, do not appear to come within the strict wording of the section. It is suggested that the rule should also apply to such documents, for the risk of imposition and the need of safeguard is just as great [Wig s 763]. This section

says that the writings which are used under ss 159, 160 for the purpose of refreshing the memory of a witness must be produced for inspection and shown to the adverse party *if he requires it*. The rule applies to both an original or its copy. The adverse party has also the right to cross-examine the witness thereon. The words used in the section are "*any writing*". It is not clear as to whether the right of inspection and cross-examination is limited to the particular parts referred to by the witness or it extends to the document generally. In an English case it has been held that the adverse party has a right to inspect those parts only which refer to the subject-matter of the case and to cross-examine thereon [*Burgess v. Bennett*, 20 WR 720] and GUERNSY B, in *Gregory v. Taverner*, 6 C & P 280, 281 said "The memorandum itself is not evidence, and particular entries are only used by the witness to refresh his memory. The defendant's counsel may cross-examine on the entries already referred to and the jury may also see those entries if they wish to do so". In *Betts v. B*, 33 TLR 200 (cited in Phip 11th Ed p 635) however, Low J, allowed a general inspection.

In *Re Jhubbo Mahton*, 8 C 739, 745: 12 CLR 233 FIELD J, observed:—"The opposite party may look at the writing to see what kind of writing it is, in order to check the use of improper documents; but I doubt whether he is entitled, except for this particular purpose, to question the witness as to other and independent matters contained in the same series of writings". As the section refers to "*any writing*" and does not appear to impose any restriction, it is conceived that the adverse party may inspect and cross-examine on the document generally. But the court in the exercise of its discretion may and should restrict the inspection and cross-examination to matters relevant to the issue or to so much as is necessary for understanding the facts testified to (see s 39 p 455). An inspection of the document generally, may sometimes be necessary to ascertain its true character. It is a check against the use of improper document. Moreover, when a document is once put into the hands of the opponent, it is hardly possible to devise a method by which vision may be restricted to particular parts. Cross-examination may however be confined to those portions which are referred to for the purpose of refreshing memory. In the case of police diaries, which are *privileged documents*, it has been held that the accused is entitled to see that portion only which has been referred to for refreshing the memory and no more [*R v. Mannu*, 19 A 890 FB (*ante* s 145: "*Police diaries*")]. When a police officer gave a date and certain names from his diary, it does not entitle the defence to an inspection of anything more than that portion of the diary [*Lachmi v. R*, 2 P 74: 68 IC 623].

If a witness is cross-examined on those portions only which are referred to by him in refreshing his memory, it does not make them evidence on the cross-examiner's side; but if he is cross-examined on other *independent* parts, it becomes his evidence [*Gregory v. Taverner, ante*; *Stephen v. Foster*, 6 C & P 289]. The same view was taken in *Re Jhubboo Mahton*, 8 C 739: 12 CLR 233 *viz* that the cross-examining counsel is not entitled to examine the witness about other *independent* matters mentioned in the memorandum unless of course he is prepared to put it in and make it his own evidence [*per* FIELD J]. If the cross-examining counsel puts a paper into the witness's hand, and puts question on it, and anything comes of those questions, his opponent has a right to see the paper, and re-examine on it; but if the cross-examination founded on the paper entirely fails and nothing comes of it, opposite counsel cannot demand to see the paper [*R v. Duncombe*, 8 C & P 369].

In all cases, where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable,—and if the witness has no independent recollection of the fact, it is necessary—that they should be produced at the trial [*Beach v. Jones*, 5 CB 696] and that the opposite counsel should have an opportunity of inspecting them in order that on cross or re-examination, he may have the benefit

of the witness's refreshing his memory by every part. Neither is the adverse party bound to put in the document as part of his evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously referred to [*R v. Ramsden*, 2 C & P 604], but if he goes further than this and asks questions as to other parts of the memorandum, it seems that he thereby makes in his own evidence [*Gregory v. Taverner, sup*; Tay s 1413].

Notes of speeches cannot be inadmissible merely because they were in shorthand which the adverse party cannot decipher [*Laxminarayan v. Returning Officer*, A 1974 SC 66].

[*Ref Tay s 1413; Phip 8th Ed pp 463-64; Hals 3rd Vol 15 para 799; Powell 9th Ed p 171*].

Time When Inspection May Be Claimed.—The opposite party has a right to look at any particular writing, before or at the moment when the witness uses it to refresh his memory in order to answer a particular question, but if he neglects to exercise his rights, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness. Any such claim will not be entertained at a later stage [*In re Jhubboo Mahton, sup*].

Right of Inspection and Cross-Examination.—The grounds upon which the opposite party is permitted to inspect a writing used to refresh the memory of a witness are (*1*) to secure the full benefit of the witness's recollection as to the facts, (*2*) to check the use of improper documents, and (*3*) to compare his oral testimony with his written statement [*In re Jhubboo Mahton, sup*]. "It is always usual and very reasonable, when a witness speaks from memoranda, that the counsel should have an opportunity of looking at those memoranda, when he is cross-examining the witness" [*per* EYRE CLJ in *Hardy's Trial*, 24 How ST 824; *Republic of India v. G P Rajan*, A 1967 Or 115]. Where two police officers denied collaboration in the preparation of their notes, and that denial was challenged by the defence, the jury should have been allowed to inspect the police officer's notebooks [*R v. Bass*, 1953, 1 All ER 1064].

The inspection is necessary as a protection against the imposition, and cross-examination further enables the opponent to discover circumstances indicating that the document is not genuine. In *Tibbets v. Sterbery*, 66 Barb 201 (Am) MULLIN J, said: "If the witness cannot be compelled to produce it, he might use documents made for him by the party calling him, or the accuracy of which he knows nothing ..... The right of a party to protection against the introduction against him of a false, forged, or manufactured evidence, which is not permitted to inspect, must not be invaded a hair's breadth". Documents should not be fastened in such a way that other parts, besides those referred to by the witness, *cannot be read* [*Betts v. Betts & Brodrick*, 1917, 33 TLR 200].

Whether Papers Given to Witness For Purposes Other Than Refreshing Memory May Be Inspected.—This section gives a right of inspection and cross-examination, only with regard to documents used by a witness under ss 159 and 160 for refreshing memory. But if a paper be put into the hand of a witness, merely to prove handwriting, and not refresh his memory [*Russell v. Rider*, 6 C & P 416], or if being given to the witness for the purpose of refreshing his memory, the questions founded upon it utterly fail, the opposite party is not entitled to see it [*R v. Duncombe*, 8 C & P 369; *Lord v. Colvin*, 23 LJ Ch 469]. If he does look at it under these circumstances, he may be required by his adversary to put it in evidence [*Palmer v. Maclean*, 1 Sw & Tr 149; Tay s 1413]. Where any document is proved and exhibited by either party, the

other party is of course at liberty to inspect it. But the fact that the document is shown to a witness and that a question is asked of him about it does not necessitate the putting of the document in evidence. A document may thus be shown to a witness in cross-examination and yet the counsel on the other side may not be entitled to inspect it since it has been proved. The document to which a witness is referred to refresh his memory is not necessarily put in evidence. But in this case it is specially provided that the other party may claim to see it [Cunn p 315].

Police Diaries.—The defence counsel cannot be permitted to cross-examine the Police Officer regarding the entries in the case diary unless the police officer uses it to refresh his memory [*Gurcharan Singh v. State*, 1985 Cri LJ NOC 56: ILR (1984) 2 Delhi 627 (DB)]. As to right of inspection of police diaries, see s 160 pp 1369-70.

S. [1]162. Production of documents.—A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents.—If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section [2][166] of the [3][Indian] Penal Code (45 of 1860).

SYNOPSIS

COMMENTARY

Principle and Scope.—The section refers to official as well as private documents [*In re Mantubhai*, A 1945 B 122]. It says that when a witness is directed by summons to produce a document which is in his possession or power, he must bring it to court, notwithstanding any objection that he may have with regard to its production or admissibility, (*eg* under ss 123, 124, 130, 131). The document may belong to another person and the witness may have the actual custody (s 131), still he

1. In Ceylon paras 1, 2, 3, have been numbered as sub-sections (1), (2), (3) respectively.
2. In Ceylon "162" substituted.
3. In Pakistan and Burma, "Pakistan" and "Burma" substituted respectively. In Ceylon "Indian" omitted.

is bound to bring it. A witness summoned merely to produce a document shall be deemed to have complied with the summons if he causes it to be produced instead of attending personally to produce the same [Or 16 r 6 C P Code; s 91(2) Cr P Code]. It may be that he is not legally bound to produce it (*eg* documents of the kind in ss 130, 131), or that it would not be admissible, yet he is bound to bring it in court in obedience to the summons. After this has been done, it rests solely with the court to hear the objection or the claim as to privilege, and to decide whether it should be allowed. And for this purpose the court may inspect the document, unless it refers to matters of State [see *post*: "*Inspection by Court of documents produced*"] or may take *other evidence* to enable it to determine the question of admissibility.

"The preliminary question of admissibility must, in the first instance, be exclusively decided by the judge, however complicated the circumstances may be, and though it may be necessary to weigh the conflicting testimony of numerous witnesses, in order to arrive at a just conclusion" [Tay s 23; see *ante* s 123: "*Principle and Scope*"]. The rule that a judge may peruse a document [*Re Daintrey*, 1893, 2 QB 116; *Kerry Council v. Liverpool Ass*, 38 Ir ITR 7] or examine witnesses [*Cleave v. Jones*, 7 Ex 421] in order to determine the claim of privilege, is in accordance with the English law. Documents brought by a witness under *subpoena duces tecum* are produced to the court only, and he may insist that they should not be handed to the parties. The court may order the documents to be read if they be relevant [*Burchard v. Macfarlane*, 1891, 2 QB 241, 247, 248 *per* LORD ESHER MR]. A sealed packet is a document and may be ordered to be produced by a summons [*R v. Daye*, 1908, 2 KB 333].

The first clause of s 162 requires that a witness summoned to produce a document must bring it to the court and then raise an objection against either its production or admissibility. The court is authorised to decide the validity of either or both of the objections. The objections specified in the section relate to all claims of privileges in Ch IX of the Act. The second clause of the section in terms refers to the objection as to the admissibility of the document. This clause should be construed to refer to the objections both as to the production and the admissibility of documents; otherwise in the absence of any limitation on its power, the court would be justified in exercising its authority under and discharging its obligations imposed by cl (*1*), by inspecting the document while holding an enquiry into the validity of the objection under s 123, and that would be inconsistent with the material provision in cl (*2*) [*S v. Sodhi Sukhdev*, A 1961 SC 493: 1961, 2 SCR 371].

The last para of the section says that if in order to determine the validity of the objection, any translation of the document is necessary, the court will cause it to be translated and if it is desirable that the contents of the documents in respect of which privilege has been claimed should be kept secret, the court may direct the translator accordingly. Disobedience to the order has been made punishable under s 166 I P Code. As to production by any party of documents in his possession or power relating to any matter in question in a suit, see Or 11 r 14. As to inspection and discovery, see s 30 and Or 11, C P Code. See also *ante* s 130.

The jurisdiction of the court to decide the validity of the objections covers not only the objection raised under s 123 but to all other objections as well [*Orient Paper Mills v. Union*, A 1979 C 114].

This section is in accordance with the provisions of English law. When a witness is served with a *subpoena duces tecum*, he is bound to attend with the documents demanded therein, if he has them in his possession, and he must leave the question of their actual production to the judge, who will decide upon the validity of any excuse

that may be offered for withholding them [*Amey v. Long*, 1808, 9 East 473; Tay s 1240]. If a person served with a *subpoena* admits that he has the documents required, with him, he must produce them [*Lee v. Angas*, LR 2 Eq 59]. He may be asked what documents he has with him, and he is bound to answer the question without being sworn, and produce the documents. The witness produces the documents to the court and not to the parties, and the court decides whether they are to be used or not. The witness can of course, take any legal objection to producing the documents [Powell 9th Ed p 653].

[*Ref Tay s 1240; Phip 8th Ed p 436; Powell 9th Ed p 653; Ros N P pp 156-58; Hals 3rd Ed Vol 15 paras 771-774*].

"In His Possession or Power".—A person cannot of course be compelled to produce documents which are not in his possession or control. The fact that the legal custody of the instrument belongs to another person will not authorize a witness to disobey the *subpoena*, provided the instrument is in his actual possession [*Amey v. Long, sup*]; but documents filed in a public office are not so in the possession of the clerk as to render it necessary, or ever allowable, for him to bring them into court without the permission of the head of the office [*Thornhill v. T*, 1820, 2 J & W 347; *Austin v. Evans*, 1841, 2 M & G 430; Tay s 1240]. As to possession or power see *ante* s 65(*a*) p 616. The summons to produce the document should specify in as clear terms as possible the particular documents required. [*Cf* Notice to produce documents s 66. *ante*].

Production of Documents in Obedience to Summons is Compulsory.—The provision of s 162 is mandatory. A person (whether a party or a stranger or the State) be he a private individual or a public servant is, when summoned to produce a document in his possession or power, bound to bring it to court or send it through some other persons although he may have any legal objection to its admissibility or production. The section makes a distinction between "bring into court" and "production" or "admissibility". The person summoned to produce a document may send it to the court in a sealed cover and claim privilege to its disclosure in the proper way (*ante* s 123: "*Privilege how claimed*") or after having himself brought the document in court, the witness may then claim privilege or prefer any other objection that he may have against the production or admissibility of the documents and the validity of the objection shall be decided by the court. The witness cannot withhold production (*ie* the actual bringing in of the document in court) by alleging that the document is one of State of that it is not producible for any other reason. It is only for the court to determine whether the document is of the kind in respect of which privilege is permissible under the law [*Bhalchandra v. Chanbasappa*, A 1939 B 237: 41 Bom LR 391; *Ibrahim v. Secy of S*, A 1936 N 25; *Gangaram v. Habibulla*, 58 A 364; *Pub Pro v. Menoki*, A 1939 M 914; *Ijjat Ali v. R*, 47 CWN 928: 1944, 1 Cal 410; *In re Mantubhai*, A 1945 B 122: 46 Bom LR 802; *Dinbai v. Domn*, A 1951 B 72, 80; *Venkatachella v. Sampathu*, 32 M 62; *Pub Pros v. Damera*, 1957 AP 486; *Tilka v. S*, A 1959 A 543: *Lakhuram v. Union*, A 1960 P 192; *S v. Sodhi Sukhdev*, A 1961 SC 493 *sup*; see *ante* s 123: "*Principle and Scope*"]. Attendance with the document summoned to produce is obligatory and presumably the object is that in the event of the court deciding against the claim of privilege or objection preferred, it may at once be admitted in evidence.

In a case the district magistrate while claiming privilege in respect of the report of a sub-divisional officer as to the cause of a man's death appeared in the High Court through counsel with the report ready to produce it, if ordered [*In re Troylukho N Biswas*, 3 C 742]. An engineer summoned to produce documents forwarded them to

the court saying that "the production is not in the interest of public service", and the inspection of the documents was entirely within the court's discretion [*Nagaraja v. Vythilinga*, 1911, 2 MWN 369]. The protection under s 126 cannot be availed of against an order to produce the document; it must be produced and then under s 162 it will be for the court after inspection to decide any objection regarding its production or admissibility [*Gangaram v. Habibullah*, 58 A 264; *Pub Pro v. Menoki*, A 1939 M 914]. So also in the case of a document to which protection is claimed under s 123 (*ante*).

It is obligatory on the witness to produce the document when called upon by the court and then at the time of production he may claim privilege [*Bhal Ch v. Chanbasappa*, A 1939 B 237; *In re Mantubhai*, A 1945 B 122; *Pub Pros v. Damera*, A 1957 AP 486]. S 54[4] Income-tax Act only lays 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 [*Varadarajalu v. Kanakayya*, A 1939 M 546: 1949, 1 MLJ 791]. Summons to Government officers for production of documents should be issued after careful consideration and once summons is issued production should ordinarily be insisted on if the party obtaining the summons so desires [*Laxman Rao v. Vithoba*, 45 IC 398]. See cases noted under ss 123, 124 *ante*.

It has sometimes been held that the officers of a corporation will not be compelled by a *subpoena duces tecum* to produce in court the book of a corporation, but the better reasoning sustains the view that a corporation is under the same obligation to furnish testimony relevant to the issue as are other persons [Jones s 802]. As to proof of proceedings of a municipal body, see s 78 and as to proof of entries in a banker's book, see Banker's Books Evidence Act, *post* App C.

Inspection By Court of Documents Produced. [Documents as to Matters of State].—It has been seen that a witness summoned to produce a document must actually bring it to court notwithstanding any objections which he may have to its production or any claim of privilege that he may wish to set up. It has also been seen that the head of the department concerned in s 123 or the public officer concerned in s 124 is the judge as to whether a disclosure will or will not be prejudicial to public interest; but he is no judge of the question whether the document relates to any affair of State or whether the communication was made in official confidence. These points must first be decided by the judge in order to determine the validity of the claim of privilege (v notes to ss 123 & 124 *ante*). For this purpose the court has power to determine whether a certain document sought to be let in evidence related to affairs of State [*Subba Rao v. Brahmananda*, A 1967 AP 155; *Lakshmandas v. S*, A 1968 B 400] and has power to inspect all documents except the documents referred to in s 123. Thus a court can inspect a document in order to determine whether or not a statement was made in official confidence within s 124 [*In re Suryanarayana*, A 1954 M 278; *Venkatachella v. Sampathu*, 32 M 62; *Tilka v. S*, A 1959 A 543]. As the court is precluded from inspecting documents referring to matters of States and as there is no other means of verifying at that stage whether a document does or does not refer to matters of State, the words "it refers to matters of State", must mean "is alleged to refer to matters of State" [see *Nazir v R*, A 1944 L 434]. While calling for production of privileged documents; general public interest must be considered paramount to individual interest of the suitor [*Samarendra Kumar Deb Nath v. Union of India*, 1981 Cri LJ NOC 144 (Gauh)]. Even without the production of the document before Court, the Court can grant immunity from disclosure if it is otherwise

---

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

proved that it would be injurious to the public interest [*Sunderesan Thampi v. V Ramachandran*, 1987 Cri LJ 108, 112 : 1986 Ker LT 1095.

The position in regard to documents relating to what are called affairs of State appears to be somewhat obscure and unsatisfactory. While the court cannot inspect such documents under s 162, it may take "other evidence" as to the character of the document [*Ijjatali v. R*, 47 CWN 928; *Bhaiya Saheb v. Ramnath*, 1940 Nag 280; *In re Mantubhai*, A 1945 B 122; *Chowdhury v. Changkakati*, A 1960 As 210; see *ante* s 123] or as to the particular affair of State that is involved, in order to determine whether the document is really of the kind in respect of which the privilege is claimed. For practical purposes such a procedure is tantamount to admitting secondary evidence of a document which the court is not allowed to see. This is a circumlocutory and unsatisfactory way of deciding a question which could have been easily and expeditiously determined by a perusal of the document by the court. It is somewhat anomalous that while the court has power to take "other evidence" in order to determine the matter of the document so that the validity of the claim of privilege may be decided, it cannot inspect the document itself. If the general powers of the court under Or 11 r 19(2), C P Code be considered as superseded by the special provision in s 162 (as held in *S v. Sodhi Sukhder*, A 1961 SC 463; *Lakhuram v. Union*, A 1960 P 192), it cannot inspect a document relating to affairs of State.

In a fully discussed case it has been held by the Judicial Committee that the court has always the power to inspect State papers in order to decide the validity of the claim for privilege. Apart from common law principles, reliance was placed on Or 31 r 14(2) of the Rules of the Supreme Court, Australia, which is exactly identical with Or 31 r 19 A (2) of the English RSC corresponding to Or 11 r 19(2), C P Code [*Robinson v. South State of Australia*, 1931 AC 709: 35 CWN 1121: A 1931 PC 254; see also *Re Daintry, Exp Holt*, (1893) 2 QB 116; *Kerry Council v. Liverpool Assen*, 38 Ir LT 7; *Power v. Freeman*, 42 Ir LT 115]. *Robinson's case* was not approved by the House of Lords in *Duncan v. C Laird & Co Ltd.*, (1942) AC 624: 1942, 1 All ER 587 (*ante* s 123) where it was observed that the judgement in *Robinson's case* was limited to civil actions. It has, however, now been applied by the House in *Conway v. Rimmer*, (1968) 1 All ER 874.

In Calcutta it has been held that as Robinson's case turned on the construction and meaning of a provision which corresponds exactly to Or 11 r 19(2), C P Code, it is good law here for the purpose of construing that rule [*Ijjatali v. R*, 47 CWN 928: A 1943 C 529]—CONTRA: It does not override the special provision of s 162 under which the court cannot inspect a State document [*G-G in Council v. Peer Md*, A 1950 Pu 228; *Lall v. Secy of S*, A 1944 L 209; *Lakhuram v. Union*, A 1960 P 192]. The prerogative of Crown in England against discovery of document does not apply in India and there may be an order for discovery against the Crown under Or 11 C P Code [*Md Mehdi v. G-G in Council*, A 1948 S 100 FB]. The Supreme Court held that the provisions of the Evidence Act under which privilege is claimed as well as the provisions of s 162 are equally applicable at the stage of inspection and Or 11 r 19(2) must be read subject to s 162 [*S v. Sodhi Sukhdev*, A 1961 SC 493 follld in *Durga Pd v. Parveen*, A 1975 MP 196]. 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. The subsequent constitution Bench decision in *Amarchand v. Union*, A 1964 SC 1658 recognised the power of inspection by the court of the document [*S v. Rajnarain*, A 1975 SC 865].

"Take Other Evidence".—Other evidence may be taken in order to determine whether the document in question relates to affairs of State [*Ijjatali v. R*; *Bhaiya Saheb v. Ramnath*; *In re Mantubhai, sup*; *Chamarbaghwalla v. Parpia*, A 1950 B 230; *G-G in Council v. Peer Md*, A 1950 Pu 228; *S v. Sodhi Sukhdev, sup*]. In the last mentioned case it has been held that though the power to inspect cannot be exercised where the objection relates to a document which refers to a matter of State, the court is empowered to take other collateral evidence to determine the character or the class of the document. It is perfectly true that in holding an enquiry into validity of the objection under s 123 the court cannot permit any evidence about the contents of the document, which cannot indirectly be proved; but that is not to say that other evidence cannot be produced which may assist the court in determining the validity of the objection [*S v. Sodhi Sukhdev, sup* pp 503-04; see *ante* s 123].

Other Cases.—If documents are tendered in evidence, the court has discretion in criminal cases, to explain the purpose for which they are put in and to interpret as much thereof as appears necessary [*R v. Amiruddin*, 7 BLR 36 p 71. See s 279(3) Cr P Code]. For the purposes of production of documents, partners of a firm are representatives of each other; and a partner may be compelled to produce documents belonging to the firm in a suit in which his co-partners are not parties [*Jakaria v. Casim*, 1 B 496]. Documents executed in favour of wife cannot be rejected on the ground that they are produced by the husband [*Suchandra v. Laloo*, A 941 P 203].

S. 163. Giving, as evidence, of document called for and produced on notice.—When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so[1].

COMMENTARY

Principle and Scope.—This section says that if—(*i*) a party produces a document upon the notice (see s 66 *ante*) of another party, and (*ii*) the latter party *inspects* the document, then (*iii*) the party calling is bound to use it as his evidence, if the party producing the document requires it. It applies to both civil and criminal trial [*Govt of Bengal v. Santiram, infra*; *R v. Makhan*, (1939), 2 Cal 429: A 1940 C 167]. All the three conditions must be fulfilled. The fulfilment of the first condition only does not make the document evidence of the party calling it [*Liladhar v. Holkarmal*, A 1959 B 528]. The mere calling for a document and its production, by the opposite party, however, does not bind the party calling, to put it in evidence. The obligation comes upon when he *inspects* the document and the party producing requires him to put it in evidence. When these requirements are fulfilled, no further proof is necessary before admission [*Govt of Bengal v. Santiram*, 58 C 96: A 1930 C 370: 127 IC 657]. Notice to produce may be given privately or through court [*Union of Firm Visudh*, A 1953 A 689].

The document should of course be relevant to the matters in issue. The rule therefore involves these elements: (*1*) If a document is produced by one party on notice from his opponent, it does not for that reason become evidence. The latter may waive his desire to make it evidence. (2) If, however, he inspects the document, the other party can insist on its being treated as evidence and it becomes the evidence of both

---

1. In Ceylon the words "and if it is relevant", have been added after "to do so".

parties. The introduction of this rule has been considered necessary because it would be manifestly unjust and unfair to permit one to gain an undue advantage by looking into the documents of his opponent without being obliged to use it as evidence for both of them. Under the pretext of a desire to use in evidence, a party might call for documents the contents of which were not known to him and finding that they did not suit his purpose or went against him, he might wriggle out of the situation by discarding them. This mainly is the reason for the penal rule.

It may be urged that such a rule is not consistent with a party's right to obtain discovery and inspection. The rule has therefore been attacked in America on the ground that (*i*) a notice to produce document ought to be considered as analogous to a bill of discovery; (*ii*) a party in possession of papers material to the case of his opponent has no moral right to conceal them and inspection would be subjected to undue hazard if an inspection merely would make the documents evidence in the case [see Jones s 226; Wig s 2125]. This section does not refer to documents produced in obedience to the order of court under Or 11 r 14 C P Code 1908.

This section follows the rule in English law. In practice a party who has given to his opponent notice to produce certain documents is allowed to call for them at any stage of the hearing. The production of papers upon notice does not make them evidence in the cause unless the party calling for them inspects them, so as to become acquainted with their contents: in which case he is obliged to use them as his evidence [*Calvert v. Flower*, 7 C & P 386; *Wharam v. Routledge*, 5 Esp 235], at least if they be in any way material to the issue [*Wilson v. Bowie*, 1 C & P 10; *Sayer v. Kitchen*, 1 Esq 210]. The reason for this rule is, that it would give an unconscionable advantage to a party, to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties [Tay s 1817]. When *A* calls upon *B* to produce a document and *B produces* it, this *prima facie* avoids the necessity of proving such document on *A's* part where it is relied on by *B* as part of his title [Wharton, s 156].

[*Ref Tay s 1817; Steph Arts 138-39; Phip 8th Ed p 469; Jones s 226; Wig s 2125*].

Documents Called for and Produced on Notice.—In *Wilson v. Bowie*, 1 C & P 8, 10 PARK J, said: "If the plaintiff's counsel call for a paper and look at it, he must read it in evidence, if it is at all material to the case; if it does not bear on the case he need not read it. This paper is of the latter kind and the plaintiff's counsel may go on without reading the paper or calling the subscribing witness". When documents called and produced are inspected by the opposite party they are bound to be given as evidence if the party producing requires it [*Union v. Firm Vishudh*, A 1953 A 689].

The last few words seem to suggest that proof of the document is necessary if not admitted. It has been held that where a party calls for a document from the other party and inspects the same under s 163, he takes the risk of making it evidence for both parties. It rests on the party, who calls for and inspects a paper to adduce evidence as to its genuineness, if that be not admitted [*Mahomed v. Abdul*, 5 Bom LR 280; see also *Rajeswari v. Bal Kishen*, 14 IA 142: 9 A 713, 718-19]. If, however, a party in pursuance of a notice produces an instrument to which he is a party and under which he claims a beneficial estate, it is not necessary for the other party to call any attesting witness. In such cases the custody of the paper affords high presumptive evidence that it is held as a muniment of title and is *prima facie* sufficient proof of execution [*Herring v. Rogers*, 30 Ga 615 (Am); Jones s 226]. When a document is called for and inspected, the party producing is entitled to have it exhibited, but such exhibiting is always subject to proof of execution and genuineness. S 163 does not render proof of the documents exhibited unnecessary or alter the nor-

mal incidence of burden of proof. *Quaere*: Whether s 163 is applicable to accounts produced under the procedure for discovery or only to accounts produced after the trial has begun [*Rajagopala v. Ramanuja*, 72 IC 549: 1923 MWN 292].

It seems to have been held in some cases that after inspection no further proof is required. Statements made in the departmental enquiry by a magistrate which are called for by the defence and inspected and made use of in cross-examining the prosecution witnesses are receivable under s 163. They can be admitted without further proof [*Govt of Bengal v. Santiram*, 58 C 96: A 1930 C 370]. In a divorce case, since counsel for the husband had called for and read through the documents in court, the consequence followed that they all had been put in evidence by him, even though he had himself put in evidence only some of the [*Stroud v. S*, (1963) 3 All ER 539]. Under s 163 an inspection of documents by adversary entitles the party producing them to tender them as evidence of both parties. Such account books need no further proof and should be admitted *in toto* and not merely in parts favourable to the party calling for it [*Kishan v. Purausa*, 106 IC 305: A 1938 N 119; see *Rajeswari v. Bal Kishan*, *ante*; *Badri v. Shanti*, A 1941 L 228].

Where during the examination of a prosecution witness defendant's counsel after inspection of the police diary put to him certain statements alleged to have been made by him to the police, the prosecution is entitled to have the entire statement in the diary admitted except the irrelevant portion. In the special circumstances of the case this was not allowed [*R v. Makhan*, 1939, 2 Cal 429: A 1940 C 167]. In criminal matters mere production of a document at the instance of a party cannot bind that party unless it is proved in accordance with law [*S v. Babulal*, A 1965 Raj 90].

When during a suit for damages for negligence defendants' lawyer holding a signed statement previously given by plaintiff's witness to the defendants asked the witness in cross-examination whether he had given that statement and the witness agreed, by using the statement in this way, the counsel waves the privilege from production and discovery and the counsel for the plaintiff is entitled to call for it for being put in evidence [*Burnell v. Br T Corpn*, (1955) 3 All ER 822].

The documents admitted under s 163 must not be deemed to be conclusive evidence against the inspecting party. They become evidence for all they are worth [*Ramadhin v. Ramdayal*, 23 OC 156: 57 IC 973].

S. 164. Using, as evidence, of document production of which was refused on notice.—When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration.

A sues *B* on an agreement and gives *B* notice to produce it. At the trial, *A* calls for the document and *B* refuses to produce it. *A* gives secondary evidence of its contents. *B* seeks to produce the document itself to contradict the secondary evidence given by *A*, or in order to show that the agreement is not stamped. He cannot do so.

COMMENTARY

Principle and Scope.—This section says that when a party who has been served with a notice to produce a document declines to produce it, he will not afterwards be allowed to use it as evidence unless the court permits or the other party consents to

can only be taken into consideration in inquiry or trial. When no oath was administered to the accused, the statement made by the accused under section 313 Cr PC will not be evidence, but conviction can be founded on admission of guilt or confession at the stage of making a statement under S. 313. Thus if statement under section 313 Cr PC cannot be taken as evidence, there is no question of drawing upon section 167. [*Ranjit Mondal & Sajal Barui v. State*, 1997 Cri LJ 1586, 1591 (Cal)]. When the court of the first instance admitted, without objection, unstamped receipts in evidence, but the appellate court rejecting them reversed the decision—*Held* that the decision of the lower court was wrongly reversed on appeal, as the irregularity was not one affecting the merits of the case [*Lalji v. Akram*, 3 BLR 235 : 12 WR 47; see also *Currie v. Mutu Ramen*, 3 BLR 126; 11 WR 520; *Afzalunnessa v. Tej Ban*, 1 A 725; *Ibrahim v. Cruickshank*, 7 BLR 653 : 16 WR 203; *Champabaty v. Bibi Jibun*, 4 C 213; *Makbul v. Iftikarunnessa*, 7 NWP 124]. Allowing secondary evidence of the contents of a lost deed, without taking the stamp duty and penalty which would have been paid, had the deed itself been produced is not a ground for special appeal [*Haran Ch. v. Russick*, 20 WR 63].

Improper Admission or Rejection of Evidence or Misdirection in Criminal Cases.—Where the prosecution was not very keen to examine a witness cited by them and when that person objected to give evidence the prosecution dropped him, it is not a case of rejection of evidence [*Narain v. S*, A 1959, SC 484].

Where there is sufficient evidence to justify a decision arrived at by the court below, independently of the evidence objected to as being improperly received, such admission would be no ground for ordering a new trial [*R v. Aloomiya*, 81 B 129; *R v. Nujam Ali*, 6 WR Cr 41; *R v. Ramaswami*, 6 BHC Cr 47; *R v. Amrita Gobinda*, 10 BHC 497; *R v. Prabhudas*, 11 BHC 90, 97; *R v. Jhubboo*, 8 C 739 : 12 CLR 233; *R v. Nand Ram*, 9 A 609; *Badri v. R*, 92 IC 874 : A 1926, P 20; *Babu Nandan v. Bd of Rev*, A 1972 A 406]. In an appeal by special leave against conviction for murder if other evidence on record is sufficient to sustain conviction after excluding inadmissible confession Supreme Court will not interfere [*Nikaram v. S*, A 1972 SC 2007]. If the court is of opinion that it is difficult to arrive at any conclusion, a retrial should be ordered [*R v. Ram Ch.*, A 1933, B 153]. In the case of reception of inadmissible evidence, the court of appeal has to see whether such reception influenced the mind of the jury so seriously as to lead them to a conclusion which might have been different. It has to see whether the reception has in fact occasioned a failure of justice and secondly whether if it is excluded, there is sufficient evidence to justify the verdict [*Harendra v. R*, 40 CLJ 131 : A 1925, C 161; *Sajjad v. R*, A 1927, C 372; *Nital v. R*, 1939, 1 Cal 337; *Surendra v. R*, A 1949, C 514; see *Mhabli v. R*, 87 IC 520 : 26 Bom LR 706; *Alapati v. Ailoori*, A 1939, M 40]. Even if there be sufficient evidence on record after eliminating the inadmissible evidence the High Court may send back the case to the trial court for decision as it had the advantage of seeing the demeanour of witnesses [*Sudhindra v. S*, A 1953, C 339]. Where improper admission of evidence has not prejudiced the accused in any way, it is not a ground for a new trial [*Ramyad v. R*, 95 IC 273 : A 1925, P 211]. Failure of counsel for the accused to object to matters and documents inadmissible in evidence, will not excuse the admission of those matters or documents, if real injury were done by the prosecution or the court to the accused person [*Inayat v. R*, 17 L 488 : 40 CWN 1101 : A 1936, PC 199].

Before the High Court can interfere with the verdict of a jury on the ground that the evidence of accused's confession was wrongly admitted, it must be satisfied, *firstly*, that the verdict is erroneous; *secondly*, that the erroneousness was caused either by the judge's misdirection to the jury as to that evidence, or by a misunder-

standing on their part of the law as to it as laid down by the judge. Where material evidence, which ought not to be admitted, is admitted, and the jury are placed in possession of it, there is an error of law in the trial under [4]s 418 of the Cr P Code (Act 5 of 1898) and there is a misdirection of law when the judge tells the jury that it is evidence which they can consider and on which they can, if they think proper, convict the accused. The fact that, after putting the jury in possession of the inadmissible evidence, the judge in his charge goes on also to point out circumstances which would justify the jury in disbelieving the wrongly admitted evidence, does not make the misdirection less a misdirection. Where evidence which the law says shall not be admitted is let in with other evidence legally admissible, and where the former is of a material character, it would be mere speculative refinement to hold that the jury must have, in convicting the accused, relied upon the latter and rejected the former [*R v. Waman Shivram*, 27 B 626 : 5 Bom LR 599].

Where a trial court convicts an accused on the evidence part of which has been wrongly admitted and the sessions court excluding the wrongly admitted evidence upholds the conviction on the remaining evidence and that trial has taken a course substantially different from that contemplated by the law by the admission of a large body of inadmissible evidence, the case is outside the purview of s 167 and should be sent back for retrial [*Lloyd v. R*, A 1933 C 136 : 142 IC 274].

Improper advice given by the judge to the jury upon a question of fact or his omission to give such advice which he, in the exercise of his sound discretion, ought to give the jury upon questions of fact, amounts to such an error in law in summing up as to justify the High Courts, on appeal or revision, in setting aside a verdict of guilt. The power of setting aside convictions and ordering new trials for any error or defect in summing up will be exercised by the High Court only when it is satisfied that the accused person has been prejudiced by the error or defect, or that a failure of justice has been occasioned thereby [*R v. Elahee Buksh*, BLR Sup Vol 459 FB : 5 WR Cr 80]. It is only when a failure of justice is occasioned by a defective or erroneous summing up to the jury that the High Court can set aside an order for conviction [*R v. Charu Ch*, 38 CLJ 309 (*R v. Elahee Buksh, sup* **folld**)].

The test in case of errors, omissions or irregularities or other matters of like nature in s 537 (now s 465) Cr P Code is not whether the court had acted illegally, but whether there has been a failure of justice [*In re Abdur Rahman*, 27 C 839]. Rules and regulations are intended to be the handmaids and not the mistress of the law. In criminal proceedings it is of the utmost importance that a decision just and reasonable should not be disturbed because in the course of the proceedings some flaw can be detected that is not fundamental, and which is not proved to have worked injustice to the accused [*R v. Erman*, 57 C 1228 FB : 34 CWN 296, 308 *per* PAGE J]. If inadmissible evidence (confession) is read out to the jury by the public prosecutor, in spite of the careful efforts of the sessions judge to remove the impression caused, it was bound to affect the verdict of the jury and a retrial should be ordered [*Damodar v. R*, 3 PLT 52 : 65 IC 573]. Where independently of the police diary wrongly relied upon by the court, there was ample evidence to corroborate the prosecution case, the High Court will refuse to interfere [*Achibat v. R*, 2 PLT 223 : 61 IC 230. See also *Dal Singh v. R*, 44 IA 137 : 44 C 876 : 21 CWN 818]. Where inadmissible evidence is admitted only as corroborative evidence and there is other sufficient evidence to justify the finding, the judgment is not vitiated [*Kalidas v. R*, A 1948 C 16]. *A* and *B* who were differently charged were tried at two separate trials and evidence was

---

4. Jury trial being abolished s 418 has been omitted in Cr P Code, 1973.

recorded separately by one magistrate. The cases were disposed of by one judgment, and discussing the guilt or innocence in each case the magistrate freely relied on the evidence in the cross-case. The procedure was irregular and the conviction was illegal [*Sheo Karn v. R*, 100 IC 590 : A 1928 L 923 (*Madat v. R*, 8 L 193 : A 1927 PC 26 relied on)].

—Applicability of S 167 to Trials by Jury[5]—There was divergence of opinion on the question whether in a jury trial where the appeal lies on a matter of law only, the admission of any inadmissible evidence or any misdirection must be followed by either an acquittal or a retrial order; or whether the appellate court has power to deal with the whole case on merits if the remainder of the evidence which is admissible, justifies such a decision. In a Calcutta case it was held that in a jury trial, the accused is entitled to their verdict on question of fact, and where a verdict is erroneous on account of improper admission or rejection of evidence or the judge's misdirection to the jury, the appellate court has no option but to set aside the verdict and order a retrial. It is not competent for the appeal court to examine whether the remaining evidence is sufficient to uphold the decision [*Wafadar v. R*, 21 C 955 (*Makin v. Att-Genl*, 1894 AC 57 **folld**); *Wafadar's case* was followed in *Ali Fakir v. R*, 25 C 230]. In England jury trial is in existence from time immemorial, but in India it is the creation of statute. *In re Elahee Buksh*, 5 WR Cr 80 JACKSON J, warned against the danger of allowing preconceptions derived from English practice to influence decision in Indian cases. This case was not however cited in *Wafadar's case*.

Approving *Wafadar's case* it was held in a case that in a trial by jury an appeal lies on matter of law only, and that in such cases there is another factor to be taken into account and the High Court ought not to substitute its own verdict on the legal evidence for that of the jury [*Ramesh v. R*, 23 CWN 661 : 46 C 895 : 29 CLJ 513; see also *Rahamat v. R*, 4 CWN 196; *Sadhu Shk v. R*, 4 CWN 576 : 11 CLJ 301; *Shk Hazir v. R*, 14 CWN 493; *R v. Ikramuddin*, 39, 384; *R v. Panchu Das*, 47 C 671; *Biru Mandal v. R*, 25 C 561].

In a Bombay case it was held (dissenting from *Wafadar v. R, supra*) that where part of the evidence which has been allowed to go to the jury is found to be irrelevant and inadmissible, it is open to the High Court in appeal either to uphold the verdict upon the remaining evidence on the record under s 167 or to quash the verdict and order a retrial and that the law as settled in England by *R v. Gibson*, LR 18 QBD 537 and as stated by the Privy Council in *Makin v. Att-Genl of New South Wales*, 1894 AC 57 with reference to the granting of new trials where evidence has been improperly admitted, does not apply to India [*R v. Ram Ch*, 19 B 749. See also *Jamiruddi v. R*, 6 CWN 553; *Taju Pramanik v. R*, 25 C 711 : 2 CWN 369; *R v. Pitambar*, 2 B 61; *R v. Pandarinath*, 6 B 34; *Govt of Bengal v. Santiram*, 58 C 96; *Ram Ch v. R*, A 1933 B 153 : 148 IC 553; *R v. Mhabli*, A 1924 B 480; *Harendra v. R*, 40 CLJ 313; *Saroj v. R*, 59 1361; *Supdt & Rem v. Shyam*, 26 CWN 558; *Netai v. R*, 1939, 1 Cal 337; *R v. Savlimiya*, A 1944 B 338; *R v. Jhina*, A 1939 B 648; *R v. Smither*, 26 M 1; *Matthews v. R*, A 1940 L 87 : 187 IC 456; *In re Harakchand*, A 1941 N 324]. In 10 MLJ 147, 171, it has been held that is not necessary to express an opinion as to which of the two decisions (19 B 749 or 21 C 955), with reference to the powers of the High Court as a court of appeal, in cases where the evidence is improperly admitted, is right, as those decisions do not apply when the court is acting in exercise of the powers, conferred upon it by cl 26 of the Letters Patent.

---

5. Jury trial has been abolished in India.

In a later Calcutta case it was held that in a jury trial, the appellate court has power in the event of any misdirection or admission of inadmissible evidence to deal with the whole case on merits if there is other sufficient or admissible evidence in law to justify such a decision [*Benoyendra v. R*, 63 C 929 : 40 CWN 432]. Thereafter the Judicial Committee held that in a jury trial where some evidence is found to be inadmissible, it does not necessarily follow that the conviction shall be quashed [*Pakalanarayana v. R*, 66 IA 66 : A 1939 PC 47 : 43 CWN 473, 482; see also *R v. Savlimiya*, A 1944 B 338]. In a fully considered case the Judicial Committee held that where inadmissible evidence has been admitted in a jury trial, the appellate court may after excluding such evidence, maintain a conviction, provided that the admissible evidence remaining is in its opinion sufficient clearly to establish the guilt of the accused. The High Court is not bound to order retrial. The power of the High Court to dispose of the case itself without ordering a retrial is not confined to murder references and appeals under s 449 Cr P Code. It was further held, that in the case of misdirection or non-direction also, it is not of itself a sufficient ground to justify interference with the verdict and to order a retrial, unless the verdict is erroneous owing to misdirection or non-direction or it has in fact occasioned a failure of justice. The court can maintain the conviction if the evidence clearly establishes the guilt [*Abdul Rahim v. R*, A 1946 PC 82 affirming A 1945 L 105 FB (*In re Elahee Buksh, sup*; *R v. Smither, sup* and *Mathews v. R*, A 1940 L 87 **approved**; *Wafadar v. R*, and *Ali Faklr v. R, sup* **overruled**); see also *Pulukuri Kottaya v. R*, A 1947 PC 67 : 74 IA 65; *Amalesh v. S*, A 1952 C 481]. The rule in *Abdul Rahim's case*, *ante* was followed and affirmed in *Mushtaq v. S*, 1953 SCR 809 : A 1953 SC 282; *Ram Kishan v. S*, A 1955 SC 104 : 1955 SCR 903. The powers of High Court in appeal against acquittal is not less extensive than in appeal against conviction [*Sheo Sarup v. R*, A 1934 PC 227; *Dhondu v. R*, A 1950 PC 30].

The policy of the law was very well-stated in *Maxwell v. DPP*, 1935 AC 309, 323 (HL) by SANKEY LC:—

> "If in any case the evidence against the prisoner, other than that which is inadmissible, is very strong and is abundant to justify a jury in convicting, it may well seem unfortunate that a guilty man should go free because some rule of evidence has been infringed by the prosecutor. But it must be remembered that the whole policy of English Criminal Law has been to see that, as against the prisoner, every rule in his favour is observed, and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed."

Discretion to exclude confession admitted earlier.—Where a judge has ruled a confession to be admissible, he has a discretion to exclude it if he considers it more prejudicial than probative [*R v. Sat Bhambra*, (1989) 88 Cr App R 56 CA].

Discretion to receive fresh evidence.—In considering whether to admit fresh evidence on appeal, the overriding consideration is whether a refusal to do so affront common sense or justice [*R v. Hardy*, 1988 Crim LR 687 CA].

Discretion to order fresh trial.—The accused was convicted of wounding with intent to do grievous bodily harm. The prosecution witness who identified the accused as being present at the scene of the offence, had, unknown to both prosecution and defence, a number of serious convictions recorded against him. On learning this the accused applied for leave to appeal. It was held, allowing the application and directing a new trial, that where the fact that a serious conviction is recorded against a prosecution witness was only discovered after the trial, the Court of Criminal Ap-

peal, where it is satisfied that the conviction was material to the credibility of the witness, has power to direct a retrial [*The People (DPP) v. Kelly*, (1987) LR 596 CCA].

Suspicion No Ground of Decision.—[See *ante* s 3 "*Legal proof and suspicion*"].

High Court's Power Under the Letters Patent.—Provisions of this section apply to cases heard by the High Court when exercising its powers under cl 26 of the Letters Patent [*R v. McGuire*, 4 CWN 433 FB. See also *R v. Pitambar*, 2 B 61; *R v. Hurribole*, 1 C 207 : 25 WR Cr 36; *R v. Navroji*, 9 BHC 358; *R v. Narayan*, 32 B 111 FB : 9 Bom LR 789; *Subramaniya v. R*, 25 M 61 : 28 IA 257 and *R v. O'Hara*, 17 C 462, where it has been held that apart from s 167, the High Court has power in a case under cl 26 of the Letters Patent to review the whole case on the merits, and affirm and quash the conviction; see also *Ramanuja v. R*, 58 M 523 FB].

Under cls 25 and 26, the High Court is not competent to order a retrial but should finally decide the matter on review. The Full Bench is competent to investigate independently of the evidence erroneously admitted, whether there was sufficient evidence to justify the verdict of the jury [*R v. Panchu*, 47 C 671 : 24 CWN 501 : 31 CLJ 402 : 58 IC 292]. Where the trial judge has allowed certain inadmissible evidence and no objection is taken to it either at the time when evidence is given or when such evidence is referred to by the judge in his summing up to the Jury, there is no 'decision' on a point of law regarding the admissibility of such evidence within cl 26 and as such grant of certificate by Advocate General is incompetent [*Ramanuja v. R*, 58 M 523 : A 1935 M 486 FB]. According to the accepted interpretation of cl 26 of the Letters Patent, the court may consider the question of alteration of sentence passed by the trial court only when the point of law reserved by the trial court under cl 25 or certified by the Advocate-General under cl 26 has been decided in favour of the accused [*R v. Barendra*, 28 CWN 170]. In cases that may come up under the Letters Patent, it is most desirable, especially in an important case, that counsel for prosecution should take a note of the summing up [*per* SANDERSON CJ, in *R v. Peary*, 23 CWN 426].

For leave to appeal under cl 41, Letters Patent in cases tried at original side sessions, the principles are the same as are laid down in *Re Dillet* and other cases cited below [*R v. Plucknett*, 43 CWN 133].

Under s 7 of the Cr P Code (Am) Act 26 of 1943 cls 25, 26 and 41 of Letters Patent for Calcutta, Bombay and Madras have ceased to have any effect. The corresponding clauses of the Letters Patent for the other High Courts have also ceased to have any effect.

Appeal to the Supreme Court in Criminal Cases.—During the pre-independence period there was no absolute right of appeal to the Privy Council in criminal cases as it was not a court of criminal appeal. It had, however, the prerogative to entertain a criminal appeal by granting special leave on certain well-defined grounds, *viz* grave injustice or violation of the principles of natural justice. Art 134(*1*)(*a*) and (*b*) of the Constn, s 379 of Cr P Code, 1973 and Supreme Court (Enlargement of Criminal Appellate) Jurisdiction Act, 1970 now empowers the Supreme Court to entertain an appeal in a criminal proceeding of a High Court in certain cases. Art 134(*1*)(*c*) also empowers the High Court to certify any criminal case as fit for appeal. In other cases Art 136 empowers the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal. In exercising the discretion to allow special leave, the Supreme Court will generally be guided by the same bounds of limitation

and principles formulated in various decisions of the Judicial Committee in the matter of such leave [see *Pritam Singh v. S*, A 1950 SC 169, 171 : 1950 SCR 453]. Some of these decisions are noted below:

The Privy Council is not a court of criminal appeal and there are constitutional limitations of its functions in criminal cases. There is no absolute right of appeal to it, but there exists in the Crown a prerogative to interfere in proper cases upon the certificate of the High Court. The existence of this prerogative was assumed in the first criminal case [*In re Joykissen Mookerjee*, 1862, 9 MIA 168 : 1 WR 13 (PC) 3] that went to the Board from India or any part of His Majesty's dominion. The principles on which the Judicial Committee will act in such cases will be found in *Re Dillett*, 1887, 12 App Cas 459; see also *Ex parte Carew*, 1897 App Cas 719. The practice with regard to appeals in criminal matters as laid down in *Re Joykissen* (*sup*) and *Falkland Isles Co v. R*, 1683, 1 Moo PC (NS) 299, has not been altered or liberalised by the decisions in *Dillet (supra)* and later cases [*Arnold v. R*, 41 C 1023 : 41 IA 149]. In *Waryam v. R*, and *Rustom v. R*, 48 B 515 : 28 CWN xxiii, it was pointed out that it should be well understood all over India that there was not a chance of the Judicial Committee's turning itself into a mere court of criminal appeal.

The power of the Sovereign to entertain criminal appeals is only exercised when there has been such a gross denial of the principles of natural justice or disregard of the forms of legal process; or otherwise substantial and grave injustice has been done as has been defined in numerous cases [*Inayat v. R*, 17 L 488 : 40 CWN 1101 : A 1936 PC 199; *Muruga Goundan v. R*, 26 CWN 57 : A 1922 PC 162(a): 69 IC 631; *Clifford v. R*, 40 IA 241 : 18 CWN 374 : 40 C 568; *Bal Mukund v. R*, A 1915 PC 29 : 42 C 739 : 42 IA 133; *Lanier v. R*, 18 CWN 98 : 1914 AC 211; *Ibrahim v. R*, 18 CWN 705; *Arnold v. R*, 18 CWN 785 : 41 IA 149 : A 1914 PC 116; *Abdul Rahman v. R*, 54 IA 96 : A 1927 PC 44 : 31 CWN 271; *Shafi Ahmed v. R*, 30 CWN 557 : A 1925 PC 306; *Begu v. R*, 30 CWN 581 : A 1925 PC 130; *Attygalle v. R*, 1936 AC 338 : 162 IC 450 : A 1936 PC 169; *Dennis Romain v. Att-Genl*, 162 IC 470 : A 1936 PC 160]. The limits of the jurisdiction exercised in criminal appeals and the principles governing such appeals were restated at some length and the principles laid down in *Dillet's case, sup* and *Mohindar v. R, post* were reaffirmed in *Md Nawaz v. R*, 1942 Lah 36 : A 1941 PC 132 : 68 IA 126, where the practice was condemned and a note of warning was sounded against those counsel who "are misusing their professional position" by grant of certificates "in utter disregard of their solemn and serious responsibilities."

Leave will be granted to scrutinise whether there has been a miscarriage of fundamental principles of justice within the meaning of the rule in *Dillett's case, sup* [*Bugga v. R*, 53 IC 703 PC : A 1919 PC 108 : 1919 MWN 748]. Leave was granted in *Abdul Rahman v. R*, 30 CWN 54*n* and *In re Bal Gangadhar Tilak*, 22 B 528 it was refused. In *Subramaniya v. R*, 25 M 61 PC : 28 IA 257 : 3 Bom LR 540 : 5 CWN 866, leave to appeal was granted and conviction set aside holding that a disobedience to an express provision of the law cannot be regarded as a mere irregularity, and therefore, not curable under s 537 (now s 465) Cr P Code. In a later Privy Council case it has however been held that mere failure to comply with the mandatory provisions of a section unaccompanied by a failure of justice is not enough to vitiate the proceedings which may be cured by s 537 (now s 465) Cr P Code [*Abdul Rahman v. R*, 31 CWN 271 : A 1927 PC 44; see Sarkar's Cr P Code 4th Ed notes under s 465.

In *Vaithinatha v. R*, 40 IA 193 : 36 M 501 : 17 CWN 1110, the Privy Council set aside the conviction of a person for abetment of murder which was based mainly on inadmissible evidence and when that was excluded there did not exist sufficient

evidence for a conviction. In *Kishan v. R*, 48 CLJ 397 : A 1928 PC 254 : 55 IA 390, it was held that the conversion by the High Court of the finding of acquittal on the charge of murder into one of conviction in a revision application was acting without jurisdiction and the case came within *Dillet's* case. Conviction for murder was set aside where the trial was so conducted as to exhibit a neglect of the fundamental rules of practice [*Mahadeo v. R*, A 1936 PC 242 : 40 CWN 1164 : 163 IC 681].

Very important principles regarding interference in criminal cases have been laid down in a later case where the Judicial Committee set aside a sentence of death for murder holding that the mistaken use of hearsay evidence, misdirection to jury, and conviction on insufficient evidence bring a case into the category of the mischiefs laid down in *Ibrahim v. R*, 1914 AC 599, 614 : 18 CWN 705 : A 1914 PC 155 and other cases. The importance of the case lies in the fact that it has been held that (even in a jury trial) apart from misdirections, where there are no grounds in the evidence taken as a whole upon which any tribunal could properly as a matter of legitimate inference, arrive at a conclusion that the appellant was guilty, a conviction on such evidence involves "a violation of the principles of natural justice" or the deprivation of "the substance of a fair trial and the protection of the law" [*Seneviratne v. R*, 41 CWN 65 : A 1936 PC 289]. Misdirection, either in leaving a case to the jury where there is no evidence or founded on an incorrect construction of a section of the Penal Code, even if established, is insufficient for leave; it must be conclusively shown that there are very special and exceptional circumstances [*Ex parte, Mac Crea*, 20 IA 90 : 15 A 310].

Leave may be granted where with reference to a section of the Cr P Code which is of vital importance to accused persons there has been a difference of opinion in the High Courts in India [*Nazir v. R*, 38 Bom LR 698 : A 1936 PC 253]. An error in procedure might be of so grave a character as to warrant the interference of the Sovereign. But improper admission of evidence (police diary) which was not essential to a result which might have been come to wholly independently of it, is no ground for interference by the Privy Council [*Dal Singh v. R*, 44 C 876 : 44 IA 137 : A 1917 PC 25]. An improper admission of evidence depending upon the particular view taken of a section of an Indian Act, does not of itself amount to substantial and grave injustice entitling a person to special leave to appeal in a criminal case [*Umra v. R*, 52 IA 121 : A 1925 PC 52 : 6 L 45; see however *Nazir v. R, sup*]. Non-observance of the requirements of s 369 (now s 362) Cr P Code does not necessarily lead to any miscarriage of justice [*Begu v. R*, 52 IA 191 : A 1925 PC 130 : 30 CWN 581 : 6 L 226]. Grounds for invoking interference, such as the meaning and effect of a section of the Evidence Act, are merely points for a court of criminal appeal and not for the Privy Council [*Mohindar v. R*, 59 IA 233 : A 1932 PC 234 : 13 L 479]. Once it appears that the principles of the law of sedition have been rightly understood by the local tribunal, the question whether those principles have been properly applied is so much in the nature of a question of fact and depends so largely on local conditions that it is difficult for the Board to interfere on this ground. Where during the pendency of an appeal, a free pardon is granted to the appellant, this of itself is a sufficient reason for declining to entertain the appeal [*Kalinath v. R*, 48 IA 96 : A 1921 PC 29 : 2 L 34 : 25 CWN 701 : 59 IC 641].

As to the principles governing leave to appeal to the Privy Council in contempt cases, see *Banerji v. K L Stone Co*, 43 CWN 197 : A 1938 PC 295.

Judge's Knowledge of Character of Witness.—A judge cannot import into a case his own knowledge of particular facts [*Har Pd v. Sheo Dayal*, 26 WR 55 PC : 3 IA 259; see *ante* s 57: "*Personal knowledge of Judge and judicial notice of notorious*

facts"]. But the knowledge of a judge about the general character and position of the parties and their witnesses is different. A censure was passed on the Zillah judge for having spoken of two attesting witnesses from his personal knowledge as professional witnesses of no character and entitled to no credit whatsoever. The Judicial Committee while not concurring at all with the censure observed: "It is of great importance that the judge should know the character of the parties, and it is of great advantage to the decision of the case, that it is heard by a judge acquainted with the character of the parties, produced as witness, who is capable therefore, of an opinion upon the credit due to them." [*Bamundas v. Tarinee*, 7 MIA 169, 203 : 15 C 684]. In another case the Privy Council observed that the subordinate judge was right in relying on the evidence of the sub-registrar and the Muktear with whose character he seemed to have been acquainted [*Buksh Khan v. Hosseini*, 15 IA 81, 91 : 15 C 684]. Where a judge declined to believe in the *bona fides* of plaintiff's suit on the ground that many suits launched by him in his court was found to be false, he was justified in alluding to his experience of plaintiff's litigation in his court [*San Hla Baw v. Mi Khorow*, 45 IC 734 : 9 LBR 160].

Magistrate's personal impressions drawn from irrelevant matters should not find place in judicial order. When exercising judicial functions, he must divest himself of executive powers [*Bisnarayan v. R*, 67 IC 195 : 3 Pat LT 239]. A person cannot simultaneously perform the functions of a prosecutor and those of a judge in criminal case. A magistrate ceases to be an executive officer when he is sitting in court to try a criminal case [*Taj Md v. R*, A 1928 L 125]. As to personal knowledge of judge, see *ante* ss 57 and 121.

Admission of evidence after close of prosecution case.—It has been laid down by the English Court of Appeal that the judge's discretion to admit further evidence after the close of the prosecution case is not confined to cases where the evidence is in rebuttal of matters arising in improviso or merely formal, although apart from such cases it should be exercised rarely. On facts, the court allowed the evidence of test identification parade as further evidence [*R v. Francis*, (1990) 1 WLR 1264 CA : (1991) 1 All ER 225]. The facts were that the accused was tried for robbery. A witness attended an identification parade but did not identify any one. As soon as the parade was over, the witness told the police that he recognised the culprit and that he stood in position 20 in the parade. At the trial the witness testified to these facts and explained that, at the parade, he refrained from pointing out the accused because he was afraid. The evidence was admitted. For comments see All ER Annual Review 1991, p 171.

Ruling out evidence admitted earlier.—A judge retains control with himself throughout the trial over the evidence to be admitted or rejected. The fact that he has already admitted a written statement as constituting a voluntary admission does not preclude him reconsidering that ruling at a later stage of the trial if further evidence emerges which is relevant to the voluntary character of the statement and ruling in the light of that evidence that the statement was not admissible. However, the occasions on which a judge should allow counsel to submit that a previous ruling on the admissibility of evidence should be reconsidered are likely to be rare and judges should continue to discourage counsel from making such submissions where they are founded on tenuous evidence [*R v. Watson*, (1980) 2 All ER 293 CA].

The SCHEDULE.—[*Enactments Repealed*]. *Repealed by the Repealing Act*, EFAB (1 *of* 1938), *s. 2 and Sch.*