NOTES ON ACTS AND LAWS

Contents
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CHAPTER 1
The Common Law

1. In the English system. Equity has acquired a technical connotation and we are accustomed to think of it as a whole jurisdiction distinct from Common Law principles.
2. For better or for worse, the stream of English Law divided into two channels, not without considerable disturbance of the soil and morbidity of the waters.
3. But the interdependence of Law and Equity has never wholly disappeared.
4. We ought not to think of Common Law and Equity as rival systems. Equity was not a self-contained system, at every point it presupposed the existence of Common Law.

The principle on which the Court of Equity granted relief

1. If we look for one general principle which more than any other influenced the Equity developed by the Chancery, we find it in a

philosophical and theological conception of *conscience.*

2. The English Equity begins to be systematised under the guidance of a governing moral principle of conscience.

3. Not that we can suppose that all the Chancellors were assiduous and consistent in the pursuit of that principle. Under the Tudors, some of them behaved with complete arbitrariness. These occasional aberrations may have inspired Seldon's oft quoted, but probably only half serious quip about the length of the Chancellor's foot. But they were not typical, the 'conscience' which the Chancellor set before him was normally something more constant and imperishable than the mere caprice of his own whim. A 'hardening' process sets in. By 1676 we find Lord Nottingham expressly repudiating the notion that the conscience of the Chancellor is merely *naturalis etinterna,* and in 1818, Lord Seldon summarily repudiates any notion of mere individual discretion being open to an Equity Judge. Equity is a settled system of conscience.

The limits of the Chancellor's authority

1. This prerogative to grant relief had certain limits':—

(i) It could be exercised only where law gave no rights but where conscience required that certain rights should be given—This was known as the *Exclusive* jurisdiction of Equity.

(ii) It could be exercised only where law gave rights required by conscience but the remedies which it gave were insufficient to satisfy justice—This was known as the *concurrent* jurisdiction of Equity.

(iii) It could be exercised in matters in which the law gave rights required by conscience and remedies sufficient to satisfy the ends of justice but as to which its process was too defective to secure the remedies without the assistance of Equity—This was known as the *auxiliary* jurisdiction of Equity.

The nature of an equitable right

1. The nature of an equitable right will be better understood if it was studied in contrast with a moral right and a legal right. A mere definition would be very little use.

2. By way of introduction we may begin by seeking to have a precise conception of a right. What do we mean when we say that any given individual has a right :

(i) If a man by his own force or persuasion can carry out his wishes, either by his own accord or by influencing the acts of others, he has the 'might' so to carry out his wishes.

(ii) If, irrespectively of having or not having this night, public opinion

would view with approval or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his so doing then he has a ' *moral right ' so* to carry out his wishes.

(iii) If, irrespectively of the approval or disapproval, acquiescence or non-acquiescence of public opinion, the State would support him in carrying out his wishes then he has a *legal right* so to carry out his wishes.

3. Whether it is a question of might, depends upon a man's own powers of force or persuasion. Whether it is a question of moral right depends on the readiness of public opinion to express itself on his side. Whether it is a question of legal right, depends upon the readiness of the State to exert its force on his behalf. A *legal right* exists where one course of action is enforced, and the other prohibited by that organised society which is called the State. A legal right is, therefore, an interest which is recognised and protected by the State. Right is any interest, respect for which is a duty and the disregard for which is a wrong.

The Characteristics of a legal right

1. A legal right is a right which unlike moral right is enforced by the State.
2. A legal right is founded in a title which must be shown to have been acquired in any one of the modes of acquiring title recognised by law—e.g. possession, prescription, agreement and inheritance, etc.
3. A vestitive fact which creates a title to a right in one person destroys the title of another to the same right.
4. A legal right creates an obligation which is either an obligation *in rem* or an obligation *in personam.*

In what respects does an equitable right resemble, in what respects does it differ, from a legal right

1. Equitable right is not like a moral right which is not enforced by the State. Equitable right is like a legal right in that it is enforced by the State.
2. A title to an Equitable right need not be created by any one of the recognised modes by which a title to a legal right is created. This is the most important distinction.

Illustration:

(i) A legal mortgage of land must be created by a deed. But an equitable mortgage may be created otherwise than by deed:—

(a) The statute of trade required that no action shall be brought upon any contract or sale of lands or any interest therein unless agreement was in writing and signed by the party or his agent.

But if the title-deeds of an estate are, without even verbal

communication, deposited by a debtor in the hands of the creditor, the mere fact of such deposit is enough to constitute the creditor a mortgage of the estate.

(b) An agreement that a creditor shall hold land at a fair rent to be retained in satisfaction of the debt, is a mortgage in equity but not in law.

(ii) **Assignment**—Legal and Equitable.

Legal: (1) Assignment must be in writing under the hand of the assignor—signature of the agent not sufficient. -

(2) The writing must contain a direction or order to the debtor by the creditor to pay the assignee.

(3) There must be express notice of assignment to the debtor.

Equitable : (1) The mode or form of assignment is immaterial provided the intention of the parties is clear. Assignment may be verbal.

(iii) **Charge**—Legal and Equitable.

(iv) **Lease**—Equitable and Legal.

(v) **Servitude**—Equitable and Legal.

Married Women's Property

This illustrates how an equitable right can arise without the legal formalities of conveyance required for the creation of a legal right.

(1) At Common Law, husband and wife were one person, and the status of the wife merged in that of the husband. The result of this merger was that the husband became the absolute owner of her personal property and acquired the sole right of controlling and managing her real estate.

On her death he became absolutely entitled to any of her personal property that had not already been sold and to a life estate by *courtesy* in her fee provided a child had been born.

(2) Secondly, a husband could not make a grant to his wife directly or enter into a covenant with her, for to allow either of these things would have been to suppose her separate existence.

(3) The effect of marriage at Common Law was to make a man complete master of his wife's property and to deprive her of contractual capacity.

(4) If property was given to a married woman by words which indicated either expressly or by implication that she was to enjoy it"*for her sole and separate use"*. Equity removed that property from the control of the husband by regarding him as a trustee, and conferred upon the wife full powers of enjoyment and disposition.

But equity went even further than this. Perceiving the danger that a husband might persuade his wife to sell her separate property and hand the

proceeds to him, it permitted the insertion in marriage settlements of what is known as"*restraint upon anticipattion"*. The effect of such restraint, which is still usual, was that a woman while possessing full enjoyment of the income was prevented during her coverture from alienating or charging the corpus of the property. She could devise but could not sell or mortgage it. This was in complete contravention of the Common Law. At Common Law, not only marriage became a vestitive fact giving the husband a title to the property of his wife but no agreement either with the wife or any other person could take away his right to hold and to alienate her property.

This is an illustration which shows that an Equitable right arises in a manner very different from that in which a legal right arises.

(3) Second distinction between a legal right and an equitable right may be formulated thus :

1. A legal right vested in one owner destroys either partially or completely the right vested in its previous owner. The destruction may be complete or may be partial. If it is a lease, it is a partial destruction. If it is a sale, it is a complete destruction. But whether complete or partial, it is destruction. This is what is meant when it is said that a *vestitive fact* is also *divestive* fact.

2. This is not true when there is a competition between a legal right and an equitable right. An equitable right does not destroy a legal right even when it prevails as against the owner of a legal right. In a conflict between a legal and an equitable right, the equitable right does not destroy the legal right, as one legal right does another legal right.

3. *Why is this so*? For this it is necessary to know how an equitable right came to be recognised at the very start by the Court of Chancery. The historical setting may be presented briefly as follows:—

(i) It was a common practice in England before the Norman conquest for one person to do something *ad opus*—on behalf of another. For instance the Sheriff seized lands and held them *ad opus domini Regis* or where a knight went about to go to the crusades, conveyed his property to a friend to hold it on behalf of his wife and children. The word *opus* became gradually transformed into *use* and the land transferred came to be spoken of as land put in use.

(ii) Now if in certain circumstances some persons could deal with land on behalf of or to the use of another, the question that inevitably occurred to men, why one person should not in a general way be allowed to hold land to the use of another. This as a matter of fact was exactly what was done in course of time. The tenant *A* would transfer his land by a Common Law conveyance to *B,* who undertook to hold it on behalf of, or adopting the correct expression, to the use of A.

In such cases B was called *the feoffee to use,* that is, the person to whom the feoffment had on certain conditions been made, while *A* went by the name of the *Astin que use,* which being interpreted, meant the person on whose behalf the land was held.

(iii) Reasons why this practice grew, are many. There were altogether six reasons why people liked to follow this practice of putting land in use. Of these two are of importance:—

(1) It enabled a party to escape the feudal burdens to which was liable at Common Law. At Common Law the following burdens were placed upon the tenant—

(i) (i) *Relief—paid* by a new tenant upon the death of an old tenant.

(ii) (ii) Aids—payable in three cases—

(a) (a) to ransom the Lord when imprisoned;

(b) (b) when the Lord desired to make his Lord a knight;

(c) (c) when the Lord was obliged to supply his eldest daughter with a dowry.

(iii) Escheat—The commission by a tenant of a crime serious enough to amount to felony caused the land to escheat.

(iv) *Wardship.*—If an existing tenant died leaving as his heir a male under 21 or a female under 14, the Lord was entitled to the wardship of the heir and as a consequence was free to make any use he liked of the lands during the minority without any liability to render accounts.

(v) *Marriage* :—To find a suitable match for an infant ward was the right of the Lord, and if the infant ward refused, the Lord was entitled to compensation.

The feoffor became free by putting his land in use. The burden fell on the person who acquired *Seisin,* namely, the feofee to uses.

(2) The second advantage was avoidance of forfeiture and escheat.

Land held by tenure at Common Law was forfeited to the Crown if the tenant committed high treason, and upon his conviction or on slavery for felony, it escheated to the Lord. These unpleasant consequences were avoided, if a tenant, before embarking upon some doubtful enterprise, had the prescience to vest his lands in a few confidential friends. The deliquent might possibly suffer the extreme penalty, but at least his family would not be destitute.

4. Legal effect of putting lands in use :—

(i) The legal consequence of this practice of putting lands in use is an

important point to note. It was to cut off the *cestui que use* in the eyes of the Common Law from all connection with the land. By a conveyance operative at Common Law, he had conveyed his estate to the feofee *to uses* and was, therefore, deprived of all Common Law rights over the land. He was nothing, the feofee was every thing. Instead of keeping scisin,he chooses to rely upon the confidence which he reposed in the feofee.

(ii) If the feofee failed or refused to carry out the directions imposed upon him or if he deliberately alienated the land for his own purposes, there was no Common Law action by which he could be rendered liable.

(iii) If a *cestui que use* was let into possession of the land by the feofee to uses, he was regarded as a mere tenant at will of the *feofee to uses* and could be turned out any moment, and in the event of contumacy could be sued in trespass by the feoffee.

5. The nature of the remedy provided by the Court of Chancery to protect the feofor must be clearly understood :—

(i) The Chancellor could not interfere with the jurisdiction of the Common Law Courts by proceeding directly against the land itself because the absolute title to the land was vested in the feofee by the conveyance. The Chancelllor could not disregard the fact that a feoffee was absolute owner at Common Law by virtue of the Common Law conveyance called feoffment whereby the land had been transferred to him.

(ii) The Chancellor distinctly recognised the fact that the feoffee was the owner of the land and had a legal right but what he said to the feoffee was this:—

"You have the legal right, I do not take it away from you but I will not permit you to exercise that legal right in such a way as to infringe the understanding on which the feoffor made the feoffment."

(iii) The Chancery in assuming jurisdiction over the *use* left untouched and inviolate the legal right of owner at Common Law. It exercised no direct control over the land. It only regulated the mode and manner of the legal right by imposing upon the owner of the legal right an obligation to observe the condition. The legal owner retained his legal right to own and to possess the land. The Chancellor gave the feoffor an equitable right to demand observance of the conditions of feoffment.

6. This is the explanation of that difference between a legal light and an equitable right according to which while one legal right destroys another

legal, either partially or wholly, an equitable right does not destroy a legal right.

7. This is also the explanation of the proposition enunciated by Strahanin *Article 11,* namely, that a legal right or interest issues *outflows out* of the property itself while equitable right or interest issues or flows out of the legal interest and not out of the property.

This is so because the Chancellor did not recognise the right of the equitable owner to obtain possession of property. That right he retained in the legal owner. What he gave to the equitable owner was the right to impose a duty upon the conduct of the legal owner and he did not give him the right to claim the property itself.

Illustration :-(1918). *2K.B.* (Ir.)353—-Graham vs.Mellwaine.

8. The consequences that follow from this fact may be noted:—

(1) Because an equitable right issues out of a legal right and not out of the property:

(i) It cannot be greater than the legal estate out of which it issues. *Illustration:*

Land conveyed to *A* for the use of *B* and his heirs. *A* is the legal owner of the land. *B* is the equitable owner.

But land is conveyed to A and not to A and his heirs. Consequently the legal right of *A* vanishes at his death. As *A's* legal right vanishes so does *B ' s* equitable right

An equitable interest cannot survive the legal interest out of which it flows, *(1914) i Ch. 300*

(ii) Equitable right will be affected by all the infirmities attaching to the legal right

A died intestate leaving B and C as his sons, B being the eldest.

B being away C takes possession and transfers it to *D* for the use of his wife *E.*

B returns and claims the property. The legal title of *D* comes to an end by reason of the flaw in C's title.

The equitable estate of *E*, the wife of C, also comes to an end.

III. The third difference between a Legal Right and an Equitable Right is that, a legal right may be a right in *rem* or may be a right in *personam.* But an equitable right is always a right in *personam.* Who is bound to respect the right of an Equitable owner? Not the world but the legal owner and no one else.

It is true, the legal owner, who is bound, is not the legal owner against whom the equitable right first arose but includes also every legal owner to whom the right is transferred.

All the same the proposition stands that an Equitable Right is a right in *personam* which binds only the legal owner.

Explain,

"Equitable rights have a resemblance to rights in rem."

(i) It is true that Equitable Rights have a resemblance to rights *in rem.*

(ii) How does this resemblance arise?

(i) An equitable right will be enforced not only against the owner of legal right but it will be enforced against:—

(a) his representatives and volunteers claiming through or under him,

(b) persons who acquire the legal right

(i) with the knowledge of the legal right,

(ii) against those who could have had knowledge.

(iii) The standard of knowledge set up by the Court of Chancery was so high that no one could escape and every purchaser was bound.

Equitable Priorities

1. An equitable right is a right *in personam*—operating against the owner of a legal right out of which it flows.

2. There may be two equitable rights flowing out of one legal right. Both would be rights in *personam* against the owner of the legal right out of which they flow.

3. An equitable right being a right in *personam* arising out of the legal and not out of the property which is the object of the legal right, could be defeated by transferring the legal right to a new owner. Or another equitable right may arise by this transfer which may defeat the prior equitable right.

4. The question to be considered is, in what cases can such a transfer defeat an equitable right?

5. The subject is discussed generally under the heading of *Equitable Priorities.* It is so designated because the test applied for the determination of the issue is the priority in time. But the real subject matter is the possible cases where an equitable right can be defeated by transfer of a legal right out of which it arises or by the creation of another equitable right out of the same legal right?

6. Cases to be considered fall under two classes :

(i) Cases where there is a conflict between Legal Right and an

Equitable Right

(ii) Cases where there is a conflict between two equitable rights.

7. Under the first class of cases there are two contingencies which must be distinguished :

(a) Where the 'Equitable Right is prior in existence to the legal right

(b) Where an equitable right arises subsequently to the legal right.

Mrs. Thorndike was the beneficiary of a certain Trust Fund of which C was a trustee. In a suit by Mrs. Thomdike, the Court directed the Trustee to transfer of the fund into the Court for the purposes of the Thorndike Trust and was held by the Administrator. It appeared that the Trustees against whom the order was made had provided themselves improperly with the means of discharging themselves from their personal liability to bring the fund into Court and that there are third persons whom they had injured. The third party so injured filed a suit praying that the fund held in the name of Thorndyke should be transferred to them. *Contention :* Legal title not in Mrs. Thorndyke and therefore, her right could not prevail. Contention disallowed. Held, not necessary to acquire legal title personally. Also no notice.

8. Altogether we shall have three questions to consider which may be formulated thus :

(i) Whether a person who acquires a legal right will be subject to a prior equitable right?

(ii) Whether a person who has acquired a legal right will be postponed to an equitable right arising subsequently.

(iii) Where neither party has a legal right and both have only equitable rights, which of them will have priority?

(i) Whether a person who has acquired a legal right will be subject to a prior equitable right?

1. The answer to this question is this:

A purchaser obtaining a legal estate for valuable consideration and without notice of a prior equitable right will not be bound by the equitable right.

2. There are three important elements in this proposition :

(1) *Purchaser must have acquired a legal Estate.*—-*There* is not much to be said about this. But the following points may be noted:

(a) (a) It is not necessary that he should acquire the legal estate personally. It is enough if somebody does it on his behalf.

Thorndike vs. Hunt, (1859) 3 De. G. 1. 563 =44 ER. 1386.
(b) The purchaser's title need not be *a perfect title.*
Illus. : If a trustee's title to property is defective, he may never the less convey to a *bonafide* purchaser an interest which will be effective against the beneficiary who is the owner of a prior equitable right.

Jones vs. Powles (1834) 3 My & K.581.

Facts

1. *John Jones* Owner—Mortgaged his house to Holbrook, redeemed it, obtained acknowledgement of payment—- but did not obtain reconveyance. The legal estate remained outstanding in Holbrook.
2. On the death of Jones Meredith, his shop assistant forged a will of Jones and on its vests obtained possession of the house.
3. Meredith mortgaged it to Hall by a conveyance.
4. Meredith died leaving his wife to whom he left the equity of redemption by a will and thereafter to James Jones.
5. James Jones conveyed it to Watkins.
6. James Jones & Watkins became partners and mortgaged the property to *Powles* who acquired possession as mortgagee.
7. Powles died leaving his wife *Sarah.*
8. Sara Powles secured surrender of the estate and full ownership.
9. Sara Jones sued Sara Powles alleging that the will was a forgery and that Sara Powles had notice and that she could not defeat her right to redeem. (c) The purchaser should obtain a legal right. But this may be:
(i) (i) at the time of his purchase, or
(ii) he may get it subsequently.

(ii) The purchaser must have given valuable consideration for his right.

A volunteer is always subject to an equitable right. The reason is that he does not suffer by being made liable to the prior equitable right not having paid any consideration.
An existing debt is, however, sufficient consideration.
Illus. Thorndike vs. Hunt.
T had paid no consideration. His right was a sort of an existing debt against the trustee.

(iii) The purchaser must have acquired the right without notice of the existence of the prior equitable right.

This is the most (important)*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52A. Notes on Acts and Laws PART I.htm - _msocom_1 element in the proposition and the question

that arises for consideration is: (further portion not found—ed.)

What is Notice?

1. Notice may be *Direct* or *Imputed,* Direct notice is notice to the purchaser himself. Imputed notice is notice to the agent of the purchaser.

2. Direct Notice may be *actual* or *constructive :*

(1) Actual notice is where the matter is *within* the knowledge of the purchaser or his agent.

(2) Constructive notice (is)* where it would have come to his own knowledge or to the knowledge of his agent if proper inquiries had been made.

Actual Notice

1. If reliance is placed upon actual notice to defeat a legal right it must be proved that :

(i) (i) It was given by a person interested in the property ;

(ii) (ii) it was given in the course of negotiations ;

(iii) (iii) it was clear and distinct.

Constructive Notice

1. Constructive Notice arises where there is notice of a fact or facts from which notice of the existence of an equitable right could be presumed. It is not notice but evidence of notice.

2. There are three varieties of constructive notice :

(i) Where there is actual notice of a fact which would have led to the notice of the existence of the right, *Bisco vs. Earl of Banbury (1676) 6) 7 Ch. Ca. 287.*

The purchaser had actual notice of a specific mortgage but did not inspect the motgage-deed which referred to other rights and encumbrances.

He was held to be bound by other encumbrances for he would have discovered their existence if he had inspected the deed as any prudent man would have done. *Davis vs. llutchings, 1907 I Ch. 356.* .

A trustee transferred a share of the beneficiary to the Solicitor relying upon the statement made by him that it was assigned. They did not call for the assignment. The assignment was subject to a charge in favour of another. *Held* they had constructive notice of the charge.

Occupation of tenant as Constructive Notice

Where land is in the occupation of some one other than the vendor, the fact of the occupation gives the purchaser constructive notice of any right of the occupying tenant.

It will not amount to notice of a third person's right—9. Moo. *P. C.* 18.

We now come to the parole evidence of notice. Upon this subject the rule is settled, that a purchaser is not bound to attend to vague rumours about purchaser—to statements by mere strangers, but that a notice in order to be binding must proceed from some person interested in the property—

R. 3 Ch. App. 488 *Lloyd* vs. *Banks* Carries j—1868

If he attempts to prove knowledge of the trustee *Aliunde,* the difficulty which this Court always feel in attending to what are called casual conversations or in attending to any kind of intimation which will put the trustee in a less favourable position as regards his mode of action than he would have been in if he had got a distinct and clear notice from the encumbrances. At the same time I am bound to say that I do not think it would be consistent with the principles upon which this Court has always proceeded, or with the authorities which have been referred to, if I were to hold that under no circumstances could a trustee without express notice from the encumbrancer be fixed with knowledge of the encumbrance. —*Illus. .- 9 Moo. P. C. 18 Barnhart vs. Greenshields.*

Where it was held that vague reports from persons not interested in the property will not affect the purchaser's conscience.

Should notice be directly from the Encumbrancer?

A purchaser cannot safely disregard information, from whatever source it may come. It is of such a nature that a reasonable man of business would act upon that information even if it came from a news-paper report.

S.R. *3 Ch. App. 488* 1868.

Registration

The registration of any instrument or matter required or authorised to be registered by law is to be deemed to constitute actual notice of such *instrument* or *matter* but not necessarily of its contents.

(ii) Where inquiry is purposely avoided to escape being bound by notice.

1. John Towsey contracted for the purchase of certain property in 1776.
2. He borrowed the amount of purchase money from one Dr. P, and placed the title-deeds in his hands as a security for repayment.
3. In 1790, T was very much indebted to one Ellames in a considerable

sum of money and executed a mortgage of the same property to Ellames.
4. Dr. P did not give any information of his claim to Ellames.
5. Ellames said that he made no inquiries after the title-deeds before he took the security, and admitted that upon executing the mortgage he inquired for them, and was informed of their being in the hands of Dr. P. but that he understood them to be so for safe custody only.
6. He received this information from one J. who was his brother-in-law, who had prepared the mortgage and appeared as his agent at the time of the execution of it.
7. Dr. P claimed priority over Ellames. It was granted as Ellames was held to have had notice.
(iii) Where there is gross negligence in not making usual and proper inquiries:

1899. 2 Ch. 264
1921. I Ch. 98.

Imputed Notice

1. 1. The underlying theory of agency is that a man can do a thing by an agent which he can do himself. Conversely, what is done by the agent is done by him. This being so, it is open to argument that what is known to the agent must be taken to be known to the Principal. This is the theory on which the doctrine of imputed notice is founded.

The Essentials of Imputed Notice

1.1. *The knowledge must have come to him as an agent* and not in any other capacity. In other words, agency must be strictly proved.
Dyllie vs. Pollen—32 L. J. Ch. 782 (N. S.)

2. Agent must be distinguished from a person employed to do merely ministerial act—*e.g.* a person employed to procure a deed is an agent. Knowledge to such a person cannot be the basis of imputed notice.
3. In this connection, the position (of)* mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52A. Notes on Acts and Laws PART I.htm - _msocom_2 a person who is in the service of two Principals as their agent has to be considered. Suppose, there are two companies, A and B, and C is an officer employed in both A & B. Suppose that A company transferred their legal right to B company which was subject to an equitable right in favour of D of which C had knowledge.
Can D say that B company had notice of his equitable right because C, their agent, had notice of it in his capacity as the agent of A?

The answer is that, his knowledge which had acquired as agent of A company, will not be imputed to B company unless he owes a duty to the A company to communicate his knowledge and also a duty to the B company to receive the notice.
(1896) 2 Ch. 743—In *Re Hampshire Land Company. Facts:*

1. Hampshire Land Company was registered under the Companies Act, 1870.
2. The Company was closely interconnected with the Port Sea Island Building Society. Four Directors and a Secretary by name Wills were common to both.
3. On the 19th February 1881, a general meeting of the Company was held at which a resolution was passed authorising the Directors to borrow 30,000 £.
4. The Directors borrowed this amount from the Port Sea Society.
5. The Society went into liquidation in 1892. The Liquidator of the Society sought to claim the sum of £ 30,000 lent to the company.
6. It was contended that the resolution of the company authorising borrowing was *ultra vires* and that because William, the Secretary was a common officer notice to him was notice to Society and therefore Society could not recover.
7. *Held* that the Society could *recover* for reasons at p. 749.

II. The notice to the agent must have been obtained by him *in the same* transaction and not *in a previous* transaction.
There is a further qualification. Even if the notice was acquired by the agent in the *same* transaction, it will not be imputed to the purchaser, unless it is so material to the transaction as to make it the duty of the agent to communicate it to the principal.

(1886)—31 Ch. D. 671—In Re Cousins.

Facts :

1. In 1871, one William's cousins made a will of his property and left it in trust to his trustees.
2. One William Banks was a solicitor for the trustees.
3. Mathew, a cousin was to receive a share in the proceeds of real and personal property left by William's cousins under the will.
4. Mathew mortgaged his share to William Banks, the Solicitor as security for a loan of £ 35.
5. In 1873, Mathew mortgaged his share to William Richardson through

Banks and Banks was paid off.
6. In 1874' Richardson transferred his mortgage to William Drake. No Notice was given to the Trustees.
7. In 1875 Mathew mortgaged his share to Dennis Pepper to secure a payment of £ 500. Banks acted as the Solicitor. The mortgage to Dennis Pepper did not mention the previous mortgage to William Drake. Subsequently a notice of this transaction was given to the Trustee.
8. Drake took out a summons for payment of his mortgage debt due from Mathew out of the funds in the hands of the Trustee in *priority* to Pepper's claim. *1884. 26 Ch. D. 482*
9. Pepper's contention was that, he had no notice of Drake's claim—Mathew not having mentioned it in his deed of mortgage.
10. It was replied by Drake that Pepper had notice because Banks, the Solicitor who acted as his agent knew of Mathew s mortgage to Drake.
II. That Banks had notice, it was not denied. That Banks was the agent of Pepper was not denied. But the question was whether notice to Banks can be held to be notice to Pepper.
12. *Held:* No—p. 677.
Reasons. The knowledge of Banks did not arise in the course of the transaction with Pepper in 1875. Pepper could not be said to have any notice.

13. Pepper's claim was allowed.
III. Notice to agent will not be imputed to the purchaser when the agent is shown to have intended a fraud on the principal which would require the suppression of his knowledge and not communicate it to the Principal.
(1880) 15 Ch. D. 629 Cane vs. Cave.
(1428) ACI—Houghton & Co vs. Nolhard)
II. *Where an equitable right has come into being subsequently to the acquisition of a legal right.*
1. Leading case on the question is *Northern countries of England Fire Insurance Co.* vs. *Whip?.*

1884 26 Ch. D. 482

Facts
C, the Manager of a company, executed a legal mortgage to his company, delivered title-deeds. They were kept in a safe of the company, the key to which was in C's possession. C— some time after took out the title-deeds and created another mortgage on the same property in favour of Mrs. Whipp. Mrs. Whipp has no notice of the first

mortgage to the Company. *Held:* Company entitled to priority.
2. The proposition laid down in the case is this—
Where the owner of a legal estate has assisted in or connived at the fraud which has laid to the creation of a subsequent equitable estate and the owner of equitable estate had no notice of the prior legal right, the Court will postpone the legal estate to the equitable estate although it is subsequent in its origin.
3. What is the evidence of assistance in or connivance at fraud:
(i) Omission to use ordinary care in inquiry after title-deeds.
(ii) Failing to take delivery in title-deeds are treated as evidence of assistance in or connivance at fraud where such conduct cannot otherwise be explained.
4. The same authority lays down another case in which also a legal estate will be postponed to a subsequent equitable estate.
Where the mortgagee, the owner of the legal estate has constituted the mortgagor, his agent with authority to raise money on the property mortgaged and the estate created has by the fraud or misconduct of the agent been represented as being the first estate.
5. For the operation of this rule, mere carelessness or want of prudence on the part of the legal owner will not be a sufficient ground. There must be fraud and connivance at or assistance therein. Nothing but fraud I will postpone.

(1913) 2 *Ch. 18.*

III. Where the competition is between two equitable rights.
1. In the two former cases the competition was between a legal right and an equitable right. In the third case the competition is between two equitable rights.
Cave vs. Cave. (1880) 15 Ch.D. 639.

Facts :
A Trustee *&B* a beneficiary.
A purchased land from trust-monies in breach of trust and exe-cuted a legal mortgage thereof to *C.*
C had no notice of the trust.
Later by an equitable mortgage transferred the same land to There are three persons who have acquired rights. C, who has a legal right, is mortgagee, being a legal mortgage.
B has an equitable right flowing out of A's right which has been transferred.
D has an equitable right flowing out of A's right.

What is the position of the parties?

1. As between *C* and B, although B ' s Equitable right is prior to C's legal right as C had no notice, C takes priority.
2. As between *C* and D, C takes priority, because C is not party to a fraud in creating the rights of D.
3. As between *B* and *D,* their rights are equitable rights : whose right prevails? B ' s right. The rule is that where there is a competition between two equitable rights, the right earlier in origin prevails over the subsequent right.
4. This rule applies only where the equitable rights have equal equities on their side. If the equities are unequal, the better of the two prevails.

Rice vs. *Rice.* 2. Drewry, 73 (76-78).

A sells land to *B* and without receiving purchase money (1) conveys land to B, (2) signs a receipt for money s and (3) delivers title-deeds to B. *B* subsequently mortgages the property to *C* who has no notice *of A's* claim. Between *A* and *C* although *A's* equitable right is earlier than that of C, yet the equities are unequal. *A* is guilty of negligence, therefore, *C's* Equity is better and will prevail although later in time.

5. In some cases conflict as to priority between two equitable interests by the respective times at which the interest was transferred. In other cases, it is determined by the respective times at which written notice is given to the proper person or persons of the interest transferred (e.g. in the case of the assignment of chose in action).

Sum up. Three maxims of Equity.

1. Where equities are equal, the law prevails.
2. Where equities are equal, the first in time prevails.
3. Where equities are unequal, the better equity prevails.

Explanation

1. The first proposition has reference to cases where there is conflict between an equitable right and a legal right and applies to both classes of cases : (1) where the equitable right is prior to the legal right as well as to cases (2) where the equitable right is subsequent to the legal right.
2. Law prevails means that legal right prevails over an equitable right where no inequity can be attributed to the owner of a legal right. — Such as notice or fraud.
3. Propositions two & three have reference to cases where there is a conflict between two *equitable rights.*

Equitable Assignment

/. *General*

1. Although the subject is called Equitable Assignment, it is an abbreviation. The subject is equitable assignment of a chose in action.
2. There are three matters of a preliminary character which must be dealt with at the outset:
(1) What is an assignment.
(2) What is a chose in action.
(3) Necessity for the study of the subject

(1) What is an assignment

1. Under the English Law of Property, property is classified as *Realty and Personality.*
2. In connection with the transfer of rights over Realty, the word used is *Conveyance.* In connection with the transfer of rights over Personality, the word used is either *Transfer* or *Assignment.*
3. Assignment, therefore, means the transfer by a person of his rights over personal property and particularly one form of it, namely, *chose in action.*

(2) What is a chose in act on

1. Under the English Nomenclature, Personality is divisible into two classes:

(i) Moveable goods of which one can take physical possession.
(ii) Personal rights of property which car only be claimed or enforced by action and not by taking physical possession.

2. The former are called :
(i) Chooses in Possession—Things in Possession. (ii) Choses in Action—-Things in Action.

3. The definition of a chose in action—
(1902) 2 K.B. 427 (430) ChannellJ. It is really speaking a debt.
4. The word assignment is used in respect of chose in action. It is something which you can only sign it away if you want to transfer it. You cannot deliver possession of it.

(3) Necessity of Studying Equitable Assignment

1. An assignment is a transfer of a right by its owner, subsisting against another, to a third person to whom the person against whom it was subsisting, becomes bound.
Illustration. A is creditor. *B* is debtor. *A* assigns his right to debt against *B* to *C :B* becomes bound to *C* and *C* gets a right to recover it from *B.*

2. Three persons are involved in an assignment :

(i) The original owner. (ii) The person bound to the original owner. (iii) The person to whom the original owner has transferred the right.
3. The right, i.e., the chose in action may be legal or equitable such as a legacy or an interest in a trust fund.
4. Assignment of a chose in action was differently treated by Equity and by the Common Law.

Common Law and Chose in Action

1. There could be no assignment in Common Law of a Chose in action. Not only there could be no assignment of an equitable chose, there could be no assignment even of a legal chose.
2. The reason was the fear of multiplicity of suits.
3. Statute law and Special law made certain kinds of Choses of action assignable:

(i) Negotiable Instruments became assignable by the law merchant
(ii) Policies of Life Insurance and Marine Insurance were made assignable by Statute.
(iii) Section 25(6) of the Judicature Act: all legal Choses in Action have been made assignable.

Equity and Chose in Action

1. In Equity, a chose in action was always assignable. Not only an equitable Chose was assignable in Equity but a legal Chose was also assignable in Equity.
2. If the Chose was equitable, the assignee could bring his proceedings to recover it in a Court of Chancery in his own name.
3. If it was a legal Chose, the proceedings had to be taken in the name of the assignor and the way the Court of Chancery interfered, was to restrain the assignor from objecting to this use of his name on the assignee giving him a proper indemnity against costs.
4. There were, however, some Choses in action to the assignment of which equity did not give effect on the ground of public policy:
(i) assignment of pay and half pay of public officers paid out of the National Exchequer.
(ii) Assignment of alimony to a wife.
(iii) Assignment affected by maintenance of property.

Conclusion

1. There are thus two ways of making an assignment—

(i) Legal, (ii) Equitable.
2. Although the Judicature Act has laid down the form and procedure for the legal Assignment of a legal Chose, it has not abrogated the rules

of Chancery relating to Equitable assignment of a legal Chose. So that if an assignment is ineffective in law by reason of some defect, it will be good if it conforms with the rules of equity. Secondly, the Judicature does not touch the assignment of an Equitable Chose in action.

Categories of cases to be considered

There are three categories of cases to be considered in connection with the assignment of a Chose in action :

(i) (i) Legal assignment of a legal Chose in action.

(ii) (ii) Equitable assignment of a legal Chose in action.

(iii) (iii) Equitable assignment of an Equitable Chose in action.

Requisites of a legal assignment of a Legal Chose

1. Assignment must be *absolute, i.e.,* it must amount to a *complete* divesting of his right by the assignor. The debt must be certain and must be of the whole amount.

2. The assignment must be in *writing* signed by the assignor. It need not be by deed. It need not be for value.

3. Express notice must be given to the debtors of the assignment.

The Section does not say :

(i) By whom is notice to be given—by *the* assignor or assignee.

(iii) (iii) At what time notice is to be given so that it may be given by the assignee after the death of the assignor.

Effect of Want of Notice

1. Absence of notice does not disentitle an assignee of suing on the assignment. It only imposes certain disabilities and results in certain disadvantages.

(i) The assignee cannot sue the debtor in his own name without making the original creditor a party to the action.

(ii) The assignee will be subject *to* equities arising between the debtor and his original creditor before the date of the assignment and will lose his right against the debtor altogether if the debtor pays the original creditor. On the other hand, if the debtor pays the original *creditor* after receiving notice of assignment, the *assignee* could still recover the debt from him.

(iv) (iv) The assignee, who fails to give notice to the debtor of his assignment, will be postponed to a subsequent assignee for value who has no notice of the previous assignment, and gives notice of his assignment to the debtor.

Requisites of an Equitable assignment of a Legal Chose in action

An Assignment which does not comply with the statutory requirements is not necessarily ineffectual, for it may operate as an Equitable Assignment.

Two things are necessary :

(1) There must be value given by the assignor.

(2) A charge created by agreement between the debtor and the creditor upon specific funds or by an order given to the creditor upon a person holding money belonging to the debtor, will amount to an assignment.

1839. *Burn vs.Carvallo 4 Hylve & Craigs Reports. 690*

Facts

F was in the habit of sending consignments of goods to *R,* who was trading in a different town and used to draw Bills of Exchange upon *R.* It was arranged by *F* with *B & Co.* that they should endorse and negotiate his Bills drawn upon *R* against consignment and they were to credit him with the amount and he was to draw upon it and *B & Co.* was reimburse itself by recovering the amount from *R. F* drew for certain amounts on *B & Co.* But *R* failed to meet the Bills on maturity.

F, who was the debtor of the *B & Co.* by a letter to *B & Co.* promised that he would direct and by a subsequent letter did direct to deliver the goods to *V* as the agent *of B & Co.*

F wrote to *R* to transfer the goods in his possession to *V*, the agent of B & Co. in the town. *R* accordingly delivered the goods to *V* on the 30th of June 1829.

On the 23rd of June 1829, F was adjudged insolvent for an act done on the 23rd of May 1829. His trustee in bankruptcy sued for the recovery of the value of the goods from *B & Co. B & Co.* contended that there was an equitable assignment of the value of the goods by *F. Held* the order of the debtor was a good assignment in Equity.

Rodick vs. *Gandell.*

(1851-2) I Degex.763. 42.E.R.749

Gandell was an Engineer and was indebted to a certain Bank for a large amount and the Bank was pressing for payment.

Gandell was a creditor of a Railway Co. To induce the Bank not to press for payment and also to pay other drafts outstanding against him, it was arranged that Gandell should instruct his Solicitor to recover the amount due to Gandell from the Railway Co. and pay it to the Bank. G,

by a letter to the Solicitors of the Company, authorised them to receive the money due to him from the Railway Co. and requested them to pay it to the Bankers. The Solicitors by letter promised the Bankers to pay such money on receiving it.

Why—no agreement between debtor and creditor. The Solicitor recovered the amount from the Railway Co. but instead of paying it to the Bank, paid it to Gandell. Gandell became insolvent and his property was taken possession of by the official assignee. The Bank sued for a declaration that there was an equitable assignment by Gandell of his funds claimable from the Railway in favour of the Bank and collected by the Solicitor and the Bank was therefore entitled to recover the amount from the official assignee. *Held.* this was not an equitable assignment. It was not an order given by the debtor to his creditor upon a person owning money or holding funds belonging to the debtor directing the *person* to pay such funds to the Creditor.

There must be *privity* between the *assignor* and *assignee* in order to constitute an equitable assignment. If there is no privity then there is no assignment even in equity.

Consequently, if the Principal directs his agent to collect money owing to the principal and pay it to a third person, such third person is not an assignee in equity if the mandate is not communicated to him. It may be revoked by the principal.

Similarly a Power of attorney or authority to collect money and to pay it to the creditor of the party granting the power does not amount to an equitable assignment. A cheque is not an equitable assignment or appropriation of money in the drawer's Bank.

Hopkinson vs. *Forster, (1874) L. R .19 Eq .74.*

There can be no valid appropriation or assignment if no specific fund is specified out of which the payment is to be made.

Percival vs. *Dunn. (1885) 29 Ch. D. 128*

Whether notice is necessary in the case of an equitable assignment?

1. An equitable assignment is complete between the assignor and assignee although no notice is given to the debtor.

2. Notice of the assignment should, however, be given to the debtor for two reasons.

(i) If there is no notice, the debtor will be free to pay to the assignor, the

original creditor and will not be liable to the assignee. On the other hand, if he pays to the assignor in disregard of the notice, he will be liable to pay over again to the assignee.

Stocks vs. *Dobson (1853) 4 De. G. M & G. II*

(ii) If there is no notice, then the assignee will not be allowed to have priority over subsequent assignee of the same chose in action by the same assignor.

This is called the rule in **Dearl** vs. **Hall** (1823) 1 Rsess 1=S. F. C. p. 57.

Facts:

Peter Brown died and left a Will whereby he made a trust of his personal estate and of the monies to arise from the sale of his real estate and directed his executors to invest the same and pay interest to his son Zachariah Brown during his life. The income came to about £ 93 a year, On 19th December 1808, Brown, in consideration of £204 paid to him by William Dearle,assigned a part of his annuity of £ 37. On 26th September 1809, Brown, in consideration of £ 150, assigned another part of his annuity of £27 to Sherring, subject to the assignment in favour of Dearle.

Neither Dearle nor Sherring had given notice of assignment to the executor.

In 1812 Brown advertised the life interest of 93 pounds p. a. in trust funds for sale as an unencumbered fund.

Joseph Hall proposed to purchase it and through his Solicitor investigated Brown's title. He also made inquiries of the executors, who knew of no encumbrance affecting Brown's interest. Thereupon Hall purchased Brown's interest for £711-3-6 and had it assigned to him.

On the 25th April 1812, Hall gave the executors written notice of the assignment to him.

On the 27th October 1812, Dearle and Sherring gave notice of their assignment to the executors.

The executors refused to pay any one of the three until their rights were decided.

Dearle and Sherring brought a Bill in chancery against Hall praying that the income of £ 93 should be applied in satisfying their's before that of Joseph Hall.

Dearle contended that the doctrine *first in time is first in law* should be applied and as he was first he should be preferred to Hall.

Held No. Hall should be preferred.

Judgement of Plumer M. R. S. & C. p. 55

The rule was based on carelessness and negligence to perfect one's claim. But the rule is now absolute and independent of conduct. The assignee who gives proper notice first will be paid first, whether the other assignee has been guilty of carelessness nor not.

Re Dallas. (1904). 2Ch. 385.

The rule in Dearle *vs.* Hall has always applied to assignment of all equitable interests in personality.

To whom notice should be given under the rule in Dearle vs. Hall

1. It must be given to the debtor, trustee or other person whose duty it is to pay the money to the assignor. *Stephens* vs. *Green, (1895) 2 Ch. 148*
2. Notice to the Solicitor will be effectual only if Solicitor was expressly or impliedly authorised to receive it. *(1880) 14 Ch. D. 406.*
3. If there are several debtors or trustees, notice to one is notice to all.
4. Fresh notice to new trustees is not necessary, if notice is given to old trustees.

What should be the form of Notice

1. Formerly, notice need not be a formal notice and might have been by word of mouth.
2. But since 1925, it must be in writing.

What title is acquired by the assignee by an Equitable assignment.

1. It has always been the rule of equity that the assignee of a thing in action cannot acquire a better right than the assignor had.
2. In other words, the assignee takes it subject to all the equities affecting it in the hands of the assignor.

Roxburghe vs. *Cox, (1881) 17 Ch. D.* 520. So that—

(1). If the Contract between the assignor and the debtor was violable, the debtor can set up the violable character of the contract against the assignee, even if the assignment was for valuable consideration.

(2). If the debtor had a right of set-off against the assignor, the same would be available to him against the assignee.

(3). The assignee is, however, free from equities arising after notice.

A debtor cannot diminish the rights of the assignee such as they are, on the date of notice, by any act done after date of notice.

Assignment of rights to be acquired in future

1. So far, we have dealt with assignments of rights which had accrued when the assignment had taken place.

2. We must consider the assignment of rights to be acquired in future.
3. Example of such rights :
(i) The expectancy of an heir-at-law to succeed to the Estate. (ii) The expectancy of a next of kin to succeed to personality. (iii) Freight not yet earned. (iv) Future Book-debts.
4. At Common Law, they were all void. A man could not assign what he had not got. In equity, they were assignable, if for valuable consideration.
5. Equity treated them not as assignments but as *contracts to assign ,* and when the assignee became possessed of it, he was compelled to perform *his* contract.
6. When the right was acquired by the assignor, the beneficial interest passed immediately to the assignee. But the legal interest remained with the assignor. So that, if the assignor transferred it to a subsequent assignee who gave value and had no-notice of the previous assignment, the title of the subsequent assignee would prevail.

Conversion

1. NECESSITY FOR THE DOCTRINE OF CONVERSION.

1. The English Law had prescribed a different mode of devolution of the *Realty* and *Personality* of the owner, if he died *intestate.* His Realty went to his heir and *Personality* went to his *next-of-kin.*
2. That being so, whether the property will go to the heir or to the next of kin must depend upon the state of the property on the date on which the succession opens.
3. Ordinarily there is no difficulty. The actual state in which the property will be found on the material date will determine its devolution. But suppose, circumstances are such that on the date on which the succession opens, land *is to be sold* for money *but is not sold*, or money is *to be invested* in the purchase of land *but is not so invested,* how is the devolution of the property to be determined? If the land is to be treated as land, until it is actually sold, then it will go to the heir. On the other hand, if it is to be treated as money, because it was intended to be sold for money, then although it is land, it will go to the next-of-kin. In other words, the question was whether property was to devolve according to the actual state in which it is found to exist or according to the form in which it was intended to be converted. The answer given by equity was, that property was to devolve, not according to the actual state in which it exists, but according to the form in which it was

intended to be converted.
4. This is what is called the **doctrine of conversion.** There would have been no necessity for the doctrine. had there been no difference in the rules of inheritance for Real and Personal Property. This difference is now abolished by Sections 33,45 and therefore, conversion has lost all its importance.
5. In India there is no such distinction in the inheritance of property—Realty to heir and Personality to next-of-kin.

II. THERE ARE FOUR CASES WHICH GIVE RISE TO CONVERSION.

(1) By operation of the law.
(2) By operation of the order of the Court.
(3) By operation of a Contract.
(4) By operation of a direction in a deed or a will.

(1) Conversion by operation of the Law

1. There is only one case in which conversion takes place by operation of the Law. That case is the case of Partners. Under the Partnership Act of 1890, Section 39, every partner has a right to require, that the property belonging to the Partnership shall be sold and the proceeds, after the discharge of all debts and liabilities, shall be divided among the partners according to their shares in the capital. As a result, land which is partnership property is treated as Personality and not as Realty.
2. It is treated as Personality, not only as between Partners themselves and their representatives after death, for the purposes of distribution of the partnership assets, but it is also treated as personality for purposes of inheritance as between the persons entitled to the property of a deceased partner.
3. The conversion of Realty into Personality under the Partnership Act takes place not on the date of the dissolution of the Partnership or the death of a partner but at the moment when it became Partnership Property.
4. The doctrine of conversion applies to Partnership Realty unless the contrary intention appears. The reason why partnership agreements convert Realty into Personality is, because a partner ordinarily is not entitled on dissolution to any specific part of the partnership property. But there may be a proviso in the partnership agreement permitting a partner to have specific property, in which case conversion will not apply, there being intention to the contrary.

(2) Conversion by order of the Court

1. Where an order is made by the Court for the sale of Realty, the Realty is treated as being converted into Personality for purposes of succession to the estate of the person whose property was ordered to be sold.

Illus. A B C have equal shares in a Realty. The Court orders the sale of the Realty. This order has the effect of converting their shares in Realty into Personality, so that the persons entitled to succeed would be the next of kin and not the heir.

2. The following points must be noted:

(i) The order for sale must be within the jurisdiction of the Court

(ii) It is immaterial whether the purpose for which it is sold will or will not exhaust the sale proceeds. The sale may be merely to pay cost. All the same, if the order is for sale, within the jurisdiction, it will effect conversion

(iii) It is immaterial whether it is actually sold or is merely ordered to be sold. Order for sale is enough to effect conversion.

(iv) Conversion takes place from the dale of the order and not from the date of the sale.

3. There are two cases in which the order of the Court will not effect conversion for the purpose of inheritance.

(i) Where the Court itself makes an order that such change in the nature of the property shall not affect its devolution on death, in which case the sale proceeds will go to the heir and not to the next-of-kin.

(ii) Where the provision of some statute prohibits a change in the nature of the property from affecting its devolution *e.g.* Section 123 of the Lunacy Act, 1890,which provides that if the property of a lunatic is sold, the proceeds will go to persons entitled to them as though it was not sold.

(3) Conversion by operation of a Contract

1. When there is a binding contract to sell Realty, the Realty is treated as part of vendors Personality. Conversely, the interest of the purchaser is treated as Realty, even if he dies before completion.

2. This is, however, subject to one condition. That is, the contract must be one of which specific performance would be ordered by the Court—*34 Ch. D. 166.*

Mere notice to treat does not suffice to bring into operation the doctrine of conversion. There will be no conversion if the contract is abortive or unenforceable.

(4) Conversion under a contract to lease with an option to purchase

A leases certain property *to B* for seven years, giving him by the lease an option to purchase the property at a certain price during the term. *B* exercises his option.

Three questions arise:

(i) Does the exercise of the option effect a conversion?
(ii) Does it effect a conversion even if the option is exercised after the death of the Lessor?
(iii) From what date does such conversion begin to operate?

(i) Does the exercise of the option effect a conversion?

In law, the option given is an offer to sell. The exercise of the option is an acceptance of the offer and when there is an acceptance of the offer, there is a contract. The exercise of the option by respiting in a contract effects a conversion. The answer to the first question is therefore in the affirmative.

(ii) Exercise of the option before the death of the Lessee and after the death of the Lessor.

1. If the Lessee exercises his option *before* the death of the Lessor, i.e., while he is alive, then there is conversion, because the offer conveyed by the option can be legally accepted and a binding contract can arise.
2. If the lessee exercises the option *after* the death, then, on principle, there ought not to be conversion, because there cannot be a contract. An offer cannot be accepted after the person, who make the offer, is dead.

But in *Lawes* vs. *Benett* (1785) 1 Cax 167, it was held that the exercise of the option, even *after the* lessor's death, is good for the purposes of conversion.

3. The rule in *Lawes vs. Benett* being anomalous, is confined in its operation. It is applied as between persons claiming under the lessor. But it is not made applicable as between lessor and lessee.

Illus. A leased certain property to B with an option to purchase. The premises were insured. They are destroyed by fire *before* the option is exercised by B. B, on exercising the option, cannot claim the insurance money as part of his purchase. That is claim as between A and B (l878)7Ch.D.858, 10 Ch. D. App. 386.

(III) From what date does conversion by contract begin to operate.

1. Conversion becomes operative from the moment when the contract is made.
2. In the case of option to purchase, conversion takes place as from the execution of the lease.
3. For the purposes of profits etc., the property remains real estate until the option is exercised, so that the rents and profits are taken by the heir entitled to Realty.
4. For the purposes of devolution. it is personality.

Conversion by direction of the owner.—Whether contained in a deed or a will.

1. Two things are necessary for conversion by deed or will : (i) There must be a direction to sell or purchase Realty. (ii) There must be some person in existence who can be said to have the right to insist upon the direction being carried out. Conversion is always for the benefit of some person. If there is no person to claim the benefit, then there need be no conversion.
2. In order to effect a conversion, the direction must be imperative. If direction is only *optional* , there will be no conversion and property will be treated as real or personal, according as to the actual condition in which it is found.

NOTE.—For a difference between a direction which is *really* optional and a direction which is *apparently* optional but really *imperative See Earlom vs. Saunders--(1754) Ambler's Reports 241.*

Direction, if it is optional, must be *express.* Otherwise it will always be held to be imperative.

3. Distinction must be made between direction to sell or purchase Realty and discretion as to the time at which sale or purchase shall be made:

(a) If the direction is imperative, mere fact that it is accompanied by discretion, will not prevent conversion having its effect.

(b) If the direction is imperative, the fact that those to whom the direction was given have failed to carry it out, will not prevent conversion having its effect.

4. Distinction must be made between a simple direction to sell or purchase and a direction, the execution of which, is made dependent *on the request* or *consent* of some other person.

In such a case, whether there will be conversion or not, rests upon the construction of the document :
(a) If the intention of the clause is to enable the person named to *enforce the obligation to convert,* then there will be conversion.
(b) If the intention of the clause is *to control the operation of the direction* by making it subject to application, then there will be no conversion until such application is made.
5. Distinction must be made between the *power to convert* and *direction to convert :*

(1892) I Ch. 279.
(1910) I Ch. 750.

A mere **power to convert** is not imperative direction and therefore, there **will be** no conversion, where there is mere power.
Illus.:
A borrowed £ 300 from *B* on a mortgage *of A's* property and gave B power of sale by the terms of which the surplus proceeds of sale were to be paid to A, his executors and administrators.
A died intestate, and after *A's* death *B* sold the estate and there were surplus sale proceeds. *To whom would the surplus go?*
As this was not a direction to sell, the property would devolve according to its *actual* state at the death of A. At the death of A it was Realty, therefore, the heir was entitled to it. If the sale had taken place during the life-time of A, at the death of A it would be personality and would have, therefore, gone to the next-of-kin.

II. TIME FROM WHICH CONVERSION BY DIRECTION TAKES.

1. This varies according as the direction is contained in a will or in a deed.
2. If the direction is contained in a will, conversion will take place as from the death of the testator.
3. If the direction is contained in a deed, conversion will take place as from the date of the execution of the deed—not withstanding that the trust to sell or purchase is not to arise until after the, settlor's death.

III. EFFECT OF THE FAILURE OF OBJECTS FOR WHICH CONVERSION WAS DIRECTED IN A WILL OR DEED.

1. Two cases must be distinguished: (i) Cases of total failure.
(ii) Cases of partial failure.

(i) Cases of total failure

1. Where there is a *total* failure of the objects *before* or *at the time* when the deed or will came into operation, or before the time at which the duty to convert is to arise, no conversion will take place at all and the property will remain as it was. The reason is that, there is no one who can insist upon the character of the property being altered.
2. The failure must *beprior* failure and not *subsequent* failure.
3. The rule regarding conversion is uniform in the case of total failure and there is no difference between the effects of a direction in a deed and a direction in a will.

(ii) Cases of partial failure

1. Where the purposes have only partially failed, then conversion is necessary to carry out such purposes as have not failed. Consequently the doctrine of conversion would operate and the representative entitled to take the property in the form in which it is directed to be converted.
2. It will be carried out to the extent necessary.

Illus.:

A devises Realty to trustees upon trust to sell and divide the sale proceeds between *B* and C. *B* predeceases A and C survives him. Here, sale is necessary in order that *C* may have what A intended to give him, i.e., money. C will take his share in money.

What would happen to the share of *B*?

It is money *in fact* and *ought* to go to the next-of-kin. But it will go to the heir because conversion to that extent was unnecessary. Heir takes it but as money.

Illus. :

A bequeaths personality to trustees to invest in the purchase of land for B and C. B predeceases A and C survives him. Here, purchase is necessary in order that C may have what A intended to give him, i.e., land. C will take his share in land.

What would happen to share of B? It will go to the next-of-kin, because, conversion to that extent was unnecessary. But the next -of-kin will take it as land.

Reconversion

1. Reconversion means annulment or cancellation of prior conversion. It is a reversion or restoration of the notional state of the property to its

actual state.
2. Reconversion can take place in two ways :
(i) (i) By act of parties.
(ii) (ii) By operation of law.

(1) By act of parties
1. This occurs where a person has the right to choose between taking the property in its converted State or in its actual state.
2. Persons who have a right to make such an election and thereby reconvert property are:—
(1) An absolute owner.
(2) A owner of an undivided share—- without the concurrence of the co-owner in the case of money to be converted into land but not in the case of land to be converted into money. This is because money is capable of apportionment while land is not.
Illus.—(1) Where money is to be invested into land in the interest of *A* and *B* as joint tenants. A can elect to reconvert without the concurrence of B.
(2) Ques :— Can a remainder man effect a reconversion by electing to take it in its actual state? This is not clearly settled.
(3) This rule of reconversion by act of parties applies where the owner who has aright to elect and thereby to effect reconversion is subject to the limitation that he must not be under any disability.

Infants **and** ***Lunatics*** are persons under disability and cannot, therefore, reconvert. But the Court may direct reconversion on their behalf if it is beneficial to them.
Married woman can reconvert if the property belongs to her for her separate use. If it is not her separate property, then she can do so only with the consent of her husband. (4) Evidence of election to reconvert—
(i) (i) express declaration of intention in that behalf;
(ii) (ii) conduct amounting to election.

(2) Reconversion by Law
Where a person, who is under an obligation to convert property, is in possession of and absolutely entitled to the property after the obligation has ceased/the property is at home and reconverted without any act on his part. Thus—

A converts within 3 years after his marriage with B to invest £ 1,000 in the purchase of lands and settle them upon his wife *B*. B dies within a year of the marriage. Since the obligation to invest money in land and the right to require its investment are both vested in A, the obligation is discharged by operation of law and the money which was converted into land by the covenant is reconverted and passes to the next-of-kin.

Election

I. DISTINCTION BETWEEN ELECTION IN LAW AND ELECTION IN EQUITY.

(a) *Election in law* is connected with the choice of a party to repudiate a liability arising out of an unauthorised act or to ratify the act and accept the liability.
(b) *Election in Equity* is connected with the choice of a person to accept a gift which is subject to a burden or to reject the gift.

II. NECESSITY FOR THE EQUITABLE DOCTRINE OF ELECTION.

(i) What is the problem which the doctrine deals with

Nature of the Problem.
A gives his property to B by an instrument-deed or a will—and by the same instrument gives to *C* a property belonging to *B*.
What can *B* take under such an instrument?

Here there are two gifts—

(i) (i) by A to B of A's property

(ii) (ii) by A to C of B's property

The gift *to B* of *A's* property is a valid gift, because A is the owner of the property gifted away. The gift to C of *B's* property by *A* is invalid, because it is not authorised by *B*.
Question is, can *B* take the gift from *A of A's* property and repudiate the gift of his property by A to C? It is this problem with which the doctrine of Election deals.
(ii) The doctrine of Election says that the gift to B shall take effect only if B elects to permit the gift to *C* also to take effect.

III. THE PRINCIPLE OF THE RULE.

When a person makes a gift of this sort, equity presumes that in such a

gift there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions, and renouncing every right inconsistent with it.

(iii) Courses open to a person called upon to elect.

(A) Two courses are open to a person who is called upon to make an election.

(1) *B* may allow C to take his (B's) property and himself take A's property.

(2) *B* may take A's property and not allow C to take his (B's) property but give him compensation to the extent required to satisfy C.

Illus.:

A gives to *B* a family estate belonging to *C* worth £ 20,000 and by the same instrument gives to *C* a legacy of £ 30,000 of his *(A's)* property. *C* can do either of the two things.

(i) (i) allow B to take the family estate *or*

(ii) (ii) keep the family estate and give B £20,000.

(B) The former course is called *taking under the instrument*. The latter is called *taking against the instrument*. The following points must be noted in connection with these two modes of Election:

(i) Election against the instrument is allowed in Equity only where the gift is made upon an *implied* condition that the donee shall part with his own property. Where the gift is made upon an *express* condition that the donee shall part with his own property. Equity will not allow Election against the instrument. The donee would take nothing if he refused to comply with the condition.

(ii) No question of compensation arises when a person elects under the instrument.

(iii) Election against the instrument where it is permitted—does not involve a forfeiture of the whole of the legacy but only of a part sufficient for compensation.

IV. CONDITIONS FOR THE APPLICATION OF THE DOCTRINE

(l) The donor must have given the property of the donee to a third person.

(2) The donor must have by the same instrument given his own property to the donee. To this the following must be added.

(3) The property *given to* the donee must be such that it can be used to compensate the third person.

(4) The property of the donee must be alienable.

NOTE.—The donor will be deemed to be disposing of such interest as he may have in the property and no more.

V. SOME CASES WHICH MUST BE DISTINGUISHED FROM CASES OF ELECTION

(1) Cases of *two* gifts to one person

In such cases the doctrine of election does not apply. They are cases of gifts of his own property.

Here the donee may accept the one that is beneficial and reject the one that *is onerous*—unless the intention of the donor was that the acceptance of the *onerous* was a condition for the grant of the beneficial.

2. Case of *two* properties in one gift.—One beneficial, the other onerous.

The beneficiary must take both or neither unless an intention appears to allow him to take the one without the other.

V I. CONCLUSION

(1) Conversion and election are doctrines which illustrate the maxim of Equity—Equity looks to intention.

(2) That being so there would be no election if there was no intention on the part of the donor to put the donee to election.

1. Performance

1. *The problem* :—A covenants with B to do a certain act. A does an act which can wholly or partly effects the same purpose *i. e.* available for the discharge of the obligation arising under the covenant but does not relate the act to the covenant. The question is *how is this act to be construed?* Is it to be construed that it is an independent *act* quite unconnected with the covenant or is it to be construed that the intention of A in doing this *act* was to perform the obligation. The answer of equity is that the *act* must be treated as being intended to perform the obligation under the covenant.

2. *Principle* •—-The principle underlying the doctrine of Performance is that, equity presumes that every man has an *intention* to perform his obligation and when he does an *act* which is similar to the one he promised to do, then equity gives effect to that intention.

3. *The difficulties that would occur if this principle was not recognised.*

Illus :

A convenanted on his marriage to purchase lands of the value of £ 200 a year and to settle them for the jointure of his wife and to the first and other sons of the marriage in fail.
A purchased lands of that value but made no settlement, so that, on his death the lands descended to his eldest son.
The eldest son brought a bill in equity founded on his father's marriage-articles to have land purchased out of the personal estate of the father of the value of £ 200 a year and settled to the uses in the marriage-articles. But for the doctrine of *performance* the man would get both.

II. The cases in which the questions of Performance arise fall into classes:
(i) Where there is a covenant to purchase and settle lands, and a . purchase is in fact made.
(ii) Where there is a covenant to leave personality to an individual arid the covenanter dies intestate and the property thereby comes in fact to that individual.

III. Cases arising under the First Class
(i) (i) Illus. already given.
Points to be noted.
(i) Where the lands purchased are of less value than, the lands covenanted for, they will be considered as purchased in part performance of
the contract.,
(ii) Where the covenant points to a future purchase of lands, lands of which the covenantor is already ceased at the time of the covenant, are not to be taken in part performance:
(iii) Property of a different nature from that covenanted to be purchased by the covenantor, is not subject to the doctrine of Performance.

IV. Cases that fall under the second class
(i) Covenant is to leave certain money.
A covenanted previously to his marriage to leave to his wife £620. He married and died intestate. His wife's share under the intestacy was less than £620.
The wife sued for the performance of the covenant. The question was, having received £ 620 on intestacy, was it not a performance of the covenant. It was *held* that it was, so that the widow could not claim her share on intestacy and £ 620 over and above as a debt under the

covenant.
(2) In this case, the covenant was wholly performed. But even if the amount received was less than the amount due under the covenant, the doctrine of performance would apply and the convenant would have been held to be performed *pro tanto. ,* (3) Two points to be noted :
(i) Where the covenantor's death occurs at or before the time when the obligation accrues, there is performance.
(ii) Where the covenantor's death occurs after the obligation has *accrued due,* there is no performance.

Satisfaction

I. *Problem.*—A is under an obligation to B. A makes a gift to B. The Question is : Is the gift to B to be taken as a gift or is the gift to B to be taken as satisfaction of A's obligation to B?
II. There is a similarity between satisfaction and performance. There are fundamental distinctions between the two.
(1) In performance, the act done is available for the discharge of the obligation, but is not related in specific terms to the obligee. In satisfaction, it is related to the obligee but not in discharge of the obligation.
(2) In performance, whether the covenant has been performed depends, not upon the intention but, upon whether that has been done which was agreed to be done. The question, whether a gift satisfies an obligation, depends upon the intention of the donor.
(3) If an obligation has been performed according to its terms, the obligor is discharged. If an obligor makes a gift by will in satisfaction of his liability, it rests with the obligee either to accept the gift or decline it. If he accepts it, he looses the right to enforce his obligation, if he declines it, he retains his original rights.
II. Intention is that, the gift is in satisfaction of the prior obligation.
III. Cases in which the question of satisfaction arises fall into two classes:—
(i) Cases in which the prior obligation arises from an act of bounty.
(ii) Cases in which the prior obligation is of the nature of a debt.
IV. Class of cases in which the prior obligation arises from an act of bounty.
In this class fall two kinds of cases— (A) Satisfaction of legacies by portion. (B) Satisfaction of portions by legacies.

(A) Satisfaction of legacies by portion

Portion—That part of a person's estate which is given or left to a child.
IlluS.:
A has three sons B, C, D. He makes a will and in that will gives a legacy to each of his sons. Subsequently to the making of his will, A makes an advancement of a certain sum of money.
2. Here, there is a legacy and afterwards a portion. Are they cumulative or are they alternative. Is the child which has got a portion also entitled to get the portion? Or is the claim for legacy satisfied by the subsequent portion given by the father?
3. The answer of equity is that, a child cannot get both, legacy and a portion. The claim for legacy shall be held to be satisfied by the subsequent grant of the portion. This is called the rule against *double portions.*
II. *Satisfaction of Portion by Legacies*
1. This is the converse of the first. In the first class of cases, there is first legacy then a portion. In the second, there is a portion first and then there is a legacy.
2. In the former case, the question was whether a legacy by will was satisfied by a subsequent portion, In this, the question is whether the obligation to give a portion is satisfied by a subsequent legacy.
3. The answer here is the same as in the former case. The same rule against double portion applies. So that a portion will be satisfied by a legacy.
4. When the will precedes the settlement, it is only necessary to read the settlement as if the person making the provision had said,"I mean this to be in lien of what I have given by my will".
But if the settlement precedes the will, the testator must be understood as saying,"I give this in lien of what I am already bound to give, if those to whom I am so bound, will accept it".
5. The same rule applies in the case of a portion followed by a portion.
II. *Limitations on the rule of double portions*
1. The rule does not apply :
(1) In the case of legacy and a portion—where the legacy is *expressed* to be given for a particular purpose and the portion subsequently advanced is for the same purpose.
(2) In the case of portion and legacy, and in the case of portion and portion—where the property is actually transferred to the child and then a provision is made either by way of a legacy or portion—in short it applies only where the first portion is only a debt.
(3) Where the person, who makes the provision is the parent or a

person *in loco parentis*— If, therefore, a person gives a legacy to a stranger and then makes a settlement on the stranger or *vice versa,* the stranger can take both, the rule against double portion does not apply to him:

(i) (i) An illegitimate child is a stranger;
(ii) (ii) a grand child is also a stranger:
(iii) a stranger cannot take advantage of the satisfaction of a child's share.

III. *Cases of two Legacies given by the same will or by a will and Codial.*

1. Question is whether the second Legacy is intended to be additional to the first or to be merely repetition.

2. The leading case is *Hooby vs. Hatton, 1 Bro. C. C. 390 N.* 3'. Two class of cases to be considered separately—

(1) Where the subject-matter of the legacy is a thing.
(2) Where the subject-matter of legacy is money.

4. *Where the subject-matter of the Legacy is a thing,* Rule :Where the same thing is given twice—not additional but repetition.

5. *Where the legacies are pecuniary legacies:*

(1) The rule varies according as the gifts are contained in the same instrument or in different instruments.

(2) Two pecuniary legacies in the *same* instrument.

Rule:

(i) (i) If equal— repetition.
(ii) (ii) If unequal—cumulative.

3. Two pecuniary legacies in *different* instrument. *Rule.*—They are cumulative.

Exception—-If same motive is expressed for both gifts and the *same* sums are given—then repetition.

B. Cases in which the prior obligation is of the nature of a debt.

1. 1.Cases may be divided into two classes—

(i) Satisfaction of debt by a Legacy.
(ii) Satisfaction of debt by a portion. (i) *Satisfaction of debt by a Legacy.*

(1) This case arises where a debtor, without taking notice of the debt be queathes a sum by way of legacy to his creditor. Question is : Is the legacy to be taken as satisfying the debt or is the creditor entitled to the legacy and also the debt?

(2) *Rule*—-That the legacy shall be taken as satisfying the debt.

(3) *Limitation on the Rule.*—The rule does not apply in the following cases—

(i) Where the legacy is of lesser amount than the debt—no satisfaction, even *protanto*.
(iii) (iii) Where the legacy is given upon a contingency.
(iv) (iv) (iii) Where the legacy is of an uncertain amount— *e.g.* residue. (iv) Where the time fixed for payment of the legacy is different from that at which the debt becomes due—so as to be equally advantageous to the creditor.
(v) Where the subject-matter of the legacy differs from the debt, *e.g.* land.
(ii) *Satisfaction of debt by Portion.*
(1) Such a case arises where the father becomes indebted to his child and then advances a portion to him in his life-time. The Question is : Can the child claim both—the debt as well as the portion? Or Is the debt satisfied by the portion?
(2) *Rule.*—Debt is satisfied by the portion.
(3) This rule is subject to the same limitations.
V. Difference between Performance and Satisfaction.

(Further notes are not available—ed.)

CHAPTER 2
THE DOMINION STATUS

1. The Statute of Westminster to some extent lays down and codifies the law which regulates the constitutional relationship of these parts of the British Empire which is known as the British Common wealth of Nations.
2. The Statute of Westminster applies to the Dominions and establishes for them what is called Dominion Status. Our inquiry will be directed to understand the meaning of Dominion Status. Before approaching the subject we must ask.

I. 1. What is a Dominion?
A Dominion is a colony which is declared to be a Dominion by the Statute of Westminster.
2. What is a Colony? A Colony is a British Possession other than U. K. and India.
3. What is a British Possession?
A British Possession is any part of the British Empire exclusive of the United Kingdom over which the King exercises sovereignty.
4. What is British Empire?

(British Empire)mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52A. Notes on Acts and Laws PART I.htm - _msocom_3 denotes the whole of the territories over which the King possesses sovereignty or exercise control akin to sovereignty. It includes therefore all the King's Dominions, over which he is sovereign, and the protectorates and Protected States whose foreign relations are controlled by the Crown.
It also includes the mandated territories.

II. What is Dominion Status?

1. The subject could be better under (stood)mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52A. Notes on Acts and Laws PART I.htm - _msocom_4 if we compare the system of Government inaugurated by the Statute of Westminster with the system of Government which was in operation before it came into force.
2. The system which was in operation was known as Responsible Government. We must therefore grasp as a first step the characteristics of Responsible Government.
3. Why Responsible Government came in some colonies and why it did not come in others?
4. The Government of a colony differed according to the nature of the colony.
5. Colonies fall into two classes :
(1) Colony by settlement
(2) Colony by Conquest or Cession.

(1) Colony by settlement

1. Thus in a colony by settlement there came up the inevitable conflict between an irresponsible executive and representative legislature, a conflict of mandates.
2. Responsible Government had to be introduced in these colonies by settlement in order to solve this conflict.
3. THE NATURE OF THE RESPONSIBLE GOVERNMENT.

The position of the King in relation to settled colonies differs from his position in relation to conquered colonies.
The King stands to possession acquired by settlement in a position analogous to his status in the United Kingdom. *10 App. Calls 6921(744).* He is possessed of the executive power and has authority to establish Courts of law, but not celesiastical Courts *[3 Moo. P. C. 115, 1865 : I Moo P.I.C.C 411, 1863].* But he cannot legislate, and if laws are to be passed. this must be done—
(1) by a legislative body of representative character on the analogy of the U.K.

(2) where this form of legislation would be difficult to carry out, parliamentary authority must be obtained authorising the establishment of a different form of Constitution.

(2) Colonies by Conquest

In these, the King possesses absolute power to establish such executive, legislative and judicial arrangements as he thinks fit, subject only to the condition that they do not contravene any Act of Parliament extending to all British Possession.

But this right is lost by the grant of a representative legislature unless it is expressly retained in whole or in part. If not so retained, power to legislature as to the Constitution or generally can only be recovered under the authority of an Act of Parliament.

1835 2 Kuapp. 130 (152) Jehson v/s Pura ; 1932 A. C. 260.

1. The Statute of Westminister applies to :

(1) The Dominion of Canada,
(2) The Commonwealth of Australia,
(3) The Dominion of New Zealand,
(4) The Union of South Africa,
(5) The Irish Free State,
(6) New Foundland.

2. This statute calls these colonies as Dominions and confers on them what is called Dominion Status.

3. These Colonies had Responsible Government before the Statute of Westminister.

What is the difference between Responsible Government and Dominion Status?

Mechanism of Responsible Government.—

(1) THE CLAIM BY THE COLONY TO COLONIAL AUTONOMY IN MATTERS WHICH AFFECTED THEM.

(2) THE CLAIM TO UNLIMITED SOVEREIGNTY BY THE IMPERIAL PARLIAMENT.

These two claims are contradictory. A self-governing colony is a contradiction in terms.

The solution of this question involved two questions :

(1) How was the division of authority to take place between the Colonial and Imperial Governments.

(2) How were the powers given to each were to be exercised by each.

The division proposed was not along the lines of imperial and colonial legislative competence.

All legislation was to be within colonial competence except what was

barred by the colonial laws, but some of it would be liable to veto by the Imperial Government not on the ground that it was beyond the competence of the colonial legislature, but it affected some Imperial interest.

The matters of Imperial concern were not reduced to writing by enumeration. The Imperial Government was free to decide whether any particular matter was or was not of Imperial concern.

The following provisions were a feature of the Constitution of these colonies:

(1) The appointment of the G. and G. G.mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52A. Notes on Acts and Laws PART I.htm - _msocom_5 by the Crown on the advise of the Imperial cabinet

(2) The Right of the G. G. to act otherwise than the advice of his ministers.

(3) The power of the Governor to Reserve Bill for the pleasure of the King on the advice of the Imperial Government.

(4) The Power of Disallowance by the King on the advice of the Imperial Government.

The terms of the Statute of Westminister

I. It frees the Dominion Legislature from the overriding effect of the laws made by the British Parliament:

(1) It abrogates the Colonial Laws Validity Act.

(2) It gives the Dominion Legislature to repeal any U. K. Act in so far as the same is the part of the Dominion.

II. It puts limitations upon the legislative sovereignty of the British Parliament:

(1) No Act of Parliament passed after December 11,1931 shall extend, or be deemed to extend to a Dominion as part of the law of that dominion unless it is expressly declared in the Act that the Dominion has requested and consented to the enactment thereof.

(2) Any alteration in the law touching the succession to the throne or the Royal Style and Titles requires the assent of the Parliaments of the Dominion as well as of the United Kingdom.

III. The Statute does not alter the other provisions :

(1) The appointment of Governor General.

(2) The Reservation of Bills.

(3) The Disallowance of Bills.

But a great change has taken place in the exercise of these powers.

Right of advice to the Crown.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52A. Notes on Acts and Laws PART I.htm - _msocom_6Dominion Status does not mean sovereignty,

* * * *

2. Constitution of the United Kingdom has been dealt with.

3. India will not be dealt with here. So also Protectorates and Mandated Territories.

4. Deal only with the Constitutional Organisation of the Colonies.

5. The Constitutional Organisation of the Colonies differs according to the mode of the acquisition of the Colony.

6. Two methods.—

(1) Settlement

(2) Conquest or Cession.

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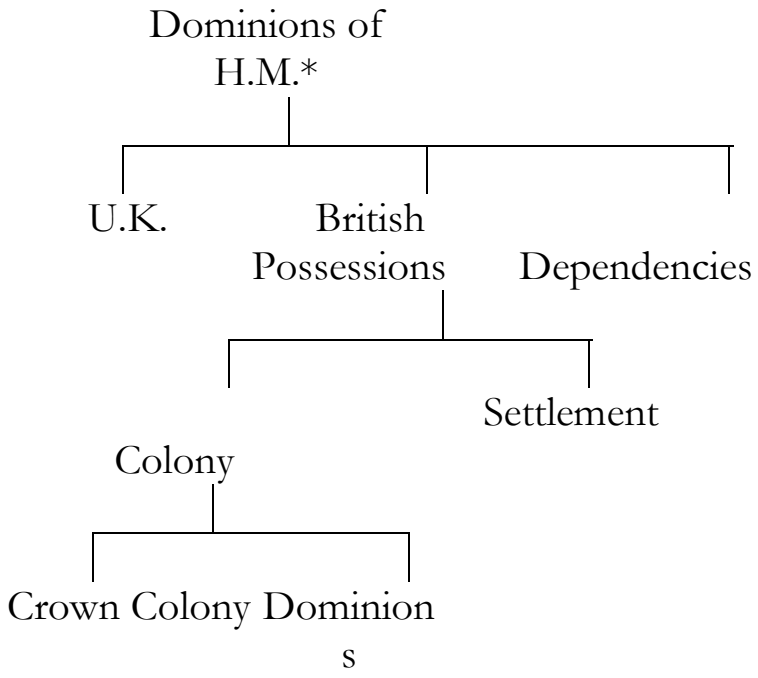

Dominions

1. The Dominion Office was established in 1925 to take over Dominions' business from the colonial office.

2. At first the Secretaryships for the Dominions and for the colonies

were held by the same minister, but in 1930 a separate S of Smk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52A. Notes on Acts and Laws PART I.htm - _msocom_7 for the Dominions was appointed.
3. The Dominion Office deals with business connected with the Dominions, Southern Rhodesia, the South African High Commission [i. e. Basutoland, Bechunaland, Protectorate Swaziland], Overseas settlement, and business relating to

Imperial Conferences. See Sir G. V. Fiddes—*The Dominions and Colonial Offices.*

Old Halsbury, 1. p. 303. 662. The dominions of the Crown include—
(a) The U. K. and any Colony, plantation, island, territory or settlement within H M's dominions and not within the U. K.

(Naturalization Act, 1870,33 Ne. c 14 s. 17)
(b) Places situated within the territory of a Prince, who is subject to the Crown of England in respect of such territory.
[Crow and Ramsay (1670) Vaugh. 281]
(c) British ships of war and other public vessels *(Parliament V/s. Belge. (1880) 5 P.D. 197.)*
(d) British Merchantmen on the high seas [1870 S. R. 6 Q. B. 31. *Marshall v/s Murgatroyd]* and probably even in the territorial waters of a foreign country [*Compare R v/s Carr and Wilson (1882) 1.0 Q.B.D.* 76].

Halsbury X. p. 503 para 856

1."British Possession"means any part of H M's dominions exclusive of the U.K.; and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed to be one British Possession. [Interpretation Act 1889 (52 *& 53 Vict.* c. *63) S. 18 (2)].*
2. A Colony is any part of H M's dominions exclusive of the British Islands and British India; and where, parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed one colony [*Ibid.* S.18(3)].
3. A British settlement means any British Possession which has not been acquired by cession or conquest and is not for the time being within the jurisdiction of the legislature of any British possession. [British Settlements Act, 1887 *(50-51 Vic. C.54)* S. 6].
4. The expression ' Dependencies ' is used to signify places which have not been formally annexed to the British dominions, and are therefore, strictly speaking foreign territories, but which are practically governed by Great Britain, and by her represented in any relations that may arise

towards other foreign countries. Most of them are"Protectorates"that is territories placed under the protection of the British sovereign, generally by treaty with the native rulers or chiefs. Cyprus and Weihaiwei are foreign territories held by Great Britain under special agreements with their respective sovereigns, but administered under the Foreign Jurisdiction Act, 1890 [53-54 Vic. C. 37], on the same general lines as protectorates. India including both the Native States and the strictly British territory of that Empire, is frequently spoken of as our great dependency.

5. Crown colonies are those in which the Crown retains complete control of the public officers carrying on the Government, and the legislative power is either delegated to the officer administrating the Government [S. S. Gibralter, Ashanti, Virgin Islands, St. Helena and Basutoland] or is exercised by a Legislative Council which is nominated by the Crown either entirely or partly the other part being elected. In these colonies, with seven exception, the Crown has reserved to itself the power of legislating by Order in Council.

Protectorates although not parts of H M's Dominions are administered in much the same manner as Crown colonies.

Dominions are those colonies which possess elective legislatures to which the executive is responsible, as in the U. K. the only officer appointed and controlled by the Crown being the Governor or G. G.

Halsbury X, p. 521

885. There is no statutory or authoritative definition of the term"protectorate"although it appears in two recent Statutes. Protectorates are not British territory in the strict sense ; but it is understood that no other civilised power will interfere in their affairs. They are administered under the provisions of orders in Council issued by virtue of powers conferred upon H. M. by the Foreign Jurisdiction Act, 1890"or otherwise vested in His Majesty"which latter phrase may be taken to be intended to bring in aid any exercise of the Royal prerogative that may be necessary to supplement H. M 's statutory powers.

Halsbury XIV, p. 420

For a recent treatment of the meaning of"dominions"see *R v/sCrewe 1910 S.K.B .576,607' ,622.*

Halsbury IX, p. 16

The authority of the King extends over all his subjects wherever they may be, and also over all foreigners who are within the realm. The jurisdiction of English Courts of Law, however, is limited, first, by the stipulations contained in the enactments by which the kingdoms of Scotland and Ireland were incorporated in the United Kingdom ; Secondly by the Charter of Justice, letters patent and statutes affecting particular colonies ; and thirdly, by the consideration that no English Court will decide any question where it has not the power to enforce its decree.

The jurisdiction of each particular Court is that which the King has delegated to it, and this delegation has been complete, for the King has distributed his whole power of prosecution to diverse Courts of Justice.

Development of Dominion Status

1. There is first the claim to unlimited sovereignty by the Imperial Parliament and Government stated in its logical perfection by Lord John Russell.
2. There is second the claim to colonial autonomy an effective demand that, in matters which interested them, the colonies should manage their own affairs.
3. There is third, the contradiction between the two. A self-governing dependency is a contradiction in terms.

Solution

On the one hand, the Imperial Parliament granted to a colony a sphere of activity in which the colonial legislature, executive and judiciary had authority to exercise governmental power. In this sphere the colony was sovereign.

On the other hand, the Imperial Parliament had the authority and full legal power, as and when it saw fit, to withdraw or limit the rights of the Colony to exercise power within a prescribed sphere, either by repealing or amending the Constituent Act of the Colony or by passing an Imperial Act explicitly applying to some subject within the jurisdiction of the Colony.

Two Questions: (1) How was the division of authority to take place between the Colonial and Imperial authority? (2) The method of exercising the powers given to each.

(1) The division proposed was not along the lines of Imperial and Colonial legislative competence.

All legislation was to be within colonial competence, but some of it

would be liable to veto by the Imperial authority, not on the ground that it was beyond the competence of the colonial legislature, but because it affected some specified Imperial interest.
(2) It was advocated that the possible matters of Imperial concern should be reduced to writing by enumeration of those matters which were deemed of Imperial concern. The British Government refused to bind itself specifically in this way [and the provisions were not allowed to stand in the Australian Bills].
(3) How were the activities of the Colonial and Imperial authorities to be adjusted and co-ordinated so that confusion and overlapping and conflict might be avoided? The solution was found in the following :
(1) The Powers of Reservations.
(2) The Powers of Disallowance.
(3) The appointment of the Governor General.
(4) The nature of responsible Government in the colonies. (5) Right of the British Government to tender advice to the Crown. (6) Colonial Laws Validity Act of 1865.

(4) The nature of responsible Government in the Colonies.
The executive Government was vested in the Governor, who was empowered to appoint to his executive council those persons whom he thought fit, in addition to those,if any, who by law were members of it. While in one or two cases it was stipulated in the Constituent statute that ministers were to be members of the executive council or that members of the executive council were to be, or were within a given period, to become members of one or other house of the legislature. In no case is the executive council required bylaw to be composed of ministers and ministers alone.
The executive council includes but does not necessarily consist only of ministers. In certain cases there is no legal necessity for members of .the executive council to be members of either house of legislature.
The Act prescribed a sphere of activity within which the colonial legislature had power to make laws for the peace, order and good Government of the colony. Thus far the statute.
The instructions to the Governor empowered him to govern with an executive council whose advice he might disregard if he thought fit.
Responsible Government was based, not upon a statutory basis, but on the faith of the Crown.

Character of InterImperial Relations

In the Commonwealth Merchant Shipping Agreement, the Dominions

appear in a position of complete equality, comparable with that of contracting states, and differences arising out of the agreement would seem suitable for reference to the inter-Imperial tribunal contemplated by the Imperial Conference 1930. [Cmd. 3994, Part VII].

But the relations are not governed by International Law. This was asserted clearly in 1924, when the Irish Free State registered with the Secretariat of the Leagus of Nations, the Articles of agreement for a Treaty of December 6, 1921 on the score that it was a treaty within the meaning of Article 18 of the covenant of the League of Nations, and the British Government insisted that neither the covenant nor the conventions concluded under League auspices were intended to govern relations *inter se* of parts of the Commonwealth [Keeth. R. G. II. 884, 885.]

The Imperial Conference 1926, took this view, holding that it had been determined in this sense by the Legal Committee of the Arms Traffic Conference of 1925 [Cmd. 2768 p. 23.]

The Dominions save the Irish Free State as well as the United Kingdom, excluded inter-imperial disputes from those to be submitted to the Permanent Court of International Justice when accepting the optional clauses of the Statute of the Court in 1929 [Cmd. 3452 p. 415] and similarly when accepting the General Act of 1928 for the Pacific Settlement of International disputes [Cmd. 3930 pp. 14, 15].

The inter-imperial preferences are a domestic issue, on which most favoured nation clauses of treaties with foreign states do not operate.

Allegiance

The bond of a common allegiance involving a common status as British subjects, and this bond is one which cannot be severed by the unilateral action of any part as follows from the formal declaration in the Preamble to the Statute of Westminister that inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations and as they are united by a Common allegiance, any alteration in the law touching the succession to the throne or the Royal style and titles, requires the assent of the Parliaments of the Dominions as well as of the United Kingdom.

While the Preamble does not make law, it expresses a convention of the constitution which would render it very difficult for the Crown or its representative to assent to a bill passed by any single part which violated this principle of the unity of the British Commonwealth of Nations on a basis of equality of its status.

Note.— In approving the report of the Conference of 1929, the Union Parliament recorded that the proposed Preamble"shall not be taken as abrogating from the right of any member of the British Commonwealth of Nations to withdraw therefrom".

Journal of Parliament of Empire XI. 797 800

But this view has never been formally adopted by the Imperial Conference.

The equality of status of the Dominions and the U. K. necessitates the consideration of a mode of deciding inter-imperial disputes [cmd.3479 p. 41].

For this purpose, the imperial conference 1930 decided that such disputes should be dealt with along the line of *ad hoc* arbitration, on a voluntary basis. The procedure is to be limited to differences between Government and only such as are justifiable.

The Tribunal is to be constituted *ad hoc* for each dispute ; there are to be five members, none drawn from outside the British Commonwealth of Nations.

Each party shall select one from the States members of the Commonwealth of Nations, not parties to the dispute, being persons who have held or hold high judicial office or are distinguished jurists and one with complete freedom of choice. The chairman shall be chosen by these four assessors may be employed if the parties desire-expenses to be borne equally. Each party shall bear those of presenting its case.

External Sovereignty of the Dominions

They have autonomy. But not status. (They Have)mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52A. Notes on Acts and Laws PART I.htm - _msocom_8 ceremonial status, but not *legal , de facto* but *not de jure*

For many purposes the Dominions are endowed with a considerable amount of international personality independent of the United Kingdom. But the Common allegiance and the Common Crown interfere with the idea of each Dominion being a distinct sovereign state connected merely in a personal union.

The issue as to the possibility of neutrality in war has been discussed, but only claimed by the Nationalist Government in South Africa. [Kerth DGII 867 868 71, 72, *Sovereignty of Dominions of D. 300-304 463-471].*

It is open to serious doubt if the King could declare war without automatically involving the Dominions in the war.

The implications of Dominion Status

1. Does it imply sovereign status?
They have the functions of a sovereign state. But they have not the status of sovereign states.
2. 2. Does it imply the right to secede?

* * * *

Law Quarterly Review
Vol. VI.
Right of aliens to enter British territory, p. 27
Subject—compulsion of, to leave the Realm p. 388
Citizenship and allegiance
Vol. XVII p. 270
Vol. XVIII p. 49
Law of citizenship in the United States
by
Prentiss Webster
Albany :1891

Webster

"The distinction between citizens proper, that is, the constituent members of the political sovereignty, and subjects of that sovereignty who are not, therefore, citizens is recognised in the best authorities of the public law". This distinction is true. The further question of who are and who are not citizens has its difficulties. Accept the definition of citizenship to be the enjoyment of equal rights and privileges at home and equal protection abroad, and consider the question from this standpoint, from which alone it should be treated, for we have no law in the U.S. A. which divides our citizens into classes or makes any difference whatever between them. We then discover the importance that the equal rights of citizens when at home should maintain when abroad, because questions as to citizenship are determined by municipal law in subordination to the law of Nations. Therefore, the value of citizenship should not be underestimated."

Webster
View of Roman Law

1. It was by man that the body politic was organised, and in entering the Organisation with his fellow men, man followed the exercise of his natural rights and became an ingredient of the society of which he, with

others, became members.
2. By the Organisation formed as of man and by man, man was so incorporated into the body politic that he could not depart.
3. Although in the early days of Rome, they alone could call themselves Roman citizens who were freeborn and born in Rome, yet very soon thereafter, foreigners were admitted to citizenship by authority of the legislative body. Later, as Rome advanced in her conquest of the neighbouring states, to these states the legislative authorities conferred charters by which the citizens of such states were admitted to Roman citizenship and their former citizenship was abolished.
4. Cicero lays down the rule,"that every man ought to be able to retain or renounce his rights of membership of a society,"and further adds,"that this is the firmest foundation of liberty."Under this the Romans received all who came and forced none to remain with them.
5. This view of the Roman Law was based upon natural law.

Effect of Invasion

6. After the downfall of Rome this principle of natural law gave way to the principles of feudalism as introduced by the invaders.
7. The invaders having conquered both the people and their lands, organised their Government, as being in a prince who was all powerful over his subjects. The relation as between man and man and his relation to the Government was forced and involuntary. The natural rights of man as being in man were disavowed.

PART II

Notes on Acts and Laws

Contents

Nature that the law permits its Specific Performance
(ii) Where the Plaintiff is a person in whose favour Specific Performance can be granted.

(iii) Where the Defendant is a person against whom Specific Performance might be granted.
The question is : Is the Court bound to grant Specific Relief in such cases?
The answer to this question is contained in Sec. 22.
(A) Section 22 lays down general rules—(1) It says that Specific Relief is discretionary. The Court may grant it or may refuse it. The Court is not bound to grant it merely because it is lawful.
(2) The discretion of the Court is not arbitrary, sound and reasonable, guided by judicial principles.
(B) Section 22 also specifies cases in which Court may exercise discretion not to grant Specific Performance and cases in which Court may exercise discretion to grant Specific Performance.

Cases in which Court may exercise discretion not to grant Specific Performance
(i) Where Specific Performance would give unfair advantage over the Defendant.
(ii) Where Specific Performance would involve some hardship on the Defendant which he did not foresee and non-performance would not involve such hardship on the Plaintiff.

Cases in which Court may exercise discretion to grant Specific Performance
Where the Plaintiff has done substantial acts or suffered losses in consequence of a contract capable of Specific Performance.

Damages and Specific Performance
Sections 19,20,29.
Two remedies for breach. Are the mutually exclusive or are they complimentary? Does one bar the other?
These are question which are considered in Sections 19, 20, 29. The rules contained in these three may be summarised as below:
19. (i) In the same suit, a Plaintiff can ask for both in addition or in substitution.
(iii) In a suit where Court decides not to grant Specific Performance Court can grant Compensation to Plaintiff if entitled.
(iv) If one suit Court may grant compensation in addition to Specific Performance if it comes to the conclusion to Specific Performance is not enough.
20. (v) The fact that liquidated damages have been agreed upon is no bar to

Specific Performance.
29. (vi) If suit for Specific Performance is decreed, it will be a bar to a suit for damages.

PART I
The Law of Specific Relief
INTRODUCTORY

1. The enactment which defines Specific Relief.

1. The law as to specific relief is contained in the Specific Relief Act I of 1877.
2. Before the passing of the Specific Relief Act the law as to Specific Relief was contained in Sections 15 and 192 of the Civil Procedure Code (Act VIII) of 1859.
3. The law was fragmentary. Section 15 dealt with declaratory decrees and Section 192 dealt with Specific performance of contracts.
4. The Act aims to *define* and *amend* the law relating to Specific Relief obtainable in Civil Court.

II. The nature of the Law of Specific Relief

1. Laws fall into *three* categories.—
(a) (a) Those which define Rights.
(b) (b) Those which define Remedies.
(c) (c) Those which define Procedure.
2.2. *Illustrations.*

(Space left blank—ed.)

3. The Law of Specific Relief belongs to the second category. It is a law which deals with Remedies.
3.3. The term '*relief* is only another word for remedy which a Court is allowed by law to grant to suitors.

III. What is meant by Specific Relief?

1. Specific Relief is one kind of remedy recognised by law. Its nature can be best understood by distinguishing the different remedies which the law allows to a person whose right has been invaded.
2. A right to be real must have a remedy. No right can give protection if there is no remedy provided for its vindication. Law therefore invariably provides a remedy for a breach of a right.
3. The general remedy provided by law for a breach of a right is *monetary repairation* called compensation or damages.
4. This remedy of money compensation is not an adequate remedy in *all* cases. The loss of some things can be compensated by payment of money. The loss of others cannot be compensated by money. Their loss can be

made good by the *return* of the very *same* article. Similarly, the refusal to perform an obligation may be compensated by money. In other cases, the only adequate remedy is to compel the performance of the very *same* obligation.

5. Thus there are two kinds of remedies provided by law :

(a) those under which the suitor is granted the *very same* things to which he is entitled, by virtue of the right he has acquired against his opponent; and

(b) those under which the suitor is granted not the very same thing to which he was entitled, but money compensation or damages in lieu thereof.

6. Specific Relief is the name given to the first kind of remedy.

7. The relief is called specific because it is relief in *specie,* i. e. in terms of the very thing to which a suitor is entitled.

IV. What Specific Reliefs are provided for in the Specific Relief Act.

1. The forms of Specific Reliefs provided for in the Specific Relief Act form under four divisions :

(1) Taking possession of property and delivering it to the claimant who is out of possession.

(2) Requiring Performance of Contract.

(3) Compelling the Performance of a Statutory Duty.

(4) Preventing the doing of a wrong.

2. The subdivisions of the 4th category are :

(i)	(i)	Rectification of an instrument.
(ii)	(ii)	Rescission of an instrument.
(iii)	(iii)	Cancellation of an instrument.
(iv)	(iv)	Declaration of status.
(v)	(v)	Receivers—appointment of—
(vi)	(vi)	Injunctions.

V. Other Laws defining Specific Reliefs.

1. These are not the only specific remedies administered by courts in India. There are other specific remedies recognised by the Indian Law and which are enforced by courts in India.

2. These specific remedies outside the Specific Relief Act are:

(i) Taking an account of the property of a deceased person and administering the same.

(ii) Taking accounts of a trust and administering the trust property.

(iii) The foreclosure of the right to redeem or sale of the mortgaged property.

(iv) Redemption and re-conveyance of mortgaged property.
(v) Dissolution of partnership, taking partnership accounts, realising assets ; discharging debts of partnership, etc.
3. We are not concerned with these.

PART II

Consideration of the Different Kinds of Specific Reliefs Recognised by the Act.

Division I
Recovery of possession of Property Sections 8, 9, 10 and 11
1. Recovery of Possession of immovable property
—Sections 8,9.
2. Recovery of Possession of movable property
—Sections 10, II.

Recovery of Possession of Immovable Property.

1. The Question is—
When can a person, who has lost possession of immovable property and sues to recovery possession thereof—be granted possession thereof instead of damages or compensation for the loss of possession.
2. The emphasis is on the nature of the relief—i.e. the recovery of the specific piece of property of which possession is lost. The relief by way of damages or compensation is always open under the general law. Question is when can an injured person insist upon specific relief for the recovery of property.
3. The cases in which a person has lost possession of immovable property fall under two classes.—
(i) The case of a person who is entitled to possession but who has lost possession.
(ii) The case of a person who had possession but who has lost possession.
4. The difference consists in *being entitled to possession* and *being in possession.*
5. These two cases are dealt with in Sections 8 and 9. Both provide that in either case the Plaintiff shall be entitled to Specific Relief by way of recovery of property.
6. Requirements of Section 8.
(i) Prove that you have a title to possession and you will succeed in recovering possession by way of specific relief.
7. Requirements of Section 9.
1. Prove that you were in possession with in six months prior to the date of suit.
2. Prove that you were dispossessed *without your consent or otherwise* than in

due course of law.

A	*in possession*	*is dispossessed by*	B
I. a with title	"	is "	without title
II. a without title	"	is "	with title
III. a without title	"	is "	without title

1. In *all* three cases A can recover possession if he brings suit under Section 9 i.e. within six months—irrespective of the question of title.
2. If he brings a suit after six months, he must rely on title so that A can recover possession in
(i) (i) —because he has a title.
(iii) —because he has a possessory title.
But cannot recover in (ii) because B has title and A has not.

Who can maintain a suit under Section 10

1. According to Section 10, only a person *entitled to* the possession of the suit property can sue.
2. Meaning of"entitled to possession"
3.Title to possession may arise
(i) as a result of ownership or
(ii) independently of ownership, as a temporary or special right to present possession
4. Title to possession as a result of ownership.
(i) Ownership may be bare legal ownership or it may be legal ownership coupled with beneficial interest.
(ii) It is not necessary that a legal owner must have also a beneficial interest in the properly to have a right to maintain a suit under Section 10.
(iii) This is made explicit in Explanation I, where a trustee is permitted to sue for the possession of the trust properly although he has no beneficial interest in it.
5. Title to possession independently of ownership
1. Title to possession independently of ownership may arise in two ways.—
(i) (i) By the act of owner.
(ii) (ii) (ii) Otherwise than by the act of the owner.
(i) TITLE TO POSSESSION BY THE ACT OF THE OWNER
(i) The owner may by his own act create in another person a right to the possession of the thing which belongs to him as *owner*.
(ii) Illustrations of such a right to possession are to be found in Bailment and lien.
(1) (1) Simple bailment cover the cases of.—
(i) loan

(ii) custody
(iii) carriage
(iv) agency.
(2) Other Bailments.
1. Pawn
2. Hire.
2. Difference between Simple Bailment and other Bailments of Pawn or Hire.-
(i) In Simple Bailment the owner (Bailer) has a right to possession and the Bailee has legal possession. The Bailee being entitled to possession can maintain a suit to recover possession. The Bailer having a right to possession can also maintain a suit to recover possession against any person other than a Bailee.
(ii) In other Bailments of Pawn or Hire—The Bailer has no right to possession. The right to possession is vested in the Pawnee or Hirer during the continuance of the Bailment and it is only the Bailee (Pawnee or Hirer) who can maintain a suit for the recovery of possession.
3. Lien is an illustration of a right to possession arising out of the act of the owner.—
(1) Lien is a right to possession of a thing which arises out of debt due by the owner.
(2) The right to possession of the owner is thus temporarily vested in another.
4. All that is necessary to maintain a suit is a right to present possession.—
(i) The right of present possession may arise out of ownership or may not.
(ii) Right to present possession may be special or temporary.
(ii) RIGHT TO POSSESSION OTHERWISE THAN BY THE ACT OF THE OWNER.—
(1) The founder of lost goods has a right to possession.
(2) It is not the result of the act of the owner.
(3) But it is good against all the world except the true owner.

II. Against whom can such a suit be maintained

1. A suit under Section 10 can be maintained against any one and can be maintained even against the true owner.
2. All that is necessary is that the Plaintiff must be entitled to possession.

Section 11. Movable Property

1. Q. 1.—Who can maintain a suit under Section 11.
A.—The person entitled to *immediate possession.*

2. Q. 2.—Against whom can such a suit be maintained?
A.—Against any person if he is not owner.
The Defendant must not be the owner. If he is, then Section 10 would apply.
3. Q. 3.—In what case will there be specific relief by way of recovery of possession?
A.—(i) Where the person who holds the thing is the agent or trustee of the claimant.
(ii) Where compensation for money would not be adequate compensation to the claimant for the loss.
(iii) Where it is extremely difficult to ascertain actual damage caused by its loss.
(iv) Where the possession of the person is the result of a wrongful transfer from the claimant.

Specific Relief regarding Possession of Property

They are dealt with in Sections 8—II.
Section 8. Recovery of specific immovable property by a person entitled to the possession thereof.
Section 9. Recovery of possession of specific immovable property by a person who is dispossessed.
Section 10. Recovery of possession of specific movable property by a person *entitled to its possession.* (1) By reason of ownership (2) By reason of temporary or special rights (Trustee) Bailment Pawn.
Section II. Recovery of possession of Specific immovable property by a person who is entitled to its *immediate possession.* This applies when the person having possession is not owner

What is meant by possession in Law?

Legal possession is a compound of two ingredients : *Corpus and animus domini.*
Note:—
(i) Legal Possession does not involve the element of title or right. Legal Possession is wholly independent of right or title. Legal Possession may be *lawful* or *unlawful.*
If a possessor acquired his *de facto* possession by a means of acquisition recognised by the Law *(Justis fitulus)* he has a lawful possession ; if he did not so acquire it (as in the case of a thief) he has legal possession, but it is an unlawful one.
(ii) *Legal Possession* confers more than a personal right to be protected against wrong-doers : it confers a qualified *right* to possess, a right in the nature of property, which is valid against every one, who cannot show a

prior and-better title.

There are two elements in legal possession. (i) Corpus, i.e. the physical relation. (ii) Animus, i. e. the mental relation.

Corpus or physical relation does not mean physical contact only. It also includes physical contact resumable at pleasure.

The essence of corpus is the power, to exclude others from the use of a thing, i. e. an effective occupation or control according to the nature of the thing possessed.

Animus is the intention of exercising such power of dealing with a thing at pleasure and excluding others—*animus domini.*

Three forms of animus

The mental attitude of the physical possessor in regard to the object of his possession may assume three degrees.—

First.—His intention may be merely to protect the thing. There is no assertion of right—Servant's possession of masters goods.

Second.—Intention to control for certain limited purposes —e. g. tenant—intention to exclude every one except the owner.

Thirdly.—Intention amounting to a denial of the right of every other person—This is the real *animus domini.*

Distinction between Possession and Trespass

1. What the plaintiff is to prove in such cases is possession of the disputed property and not mere isolated acts of trespass over that property. He must prove—

(i) That he exercised acts which amounted to dominion, the nature of these acts of dominion varies with the nature of the property.

(ii) That the act of dominion was exclusive.

2. If the occupation of the piff., as indicated by those acts, has been peaceable and uninterrupted and has extended over a sufficient length of time, the inference may properly be drawn that the plaintiff was in possession.

Objects of Section 8 and 9.

(i) Section 8 of the Act provides that the person entitled to the possession of specific immovable property may recover it in the manner prescribed by the C. P. C., i.e., by a suit for ejectment on the *basis of title.*

(ii) Section 9 gives a summary remedy to a person, who has, without his consent been dispossessed of immovable property otherwise than *in due course of Law* for recovery of possession without *establishing title.*

Section 9.

This Section deals with the subject of unlawful dispossession, and gives to the person dispossessed the alternative of two remedies.—

(i) He may simply prove the fact of his unlawful dispossession, in a suit instituted by him within six months thereof, recover possession of the property. The question of his *title* to the property is quite immaterial.
(ii) He may recover possession by relying on his title in a suit brought by him for that purpose. Here his success depends upon his proof of title.
The former remedy is called remedy by way of a possessory suit and is enacted in Section 9. The latter is the ordinary remedy of a suit based on title and is embodied in Section 8.

Nature and object of Section 9.

(i) To prevent people from taking the law into their own hands, however good their title may be.
(ii) To prevent the shifting of the *burden of proof owing* to dispossession—-Possession being *prima facie* evidence of title.
Anterior possession *per se* constitutes a perfect title to property as between the *dispossessed* and the *dispossessor,* in a suit under Section 9, i. e. within six months of the dispossession.
Question.—What is the effect of anterior possession in a suit for possession by a person, who is dispossessed after 6 months have elapsed and a suit under Section 9 is barred?
The following propositions have been judicially established :—
(i) Possession for a period of sixty years and upwards is sufficient to create a title in the possessor which no one can question.—8 D.R. 386.

(ii) Adverse possession for l2 years under article l42 is itself title even against the rightful owner himself.

Consequently, where in a suit for possession, a plea of adverse possession during the prescribed period of limitation is set up by the Defdt. the question of limitation becomes a question of title, and the Plff. must furnish *prima fade* proof of subsisting title at the dale of his suit, before the Defdt. is required to establish his adverse possession.

(iii) Prior possession, however short, is itself a title against a *mere wrong-doer* and a bare plea of anterior possession, and dispossession, is in fact a good ground for recovery of possession,

(1) Where the dispossessor can Drove no title, or
(2) Where neither party can prove a title.

Statement of the Position

A in Possession		**Is dispossessed by**	**B**	
(a) with tit	**(b) without tit**		**(a) withou**	**(b) with**

title title

1. Suit brought within 6 months.-

(a) and (a) |

(b) and (b) | A can recover possession under Section 9 irrespective of

(b) and (a) | title.

II. In a suit brought after six months.-

(a) and (a) | A can recover because the title is in A.
(b) and (b) | A cannot recover because the title is in B.
(b) and (a) | A can recover because A's anterior possession.

Entitled to Possession

A right to possession exists either.—
(i) (i) as a part of ownership or
(ii) (ii) independently of ownership, as a temporary or special right.
These special rights arise either.—
(i) (i) by the act of the owner or,
(ii) (ii) otherwise than by the act of the owner.

I. I. By act of the owner

(1) Bailment and (2) Lien
Bailment is (1) simple and (2) special of *Pawn* and *Hire*
(i) *Simple Bailments* e. g. loan, custody, carriage and agency.
In simple Bailments, the Bailor has a *right to Possession* and the Bailee has legal possession.
A is Bailor and B is Bailee. Both can recover possession against C. A can recover possession as against B.
(ii) *Special Bailment.*— Pawn and Hire

Bailor has no right to possession during the continuance of the bailment and he only can recover possession.
Lien. Arises out of debt—the Vendor having the right to possession of the thing sold, until the purchaser has paid the purchase money.

II. Right to possession otherwise than by act of owner

Finder of lost goods—entitled to possession as against all the world except the owner.

PART II
DIVISION II
Performance of Contract

Specific Performance of a Contract is"its actual execution according to its stipulations and terms; and is contrasted with damages or compensation for the non-execution of the contract.
It is a species of Specific Relief, afforded by ordering a party to *do* the very act which he is under an obligation *ex-contractor* to do.

Specific Performance of a Contract

Sections 12 and 21 deal with Specific Performance of a Contract.
Section 21.—Defines contracts which *cannot* be specifically enforced.
Section 12.—Defines contracts which *may* be specifically enforced.
Section 27.—There are eight sorts of contracts which *are not* specifically enforceable.—
(i) Contracts for the non-performance of which money compensation is an adequate relief.
(ii) Contracts (i) running into minute details.
(ii) dependent on personal qualifications or volition of parties.
(iii) is such that Court cannot enforce Specific Performance of its material terms.
(iii) Contracts the terms of which the Court cannot find with reasonable certainty—e. g. necessary appliances.
(iv) Contracts which in its nature is revocable e. g. Partnership without duration.
(v) Contracts by trustees in excess of their powers, or in breach of their trust.
(vi) Contracts by company in excess of its powers.
(vii) Contracts the performance of which involves the performance of a continuous duty extending over a longer period than 3 years from its date.
(viii) Contracts material part of the subject-matter supposed by both to exist has ceased to exist.

(ix) Contracts to refer a controversy to arbitration.

Note. Practically Specific Performance because no right of suit is given.

Specific Performance of Contracts

Section 12

1. There are four cases in which Specific Performance may be enforced.

(i) (i) Where act promised is in performance of a trust.

(ii) (ii) Where there is no standard to ascertain actual damage.

(iii) (iii) Damages, no adequate relief. (iv) Compensation for non-performance cannot be got.

Contract

The first question to be determined by the Court in a suit for Specific Performance of an agreement is, whether the agreement in question is a contract or not. Section 4 (a)—right to relief unless agreement is a contract.

The following agreements are not contracts because they are not enforceable and are therefore excluded:—

(i) Incomplete agreements—Parties not gone beyond the stage of negotiations; (ii) Agreements which are void.

(iii) Contingent agreement—until the contingency has applied . . . should be"arisen".

Voidable contracts are not excluded.

There must always be a contract before the Court which has been unperformed.

Mutuality—The remedy by way of specific performance is *mutual,* i. e., the vendor may bring his action in all cases where the purchaser can be sure for specific performance.

This principle of mutuality applies both in the case of immovables and movable.

Doctrine of mutuality— This means, that at the time of making of the contract, there must have been consideration on both sides or promises mutually enforceable by the parties. Hence specific of performance of a gratuitous promise under Seal will not be granted nor can an infant enforce a contract by this remedy. His promise is not enforceable against himself and it is a general principle of Courts of equity to interfere, only where the remedy is mutual.

Section 13

Specific performance of con tract and impossibility of performance.
Section 56 of the Contract Act.
Section 56 clause 2 enacts a general rule. It lays down when a contract becomes void.
This rule covers every ground of impossibility and is based on the assumption, that there is, in all cases of contract, an implied condition that performance shall be possible.
Impossibility in relation to contract.
Impossibility
(1) at the time or (2) subsequently

Physically or legally impossible.	Or subject matter of contract not existent.

Subsequent Impossibility
Whether a party can be relieved upon discovery, subsequent impossibility depends upon—
(i) Whether the contract is conditional or unconditional.
(I) If unconditional— must perform
(II) If conditional— on three circumstances
(i) Continuing legality.
(ii) Conditional by express terms—
(iii) Conditional by implication— continued existence of the subject-matter of the thing in Sec. 56 Contract Act.— subsequent in possibility— the Contract is *void.*
might on two grounds.—
(i) (i) The thing agreed to is physically or legally impossible.
(ii) (ii) The subject matter of the contract is non-existent.
Such Impossibility might be either.— (i) *Initial or subsequent.*
If impossible, the contract is void and no question of Specific Performance arises whether the impossibility is initial or subsequent.
Section 13 of the Specific Relief Act establishes an exception to Section 56 of the Contract Act in respect of one species of impossibility i. e. *impossibility by reason of non-existence of the subject-matter.*
Section 13 says that Specific Performance of a contract may be enforced even though the subject-matter is partly destroyed.
Sale of a house— Destruction by cyclone— purchaser may be compelled to perform.
Section 13 enacts an exception

It deals with the case where a *portion* of the subject matter ceases to exist.
The rule shortly expressed.—
Because A, owing to special inevitable circumstances, is unable to perform his promise, it is no reason why B should not perform his, especially as he might have protected himself by making the performance of his promise conditional upon performance by A. Having made an unqualified promise he must stand by it.

Specific Performance of a Part of a Contract

Can the Court decree the performance of a part of the contract? This question is dealt-with in Section 14-17.
Section17 enacts a general rule. It lays that the Court will not, as a general rule, compel specific performance of a Contract, unless it can execute the whole contract. Specific performance must be of the whole or nothing.
Sections 14, 15, 16 form exceptions to the rule.
Exceptions : The promises undertaken— may be divisible or indivisible.
1. *Divisible promises* i. e. promises— one part stands on a separate and independent footing from another part. If the former can and might be specifically performed it will be so enforced, although the latter cannot or ought not to be specifically enforced— Section 16.
II. *Indivisible promisers.*— The part which cannot be performed may— (i) Admit of compensation by money or, (ii) It may not. (A) Admits of compensation— Two cases
It may bear—
(i) A small proportion to the whole undertaking, (ii) A large proportion to the whole undertaking.
If— (i) it bears *a small proportion,* then a party sue for specific performance of either part and for damages for non-performance of the balance— Section 14.
If—(ii) *itbesrs a large proportion, then* the promise may sue for Specific Performance of the remaining part, if he relinquishes all claim to further performance and all right to damages.
(B) Part which cannot be performed, does not admit of compensation
Then the promisee may sue for Specific Performance of the remaining part, if he relinquishes all claim to further performance and all right to damages— Section 15.
Illustration

A contracts to sell to B an estate with a house and garden for 1 lakh. The garden is important for the enjoyment of the house. It turns out that A is unable to convey the garden.
Can B obtain specific performance to the contract?—Yes, if B is willing to pay the price agreed upon and to take the estate and house without garden, waiving all rights to compensation either for the deficiency or for loss sustained by him through A's neglect or default.
There are *thus* four exceptions to the rule.
I. Where parts are divisible— Specific Performance can be decreed of one part though not of all parts— Section 16.
2. Where parts being in divisible part which *cannot* be performed admits of compensation and bears a small proportion to the whole, the party may sue for Specific Performance — Section 14.
.3. Where parts being indivisible, part which *cannot* be performed admits of compensation and bears a large proportion to the whole undertaking, the promisee may sue for Specific Performance of the remaining i. e. of the part which can be performed provided he relinquishes all claim to further performance and all right to damages— Section 15.
4. Where parts being indivisible, the part which cannot be performed does not admit of compensation and bears a large Specific Performance of the part which can be performed may be decreed within the terms mentioned in Section 15.

Specific Performance of a Contract

Where the Vendor or Lessor has an Imperfect Title
1. The rule as to this is contained in Section 18.This Section deals with four clauses:—
(i) Where Vendor/Lessor has acquired good title *after* the contract. (ii) Where procuring of the consent of other persons is necessary. (iii) Where encumbered property is sold as though it was unencumbered.
(iv) Where *deposit* has been paid and the suit for Specific Performance has been dismissed.
Clause (a).—Is based on the undeniable proposition that when a person enters into a contract without the power of performing that contract, and subsequently acquires the power of performing that contract, he is bound to do so.
Illus. An heir apparent, who contracts to sell the property to which he is heir, will be compelled to specifically perform such contract if and when he succeeds to the property.
Whatever interest the seller acquires in the property subsequently to

the contract, he will be compelled to convey to the purchaser.

Clause (b).—Is based upon the proposition that where the validity of a contract is dependent upon the concurrence of a stranger to the contract, and the stranger to the contract is bound to convey at the request of the Vendor or lessor, the Vendee and the lessee can compel him to obtain such concurrence.

Clause (c).—Is based upon the proposition that where the property sold or leased is represented as being free from encumbrance but is *encumbered*, the Vendor shall be compelled to free it from encumbrance sale of property which is mortgaged— Provided the price is not above the mortgage money.

Clause (d).—Clauses (a), (b) and (c) cover cases where the purchaser or lessee is the plaintiff suing for perfection of title.

Clause (d) covers a case, where the suit is brought by the Vendor or lessor for Specific Performance and it fails because of his not being able to perfect the title.

In such a case the Court cannot only dismiss the suit with costs, but proceeds to award to the defendant purchaser a special relief *viz*—the return of his deposit with interest and his cost and a lien for all these on the property agreed to be sold or let.

General Rule regarding deposit.—Deposit is paid as a guarantee for the performance of the contract and where the contract fails by reason of the default of the purchaser, the vendor is entitled to retain the deposit.

Rights of Parties to a Contract to sue for Specific Performance

Four cases to be considered:—

I. For whom contracts may be specifically enforced.

II. For whom contracts cannot be specifically enforced.

III. Against whom contracts may be specifically enforced.

IV. Against whom contracts cannot be specifically enforced.

1. For whom contracts may be specifically enforced.

Section 23 deals with the question Who may obtain *Specific Performance?* Clause (a) any party thereto. Clause (b) (i) an assignee from a promisee. (ii) Legal representative of a promisee after his death. (iii) an undisclosed principal of a promisee.

Each of these may obtain Specific Performance of a contract in which he is interested, but each is subject to the proviso that the contract must not be a personal one, nor must the contract prohibit the assignment of the interest of the Promisee.

(c) Persons entitled to the benefit of a marriage contractor

compromise of doubtful rights between members of the same family. (d) Remainder man on a contract made by a tenant for life. (e) Reversioner in possession. (f) Reversioner in remainder. (g) New company on amalgamation. (h) Company on a contract made by the promoters.

Cases where contract cannot be specifically enforced except by varying it—Sec. 76.

(1) By mistake or fraud the contract is in terms different from that which the Deft. supposed it to be.

(2) Deft. entered into contract under a reasonable misapprehension as to its effect between Deft. and Plff.

(3) Enters into a contract relying upon some misrepresentation by the Plff.

(4) Where the object is to produce a certain result which the contract fails to produce,

(5) Where Parties have agreed to vary it. *Comment.*

Sections 91, 92. Evidence Act.-—A plff. cannot give oral evidence to make out a variation. It does not debar a deft. from showing that by reason of fraud or misrepresentation, the writing does not contain the whole contract ; he can under provision I to S. 92 give oral evidence to prove that there is variation.

Plff. in that case cannot have a decree unless he submits to the variation; the Plff. is put on his election either (1) to have his action for Specific Performance dismissed or (2) have it subject to variation. If he elects not to accept the variation, he does not lose his remedy of damages.

II. Persons for whom contracts *cannot* be specifically enforced. This is dealt with in Sections 24 and 25.

Section 24

(i) Who could not recover compensation for its breach. (ii) Who has become incapable of performing or voilates any essential
term of the contract. (iii) Who has already chosen his remedy and obtain satisfaction for the
alleged breach. (iv) Who, previously to the contract had notice that a settlement had
been made and was in force.

This Section is distinguishable from Section 23 in that the defence to Specific Performance is not founded on anything *in the contract itself*

but is based solely upon the *acts* or *conduct* of the Plff.
Section 24 is a general Section. While Section 25 is a Section which is a particular one and is limited in its application to two kinds of contracts only:—
(i) Contract to sale and (ii) Contract to let property whether movable and immovable,
Sec. 25 says that such a contract cannot be specifically enforced in favour a Vendor or Lessor, i. e. in the following cases:—
(i) Knowing not to have any title to the property, has contracted to sell or let the same.
(ii) Who cannot give a title free from reasonable doubt at the date fixed by parties or Court.
(iii) Who, previous to entering into the Contract has made a settlement of the subject-matter of the contract.
Settlement is defined in Section 3 and means any instrument— where by the destination or devolution . Successive interests in movable and immovable property is disposed of or is agreed to be disposed of.

III. Persons against whom contract may be enforced *Section 27.*
(i) Either party.
(ii) Any other person claiming under a party by a title arising subsequently to the Contract, [except a transferee for value without notice].
(iii) Any person claiming under a title which prior to the contract voidable and known to the plantiff, and might have been displaced by the defendant.
(iv) New company after amalgamation.
(v) Company in respect of the contract made by promoters.
IV. Against whom contract cannot be enforced *Section 28.*
(i) Where consideration is grossly inadequate as to be evidence of fraud.
(ii) Where assent is obtained through misrepresentation; unfair practice or other promise not fulfilled.
(iii) Where assent is given under the influence of mistake of fact, misapprehension or surprise.
Specific Performance and Discretion of the Court
In granting Specific Relief, the important point is—When is the Court bound to grant Specific Performance Relief? Obviously the

Court cannot grant Specific Performance Relief in cases where the law provides that no Specific Performance Relief shall be granted. Such cases fall under three classes:

(i) Where the nature of the contract is such that law does not allow it to be specifically enforced.

(ii) Where the Plff. is a person in whose favour a contract cannot be specifically enforced.

(iii) Where the Deft . is a person against whom a contract cannot be specifically enforced.

There remain the following three cases in which a contract can be specifically enforced:—

(i) Where the contract is of such a *(further pages not found— ed.)*

	Liabilities of the parties			
	Of the seller		Of the buyer	
	Before Conveyance	After Conveyan	Before Conveyan	After Conveyance
1	Section 55(I) (a) To disclose materia defects	Section 55(I) (b) To give possession	Section 55(5) (a) To disclose facts materially increasi value.	Section 55(5) (c) To bear loss or injury to property
2	Section 55(I) (b) To produce title deeds	Section 55 (2) Implied convenant for title.	Section 55(5) (b) To pay price.	Section 55(5) (d) To pay outgoings.
3	Section 55(I) (c) To answer question as to title	Section 55 (3) To deliver title deed on receipt price.		
4	Section 55(I) (d) To execute conveyance			
5	Section 55(I) (e) To take care of property.			
6	Section 55(I) (f)			

	To pay outgoings.			

	Rights of the parties			
	Of the seller		Of the buyer	
	Before Conveyance	After Conveyan	Before Conveyan	After Conveyance
1	Section 55(4) (a) To take rents and profits.	Section 55(4) (b) To claim charge for price not pai	Section 55(6) (b) To claim charge f price prepaid.	Section 55(6) (a) To claim benefit c increment to property.

Uberrima fides= *(most* abundant faith)

Contracts said to require *uberrima fides* are those between persons in a particular relationship, as

(i) Guardian and ward. (ii) Attorney and client. (iii) Physician and patient. (iv) Confessor and penitent.

Complete disclosure necessary.

Liabilities of the Parties

A. A. Liabilities of the Seller

1. BEFORE CONVEYANCE

1. SECTION 55 (1) (A)—TO DISCLOSE MATERIAL DEFECTS.

(1)A contract for the sale of land is not a contract *uberrimal* fidei : The duty of disclosure is not absolute. *The duty to disclose is an obligation to disclose latent defects.*

(2) A latent defect is a defect which the buyer could not with ordinary care discover for himself. There is no duty to disclose defects of which the buyer has actual or constructive notice.

(3) As to patent defects of which the seller is unaware, the maxim *caevat emptor* applies. But a mutual mistake as to a matter of fact essential to the agreement will render the agreement void.

(4) *A latent defect whether of property or of title must be material.* A defect to be material must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it, he might not have entered into the contract at all, for he would be getting something different from what he contracted to buy.

(5) Whether a defect is material or not must depend upon the circumstances of each case. When land was sold for building purposes, an underground drain was held to be a material defect, but not when a house or land were sold mainly for residence.

(6) Defects may be Defects in property or Defects in title. 2. SECTION 55(1) (B)—PRODUCTION OF TITLE DEEDS

(1) The obligation is to produce title-deeds for inspection and not for delivery.

(2) The documents of title required to be produced for inspection are not only documents which are in the possession of the seller, but also includes documents which are in his power to produce.

(3) There is no obligation *to produce* title deeds unless the buyer makes a requisition.

(4) The Buyer however must not omit to take inspection, otherwise he will be held to have constructive notice of matters which he would have discovered if he had investigated the title.

3. SECTION 55(1)(C)—SELLERS DUTY TO ANSWER QUESTIONS

(1) When the documents of title are produced, the buyer examines them and if he is not satisfied makes requisitions. These requisitions are.—

(i) Requisitions relating to title. (ii) Requisitions relating to Conveyance. (iii) Other enquiries.

(2) Requisitions on title are objections that the documents do not show the agreed title or that the documents are not efficacious i. e. not duly attested.

(3) Requisitions on matters relating to conveyance refer to such matters as the joinder or concurrence of parties to the conveyance.

(4) Inquiries are for the protection of the buyer, and call attention to possible omissions of disclosure by the seller, and seek information on such points as easements, party walls and insurance.

(5) The Seller is bound to answer all requisitions which are relevant to the title and which are specific.

(6) The duty to answer requisitions is altogether distinct from the duty of disclosure under Section 55 (1) (a) of a defect, for, the omission of the buyer to make a requisition will not absolve the seller if he has not made a full disclosure.

(7) A buyer may waive requisitions. Waiver may be express or may be implied.

(8) Waiver is implied from conduct.

(i) (i) When a buyer does not press a requisition that has been made.

(ii) (ii) When a buyer asks for time to pay the price.

(iii) (iii) When a buyer enters into possession.

(iv) (iv) When a buyer pays the whole or part of the price.

4. SECTION 55(1) (D)—EXECUTION OF CONVEYANCE

(1) The execution may be to the purchaser or to such person as the purchaser shall direct. Consequently, on a resale by the buyer before conveyance, the conveyance may be direct to the subpurchaser. The seller may require the original buyer to be a party to the Conveyance if there is a difference of price but not otherwise.

(2) It is the duty of the buyer to tender to the seller a proper draft—*31 Cal.L.J. 87.*

(3) This duty of the buyer is subject to a contract to the contrary.

(4) The execution of the conveyance and the payment of price are reciprocal duties to be performed simultaneously. They are concurrent promises. If either party sues for specific performance, he must show that he was ready and willing to perform his part.

(5) Proper time for execution:—

(i) (i) The section is silent as to what is proper time.

(ii) (ii) The time is usually settled by the contract of sale.

(iii) If time is fixed, and an unreasonable delay occurs, the proper course is to give notice making time the essence of the contract

(iv) If time is not settled, the proper time is the date when the seller makes out his title.

(6) Proper place for execution:—

(i) The Section is silent.

(ii) Since it is the buyer who has to tender the draft conveyance to the seller, the proper place for execution would be the Seller's residence or his Solicitor's office.

(7) Cost of Conveyance:—

(i) The Section is silent.

(ii) This is usually settled by the terms of the contract.

(iii) In the absence of any express term, the buyer has to pay the cost of the Stamp—Section 29 (c) Indian Stamp Act.

5. SECTION 55 (1) (E)—CARE OF PROPERTY

(1) The contract of sale does not give to the buyer any interest in property. But it imposes upon the seller a personal obligation to take care of the property.

(2) The seller must also take care of the title deeds. The loss of title deeds depreciates the value of the property and damage done to the estate.

(3) To take care means to do what a prudent owner ought to and keep the property in reasonable repair and protect it from injury by trespassers.

(4) The obligation to take care is one collateral to the contract and does not merge in the conveyance. The duty to take care continues even after completion of the sale and the buyer is not responsible for any loss caused by the seller. If the seller neglects his duty, the buyer is entitled to compensation to be deducted from the purchase money; after the completion the buyer may recover damages.

6. SECTION 55(1) (G)—MEET OUTGOINGS

(1) It is the duty of the seller to pay what are called under England Law outgoings. In India they include—

(i) (i) Public Charges
(ii) (ii) Rent
(iii) (iii) Interest
(iv) (iv) Encumbrances.

(i) Public charges over

(i) (i) Government Revenue.
(ii) (ii) Municipal Taxes.
(iii) (iii) Payment charged upon land by Statute either expressly or implied by reason of their being recoverable by distress or other process against the land.

(ii) Rent—The payment of rent is a question which arises when the property sold is leasehold property. The seller of the leasehold property is bound to pay rents accruing due up to the date of the sale.

(iii) Interest.

(i) Encumbrance means—a claim, lien, or liability attached to the property.

(ii) The seller's duty is to discharge all Encumbrances. It is immaterial that the buyer was aware of the Encumbrances when he contracted to buy.

(iii) The sale is not subject to Encumbrances, unless there is an express provision to that effect.

(iv) If the Encumbrance is a common charge on the property sold and other properties of the seller, the buyer may insist on its being discharged out of the other property.

(6) This liability imposed upon the seller is collateral to the contract and may be enforced even after conveyance.

Seller's Liabilities

AFTER CONVEYANCE

1. *Section 55(1)(b)—To give possession*

1. It is the duty of the seller to give possession after conveyance and not to leave the buyer to get possession for himself.

2. This liability may be enforced by a suit for Specific Performance.

3. 3. Time for giving possession—

(i) The Section does not say when the seller should give possession.

(ii) Reference to Section 55 (4) (a) shows that possession be given when ownership passes to the buyer. This would be at the time of the execution of the sale-deed—*6 Lah. 308*.

(iii) The seller cannot refuse possession because price has not been paid unless there was intention to the contrary.

(iv) The buyer's right to possession and the seller's right to unpaid price may be enforced in the same suit.

4. Nature of Possession—

(i) Possession does not mean actual occupation.

(ii) Physical possession in the case of tangible and symbolical possession in the case of intangible properly is enough.

(iii) Symbolical possession is enough in the case of property which is in the possession of tenants or mortgagees.

2. *Section 5 5 (2)—To assure that the interest subsists.*

1. There are two views as to whether this liability of the seller is one which arises before conveyance or after conveyance.

(i) *Calcutta view*. This clause contemplates a *completed contract* and corresponds to covenant for title in an English conveyance. *57 Cal. 1189*.

(ii) *Madras view*. This clause contemplates cases, where the transaction has not progressed beyond the stage of contract. *40 Mad. 338 (350):*

38 Mad. 1171.

(iii) Lahore view. Follows Madras.

6 Lah. 308.

(iv) (iv) Bombay view. It pertains to liability *after conveyance*

18 Bom. S. R. 292: 52 Bom. 883: 31 Bom. LR. 658.

(a) The provisions of Section 55(1) enable the buyer before completion, to ascertain if the title offered is free from reasonable doubt. Once he has accepted the conveyance and the sale is completed, he has no remedy on the contract except for fraud.

(b) The covenant for title implied by Section 55 (2) gives the

buyer a further remedy in case of defects discovered after conveyance.

(v) Another view which probably is the correct view. (a) In the matter of Title, the liability of the seller is twofold. (i) He must pass to the buyer a title free from reasonable doubt. (ii) He must pass to the buyer a title which he professes to pass and nothing less. He must make good his representation.

Under (i) he must prove that he has acquired his title in any one of the recognised ways: such as prescription, possession, inheritance, purchase, etc.

Under (ii) if he professes to transfer a full proprietary interest, then interest transferred must be full proprietary interest and not merely occupancy interest: Sale of free from Encumbrances land which is subject to Encumbrance: Sale of non-transferable land as transferable.

(b) Section 55(1) relates to liability for a title free from reasonable doubt: Section 55 (2) relates to liability for passing title which he professed to pass.

2. Section 55 (2) relates to misrepresentation or misdescription as to title. A distinction must be made between misdescription of title and misdescription of property.

(i) Misdescriplion of title is a breach of the covenant for title under Section 55 (2) and gives right to damages.

(ii) Covenant for title docs not extend to misdescription of property i. e. as to the extent of the land sold.

(iii) A covenant for title is not a covenant that the land purported to be conveyed is of the extent stated in the sale-deed. It is merely a contract with the purchaser of the validity of the sellers' title. Consequently if the purchaser finds a deficiency in area his, suit must be based not on the covenant for title, but for part failure of consideration.

3. Express covenant for title. Every conveyancer has an implied covenant for title. But parties may enter into an express covenant relating to title. The points to be noted in regard to an express covenant are:

(a) If overrides and does away with the effect of all implied covenants.

(b) Although an express covenant alone can govern the rights of the parties, yet an implied covenant cannot be got rid of except by *clear* and *unambiguous* expression.

4. *Who can claim the benefit of the covenant :* The benefit of a covenant for title can be enjoyed not only by the purchaser and his representatives, but also subsequent alienees, who claim under the purchaser, can enforce it as against the seller.

5. Under this clause the vendor is presumed to guarantee his title absolutely to the property. If he wishes to contact himself out of the covenant he must do so expressly or by necessary implication.

6. The implied covenant for title has nothing to do with the question, whether the buyer has or has not notice of the defect of title and the buyer's knowledge of the defect does not deprive him of the right to sue for damages and can claim a return of the purchase-money if he is dispossessed by reason of a defect in title.

7. *Covenant for title—what does it include.* The covenants for title implied in an English conveyance, include.—

(i)	(i)	Right to convey,
(ii)	(ii)	Right to quiet enjoyment,
(iii)	(iii)	Right to hold free from Encumbrances,
(iv)	(iv)	Right to further assurance.

Under the covenant for further assurance, the seller is bound to do such further acts for perfecting the buyer's title as the latter may reasonably require. Thus, if a seller has, after the sale perfected an imperfect title by the purchase of an outstanding interest, he can under this covenant, be compelled to convey it to the buyer.

(2) The English covenants are more extensive as they include the covenant for quiet enjoyment, for freedom from Encumbrances and for further assurance. Under Indian Law they are not included.

8. Covenant for title is a covenant for a title free from reasonable doubt. It has been held by the Privy Council that an absolute warranty of title cannot be insisted upon by the purchaser. *9 I .A. 700 (713).*

9. The implied covenant for title does not apply in the case of a trustee:

(i) A trustee is only deemed to covenant that he has done no act whereby the property is encumbered, or that whereby he is hindered from transferring.

(ii) If a trustee conveys without disclosing his fiduciary character, he could no doubt be required to convey"as beneficial owner"so as to become subject to the usual covenants for title.

10. The implied covenant for title does not apply in the case of a guardian selling on behalf of the minor.

CHAPTER 4
THE LAW OF TRUSTS

OUTLINE

PART 1. What is a Trust and to what the Act applies?
PART II. Express or Declared Trusts— (i) Creation. (ii) Extinction.
PART III. The Administration of a Trust.
PART IV. Constructive Trusts.
PART V. The Administration of a Constructive Trust.

PART I
What is a Trust and to what the Act applies?

II. To what KINDS OF TRUSTS The ACT Applies?

I. Section I says in what cases the Act shall not apply. They are:

(i) Wakfs created by a Mohammedan.

(ii) Mutual relations of the members of an undivided family as determined by any customary or personal law. (iii) Trusts to distribute prises taken in war among the captors. (iv) Public or Private religious or Charitable Endowments.

1. *Explanations.*

1. Wakf.—Permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman Law as religious, pious or charitable.

Two classes of Wakfs—

(i) Where benefit is reserved to the settlor and his family— Act VI of 1913 applies.

(II) Where no benefit is reserved—Act 42 of 1923 applies.

II. II. MUTUAL RELATIONS OF MEMBERS OF AN UNDIVIDED FAMILY.

Illus—

1. The manager of a joint Hindu family and other members of the family.

2. A Hindu widow and a reversioner.

Their relations are not governed by the Trust Act. They are governed by customary law or personal law.

III. DISTRIBUTION OF PRISES TAKEN IN WAR.

1. *Prise,*—A term applied to a ship or goods captured *jure belli* by the maritime force of a belligerent at sea or seized in port.

2. All prises taken in war vest in the sovereign, and are commonly by the royal warrant granted to trustees upon trust to distribute in a

prescribed manner amongst the captors.

3. To such a trust created for the purpose of distributing prises the Trust Act does not apply.

IV. PUBLIC TRUSTS AND PRIVATE, RELIGIOUS OR CHARITABLE ENDOWMENTS.

Trusts are either *Public* or *Private Trusts.*

1. *Public Trusts.*—A trust is a Public Trust when it is constituted for the benefit either of the public at large or some considerable portion of it answering a particular description. A Public Trust is for an unascertained body of people though capable of ascertainment.

II. *Private Trust.*—A Private Trust is a trust created only for the benefit of certain individuals who must be ascertained or ascertainable within a limited time.

III. *The Purposes of a Public Trust.*—They fall under three heads:— (i) Public purposes. (ii) Charitable purposes. (iii) Religious purposes.

(1) The phrase public purposes is used in two senses :

(a) In its ordinary sense—it includes purposes. Such as mending or repairing of roads, a parish supplying water for the inhabitants of a parish, making or repairing of bridges over any stream or culvert that may be required in a parish.

(2) The Phrase Charitable Purposes—includes almsgiving, building alms-houses, founding hospitals and the like.

(3) The Phrase Religious Purpose—includes relating to religious teaching or worship—purchase or distribution of religious books, upkeep of Churches, Temples, etc.

If a Trust is a Public Trust—The Trust Act does not apply. If a Trust is a Private Trust—Does the Trust Act apply?

The Act applies only if the Private Trust is a trust which is not a Charitable or Religious Trust.

What is the Law that applies to a Public Trust or a Private Trust which is Charitable and Religious? There are various enactments which apply.

1. Section 92, C. P. C.
2. The Religious Endowments Act,1863.
3. The Religious Society's Act I of 1880.
4. The Official Trustee Act II of 1913.
5. The Charitable Endowments Act VI of 1890.
6. The Charitable and Religious Trusts Act XIV of 1920.

Different kinds of Trusts

1. Trusts fall into different classes. The class into which a trust falls

depends upon the point of view a trust is looked at—

2. A trust can be looked at from three points of view— (i) From the point of view of the mode in which a trust is created. (ii) From the point of view of the constitution of the trust. (iii) From the point of view of the nature of the duty imposed on the trustee.

3. From the point of view of the mode in which a trust is created trusts fall into two divisions (i) Express and (ii) Constructive.

4. From the point of the constitution of a trust, trusts fall into two divisions (i) completely constituted trusts and (ii) incompletely constituted trust.

5. From the point of view of the nature of the duty imposed on the trustee trusts fall into two divisions (i) Simple Trusts and (ii) Special Trusts.

1. EXPRESS AND CONSTRUCTIVE TRUST

1. A trust can arise in two ways—

(i) It is the result of a voluntary declaration made by an individual. (ii) It may be the result of a rule of law.

2. When a trust is the result of a voluntary declaration it is called an Express Trust or Declared Trust. When a trust is the result of a rule of law it is called a Constructive Trust.

3. The term Constructive Trust is used in another sense. In this sense it is used to signify a trust which is the result of a construction put upon the deed. A trust is a matter of intention. Intention may be declared in specific terms or it may be found by the Court to have been indicated by the party on a proper construction of the deed. In the latter case the trust is sometime called a Constructive Trust.

4. Two things have to be remembered in connection with a constructive trust used in this sense.

(i) Such a Constructive Trust is some times contrasted with an Express Trust. This is quite wrong. Such a Constructive Trust is really an Express Trust and is not to be contrasted with it. A trust is none the less an Express Trust because the language used by the settlor is ambiguous or clumsy, if, on the true construction of that language the Court comes to the conclusion that a trust must have been *intended*.

(ii) A trust which is constructive in the sense that the intention is deduced by constructing the document must not be confused with a Constructive Trust which is the result of the operation of the law. In the former there is an intention to create a trust and in that sense it is

the result of the voluntary act of the party. In the latter there is no intention to create a trust. It is the creation of law and not of an act of the party.

Constructive Trusts fall into two sub-divisions :—

(i) Resulting Trusts. (ii) Non-Resulting Trusts.

The difference between the two will be considered later when dealing with Constructive Trusts. They have one thing in common— they are both the result of the operation of law and not the result of an act of party.

II. COMPLETELY CONSTITUTED TRUSTS AND INCOMPLETELY CONSTITUTED TRUSTS.

1. A trust is said to be completely constituted when the trust property is *vested* in the Trustees for the benefit of the beneficiaries. When there is a mere declaration of a trust but the property is not vested in the Trustee the trust is incompletely constituted.

2. The question whether a trust is completely constituted or not is of the *utmost* importance where no valuable consideration is given for its creation.

3. *If value is given* it is immaterial whether the trust is perfect or not, for as equity looks on that as done which has been agreed to be done an imperfect conveyance for value will be treated a contract to convey and the Court will see that it is perfected.

4. *If no value is given* there is no equity and the Court will not grant any assistance to a person seeking to enforce.

5. If there is a complete transfer of property although it is voluntary yet the legal conveyance being effectually made the trust will be enforced by the Court.

6. There are two ways in which a trust may be completely constituted:

(i) (i) The settlor may convey the property to the trustees.

(ii) (ii) The settlor may declare himself to be a trustee of it.

7. *Distinction between complete and incomplete trust*—

(i) A completely constituted trust is one in which the trust property has been finally and completely vested in the trustees.

(ii) A trust is incompletely constituted when the trust property has not been finally and completely vested in the trustees.

NOTE.—All trusts arising underwills are completely constituted, though may be either executed or executory—

(iii) A seller must take all due steps to do all that it is his duty to

vest the property in the trustee, and the instrument of conveyance must also contain a declaration of trust, if the settlor's intention is to escape defeat.

8. *Consequences arising from this difference*—

(i) An incomplete trust will be enforced if it is for valuable consideration. It will not be enforced if it is voluntary, i.e., without valuable consideration.

(ii) Valuable consideration in the law of trust, as in the law of contract, is some valuable thing assessable in terms of money, with the proviso that marriage, and also forbearance to sue is so considered.

(iii) A distinction exists between valuable consideration and good consideration. The phrase good consideration is applied to natural love and affection. Such a consideration though good is not valuable.

(iv) A good consideration does not make an incompletely constituted trust enforceable at the instance of a volunteer. It serves to rebut a resulting trust

(V) *How far marriage is a consideration :*

(i) If the settlement is made *before* and in consideration of marriage, it is made for valuable consideration. So it is also, if made after marriage, but in fulfilment of an ante-nuptial agreement to settle.

(ii) But if the settlement is made after marriage, and not in pursuance of an ante-nuptial agreement, it is voluntary.

(VI) *Who are within the marriage consideration:*

(i) The only persons within the marriage consideration are the actual parties, the husband and the wife, and the issue of that marriage.

(ii) All other persons are volunteers and cannot enforce the provisions of a settlement *as against the settlor* so far as the transfer of property is still incomplete, e.g., an agreement to settle after—acquired property.

9. *Does the Indian Trust Act recognise this distinction between complete trust and incomplete trust*—

Simple and Special Trusts

1. A Simple Trust is a trust in which a trustee is a mere passive custodian of the trust property, with no active duties to perform..

2. A Special Trust is a trust in which a trustee is appointed to carry out some scheme particularly pointed out by the settlor and is called

upon to exert himself actively in the execution of the settlor's intention.

3. A Simple Trust is spoken of as a passive trust and Special Trust is spoken of as an active trust.

4. Where a Simple Trust exists, the beneficiary, provided that he is *sue juris* and absolutely entitled, has a right to be put into actual possession of the property and he enjoys the further right of compelling the trustees to dispose of the legal estate in accordance with the beneficiary's instruction.

5. Special Trusts are divided into—(i) Ministerial and (ii) Discretionary.

6. In both, the trustees have positive duties to perform.

7. The point of distinction is that in a Ministerial Trust the duties are such that the trustee is not called upon to exercise *prudence* while in a discretionary trust a trustee is required to *exercise prudence.*

PART II
EXPRESS OR DECLARED TRUST

CHAPTER I
Two kinds of Declared Trusts
Executed and Executory

An Express Trust is either an *Executed Trust* or is an *Executory Trust.*

1. EXECUTED AND EXECUTORY TRUSTS

1. The expressions Executed and Executory as used in relation to contract have not the same meaning which they have when used in relation to trust.

2. When used in relation to a contract they refer to the carrying out of the contract. When used in relation to a trust they refer to the creation of a trust as distinguished from its carrying out.

3. In the sense in which the term is used in contract every trust is executory until it is over. But that is not the meaning in which the word is used in relation to trust.

4. When the words *Executed* and *Executory* are used in connection

with a trust they have different meaning.

(1) A trust is an Executed Trust when the author of the trust has not only designated the persons who are to benefit by the trust but has also indicated the *interests* which they are to take in the trust property.

(2) A trust is said to be an Executory Trust when the author of the trust has only designated the persons who are to benefit by the trust but has not indicated the interests which they are to take in the trust property but has left it to be defined by another person by another instrument.

Illus.—On the marriage *of A* and B it is agreed between them that certain property shall be settled on trust for them and for their children.

NOTE.—Here the parties who are to benefit by the trust are defined—They are *A* and *B* and their children—

(1) But what benefits *A* and *B* their children are to take is not defined.

(2) Therefore, it is an Executory Trust.

(3) The line of cleavage between an Executed Trust and an Executory Trust is different from the line of cleavage between a completely constituted trust and an incompletely constituted trust.

(4) The line of cleavage between a completely constituted trust and an incompletely constituted trust is:- in the former the property is vested in the Trustees upon trust; in the latter the property is not so vested.

(5) The line of cleavage between an Executed Trust and an Executory Trust is that in the former the interests of the beneficiaries are defined when in the latter they are not so defined.

(6) That being so an Executory Trust may be a completely constituted Trust.

II. PARTIES TO A TRUST.

1. Apparently there are three parties to the transaction of a trust—

(i)	(i)	The party who makes the trust.
(ii)	(ii)	The party who accepts the trust.
(iii)	(iii)	The party for whose benefit the trust is made.

2. The party who makes the trust is called"the author of the trust". The party who accepts the trust is called the trustee. The party for whose benefit the *trust* is made by the author and accepted by the trustee is called the beneficiary.

3. Is it necessary that the three parties *should* be distinct and separate and that one of three cannot occupy the role of any two of them? The

answer to this question is *some* of them can play the role of two.

(i) The author of the trust and the beneficiary of the trust must be distinct and separate.

(ii) The trustee and the beneficiary must be distinct and separate.

(iii) The author of the trust need not be distinct and separate from the Trustee.

4. The reasons why some parties can occupy the role of two in one and some cannot are important.

(i) The making of a trust results in the creation of two different estates in the property which is the subject-matter of the trust— the legal and the equitable. A trust lasts as long as these two interests remain separate, (ii) If the legal and equitable estates happen to meet in the same person, the equitable is forever extinguished by being absorbed in the legal. In other words, where the legal and the equitable interests are co-extensive and vested in the same person the equitable merges in the legal interests which means that the trust comes to an end.

There are two principles to be borne in mind

(i) There is no trust if it does not create a separate equitable interest.

(ii) There is no trust if the separate legal and equitable interest become merged.

5. Applying these two principles we reach the following conclusion—

(i) There is no merger when the author of the Trust and the trustee are the same. Therefore, they need not be distinct.

(ii) There is no creation of a separate equitable estate when the author of the Trust and the beneficiary are the same. Therefore, they must be distinct.

(iii) There is merger when the trustee and the beneficiary are the same. Therefore, they must be distinct.

To sum up. The author of the trust and the trustee may be one and the same person. But the beneficiary must always be a distinct person separate from the author of the trust as well as from the trustee.

6. So far we have taken simple cases where the parties are single individuals. What happens when the parties are multiple parties, and where some of them play double role.

Illus.

(i) A and B are the beneficiaries of a trust Of them A is also a trustee. Is such a trust valid?

(ii) A and B are beneficiaries of a trust Of them A is the author of

the trust Is such trust valid?

7. The answer to the first question is in the affirmative. It is found in Section 6 which defines a trust. The definition does not give an answer to the Second question. Yet such a trust is invalid.

CHAPTER II

(i) The Creation of an Express Trust

1. CONDITIONS FOR THE CREATION OF A VALID TRUST.

For the validity of a declared Trust the following *four* conditions prescribed by law must be satisfied.

(i) Section 6.

(1) There must be necessary parties to the trust.

(2) (1) The language of the settlor must be such that the Court can find from it, as a fact,

a) a) An intention to create a trust;
b) b) of ascertainable property ;
c) c) in favour of ascertainable beneficiaries and
d) d) for an ascertainable purpose.

(ii) Sections 7-8.

The trust property must be of such a nature as to be capable of being transferred and settled in trust.

(iii) Section 4. The object of the trust must be lawful.

2. The English Law of Trust differs from the Indian Law in regard to the creation of a trust. According to Snell the creation of a trust requires three certainties,

(i) Certainty as to intention. (ii) Certainty as to trust property.

(iii) Certainty as to beneficiary. According to Underhill the creation of a trust requires *four* certainties, those mentioned by Snell and one more namely.

(iv) The purpose of the trust.

The English Law does not require the transfer of the trust property to the trustee. But the Indian Law does.

(ii) Certainty as to intention

(i) The intendor to create a trust may be by words or acts.

ii) These are illustrations which show how a trust could be created by the acts of the author of the trust.

Illus.

(i) A father opening an account in his book in the name of his son in which money is credited in the name of his son.

9 Bom. 125 (ii) A buying shares in 5 Bom. 268 17 Col. 620 (628)

3. Examples of trust created by words are unnecessary. The question is

what kind of language is necessary to show there is a certainty to show that there was intention to create a trust—

(i) No technical expressions are needed for the creation of a trust. The matter is one of construction. The question, therefore, which has to be determined is whether upon construction of the will or deed as a whole, the testator intended that the person to whom property was given should take as a mere trustee or should take beneficially, subject to a mere superadded expression of a wish or desire, which the testator may have thought would be sufficient to influence the donee, but which was not intended to and does not impose upon him any obligation. Question is did the author of the trust merely express a wish that the trustee should do a particular thing or did he impose an obligation upon him to do a certain thing. If an obligation was in fact intended then obviously he had the intention to create a trust.

(iii) The language used may be *either precatory* or *imperative.*

(i) The words request, recommend, desire, hope, etc., are precatory words.

(ii) Such words cannot be said to indicate an intention to create a trust, because they do not show an intention to impose an obligation upon the trustee.

(iii) Under the English Law such precatory words were held to constitute a, trust and the trusts were called precatory trust. But the modem tendency is against.

(iii) Certainty as to beneficiary

1. The beneficiary must be specified or described sufficiently as to be capable of identification.

2. *Illustrations of uncertainty.*

(i) Estate given to A with the direction that he would continue it in the family—family uncertain.

(ii) To the settlor's relations—relations uncertain.

3. *Illustrations of sufficient description*

(i) Descendants-held to be sufficient description and therefore not uncertain

3. Certainty of Purpose

1. How the property is to be applied must be specified.

2. Illustrations of uncertainty of purpose.

(i) To consider certain persons. (ii) To be kind to them. (iii) To make ample provision for them. (iv) To remember them. (v) To do justice to them. (vi) To take care of his nephew as might seem best in future.

(vii) To use property for herself and her children and to remember the Church of God and the poor.

3. The purpose of the trust means the way in which the beneficiaries are to be benefited the way in which the property is to be applied.

4. Certainty as to trust property

1. The property which is to be the subject-matter of the trust must be indicated with reasonable certainty. It must be specified or sufficiently described so as to be capable of identification.

Illus.

(i) A bequeathes certain property to B—directing him to divide the *bulk* of it among the children of C. There is no creation of a trust because the property is not indicated with reasonable certainty.

(ii) A gives property in trust for his wife and directs that such part of it as may not be required by her shall, after her death, be held in trust for his children.

(iii) A gives property in trust for his servants with a direction to reward them according to their deserts out of such parts of my estate as may not have been sold or disposed of by her.

Conclusion

1. Thus, it must be clear that the settlor intended to create a *definite* trust over *definite* property for *definite* persons. No trust can arise in the absence of an intent to create a definite equitable obligation giving definite equitable rights to definite beneficiaries.

2. It will, however, be noticed that the failure to nominate a definite person as a trustee does not invalidate the trust. Where a trust is clearly intended, then (subject to the rules as to voluntary trust), the mere omission to appoint a trustee will not invalidate the trust : for equity never allows a trust to fail for want of a trustee. So, if no trustee is appointed or if the trustee appointed fails, either by death, or disclaimed or incapacity or otherwise the mist does not fail, but fastens upon the conscience of any person (other than a purchaser for value without notice) into whose hands the property comes and such person holds it as a passive trustee, whose only duty is to convey it to new trustees when properly appointed.

3. The effect of uncertainty as to property or as to beneficiary or purpose of the trust is different :

(i) Where the trust is affected by uncertainty as to property the trust is void. As there is no property capable of identification there is nothing to litigate about.

(ii) Where the trust is affected by uncertainty as to the beneficiary or the purpose the trust is void. As there is no person named as a beneficiary no one can come forward to enforce it

(iii) Where the property is described with sufficient certainty, and the words actually used, or the surrounding circumstances make it clear that although the donor has not sufficiently specified. The objects of his bounty or the way in which the property was intended to be dealt with yet he never meant the trustee to take the entire beneficial interest, the Law implies a resulting trust in favour of the donor or his representative.

II. TRUST PROPERTY MUST BE CAPABLE OF TRANSFER.

1. *What property is capable of transfer?*

2. The answer to this question is to be found in section 6 of the Transfer of Property Act.

3. Property which can be transferred may be subject-matter of a trust.

4. But there can be no trust of a beneficial interest under a subsisting trust. A Beneficiary cannot create a trust of his interest in trust. His interest is transferable but he cannot create a trust of it.

5. This marks an important distinction between the English Law and Indian Law of Trust.

6. Under the English Law a beneficiary can create a trust of his equitable estate.

7. The reason is that the Indian Law does not recognise the distinction between legal and equitable estates in a trust.

Sec. II.—A Trust may be properly created and yet enforceable.

1. A trust may have been properly created but may not be enforceable. To be enforceable a trust must satisfy two other conditions:—

1. The object of the Trust must not be unlawful. II. The formalities prescribed for the creation of a trust must be satisfied.

Object of the trust Sec. 4.

1. The object of a trust must be lawful.

2. *What are lawful objects?*

(1) The purpose must not have been forbidden by Law.

(2) Purpose must not be such which if permitted would defeat the provisions of any law.

What are unlawful objects?

(1) Purpose which is fraudulent

(2) Purpose which involves or implies injury to the person or property of another.

(3) Purpose which is immoral or opposed to public policy.

Illus.

(1) Trust for the care of female founding to be trained as prostitutes.

(2) Trust to carry on smuggling business and to maintain it out of the profits.

(3) Trust by a person in insolvent circumstances—defeating creditors.

(4) Trusts for illegitimate children.

(5) Trust for the creation of a perpetuity.

(6) Trust to take effect upon future separation of husband and wife.

3. Whether the trust is lawful or unlawful is to be determined in the case of immovable property by the law where the property is situated.

4. A trust which is unlawful is *void.*

5. Where a trust has two purposes of which one is lawful and the other unlawful, the validity of the trust depends upon the severability of the two. If they can be severed, the one with a lawful purpose is valid and the one with an unlawful purpose will be void. If they cannot be separated the whole will be void.

6. Consequences of settlor creating an unlawful trust—

(i) Court will not enforce it in favour of the person intended to be benefited thereby. (ii) Court will not help the settler to recover the estate.

Formalities for a valid trust

Sec. 5.

1. A trust may be a trust of immovable property or it may be a trust of movable property. The formalities prescribed by law for the validity of a trust differ according as the property is immovable property or movable property.

2. *Formalities in case the property is immovable.* Such a trust may be made in two ways—

(i) Either by a non-testamentary instrument signed by the author of the trust or by the trustee, or

(ii) By the will of the author of the Trust,

3. *Formalities in the case of a trust of movable property.* There are *three* ways by which it could be done.

(1) By a non-testamentary instrument signed by the author of the trust or the trustee.

(2) By a testamentary instrument signed by the author or the trustee.

(3) By transfer of the ownership of property to the trustee.

4. Difference between declaration and creation of Trust. (Not explained in ms.)

5. Transfer of Trust Property

1. No trust is created until the author of the trust has divested him of the trust property. That means he must have transferred the property to the Trustee.

2. This does not apply where the author of the trust is himself the trustee. All that is necessary to show is that he has changed the character in which he holds it.

3. This does not apply when the trust is created by a will. The will operates after his death and the trustees then take possession.

Section II.—A trust may be valid and yet impeachable.

1. A valid trust may be impeached on the following grounds by the following persons :—

(a) By the settlor or his successors in title on the ground: (i) of the incapacity of Parties.

(ii) of some mistake made by, or fraud practised on, the settlor at its creation.

(b) By the settlor's creditors, by reason of its having been made with a fraudulent intention to defeat or delay them or because it infringes the provisions of the Insolvency Act.

(c) By future purchasers of the property from the settlor without notice of the trust, where the trust property is land, and though was intended by the settlor to defeat the claims of future purchasers.

1. Incapacity of Parties to a Trust *§ Capacity of the author of the Trust.*

1. The author of a trust must be a person who is *competent* to contract, i.e., (i) He must be major and (ii) He must be of sound mind.

2. Although this prevents a minor from making a trust yet the law provides for a minor making a trust, if the conditions prescribed are observed under the Law, a trust may be made by or on behalf of the minor, provided it is done with the permission of the Principal Court of original jurisdiction.

The Principal Civil Court of original jurisdiction is according to the Civil Procedure Code the District Court.

3. This competency of the Author of the Trust to make a trust is limited in two ways—

(i) The property which is to be the subject-matter of the trust must be transferable.

(ii) He can transfer it only to the extent permitted by Law for the

time being in force. A trust is not valid if the author had no power to dispose of property.

4. What property is transferable and what is not is defined in section 6 of the T. P. Act.

5. The authority to dispose of property and the extent of such power depends upon law.

Illus.

(i) A Hindu father cannot dispose of the ancestral property and therefore, he cannot create a trust thereof.

(ii) A Hindu widow cannot dispose of the estate inherited by her from her husband. She having only a life-estate in it— therefore, she cannot dispose of it by way of Trust.

(iii) A Mohammedan cannot dispose of more than 1/3 of his property after the payment of debts and funeral expenses— therefore, cannot dispose of more than 1/3 by way of a Trust.

§ Capacity to be a Trustee— Sec. 10.

1. Every person capable of holding property is competent to be a trustee.

2. *Who is capable of holding property?*

Every *living person* is capable of holding and taking property. Therefore, every living person whether a minor or a lunatic is capable of being a trustee.

3. There is a difference between capacity to contract and capacity to hold and take property. Every living person does not have the capacity to contract; but every living person has the capacity to hold and take property.

4. This distinction is necessary to make and important to bear in mind because a person may not have capacity to contract yet he may be competent to be a trustee provided he has capacity to hold and take property ;be not dead physically he must not be dead civilly: (1) A person who is sentenced to transportation is not civilly dead.

7. There is one further distinction which is to be noted. Ordinarily a person who is competent to be a trustee is also competent to execute a trust. But in the case where a trust involves the use of discretion the person who is competent to be a trustee is not necessarily competent to execute a trust.

8. Where the trust is such that it does not involve the use of discretion the requirement for competency to execute a trust is the same for being a trustee, namely, capacity to hold and take property.

9. Where the trust is such that its execution does involve the use of

discretion, then the trustee must have capacity to contract.

Capacity to be a Beneficiary— Sec. 9.

1. Every person capable of holding property may be a beneficiary.

- 2. The requirement for being a beneficiary is the same as for being a trustee.

3. That is every living person can be a beneficiary. That is a trust can be created in the interest of every living person. It is not necessary that a beneficiary should have contractual capacity. In this respect his position is regulated by the same provisions as that of the trustee.

CHAPTER III
The Revocation of an Express Trust Declared

Sec. 78.

1. Whether a trust can be revoked depends upon how the trust is created.

(i) If the trust is created by a will then it can be revoked by the testator *at his pleasure*. This is because will does not take effect till death. There is can be revoked before it takes effect

2. If the trust is created otherwise than be a will—i.e., by a non-testamentary instrument or by word of mouth then it can be revoked in the following circumstances only—

(i) If the power of revocation is expressly reserved to the author of the trust.

(ii) If the beneficiaries consent, provided all of them are competent to contract

CHAPTER IV

The Extinction of an Express Trust
Sec. 77.

1. A trust comes to end in the following cases— (i) When the purpose is completely carried out. (ii) When its purpose becomes unlawful. (iii) When the fulfilment becomes impossible. (iv) When the trust being revocable is expressly revoked. (v) If there is only one beneficiary or if there are several (whether entitled concurrently or successively) and they are or they are not under any disability (such as infant, lunatic) the trust may be extinguished by them without reference to the wishes of the setter or the trustees.

2. The terms for the extinction of a trust are the same as those for the extinction of a contract.

1. Two questions remain to be considered. (i) When does a trust

becomes administrable? (ii) What estate does the Trustee and Beneficiary have in the trust?

2. These questions are preliminary to the question of the administration of the trust.

1. When does a trust begin to function?

A trust becomes administrable when it has been accepted by the Trustee and the beneficiary—

I. I. DISCLAIMER AND ACCEPTANCE OF A TRUST

Acceptance Art. 34=Sect. 10.

1. Although the author of the trust may appoint a person as a trustee, the person so appointed is not bound to accept such appointment.

2. A person appointed to the office of a trustee may accept the office or he may disclaim it.

3. The acceptance of the office may be indicated expressly or by conduct. If it is by conduct it must indicate with reasonable certainty such acceptance.

Illus.—*A* by his will bequeaths certain properties *to B* and *C* as Trustees for *D*. *B* and C prove A's will. On a question being raised whether *B* and *C* had accepted the office of Trustee, held that their conduct in proving the will was tantamount to acceptance of office.

4. Other illustrations of acceptance by conduct are :—

(i) Acceptance by acquiescence—Permitting an action regarding trust property being brought in his name.

(ii) Acceptance by exercising dominion over the trust property—such as advertising for sell—giving notice to tenants.

(iii) Acceptance by dealing with property—unless the dealing is plainly referable to some other ground.

(iv) Acceptance by long silence with notice of the trust and in the absence of any satisfactory explanation of the silence.

(v) Acceptance of a part of the trust is acceptance of the whole, notwithstanding any attempted disclaimer of part.

5. The law does not say how a disclaimer is to be made by a trustee who does not wish to accept the office. It only says that a trustee must do so within reasonable time.

6. Although the law is silent on the point, the following points with respect to disclaimer have been settled by judicial decisions—

(i) The disclaimer should be before acceptance. Once a trustee has accepted the office he can renounce it only under circumstances mentioned in section 46.

(ii) A person can disclaim a trust although he may have consented

to act as a trustee during the lifetime of the settlor.

(iii) A person cannot disclaim the office as to a part of the trust and accept as to the rest.

(iv) (iv) A disclaimer may be by words or by conduct.

7. **Effect of disclaimer.**

(i) If there is only one trustee a disclaimer prevents the trust property from vesting in him.

(ii) If there are two more trustees and if one of them disclaims, such a disclaimer vests the trust property in the other or others or makes him or them the sole trustee or trustees from the date of the creation of the trust.

8. What happens when there is only one trustee and he disclaims,

Two things can happen :—

(i) A new trustee may be appointed under section 73— (a) By one mentioned in the trust

(b) If there be none such, by the settlor if alive and competent to contract

(ii) If no trustee is appointed in place of the one who has disclaimed the property reverts to the settlor or his representatives if he is dead.

9. What happens to the property? Is it freed from the trust? Does it remain subject to the trust?

The answer is that the trust is not extinguished. The settlor or his representatives, if the settlor is dead, holds it on trust for the beneficiary. In other words the setter or his representative becomes the trustee in place of the trustee who has disclaimed.

The rule is that a trust will never fail for want of a trustee. Wherever a trust exists, and there is no trustee to execute it, the person in whom the legal estate vests holds the property as trustee. This rule is intended to protect the beneficiary.

Mallott vs. *Wilson (1903) 2 Ch. 494.*

II. DISCLAIMER AND ACCEPTANCE BY BENEFICIARY—

Section 9

1. A beneficiary is not bound to accept the trust. He may accept it or he may disclaim it.

2. His disclaimer amounts to a renunciation of his interest under the trust.

3. If he wishes to disclaim he can do so in two ways : (i) By a disclaimer addressed to the trustee or (ii) By setting up a claim inconsistent with the trust with the knowledge of the trust.

4. A claim inconsistent with the trust would be a claim such as ownership of the trust property.

4. What happens to the trust when the beneficiary disclaims?

III. THE ESTATE OF A TRUSTEE UNDER A TRUST. (Page left blank)

IV. THE ESTATE OF A BENEFICIARY UNDER A TRUST. (Page left blank)

PART III
THE ADMINISTRATION OF A TRUST

The Administration of a Trust

In connection with the Administration of a Trust, the Trustee has certain—

(i) Duties—Sections 12—20.
(ii) Liabilities—-Sections 23—30.
(iii) Rights—Sections 31—36.
(iv) Powers—Sections 37—45.
(v) Disabilities—Sections 46—54.

Similarly the beneficiary has certain—

(i) (i) Rights—Sections 55—*67*.
(ii) (ii) Liabilities—Section 68.

1. **Duties of a Trustee** Sections 12—20

V (2) Duty to obey directions contained in the Trust.
IV (3) Duty to act impartially between the beneficiaries.
IV (4) Duty to sell Wasting and Reversionary property.
IV (5) Duty in relation to payment of outgoing of Crops and income.
IV (6) Duty to exercise reasonable care.
IV (7) Duty in relation to the Investment of Trust Funds.
IV (8) Duty to pay Trust moneys to the Right Persons.
IV (9) Duty in relation to delegation of Duties and Powers.
IV (10) Duty to act jointly when there are more than one Trustees.

mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_1 IV (II) Duty not to set up *Jus Tertii*

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_2IV (12) Duty to act gratuitously.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_3IV (13) Duty not to traffic in Trust Property.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_4IV (14) Duty to be ready with Accounts.

V. Powers of a Trustee Sections 37—45.

V. The powers of a Trustee * V (1) General Powers of a Trustee.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_5 V (2) Power of Trustees to sell or mortgage the Trust Property.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_6 V (3) Power in relation to conduct of sales.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_7 V (4) Power to give receipts. * V (5) Power to compound and settle disputes.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_8 V (6) Power to allow Maintenance to Infants.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_9 V (7) Power of Trustees to pay Cost of Beneficiary.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_10 V (8) Suspension of the Trustee' s Powers by Administrative Action.

VI. Powers of the Beneficiaries

mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_11 VI (1) Power of a sole beneficiary.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_12 VI (2) Power of one of several beneficiaries.

25. Is a trustee liable for breach of trust by his predecessor? He is not.

26. Is a trustee liable for the breach of trust committed by a Co-trustee?

He is not except in the following cases :—

(i) Where he has delivered trust-property to his Co-trustee without seeing to its proper application.

(ii) Where he allows his Co-trustee to receive trust property and fails to *make* due inquiry as to the Co-trustee's dealings therewith or allows him to retain it longer than the circumstances of the case reasonably require.

(iii) Where he becomes aware of a breach by a Co-trustee and conceals it or does not take proper steps to protect the property.

27. Breach of Trust jointly committed by Co-trustees.

What is the liability for each? Is it for the whole? Each is liable for the whole to the beneficiary. There will be a right of contribution from the rest.

28. Liability for Payment by a Trustee to a person who is not the person in whom the beneficiary's interest is not vested.

Trustee is not liable, provided:

(i) He had no notice that the interest had vested in another person.

(ii) That the person to whom payment is made was a person who was entitled to payment.

XIII. Protection to Trustees

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_13 (1) General Protection.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_14XIII (2) Statute of Limitation.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_15 Each page contains only the heading and not the details—ed.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_16 XIII (3) Concurrence of or waiver or Release by the Beneficiary.

* mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_17XIII (4) Protection against acts of Co-Trustees.

* mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_18XIII (5) Right of contribution and indemnity as between Co-trustees.

* mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_19XIV. Liability of Third Parties and Beneficiaries.

* mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_20XIV (1) Liability of Third Parties and Beneficiaries who are parties to a Breach of Trust.

* mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_21XIV (2) Following Trust Property into the hands of Third Parties.

PART IV
Constructive Trusts

1. 1. There are *fourteen* cases of constructive trusts which are enumerated in the Trust Act.
2. 2. They fall *under five* heads :—

(1) CONSTRUCTIVE TRUSTS ARISING OUT OF TRANSFERS—SECTIONS 81, 82,84,85.

(2) CONSTRUCTIVE TRUSTS ARISING OUT OF UNFAIR ADVANTAGE GAINED BY ONE PERSON AS AGAINST ANOTHER PERSON—SECS. 85, 88, 89, 90, 93. (3) CONSTRUCTIVE TRUSTS ARISING OUT OF CONTRACTS MADE-SECS. 86,

91,92.

(4) CONSTRUCTIVE TRUSTS ARISING OUT OF A MERGER OF TWO PERSONALITIES IN ONE INDIVIDUAL—SECTION 87. (5) CONSTRUCTIVE TRUSTS ARISING OUT OF A PAST TRUST—SECTION 83.

(1) TRANSFER OR BEQUEST OF PROPERTY

(i) Section 81.

1. In certain cases the transfer or bequest of property imposes an obligation upon the transferee or legatee in the nature of a trust in favour of the owner or his legal representative.

Ordinarily the transferee or legatee would take the property absolutely without any such obligation.

2. When can it be held that the transferee or legatee takes it subject to an obligation? He takes it subject to an obligation when there is no intention on the part of the owner to dispose of the beneficial interest in the property to the transferee or legatee.

3. How is intention to be determined?—In the light of the circumstances of the case. It is the circumstances which must be referred to in order to find out the intention of the owner. (ii) Section 82.

1. The second case where the transfer of property imposes an obligation upon the transferee in the nature of a trust is the case where the transferee is made to one and the consideration is paid by another—in such a case the transferee holds it on trust for the person who paid the consideration.

Ordinarily the transferee would be the owner in the eye of the law, the property being conveyed to him by the transferor.

2. This rule that a transferee who has not paid consideration holds it on trust for a person who has paid consideration applies generally except in one case—

3. *Exception:*

This rule does not apply where there is an intention on the part of the person who paid the consideration to benefit the transferee.

4. *Proof of intention.*

(iii) TRANSFER FOR AN ILLEGAL PURPOSE. Section 84.

1. Ordinarily when a transfer is for an unlawful purpose the Court will neither enforce the transaction in favour of the transferee nor will it assist the transferor to recover the estate if he has parted with it.

2. But the rule does not apply under *all* circumstances. The rule does apply under certain circumstances.

3. What are the circumstances in which the rule does not apply?

The circumstances in which the rule does not apply are—

(i) (i) If the propose is not carried into execution.

(ii) (ii) If the transferor is not as guilty as the transferee.

(iii) (iii) If the effect of permitting the transferee to retain the property might be to defeat the provisions of any law.

4. In these cases the Court will help the transferor and impose upon the transferee an obligation to hold the property for the benefit of the transferor.

(iv) BEQUEST UPON TRUST FOR AN ILLEGAL PURPOSE. Section 85.

1. The position in law with regard to transfers for an illegal purpose is on a par with trust for an illegal purpose.

2. That is, a Court will neither enforce the trust in favour of the parties intended to be benefited nor will it assist the settlor to recover the estate if he has parted with it. 9 *Bom. S. R. 542.*

3. Section 85 recognises a trust although the purpose is unlawful. This is in contrast with the general principle enunciated in section 4 of the Trust Act and therefore requires some explanation.

4. The general principles governing the rights of the parties to an unlawful trust and the exceptions to those principles may formulate as follows :—

1. Where a trust is created for an unlawful and fraudulent purpose, the Court will neither enforce the trust in favour of the parties intended to be benefited nor will it assist the settlor to recover the estate (except in one case).

Q.—Why is a beneficiary not allowed to enforce it?

A.—Because it would be giving effect to an unlawful purpose.

Q.—Why is the author not allowed to recover the estate if he has parted with it?

A.—Because it would be helping him to take advantage of his own fraud.

II. The one case in which the settlor allowed to recover the property although the trust is for an illegal purpose is the case where the illegal

purpose has failed to take effect.

Q.—Why is this exception made?

A.—There are two reasons :—

(i) The purpose being unlawful no trust arose—it being void *ab initio*.

(ii) The trustee having paid no consideration has no right to retain the beneficial interest in the property which must, therefore, return to the settlor.

III. The disabilities attaching to the author of an unlawful trust do not apply to his legal representatives—

Q_why?

A.—Because they are not parties to the transactions.

5. The reason why section 85 recognises a trust in favour of legal representatives is because they are innocent parties having nothing to do with the creation of an unlawful trust.

(3) (2) Constructive Trusts arising out of unfair advantage—

1. Section 85.

1. The first case under this head arises where property is bequeathed under a will and the testator during his life-time wanted to revoke the bequest and he is prevented from revoking it by coercion.

2. Under such circumstances the legatee takes the property not as a beneficial owner thereof but holds it as a trustee for the legal representatives of the testator.

3. The reason is that the legatee has taken unfair advantage by using unfair means. He cannot, therefore, be allowed to retain such an advantage.

II. Section 88

1. The second case arises when any person who is bound to protect the interest of another person by reason of his fiduciary relationship with the latter.

2. Persons who fall in this category are—

(i)	(i)	Agent and Principal.
(ii)	(ii)	Partners in a firm.
(iii)	(iii)	Guardian and ward.
(iv)	(iv)	Trustee and beneficiary.
(v)	(v)	Executor and Legatee.

3. The section says—

(i) That any such person who gains any pecuniary advantage by availing himself of his fiduciary.

(ii) Enters into any dealings under circumstances in which his own

interests are adverse to those of the person whom he is bound to protect and thereby gains for himself a pecuniary advantage

Then

He must hold the advantage so gained for the benefit of the person whose interest he was bound to protect.

4. *Illus.*

(i) A partner buys land in his own name with funds belonging to his firm. He must hold it for the benefit of the partners.

(ii) A trustee, retires from his trust in consideration of a bribe paid to him by his Co-trustee. The trustee must hold the sum for the benefit of the trustee.

(iii) An agent is employed by A to secure a lease from B of a certain property. The agent obtained a lease for himself. The agent must hold it for the benefit of B.

(iv) A guardian buys up the Encumbrances on his ward's property at an undervalue. He can charge the ward only for the value he has actually paid for the Encumbrances.

III. Section 89

1. The third case arises where advantage is gained at the cost of another person by the exercise of undue influence.

2. This is dealt with in section 89. Section 89 says that such a person must hold the advantage for the benefit of the person who is the victim of such undue influence.

3. 3. This is subject to two limitations—

(i) The advantage must have been gained without consideration or

(ii) The person must have had notice of the advantage having been gained by undue influence.

IV. Section 90

1. The fourth case arises where advantage is gained by a qualified owner availing himself of his position as such in derogation of the rights of other persons interested in the property.

2. This is dealt with in section 90. Section 90 says that such an advantage shall be held for the benefit of all and not merely for the benefit of the one who secured it.

3. Subject to two conditions—

(i) The others must repay their due share of expenses properly incurred for securing such advantage.

(ii) The others must bear proportionate part of their liabilities properly contracted for gaining such an advantage.

4. Cases covered are those of co-tenants, members of joint family,

mortgagee, etc.

V. Section 93

1. The fifth case arises where the advantage is gained by a creditor secretly.

2. Such a case generally arises when the creditors accept a composition from a debtor who is unable to pay his debts in full.

3. If it is found that one of the creditors who is a party to the composition has by arrangement with the debtor unknown to the other creditors gains better terms for himself he shall not be entitled to retain the advantage gained by him by reason of such better terms which have caused prejudice to other creditors.

4. 4. The law will regard him as a trustee for the other creditors in so far as the advantage gained by him is concerned.

(4) (3) Constructive Trusts arising out of Contracts

I: Section 86

1. The first case dealt with by the Trust Act under this head relates to a contract for the transfer of property.

2. It falls under section 86. Section 86 refers to a contract in pursuance of which property is transferred and where the contract is of such a character that—

(i) (i) It is liable to recession or

(ii) (ii) It is induced by fraud or mistake.

3. The transferee of the property under such a contract shall hold the property for the benefit of the transferor.

4. This obligation arises only under certain circumstances and is not absolute:

(i) The obligation arises only on receiving notice from the transferor that the contract is liable to recession or that it has been induced by fraud or mistake.

(ii) The obligation will be enforced only on repayment by the transferor of the consideration actually paid by the transferee.

II. Section 91

1. Acquiring property with notice that is subject to a contract with another person.

2. In such a case the person who acquires the property must hold it for the person who had contractual rights in it.

3. This obligation is limited in its extent. It is enforced only to the

extent necessary to give effect to the contract.

4. This obligation does not arise in the case of every acquisition of property which is subject to a contract. It applies only in the case of a contract which could be specifically enforced.

1. Property bought for being held on trust for certain persons.

2. A contracts to buy property from B and represents to B that the purpose of buying it is to hold the property on trust for C. B believing in the representation of A sells the property to A.

3. A must hold the property for the benefit of C.

4. This obligation is also limited in its extent—It is enforced only to the extent necessary to give effect to the contract.

5. The contract may be to hold part of the property in trust for C. In that case the obligation will be enforced only to the extent of the property.

(4) Constructive Trust arising out of merger of two personalities in one individual.

1. Section 87

1. This provides for the case of double personality —one man but two persons.

2. Every contract, debt, obligation or assignment requires two persons.

3. But these two persons may be the same human being.

4. In all such cases, were it not for the recognition of double personality, the obligation or Encumbrance would be destroyed by merger.

5. Because no man can in his own right be under any obligation to himself; or own any Encumbrance over his property.

6. But with the recognition of the double personality this is possible.

7. In fact this is necessary.

8. *Illustration*— Debtor becoming executor.

Executor is the owner in the eye of the law. Merger. Extinction of debt.

9. Section says no.

PART V
The Administration of a Constructive Trust
THE INDIAN TRUST ACT

1. The Law relating to Trust is contained in Act II of 1882.

2. It is an Act which defines and amends—that means that it does not introduce any new principle.

3. The Act does not consolidate the Law—That means that it is not an

Exhaustive Code.

4. The object of the Act was to group in one to enact the legal provisions relating to trusts. Before the Act of 1882 the statutory law relating to trust was contained in 29 *Car II. C. 31 sections 7— II.*

Act XXVII of 1866 ActXXVIIIofl866

There were also few isolated provisions scattered through the Penal Code, Specific Relief, C. P. Code Stamp Act, Limitation, Government Securities Act, Companies Act, Presidency Banks Act.

5. As originally passed, the Act did not apply to the whole of British India. For instance, it did not apply to Bombay. But provision was made to extend it by notification by local Government.

6. It is unnecessary to discuss here whether the Hindu Law and Mohammedan Law recognised trust as defined in the Trust Act. That may be dealt with by others.

The nature of a Trust

1. Trust is defined in section 3. A trust involves three things:

(1)A person who is the *owner* of some property.

(2) Ownership burden with an obligation.

(3) Obligation to use the property for. the benefit of another or of another and himself.

2. It is ownership without beneficial enjoyment. It involves separation of ownership and beneficial enjoyment.

3. A trust arises out of a confidence reposed in and accepted by the owner.

4. The owner in the eye of the law is the trustee. After the trust is created the author of the trust ceases to be the owner of the property.

1. WHAT IS A TRUST.

1. The terms Trust and Trustee are defined in various enactments of the Indian Legislature.

(i) *Definition in Specific Relief Act I of 1877. Section* 3—

(1) *Obligation* includes every duty enforceable by law.

(2) *Trust* includes every species of express, implied or constructive fiduciary ownership.

(3) *Trustee* includes every person holding expressly, by implication, or constructively a fiduciary ownership.

(ii) *Definition in the Indian Trustees Act XXVII of 1866. Section* 2—

"Trust shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception, the words *trust* and *trustee* shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some

beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of executor or administrator of a deceased person.

(iii) *Definition in Limitation Act IX of 1908. Section 2 (ii)*—

Trustee does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied or a wrong-doer in possession without title.

(iv) *Indian Trusts Act II of 1872.*

(1) Section 3—"A trust is an obligation annexed to the ownership of property . . .

(2) Ingredients of a Trust (i) A Trust in an *obligation.*

(ii) The obligation must be annexed to the *ownership* of property.

(iii) The ownership must arise out of *confidence* reposed in and accepted by the owner.

(iv) The ownership must be for the benefit of another (i.e., a person other than the owner) or of another and the owner.

Explanation of Terms

I. THERE MUST BE OBLIGATION.

II. OBLIGATION MUST BE ANNEXED TO OWNERSHIP PROPERTY.

1. There may be an obligation to which a person is subject although there is no property to which it is annexed.

E.g. *Torts* assault—

2. There may be property without there being any obligation attached to it. E.g. *Full* and *complete* ownership—sale of property.

III. THE OWNERSHIP OF PROPERTY MAY BEFOUNDED IN CONFIDENCE OR IT MAY NOT.

Illus.

A person may transfer ownership to another with the intention of conferring upon him the right to enjoy the property.

A person may transfer ownership to another without the intention of conferring upon him the right to enjoy the property.

The difference between ownership founded in confidence and ownership not founded in confidence consists in this—

(i) In the latter there is *a jus in re* (a complete and full right to a thing) *or jus ad rem* (an inchoate and imperfect right).

(ii) In the former there is not. E.g. Bailment.

3. The nature of a trust can be better understood by contracting it with

other transactions resembling a trust.

Trust distinguished from agency

1. Where there is a trust, the ownership of the trust property is in the trustee. The trustee is personally liable on all contracts entered into by him in reference to the trust, although he may have a right of recourse against the trust funds or against the beneficiary.

2. An agent has no ownership in law in the goods entrusted to him. If an agent enters into a contract as agent, he is not personally liable. The contract is with the principal.

Trust distinguished from Condition

1. Cases of condition differ from cases of trust in two respects—

First. A trust of property cannot be created by any one except the owner. But A may dispose of his property to B upon condition express or implied that B shall dispose of his own property in a particular way indicated by A.

Second. The obligation of the person on whom the condition is imposed is not limited by the value of the property he receives, e.g., if A makes a bequest to B, on condition of B paying A's debts, and B accepts the gift, he will be compelled in equity to discharge the debts although the exceed the value of the property.

2. But the words"upon condition"may create a real trust. Thus a gift of an estate to A on condition of paying the rents and profits to B constitutes a trust because it is clear that no beneficial interest was intended to remain in A.

A may dispose of his property to B upon condition express or implied that B shall dispose of his property to C. There is a condition in favour of C.

Is this a trust? Trust distinguished from Bailment

1. Bailment is a deposit of chattel and may in a sense be described as a species of trust. But there is this great difference between a bailment and a trust, that the general property in the case of a trust, is in the trustee, whereas a bailee has only a special property, the general property remaining in the bailor.

2. The result of this difference is that an unauthorised sale by a trustee will confer a good title upon a *bonafide* purchaser who acquires the legal interest without notice of the trust, whereas such a sale by a bailee confers as a rule no title as against the bailor.

3. Bailee does not become the owner of the property as a result of the bailment. But a trustee does in law become the owner

of the property as a result of the trust notwithstanding he is under an

obligation to deal with the property in a certain specified manner.

Trust distinguished from Gift

Ordinary contract differs from a trust. Contract which confers a benefit on a third party closely resembles a trust.

1. There is a similarity between a Trust and a Gift inasmuch as in both the transfer results in ownership. The Trustee and the Donee both become owners of the property.

2. But there is a difference between the two. In a gift the donee is free to deal with the property in any way he likes. In a Trust the trustee is under an obligation to use the property in a particular manner and for a particular purpose.

Trust distinguished from Contract

1. That there is a distinction between trust and contract is evident from the existence of differing legal consequences attached to a trust and to a contract:

(i) A trust, if executed, may be enforced by a beneficiary who is not a party to it whilst only the actual parties to a contract can, as a rule, sue upon it

(ii) An executed voluntary trust is fully enforceable while a contract lacking consideration is not.

2. However, the determination of the question whether a given set of facts gives rise to a trust or a contract is not easy. What is the test?

Keetan—-pp. 5-6 (1919) A. C. 801 | 38 Bom. S. R. 610.
(1926) A. C. 108 |

It is a question of intention.

Trust distinguished from Power

1. The term”power”in its widest sense includes every authority given to a person (called the donee of the power) to act on behalf of or exercise rights belonging to the person giving him the authority (called the donor of the power).

2. Powers are of many kinds e. g.

(i) The common law power of an agent to act for his principal, given sometimes by a formal”power of attorney".

(ii) Statutory power such as the power of sale given to a mortgagee.

(iii) The various express and implied equitable powers possessed by trustees and executors.

(iv) Powers to appoint trusts so as to create equitable interests.

3. The power of appointment is a transaction which resembles a trust and it is this which must be distinguished from a trust.

The word appointment means -pointing out, indicating-the act of declaring the destination of specific property, in exercise of an authority conferred for that purpose-the act of nominating to an office.

The last class *termed, powers of appointment* are made use of where it is desired to make provision for the *creation* of future interests, but to postpone their complete declaration.

Thus in a marriage settlement, property may be given to trustees upon trust for the husband and wife for their lives and, after the death of the survivor upon trust for (i) *Such of the children* of the marriage as the survivor shall appoint, or (ii) *All the children* of the marriage in such shares as the survivors shall appoint. In such a case, upon appointment being made, the child to whom it is made takes exactly as if a limitation to the same effect had been made in the original instrument.

A power of this kind, where there is a restriction as to its objects (i.e., persons in whose favour it may be exercised) is termed a *special power of appointment.* But there may be a *general power* of appointment when there is no such restriction, so that the donee may appoint to himself. In such a case the donee having the same powers of disposition as an owner, is for most purposes treated as the owner of the property :

(i) (i) A power may give a mere discretion and therefore is distinct from a trust, which creates an obligation or

(ii) (ii) A power may impose an obligation to exercise the discretion.

In the former case there is no trust. In the latter case there is. The former is called *mere power.* The latter is called power in the nature of a trust *or power coupled with trust.*

(iii) There is also a third category of cases which arc cases of a *trust coupled with a power.*

These are cases where a trustee of a property though under an obligation to apply it for the benefit of certain individuals or purposes, may have a *discretion* as to whether he will or will not do certain specified acts, or as to the amount to be applied for any one individual or purpose or as to the time and manner of its application. In such cases, the Court will prevent the trustee from exercising the power unreasonably, it will not compel him to do such acts or attempt to control the proper exercise of his discretion.

1. Power resembles a trust and also differs from it.

(i) It resembles a trust inasmuch as a power is an authority to

dispose of some interest in land, but confers no right to enjoyment of land.

(ii) It differs from a trust inasmuch as a power is discretionary, whereas a trust is imperative; the trustee if he accepts must necessarily do as the settlor directs.

mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_22 VII. NEW TRUSTEES.

(1) Survivorship of the office and estate or trustee on death.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_23 (2) Devolution of the office and estate on Death of the survivor.

*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_24(3) Retirement or Removal of a Trustee.

* mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_25(4) Appointment of New Trustees.

* mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_26VIII. APPOINTMENT OF A JUDICIAL TRUSTEE.

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*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_28 (2) Appointment of a Public Trustee as an ordinary Trustee.

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mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_30 (4) Duties, Rights and Liability of the Custodian Trustee and Managing Trustee.

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(1) (1) Right to Reimbursement and Indemnity.

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PART II.htm - _msocom_34(3) Right to pay Trust Funds into Court.

* mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52B. Notes on Acts and Laws PART II.htm - _msocom_35**XI.** RIGHT OF TRUSTEES AND BENEFICIARIES TO SEEK THE ASSISTANCE OF PUBLIC TRUSTEE OR COURT.

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XII. CONSEQUENCES OF A BREACH OF TRUST.

1. *Definition of Breach of Trusts.*—Breach of trust is defined in section 3, a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a breach of trust.

2. *Under the English Law.*—Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument, or by law, is called a breach of trust.

3. *Breach of Duty.*—A trustee has Duties, Right, Powers and disabilities. Only breach of duty is breach of trust.

1. *The measure of liability* is the loss caused to the trust property.

2. Is he liable to pay interest? Only in the following cases—

(a) Where he has actually received interest.

(b) Where the breach consists in unreasonable delay in paying trust-money to the beneficiary.

(c) Where the trustee ought to have received interest, but has not done so.

(d) Where he may be fairly presumed to have received interest.

(e) Where the breach consists in failure to invest trust-money and to accumulate the interest or dividends.

(f) Where the breach consists in the employment of trust property or the proceeds thereof in trade or business.

3. Is he entitled to set off a gain from breach of trust against a loss from breach of trust.

He cannot.

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VII—**Law of Prescription** (Page left blank)

I. I. INTRODUCTORY

1. What is the nature of the Law of Limitation?

1. There are various ways in which a time-limit enters into a course of litigation:

(1) Cases where the law says action shall be taken *within* a stated period:

Illus.—Order 6 Rule 18.—Amendment of a Plaint. Party obtaining leave to amend must amend within the time fixed by the Court for amendment and if no time is fixed then within 14 days. (2) Cases where the law says action *shall not* be taken before a certain period has elapsed.

Illus.—Section 80 of the C. P. C.—Suit against Secretary of State. No suit shall be instituted against the Secretary of State for India in Council or against any public officer in respect of any Act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been given.

(3) Cases in which the law prescribes that action shall not be taken *after* a certain period has elapsed.

2. It is the *third* class of cases which strictly speaking constitute the subject-matter of the Law of Limitation.

2 Distinction between Limitation—Estoppel— Acquiescence and Laches

All these have the effect of denying to an aggrieved party a remedy for the wrong done to him. That being so it is necessary to distinguish them

from Limitation as such.

Limitation and Estoppel

1. By Limitation a person is prevented from getting relief because of his having brought the action after the time prescribed for bringing his suit.

2. By Estoppel a person fails to get relief because he is prevented by law from adducing evidence to prove his case.

Limitation and Acquiescence

1. Limitation defeats a suitor in the matter of obtaining relief for a wrong because he has *consented* to the doing of the wrong because his suit is beyond time.

2. Acquiescence defeats a suitor in the matter of obtaining relief for a wrong because he has *consented* to the doing of the wrong.

Limitation and Laches

1. Both have one common feature—relief is denied on the sole ground that action is not brought within time.

2. The distinction lies in this—In limitation time within which action shall not be brought is prescribed by Law. In laches there is no time prescribed and the Court, therefore, in granting relief works on the principle of unreasonable delay.

3. In India the doctrine of laches has not much scope because of the Law of Limitation which has prescribed a definite time limit for almost all actions. It does not, therefore, matter whether a man brings his suit on the first day or the last day of the period prescribed by law for his action.

5. 3. The doctrine of laches applies in India only in the following cases:

(1) Where the relief to be granted by the Court is *discretionary*.

This is so

(i) (i) In cases falling under specific relief.

(ii) (ii) In cases falling under interlocutory relief.

(2) Where the Law of Limitation does not apply e.g. Matrimonial suits.

Delay would mean that the offence was condoned.

3 The object of Limitation

1. Two things are necessary for a well-ordered community (i) Wrongs must be remedied. (ii) Peace must be maintained.

2. To secure peace of the community it is necessary that titles to property and matters of right in general should not be in a state of constant uncertainty, doubt and suspense.

3. Consequently, if persons are to be permitted to claim relief for what they think are wrongs done to them, then they must be compelled to seek relief within a certain time. There is nothing unjust in denying relief to a

person who has tolerated the wrong done to him beyond a certain period.

4. The Law of Limitation is based upon this principle.

5. That being the underlying principle, the Law of Limitation is absolute in its operation and is not subject to agreement or conduct of the parties. That is to say it is not subject to

(1) Waiver.
(2) Custom.
(3) Estoppel.
(4) Variation in respect of enlargement or abridgement of time by agreement of parties sections 28 and 23 of the Contract Act.

6. In this respect the Law of Limitation differs from the Law of Negotiable Instruments.

7. *Limitation and the onus of Proof.*

1. The onus of proof is upon the Plaintiff. He must prove that his suit is within time.

37. *Bom. S. R. 471 - A.I.R.. 1935 September.*

A by a registered lease, dated 8th July 1922, gave certain lands to *B* on a rental for a period of 25 years. Subsequently, *A* dispossessed *B* alleging that the lease was taken by undue influence. *B* brought a suit against *A* for an injunction restraining *A* from interfering in any way with his possession and enjoyment and for possession of land.

It was contended on behalf of B that A was precluded from challenging the validity of the lease, on the ground that if he had sued to have the lease set aside the suit would have been barred by Limitation. In other words, it was contended that the plea of the Defendant was barred of the Limitation.

Question is : Is Defendant bound by the Law of Limitation?

The answer is No. —Section 3 refers to Plaintiff and not to Defendant.

8. *Plea of Limitation and the Stage of the Proceedings.*

1. The plea of limitation may be raised at any stage of the proceedings, i. e., it can be raised even in second appeal.

2. It can be raised for the first time in appeal

38 Mad. 374
36 Cal. 920
38 Cal. 512
38 Bom. 709 (714).

3. It can be raised in appeal even though it was abandoned in the trial Court.

3 All. 846 (848).

4. 4. It can be raised before the Privy Council although it had been

abandoned in the Courts below.

361 A. 210.

5. 5. This is subject to the proviso that when it is raised in the appeal stage Court will not allow it if the facts on record are not sufficient for its decision and if it involves a further inquiry into facts.

57 *Cal. 114.*

II. THE INDIAN LAW OF LIMITATION

Its Scheme of arrangement

Operation of Lapse of time under Indian Statute Law

1. Lapse of a definite period of time produces four results under Indian Statute Law.

(1) It multiplies the right of the holder to obtain a remedy for the wrong—Section 3 of the Limitation Act.

(2) It not only bars his remedy but extinguishes his right—Section 28 of the Limitation Act.

(3) It confers a right to light, air, way, watercourse, use of water or easements on a person who has enjoyed it for a prescribed period—Section 26 Limitation Act. (4) It extinguishes right to easements—Section 47 of Act V of 1882.

(2), (3), (4) are cases which fall under the Law of Prescription. (1) Only falls under the Law of Limitation. The Limitation Act deals with a mixed body of law and two must be studied separately.

II. II. THE INDIAN LAW OF LIMITATION

Its Applicability

I. In respect of Territory

1. The Act extends to the whole of British India—*Section 1(2).*

2. The Act applies to *every* suit instituted, appeal preferred and application made in Courts functioning in British India.

3. It does not matter where the cause of action, whether in British India or outside British India, it does not matter where the transaction took place, whether in British India or outside British India, if the suit is instituted or appeal is preferred or application is made in a Court in British India, the Law of Limitation that will apply will be the Indian Law of Limitation and not Foreign Law of Limitation.

4. There is one exception to this rule which is enacted in section 11 (2) which says : A Foreign Rule of Limitation shall be a defence to suit in British India on a contract entered into in a foreign country if the rule has extinguished the contract and that the parties were domiciled in such

country during the period prescribed by such rule.

2. **In respect of Proceedings**

1. SPECIAL PROCEEDINGS

(1) *Arbitration Proceedings*

It was at one time doubted if the Limitation Act applied to proceedings before an Arbitrator on the ground that it applied only to suits, appeals and applications to the *Court* and that the Arbitrator was not a Court. This doubt has now been resolved by the Privy Council which has held that where persons have referred their disputes to arbitration, the arbitrator must decide the dispute according to the existing law and that he must recognise and give effect to every defence of limitation, unless that defence has been excluded by agreement between the parties. (1929) 561. A. 128.

Ques. This decision goes to the length of laying down that parties can vary the Law of Limitation by private agreement. This seems to overlook the provisions of sections 28 and 23 of the Contract Act.

(2) *Proceedings under the Companies Act.*

When a Company is being wound up and a liquidator is appointed to carry on the affairs of such Company, Section 186 of the Company's Act provides that the liquidator may make an *application* to the Court for an order upon a person"to pay any moneys due from him to the Company."Ordinarily there would have to be a suit. But to avoid multiplicity of suits this special proceedings is permitted by law.

Question is whether Limitation applies to such proceedings. It has been held that"money due"in section 186 means moneys due and recoverable in law, i.e., *moneys not* time-barred. This means that the Law of Limitation applies to such proceedings. *601.A.13(23)*

(3) *Proceedings under the Income Tax Act.*

The Civil Courts in India have no jurisdiction in matters of public revenue.

They can have such jurisdiction only if a particular Revenue Act invests them with such jurisdiction. For example a provision will be found in section 66(3) of the Indian Income Tax Act of 1922. Under the section, a party aggrieved by an order of the Income Tax Officer in the matter of assessment may apply to him for stating a case to the High Court and if he refuses may apply to the High Court for an order compelling the Commissioner to state a case and refer it to the High Court.

There is a time-limit for such an application. But the Law of Limitation does not apply to it. The time-limit is the time-limit prescribed by the Income Tax Act and not by the Law of Limitation.

(4) Proceedings before the Commissioner of Workmen's Compensation

The Workmen's Compensation Act, 1923, provides for Compensation to be paid to workmen for injuries caused to them in the course of their employment. The cases are heard by a Commissioner. The Commissioner is a special tribunal and not a Court and therefore the Limitation Act does not apply to proceedings before him.

This does not mean that the claim for compensation for injury can be prosecuted before him at any time. That would be so if the Act had made no provision for a time-limit. As the Act has presented six months as the time-limit, suits have to be brought within that period. (5) *Proceedings under Registration Act.*

(1) Presentation of Documents—4 months.

(2) Appearance of Parties for admitting Documents-4 months.

3. Criminal Proceedings

1. Criminal Proceedings are generally instituted in the name of the Crown because they involve a breach of the King's peace.

2. It is a maxim of Constitutional Law that lapse of time does not affect the right of the King.

3. That being so the Law of Limitation does not apply to criminal prosecutions.

4. Two things may be noted :

(1) There are many Acts which prescribe limits of time for institution of prosecution under those Acts. E.g. Government of India Act, Section 128 : Opium Act, Customs Act, Salt and Excise Acts and Police Act.

(2) Limitation Act, although it does not provide for any time-limits for criminal prosecutions, it does provide for *appeals* under the Cr. P. C.

4. Civil Proceedings

(i) With regard to *suits* different kinds of suits have been specified in different Articles. There is also a general residuary Article No. 120 which is made to apply to any suit for which no period of limitation is provided elsewhere in the Schedule. The Act, therefore, applies to *all* suits.

(ii) With regard to *appeals* there are two Courts to which appeals can lie in India—(i) The Court of a District Judge and (ii) The High Court. The Limitation Act specifies appeals to both these Courts and therefore, it can be said that the Law of Limitation applies to all appeals.

(iii) With regard to *applications,* different kinds of applications are enumerated in the different articles in the Schedule. As in the case of articles relating to suits there is also an Article 181 for applications for

which no period of limitation is prescribed elsewhere in the schedule or by section 48 of the C. P. C. But almost all High Courts have held that the operation of this Act is to be restricted to applications under the C. P. C. only. That being so it is clear that the Limitation Act *does not apply* to *all* applications. For instance it does not apply to :

(i) Applications for the grant of probate letters of administrations succession certificates.

(ii) Applications under the Rules of the High Court

32 Bom. I
48 Cal. 817
46 Cal. 249.

(iii) Applications under a Local or Special Act (unless such Act provides for it).

These not being matters dealt with by the C. P. Code.

In respect of persons

1. The general rule is that the plea of limitation applies to every Plaintiff.

2. Originally, limitation did not apply to the Crown when it sued as a Plaintiff, on the ground that lapse of time did not affect the Crown. This maxim of Constitutional Law although it governs criminal prosecutions has been negatived so far as civil proceedings by the Crown are concerned by Article *149* of the Limitation Act which applies to every kind of *suit brought by Government,* and prescribes *60* years as the time-limit. Suits *against* Government must be brought within the ordinary time-limits.

15 Mad. 315.

Similarly, suits by private persons *claiming through* Government are also subject to the ordinary time-limit prescribed by the Act. This was always the rule. It was not always the rule for Government to bring a suit within any prescribed time. This has now been altered. It can, therefore, be said that as a rule the Law of Limitation applies to *all* persons whether they are private persons or corporate bodies of Governments, and that the plea of limitation is available to every Defendant as against every Plaintiff whether that Plaintiff is a private person or a Government.

3. The plea of limitation is available to every Defendant. To this rule there are certain exceptions.

37 *Bom.*—-*S. R. 471*

Section 10.

1. The defence of limitation is not available to a person in whom property has become *vested in trust* for any specific purpose nor is it available to his legal representatives or assigns (not being assigns for valuable consideration), in a suit for recovery of the property or the proceeds

thereof or for an account of such property. This section is to be applied to an *express trust* as distinguished from an *implied* or *constructive trust*. A trustee of an implied or constructive trust can take the defence of limitation.

Distinction between an Express Trust and Implied or Constructive Trusts.

Persons, therefore, who are holding a fiduciary position are not trustees within the meaning of Section 10 ; E.g. Agent, Manager, Factor, Benamidar, Executor or Administrator, Banker, Surviving partner. Director of a Company Liquidator of a Company, *Karta* or Manager of a joint Hindu family.

Secondly Section 10 is applicable only in cases of persons"in whom property has become *vested*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52C1. Notes on Acts and Laws PART III.htm - _msocom_1 in trust for a *specific purpose"44 Mad.* 277 *(281-2).*

What is Specific Purpose? A specific purpose is a purpose that is actually and specifically defined in the document by which the trust is created for a purpose which from the specified terms can be certainly affirmed.

49 1 .A. 37 (43)
58 I.A.I

That being so even a trustee *de son tort* would fall within this Section.

Meaning of *a trustee de son tort.*

Explanation.—Hindu, Mohammedan and Charitable endowments are declared to be express trusts and their managers express trustees.

Thirdly.-Section 10 not only applies to the defaulting trustee himself, but also applies to his legal representatives and assigns except assigns for valuable consideration. Purchasers for value from a defaulting trustee are protected and they can plead limitation.

Whether purchasers from a trustee must in addition to being purchasers for value should also be purchasers without notice of trust is a point on which the Act is silent. Judicial decisions on this point are, however, in conflict.

Section 29 (3) II. The Limitation Act does not apply to parties litigating under the Indian Divorce Act (IV of 1869).

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As against a Special Law

1. Besides this General Law of Limitation there are other special or local laws which also prescribe time-limits for suits, appeals or applications. In case there is a difference between the time-limits fixed by the general and special law, question is which law is to prevail.

2. The answer to this question is given in Section 29. According to the Section the special law will prevail over the general law.

3. Section 29 also provides for the applicability and non-applicability of the other Sections of the Limitation Act in cases of conflict between the general and special law as to time-limit.

4. According to Section 29, in cases of conflict the provisions of Sections 4, 9 to 18 and 22 of the Limitation Act will apply

(unless expressly made inapplicable) and the remaining provisions of the Act shall not apply (unless expressly made applicable by the Special Law).

The Scheme of the Law of Limitation

1. The Indian Limitation Act consists of 29 Sections and one Schedule.

2. The Schedule is divided into three Divisions :

First Division—deals with Suits.

Second Division—deals with Appeals.

Third Division—deals with Applications.

3. The Schedule in respect of each of its Divisions is cut up into 3 Columns.

Column 1—Describes the nature of the claim for which suit is brought or of the appeal or if application is made. Provision is made for 154 different classes of suits.

Provision is made for 9 different classes of appeals. Provision is made for 26 different classes of applications.

Each of these provisions is numbered seriatim and is called article no. so and so. There are in all 189 articles in the Schedule though the last article is 183, that is, because some articles have the same number and are distinguished by the addition of A to the same number.

Column 2.—Specifies the period *within* which the suit must be filed, appeal or application must be made.

Column 3.—Specifics the starting-point of the period of limitation within which *suit* must be filed or appeal or application must be made.

4. The Sections of the Act in so far as they deal with the Law of Limitation as distinguished from the law of prescription deal with various questions arising out of the three columns of the Schedule. The Schedule, therefore, is the most important part of the Law of Limitation.

IV.LAW OF LIMITATION

Questions arising out of Column 3

Subject-matter of Column 3

1. Column 3 deals with the starting point of Limitation. Two Questions arise—

(1) When does time begin to run? What is the starting point of Limitation?

(2) Is there only one starting point of Limitation? *Or* Can there be a

fresh starting point of Limitation?

1. *When does time begin to run? What is the starting-point of Limitation.*

1. The answer to the question as to when time begins to run is this. Time in respect of the institution of a *suit, appeal* or *application* begins to run from the occurrence of the event mentioned in Column 3. In most cases the event is the incident. . But in some cases it is the knowledge of the incident to the Plaintiff—90-92. Whether it is the incident or the knowledge of the incident, in any case the occurrence of the event in Column 3 marks the starting point of limitation. Two questions with respect to right to sue and cause of action.

(1) Must a Plaintiff sue when there is a cause of action?

2. Confining to suits it may be said that time begins to run when the right to sue arises—Article 120. This is the first fundamental Rule.

When does the right to sue arise? It arises—

(i) When the event mentioned in column 3 occurs if the suit falls under any of the articles.

(ii) When the suit does not fall under any specific article but falls under the general article (120) then right to sue accrues when the cause of action arises or in certain cases knowledge that cause of action has arisen comes to the Plaintiff, so that time begins to run from the occurrence of the cause of action or from the date of the knowledge of the cause of action.

Cause of action arises when a wrong is done to a party. Every wrong does not necessarily give rise to a cause of action. The wrong must under the circumstances be real and necessitate taking of action.

(iii) The effect of death on the starting point of Limitation.

1. When does limitation commence in the case of a person who dies before the right to sue accrues to him?

2. When does limitation commence in the case of a person who dies before another person gets a right to sue him?

1. When a person dies *before* the right to sue accrues to him the period of limitation *will commence* when there is a legal representative of the deceased capable of instituting such a suit.

II. When a person against whom a right to sue would have accrued dies before such accrual, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom a suit could be brought.

Exception to the fundamental Rule—Limitation runs from the moment the right to sue accrues

1. Cases where Limitation commences *before* the right to sue accrues.

(i) Money payable on demand and money payable on a Bill or a Pronote made on demand.

In these cases unless there is a demand to pay and there is a consequent refusal to pay there is no right to sue. The right to sue arises on the date of the refusal to pay. But time begins to run not from the date of the refusal but from the date of the loan or the date of the Bill or note, i.e., *before* right to sue has accrued. 57—58—59—67—73

(ii) Redemption of a Pledge—suits on—

The pawnee's right to sue to recover the pledge accrues on the date on which the debt in respect of goods pledged is paid off by him. But time begins to run not from the date of payment but from the date of the pledge, i.e., *before* the right to sue has accrued—145.

§ Cases where Limitation does not commence even the right to sue has accrued—Sections *6,* 7, *8*

1. These are cases where a person to whom a right to sue has accrued is suffering from a disability the date on which the right to sue accrued.

2. According to this exception time will not run against a person who is suffering from a disability although the right to sue has accrued to him.

3. Only three kinds of disabilities are recognised— (i) minority, (2) lunacy, (3) idiocy.

4. In the case of a person suffering from a disability, time commences when the disability ceases.

5. Where these disabilities are concurrent or succession in their operation, limitation commences when all such disabilities have ceased.

6. Where the disability continues upto the death of the person then time will commence against his legal representative from the date of his death.

7. If the legal representative is under a disability at the death of the person then time will commence when the disability of the legal representative comes to an end.

8. What is the effect of a disability of persons who are jointly entitled to sue upon the starting point of limitation.

Two cases must be distinguished:

(i) Where only some of them are under a disability.

(ii) Where *all of them* are under a disability.

1. Where *only some* of them are under a disability :

(i) Where full discharge or release can be given to the Defendant by the **party** not *under, disability* without the concurrence of the person under a disability time will commence to run against all of them from the time the right to sue accrues.

(ii) Where no such discharge can be given, time will not run against

any of them until the disability ceases or until the person under disability loses his interest in the subject-matter.

II. Cases where *all* persons who are entitled to sue are under a disability:

(i) Where all are under a disability, rules laid down in Section 6 will apply.

(ii) Where one of them *ceases* to suffer from the disability, Section 7 will apply and the governing question will be whether the person who is free from his disability give a valid discharge without the concurrence of those who continue to suffer from their disability. If the answer is in the affirmative, time will commence to run against *all* from the moment the disability of such a person has ceased to operate. If the answer is in the negative then lime will not run against any of them until *all* of them cease to suffer from their disabilities.

9. Within what time from the date of the Cessation of the disability, a suit must be brought by the person who was under a disability when the right to sue accrued to him?

1. There are three answers to this question.

(i) Within the prescribed period *to be counted from the date of the accrual of the right to sue, if* the period left over after the cessation of the disability is more than three years.

Illus. Prescribed period—12 years from 1920 to 1932.
Years of disability—4 years i.e. 1924 to 1936.
Period left over—9 years. Suit must be brought before 1932.

Suit must be brought within 9 years, i.e., within 12 years from the accrual of the right to sue i.e. within the prescribed period. He gets no benefit at all. Even his time is counted from the date of the accrual of right to sue.

(ii) Within the prescribed period *to be counted from the cessation of the disability,* if the period prescribed is less than three years.

He gets no benefit from his disability ; only his time begins to run from the date of the cessation of the disability.

Illus. Prescribed period I year from 1920 to 1921.
Years of disability—4 years. *S. P.* 1924 Bar 1925.
Suit must be brought in 1925.

(iii) Within *three* years from the date of the cessation of the disability, if the period left over after the cessation of the disability is *less* than three years and the period prescribed is *more* than three years.

Prescribed period—6 years from 1920 to 1926.
Years of disability—4 years from 1924—Bar 1930.
Period left over after cessation is—2 years.

Suit must be brought in 1928 within three years from cessation of disability.

10. Some points to be noted with regard to this question of disability.

(i) The Section applies only to *suits* and to applications for the execution of a decree, but not to any other applications, nor to appeals.

(ii) The Section applies only to a person who was already under a disability when the right to sue accrued. If the disability supervenes *subsequently* than the Section does not apply.

(iii) The Section applies only where the *Plaintiff* or the person entitled to sue is under a disability. The disability of the *Defendant*—person liable to be sued—does not matter at all.

Time will begin to run against the Plaintiff even if the Defendant is suffering from a disability.

First Fundamental Rule is that limitation starts in the case of person who is not suffering from a disability, from the date of the occurrence of the event mentioned in Column 3 and if no event is mentioned in Column 3 then from the date when the cause of action is said to arise.

Fundamental Rule II

1. When once time has begun to run, no subsequent disability or inability to sue stops it.

2. This means that Limitation, once it starts is never suspended. If a person becomes insane or dies *after* the right to sue has accrued, time will continue to run against them.

II. Is THERE ONLY ONE STARTING-POINT OF LIMITATION? OR CAN THERE BE A FRESH STARTING POINT OF LIMITATION.

1 Distinction must be made between the occurrence of a fresh cause of action and the occurrence of a fresh staring point if limitation in respect of the *same* cause of action. We are here considering cases where there occurs a fresh starting point of limitation in respect of the *same* cause of action.

2. The general rule of the Law of Limitation is that for a right to sue there is *only one* starting point of limitation and that starting point dates from the day when the right to sue accrues.

3. There are three cases where there is a fresh starting point of limitation in respect of the same cause of action :

(i) Case where there is an acknowledgement.

(ii) Cases where there is a part payment.

(iii) Cases where the cause of action arises out of a continuing breach of contract or out of a continuing Wrong independent of contract.

Section **19**—§ Acknowledgement

I. GENERALLY

1. The acknowledgement must have been made *before* the period of limitation has actually run out. An acknowledgement made *after* the period has run out is of no avail and cannot be given a fresh starting point of limitation.

2. The acknowledgement must be in writing.

3. The acknowledgement must be signed by the party liable or by his agent duly authorised to sign an acknowledgement of liability.

4. The acknowledgement need not be *to the* creditor.

5. The acknowledgement must contain an admission of a *subsisting liability*. It need not contain a promise to pay. Indeed it may be coupled with a refusal to pay or with a claim to a set-off.

II. SECTION 21 (2)—ACKNOWLEDGEMENT BY PERSONS JOINTLY LIABLE

1. When a property or a right is claimed against persons who are jointly liable such as joint-contractors, partners, executors, mortgagees, etc., an acknowledgement signed by any one of them (or by the agent of any one) render the rest chargeable.

III. SECTION 21 (3)—ACKNOWLEDGEMENT BY A HINDU WIDOW

Acknowledgement by a Hindu widow or other limited owner shall be binding upon the reversioners.

IV. SECTION 21 (3)—ACKNOWLEDGEMENT BY A HINDU MANAGER

The acknowledgement signed by (or by the agent of) the Manager of a joint Hindu family shall be binding upon the whole family where the acknowledgement is in respect of a liability incurred by or on behalf of the whole family.

§ Payment of interest on debt or on Legacy and Section 20—Part-payment of the Principal

1. The payment must be payment before time has run out.

2. The payment is made by the debtor or by his agent duly authorised to make such payment.

3. The payment must be *voluntary*.

Section 23—§ Continuing breach of contract and continuing wrong independent of contract

1. In the case of a continuing breach of contract or a continuing wrong, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong continues.

Q.—What is meant by a continuing breach and a continuing wrong?

Continuing breach of contract

1. Covenant to repair in a lease which is broken every day the premises

are out of repair.

3. 1. Use of premises contrary to the covenants in the lease.

Continuing wrongs in respect of a tort

1. Infringement of a trade mark.

2. Refusal of a wife to return to her husband.

In these cases the right to sue arises *de die in diem* (from day to day).

3. The distinction between a continuing and a non-continuing wrong is very difficult to draw. A wrong continues either because the effect of a wrongful act once done continues or because the wrongful act is repeated.

The case of a continuing wrong is the case where the wrongful act is repeated and not where the effect of a wrongful act continues.

CHAPTER 6
THE LAW OF CRIMINAL PROCEDURE IN BRITISH INDIA

PRELIMINARY
Wrong and the Remedy for it

1.mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52C1. Notes on Acts and Laws PART III.htm - _msocom_2 One of the clauses in the constitution of the U. S. A. runs thus:

"No citizen shall be deprived of his life, liberty and property without due process of law".

Such a clause is not found in the constitution of other states. All the same every civilised State seeks to protect the life, liberty and property of its citizen from unwarranted attacks.

Such a guarantee is the foundation of the state. With this object in view every state has a code of laws which defines what are wrongs. In India we have the Penal Code and the law of Torts.

2. Wrongs are either civil *or* criminal.

Some wrongs are both civil as well as criminal; *Assault, Defamation :* they are both civil as well as criminal wrongs. The aggrieved party can proceed both in a criminal court and also in a civil court.

3. *Remedy.* It would be of no avail whatsoever merely to enact wrongs' if for every wrong an appropriate remedy is not provided. On the other hand, it may be said, that the law recognises a wrong only when it provides a remedy for its vindication. When there is no remedy provided for the commission of a wrong, the enactment of a wrong would be an idle work.

Liberty of a person and the writ of Habeus Corpus.

4. The Criminal Procedure Code is a remedial law. It provides a remedy to the aggrieved party against the offender for the vindication of the

criminal wrong done to him. It is a popular notion that the law allows ten guilty persons to escape rather than punish an innocent individual. This is absolutely incorrect. All that the law says is that no man shall be tried except in accordance with the procedure laid down by law.

5. The Criminal Procedure lays down :

(1) The Constitution of the Criminal Courts.

(2) The means and methods by which the accused may be brought before a Criminal Court for his trial.

(3) The rules as to trial of an accused.

(4) The rules as to punishment, and

(5) The rules as to rectification of an error in the trial, conviction or punishment of an accused.

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I. CONSTITUTION OF CRIMINAL COURTS

7. For a proper understanding of this subject a distinction must be drawn between the Presidency Towns system and the Provincial system.

Such distinction is often made in India in respect of other laws as well;

e.g. Insolvency— 1. Presidency Towns Insolvency Act.
2. Provincial Insolvency Act.

Small Causes—1. Presidency Towns Small Causes Courts Act.
2. Provincial Small Causes Courts Act.

A. A. Provincial System

1. Sessions Courts

Section 7 (1)

8. 1. Every Province shall be a Sessions Division or shall be divided into more than one Sessions Division. Every Sessions Division shall be coterminus with a district or more than one district.

Section 9 (3)

3. For any Sessions Division there may be Additional Session Judges and Assistant Judges to exercise jurisdiction in one or more of Sessions Courts.

Section 9 (2)

4. The Court of Session shall hold its sitting at such place or places as may be notified by the L. G.mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52C1. Notes on Acts and Laws PART III.htm - _msocom_4 in the Official Gazatte.

Section 9 (4)

5. A Sessions Judge of one division may also be appointed as an Additional Sessions Judge of another division in which case he may sit in

either division to dispose of cases.

4. 2. Magistrates Courts

9. **(1) District Magistrate.**

Section 10

(1) In every district there *shall* be magistrate of the first class who shall be called the District Magistrate.

(2) Any magistrate of the first class may be appointed to act as an Additional District Magistrate.

(2) **Sub-Divisional Magistrate.** *Section 8 (1)*

10. A District may be sub-divided into a sub-division. *Section 13 (1) and (2)*

A Magistrate of the 1 st or 2nd Class may be placed in charge of a sub-division and shall be called a Sub-Divisional Magistrate.

(3) **Subordinate Magistrates.** *Section 12 (1)*

11. In every District there may be appointed besides the District Magistrate, as many persons as may be necessary to be Magistrates of the first, second or third class.

They will exercise jurisdiction in such local areas as may be defined in the case of each.

Section 12 (2)

If no such area is fixed, their jurisdiction and power shall extend throughout such District.

3. **District Magistrate and 1st Class Magistrate**

The Code does not recognise any particular Court as that of the District Magistrate, but only Courts of 1st, 2nd and 3rd Class Magistrate.

Where a trial was commenced by an officiating District Magistrate and before its close he reverted to his original position as 1st Class Magistrate in which capacity he had jurisdiction over the offence, it was held : he had jurisdiction to continue the trial.

Emp. v/s Sayed Sajjad Husain 3 A.L.J. 825

11. As regards original jurisdiction, whatever the District Magistrate might do with regard to offences committed outside the division, the Sub-Divisional Magistrate is competent to try within his local jurisdiction. *4 A. 366.*

4. Special Magistrate

Section 14 (1)

12. (1) In any local area persons may be vested with the powers of the Magistrate of the 1st, 2nd or 3rd class in respect of particular cases or classes of cases or in regard to cases generally.

(2) To be called a Special Magistrate and to be prescribed for a term.

(3) Such a person may be an officer under its control.

(4) If he is a police officer, he shall not be below the grade of Assistant District Superintendent and he shall not have any power beyond what is necessary for :

(i) (i) preserving the peace
(ii) (ii) preventing crime
(iii) (iii) detecting, apprehending and detaining offenders in order to
their being brought before a Magistrate
(iv) the performance by him of other duties imposed upon him by any
law for the time being in force.

5.Bench Magistrates

Section 15 (1)

13. Any two or more Magistrates may sit together as a Bench and may hear such cases or such classes of cases only and within such local limits as may be prescribed in that behalf.

6. 6. Relation of the different Courts in the Provincial System

Section 17 (2)

14. Every Bench and every Magistrate in a sub-division shall be subordinate to the Sub-Divisional Magistrate. Within a sub-division, the jurisdiction of the District Magistrate and sub-divisional Magistrate are co-ordinating. *4 All. 366.*

Magistrate who is subordinate to S. D. M. is also subordinate to D. M. All Benches and Magistrates including Sub-Divisional Magistrates are subordinate to the District Magistrate.

Section 10(3)

An Additional District Magistrate shall be sub-ordinate to the District Magistrate for the purpose only of:

(i) (i) Section 192 (1)
(ii) (ii) Section 407 (2)
(iii) (iii) Section 528 (2) and (3).

Section 17 (3)

All Assistant Sessions Judges are subordinate to the Sessions Judge in whose court they exercise their jurisdiction.

15. Subordinate.—(1) inferior in rank.

9 Bom. 100
8 Mad. 18 (F. B.)

(2) Subordinate in respect of judicial as well as executive powers.

2 All. 205 (F. B.)

9 Bom. 100. There may be inferiority without subordination, but there cannot be subordination without inferiority, as subordinate means inferior in rank.

Section 17 (5)

Neither the District Magistrate nor the Magistrate and Benches shall be subordinate to the Sessions Judge except to be expressly provided by the Code.

Subordinate to the Sessions Judge only for the purposes of Section 123, 193, 195,408,431,436,437. If a Sessions Judge rule that touts should not be admitted to the Court it would not apply to the magistracy.

Subordinate means not merely subordinate so far as the regulation of work is concerned. Subordinate also means judicially inferior in rank, i. e. a Court over which another Court can proceed under Section 435. (call for records and pass orders) *9 Bom. 100.*

B. Presidency Towns System

1. 1. Magistracy

Section 18(1)

16. In each of the Presidency Towns, a sufficient number of persons shall be appointed to act as Presidency Magistrates.

Of the number appointed for each town, one shall be appointed to act as a Chief Presidency Magistrate.

Any person may be appointed to act as an additional Chief Presidency Magistrate.

Section 19

17. Any two or more Presidency Magistrates may sit together as a Bench.

2. Relation of the Presidency Magistrates to the Chief Presidency Magistrate

Section 21

18. He is like a District Magistrate controlling Magistrates subordinate to him.

Local Government is to declare the extent of such subordination. *Control:*

1. Conduct and distinction of business and practice in Courts.
2. Constitution of Benches.
3. Settle times and places at which Benches shall sit.
4. Settle differences of opinion.

18. The Bombay Government has defined that Presidency Magistrate shall be subordinate to the Chief Presidency Magistrate.

I Bom. L. R. 437.

High Court

19. Along with these Criminal Courts, we have the High Courts of Judicature.

The High Courts owe their origin to the Charter Act passed by Parliament in 1861.

Section I empowered Her Majesty by *letters patent* to erect and establish High Courts for Bengal at Calcutta, for Bombay at Bombay, and for Madras at Madras.

Section 9

Each of the High Courts to be established under *Section 106* of this Act shall have and exercise all *such* Civil, Criminal, Admirality, and Vice-Admirality, Testamentary, Intestate and Matrimonial Jurisdiction, *original and appellate* and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as His Majesty may grant and direct.

High Court's Power of Superintendence

3 Pat L. J. 581. 7.B. Sheonandan v/s Emperor.

1. High Court's powers of superintendence are limited by Section 15 of the Act of 1861 (Section 107 of the Government of India Act) to Courts subject to its appellate jurisdiction.

2. But where the High Court has appellate jurisdiction, even in a *modified* form from an inferior Court, it will exercise superintendence over that Court, even in cases which are not subject to appeal.

3. There are three classes of cases to be considered:

(a) Where a subordinate Court is subject to the *appellate jurisdiction* of the High Court, in certain cases, only the right of superintendence exists and its exercise is not confined to cases where a right of appeal lies to the High Court. This special power of superintendence is not as a rule exercised in cases where there is an adequate remedy by other proceedings such as appeal or revision.

(b) In cases in which the High Court has powers of revision over subordinate or where the power of reference to the High Court exists, a modified form of appeal may be said to exist.

(c) The power of superintendency may be conferred upon the High Court by the Act constituting the subordinate Court independently of Section 15 of the Charter Act

4. A Court may be established without being made subject to the superintendence of the High Court.

The Relation of the High Court to other Criminal Courts *Section 15,107*

Each of the High Courts shall have powers of superintendence which

may be subject to its appellate jurisdiction and shall have powers to call for returns etc.

What are the Courts subject to its appellate jurisdiction? *Letters Patent.*

The High Court shall be a Court of appeal from the Criminal Courts in the Presidency.

3. *Pat. L.J. 5817. B* *Two questions*

Sheonandan v/s Emperor

1. Can the High Court have power of Superintendence where it has no power of appeal but has only power of revision or reference?

2. Can there be a Criminal Court in the Presidency which will not be subject to its power of superintendence.

The Local limits of the jurisdiction:

10. (1) of the District Magistrate is the District.

11. (2) of the Sub- Divisional Magistrate is the Sub-Division.

12. (3) of the subordinate Magistrate, such local area as the Local Government may prescribe.

14. (4) of the Special Magistrate, such local area as the Local Government may prescribe.

20. (5) of the Presidency Magistrate.

Every Presidency Magistrate shall exercise jurisdiction in all places within the Presidency-town for which he is appointed and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law.

(6) Sessions Judge—within the Sessions Division.

(7) High Court.

What are the powers granted by *letters-patent* in criminal matters.

22. The *letters patent* direct that High Court Jurisdiction shall be as follows:—

Criminal Jurisdiction of the High Court

Original	Appellate *Letters Patent* Paras 27,28,29.

Ordinary Letters patent	Extraordinary *Letters Patent*

Paras22 and 23
23 Para 24

23. **Ordinary original Criminal jurisdiction.**—High Court shall have original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction.

24. **Extraordinary original Criminal Jurisdiction.**—High Court shall have Extraordinary Original Criminal Jurisdiction in places within the jurisdiction of any court subject to its superintendence.

25. *Appellate Criminal Jurisdiction.*—High Court shall be a Court of appeal from the Criminal Courts in the Presidency and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

Sentence on Escaped Convict Section 396.

(1) When a sentence is passed on escaped convict, such sentence, if of death, or fine or whipping shall subject to the provisions hereinafter contained, take effect immediately, and if on imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which at the time of his escape remained unexpired of his former sentence.

Explanation : for the purposes of this Section :

(a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment.

(b) a sentence of imprisonment with solitary Confinement shall be deemed severer than a sentence same description of imprisonment with solitary confinement; and

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

397. *Sentence on a person already undergoing sentence.*—

When a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment,

penal servitude or transportation, such imprisonment, penal servitude or

transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence : Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced : Provided, further, that where a person, who has been sentenced to imprisonment by an order under Section 123 in default of furnishing security, is whilst undergoing such sentence sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

398. (1) Nothing in Section 396 or 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

(2)

399. Confinment of youthful offenders in Reformatories.

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Suspensions, Remissions and Commutations of Sentences

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Section 401

Governor-General in Council or Local Government may suspend **or** remit on conditions or without conditions any sentence.

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Section 402 Power to commute sentences for any other mentioned

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IV.Conferment, Continuance and Cancellation of Powers

Section 39

(1) In conferring powers under this Code, the Local Government may, by order, empower persons specially by name or in virtue of their office or classes of officials *generally* by their official titles.

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered.

Section 40

Whenever any person holding an office in the service of Government who has been invested with any powers under this Code throughout any local area is *appointed* to an equal or higher office of the same nature within a local area under the same Local Government, he shall, unless the Local Government otherwise directs, or has otherwise directed, exercise the

same powers in the local area in which he is so appointed.

Section 41

(1) The Local Government may withdraw all or any of the powers conferred under this code on any person by it, or by any officer subordinate to it.

(2) Any powers conferred by the District Magistrate may be withdrawn by the District Magistrate.

Statement made by a witness in deposition is not a complaint. (Page left blank in MS.—ed.)

PART II
Trial of an Offender

1. TAKING COGNISANCE OF AN OFFENCE

When an offence has been committed, there are three ways in which the Magistrate can take cognisance of an offence.

Section 190

(a) upon receiving a complaint of facts which constitute such offence.

(b) upon a report in writing of such facts made by any police-officer.

(c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.

A. Complaints to Magistrates.

1. Definition of a complaint.

= means the allegation made *orally* or in writing to a Magistrate, with a view to his taking action under the Cr. P. C. that some person, whether known or unknown, has committed an offence, but it does not include the report of a police-officer.

Complaint must allege that an offence has been committed.

An application for taking action under Section 107 is not a complaint.

Complaint must be with Magistrate ; it must be with a view to his taking action.

Mere statement to a Magistrate by way of information without any intention of asking him to take action, is not a complaint.

e. *g.* An Assistant Collector writing to the District Magistrate complaining against a party but merely 'solicited for orders', did not amount to a complaint.

40 All. 641

It must be with a view to taking action under this Code.

A statement made to a Magistrate with the object of inducing him to take action not under this Code, but under Section 6 of the Bombay Gambling

Act IV of 1887, is not a complaint within the meaning of this Section.

II. II. WHO MAY COMPLAIN

As a general rule the person aggrieved is the complainant.

But the complainant is not an essential party for initiation of criminal proceedings.

The Magistrate can act upon information received or upon his own knowledge.

Although, if he does so act, he shall be bound by the provisions ofSection491.

But there are exceptions to the general Rule.

These exceptions will be found in Sections 195 to 199-A. Section 195 deals with

(a) (a) Prosecution for contempts of lawful authority of public servants.

(b) (b) Prosecution of certain offences against public justice.

(c) Prosecution of certain offences relating to documents given in evidence.

In cases coming under (a) No courts shall take cognisance except on the complaint in *writing* of the public servant concerned or of some other public servant to whom he is subordinate.

In cases coming under (b) No court (shall take cognisance)mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52C1. Notes on Acts and Laws PART III.htm - _msocom_5except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.

In cases coming under (c) (No Court shall take cognisance)mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52C1. Notes on Acts and Laws PART III.htm - _msocom_6except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.

Section 196.Prosecution for offences against the State.

Unless upon complaint made by order of, or under authority from, the Governor General in Council, the Local Government, or some officer empowered by the Governor General in Council in this behalf.

Section 196-A

Prosecution for certain classes of Criminal Conspiracy falling under Section 120-B of the 1. P. C.

If they fall under sub-Section (1) then :

Complaint must be under order of, or under the authority from, the Governor General in Council, the Local Government or some officer empowered by the Governor General in Council in this behalf.

If they fall under sub-section (2), the Chief Presidency Magistrate or D.

M. has by order in writing, consented to the initiation of the proceedings.

Section 197

Prosecution of Judges, Magistrates and public servants for an offence alleged to have been committed by him, while acting or purporting to act, in the discharge of his official duty,

No Court shall take cognisance of such offence except with the previous sanction of the Local Government.

(2) Such Local Government may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judges, etc . .. is to be conducted, and may specify the Court before which the trial is to be held.

Section 198

Prosecution for breach of contract or defamation, or offences against marriage. No cognisance except upon a complaint made by some person aggrieved by such offence. Proviso : in certain cases some other person may with the leave of the Court, make a complaint on his or her behalf.

Section 199

Prosecution for adultery or enticing a married woman : No cognisance except upon a complaint made by the husband of the woman, or in his absence, made with the leave of the Court, by some person who had care of such person on his behalf at the time when such offence was committed.

POLICE REPORT

I. How does it originate?

It originates in what is known as the first information. Information is usually given by the aggrieved party. But it may be given by any party. Even a police officer may give such information based on his knowledge. Not only that but in certain cases the law compels certain persons to give information.

Section 44.

Every person shall give information to the Magistrate or Police of certain offences.

Section 45

Information given to the police may refer to a cognisable offence or to a non-cognisable offence.

Cognisable offence is one in which the police can arrest without a warrant.

Non cognisable offence is one in which the police cannot arrest without a warrant. *Section 154*

Information relating to a cognisable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his

direction, and be read over to the informant and every such information whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it and the substance of it shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

Section 155 Information relating to non-cognisable offence :

He shall enter in a book to be kept the substance of such information and refer the informant to the Magistrate.

Section 155

No police-officer shall investigate a non-cognisable case, without the order of a Magistrate of the 1st or 2nd class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

Section 156

Any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognisable case which a Court having jurisdiction over the local area within the limits of such station, would have power to inquire into.

The police report which can be the basis of action by a Magistrate, is based upon information relating to a cognisable offence.

Section 157

If, from information received i.e. under Section 154, the officer has reason to suspect the commission of a cognisable offence then;

(1) He shall send a report of the same to a Magistrate empowered to take cognisance of it.

(2) Shall proceed to the spot to investigate the facts and circumstances of the case

and

(3) take measures, if necessary, for the discovery and arrest of the offender.

Provided

(a) that the informant gives the names of the offender and the case is not of a serious nature, the officer need not proceed in person to make an investigation on the spot.

(b) that if the officer thinks, there are no sufficient grounds for entering on an investigation, he shall not investigate the case.

He shall state in his said report his reasons for not complying fully with the requirements of the Section.

He should notify to the informant that he will not investigate the case or cause it to be investigated. But this withdrawal of the police cannot block the prosecution of the offender. They are two ways yet open.

1. The Magistrate, on receiving such report, may direct an investigation or may at once proceed and ask subordinate Magistrate to hold a preliminary inquiry into or otherwise dispose of the case in manner provided by the case.

This is a preliminary report before completion of the investigation. The Magistrate can act under Section 159. But if the report is submitted *after investigation,* the Magistrate is not empowered to act under this Section.

II. The aggrieved party may move.

If the police do not move, then they have the following powers ; *Section 160* (1) to require attendance of witnesses by an order in writing.

Witnesses are not required to tell the truth under this Section. If they give false testimony they cannot be prosecuted. They don't sign it. It is made before police.

Section 161

Police may examine witnesses acquainted with the facts of the case.

(2) Such witnesses shall be bound to answer all questions put to them, unless the question incriminates them.

Although Police can take statements from witnesses yet

Section 162

(a) they shall not be signed by them,

(b) they shall notice made use of at any inquiry or trial, in respect of any offence under investigation at the time when such statement was made.

Provided that, on the request of the accused, the Court shall refer to such writing and direct that the accused be given a copy thereof for contradicting such witness, provided that Court may exclude that part which is irrelevant or its disclosure is inexpedient with interests of the public or does not promote the ends of justice.

In short, they do not form evidence which can be said to be admissible.

If such statements are to be treated as evidence, then they must be recorded by Magistrates and not Police Officers. Consequently provision is made in the Criminal Procedure Code.

Section 164

Any Presidency Magistrate, Magistrate 1st class and Magistrate of the Second class especially empowered may, if he is not a police officer

record any *statement or confession* made to him in the course of an investigation under this chapter.

Statement shall be recorded in a manner prescribed for recording evidence.

Confession is to be recorded in the manner provided for in Section 364.

Provided that the Magistrate, before recording such confession, shall explain to the accused that he is not bound to make it and if he does so it may be used as evidence against him.

No Magistrate shall record, unless he has reason to believe, that it is made voluntarily.

On recording confession. Magistrate shall make a memorandum at the foot showing that he has observed the conditions.

Search

Section 165

(1) In the course of his investigation, a police officer may find it necessary to make a search in any place. Such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search or cause search to be made, for such thing in any place within the limits of that station in his charge.

(2) The police officer shall, as far as possible, conduct the search in person.

(3) He may authorise his subordinate after recording reasons in writing and specifying the place and thing to be searched.

(4) The provisions of the Code, as to search warrants and the general provisions as to searches contained in Section 102 and Section 103, shall apply.

(5) Copies of record made during search shall be sent to the nearest Magistrate and the owner or occupier of the place of search shall be given a copy of the record on payment of fees.

Section 166

Police officer can cause search to be made within the area of another police station.

Section 167

If the investigation cannot be completed within 24 hours fixed by Section 61, and *there are grounds for believing that the accusation or information is well founded,* the Police shall forthwith transmit to the nearest Magistrate, a copy of the entries in the diary hereinafter prescribed relating to the case and shall, at the time, forward the accused to such jurisdiction.

(2) The Magistrate shall, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding 15 days.

(3) A Magistrate authorising detention in police custody shall record reasons for so doing.

Section 169

When police officer finds that there is not sufficient evidence or reasonable ground of suspicion to justify forwarding the accused to Magistrate *he shall release him* on his executing a bond with or without sureties *to appear if and when so required*, before a Magistrate empowered to take cognisance.

Section 170

(1) When police officer finds that there is sufficient evidence or reasonable ground, such officer shall forward the accused under custody to a Magistrate empowered to take cognisance.

(2) Along with this, he shall send article necessary to be produced before Magistrate and shall require complainant and witnesses, to execute a bond to appear before Magistrate.

Section 173

The police officer shall send a report giving names of parties, information each is responsible for.

Accused is entitled to a copy of the report. *Exemption of accused from attendance.* Section 205; 366; 424; *6 All. 59: 21Cal.588*

Section 205.—Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(21) But the Magistrate may call accused at any time. *Section 366.—Time of Judgement.*

Should be read in the presence of the accused unless it is dispensed with and the sentence is of fine only.

Section 424.—Judgement by appellate Court. Accused need not be called to hear judgement.

II. Of how many offences can the Court take cognisance of at one trial

Joinder of Charges

Sections 233, 234, 235 *Section 233.*

1. *Every offence shall be tried separately.*

A is accused of theft on one occasion and of causing grievous hurt on another occasion. A must be tried separately for the two offence. He cannot be tried for both at one trial. There are exceptions to this general proposition.

Section 234

Three offences *of the same kind* may be tried at one trial *if they are committed within the space of twelve months,* irrespective of the question whether they are committed against the same person or not.

Offences of the same kind = Offences punishable with the same amount of punishment under the same section of the 1. P. C. or of any special or local law.

2. *Must not exceed three.* Joinder of charges of three offences under section 411 and three offences under 414isbad. Three offences of forgery and three offences of breach of trust bad.

Same kind. Adultery and bigamy |
Murder and hurt | not same
Forgery and giving false evidence |

The rule as to kind is subject to two proviso.

(1) Offences under Section 379 (Theft) and under Section 380 (Theft in a dwelling house) shall be deemed to be offences of the same kind even though they are not offences under the same section and the punishment for them is not identical.

(2) The offence and the attempt to commit that offence (Section 511 I. P. C.) shall be deemed to be offences of the same kind even though they are not offences under the same section and the punishment for them is not identical.

Section 235 (2)

When an act constitutes an offence under two or more separate definations of any law defining or punishing offences the person accused of them may be tried at one trial for each of such offences.

Section 235 (3)

When an act, which by itself constitutes an offence, constitute when combined with another a different offence.

The person accused of them may be tried at one trial for the offences, constituted by such act when combined, and for any offences constituted by the act when taken by itself.

This is so when the act or acts done by the accused constitutes a single offence.

But it may be, that the acts done by the accused constitute more than one offence i.e. show that a plurality of offences have been committed.

Can the accused be tried for all such offences at one trial? Or must he be tried separately for each offence?

The rules as to this will be found in *Section 235 (1)*

If the acts amounting to different offences are committed by the accused in the course of the *same transaction,* then he may be tried at one trial for every such offence.

1. *Same transaction*

In deciding whether acts constituting an offence are so connected as to form one and the same transaction, the determining factor is not so much proximity in time as continuity and community of purpose and object.

A mere interval of time between the commission of one offence and another does not by itself import want of continuity, though length of interval may be an important element in determining the question of connection between the two.

2. There is no limit to the number of offences that can be tried together.

Ill, Of how many offenders can the Court try at one trial
Joinder of Accused

Section 239

The following persons may be charged and tried together:

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abatement, or of an attempt to commit such offence;

(c) persons accused of more than one offence of the same kind within the meaning of Section 234 *committed by them jointly* within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, or criminal misappropriation,

and

(f) persons accused of receiving or retaining, or assisting in the disposal or concealment of property, the possession of which is alleged to have been transferred by any such offence committed by the first-named persons,

or

persons accused of abutment of or attempting to commit any such last-named offence.

(f) persons accused of offences under sections 411 and 414 of the 1. P. C. or either of those sections in respect of stolen property, the possession of which has been transferred by one offence.

(g) persons accused of any offence under Chapter XII of the 1. P. C. relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abutment of or attempting to commit any such offence.

NOTE.—The foundation for the procedure of joint trial of different persons is their association from start to finish to attain the same end.

The fact that they carried out their scheme by successive acts done at intervals does not prevent the unity of the project from constituting the series of acts one transaction i.e. the carrying through of the same object which they had from the first act to the last.

20 cal. 358
5 Mad. 199

IV. Securing the presence of the accused and the witness

Although the Court has taken cognisance of an offence, the actual criminal proceedings can commence only when *the accused* and the witnesses are present in Court, the one to answer the charge and the other to give evidence.

How are they to be brought before the Court? Section 104

1. When cognisance is taken on police report based on investigation conducted under Section 173, the accused and witnesses are already before the Court.

II. When cognisance is taken otherwise than on police report under Section 173, the accused and the witnesses are not before the Court. They have to be brought before the Court.

What is the process for bringing them before the Court?

The Criminal Procedure Code contemplates two such processes.

Notes on Acts and Laws

Contents

PART III Continued...

***Section 68* 1. Summons to appear and II. Warrant to arrest**

Section 68

1. Summons to appear

Every summons issued by a Court under this Code shall be in *writing* in *duplicate, signed and sealed* by *the presiding officer of* such Court or by such other officer as the High Court may, from time to time by rule direct.

(2) Summons shall be served by a police-officer, or, subject to such rules as the Local Government may prescribed in this behalf, by an officer of the Court issuing it or other public servant.

Section 69 Personal Service

(1) Summons shall if, practicable, *be served personally* on the persons summoned, by delivering or tendering to him one of the-duplicates of the

summons.

(2) Every person served with summons shall, if so required by the serving officer, *sign a receipt* therefor on the back of the other duplicate. (3) *Service on Corporations*

Service on incorporate company or other body corporate may be effected by serving it on the *Secretary, local manager or other principal officer of the corporation in British India.* In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

Section 70

Service when person cannot be found may be served by leaving one of the duplicates for him with some adult male member of his family, or, in a Presidency-town, with his servant residing with him.

The *person with whom* it is left, shall sign on the back of the duplicate.

Substituted service is improper where sufficient steps are not taken to serve accused personally.

69 J. C. 627.

Section 71

If this is not possible, then the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides.

Section 72

Service on a Government Servant or of Railway Company.

Where person summoned is in the active service of the Government or of a Railway Company, the Court issuing the summons shall ordinarily *send it in duplicate to the head of the office in which such person is employed,* and such head shall thereupon cause the summons to be served in manner provided by Section 69 and shall return it to the Court under his signature with the endorsement required by that Section.

(2)Such signature shall be evidence of due service.

Section 73

Service of summons out of local limits.

When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, *it shall ordinarily send such summons in duplicate to a Magistrate within* the local limits of whose jurisdiction the person summoned resides or is, to be there served.

Section 74

Proof of service in such cases when serving officer is not present.

(1) An affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to

be endorsed (in the manner provided by S. 69 or S. 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

Service on pleader is not sufficient.

6 C. W.N.927

Copy should be served and it is not enough merely to show it.

5 *B. H. C. R. 20.*

Tender amounts to service if summons is refused.

28 M. L. F. 505.

Refusing to *receive* summons is no offence.

II Warrantor Arrest

Section 75

(1) Shall *be in writing, signed* by the Presiding Officer, or in the case of a Bench of Magistrates, by any member of such Bench and shall bear the seal of the Court.

Warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

(2) Difference between Summons and Warrant. Summons is an order to the person to be summoned.

Warrant is *not* an order to the person to be arrested. Therefore a person can be punished for disobedience of a summons. But he cannot be punished for a disobedience of a warrant.

5W.R. ed. 71.

Section 76

Court may direct Security to be taken.

(1) The Issuing Court may in its discretion direct by endorsement on the warrant that, *if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.*

(2) The endorsement shall state.

(a) The number of sureties;

(b) The amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound; and

(c) The time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the officer, to whom the warrant is directed, shall forward the bond to the Court.

Section 77

(1) *Warrant to whom directed.*

Warrant shall ordinarily be directed to one or more police-officer, and when issued by a Presidency Magistrate, shall always be so directed; but any other Court issuing such a warrant may, if its immediate execution is necessary and no police-officer is immediately available, direct it to any other person or persons; and such person or persons shall execute the same.

(2) *Warrant addressed to more than one person.* May be executed by all or by any one or more of them.

Section 78

(1) *Warrant may be directed to Land holder, farmer, or manager of land,*

for the arrest of (l)any escaped convict, (2) proclaimed offender, or (3) person who has been accused of a non-bailable offence, and who has eluded persuit.

(2) Who shall sign it and execute it, if the person is on the land under his charge.

(3) On arrest the person shall be made over to the nearest police station.

Section 79

A police officer to whom a warrant has been addressed may endorse it on to another police officer to execute.

Section 80

Arresting party shall notify the substance of the warrant to the person arrested.

Section 81

Subject to the provisions of Section 76 as to Security, the arresting party shall without unnecessary delay, bring the person arrested before the Court before which he is required to produce him.

Section 82

Warrant of arrest may be executed at any place in British India.

Section 83

When warrant is to be executed *outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a police officer, forward the same by post or otherwise to any Magistrate, or District Superintendent of Police, or the Commissioner of Police in a Presidency town,* within the local limits of whose jurisdiction it is to be executed.

(2) The Magistrate or D. S. P., .or Commissioner whom such warrant is so forwarded, shall endorse his name thereon, and if practicable, cause it to be executed in manner herein before provided, within the local limits of his jurisdiction.

Section 84

When a warrant directed to a police-officer is to be executed outside the

jurisdiction, he shall ordinarily take it for endorsement either to a Magistrate or to a police officer not below the rank of an officer in charge of a station within the limits within which the warrant is to be executed.

(2) Such Magistrate or police officer shall endorse, his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same.

(3) If the obtaining of endorsement is likely to cause delay, it may be executed without endorsement.

Section 85

When arrest is made outside, the person arrested shall be taken to the Magistrate, D. S. P., Commissioner of Police.

Section 86

They shall then direct his removal in custody to the Court issuing the warrant.

Effect of Non-execution of the warrant of arrest. Section 87

If the person is absconding, such Court may publish a written proclamation requiring him to appear at a specified place and at a specific time not less than 30 days from the date of publishing such proclamation.

(2)How to publish the Proclamation.

(a) It shall be read in the place in which he ordinarily resides.

(b) It shall be affixed to some conspicuous part of the house in which he resides.

(c) A copy of it affixed to the Court house. *Section 88*

The Court issuing a proclamation under Section 87 may at any time order the attachment of any property movable or immovable or both, belonging to the proclaimed person.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made.

Section 89 Restoration of attached property

If the person *appears* within 2 years after the date of the order of attachment and satisfies (1) That he did not abscond or conceal himself *and* (2) that he had not such knowledge of the proclamation as to enable him to appear within time—

Section 90

Against whom can Warrant be issued?

Ordinarily, one would imagine, that it can be issued only against the accused. But that is not so. The law is that warrant can be issued against any person against whom a summons can be issued except a juror or assessor.

This means that a warrant may be issued even against a witness.

Provided:

(1) The Court sees reason to believe before the time for appearance that he has absconded or will not obey the summons ; or

(2) That at such time he fails to appear, and the summons is shown to have been duly served to enable him to appear in time but he does not appear.

Safeguard for continued presence of the Parties called before Court by due process

Section 91

When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant is present in such Court, *such officer may require such person to execute a bond with or without sureties for his appearance in such Court.*

Section 92

When any person who is bound by any such bond does not appear, the officer presiding may issue a warrant directing that such person be arrested and produced before him. Besides, the necessity of having before the Court the *complainant, the accused* and *the witnesses.* There is also the necessity having before the Court the *Corpus deticti,* which are the subject matter of the accusation or things which are necessary to prove the accusation.

Forged document, person confined

We must therefore consider the rules relating to the production of these.

1. PRODUCTION OF A DOCUMENT OR A THING.

Section 94

Whenever any Court considers the production of any document or thing is necessary or desirable for the purpose of investigation, inquiry or trial or other proceedings before such Court, he may issue a summons to the person in whose *possession or power* such document or thing is believed to be, requiring him to attend and produce it, at the time or place stated in the summons.

(2) When the summons is merely to produce, he need not attend. Sufficient if he sends it.

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(Earlier part is not found—ed.)

Officer or Judge or in his presence and hearing under his personal direction and superintendence and shall be signed by the Magistrate or Sessions Judge.

In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness

proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

Section 363

Sessions Judge and Magistrate shall also record remarks regarding demeanour of the witnesses whilst under examination.

Section 360

As the taking down of the evidence of each witness is completed, it *shall* be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objections made to it by the witness and shall add such remarks as he thinks necessary.

Omission to read over is an illegality.

II.**BEFORE PRESIDENCY MAGISTRATES**

Section 362

Appealable cases and non-appealable cases.

In appealable cases

The Magistrate shall take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court.

All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

The Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record.

In non-appealable cases

It shall *not be necessary* for a Presidency Magistrate to record the evidence or frame a charge.

Section 359,362 (2) Mode of recording Evidence

Evidence shall ordinarily be taken down in the form of a narrative, though the Court may in its discretion take down, or cause to be taken down, any particular question and answer.

Exception: Examination of the accused. *Section 364*

The whole of such examination, including every question put to him and every answer given by him, shall be recorded in full.

This does not apply to the record of the examination of the accused by the High Court.

II. RECORD IN SUMMARY TRIALS *Section 260*

1. The District Magistrate.

2. *Magistrate 1st class* especially empowered in this behalf by the Local Government.

3. Any Bench Magistrate invested with 1st class powers and especially empowered in this behalf by the Local Government may, if he thinks fit, try in a *summary* way all or any of the following offences:—

(a) Offences not punishable with death, transportation or imprisonment for a term exceeding six months and certain other offences mentioned in the Section.

Cases which can be tried summarily may be appealable or nonappealable.

Section 263

But they shall enter in such form as the Local Government may direct the following particulars.

(a) (a) The serial number.
(b) (b) The date of the Commission of the offence.
(c) (c) The date of the Report or Complaint.
(d) (d) The name of the complainant (if any).
(e) (e) The name, parentage and residence of the accused.
(f) (f) The offence complained off and the offence (if any proved) and the value of the property in respect of which the offence is committed.
(g) (g) The pica of the accused and his examination if any.
(h) (h) The finding and in conviction brief statement of the reasons for it.
(i) (i) Sentence or other final order; and
(j) (j) The dale on which the proceedings terminated.

In appealable cases Section 264

Before passing sentence the Court mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52C2. Notes on Acts and Laws PART III.htm - _msocom_1 shall record a judgement embodying the substance of the evidence and also the particulars required in non-appealable cases.

Such judgement shall be the only record in appealable cases.

Judgement

Section 366

The judgement in every trial in any Criminal Court *shall be pronounced,* or the substance of such judgement shall be explained;

(1) In open Court, either immediately or in subsequent date to be notified.

Provided that the whole shall be read if requested by the parties.

(2) The accused shall, if in custody, be brought up and if not in custody be brought up to hear judgement delivered.

Except where his personal attendance has been dispensed with and the sentence is of fine only or he is acquitted.

N. B.— (3) Judgement shall not be read if delivered in absence.

Section 367

Every judgement unless otherwise provided *shall be written* by the presiding officer of the Court or from his dictation.

Shall contain

(1) Point or points for determination

(2) The decision thereon and

(3) The reasons for the decision

(4) Shall be dated and signed by the Presiding officer in open Court at the time of pronouncing it, and where it is not written by the Presiding officer with his own hand, every page of such judgement shall be signed by him

(5) It shall specify the offence (if any) of which, and the Section of the I. P. C. or other law under which the accused is convicted, and the punishment to which he is sentenced.

(6) When the conviction is under the 1. P. C. and it is doubtful under which of the two parts of the same section of that Code the offence falls, the Court shall directly express the same and pass judgement in the alternative.

(7) If it be a judgement of acquittal it shall state the offence of which he is acquitted and direct that he be set at liberty.

(8) If the accused is convicted of offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall give reasons.

Provided that in trials by jury, the Court need not write a judgement but the Court of Session shall record heads of charge.

Section 368

When sentence of death—sentence shall direct that he be hanged by the neck till he is dead.

Section 369 Alteration of judgement

Save as otherwise provided by the Code or other law or in the case of the High Court, no Court, when it has signed its judgement, shall alter or review the same except to correct a clerical error.

(Even the High Court has no power.)

Section 370 Judgement by a Presidency Magistrate

Instead of recording a judgement in the above, a Presidency Magistrate shall record the following particulars :

(a) (a) Serial number.
(b) (b) The date of the commission of offences.
(c) (c) Name of the complainant (if any).
(d) (d) Name of the accused and (except in the case of European British subject) his percentage and residence.
(e) (e) The offence complained of or proved.
(f) (f) Plea of the accused and his exam (if any).
(g) (g) Final order.
(h) (h) Date of such order.
(i) (i) In all cases, where the sentence is imprisonment or fine exceeding 200 or both, a brief statement of reasons for the conviction.

Section 371

Copy of judgement to be given to accused without delay In cases other than summons cases it shall be given free of cost.

In trials by jury, a copy of heads of charge by the jury shall be given to him.

In sentence of death, shall inform the accused of the period of limit for appeal.

Section 373

Court of Session to send copy of finding and sentence to the District Magistrate.

Criminal proceedings other than trial of an offender

I. Those dealing with keeping of peace and maintaining good order.

II. Those dealing with the enforcement of certain obligations. Family obligation and public nuisance.

III. Those dealing with the maintenance of public peace.

1. THOSE DEALING WITH THE PUBLIC ASSEMBLY—KEEPING OF PEACE AND MAINTAINING ORDER.

It is better to prevent crime than only to punish it when it is committed.

This theory is not accepted universally. Attempt to prevent crime may involve undue interference in the liberty of the individual.

English theory is inclined towards the view that the state should intervene only when the conduct of an individual amounts to a crime.

E. g.— English law of sedition, assembly.

On the other hand, the Indian Law takes a different view. E. g. Press Act, Public Meetings Act.

That being so, the Criminal Procedure Code enacts certain Sections to enable the Criminal Courts to prevent the commission of offences. (Page left blank—ed.)

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Chapter VIII deals with offences against public tranquillity.

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The Court Contemplates the following usage fit for such preventative or anticipatory action.

1. There are quarrelsome people in every country in the world, and there are some quarrels which may lead to violence and even to serious crime.

2. In the same way certain forms of propaganda, if carried on without any restraint, may induce ignorant persons to do harmful things, they may be circulating falsehoods, or even more deadly half-truths, cause ignorant persons to believe, to act upon the belief, that malicious designs are being entertained which in fact are not entertained by any one.

3. Again there are those who prefer a life of idleness, varied by occasional crime when detection seems unlikely, to one of honest work. There are also persons who live mainly on the proceeds of crime committed by themselves, or on a share of the proceeds of crime committed by others, whom they help to escape detection, or assist by setting up an Organisation which affords its supporters both opportunity to dispose of the proceeds of their dishonesty and a fair prospect of immunity from punishment.

4. Habitual Offenders. *Section 183*

9. Where an offence is committed while the offender is on a journey or voyage, the offence may be inquired into or tried by a Court through or into the local limits of whose jurisdiction

the offender or	passed in the
the person against whom or	course of that
the thing in respect of which the offence was committed	journey or voyage

Notes on Acts and Laws

Contents

Chapter 7
The Transfer of Property Act

CONTRIBUTION

1. Suppose two properties are mortgaged and they belong to different persons. Suppose for the realisation of the mortgage money only one property is sold and the proceeds are found to be sufficient to pay the amount. The result is that one mortgagor has lost his property while the other gets it back without having to pay any thing.

This is a gross injustice. To remedy this injustice Equity invented the doctrine of Contribution which is embodied in Section 82.

2. According to this Section, the different owners are liable to contribute rateably to the debt secured by the mortgage.

3. For determining the rate at which each should contribute the value therefore shall be taken as the value at the date of the mortgage deducting the amount of mortgage, if any, to which it was subject on that date.

1. The claim for contribution can arise only when the whole of the mortgage debt has been satisfied—*26 All. 407 (426, 27) T.B.*

2. The right to contribution is subject to the rule of marshalling. That is where marshalling comes into conflict with contribution, the rule of marshalling shall prevail—This is the meaning of the last para of Section 82.

WHO CAN CLAIM THE RIGHTS OF THE MORTGAGOR *Section 91.*

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WHO CAN CLAIM THE RIGHTS OF THE MORTAGAGEE *Section 92.*

Any person *other than the mortgagor* who pays the mortgagee becomes entitled to the rights of the mortgagee.

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Such persons are—

1. Subsequent mortgagee.
2. Surety.
3. Any person having an interest in the property.
4. A co-mortgagor.

5. Any other person with whose money the mortgage has been redeemed if the mortgagor has by a registered deed agreed to this.

This is called the rule of subrogation.

II. DOES THE LAW OF SALE PRESCRIBE ANY PARTICULAR MODE OF TRANSFER?

1. The Law of Sale of Immovable Property does prescribe a mode of transfer. The mode of transfer is either *Registration* or *Delivery of Possession.*

2. Whether the appropriate mode of transfer in any particular case is Registration or Delivery of Possession depends upon two considerations—

(i) Whether the immovable property is tangible or intangible. (ii) Whether the Immovable Property is worth more than Rs. 100 or is less than Rs. 100.

3. If the property is *Intangible* then the transfer can take place only by registration, no matter what the value of the property is.

4. If the property is *Tangible* property then

(i) If it is worth more than Rs. 100 then the transfer must be by registration.

(ii) If it is worth less than Rs. 100 then the transfer may be either by Registration or by delivery of possession.

5. It is clear that in all cases except one. Registration is the only method of effecting a sale. The case where option is given either to register or deliver possession is the case where the property is tangible and is less than Rs. 100 in value.

6. *Registration and Delivery as alternative complimentary modes.*—In this connection the following points may be noted:—

(i) Where Registration is prescribed as the *only* mode of transfer, delivery of Possession is neither necessary nor enough to complete the transaction of sale.

(ii) Where delivery of possession is prescribed. Registration is not necessary to complete the sale. However, Registration without delivery will be enough to complete the sale.

7. *No other mode of Transfer.*—The provisions as to modes of transfer are exhaustive and a sale cannot be effected in any other way. Title cannot pass by admission or by recitals in a deed or petitions to officers or entry in the record of rights. Admission that land has been sold, will not operate as an estoppel so as to do, away with the sale for a registered conveyance or delivery. 43 Cal. 790.

8. It is necessary to observe the prescribed modes of transfer—

(i) Ownership does not pass except by a transfer in the prescribed form.

(ii) An unregistered deed *is not enough* (a) In cases where Registration is compulsory. (b) Also in cases where the value is less than Rs. 100 and the transfer is not made by delivery.

9. *Meaning of tangible and intangible* (i) Immovable Property is either *tangible* or *intangible.*

(ii) The distinction between tangible and intangible is analogous to the distinction made in English Law between a corporeal hereditament and incorporeal hreditament

(iii) A corporeal hereditament is an interest in land in possession i.e. a present right to enjoy the possession of land. An incorporeal hereditament is a right over land in the possession of another, which may be a future right to possession, or a right to use for a special purpose the land in the possession of another e. g. a right of way.

(iv) The contract between tangible and intangible is a contract between the estate of one who is possessed of the land, the tangible thing and that of a man who has the mere right, the intangible thing, without possession of anything tangible.

(v) A thing to be tangible must be capable of actual delivery. *Sulaiman C. J. 50 All. 986.*

10. *Meaning of Delivery of Possession*

(i) Delivery takes place when the seller places the buyer, or such other person as he directs, in possession of the property.

(ii) Delivery is an act which has the effect of putting the buyer in the possession of property.

(iii) What amounts to Possession? The question remains unanswered. Is it actual possession? or Is it symbolical possession?

(iv) One view is that since delivery is prescribed for tangible property only what the Legislature intends is actual possession.

(v) The other view is that it is used in a wider and ordinary sense because in the great majority of cases, land is in the occupation of a tenant or the buyer and physical delivery is therefore impossible.

(vi) The latter view is the generally accepted view, so that there is physical delivery, when the owner of property places the buyer in such relation to the land and its actual occupants as he himself occupies.

11. *Ownership when transferred* (i) Ownership passes upon delivery or registration. (ii) With regard to registration, the following points should be noted:—

(a) Once registration is effected, the title relates back to the date of the execution.

(b) A Registered sale-deed will not be defeated by another deed

executed later but registered earlier.

(c) The transfer will not be subject to the *pendens* if the deed was executed before the suit but registered after the suit.

(d) Although it is true that property does not pass i. e. ownership is not transferred until Registration is effected, it is not true to say that property passes as soon as the instrument is registered, for the true test is the intention of the parties.

3. Section 55 (3)— *To deliver title-deeds :—*

1. Title-deeds are accessory to the estate. They pass with the conveyance without being named.

2. This includes *all* deeds relating to the property conveyed in possession as well as in power.

3. The liability to deliver title-deeds also includes the liability to bear the cost of obtaining them.

4. Counterparts leases and Kabulayets are deeds of title accessory to the estate.

5. The duty to deliver title-deeds is not dependent upon the completion of the conveyance. This duty does not arise until the price has been paid.

EXCEPTIONS :

(i) When the seller retains parts of the property comprised in the deeds, he may retain the deeds but is under an obligation for their safe custody and to produce them or give true copies when required.

(ii) When property is sold in different lots—the purchaser of the lot of the *greatest lot* is entitled to the documents—subject to the same obligations as above.

By an express covenant, it may be given to the purchaser of the *largest lot* i.e. in area.

6. The sub-section does not say what is to happen if the sales are at different times.

BUYER'S LIABILITIES

1. BEFORE CONVEYANCE

1. Section 55 (5) (a)—*To disclose facts relating to the interest of the seller in the property materially increasing value.*

1. Every purchaser is bound to observe good faith in all that he says or does in relation to the contract and must abstain from all deceipt, whether by suppression of truth or by suggestion of falsehood.

2. The buyer, however, is under no duty to disclose latent advantages as the seller is to disclose latent defects.

3. To this rule, matters of title are an exception. Although the seller's title is ordinarily a matter exclusively within his knowledge, yet there may be

cases where the buyer has information which the seller lacks. In such eases he must not make an unfair use of it.

Illustration 1.—Summers vs. Griffiths.

An old women sold property at an undervalue believing that she could not make out a good title to it while the buyer knew that she could. The sale was set aside.

Illustration 2.—Ellard vs. Llandaff (Lord)

The lessee obtained a renewal of a lease, in consideration of a surrender of the old lease, suppressing the fact (that)*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52D. Notes on Acts and Laws PART IV.htm - _msocom_2 the person on whose life the old lease depended was on his death-bed.

2. Section 55 (5) (6)—*To pay the Price.*

1. The buyer is not bound to pay the price except on a complete conveyance to himself of the whole interest that he has purchased.

2. If the property is sold free from Encumbrances and these are not discharged at the time of conveyance, the buyer is not bound to pay.

3. His remedies for getting rid of Encumbrances are—

(i) Under Section 18 (c) of the Specific Relief Act to compel the vendor tot discharge them.

(ii) He may discharge it himself and set off the amount against purchase money.

(iii) Recover it by subsequent suit against the vendor.

4. This sub-section imposes a personal liability on the buyer apart from the liability imposed by Section 55 (4) (b) on the property—52 *All. 901.*

BUYER'S LIABILITIES

II. AFTER CONVEYANCE

1. Section 55 (5) (c)— *To bear loss, etc.*

1. Under sub-section 55 (1) (c) the seller is to bear the loss between Contract and Conveyance.

2. After conveyance the buyer is the owner and the property is at his risk. He must therefore bear the loss.

3. This is different from English Law under which the contract for sale transfers an equitable estate and with it liability for loss or destruction.

4. The seller is liable for waste and if the seller has insured the property, the buyer can compel him to apply it for restoration.

2. Section 55 (5) (d)— *To pay outgoings.*

1. Before conveyance this liability falls upon the seller—55 (1) (g) after

conveyance it falls on the buyer— Public charges, Rent, Interest and Encumbrances.

2. The liability is statutory and not merely contractual and therefore it is binding on a minor vendor on. whose behalf the property is sold—*46 Mad. L. J. 464.*

3. If property is sold free from Encumbrances, the seller must discharge it. If sold, subject to Encumbrances, then the interest on Encumbrances *upto sale* must also be paid by the buyer—*26 Bom. S. R. 942.*

RIGHTS OF BUYER AND SELLER RIGHTS OF THE SELLER

1. BEFORE CONVEYANCE

1. Section 55 (4) (a)—*To take rents and profits.*

1. Until conveyance, the seller continues to be the owner. Therefore, he has a right to take rents and profits of the property.

II. AFTERCONVEYANCE

1. Section 55 (4) (b)—*To claim charge, on property for price not paid.*

1. If the sale is completed by conveyance and the price or any part of it is unpaid, the seller has under this sub-section a charge for the price or for the balance.

2. The charge is a non-possessory charge i. e. it does not give a right to retain possession. As the ownership has passed, the charge gives the seller no right to refuse possession—

30 Mad. 524 ; 43 Mad. 712 ; 23 Bom. 525 ; 34 Mad. 543.

3. The charge being on the property, it does not matter if there are several purchasers who had agreed among themselves to pay in a certain proportion.

4. The claim for a charge for unpaid price, not only subsists against the original buyer, but is also available against a transferee *without consideration* or a transferee with notice of non-payment.

5. The charge is not only for the purchase money but also for interest on the purchase money.

6. The right to a charge for interest commences only from the date on which possession has been delivered. The right to include interest for the purposes of a charge on the property *before* possession has been delivered depends upon the equities and circumstances of the case.

Illustration.—If the purchaser retains part of the purchase money as security for the seller discharging an Encumbrance, he is not liable to pay interest.

7. *English and Indian Law.*

(i) Under the English Law the seller has a lien from the date of the Contract.

(ii) Under the Indian Law the charge begins from the date of the conveyance.

(iii) The reasons for this difference :—

(a) Under the English Law, the seller parts with the estate as a result of the contract.

(b) Under the Indian Law, the seller parts with it as a result of conveyance.

(c) The result is the same, for both give the right to proceed against the property. The only difference is that the English lien being equitable, can be moulded by equity to suit circumstances. While the Indian charge being statutory, is rigid and must conform to the terms of the statute.

BUYER'S RIGHTS

1. BEFORE CONVEYANCE

1. Section 55 (6) (b)—*To claim a charge on the property for purchase money paid before conveyance.*

1. The clause as worded makes no sense. It is in two parts. If the clause"unless he has improperly declined to take delivery"which is negatively put was put positively to read"if he has properly declined"then there is no distinction between the two clauses.

2. But there is a distinction between the two parts which is a distinction arising from burden of proof. Under the first part, the purchaser is entitled to certain rights which he can enforce"unless he has improperly declined to take delivery"which means that he is to lose those rights if the seller proves that he, the purchaser, has improperly declined to accept delivery. Under the second part of the clause, the purchaser gets certain additional rights which he can claim, only if, he can show that"he has properly declined to take delivery"and the burden of showing it will be upon him.

3. Under this clause, a buyer has a right to a charge for three things:—

(i) (i) for the amount of purchase money properly paid,

(ii) (ii) for the earnest if any,

(iii) for the costs awarded to him.

4. *Charge for Purchase money paid.*

1. This charge attaches from the moment the buyer pays any part of the purchase money.

2. Charge for purchase money is lost *only* when the seller proves that the buyer has improperly declined to take delivery. The burden of

proof is upon the seller.

5. *Charge for earnest and cost.*

(1) There is a possibility for a charge in respect of these two. But this possibility will be realised only if the buyer proves that he has properly declined to take delivery. The burden of proof is upon the buyer.

6. *Earnest and Part Payment of Purchase money.*

(1) What is stated above about charge in respect of earnest applies only if the money paid is paid as earnest.

(2) Money paid by a buyer before conveyance serves two purposes : (1) It goes in part payment of the purchase money for which it is deposited. (2) It is security for the performance of the contract. In the latter case it is earnest. In the former case it is instalment.

(3) This difference is important because whether there would be a charge or personal liability or there would not be, would depend upon whether the payment made is I*nstalment or Earnest.*

(i) If it is earnest—There is no charge (except in the case of a buyer who proves that he has properly declined to take delivery). Earnest is wholly lost and there is not only no charge but there is even no personal liability.

(ii) If it is part payment—There is a charge unless seller shows that the buyer has improperly refused to take delivery. Part payment is never wholly lost. If it fails to create a charge, it remains as a personal liability of the seller.

(4) Whether it is part payment or earnest is matter of contract or intention.

7. The purchaser's charge can be enforced against the seller and all persons claiming under him.

8. 8. (1) The buyer loses his charge :—

(i) By his own subsequent default

(ii) By his improperly refusing to take delivery.

(2) Earnest money—There are two purposes underlining Earnest:—

(i) It goes in part payment of the purchase money.

(ii) It is a security for the performance of the contract. It becomes part of the purchase money if the contract goes through. It is forfeited, if the contract falls through by reason of the fault or failure of the purchaser.

II. AFTER CONVEYANCE

1. Section 55 (6) (a)—*To claim increment.* 1. This must be so, because, after conveyance he is the owner.

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Sales free Encumbrances

1. As far as possible, a sale ought to be free from Encumbrances. To provide sales being made free from Encumbrances T. P. Act contains two sections which make it possible. They are Section 56 and Section 57.

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SECTION I

THE NATURE OF A MORTGAGE

1. DEFINITION.

1. Section 58 defines what is a mortgage. According to the section, there are three ingredients of a mortgage transaction :—

(i) The transfer of interest. (ii) In specific immovable property.

(iii) For the purpose of securing the payment of money advanced by way of a loan.

II. EXPLANATION OF THESE INGREDIENTS.

(i) Immovable property is not an essential ingredient of mortgage:

(1) Under the English Law, all kinds of property, personal or real, can be made the subject of a mortgage. The Real estate may be corporeal or incorporeal and the personal estate may be in possession or in action. The Estate may be absolute or determinable i. e. for life : it may be legal or equitable. Not only any kind of property may be the subject-matter of a mortgage but any interest in it may be mortgaged, whether such interest is vested, expectant or contingent.

(2) The Transfer of Property speaks only of immovable property in relation to mortgages. This gives the impression that the law does not recognise the mortgage of a movable property. This would be a mistake. The Transfer of Property Act merely *defines* and *amends* the law relating to property. It does not consolidate the law. It is, therefore, not a complete or exhaustive code of law relating to mortgage.

(3) (1) Mortgages of movables are recognised in India.

9 C. W. N. 14 : 8 Bom. S. R. 344.

(4) *Law by which mortgages of movables are governed.*

The Transfer of Property Act makes no provision: The Indian Contract Act makes no provision. Consequently the principles of English Law will be applicable to such mortgages.

34 Cal. 223 (228): 27 Bom. S. R. 1449.

(5) Mortgage of movable property may be effected without writing.

(6) Mortgage of an actionable claim—in writing—though movable by reason of Section 130 T. P.—*37 Bom. 198. (P. C.)* Deposit of insurance policy.

(ii) Transfer of an Interest :

1. It means the transfer of *some* right belonging to the mortgagor in respect of the property.
2. Ownership consists of a bundle of rights, such as, right to possess, right to enjoy, sell, etc.
3. It is enough if one of these rights is transferred. The right transferred may vary :— (i) It may be the right to sell. (ii) It may be the right to enjoy. (iii) It-may be the right to own.
4. The nature of the right transferred is matter of no consequence so long as some right is transferred.

III. THE PURPOSE MUST BE SECURING THE PAYMENT OF MONEY ADVANCED.

1. The transfer of interest is by way of *Security*. The idea of a Security involves two things. There must be a debt or pecuniary liability and secondly there must be some property pledged for the meeting of that liability.
2. 1. The purpose of the transfer must be securing of the debt. A transfer made for the purpose of securing a debt must be distinguished from a transfer, the purpose of which is to discharge a debt.

25 All. 115=30 I .A. 54.
II Bom. 462.

3. The right transferred must be to enable the man to recover the debt. The transfer must not extinguish the debt. If the effect of the transfer is to extinguish the debt then there is no mortgage.

Illustration.—

II Bom. 462 Abdulbhai vs. *Kashi*

In 1862, *A* in consideration of Rs. 150 passed to *B* a writing called *Karz Rokha* (or debt-note). It proved *(inter alia)* that *B* should hold and enjoy a certain piece of land belonging to *A* for twenty years, that at the end the land should be restored to *A* free from all claims in respect of principal or interest.

Held, not a mortgage.

25 All. 115.

MORTGAGE COMPARED WITH OTHER FORMS OF ALIENATIONS

MORTGAGE AND SALE

1. Sale is defined in Section 54—It is a transfer of ownership for a price.

The price is not a loan and the transfer is not a transfer of an interest but is an absolute transfer of ownership.

2. In a mortgage, the money paid is a loan and the transfer is a transfer of an interest only.

3. In a breach of a contract of sale, the rights are the rights of a vendor and purchaser while the contract is a contract of mortgage the rights are those of a mortgagor and mortgagee.

4. In sale, the property is transferred absolutely. In mortgage, the property serves only as a security for the repayment of a debt.

MORTGAGE AND OTHER KINDS OF SECURITIES

1. There are four kinds of securities (1) mortgage, (2) pledge, (3) lien and (4) hypothecation or charge.

It is important to note the distinction between mortgage and other kinds of securities.

1. MORTGAGE AND PLEDGE

1. The bailment of good as security for payment of debt or performance of a promise is called a ' pledge ' —*Section* 172 Indian Contract Act.

2. In a mortgage, general ownership in the property passes to the mortgagee and the mortgagor has only a right to redeem. In a pledge,' only ' a qualified or special property ' passes to the pledgee, the general ownership remains in the pledger.

3. Delivery of possession of the property pledged to the pledgee is essential. But delivery of possession is not essential to a mortgage.

4. The property which is once pledged cannot be pledged a second time, because, no possession can be granted to the second pledgee, while property which is mortgaged once to one person can be mortgaged again to others subsequently.

5. Pledge can only be *of personal* property. Mortgage can be of both personal as well as real property.

Mortgage and Liens

1. A lien is a kind of security which is created by the operation of the law. Lien is a right created by law and not by contract to retain possession of the property belonging to another until certain demands are satisfied.

2. The law on the subject of lien is scattered in many statutes of the Indian Legislature. E. g. Contract Act Sections 170-General-171-Bankers Solicitors, etc., 221-Agent's lien. Sale of goods 47, unpaid Vendor's lien. T. P. 554 : 55 (6) seller's and buyer's lien.

3. Lien does not create general ownership as a mortgage does, not even qualified property as in a pledge—only right to retain possession.

4. Both mortgagee and pledgee can sell: but lien holder cannot.

Mortgage and a charge

1. A charge is defined in Section 100. There are two elements in a charge:
(1) There is a pecuniary liability.
(2) Immovable property is made security for the discharge of that pecuniary liability.

2. In a mortgage there are three elements :— (i) There is pecuniary liability.
(ii) Immovable property is made security for the discharge of that pecuniary liability.
(iii) There is a transfer of an interest in that property in favour of the creditor.

3. In a charge there is no transfer of interest. There is only burden.

35 Cal. 837 (844) ;
13 Lah. 660 T. B.
35 Cal. 985.

4. The difference between mortgage and charge is material.

1. A mortgagee can follow the mortgaged property in the hands of any transferee from the mortgagor. While a charge can be enforced only against transferee with notice—

33 Cal. 985.

§ DIFFERENT CLASSES OF MORTGAGE

1. The section enumerates six classes of mortgage :—
(i) (i) Simple mortgage.
(ii) (ii) Mortgage by conditional sale.
(iii) (iii) Unsufructuary mortgage.
(iv) (iv) English mortgage.
(v) (v) Equitable mortgage.
(vi) (vi) Anomalous mortgage.

2. Characteristics of the different classes of mortgage.

(i) Simple Mortgage

1. 1. A Simple mortgage involves two things :
(i) A personal obligation, express or implied, to pay.
(ii) The transfer of a right to cause the property to be sold.

Personal obligation

1. When a person accepts a loan, there is involved a personal liability to pay, unless there is a covenant to pay out of a particular fund.

10 Cal. 740;22 Cal. 434;16 Cal. 540,13 Mad. 192; 15 Mad. 304 ; 27

Mad. 526 : 86.

1. A loan may be a secured loan or unsecured loan.

2. 2. Every unsecured loan involves a personal obligation to pay.

3. The only case of a loan in which a personal obligation to pay is negatived, is where there is a covenant to pay out of a particular fund.

Cases. 10 Cal. 740 ; 22 Cal. 434 ; 16 Cal. 540 ; 13 Mad. 192 15 *Mad, 304 ; 27 Mad. 526 : 86.*

4. Whether a loan, for which there is security, involves a personal obligation to pay is a question of construction. Two propositions may be stated as those of law :—

(i) Personal liability is not displaced by the mere fact that security is given for the repayment of the loan with interest.

(ii) The nature and terms of security may negative any personal liability on the part of the borrower.

5. In a simple mortgage, there is always security given for the loan. The loan is a secured loan. But nature and terms of the security must not negative the personal liability of the mortgagor. A personal covenant to pay is implied in and is an essential part of every simple mortgage.

Cases. 22 All. 453 (461) ; 29 Mad. 491 ; 30 All. 388.

6. In the absence of such a covenant, the security would be a mere charge.

Cases. 42 All. 158 (164)=46 1. A. 228; 52 All. 901.

II. Right to cause the property to be sold.

1. This is aright in rein although it can only be enforced by the intervention of the Court, as the words, ' cause to be sold ' indicate.

2. The transfer of this right may be express or it may be implied.

(ii) Mortgage by Conditional Sale

1. Characteristics.

(1) The transfer is by way of sale. It is a transfer of ownership.

(2) The difference between sale and mortgage by conditional sale is that, in sale the transfer is absolute while in mortgage by conditional sale, it is not absolute but is subject to a condition.

(3) The condition may take three forms :—

(i) (i) That on default of payment of mortgage money *on a certain day,* the sale shall become absolute.

(ii) (ii) Then on such payment being made, the sale shall become void.

(iii) (iii) (iii) That on such payment being made, the buyer shall

transfer such
property to the seller.

2. A mortgage by conditional sale and a sale with a condition of repurchase have a very close resemblance. In both cases, there is a right of reconveyance :—

(1) But they are different in the nature of the terms on which the right to reconvey can be exercised vary.

(2) If it is a sale with a condition of repurchase then :— (i) The right is personal and cannot be transferred.

(ii) The right can be enforced on strict compliance with the terms laid down by the condition of repurchase.

Cases. 10 Cal. 30 ; 6 All. 37 ; 21 Bom. 528.

(3) If it is a mortgage by conditional sale, then—

(i) The right to reconveyance is not personal but is a right in term and can be exercised by the transferee.

(ii) Time will not be treated as of the essence.

3. *What is it that distinguishes sale with a condition of repurchase and mortgage by conditional sale?*

(1) In a mortgage by conditional sale, the transaction notwithstanding the form, remains a lending and borrowing transaction. The transfer of land, although it is in the form of a sale, in fact it is a transfer by way of security.

(2) In a sale with a condition of repurchase, the transaction is not a lending and borrowing arrangement. It is not a transfer of an interest. It is a transfer of all rights. It is not a transfer by way of security. It is an absolute transfer reserving only a personal right of repurchase.

What is the test for determining whether a transaction is a mortgage?

(1) No particular words or form of conveyance are necessary to constitute a mortgage. As a general rule, subject to very few exceptions, where a transfer of an estate is *originally* intended as a security for money, it is a mortgage and where it is not so originally intended, it is not a mortgage.

(2) (1) It is not the *name* given to a contract by the parties that determines the nature of the transaction. A document may be held to be a sale although it is called a mortgage by the parties.

2 *Bom. 113.*

(3) (2) It is the jural relation, constituted by it, that will determine whether the transaction is a mortgage or not.

2 *Bom. 462.*

4. *How to find what the intention of the parties was?*

By finding out how they have treated the money advanced? If they have

treated it as a debt, then it is mortgage. The criteria adopted by the Courts are—

(i) The existence of a debt

(ii) The period of repayment, a short period being indicative of a sale and a long period of a mortgage.

(iii) The continuance of the mortgagor in possession indicates a mortgage.

(iv) The price below a true value indicates a mortgage.

In applying these tests, the Courts put the onus on the party alleging that an ostensible sale-deed was a mortgage, and in a case of ambiguity, lean to the construction of a mortgage.

5. *Is oral evidence of intention admissible?*

1. Before the Indian Evidence Act was passed, oral evidence and other instruments were freely admitted to prove this intention. But this practice was condemned by the Privy Council.

2. After the passing of the Indian Evidence Act, the question was governed by Section 92.

3. Section 92 excludes oral evidence to contradict a written document. The Indian Courts, never the less, on the authority of *Lincoln* vs. *Wright (1859) 4 De G. & J. 16* admitted evidence of acts and conduct of parties to show, that a deed which purported to be an absolute conveyance was intended to operate as a mortgage.

4. In 1899, the Privy Council definitely ruled in *Balkishen v/s. Legge= 22 All. 149* =27/. *A. 58*. that the rule in *Lincoln* vs. *Wright* had no application in India.

5. The result is that, the Courts are definitely limited to the document itself in order to ascertain the intention of the parties.

The question is not what the parties meant, but what is the meaning of the words they used.

Importance of the Proviso.

1. 1. The condition must be embodied in the same document.

Points to be noted.

1. Only means that in determining the question if the condition is contained in another document Court cannot take into consideration in determining intention.

2. But, even if, it was contained in the same document, it is necessarily a mortgage by conditional sale and not a sale with the condition of repurchase.

3. The question of construction still remains.

(iii) Unsufructuary Mortgage

1. CHARACTERISTICS.

(i) Delivery of possession or undertaking to deliver possession.

(ii) Authority to retain such possession until payment of mortgage-money.

(iii) Authority to receive the rents and profits and to appropriate the same in liue of interest or in payment of the mortgage-money.

NOTE.—There is no personal obligation to pay.

(iv) English Mortgage

I. CHARACTERISTICS

(i) There is a personal obligation to repay by the mortgagor on a certain day.

(ii) The transfer of the mortgagee is *absolute.*

(iii) The transfer is subject to the proviso that the mortgagee shall reconvey the property on payment.

II. This closely resembles the conditional mortgage. *Difference.*

(i) In the English Mortgage the sale is absolute while in the mortgage by conditional sale the sale is *ostensible.*

Query. How can it be a mortgage if the sale is absolute? This seems to conflict with the definition of mortgage which is transfer of an interest.

Difference in practice merely means this: that in English Mortgage, the mortgagee is entitled to immediate possession. While in the case of a mortgage by conditional sale, the right to possession depends upon the terms of the mortgage.

(2) In English Mortgage, there is a personal obligation to pay. In a conditional mortgage, there is no such right.

REQUISITES OF A MORTGAGE BY DEPOSIT OF TITLE DEEDS.

1. *Debt.*

1. A debt has been defined as a sum of money due now even though payable in the future, and recoverable by action—(7922) 2 *K.B.599 (617).*

NOTE.—AS to difference between a debt due by statute and debt due by contract—(1922) 2 K. B. 37. There is no necessity of a promise to pay in order to render the money recoverable when the debt is a statutory debt.

2. The debt may be an existing debt or a future debt. The deposit may be to cover a present as well as future advances—*50*

I. A. 283 ; 17 All. 252 ; 17 All. 252 ;25 Cal. 611.

3. 3. The debt may be a general balance that might be due on an account.

2 *Mad. 239 P. C.*

III. I. DEPOSIT OF TITLE DEEDS.

(i) **Title deeds**

1. It has been held in England that it is sufficient if the deeds deposited *bona fide* relate to the property or are *material evidence of title,* and that, it is not necessary that all the deeds should be deposited. *(1872) 8 Ch. App. 155.*

2. These cases have been followed in India. *59 Cal. 7 81.*

3. But Page *c.f.* in 11 *Rang 239* F. B. held that the documents must not only relate to the property but must also be such as to show *a prima facie* or apparent title in the depositor.

4. If the documents show no kind of title, no mortgage is created—Tax receipt—Plan—not documents of title.

5. If the deeds are lost, copies may be deposited.

(ii) If the deeds are already deposited by way of mortgage, they can, by oral agreement, be made a security for further advance. It is not necessary that they should be handed back and redeposited.

17 All. 252.
25 Cal. 611.

III. INTENTION.

1. The intention that the title-deeds shall be the security for the debt is the essence of the transaction.

2. Mere possession is not enough without evidence as to the manner in which the possession originated so that a contract may be inferred.

23 1. A. 106; 38 Bom. 372.
I Rang. 545.

3. If it is in contemplation of the parties to have a legal mortgage prepared and if the title-deeds are deposited for that purpose *only,* the deposit does not create an equitable mortgage.

4. But although the deposit is for the purpose of the preparations of a legal mortgage, there may also be an intention to give an immediate security, in which case the deposit creates an equitable mortgage.

5. The question is whether mere possession *coupled with debt* does not raise an inference that it is a mortgage? There is a difference of opinion but the better opinion seems to be as between creditor and debtor possession coupled with debt raises a presumption in favour of a mortgage.

IV. TERRITORIAL RESTRICTIONS.

1. This kind of equitable mortgages can be created only in certain towns.

2. The question is, to what does the restriction refer? Does it to the place where the deeds are delivered? or does not refer to the place where the property mortgaged is situated? It is held that the restriction refers to the place where the deeds are delivered and not to the situation of the property mortgaged.

Cases. 14 All. 238. 231. A. 106.

It is not necessary for the property to be situated in the towns mentioned.

(vi) Anomalous Mortgages

1. Any mortgage, other than those specified, is called an anomalous mortgage. It is a mortgage which does not fall within any of the other five classes enumerated.

2. Anomalous mortgages take innumerable forms moulded either by custom or the caprice of the creditor—some are combinations of the simple forms—others are customary mortgages prevalent in particular districts, and to these special incidents are attached by local usage.

What is it that distinguishes different kinds of mortgage.

It is the nature of the right transferred which distinguishes the mortgage.

(1) In a simple mortgage, what is transferred is a power of sale which is one of the component rights that make up the aggregate of ownership.

(2) In a unsufructuary mortgage, what is transferred is a right of possession and enjoyment of the usufruct.

(3) In a conditional mortgage and in an English mortgage, the right transferred is a right of ownership subject to a condition.

(4) In a simple mortgage and English mortgage, there is a personal obligation to pay.

(5) In an usufructuary mortgage and mortgage by conditional sale, there is no personal obligation to pay.

What is it that is common to all mortgages.

1. A mortgage is a transfer of an interest in specific immovable property as security for the repayment of a debt.

2. The existence of a debt is therefore a common characteristic.

3. It is said that this cannot be so because in a conditional mortgage or in an usufructuary mortgage there is no personal covenant to pay.

4. The reply to this is, a debt does not cease to be a debt. The remedy of an action for debt does not exist. The remedies for the recovery of debt may differ without the transaction ceasing to be a transaction for debt.

An ordinary mortgage of land may be viewed in two different aspects:

(1) Regarded as a promise by the debtor to repay the loan, it is a contract creating a personal obligation.

(2) It is also a conveyance, because it passes to the creditor a real right in the property pledged to him.

Out of this double aspect, many questions arise.

Q. I.—By what law the validity of a mortgage of land situated abroad should be governed?

It is now settled that it is governed by the law of *situs,* and no distinction is recognised between an actual transfer and a mere executory contract.

Q. II.—What is the *situs* of the secured debt—Is the debt to be regarded as situated in the country where the debtor resides, or where the land on which it is secured is situated?

The Privy Council says"It is idle to say that a debt covered by a security is in the same position with one depending solely on the personal obligation of the debtor".

III

REQUISITES OF A VALID MORTGAGE

This requires the consideration of the following topics :

I. Formalities with which a mortgage must be executed.
II. The proper subject-matters of a mortgage.
III. The capacity to give and to accept a mortgage.
IV. Contents of a mortgage-deed.

I FORMALITIES WITH WHICH IT MUST BE EXECUTED

Section 59.—

1. Except in the case of mortgage by a deposit of title-deeds, every mortgage created securing the repayment of Rs. 100 or more as principal money must, under the T. P. Act, be effected by a registered instrument, signed by the mortgagor and attested by at least two witnesses.

2. Where the principal money is less than Rs. 100, a mortgage may be created either by such an instrument or except in the case of simple mortgage by delivery of possession of the mortgaged property.

3. If the principal is Above Rs. 100, the transaction of mortgage must be in writing i.e. it must be by a deed and the deed must be:—

(1) Signed by the mortgagor.
(2) Attested by at least two witnesses.
(3) Registered.

4. If it is less than Rs. 100 no writing is necessary. Parol agreement is enough in the case of :—

(1) Simple mortgage.
(2) Conditional mortgage.
(3) English mortgage.
(4) Usufructuary mortgage.

Parol agreement plus transfer of possession.

4. 4. We have only to consider mortgages where the principal is above Rs. 100.

(1) (1) § SIGNATURE

General Clauses Act 1897. Section 3 (52).

1. The signature may be made by means of types or by a facsimile. 25 *Cal. 911.* Such person having a name stamp used by servant.

2. It may be the mark of an illiterate person. *41 Bom. 384* mark of a dagger.

3. But a literate person cannot sign by making a mark. Confession not signed the accused was literate. *32 Cal. 550.*

Signature includes a mark in the case of a person unable to write his name.

(2) § ATTESTATION

1. *Attestation.*—To attest means to bear witness to, affirm the truth or genuineness of, to testify, certify. *Attestation* means the verification of the execution of a deed or will by the signature in the presence of witnesses. Attesting witness is a witness who signs in verification.

2. That being so question is, must the attesting witness be present at the execution of the instrument or a mere acknowledgement of execution by the mortgagor to a witness who afterwards subscribes his name is enough to satisfy the requirements of law in respect of attestation?

3. The Privy Council has laid down that the attesting witness ought to be present at the execution of the instrument and a mere acknowledgement will not suffice.

39 I.A. 218 ; 35 Mad. 607 which overrule the Allahabad and Bombay decisions to the contrary—*27 Bom. 91 and 26 All. 69.*

§ ATTESTATION OF PARDANASHINS.

4. The same rule was applied. The signature of the Pardanashin lady must be in the presence of the witness otherwise he cannot be said to be an attesting witness.

Case Law. 451. A. *94.*

A mortgage-deed for over Rs. 100 purported to be signed by a Pardanashin lady on behalf of her son, a minor and to be attested by two witnesses. It appeared from the evidence that the lady was behind the parda when the deed was taken to her for signature. The witnesses did not see her sign it, but her son came from behind the parda and told them that it had been signed by his mother; they thereupon added their signatures as witnesses :—

Held that the deed was not"attested"within the meaning of section 59 of the T. P. Act.

42 1. A. 163

A mortgage-deed purported to be executed by two pardanashin ladies. It appeared from the evidence of two of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that although they could not see the faces of the executants, they heard them speak and recognised their voices :—

Held that the deed was duly attested in accordance with the T. P. Act.

5. The Law is now changed and attestation on acknowledgement of his signature by the executant is good—See Definition *Attested* in section 3, T. P. Act as amended in 1926.

(3) § REGISTERED

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* * *

(Earlier portion not found—ed.) to operate immediately, it is not necessary that there should be a formal delivery or even that the document should go out of the possession of the party who executes it.

illus—Exton vs. *Scott. (1833)* 6 Simons 31.

A certain person having received moneys belonging to another without any communication with him executed in his favour a mortgage for the amount. The mortgagor retained the deed in his custody for several years and then died an insolvent. After his death the document was discovered in a chest containing his title-deed. It was contended that there was no binding mortgage, because there had been no delivery of the deed. But the contention is overruled, on the ground that there was no evidence to show that the deed was not intended to operate from the moment of its execution.

6. There seems to be an idea that if the deed is delivered to the other party, it must have immediate operation and *cannot* in point of law be delayed in its operation. But it is now established that evidence is admissible to show the character in which the deed is delivered to a person though he is himself a party taking under it and not a stranger. (1897) 2 Ch. 608.

7. Where an instrument is to come into operation, not immediately, but only upon the performance of some condition, it is known as an escrow which simply means a scrawl, or writing, that is not to take effect till a condition precedent is performed.

8. Mere execution is not enough. There must be intention to give it immediate effect. Delivery means an intention to give immediate effect.

That intention is independent of the process of delivery or non-delivery.

9. Where a document intended to be executed by one or some only and others refuse to complete it the question whether it is binding on those who have executed it, is one of the intention of the parties to be gathered from the facts of each.

§ MATERIAL ALTERATION IN A DEED—EFFECT OF

1. A material alteration in a deed made *without* the consent of the mortgagor and with the privity and knowledge of the person who relies upon it, would altogether destroy the efficacy of the deed.

2. If blanks are left to be filled up with merely formal matters the mortgagee may fill them up without imperilling his rights.

(1905) 2 Ch. 455.

3. 2. The question what constitutes a material alteration within the meaning of the rule has given rise to some difference of opinion.

10 C. W. N. 788 (of Mukerji J.)

Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is a material change, or technically, *an alteration,* and such a change will invalidate the instrument against all parties not consenting to the change.

An addition of a party to a contract constitutes a material alteration.

§ IMPORTANCE OF THE THREE FORMALITIES

1. The absence of any of three formalities is fatal to the validity of the transaction. The word is *only.*

2. Not only the formalities must exist but they must be valid, i. e., in accordance with law.

3. Not only must there be signature but the signature must be valid.

4. Not only must there be attestation but the attestation must be valid. If attestation is invalid, the deed cannot operate as a mortgage—e. g. attestation without the presence or acknowledgement by the executor.

5. Not only must there be registration but the registration must be valid. Thus

(i) If the property is so incorrectly described that it cannot be identified—18 *Cal. 556/4.B.*

(ii) When the deed is registered in a circle in which the property is not situate.

29 Cal. 654.

(iii) Where the deed is not presented for registration by the proper person the mortgage is invalid.

581. A. 58

Two other questions have to be considered in connection with the subject-matter of Formalities.

I IS EXECUTION OF THE DEED ENOUGH TO GIVE EFFECT TO THE MORTGAGE?

1. It is hardly necessary to state that the mere execution of a deed is not enough if it is not intended to operate as a binding agreement.

2. This is expressed in English Law by the formula that a deed must be delivered.

3. This may not be clear unless one understands what meant by 'delivered'. There is nothing mysterious about the delivery of a deed which does not represent any technical process, but only indicates that the instrument is to come into immediate operation.

4. Shephard in his *Touchstone* speaks of *delivery* as one of the requisites of a good deed and adds that it is a question of fact for the jury.

CASE LAW

I. I. SUIT AGAINST SECRETARY OF STATE

*(1906) I **K.B** .613; 5 Luc. 157; 37Mad. 55.*

II. POSITION OF THE CROWN

1920A.C.508 ;1932A.C.28 ;1929A.C.285 ;8App.cases 767 ; 8 M. I. A. 500 ; 1903 App. cases 501.

III.PARAMOUNTCY

(1792) 2 *Ves. 60 ; 13 M. P. C. C. 22* ; *(1906) I K. B. 613.*

British India = Section 3(17) General Clauses Act, 1897. Whole of British India = includes the Scheduled Districts. 52 Mad. 1.

Any newly acquired territory becomes an annexation part of British India—*Onsley* vs. *Plowden (1856—59) I Bom. 145.*

But it retains its laws until altered by the Crown or Legislature. *19 Bom. 680 (686) following I M.I. A. 175/271.*

Acts such as Stamp Act passed by the Indian Legislature have been extended to many places which though outside British India are under British Administration (e. g. Bangalore, Hyderabad assigned districts: Baroda cantonment: Mount Abu, etc.) by notifications under Sections 4 and 5 of the Foreign Jurisdiction and Extradition Act, 1879, and the Indian (Foreign Jurisdiction) Order in Council, 1902.

§ CAPACITY TO GIVE OR TAKE A MORTGAGE

1. A mortgage is a *transfer of property* and also a contract. It must therefore satisfy the requirements as to capacity laid down for a valid transfer of property and for a valid contract.

§ REQUIREMENTS AS TO CAPACITY FOR A VALID

TRANSFER OF PROPERTY

1. Transfer of property means an act by which a living person conveys property to one or more other living persons or to himself or to himself and one or more other living persons —Section 5.

2. A mortgage being an act of transfer of property, the parties to an act must be living persons.

3. When it is said that both persons must be living it is obvious that the intention is to make two distinctions :—

(i) Between a transfer *inter vivos* and a will. (ii) Between a transfer and the creation of an interest (Sections 13, 14, 16 and 20).

4. A will operates from the *death* of the testator. A mortgage therefore cannot be created by a will. It must be created *inter vivos*. A will does not operate as a transaction between two living persons.

5. A mortgage is a transfer of an interest. Sections 13, 14, 16—20 permit that an interest may be created in favour of a person not in existence at the date of transfer. But a mortgage is not the creation of an interest, but it is the *transfer* of an interest.

§ Living.

1. What is the meaning of the word *Living*? Does it mean one who has not suffered natural death or does it mean that a person has not suffered civil death? There may be no natural death although there may be civil death.

Illus. Sannyasi—Buddhist.

Where a person enters into a religious order renouncing all worldly affairs, his action is tantamount to civil death.

Illus.

Sannyasi—*Mulla.p.ll3*. Buddhist Monk—7. *Rang. 677. 1. B.*

2. A person who is civilly dead is not dead for the purpose of the T. P. Act.

3. *Living* as defined in explanation 3 to Section 299, I. P. C. would indicate that some part of its body must have been brought forth. But under the Hindu Law a son conceived is equal to son born—*Mulla p. 319*. A person may be living for the purpose of the Hindu Law and may not be for the purpose of T. P. Act.

16 Mad. 76 ; 37 All. 162 ; 58 Mad. 886.

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4. Another case of a person in a like position is that of a convict. A convict under the English Law, since he cannot enter into a contract or dispose of property, has no power to lend or borrow money on mortgage ;

but the administrator of a convict may mortgage any part of the convict's property.

A convict is defined in Section 6 of the Forfeiture Act *33 and 34 Vict. Ch. 23, 1870 :* to mean any person against whom judgement of death, or of penal servitude, shall have been pronounced or recorded by any Court of competent jurisdiction in England, Wales or Ireland upon any charge of treason or felony.

4. 3. What about the position of a convict in India.

* (Page left blank in the Ms—ed.)

§ PERSON

1. The word"person"according to the General Clauses Act includes any company or association or body of individuals whether incorporated or not.

2. That the word person includes a"juristic person"such as a corporation was a long established view. But it is now made clear by a special proviso which was added to Section 5 of the T. P. Act in 1929.

3. A corporation, which has power to acquire and hold land has also impliedly power to mortgage it for purposes of carrying out the object for which it was created. The powers of statutory corporations are generally speaking regulated by the act of incorporation, but where borrowing is necessary for the purposes of the corporation, it is not forbidden by the T. P. Act because it is a"person".

4. By Hindu Law an *Idol* is recognised as a juristic person capable of holding property. 311. A. 203.

But the possession and management of the property of the *idol* are vested in the Sebait. But as the ownership belonged to the idol and as the idol is a juristic person and therefore a living person, it can be a party to the mortgage.

§ REQUIREMENTS AS TO CAPACITY FOR CONTRACT

1. This is dealt with in Section 7. Two things are necessary undersection?.

(i) Person must be competent to contract

(ii) Person must be entitled to transferable property or authorised to dispose of transferable property.

(i) § COMPETENT TO CONTRACT

1. Section 4 says that the Chapters and Sections of the T. P. Act which relate to contracts shall be taken as part of the Indian Contract Act.

2. Competency to contract must therefore mean competency in

accordance with the Contract Act.

Section 11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

3. Disqualification of an Insolvent.

A word may be said as to the capacity of an Insolvent to deal with any property subsequently acquired by him. Now it is settled Law that an insolvent, who has not received his final discharge, cannot create a mortgage on immovable property acquired by him. *17 Mad. 21* (But *See 8 Cal. 556).*

§ ENTITLED

1. The question is whether *entitled* means entitled as a full owner or as a limited owner.

2. That a full owner has the capacity to mortgage is obvious. The question is whether a limited owner has the capacity to mortgage?

3. Person holding property on trust for sale without express power to mortgage.

It may be laid down generally that a trust for sale containing a direction for absolute conversion does not authorise a mortgage.

4. *Partner*—can mortgage partnership property to secure partnership debt.

5. An executor or administrator under the Indian Succession Act is competent to transfer.

6. Hindu widow, a Member of a joint family and the Karta of a joint family, the Trustees of Hindu Religious Endowments.

7. The last two having their *power* and *necessity.*

§ TRANSFERABLE PROPERTY

1. The person whether he is a full owner or limited owner, the subject-matter must be transferable property.

2. What is transferable property?

(i) Section 6 says—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law. Every kind of property is transferable unless its transfer is prohibited by Law.

(ii) The exceptions fall under two heads: (a) Merely personal rights cannot be transferred.

(b) An interest in property restricted in its enjoyment to the owner personally cannot be transferred.

3. This shows that there may be a mortgage of movable property. The T. P. Act does not deal with it because the contract deals with it as a pledge. It does not prohibit.

§ THE CONTENTS OF A MORTGAGE-DEED

It is desirable that the mortgage-deed should specify certain particulars.

1. The debt or engagement, which is the subject-matter of the security, should be specified in the deed, otherwise the mortgagor may substitute one debt for another.

2. The time for the payment or performance must be specified in the deed. A stipulation that whole will be payable on payment of instalment

3. The deed should also contain a covenant to pay because there are various kinds of mortgages in which no debt is implied.

4. The property which is given in mortgage should be sufficiently described. It is true, extrinsic evidence is always admissible for the purpose of identifying any property, where the description is either indefinite or even actually misleading.

Q.—Whether a mortgage can be created on a person' s property, if such property is not specifically described? Whether a general mortgage is valid?

Q.—Whether a general pledge of all the property that the debtor then has, without any further distinction, can create a mortgage under our Law.

1. Distinction must be made between an instrument which contains sufficiently apt words to create a security and the one in which the debtor merely agrees that, if the money is not repaid, the obligee would be at liberty to recover the debt from the whole of the debtor's property.

In the latter case, if they *stand alone,* merely give the obligee the ordinary right of a creditor to levy execution on the property of his debtor and do not create any pledge.

Supposing the case to fall under the first head, is such hypothecation good to create a mortgage.

In India, the validity of such securities has been questioned on the ground that a general hypothecation is too indefinite to be acted upon.

(1) It is said that such hypothecations sin against the canon that a contract form must be definite and reliance is placed upon Section 29 of the Contract Act and Section 93 of the Evidence Act.

(2) Vagueness is a misleading term. It may mean (1) either that the language is so indistinct that it cannot be understood or (2) that the property to which it relates is not specified in the contract.

(3) Indefiniteness is, however, frequently confounded with what has been called wideness.

The subject-matter of a contract may be *wide and yet definite.* On the other hand it may be narrow and yet indefinite.

If a man says"I mortgage all my landed property", it is wide but definite.

If a man, who has several houses, says ' I mortgage one of my houses ', the description is not wide but is still indefinite.

(4) The word ' specific ' in the T. P. Act is used to distinguish it from general and unless the property is specified in the deed, there can be no mortgage in Law.

(5) The property must be specified although the Law does not say that it must be specified in any particular way.

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THE RIGHTS AND LIABILITIES OF THE MORTGAGE
INTRODUCTION

1. The property which is the subject-matter of the mortgage is subject to the rights of the mortgagor and the mortgagee.

2. There are two questions to be considered— (i) What are the rights of the mortgagor and mortgagee? (ii) What is the *nature* of those rights?

§ What is the nature of the rights

1. The English Law divides :—the interests of the mortgagor is spoken of as an equitable estate, while the interests of the mortgagee is spoken of as a legal estate. The Indian Law does not recognise this distinction between legal and equitable estate.

(1872) 1. A. Supp. 47 (71). 30 1. A. 238.

2. Even under the Trust Act this distinction is not recognised. *581. A. 279.*

3. Both have legal rights—there is nothing equitable as opposed to legal.

II. Under the English Law mortgagee is owner while the mortgagor has a bare right of reconveyance.

1. Under the Indian Law it is just the reverse. The mortgagor is the owner and the mortgagee has only a right in re *abena.*

Rights of the Mortgagor

1. The Rights of the mortgagor fall into three divisions—

I. The Right to redeem.
II. The Right to manage the property.
III. The Right to obtain re-transfer.

§ Right to redeem *Section 60*

1. The right to redeem entitles the mortgagor to require the mortgagee to do three things— (i) To deliver to the mortgagor the mortgage-deed. (ii) To deliver possession if the mortgagee is in possession. (iii) To have executed and registered an acknowledgement in writing that the right (is

redeemed)*mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52D. Notes on Acts and Laws PART IV.htm - _msocom_4

2. This right to redeem he can exercise on the following conditions:—

(i) On payment or tender of the mortgage money. (ii) At any time *after* the principal money has become *due*. (iii) If the right to redeem is not extinguished by act of parties or by decree of a Court. (iv) If the mortgagor is prepared to redeem the whole.

1. RIGHT TO REDEEM

1. The section is not prefaced by any such words as in the absence of a contract to the contrary.

2. The right of redemption is therefore a statutory right which cannot be fettered by any condition which impedes or prevents redemption.

491. A. 60. 3. Any such condition is void as a clog on redemption.

II. CLOG ON REDEMPTION—Any provision inserted in the mortgage transaction to prevent redemption by a mortgagor is void:

(1) The principle underlying the rule against clog is that, mortgage is a conveyance as a security for the payment of a debt. Nothing ought to prevent a man from getting back his *security*.

(2) There is a difference between *sale and security*. If sale, there is no right to get back property. If security, there is a right to get back property.

(3) This right cannot be taken away by a contract. If it does, it will be treated as a clog and will not be enforced.

III. INSTANCES OF CLOG ON REDEMPTION

I. The following clauses are clogs on Redemption :—

(1) Redeem during the life of the mortgagor.

(2) Redeem with his own money—-not from any other person.

(3) Redeem by payment on due debt or the mortgage will become sale.

(4) Redeem on condition that mortgagor shall grant permanent lease to the mortgagee.

II. The following clauses are not deemed to be clogs on Redemption:—

(1) Not to redeem unless prior mortgages are redeemed.

(2) Not to redeem an usufructuary mortgage until after the expiry of 15 years.

(3) Postponement of the right to take possession after redemption for a reasonable and necessary period.

III. No hard and fast rule as to what is a clog and what is not :—

(1) The mere fact that the terms of a mortgage are hard, does not

make the clause a clog.

(2) The test is whether it hampers the mortgagor in the exercise of his right to redeem in such a way as to place the right to redeem beyond his reach.

(3) If the clause is a clog, then it will not be enforced, even though it may be contained in a consent decree. The right to redeem cannot be said to have been waived by consent

IV. The doctrine of clog on redemption relates only to the dealings which take place between the parties to the mortgage at *the time* when the contract of mortgage has been entered into. It does not apply to a contract made subsequently with each other.

1. That means that parties are not free at the time when the contract of mortgage is made to take away the right of the mortgagor to redeem.

2. But they are at liberty subsequently to alter the terms of the contract of mortgage and any clause which fetters the right to redeem will not be treated as a clog.

V. *Due.*

1. Must be distinguished from payable. Money may be payable but not due.

2. Due = demand able.

3. If it is not paid on due date, the right to redemption is not lost. Mortgage remains a mortgage—only it can be exercised.

VI. Payment.

(i) Payment must be to *all* if there are more than one mortgagee. (ii) Mode of payment—legal tender or any other medium acceptable to the creditor. (iii) Place of payment—(Page left blank in Ms—ed.)

Redemption and Improvements *Section 63 A*.

1. The mortgagor on redemption is entitled to improvements in the absence of a contract to the contrary.

2. The mortgagor shall be liable to pay the cost of improvements if the improvement was— (i) necessary to preserve the property from destination. (ii) necessary to prevent security from being insufficient. (iii) made in compliance with lawful order of a public authority.

3. This also is subject to a contract to the contrary.

4. Section 63 A lays down the general rule that ordinarily a mortgagee is not at liberty to effect improvements and charge the mortgagor therewith. The object of the law is to prevent a mortgagee from laying out large sums of money and thereby increasing his debt to such an extent as to cripple the power of redemption. The mortgagee cannot be allowed to make

redemption impossible by making improvements—This is called improving a mortgagor out of his estate.

5. The mere *consent* of the mortgagor to improvements is not enough to make him liable, unless it amounts to a promise to reimburse.

Right of Redemption and the benefit of the renewal of a lease

Section 64

The renewal of a lease is a kind of an accession to the original interest of the mortgagor.

1. If the mortgagee obtains a renewal of the lease, the mortgagor is entitled to the benefit of the renewed lease on redemption.

2. This is subject to a contract to the contrary.

Right of the Mortgagor to manage *Section 66*

1. As long as the mortgagor remains in possession, he is at liberty to exercise the ordinary rights of property and to receive the rents and profits without accounting for them.

2. Question is whether the mortgagor is liable for waste?

3. This is a Section which deals with the doctrine of waste. Waste is either voluntary or permissive. *Voluntary waste* implies the doing of some act which tends to the destruction of the premises, as by pulling down houses, or removing fixtures ; or to the changing of their nature as the conversion of pasture land into arable or pulling down buildings.

Permissive Waste implies an omission whereby damage result to the premises, where for instance houses are suffered to fall into decay.

To constitute voluntary waste by destruction of the premises, the destruction must be wilful or negligent; it is not waste if the premises are destroyed in the course of reasonable user and any user is reasonable if it is for the purposes for which it is intended to be used, and if the mode and extent of the user is apparently proper, having regard to the nature of the property and what the tenant knows of it.

4. According to Section 66 the mortgagor is not liable for permissive waste. He is liable for voluntary waste which renders the security insufficient.

5. A security is insufficient if the value is less than 1/3 of the money due and less than 1/2 if the security is buildings.

For Section 65 A.—Please see page No. 523

Liabilities of the mortgagor

Section 65.

1. The liabilities consists of certain statutory covenants.

2. They are warranties for the breach of which the mortgagor is liable.

I. GENERALLY— (a) *Covenant for title.*

(i) There is a title in the mortgagor in the interest transferred. (ii) That he had the right to transfer. *Substituted Security*

Where the owner of an undivided share in a joint and undivided estate mortgages his undivided share, the person who takes the security i.e. the mortgagee takes it subject to the right of these co-sharers to enforce a partition and thereby convert what is an undivided share of the whole into a defined portion held in severally—*II. A. 106.* After partition the security will be the separate share allotted in place of the undivided share. Proceed against the share allotted and not against share originally mortgaged.

* * *

(a) Covenant to deferred title.

(b) Covenant to pay public dues—if the mortgagee is not in possession.

(c) Covenant to pay prior Encumbrance (debt) on its being due.

II. WHEN THE MORTGAGED PROPERTY IS LEASEHOLD.

(i) Covenant that all conditions have been performed down to the commencement of the mortgage.

(ii) Covenant to pay rent reserved by the lease if the mortgagee is not in possession.

(iii) Covenant to perform all the conditions if the lease is renewed.

These covenants are not personal covenants. They run with the mortgaged property and can be availed of by a transferee from the mortgagee.

* * *

Rights of the Mortgagee

1. They fall into two divisions—

(1) Right to realise the mortgage money.

(2) Right to have the security maintained in tact during the continuance of the mortgage.

1. RIGHT TO REALISE THE MORTGAGE MONEY.

1. Under this fall the following rights—

(1) Right to foreclose 67.

(2) Right to sell 67/69.

(3) Right to sue for mortgage money 68.

(4) Right to claim money on sale and acquisition 73.

2. A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is a suit for foreclosure.

NOTE.—

1. Mortgage money does not mean the whole of the mortgage money.

If a mortgage is payable by instalments, it is open to the mortgagee to bring a suit for foreclosure for an instalment of the principal and interest.*13 M. L.1. 2.*

2. In the absence of an express stipulation, a mortgagee is not bound to receive payment by instalments—*24 All. 461.*

3. A suit for interest is maintainable even before the principal money became due unless there is a covenant prohibiting him from doing so.

4.The three rights are not available to every mortgagee.

1. THE RIGHT TO SUE FOR MONEY.

Section 68.

This is available only where the mortgagor binds himself to repay the same.

Question.—When can it be said that a mortgagor *personally* binds himself to pay?

There are two views on the matter.

(a) A personal covenant is presumed in all mortgages of whatever form. According to this view, the only difference that can arise is that the Court might in the absence of an express covenant, demand more clearly implied covenants than it might require in other case—*13 Lah. 259.*

(b) The other view is that a covenant can arise only where there is an express covenant the words are *binds* himself. This clause would be unnecessary if personal covenant was implied in all cases.

By definition

Section 58.

1. The mortgagor in a simple mortgage *binds* himself to repay the money.

2. In a mortgage by conditional sale, he says that"if he pays he will recover his property".

3. In a usufructuary mortgage he does not even make this qualified covenant. It is therefore clear that a mortgagor can sue for a money decree in the case of a simple mortgage but not in the case of other kinds of mortgages unless there is an express covenant to that effect.

Exceptions.

The mortgagor can sue for a money decree from the mortgagor. But he cannot sue for a money decree from a transferee from the mortgagor or from his legal representative.—

Other cases in which he can sue for a money decree.

Generally a mortgagee can sue for a money decree when there is a personal covenant by the mortgagor to pay.

2. There are cases where a mortgagee can sue although there is no personal covenant to pay—

Section 68.

(i) Where by accidental causes, not due to the act of either party such as fire, flood or *vis major* the property is destroyed, wholly or partly, or is rendered insufficient and the mortgagor on being given an opportunity fails to give further security.

(ii) Where the mortgagee is deprived of the whole or part of his security by the wrongful conduct of the mortgagor.

(iii) Where the mortgagee being entitled to possession, the mortgagor fails to deliver possession or fails to secure the mortgagee in his possession.

Right to sell 1.

This right belongs only to—

(i)	(i)	Simple mortgagee.
(ii)	(ii)	English mortgagee.
(iii)	(iii)	(iii) Equitable mortgagee.

2. They cannot sue to obtain possession. They can only sue for sale. If the Court erroneously gives him possession, that possession does not amount to foreclosure and the mortgagor can subsequently redeem the mortgage.

19 *Mad. 249 (252-53)* P. *C.*

CONDITIONS FOR THE EXERCISE OF THE RIGHT OF SALE AND FORECLOSURE.

1. After the mortgage-money has become due and before decree for redemption is made.

2. Suit must be for the whole of the mortgage-money. There cannot be a suit for the realisation of a part of the mortgage-money by sale or foreclosure of a part of the mortgage property.

Exception.—If there is a severence of the interests of the mortgagee with the consent of the mortgagor, a suit for a part may be brought by the mortgagee.

Section 67 A.

3. A mortgagee who holds *many* mortgages against the same mortgagor must bring *one* suit on those mortgages in respect of which—

(i) A right to sue has accrued to him and

(ii) In respect of which he has a right to obtain the same kind of decree.

Section 65 A.

4. If the mortgagor could not only manage the property but, if he is

lawfully in possession of the mortgaged property, he shall have the power to make leases thereof which would be binding upon the mortgagee.

5. After the mortgage this power of the mortgagor to deal with the property is limited. He has not anything like general authority.

6.The power to lease is circumscribed by certain condition.

(i) He may lease it in accordance with local law, custom or usage.

(ii) Every lease shall reserve lest rent can reasonably be obtained—rent shall not be paid in advance.

(iii) The lease must not contain a convenant for renewal.

(iv) Lease shall take effect from a date not later than 6 months from the date on which it was made.

(v) In the case of a lease of a building, the duration of the lease shall not exceed three years.

7. The general power of the lease is subject to a contract to the contrary. The other provisions are subject to variations.

Right to foreclose. This right belongs to—

(1) Mortgagee by conditional sale.

(2) Mortgagee by anomalous mortgage by the terms of which he is entitled to foreclose.

Mortgagees who can neither sue for sale nor for foreclosure.

(1) Usufructuary mortgagee.

(2) Mortgagee of a Railway and canal or other work in the maintenance of which the public are interested. *Case of a mortgagor who may become a trustee or executor of the mortgagee or the mortgagee may become a trustee or executor of the mortgagor.*

Can such a mortgagor or mortgagee foreclose sale?

Sub-clause (b) of Section 67 provides for the case of a mortgagor who has become a trustee for the mortgagee. According to this clause a mortgagor trustee, who may sue for sale, is not allowed to foreclose.

In the other case the foreclosure is equally prohibited according to English practice on the principle that it is the duty of the trustee to consult the interests of the mortgagor and that it is for the mortgagor's interests that a sale and not foreclosure, should take place.

EXERCISE OF THE POWER OF SALE WITHOUT THE INTERVENTION OF THE COURT

1. As a rule, a mortgagee can bring the property to sale only through the Court.

2. Section 69 provides exceptions to this rule.

(i) Where the mortgage is an English mortgage and neither the mortgagor or the mortgagee is a Hindu, Mohammedan or Buddhist or a

member of a community notified in Gazette.

(ii) Where a power of sale is expressly given by the deed and the mortgagee is the S. of S.

(iii) Where a power of sale is expressly given by the deed and the property or any part of it was on the day of the execution of the deed situated in the towns of Bombay, etc

Section 69 A.

3. The mortgagee who has the *power* (as distinguished from the right) to sell without the intervention of the Court is also entitled to appoint a receiver by writing signed by him or on his behalf.

4. The exercise of this power of sale or power of appointing a receiver is to notice to the mortgagor.

5. The notice must be in writing requiring payment of the principal money and default for three months.

Section 73. I Mortgagee's Right to proceeds of sale

1. When property is sold for failure to pay arrears of revenue or other public charges and such failure is not due to default by the mortgagee, the mortgagee is entitled to claim the balance of the sale proceeds.

2. Similarly if he mortgage property is compulsorily acquired, the mortgagee shall be entitled to claim payment of the mortgage money out of the amount due to the mortgagor as compensation.

3. His claim shall prevail against all except those of the prior encumbrances.

4. The claim may be enforced although mortgage money has not become due.

//. Rights of the mortgagee to the maintenance of the Security in tact during the continuance of the mortgage.

1. Right to accession—Section 70.

II. Right to renewed lease-—Section 71.

III. Right to preserve property—Section 72.

Section 70

1. § Right to accession.

1. The mortgagee is entitled to the accession for the purpose of his security *if* the accession is made after the date of the mortgage. 29 *Cal. 803.* Where two mortgages were executed on a land on which there was a house and thereafter two new houses were built by the mortgagor on the land held that they were accessions on which a mortgagor could rely for security.

If the house was built *before* mortgage, he could not.

He could not if it was built after decree although the section does not say

so.

This is subject to a contract to the contrary. *Section 71.*

2. § **Right to the benefit of a renewed lease.**

He will be entitled to the benefit of the new lease for the purposes of his security.

This is subject to a contract to the contrary. *Section 72.*

3. § **Right to preserve the property.**

1. A mortgagee may spend such money as is necessary—

(i) (i) for the preservation of the mortgage property from destruction, forfeiture or sale.

(ii) (ii) for supporting the mortgagor's title to the property.

(iii) (iii) for making his own title thereto good against the mortgagor.

(iv) (iv) when the mortgaged property is a renewable leasehold, for the renewal of the lease.

(v) (v) he may insure if the property is insurable and add the cost to the principal money.

Right of mortgage to Priority

I. PRIORITY BY TIME.

1. The general rule regarding priority in the matter of transfers of interests in immovable property is laid down in Section 48 of the T. P. Act.

2. The same rule applies to questions in regard to mortgages so that priority of mortgages in India depends upon the respective dates of their creation, the earlier in date having precedence over the latter—-*56Cal.868.*

3. Section 78 is an exception to this rule. It lays down that the Court would postpone the prior mortgagee to the subsequent mortgagee where the prior mortgagee has, through fraud, misrepresentation or gross neglect, induced the subsequent mortgagee to advance money on the security of the mortgaged property.

Misrepresentation:

1. Is defined in Section 18 of the Indian Contract Act.

2. It does not necessarily mean fraudulent misrepresentation.

Fraud

Gross Negligence.

There is a difference between English and Indian Law. According to English Law gross negligence means negligence *amounting to fraud.*

According to Indian Law gross negligence is different from fraud.

II. PRIORITY BY PAYMENT.

Q.—Can a mortgagee acquire priority over an intermediate mortgagee by buying the rights of an earlier mortgagee?

Section 93

1. A mortgagee cannot acquire priority over an intermediate mortgagee by paying off a prior mortgagee whether he pays with or without knowledge of the intermediate mortgagee.

2. A mortgagee making a subsequent advance to the mortgagor, shall not acquire priority in respect of such subsequent advance over an intermediate mortgagee, whether he makes the advance with or without the knowledge of the intermediate mortgagee.

Section 79

This Section forms an exception to the second rule laid down in Section 93.

Under Section 79. A subsequent mortgagee having notice of the prior mortgage is postponed in respect of any subsequent advance if the prior mortgage is made to secure future advances and the subsequent advance does not exceed the maximum.

Right of Mortgagee to Marshalling

Section 81.

Section 82.

Question of Marshalling

1. This arises when two or more properties are mortgaged to two *different* mortgagees in such a way that both properties are subject to the mortgage rights of one mortgagee while only one is subject to the mortgage rights of the other.

Illus.

A is the owner of two estates—Whiteacre and Blackacre. *A* mortgages Whiteacre and Blackacre to *B* and thereafter mortgages Blackacre to C.

The position that arises is this. *B* has a mortgage over Whiteacre as well as Blackacre. *C* has a mortgage over Blackacre only. From the standpoint of realizing the mortgage money *B* has a right to sell both Whiteacre as well as Blackacre. While *C* has a right to sell only Blackacre.

If B were allowed to exercise his rights as a mortgagee it would result in prejudice to the rights of *C.*

In order to protect *C* equity invented the doctrine of marshalling—under this equity compelled *B* to proceed first against that property which is not the subject-matter of security for the debt of another mortgagee. This is embodied in Section 81.

Note.—1. It is unnecessary for the mortgagee to have had no notice of the former mortgage in order that he may be able to claim the benefit of marshalling.

CHAPTER 8
LAW OF EVIDENCE

LAW OF EVIDENCE

1. § Meaning of the word Evidence

Like most of the words used in the statutes the word has a popular as well as technical meaning.

Popular meaning

Evidence in its ordinary sense signifies that which makes apparent the truth of the matter in question.

4 Mad. 393.

Technical meaning

The word however is used in the Evidence Act in a technical sense.

Section 3 defines the sense in which the word evidence is used in the Evidence Act. According to that Section

Evidence means and includes :

(1) All Statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry;

(2) All documents produced for the inspection of the Court. This definition of the term ' Evidence ' is incomplete.

The depositions of witnesses and documents which only are included in the term evidence as defined by the section are the two principal means by which the materials upon which the judge has to adjudicate are brought before him. The examination of witnesses is generally indispensable and by means of it, all facts except the contents of documents may be proved (Sec. 59). For the proof a document as a statement made by the person by whom it purports or is alleged to have been made, oral Evidence is required. (Sec. 67-73).

As compared with the definition of the word"Proved"this definition of the word"Evidence"is narrow. According to the definition of the word"Proved",

"A fact is said to be proved when, after considering **the matters before it,** the Court believes it to exist....."

The Expression **matters before it** is much wider than what the word **Evidence** is said to include.

Evidence does not include :

(1) Statement made by the parties and accused persons.
(2) demeanour of witnesses.
(3) Results of local inspection.
(4) Facts judicially noted.

(5) Any real and personal property, the inspection of which may be material in determining the question at issue such as weapons, tools or stolen property.

(6) Questions put to the accused by the Magistrate and the answers.

But all these are included in the expression"matters before it".

The point is that the definition of evidence is strictly applicable to matters dealt with in the Evidence Act. It does not apply to evidence as dealt with by other Acts.

2. § Genesis of the Indian Evidence Act.

1. The Law of Evidence in India is contained in Act I of 1872.

§ Diversity of the Law of Evidence

2. There were two sets of Courts in British India ever since 1773 when the Regulating Act was passed by Parliament with a view to control the administration by the East India Company of its Indian possessions. There were the Supreme Courts established by Royal Charter in the Presidency Towns of Bombay, Madras and Calcutta. In the Muffassils, there were Courts established by the East India Company, Civil and Criminal. The rules of Evidence followed by the Supreme Courts were different from the rules of evidence followed by the muffassil Courts.

3. The Supreme Courts followed such of the rules of evidence as were contained in the Common and Statute Law which prevailed in England before 1726 and which were introduced by the Charter of that year in India. Some others were rules to be found in subsequent statutes of Parliament expressly extended to India; while others again, had no greater authority than that of use and custom.

4. For the Courts outside the Presidency Towns and not established by the Royal Charter no complete rules of Evidence were ever laid down or introduced by authority. Regulations made between 1793 and 1834 contained a few rules. Other were derived from a vague **customary law of evidence** partly drawn from the Hedya and **Mohomeden Law Officers.** Others were drawn from English text books.

§ Efforts towards Uniformity:

5. The first Act of the Governor General in Council which dealt with evidence, strictly called, was **Act X of 1835** which applied to all the Courts in British India and dealt with the proof of the Acts of the Governor General in Council.

This was followed by **eleven enactments passed at intervals** during the next twenty years, which effected various small amendments of the law of evidence and applied to the Courts in India several of the reforms in the law of Evidence made in England.

In 1855, Act II of 1855 was passed for the further improvement of the law of evidence which contained many provisions applicable to all the Courts in British India.

6. Notwithstanding this attempt at uniformity there continued to be a great deal of disparity between the rules of Evidence applicable in the Presidency Towns and those applicable in the Muffassil. This disparity continued to be the subject of frequent judicial comment.

To remedy this state of affairs. Act of 1872 was passed.

§ Construction of the Act :

1. An Act may be (1) to *consolidate* or (2) *to amend* or (3) to *consolidate and to amend* or it may be to *define* i. e. to codify. The construction of an Act would differ according as it is a consolidating Act or a Codifying Act.

2. **Construction of a Codifying Act** : The rule of construction in regard to a Codifying Act is laid down in (1891) A. C. 107 (120).

Bank of England vs. *Vagliano* .

Lord Halsbury observed:

P. 120.

"I am wholly unable to adopt the view that where a statute is expressly said to Codify the law, you are at liberty to go outside the Code, so created, because before the existence of that code another law prevailed."

Lord Harschell observed:

P. 144

"The proper cause is in the first instance to examine the language of the Statute and to ask what is its natural meaning, **uninfluenced by the considerations derived from the previous state of the law** and not to start with enquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words will bear an interpretation in conformity with this view."

3. The object of codification of a particular branch of the law is that, on any point specifically dealt with by it, such law should be sought, for in the codified enactment, and is ascertained by interpreting the language used.

4. Construction of a Consolidating Act: The rule of Construction in regard to a Consolidating Act is laid down in (1894) 2 Ch. 557.

Shitty J. (P. 561) observed after referring to the rule of construction laid *down in Bank of England* vs. *Vagliano* in regard to a codifying Act. in Lord Halsbury

"..... But I have here to deal, not with an Act of Parliament codifying the law, but with an Act to amend and to consolidate the law and therefore it is I say these observations (of lord Halsbury) do not apply and I think it

is legitimate in the interpretation of the section in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the legislature."

5. The object of consolidation with or without amendment is merely to assemble together the scattered parts of the Existing law. It is merely a re-enactment of the old law. It is not a new enactment of the law. Prima facie the same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted.

6. The Indian Evidence Act is as stated in the Preamble an Act to *Consolidate, define* and *amend* the law of evidence.

It is not a statute which merely consolidates and amends the evidence i. e. it codifies the law of evidence. Its constructions will be governed by the rule laid down *in Bank of England* vs. *Vagliano* and not by the rule laid down in it.

§ Scope and Extent of the Act

1. The scope of the Act is defined in *Section 2*. Under section 2 the law of evidence is contained :

(i) In the Evidence Act and

(ii) In other Acts or statutes which make specific provision on matters of evidence and which are not expressly repealed.

This Section in effect prohibits the employment of any kind of evidence not contained in the Act or any other statute or Regulation not expressly repealed.

Section 2:—The following laws shall be repealed.

(1) All rules of Evidence not contained in any Statute Act or Regulation in force.

(2) All such rules contained in Regulation as have acquired the force of law under Section 25 of the Indian Councils Act, 1861.

(3) Enactments mentioned in the Schedule.

2. The Evidence Act and other Acts relating to Evidence—

(1) The Evidence Act is a separate statute dealing with an important branch of law and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope unless it is clearly proved that they have been repealed or altered by another statute.

7 Lah. 84.

§ Application of the Act

Section I prescribes the application of the Act

(1) Territorial Application

It extends to the whole of British India and therefore applies to the

Scheduled Districts.

It extends to places where it has been declared to be in force.

(2) Application to Tribunals It applies to all judicial proceedings **in or before any Court.**

(i) WHAT IS MEANT BY A JUDICIAL PROCEEDINGS? There is no definition.

An inquiry is judicial if the object of it is to determine a jural relation between one person and another or a group of persons or between him and the Community generally ; but even a Judge acting without such an object in view is not acting judicially.

12 Bom. 10 M. 1. A. 340.

An inquiry under section 32 of the Bombay Land Revenue Code is not a Judicial proceeding.

22 Bom. 936.

2. The Act applies to all judicial proceedings i. e. to **civil** as well as **criminal.**

3. The Act speaks of proceedings not merely suits and trials. Proceedings is a wider term. Inquiry under *Section 107* or *144* of the Criminal Procedure Code is not a trial but is a proceeding. Similarly execution of a decree is not a suit but is a proceeding. Consequently the Act applies to proceeds other than trials and suits.

(ii) **What is a Court**

1. Section 3 which is an interpretation clause speaks of the sense in which the word Court is used in the Act. According to this Section—

"Court includes all Judges and Magistrates, and all persons, except Arbitrators, legally authorised to take evidence. ' '

2. **This Section does not define what is a Court.** It merely says what is to be included in the meaning of the word Court i. e. what functionaries are to be treated as a Court.

3. Where in an interpretation clause it is stated a term includes this and that, the meaning is that the term retains its ordinary meaning and the clause enlarges the meaning of the term and makes it include matters which the ordinary meaning would not include.

23 A. L. J. 845.

4. The Court means all persons except Arbitrators who are legally authorised to take evidence. That being so the word Court is not to be confined to persons presiding over a Civil tribunal or a Criminal tribunal.

A Registrar holding an enquiry and taking evidence under the Registration Act is a Court.

15 Mad. 138.

A Commissioner appointed under order XXVI R. 1-10 of the Civil Procedure Code and under Section 503-508 of the Criminal Procedure Code is a person legally entitled to take evidence and as such he is a court.

5. Judges.

No definition of the word"Judges"is given in this Act. Section 2 (8) of the Civil Procedure Code defines the word ' Judge ' to mean the presiding officer of a Civil Court.

Section 19 of the Indian Penal Code, also gives definition of the word Judge. According to this definition a Judge is a person designated as a Judge also a person who is empowered by law to give, in any legal proceeding, civil or criminal a definitive judgement.

6. Magistrates.

No definition of this term is given in the Act. The General Clauses Act (X of 1897) lays down the following definition of the term:—

Magistrate shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force.

7. The peculiarities of these definitions is that they are neither uniform nor are they co-extensive.

(i) The basis of the definition of Judge in the Civil Procedure Code is the presidency of the officer.

The basis of the definition of the same word under the Indian Penal Code is his authority to give the Judgement. The basis of the definition under the evidence is the power to take evidence.

(ii) The definition of a Judge under the Criminal Procedure Code would not include a Magistrate. But the definition in the Indian Penal Code would include a Magistrate.

(iii) The Evidence Act would not include Arbitrator either Judges or Magistrates. But the definition of ' Judge ' in the Indian Penal Code would include Judges, Magistrates as well as Arbitrators.

The conclusion is that the definition of the word Court in the Evidence Act is framed only for the purpose of the Act. itself and should not be extended beyond its legitimate scope.

§ Proceedings to which the Evidence Act does not apply

1. The Act does not apply to :—

(i) Judicial proceedings in or before a Court Martial convened under the Army Act or Air Force Act. (ii) Affidavits presented to any Court or officer. (iii) Proceedings before an Arbitrator.

Proceedings before a Courts Martial

1. The Act does apply to the proceedings of a Courts Martial under the

Indian Army Act i. e., it applies to Native **Courts Martial.** *Act VIII of 1911.*

2. The Act also applies to all proceedings before the Indian Marine Courts.

Act XIV of 1887 s. 68.
Act V of 1898.
Act XVII of 1898.
Act I of 1899.

3. The Act does not apply to the proceedings of a Court Martial convened under the British Army or Air Force Act.

Questions relating to evidence are determined by Ax **loci contractus,** but by the law of the Country where the question arises where the remedy is sought to be enforced and where the court sits to enforce it.

The law of evidence which governs the proceedings before a court is the

Ax fori.

This provision of the Evidence Act is an exception to this general principle.

II. Affidavits.

1. Ordinarily the evidence of witnesses shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge (Order 18 R. 1. C1.P. C.).

2. An Affidavit is a evidence contained in a statement or a declaration in writing on oath or affirmation before a person having authority to administer oath or affirmation.

3. Matters relating to affidavit are regulated by the Civil Procedure Code.

4. **Affidavit is evidence not taken before the Court and not subjected to cross examination.**

5. The safeguards for truth in affidavits are two :

(i) Provisions for the production of the witness for cross Examination.
(ii) Provisions of the Penal Law relating to giving of false evidence.

III. Proceedings of the Arbitrator.

He gives rough and ready justice and cannot be bound by the technicalities of the Law of Evidence.

§ Proper approach to the study of the Evidence Act.

1. The Indian Evidence Act divides the subject matter of evidence into three parts :

Part I deals with Relevancy of facts—what facts can be proved.

Part II deals with Proof.

Part III deals with Production and Effect of Evidence— Burden of Proof.

2. This may be a logical order. It may be a scientific order. But this certainly does not appear to be a natural order, natural from the point of view of the litigant.

3. The rules of Procedure regulate the general conduct of litigation; the rules of pleading help to ascertain for the guidance of parties and the Court, the material facts in issue in each particular case. Then arises the question of proof i. e. the Establishment of the facts in issue by proper legal means to the satisfaction of the Court.

4. The first question which faces the litigant is **who must prove the issue?** The questions how and by what sort of evidence he can prove them are secondary questions to him. We must therefore begin with **Burden of Proof.**

BURDEN OF PROOF

Notes on Acts and Laws

Notes on Acts and Laws

BURDEN OF PROOF

1. What Is Meant By Burden Of Proof
2. The Burden Of Proving The Issue In Criminal Trials
3. The General Rule Regarding Burden Of Proving Good Faith
4. Judgements As Conclusive Proof
5. English And Indian Law Of Estoppel

BURDEN OF PROOF

1. What is meant by Burden of Proof.

Description, letter, then definition:

The judge or jury can decide a case only by considering the truth and value of the several facts alleged and proved by the parties and as the facts are unknown to both judge and jury. They must be established by evidence. The question at once arises, which party must adduce evidence? The responsibility for adducing such evidence as will establish any allegation is called the"Burden of Proof".

2. The subject-matter of the Burden of Proof as applied to judicial proceedings falls into two parts:

1. Burden of Proving an issue.
2. Burden of Proving a particular fact.

THE NECESSITY FOR MAKING THIS DIVISION.

1. The Proof of an issue may involve the proof of many facts as they may involve the proof of only one fact.

Illustration:

1. Issue is, Did A commit murder of *B*?
2. Issue is, Is the signature on the document that *of A*?

Issue No. 2 involves the proof of one fact only. Issue No. I may involve the proof of many facts.

e. *g.* Was *A* present? .
Could *C* see him?

Is the bloodstained shirt his? and so on.

§ Burden of Proving an issue.

3. The framing of an issue presupposes an assertion of the existence of a certain set off acts and circumstances by one party and the denial of them by the opposite party. There are two ways by which the issue may be adjudicated upon (1) By proving that the circumstances alleged do not exist or (2) By proving that the circumstances alleged do exist. Question is which of the two modes of proving the issue to be adopted— the mode of proving the affirmative or the mode of proving the negative.

4. Where there are no reasons for holding :

(a) that what is asserted is more probable than what is denied

and

(b) where the means of proof are equally accessible to both the parties then the rule is that the party which alleges the existence of the facts must prove that they exist. The burden is on him who states the affirmative of the proposition. He who denies need not prove that they do not exist.

This rule is laid down in Section 101.

5. Reasons why the law requires the affirmative to be proved instead of the negative.

(1) The man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not on the want of right or the weakness of proof in his adversary.

Illus. *Midland Rail Co.* vs. *Bromby* —17 C B 372.
Doe vs. Longfleld— 16 M & W 497.

17 C. B. 372
P. 380

(2) A simple negative by reason of its indefiniteness is difficult if not impossible of proof. A person asserts that a *certain event took place,* not saying when, where, or under what circumstances. How can a person disprove that, and convince others that at no time, at no place and under no circumstances has such a thing occurred. The utmost that could possibly be done in most instances would be to show the impossibility of the supposed event and even this would require an enormous mass of presumptive evidence.

A negative averment must be distinguished from a contradiction of a positive averment, technically known as a"traverse".

Illustrations: Malicious Prosecution.

In an action for Malicious Prosecutions the Plaintiff makes two main allegations.—

(1) That the Defendant prosecuted him,

(2) That the Defendant had no reasonable cause for the prosecution.

The first being affirmative the second a negative averment. The burden of proof of both of them is on the Plaintiff.

Negligence.

The Defendant did not take reasonable and proper care. This is not a negative but a negative Averment.

6. Two things must be noted with regard to the rule of evidence that the affirmative of a proposition must be proved.

12 Mad. 526-15 Jur. 544-545.

What is a traverse.

1. It is a matter which relates to the law of pleadings. Before Judge is asked to decide any question which is in controversy between litigants, it is in all cases desirable and in most cases necessary, that the matter to be submitted to them for decision should be clearly ascertained. The defendant is entitled to know what is it that the plaintiff alleges against him; the plaintiff in his turn is entitled to know what defence will be raised in answer to his claim. The defendant may dispute every statement made by the plaintiff or he may admit or admit and allege other facts which put a different complexion on the case.

To put it technically a Defendant may either:

(1) Admit

(2) Deny

(3) Deny and allege other facts.

2. When a defendant denies the allegation of the Plaintiff in the Plaint, he

is said to traverse it. A traverse is the express contradiction of an allegation of fact in an opponent's pleading. It is generally a contradiction in the very terms of the allegation. It is as a rule framed in the negative ; because the fact which it denies is as a rule alleged in the affirmative. These traverses of affirmative allegations must be distinguished from a negative allegation which is in truth a positive allegation.

If a party asserts affirmatively, and it thereby becomes necessary to his case to prove that a certain state of facts does not exist, or that a particular thing is insufficient for a particular purpose, and such like—these although they resemble negatives,— are not negatives in reality : they are in truth possible averments, and the party who makes them is bound to prove them.

Plaintiff may have to prove negative in order to prove his positive assertion**.**

A negative averment if in truth it is a positive averment must be proved by the plaintiff.

Sale and Mortgage-Adequacy of price. Price is not inadequate?

II. To remember that the affirmative and the negative of the issue mean the affirmative and negative of the issue In substance and not merely its affirmative and negative inform.

Illustrations: (1) Moody and Robinson 464. *Amos* vs. *Hughes.*

Fact alleged in the Plaint

That the defendant did not emboss the Calico in a workmanlike manner.

Fact alleged in the Written Statement.

The Defendant did emboss the Calico in a workmanlike manner. On whom is the burden? If **form** alone was considered the burden would be on the Defendant. If substance was taken into account the burden must be on the Plaintiff. Although put in the negative he affirms that the workman embossed the Calico in an unworkmanlike manner.

(2) 7 Carrington and Payne 612. *Loward* vs. *Leggatt.* Fact alleged by the Plaintiff.

That the Defendant did not repair the premises as bound by the covenant.

Fact alleged by the Defendant. That the Defendant did repair. In form the burden is on the Defendant. In substance it is on the Plaintiff.

The Burden of proving the issue in Criminal Trials

1. Section 101 is a general section and applies to both civil as well as criminal proceedings.

Section 105 is another section which relates to the burden of proving an

issue as distinguished from the burden of proving a fact but applies to criminal proceedings only.

2. To understand this section it is necessary to know the scheme of the Indian Penal Code. The Indian Penal Code defines various offences such as theft, murder, cheating etc. Some 400 in all. The task of framing definitions which would be exact, neither too wide, nor too narrow has been very difficult and with the best of efforts the authors of the Code have failed to frame exact definitions. They have however erred in making them too broad. Consequently they found it necessary to limit these definitions by enacting exceptions. Some of these exceptions arc common to all the offences as defined by the Code. Other exceptions arc specifically applicable to a particular offence.

Illustration (1):

(1) Whoever causes hurt..... .323

(2) Whoever steals ..... .379

Whoever = Any person who does etc.,

Any person = Any person of whatever age so that the definition as given in the section would make even a child I year old guilty. But the Penal Code recognises that a child below 7 has no *mens rea* = criminal mind which is the essence of the offence. To exempt children from the liability of an offence it would be necessary to say whoever above 7 years etc., in every section of the Indian Penal Code.

(1) Whoever takes any property belonging to another from his possession without his consent—378.

(2) Whoever wrongfully confines—342.

(3) Whoever enters into or upon property in the possession of another—441.

(4) Whoever assaults or uses criminal force—352.

It is obvious that under these definitions a Bailiff who acted under the order of his superiors in levying the attachment would be guilty of theft /37 8 and criminal trespass /441. Similarly a police officer who arrested a person in the discharge of his duty would be guilty of assault /353 and wrongful confinement /342.

That was not the intention of the framers of the Penal Code. It recognises the necessity of exempting Public Servants from the penal consequences of their acts done in discharge of their duty. To exempt public servants from the scope of the definitions of offences it would be necessary to say in each one of these sections"Whoever not being a public servant in the discharge of his duty".

Instead of repeating these limiting words in so many different sections to

which they are common the Penal Code has grouped them together in Chapter IV which is called General Exceptions and which cover sections 76 to 106.

There are also limiting clauses which apply to some specific offence as defined in the Penal Code.

Illus— Section 499. Defamation.

Definition is so wide that there are ten Exceptions. The necessity of 9th Exception—protection of interest. Such Exceptions are special Exceptions as distinguished from General Exceptions.

Proviso— *Illus—Sec. 92 1. P. C.*

Question is who should prove that the case of the Accused falls within the Exception, General or Special. Exception or the Proviso as the case may be? The prosecution who alleges that it does not or the Accused who alleges that it does? The Answer is given in Section 105. The burden is on the Accused to prove.

This is a departure from the previous law. Under it the burden was on the prosecution to prove that the case did not fall within the Exception.

§ Burden of Proving an Exception to a Civil Law—

1. There is no specific section in the Evidence Act which regulates the Burden of Proof in respect of an exception to a Civil Law. The rule is however the same as in Criminal Law. Namely that the Defendant must prove that his case falls under the Exception.

Illus— 15 *Cal. 555*

"The suit is governed by Section 37 of Bengal Act XI of 1859 (Revenue Sale Act)—and that section dealing separately with encumbrance and under tenures, lays down that the Auction purchaser shall be entitled to avoid all under tenures and to eject the holders of them with certain exceptions, and then goes on. to set out the Exceptions. It appears to us that the presumption is in favour of the general proposition of law laying down that all under tenures are voidable, and that pleading a certain exception is bound to bring himself within it. That being so, it will be for the Defendant in this case to bring himself within the exception which he pleads."

§ Burden of Proving an Exception a proviso/or a condition precedent in an Agreement.

1. Distinction between a Proviso and an Exception.

A Proviso is properly speaking the statement of some thing extrinsic of the subject-matter of a covenant which by the terms of the covenant is to go in discharge of that covenant by way of defeasance.

An Exception is a taking out of the covenant some part of the subject-

matter of the covenant.

Whether particular words form a proviso or an exception will not in any way depend on the precise form in which they are introduced, or the part of a deed in which they are found.

2. The rule of pleading is that a Plaintiff need never state a proviso in his plaint, but he must always state an exception.

Aga Syud Saduck vs. *Raji Jackariah Mahomed.* 2 *Ind. Jur. N. S. 308 (310)*

310. Markby J.

In the Note to *Thursby* vs. *Plant'* 1 Wms. Saund. p. 2336 it is laid down that a proviso is properly the subject of some thing extrinsic of a subject - matter of a covenant by way of defeasance. An exception is a taking out of the Covenant some part of the subject -matter of it. Of these be right definitions a Plaintiff need not never state a proviso, but always state an exception.

3. Although this is laid down as a rule of pleading it also holds good as a rule of burden of proof. So if a clause in an instrument such as a policy of assurance, be an exception, the Plaintiff must onlystateit, but show that it is not applicable. If it be a proviso the Defendant must state it, and show that it applies.

2 *Ind. Jur. N.S. 308, 310*

2. Ind. Jur. N. S. 308. 1867

A sued B. & Co. on a policy of insurance on the ship"Alaya"from noon of the 24th November 1865 to noon of the 24th February 1866"and to all ports and places". The words"and to all ports and places"were written, the rest being printed. B & Co. in their Written Statement admitted the policy, but set up the following exception:"All risks or losses arising from the detention etc.; also from storms and gales of wind, or other perils of the sea; while touching or trading on the Coast of Coromandel from Point Palmyras to Ceylon and within surroundings between the 15th October and 15th December inclusive are here by excepted, which risks or losses are to be borne by the assured and not by the Assurers, notwithstanding anything to the contrary herein before expressed."

3. Akiks

4. Condition Precedent = Proviso.

In this connection the law of evidence has appointed three principles.

I. The burden of proof of a fact is on a person who wants to benefit himself by the special facilities provided by the law of evidence for the proof of that fact.

Section 104 is an illustration of this principle.

2. § Burden of proving a particular fact.

1. The rule is the same as in the case of burden of proving an issue. That is the burden of proving a particular fact is on the party who affirms the existence of the fact and not upon the party who denies it. The rule is contained in Section 103 and the reasons of the rule are the same in both cases.

2. There are however certain facts the burden of proving which is placed by law upon a particular person irrespective of the question whether he asserts its existence or denies its existence. Sections 104 to I II specify the cases in which the law of evidence places the burden on particular persons.

3. The principles underlying these sections and which justify this departure from the general rule relating to Burden of Proof seem to be four.

I. The burden of proving a fact should be on a party who wants to take the benefit of the **special** facilities provided by the law of evidence for the proof of that fact.

II. Where parties are unequal in their relative position the burden of proving a particular fact should rest on the one who is comparatively in a better or stronger position.

III. Where things have continued to exist the burden of proving their discontinuance is on the party who alleges discontinuance.

IV. Where one fact is a mere legal incident of another fact the burden of proving that the incident should not be attached to the fact is on the party who alleges that it should not be.

§ Sections illustrative of the First principle.

1. Section 104 is an illustration of the First Principle. This deals with the burden of proof of a fact, the proof which is a necessary prerequisite for the proof of another fact.

2. The law of evidence lays down certain conditions which must be fulfilled before evidence of a particular fact is given. Similarly the law of evidence lays down certain conditions which must be fulfilled before a particular method of proving a fact can be resorted to.

Illus-I.

Nothing is evidence unless it is given before and in the presence of the Court. Ordinarily therefore the statement made by a person who is dead is not evidence. The law of evidence however permits evidence being given of anything said by a deceased person if it is relevant to the issue on the condition that the fact of his death is proved.

Illus-ll.

The law of Evidence requires that the contents of a document must be

proved by the production of the original. The law however permits secondary evidence being given on the condition that the loss of the original is proved.

3. The question is who must prove the fact of death or the fact of the loss of the original document? In general who must prove these prerequisites? Section 104 lays the burden on the party who wishes to profit by these special facilities.

§ Sections illustrative of the Second Principle.

1. 1. Section 106 and 111 illustrate the Second Principle.

Section 106.

1. This section deals with the burden of proof of a fact which is especially within the knowledge of one of the Parties.

(i) If A alleges a certain fact and if B denies it then by virtue of the rule contained in Section 103, A must prove it because A affirms it.

(ii) But if the fact is especially within the knowledge of B then by virtue of this section the burden of proof in respect of it rests on B.

2. 2. **Illustrations**

22 *Cal. 164.*

Haradhan had 2 daughters—twins about a year old—sold one of them to Karuna a prostitute for Rs. 9 and within 10 days sold to Karuna who she had brought up from her infancy and who was then living with her and leading the life of a prostitute.

Question. On a prosecution under Sec. *3721373* for buying and selling minors for prostitution the question was who should prove that the intention was that the girls were to be used for prostitution. By the accused-being a matter within their knowledge.

23 All. 124.

Several persons were found at 11 O'clock at night on a road just outside the city of Agra all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry arms, and none could give reasonable explanation of his presence at the spot.

On a charge under Section 402 held burden of intention on the Accused.

Section III.

1. This section deals with the burden of proof in respect of the *good faith* of a transaction.

2. Definition of good faith.

(1) Good faith is not defined in the Evidence Act.

(2) It is defined in Section 52 of the Indian Penal Code. Nothing is said to be done or believed in ' Good faith ' which is done or believed without due care and attention.

(3) It is also defined in Section 3 (20) of the General Clauses Act X of 1897.

"A thing shall be deemed to be done in ' good faith ' where it is in fact done honestly whether it is done negligently or not".

(4) The difference between the two definitions is that the *question of honesty* is immaterial to good faith as defined by the Penal Code. But it is the very core of the definition as given in the General Clauses Act.

(5) The term good faith as used in the Evidence Act is used in the sense in which it is used in the General Clauses Act.

3. The General rule regarding Burden of proving good faith.

(i) It is a general principle of law to hold that all persons in their dealings act fairly. Nothing dishonourable or odious is to be attributed to any person. Law will not impute vice and immorality. That being so the person who wishes to impeach the conduct of any person as being dishonest or unfair has the burden of proving dishonesty and unfairness. In other words the burden of proof in respect of good faith is upon the person who allege the absence of good faith. The motive must be proved.

(ii) Section 111 enacts an exception to this general rule and prescribes the circumstances in which a person must prove affirmatively the presence of good faith.

If the good faith of a transaction between two parties is questioned by one of them and the two are so related that one stands to the other in a position of *Active confidence* the burden of proving good faith affirmatively is on the person who stands in the position of active confidence.

This Exception applies only where the two parties to the transaction are so related that one stands to the other in a position of active confidence.

(IV) Meaning of the"Position of Active Confidence":

(i) Position means legal relationship.

(ii) Active confidence means habituated to consult and act on advice.

Position of Active confidence therefore means such legal relationship between the parties as gives rise to the habit in one party to consult the other for the protection of his interest and imposes upon the other the duty to see that his advise is such as will safeguard his interest.

The section contemplates *legal relationship* between the parties such that it becomes the duty of the person taken in confidence to protect the others interests.

Burden of Proof.htm - _msocom_1rule applies because parties were husband and wife. The rule was not applied because parties were not husband and wife but mistress and paramour.

A transaction between *Trustee and beneficiary, solicitor and client, father and son or husband and wife* would be subject to this rule if the issue of good faith were raised.

(V) The rule although confined by the Section to cases where one person stands to the other in a position of active confidence it is extended by the Court to all cases where a person has domination over another and is in a position to exercise undue influence.

Sections 107-108.

1. They must be read together because 108 is only a proviso to the rule contained in Section 107.

2. The sections do not deal with the question, how long was a person alive.

3. The sections do not deal with the question at what *time* he died.

4. The sections do not deal with the question whether he was alive or dead at some antecedent date.

5. The sections deal with the question whether a person is alive or dead at the time when the question is raised, that is at the date of the suit.

Sections illustrative of the third Principle.

Sections 107, 108 and 109.

Sections 107 deals with the burden of proof where the *question is whether a man is alive or dead.*

According to this section where it is proved that the person in question was alive within the last 30 years then the burden is upon the party who asserts that he is dead. Where it is not proved that the person in question was alive within the last 30 years then the burden is on the person who alleges that he is alive.

Section 108 deals with the burden of proof where the question is whether the man who has not been heard of is alive or dead.

According to the section :

(1) if the man is not heard of for *seven* years

and

(2) by those who would *naturally* have heard of him the burden is upon the party who *affirms that he is alive.*

Comment—

The death of any party once shown to have been alive is a matter to be determined by the Court. As the presumption is in favour of the continuance of life the *onus* of proving the death lies on the party who

asserts it. But the presumption of continuance of life ceases at the expiration of 7 years from the period when the person in question was last heard of. And the burden of proving that the person was alive within the seven years is upon the person asserting it.

But a Court may find the fact of death from the lapse of a shorter period than seven years, if other circumstance concur.

Re.: Walker (1909) P. 115.

Application of Sections 107-108.

The question for which provision is made in these two sections is whether a person is alive or dead at the time the question is raised. These sections do not apply where the question is whether the man died at a particular time. If any one seeks to establish the precise time of death the burden of proof is upon him.

Section 109. This section deals with the burden of proof as to continuance or discontinuance of three relationships'

(1) Partners.
(2) Landlord and tenant.
(3) Principal and agent.

This section provides that once it is shown that two persons have stood in the relationship of partners. Landlord and Tenant or Principal and Agent the burden of proving that they have ceased to stand in that relationship is on the party who alleges that they have ceased.

§ Section illustrative of the 4th Principle—

Section 110. This section deals with the burden of proof regarding title to property when the competition is between a person in possession and the owner who is out of possession.

1. The rule laid down in Section 110 is that the burden of proof that the person in possession is not the owner is on the person who alleges that he is not the Owner.

Reason for the Rule—

Ownership chiefly imports the right to exclusive possession and enjoyment of a thing. The owner in possession has the right to exclude all others from possession and enjoyment of it ; and if he is wrongfully deprived of what he owns, he has the right to recover possession of it.

Ownership also imports the power to dispose of property, to sell, mortgage or donate.

Right to possession and Right to dispose of are therefore incidents of Ownership. Where there is ownership there goes with it the right to possession and the right to dispose.

The law therefore holds that a person would not be in possession of

property unless he was the owner and places the burden on his opponent.

The principle of the section does not apply in the following cases—

(i) Where the possession is merely judicial as distinguished from actual present possession.

(ii) Where possession is obtained by fraud or force.

BURDEN OF PROOF

1. The Law requires the person to discharge the Burden of Proof which is placed upon him.

2. In discharging the Burden of Proof attention must be paid to two considerations.

(i) There are Matters of which Proof is not required. (ii) There are Matters the Proof of it is not allowed.

3. 3. We must therefore proceed to consider these matters and the rules regulating them.

I. BURDEN OF PROOF

(i)(i) Matters of which Proof is not required.

§ Facts of which Proof is not required.

1. Matters of which Proof is not required fall under three heads:

(1) Facts Judicially noticed.

(2) Facts admitted by the Parties.

(3) Facts the existence of which is presumed by law.

§ (i) Facts judicially noticed.

1. Sections 56 and 57 deals with facts judicially noticed.

2. Section 56 says no fact of which the Court will take judicial notice need be proved.

3. Sec. 57 lays down 13 matters of which the Court *must* take judicial notice.

4. Principle of the Section. Certain matters are so notorious and are so clearly established that it would be useless to insist that they should be proved by evidence.

Illus—

(1) Commencement and Continuance of hostilities.

(2) Geographical Divisions.

5. The last two paras are important and read with section 56. They furnish a clue to the proper understanding of them. The effect is that when a matter enumerated in Section 57 comes into question, the parties who assert the existence to the contrary need not produce any evidence in support of their assertions. The judge must come to a conclusion without requiring any formal evidence.

(1) The Judge 'sown knowledge may be sufficient. If it is not he must look the matter up.

(2) The Judge can also call upon the parties to assist him, if he thinks it necessary.

(3) The Judge in making this investigation is emancipated entirely from all the rules of evidence laid down for the investigation of facts which the law requires a person to prove.

(ii) Facts admitted by parties. Section 58

1. There are two sorts of admissions which must be distinguished.

(1) Formal admissions made touching matters related to a proceeding in a Court and made intentionally by parties so as to dispense with their Proof.

(2) Informal admissions alleged to have been made by a party to the proceedings but not made in the course of the proceedings.

2. Section 58 applies only to formal Admissions. Formal admissions may be made by parties in 6 different ways : (i) On the pleadings. (ii) In answer to interrogatories. (iii) In answer to a notice to admit specified facts. (iv) In answer to produce and admit documents. (v) By the Solicitor of a party during the litigation. (vi) In open Court by the litigant himself or by his Advocate.

3. Proof of such facts would be futile. The Court has to try the questions on which the parties are at issue and not on which they are agreed.

4. 4. Applicability of Sec. 58 to criminal trials is a matter on which there is a difference of opinion.

(i) (i) **Nortion** says that it does not apply to criminal trials.

(ii) (ii) **Cunningham** says that it does.

30 Bom. L. R. 646.

Section 58 makes no exception in regard to criminal proceedings.

Rat. Un. Cr. C. 769.

Section 58 makes no exception in regard to Criminal Proceedings.

39 Mad. 449.

On general principals of Jurisprudence Sec. 58 ought not to be applied to criminal trials.

"The question remains whether the Provisions of the Act are exhaustive and whether we can invoke the aid of the principles of Jurisprudence or of English Law as supplementing and explaining the rules of Evidence given in the Act."12 All. I. English rules of Evidence apply.

The rule is not an absolute rule. The section provides that a fact which is admitted may be required by the Judge to be proved by evidence by the

party on whom the Burden of Proof lies.

This is a safeguard intended to protect simple and ignorant persons against mistakes.

It is probably under this proviso that admissions in Criminal trials are not permitted.

§ Facts the Existence of which is presumed by Law.

1. Definition of presumption.

A presumption is a conclusion or inference drawn from a certain fact.

2. Principle underlying the rule of Presumption :

(1) The universe is no doubt composed of diverse elements and the motives that operate upon people are different.

Notwithstanding this there is a certain amount of regularity and uniformity.

(2) With respect to **things** the order and changes of the seasons, the rising, setting and the course of heavenly bodies, and the known properties of matter-magnetism-specific-gravity show a certain regularity and uniformity of movement and occurrence.

(3) With respect to persons the natural qualities, powers and faculties which are incident to the human race in general are more or less uniform.

(4) With respect to Conduct of men more or less the uniformity. They are actuated by the same uniformity.

3. Given this uniformity it is possible to say that given one thing another can be said to follow.

4. It is on this principle Section 114 is based.

1. 1. It empowers the Court to presume the existence of a fact if that fact is a likely result of a particular fact.

2. The test is—

(i) common Course of natural events. (ii) human conduct. (iii) Public and private business.

3. It gives 9 illustrations of what would be likely results of certain facts.

4. Explain.—Illustrations (not given in MS—ed)

5. An event likely in one circumstance may very unlikely in another circumstance. Therefore in drawing a presumption the Court must have regard to the facts of the particular case.

Explanations to illustrations (not given in MS—ed)

6. There can be no general codification of presumptions because the likely result must vary under circumstances.

7. The effect of presumption is to relieve a person from the Burden

of Proof.

8. Presumption of Law and Presumptions of fact.

9. Rebuttable and Irrebuttable Presumptions.

Norton P. *381.*

II. Analogous presumptions are maxims of law. They are also called presumptions in the loose sense of the word.

1. There are certain maxims of Law which are also called Presumptions.

2. Illustrations of Maxims of Law :

(1) The law will presume that every body knows the law.

(2) The law will presume that every person intends the natural consequences of his acts.

(3) The law will presume that an accused person is innocent.

(4) The law will presume that every human being is endowed with the power of understanding.

(5) The law will presume that no man will throw away his property for instance, by paying money not due.

(6) The law will presume that money advanced by a Parent to his child is intended as a gift, and not as a loan.

(7) The law will presume that a parent prefers his own children to those of others.

These maxims are related to burden of Proof. They help to fix the burden.

§ Presumptions as to Documents 79-90

12	Presumption as to documents 30 years old	90

BURDEN OF PROOF

(ii) Matters of which Proof is not allowed

1. § Matters which parties are debarred from asserting. (conclusive evidence).
2. § Matters which parties are estopped from proving. (Estoppel).
3. § Matters stated without prejudice.
4. § Matters which are irrelevant.

1. § Matters which parties are debarred from asserting—

Matters which parties are debarred from asserting are spoken of in the Evidence Act as Matters of Conclusive proof or commonly spoken of as irrebuttable presumptions or presumptions of Law.

They are dealt with in Sections 41, 112 and 113.

II. Section 112

1. This section deals with the Question : How to prove that A is the legitimate child of B and his wife C?

2. There are two ways of proving this fact according to two different contingencies.

(i) (i) If the contingency is that the child is born during wedlock.

(a) (a) Prove lawful marriage between B and C.

(b) (b) Prove the Existence of Marital relations between B and C at the date of the birth of A.

On proof of these two facts the Law will conclude that A is the legitimate son of B and C.

(ii) If the Contingency is that the child is born after dissolution of the marriage between B & C—Either by death of the father or divorce.

(a) Prove that A was born within 280 days after the dissolution of the marriage by death or divorce.

(b) Prove that the mother had remained unmarried during that period of 280 days.

On Proof of these two facts the law will conclude that A is the legitimate son of B and C.

Points to be noted

1. The deciding factor in the question of legitimacy is not the time of the conception of the child but the time of the birth of the child. Whoever was the **husband** of the woman at the time of the birth of the child is the father.

Illus.

1. *Pal Singh vs.Jagir. 7 Lahore 368*. Harnam Kaur married Hari Singh. Had Singh died on the 10th January 1919. Harnam Kaur married Sohan Singh on

25th February 1919. Jagir was born to Harnam Kaur on the 17th October 1919 i.e. 279 days after the death of Hari singh and 198 days after her marriage to Sohan Singh.

On a question being raised whether Jagir was the son of Hari Singh, Held that he was the son of Sohan Singh and not of Hari Singh.

2. *Palani vs.Sethu. 49 Mad. 553.*

Pechi Ammal married Subramanya in October 1903. That marriage was dissolved in June 1904.

Pechi married Thirumani in July 1904.

Palani was born during the second week in September 1904 i.e. 4 months after the dissolution of Pechi's marriage with Subramanya and 3 months after her marriage with Thirumani.

Whose son is Palani? of Subramanya or Thirumani. Held he was the son Thirumani.

2. This is treated as case of conclusive proof. This is treated so not because the truth is beyond dispute. A woman although married lawfully to one man may be in the keeping of another and her children may well in fact be the children of her paramour. This is so treated because for reasons of public policy or in the interests of Society an artificial probative value is given by the law to certain facts and no evidence is allowed to be produced with a view of combating that effect. Under Section 112 artificial probative value is to the following facts.

(1) The fact of marriage.

(2) The fact of access.

So that where these two facts exist the law concludes that issue born must be legitimate i. e. it must be issue born of the husband.

(2) This conclusion can be demolished only by giving evidence of non-access.

It must be proved that the parties to the marriage had no access to each other at any time when the child could have been begotten.

Meaning of non-access.

1934. 38 Bom. L. R.394.

Karapaya vs. *Mayandi.*

Access does not imply actual cohabitation. It means no more than opportunity of intercourse.

Kerapaya, a Madras Hindu acquired considerable property in Burma. He died a lunatic in 1923.

Karapaya first married Karapayi and then married Nachiama. Kerapaya lived with Nachiama at Tamagyo while Karayappi was living at Houlmein with her mother and brother.

In December 1911 an agreement made between (Left incomplete—ed.)

(3) The conclusion cannot be demolished by giving evidence of inability to cohabit.

29. *I.A.17 Narendra* vs. *Ram Govind.*

1901

Upendra was married to Tilottama. Upendra died on July 15 from the effects of a Carbuncle in his back, from which he had been suffering for sometime.

After the death of Upendra, Tilottama gave birth to a son Narendra on April 18,1887 i.e. 9 months 10 days or 280 days after

the death of Upendra.

There were three questions to be considered :

1. Was Narendra the child of Tilottama—Upendra?
2. Was he born within 280 days from the death of Upendra?
3. Is it proved that he and she had no access to each other at any time when the appellant could have been begotten?

On the last issue the evidence was as follows :

Tilottama was married when she was quite a child and lived with her parents. But shortly before his death in July 1886 she went to live with her husband. How long before it is not clear. Some witnesses said five or six days others said ten or twelve days.

The important circumstances in the case were two :

(1) That Upendra died from the effects of a Carbuncle from which he had been suffering for a fortnight.

(2) That Upendra had made will on the 14th July 1886 appointing Tilottama as his Executrix and directing her to adopt a son.

The contention was that if he was ill he could not have cohabited. The contention was negative.

(3) Inability to cohabit must be distinguished from genital inability. *1935.* (All India Reporter)P. *0. 199* (for Physical inability).

Query- If he was impotent.

The Section abrogates the rules of Hindu and Mahomedan Law regarding Legitimacy. *10. All. 289.*

1. According to Mahomedan Law a child born six months after marriage or within two years after divorce or death of the husband is presumed to be her legitimate offspring.

2. According to Hindu Law it is ten months after divorce or death of the

husband.

The section does not prohibit a person born after 280 days from proving he is the legitimate son. Only the burden of proof is upon him.

24 All. 445. 357 days after the death of the father.

There is a difference between the English and Indian Law of Evidence regarding the competency of the Husband and wife on the issue of access when the question of the Legitimacy of the child arises.

1. Under the English Law they are incompetent.
2. Under the Indian Law they are competent.

38 Mad. 466.
28 Bom. L. R. 207.

Section 113

1. The section deals with the Burden of Proof regarding the cession of a territory.

How is it to be proved that a certain territory which was once a part of British India has ceased to be part of British India.

"The question is not merely academic. It is of great practical importance. It goes to the root of the question of the jurisdiction of the Court. If a territory is not a part of British India then it is not subject to the Jurisdiction of any Court.

2. Provision was made in Section 113. It said that a notification in the Gazette of India that a British Territory has been ceded to any native State Prince or Ruler should be taken as a conclusive proof that a valid cession of such territory took place at the date mentioned.

3. This Section has been declared to be *ultra vires* of the Indian Legislature and therefore void and of no legal effect by the Privy Council.

7. *Bombay 367 Damodar Gordhan vs.DeoramKanji.*

P. 0.1876

The Governor General in Council being precluded by the 24-25 Vic. 0. 67 Sec. 22 from legislating directly as to sovereignty or dominion of the crown on any part of its territory in India or as to the allegiance of British subjects cannot by legislative Act (E. G. Evidence Act. S. 113) purporting to make a notification in the Government Gazette conclusive proof of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of that cession.

Judgements as conclusive Proof.

1. Just as certain facts are deemed to be conclusive proof of certain other facts, similarly the Evidence Act treats certain Judgements as conclusive on certain issues. Sec. 41.

2. The judgements which are declared to be conclusive are :—

(1) Final Judgement, order or decree of a Competent Court in the exercise of

(1) Probate
(2) Matrimonial
(3) Admiralty
(4) Insolvency Jurisdiction

which confers a legal character or takes away a legal character or declares a person to be entitled to a legal character or to a thing not against any specified person but absolutely.

Are conclusive Proof:

(1) That the legal character as given or taken away.
(2) That it is given or taken away on the date of the Judgement.

Section 41.

This section deals with use of Judgements of Courts of Law for the proof or disproof of certain questions.

Question is:

(1) The right of a person to a certain status
(2) When did such right accrue to him.

Question is:

Did (1) A particular person cease to have a status (2) If so, when.

Question is whether any particular person was entitled to a certain property.

The Section declares that certain Judgements will be conclusive evidence of these facts.

What are these Judgements :

(1) It must be a Judgement of a Competent Court.
(2) It must be a Judgement in the exercise of

(i) Probate (ii) Matrimonial (iii) Admiralty (iv) Insolvency

1. Which declares conferring or taking away of a legal character on or from any person.

2. Which declares a person entitled to any specific thing not against any specified person but absolutely.

1. 1. If it is a final Judgement, order or decree.

Probate Jurisdiction.

The Courts exercise testamentary and intestate jurisdiction under:

(1) Indian Succession Act.
(2) The Hindu Wills Act.
(3) The Probate and Administration Act.

Matrimonial Jurisdiction.

Exercised under the Indian Divorce Act and other Acts relating to

marriage and divorce.

Admirality Jurisdiction.

Letters Patent of the High Court and the Colonial Courts Admirality Act. 1890.

Insolvency Jurisdiction.

Charters and the Insolvency Acts.

§ Matters which parties are estopped from Proving.

1. The law of Estoppel is contained in Sections 115, 116, 117. Section 115 states the general rule of estoppel. Sections 116 and 117 enact particular kinds of estoppels.

2. 2. Section 115.

(i) Comparison of Section 115 with Section 31.

Estoppel is like an Admission inasmuch as it is a statement of a fact. Most admissions can be withdrawn by the party who makes them. The fact that they were made remains, but the party who made them can be heard to explain that he made them rashly and carelessly or under an honest misapprehension. Even he could be heard to say that he knew what he said to be false. But a statement may be made by one person to another in such an unequivocal manner and under such circumstances that it has a decisive effect on the conduct of the other. The law will not permit a person making such a statement to contradict it. The margin between an estoppel and an admission is very narrow and the answer to the question whether a statement is a mere admission or is a estoppel depends upon the nature of the statement and the circumstances appertain to it.

(ii) What are the legal requirements of the Rule of Estoppel?

The rule of Estoppel comes into operation when the three following conditions are satisfied. *37 Bom. L. R. 544 P. C.*

(i) A statement amounting to a representation of the existence of a fact has been made by the defendant or an authorised agent of his to the Plaintiff or some one on his behalf.

(ii) (ii) With the intention that the Plaintiff should act upon the faith of the statement, and

(iii) The Plaintiff does act upon the faith of the statement.

§ Statement must amount to representation.

(1) (1) Representation may be by word or by conduct.

A. If it is by word it may be active misrepresentation made deliberately with a knowledge of their falsehood.

Illus.-

Mc Cance vs. *London and Nother Western Railway Co., (1861) 7 H. & N.*

477.

M entered into a contract with the Railway Co., to carry his horse in trucks which should be reasonably fit and proper for the carriage of horses from Edge Hill near Liverpool, to Wolverhampton. The Railway agreed to provide trucks which should be reasonably fit and proper.

M filled in a declaration form in which he stated that, the value of a horse did not exceed £10 per horse. Under the system followed by the Railway there were modes of transporting horses. One was to send them in trucks allowing the owner to place as many horses as he liked in each truck. The other was to send them in horse boxes, each horse being placed in a separate stall. The rate of carriage by the latter mode being three times as-much as when carried by the former mode. There was a further rule that the Railway would take horses above the value of £10 in trucks.

In transit some horses were injured owing to the defective state of the trucks provided by the Railway. The damage sustained by M on the basis that the value of each horse was £10 came to £25 which amount the Railway Company was agreeable to pay as they admitted that the trucks were defective. The Plaintiff claimed that the real value of a horse was £40 and the damages came to £55.

This is a case of active misrepresentation.

Illus. (2) Munnoo Lal vs. *Lalla Choonee Lal. 1. I.A.144*

Reep Singh was in debt but possessed considerable Estate. M had been his Banker. On 9th October 1863 M obtained a mortgage from R of a property to secure a debt of Rs. 20,000 owed by R. On 9th August 1863 R sold the same property to C. When negotiations for the purchase took place between R and C, M was present and took part in same and in answer to inquiries by C gave him to believe that he had no lien upon the Estate.

In 1868 M filed a suit against C to enforce the payment of his mortgage bond. He was estopped.

This is also a case of active misrepresentation.

B. Representation may be innocent misrepresentation

Illus. Gould vs. *The Bacup Local Board. (1881) 50 L.J.(M. C.) 44.*

Certain premises belonging to Gould were kept in a very insanitary condition. The Board asked him to do certain improvements which he refused to do. The Board then served a notice upon him staring that if he did not carry out the improvements within a given time the Board would execute them.

There were two modes of recovering the expenses which were prescribed by the Act, one was by Section 213 and another by Section 240. Section

213 allowed the Board to recover them by additions to the local rate levied by the Board and Section 240 allowed them to recover them independently in lump sum. In the notice served upon Gould it was stated that the recovery would be under Section 213. But in the suit the Board sought to recover the amount as provided by section 240. The Board was estopped. This is a case of innocent misrepresentation.

(2) Representation may be by words or may be by silence. Silence under certain circumstances may be eloquent and may amount to a representation as good and as real as is made by the spoken word.

But every case of silence cannot be taken as equivalent to speech. Because the law does not require a person to speak out what is in his mind on each and every occasion. The law requires

a person to speak only when there is a duty upon him to speak and to disclose his mind. Otherwise silence is golden.

Silence therefore to raise an estoppel must imply an obligation to speak. In considering the effect of silence it has to be seen whether there was any occasion for words and any reasonable occasion for silence. This ought to be done before relying on silence as a legitimate ground for inference.

(1896) A. C. *231(238)*

2 *Br. C. C. 400 (419)*

6 Bom. L. R.

Illus. (1) **Silence no ground for Estoppel.**

10 Bom. L. R. 297.

A decree was obtained against the father by a judgement creditor. In execution the property was managed by the Collector and the proceeds were sent to the creditor. While this was going on, the father died and the son inherited the property. The Joint Creditor sought to execute the decree against the son who contended that he was not liable as the debts were improper. It was contended that the son was estopped because his silence was representation that he accepted the decree ; Held that it was not because there was no duty.

Illus. (2) **Silence ground for Estoppel**

151. A. 171.

Sale by Court in Execution proceedings by a proclamation which described the rights of the Judgement-debtor very imperfectly. The result is that the property worth of Rs. 40,000 sold for Rs. 20,000. Suit was brought by the Joint Debtor to set aside the sale. Contention was that *silence was Estoppel.* Held it was, as there was a duty to come forward and get the proclamation corrected.

Representation may be by conduct 1. Conduct may amount to

representation or it may not— (i) Where it does amount to representation 19 1. A. 203. (ii) Where it does not. 19 1. A. 221.

II. Conduct is either Active or Passive. Passive conduct is either

(1) Indifference.

(2) Acquiescence.

Passive conduct to raise an estoppel must amount to acquiescence. It must not merely be conduct of indifference.

Conduct of Acquiescence may be described as follows—

"If a person having a right and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce a person committing the act, and who might otherwise have abstained from it, to believe that he asserts to its being committed, is a conduct which amounts to conduct of acquiescence".

2 Bh.117 (123) 41 E. R.886.

Imp. 45 Bom. 1. L. R. 80.

14 All. 362 (364).

Acquiescence may occur while the act acquiesced in is in progless or it may occur only after it has been completed.

For the purposes of Estoppel it must occur while the infringement is inprogress. *Ch. D. 286 (314).*

Points to be noted.

1. Misrepresentation must be as to existing facts and not of mere intention. 5 *R. L. Cases 185.*

Illus—

1. A person has a legal right but between the time of its creation and that of his attempt to enforce it, he has made representation of his intention to abandon it.

2. There can be no estoppel where the truth of the matter is really known to *both parties.*

30 Cal. 539 P. C.

Mohori Bibee vs. *Dharemdas Ghose.*

On the 20th of July 1895 Damodar Das executed a mortgage in favour of one Brahma Dutt, a money lender. Brahma Dutt was absent throughout the transaction and the transaction was carried through by his attorney Kedar Nath, the money being found by Dedraj the local manager of Brahma Dutt. While the transaction was going on, the mother of Damodar Das wrote a letter to Kedar Nath the attorney that Damodar Das was a minor and any one advancing him any monies would do so at his own risk.

On the date of the mortgage Kedar Nath took a long declaration from

Damodar Das that he was major.

On the 10th September 1895 the mother filed a suit for cancellation of the Deed of Mortgage on the ground that D was a Minor.

Contention of B was that D was estopped. Held he was not because facts was known to B.

Actually knowing the fact is different from having the means of knowing it.

L. R. 20 Ch. D. 1. Redgrave vs. *Hard.*

The Plaintiff represented that his business brought in about £ 300 a year and produced 3 Summaries showing about 2/3rd of that together with some papers which Defendant did not examine. Upon the faith of this Defendant signed an agreement to purchase the Plaintiffs business and paid a deposit. Finding the business worthless he refused to complete and Plaintiff sued him for specific performance. Contention of Plaintiff was that Defendant was estopped from alleging that the representation of Plaintiff was false because he had the means of knowing the truth.

Jessel M. R. P. 21.

"Where one person induces another to enter into a contract by a material representation which is untrue, it is no defence to an action to rescind the contract that the person to whom the representation was made, had the means of discovering or might with reasonable diligence have discovered that it was untrue. It must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms or showed clearly by his conduct, that he did not rely on the representation."

II. Second Element in the rule of Estoppel the *intention* that the Plaintiff should act upon the faith of the statement.

It is *not* necessary that the party making the representation must have been under no mistake himself.

It is not necessary that the party making the representation must have acted with the intention to mislead or to deceive.

191. A. 203.

But it is necessary that the party making the representation must have the intention that the Plaintiff should act upon the faith of the representation.

How to prove intention?

Intention is used in two different senses :

(1) It is used to indicate as a presumption of law. A man is presumed to intend the natural or necessary consequences of his act.

(2) Intention is used to indicate a specific existing state of mind in a person.

This specific state of mind must be proved as a fact like any other fact and cannot be presumed.

Illus—

(1) Section 225, 1. P.C. whoever intentionally offers.

(2) Section 124, 1. P. C. whoever with the intention.

Intention here is used as a presumption of law and is not used in the second sense.

It is not therefore necessary to prove intention that the party should act as a specific fact.

If a reasonable man would take the representation to be true, and believe it was meant that he should act on it, the requirement as to intention would be satisfied.

19 1. A. 203 (219).

III. The third element in the rule of Estoppel is that the party to whom the representation was made must have acted upon the faith of it.

1. This element is really the foundation of the law of Estoppel and explains the principle underlying it. The principle underlying the rule of Estoppel is that it must be inequitable unjust; that if one person by a representation made or by conduct amounting to representation has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it.

2. The reason of the rule is that the man has acted upon it and altered his position. To amount to estoppel the statement must have been acted upon by the party to whom it was made.

14 Bom. 312.

13 Moo I .A. 585 (599).

Limitation on the rule of Estoppel. 1. It cannot override the law of the land.

(i) Minor—represents himself as Mojor—not estopped from proving minority.

(ii) Corporation—does Acts which are *ultra vires*—not estopped from proving that they were beyond its power.

Other distinctions between Admissions and Estoppel.

1. An admission does not prevent the party from proving that the admission is untrue. An Estoppel prevents the party from doing so.

2. An admission can be taken advantage of by any person other than the one to whom it was made. An Estoppel can be taken advantage of only by the party to whom it was made. As against a stranger he can deny its truth.

5 W.R.209.

5. A. R. 209.

Plaintiff alleged that he had purchased the property in the suit for Rs. 10,000. Pressed for money he subsequently mortgaged it to his mother. That he redeemed the Mortgage a year after and took possession of the property.

The Defendant had obtained a decree against mother of the Plaintiff and in execution and satisfaction of the Decree had the property sold by Court Sale and purchased it Benamee and Plaintiff was ousted. The Plaintiff filed a suit for the recovery of the property.

The Defendant contended that Plaintiff was estopped from proving that he was the Owner because in a former suit Plaintiff had admitted that his mother was the Owner to that suit Defendant was not a party. Held there was no Estoppel.

Difference between Estoppel and Conclusive Proof.

1. Estoppel can be waived by the party in whose favour it operates. But conclusive proof cannot be waived.

Difference between Res Judication and Estoppel.

Res Judication prevents a man avering the same thing twice over in successive litigations.

Estoppel prevents a man from saying one thing at one time and the opposite at another. *36 Bom, 214.*

English and Indian Law of Estoppel.

1. Under the English Law Estoppels are usually classed under three heads.

(i) (i) Estoppel by Record.
(ii) (ii) Estoppel by Deed.
(iii) (iii) Estoppel by Conduct

2. **Estoppel by Record** means estoppel by the Judgement of a competent Court.

(i) Estoppel by Record is recognised by the law of India. It is dealt with:
(a) (a) By the Code of Civil Procedure. *Sections 11-4.*
(b) (b) By the Evidence Act. *Sections 40-44.*

3. Estoppel by Deed.

1. Under the English Law a party to a deed cannot, in any action between him and the other party, set up the contrary of his assertion in that deed. This rule affords an illustration of the exaggerated importance of a ' seal ' in English law. Neither sealing wax nor Walter is necessary to constitute a seal. Apparently, a smudge of ink on document purporting to be a deed is a seal if so intended, and it makes a greater importance in law than a

deliberate and identifiable signature. **There is no estoppel in the case of ordinary signed documents.**

2. The strict technical doctrine of Estoppel by Deed cannot be said to exist in India.

3. But while the technical doctrine has no application in this country, statements in documents are, as admissions, always evidence against the parties. In some cases such a statement amounts to a mere admission of more or less evidential value according to circumstances, but not conclusive. In other cases namely those in which the other party has been induced to alter his position upon the faith of the statement contained in the document, such a statement will operate as an estoppel. In this view of the matter, an estoppel arising from a deed or other instrument is only a particular application of that estoppel by conduct or misrepresentation under Section 115.

4. An estoppel does not arise under the Evidence Act merely because a statement is contained in a deed. It can work an estoppel only when it can fall with section 115.

I *All. 403.*

II Bom. 708.

5. A Recital in a deed may be merely an admission or it may be estoppel according to circumstances.

§ Particular Estoppels.

1. Section 115 deals with Estoppels in general, sections 116 and 117 deal with particular Estoppels.

2. The distinction between Estoppels under Section 115 and Estoppels under 116-117 may be noted.

(i) Estoppels under section 115 can arise between any two parties. It is not necessary that they should be related by a particular legal tie. Estoppels under 116-117 arise **only** between parties who are related by a particular relationship.

(ii) Estoppel under 115 arises by reason of misrepresentation of facts by one party to another. Estoppel under 116, 117 arise by reason of agreement between the parties which has forged a particular relationship between them.

Section 116. deals with Estoppels between

(i) (i) Landlord and Tenant and

(ii) (ii) Licensee and Licensor of immovable property.

I. I. Landlord and Tenant.

This Estoppel applies to the tenant of immovable property.

2. This estoppel applies also to a person claiming through the tenant. In other words, if a tenant sublets his property without the knowledge or permission of the landlord, the sub-tenant will also be estopped from denying that the landlord had the title in the beginning.

3. This Estoppel does not ensure to the benefit of a person claiming through the landlord.

There are two possible cases in which premises may be let :

(i) Where the Plaintiff has let the Defendant into possession of the land.

(ii) When Plaintiff is not himself the person who lets the Defendant into possession, but claims under a title derived from the person who did.

This section applies to the first case and estops the tenant from denying the Landlord's title. It does not apply in the second case where the title of the landlord is derivative i. e. by sale, lease or inheritance so that when the Plaintiff claims by a derivative title, the defendant is not estopped from showing that the title is not in the Plaintiff but in some other person. The tenant can show that he has no derivative title. This is the effect of the absence of the words"claiming through the landlord"..

This estoppel applies to a denial of title at the beginning of the tenancy, so that a tenant can show that his landlord's title has expired or is determined. In such a case he does not dispute the title, but confesses and avoids it by a matter *ex-post facto*. Justice requires that the tenant should be permitted to raise this plea, for, a tenant is liable to the person who has the real title and may be faced to make payment to him, and it would be unjust if, being so liable, he could not show the expiry or determination of his landlord's title as a defence.

4. The Scope of the Estoppel. A tenant or his representative will not be permitted to deny that on the day on which his tenancy commenced, the landlord who granted the tenancy had title to the property.

5. This Estoppel binds the tenant only so long as the tenancy continues. Once the tenancy has ceased he is free to deny that his landlord had any title even on the day on which tenancy commenced.

II. Licensee and Licensor of immovable property.

1. The rule is the same as a licensee, namely, that the licensor had title to such possession at the time when such license was given.

2. Difference between a tenant and a licensee.

License means permission given by one man to another to do some act, which without such permission it would be unlawful for him to do. It is a personal right, and is not transferable, but dies with the man to whom it is

given. It can as a rule be revoked by the Licensor unless the licensee has paid money for it.

Tenancy is an interest in land and is transferable and heritable.

Section 117 deals with (1) Estoppel of acceptor of a Bill of Exchange.
(2) Estoppel of a Bailee.
(3) Estoppel of a Licensee.

(1) The Estoppel with regard the Acceptor is to the effect that he should not be permitted to deny that the drawer had an authority to draw the Bill or to endorse it.

Reason for this rule is to be found in the Agreement between the Acceptor and the holder of the Bill.

What does the agreement of acceptance impost:

(1) That he will pay the payee or the holder.
(2) That if he fails to pay the drawer will pay.

What does it mean when he says that the Drawer will pay? It means that the drawer had the authority and capacity to bind himself.

The payee took it on the basis of this agreement. The acceptor, therefore, is not permitted to deny this agreement.

Under Explanation I, he is permitted to deny that the signature of the drawer is a forgery.

This is contrary to English Law.

(2) & (3) Estoppel in respect of a Bailee and Licensee.

They cannot deny the authority of the bailor to make the bailment or of the licensor to grant such a license at the time when such bailment or license commenced.

§ Matters stated without prejudice.

1. Under this head fall certain classes of admissions made by aparty.

2. If the admission is made under certain circumstances mentioned insection 23, it cannot be proved against the party who made it.

3. What are those circumstances?

(1) If it is made on condition that evidence of it is not to be given
(a) Condition may be express or (b) Condition may be implied from the Conduct of the parties.
(2) Agreement may be verbal or in writing.

4. The application of Section 23.

(1) It applies to Civil cases only. The rule does not extend to criminal cases.

(2) By Judicial interpretation the application of the Section has been confined to admissions made in the course of the negotiations in the

same.

The mere fact that a document is stated to have been written"Without Prejudice"will not exclude it. The rule which excludes documents marked"Without Prejudice"has no application unless some person is in dispute or negotiations with another and terms are offered for the settlement of the dispute or negotiation. *23 Bom. 177 (180).*

Explanation—

This section does not apply where a person is compellable to answer.

§ Matters which are irrelevant.

1. The law of Evidence does not state what matters are irrelevant.

2. It proceeds to state what matters are relevant and thus excludes those that are not relevant.

3. It is objected that the rules of relevancy are of no use.

4. There are two problems a Judge is faced with

(i) Whether and how far he ought to believe what the witness says?

(ii) What inference a Judge ought to draw from the facts which he believes to have been proved?

In every judicial proceedings there are two essential questions— Is this true? and if it is true, what then?

5. Rules of relevancy throw no light on either of them and persons who are absolutely ignorant of these rules may give a better answer.

6. Answer to the objections.

(i) Men reason and reason well even without the study of Logic. But it does not follow that we should study Logic.

(ii) The rules of relevancy out the flood of irrelevant gossip and collateral questions which are sufficient to comprise the strongest head and distract the most attentive mind.

I. Cardinal rule of relevancy is that you can prove a fact and not opinion.

Facts fall into two classes :

Those can and those which cannot be perceived by the senses. Those which cannot be perceived by the senses are :

(1) Intention, (2) Fraud (3) Good faith and (4) Knowledge.

§ Matter of which Proof is allowed by Law.

1. Facts in Issue. 3,5,12.

2. Facts relevant to Facts in Issue. 3,6,7,8,9, 13-16,52-58 45-51.

3. Facts which are consistent with facts in Issue or with Relevant Facts or which show the probability of a Fact in Issue and Relevant Fact. 34-39-46.

Note—31-32 will go under direct evidence as exceptions.

4. Facts which are inconsistent with 11(1). Facts in Issue or with

Relevant Facts. 17-31. or which show the improbability of a Fact in Issue or Relevant Fact. 41-44,46.

§ Facts in Issue.

Section 3. There are two Requisites of a fact in issue :

(1) **It is a necessary fact.**

A Fact in Issue is a fact which is the foundation of right claimed or of the liability which is sought to be imposed by one party against or upon another party.

A fact in issue is a fact the proof of which is necessary for the claim being granted or the liability being imposed.

Illus—

(1) Supposing the inquiry to be whether A is entitled to succeed to B's property as his son.

The following facts would be necessary facts :

(a) (a) Whether A is the son of B.

(b) (b) Whether Bis dead.

(c) (c) Whether the property belongs to B.

They are necessary facts because unless they are proved A's claim to succeed cannot be granted. They are the foundation of his claim.

Illus— (2) Supposing the inquiry is

Whether A caused the death of B.

The following facts would be necessary facts : (i) Whether A caused the death of B. (ii) Whether A had the intention to cause death.

2. Every necessary fact is not a fact in issue. A necessary fact whether it is asserted and denied becomes a fact in issue.

In Illus. I and 2 if any necessary fact is not denied it would base to be a fact in issue.

3. A fact in issue is, therefore, a necessary fact which is in dispute between the two parties.

2. § Facts which are relevant to Facts in Issue.

Section 3. 1. Relevant fact means fact connected to the fact in issue.

1. The connection must be visible and open i. e. must be obvious.

2. The connection must be immediate and not remote.

3. The connection need not be necessary connection that would exclude all presumptive evidence, but such as is reasonable, and not latent or conjectural.

4. Whether there is a connection is a matter of legal instinct or legal sense to be acquired by practice. A few instances may serve for illustrations.

(a) On a Criminal trial of A, the statement of B, who is not a witness that he was the real criminal and that A is innocent would be rejected

for remoteness and want of connection apart from the danger of collusion and fabrication.

R vs. *Gray Ir. Cir. Rep. 76.*

(b) On a suit by A against B for the recovery of £ 5 lent to him, an entry made by A in his diary that B owed him £ 5 would be rejected for want of connection.

Storr vs. *Scott.* 6 c &P *241.*

(c) A as Agent of B, a Merchant residing abroad bought goods of C. At the time of purchase A did not inform C who was his principal ; but the invoices described the goods as"bought on account of B per A". C afterwards drew upon A for the amount. B after receiving advice for the purchase and of the acceptance of bills by A had made large remittances to A. But A had become insolvent in the meantime.

C sued B the principal.

C desired to give evidence of his account books for the purpose of showing that B had been throughout debited by him as principal.

Held that evidence was inadmissible.

Smyth vs. *Anderson. 7* C-b. *21.*

II. It is not every connected fact which is relevant. It is only facts connected **in a particular** respect which are relevant. The Evidence Act lays down in what way a particular fact must be connected with the fact in issue in order that it may be treated as a relevant fact.

6. 1. § Proof is allowed of Facts forming part of the same transaction comprised in the facts in issue.

Take Illus (a), (c) (d).

What is meant by transaction?

A transaction is a group of facts so connected that they go by a single name such as a **crime, contract, sale** etc.,

Anything connected with the crime or contract if the connection is open and visible i. e. **obvious** and **immediate** is part of the same transaction and is relevant.

What does transaction include?

A transaction not only includes acts done but also statement made in the course of the transaction.

Illus—

The cries of a woman when raped. The statement to be part of the same transaction must accompany the act.

What is meant by same transaction?

1. Same does not mean similar. Evidence of series of similar transactions irrelevant.

2. Same transaction does not mean transaction which has taken place at the same time and same place. It has nothing to do with simultaneity of occurrence as to time and place.

Illus—

Robbery may take place in January in one place, stolen goods may be entrusted with a receiver in another place in February and may be sold in March in a third place. All this would be parts of the same transaction.

3. Same transaction means one connected transaction— parts of the same piece.

Case Law. Cockles pp. 66-68. *53 Cal. 372.*

Principle. Such evidence is allowed because it makes things intelligible. It provides context.

2. § Proof is allowed of a Fact which shows occasion, cause, effect or opportunity for a fact in issue or for a relevant fact.

1. A man is accused of theft. If no money is found in his possession, probability is that he did not commit theft. Every cause has effect. If there was no effect no cause.

2. A man is accused of assault. —That there was a quarrel may be proved to show that there was occasion or cause.

3. A man is accused of poisoning his wife. —To show there was no opportunity for him to do so, it can be proved that the nurse was always present.

4. A is accused for murdering B. —To show there was cause for murder can be proved that B knew that A had married to C and that wanted hushmoney from A.

8. 3 § Proof is allowed of facts which show Motive, Preparation for any fact in issue or relevant fact.

Motive. Illus. (a) (b). No rational man acts without motive.

Preparation. Illus. (c) (d). No act can be done without preparation.

Case Law.

1. *61 Cal .54*—Motive-intention-Preparation-attempt-Act.

2. *R vs. Palmer*—Cockle P Killed Cook. Pecuniary embarrassment, his buying poison, attempting to avoid inquest.

3. R vs. *Lillyman* Cockle P. (1896) 2QB 167.

4. § Proof is allowed of a fact which shows the conduct of a party to any suit which has reference to such suit or which has reference to any fact in

issue or to any relevant fact. Similarly proof is allowed of a fact which shows the conduct of an accused if such conduct influences and is influenced by any fact in issue or by any relevant fact.

1. Conduct of persons generally.

Illus.— (d) The making of a will. Not long before the making of the will, the deceased made inquiries and drafts relevant.

Conduct of the Accused :

Illus.— (e) suborning witnesses. *Illus.*—(h) absconding. *Illus.*—(h) concealing things.

Explanation—

1. Conduct does not include statement unless the statement accompanies the conduct and explains the conduct.

2. If conduct is relevant then

a statement which affects the conduct is relevant if it was made to the person or in his presence and hearing.

Illus—

(g) Question is whether A owed B Rs. 10, 000. The A asked C to lend his money and D said in A's presence and hearing"I advise you not to trust A, for he owes Rs. 10,000"and A went away without making any answer is relevant.

Case Law.

Imp. 34 om. & R. 1087.

Imp. 7 All. 385 F. E.

Cockles-P. 75. Bright vs. foeBTatham.

5. § Proof is allowed of facts which are necessary to explain or introduce a fact in issue or a relevant fact.

Illustration—

(d) On an indictment for crime it was alleged that the Accused was absconding.

Evidence may be given to show that he had urgent business.

(f) A is tried for a riot to assault or overawe the Police Officer and is proved to have marched at the head of a mob. Evidence may be given of the cries of the mob to explain the nature of the transaction.

(b) On suit for libel—imputing disgraceful conduct. Evidence may be given of the position and relation of Parties at the time the libel was published as introductory to facts in issue.

Under this evidence may be given of:

(1) The identy of a person or thing whose identity is in question.

(2) Exact time and place at which a fact in issue or a relevant fact happened.

(3) of the relation of the parties to the fact in issue or relevant fact.

4. § Proof is allowed of facts showing the existence of any state of mind.

1. Under this, facts may be proved which shows intention, knowledge, good faith, negligence? ill-will or goodwill.

knowledge, Illus. (a) : good faith Illus. (f) : Intention, Illus. (e) (j) : III - will. Illus. (k).

2. Under this, evidence of previous conviction may be given. Illus. (b).

3. Limitations upon the use of the Section.

(1) The state of mind of which evidence is given is not general state of mind- general disposition -but a state of mind which has reference to the particular matter in question.

(2) The evidence of the previous commission of the offence must be to show his state of mind with regard to the particular matter in question and for no other purpose.

15. § Proof is allowed of facts to show that the act done was a part of a series of similar acts in order to show that the act in question was done intentionally and not accidentally.

Illustration— (a) (b)

1. Ordinarily the evidence of similar acts is not relevant because if a person has done one act, it does not follow that he must have done the particular act in question.

16. § Proof is allowed of facts showing the existence of a course of business according to which it naturally would have been one, if the question is a particular act was done or not.

Illus—-(a) (b). This shows probability.

Question is whether a particular letter reached A or not? The letter was posted and was not returned through the Dead Letter Office may be proved.

13. § EVIDENCE OF TRANSACTION AND INSTANCES IN PROOF OF RIGHTS AND CUSTOMS.

1. Scope of the word Right. (A) There are three kinds of rights.

Private—e. g. a private right of way.

General - A Right common to any considerable class of persons. E. G. the right of villagers of a particular village to use the water of a particular well. Sec. 48 Illus.

Public—This is not defined in the Act. Every public right in the sense of the previous definition of general right is a general one though (according to the distinction drawn by the English Law) every general right is not a public right.

The section applies to all rights whether they are Private, General, or

Public by reason of the word any.

(B) Does the section apply to all kinds of rights? This question arises because of the absence of the word every. There was once a conflict of decisions on this question. One view was that included all rights. The other view was that it included only incorporeal rights.

The view now held seems to be that the term includes all rights.

2. Scope of the word custom.

A custom is not limited to ancient custom but includes customs and usages. Usage would include what people are now or recently in habit of doing in a particular place. It may be that the particular habit is of a very recent origin or it may be existed for a very long time. If it is one which is ordinarily practised there is usage.

B. Custom may be

(i) (i) Private custom—Family custom.

(ii) (ii) General Custom—Custom common to a considerable class of people and may be

(a) (a) local

(b) (b) caste or class

(c) (c) Trade customs or usages.

(III) Public—Not defined.

C. The Section applies to all customs and to all usages.

3. The evidence to be given is to be evidence of a transaction or of instances in which the right or custom arose.

A. Meaning of transaction and instance

(1) Transaction—some business or dealing carried on between two or more persons.

(2) Instance—Case occuring—individual acting in a particular way.

B, Proof is not restricted to previous transactions in cases between the parties to the proceedings. The use of the word any shows that it need not be between the parties to the litigation. It may be between strangers or it may be between a party to the litigation and a stranger.

C. The word transaction and instance has given a deal of trouble and the question has been raised whether it includes a judgement decree and the litigation in which they were pronounced not being between the same parties (and not being of a public nature), as evidence of a transaction or instance.

The question was considered in the leading case *Gajju Lall vs.FattehLaL* 6Cal.l71.

III. Facts which arc consistent with facts in issue or with relevant facts or which makes a fact in issue or of a relevant fact highly probable.

1. The Section is no doubt expressed in terms so wide and so extensive that any fact which can by a chain of ratiocination be brought into connection with another so as to have a bearing upon a fact in issue or a relevant issue may possibly be held to be admissible.

2. That such an extensive meaning was not intended by the legislature is clear from the word ' highly '. The words ' highly probable ' point out that the connection between the facts in issue and the fact sought to be proved must be so mediate as to render the co-existence of the highly probable.— *6 Cal. 665 (662).*

3. To render a collateral fact admissible under this section, it must (a) be established by reasonably conclusive evidence and (b) when established afford a reasonable presumption or inference as to the matter in dispute.— *6Bom.L.R. 983.*

4. The terms of this section though very wide must be read subject to other sections of the Act.

Illus—

1. *Ramanujan* vs. *King Emperor. 58 Mad. 523 F. B.*

Ramanujan was charged for having murdered Seethammal. Facts given at p. 526.

There was no eye-witness to the murder. The prosecution tendered evidence of the following facts :

1. That Seethammal when she left her husband joined the prisoner taking with her some jewels and some silver vessels.
2. That Seethammal and the accused lived together at various addresses.
3. They were last seen in 24 Peddunaicken Street on the 11th January.
4. On the morning of the 12th, when the milkwoman went, the room was locked.
5. That on or about the 13th he pledged certain ornaments belonged to Seethammal.
6. That he purchased a mattress like the one in which the dead body was wrapped.

2. Long continued absence of demand to prove the payment of an alleged debt.

3. The resemblance of a child to the Defendant to prove paternity in a maintenance case.

II (2) § Facts which are inconsistent with facts in issue or relevant facts or which make them highly improbable.

Illustrations.

1. In an action for money lent, the poverty of the alleged lender is relevant as being inconsistent with the making of the loan.

2. That a witness or the accused was at another place is relevant as inconsistent with his alleged presence at the scene of the offence.

3. In a case involving the determination of the question whether the thumb impression is that of A or not. Evidence may be given of his thumb impression on another document if their dissimilarity makes the story of his thumb impression improbable.

52-55. § Proof of facts relating to character.

1. The rules regarding evidence of character fall into two classes.

I Those which relate to the character of witnesses.

II Those which relate to the character of parties.

Character of witnesses.

1. The character of a witness is always material as affecting his credit. The credibility of a witness is always in issue. For as witnesses are the media through which the Court is to come to its conclusion on the matters submitted to it, it is always most material and important to ascertain whether such media are trustworthy and as a test of this, questions, among others, touching character are allowed to be put to witnesses in the case— Sections 145-153.

§ Character of a Party.

1. In respect of the character of a party, distinctions must be drawn between Cases where the character of the party is in issue and Cases where it is not in issue.

Where the character of the party is in issue, there, proof of facts relating to character is allowed irrespective of the question whether the proceedings are civil or criminal. Sec. 52.

Illus—

(i) In a Civil Suit the issue is"whether the governess was competent, ladylike and good tempered while in her employer's service"witnesses can be allowed to assert or to deny her general competency, good manners and temper.

(ii) In a Criminal prosecution for conspiracy to carry on the business of common cheats witnesses can be allowed to assert or to deny the general character of the accused.

When such general character of a party is not in issue, proof of character is not permitted by Law. *Sec.* 52.

There are two exceptions to this rule under which evidence of character is allowed even the character is not in issue.

(i) In Civil proceedings, proof of facts relating to character is allowed if they affect amount of damages. *Sec. 55.*

(ii) In Criminal Cases.

(i) Proof of facts showing accused is of good character is always allowed. Sec. 53.

(ii) Proof of facts showing accused is of bad character is not allowed except in the following case :

Where accused has given evidence that he has a good character.

Reasons why this difference is made between civil and criminal proceedings is obvious.

(1) Bad character only creates prejudice against the accused. It does not prove the case against the accused. It is irrelevant unless the accused makes it a matter of issue by giving evidence of his good character, then of course evidence of bad character may be given.

(2) Good character strengthens the innocence of the accused and ought on humanitarian grounds to be permitted.

Two things are to be noted.

1. 1. What is included in the term character?

Sec. 55.

The word Character includes both reputation and disposition. This is a departure from English law under which character is confined to reputation only.

There is a distinction between reputation and disposition. Reputation means what is thought of a person by others, and is constituted by public opinion. It is the general credit which a man has obtained in that opinion.

Disposition comprehends the springs and motives of action, is permanent and settled and has regard to the whole frame and texture of the mind.

2. How to prove Character?

There are two ways of proving the character of a man. One way is to give evidence of general reputation and general disposition. The other way is to give evidence of particular acts which may then become the basis of inference for reputation and disposition.

55 Expl.

The Evidence Act permits evidence to be given only of general reputation and general disposition.

55 Expl.

There is only one exception to this under which evidence of previous conviction may be given as evidence of bad character.

Sec. 45-51.

§ Proof of opinions.

1. The use of witnesses is to inform the Court of the facts of the case. It is the duty of the Court to form its own opinion.

2. To show what the witness thought or believed would be objectionable on two grounds (1) It can show nothing at all and (2) it would be entrenching upon the province of the Judge.

3. The rule is that witness must state facts and not-opinions. A strict application would create two difficulties.

(1) What a third person (i. e. some one who is neither a plaintiff, a defendant nor a prisoner) thinks or believes about any matter in question is not material. If such a third person be called as a witness, he must, as a rule, only state facts; his personal opinion is not evidence. But what a party thinks or believes at the time he does a material act is often a matter in is sue both in Criminal and Civil proceedings.

Illus.— Carter -vs. *Boehin. Cockle p.*

Question was whether a policy of insurance was vitiated by the concealment of facts which had not been communicated to the under writers. A broker gave evidence of the materiality of the facts. He was asked whether he would have entered into the contract if these facts were disclosed. His answer that he would not have was held to be inadmissible as it was matter of opinion. But if the question had been asked to the party then his opinion would have been admissible.

(2) A strict application of the rule is bound to create difficulties. In cases where the Court is required to form an opinion, the Court may not be competent to form an opinion cases occur in which special experience or special training is necessary before a true opinion can be formed. In such cases therefore the opinion of those who have had special experience or special training must be laid before the tribunal to enable it to arrive at a correct decision.

(3) There are certain cases where it is naturally impossible for any witness to speak positively, cases where he must speak if at all, as to his opinion or belief, the matters to which he deposes being so essentially matters of opinion or else to complex or indefinite that the Court is compelled to accept his opinion for what it is worth. The former are cases involving questions of science, art, or skill which necessarily require the opinion of the expert. The latter class of cases are cases involving question of impressions which may be those of non-experts.

(5) The Evidence Act therefore makes the following exceptions to the general rule that the opinion of a witness is not admissible.

Sec. 45.

(1) The opinions of skilled or scientific witnesses (Experts) are admissible evidence to elucidate matters which are strictly of a professional or scientific character.

For instance. (i) Question of foreign law.
(ii) Question of Science or Art (working of a gun machine).
(iii) Question of as to identity of handwriting or finger impression.

Sec. 47.

(2) On questions of identification of a person by whom any document was written or signed, the opinion of the person acquainted with the handwriting of the person is relevant.

Sec. 48.

(3) Where the Court has to form an opinion as to the existence of any general custom or right, the opinion of persons likely to know of its existence is relevant.

Sec. 49. (4) When the Court has to form an opinion as to :

1. The usages and tenets of anybody of men or family.
2. The constitution and government of any religions or charitable foundation.
3. The meaning of words or terms used in particular districts or particular classes of people.

The opinions of persons having special means of knowledge thereon are relevant facts.

Sec. 50.

(5) When the Court has to form an opinion as to the relationship between two persons, the opinion of persons based on the conduct of parties and having special means of knowledge on the subject.

Illus— (a) (b)

Proviso. Such opinion shall not be sufficient to prove marriage under Indian Divorce Act or the prosecutions under sections 494, 495, 497, 498 of the I.P.C

Notes on Acts and Laws

Contents

Nature of Evidence Required for Proof
Summary of the Law

I. THE RULE OF BEST EVIDENCE.

REQUIREMENTS OF THE RULE OF BEST EVIDENCE.

(i) The rule of Best Evidence requires. (a) That if the Evidence is oral then it must be direct. (b) Exceptions.

(ii) The rule of Best Evidence requires that if the Evidence is documentary then.

(i) (i) It must be original.

(a)Exceptions.

(ii) it be exclusive.

(a) Exceptions.

§ The Rule of Best Evidence:

1. It is an incontrovertible proposition of law that the party who is to prove any fact must do it by the **best** evidence of which the nature of the case is capable.

2. This rule, really speaking, underlies the whole law of Evidence.

(i) It is because of this rule that the law requires as a condition precedent to the admissibility of Evidence that there should be an open and visible connection between the principal and evidentiary facts.

(ii) It is because of this rule that the law requires that Evidence in order to be receivable should come through proper instruments.

(iii) It is because of this rule that the law requires that the evidence to be admissible should be original and not derivative.

3. At one time the rule of Best Evidence was very strictly applied. But its application is now greatly relaxed and what were once objections to admissibility now went merely to sufficiency on weight.

4. But the rule still survives and is illustrated by the requirements of the law of evidence in respect of oral Evidence and documentary evidence.

§ Oral Evidence:

1. The rule of best Evidence requires that if the evidence is oral then it must be direct.

2. This rule is embodied in section 60 of the Evidence Act.

3. What is meant by Direct Evidence?

4. The answer that is commonly given is that oral evidence must not be hearsay evidence. This leads to the consideration of hearsay evidence.

The rule excluding Hearsay is subject to three main classes of Exceptions:

(i) Admissions and Confessions : Statements made in the presence of the party.

(ii) Statements made by persons since deceased. (iii) Statements made in

public Documents.

§ What is hearsay evidence:

1. Hearsay evidence has been defined in many different ways :

(i) All Evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person.

(ii) The statement as to the existence or non-existence of a fact which is being enquired into, made otherwise than by a witness whilst under examination in Court can be used as evidence.

2. Hearsay evidence is evidence reported by witnesses of statements made by non-witnesses.

§ Why hearsay evidence is excluded?

1. When A sworn in Court, details something which he did not see with his own eyes immediately but which he heard from B immediately he is not giving expression to the evidence of his own bodily senses, but is the medium merely of communicating that which save third unsworn person has said he saw. He is bringing evidence to birth, *obstetricante manu,* with the hand of a midwife; and is a mere channel or conduct pipe for communicating the information of a party not before the Court. A may most correctly and truthfully

report what has been related to him, but it is never the less apparent that the real truth of the original statement cannot under such circumstances be tested. The originator of the report is not subjected to an oath or to Cross Examination *Non Constat* but he may have spoken idly or jocularly ; and he would be unwilling to repeat on oath what he had not hesitated to narrate in ordinary conversation. *Non constat* that he might not have wilfully fabricated a story or been the dupe of some one still farther hid behind the scenes or that though perfectly veracious as to intention, he might have been the victim of his faulty impressions or unretentative memory ; and so have utterly broken down, if only exposed to the test of Cross Examination. Therefore the law determines that such evidence shall not be receivable ; that if it is important to the party calling A, to establish the facts which A has heard from B, B himself shall be produced, make his own statement in Court, be subjected to the two tests of oath and Cross Examination and the scarcely less terrible detector of inaccurate or fallacious evidence, the observation to which a Judge, experienced in forensic practice, and skilled in the knowledge of human nature, subjects the demeanour, the department, the manner, of every witness who comes before him.

§ Does the rule of Exclusion apply to all Hearsay Evidence?

1. Hearsay is the statement of a person who is not a witness in the Court and which is sought to be tendered as evidence through another person who comes as a witness.

2. The question is, does the rule of exclusion apply to all statements of a person who is not a witness in Court.

3. To understand, this question it is necessary to realise that a statement when tendered in evidence wears two different aspects. A statement is a fact and it is also the statement of a fact.

Illus--

When A gives Evidence that B said this or that

(i) (i) taken as a fact the question is did say so or did he Not

(ii) (ii) taken as a statement of a fact the question is is what said false or true.

4. The Evidence of a statement by a person who is not a witness may be given for two purposes :

(i) To prove that such a statement was made. (ii) To prove that a statement made is a true statement.

In its former aspect it is merely a fact in issue. In its latter aspect it is an assertion to prove the truth of the matter stated.

5. Whether a statement by a non-witness sought to be tendered in evidence and the admissibility is in question is tendered merely as a fact in issue or relevant fact and is tendered as an assertion to prove the truth of the matter, depends upon the purpose for which it is tendered. The test is the purpose.

6. The Rule of Exclusion of hearsay is stated in a narrow sense as well as in a wider sense. In its narrower sense, it is confined to unsworn statements used to prove the truth of the facts stated. In its wider sense, it is used to inched all statements by unsworn witnesses for whatever purposes tendered i. e. including statements used merely as facts.

The Rule adopted in the Evidence Act.

1. The Indian Evidence Act does not recognise the rule that"no statement as to the existence or non-existence of a fact which is being enquired into, made otherwise than by a witness whilst under examination in Court can be used as evidence"— Markby.

2. Under the Indian Evidence Act statements by nonwitnesses are admissible where the making of the statements not its accuracy is the material point.

3. Therefore

(i) Statements which are parts of the resgestee, whether as actually constituting a fact in issue or accompanying it (ss 5,8),

(ii) Statements amounting to acts of ownership, as leases, licenses and grants (Sec. 13),

(iii) Statements which corroborate or contradict the testimony of witness (ss. 155,157,158)

are admissible even though they are statements by non-witness.

4. The rule of the exclusion of hearsay applies only to statements made by non-witnesses which are used to prove the truth of the facts stated.

4. What are the exceptions to the rule?

1. Under the rule of evidence contained in the Evidence Act a statement made by a non-witness to prove the truth of the facts stated therein is inadmissible.

2. There are exceptions to this rule.

§ Exceptions contained in Section 32.

1. 1. When a person is dead or cannot be found or has become incapable of giving evidence or whose attendance cannot be procured without delay or expense, statements written or verbal made by such persons may be proved if the statements fall under any one of the 8 categories mentioned in Section 32.

(i) When it relates to the cause of his death (a)

(ii) When it is made in the course of business. *Illus* (b) (j)

(iii) When it is against the pecuniary or proprietary interest of the maker or which if true would have exposed him to criminal prosecution or suit for damages. *Illus* (e) (f)

(iv) When the statement gives his opinion as to public right or custom or matters of general interest provided such opinion was given before controversy had arisen. *(Illus)* (i)

(v) When it relates to the existence of relationship by blood, marriage or adoption and the person had special knowledge and was made before controversy.

(vi) When it relates to the existence of relationship between persons deceased and is made in any will or deed relating to family affairs, in a family pedigree, upon any tombstone, family portrait etc., and is made before controversy.

(vii) When it is contained in any deed, will or other document which relates to any transactions as is mentioned in Sec. 13, clause (a).

(viii) When it is made by a number of persons expressing feelings or impressions. Illus. V.

§ Exceptions contained in Section 33.

1. When a person is dead, or cannot be found, or is incapable of giving evidence or is kept out of the way by the adverse party or if his presence

cannot be obtained without unreasonable delay on expense then

the Evidence given by such a person as a witness in a former judicial proceeding or before any person authorised by law to take it,

can be tendered in a subsequent judicial proceedings or in a later stage of the same judicial proceedings to prove the truth of the facts which it states.

PROVIDED

(i) That the proceeding was between the same parties or their representative in interest

(ii) That the adverse party in the first proceeding had the right and opportunity to cross examine

(iii) That the questions in issue were substantially the same in the first as in the second proceeding, (Further portion not forthcoming—ed.)

35 § Entries in any book, register or record

1. Conditions of admissibility.

(i) Two classes of entries are contemplated by the section, (a) By public servants and (b) by persons other than public servants. If it is by a public servant then it must be in the discharge of his official duty. If it is by persons who are not public servants then the duty to make the entry must have been specially enjoined by the law. The former is as a matter of course. The latter is as a matter of special direction.

(ii) The book, register or record must be either public or an official one.

Official does not mean maintained for the use of the office. It means maintained by the State as distinguished from anything maintained by a private individual.

Public means for the use of the public. Public does not mean open to every one. It means open to every one having a concern to it. *18 Cal. 584.*

(iii) The Book, Register or Record may be in the book, register or record kept in any country not necessarily in India, provided it satisfied the conditions. An entry in a book, register or record of any foreign country can be proved.

Points to be noted.

(1) The entry is evidence ; though the person who made it is alive and is not called as a witness—For the proof of public and official documents see Sections 76-78.

(2) The Sections does not make the book, register or record evidence to show that a particular entry has not been made— *10 Cal. 1024; 25 All. 90.*

(3) The Section is not confined to the class of cases where the public officer has to enter in a register or other book some actual fact which

is known to him— *20 Cal. 940.*

(4) Although the entry must have been made by a public servant in the discharge of his official duty or in the performance of a duty specially enjoined by law, but it must not be such an entry which a public servant is not expected or permitted to make, or which from ignorance of his duties or caprice or otherwise, he may choose to make at the dictation of a person who had a personal knowledge of the truth of the facts stated in the entry. 25 *All.* 90. F.B.101.

2. It is not necessary that the entries must have been made up from day or (as in banks) from hour to hour as the transactions take place. Time when the entries are made is not essential. All that is necessary is that they must have been made regularly in the course of business. Delay in entry may affect its value but cannot affect its admissibility—-27 Cal. 118 (P.C.); 13 C. L. J. 139.

3. Although the actual entries in books of account regularly kept in the course of business are relevant, the book itself is not

relevant to disprove an alleged transaction by the absence of any entry concerning it. *10 Cal. 1024.*

NOTE : It may be admissible under Sec. 9 and 11—19 C. N. 1024.

For inference to be drawn from absence of entry. *30 Cal. 231 (247) P .C.*

4. The entry must be in some book, register or record. Entry does not include correspondence 7 *M.L.I. 11*7.

Illus—

1. Entries in Birth and Death Registers.
2. Entries in Birth and Revenue Registers.
3.. Entries in Birth and Marriage Registers.

36 § Statements of fact in issue or relevant facts made in Maps, Plans and Charts.

I Conditions of admissibility.

The section refers to two classes of Maps and Plans.

(a) Those generally offered for public sale and

(b) Maps or Plans made under the authority of Government.

Reasons for the admissibility of (a)

The publication being accessible to the whole community and open to the criticism of all the probabilities are in favour of any inaccuracies being challenged or exposed.

Reasons for the admissibility of (b)

Being made and published under the authority of Government, they must be taken to have been made by and to be the result of the study or inquiries of competent persons.

37 § Statement made in a recital in any Act or in a notification of the Government appearing in the Gazette.

Reasons.

1. The Gazettes and Acts are admissible because they are made by the authorised agents of the public in the course of an official duty and published under the authority of the State and facts stated in them are of a public nature and notoriety.

2. As the facts stated in them are of a public nature, it would often be difficult to prove them by means of sworn witnesses.

1. Relevant only if the Court has to form an opinion as the existence of any fact of a public nature.

2. Public nature, (not explained—ed.)

3. The section draws no distinction between a public and private Act of Parliament. It merely requires that the fact recited in either case should be a public nature.

4. The recitals are not conclusive so far as the Evidence Act is concerned. However they may be expressly declared to be conclusive.

5. A recital is to be proved for showing the existence of a fact. It is no evidence that the particular person knows its existence. Knowledge of a fact although it be of a public nature is not to be conclusively inferred from a notification in the Gazette; it is a question of fact for the determination of the Court. It must be shown that the party affected by notice has probably read it.

38 S.

1. Statement of the law of any country in

(a) book purporting to be printed or published under the authority of the Government of such country and to contain any such law.

2. Report of a ruling of the Court of such country contained in a book supporting to be a report of such rulings.

This applies where the Court has to form an opinion as to a law of any country.

Particular instances of facts which are inconsistent with facts in issue or relevant facts or which make them highly improbable.

They are (1) Admissions (2) Confessions and (3) Judgements.

§ Admissions

Sec. 27.

1. Admission may be proved against the person who makes them or against his representative in interest.

2. Question is what is an admission? Before that certain points regarding the relevancy of admissions must be noted.

(1) Admission can be proved against a person. Admission in favour of a person cannot be proved by him. A plaintiff can prove an admission made by the Defendant if it is necessary for this case. A defendant can prove an admission made by the plaintiff if it is necessary for his case. But a plaintiff cannot prove an admission made by him however helpful it may be for his own case. Similarly a Defendant cannot give evidence of an admission made by him however hopeful it may be for his own case.

The reason is that a party cannot be allowed to create evidence in his own favour.

There are three exceptions to this rule under which a party is permitted to give evidence of an admission in his own favour.

(a) If the Admission is relevant under Sec. 32. (b) If the Admission relates to a state of mind or body made about the time and is accompanied by conduct. (c) If the admission is relevant otherwise than as an admission.

Illus: (d)and(e)

Sec. 23.

(2) Barring these three cases , an admission, if it is to be proved can be proved only against a party. But there is a case in which proof of an admission cannot be given. This is a case where admission was made on the express condition that proof of the admission shall not be given.

Sec. 31.

(3) Admissions are not conclusive proof of the matter admitted. An admission may become an estoppel if the elements necessary for estoppel exist in which case a party against whom it is sought to be proved cannot give evidence to disprove it or explain it away. But if it is not an estoppel, evidence can be given by the party against whom it is proved to disprove it or to explain it.

3. Admissions can only be proved against the party who made them but they can also be proved against his representative- interest.

Who is a representative-in-interest?

(i) (i) There is no definition of the term given in the Act.

(ii) (ii) It is held to be wider than the term Legal representative which according to the penal code means a person who represents in law the estate of a deceased person.

(iii) **(iii)** It not only includes a ' legal representative ' but also includes the **privies of a person.**

(iv) (iv) The privies of a person are :—

(i) (i) *Privies in blood,* such as ancestors and heirs.

(ii) (ii) *Privies in law,* such as executor of a testator

or administrator to an intestate.

(iii) *Privies in estate* or interest, such as Vendor and Purchaser, grantor and grantee, donor and donee, lessor or lessee.

So that an admission :

(1) made by the father can be proved against the son ;

(2) (1) made by the deceased against the executor or administrator ;

(3) (2) made by the Vendor against the Purchaser.

17-20 § What is an Admission.

1. 1. Admissions are (1) Formal or (2) Informal. (1) Formal admissions are :

(i) (i) Admissions contained in the pleadings.
(ii) (ii) Admissions in answers to interrogatories.
(iii) (iii) Admissions on notice to admit facts.
(iv) (iv) Admissions on notice to admit documents.
(v) (v) Admissions by Solicitors.
(vi) (vi) Admissions by Counsels.

(2) Informal Admissions are :

(i) (i) By Statements.
(ii) (ii) By Conduct—
(1) Act or Omission.
(2) Silence.
(3) Acquiescence.

4. Admissions the proof which is allowed by section 21 do not Formal Admissions. Section 21 deals with informal admissions only. But it does not deal with all the classes of informal admissions. It does not deal with informal admissions by conduct. It only deals with informal admissions contained in statements. It deals with assertions and not acts.

5. The definition of an admission as used in Section 21 is spread over sections 17-20.

An admission is a statement, oral or documentary, which suggests an Inference as to any fact in issue or relevant fact made by a person specified in Sections 18, 19, 20.

Two things are necessary.

The statement may not be directly touching the fact in issue or a relevant fact. It is enough if it suggests an inference of acknowledging the fact in issue or relevant fact.

Illus —

A sues X for damage done by K's cattle to A's crop and for the purpose of showing an admission on the part of X that his cattle had caused the

damage. X offers the testimony of B to the effect that X told that X had offered a certain sum to cover the damage.

This is a statement which can sustain the inference that X's admission that his cattle did do the damage.

IIIUS—

A sued *X* for the loss of his sheep alleging that *X*′ s dog had killed them. As proof he adduced evidence that *X* had killed his dog at the time remarking that it will not kill any more sheep.

Is this an Admission?

II. It must have been made by persons specified in Sections 18-20.

1. Deference to sections 18-20 shows that the reasons specified fall into categories.

(1) Persons who are parties to the proceedings and

(2) Persons who are not parties to the proceedings-strangers.

Persons who are parties to the proceedings include :

(1) Parties.

(2) Agents of the parties.

(3) Persons jointly interested in the subject-matter of proceedings . e. g. partners, joint contractors.

(4) Persons from whom parties have derived their interest.

I. Strangers.

Where can a statement of a person who is a stranger and is not in any way related to a party to the proceedings mentioned in Section 18, be treated as an admission by a party.

Two cases. (1) Statement is that of a referee—Section 20.

II. When the liability or position of that stranger is subject-matter of the proceedings.

and

(2) When the statement of the stranger, be such as to amount to admission by him of his liability i. e. it must come within Section 17-18.

Illus. To the section —of liability. *Illus. 5 Mad. 239*—of position.

A and B are jointly liable for a sum of money to C who brings an action against *A* alone.

A objects that he cannot singly or severally be made liable and that *B* should be joined as a co-defendant being jointly liable.

An admission by B to *D* as to his joint liability is relevant between *A* and *C* and may be proved.

D may prove it although *B* is not called.

§ Confession

1. Evidence may be given of a confession provided it be not expressly

excluded whether made to a private person or to a Magistrate.

2. That a confession was made is a fact which must be proved like any other fact.

9 Mad. 224 (240).
5 Lah. 140.
4 All. 46 (94).
8 W. R. Cr. 28.

3. Two Questions arise :

I. What is a Confession.

II. What are the cases in which the Evidence of a Confession is excluded.

1. What is a Confession :

1. The Act contains no definition of the term Confession.

2. The definition of the term is therefore a matter of judicial interpretation.

3. A confession is a statement. An Admission is also a statement although the one is a statement by an accused while admission may be statement by a party. Two questions arise :

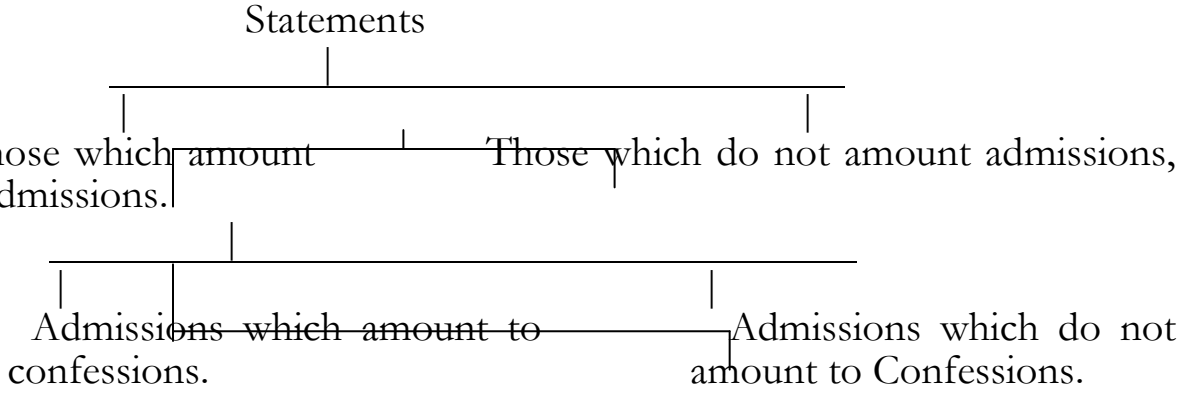
(1) What is the precise difference between Confession and Admission.

(2) When is a statement by the accused a Confession and when it is an admission.

1. Statements made by an Accused person belongs to a class which the Evidence Act calls"admissions"(sections 17,18) and. . .. .. they are evidence against the maker but not in his favour.

2. Confessions are a sub-species of"statements"and a species of admissions.

3. The following table illustrates the relationship.



4. The common feature of confessions and admissions is that they are both of them are **statements** made by the party to the proceedings.

5. Two questions arise.

1. A statement is an admission even though it is not made by the party himself. If it is made by a person defined in Sections 18-20 it will be an admission. Can a statement rank as a confession if it is made not by the Accused himself but by persons specified in Sections 18-20.

1. To be a Confession, it must be by the Accused himself. If it is not by the accused it is not a Confession :

1. An exculpatory statement by the Accused is not a Confession.

2. An inculpatory statement by the Accused which involves him but does not incriminate him is not Confession.

3. An inculpatory statement which not only involves but also incriminates is a Confession.

Points to be noted.

1. The incrimination may be direct or may be by inference. A statement which can by itself be the foundation of conviction is a confession.

2. The statement may be intended by the accused to be self-exculpatory but it may nevertheless be an admission of an incriminating circumstance in which case it will amount to a Confession. *6 Bom. 34*.

§ Two sorts of Confessions.

1. Confessions are either Judicial or Extra Judicial.

(i) Judicial Confessions are those which are made before a Magistrate or in Court in the due course of legal Proceedings. (ii) Extra Judicial Confessions are those which are made by the party elsewhere than before a Magistrate or in Court.

§ What are the cases in which Evidence of Confession excluded

1. The Evidence Act has considered three possible cases : (i) Confession is made to a Police Officer. (ii) Confession is made while in the custody of the Police. (iii) Confession which is made to a person who is not a Police Officer and which is not made while in the custody of the Police.

With regard to (i)

It is excluded by Section 25. With regard to (ii)

It is excluded by Section 25, 26. Exception.

Effect of Sec. 27.

6All. 509(F.B.)

Question. Is Section 27 an exception only to Section 26 and not to section 25?

or

Is it an exception to both?

57Cal. 1062.

With regard to (iii)

The matter is governed by Section 24. **Explanation.**

1. Person in authority.

2. Appears.

Points to note:

1. Sec. 28 Confession after..... ..... is removed.
2. Sec. 29

Queries.

1. Does Sec. 24 apply to statements made by the Accused under Sec. 287 Cr. P. C. before the Committing Magistrate.

Q. Not settled. *17 Bom. L.R. 1059.*

II. Does Sec. 24 apply to statement of an Approver under pardon under Sec. 339 (2) Cr. P. C. (22 *Bom. L. R. 1247).*

§ Use of Confessions.

1. Statement made by an Accused person binds him only so because of two reasons.

(i) The general rule of law is that an Admission made by one person could prejudicially affect another person.

(ii) The statement made by an accused person is not on oath.

(iii) The statement is not subject to cross-Examination.

2. But if the statement is a Confession which affects both himself and another person, then Section 30 says the Court may take into consideration the confession made by the Accused against other persons mentioned in the Confession.

3. Section 30 is therefore an exception to the general rule. The reason for this exception is the fact of self- implication which is said to take the place as it were of the sanction of an oath or is rather supposed to serve as same guarantee for the truth of the accusation against the other.

4. With regard to the use of the confession of one Accused against another accused, the important words are"**Court may take into consideration**". This means,

(1) That the use is not obligatory. It is permissive and discretionary. Court is permitted to use it. Court is not bound to use it.

(2) Court may Consider it. The word consider is significant.

(1)A statement made by a witness is"evidence", according to the definition of that term. A confession by an accused person affecting himself and his co-accused is not"evidence"in that special sense. It is in the sense that it is a matter before the Court which it may consider. The question is while allowing it to be so considered, does it do away with the

necessity of other evidence? There is no direct answer given in the Evidence Act. But all the Courts have held that it does not do away with the necessity of other evidence. The reasons are:

(1) Confession is never a complete guarantee of its truth against the other persons whom it involves. A confession may be true so far as it implicates the maker but may be false and concocted through malice and revenge so far as it affects others.

(2) Confession cannot be placed above the testimony of an accomplice because the latter is subject to Cross Examination while the former is not and if testimony of an accomplice requires corroboration a confession must.

Conclusion. If there is (a) absolutely no other evidence in the case, or (b) the other evidence is inadmissible such a Confession alone will not sustain a Conviction. There must be corroboration.

When persons are accused of an offence of the same definition, arising out of a single transaction, the Confession of one may be used against the other, though it inculcates himself through acts separable from those ascribed, to his accomplice, and capable, therefore of constituting a separate offence from that of the accomplice.

8 Bom. 223.:7 Mad. 579 Abatement—Same offence

1. Importance of the words made and proved. Does the section include statement made by one accused at the trial which incriminates himself and implicates a co-accused?

The answer is that it does not.

The Section is not to be read as though the words**"at the trial**"were inserted after"made"and the word"recorded"substituted for"proved". *(1890) 14 Mo. Jur. N. S. 516.*

The Section does not refer to the statements made at the trial. It refers to statements **made before** and proved at the trial. The use of the term proving a Confession is inapplicable to the procedure where the Judge asks questions and the accused gives explanation. *45 All. 323.*

2. Importance of**"Jointly tried**".

In this connection two important questions arise—When one Accused confesses and in his confession implicates a co-accused and pleads guilty.

(i) In such a case can he be treated as being jointly tried with the rest, as to let in his confession under this section against co-accused?

(2) In such a case can an Accused who pleads quilty be called as a witness against those who do not plead guilty?

Q. 1. His Evidence cannot be taken into consideration because he ceases to be jointly tried. 5 *Bom. 63; 7 Mad. 102; 19 Bom. 195.*

Although it is open to the court to continue the trial without convicting the Accused who pleaded guilty, yet it is unfair to defer convicting them merely in order that their confessions may be considered against the other accused. *23 All. 53.*

Q. II. This depends upon the definition of the word accused : When does an accused person cease to be an accused person?

Until an Accused person who has pleaded guilty is convicted or acquitted, he is still an accused person and is therefore not a competent witness against the co-accused. *13 C. W. N. 552.* Until an Accused person who has pleaded guilty is convicted and **sentenced,** he is still an Accused person and is therefore not a competent witness against the coaccused. *3 Bom. L. R.*

Summary.

1. When a person pleads guilty—he ceases to be jointly tried but he does not cease to be accused person. So that on plea of guilty his confession cannot be taken into consideration against other accused because they are not co-accused jointly tried : nor can he be called as a witness because he continues to be an accused until sentenced.

2. When a person pleads guilty and he is jointly tried and ceases to be an accused person, his Confession cannot be used but he becomes a competent witness.

Relevancy of Judgements. *Sec. 40*

Where the question is whether a Court ought to take cognisance of a suit or to hold such trial.

The existence of a judgement order or decree which **prevents** any Court from taking cognisance of a suit or holding a trial is relevant fact.

Comment.

1. The law by which a prior judgement order or decree prevents a civil court from taking cognisance of a suit is contained in the Civil Procedure Code and the law by which a prior judgement prevents a criminal Court from holding a trial, is contained in the Cr. P. C.

2. The relevant Sections of the C. P. C.are 11-14. Provisions summarised in Field p. 260.

3. The relevant Section of Cr. P. C. is section 434.

4. Under Section 40 a Judgement is relevant if its effect is to conclude the court.

5. Such a judgement must be just between the **same** parties and on the same issues.

6. A Judgement *inter panes* does not bind a stranger. The principle underlying the rule is that no man ought to be bound by proceedings to

which he was a stranger and over which he had no control.

Exception to the Rule

(I) Sec. *41*. enacts an exception to the rule, under it. A final Judgement of a competent court in the exercise of

(i) Probate |
(ii) Matrimonial | Jurisdiction
(iii) Admirality |
(iv) Insolvency.

which confers or takes away a legal character or which declares any person to be entitled to any specific thing is admissible.

Comment:

1. This means that a judgement infer parties is admissible in a proceedings between persons who were not parties to that proceedings.

2. This section deals with what are called judgements *in rem* without using that expression. All judgements are *inter panes*. But some *inter partes* judgements are judgements *inper-sonam* and some are judgements in *rem*. Both are *inter partes*. Instead of defining judgements *in rem*—the section enumerates them.

3. The result is that every judgement which gives or takes away a character is not admissible. It is only judgements given in the exercise of particular kind of jurisdiction which is admissible.

Illus. Adoption is not admissible as between strangers.

It is a Judgement which confers a statics. But it is not admissible because it is not under any of the jurisdiction mentioned.

(II) **Exception.** *Sec .42*.

Judgement in *personam* is relevant as between strangers if the judgement relates to a subjects of a public nature.

Subjects of a public nature.

(1) Customs.
(2) Prescriptions.
(3) Tolls.
(4) Boundaries.
(5) Rights of Ferry.
(6) Sea Walls etc.

(Ill) **Exception Sec. 43.** Under this section Judgements *in personam* are admissible as between strangers under two circumstances

(i) Where the existence of such judgement is a fact in issue. (ii) Where the Judgement is relevant under some other provision of the Evidence Act.

Comment:

1. 1. The first circumstance is easy to conceive.

Illus.

(1) A sued B for slander in saying that he had been convicted of forgery. *B* justified it upon the ground that it was true.

The conviction of A forgery would be a fact in issue and a judgement supporting his conviction would be admissible also. *B* was not a party to that judgement.

(2) A Judgement against a surety obtained by the creditor will be admissible in a suit by the surety against the principal debtor although the principal debtor was not a party to it.

(3) Upon a trial for intentionally giving false Evidence in a Judicial proceedings the record will be evidence that there was a Judicial proceedings.

2. It is the second circumstance which has created difficulty. What are the sections under which a judgement is likely to be relevant?

Under sec. 7—Show cause, occasion. Under sec. 8—Motive conduct. Under sec. 9—Facts necessary to explain relevant facts. Under sec. 11—Facts inconsistent. Under sec. 13—Transaction.

3. Two Questions.

I. Is a Judgement a fact.

II. Is a Judgement a transaction. *6. Cal. 171 F. B.*

4. Comment on 6 Cal. 171. that it is a fact. p. 181.

Fact: (1) Anything state of things, or relation of things capable of being perceived by the senses.

(2) Any mental condition of which any person is conscious.

II Documentary Evidence.

1. The subject to be dealt with is the proof of the statements made in a document i. e. proof of the contents of a document. Oral Evidence deals with the proof of the statements made verbally by a party.

2. What are the requirements of the Rule of Best Evidence with regard to the proof of the contents of a Document? There

are two requirements'—

(i) In certain cases the Evidence must be documentary and not oral.

(ii) In those cases where the Evidence must be documentary that evidence must be primary.

§ Cases where Evidence must be documentary

1. Many matters are reduced to writing. But because they are reduced to writing, the Law does not require that every such case they shall *be proved only* by the production of the document. Some may be proved by oral Evidence and others must be proved by documentary Evidence.

2. For this purpose it is necessary to note that the Indian Evidence Act makes two distinctions—

(1) between documents which are **dispositive** in character and documents which are non-dispositive in character and

(2) between transactions which are required by law to be in writing and those which are not.

3. Dispositive and non-dispositive. Dispositive means transactions in which parties dispose of their rights, such as a Contract, grant etc., Non-dispositive means transactions in which no disposition of rights is involved.

4. The rule embodied in the Evidence Act is twofold :

(i) When a document is a dispositive document and when the matter is such that the law requires it to be reduced to writing no evidence shall be given in proof of the matter except the document. In other words oral Evidence in such cases cannot be substituted for documentary Evidence. But if the document is of a non-dispositive character or if it is one which is not required by law to be reduced to writing then although the transaction may have been reduced to writing yet oral evidence may be given in proof of the transaction.

(ii) If the transaction is a dispositive transaction or is one which is required by law to be in writing then not only oral Evidence cannot be substituted for the documentary Evidence but oral evidence cannot be admitted to contradict, modify or vary the terms of the document.

5. This rule is contained in Sections 91-92.

§ Exceptions to the Rule contained in Secs. 91-92.

1. There are exceptions to this rule. They fall into classes. They must be kept separate. One class deals with cases where the question is whether oral evidence may be substituted for documentary Evidence. The second deals with cases where the question is whether oral evidence may be admitted not to substitute but to modify documentary evidence where the rule requires that the Evidence shall be documentary.

§ Exceptions which permit substitution of oral Evidence for documentary Evidence.

1. They are contained in Section 91 and cover the following cases:

(i) Appointment of a Public Officer. (ii) Will may be proved by the probate.

§ Exceptions which permit oral Evidence to be given to modify the terms of the document.

1. They are contained in Sec. 92 and cover the following cases.

2. The first thing to note is that such evidence can always be given by persons who were not parties to the document or who are not representatives in interest of the parties to the document.

3. The cases in which parties to the document or their representatives in interest can give oral Evidence are as follows :— (i) Fact which would invalidate a document e. g. fraud, want of capacity.

(ii) Fact on which document is silent and which is not inconsistent with its terms. (iii) Condition precedent. (iv) Subsequent oral agreement. (v) Usage or custom by which incidents are attached to contracts. (Bakers dozen). Provided it is not inconsistent. (vi) Fact showing how the language is related to existing facts.

§ Cases where oral Evidence may be admitted to Explain documentary Evidence.

There are two propositions of law which arise out of the first rule of Best Evidence relating to Documentary Evidence.

1: Where the transaction embodied in a document is of a nondispositive character or is one not required by law to be in writing the fact of the transaction may be proved by oral Evidence.

2. Where it is dispositive or required by Law to be in writing then oral evidence not only given to prove the transaction but it cannot be given to contradict, modify or amend the terms of the transaction as embodied in the document.

3. One question however remains. Can oral Evidence be given to explain documentary Evidence? This is a distinct question and must be separated from the question whether evidence can be given to modify contract etc. the terms of the documentary evidence.

4. This question is dealt with in Sections 93-100.

5. In dealing with documentary Evidence disputes may arise on three counts:

(i) Disputes regarding applicability or non-applicability of the language of the document to existing facts.

(ii) Disputes regarding the meaning of the documents where the language used is ambiguous or defective.

(iii) Disputes regarding the meaning of the words used in the document.

1. Under I there are three possible cases of disputes.

(1) Where language applies accurately to facts and the contention is that it was not meant to apply— Evidence may not be given in support of the contention to show that it was not meant to apply to the existing facts to

which they do apply—Sec. 94.

(2) Where language applies to one of the existing facts but not to all of them— and the contention is that it applies to one specified fact— Evidence may be given in support of the contention to show to which particular fact it was intended to apply.—Sec. 95.

(3) Where language applies partly to one set of facts and partly to another set of facts and whole does not apply correctly to either and the contention is that it applies to one set and not to the other—Evidence may be given in support of the contention to show to which of the two it was meant to apply—Sec. 97.

1. Under the second Head of Disputes there are two possible cases:

(i) Where language is ambiguous or defective and the contention is that the parties meant a particular thing— Evidence may not be given in support of the contention to show its meaning or to supply its defects— Sec. 93.

(ii) Where the language is plain in itself but is unmeaning in reference to existing facts and the contention is that it was meant to indicate a particular thing—Evidence may be given in support of the contention to show what was meant —Sec. 95.

. Under the third head of disputes there arises the following case— (i) ... (Space left blank in M.S.—ed.)

Difference between latent ambiguity and patent Ambiguity. II How to prove the contents of a Document?

1. What are the requirements of the Rule of Best Evidence with regard to the proof of the Contents of a Document?

2. There are two requirements in this respect as laid down in the Evidence Act.

(i) The contents of a document must be proved by Primary Evidence.

(iii) (iii) The document must be proved to be genuine.

§ What is meant by Primary Evidence?

Sec. 62.

(1) Primary Evidence means the document itself produced for the inspection of the Court.

Explanation (Space left blank in M. S.—ed.)

§ How to prove that the document is genuine?

1. For the purpose of proving their genuineness the Evidence divides documents into two classes (1) Public Documents and (2) Private Documents.

2. Public Document is defined in Sec. 74.

3. Section 75 declares that any document which is not a public document

is a private document.

4. The rules for proving the genuineness of a document differs according as the document is a public document or a private document.

5. The mode of proving the genuineness of a public document is stated in Sections 76-78.

6. The mode of proving the genuineness of a private document is stated in Sections 67-75.

7. Private documents must generally be proved by the production of the original coupled with the evidence of the **handwriting, signature or execution** as the case may be. **Exception**— will may be proved by probate.

8. The genuineness of public documents may be proved either by the production of certified copies under Section 77 or if they be documents of the kind mentioned in Section 78 the various modes prescribed in that section.

9. With regard to the burden of the genuineness of a document whether it is public or private, the Evidence Act enacts certain presumptions which are contained in Sections 79-90 although they are not conclusive presumptions.

10. These presumptions fall into classes :

(1) Those in which the Court shall presume. 79-85 and 89.

(2) Those in which the Court may presume. 86-88 and 90.

§ When is Primary Evidence dispensed with?

(Space left blank in M. S.—ed.)

§ How are the Contents of a document proved where Primary Evidence is dispensed with?

1. By Secondary Evidence.

(Space left blank in M.S.—ed.)

§ What is Secondary Evidence?

(Space left blank in M. S.—ed.)

BURDEN OF PROOF

1. The law requires the person on whom the burden of evidence is placed to discharge the burden.

2. In discharging this Burden of Proof the following considerations must be borne in mind :—

(i) There are matters of which Proof is not required. (ii) There are matters of which Proof is not allowed.

3. Under (i) his burden is lightened while under (ii) his burden is increased.

BURDEN OF PROOF

(i) Matters of which Proof is not required by Law

1. Matters of which Proof is *not* required by Law fall under three heads: (a) Matters which are judicially noticed. (b) Matters which are admitted by parties. (c) Matters the existence of which is presumed by Law.

§ Matters which are judicially noticed

1. Sections 56 and 57 deal with facts which are judicially noticed. Section 57 enumerates 13 matters of which judicial notice must be taken.

Section 56 says that no fact of which the Court will take judicial notice need be proved by evidence. Parties are relieved from the burden of adducing evidence to prove a fact which falls under any one of the matters falling under Section 57 of which judicial notice must be taken.

2. *The principle underlying the Sections.*— Certain matters are so notorious and are so clearly established that it would be useless to insist that they should be proved by evidence.

Illus.

1. The commencement and continuance of hostilities.
2. The Geographical Divisions of the Country.

These facts are so notorious that proof of them by evidence is superfluous.

2. 2. Matters enumerated in Section 57.

(i) RULES HAVING THE FORCE OF LAW.

Many Acts contain a Section empowering the Local Government to make rules for carrying into effect the provisions of the Act and declaring that such rules shall have the force of Law e. g. Rules made under the Government of India Act. Such rules fall within the purview of this section.

2. Distinction must be drawn between rule having the force of law and custom which is the source of Law. A large part of Hindu Law is based on custom. But the Court will not take judicial notice of a custom. The party who relies on a custom must prove the existence of the custom. When the party has proved the existence of the custom the Court will give effect to it only if it comes to the conclusion that it is a valid custom.

3. It is true that there are some customs for the proof of which the Court does not require Evidence. But that is not because the Court is bound to take judicial notice. The Court does not require formal proof because by the rule of precedent, the Court is bound to uphold a custom, the existence and validity of which has been recognised in an earlier decision by a Court to which it is Subordinate.

(ii) STATUTES. The statutes passed by Parliament are either general or special.

A General Statute is universal in its application and extends to all persons and to all territories.

A Special Statute is either local or personal and operates upon particular persons and private concerns.

2. All Acts of Parliament are to be presumed to be public unless the contrary be declared therein - Section 13 of 14 Vict. c. 21.

3. Judicial notice *must* be taken of all public Acts. Court is not bound to take judicial notice of a Private Act unless the particular Private Act contains a direction to the Court to take judicial notice. If it does not contain such a direction, the party must prove that a Private Act relied upon is an Act of Parliament.

(iii) INDIAN ARTICLES OF WAR.

These are rules of discipline for Native Officers, soldiers and other persons in His Majesty ' s Indian Army. They are contained in the Indian Army Act of 1911.

(iv) COURSE OF PROCEEDINGS OF PARLIAMENT AND COUNCIL.

1. Course of Proceedings must be distinguished from proceedings themselves.

2. The Court will take judicial notice of the course of proceedings and not of the proceedings.

Foreign State

Court will take judicial notice whether a foreign State is recognised or not by His Majesty or by the Governor-General in Council.

State of War

The existence of a State of War between foreign States will not be taken judicial notice of.

Rules of the Road on Land or Sea

Effect of the last para.

1. Court can refuse to take judicial notice under certain circumstances of matters of which they are bound to take judicial notice.

2. Party is bound to produce the necessary material to enable the Court to take judicial notice.

Illus.

Gazette must be produced if the party wishes the Court to take judicial notice of a Proclamation.

Mode of Proof

1. The general rule regarding mode of proof may be stated thus:

The law requires evidence to be given by a person— (i) Who is present in the Court. (ii) Who is legally competent as a witness. (iii) Upon oath or affirmation. (iv) In regular course of Examination. (v) Subject to contradiction as to facts. (vi) Subject to discredit as to veracity.

1. PRESENCE IN COURT.

1. It is a duty of the citizens to appear and testify to such facts within their knowledge as may be necessary to the due administration of justice. It is a duty which has been recognised and enforced by the Common Law from an early period.

2. The right to compel the attendance of witnesses was incidental to the jurisdiction of the Common Law Court, and the statutes have conferred this power upon other officers such as Arbitrators. Every Court having power definitely to hear and determine any suit, has by the Common Law, inherent power to call for all adequate proof of the facts in controversy and to that end, to summon and compel the attendance of witnesses before it.

3. The wilful neglect to attend and to testify after proper and reasonable service of the *subpoena* and in civil cases, after payment or tender of the witnesses fee of waiver of payment is a contempt of Court.

4. The process to compel attendance of witnesses to give testimony or to produce documents is not provided for in the Evidence Act. It is provided for in the Civil and Criminal Procedure Codes.

3. 1. The following matters are in the Country provided for by the Civil and Criminal Procedure Codes.

(i) Summoning of witnesses :

Civil Pro. C. 0. XII

Cr. Proc. C. 68-74 (Summons)
90-93 (Other rules regarding Process)

328 328 (Summons on Juror or Assessor)
244 244 (Issue of Process in Summons Cases)
254 („ „ Warrant cases)
256 ( )
257 ( )
540 (Power to summons material witness on Examine person present)

(iii) (iii) Production of documents and other things:

Civil P. C. 0. XI, XVI.

Cr. P. C. 94,95 (Summons to produce documents or other thing)
96-99 (Search warrants)

485 (Consequences of refusal to produce)

(iii) Expenses of the witnesses :

Civil P. C. 0. XVI. R. 2-4

Cr. P. C. 244, 257.

(iv) The freedom of complainants and witnesses in criminal cases from police restraints.

Cr. P. C. 171.

(v) Recognisance for the attendance of complainants and witnesses in Criminal proceedings.

Cr. P. C. 217, 170.

NOTE.— Not provided for in Civil cases.

(vi) Exemption of witnesses from arrest under Civil process. Civil Pro. Code S. 135.

NOTE.—There is no protection given against Criminal process.

6. Not only is there provision for summoning a witness, there are provisions for compelling his attendance.

(1) Non-attendance in obedience to a Summons is made an offence by Section 174, 175,1. P. C.

(2) Non-attendance in obedience to a summons may be followed by *Warrant of arrests* under Sections 75-86 and by Proclamation and Attachment under Sections 87-89 of the Cr. P. C.

(3)Non-attendance may further render a witness liable to a Civil action for damages under Section 26 of Act XIX of 1853 (in force in Bengal) and under Section 10 of Act X of 1855 (in force in Bombay and Madras).

24W.R.72.

7. Although the law requires persons summoned as witnesses *to attend inperson,* the law also excuses non-attendance in certain cases.

(i) By reason of non-residence within certain limits.

Civil P. C. 0. XVI R. 19. (ii) By reason of the witness being a *purdanashin* lady.

Civil P. C. Section 132.

(iii) By reason of the witness being a person of Rank. Civil P. C. Section 133.

§ The witness must be competent to give evidence

1. The question of competency of a person may be considered from two points of view.

(1) From the point of view of his intellectual capacity.

(2) From the standpoint of his veracity.

1. COMPETENCY FROM THE STANDPOINT OF

INTELLECTUAL CAPACITY.

1. Section 118 deals with the question of competency from the standpoint of intellectual capacity.

2. The rule enacted in Section 118 is a rule which recognises the power of understanding as the *only* test of competency.

3. As every normal person has the intellectual capacity to understand things and to grasp their importance. Section 118 declares *that all persons* are competent to testify unless they suffer from want of understanding.

4. The law of competency is therefore practically the law of incompetency. A person is a competent witness who is not incompetent.

5. Incompetency therefore means want of understanding. This want of understanding may arise from

(i)	(i)	Tender years.
(ii)	(ii)	Extreme old age.
(iii)	(iii)	Disease whether of body or mind.
(iv)	(iv)	Any other cause of the same kind.

6. *Comment.* (i) *Tender year or* (ii) *Extreme old age*— is not defined.

A boy of 7 may not be incompetent but 12 may be, if the former has an understanding which the latter has not. A man of 60 may be incompetent and a man of 80 may not be.

The test is not the age. The test is the Existence or non-Existence of understanding.

(iii) *Disease of the body*

A witness may be in such extreme pain as to be unable to understand or if able to understand to answer questions. He may be unconscious, as if in a fainting fit, catalepsy or the like. Here again it is a question of fact whether in any particular case the disease of the body is such as to deprive a person of his power of understanding.

(iii) *Disease of the mind*

1. This contemplates the case of an idiot and a lunatic, both suffer from the disease of the mind.

2. An idiot is one who is born irrational, without the reasoning faculty. A lunatic is one who is born rational, has subsequently become irrational and lost his reasoning faculty.

3. A lunatic is either a *monomaniac* or is a maniac for the time being. That being so, a lunatic is not incompetent merely because he is a lunatic. Lunacy does not mean complete annihilation of understanding. If it is general lunacy, he may be lucid at intervals. If he is a monomaniac, his understanding about other matters may be clear.

Illus. of partial lunacy.

(1) Murder discussion in Lunatic Asylum.

(2) Interview by a person with his lunatic friend in the asylum and his remark about time.

Illus. of Monomaniac,

(1) R. V. Hill—Hill was tried for murder. Donelly witness— lunatic— suffered from the delusion that he had 20000 spirits about him which were continually talking to him.

That being so a lunatic can be a competent witness. This is recognised in the Explanation. (iv) *Any other cause.*

This means any other cause depriving a person of his power of understanding, e. g. *drunkenness.*

Some of these disabilities are coextensive with the cause, therefore, when the cause is removed the witness becomes competent.

e.g. When pain ceases
drunkenness ceases
Lunacy ceases

Whether there is understanding or not in the witness, is a matter which is determined by the Court by questioning the witness.

§ Accused as a witness

1. While all persons who have understanding are competent as witnesses, there is one exception to the rule. That is, an accused person cannot be examined as a witness in a criminal case in which he is being tried.

There is a case of the disease of the body which does not affect the mind of the understanding. Dumbness is such a disease.

Section 119 deals with the case of such a witness. The Section does not declare him to be incompetent. On the other hand, it treats him as a competent, and permits him to give evidence in any manner by *writing* or by *signs* made in open Court.

§ Competency from the standpoint of the veracity of the witness

1. The motives, which prevent a person from telling the truth, are more numerous in judicial proceedings than in ordinary affairs of life because of the fact that, result of a judicial proceeding cannot be flouted and are binding in a more absolute manner than other informal proceedings of a Panch are. Consequently the law at one time rendered many people intellectually competent incompetent to give evidence in a cause.

2. Formerly, therefore, not only mental incapacity was a good ground for incompetency but *interest* was also a ground for incompetency. Reason was that, an interested person would not tell the truth. Consequently, at one

time, the following persons were deemed incompetent.

1. Parties to the suit.
2. Husband and wife against each other.
3. Accused against himself.
4. An Accomplice.

3. This view of the law is now changed and the principle has undergone a change. Question of competency or incompetency has been converted into a question of credibility or incredibility. So that every son is rendered competent to give evidence but it is left to the Court to believe him or disbelieve him.

4. This new principle is embodied in Sections 120 and 133.

§ Section 120

I. CIVIL PROCEEDINGS (i) The parties to the suit are competent witnesses.

(ii) The husband and wife of any party to the suit are competent witnesses.

II. CRIMINAL PROCEEDINGS

1. The husband or wife of the accused is a competent witness either for or against.

§ Section 133

1. This section deals with the competency of an accomplice. The evidence of an Accomplice is held untrustworthy for three reasons:

(i) because an accomplice is likely to swear falsely in order to shift the guilt from himself.

(ii) because an accomplice as participator in crime, and an immoral person, is likely to disregard the sanction of the oath.

(iii) because he gives his evidence under a promise or hope of not being prosecuted, if he discloses all he knows against his participators in the crime.

2. But his evidence has to be admitted from necessity, it being often impossible without having recourse to such evidence to bring the principal offenders to justice.

§ Difference between the value of Evidence of Accomplices and other persons

1. Persons other than accomplices are not only competent but are also credible. An Accomplice on the other hand is only competent but is not credible.

2. Witnesses may be incredible in the eye of the Judge. But they are not incredible in the eye of the law. An Accomplice has a statutory incredibility attached to him by the law.

3. This statutory incredibility arises from illustration (b) to Section 114 of the Evidence Act. The presumption is sanctioned by the Act and although it is rebuttable, it would be an error of law not to disregard.

4. For attaching this statutory incredibility, it would be necessary to determine whether the witness is an Accomplice. The term is not defined.

(i) An Accomplice is a person who is concerned with another or others in the commission of a crime. He is a participant. But it is not every participation in a crime which makes an accomplice. Much depends on the nature of the offence and the extent of the complicity of the witness in it. 5 *W. R. Cr. 59.*

(iii) *(iii)* An Accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act, that he can be justly indicted with the Accused who is being tried. *27 Mad. 271.*

§ Effect of Sections 120 and 133

1. The sections enumerate certain persons as being competent to give evidence. Question is, Are other persons not competent? The sections are not to be understood to mean that these are the only persons who are competent and others are not. The effect of the sections is that all persons are competent including those mentioned in Sections 120 and 133.

2. The reason why it was necessary to specifically deal with these classes is, because under the earlier law they were incompetent. The ban against them had to be lifted and therefore the specific provisions relating to them. Other classes of persons were already deemed to be competent and it was unnecessary therefore to say anything about them.

3. The Effect of Sections 120 and 133 is this, that not only

(1) Parties to suits.
(2) Husbands and wives.
(3) Accomplices.

are competent witnesses, but

(1) Jurors and Assessors—Section 294 Cr. P. C.
(2) The Executor of a Will
(3) An Advocate for a party may be competent witnesses in the case to which they are a party, although it is a cause in which they are interested.

Evidence must be given on Oath

1. Oath is not a requirement of the Indian Evidence Act. Left to the Indian Evidence Act, evidence by a witness would be legal evidence although the witness had given evidence without taking oath.

2. Oath is a requirement of the Indian Oaths Act X of 1873. Section 5 of

the Oaths Act lays down.

1. That oaths or affirmation *shall* be made by the following persons.

(a) all witnesses. (b) interpreters. (c) Jurors.

3. Section 6—permits a person who objects to the oath to affirm.

4. Section 14.—Every person giving evidence before any Court or person authorised to administer oaths or affirmation shall be bound to state the truth on such subject.

5. There are three questions that arise for consideration.

(1) Can a Court decline to administer oath or affirmation to a witness?

(2) Can a party decline to take oath or make affirmation?

(3) Effect of the refusal of a witness to take oath or affirm and of the failure of the Court to administer oath.

Answer to Question 1. It is a statutory duty of the Court to administer oath. There is one qualification, namely, Court is bound to administer it to a person who is competent and not bound to administer it to one who is incompetent, e. *g.* a child.

6 Pat. L. J. 147.

Answer to Question 2. The answer is given in Section 12. Party shall not be compelled to make it. But the Court is to make a record of his refusal and the reasons, if any, given by him.

Answer to Question 3.

Part I— Effect of the refusal of the party to take oath or make an affirmation	1. .....
	2. Such refusal only affects the value of the evidence.
Part II—Effect of the failure Judge to give oath.	1. The evidence remains of the admissible.
	2. Obligation to tell the truth remains.

6. The Provisions of the Oaths Act in India are not so strict as they are in England.

(1) Oath is not a necessary condition precedent for the obligation of telling the truth. It is necessary merely to remind a witness of its sanction.

(2) The Indian Act condones the failure to remind or failure to take oath. The English law makes the evidence inadmissible.

IV. COURSE OF EXAMINATION

1. There are two possible ways in which a witness can depose (i) By narrating the facts. (ii) By answering questions put to him.

2. The Evidence Act provides that the testimony of a witness shall be taken in the form of Examination, not in the form of a narration. The reasons why the law prefers examination as the mode of giving evidence are to be traced to the rules of relevancy. A person is permitted to give evidence of matters which are relevant. He is not permitted to give evidence of all matters relating to the issue. Matters which are related to the issue are not necessarily relevant to the issue and under the Evidence Act it is the duty of the Judge to decide whether any particular fact is relevant or irrelevant and to rule out the irrelevant then and there.

If a witness is permitted to give his testimony in the form of a narration two things will happen :—

(i) The witness will in all probability tell *all* tacts relevant as well as related and this introduce irrelevant matter and

(ii) The action that a Judge may be able to take to rule out irrelevant matters will be *ex-post facto*.

On the other hand if the witness was required to give his testimony in the form of answers to questions, two objects will be achieved:—

(i) his testimony could be made to confine to relevant matters only not being permitted to wander and

(ii) the Court can immediately check and rule out the introduction of irrelevant testimony.

4. With regard to the examination of witnesses, there are two questions which are distinct and which are regulated by different law. The *order* in which parties are to produce their witnesses for examination, and the *course* of Examination to which each witness is to be subjected when he is produced before the Court, are two separate questions.

Sections 135,138

The order in which witnesses are to be produced by the parties is a matter which is regulated by the Civil and Criminal Procedure Codes. While the course of examination to which a witness is to be subjected, when produced, is laid down by the Evidence Act.

§ Order of Production of Witnesses

1. *In Civil cases*

Order XVIII Rule 1.

In Criminal cases

Summons cases 224 Cr. P. C.

Warrant cases 252
254
257

Summary cases 262.

Rule seems to be this.

1. The first question to be determined is who has the right to begin.
2. The right to begin depends upon on whom is the burden of proof.

§ Course of Examination

1. The Course of examination of a witness prescribed by the Evidence Act is to consist of *3* parts.

Section 138

(i) Examination in chief. (ii) Cross Examination. (iii) Re-Examination.

2. Examination in chief is the Examination of the witness by the party who calls him.

Section 137

Cross Examination is the examination of the witness by the adverse party.

Re-Examination is the examination of the witness by the party who called him subsequent to his cross examination by the adverse party.

Questions to be considered

3. Examination in chief is a matter of choice. No one can compel a party to call witnesses. But if witnesses are called and examined in chief, then the question that arises is this:— Is Cross-Examination and Re-Examination a matter of *right* or a matter of *privilege,* which may be granted or withheld according to the discretion of the Court?

The answer to this question is that Cross-Examination and Re-examination are matters of right and not of privilege. The Court cannot stop a party from Cross-examining or Re-examining a witness who has been examined in chief by the party. What about a witness who is *called by the Court* and not by any party to the proceedings? Is there any right to cross examine such a witness? If so which party? The Evidence Act makes no provision for such a case. It has however been held that a witness summoned and examined by the Court *cannot* as of right be Cross-Examined by either party without the permission of the Judge.

(1894) 2 Q.B. 316,
3 B. L. R. 145
11 W. R.I 10
24 CaL 288
5 Cal. 614
16 W. R. 257.

4. When can the right to Cross examine be exercised?

As to this, there is a difference between civil cases and criminal cases.

(i) In *Civil Cases,* the right must be exercised immediately. It cannot be

postponed to a future date.

(ii) In Criminal Cases, in a summons case before the Magistrate and in the Sessions case the right must be exercised immediately. But in a warrant case, the accused has a right to postpone the Cross-examination of the prosecution witness to the next date of hearing.

The case of a person who is called as a witness by both the parties : In a litigation between A and B, C is cited as a witness by both A and B. First he is called as a witness by A on his behalf. After his cross-examination by B and Re-Examination by A, he is called as a witness by B on his behalf.

Can B Cross-examine C?

There is no specific provision answering this question in the law of evidence. It is a question of judicial opinion. On this question there is a divergence of view.

(1) One view is that, when a person once gets a right to Cross-examine a witness, that right continues to him at all subsequent stages of the case against that witness, no matter in what role the witness reappears, so that, even if he comes as his own witness he can Cross-examine him. This view is based on the theory that every witness is favourably disposed towards the party calling him.

(2) The other view is that, each party should alternatively have the right of X 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 leading questions with regard to their own case. So that a Plaintiff may Cross-Examine any of his own witnesses, on hearing afterwards called on behalf of the Defendant.

The better opinion is that the right to X Examine does not survive and he cannot be asked leading questions on his Second Examination. 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.

This rule appears to have been adopted by the Evidence Act.

5. Does this prescribed course of Examination apply to every witness?

1. There are three sorts of witnesses who are called before the Court:

(i) (i) Those who are called to depose to relevant facts.

(ii) (ii) Those who are called to speak to character.

(iii) (iii) Those who are called to produce documents.

2. With regard to witnesses who are called to depose to relevant facts or to speak to character, they are subject to the full prescribed course of examination. Cross-examination and Re-examination. But the witness, who is called to produce documents, stands on a different footing. He is not a witness and therefore cannot be cross-examined.

6. Can one Co-accused Cross-examine a witness called by another co-accused? Can one Co-defendant Cross-examine another co-defendant or the witness called by a co-defendant?

(1) The Section does not make special provision for the case of Cross-examination by co-accused and co-defendants.

(2) The Evidence Act gives a right to Cross-examine witnesses called *by the adverse* party and to no other. Consequently, it follows that one co-accused can cross-examine a witness called by another Co-accused only when the case of the second is adverse to that of the first. *21 Cat. 401.*

(3) The rule of English law in this respect is different. Under the English law the right of a defendant (and *a fortiori* an Accused) to Cross-examine a co-defendant or co-accused is, according to the English-cases, is unconditional and not dependent upon the fact that the cases of the accused and co-accused are adverse or that there is an issue between the defendant and his co-defendant. And one co-defendant may Cross examine a co-defendant's witness and the co-defendant if he gives evidence.

The reasons for this English rule are :

(i) It is settled that the evidence of one party cannot be received as evidence against another party unless the latter has had an opportunity of testing it by Cross-examination. *Allen* vs. *Allen. L.R.P.D. (1894) 248/254.*

(ii) It is also Settled that all evidence taken, whether in examination-in-chief or Cross-examination, is common open to all the parties. *Lord* vs. *Coloin. 3 Drewery 222.*

(iii) It follows that if all evidence is common and that which is given by one party may be used for or against another party, the latter must have the right to Cross-examine.

7. What is the effect of a default in the course of the examination of a Witness prescribed by law?

(1) This question can arise only when there is a default in Cross examination or Re-examination. Until there is Examination-in-Chief, there is no evidence at all in the legal sense of that term.

It is only when evidence has been given by the witness in his Examination-in-Chief that this question can arise. The question to be

considered reduces itself to the effect of default of Cross-examination or Re-examination on the testimony of a witness.

(2) Such default takes place when the witness dies or falls ill, becomes insane or paralytic or disappears after his Examination-in-Chief or before X Examination.

(3) The Evidence Act does not in clear terms state in express terms what the effect will be. Whether, for want of Cross-examination or Re-examination of a witness, his testimony given in Examination-in-Chief will cease to be evidence in the legal sense of the word and will have to be cancelled and excluded from the consideration of the Court or whether it will merely affect its evidentiary value, is not stated in the Evidence Act. The question is determined by Judicial interpretation.

According to judicial interpretation, two propositions are well established.

(1) Such default does not make the evidence inadmissible. It only affects its credibility.

(2) Whether it would be credible or incredible, must depend upon the reasons for the default in Cross-examination.

There are two ways in which default in X Examination may take place:

(i) Where a party could have X Examined but did not do so. (ii) Where a party would have X Examined but could not do so.

The question of credibility could arise only in the second case. It could not arise in the first. The Law can give an opportunity and nothing more. If opportunity is not taken, the law holds there is no injury.

§ Regular Course of Examination

1. The Course of examination of a witness must be *regular*.

2. A Course of Examination to be *regular* must be in accordance with the rules laid down in the Evidence Act?

3. The rules for a Regular Course of Examination relate to :

(i) (i) Scope of Examination.
(ii) (ii) Manner of Examination.
(iii) (iii) Limits of Examination.

§ Scope of Examination of a witness

Under this head, we must deal with matters on which it is permissible to a party to ask questions to a witness.

1. The objects underlying the examination of a witness are chiefly two: (i) to elicit from him what he knows. (ii) to test the truth of what he states.

2. The object of testing the truth of what the witness has stated can be achieved, only if, the Examination of the witness is extended to such questions as relate : (i) to the corroboration and contradiction of the witness.

(ii) to the confirmation or impeachment of the credit or character of the witness.

3. Under *Scope of examination,* we shall therefore be concerned with Rules relating to the following subjects :

(i) Rules relating to matters which can or cannot be elicited in the course of the Examination of the witness.

(ii) Rules for testing the credibility or incredibility of a witness.

(iii) Rules regarding the corroboration or contradiction of matters deposed to by the witness.

1§ Matters which can or cannot be elicited in the course of an Examination

1. This question is dealt with by Sections 138 and 146. The effect of these sections is that there are two kinds of matters which can be elicited from a witness in the course of his examination.

(i) Matters which are relevant to the issue and (ii) Matters which relate to the credibility of the witness.

These are the only two matters on which a witness can be examined.

2. But every party is not entitled to examine a witness on both these matters

(1) With regard to matters which are relevant, both parties are entitled to examine the witness, the party who called him and the adverse party. Indeed the rule is not that the party is entitled to examine the witness on all relevant matters ; the rule is that the examination of a witness must be confined to relevant facts.

This rule applies not only to Examination-in-Chief but also to Cross-examination. The only difference is that Cross-examination need not be confined to matters raised in Examination-in-Chief. It may be extended to other matters not raised in Examination-in-Chief. But these other matters must also be *relevant* matters. Nothing that is irrelevant is permissible either in Examination-in-Chief or Cross-examination.

There is therefore no difference in the scope of the Examination-in-Chief or Cross-examination so far as relevant matters are concerned.

(Here concludes Page 203 of the M.S. Page 204 is missing. Following text starts from Page 205—ed.)

There is agreement on the absence of the particular virtue of truth telling has the necessary effect of shaking the man's credit and therefore such questions as relate to this aspect of the witness character are always permissible and can be asked in Cross examination.

But there is no general agreement as to the absence of general good character on the veracity of a witness.

There are two views on the subject. One is that, bad general character necessarily involves an impairment of the truth telling capacity and therefore to show general moral degeneration is to show an inevitable degeneration in veracity. The other view is, a bad general disposition does not necessarily or commonly involve a lack of veracity and that, therefore, a bad general disposition is of no probative value for the purpose of shaking a witness's credit.

Under the English law, for the purposes of shaking credit by injury to character, general character is excluded and character for veracity only is taken into account.

§ Impeachment of Character otherwise than by Cross-examination

Section 155

1. Impeachment of character of a witness is permitted by the production of independent evidence under the provisions of Section 155.

2. *This again is a right of the adverse party.* So that a party who calls a witness cannot impeach the character of that witness by evidence of other persons.

3. *The impeachment may be undertaken in the following ways* .

(1) by evidence of persons who testify from personal knowledge that the witness is unworthy of credit.

(2) by proof that has been bribed or accepted the offer of a bribe or has received 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 contracted.

(4) by proof in rape that the prosecutrix was of generally immoral character.

3 § Rules regarding corroboration and contradiction of a witness

1. *Definition of a Corroborative Evidence*—Corroborative evidence simply means evidence which has the effect of confirming the truthfulness of the testimony of a witness. It is evidence which makes the assurance of a witness doubly sure.

2. *Kinds of Corroborative Evidence.*—The Evidence Act recognises two kinds of Corroborative Evidence. (i) Evidence of facts other than relevant facts. (ii) Additional evidence of.

Section 156. § Corroborative Evidence of facts other than relevant facts

There are two requirements which must be fulfilled.

(i) The Corroborative circumstance of which evidence is being given must have been observed by the witness *at or near to the time* at which the relevant fact occurred.

(ii) The Court must be of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact

Illus.

A and B jointly committed robbery at a certain place. B is charged and A, the accomplice gives evidence against him. In his evidence A describes various incidents unconnected with the robbery which occurred on the way.

Prosecution call independent witnesses to prove the truth of the testimony of the accomplice relating to the *incidents on the way.*

The relevant question is whether *B* committed robbery. The Evidence tendered by the prosecution does not relate to the relevant question. Still it will be allowed as a corroborative evidence if the Court is of opinion that it will help to corroborate the testimony of the accomplice as to robbery.

§ Corroborative Evidence byway (of)* mk:@MSITStore:C:\Important\Writing_Of_Babasaheb.chm::/52F. Notes on Acts and Laws Burden of Proof.htm - _msocom_1 **Additional Evidence of relevant facts**

Section 157.

1. *This can be done by giving evidence of any former statement made by the witness relating to the same fact.* This is based upon the principle that he, who is consistent, deserves to be believed. The mere fact of a man, having on a previous occasion made the same assertion, may add little or nothing to the truthfulness. One may persistently adhere to falsehood once uttered, if there is a motive for it so that if consistency was conclusive nothing would be easier for designing and unscrupulous persons to procure the conviction of any innocent man, who might be obnoxious to them, by first committing offences and afterwards making statements to different people and at different times or places implicating the innocent man. *R.* vs. *Malappa, 11 Bom. H. C.R. 196 (198).*

2. The previous statement may be a statement made on oath or otherwise and either in ordinary conversation or before some persons who had authority to investigate and question the person who made it. It may be verbal or in writing. *There is one distinction between a previous statement made before a person who has authority to investigate and a previous statement* made before a person not so authorised. If not made before any person legally complain to investigate the fact, then to be admissible, must have been made at or about the time when the fact took place. This condition does not apply to a previous statement made before a person having authority to inquire.

25 Mad. 210. Illus.

(i) A statement by a girl, alleging that she was raped made immediately

after the rape, is admissible.

(ii) The dying declaration of a man, who chances to live, is admissible as a corroborative piece of evidence.

(iii) The first information given to the police is admissible as corroborative evidence of the testimony of the informant.

(iv) The Panchnama is admissible as a corroborative. *Two points must be urged by way of caution.*

(1) The use of statements made to the police in the course of investigation under Section 162, Criminal Procedure Code. These are also *previous statements* made before a person who is authorised to investigate.

Can they be used for the purposes of corroboration?

At one time it was held that they could be so used.

36 Cal. 281.
35 Mad. 397.
39 Bom. 58.

The Amendment to Section 162 of the Criminal Procedure Code excludes both the written record and *viva voce* statement made to the Police. Though previous statements, they cannot be used as a corroboration.

(2) The distinction between corroborative evidence and substantive evidence is important, because, on this depends the use of corroborative evidence. Corroborative evidence is not substantive evidence.

Illus.

In a trial of a prisoner, the depositions of witnesses given in a previous trial of other persons charged with having been engaged in the same offence, were used against him. The witnesses instead of being examined in the ordinary way, were re-sworn and said"I gave evidence before in this Court and that evidence is true".

Held that this evidence was inadmissible. It was only corroborative evidence and could be used only when substantive Evidence is given. If substantive Evidence is not given, then corroborative evidence cannot be given.

12W.R.Cr.3.

Similarly—If a panch does not identify the accused, the Panchanama of identification as corroborative evidence could be inadmissible.

In this connection there arises the question of giving corroborative evidence of a person who cannot be called to give substantive evidence by reason of the fact that the witness is deader who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense, which under the

circumstances the Court thinks unreasonable.

Section 158 permits corroborative evidence being given although no substantive evidence is tendered. This is an exception to the general rule. That exception applies only *if the witness cannot be procured.*

This is an exception created by Statute. Another exception created by Statute is contained in Section 288 of the Criminal Procedure Code. By that Section, evidence before the committing Magistrate is treated as evidence before the Sessions Court for *all* purposes i. e. substantive Evidence of all facts deposed therein.

§ 3/2 § Rules regarding the contradiction of a witness

1. This is a matter which must necessarily be governed by two considerations:

(i) The object of inquiry by the Court is to get at the truth and therefore contradiction must be permitted.

(ii) If contradiction is permitted, the inquiry will be endless and therefore there must be some limit on the process of contradiction.

2. *In what cases can a witness be contradicted?*

The Section which deals with the contradiction of a witness is Section 153. For the purposes of contradiction, the Section divides the answers of the witness into two classes (1) Answers to questions relating to relevant facts and (2) Answers to questions relating to the credit of a witness.

3. *Are the answers of a witness to questions relating credit liable to contradiction?*

The answer given in Section 153 is positive to the effect that such answers shall not be contradicted.

There are only two exceptions to the rule :

(i) If previous conviction is denied, you can contradict it by evidence. (ii) If the witness denies partiality he may be contradicted.

In this connection, it must be borne in mind that under the provisions of Section 155, the answers of a witness giving reasons in X-Examination for his belief in the untrustworthiness of another witness are not liable to be contradicted.

In all these cases, where the answers of a witness to questions relating to credit are not liable to contradiction, the law provides that if their answers are false they may afterwards be charged with giving false evidence.

4. *Are answers of a witness to questions on relevant facts liable to contradiction?*

(1) Section 153 is negative in character and merely states cases in which contradiction is not allowed. It does not state in what cases contradiction will be allowed.

(2) It does not include answers to relevant questions in its prohibition. By implication it seems to permit contradiction of such answers.

(3) There is illustration (c) to Section 153 which shows that the legislature intended to permit contradiction of such answers.

5. Section 153, therefore, lays down the rule that you can contradict answers to relevant questions. But you cannot contradict answers to questions on credit.

§ Contradiction on relevant facts

1. The next question is ; *Is such contradiction permitted to the party who called the witness or Is it permitted to the adverse party only?*

2. That, a party may contradict the answers given by the witness called on behalf of the adverse party, is beyond question and is always permissible. The defence witnesses are thereto contradict. But it does not seem to be quite so obvious in the other case. A witness is called on behalf of a party. In answer to a question on a relevant fact, he gives a particular answer which the party who called him feels is untrue. Can the party, who called him, call another witness to contradict him?

3. *The answer is that he can.* The law seems to make difference between discrediting his own witness by attacking his general character and showing that in a particular respect his testimony is incorrect.

§ Manner of Examination of a Witness

1. *Manner of Examination means the manner of interrogating the witness,* i. e. the manner of putting questions.

2. This matter is left not to the discretion of the party interrogating the witness, but is regulated by law.

3. From the standpoint of the manner of putting questions, questions are either leading questions or not leading questions.

4. A leading question is generally said to be a question which can be answered by a mere yes or no. Although, all such questions undoubtedly come within the rule, the character of leading question is not limited to them.

The Evidence Act defines a leading question as one, which suggests a particular answer, which the questioner expects to have from the witness.

Illus.

On a charge for murder by stabbing, to ask a witness ' Did you see the accused covered with blood and with a knife in his hand coming away from the corpse? ' is a leading question.

5. A distinction must be made between two sorts of leading questions,

(i) A leading question which suggests the answer. (ii) A leading question which directs the attention of the witness to the *subject* respecting which he is questioned.

As an illustration of the second sort of leading question, take the

following:

A was sued for defamation *by B* for having said in a conversation to C that B was in bankrupt circumstances and that his name would appear in the London Gazette among bankrupts. Question was asked to the witness.

"*Was anything said about the Gazette?*"

This is not a leading question in the sense of a question which suggests an answer. It is a leading question which directs the attention of the witness to the *subject* about which he is being questioned.

The manner of interrogation in Examination-in-Chief varies from the manner of investigation in Cross-examination.

In Cross-examination, a witness may be interrogated in the form of leading questions. But leading questions must not be asked in Examination-in-Chief, if objected to by the opposite party.

In Examination-in-Chief, the witness must be asked merely such question as"What did you see?""What did you hear?""What happened next?"

Reasons for the Rule

(1)A witness has a bias in favour of the party calling him and hostile to the opponent. He is, therefore, likely to agree to the answers suggested to him by the pleader of the party.

(2) That the party calling a witness has an advantage over his adversary, in knowing before hand what the witness will prove, or at least expected to prove ; and that, consequently, if he were allowed to lead, he might interrogate him in such a manner as to extract only so much of the knowledge of the witness as I would be favourable to his side, or even put a false gloss upon the whole.

Exceptions to the Rule.

Leading questions are permissible in Examination-in-Chief in the following cases :—

(i) (i) Where the matters are merely introductory, such as a name, occupation of a witness.

(ii) (ii) Identification of persons or thing.

(iii) (iii) About matters which are not in dispute.

(iv) (iv) When a question from its very nature cannot be put except in a leading form.

(v) To contradict evidence already given by a witness on the other side.

E. G.—If the Plaintiff has sworn that the defendant said,"The goods need not all be equal to sample", the Defendant can and should be asked,"Did you ever say to the Plaintiff that the Goods need not all be equal to sample or any other words to that effect?"

(vi) Where the witness is hostile. Difference between a hostile and a witness who is unfavourable.

A Witness should always state what happened according to his own personal recollection, and not according to what he has since been told.

Suppose the witness cannot recall the facts and his memory fails, what is to be done?

There are two ways open :

(1) To assist the memory of a witness by leading questions.

(2) To permit him to refresh his memory by permitting him to refer to any writing which is a record of the fact.

Examples of writings used to refresh memory are—

(i) Entries in diaries. Entries in call books. Entries in account-books. Entries in Railway time-tables.

A witness may refresh his memory by referring to any writing or document *made by himself*. But he may also refresh his memory from documents made by other persons under his immediate observation.

The only condition is that the document must have been made at the time when the transaction was fresh in his mind or was *read by him,* if made by another person, at the time when the transaction was fresh in his memory and knew it to be correct.

A copy may be used if the original cannot be produced for reasons which satisfy the Court for its non-production.

Refreshing memory by inspecting a writing or document does not make it documentary evidence. So that a document which could be inadmissible in evidence for want of stamp would be admissible for refreshing memory.

There is a difference between referring to a writing for refreshing memory and using a document for corroboration.

A document which could not be used for corroboration can be used for refreshing.

Example : USE OF POLICE DIARIES

In connection with a document used for refreshing memory, it must be ascertained whether a memorandum does assist the memory or not.

The law, therefore, requires that such writing shall be produced and shown to the adverse party, if he requires it and he may cross examine the witness thereupon, if he so desires.

8 Cal. 739 (745).

The grounds upon which the opposite party is permitted to inspect are threefold : (i) to secure the full benefit of the witness 's recollection as to facts ; (ii) to check the use of improper documents and (iii) to compare his oral testimony with his written word.

Can the adverse party compel the witness to refresh his memory by referring to the writing.

It may be very advantageous to an accused person that Police Officer should state a certain fact. The Police Officer does not recall fact and would not refresh his memory by reference to his diary.

(8 Cal. 154), (8 Cal. 739) Says he cannot be compelled. *A. I. R. (1924) Pat. 829,* Says he can be compelled.

§ On the Limitations on the Examination of a witness

1. The subject-matter to be considered under this head relates to the questions a witness is bound or is not bound to answer.

2. The general rule is that a witness must answer *all* questions put to him.

Section 132, Section 132 puts the matter negatively.

3. This rule is subject to *two* qualifications : (i) Certain questions a witness cannot be *compelled* to answer. (ii) Certain questions a witness is not to be empowered to answer.

4. Sections which deal with questions which cannot be *compelled* to answer are : 121,122, 124,125,129.

5. Sections which deal with questions which a witness is not empowered to answer are : 123, 126, 127, 128.

DISCHARGE OF THE BURDEN OF PROOF

1. Effect of Evidence may be : (i) To prove a fact. (ii) To disprove a fact. (iii) To fail to prove and therefore disprove.

2. Burden of Proof is discharged when : (i) The fact required to be proved is prove. (ii) The fact required to be disproved is disproved.

3. Burden of proof is *not* discharged when the Party on whom the Burden lies fails to prove or disprove as the case may be.

4. When can a fact be said to be proved or disproved? And when can it be said to be not proved.

The answer to this question is given in section 3.

NOTE.—TWO things must be noted.

(i) Proof does not mean rigid mathematical demonstration. (ii) Moral conviction is not proof.

Proof means Evidence.

But such evidence as would induce a reasonable man to come to some conclusion. *(1911) 1. K. B. 988 (995). 31 Bom.* L. *R. 516.*

The question of proof is one of probability and not of certainty.

Discharge of Burden of Proof and Quantum of Evidence

(1) Under the English Law corroboration is necessary in certain cases:

(1) High Treason—Two witnesses.

(2) Perjury—
(3) Breach of Promise—
(4) Bastard—Mother's testimony must be corroborated.

(II) Under the Indian Law the rule is absolute. The Court may act on the testimony of a single witness even though uncorroborated.

Exception. ***