Section 33:

Section 33 deals with ‘Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated:

It reads as follows:

“Section 33: Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.- Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness 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 an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided-

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.- A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

The evidence contemplated by this section is evidence given by a witness in an earlier judicial proceeding or before any person authorized by law to take evidence. The section states that such evidence is relevant in a subsequent proceeding for the purpose of proving the truth of the facts which it states when

(a) the witness is dead, or

(b) the witness cannot be found, or

(c) the witness is incapable of giving evidence, or

(d) witness is kept out of the way by adverse party, or

(e) witness's presence cannot be obtained without any amount of delay or expense which, under the circumstance of the case, the Court considers unreasonable

This is subject to three conditions:

(1) that the proceeding (i.e. earlier proceeding) was between the same parties or their representatives in interest;

(2) that the adverse party in the first proceeding had the right and opportunity to cross examine;

(3) that the questions in issue were substantially the same in the first as in the second proceeding.

The section has been applied in civil as well as criminal cases. We shall refer to a few such cases before we discuss the recommendations made in the 69th Report.

The old Criminal Procedure Code, 1898, contained a committal procedure, where a witness was examined at the committal stage before a Magistrate, and could not be cross examined there, then the evidence given by the witness in the Committal Court could not be used against the accused at the Sessions trial. If before a Magistrate, there was opportunity to cross examine and a defence counsel did not choose to cross examine a witness, the evidence in the committal proceeding could be used in the later proceedings and the defence, which did not avail of its right to cross examine before the Magistrate, would not be able to complain.

The question in issue in the two criminal proceedings need not be identical but it is sufficient if they are substantially the same. In re: Rama Reddi (1881) ILR 3 Mad 48, it was held:

> "Although the Act, in using the word 'questions' in the plural, seems to imply that it is essential that all the questions shall be same in both proceedings to render the evidence admissible that is not the intention of the law"

In that case, R charged A with breach of trust and S gave evidence for R while A was examined as defence witness. A was acquitted. Later A prosecuted R for making a false charge against him and R's witness S for perjury. In this latter prosecution, the evidence given by A's defence witnesses earlier was sought to be given because the witnesses had died. It was held that so far as the said prior statements of witnesses were concerned, they were admissible against R because all conditions of sec. 33 were satisfied but not against R, who was only a witness in the earlier case.

The Privy Council held in Bal Gangadhar Tilak vs. Shriniwas Pandit : AIR 1915 PC 7 that in the absence of proof that conditions stated in sec. 33 were satisfied, the evidence given an earlier civil proceedings could not be imported into a later criminal case.

By consent, the conditions can be waived in civil cases but not in criminal cases (Kottam vs. Umar, ILR 46 Mad 117).

The previous deposition must have been recorded in the manner laid down in sections 263, 264, 273 – 84, 291, 2991 Cr.P.C. or under 0.18 R. 4-17A of the CPC. Otherwise, they cannot be used under sec. 33.

In a case where three prisoners were indicted for felony and a witness for the prosecution was proved to be absent through the inducement of one of them, the Court held that his deposition might be read in evidence as against the man who had kept him away but could not be received against the two others (R vs. Scaife (1851) 20 L.J.M.C 229: Tay sec. 472 fn).

In civil cases, sec. 33 has been widely applied. Evidence of a witness examined in an inquiry by the sub-registrar under sec. 41(2) of the Registration Act, 1908 as to the genuineness of a will is admissible in a subsequent suit between the same parties raising an issue as to the genuineness of the will, if the witnesses were dead and the adverse party at the inquiry under sec. 41 had the opportunity to cross-examine them.

We shall now proceed to refer to certain important aspects arising under sec. 33. The first of these relates to the first proviso which reads:

"provided that the proceeding was between the same parties or their representatives"

A plain reading of the proviso leads to the conclusion that the parties (or their representatives) to the earlier proceeding in which the deposition was given by a witness, must have been the same.

The question has arisen with regard to the first proviso to sec. 33, whether the parties to the latter proceeding should be parties or representatives of the parties to the earlier proceeding,- as is the position under various Indian statutes – or whether the legislature deliberately required parties in the first proceeding to be parties or legal representatives of the latter proceeding. In the law in England, corresponding to sec. 33 of our Act, the requirement is the other way – the parties to the latter proceeding must be parties or representatives of parties to the first proceeding.

The Privy Council in Krishnayya vs. Venkata Kumara AIR 1933 PC 202 felt that the section did not invert the normal principle of representation but that perhaps it was deliberate having regard to the representative doctrines of Hindu joint family. The Privy Council said:

> "Their Lordships, however, are not disposed to consider this inversion to be accidental. Nothing would have been easier, had it been desired so to do, than to follow the English rule, or to require that the party to the first proceeding should be privy in estate with or the predecessor in title of the party to the second proceeding. Instead of using such well-known terms a much more elastic phrase is employed, and one which is neither technical nor a term of art. The legislative authority was, it must be remembered, dealing with a country in which (amongst other institutions) the Hindu joint family involved representation of interest of a kind and degree and in circumstances unfamiliar to English law. In view of this fact, their Lordships cannot surmise that the omission of strict English legal terminology and the employment of the less restricted phrase "representative in interest" was deliberate and intentional."

The above view of the Privy Council, in our opinion, is open to criticism. Sri Vepa P. Sarathi (Evidence, 2002, 5th Ed., p. 155) says as follows:

> "This elaborate interpretation became necessary on the assumption that the requirements in the Act are an inversion of the requirements of the English law, where the parties to the second proceeding must be the same or legally represent the parties to the first proceeding. It is submitted that in view of the identical phraseology used by Sir James Stephen, in Article 33 of his 'Digest of the Law of Evidence', which

refers to the English law on the subject, the interpretation of sec. 33 should have been that the 'inversion was accidental'."

The Privy Council did not obviously notice that in Sir James Stephen's Digest there was no deviation from the English law or rather the very common concept of parties in a latter proceeding being parties or representatives of parties to an earlier proceeding. In fact, if parties to an earlier proceeding are to be representatives of parties to a latter proceeding,- having regard to the limited span of human life – the principle of the section gets limited to a few cases where in the first proceeding, younger people are involved who are representatives of (living) older people who are parties to the latter proceeding. The reference to the principles of representation in Hindu law by the Privy Council also appears to be inappropriate.

Are there situations in Hindu law where parties in an earlier litigation could be claiming through parties to a latter litigation? The concept of a Joint Hindu family Manager, however peculiar to Hindu law, does not give rise to a situation where parties to an earlier litigation could be claiming through a manager who is party to a latter litigation.

Phipson (15th Ed., 1999 para 39.13) dealing with 'Deposition in Fomer Trials) states:

> "At common law, depositions and oral testimony given by a witness were admissible in a civil case Wright vs. Doe-d Tatham (1834)1 Ad & El (3) and are still in criminal proceedings, R vs. Hall (P.B.) 1973 Q.B. 496, in a subsequent (or in a later stage of the same) trial in proof of the facts stated, provided (1) that the proceedings are between the same parties or their privies; (2) that the same issues are involved; (3) that the party against whom, or whose privy, the evidence is tendered had on the former occasion a full opportunity of cross-examination; and (4) that the witness is incapable of being called at the second trial".

The above 'inversion' in sec. 33 has created several practical problems and the Courts had to stretch the meaning of the word "representatives-in-interest".

It has been held by the Patna High Court that the vague expression 'representatives in interest' must at least include 'privies' in estate. Partners and joint contractors are each others' agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts and must be regarded as 'privies in estate' (Chandreswar vs. Bisheswar AIR 1927 Pat 61). The Madras High Court has held that the word 'representatives-in-interest' is not for all purposes synonymous with the expression "the persons claiming under" as in sec. 11 CPC (Ramakrishna vs. Tirunarayana AIR 1932 Mad. 198.

In the light of the fact that Sir James Stephens Digest refers to the correct principle by requiring, as under the English law, the party to the latter proceeding to be party or representative in interest of the party in the prior proceeding, we are of the view that section must be amended in accordance of the Digest of Sir James Stephen. In fact, that appears to be consistent with similar situations e.g. – see sec. 21, 92, 99, 115 of the Evidence Act.

Now, if we read sec. 33 again, it uses the words 'Evidence given by a witness in a judicial proceeding or before any authority authorized by law to make it, is relevant for the purpose of proving in a subsequent judicial proceeding or in a later stage of the same judicial proceeding'- and the first clause in the proviso uses the word "proceeding was between the same parties or their representatives in interest" while the third clause of the proviso uses the words "that the questions in issue were substantially the same in first as in the second proceeding". It will be seen that the main clause uses the word 'subsequent proceeding' while the third clause in the proviso uses the words 'first' and 'second' proceeding. In the first clause of the proviso, the word 'proceeding' is used without any qualification.

In the 69th Report, in para 12.204, after referring to the Privy Council case, it was stated that in the first clause of the proviso, the word 'first' be added before the word 'proceeding'. Para 12.205 of the report said:

"It may be noted that the proviso to sec. 33 inverts the requirement of English law, which requires that the parties to the second proceeding should legally represent the parties to the first proceeding or by their privies in estate. As observed by the Privy Council, this inversion is not accidental.

Instead of saying that the parties to the second proceeding should represent-in-interest the parties to the first proceeding, the proviso employs different language.

12.206.As the departure from the English law has been held to be deliberate by the Privy Council, the language of the provision should be altered for bringing into line with English rule, on this point."

Having said this, in para 12.215, in the draft prepared, the Report stated, so far as the first clause in proviso, is concerned as follows:

"(i) that the first proceeding was between the same parties or their representatives in interest."

Whereas, if the English law was to be restored, the first clause in the proviso should read:-

> "provided that the subsequent proceeding was between the same parties or their representatives in interest."

Obviously, the draft of the section as proposed is contrary to the recommendations and in the draft section, the word 'first' has to be replaced by the word 'subsequent'.

In the 69th Report, a few other formal changes were proposed, the words "in a judicial proceeding" were brought to the beginning of the section and the word 'before a court' were added thereafter and after the words 'evidence given' the words 'previous' added. The words or "in an earlier stage" were added in the beginning and for the words 'subsequent' judicial proceeding or a later stage of the same judicial proceeding- the words "in a judicial proceeding' are substituted. Before the word 'before any person authorized by law', the words 'any proceeding' are added. These are all formal changes in the section and we agree that they make the section more precise and can remain certain and we accept them.

We then come to the Explanation. It says "A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused

within the meaning of the section". The scope of the explanation is this: Suppose a man is run over by a car and his leg is amputated. He complains (i.e. by way of private complaint) against the driver who is prosecuted by the State for an offence under the Motor Vehicles Act or Penal Code. Later, he files a suit against the driver for damages. Some of his witnesses who appeared in the criminal court may be dead by the time the civil case comes up for trial. If the evidence given in the criminal case is sought to be used in the civil case, it may be objected to on the ground that the parties are not the same, as the parties in the criminal case are the State and the driver and the parties in the civil case are the victim and the driver. The Explanation has been put in to get over this argument and make the evidence in the criminal case relevant evidence in the civil case. (see Vepa Sarathi, 5th Ed., 2002, pp 158-159)

In the 69th Report, after an elaborate discussion, the Commission wanted that the Explanation must be split up into two parts, one dealing with a criminal case based on a private complaint and one where it is, to start with, is by the State. The Commission recommended (para 12.215) two clauses in the Explanation as follows:

"Explanation: A criminal trial or inquiry shall,

(a) where the criminal proceedings are introduced by private person, be deemed to be a proceeding between that person and the accused within the meaning of that section, if that person is permitted by

the Court to conduct the prosecution under section 302 of the Code of Criminal Procedure, 1973;

(b) in other cases, be deemed to be a proceeding between the State and the accused."

The above discussion covers the various aspects dealt within the 69th Report.

So far as the second proviso is concerned, it says: "provided that the adverse party in the first proceeding had the right and opportunity to cross-examine."

As regards this proviso, the Privy Council stated that the adverse party must have had both the right and the opportunity to cross-examine (Dal Bahadur vs. Bijoy: AIR 1930 PC 79). This was followed in Mulkraj vs. Delhi Admn. AIR 1974 SC 1723. But in some cases, it was held that if opportunity was there it was sufficient and it is not necessary he should have actually cross-examined (Sundare vs. Gopala AIR 1934 Mad 100). This latter view is not accepted by the Supreme Court in V.M. Mathew vs. V.S. Sharma: 1995(6) SCC 122 and the view of the Privy Council was reiterated.

In the above Supreme Court case, the Court said "that in exparte proceedings against a defendant, he has no right and opportunity to cross-

examine the witness". However, since he has no right and opportunity to cross-examine the witness, "the same evidence cannot be used against the defendant in a subsequent proceeding. Thereby, the proviso seeks to protect the rights of those against whom the previous proceeding might have gone exparte who had no right and opportunity to cross-examine the witness".

We do not want to go into the case of evidence adduced in exparte proceedings in view of the decision of the Apex Court.

In the result, we accept generally the recommendation in para 12.215 of the 69th Report but we have changed the format of the proposed amendments.

We, therefore, recommend that sec. 33 be revised as follows:

Relevancy of certain evidence for proving, in subsequent proceeding,the truth of facts therein stated

"**33**. Evidence given by a witness –

(a) in a previous judicial proceeding, or

(b) in an earlier stage of the same judicial proceeding, or

(c) in any proceeding before any person authorized by law to take evidence,

is relevant in a subsequent judicial proceeding before a court, for the purpose of proving the truth of the facts which it states, when the witness 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 an amount of

delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided-

(i) that the subsequent proceeding before the Court is between the same parties or their representatives 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 are substantially the same in the first as in the subsequent proceeding.

Explanation:- A criminal trial or inquiry shall in cases ,

(a) where the criminal proceedings are instituted by a private person, be deemed to be a proceeding between that person and the accused within the meaning of this section, if that person is permitted by the Court to conduct the prosecution under section 302 of the Code of Criminal Procedure, 1973; and

(b) other than those referred to in clause (a), be deemed to be a proceeding between the State and the accused."

Section 34:

Sections 34 to 37 are placed under the heading "statements made under special circumstances".

Section 34 of the Act (as amended by Act 21/2000) reads as follows:

"S.34: Entries in books of account when relevant.- Entries in the books of account [including those maintained in an electronic form] regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

There is an illustration below section 34, which reads as follows:

"Illustration: A sues B for Rs.1000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence to prove the debt."

In the 69th Report of the Law Commission, in Chapter 13, under the heading "Entries in Books of Account", the section has been critically examined. Part I of the chapter is 'Introductory', Part II contains the 'previous law', Part III refers to 'English Law and Roman Law', Part IV with 'corroboration', Part V with 'Interpretation and Procedure', Part VI contains the conclusion (see para 13.27).

Reference was made to the language in the corresponding section of the Evidence Act of 1855 and to section 43 therein which was in different language:

> "S.43. Books proved to have been regularly kept in the course of business, shall be admissible as corroborative but not as independent proof of the facts stated there"

and it was pointed out that the present Act uses the words 'proved to have been regularly kept' for the words 'regularly kept' used in the Act and that there is a change in the law, as pointed by Markby J. in Belaet vs. Rash Beharie: (1874) 22 W.R. 549.

Reference was made to the provisions of section 54 of the (English) Chancery Practice Amendment Act, 1852 which made entries 'prima facie' evidence and to the practice of 'supplementary oath' under the Roman law (see also Or. 30. R7 of the Supreme Court Rules, added in 1894) (Sarkar, 15th Ed., 1999 p. 756).

Under the present Act, books of account, according to the 69th Report (see para 13.16), when not used to charge a person with liability (civil or criminal) may be used as independent evidence without the need for any further corroboration but when sought to make any person liable, the books would require corroboration (see Sarkar, ibid p. 758). Other evidence may be that of the maker of the entry or for that matter, any 'fact' relevant under the Evidence Act (para 13.17).

It was pointed out that entries in books of account could be relevant under other provisions of the Act also, e.g. section 32(2) as statements made by a person in the ordinary course of business or under section 159, to refresh the memory of a witness, if the entry has been made by that witness

himself and relates to some transaction concerning which he is now giving evidence.

Absence of an entry in the book is not relevant under section 34 but can become relevant under sections 9 and 11.

The 69th Report concluded by stating (see para 13.27) that section 34 did not require any substantial amendment except for a verbal change by substituting the words "such entries" for the words "such statement".

In the Hawala case which went up to the Supreme Court CBI vs. V.C. Shukla AIR 1998 SC 1406, which more or less affirmed the judgment of the Delhi High Court in L.K. Advani vs. CBI (1997) Crl LJ 2559, the section came under elaborate scrutiny. In that case, the verdict in favour of the accused was based in the High court, upon the conclusion that the alleged entries in diaries were mere entries kept by a person as a memorandum and there were no debit or credit entries and were not account books falling under section 34. The Supreme Court, on appeal, observed that spiral pads and spiral note books is a book of account but not loose sheets of papers contained in a file. The court however observed that it was not necessary that the entry should be made at or about the time the related transaction took place so as to pass the test of having been 'regularly kept'. Again, activities carried on continuously in an organized manner with a set purpose to augment one's own resources may amount to 'business'.

The Privy Council had occasion to interpret section 34 of the Act and the corresponding provision under the 1855 Act, in Bhoy Hong Kong vs.

Ramanathan: ILR 29 Cal 334 = 29 IA 43; Jaswant vs. Sheo Narain, 21 IA; Ganga Prasad vs. Inderjit, 23 WR 390; Rajeshwari vs. Bal Kishen, 14 IA 142; Dy. Commr. Vs. Ram Prasad, 26 IA 254; Dwarkadass vs. Janki Dass, 6 MIA 88; Imambandi vs. Mota Suddi, AIR 1918 PC 11; Gopal vs. Sri Thakurji, AIR 1943 PC 83; Sorabjee vs. Koonmarjee, 1 MIA 47; Seth Lakshmi vs. Seth Indra, 13 MIA 365; Srikishen vs. Harikishen, 5 MIA 432; Mulka vs. Tekaeth, 14 WR 24 (PC); Seth Maganmal vs. Darbari Lal, AIR 1929 PC 39; Farraquharson vs. Wwarka, 14 MIA 259.

The Supreme Court of India too had occasion to deal with this section. We have already referred to CBI vs. V.C. Shukla, AIR 1998 SC 1406.

In State Bank of India vs. Ramayanapu Krishna Rao: (AIR 1995 SC 244), the Supreme Court observed that the certified copy of ledger accounts maintained in the regular course of business is admissible under section 34 and can be used as a piece of evidence corroborating any substantive evidence on record indicating liability if any. That was a case of a Bank. Otherwise, ordinarily, in courts, entries in a Day Book, contained in the regular course of business are given greater evidentiary value than mere entries in ledgers. Earlier, in Mahasay vs. Narendra: AIR 1953 SC 431, the Supreme Court stated that loose sheets of account have not the same probative force as books of accounts regularly kept. No particular form of books of account is generally prescribed, although books are far more satisfactory when kept in the form of daily entries of debits and credits in a day book or journal. But it must be a regular account-book as would explain itself and as appears on its face to create a liability in an account with the party against whom it is offered, and not to be a mere memorandum for

some other purpose. Hence, mere loose sheets of papers are not admissible and a single entry does not constitute an account book (Jones, section 575). Books of account must be held to have been proved even in the absence of their being written, upon proof of their being properly maintained and kept: Ramjanki vs. Juggilal: AIR 1971 SC 2551. Where a debit entry at the end of a page showed sale of certain goods written closely in a cramped manner and in a different ink, it was not accepted: Venkata Mallayya vs. Ramaswami & Co.: AIR 1964 SC 818.

In S vs. Ganeswara: AIR 1963 SC 1850, it was held that the entries, though relevant, are however, not by themselves sufficient to charge anyone with liability. The entry in A's account books, though in his own favour as a piece of evidence may be taken into consideration along with the evidence of A that the amount was paid by A to B. In Chandradhar vs. Gauhati Bank, AIR 1967 SC 1058, it was held that mere entries in Banks books of account or copies thereof are not sufficient to charge a person with liability except where the person concerned accepts the correctness of entries. In Dadarao vs. State, AIR 1974 SC 388, it was held that mere entries of account are not sufficient evidence of entrustment so as to substantiate a plea of breach of trust, AIR 1974 SC 388.

Non-existence of entry in books of account was held to be relevant under sections 5 and 11 in State vs. C. Ganeswara: AIR 1963 SC 1850. In State Bank of India vs. Yammam Gouramani Singh: AIR 1994 SC 1644, it was held that entries in books of account corroborated by the evidence of the Branch Manager and other bank officials was sufficient proof of the loan transaction.

It may here be noted that for Banker's Books, special provision is made in the Banker's Books Evidence Act (19/1889 as amended by Act 12/1900). It has also been amended by the Information and Technology Act (21/2000). After Barker vs. Wilson: 1980(1) WLR 884, regarding the applicability to 'microfilm' of Banker's Books, the same has been given legislative approval by Banking Act, 1987; Trust Savings Banks Act, 1981; Building Solicitors Act, 1986. 'Banker's Books' now include (i) ledgers (ii) day book (iii) cash books (iv) account books (v) other records used in the ordinary business of the Bank whether those records are kept on microfilm, magnetic tape or any other form of mechanical data retrieval mechanism. As to entries, see also section 54 of the Indian Companies Act (1/1956), Or 7 CPC.

In England, it has been held that a person's medical record kept by a National Health Service Hospital is not 'a record relating to trade or business' within section 1(1)(a) of the (English) Criminal Evidence Act, 1965 (See R vs. Caryden 1978 (2) All ER 700 (CA)). However, under that Act, Bills of Lading and cargo manifest have been held to be business records (R vs. Sullivan: 1978 (2) All ER 718 (IA)).

Having considered the above case law and other aspects, we do not think any further amendment of section 34 is needed. We, therefore, agree with conclusion in the 69th Report (see para 13.27 of 69th Report) that the words "such statements" be substituted by the words "such entries".

Section 35:

Section 35 refers to the relevancy of entry in Public record made in the performance of duty. As amended by Act 21/2000, it reads as follows:

> "S.35: An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept, is itself a relevant fact."

There are no illustrations below the section.

In the 69th Report, this section is referred to in Chapter 14. Part I thereof is introductory, Part II refers to English law, Part III to 'two classes of entries', Part IV to 'illustrations' with reference to case law, Part V to 'other provisions' and Part VI to 'Recommendations'. The recommendation is only one of form, namely, that the entry which must be made in performance of a statutory duty is applicable only to the latter-half of the section. Under the earlier part of section 35, the emphasis is only on "public or official character" of the entry and not to its statutory character. The section is split up into clause (a) and clause (b) as stated below (see para 14.20 of that Report). In other words, the clause 'specially enjoined' does not qualify public servants.

'Public servant' is defined in section 21 of the Indian Penal Code. Entries must have been made by a public servant or by a person so enjoined by a law. The acts or records of 'public functionaries' are dealt with in

section 74 as 'public documents'. The entry under section 34 may be regarding a fact in issue or a relevant fact.

The section is based upon the assumption that public officials must have performed an official duty correctly and that the entries made by persons statutorily enjoined also do it correctly and after lapse of several years, they may not be available to give evidence. Section 35 refers to book, register or record.

Public register or record kept outside India or under foreign law are within section 35 as decided by case law. The duty may be enjoined by Act or Rules.

First information taken under section 154 Code of Criminal Procedure, 1973 amounts to an entry by a public servant in the discharge of his official duty and falls within section 35 but it is not substantive evidence and is not evidence of facts it mentions. It can be used merely by way of previous statement for corroboration (section 157 of Evidence Act) or contradiction (sec. 145 of Evidence Act) (Hasib vs. State: AIR 1972 SC 283).

Absence of an entry does not fall within sec. 35 but may fall under sec. 9 or sec. 11.

There are a large number of decisions of the Privy Council under sec. 35. There are also a large number of a decisions of the Supreme Court rendered before 1977 when the 69th Report was submitted and between 1997

to 2002. We are not referring to them in as much as some of them apply the provisions of sec. 35 to make certain record, register relevant and some not.

See in this connection sec. 7 of the English Civil Evidence Act, 1968 (Phipson, 15th Ed, 2000 Chapter 36 and para 44.85 at p. 1321-1322).

Suffice it to say that we agree with the recommendation in the 69th Report (see para 14.20) that sec. 35 be revised with slight modification as follows:

> **Relevancy of entry in public record or in electronic record made in performance of public duty**
>
> "**35.** An entry in any public or other official book, register, record or electronic record stating a fact in issue or relevant fact, and made by
> (a) a public servant in the discharge of his official duty, or
> (b) any other person in performance of a duty specially enjoined by the law of the country in which such book, register, record or electronic record is kept,
>
> is itself a relevant fact."

Section 36:

Sec. 36 refers to relevancy of statements in maps, charts and plans and reads (as amended in 1948, 1950) as follows:

> "S.36: Statement of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts."

In the 69th Report, it was pointed out firstly (see para 14.32) that the words 'maps or plans or charts' must appear in the first and second parts of sec. 36. As at present, in the first part which refers to those offered for public sale, 'plans' are not included while in the second part which refers to those made under the authority of Government, 'charts' are not included.

Secondly, it was stated (see para 14.34) that the opening part of the section which refers to "statements of facts in issue or relevant facts" is governed by the words in the latter part, namely, "as to matters usually represented or stated" and that this idea must be prominently brought out by suitable amendment.

In this context, we may refer to Ram Kishore Sen vs. Union of India, AIR 1966 SC 644 and Dharam Singh vs. State of UP, 1962 Suppl (3) SCR 769 to the effect that the section deals with relevancy only of matters 'usually represented or stated' by such plans, maps or charts and not if such plans or charts or maps are prepared for the specific purpose of a litigation between the Government and a particular person. In that event, the facts stated in the plans or charts or maps will have to be established by the Government independently.

We may add that under Order 26 R10, Code of Civil Procedure, 1908, a map prepared by a Commissioner who makes a local investigation is by itself evidence.

We do not think it necessary to accept the second part of the recommendation of the 69th report. Further, the words "as to matters usually represented or stated" cannot easily be particularized.

We, therefore, recommend, that the recommendations made in the 69th report be accepted by referring to the words 'maps, charts and plans' in both parts of sec. 36 and further sec. 36 may be recast as follows:

Relevancy of statements in maps, charts and plans

"**36**. Statements of facts in issue or relevant facts -

(a) made in published maps, charts or plans generally offered for public sale; or

(b) contained in published maps, charts or plan made under the authority of the Central Government or any State Government,

as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts."

We recommend accordingly.

Section 37:

Sec. 37 refers to the relevancy of statements as to facts of a 'public nature' contained in certain Acts or Notifications. It reads as follows:

"Sec.37: When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament of the United Kingdom, or

in any Central Act, Provincial Act or a State Act or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty, is a relevant fact."

In the 69th Report it was suggested (para 14.43) that the relevant parts of the section referring to Parliament of UK or London Gazette or Dominion or Crown Representative should be separated and be covered by addition of a clause before these clauses "such as respects the period before the 15th day of August, 1947".

There can be no difficulty in accepting this recommendation. The section has then to be revised as follows:

Relevancy of statement as to fact of public nature contained in certain Acts or notifications

"37. When the Court has to form an opinion, as to the existence of any fact of a public nature, any statement of it made in a recital contained –

(a) in any Central Act, Provincial Act, or a State Act, or

(b) in a Government notification appearing in the Official Gazette, or

(c) as respects the period before 15th day of August, 1947 –

(i) in any Act of Parliament of the United Kingdom, or

(ii) in a Government notification appearing in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty, or

(iii) in a notification by the Crown Representative appearing in the Official Gazette,

is a relevant fact."

Section 38:

Sec. 38 which is the last one under the heading 'statements made under special circumstances', refers to 'relevancy of statements as to any law contained in law books'. It reads as follows:

> "Sec.38: When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant."

In the 69th Report, a pertinent point was raised with reference to this section, namely, that so far as the proof as to 'law of any country', the Court may require proof in the manner mentioned in this section (or by calling an expert) but that so far as the law in force in India is concerned, that is a matter which the Court is bound to take 'judicial notice' of and need not be proved. The 69th Report pointed out that Indian law cannot be a matter for evidence, that it is the duty of the Court to decide the question according to the Indian legal system and that cannot be a matter of proof, such as by expert evidence or under this section. Best on 'Evidence' was quoted to say that courts are bound to know the 'general law' of the land, without proof. (Sec. 57 also speaks of facts which a court is bound to take judicial notice of.)

So far as proof of rulings of Indian courts are concerned, it is again not a matter of evidence. It is a question of authority and under the Indian Law Reports Act (Act 18 of 1875), sec. 3 provides that a court is not bound to hear a citation of a legal report "other than a report published under the authority of any State Government". (May be, the court may look into private law reports though not bound to do so.)

In para 14.59 of the 69th Report, it was recommended that sec. 38 is to be 'narrowed down, so as to exclude Indian law from its application' and that to achieve this object, after the words 'any country', the words 'other than India' should be added. Sarkar (15th Ed, 1999, p. 809) also refers to this anomaly, namely, that the latter part of sec. 38 is inconsistent with sec. 3 of the Indian Law Reports Act.

Vepa P. Sarathi, in his 'Law of Evidence' (5th Ed, 2002, p.169) says that 'Indian courts take judicial notice of Indian law, but with respect to foreign law, it must be proved before the court under this section or calling an expert'.

Phipson (15th Ed, 1999, para 2.11) states that courts in England take judicial notice of every branch of unwritten law (i.e. apart from statutory law) obtaining in England and Ireland (sec. 19 of Supreme Court Act, 1981). He says:

> "Thus, if in a common law court, points of equity or of parliamentary, ecclesiastical or Admiralty law arise, even before the Judicature Acts, they had to be determined <u>not</u> by calling experts, but by the court

itself, within its own knowledge or by inquiry, or by hearing authority and argument. Scots, colonial or foreign law, however, are not judicially noticed but must be proved as a fact by skilled witnesses or by appropriate reference to the courts of those countries, except Scots law and the law of Northern Ireland in the House of Lords, or colonial law in the Privy Council, when what was a question of fact in the court below to be proved by evidence becomes a question of law to be judicially noticed."

However, in England, the law of the European Economic Community is an exception and is to be taken judicial notice of and is not to be treated as 'foreign law' because of sec. 3 Sch. 11 Part I of the European Communities Act, 1972. Similarly, the European Judgments Convention, 1968 and the 1971 Protocol and the Accession Convention as well as the decisions of the European Court of Justice, relating to these Conventions, are taken judicial notice of because of sec. 2(1) and 3 of the Civil Jurisdiction and Judgments Act, 1982.

Sec. 4(2) of the English Civil Evidence Act, 1972 refers to 'questions as to the law of any country or territory outside the United Kingdom'.

We, accordingly, agree with the recommendation in para 14.59 of the 69th Report but instead of the words 'other than India', the words 'outside India' are appropriate (as in the English Act of 1972) and have to be added after the words 'any country'.

Section 39:

This single section is dealt with under the heading 'How much of a statement is to be proved'. It reads as follows (as amended by Act 21/2000):

> "S.39: What evidence to be given when statement forms part of a conversation, document, electronic record, book or series of letters or papers: When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of an electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, electronic record, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made."

In a very interesting discussion, the 69th Report, reviewed the corresponding English and American law on the subject and suggested some 'improvements' to this section. While a party should be restricted to 'so much' of the "statement, conversation, document, electronic record, book or series of letters or papers", the question is whether the words "as the Court considers necessary" gives a discretion to the court and if so, to what extent? The more important question is whether the opposite party has a 'right' to place the entire statement, conversation, document etc. before the court, for a proper understanding of the "nature and effect" of the statement etc.

The section deals with two interesting situations, namely, (i) that a party should not be allowed to place before court wasteful or inadmissible

parts of a statement, conversation etc. and (ii) that he does not rely on a truncated parts of the statement, conversation etc.

The proposed 'improvement' concerns this second aspect and the need to provide a right to the opposite party. Taylor states (sec. 733) that basically if a part of a conversation is relied upon as an admission, the adverse party can give evidence only as to so much of the same conversation as may explain or qualify the matter already before the court. But, there are exceptions. Sarkar (15th Ed, 1999 p.814) refers to the decision of Abbot CJ in Queen's case (1820) 2 B&B 297 where the learned Judge refers to conversation which a witness may have had with a party to the suit and one with a third person. In the first case, if the conversation with a party to the suit is itself evidence against him (the party), then the party has a right to lay before the court the whole of the conversation and not merely so much as may explain or qualify the matter introduced by the previous examination, but even matters not properly connected with the part introduced in the previous examination, provided it related to the 'subject matter of the suit'. On the other hand, as held in Prince vs. Samo: 7 Ad&E 627, if it is the case of a non-party witness who has given evidence, he cannot be cross-examined with respect to other unconnected assertions of the plaintiff.

Sarkar (p.814-815) also quotes Wigmore (para 2113) to say that the "opponent against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal, a complete understanding of the total tenor and effect of the utterance. There is much opportunity for difference of opinion whether the proponent in the first instance must put the whole. But there is and could be

no difference of opinion as to the opponent's right, if a part only has been put in, himself to put in the remainder". This is subject to three conditions (a) No utterance irrelevant to the issue is receivable; (b) No more of the remainder of the utterance that concerns the same subject and is explanatory of the first part, is receivable; (c) The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.

Sarkar (see p.815) quotes Norton (pp.203-204) to say that the judge is therefore a referee, by whose decision is limited the quantity of the document etc. containing the statements which shall be put in evidence. His discretion is to be guided by the principle of letting so much, and so much only as makes clear "the nature of the effect of the statement and the circumstances under which it was made".

In the 69th Report, it is stated (see para 15.10) that while the principle has been adequately reflected in sec. 39,

> "the section could be improved in one respect, by an express provision spelling out the rights of the opposite party."
>
> The Report then quotes sec. 1854 of California Code as follows:
>
> "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the subject may be enquired into by the other; thus, when a letter is read, the answer may be given, and when a detached act, declaration, conversation, or writing is given in

evidence, any other act, declaration, conversation or writing which is necessary to make it understood may also be given in evidence."

The Montana Code provides in sec. 3130:

"When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be enquired into by the other; thus, when a letter is read, all other matters on the same subject between the parties may be given."

The 69th Report then states (see para 15.14 and 15.20) that it is not as if sec. 39 gives a discretion to the court. It uses the words 'court considers it necessary'. The Report refers to police diaries and then to the Full Bench decision of the Allahabad High court in Queen Empress vs. Mannu (1897) ILR 19 All 390 (para 15.27) where the majority treated the section as giving a 'discretion' while the minority view of P.C. Banerji J was that the accused had the right which he may use at his discretion. The point here was examined from the point of view concerning use of 'police diaries' by the prosecution for 'refreshing memory'.

Sec. 172 of the Code (Criminal Procedure Code, 1898) provides that if a police officer used a diary to refresh his memory, the Evidence Act would apply, bringing into effect sec. 161 of the Evidence Act and also sec. 145. Sec. 161 Evidence Act reads as follows:

"Sec.161. Right of adverse party as to writing used to refresh memory: Any writing referred to under the provisions of the two last

preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon."

Section 145 reads as follows:

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

The 69th Report says that the majority in the Allahabad case while holding that the court has a 'discretion' did not refer to sec. 161 and 145 of the Evidence Act. The Report, therefore, recommended that a subsection be added in sec. 39 that where a party has failed to give evidence, any part of the statement, conversation etc. which is necessary, as aforesaid, the other party may give that part in evidence. The proviso in the existing sec. 39 'as the court considers necessary' is to be deleted. Discretion of the court is substituted by discretion given to the other party. Sec. 39 is split up into two subsections and a revised sec. 39 is recommended as follows (the underlined words are new):

"39. (1) When any statement of which evidence is given –

(a) forms part of a longer statement or of a conversation or part of an isolated document, or

(b) is contained in a document which forms part of a book or of a connected series of letters or papers,

then, subject to the provisions of subsection (2), the party giving evidence of the statement shall give in evidence so much, and no more, of the statement, conversation, document, electronic record, book or series of letters or papers as is necessary in that particular case to the full understanding of the nature and effect of the statement and of the circumstances under which it was made.

(2) Where such party has failed to give in evidence any part of the statement, conversation, document, electronic record, book or series of letters or papers which is necessary as aforesaid, the other party may give that part in evidence."

We agree with the above recommendation subject to the further amendment consequent to Act 21/2000 by adding the words 'or is contained in part of electronic record' after the word 'book' in proposed clause (b) of subsection (1) and later adding the words 'electronic record' after the word 'document' in the same subsection (1). We also recommend that the words 'electronic record' be added after the word 'document' in proposed subsection (2) also.

The revised section 39 should read as follows:

HOW MUCH OF A STATEMENT IS TO BE PROVED

What evidence should be given when statement forms part of a conversation,electronic records,document,book or series of letters or papers

"**39.**(1) When any statement of which evidence is given –

(a) forms part of a longer statement or of a conversation or part of an isolated document or part of an electronic record, or
(b) is contained in a document which forms part of a book or is contained in part of an electronic record or of a connected series of letters or papers,

then, subject to the provisions of subsection (2), the party giving evidence of the statement shall give in evidence so much, and no more of the statement, conversation, document, electronic record, book or series of letters or papers as is necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

(2) Where such party has failed to give in evidence any part of the statement, conversation, document, electronic record, book or series of letters or papers which is necessary as aforesaid, the other party may give that part in evidence."

Sections 40 to 44: Judgments of Courts of Justice, when relevant

Section 40 mentions where 'previous judgments relevant to bar a second suit or trial'. It reads as follows:

"S.40: The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial."

Sec. 40 deals with the principle of res judicata in civil cases or autre fois acquit or autre fois convict, in criminal cases. The section deals with the relevancy of an earlier judgment, order or decree for deciding whether a court can take cognizance of a suit or holding a trial. However, the conditions under which a former judgment, order or decree will prevent a civil or criminal court from taking cognizance of a suit or holding a trial, do not belong to the Law of Evidence but are contained in sec. 10-13 and Order 2 Rule 2 of the Code of Civil Procedure, 1908 and to principles of autre fois acquit in sec. 300 of the Code of Criminal Procedure, 1973. Sec. 298 of the latter Code prescribes the mode of proving a previous conviction or acquittal. It may be noted that in civil cases trial of a particular issue decided earlier may be barred. Even in criminal cases, there may be judgments which bar the trial, not of a whole case, but of a particular issue, known as 'issue estoppel'.

The section, it was pointed out in the 69th Report (see para 16.7 to 16.11) ought to have referred to the bar of 'issues' also rather than merely to suits or trials of a whole case. Reference was made to the Full Bench decision in Gujjulal vs. Fateh Lal: (1880) ILR 6 Cal 171 at p.190 and to a similar defect to sec. 2 of Act VIII of 1859 as was pointed out by the Privy Council in Soojo Monee vs. Saddanund 12 Beng LR 304 (PC). The speech of Sir James Stephen dt. March 12, 1872 when the Act was introduced speaks of previous decision on matters of fact relevant to the issue (see Sarkar, Evidence, 15th Ed, 1999, pp. 816-817).

The present sec. 40 is intended to refer to judgments inter partes (and not to the judgments mentioned in sec. 41), for which no provision is made in the Code of Civil Procedure.

In this connection, reference may be made to the recent judgment of the Supreme Court in K.G. Premshankar v. Inspector of Police: 2002 (6) SCALE 371 which refers to secs. 40, 41, 42 and 43 and to the relevance of previous judgment in a civil case, in a subsequent criminal case. It is not always conclusive though it is always relevant.

We, agree with the recommendation in para 16.12 of the 69th Report that sec. 40 be revised as follows:

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT

Previous Judgments relevant to bar a second suit or trial

> **"40**. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or issue or holding a trial or determining a question, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or issue, or to hold such trial or determine such question, as the case may be."

Section 41:

Sec. 41 is lengthy and deals with relevancy of certain judgments in probate, matrimonial, admiralty or insolvency jurisdictions, which confer upon a person any legal character, or which declares any person to be

entitled to any such character, or to be entitled to any specific thing, - not as against any specified person but – absolutely, when the existence of any such legal character, or the title of any such person to any such thing, is in issue. Such judgment, order or decree, the section says, is "conclusive proof". The words 'judgment in rem' is not used in the section and the English concept of judgment in rem is not identical with what is contained in sec. 41 (see para 16.29 to 16.31 of the 69th Report). The Select Committee stated that the language of the section is based on the judgment of Sir Barnes Peacock CJ in Kanhailal vs. Radha Churn: 7 WR 338 (Cal) (see Report of Select Committee in Gazette of India, 1st July 1871, Part V at p. 273 (quoted in Sarkar, 15th Ed, 1999 at p. 827). This sec. 41 refers only to four types of cases and the section is based on public policy in as much as the peace of society requires that matters of social status should not be left in continual doubt (Taylor, s1676).

Sec. 41 is not restricted to a court in India but includes a foreign court competent to pronounce judgment in respect of the four types of subject matter.

Sarkar says (ibid p. 833) that sec. 41 does not expressly mention courts-martial, but courts-martial – other than courts-martial concerned under the Army Act – are included in the operation of the Act (sec. 1).

Judgments on questions of legitimacy, adoption or partnership or fixation of standard rent and the like – which are outside the four enumerated categories – are not in rem.

The 69th Report, however, discussed lunacy jurisdiction and recommended (para 16.32) that as it is not one of the four enumerated categories, the order in that behalf under the Indian Lunacy Act is not a judgment in rem though it may be binding between parties and privies.

We do not, however, think that this classification is necessary for it is no different from the cases of legitimacy, adoption etc. referred to above.

In para 16.33 to 16.37, the 69th Report referred to 'Order refusing probate' and observed that negative orders do not fall within sec. 41. The observation in the decision of the Madras High Court in Chinnaswami vs. Harihara Badra (1893) 16 Mad 380 that a refusal to grant probate took away the character of executors or legatees or beneficiaries under a will and this was also conclusive. The Bombay High Court in Ganesh vs. Ram Chandra, (1887) ILR 21 Bom 563 and in Kalyan Chand vs. Sita Bai, AIR 1914 Bom 8 (FB) took the opposite view. In the former case, the said High Court in its probate jurisdiction held that the execution of the will was not proved. The judgment was held not to bar a suit by the same applicant as a person who was a beneficiary under the will. The court held:

> "From a refusal to grant probate, it by no means follows that in the opinion of the court, the will is not a genuine will of the testator."

In the second case, the probate was refused on the ground the testator was of unsound mind. The widow brought a latter suit as executor de son tort against the defendant claiming to be executors under the will. The court held that sec. 41 was not applicable and that 'the finding of a court that an

attempted proof has failed is not a judgment and that the defendant executors could still set up the will.

In para 16.37, the 69th Report recommended clarification in sec. 41 on this aspect of refusal to grant a probate. We are also of the view that this had to be done in as much otherwise there can be argument in favour of the Madras High Court's view, 'probate' being one of the four subjects dealt with in sec. 41.

[Sarkar (ibid, p. 830) says that a finding in probate proceedings that the due execution of a will has not been proved, should not be treated as a final decision upon the genuineness of the will and will not preclude a fresh application on the part of the executors, when they are in a position to support it with more ample proof, quoting Ganesh vs. Ram Chandra ILR 21 Bom 563 already quoted. Kalyan vs. Sitabai, ILR 38 Bom 309 (FB) was also referred to.]

We accordingly recommend that an Explanation therefore be inserted below sec. 41 to the following effect:

> "Explanation: An order refusing to grant probate does not fall within the scope of the section."

Section 42:

This section deals with the relevancy and effect of judgments, orders or decrees, other than those mentioned in sec. 41 and declares them not

conclusive proof but only relevant if they relate to matters of public nature relevant to the inquiry.

There is an illustration below sec. 42 which refers to a suit by A against B alleging existence of a public right pleaded by B over A's land. The fact that in a suit by A against C, C claimed a public right was relevant but not conclusive proof of the right of way.

This is a principle drawn from English law and is an exception to the general rule that persons not parties or privies to a judgment shall not be affected or prejudiced thereby.

The Supreme Court, in V. Shankarayya vs. N.S. Pattadadevan, AIR 1995 SC 2187 applied sec. 42 to a judgment relating to the validity of nomination and installation of a person to the office of Paddayya. An earlier judgment in that behalf of the Privy Council of a native State was treated as relevant, though not conclusive, under sec. 42.

Vepa P. Sarathi summarises (Law of Evidence, 2002, p. 173) as follows as to the effect of sec. 41 to 44 and sec. 13:

> "The result may be stated thus: (a) If a judgment comes under sec. 41, it is relevant as well as conclusive even against a third party; (b) If it comes under sec. 42, it is relevant as against a third party; (c) All other judgments are relevant as between the parties or their representatives only, under sec. 40."

The author adds:

> "The existence of such judgments, i.e. those mentioned in (c) would be relevant as against third parties, if such existence of a conclusion is relevant under some section of the Act relating to relevancy, as a fact in issue, or a motive under sec. 8 or a transaction under sec. 13."

We have already discussed about the relevancy of a judgment not inter partes while dealing with sec. 13, as a 'transaction' in which a right, custom etc. is recognized etc.

The 69th Report deals with the relevancy of a judgment of a civil court in a criminal case and vice versa. Sri Sarathi also discusses sec. 40 to 42 and also sec. 43 this aspect (ibid p. 173) and states as follows:

> "If the judgment of the civil court comes under sec. 41 or sec. 42, it would be relevant in a criminal case also. But if it does not come under these two sections, it cannot be relevant, because sec. 40 cannot apply. The application of sec. 40 depends upon sec. 11 of the Civil Procedure Code and sec. 300 of the Criminal Procedure Code. Under sec. 11, Civil Procedure Code, a judgment of a civil court in certain circumstances is relevant in another civil court, and under sec. 300, Criminal Procedure Code, a judgment of one criminal court in certain circumstances is relevant in another criminal court, but the judgment of a civil court is not made relevant evidence under either of these two sections in a criminal court. The existence of a judgment, i.e. the

conclusion in a judgment would, be relevant under the second part of sec. 43 and as shown by illustration (d)."

Referring to the converse position, the author says:

"A judgment of a criminal court cannot come under sec. 41 and 42. Thus it can never be relevant under these two sections. Under sec. 40, as shown above, a judgment of a criminal court can only be relevant in another criminal case and not in a civil case. The existence of a judgment of a criminal court, however, may be relevant under the second part of sec. 43."

In Anil Behari vs. Shrimati Latika Bala, AIR 1955 SC 566, it was held that the judgment of a criminal court convicting a person for murder of the testator (his father) is no proof of that fact of intestacy in a proceeding to revoke a probate. The judgment was relevant only to show that that was a trial resulting in the conviction and sentence of the son. The question of murder by him is to be decided again in the case relating to grant of probate.

However, under sec. 145 CrPC, judgment of a criminal court was treated as relevant in a latter civil case to prove certain facts under sec. 13 (Dinomoni vs. Brojomohini, ILR 29 Cal 187). This case has been discussed in extenso under sec. 13.

We agree with para 16.47 of the 69th Report that no amendment is necessary in sec. 42.

Sec. 42A proposed in 69th Report but not finally recommended

In the light of above discussion, question arises whether there should be a separate provision for making judgments in a criminal case relevant in civil cases. The 69th Report considers this aspect in para 16.48 etc. The English statute of 1968 was considered and in para 16.67 the suggested section sec. 42A is drafted but it is said finally

> "After considerable discussion; we have decided not to recommend any such change."

In England, it was also the law in Hollington vs. Hewthorn 1943 (1) KB 587 that a previous conviction is irrelevant in a latter civil case. That was a case of collision between two cars. In a subsequent action for damages, the earlier conviction was treated as irrelevant.

In England, by sec. 11 and 13 of the Civil Evidence Act, 1968, the common law rule was changed. Sec. 11 related to 'conviction as evidence in civil proceedings' and sec. 12 of 'findings of adultery and maternity as evidence in civil proceedings'.

In the 69th Report, in para 16.59 etc., the case law after the 1968 Amendment in UK was referred to. Then sec. 42A was formulated and finally, it was said that it was not being recommended after "further discussion". No reasons were given for giving up the proposal for adding sec. 42A.

Now we find that the UK 1968 Amendment was carried into Civil Evidence Act, 1995 and it is stated by Phipson (15th Ed, 1999, para 38.78) "but the legislature accepted the view that these provisions by themselves would not be sufficient". Phipson says (para 38.78):

> "Whichever policy is regarded as preferable, it is submitted that there are intelligible reasons for that adopted by the courts, and the various factors which have been outlined in this paragraph provide a composite rationale for the doctrine (which is still effective in relation to a wide range of verdicts) which was not sufficiently articulated in Hollington vs. F. Hewthorn & Co.Ltd. 1943 KB 587. Notwithstanding recent criticisms of the decisions which have high authority (Hunter vs. Chief Constable of the West midlands 1982 AC 529, Hollington vs. F. Hewthorn & Co. was treated as clear authority by the Privy Council in Hui Chi-ming vs. R: 1992 (1) AC 34. Consequently, it is probably safer to say that the rule still applies in all cases not covered by common law exceptions (admiralty, matrimonial, bankruptcy, etc.) or the various statutory exceptions."

If in England, there is, even after the amendments, a feeling that the new provisions are not sufficient and the House of Lords in 1982 and the Privy Council in 1992 have taken divergent views in relation to the correctness or applicability of Hollington, we are of the view that the 69th Report did well in not proceeding with the proposed sec. 42A to make previous convictions admissible in latter cases. We leave the matter at that.

Section 43:

We had briefly referred to sec. 43 while discussing sec. 42 but now we shall refer to it specifically. Sec. 43 refers to 'Judgments etc., other than those mentioned in sec. 40 to 42, when relevant. It reads as follows:

"Sec.43: Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such Judgment, order or decree, is

a fact in issue or

is relevant under some other provision of this Act."

The section deals with Judgments not inter partes. There are six illustrations below sec. 43. Illustrations (a), (b), (c) refers to situations where an earlier Judgment is irrelevant in a latter case. Illustration (a) refers to a situation where both cases are civil in nature, (b) to an earlier criminal case and a latter civil case and (c) again to an earlier criminal case and a latter civil case.

Illustrations (d), (e), (f) deal with situations where an earlier Judgment is relevant in a latter case, otherwise than under sec. 40, 41 and 42. Ill. (d) refers to an earlier civil case and a latter criminal case, (e) with an earlier criminal case and a latter criminal case and (f) when both are again criminal cases. In (d), relevancy is accepted because the existence of the earlier Judgment in the civil case showed that 'motive' under sec. 8 from the latter crime; in (e), relevancy is accepted because it is a 'fact in issue' in the latter case; in (f) relevancy is accepted because the earlier judgment is evidence of motive under sec. 8 in the latter case.

Sarkar explains (15th Ed, 1999 p. 838) that in sec. 40 to 42, the Act referred to specific situations; sec. 40 to situations where an earlier judgment barred a latter one (both in civil and criminal matters); sec. 41 to judgments in four classes where they are conclusive against all the world; sec. 42 to judgment of a public nature which are valid against strangers; and now sec. 43 refers to a general rule that all other judgments not inter partes are irrelevant unless when their existence is a fact in issue, or when it is relevant under the rules of relevancy contained in other provisions of the Act, such as sec. 8 (which refers to motive, preparation and previous or subsequent conduct); sec. 11 (which says when facts not otherwise relevant become relevant); sec. 13 (when existence of right or custom is in question then any transaction or particular instances where the right or custom is claimed, recognized etc. become relevant), sec. 54 Expl. (2), when a previous conviction is relevant as evidence of bad character), etc. In such exceptional cases, judgments, not inter partes, are relevant. The view of the majority Full Bench in Jaggulal vs. Fatehlal: ILR 6 Cal 171 that a judgment cannot be a transaction is no longer valid.

The section has been adverted in S.P.E. Madras vs. K.V. Sundara Vedu: AIR 1978 SC 1017; Jakati vs. Borkar: AIR 1959 SC 282. In land acquisition cases judgments not inter partes are relevant if they relate to similar situation of the property and contain determination of value on dates fairly proximate to the relevant date. (Improvement Trust vs. H. Narayanaih AIR 1976 SC 2403).

In Brijbasilal vs. State: AIR 1979 SC 1080, in a document, the accused confessed to misappropriation of 3 items of money. In a Judgment

in a previous case relating to two items, the confession was found not to be voluntary and accused was acquitted. In a subsequent case relating to the third item, the earlier judgment was held admissible to show the issue in question in that case and the decision thereof. In the circumstances of the case, the document containing the confession was found to be of little value and should not form the sole basis of conviction.

In the 69th Report, it was stated in para 16.71 that the only change required in sec. 43 (which refers to sec. 40, 41 and 42), was also to refer to the proposed sec. 42A. This paragraph must have been drafted before the last sub-para of para 16.67 was included, which clearly stated: "After considerable discussion, we have decided not to recommend any such change" (in sec. 42A). After the above sub-para of para 16.67, the Commission ought to have deleted para 16.71 for it is no longer necessary to include sec. 42A in the list of sections referred to in sec. 43.

Therefore, no change is necessary in sec. 43.

(In fact, para 16.95, 16.97, 16.145 have not unfortunately chosen to delete reference to sec. 42A proposed sec. 43A of the 69th Report. This section was proposed in the 69th Report (see paras 16.72 and 16.73) for treating as relevant the summary of pleadings in an earlier judgment. The recommendation was based upon the suggestion of the Civil Justice Committee (pp. 497-501, ch. 42, para 2.3) to make summary of pleadings relevant so as to get over the judgment of the Madras High Court in Tripurna Seethapati Rao Dora vs. Rokkam Venkanna Dora (citation not given): 0rder 20 R4 of the Code of Civil Procedure requires a concise statement of the

case to be given in the judgment and this usually takes the form of a summary of the pleadings. The Committee said: "it is difficult to see why such recitals cannot be treated as coming within the purview of sec. 35 (Relevancy of entry is public record, made in performance of duty)."

We find (see u/s 35 in Sarkar, 15th Ed, p. 788-789) that the Calcutta High Court did hold such a summary of pleading relevant: "when the decree in a former suit of 1818 against the defendants' predecessor-in-title contained an abstract of the pleadings in the case, the abstract was admitted to rely on an admission made by the defendant's predecessor-in-title (Parbutty vs. Purna, ILR 9 Cal 586 followed in Bhaya vs. Pande, 3 Cal LJ 521; Thama vs. Kondan, ILR 15 Mad 378. A statement amounting to an admission by the predecessor-in-title of the opposite party, contained in a judgment, is evidence u/s 35 according to Krishnaswami vs. Rajagopala, ILR 18 Mad 78. This was followed in Bihar Board vs. Madan, AIR 199 Pat 23. The Privy Council observed in Collector of Gorakhpur vs. Ram Sundar, AIR 1934 PC 157 (which we have quoted u/s 13) that "there is much to be said for this view of sec. 35". This view was followed in Ramaswami vs. Subbaraya, AIR 1948 Mad 388 and in Chandulal vs. Pushkar, AIR 1952 Nag 271.

In the light of the above law, after the judgment in Tripurna Seethapathi Rao's case, we are of the view that there is no need to have a separate sec. 43A to make summary of pleadings contained in an earlier judgment relevant. The summary prepared by the court is relevant u/s 35, as part of a public record. In the 69th Report, in paras 16.72 and 16.73, the above change in the case law and the observation of the Privy Council were

not noticed. We, therefore, do not think that sec. 43A as proposed in the 69th Report, is necessary.

Section 44:

This section says 'Fraud or collusion in obtaining judgment, or incompetency of court, may be proved'. It reads:

> "44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sec. 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion."

In the 69th Report, after referring to a minority view in a few cases that proof of perjured evidence could be a ground, the said view was not accepted in the light of the dictum of Sadasiva Ayyar J in Kadirvelu Nainar vs. Kuppuswami Naickar, 1919 Mad 1044 that if such a principle is to be accepted, there would be no end to litigation in India.

We may also point out that 'fraud' under sec. 44 must be extrinsic fraud, such as prevented a party from placing his evidence before court or in presenting his case. Similarly, gross negligence in conducting a prior case is no ground for fresh litigation except in the case of negligence of the guardian of a minor for which special provisions are contained in the Code of Civil Procedure, 1908 and the Limitation Act, 1963.

The 69th Report did not suggest any changes in sec. 44 except to add proposed sec. 44A. We do not propose any change in section 44.

Section 44A (as proposed in the 69th Report)

Proposal in 69th Report is for adding section 44A relating to 'gross negligence of a guardian or next friend of a minor' as basis for setting aside or ignoring an earlier judgment against the minor. (This is to apply to persons under other disabilities also)

In the above Report, it was felt that there was some conflict of opinion in the High Courts as to the right of a minor or other person under disability to sue to set aside a judgment on the ground of negligence of the guardian ad litem or the next friend. It was said that there was no direct judgment of the Privy Council or Supreme Court on the point. (para 16.118A). (para 16.120).

Now, the Report refers to Judgments of the High Courts of Allahabad (Biraj Fatma vs. Mahmood Ali, AIR 1932 All 293 (FB), Calcutta, Lalla Sheo Churn Lal vs. Bamanandan Dobey, (1894) ILR 22 Cal 8 and Mahesh Chandra vs. Mahindra Nath, AIR 1941 Cal 401 (per B.K. Mukherjee J, as he then was); Delhi in Sant Bhushan Lal vs. Brij Bhushan Lal, AIR 1967 Delhi 141; Kerala in Narayanan vs. Gopalan, AIR 1960 Ker 367 (DB); Lahore Full Bench in Iftkhar vs. Beant Singh, AIR 1946 Lah 233 (per Mehr Chand Mahajan J, as he then was); Mysore, Bore Gowda vs. Negaraju, AIR 1964 Mys 8, as Judgments which affirm a right of a minor to challenge a Judgment on the ground of negligence of the guardian or next friend, since sec. 44 does not prohibit any such action or defence. Mathern vs. Ramc, ILR 14 Pat 824; Chandulal vs. Ragam, AIR 1922 M 273; Egappa vs.

Ramanathan, AIR 1942 Mad 384; Kamakshya vs. Baldeo, AIR 1950 Pat 97 (FB).

The opposite view is contained in Krishna Das vs. Vithoba, AIR 1939 Bom 66. We do not think that it is necessary to have a separate provision merely because of the contrary view in Krishna Das vs. Vithoba, AIR 1939 Bom 66 and two other Bombay cases.

The 69th Report referred to the following observations of the Privy Council in Talluri Venkata Seshayya vs. Tadikonda Kotiswararao (1936) 64 IA 17, referring to Judgments which held 'gross negligence' was always a ground (whether involving minors or not):

> "Their Lordships are not concerned to discuss the validity of these decisions, or the elusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actions of their guardians is a special one."

The Privy Council case was one where negligence was not equated with fraud (see para 16.119) but there are clear observations in that case that negligence of guardians is a special case. Then the Privy Council dissented from Karri Bapanna vs. Sunkari, 45 MLJ 324 in equating gross negligence of guardians with fraud.

The 69th Report itself (see para 16.118) refers to an earlier Privy Council case (from Cape of Good Hope), in Orphan Board vs. Van Rosnen (1825) 1 Knapp 84 (cited in AIR 1950 Pat 97) to the following effect:

> "If His Majesty were to dismiss this appeal on account of the neglect of their guardian to bring it to a decision, when the infants attain their full ages they would have a right to revive it. Infants were not to be prejudiced by the neglect of their guardians. On the contrary, according to the Civil law, as laid down in the Digest, Lib, 41, 1.8, minors, although not defended by their guardians or curators, may afterwards, on their causes being heard, be released from judgments pronounced against them."

The 69th Report itself refers to the Supreme Court case in Bishun Deo vs. Seogem Ray, AIR 1951 SC 280 at 283 (para 23) where the above principle was clearly accepted by Bose J. The learned Judge held that the decree of compromise could not be challenged and that if the minor was properly represented, the decree would be binding on the minor:

> "unless the minor can show fraud or negligence on the part of his next friend or guardian ad litem"

The 69th Report itself says that the Bombay High court had referred to some English cases which negatived the right but there were a large number of other English cases (referred to in AIR 1950 Pat) which were in favour of it, which were not referred to by the Bombay High Court.

In the light of the two Privy Council cases and the Supreme Court judgment, it is not necessary to include 'negligence' as a separate ground in sec. 44 merely because of one judgment of the Bombay High Court. We do not agree for insertion of sec. 44A as recommended in para 16.145 of the 69th Report.

Sections 45 to 51:

The sections deal with the subject 'opinions of third persons, when relevant'. Sec. 45 refers to 'opinions of experts' and reads as follows:

> "45. When the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting, or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art or in questions as to identity of handwriting or finger impressions, are relevant facts.
>
> Such persons are called experts."

There are three illustrations set out below sec. 45. One deals with an opinion as to 'poisoning', the other as to 'unsoundness of mind' and third as to 'identity of handwriting'.

In the 69th Report, after an elaborate discussion, the Commission recommended (end of para 17.44) to include 'footprints, palm impressions or typewriting, as the case may be' in sec. 45 and further recommended insertion of sec. 45A in regard to the duty of an expert witness to supply copy of his report to all parties, along with the grounds for opinion.

It may be noted that in State (through CBI vs. S.J. Choudhary AIR 1996 SC 1491, while holding that experts could be examined with regard to 'typewriting', the 69th Report of the Law Commission was quoted.

Sec. 45B was proposed to cover expert opinion on 'foreign law' as in the British statutes of 1859, 1861 with two subsections.

Sec. 45 has to be read along with sec. 11 (when facts not otherwise relevant become relevant), sec. 38 (relevancy of statements as to any law contained in law books), and also the proviso to sec. 60 which deals with a situation where because no expert is available, treatises can be quoted.

Sec. 45 deals with expert evidence and not with mechanical evidence such as automatic photographs, computer printouts etc.

In UK, the relevancy of expert evidence is contained in the Civil Evidence Act, 1972, and the recent Civil Procedure Rules, 1995 (based on Lord Woolf's Report on 'Access to Justice') (which impose an overriding duty on the expert to give his opinion, irrespective of whether he was being examined by one party or the other. (LPR PC 35 R3); and in criminal cases, by the Police and Criminal Evidence Act, 1984 and Criminal Justice Act, 1988 (see Phipson, 15th Ed, 1999, para 37.09).

Sec. 45 speaks of experts on points of "foreign law, science or art, or as to identity of handwriting or finger impressions".

Phipson (15th Ed, 1999, para 37.53 to 37.63) includes one more item of 'trade' in this list. He says (referring to case law):

> "The opinions of shopkeepers are admissible to prove the average waste resulting from the retail sale of goods, those of persons conversant with a market, to prove market value; those of accountants, to prove what losses are chargeable to capital; and those of businessmen, to prove the meaning of trade terms. So, though formerly doubtful, it is now well-settled that the opinions of underwriters are receivable as to what facts are 'material' in a policy of marine insurance. The opinions of medical men are similarly admissible as to what maladies are in an insurance proposal."

However, he states:

> "The opinion of tradesmen is inadmissible on the question of whether or not a trade name is calculated to deceive, whether for the purposes of a passing off action or in proceedings under the Trade Descriptions Act, 1968. It is equally inadmissible on the question of whether or not tradesmen would in fact be or be likely to be deceived."

It is also pointed out:

> "Where there is a question as to whether or not a covenant in restraint of trade is reasonable, evidence may be given by those engaged in the trade of the nature of the trade, what is usual in it, of any particular

precautions required to be taken but their opinion is inadmissible as to the reasonableness or otherwise of the restraint."

and

"Similarly, definition of the nature of a trade or of the terms used in the trade may be subject to expert evidence from those engaged in the trade. There is a good deal of ancient learning on the evidence what is admissible to prove trade customs and trade usages; but it is probable that no modern court would exclude expert evidence on these topics unless precluded by authority directly on the point and binding on the court. In income tax inquiry, the commissioners may, but are not bound to receive expert evidence."

One other aspect alluded to by Phipson in para 37.56 refer to "technical terms". Local or technical terms may always be explained by experts, unless they are equally intelligible to ordinary readers; thus the opinions of engineers are not admissible to show what matters are "delineated" upon statutory plans, nor those of surveyors and auctioneers as to the meaning of 'nominal rent' in a statute. But, in Patent cases, experts obviously have a good deal of experience and may be called upon (1) to explain the technical terms employed; (2) to instruct the court in the relevant scientific principles; (3) to show the state of scientific knowledge at the time of the grant; (4) to explain the nature, working, characteristic features and probable mechanical results of an invention, together with what is old or new in the specifications, and how far any scientific advance has been made thereby, as well as (5) in the case of rival inventions, to point out the

similarities or differences therein and how far these are material or unimportant."

On the other hand:

> "They may not however give evidence as to the construction of the specification, or as to whether there is or is not a want of novelty, or whether the defendant's invention infringes the plaintiff's patent or not, because these are matters for the court to decide."

Coming to questions of identity, the relevance of identity has been dealt with in sec. 9. (see also sec. 112) Here we are, however, concerned with the opinions of experts and the relevance of the said opinion on the questions of identity.

Again, 'identity' of persons, today, is a matter of expert evidence according to Phipson (ibid, para 37.62). Fingerprint evidence has long been available for this purpose and evidence of blood tests has been admissible (especially in paternity suits) for many years. In recent years, other types of scientific processes have been put before the court by appropriately qualified experts. Evidence of facial mapping has been admitted, both by a more or less sophisticated method (see R vs. Stockwell (1993) 97 Crl. App Rep 260 (CA) and R vs. Clarke (1995) (2) Crl App Rep 425 (CA). Similarly, voice identification by a person experienced in the task is admissible even though the expert relies on audatory impression and not on acoustic measurement (R vs. Robb) (1991) 93 Crl App R 1GL (CA).

There can also be expert evidence in relation to identity of animals. Such a question may arise, for instance, when somebody's pet dog is stolen allegedly by an accused.

DNA evidence is yet another one. We have dealt extensively with DNA in sec. 9. But here the question is about experts in DNA. It is known as 'genetic printing by DNA analysis'. See R vs. Gordon (1995 (1) Crl App Rep 290) (CA). However, so far the English Court has "set its face squarely against supplementary expert evidence on the probabilities involved." (R vs. Adams No.1 1996 (2) Crl. App Rep 467 (CA); R vs. Adams No.2 1998(1) Crl App Rep 377 (CA) In R vs. Dohoney and Adams 1997 (1) Crl App Rep 369 (CA), the Court of Appeal laid down guidelines for dealing with DNA evidence (at pp. 374-375 of that case).

So far as DNA is concerned, an expert can give evidence only in regard to providing the "random occurrence ratio" and if he or she has the necessary data, it may indicate how many people with matching DNA characteristics are likely to be found in (say) UK or in a limited relevant subgroup of which the perpetrator is, in all likelihood, a member. It is inappropriate for an expert to expound a statistical approach to evaluating the likelihood that the accused left the unknown sample (see R vs. Dohoney and Adams: 1997 (1) Crl App Rep 369).

DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not 'match', then this will prove a lack of identity between the known person and the person from

whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1 person in every 100,000: This is described as the 'random occurrence ratio' (Phipson 1999, 15th Ed, para 14.32).

Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law.

In this connection, reference may be usefully made to the Report of the Australian Law Reform Commission, referred to in our discussion under sec. 9. That deals with the problems relating to expert evidence on DNA. The law is still developing.

We think that apart from adding the words "footprints, palm impressions and typewriting" in sec. 45 as recommended in the 69th Report, we shall make some more additions. We, therefore, propose to recommend addition of the words "trade, technical terms and identity of persons or animals" also in sec. 45.

We recommend that sec. 45 be amended as follows:

For the portion beginning with the words "When the court has to form an opinion" and ending with the words "Such persons are called experts" the following shall be substituted, namely:-

"When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to the identity of handwriting, or finger impressions or, footprints or, palm impressions or typewriting or usage of trade or technical terms or identity of persons or animals, the opinions, upon that point, of persons specially skilled in such foreign law, science or art, or as to the identity of handwriting, finger impressions, footprints, palm impressions, typewriting, usage of trade, technical terms or identity of persons or animals, as the case may be, are relevant facts. Such persons are called 'experts'."

[Illustrations as at present are not disturbed]

Section 45A (as recommended in the 69th Report):

We are also in agreement with the 69th Report that sec. 45A is to be inserted in regard to the duty of an expert witness to supply a copy of his report to all parties along with the grounds for opinion. No doubt, this is procedural and could be inserted in the Code of Civil and Criminal Procedure but instead, it could as well form part of the Evidence Act. The experts' Report should be 'verified'. In this connection, we not only wish to insert sec. 45A also as suggested but we also wish to expand sec. 45A further, on the model of the UK 'Practice Directions, Supplementary Civil Practice Rule 35' set out in para 44.24 of Phipson, in the manner stated below. (see Phipson, paras 44.223 and 44.224) Under the English statute,

the expert is now treated as a person who has obligations to the court and is no longer the witness of the party who called him.

Supply of copy of Expert`s Report

"**45A**. (1) Except by leave of the Court, a witness shall not testify as an expert unless a copy of his report has, pursuant to subsections (2) and (3), been given to all the parties.

(2) An expert's report shall be addressed to the Court and not to the party on whose behalf he is examined and he shall owe a duty to help the Court and this duty shall override any obligation to the party on whose behalf he is examined.

(3) An expert's report must -

(a) give details of the expert's qualifications;

(b) give details of any literature or other material which the expert has relied on, in making the report;

(c) state who carried out any test or experiment which the expert has used for the report and whether or not the test or experiment has been carried out under the expert's supervision and the reasons if any, given by the person who conducted the test;

(d) give the qualifications of the person who carried out any such test or experiment;

(e) where there is a range of opinion on the matters dealt with in the report –

(i) summarise the range of opinion, and

(ii) give reasons for his own opinion;

(f) contain a summary of conclusions reached;

(g) contain a statement that the expert understood his duty to the Court and has complied with that duty;

(h) contain a statement setting out the substance of all material instructions (whether written or oral) of the party on whose behalf he is examined.;

(i) be verified by a statement of truth as follows:
"I believe that the facts I have stated in the report are true and that the opinion I have expressed are correct "; and

(j) contain a statement that the expert is conscious that if the report contained any false statement without an honest belief about its truth, proceedings may be brought for prosecution or for contempt of Court, with the permission and under the directions of Court."

Section 45B (proposed by the 69th Report)

The 69th Report contains a separate chapter (ch. 18) on the question of expert opinion on 'Foreign Law' and refers to the procedure in UK, USA etc. and to Indian law e.g., sec. 26 of the Negotiable Instruments Act, sec. 11 of the Contract Act relating to capacity, the constitutionality of foreign law, and specially of the British statutes applicable to India (sec. 5, Report of the Law Commission of India, page 45, entry 55, and the British States (Application to India) Repeal Act, 1900 (Act 58 of 1960). The 69th Report stated: (see p. 348)

"whether they (British statutes) should be incorporated in the Evidence Act or elsewhere, is a matter of detail, which we leave to the draftsman"

The Recommendation for insertion of new section in the 69th Report (see p. 348-349) is as follows: (18.33, though para number not given)

"In the light of the above discussion, we recommend

(a) insertion of a provision requiring notice to be given where a party in a civil case desires to raise a question of foreign law;

(b) incorporation of the substance of the British statutes of 1859 and 1861 into our statute law;

(c) insertion of a provision enabling the court to look at the relevant material relating to foreign law, where it considers such a course necessary in the interests of justice."

Though sec. 45 refers to the evidence of an expert on foreign law, we are of the view that procedure in that behalf should be provided in a separate section. In fact, the decision of the court on a foreign law is treated as a question of law and not as a question of fact.

Our Recommendation on sec. 45B & British statutes of 1859, 1861:

So far as the above recommendation for insertion of sec. 45B with two sub-sections, we do not want to repeat the reasons given in the 69th Report but we wholeheartedly support the recommendation.

So far as the recommendation for making a separate Act incorporating the substance of British statutes of 1859 and 1861 are concerned, we are of the view that it is unnecessary.

We shall briefly refer to the 1859 and 1861 statutes as contained in the 69th Report itself.

This aspect is contained in the 5th Report of the Law Commission of India page 45, entry 55. The two British statutes whose substance is to be incorporated as per the proposal, into our law are –

(1) British Law Ascertainment Act, 1859

(2) Foreign Law Ascertainment Act, 1861

Phipson refer to the 1859 UK statute and to the 1861 UK statute (see para 37.59) and they read as follows:

"By the British Law Ascertainment Act, 1859, a case may be stated for the opinion of the superior Court in any of Her Majesty's Dominions to ascertain the law of that part (see Lord vs. Colvin: 1 D&S 24 (Scotish law); Login vs. Princess of Coorg: 30 Beav 632 (Hindu law). And by the Foreign Law Ascertainment Act, 1861, a similar case may be stated for the opinion of the court in any foreign state with which Her Majesty may have entered into a convention for the ascertainment of such law. The latter Act is a dead letter as no convention has ever been made in this behalf."

The proposed section 45B is to be the following effect:

Procedure to prove foreign law and Court's power

"45B. (1) A party to a suit or other civil proceeding who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice.

(2) The Court, in determining a question of foreign law, in any particular case may, after notifying the parties, consider any relevant material or source, including evidence, whether or not submitted by a party, and the decision of the Court shall be treated as a decision on a question of law".

Section 46:

The section refers to 'Facts bearing upon opinions of expert'. It reads as follows:

> "Sec.46. Facts not otherwise relevant, are relevant if they support or are inconsistent with the opinion of experts, when such opinions are relevant."

There are two illustrations below this section. Illustration (b) is based on the case in Folkes vs. Chadd (1872) 3 Doug. 157 which deals with choking up of other harbours on account of a bank erected. This evidence supported the evidence of an expert.

In the 69th report, it was pointed out in Ch. 19 that Sec.46 does not require any change. We agree with this view.

Section. 47:

This sections speaks of 'opinions as to handwriting, when relevant' and reads as follows:

> "47. When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the persons by whom it is

supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation. A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person, have been habitually submitted to him".

There is an illustration below section 47.

In the 69th Report, it was mentioned that section 47 is clear enough and does not require any change.

Phipson (15th Ed. P.999, para 3733) also says that a non-expert's evidence may be relevant when the person has knowledge of somebody's handwriting (a) by having at any time seen the party to write (b) by the receipt of written communication or (c) by having observed, in the ordinary course of business, documents purporting to be in that person's handwriting.

We agree with the recommendation in the 69th Report that no amendment is necessary in sec. 47.

Section 47A:

The section was inserted by Act 21/2000 w.e.f. 17.10.2000 and says 'opinion as to digital signature, when relevant'. It reads as follows:

"47A. When the court has to form an opinion as to the digital signature of any person, the opinion of the certifying authority which has issued the digital signature certificate is a relevant fact.

We may refer to sect. 4 which says that the expression 'Certifying Authority', 'Digital Signature', 'Digital Signature Certificate' shall have the same meaning as given to these words in the 'Information Technology Act, 2000".

This new section does not require any further amendment.

Section 48:

This section says where 'opinion as to existence of right or custom, when relevant'. It reads as follows:

"48: When the court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence, if it existed, are relevant.
Explanation:The expression "general custom or right" includes customs or rights common to any considerable class of persons."

There is an illustration below section 48.

It reads:

"The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section".

The 69th Report refers in Chapter 19 to sec.32(4), to this section (i.e. sec. 48) and to the next section (sec. 49) which deal with evidence in matters of custom or usage and point out that there are slight differences as to the phraseology used in these sections. Section 32(4) refers to a 'public right or custom or matter of public or general interest', sec.48 speaks of 'general custom or right' (with an explanation) and sec. 49 speaks (usages and tenets of any body of men or family). The 69th Report says that the words used in s. 32(4) are the 'widest' i.e. "public right or custom or matter of public or general interest" and should be brought into sec. 48 which refers to 'general right' and 'general custom', in as much as s. 48 would not have been intended to be broader than sec. 32(4).

The result will be to redraft sec. 48 as follows:

<u>Opinion as to existence of right or custom, when relevant</u>

"**48.** When the Court has to form an opinion as to the existence of any general or public right or custom or any matter of general or public interest, the opinions, as to the existence of such right or custom or such matter, of persons who are likely to know of its existence if it existed or of that matter, as the case may be, are relevant.

Explanation: The expression 'general or public right or custom or any matter of general or public interest` includes rights or customs or matters common to any considerable class of persons.

Illustration:-

> The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section."

We recommend accordingly.

Section 49:

This section says 'opinions as to usages, tenets etc.' when relevant. It reads as follows:

> "49: When the court has to form an opinion as to-
> the usages and tenets of any body of men or family,
> the constitution and government of any religious or charitable foundation, or
> the meaning of words or terms used in particular districts or by particular classes of people
>
> the opinions of persons having special means of knowledge thereon, are relevant facts."

In the 69th report, in ch. 19, it was stated that the section does not require any change. We agree with the view.

Section 50:

This section says "opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such

relationship, of any person who, as a member of the family of otherwise, has special means of knowledge on the subject, is a relevant fact.

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act (4 of 1869), or in prosecution under sections 494, 495, 497 or 498 of the Indian Penal Code (XLV of 1860)".

There are two illustrations below sec. 50.

In the 69th report, it was suggested (sec. ch. 19) that the proviso as it stands now only refers to the Indian Divorce Act, 1869. Since then, the right to divorce has been included in several family law systems and that it is, therefore, necessary to add, "or any other enactment providing for dissolution of marriage"; and so far as prosecution, referred to in the provision are concerned, it would be necessary to add again the words, "or under any other enactment providing for the punishment of bigamy".

Sarkar (15th Ed 1999, p. 959) says that "There is a presumption against the legislature that it enacts laws with complete knowledge of all existing laws pertaining to the same subject, and the failure to bring an amendment to sec. 50, corresponding to the amendment to sections 304B and 498A IPC indicates that the intent was not to repeal existing legislation" (Vadde Rama Rao vs. State of A.P.) (1990) Crl LJ 1666 or 1671 (A.P.)

It will be noticed that the purport of the proviso to sec. 50 was that where party wants to prove that there was a marriage, he cannot merely rely

on an opinion expressed by conduct of any person. The section as drafted is in two parts, (a) relating to certain civil proceedings where dissolution of a marriage is sought – which requires that there was a marriage first and (b) relating to certain criminal proceedings where for the purpose of proving that certain offences like bigamy, adultery etc. were committed, one is obliged to first prove a marriage.

Instead of proceeding as suggested in the 69th Report to add a clause referring to other laws relating to dissolution or to add a clause referring to other laws governing punishment for bigamy, we are of the view that a general clause covering both clauses can be drafted. In fact, apart from cases of dissolution or bigamy there may be other situations where a person is first obliged to prove a 'marriage'. If opinion by conduct is not to be sufficient, such a principle must apply to all cases where a marriage has to be proved first. It is not correct to confine the section to cases of dissolution of marriage or bigamy alone.

We recommend that the proviso in this section should be substituted as follows:

> "Provided that such opinion shall not be sufficient in any civil or criminal proceedings, where a person has to prove that there was a marriage"

Section 51:

This section deals with 'Grounds of opinion, when relevant". It reads:

"51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant"

There is an illustration below sec. 51, which reads as follows:

"An expert may give an account of experiments performed by him for the purpose of forming his opinion."

The 69th Report said the section requires no change. Further, we have already recommended in sec. 45A that an expert should submit a copy of his report to the parties and that the report must contain reasons for his opinion.

We agree that no changes are necessary in sec. 51.

Secs. 52 to 55:

These sections deal with relevancy of character and go together.

Section 52:

It refers to the question as to when in civil cases, character to prove conduct imputed could be relevant or irrelevant. It reads:

> "52. In Civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant."

Section 146(3) and 155(4) also deal with relevance of character, but those sections relate to character of a witness.

So far as sec. 155(4) of the Evidence Act is concerned, the Law Commission had recommended in its 172nd Report for deletion of this sub-section. Pursuant to the said recommendation, Parliament has now enacted the Indian Evidnece (Amendment) Act, 2002 (Act 4 of 2003) omitting sec. 155(4). However, we note that under the same amendment a proviso has been inserted below clause (3) of sec. 146 as follows:

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

Sarkar (ibid p. 963) states that the last part of the section, however, makes character relevant if the facts make it relevant and these exceptions are as follows:-

(1) Character as affecting damages in cases of defamation, seduction, breach of promise, adultery (see sec. 55 and Sec. 12)

(2) Character of accused (sec. 53 and sec. 54).

(3) Character of prosecutrix (sec. sec. 155(4) and sec. (54). (Here it may be noted that in the 172nd Report of the Law Commission, it was recommended that sec. 155(4) be deleted).

(4) Character of witnesses (sec. 146, 153, 155).

(5) Character of animals, places and things.

(6) Character as affecting state of mind.

The 69th report states (see ch. 20 p. 555) no change is necessary in sec. 52.

We agree that no change is necessary in sec. 52.

Section 53:

Section 53 and 54 refer to relevancy of character in criminal cases and go together. Section 53 refers to relevancy of previous 'good character' in criminal cases while section 54 refers to relevancy of bad character "in reply".

Sec. 53 reads as follows:

"Sec. 53: In criminal proceedings, the fact that the person accused is of a good character, is relevant.

Explanation 1. This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2. A previous conviction is relevant as evidence of bad character."

In the 69th report, it was stated (p. 357) that sec. 53 does not require any change. We agree.

Section 53A(as proposed):

In the 172nd Report at para 5.3.8.1 the Law Commission recommended insertion of sec. 53A as follows:

> "53A. In a prosecution for an offence under sections 376, 376A, 376B, 376C, 376D, 376E or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of his/her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent."

It may be noted also that the Indian Evidence (Amendment) Act, 2002 (Act 4 of 2003), a proviso has been added in sec. 146(3) as follows:

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

The above amendment appears to cover only sec. 376 IPC. The amendment now proposed in the 172nd Report applies to other sexual offences against women where also consent is relevant and question arise as to what type of evidence is permissible to prove her consent. But, that Report is not yet implemented by way of legislation.

In any event, section 53A proposed above being wider than the proviso to sec. 146(3) introduced by Act 4 of 2003, we recommend sec. 53A

as above extracted to be inserted after sec. 53, omitting reference to sec. 376E (which has not yet been incorporated in the IPC).

The 172nd Report also refers to sec. 376E IPC, but that provision has not yet been incorporated in the IPC. Therefore, we are omitting sec. 376E for the present but as and when sec. 376E as proposed in that Report is introduced in the IPC, that provision may also have to be added in sec. 53A.

We recommend sec. 53A to be inserted as follows:

Character of victim not relevant in certain cases

"53A.. In a prosecution for an offence under section 376, 376A, 376B, 376C or 376D or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent."

Section 54: It reads as follows:

"54: In criminal proceedings, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has good character, in which case it becomes relevant."

So far as sec. 54 is concerned, it was stated (see page 357) that the substance of the section need not be disturbed but amendment is necessary in respect of some detail because the words "unless evidence has been given that he has good character" can occur by way of evidence extracted during cross-examination of a prosecution witness or of defence witness (see also

sec. 140 of the Evidence Act) and sec. 315 of the Code of Criminal Procedure, 1973.

(We may, however, add that in a warrant case under ch. XIX and session's trial under ch. XVIII of Cr.PC, when the accused leads evidence of good character by way defence, the prosecution cannot, as of right, lead evidence in rebuttal but the court has, as stated in Ramaswami vs. Ramalinga, AIR 1930 Mad 448, a discretion to permit rebuttal evidence under sec. 116(4) Cr.P.C. The fact that the person is a habitual offender may be proved by evidence of general reputation or otherwise. Evidence of previous conviction is relevant under sec. 109 Cr.P.C. (See Sarkar 1999, 15th Edn. 976, 977).

As to the nature of questions that may be put in cross examination or evidence in rebuttal, various guidelines have been issued in R vs. Mcleod: 1994(3) All. ER. 254.

Previous conviction may be relevant otherwise than under sec. 54. See ss. 211, 236, 248(3), 298 of CrPC, sec. 75 of I.P.C., Art. 117 of Indian Articles of War (Act 5 of 1869); sec. 14 of Evidence Act, explanation (2); sec. 43 of Evidence Act (ill (e), sec. 8 of the Evidence Act as showing motive (s 43, ill(f). Bad character is also relevant under Criminal Tribes Act (Act 27 of 1871). (See Sarkar, ibid, p 981).

We agree with the recommendation in the 69th Report that the words:

"whether through witnesses for defence or through cross-examination of witnesses for the prosecution or in any other manner,"

be added after the words "unless evidence has been given that he has good character", and before the words "in which case it becomes relevant".

Section 55:

This section refers to relevance of 'Character' as affecting damages. It reads as follows:

"55. In Civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation: In sections 52, 53, 54 and 55, the word 'character' includes both reputation and disposition; but except as provided in sec. 54, evidence may be given only of general reputation and general disposition and not of particular acts by which reputation or disposition were shown."

It will be seen that the Explanation is indeed an Explanation to ss. 52, 53, 54 and 55.

In the 69th Report, it was suggested (see p.358) that as to 'Libel action', in a suit for damages for defamation for injury to reputation of a person, evidence of character should relate to that aspect of that person's character to which the libel relates and that this recommendation is in furtherance of the approach of the 69th Report to sec. 12 (see para 8.40 of the Report).

On a consideration of this aspect, we are of the opinion that the above aspect is indeed a matter on facts in each case, and that no special provision need be made in sec. 55 to cover cases of libel. We are, therefore, differing from the recommendation given in the 69th Report in this behalf. We do not suggest any modification in the provision.

Sections 56 to 100 ("on proof"):

These sections are contained in Part II of the Act and start with Chapter III, followed by Chapter IV, V VI which will take us upto section 100.

Chapter III: Sections 56 to 58

These sections deal with 'facts which need not be proved', that is to say facts of which judicial notice may be taken or admitted.

Section 56:

It states that 'Facts judicially noticeable need not be proved'. It reads as follows:-

> "56. No fact of which the court will take judicial notice need be proved."

This section as pointed out in para 21.21 of the 69th report, is introductory in nature and requires no amendment. We agree.

Section 57:

This section refers to 'facts of which the Court must take judicial notice'.

This section has 13 clauses and is lengthy and we do not propose to extract the entire section. Thereafter there are two additional paragraphs.

In the 69th Report clause (1) of sec. 57 was taken up separately and clauses (2) to (6) of sec. 57 were taken up together, clause (7) of section 57 was taken separately, clauses (8) to (13) were taken up together. Then the two additional paragraphs were taken up separately.

We shall therefore, take up the discussion on the same lines.

Clause (1) of Section 57:

It says that, 'All laws in force in the territory of India have to be taken judicial notice of'.

We find that in Burma sec. 57(1) has been amended as follows:

> "(1) All laws, or rules having the force of laws, now or heretofore in force or hereafter to be in force, in any part of Burma or India or Pakistan"

Art. 13(3)(a) of the Constitution includes, within the meaning of the law 'laws in force', ordinance, order, bye-law, rules, regulation, notification, custom or usage having in the territory of India the force of law and Art.

13(3)(b) says it includes laws passed by the legislature or other competent authority in the territory of India.

The words 'laws in force' are also defined in Art. 372 of the Constitution of India.

Art. 366 (10) says 'existing law' means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of the Constitution.

Section 3(29) of the General Clauses Act, 1897 defines 'Indian Law' as including Act, Ordinance, Regulation, Rule, Order, Bye-law or other instrument have force of law.

In Edward Mills Ltd. vs. State of Ajmer AIR 1955 SC 25, interpreting the words 'law in force', it was held (reference to Act 366(10) and 372) that the said Articles are wide enough to include not merely a legislative enactment but also any regulation or order which has force of law. This view was affirmed in later cases by the Supreme Court of India.

Question arises as to whether the courts can take judicial notice of notifications, bye-laws, rules of business of legislature etc. or whether they

have to be proved by the party relying on them or should be ascertained by the court itself. An executive notification in a Gazette (not issued under any 'particular statute') is not law as held in State vs. Gopal Singh AIR 1956 MB 138 (FB) and has to be proved.

Rules of Hindu Law, it was held, could be gathered from books, including the opinion of pundits (see Bhagwan vs. B) (ILR 21 All 423), Collector of Madras vs. Muthu Ramalinga 12 Moores' Indian Appeals 397 but not Mohammedan ecclesiastical law (R. vs. Ramzan) (7 All 461).

The problem indeed arises as to the extent of duty of the court as to proof of notifications, bye-laws etc. made under statutory power.

After referring to some case law, the 69th report suggested clarificatory Explanations below clause (1) of sec. 57 as follows: (see para 21.42)

> "Explanation I: Where, by virtue of this section, the Court is bound to take judicial notice, and the question relates to the existence, extent, commencement, of the terms of a statutory instrument, the Court shall, for the purpose of deciding the question, resort for aid to appropriate books or documents of reference, if such books or documents are readily available, before calling upon the party concerned to produce such books or documents.

> Explanation II: 'Statutory instrument' means a rule, notification, bye-law, order, scheme, or other instrument made under an enactment."

We agree that the two Explanations be added below clause (1) of sec. 57 as follows:

> **"Explanation I**:-Where, by virtue of this section, the Court is bound to take judicial notice, and the question relates to the existence, extent, commencement of the terms of a statutory instrument, the Court shall, for the purpose of deciding the question, resort for its aid to appropriate books or documents of reference, if such books or documents are readily available, before calling upon the party concerned to produce such books or documents.
>
> **Explanation II:-**'Statutory instrument' means a rule, notification, bye- law, order, scheme, or other instrument made under an enactment;"

Clauses (2) to (6) of section 57:

These clauses contain a large number of items of which the court shall take judicial notice of such as law, articles of war, Proceedings of Parliament, etc.

Now clause (2) of 57 refers to all Acts passed by the Parliament of UK. It was suggested in the 69th report in para 21.43 that this clause should be confined to UK Acts passed before 15.8.1947, in view of what we have said under section 37, relating to proof of foreign law.

Similarly, it was pointed out in para 21.45 of the 69th Report, that in clause (4) of section 57 reference to proceedings to UK Parliament should be confined to proceedings before 15.8.1947.

Likewise, clause (5) of section 57 which refers to accession in UK, should be confined to the power before 15.8.1947.

Clause (6) of Section 57 refers to seals of English court and other matters relating to UK. It was suggested in para 21.48, these should be limited to the period prior to 15.8.1947.

In the light of the above, we agree with the 69th Report that clauses (2),(4), (5) and (6) of section 57 be revised as follows:-

> "(2) All public Acts passed by Parliament of the United Kingdom before the fifteenth day of August 1947 and local and personal Acts directed by Parliament of the United Kingdom before that date, to be judicially noticed;"

> "(4) The course of proceeding of Parliament of the United Kingdom before the fifteenth day of August 1947, of the Constituent Assembly of India, of Parliament and of legislatures established under any laws for the time being in force in a Province before the said date or in the States;

(5) The accession and sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland in relation to any act done before the fifteenth day of August 1947;

(6) The following seals, that is to say,

(a) All seals of which English Court take judicial notice in relation to any act done before the fifteenth day of August 1947:

(b) The seals of all Courts in India;

(c) Seals of all Courts out of India, established by the authority of the Central Government;

(d) Seals of law Courts established by the authority of the Crown Representative in relation to any act done before the fifteenth day of August 1947.

(e) Seals of Courts of Admiralty and Maritime Jurisdiction and Notaries Public;and

(f) All seals which any person is authorized to use by an Act of Parliament of the United Kingdom in relation to any act done before the fifteenth day of August 1947 or by the Constitution of India or an Act or Regulation having the force of law in India;"

Clause (7) of Section 57 :

As clause (7) of section 57 did not refer to offices held in India, it was recommended in the 69th Report (para 21.50), that the matter should be added and clause (7) of section 57 be revised as follows to which we agree:

"(7) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in India or any State, if the fact of their appointment to such office is notified in any Official Gazette;"

Clauses (8) to (13) of Section 57:

We agree with the 69th Report that no amendment is called for in these clauses.

Second Para of Section 57: This para is immediately below clause (13) of sec. 57.

This para refers to the powers of the court to refer to appropriate sources for reference and does not require any amendment. We agree with para 21.53 of the 69th Report.

Third Para of Section 57: This para is immediately below the para mentioned above.

This para confers a discretion upon the court to refuse to take judicial notice in the absence of sufficient material. We agree that this paragraph does not also call for any amendment.

Proposed Section 57A:

In Chapter 22 of the 69th Report, the Commission proposed an important provision, sec. 57A, concerning 'Judicial Notice' of 'International facts'. The question relates "international facts" and concerns (a) recognition of a State and (b) recognition of a head of a State.

It was pointed out that section 87A (2) of the Code of Civil Procedure, 1908 contains a provision in this behalf but that provision pertains only to civil proceedings. It was suggested (see para 22.13) that such a provision is necessary for purposes of criminal proceedings as well and that section 87A (2) be deleted and shifted to the Evidence Act so that a single provision can apply to criminal proceedings as well as to civil proceedings.

Section 87A of the C.P.C. is as follows:

"Sec.87A: Definitions of "foreign State" and "Ruler":

(1) …….. …….. …….. ……

(2): Every court shall take judicial notice of the fact –

(a) that a State has or has not been recognized by the Central Government;

(b) that a person has or has not been recognized by the Central Government to be the head of a State."

This section is in addition to section 6 of the Foreign Jurisdiction Act 1947 which also deals with 'judicial notice' of certain other international facts and reads as follows:

> "Section 6: If in any proceeding, civil or criminal, in a court established in India or by the authority of the Central Government outside India, any question arises as to the existence or extent of any foreign jurisdiction of the Central Government, the Secretary to the Government of India in its appropriate department, shall, on the application of the court, send to the court, the decision of the Central Government on the question, and that decision shall for the purpose of the proceeding, be final.
> (2) The court shall send to the said Secretary, in a document under the seal of the court or signed by a judge of the court, questions framed so as properly to raise the question, and sufficient answers to those questions shall be returned to the court by the Secretary and those answers shall, on production thereof, be conclusive evidence of the matters therein contained."

The Supreme Court had referred to section 6 of the Foreign Jurisdiction Act 1947 in Hardeodas Jagannath vs. State of Assam, AIR 1970 SC 724 in relation to the provincial jurisdiction of the Dominion of India. The matter arose under the Assam Sales Tax Act 1947. Again, in N. Masthan Sahib vs. Chief Commissioner, AIR 1962 SC 797, the same Act was referred to in dealing with the question as to whether Pondicherry was an acquired territory.

Section 9 of the Diplomatic Relations Act, 1972 is also relevant and deals with diplomatic immunity of a person. But, presently, we are concerned with the 'status' of a country, whether it is recognised or not and of a person, as to whether he is the head of a State or not.

Several of these aspects are reference to in Phipson (15th Edn., 1999, para 2.14) under the heading 'Constitutional, political and administrative matters of which judicial notice is taken'.

We agree with the recommendations in para 22.13 of the 69th Report for deleting section 87A(2) from the Code of Civil Procedure, 1908 and omitting the figure and bracket '(1)' in sec. 87 and for insertion of section 57A in the Evidence Act, by the following method: Sub-section (1) of proposed sec. 57A will cover the aspects contained in sec. 87A(2) of the CPC. (The 69th Report dealt only with this aspect in sec. 57A as proposed by them in para 22.13).

But, it is also necessary to bring into sec. 57A, the procedure for grant of a certificate as contained in section 6(1) and (2) of the Foreign Jurisdiction Act, 1947. We propose to bring in that procedure by further adding sub-sections (2) and (3) in sec. 57A. (This aspect was not considered in the 69th Report)

In the result, we accept the 69th Report and add something more and propose insertion of sec. 57A as follows and sec. 87A(2) has to be deleted and the number (1) in the opening part of sec. 87A has also to be deleted.

Court to take judicial notice of certain matters relating to foreign states

" **57A**. (1) Every Court shall take judicial notice of the fact –

(a) that a State has or has not been recognized by the Central Government;
(b) that a person has or has not been recognized by the Central Government as head of a State.

(1) If, in any Court, questions with reference to sub-section (1) arise, the Secretary to the Government of India in the appropriate department shall, on the application of the Court, forward to the Court, the decision of the Central Government on the question, and that decision shall, for the purpose of the proceeding, be final.

(3) The Court shall forward to the said Secretary, in a document under the seal of the Court and signed by a Judge of the Court, questions framed so as properly to raise the question, and sufficient answers to those questions shall be returned to the Court by that Secretary and those answers shall, on production thereof, be conclusive evidence of the matters therein contained."

Section 58:

This section says that facts which are admitted need not be proved. It reads as follows:

"58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

The section does not apply to criminal proceedings. The 69th Report stated in paras 23.6 and 23.9 that amendment need be made in sec. 58 by adding the words "other than a criminal proceeding" after the words "in any proceeding".

As pointed out by Sarkar (ibid, page 1022), admissions for the purpose of trial may be considered as having been made –

(1) on the record which are
   (a) actual, i.e. either on the pleadings (Order 8 Rule 5 CPC) or in answer to interrogation (Order 11 Rule 22).
   (b) implied from the pleadings (Order 8 Rules 3, 4 and 5).
(2) between the parties –
   (a) by agreement in writing before the hearing,
   (b) by notice (Order 12, Rules 1, 2, 4)
(3) at the hearing by party or his lawyer (Order 10).

All notices must be in writing (sec. 142 CPC). The Court can even pass a decree on admissions as stated in Order 12 Rule 6.

If an admission is made, subject to any condition, it must be accepted subject to such condition or not accepted at all (Mota Bhoy vs. Mulji 42 Ind. App. 103).

There can be an agreement admitting a fact subject to "just exception" (Chaplin vs. Levy: 23 LJ Ex. 117).

If an admission is contained in a document not properly stamped, it is inadmissible under sec. 35 of the Stamp Act unless deficiency or penalty is paid (except as to bills of exchange etc.).

Admissions of guilt are in certain instances not admissible in view of provisions contained in the Evidence Act and the Code of Criminal Procedure, 1973. (vide ss. 24-27 Evidence Act and s. 162 CrPC)

Under Order 8 Rule 5(1) of the CPC, an allegation made by one party if not denied by the opposite party, is to be treated as an admission by implication but the legislature has, however, endeavoured to modify the rigour of the rule by adding a proviso to the Rule which exactly corresponds to the proviso to sec. 58, where the Court is satisfied that an admission has been obtained by fraud, or that there is other good and sufficient cause, it will, in the exercise of the discretion given by the proviso require the fact to be proved otherwise than by such admission (Oriental Life Assurance Co.

vs. Narasinha ILR 25 Mad 205). In spite of failure of a defendant to deny a fact, a court may under the proviso insist on the plaintiff proving the fact. (Wenmanard Marak vs. Smit Pirby Momin: AIR 1988 Gauhati 50 (SB) Biswanath vs. Debi Prosad: AIR 1978 Cal. 533.

The above principles are laid down by the courts in various cases but it is not necessary to add anything to Sec. 58.

We agree with para 23.9 of the 69th Report to add the words "other than in a criminal prosecution", after the words "in any proceeding".

Sections 59 and 60:

These two sections are in Chapter IV and deal with 'Oral Evidence'.

Section 59:

Section 59 refers to 'Proof of fact by oral evidence'. It reads as follows:

> "59. All facts, except the contents of documents, may be proved by oral evidence."

In other words, what the section implies is that so far as the contents of documents are concerned, no oral evidence is at all admissible. This part of the section does imply a mandatory rule so far as contents of documents are concerned. This has to be reconciled with other sections of the Act like sec. 65(3) and sec. 91 and 92.

Video Conferencing and Oral Evidence

In recent times, evidence by 'video conferencing' and 'video record' is being experimented in several countries. It is, therefore, felt that this aspect be considered in some detail.

Sec. 59 states that all facts, except the contents of documents or electronic records, may be proved by oral evidence. Sec. 135 refers to 'Order of production and examination of witnesses'. Sec. 136 to 138 deal with mode of examination. Order X Rule 2 of the Code of Civil Procedure, 1908 deals with 'oral examination' of party or companion of party. A reading of all these provisions shows that what is contemplated is the examination of a witness who is physically present in the Court hall. It is obvious that in 1872 and 1908 when the above statutes were respectively enacted, technology had not advanced as much as it is now and those laws could not obviously have provided for admissibility of such evidence.

We may add that in some States, such as Andhra Pradesh, certain provisions of the Code of Criminal Procedure appear to have been amended to enable Magistrates to speak to prisoners in jail through video-conferencing at the stage of remand and grant of bails etc.

Apart from such limited resort to video-conferencing, the above technology has not so far been installed in our trial Court systems. A newspaper cutting of Hindustan Times dated 10.11.2001 shows that a trial Court in Bombay, in a criminal matter, permitted examination of a US based physician through video conference. The issue there was that Dr. P.B. Desai

of Sloan Kettering Hospital, Bombay allegedly conducted surgery upon Mrs. Leela Sanghi, wife of Mr. P.C. Sanghi, contrary to the advice of the US based doctor. The patient died after surgery. The High Court of Bombay quashed the Order of the trial Court. The Supreme Court directed notice to issue on the special leave petition filed there against on 9.11.2001.

We are also aware that in some arbitration matters, evidence is taken by way of video-conferencing, by consent of parties.

We shall next refer to certain developments in other countries on the question of admissibility of video-conference evidence.

In Singapore, where we have the same Evidence Act as the Indian Evidence Act, 1872, the legislature has recently introduced sec. 62A in respect of "Evidence through live-video or live-television links" to apply to proceedings other than criminal proceedings. Sec. 62A contains nine sub-clauses. Under the above section, the Court has to grant leave after being satisfied on various counts. We shall extract sec. 62A.

> "**Evidence through live video or live television links**
> 62A.- (1) Notwithstanding any other provision of this Act, a person may, with leave of the court, give evidence through a live video or live television link in any proceedings, other than proceedings in a criminal matter, if-
> (a) the witness is below the age of 16 years;
> (b) it is expressly agreed between the parties to the proceedings that evidence may be so given;
> (c) the witness is outside Singapore; or
> (d) the court is satisfied that it is expedient in the interests of justice to do so.
>
> (2) In considering whether to grant leave for a witness outside Singapore to give evidence by live video or live television link under this section, the court shall have regard to all the circumstances of the case including the following:

(a) the reasons for the witness being unable to give evidence in Singapore;
(b) the administrative and technical facilities and arrangements made at the place where the witness is to give his evidence; and
(c) whether any party to the proceedings would be unfairly prejudiced.

(3) The court may, in granting leave under subsection (1), make an order on all or any of the following matters:
(a) the persons who may be present at the place where the witness is giving evidence;
(b) that a person be excluded from the place while the witness is giving evidence;
(c) the persons in the courtroom who must be able to be heard, or seen and heard, by the witness and by the persons with the witness;
(d) the persons in the courtroom who must not be able to be heard, or seen and heard, by the witness and by the persons with the witness;
(e) the persons in the courtroom who must be able to see and hear the witness and the persons with the witness;
(f) the stages in the proceedings during which a specified part of the order is to have effect;
(g) the method of operation of the live video or live television link system including compliance with such minimum technical standards as may be determined by the Chief Justice; and
(h) any other order the court considers necessary in the interests of justice.

(4) The court may revoke, suspend or vary an order made under this section if -
(a) the live video or live television link system stops working and it would cause unreasonable delay to wait until a working system becomes available;
(b) it is necessary for the court to do so to comply with its duty to ensure that the proceedings are conducted fairly to the parties thereto;
(c) it is necessary for the court to do so, so that the witness can identify a person or a thing or so that the witness can participate in or view a demonstration or an experiment;
(d) it is necessary for the court to do so because part of the proceedings is being heard outside a courtroom; or
(e) there has been a material change in the circumstances after the court has made an order.

(5) The court shall not make an order under this section, or include a particular provision in such an order, if to do so would be inconsistent with the court's duty to ensure that the proceedings are conducted fairly to the parties to the proceedings.

(6) An order made under this section shall not cease to have effect merely because the person in respect of whom it was made attains the age of 16 years before the proceedings in which it was made are finally determined.

(7) Evidence given by a witness, whether in Singapore or elsewhere, through a live video or live television link by virtue of this section shall be deemed for the purposes of sections 193, 194, 195, 196, 205 and 209 of the Penal Code (Cap. 224) as having been given in the proceedings in which it is given.

(8) Where a witness gives evidence in accordance with this section, he shall, for the purposes of this Act, be deemed to be giving evidence in the presence of the court.

(9) The Rules Committee constituted under the Supreme Court of Judicature Act (Cap. 322) may make such rules as appear to it to be necessary or expedient for the purpose of giving effect to this section and for prescribing anything which may be prescribed under this section."

In New Zealand, sec. 19 introduced by the Evidence Amendment Act, 1994, likewise refers to the Court granting leave for receiving evidence by video link and telephone conference from Australia. Sec. 20 deals with powers of New Zealand Court in Australia, enabling the New Zealand Court to exercise in Australia all its powers which it is permitted to exercise in Australia under Australian-law. Sec. 21 refers to evidence and submissions by video-link. Sec. 22 refers to evidence and admissions by telephone. Sec. 23 deals with rights of Australian Counsel. Sec. 24 likewise enables Australian Courts to take evidence and receive submissions by video-link or telephonic conference in New Zealand. Sec. 26 refers to orders of Australian Courts. Sec. 27 refers to 'place where evidence given part of Australian Court'. Sec. 28 refers to 'privileges, protections and immunities of Judges, Counsel and witnesses in Australian proceedings'. Sec. 29 refers to power of Australian Courts to administer oaths in New Zealand. Sec. 30 to contempt of Australian Court by a person in New Zealand. Sec. 31 deals with assistance to Australian Courts.

Sec. 32 of the UK Criminal Justice Act, 1988 also refers to evidence by television-link. The British Law Commission, in its 245th Report felt that evidence by television link is better than hearsay.

In a case decided in Florida State, on March 9, 1997 by the District Court of Appeal, Third District, video-conference evidence was allowed: (David Harrell vs. The State of Florida). (This judgment was affirmed by Supreme Court of Florida on 23.4.98). (see 689. So. 2d. 400: 65. USLW 2679, 22 Fla L Weekly D 582). In that case, the defendant was accused of charges arising from robbery and assault on foreign tourists from Argentina. The video conference pertained to these foreign tourists in Argentina.

The District Court of Appeal in Florida held that admission of the evidence of tourists' live satellite testimony did not violate defendant's constitutional right of confrontation of a witness. The live satellite testimony of foreign witnesses was given in court in presence of Judge, Jury, the defendant (accused), counsel, clerk and court reporter, after oath was administered, and was therefore held reliable, and did not qualify as hearsay. Oath administered by court clerk in US to the witnesses who were in Buenos Aires, Argentina, was held binding, and assured of reliability. It was also held that the live satellite testimony from foreign witnesses, who were unable to return to US for trial, satisfied face-to-face element of confrontation clause, where the defendant and witnesses were able to interact, defence counsel had opportunity to contemporaneously cross-examine the witness, and defendant, judge and trier of fact observed the demeanour of witnesses while they testified. The testimony by satellite video conference was held admissible as it satisfied the 'confrontation

clause' since it contained the essential component of face-to-face confrontation, namely, testimony under oath, cross-examination and opportunity to observe witness demeanour while testifying. The trial court, without precedent, applied the new testimonial procedure as the procedure furthered an important public policy interest. Use of satellite testimony, in criminal trial, it was held, furthered important policies of promoting efficient use of limited resources and deterring violence against foreign tourists by making it easier for them to testify, and thus the new procedure could justifiably be employed, consistent with the 'confrontation clause', despite lack of precedent.

It was further observed by the District Court of Appeal that any errors caused by minor problems arising during satellite testimony of foreign witnesses, when one witness glanced to the right of the cameras and when audio portion of transmission was delayed briefly, were harmless, as the judge ordered that the camera be pulled back for wider view after the witness glanced to right, and the jurors were able to determine his credibility and demeanour of the witness testifying. Even during brief period when transmission was not perfectly synchronized, witness corroborated testimony of each other and police officers and finger print evidence of the defendant at scene of crime. To safeguard defendant's constitutional rights during the satellite testimony, protocols would be adopted, which included allowing only court official, court reporter, and necessary technical staff in room where witness is testifying; providing two-way audio and visual transmission in colour, placing video screen on witness stand, and keeping cameras focused on defendant and the witness, questioning attorney and presiding judge; and scrambling transmission. The defendant was convicted.

The trial Judge, Gersten J observed:

> "The admission of material witnesses' testimony by satellite explores a panoply of issues not contemplated by our Founding Fathers. For example, with current technology, we could conduct satellite trials in a virtual courtroom, while the jury deliberates in a secure cyber chatroom. Unfortunately, the Constitution does not address this specific issue, but its timeless language, having survived the Industrial Revolution and other technological revolutions, must apply to all judicial proceedings. Our Courts, however, must integrate procedural rules with the techno-evolutionary reality beyond the insulated stonewalls of the courthouse. We wholeheartedly embrace the concept of satellite testimony, because it enhances the efficiency of the Courts."

The Judge referred to sec. 90.801(1)(c) of Fla. Stat (1995) as to exclusion of hearsay and Art. VI of the US Constitution as to 'confrontation' and there does not appear to be any other new amendment in the law of evidence. He only referred to the protocol taken from In re San Juan Dupont Plaza Hotel Fire Litigation: 129 F.R.D 424 (D.P.R. 1989) which read as follows:

> "PROTOCOL FOR SATELLITE TRANSMISSIONS:
> 1. *Two-way audio/visual transmissions.* Two-way audio and visual transmissions shall be provided for each witness.
>
> 2. *Color transmissions.* Transmissions both to and from the place where the witness testifies shall be in color.

3. *Persons present with witnesses.* Spectators and counsel will not be allowed in the room where the witness testifies. Present with the witness shall be a courtroom deputy clerk of the United District Court from where the transmission originates, a court reporter, if necessary, and any technical staff needed for the satellite transmission.

The courtroom deputy clerk will administer the oath to the witness, hand him any documents which the witness is asked to refer to during his/her testimony and perform such other duties and functions as a courtroom deputy clerk would normally perform.

4. *Documents to be shown to the witness.* The party calling the witness shall furnish the Document Depository at least seven (7) working days prior to the transmission a list of all documents to which the witness will be asked in direct examination. The Document Depository will provide the courtroom deputy clerk at the district where the witness will appear copy of all such documents with sufficient time in advance for these to be available when the testimony is scheduled to commence.

Any documents needed for cross-examination or redirect which are not available at the site of the testimony when cross-examination commences shall be shown to the witness via satellite or copy thereof transmitted by telecopier.

5. *Telephone and telecopier.* There shall be available in the courtroom, for coordinating any necessary technologic aspects or any other matters that may arise during the satellite transmission, the following telephone number: (809) 766-5448. The party calling the witness shall provide a headset/headphones compatible with the existing telephone equipment. A telecopier capable of using the same telephone number shall also be placed in the courtroom by the party calling the witness.

There shall also be available in the room where the witness is to give his testimony a telephone with a headset/headphones compatible with the equipment and a telecopier. It shall be the responsibility of the party calling the witness to provide this equipment, to ensure it is in place and in working condition in time for the transmission and to pay all expenses related to its use.

407 The party calling the witness shall advise the Court of the number(s) of the telephone and telecopier (if different) to be used in the district where the witness is to appear. This shall be done no later than fifteen (15) calendar days before the satellite transmission is scheduled to commence.

6. *Additional Equipment.* In addition to the technical equipment needed for the transmission to be carried out, the party calling the witness shall also provide the following, at its own expense.

a. *Courtroom in Puerto Rico.*
   1. In addition to the existing monitors, an IN monitor and an OUT monitor from and to the location where the witness is present.
   2. A screen to be placed on the witness stand where the witness would sit.
   3. In addition to the existing cameras and monitors, one remote control camera to be placed on the witness stand focusing on the questioning attorney and another focusing on the presiding judge, each one with its corresponding monitor.
   4. Switcher(s) for the additional cameras.

b. *Room where witness is present.*
   1. Monitor for the witness to see the pertinent person(s), documents and/or exhibits in the courtroom.
   2. Adequate sound for the witness to hear any matters originating in Puerto Rico including headphones if necessary.

7. *Coordinating technical matters in this district.* Any coordination on technical matters needed for the courtroom in Puerto Rico shall be made through Mr. Jaime Sotomayor, this Court's audio and video technician.

8. *Coordinating with other district(s).* The party calling the witness shall advise this Court, at least fifteen (15) calendar days prior to commencing each satellite transmission, the address in each district where the transmission will be originated and the intended date(s) for each transmission.

It shall be the responsibility of the party calling the witness to coordinate in those other district(s) all necessary personnel and logistical matters to allow for a timely and smooth transmission. This includes securing the attendance of the courtroom deputy clerk, court reporter if necessary and ensuring all equipment is in place and in working condition prior to the transmission.

9. *Safeguarding transmission.* No person shall make or allow to be made any recording/videotape or copy of a recording/videotape of the satellite transmission except by written order of this Court in which case such recording/videotape made shall be the sole property of the Court. Necessary measures (encoding or scrambling) shall be taken by the party calling the witness to ensure that persons other than those in the courtroom are not able to watch, hear, or otherwise monitor the satellite transmission. Implementation of effective prophylactic measures to ensure this are a condition for allowing the satellite transmissions.

10. *Cost.* The entire cost of the procedures authorized herein, the necessary technical equipment as well as all logistical arrangements attendant to these

procedures shall be borne by the party calling the witness. This includes any expenses associated with necessary delays or adjournments and those warranted to complete cross-examination; provided, however, that any abuse of cross-examination, including repetitive or cumulative questioning, or any unnecessary prolonging of the testimony by repetitive, long or frivolous objections will result in allocation of costs due to delays to the party responsible.

11. *Cancellation of testimony.* In the event of cancellation of the testimony of any witness, the cost associated therewith shall be borne by the party calling the witness. If the cancellation was avoidable or resulted from matters within the cancelling party's control, the calling party shall bear the cost. Should the witness not be available to testify for a valid reason, the party having control over the witness shall advise the party calling the witness immediately or else the cancelling party will bear all costs associated with the cancellation.

12. *Subpoena and option to testify in Puerto Rico.* Any party seeking to compel **408** the testimony of any witness pursuant to the procedures set forth herein shall serve upon the witness a subpoena at least fifteen (15) calendar days in advance of the intended transmission.

A witness subpoenaed to testify by way of a satellite transmission may elect to testify instead at trial in Puerto Rico in which case all expenses related to such attendance shall be borne by the party calling the witness. This option, however, must be notified to the calling party at least seven (7) calendar days in advance of the date for the transmission in which case the calling party may either decline the option or the party having control over the witness will bear the cost of any expenses related to the aborted satellite transmission if these could not be avoided, e.g., pre-production costs.

13. *Recalling of witnesses.* A witness who testifies via satellite will not be allowed to subsequently appear in person at trial. His/her subsequent testimony will be either by way of satellite transmission or deposition. In the event it is by way of satellite transmission, the calling party shall bear all associated expenses."

The above judgment convicting the accused was affirmed by the Supreme Court of Appeal of Florida State in David Harel vs. State of Florida, No 90114 on 23.4.98 (709, So. 2d. 1364 = 23 Fla. L. Weekly 2236) (Harding J delivered the judgment and Kogan CJ, Overton, Shaw, Wells and Anstead JJ concurred). The State Supreme Court held that the defendant's right to physically confront his accusers under the Confrontation Clause is not absolute and there are certain exceptions where a defendant's right to

face-to-face confrontation will give way to conductors of public policy on the necessities of the case. Exceptions are only permitted when the reliability is otherwise assured, and reliability can be exhibited through the other three elements of confrontation, the oath, cross-examination, and observation of witnesses' demeanour. For the virtual picture via image on a screen in the Court for the purposes of the Confrontation Clause, in order to qualify as an exception, the proposed procedure must (1) be justified, on a case-specific-finding based on important interests, public policies, or necessities of the cases, and (2) must satisfy the other three elements of confrontation, that is, the oath, cross-examination, and observation of the witnesses' demeanour. Here, the witnesses were living beyond the subpoena power of the Court and there was no way to compel their appearance in Court, one witness was in poor health and could not make the trip to US and both witnesses were absolutely essential to the case as they were the victims of the crime. Depositions to perpetuate testimony are analogous to satellite procedure to provide live testimony subject to Confrontation Clauses, and the proper approach for determining when the satellite procedure is appropriate is similar to that made under the rules providing circumstances under which and the procedure by which a party can take a deposition to perpetuate testimony for those witnesses that are found to be unavailable. For the party who, in a criminal case, moves for satellite testimony, it is incumbent to (1) verify or support by affidavits of credible persons that a prospective witness resides beyond the Court's territorial jurisdiction or is unable to attend or is prevented from attending a trial or hearing, and (2) establish that witness's testimony is material and necessary to prevent a failure of justice. Upon such a showing, the trial Judge shall allow the satellite procedure that affords live, contemporaneous opportunity to cross-

examine the witness and allows the jury to observe the witness's demeanour during exchange. In case the parties are in conflict as to whether satellite proceeding or a deposition to perpetuate testimony is more appropriate, the decision shall be left open to the discretion of the trial Judge based on whichever procedure the Judge feels will be better to serve justice. Procedure in presenting testimony via satellite satisfied the safeguards of the Confrontation Clause of oath, cross-examination, and observation of witness's demeanour and thus, witness's testimony was sufficiently reliable; out-of-country witnesses were placed under oath by State Court client, defence had an opportunity to cross-examine the witnesses, jury could observe the witnesses as they testified, witnesses could see the jury, and witnesses were subject to possible penalty for perjury. Oath required by the Confrontation Clause is only effective if the witness can be subjected to prosecution for perjury upon making a knowingly false statement. To ensure that the possibility of perjury is not an empty threat for witnesses that testify via satellite from outside US, in order for the oath requirement of Confrontation Clause to be met, it must be established that there exists an extradition treaty between the witness's country and the US and that such treaty permits extradition for the crime of perjury. Extradition treaty exists between US and Argentina for perjury, and this, testimony of Argentina witnesses via satellite, satisfies oath requirement of Confrontation Clause. Due to possible audio and visual problems that can develop with satellite transmission of witnesses testimony, the trial Judge must monitor such problems and halt the procedure if problems threaten the reliability of the cross-examination or the observation of the witnesses' demeanour requirements of the Confrontation Clause.

For the above reasons, the Supreme Court of Florida dismissed the appeal and confirmed the conviction. Harding J concluded, stating that courts 'cannot sit idling by, in a cocoon of yesteryears':

> "Our Court is mindful of the importance of today's decision. Yet, we are also mindful that our society, and indeed the world, is in the midst of the Information Age. Computers are the norm in American households and businesses; an infinite amount of information is available at our fingertips through the Internet; and satellite technology allows us to travel the world without ever leaving our living rooms.
>
> The legal profession has also benefited from these technological innovations. Legal research that once took hours or days is now available in seconds through computer and Internet databases. Clients can reach their attorneys anywhere in the world through the use of cellular and video innovations. The list goes on and on.
>
> Indeed, our very own court takes pride in the recent technological advancements that have been made. Oral arguments before the Court are broadcast live via satellite throughout the state. These same arguments can be viewed online, along with the parties' briefs. The Florida Supreme Court Website has received worldwide acclaim for opening up the courthouse doors to the general public. All of these steps provide greater access to the judicial system, which in turn increases public trust and awareness.
>
> That being said, it becomes quite clear that the courtrooms of this State cannot sit idly by, in a cocoon of yesteryear, while society and technology race towards the next millennium. Fortunately, the courtrooms of this State have not been idle, nor are they speeding at a reckless pace. Recent changes in the courtroom have included the use of audiotape stenographers as well as video transmission of first appearances, arraignments, and appellate oral arguments, just to name a few.
>
> We recognize that there are generally costs associated with change. Nevertheless, technological changes in the courtroom cannot come at the expense of the basic individual rights and freedoms secured by our constitutions. We are confident that the procedure approved today, when properly administered, will advance both the access to and the efficiency of the justice system, without compromising the expectation of the safeguards that are secured to criminal defendants.
>
> Our nation's Constitution is a living document that has stood the test of time and change. This point is exemplified by the fact that our Constitution is still viable today – some two hundred-plus years after our country's birth. There was no way the founders of this nation could have foreseen the innovations that would

> take place throughout our country's lifetime – changes that, up to this point, have included advances in communication, electricity, train, airplane, and automobile transportation, and even space exploration. Nor can we predict today the changes yet to come. But we can say with certainty that our Constitution, as well as this great nation, can endure any future changes while at the same time ensuring that individual rights and liberties will be upheld.
>
> Accordingly, for the reasons stated above, we answer the certified question in the negative and approve the result that was reached by the Third District Court of Appeal."

Video conferencing in UK (Family Division) Practice Direction: (2002 (1) W.L.R. 406)

In the United Kingdom, in the Family Division, procedure for video conferencing has been laid down by means of a Practice Direction issued by the Senior District Judge, Mr. Gerald Angel, with the approval of Justice Dame Elizabeth Butler-Sloss P. It reads as follows:

> "1. Video conferencing facilities are available in the Royal Courts of Justice ("RCJ") in Court 38. In proceedings pending in the Principal Registry of the Family Division which are to be heard in the RCJ or in First Avenue House and in which it is desired to use these facilities, the following procedure should be observed.
>
> 2. (a) Directions for the video conferencing hearing should be given by an order made in the proceedings. The order may be made without attendance, provided all parties consent. (b) The order should specify, in general terms, the purpose of the hearing and give the date, time, place and duration of the hearing and the place or country with which the link is to be effected. (c) Availability of the facilities must be ascertained prior to the order being made fixing the appointment. This can be done by communicating with those responsible for managing the video conference facility in the RCJ, ("the video managers" – Roger Little and Norman Muller, telephone 020 7947 6581; fax 020 7947 6613). If the order is made at a hearing, the court associate or clerk will be able to make the telephone call to ascertain an available date. For orders to be made without attendance, the parties must ascertain the availability of the facilities prior to submitting the application. (d) In every case, the parties must communicate with the video managers as soon as possible after the order has been made to ensure

that all the necessary arrangements for the telephone link to be established are settled well in advance of the appointed date.

3. Where in any case the main hearing may be delayed because video conferencing facilities at the RCJ are not conveniently available, consideration should be given to using the video conferencing facilities at the Bar Council or the Law Society. If facilities away from the RCJ are to be used, it will be the responsibility of the party applying for the video conferencing hearing to make all the necessary arrangements with the video conferencing provider.

4. Issued with the approval of Dame Elizabeth Butler-Sloss P."

We may also refer to the UK Criminal Procedure and Investigations Act, 1996 which deals with Television links and video recordings. (see http://www.hmso.gov.uk/acts/acts1996/96025--n.htm)

So far as making a provision in the Evidence Act in regard to video-conferencing, we are of the view that the time is not ripe enough to introduce any provision in this behalf. A reading of the provision introduced in other countries shows that first there must be facilities in the trial Courts for video-conferencing and they must be fool-proof. Further, considerable expense is involved in providing these facilities. So far as contempt law is concerned, we have seen that Australia and New Zealand have a bilateral arrangement which is reflected in the Rules. The judgment from USA shows that so far as perjury is concerned, there must be extradition treaties with the States in which the witness is resident. In Singapore, we find, the facilities are restricted to proceedings other than criminal proceedings.

In the light of these problems, we are of the view that at an appropriate point of time, we can bring a separate law relating to Television

links as in Singapore or New Zealand, with such modifications as may be necessary.

Video recordings:

Sometimes, evidence is sought to be produced by a statement recorded by video. Here several safeguards are necessary to be taken to see that there is no tampering of the video-record. Further, as it is a pre-recorded video-cassette, it may not be useful to produce such evidence in a criminal trial because the accused has a right to see that prosecution evidence is recorded in his presence. (In the case of a live-video-recording by tele-conference, this right may remain adequately safeguarded.)

Section 30 of the Prevention of Terrorism Act, 2002 makes special provision for protection of witnesses.

In UK, sec. 23(3) of the Criminal Justice Act, 1988 make some provision in this behalf. This is applicable to a person who 'does not give evidence through fear or because he is kept out of the way'.

We do not think it necessary to make any separate provision in regard to pre-recorded video-cassette evidence inasmuch as the existing provisions can take care of the correctness or veracity of such evidence.

In the 69th Report (see Chapter 24) after some discussion, it was pointed out in para 24.4 that the section is not happily worded (as stated by Woodroffe and Amir Ali) in so far as it implies a mandatory rule that the contents of documents can never be proved by oral evidence. In certain circumstances, the contents of documents may be proved by oral evidence, when such evidence of their contents is admissible as secondary evidence (see sec. 63(5))(See also sections 91 and 92). However, it was said that it is a minor point, not calling for amendment.

We would, however, think that this is not a minor point and we propose sec. 59 be amended as follows:

Proof of facts by oral evidence

"**59.** (1) Subject to the provisions of sub-section (2), all facts may be proved by oral evidence.

(2) Save as otherwise expressly provided under this Act, the contents of documents or electronic records shall not be proved by oral evidence."

Section 60:

Section 60 says that 'oral evidence must be direct'. It reads as follows:

"60: Oral evidence must, in all cases whatever, be direct; that is to say –

- if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

- if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
- if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
- if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treaties if the author is dead or cannot be found, or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection."

The second proviso refers to what is called "real evidence"

In the 69th Report, an additional proviso was suggested (see para 25.36, 25.37) to say that the mandatory requirements to examine an expert is a waste of time and that instead, it should be left to the discretion of court.

In this context, we may point out that in England too, there has been serious criticism of abuse of the right to examine experts, resulting in unnecessary delay in trials in civil courts, "in the result, the whole of the procedure for the admission of expert evidence in civil cases has been fundamentally transformed by the changes wrought by the Civil Procedure Rules (CPR) introduced in the wake of Lord Woolf's two reports entitled Access to Justice (Interim Report, June 1995 and Final Report, June 1996). In England, in small claims track, no expert can be examined. Separate rules are made for 'fast track' and 'multi track' cases (see Phipson 1999, 15 Edn., paras 37.19 to 37.30).

We, therefore, fully endorse the recommendation in the 69th Report (see para 25.37). The provision proposed does not cause any injustice because the right of a party to summon the expert for cross-examination will remain unaffected. If necessary, it could be expressly provided that the parties shall have a right to call the witness for cross-examination. Where the opinion of the expert is one tendered by a party himself then, of course, he will not have any such right subject, of course, to section 154. With this recommendation in the 69th Report, we fully agree.

The proposed proviso also refers to cases where the expert is a government employee.

The 'rough draft' proposed reads as follows: (see para 25.37 of 69th Report)

"Provided further that the opinion of an expert expressed in writing, and the grounds on which such opinion is held, may be proved by the production of such writing, if the following conditions are fulfilled, namely –

(i) the expert is an employee of the government or of a local authority or of a university or other institution engaged in research and has been consulted by the court either of its own or on application,

(ii) the expert recorded the opinion in the course of his employment, and

(iii) the court, having regard to the circumstances of the case, considered it desirable in the interests of justice that the opinion of the expert and the grounds of his opinion should be proved by production of such writing, subject to the right of either party to summon the expert for cross-examination."

But, we feel that the 'rough draft' is some what defective as it nowhere refers to the discretion of court. Instead, we redraft the proposed proviso as follows:

"Provided further that the opinion of the expert expressed in writing, and the grounds on which such opinion is held, may be proved without calling the expert as a witness, unless the Court otherwise directs, having regard to the circumstances of the case, where the expert –

(i) is an employee of the Central or State Government or of a local authority or of a University or other institution

engaged in research and has been consulted by the Court on application of a party or on its own motion; or

(ii) recorded the opinion in the course of his employment,

subject however to the right of either party to summon the expert for the purpose of cross-examination."

Section 60A: (as proposed in the 69th Report)

This section was proposed in the 69th Report in regard to "evidence of age" but the Commission gave up the proposal as it felt that the provision will be abused. We respectfully agree.

Section 61 to 73A in Chapter V

These sections have been grouped together under the heading 'Of Documentary Evidence' under the same chapter V. Other groups of section are dealt with under other headings. We shall take up section 61 to 73A in one group.

Section 61:

This section refers to 'proof of contents of documents'. It reads as follows:

"61. The contents of documents may be proved either by primary or by secondary evidence."

Section 62 refers to 'primary evidence', section 63 to 'secondary evidence', section 64 to 'proving of documents by primary evidence, section 65 to 'cases in which secondary evidence relating to contents of documents may be given', section 65A and section 65B to 'special provisions as to evidence relating to electronic record and their admissibility', section 66 to 'Rules as to notice to produce' (which refers to section 65 clause (a)), section 67 to 73 refer to other matters of detail, relating to proof of signature, execution, comparison of signature, proof of verification of digital signature'.

So far as section 61 is concerned, the 69th Report stated (see para 27.11) that it does not require any amendment. We respectfully agree.

Section 62:

This refers to 'primary evidence'. It reads as follows:

"62. Primary evidence means the document itself produced for inspection of the court.

Explanation 1.- Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

> Explanation 2.- Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original."

There is an illustration to the section and it relates to 'printed' placards, all printed from one original. Any one of the placards is primary evidence of the contents of any other but no one of them is primary evidence of the contents of the original."

Phipson says (see 15th Edn., 1999, Pr. 41. 08) that it is 'not always easy, however, to determine what is the original document so as to constitute primary evidence in this sense; and sometimes the same document is primary for one purpose and secondary for another'.

Where documents are produced by "reprographic, automated or computerized" system, they must be marked as "original" to comply with Article 20 (b) of the Uniform Customs and Practice for Documentary Credits (UCPDC)" which is deemed generally to be incorporated in most documents transacted by Banks (see Glencore, International A.G. vs. Bank of China) (1996) (1) Lloyds Rep 135. See also Federal Bank Ltd. vs. V.M. Jog Engg. Ltd. (2001 (1) SCC 663).

Explanation 2 shows that in the case of printing etc., each is not the primary evidence of the original but each is the primary evidence only of the other copies. Phipson says (ibid) (para 41.19) that a copy made by a

copying machine is regarded as a secondary evidence of the original (Nodin vs. Murra: (1812) 3 Camp. 228). And printed, lithographed and photographed copies – though, as we have seen, are primary evidence of each others' contents, – are merely secondary evidence of the common original. In Re Stephens: LR 9 C.P. 187. Photographs of non-removable records were received; but the accuracy of a photographic copy, particularly of external objects, must, like that of a map or plan, be established on oath, to the satisfaction of the judge, either by the photographer or by someone who can speak to its correctness (Hindson vs. Ashby: (1896) 2 Ch. 1; U.S. Shipping Board vs. The St. Albans 1931 A.C. 632.

The Supreme Court observed in Govt. of AP vs. Karsichinna Venkate Reddy, AIR 1994 SC 591 that when the genuineness of a document is the fundamental question, the photostat copies thereof should be accepted after examining the original record.

Carbon-copies produced by type-writers may, for all practical purposes, be regarded as equivalent, though the impression on the lower sheets, are likely to be imperfect. Cash memos prepared at the same time are primary evidence (Gurumurty Patra vs. State of Orissa, 1990 Cri. L.J. (NOC) 160 (Orissa). In Federal US Co. vs. Indian L & M Co. (176 Ind. 328), in the case of a machine-carbon-copy in triplicate, each one was held to be an original (Prithi Chand vs. State of H.P., AIR 1989 SC 702).

The 69th Report stated that section 62 does not require any amendment. We agree.

Section 63:

Sec. 63 refers to 'Secondary evidence'. It reads as follows:

"63. Secondary evidence means and includes –

(1) Certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copies, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of document as against the parties who did not execute them;

(5) Oral accounts of the contents of a document given by some person who has himself seen it."

There are four illustrations below this section.

In the 69th Report, there was division of opinion 3:3 between the members. Dr. P.B. Gajendragadker, Shri Sen Verma and Sri P.M. Bakshi proposed that what is mentioned in clause (b) and (g) of section 65 should also be brought into section 63 because section 63 is otherwise being treated by courts as exhaustive of the definition of secondary evidence. In fact, there was some conflict among the courts in this behalf. This controversy has arisen because section 63 uses the words "means and includes". On the other hand, Dr. Tripathi and Shri Mitra felt that section 63 should not be amended and they gave a separate note. Dr. Dhavan gave a separate note for disagreeing with the views of Dr. P.B. Gajendragadkar, Mr. Sen Verma and

Mr. P.M. Bakshi. In view of this difference, nothing was finally decided as to the amendment.

Section 63 refers to five types of evidence. Clauses (1), (2) and (3) refer to three types of copies of documents. Clause (4) refers to counterparts; Clause (5) refers to oral account of contents of documents.

Illustration (a) refers photograph, first part of clause (2) says that no comparison with original is necessary. Illustration (b) refers to copy compared with copy and refers to the latter part of clause (2) and states that comparison with original is necessary. Illustration (c) refers to clause (3), copies transcribed and compared with original. Illustration (d) refers to clause (5) and shows that an oral account of the contents of the original and not of the copy would be secondary evidence.

Section 65 says secondary evidence may be given of the existence, condition or contents of a document when –

(a) …..

(b) when the existing condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest,

(c) ……

(d) …….

(e) ……..

(f) ……

(g) when the original consist of numbers accounts or other documents which cannot conveniently be examined by the court, and the fact to be proved is the general result of the whole collection.

Section 65 further says that in clause (b), the written admission is admissible and in clause (g), evidence as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents, is necessary.

Sarkar says (15th Edn., 1999, p.1064) that "some other forms of secondary evidence have already been considered, eg., admissions, statements by deceased person, etc. and that it has been held in a case that this section is exhaustive of the kinds of secondary evidence admissible under the Act. Where the terms of the document were sought to be proved by a judgement containing a transaction thereof in a suit which was not between the same parties or their representatives, neither the translation nor the statement in the judgment was secondary evidence of the contents of the document. It was so held in Jagannath vs. Secretary of State, AIR 1922 Madras 334.

Sarkar also refers to Hafiz Mohd. Vs. Hariram, AIR 1937 Lah 370, that the section is exhaustive and an abstract translation which is a summary of a document does not come within the purview of section 63. Draft of award of arbitrators, from which award was prepared, unless shown to have been compared with the fair award, is not secondary evidence (Girdhar vs. Ambika, AIR 1969, Pat 218).

But in Kalliani Amma vs. Narayanan, AIR 1915 Mad. 962, (referred to in the 69th Report, para 29.10), it was held that section 63 was not exhaustive. The case related to written admission of contents of the document. Tyabji J. stated that clause (b) and (g) of section 65 do not fall within the five clauses of section 63.

In Hindustan Construction Co. vs. Union of India, AIR 1967 SC 526, 527 it was held that a copy means a document prepared from the original which is an accurate or true copy of the original.

Now, we shall discuss the difference of opinion in the 69th Report. The crucial difference in the opinions between the Members of the Commission may now be summarized. According to Dr. P.B. Gajendragadkar, Mr. Sen Verma and Sri P.M. Bakshi in view of Kaliani A's case stated above, clause (b) and (g) of section 65 are to be added to section 63 for they do not, as stated by Tyabji J. in this case, fall within any of the five clauses of section 63.

On the other hand, according to Dr. Tripathi and Sri B.C. Mitra, when clause (b) of section 65 says that 'admission' is admissible, it is only referring to a situation where secondary evidence is admissible and is not making the admission equivalent to secondary evidence of the document as such. So is the position with clause (g) of section 65 where evidence as to the general result of a number of documents – which are too numerous to be produced in court – can be given and that is not secondary evidence of those documents in that full measure.

While this latter reasoning is correct, in our opinion, Dr. Tripathi and Sri B.C. Mitra do not say that clauses (b) and (g) of section 65 can fall within any of the five clauses in section 63.

Coming to the dissenting view of Sri Dhavan, upto a point he agrees that Tyabji J. is correct, that clauses (b) and (g) of section 65 are not covered by section 63 but the very fact of adding these clauses to section 65 would mean that the legislature treated the five clauses of section 63 as not being exhaustive. The Member says, with the development of science and technology, new forms of secondary evidence may come into being and it is not desirable to make section 63 exhaustive. Having said this, the Member says that, if any change is at all to be made, he would prefer to replace the words "means and includes" by the words "includes".

We may point out that section 63 says "secondary evidence means and includes" and contains five clauses as already set out above. Section 65 bears the title "Cases in which secondary evidence relating to documents may be given".

Now, the view of the three Members in favour of the amendment does not answer the point raised by the two other dissenting members i.e. Dr. Tripathi and Sri B.C. Mitra that clauses (b) and (g) only make admission and a 'general account' admissible as secondary evidence but by that, the entirety of the document, word for word, is not coming on record. At the same time, the said two Members do not answer the point raised by the first three that the cases falling under clauses (b) and (g) of section 65 do not fall within any of the five clauses of section 63. The third dissent goes a long

way in supporting the amendment but satisfies itself to omit the word 'means' in section 65 in as much as more types of secondary evidence may come into being with the advance of science and technology.

We have noticed the statement by Sarkar (p.1064) that 'some other forms of secondary evidence have already been considered, eg., admissions, statements of deceased person etc.' We can visualize also that with the development of science and technology, there could be addition to clauses (1) to (5) of section 63. In that sense, section 63 is exhaustive "only for the present". While the comment that clauses (b) and (g) of section 65 do not substitute the document word for word and are secondary evidence in the full sense, the admissions and general account referred to in these clauses being admissible, could form the basis of proof for one party.

Phipson refers under para 41.13 to 41.36, 'secondary evidence' but the discussion covers not only what is contained in section 63 but also that in section 65.

In the light of the above discussion, we are of the view that clauses (b) and (g) cannot be included in the definition of 'secondary evidence' by adding them to section 63 because they do not bring in the whole document. But, as clauses (b) and (g) make evidence admissible, otherwise than of the original document, such evidence must be 'secondary evidence', if it is not 'primary evidence' because we do not have a third or hybrid character of evidence. Thus section 63 cannot ignore the concepts behind clauses (b) and (g) of section 65. The only way this can be achieved, and the further scope for scientific developments can also be given, is to drop the word "means

and" in section 63. We have reached our conclusion in this behalf for reasons which are other than or in addition to the reasons given by Sri Dhavan. We now proceed to deal with other clauses of section 63.

We agree with the 69th Report that in clause (3) for the words "made from or compared" the words "made from and compared" shall be substituted.

In the 69th Report, three clauses were separately considered (see paras 29.23 to 29.28) and it was held that no amendment is called for except to use the word 'seen' for the word 'read' in clause (5) of section 63. That relates to oral accounts of contents given by those who have 'seen' the document. Surely, in our opinion, 'read' is a better word.

In the result, we recommend deletion of the word 'means and' in the opening portion of section 63 and substituting the word 'read' for 'seen' in clause (5) of section 63 and also substituting the words "made from and compared" in clause (3) of sec. 63 for the words "made from or compared".

Section 64:

This section refers to 'Proof of documents by primary evidence'. It reads as follows:

> "64. Documents must be proved by primary evidence except in the cases hereinafter mentioned".

In the 69th Report, it was observed that no amendment of section 64 is necessary. We respectfully agree.

Section 65:

This section refers to cases in which secondary evidence relating to contents of documents may be given. It contains seven clauses (a) to (g). We have already referred to clauses (b) and (g) while dealing with section 63.

In the 69th Report, in para 30.26, five recommendations (a) to (e) were made for amending section 65.

It becomes, therefore, necessary to deal with section 65 in some detail. The section reads as follows:

"65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

(a) when the original is shown or appears to be in the possession or power –

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the court, or

of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) When the original is of such a nature as not to be easily moveable;

(e) When the original is a public document within the meaning of section 74;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in evidence;

(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in

court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents".

The notice contemplated in section 65 (a) is the notice referred to in section 66 and is to be issued in the manner mentioned in Order 11, Rule 16 of the Code of Civil Procedure, 1908 except in the cases mentioned in the proviso to section 66.

Whether various clauses of section 65 mutually exclusive

(1) In para 30.5 of the 69th Report, it was pointed out that the various clauses of sec. 65 are not mutually exclusive in the sense that if a case does not satisfy the requirement of one clause, it may still be admissible as secondary evidence under another clause. For example, if a case falls under clause (a), then secondary evidence is admissible, even if the conditions of clause (e) or clause (f) are not satisfied. The Report suggested that an attempt to contend that the clauses were

mutually exclusive was urged but not accepted in 'In the matter of Collusion' (1879) ILR 5 Cal 568 and in Sunder vs. Chandreshwar: (1907) ILR 34 Cal 293.

It was pointed out that a clarification in this behalf is not necessary so far as clauses (a) to (d), (g) are concerned, but is necessary because of the negative words used in the last part of the penultimate para of the section:

"In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible."

The 69th Report suggested (see para 30.6 and 30.7) that the words "unless some other clause of this section applies" be added in the penultimate para after the words 'is admissible'.

We agree respectfully.

(2) S. 65(a)

One of the important aspects concerning s. 65(a) which requires a close examination is the third clause therein which refers to non-production

of a document by "any person legally bound to produce it". In such a case, the section permits secondary evidence of its contents.

The clause is applicable obviously to 'any person' which may mean 'the opposite party' or even a 'third person non-party' who is a witness or who may, by compulsion of the Court's orders, be called upon to "produce the document in court."

The controversy concerning section 65 (a) is whether indeed it was intended to cover a situation where the original document is in the possession of a person 'not bound to produce it', in which event, the party relying on it may be entitled to produce secondary evidence. It has been pointed out that under English Law, the provision is referable to a person 'not compellable by law to produce', on the ground of some privilege, e.g., as it goes against him, or he has a lien on the title deed or the document may incriminate him. (Mills vs. Oddy, (1834) 6 C&P 728), Hibberd vs. Knight (1848) 2 Exch 11: Newton vs. Chaplin: (1850) 10 C.B. 356. He has to be compelled by subpoena duces tecum and must expressly claim privilege (Lloyd vs. Mostyn) (1842) 10 M&W 476. See also Halsburry 3rd Edn., Vol. 15, para 647; Wigmore (para 1212) says 'if after service of subpoena, the possessor is recalcitrant and refuses to obey, the proponent should be excused'. Under English Law in the case of a person 'bound to produce', but if he does not, he can be sued for damages. But, this according to Indian law was not just. The proponent must, in such a case, be entitled to produce

secondary evidence under section 65 (a) (see Sarkar, 15th Edn., 1999, p.1089).

The question was debated whether section 65 (a) meant or should have also provided for permitting secondary evidence if the person in possession thereof is not bound to produce it but refuses court orders to produce it. These views are recorded in Sarkar's commentary as also in the 69th Report. Several jurists like Markbhy, Cunningham, Field, Norton and Sarkar have all stated that the section must also permit secondary evidence in a case where the refusal is by a person not bound to produce it. Otherwise, grave injustice would be caused to the proponent if he is not permitted to bring in secondary evidence.

The 69th Report after referring to this aspect (see para 30.10 to 30.13) accepted that section 65 (a) should have provided for the above situation. It said:

> "It must be noted that the remedy which the English law allows in such a case (case of a person bound to produce) – action for damages – is not speedy, and may even not be adequate, because the person concerned, having custody of the document, may be a man of straw. We are of the opinion that the latter is the correct view. We do not, therefore, suggest any amendment of clause (a) on this point. As to persons not legally bound, we are adding them separately."

and in para 30.17 to 30.20, they recommended that provision should be made in section 65 (c) by an amendment adding necessary words after 'for any reason not arising from his default or neglect.' The actual string of words to be added in section 65(c) was not spelled out.

We would, however, think that the addition must be in section 65 (a) itself and not section 65 (c). We would think that in section 65 (a) at the end, after the words "such person does not produce it", another clause is added, or, "of any person not legally bound to produce it, where after notice by court at the instance of any party, to produce it, such person does not produce it". (This is proposed under clause (aa)).

In this context, Order X Rule 16 of the CPC may not be helpful because it contemplates notice to a 'party' and not notice to a witness, other than a party, who, not being bound to produce, does not produce the document.

To avoid confusion, we propose, clause (a) to be sub-divided as follows:

"(a) when the original is shown or appears to be in the possession or power –

(i) of the person against whom the document is sought to be proved; or of any person out of reach of, or not subject to,

> the process of the Court and such person does not produce the original; or
>
> (ii) of any person legally bound to produce it, and such person, after receiving the notice mentioned in section 66, does not produce it; or

(aa) when the original is shown or appears to be in the possession or power of any person not legally bound to produce it, and such person, after receiving notice from the Court at the instance of any party to produce the original, does not produce it."

In para 30.11, the 69th Report suggested that the words "and when, after notice mentioned in sec. 66, such person does not produce it", do not apply to "any person out of reach of, or not subject to, the process of the Court". We agree and have incorporated a change in sec. 65(a) accordingly.

In the 69th Report, it was also suggested (see para 30.12) that the word 'after the notice mentioned in section 66' may be replaced by the words 'when any person in whose possession or power the original may be, does not, after receiving the notice (if any) required by section 66, produce such originals" and that after the figure "66", the words "when such notice is necessary" are added. We do not think that this is necessary.

The above format has to be further changed, in as much as we have agreed for the proposal in para 30.11 as follows:

We finally recommend that Clause (a) of section 65, with all these above amendments should read as follows:

"(a) when the original is shown or appears to be in the possession or power –

> (i) of the person against whom the document is sought to be proved; or of any person out of reach of, or not subject to, the process of the Court and such person does not produce the original; or
>
> (ii) of any person legally bound to produce it, and such person, after receiving the notice in section 66, does not produce it; or

(aa) when the original is shown or appears to be in the possession of any person not legally bound to produce it, and such person, after receiving notice from the Court at the instance of any party to produce the original, does not produce it."

Section 65(b):

In the 69th Report, it was stated (see para 30.15) that no changes are required in sec. 65(b). (see also below sec. 65(d) to (g)). We agree.

Section 65(c):

This clause need not be amended. In fact, in the 69th Report, no amendment was suggested in the context of clause (c) of sec. 65. However, the situation arising under sec. 65(a), if a person not obliged to produce a document was sought to be brought into clause (c) by addition of words. We have already stated while dealing with sec. 65(a) that it will be appropriate

to bring this aspect in sec. 65(a) itself. We have, in fact, formulated the sub-clauses (i) and (ii) also while dealing with sec. 65(a).

Therefore, no words need be added in sec. 65(c).

Sections 65(d) to (g):

No changes are needed. While dealing with sec. 63, we referred to a controversy as to whether sec. 65(b) and (g) should be brought into sec. 63. We have said it is not necessary. Hence, sec. 65(d) to (g) require no change.

As already stated, we agree with the suggestion in the 69th Report that the words "unless some other clause of this section applies" be added in the penultimate para after the words "is admissible".

Sections 65A & B:

These sections have been added to cover electronic record, by Act 21/2000.

Section 65A says special provisions are made for proof of electronic record. Sec. 65B deals with that procedure. Sub-section (1) of sec. 65B says that notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a 'document', if the conditions mentioned in the section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings without proof of original or of any fact stated therein of which direct evidence would be admissible.

Sub-section (2) of sec. 65B refers to the conditions in respect of the computer output. Subsection (3) of sec. 65B refers to combination of computers. Subsection (4) requires a certificate to be given by the person occupying a responsible official position in relation to the computer operation or management, shall be evidence of any matter stated on the certificate. Subsection (5) clarified certain aspect and there is also a further Explanation below the section.

We do not think that any amendment is necessary in these sections.

Section 66:

This section refers to 'Rules as to notice to produce' and is referable to sec. 65(a) which requires a notice be given. We are not extracting the section as it is lengthy.

In the 69th Report (see para 30.29), it was stated in para 30.29 that no amendment is necessary in this section. We agree.

Section 67:

This section refers to "proof of signature and handwriting of person alleged to have signed or written (the) document produced." It reads as follows:

"67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so

much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

After some discussion of sec. 67 (including cases of registered documents), the 69th Report stated (see para 31.15) that no amendment is necessary. But, in our view, the following Explanation be added below sec. 67 to clarify the meaning of the word 'execution' or 'signatures' in sections 68 to 73.

> "Explanation:- In this section and in sections 68 to 73, the expressions 'execution' or 'signature' in relation to wills shall have the same meaning assigned to them under section 63 of the Indian Succession Act, 1925 and the expression 'attestation' shall mean signing or putting a mark by the attestor."

Section 67A:

This section was inserted by Act 21/2000 and deals with 'proof as to digital signature'. It states that except in the case of a 'secure digital signature', if the digital signature of any subscriber is alleged to have been affixed to an electronic record, the fact that such signature is the digital signature of the subscriber must be proved.

It may here be noted that the definition of 'digital signature' and of 'secure digital signature' is contained in the Information Technology Act, 2000 (Act 21/2000). Sec. 3 of the Evidence Act has been, as already stated, amended to say that the above expression and certain other expressions have the same meaning as given to them under Act 21/2000.

There are no proposals for amending sec. 67A.

Section 68:

This section deals with 'proof of execution of document'. In the 69th Report, some amendments have been suggested and, therefore, we shall examine the matter in some detail. Sec. 68 reads as follows:

> "68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

Under the provisions of sec. 57, 58 and 63 of the Indian Succession Act, 1925, certain wills are liable to be attested by two witnesses. (There may be other wills which are not required to be attested.) Under sec. 59 of the Transfer of Property Act, 1882, mortgages for Rs.100 or more have to be

attested by two witnesses and gifts of immovable property have to be also attested by two witnesses under sec. 123 of the same Act.

In the 69th Report, various reasons were given for dispensing with the need for calling an attesting witness in the case of all documents (except wills) and confine the section to wills. It was also suggested that cases of "delay or expense in calling him", or "being kept out of the way by the adverse party" or 'incapable of giving evidence' should also be added in the exceptions, i.e. after the word 'unless'. Reference was made to the hardship created by the section requiring that an attesting witness be called in the case of every document required to be attested (except wills) and to the opinion of Sarkar to support this view. It was also said that sec. 68 should not apply if the will is more than 30 years old (sec. 90) or was not produced in spite of notice (sec. 89).

We may add that the proposals are broadly in conformity with the English law as it stands after the (UK) Evidence Act, 1938. Phipson says (para 40.13):

> "Documents required by law to be attested are (subject to the exceptions mentioned below) provable by calling the attesting witness. The rule is now imperative only in the case of wills and other testamentary instruments. The witness, in the case of wills, etc. is the witness of the court and can be cross-examined by the party calling him as to any evidence he gives tending to negative execution, or on other relevant issues."

In para 40.16(f), it is observed:

> "The law has been much altered by the Evidence Act, 1938, sec. 3. In the case of any document, other than a will or other testamentary disposition, the former law is practically reversed by the provision that an instrument required by law to be attested may be proved in civil or criminal proceedings as if no attesting witness were alive. In the case of a will or other testamentary instrument, the Act expressly leaves the old law unaltered. In the case of a testamentary instrument, therefore, it remains the law that where the attesting witness is dead, insane, out of the jurisdiction, kept away in collusion with the other side, or cannot be found after diligent search, and the document is not 20 years old, secondary evidence of execution must be given by proof of the handwriting of the witness; or if this is not obtainable, by presumptive or any other available evidence. So, perhaps, if the witness is seriously ill."

It will be noted that the corresponding law in England is to accept not only documents other than a will but even in case of wills, to accept other situations where the witness is kept out of the way. So far as attestor who cannot be found, that aspect is covered by sec. 69.

We shall now refer briefly to the reasons given both in England (Phipson) and in India (69th Report and Sarkar) as to why the procedure of calling an attesting witness in the case of all documents (other than wills), should be given up.

The reasons in the 69th Report and those added by us are: (i) hardship in calling the attestor as a witness, in as much as, over a period of years, the attestor may have gone to a distant place, or become old or sickly; (ii) if the evidence of the executant, if living, is not mandatory, why should attestor's evidence be mandatory; (iii) any way, attestation has to be proved, if the Transfer of Property Act had made attestation compulsory in the case of some documents. Even in the case of documents which did not require compulsory attestation, proof of attestation may add to the proof of genuineness of the document; (iv) sometimes, if the attestor denies his attestation, the parties have to cross-examine him and prove attestation; (v) it is not necessarily the best evidence.

Phipson also says (see para 40.13) that the original principle was this: "The reason is not (as is sometimes supposed) that proof by the attesting witness is the best evidence, but that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, an agreement which may be waived for the purposes of dispensing with proof at the trial but cannot be broken".

But, according to Phipson, this old principle is no longer accepted: "The rule appears to have no connection with the 'best evidence' principle, which, as already noticed, was a much later introduction. Indeed, at first a witness to an instrument was not necessarily one who had seen it being executed but one who was prepared to give it credit by his name, and it was no uncommon thing for such witnesses, when questioned, to know nothing about the execution." He says further: "There is no rule that evidence of an

attesting witness is conclusive. Other persons present at the time may be called to contradict him".

Sarkar (15th Ed, 1999, p. 1124) quotes Wigmore (para 1288) to say that the theory that parties must be deemed to have agreed that an attestor will be a person who should speak about the circumstances of the execution, is not correct and there "no such agreement can be implied, particularly when attestation is required by law". In other words, the mandate of the law excludes any theory of an implied agreement that "the attestor" is to be the witness to the circumstances of execution. Wigmore also says (para 1288) that the right to cross-examine the attestor is not a weighty safeguard. Sarkar says: "This reason is also criticized by Wigmore on the ground that "the rule applies even where fraud, duress, and time are not in issue, and even where the maker himself is competent as a witness." Again, the attestor "is in practice, not usually a person who knows anything about the circumstances preceding the document's execution, or knows more than any other person who by being present, would be a qualified witness". (Sarkar p. 1124)

The real reason for requiring attestation (though not for calling the attestor a witness), according to Wigmore (para 1288) is that precaution against forgery, non-existence of special hardship in obtaining the attestation of a witness, the attestor's testimony being the most desirable and trustworthy evidence as to the fact of execution of documents by illiterate persons who are dead and the fairness of placing the burden of producing the attesting witness upon the party of whose duty it was to prove the due execution and attestation.

It has also been held that under sec. 68, it is not necessary that an attesting witness should prove execution; it requires that an attesting witness must be called to prove execution, but if he forgets or pretends to forget or denies execution or proves hostile, it may be proved by other evidence under sec. 71 (see Bashiran vs. Md. Hussain, AIR 1941 Oudh 284; Sarjoo vs. Jagatpal, AIR 1942 Oudh 201 (quoted in Sarkar, p. 1124).

Sarkar says that the changes made in England in 1938 under the U.K. Evidence Act, 1938, to which we have already referred to are long 'overdue' in India and the "continuation of the former English law leads to avoidable perjury in many cases".

Sarkar (15th Ed, 1999) enumerates about 14 situations in which it may be difficult to call or examine an attestor (p. 1125-1126). One of them is that under the Merchant Shipping Act, 1894, documents requiring attestation, may be proved without calling attesting witnesses. We find that all these are covered by the proposals referred to in the 69th Report and the additions we have suggested. We are, therefore, not referring to these fourteen types of cases.

One other aspect is whether the words 'shall not be used as evidence' mean that the document can be used for collateral purposes. Such a view was not accepted in Shib Ch. vs. Gour Ch: 27 CWN 134 following the older English cases. But, in several jurisdictions in America, the rule is relaxed when the document whose execution is to be proved is not a document necessarily involved in the pleading but comes collaterally or incidentally in

issue (Wig. S. 129 quoted by Sarkar p. 1129). However, the Allahabad High Court has relaxed this rule - an admission in a mortgage bond of a prior mortgage could be relied upon for purpose of an acknowledgement without proof of attestation (Shyam Lal vs. Lakshmi, AIR 1939 All 366) or to prove the handwriting of a scribe (Motichand vs. Lalta (ILR 40 All 266; Mathura vs. Chhedi, AIR 1915 All 254; Radhakrishnan vs. Bharaethan, AIR 1990 Kerala 146. We propose that inadmissibility must be confined to the testamentary disposition coming into effect and not for collateral matters, such as where the will contains an acknowledgement of debt or proof of relationship etc.

Sec. 63 of the Indian Succession Act requires that the testator 'sign or affix his mark', but while referring to attestation, sec. 63 used the word 'sign'. There is a conflict of opinion among the High Courts (see Sarkar p. 1143) and the author says that the view that 'mark' could be accepted as attestation is correct. We have already made a provision by adding an Explanation in sec. 67.

Again, in regard to contention that the signature of a Registrar of Assurances should be treated as attestation appears to be not acceptable (see Abdul Jabbar vs. Venkata Sastri, AIR 1969 SC 1147), there are conflicting views in the High Courts as to whether a scribe or any one who does not sign in the capacity of an attesting witness, can be treated as an attesting witness (see Sarkar p. 1147-1151). The Supreme Court has stated in Abdul Jabbar's case that a scribe or identifier cannot be an attesting witness unless he puts his signature animo attestandi.

We have referred to some of these aspects which have arisen under sec. 68, but in view of the decisions of courts, we do not think any specific provision need be made in the section.

In the result, we recommend that sec. 68 must be confined only to wills and required to be redrafted and the exceptions added and referred to in the 69th Report require further expansion.

The section as redrafted in the 69th Report reads as follows (see para 32.34). (Of course, one member Sri Mitra gave a note of dissent).

> "68. If a will is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court, unless the witness is incapable of giving evidence or is kept out of the way by the adverse party or is one whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable:
>
> Exception – Nothing in this section applies to the case where the will is in the possession of the opposite party, nor shall this section affect the provision of section 89 or 90."

Sec. 89 deals with documents in regard to which a notice is given for production and sec. 90 to cases of wills more than 30 years old.

We propose a few more changes. One is that the bar must apply only in respect of proving the 'testamentary disposition' and not to proving collateral facts, already referred to. The other one is that the exceptions must also refer to a case where the attesting witness is kept away by another person in collusion with the adverse party.

We, therefore, recommend that sec. 68 be redrafted as follows:

Proof of execution of will required by law to be attested

"**68.** (1) If a will is required by law to be attested, it shall not be used as evidence of any testamentary disposition until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence.

(2) Notwithstanding anything contained in sub-section (1), an attestor need not be called as a witness to prove the execution of a will if,-

(a) the attesting witness is incapable of giving evidence; or is kept out of the way by the opposite party or by another person in collusion with that party or is one whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or
(b) the will is in the possession of the opposite party; or
(c) a party wants to refer to any collateral fact contained in the will; or
(d) the provisions of section 89 or section 90 apply."

Section 69:

This section deals with "proof where no attesting witness found". It reads as follows:

> "69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

The 69th Report recommended (para 32.37 & 32.30) and rightly in our view, for replacing the word 'document' by the word 'will', and for omitting the words "or if the document purports to have been executed in the United Kingdom".

We agree.

The revised section, as recommended, is as follows:

> **Proof where no attesting witness is found**
>
> **"69**. If no such attesting witness can be found as specified under sub-section (1) of section 68, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the will is in the handwriting of the executant of the will."

Section 70:

Section 70 deals with "admission of execution by party to attested document".

It reads as follows:

> "70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

In view of the recommendation for confining sec. 68 to 'wills', it is obvious that sec. 70 must be confined to wills. But the question is whether the testator, being the sole party, would have had occasion to admit execution of the will, the fact remaining that a will comes into effect only after the death of the testator.

In fact, the 69th Report had this aspect in view and observed (see para 32.47) as follows: "Since a will speaks from the death of the testator, questions as to its execution would arise mostly only after the death of the testator. However, it is not inconceivable that during his lifetime, the testator is a party to a proceeding in which the will is in issue – for example, in the case of mutual wills".

We find that since the 69th Report was submitted, the Kerala High Court held in R. Saraswathy vs. Bhavathy Ammal: AIR 1989 Ker 228 that sec. 70 is not applicable to a will because the executant of a will, which will become effective only on the death of the executant, will not be available to admit the execution at the relevant time.

In the case of a will, if the testator had, during his life time, occasion to admit the execution of will (say) in some other registered document or while giving evidence in some other case, that evidence may be relied upon by those who claim under the will as against those who dispute its execution, after the testator's death.

It was also recommended in the 69th Report (see paras 32.43 to 32.47) that the admission of execution of the document (i.e. will) must have been in the course of a legal proceeding, in a pleading or evidence but not an admission before the litigation started. The Commission accepted this view as correct as against the opposite view that the admission could be before or outside the litigation. We agree with the view of the Commission and the reasoning that the principle is "that the parties arrange for attestation with the object of securing evidence in case of litigation" (see para 32.44).

The revised section as recommended in the 69th Report (see para 32.48) is as follows:

> "70. The admission of a party to an attested <u>will</u> of its execution by himself shall, if such admission is made in a pleading or otherwise in the course of the proceeding, be sufficient proof of its execution as against him, though it be a will required by law to be attested."

With regard to this format, we have something to say. We are of the view that the section must speak of the 'executant' rather than 'party' to an attested will. Secondly, keeping in view the Kerala Judgment, it will be

useful to add the words "such admission", after the words "executant of the will". Again, instead of the words "against him", the words "as against those who dispute the attestation".

We recommend sec. 70 to be revised as follows:

Admission of execution by party to attested will

"70. The admission by the executant of an attested will of its execution shall, if such admission is made during his lifetime in a pleading or otherwise in the course of a suit or proceeding, be sufficient proof of its execution as against those who dispute the execution, though the will is one required by law to be attested."

Section 71:

Section 71 deals with "proof when attesting witness denies the execution". It reads as follows:

"71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

The word 'document' must for the reasons stated hereinabove, be replaced by the word 'will'. There is another aspect where there is more than one attesting witness and the party who wants to prove the will calls him but he turns hostile or does not remember. One view was that there is no duty to call the other attesting witnesses, even if available (see Hason Ali vs. Gurdas, AIR 1929 Cal 188; Manki vs. Hansraj, AIR 1938 Pat 301; Ayenati vs. Md. Ismail, AIR 1929 Cal 441 (Contra Mitter J). This view

was accepted in the 69th Report (see para 32.51) on the basis that the section did not say so and that, calling other attestors, will cause inconvenience.

The opposite view that other attesting witness may then have to be called is supported by the observation of the Privy Council in Surendra vs. Behari, AIR 1939 PC 117 and is more appealing to us. This opposite view that other attesting witnesses must be called was taken in Hare Krishna vs. Jagneswar, AIR 1939 Cal 688; Vishnu vs. Nathu, AIR 1949 Bom 266. The law in England also is the same, having regard to the fact that proof of wills has always been put at a higher pedestal. In Pilkington vs. Gray: 1899 AC 401, one of the two witnesses to a will gave adverse evidence and said that the signatures were forged. It was held that other evidence could not be let in unless the absence of the second attesting witness was satisfactorily explained. In Coles vs. C, 13 LT 608, it was held that the other attesting witness must be called although the party may know him to be adverse. See also Bowman vs. Hodgson (1867) I P&D 362; Dayman vs. D 71 LT 699. The Patna High Court held in Tubla vs. Gopal 1 Pat Law J. 369 and the Calcutta High Court also held in Gobind vs. Pulin 31 CWN 215, that a plea that even if he is called, he will be hostile, has not been accepted.

Sarkar says that the view that other attestors need not be called is not correct and we agree with that view and respectfully disagree with the reasoning given in the 69th Report. Of course, the exceptions laid down in sec. 68 will always be applicable, such as the other attestor not being alive, or being kept away by the opposite side etc.

The 69th Report recommended that sec. 71 should be revised as follows:

> "71. If the attesting witness called for the purpose of proving execution denies or does not recollect the execution of the will, its execution may be proved by other evidence and it shall not be necessary to call any other attesting witness."

Instead, we recommend sec. 71 be revised as follows:

Proof when attesting witness denies the execution

> **"71.** If the attesting witness called for the purpose of proving execution of a will denies or does not recollect the execution of the will, its execution shall, subject to the provisions of section 68, be proved, by calling other attesting witnesses, before other evidence is adduced."

Section 72:

This section refers to 'proof of document not required by law to be attested'. It reads:

> "72. An attested document not required by law to be attested may be proved as if it was unattested."

The 69th Report again confined sec. 72 to wills. (No doubt, there are categories of wills not required to be attested – see Indian Succession Act, 1925). The revised sec. 72 we propose is as follows:

Proof of wills or other document not required by law to be attested

"72. An attested will or other document not required by law to be attested may be proved as if it was unattested."

Section 73:

Section 73 deals with "Comparison of signature, writing or seal with others admitted or proved".

The first part of the section permits the Court to compare a 'purported' signature, writing, or seal with one which is admitted or proved to the satisfaction of the court to be a genuine one.

The second paragraph enables the Court to direct any person present in Court, to write any words or figures for the purpose of comparing the disputed one.

The third paragraph of the section says that the section applies also to 'fingerprint impressions'.

(a) First para of sec. 73: The 69th Report suggested some amendments in view of the multiplicity of judgments of the Courts. So far as the word 'purported' used in para one is concerned, some High Courts took a narrow view of the meaning of the word 'purported' and said that sec. 73 applies only if the disputed writing itself states that it was the writing of the person in question while some

other High Courts interpreted the words widely and held that the word 'purport' meant 'alleged'. In fact, the second para of sec. 73 permits the Court to direct any person in the Court to write words or figures.

The recommendation in para 33.19 of the 69th Report is that the word 'purports' be substituted by the words 'is alleged'. We agree with this recommendation.

(b) Another controversy was whether the comparison is restricted to comparison by the Court and whether it extends to comparison by an expert or any other person. After referring to the conflict in the case law, and in particular to Kailash Chandra vs. Dhobi Barik: AIR 1967 S.C. 771, and M.P. Sharma vs. Satish Chandra: AIR 1954 S.C. 300, the 69th Report stated in para 33.23 that while sec. 73 does not expressly authorize reference to any expert or other person, the same is not prohibited. For example, the Court may still think of sending the disputed signature to an expert to compare the same with the admitted one or the one which the Court was satisfied, was genuine. It was pointed out that in England under sec. 4 of the Criminal Procedure Act, 1865 such comparison can be allowed to be made even by witnesses.

In para 33.28, the 69th Report opined that this is an aspect which certainly needed to be clarified.

Second para of sec. 73: So far as the second para of sec. 73 is concerned, the power to compel a witness to give his signature or thumb impression or `writing, it must be noted, does not offend Art. 20(3) of the Constitution of India (State of Bombay vs. Kathi Kalu AIR 1961 SC 1816.

The 69th Report refers to the judgments of various High Courts which stated that the Court of a Magistrate or similar Court cannot direct signature or thumb impression be given, when a criminal complaint is under investigation and before the Court had taken cognizance of an offence. The reasoning was that the Evidence Act applies only to judicial proceedings and not to stages of investigation. It was therefore recommended in para 33.40 that an Explanation be added. Sec. 73 does not apply to a criminal Court before it had taken cognizance of an offence. The proposal was to add an Explanation as follows:

"Explanation – Nothing in this section applies to a criminal court before it has taken cognizance of an offence."

But, in our view, it should not appear that at the stage of investigation, such a power could not at all be vested in a court. It would be necessary to add the following words before the words "Nothing in this section",

"Without prejudice to the provisions of any other law"

Third para of sec. 73: So far as the third para of sec. 73 is concerned, the 69th Report recommended in para 33.41 that the section should also apply to "palm impressions, footprints and type writing." In that connection, it was pointed out that these words in sec. 45 were also to be included. (We have, however, proposed to add the word 'identity' in sec. 45.) We accept the said recommendation.

Going by the above recommendations which are acceptable to us subject to the slight modification suggested, the section should be redrafted as follows:

Comparison of signature, writing or seal with others admitted or proved

"73. (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it is alleged to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared by the Court or under its orders with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

(2) The Court may direct any person present in Court to write any words or figures for the purpose of comparison of the words or figures so written with any words or figures alleged to have been written by such person.

(3) This section applies also, with any necessary modifications, to finger impressions, palm impressions, footprints and type-writing.

(4) Without prejudice to the provisions of any other law for the time being in force, nothing in this section shall apply to a criminal Court before it has taken cognizance of an offence."

Section 73A:

This section refers to 'proof as to verification of digital signatures' and was incorporated by the Information Technology Act, 2000 (Act 21/2000). It reads as follows:

> "73A: In order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may direct-
>
> (a) that person or the Controller or the Certifying Authority to produce the Digital Signature Certificate;
> (b) any other person to apply the public key listed in the Digital signature certificate and verify the digital signature purported to have been affixed by that person.
>
> Explanation: For the purposes of this section, 'Controller' means the Controller appointed under sub-section (1) of section 17 of the Information Technology Act, 2000."

We do not think that any change is necessary in this section.

Section 74:

Sections 74 to 78 deal with 'Public documents', Private documents, certified copies and proof. We shall take up the sections one after the other.

Section 74 reads as follows:

"74: The following documents are public documents.-

(1) documents forming the acts or records of the acts

(i) of the sovereign authority,
(ii) of official bodies and Tribunals, and
(iii) of public officers, legislative, judicial and executive, (of any part of India or of the Commonwealth), or of a foreign country;

(2) public records kept in any State of private documents."

In the 69th Report, after a lengthy discussion, it was proposed in para 34.18 that the plaints, written statements, petitions and other papers filed by parties be regarded as public documents by adding following Explanation:

"Explanation: Records forming part of a case leading to a judgment of a court or an order of a public officer, if the order is pronounced judicially, are themselves public documents."

Before making the above recommendations, the 69th Report examined the conflicting case law of various High Courts on the question.

The Commission, in paras 34.13 to 34.15 referred to the problem concerning the meaning of the words "documents forming the acts or

records of the acts". Case law concerning income tax returns on the one hand and pages forwarded to a magistrate by a police officer in connection with the Code of Criminal Procedure (see Narasimha vs. Venkataramayya: AIR 1940 Mad. 768 (FB) and Queen Express vs. Arumugam : (1896) ILR 20 Mad 189 (FB) was dealt with. But, it was observed in para 34.15 of the Report that having regard to the various types of documents that may be coming up under sec. 74, "it would not be easy to frame a clarification of a general nature".

We agree with the above view, and finally agree that the limited Explanation which is applicable to courts/public offices pronouncing judicial orders, be accepted.

We propose a modified Explanation be added in clause (1) of sec. 74, using the word 'deemed'. For convenience, we shall reproduce it again:

> "Explanation:- Records forming part of a case leading to a judgment of a Court or an order of a public officer, if the order is pronounced judicially, shall be deemed to be public documents."

Section 75:

Section 75 provides that all other documents are private documents.

In the 69th Report, it was stated in para 34.20 that it needs no change. We agree.

Section 76:

The section speaks of 'Certified copies of public documents' and contains an Explanation.

It reads as follows:

> "76: Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.
>
> Explanation: Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section."

The section starts with "right to inspect". In para 35.3 of the 69th Report, it was pointed out that such a right could be found in various Central and State laws but that the right was, as in England, available apart from statute.

It was pointed out in para 35.9 that right to inspection and right to copies are provided by three types of statutes:

(a) The statute may give a right of inspection, and also provide a penalty and a remedy in case of refusal to allow inspection. This is rare, or

(b) The statute may merely give a right of inspection, without making any provision for any remedy, or

(c) The statute may give a right to certified copies, without an express right for inspection.

After referring to the provision of various Indian statutes and some English statutes, the 69th Report observed in paras 35.14 to 35.17 that it is necessary to clarify that:

> "whenever copies are required to be given to a person under a statutory provision, or non-statutory-rule or order made by the government – even if it be non-statutory, the document should be regarded as one which that person has a 'right to inspect'."

Reference in that connection was made to the Bombay judgment in Devi Ram vs. Sri Ram: AIR 1932 Bom 291 where it was held that an assessee cannot get a copy of his own income tax return or order as the Act of 1922 gave no right to inspect the return or order. But the Allahabad High Court held in Suraj Narain vs. Jhebu Lal: AIR 1944 Allahabad 114 held that because an assessee has right to a copy of the order under the Income Tax Manual, he has a right to inspect the order. It was then stated that the above clarification was suggested that if copies are required to be issued under a statute, rule or even a manual, a right to inspect must be implied. We find that in K. Pedda Jangaiah vs. Mandal Rev Officer 1996 APHC 1006, (A.P.)

the Andhra Pradesh High Court also held that right to certified copy is dependent on right to inspect.

We may also refer to Order 11 Rule 15, Order 20 Rule 20, Order 41 Rule 36 of the Code of Civil Procedure. See also sec. 363(1), (2), (6) of the Code of Criminal Procedure. We agree with the recommendation in para 35.17.

The 69th Report then refers to 'confidential documents' and after referring to the conflicting views of the Bombay, Calcutta and Allahabad High Courts, it observed that to deny copy of a document for inspection on the ground of confidential nature of the document is not correct. In para 35.22 it was rightly pointed out that keeping a document confidential from others is different from keeping it confidential from the persons whom it concerns or affects. The Commission, in para 32.25 also referred to documents relating to affairs of the State which, in any event, the Court can peruse. (Of course, the position is different under sec. 162 of the Code of Criminal Procedure, 1973, as specifically provided in that Code.)

Thus there may be public documents (say) like a birth register in a Municipality which <u>every person</u> can inspect; an income tax return or order which only the assessee concerned can inspect; and documents relating to affairs of State which no one can be allowed to inspect.

The 69th Report, in para 35.28, referred to the 14th Report of the Law Commission, on the question of delay in obtaining secondary evidence of public documents but felt that there is no other immediate solution possible.

The 69th Report then recommended, in para 35.30 that the Explanation now contained in sec. 76 be numbered as Explanation 1 and that new Explanations 2 and 3 be added as follows:

> "Explanation 2: For the purposes of this section, it is not necessary that the public should have a right to inspect the document and it is sufficient if the person demanding a copy has a right to inspect the document of which the copy is demanded.
>
> Explanation 3: Where a person has by law a right to inspect a document or to a copy thereof, or where a rule or order made by the Government allows a copy to be given, this section applies notwithstanding any provision of law requiring that the document shall be treated as confidential in regard to other persons."

Explanation 3 refers to the clarification referred to above that a person who has a right to a copy has a right to inspect but the idea is not clearly brought out. The common law rule is also to be reflected. Instead, Explanation 3 should read as follows:

> "Explanation 3- If a person has a right to obtain a copy of a document, he shall be deemed to have a right to inspect; and where a person has been conferred by any law , a right to inspect or a right to obtain a copy thereof or where a rule or order made by the Government allows a copy to be given, this section applies notwithstanding any provision of law requiring that the document shall be treated as confidential as regards other persons."

We recommend insertion of Explanation 2 as per the 69th Report and Explanation 3 as formulated by us in this section.

Section 77:

This section deals with "proof of documents by production of certified copies". It reads as follows:

> "Section 77: Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies."

In the 69th Report, it was pointed out (see para 35.32) that the use of the word 'such' in sec. 77 referred to documents in relation to which there is a 'right to inspect'. Now it will be subject to the amendment proposed to sec. 76. In the said para, the 69th Report referred to a conflict of views among the High Courts as to the admissibility of the certified copies where the copy is issued to a person not entitled to inspect. The Commission recommended in para 35.34, if a copy is "in fact" given it must be admissible irrespective of the right. This was to be clarified (see para 35.41).

The Commission felt in paras 35.35 to 35.40 that no special provision need be made in respect of 'certified extracts' as the same was covered by decisions of courts or special provisions of statutes.

In so far as the clarification referred to above, the draft was not given in the 69th Report. We would therefore recommend addition of the following Explanation in sec. 77.

> " Explanation:- If a certified copy is in fact issued, the same shall be admissible irrespective of whether it has been issued pursuant to a right to inspect or a right to obtain a certified copy."

Section 78:

This section deals with proof of certain public documents by other methods.

The section contains 6 clauses and refers to various classes of public documents and the manner in which they may be proved.

In the 69th Report, changes were recommended in clauses (1), (2), (3) and (6). No changes were considered necessary in clauses (4) and (5).

The above proposals are formal and we think it is sufficient to refer to them.

78(1): The reference to the crown representative is to be confined to the period before 15th August, 1947.

(2) The word 'legislatures' is to be substituted by the word 'Parliament or of the legislature of any State'.

(3) Add the words 'before the 15th August, 1947', after the words 'proclamations, orders …….. Her Majesty's Government'.

(4) Split up clause (6) as under:

"(6). Public document of any other class in a foreign country,

(a) by the original, or
(b) by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of an Indian Consul or diplomatic officer, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country."

We accept the above recommendations.

(5) As recommended in our discussion under sec. 79, clause (2A) has to be inserted below clause (2) in 78, as follows:

"(2A) the unpublished and private proceedings of a legislature or its Committees,

by a certified extract of the proceedings issued under the signature and seal of the presiding officer of the legislature concerned or of the Chairman or head of the Committee of the legislature concerned."

Section 79:

Sections 79 to 90A deal with "Presumptions as to documents". These are the last group of sections in Chapter V. These are presumptions which 'shall' have to be drawn and not presumptions which 'may' be drawn. The presumption is rebuttable see U.P. State Road Transport Corporation vs. Kedar Singh AIR 1991 All 317. "79: Extract from Sarkar Vol. I, pages 1213-14. The certified copy can be proved incorrect if challenged and the original is shown to have interpolations.

Certificates can be granted under sec. 60 Registration Act, sec. 298, 331, 337 of Cr.P.C., sec. 90 of the Christian Marriage Act, 1872 etc.

The provision requires only substantial compliance. Thatha vs. Paru: AIR 1986 Ker 196.

Section 79 deals with 'Presumption as to genuineness of certified copies'. It reads as follows:

In the 69th Report, after an elaborate discussion, it was recommended (see para 37.27) that the following words in sec. 79 be omitted.

> "or by any officer in the State of Jammu and Kashmir, who is duly authorized thereto by the Central Government."

This was because the reference became necessary to J&K State when the concept of Part A, Part B and Part C states was there in 1951 and is no longer necessary because now there are no Part B or Part C States.

We agree with the recommendation.

Yet another recommendation (see para 37.9) refers to Parliamentary proceedings. A Committee on Privileges of Lok Sabha (Report F No. 3(1)/55.L.C. Part I, S.No.5) (vide Notes of Ministry of Home Affairs F.No. 22/4/58-Judl) (Ministry of Law, U.O.No.20(1)58-Leg.II, dated 21.7.59) recommended that normally, when documents connected with Parliament

are to be produced in a court of law, certified copies should be considered sufficient evidence of such documents, and that, if necessary, the Evidence Act may be amended to that extent.

Under sec. 78(2) of the Evidence Act, the proceedings of the legislatures can be proved by journals of the legislatures or published Acts or abstracts, or by copies purporting 'to be printed by the order of the Government concerned'. This is so far proceedings of legislatures which are published. Question remains regarding proceedings of legislatures which are not published. They may (according to para 37.8 of the 69th Report) be classified as follows:

(a) documents which form 'the acts and records of acts' of Parliament, and

(b) documents which do not form the acts or records of acts of Parliament.

(a) The Law Commission in the 69th Report pointed out (para 37-8) that category (a) would fall under 'public document' referred to in sec. 74(1)(iii), so that certified copies can be given under sec. 76 and such certified copies can, under sec. 77, be accepted in evidence without production of the original under sec. 77.

(b) In regard to the (b) category, the Law Commission said (see para 37.9) that the only question to be considered was the extension of the beneficial provisions of section 79 (presumption as to the genuineness of certified copies), to certified copies of such documents. The Commission recommended accordingly.

We agree with this recommendation.

Further, whenever, any document relating to the House or any Committee thereof is required to be proved in a Court, the Court has to make a request to the Speaker or Chairman of that House or Committee mentioning the purpose why it is required and the date when it is required. A form has been prescribed (see Shakdher and Kaul, Parliamentary Procedure in India, pages 177 (and Lok Sabha Debates, 13.9.57, p 13760 to 13763).

For the benefit of public and courts, we shall once again extract the said format which is extracted in paras 37.14 (pp 475-476) of the 69th Report. It reads as follows:

"From

To

The Speaker of the House of the People/The Chairman of the Council of States, Parliament House,
New Delhi.

Dated, the……19…….

Sub: (Description of the case)

Sir,

In the above proceedings, the plaintiff/defendant/complainant/accused proposed to rely upon the documents, specified in the Annexure, which are in the custody of the House of the People/the Council of States. I have to request you to move the House if you have no objection to grant leave for the production of documents in my court and, if such leave is granted, to arrange to send the documents/certified copies of the documents so as to reach me on or before ……. by registered post (A.D.) or through an officer in the Secretariat of the House.

In the above proceedings, the plaintiff/defendant/complainant/accused proposes to examine ……. an officer in the Secretariat of the House of the People/the Council of States (or any duly informed officer in the Secretariat of the House) as a witness in regard to matters specified in the Annexures. I have to request you to move the House, if you have no objection to grant leave for the examination of the said officer in my court, and, if such leave is granted, to direct the officer to appear in my court at 11.00 a.m. on ……..

Yours faithfully,

ANNEXURE

1 ……..

2 ……..

3 ……..

4 ……..”

(A)We recommend as follows: There must be a provision relating to the presumption in regard to genuiness of certified copies of documents relating to legislatures which are not published. These documents fall under section 78(2A) as proposed.

(B) We recommend that section 79 be amended as follows:

> For the words "duly certified by any officer of the Central Government or of a State Government or by any officer in the State of Jammu and Kashmir, who is duly authorized thereto by the Central Government," the following shall be substituted, namely:-
>
> > "duly certified by any officer of the Central Government or of a State Government or by the presiding officer of the legislature concerned or of the Chairman or head of the Committee of the legislature concerned."

Section 80:

This section deals with 'Presumption as to documents produced as record of evidence'. It reads as follows:

> "80. Whenever any document is produced before any court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume –

> that the document is genuine; that any statement as to the circumstances under which it was taken, purporting to be made by the persons signing it, are true, and that such evidence, statement or confession was duly taken."

It will be noticed that this section is primarily intended to raise a presumption in favour of genuineness of evidence given by a witness in a 'judicial proceeding or before any officer authorized by law to take such evidence', or is a "statement or confession" by a "prisoner or accused person", if the same was taken in accordance with law and signed as stated in the section. The presumption is extended to the circumstances under which it was taken.

The word 'evidence' is defined in sec. 3. The mode of recording evidence in civil cases is found in Order 18 Rules 5-13, CPC, 1908 and in criminal cases in Ch. XXIII sections 272-283 of Cr.P.C., 1973. Section 80 of the Evidence Act cannot apply to sec. 162 Cr.P.C. Statements recorded by police. Statements recorded by Magistrates in Judicial proceedings are admissible and the Magistrate need not be called a witness (Modi Ganga vs. State AIR 1981 SC 1165). Section 80 does not guarantee voluntariness of a confession under sec. 24. Irregularities in recording confession under sec. 164 Cr.P.C. may be cured by sec. 533 (now sec. 463 of the 1973 Act) (Shanti vs. State AIR 1978 Orissa 19 (FB).

In the 69th Report, it was pointed out (see para 38.5) that the expression 'judicial proceeding' does not cover statements recorded by a Magistrate under sec. 164 Cr.P.C. The statements are also not evidence and

hence do not perhaps come within the words "before any officer authorized by law to record evidence", unless we broadly construe the above words by merely referring to the qualification of the officer. The 69th Report recommended that sec. 80 be amended to include a presumption of genuineness of sec. 164 statements recorded by Magistrates.

It was pointed out further after referring to conflicting views of High Courts (see para 38.13) that if the above amendment is made, it will also cover the cases of dying declarations recorded by Magistrates under sec. 164. As at present, such dying declarations are not covered by sec. 80 because they are not always made by prisoners or accused persons but by victims of criminal offences. Further at that stage, the Magistrate can not be said to acting in a judicial capacity.

We agree with the above recommendation that in sec. 80, after the words 'taken in accordance with law', and before the words "and purporting to be signed by any Judge", the following words be added: (para 38.16)

> "or to be a statement recorded by a Magistrate under section 164 of the Code of Criminal Procedure, 1973".

Section 81:

The section deals with 'presumption as to Gazettes, newspapers, private Acts of Parliament and other documents'. It reads as follows:

> "81. The court shall presume the genuineness of every document purporting to be the London Gazette or any Official Gazette, or the

Government Gazette of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament of the United Kingdom printed by the Queen's printer and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody".

We agree with the 69th Report (see para 39.3) that the presumption in respect of (1) London Gazette, (2) the Government Gazette of any Colony, dependency or possession of the British Crown and a private Act of the UK Parliament printed by the Queen's Printer must be confined to the period before 15.8.1947. (see the recommendation in sec. 37 of the Act also).

So far as newspapers and journals are concerned the presumption is only about their genuineness but not about the truth of their contents (Bawa Sarup Singh vs. The Crown: AIR 1925 Lah 299).

The words 'proper custody' are explained in sec. 90, Explanation.

Judicial notice of notification of appointment of public officers appearing in Gazettes is referred to in sec. 57 (cl.7). As to proof of proclamations, orders in council etc. by production of Gazettes, these are covered by sec. 78. We shall refer to few recent cases after 1977.

The Supreme Court held that the Gazette of Bombay Presidency, Vol. III published in 1879 is admissible under sec. 35 read with sec. 81(Bala

Shankar Maha Shankar Bhattjee vs. Charity Commissioner AIR 1995 SC 175. Till a decision is published in Gazette, it may not travel beyond the knowledge of its author and will remain cloistered (Kashmiri Lal vs. State of Punjab: AIR 1984 P&H 87.

In R.S. Nayak vs. A.R. Antulay : AIR 1986 SC 2045, it was held that there must be an assumption that whatever is published in the Government owned paper correctly represents the actual state of affairs relating to Government business until the same is successfully challenged and the real state of affairs is shown to be different from what is stated in the Government publication. In Laxmi Raj Shetty vs. State of Tamil Nadu AIR 1988 SC 1274 and S. Bangarappa vs. G.N. Hegade : 1992 Cr. LJ 3788 (Karn), it was held that the presumption of genuineness stated in sec. 81 to a newspaper report cannot be treated as proof of facts reported there.

The translated copy of a news item cannot be considered by the Court as a document in the absence of the newspaper. (Binod Kumar Jain vs. Gauhati Municipal Corp.) (AIR 1994 Gauhati 96).

News item on Doordarshan and newspapers were held to be mere hearsay and could not be relied upon: (Nachhattar Singh vs. State of Punjab) (1985 Crl LJ (NOC/115 (FB).

We agree with the 69th Report, that sec. 81 should be amended as follows:-

For the words, ""The Court shall presume the genuineness of every document purporting to be the London Gazette," the words "The Court shall

presume the genuineness of every document dated or issued before the fifteenth day of August 1947,purporting to be the London Gazette," shall be substituted.

Section 81A as proposed in the 69th Report

The 69th Report recommended sec. 81A in relation to Registration of Births.

It was pointed out that (para 39.6) the 5th Report (British Statutes applicable to India, page 44. Entry 48) of the Law Commission dealing with British statutes applicable to India, examines the British statutes – 'Registration and Births, Deaths and Marriages (Scotland) Act, 1854 and the Amendment Act 1910, which made an entry in the birth register referred to therein, admissible without further proof and that as there was no such provision in the Central Act, namely, the Registration of Births and Deaths Act (18 of 1969), a similar provision be made in the Evidence Act (para 39.9).

We may point out that according to Phipson (15th Ed., 1999), para 36.13, 36.14 and 36.23, entries in similar registers under the UK Act of 1836 and 1953 (U.K.) (sec. 15) are prima facie entries but not conclusive evidence (Brierley vs. Brierley (1918) p. 253).

While the above English Acts and the 5th Report required a provision to make the entries 'admissible' and even the recommendation in para 39.8 of the 69th Report is only to make the entries admissible or relevant without proof, we do not see why the 69th Report wanted sec. 81A in a chapter which

deals with 'presumption'. In fact, there is no recommendation that sec. 81A must be introduced for purpose of raising a presumption of genuineness.

We, therefore, feel that sec. 81A as proposed does not fit into the scheme of the Act between sec. 81 and 82.

The next question is whether there is any need to have a provision elsewhere in the Act making such entries admissible as recommended in the 5th Report and the 69th Report. We find that no special provision is necessary to make entries in Birth register admissible in as much as such entries are admissible under sec. 35 of the Act and that section has been consistently applied by courts to such registers, as stated below.

Now sec. 35 refers to 'relevancy of entry in public record made in performance of duty'. In fact, Sarkar (15th Ed., 1999(p. 780) refers to relevancy of these entries and refers to Brierley vs. Brierley 1918 p 257, State of Gujarat vs. Inayathusen Mohmadiya : 1996 Cr. LJ 3225 (Guj), Anita vs. Atal Bihari: 1993 Crl LJ 549. It is not conclusive: P.C. Purushothama vs. S. Perumal: AIR 1972 SC 608.

In Bishwanath vs. Dulhin: AIR 1968 P 481, it was held that a presumption of correctness also arises. See also Prakash Chandra vs. Smt. Parmeshwar: AIR 1987 P&H 37.

It is significant that in Muhammad vs. Sulekha 1981 Crl J (NOC) (Ker), it was held that the certified copy of the entry itself is not sufficient to establish the reliability of the contents of the register in all cases. In Dalim

vs. Nandarani : AIR 1970 Cal 292, the register was also treated as a public document under sec. 77.

Extract under Madras Act 3/1899 was held admissible in Ramalinga vs. Kotayya AIR 1913 Mad. 451.

It is not necessary to multiply cases under other State Acts. Suffice it to say that if the entries are admissible under sec. 35, it is not necessary to have another sec. 81A specifically concerning such registers.

Having regard to the fact that the 69th Report has not suggested that initially the Court 'shall' draw a presumption of genuineness of entries from such Birth Register and having regard to the case law, we do not think it is necessary to have a provision like sec. 81A. We do not, therefore, accept the recommendation.

Section 81A (as incorporated by Act 21/2000)

The section 81A as incorporated by the Information and Technology Act (Act 21/2000) deals with 'presumption' as to gazettes in electronic forms. It reads as follows:

> "81A: The Court presume the genuineness of every electronic record purporting to be the Official Gazette, or purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from proper custody."

This section is newly introduced in the year 2000 and does not require any modification.

Section 82:

This section refers to presumption as to document admissible in England without proof of seal or signatures.

It states that if the document, by the law of England or Ireland, is admissible in a Court in England or Ireland, without proof of seal or stamp or signature; or of the judicial or official character claimed by the persons by whom it purports to be signed, then the Indian Court will presume the seal, stamp or signature as genuine and of the judicial or official character and that the document shall be admissible for the same purpose for which it would be admissible in England.

In para 39.10 of the 69th Report it was stated that "On a study of the subject as dealt with in some of the English books on Evidence, it would appear that the various categories of documents in respect of which English Courts do not insist on proof of signature or seal are, in the vast majority of cases, documents executed in England, Scotland or Ireland"

and the recommendation was that the section may be deleted (see para 39.11).

We agree that there is no need any longer to have such a special provision for documents of England alone. The documents may be

admissible because the Court can take 'judicial notice' or same may be public or judicial documents.

We agree that this section 82 can be deleted.

Section 83:

This section deals with 'presumption as to maps or plans made by authority of Government'. It reads as follows:

> "83: The Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate."

In the 69th Report, it was pointed out sec. 86 of the Act speaks of relevancy of maps.

The words 'maps made for the purposes of any cause' are rather vague but they mean, 'maps made for the purposes of any particular cause' and in that event, the section does not apply. We would consider amending the last part of sec. 83 by adding the words 'particular' before the word 'cause'.

In addition, we accept the 69th Report that apart from 'maps or plans', 'charts' should also be covered by the presumption under sec. 83.

The revised sec. 83, as proposed would read as follows:

Presumption as to maps, charts or plans made by authority of government.

"**83.** The Court shall presume that maps or plans or charts purporting to be made by the authorities of the Central Government or any State Government were so made and are accurate; but maps or plans or charts made for the purpose of any particular cause must be proved to be accurate."

Section 84:

Section 84 refers to the 'Presumption as to collections of laws and reports of decisions'. It reads as follows:

"84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country."

This section has to be read with sec. 38 which makes relevant the statements of the laws and rulings contained in officially printed books of any country, i.e. including India. Section 57 allows the Court to take 'judicial notice' of the existence of all laws and statutes in India and in UK. Section 74

recognises the statutory records as public records while sec. 78 lays down the method of proving the statutes passed by the legislature. This section dispenses with proof of the genuineness of the officially printed books of any country (including foreign countries) containing laws and reports of decisions of courts. Their accuracy is to be preserved. As regards the books containing authorized reports of decisions of the Courts in India, see Indian Law Reports Act (18 of 1875). The relevancy of the decisions published therein is governed by sec. 38 of the Evidence Act (see Sarkar, 15th Ed., 1999, page 1232). (No doubt, there is no similar statute governing the Supreme Court Reports but sec. 84 would certainly apply).

In the 69th Report it was stated in para 39.18 that the words 'any country' in sec. 84 includes India also. It was also stated that the section does not require any amendment. We agree.

Section 85:

Section 85 deals with 'presumption as to power-of-attorney'. It reads as follows:

> "85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated."

Powers of Attorney are governed by the Powers of Attorney Act, 1882. Under sec. 57(6) of the Evidence Act, the Court is bound to take judicial

notice of all seals of the functionaries mentioned therein including the seal of the Notary Public. Under the Notaries Act, 1952, Notaries Public could be appointed by the Central Government or the State Government for all recognized notarial purposes. Section 85 applies to Notaries Public of foreign countries also (see Jugraj vs. Jaswant: AIR 1971 SC 761 followed in Abdul Jabbar vs. Second Addl. Judge AIR 1980 All. 369 and N&G Bank vs. World Science News AIR 1976 Delhi 263. (Sarkar 15th Ed., 1999 page 1234).

Notary Public is also mentioned in sec. 78 of the Evidence Act and sec. 33 of the Registration Act, 1908, and sec. 2(21) of the Stamp Act.

There are some judgments after 1977 under this section but we do not propose to refer to them because we are in agreement with the 69th Report (see para 40.8) that no amendment of sec. 85 is necessary.

Sec. 85A to 85C

Sections 85A to 85C refer to presumptions of electronic records and digital signatures and were introduced in the year 2000. Sections 85A, 85B, 85C use the words 'shall presume'. These sections require no amendment.

Section 86:

This section deals with 'presumption as to certified copies of foreign judicial records'.

In Aleyamma Kuruvilla vs. Pennamma Thomas 1994(1) Crimes 670 (Ker) it was held that a fax copy of the order passed by an American Court duly attested by the Indian Consulate was admissible as secondary evidence.

It has been held that sec. 86 does not exclude other methods of proof.

Section 14 of the Code of Civil Procedure, 1908 lays down that where a foreign judgment is relied upon, the production of the judgment duly authenticated, is presumptive evidence that the Court which made it had competent jurisdiction (Kassim vs. Isaf Md: ILR 29 Cal. 509).

We agree with the 69th Report (see para 40.10) that no amendment is necessary in sec. 86.

Section 87:

This section deals with 'presumption as to books, maps and charts' and uses the word 'may presume'. It reads as follows:

> "87: The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statement of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published."

It may be noticed that clause (13) of sec. 57 lays down that in all the cases referred to therein and also on all matters of public history, literature,

science or art, the Court may resort for its aid to appropriate books or documents of reference. Section 36 declares the relevancy of statements of facts in issue or relevant facts in published maps or charts generally offered for public sale. This section refers to a presumption that it was written or published by the person at the time and place, and by the person, as stated in the section.

It must be noted that sec. 87 raises only a presumption of genuineness but not of accuracy. On the other hand, secs. 83 and 86 also speak of accuracy. But, under sec. 114, in cases falling under sec. 87, accuracy may, in some cases, be presumed. In the case of maps, charts or plans falling under sec. 83, published by Government, accuracy can also be presumed.

In the 69th Report, it was suggested (see para 40.17) that two changes are necessary – (1) add plans, (as in sec. 36); (2) that portion relating to 'statement of facts' must be expressed more clearly. Draft of the proposed amendment was not given.

The proposed section 87 would therefore be redrafted as follows:

Presumption as to books, maps, plans and charts

"**87.** The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or plan or chart, the statements regarding which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written and published."

We recommend accordingly.

Section 88:

This section deals with 'presumption as to telegraphic messages'. It uses the word 'may presume'. It reads as follows:

> "88: The Court may presume that a message, forwarded from a telegraph office to the persons to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission."

Section 88 allows the Court to make a presumption as stated in the section. But sec. 88 contains a bar to the making of any presumption as to the person by whom the message was handed in for transmission or sent, when the original has not been proved to be in the hand writing of the alleged sender (Kishore vs. Ganesh: AIR 1954 SC 316) and in the absence of any evidence that it was sent by him, his denial stands (ibid). Though there is no presumption under sec. 88 as to the person who delivered the message for transmission, such proof of authorship may be given by circumstantial evidence e.g., by the internal evidence afforded by the contents of the message in the context of the chain of other correspondence (Mobarak vs. State: AIR 1957 SC 857). Sections 114(e) and sec. 16 are relevant in this context.

The form handed over into the post office by the sender is the original: Henkel vs. Pape: LR 6 Ex. 7; R vs. Regan : 16 Cox CC 203. Presumption as to date and hour of sending a telegram are the same as in the case of letters (Hals, 3rd Ed. Vol. 15, para 73). (Sarkar, 15th Ed., page 1240).

Proof of authorship can be established by circumstantial evidence. (Mrs. Abba vs. Suresh 1984 AIR NOC 131 (Del). In the case of a post office, there is a presumption that a letter properly directed and posted will be delivered in due course (British And American Tel. Co. vs. Colson-LR 6 Ex.122).

The presumption under this section could be rebutted by producing messages actually received by the person who wants to rebut the presumption (Manchalal vs. Shah Manikchand: AIR 1988 Karn. 221.

Section 62, Expl. (2) and sec. 63(2) are relevant in the context of sec. 88.

We agree with 69th Report (see para 40.22) that no amendment is necessary in sec. 88.

Section 88A:

This section refers to the 'presumption as to electronic messages'. This was introduced by Act 21/2000.

It is on the same lines as sec. 88. It reads as follows:

> "88A: The Court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person by whom such message was sent."

The section contains an Explanation as to the meaning of the words 'addressee' and 'originator'.

It does not require any amendment.

Section 89:

This section relates to the 'presumption as to due attestation, stamp law conformance and execution in the manner required by law of documents not produced, in spite of notice to produce. It reads as follows:

> "89: The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law."

The notice to produce referred to in the section has to be read in conjunction with sec. 65(a) and sec. 66. The presumption is of course, rebuttable, though the Court is initially bound to draw it. The presumption does not extend to the correctness of contents of the document.

The section is founded on the maxim, 'omnia praesumuntur contra spoliatoren'. It is based on the principle that nobody shall be allowed to take advantage of his own wrong. A similar principle is laid down in several English cases (Crisp vs. Anderson: 1 Stark 36; Tay ss 177, 148, where a document requiring stamps is lost, or not produced upon notice, it will, in the absence of evidence to the contrary, be presumed to have duly stamped; but where it is shown to have been unstamped, it will be presumed to have so continued until the contrary is proved: (Closmadeuc vs. Carrel 18 C.B. 36; Marine Investment Co. vs. Haviside: L.R.5 HL 624; see also Raja of Bobbili vs. Inuganti: 26 I.A. 262 (P) and Ahmed Raza vs. Saiyid Abid: 43.IA 264 (P-C).

Once the plaintiff excuses himself from producing on the plea that the document is not traceable or is lost, the question of giving notice for production does not arise: Manilal vs. Surat Mun : AIR 1978 Guj 193.

In the 69th Report, it was stated that the section does not require any amendment. We agree.

Section 90:

Section 90 refers to 'presumption as to documents thirty years old'. The Court 'may presume'. It reads as follows:

> "90: Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the

handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation: Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81."

There are three illustrations under sec. 90.

In UP there were two amendments. One in sec. 90 where, after renumbering the existing section as clause (1), reducing 30 years to 20 years and clause (2) was added to sec. 90 and it referred to a certified copy of the original which was produced, the original having been registered, and the same presumption as to handwriting of the person, execution, attestation as applicable to the original under sub-section (1) was applicable to the original of the certified copy of the registered document.

In addition, sec. 90A was added and clause (1) thereof refers to a registered document or a duly certified copy thereof or any certified copy of a document which is part of the record of a Court of Justice. Here, there is no need that the original is to be 20 years old. Here when such copies are

produced, the court may presume that the original was executed by the person by whom it purports to have been executed. There is no presumption as to handwriting or as to attestation. Clause (2) of sec. 90A says that the presumption under sec. 90A(1) shall not apply in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement.

I(a) In the 69th Report, the reduction of the period from 30 years in sec. 90 to 20 years and the presumption introduced by adding clause (2) to sec. 90 in respect of certified copies of registered documents 20 years old, was recommended if the registration of the original was 20 years or more than 20 years by the date of production of the copy in the Court.

We agree that an amendment in sec. 90 as done in UP should be introduced.

In England by sec. 4 of the Evidence Act, 1938, the period for presumption of 'ancient documents' was reduced to 20 years. Initially, the period was 40 years (see Gilbert, Evidence 1st Ed. p. 102). In R vs. Farrington (1788) 2 T.R.466, it was reduced to 30 years and in 1938 to 20 years. The rule is based on difficulty of producing witnesses connected with ancient documents.

According to Halsbury's Laws of England, 4th Ed., (Vol.17, para 129) such ancient documents prove themselves notwithstanding the fact that one of the subscribing witnesses is alive.

In as much section 90 uses the words 'may presume', it has been held that in case the executant or attesting witnesses are alive and available, the Court can insist on proof by witnesses rather than draw the presumption under sec. 90. Similarly, if the executant or attesting witness are dead, the Court can consider whether the document can be proved by the procedure in sec. 69 before raising a presumption under sec. 90 (Haradhan Mahatha vs. Dukhu Mahatha: AIR 1993 Pat. 129). See also D. Ramanatha Gupta vs. S. Razack AIR 1982 Karn. 314. If the document is not proved to be 30 years old, the presumption cannot be drawn (State of Karnataka vs. Veeranagouda: AIR 1995 Karn. 361). Entries in revenue records more than 30 years old can be presumed to be authentic (Kartar Singh vs. Collector, Patiala : 1996 AIHC 1538 (P&H).

The presumption has been applied to wills by the Privy Council in Basant vs. Brijraj : AIR 1935 P.C. 132.

I(b) But the presumption under sec. 90 has to be applied, as the law now stands, only to originals and not to copies Kalidindi vs. Chintalapati : AIR 1968 SC 947; Munna Lal vs. Kashibai AIR 1947 P.C. 15. But in Satyapramoda vs. Mull Gunnayya AIR 1982 A.P. 24, the admissibility of a certified copy of a special vakalat (for accepting a compromise signed by a lawyer under that Vakalat) filed in a proceeding 30 years old was accepted after it was found that the original which was in the District Court was destroyed as per rules. A presumption was drawn in respect of the existence of the original vakalat. See also Sital Das vs. Sant Ram : AIR 1954 S.C. 606; Harihar vs. Deo Narain AIR 1956 SC 305; Tilak vs. Bhim 1969 (3) SCC 307; Shivlal vs. Chetram AIR 1971 SC 2342.

In the case of certified copies, it has been held that resort can be had to sec. 57(5) of the Registration Act (Karupanna vs. Kolandaswami : AIR 1954 Mad 495 or sec. 60(2) as to admission of execution before the Registrar (Kashibhai vs. Vinayak AIR 1956 Bom 65). Of course, if the original is lost, certified copies may be admissible as secondary evidence, Wigmore, (Ev. s. 2143) says "Where the alleged ancient original is lost, and an ancient purporting copy is offered, made by a private hand, and the purporting maker being unknown or deceased, it seems to have been long accepted that this suffices, and that the copy may be received under the ancient document rule." Wigmore also says (Ev. s. 2143) "that when the alleged ancient original is lost (or otherwise unavailable) and a purporting official record is offered, made more than thirty years before, and certifying the deed's contents and the execution, the case is stronger than the preceding one."

The UP amendment, 1954 to sec. 90 has the effect of reducing the period to 20 years and extends sec. 90 to certified copies (Sardaran vs. Sunderlal: AIR 1968 All 363); Babu Nandan vs. Board of Revenue: AIR 1972 All 406. These amendments we are proposing in sub sec.(1) & (2) of section 90.

II So far as sec. 90A of the UP Amendment is concerned, it deals with the original registered document or duly certified copy thereof or one certified from court record and the presumption applies only if the original shows on its face the name of the person by whom is purports to have been executed. Under sec. 90A, the presumption is with regard to execution

only, as stated earlier, and is narrower than sec. 90 which raises a presumption as to the handwriting and attestation also. Further, under clause (2) of sec. 90A, presumption as to genuineness of execution of the registered document cannot arise by production of a certified copy when it forms the basis of a suit or defence.

In Ram Jos vs. Surendra: AIR 1980 All 385 (FB), Omprakas Bhagwan: AIR 1974 All 389 was overruled; and Smt. Vidya Devi vs. Nandkumar: AIR 1981 All 274; Bhaggal vs. Ranji Lal AIR 1986 All 163 were approved. These cases related to a plea based on sec. 90A(2) when the copy related to an original document more than 20 years old. Question was whether even though the registered copy fell within sec. 90(2), as in force in UP, whether sec. 90A(2) too applied, because the original was registered and whether, if the document was the basis of the suit, it was excluded by sec. 90A(2) as in force in UP. The Full Bench held that if the certified copy fell under sec. 90(2) – being a copy of an original more than 20 years old, sec. 90A(2) did not apply but sec. 90(2) alone applied.

We shall briefly refer to the facts in Ram Jos' case (1980) decided by the Full Bench of the Allahabad High Court. In that case, a certified copy of a registered will was pressed in evidence and it was the basis of the suit. The original document which was registered was more than 20 years old. The document being a certified copy did not fall under sec. 90(1) but fell under sec. 90(2) as amended in UP and was admissible for the purpose of raising a presumption under that sub-section. But then it was argued that sec. 90A was also applicable because sec. 90A was applicable to certified copies whether they were copies of originals registered more than 20 years

old or not. If it could also fall under sec. 90A, then under sec. 90A(2) it would not be admissible if the document was the basis of the suit or defence. The Full Bench held that sec. 90 and sec. 90A, both as amended in UP were independent of each other and if a certified copy of a registered document (the original being 20 years old or more than 20 years old) was admissible under sec. 90(2) and a Court could raise a presumption, the fact that it was the basis of the suit or defence was immaterial. In other words, sec. 90A(2) would be applicable only if the document was less than 20 years old or rather sec. 90A(2) would not have any impact on sec. 90(2).

In para 41.28 of the 69th Report, reference was made to the observations of the Commission in the 14th Report Vol.1, page 518 (para 9), and first sub paragraph, and page 519, para 10.

The 69th Report, as already stated, finally recommended (para 41.31) that the existing provision of sec. 90 should be sub section (1) of sec. 90 and that subsection (2) be added to sec. 90 as in UP so as to allow a presumption to be raised in respect of certified copies of such documents.

Now, if a document which in UP is more than 20 years old was registered in accordance with the law relating to registration, the Registrar would have made an endorsement on the document regarding the due execution of the document by the executant at the time the document purports to have been executed. If years later, before a suit or written statement is filed, a party wants to rely on the document which is more than 20 years old by obtaining, even a recent certified copy thereof, then that certified copy will reproduce the endorsement made by the Registrar and

that endorsement would raise a presumption under sec. 90(2) of the 'signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting and in the case of a document executed or attested, that it was duly executed and attested'. Thus, a certified copy of an original 20 years or more than 20 years old would now fall only under sec. 90(2) and a presumption as to execution, handwriting and attestation could all be made under sec. 90(2). It would not be hit by sec. 90A(2) which says that if the certified copy is the basis of the suit, the presumption is not available.

In fact, section 90A of UP was intended to cover cases of certified copies of original documents which were registered and the execution of the original was on a date less than 20 years by the date of production of the certified copies in the Court. Here the presumption is restricted only to 'execution by the person' and the presumption is not available if the document is the basis of the suit or defence.

The 69th Report also recommended a provision like sec. 90A(1)(2) of the UP amendment (see para 41.32 to 41.38) but with some slight changes we shall now refer to them.

The little modification was that with regard to certified copies 'judicial records' referred to in sec. 90A(1), the presumption should be confined to (see para 41.38) (a) registered document, (b) documents adjudged to be genuine in an earlier case.

In our view while proposing section 90A, which corresponds to the UP sec. 90A, we shall keep in mind (1) the point decided by the Allahabad Full Bench in Ram Jos case AIR 1980 All 385 (FB) and the suggestion in para 41.38 of the 69th Report, referred to above. Section 90A, under the UP Act applies to "any registered document, or duly certified copy thereof or to any certified copy of a document which is part of the record of a court of justice". So far as the 'duly certified copy thereof 'is concerned it is the one which is issued by the registration authority. So far as the 'any certified copy of a document which is part of the record of a court' is concerned, if the document filed into court was in itself a document in original which is registered, the court would be giving a certified copy of an original document which is registered and its execution by that person can be presumed. So far as the other original documents are concerned, if the court gives a certified copy its genuineness can be presumed only, if such genuineness was adjudged in a previous case.

This is because, it is customary for some parties to file a forged document in (say) a proceeding under the Tenancy Laws, take a certified copy from the Court, and file the copy in the Civil Court. Such certified copies cannot raise a presumption of genuineness unless genuineness was decided by the Tenancy Court.

Section 90A of the UP Amendment refers to 'proper custody' and in so far as the said words qualify 'registered document', there is good reason but the 'proper custody' principle has been applied even to a 'duly certified copy thereof or any certified copy of a document which is part of the record of a Court of Justice'. This latter qualification is, in our view, not warranted

because the certified copy from the Registrar's office or from the court records may even be a recent one obtained just before the present suit

We accept these recommendations and suggestions. We propose renumbering section 90 as section 90(1) and insert subsection (2) as done under the UP Act, 1954. We add a separate section 90A as under the UP Act of 1954. Section 90 applies to documents which are 20 years old or more. Section 90A applies to certain documents less than 20 year's old.

We recommend the following revised sec. 90 and 90A.

Presumption as to certain documents 20 years old

"90(1) Where any document, purporting or proved to be twenty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to be executed or attested.

(2) Where any such document as is referred to in subsection (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested.

Explanation: Documents referred to in sub-section (1) are said to be in proper custody if they are in the place in which, and under the care of the person with whom they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the

circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81 and clause (a) of section 90A.

Illustrations

(a) A, has been in possession of landed property for a long time. He produced from his custody deeds relating to the land, showing him titles to it. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

Presumption as to certain documents less than 20 years old

90A Where –

(a) any document registered in accordance with the law relating to registration of documents is produced from any custody which the Court in the particular case considers proper, and which registered document is less than twenty years old; or

(b) a duly certified copy of a document registered in accordance with the law relating to registration of documents, the original of which is less than twenty years old, is produced; or

(c) a duly certified copy of a document which is part of the record of a Court of justice, the original of which has been proved to be genuine in the earlier case and the original of which is less than twenty years old, is produced,

the registered document mentioned in clause (a) or the originals of the documents referred to in clauses (b) or (c) may be presumed by the Court to have been executed by the person by whom it purports to have been executed:

Provided that no such presumption shall be made under this section, in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement."

Section 90A:

This section was introduced by Act 21/2000. It shall be renumbered as section 90B.

Section 91:

This section and sections 92 to 100 are contained in Chapter VI of the Act and deal with "of the exclusion of oral by documentary evidence".

We shall first start with sec. 91. It is a lengthy section with two Exceptions and three Explanations. There are five illustrations below the section.

In the 69th Report, after an elaborate discussion in paragraphs 42.1 to 42.40, after consideration of the provisions of the main section, the two Exceptions and three Explanations, it was recommended that the amendments are not necessary (see paras 42.25, 42.37, 42.40A).

But it was stated that section 91 and the next section i.e. sec. 92 are complementary to each other. In the discussion under sec. 92, some amendments were suggested (see paras 43.18 and 48.20).

As the two sections are complementary, it would be necessary to refer to sec. 91 and its main scheme. Section 91 reads as follows: It bears the heading

> "Evidence of terms of contracts, grants and other dispositions of property reduced to the form of a document"

The body of sec. 91 reads as follows:

> "91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other dispositions of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> Exception 1 – When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2 - Wills admitted to probate in India may be proved by the probate.

Explanation 1 – This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2 – Where there are more originals than one, one original only need be proved.

Explanation 3 – The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact."

Illustrations and their purport

(a) If a contract be contained in several letters, all the letter in which it is contained must be proved (This illustrates the first Explanation).

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved (This illustrates the main paragraph).

(c) If a bill of exchange is drawn in a set of three, one only need to be proved (This illustrates the second Explanation).

(d) A contract, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible (This illustrates the third Explanation).

(e) A gives B a receipt for money paid by B. Oral evidence is offered for the payment. The evidence is admissible. (This also illustrates the third Explanation).

This section refers to the 'primary evidence rule' and the 'secondary evidence rule' and applies to two types of documents:

(1) when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and

(2) in all cases in which any matter is required by law to be reduced to the form of a document (such as sec. 17 of the Registration Act, 1908).

In these cases, the primary document must be produced; or secondary evidence of its contents may be adduced in cases in which secondary evidence is admissible under the provisions of the Act (sections 65, 66).

Apart from the two exceptions, Explanation 3 also provides for another exception – where a document in writing is not of a fact in issue and is merely used as evidence to prove some fact, oral evidence aliunde is

admissible such as where the payment of money may be proved by oral evidence although a receipt was granted.

There is a huge body of case law of the Privy Council, Supreme Court and the High Courts. Sarkar (Evidence, 15th Ed., 1999) discusses the case law from page 1267 to page 1305 and refers to the English cases also. The author also refers to the case law subsequent to the 69th Report of the Law Commission. We have examined the case law referred to in Sarkar and in other treatises.

Vepa Sarathi in his Evidence (5th Ed., 2002)(at p.299) has referred to the Supreme Court judgments arising under sec. 91 and we shall just give a list of these cases, those before and after 1977 but do not propose to discuss the case law as in our opinion, sec. 91 does not require any amendment. The cases decided by the Supreme Court may be stated as follows:

Radha Sunder Datta vs. Mohd. Jahadur Rahim: AIR 1959 SC 24; Anayatullah vs. Commr. of Muslim Wakfs: 1991 Suppl(1) SCC 396; T.N. State Education Board vs. N. Raju Reddi: 1996(4) SCC 551; Gen Court Martial vs. Aniltej Singh Dhaliwal: 1998(1)SCC 756; Ishwar Das Jain vs. Sohan Lal: 2000(1) SCC 434; Zahuri Shah vs. Dwarka Prasad: 1966(2) SCWR 184; Gurnam Singh vs. Surjit Singh: 1975(4) SCC 404; Mohinder vs. State of Haryana 1974(4) SCC 285; Bhireshwara Swami Varu Temple vs. Pedapudi: 1973(2)SCC 261; Fort Gloster Industries vs.Sethia Mercantile: 1972(4)SCC 252; Abdulla Ahmed vs. Animendra: 1950 SCR 30; Veeramachineri vs. Andhra Bank: 1971(1) SCC 874; Phiroze Bamanji Desai

vs. Chandrakant: 1974(1) SCC 661; Mahendra & Mahendra vs. Union of India: 1979(2) SCC 529.

Section 91 applies as between persons who are parties or even to non-parties unlike section 92.

There is considerable case law pertaining to documents required to be registered but not registered, documents required to be stamped under the relevant stamp law and not stamped, admission of evidence as to collateral facts (under Explanation III). We do not find any point in referring to the various areas in which the section is held applicable in as much as that turns upon the applicability or otherwise of the clear principles set out in sec. 91.

We agree with the 69th Report that no changes are required in sec. 91.

Section 92:

The section deals with 'exclusion of evidence of oral agreement'. Apart from the main part, it contains provisos (1) to (6). Below the section, ten illustrations (a) to (j) are there.

In as much as the 69th Report has proposed some amendments to sec. 92, we deem it necessary to extract sec. 92. It reads as follows:

> "92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as

between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or substracting from, its terms.

Proviso (1) – Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2) – The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3) - The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4) – The existence of any distinct subsequent oral agreement to rescind or modify any such contact, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5) – Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved.

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6) – Any fact may be proved which shows in what manner the language of a document is related to existing facts.

(There are ten illustrations (a) to (j) below sec. 92).

Under sec. 91, when the terms of any transaction have been reduced to writing, they must be proved by the production of the document unless grounds are made out for reception of secondary evidence. In other words 'no substitution' of the terms of a transaction is permitted under sec. 91. Under sec. 92, no variation of the terms shall be allowed. Thus sec. 92 is a logical corollary to sec. 91.

The application of sec. 92 is confined to the parties to the document unlike sec. 91 which is applicable to all persons whether they are parties to the document or not.

There is again vast case law under sec. 92. Sarkar (Evidence, 15th Ed., 1999) deals with sec. 92 from pages 1309 to 1405 (nearly 96 pages). There are number of judgments of the Privy Council, Supreme Court and High Court judgments on various aspects of sec. 92.

The 69th Report considered that the main part of the section requires some re-drafting. It also dealt with the aspect as to the difference between the earlier part and the latter part of the main section, namely that the earlier part refers to 'contracts, grant or other disposition of property' which are between one or more parties; and the prohibition that no evidence of any oral agreement or statement at variance with the document refers to transactions, between parties to any such instrument or their representative. One view is that the latter part is also confined to bilateral documents and does not apply to unilateral documents such as (i) confessional statement of the accused (ii) statements of witnesses (iii) other court proceedings (apart from decrees); and (iv) resolutions of companies when required to be in writing (see para 43.19 of 69th Report). (So far as variation of a decree is concerned, the 69th Report stated in para 43.22 that this is a matter of procedure and not of evidence. A decree cannot be varied by parties privately except through the court. So far as executing Court is concerned, Order 21 Rule 2 of the Code of Civil Procedure, 1908, states very clearly, the procedure for recognition of variations. Hence, decrees need not be protected by sec. 92).

So far as unilateral documents of the type referred to above, it is obvious that sec. 92 does not apply and hence oral evidence to vary the document is permissible. Such a view, according to the 69th Report, cannot be accepted and may be corrected by stating that the prohibition against adding oral evidence to vary a document should extend even to unilateral documents.

The 69th Report referred to conflicting views of various High Courts and finally to the observations of the Supreme Court in Bai Hira Bai Devi vs. Official Assignee, Bombay: AIR 1958 SC 448. In that case the Official Assignee moved the Insolvency Court under sec. 55 of the Presidency Towns Insolvency Act, for a declaration that a deed of gift executed by the insolvent in favour of his wife and sons (appellants) was void, as one without consideration. It was held that it was open to the appellants (the wife and sons) to lead oral evidence to show that the transactions evidenced by the deed was, in reality, not a 'gift' but a 'transfer for consideration' and that as the dispute did not arise between parties to the transaction but arose between the wife and sons of the transferor and a third party, (the Official Assignee) oral evidence was admissible to show that the deed was not a gift but one for consideration and therefore a transfer for consideration. In that event, it would be a valid document which could not be avoided by the Official Assignee. In that context, the Supreme Court said that the prohibition in the latter part of sec. 92 was confined to issues between the parties to the document or their representatives and not if the issue as to varying the terms of the document arose between a party to the document and a non-party. It also referred to sec. 99 of the Evidence Act which expressly enables persons not parties to the document to give evidence varying the terms of document.

The 69th Report does not suggest that the effect of the above judgment in Bai Hira Bai has to be corrected. It refers to that judgment only to show that, according to the Supreme Court, both the first and latter part of sec. 92 apply to transactions between parties to the document. From that it follows that sec. 92, as it stands now, does not apply to unilateral documents such as

(i) confessions of the accused (ii) statements of witnesses, and (iii) Court proceedings (other than decrees or judgments), (iv) resolutions of companies when required to be in writing.

It is obvious that such documents, though unilateral, cannot be allowed to be varied or modified by oral evidence. Sarkar points out (15th Ed., 1999, pages 1312 and 1316) that for example, as the section now stands, the facts stated in a 'deposition' can be allowed to be contradicted by oral evidence because sec. 92 applies only as between parties to a document. The author says that the 'rules as to admissibility of extrinsic evidence to contradict depositions, appears to be otherwise in England. There, the same rule of exclusion of extrinsic evidence applies to the statutory deposition of a witness in a civil or criminal proceeding, and the statutory examination of a prisoner, neither of which can be contradicted or varied by extrinsic evidence (Phipson 11th Ed. p 788)". In the 15th Ed. of Phipson (see para 42.17) it is stated that the 'same rule applies to the statutory deposition of a witness in a civil or criminal proceeding which cannot be contradicted, or varied by extrinsic evidence. (Of course, a view was expressed that parol evidence to add something to a deposition could be permissible) (see Leach vs. Simpson: 5 M&W. 309); (Sidney Bolsom Investment Trust Ltd. vs. E. Karmios & Co.Ltd. 1956(1) QB 529 (although it would not be possible to give extrinsic evidence by way of addition or contradiction when the deposition is used in the absence of the witness, since the statutory conditions as to admissibility are not fulfilled). Some views are also expressed in para 42.04 in regard to deposition that they could be varied by leading oral evidence (Leach vs. Simpson: 5 M&W 309).

(A) Therefore, in the light of the above discussion, the main part of sec. 92 requires (a) some redrafting so far as bilateral transactions are concerned and (b) provision to prohibit oral evidence to vary unilateral transactions are concerned, must be inserted. This is precisely what was recommended in para 43.18 and para 43.20 of the 69th Report.

In the main part of sec. 92, it was recommended, that it be split up as follows into sec. 92(1)(a) and (b) in regard to documents 'between parties', clause (a) referring to contract, grant or other disposition of property and clause (b) referring to documents in which the matter required by law to be reduced to the form of a document is recorded. Sec. 92(2) is to be added to cover matters required to be reduced to the form of a document and <u>not constituting</u> a transaction between two or more parties'.

We recommend the format proposed in para 43.18 of the 69th Report regarding the amendment in the opening paragraph of section 92. We further recommend that for exclusion of oral evidence in the case of certain unilateral documents, besides the format of provision given in para 43.20 of the 69th report, the following words should be added "such as confessions of the accused, statements of witnesses, court proceedings other than judgments, decrees or orders, resolution of a company required to be in writing". But instead of bringing it in subsection (2) of section 92 as proposed in the 69th report (para 43.20), we recommend that this should be brought out in a new section 92A.

We recommend the following draft of amendment in the opening paragraph of section 92 and insertion of a new section 92A :-

"**92** When the terms of any such contract, grant or other disposition of property as is referred to in section 91 or any matter required by law to be reduced to the form of a document and constituting a transaction between two or more parties, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted-

(a) as between the parties to any such contract, grant or other disposition of property or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, the terms of the document, or

(b) as between the parties to such transaction, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from the terms of the document in which the matter required by law to be reduced to the form of a document is recorded, as the case may be.

Exclusion of oral evidence in the case of certain unilateral documents

92A. When any matter required by law to be reduced to the form of a document, and not constituting a transaction between parties, such as a confession of an accused, the statement of a witness, a court proceeding (other than judgments, decree or order), a resolution of a company required to be in writing, has been so reduced to writing and proved according to section 91, no evidence of any oral statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from the contents of the document."

(B) We shall next deal with the six provisos to sec. 92. The 69th Report divides the discussion here into (a) the first five provisos and (b) the sixth proviso. For convenience, we shall follow the same method.

(a) the first five provisos to sec. 92

(i) So far as the first proviso is concerned, this proviso permits proof of a fact which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of execution, want of capacity and any contracting party, want or failure of consideration, or mistake of law or fact. Illustration (e) is in point.

So far as mistakes are concerned, sec. 31 of the Specific Relief Act, 1877 or now sec. 26 of the Specific Relief Act, 1963 also permits mistakes to be corrected by way of 'rectification'. The proviso is, however, not limited in its application to suits for rectification of instruments (Mahendra vs. Jogendra: 2 CWN 260; Rajaram vs. Manik: AIR 1952 Nag. 90). In fact, mistake of fact can be pleaded in defence also.

Unilateral mistake (not amounting to fraud, legal or equitable) is not a ground for rectification and does not, therefore, if proved, entitle the party alleging it to a decree or order rectifying or cancelling the document (United State vs. Motor Trucks Ltd. 1924 A.C. 200). But when a mistake is common to all parties, evidence would be admissible, under proviso (1), to found a claim for the rectification of the document (Janardan vs. Venkatesh: AIR 1939 Bom 149).

Mistake as to identity of a person, would fall under the sixth proviso. For misdescription of property, separate provision has been made in sections 95, 97.

Where either mutual mistake or fraud is alleged oral evidence as a general rule, will be received. See also Rikhiram vs. Ghasiram AIR 1978 M.P. 189.

We do not, however, suggest any amendment in proviso (1).

Proviso (2): Under this proviso, the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Illustrations (f), (g), (h) are in point. The word 'may' shows the Court has a discretion.

We do not propose any amendment to proviso (2).

Proviso (3): It says that the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

This proviso is illustrated by illustration (b) and (j).

We do not propose any amendment to proviso (3).

Proviso (4): It says that the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to registration of documents.

We do not propose any amendment to this proviso.

Proviso (5): It says that any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description, may be proved. This proviso states that such 'incident' should not be repugnant to the express terms of the contract.

The rule under this proviso applies generally to mercantile transactions and is not exclusivelyconfined to mercantile transactions.

Incidents annexed to a contract by usage or custom mean what things are customarily treated as incidental and accessorial to oral evidence and such evidence is permitted to prove that such incidents are treated as part of the same transaction.

We do not propose any amendment to proviso (5).

Proviso (6): This provision says that any fact may be proved which shows in what manner the language of a document is related to existing facts.

In fact, sections 93 to 98 deal with special situations though they too deal with similar issues. This proviso (6) indeed refers to a principle of interpretation of contracts.

In the 69th Report, this proviso (6) was considered in some detail, but ultimately, it was stated (see para 43.33) that even the proviso does not require any amendment.

The point discussed was that in some judgments of High Courts it was pointed out that the section was somewhat vague (Martand vs. Amritrao, per Macleod CJ in AIR 1925 Bom 501. But the Commission observed that the section could have been clearer and, in fact, such a criticism applies to several other provisions of the Act too. It was observed that in spite of the above comment about proviso (6), it was not difficult to perceive the principle behind it, namely that, oral evidence is permissible "to show the connection between the words of an instrument and external reality and to ascertain the identity or extent of the subjects referred to in the document'. The surrounding circumstances which the Court could look into were described as a 'lamp' by Goodeve (Evidence p. 386, cited by Woodroffe) (69th Report, para 43.33).

Sarkar says (15th Ed., 1999 page 1395) that while the object of admissibility of the evidence of surrounding circumstances is to ascertain the real intention of parties, the said intention must be gathered from the plain

language of the document as explained by extrinsic evidence. But, at the same time, no evidence of any intention inconsistent with the plain meaning will be admitted. "This rule of interpretation is not so easy as it may appear, and it is not possible to define its precise limits in view of the ever changing facts involved in every cases." It appears that Macleod CJ said in another case Ganpathrao vs. Bapu Tukaram AIR 1920 Bom 143 that proviso (6) was 'the despair of judges and the joy of lawyers'.

In Raj Kumar vs. State of H.P. AIR 1990 SC 1833, the Supreme Court observed thad if the language employed is ambiguous and admits of a variety of meanings, the 6th proviso could be invoked. The object of admitting oral evidence of the circumstances is to assist the Court to get at the real intention of the parties and thereby overcome the difficulty caused by the ambiguity. In such a case, the subsequent conduct of the parties may furnish evidence to clear the blurred area and to ascertain the real intention of the parties.

The principle of the section has been applied to wills also.

After considering all aspects relating to proviso (6), we are also of the view that the proviso be left as it is.

Section 93:

This section deals with 'exclusion of evidence to explain or amend ambiguous document'. This section and sec. 94-98 deal with interpretation of documents. Section 93 reads as follows:

"93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects."

There are two illustrations below sec. 93.

This section does not affect any of the provisions of the Indian Succession Act, 1925 as to construction of wills, contained in sections 74 to 111 of that Act.

Section 93 refers to ambiguity or defect 'on its face'. This is known as 'patent ambiguity' as distinct from 'latent ambiguity. Latent ambiguities are referred to in sections 95, 96 and 97.

Illustration (b) refers to a document the language of which is so vague or defective on its face as to convey no meaning and illustration (b) refers to inherent ambiguity leading to mere speculation as to intention. Extrinsic evidence is not admissible to explain 'patent' ambiguity.

Under sec. 29 of the Contract Act too, agreements, the meaning of which is not certain or capable of being made certain, are void.

In Keshavlal vs. Lalbhai AIR 1958 SC 512, it was held that if, on a fair construction, the condition mentioned in the document appears to be vague or uncertain, no evidence can be admitted to remove the said evidence or ambiguity.

In the 69th Report, it was stated (see para 44.21) that sec. 93 does not require any change. We agree.

Section 94:

This section refers to 'exclusion of evidence against application of document to existing facts'. It reads as follows:

> "94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts."

This section does not refer to any patent or latent ambiguity. It says that if the language is crystal clear, and applies correctly or definitely to existing facts, no evidence can be allowed to say that the parties intended to mean something else.

We agree with para 44.3 of the 69th Report that sec. 94 does not require any change.

Section 95:

This section refers to 'evidence as to document in unmeaning reference to existing facts'. It reads as follows:

> "95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense."

There is an illustration below sec. 95. It reads as follows:

> "A sells B, by deed, 'my house in Calcutta'. A had no house in Calcutta but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.
>
> These facts may be proved to show that the deed related to the house at Howrah."

This section refers to 'latent ambiguity' of a particular type as explained in sec. 93. Sections 96 and 97 also deal with latent ambiguities. Section 95 has to be read with sec. 97 which refers to 'language', which applies to two sets of facts.

These three sections 95, 96 and 97 are based on the maxim: 'Veritas nominis tollit errorem demonstrationem: nihil facit error nominis cum de corpore constat; falsa demonstratio non nocet cum de corpore constat' – A false description does not vitiate a document.

Errors in survey numbers can be disregarded by relying upon the boundaries of the property covered by a document.

In para 44.4 of the 69th Report, it was stated that this section does not require any amendment. We agree.

Section 96:

This section refers to 'evidence as to application of language which can apply to one only of several persons'. It reads as follows:

> "96. When the facts are such that the language used might have been meant to apply to anyone, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of these persons or things it was intended to apply to."

There are two illustrations below sec. 96.

This section also deals with latent ambiguities. This is called 'interpreting an equivocation'.

Illustrations (a) and (b) of the section bring about the meaning of the section. They are as follows:

> "(a) A agrees to sell to B, for Rs.1000/-, "my white horse". A has two white horses. Evidence may be given of facts which show which of them was meant.
>
> (b) A agrees to accompany B to Hyderabad. Evidence may be given of facts showing whether Hyderabad in the Dekkan or Hyderabad in Sindh was meant."

Questions have arisen whether (a) 'blank space in a document can be filled by extrinsic evidence. Decided cases show that if the document is

incomplete and does not disclose its intention or is blank on essentials, no extrinsic evidence is permissible (see Sarkar 15th Ed 1999 p. 1429).

We agree with the 69th Report, para 44.6 that the section does not require any amendment.

Section 97:

It refers to 'evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies'. It reads as follows:

> "97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply".
>
> The illustration below sec. 97 reads as follows:
>
> "A agrees to sell to B, 'my land at X in the occupation of Y'. A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell."

We agree with para 44.10 of the 69th Report that sec. 97 does not require any amendment.

Section 98:

This section refers to 'evidence as to the meaning of illegible characters, etc'. It reads as follows:

"98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations, and of words used in peculiar sense".

Illustration below sec. 98 reads thus:

"A, sculptor, agrees to sell to B, "all my mods". A has both models and modeling tools. Evidence may be given to show which he meant to sell'.

We agree with para 44.14 of the 69th Report that sec. 98 does not require any change.

Section 99:

This section deals with the question 'who may give evidence of agreement varying terms of document'. It reads as follows:

"99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document".

There is an illustration below sec. 99. It reads as follows:

> "A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time, they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C, if it affected his interests."

In the 69th Report, three aspects are considered and three amendments suggested to sec. 99. The first one is that the section enabling extrinsic evidence must apply where both parties in a case are strangers to a document or one party is a stranger. Secondly, the section permits evidence to 'vary'. The word, 'contradict, add to or subtract', which are used in other sections must also be added. Thirdly, so far as where third parties to the document are involved, there must be an exception, as in England. The Commission accepted the suggestion in Cross on Evidence, 1974, page 540, that 'contradiction by oral evidence should not be permitted, even between strangers', if the matter is required by law to be reduced to writing'.

We agree with the above proposals and revised draft from para 44.27 of the 69th Report with slight modification as follows:-

Who may give evidence of agreement varying the terms of a document

> "**99.** Evidence of any fact tending to show a contemporaneous agreement contradicting, varying, adding to, or subtracting from the terms of a document may be given –

(a) as between persons who are not parties to the document or their representatives in interest; or
(b) as between a person who is a party to the document or his representative in interest and a person who is not such party or representative in interest:

Provided that no such evidence shall be given where the matter is required by law to be reduced to writing.

Illustration

A and B make a contract in writing that B shall sell certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C, if it affected his interests."

Section 100:

This section refers to 'saving of provisions of Indian Succession Act relating to wills'. It reads as follows:

"100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act, 1865 (10 of 1865) as to the construction of wills".

In the 69th Report pointed that the words "Indian Succession Act, 1865 (10 of 1865)" be substituted by the words "Indian Succession Act, 1925" We agree.

Sections 101 to 167:

Part III of the Act deals with 'Production and effect of Evidence'.

The part contains Chapters VII to XI; Chapter VII (Of the Burden of Proof), (Sections 101 to 114A), Chapter VIII (Estoppel) (sec. 115 to 117); Chapter IX (Of Witnesses) (sec 118 to 134); Chapter X (Of the examination of witness) (sec. 135 to 166); and Chapter XI (Of improper admission and rejection of evidence) (sec. 167).

We shall take up section 101 in Chapter VII relating to Burden of Proof.

Section 101: bears the heading 'Burden of Proof'. It reads as follows:

> "101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

There are two illustrations below sec. 101.

In the 69th Report, in Chapter 45, the Commission considered section 101 and came to the conclusion that no amendments are called for so far as sec. 101 is concerned (see para 45.18).

But, the Commission referred to the broad principle in civil cases relating to the burden of 'establishing a case' or the 'legal burden (or

persuasive burden', which never shifts and the 'evidentiary burden' which shifts during the trial from one side to the other. In a criminal case, the burden is always on the prosecution to prove that the accused is guilty, though there may be special statutes requiring the accused to prove certain facts whenever the prosecution has proved certain other facts.

These principles being well known and basic, we do not propose to refer to the case law relating to burden on the basis of the pleadings and the evidential burden. We shall proceed to refer to the other sections in this Chapter VII.

We agree with the 69th Report that no amendment is necessary in this section.

Section 102:

This section concerns the question: 'On whom burden of proof lies'. It reads as follows:

> "102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

There are two illustrations below sec. 102.

The section again lays down an elementary proposition and we agree with 69th Report (see para 45.19) that sec. 102 does not require any amendment.

Section 103:

This section relates to 'Burden of proof as to particular fact'. It reads as follows:

> "103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

There is one illustration but is designated (a). (There is no illustration (b).) It states that if A alleges that B committed theft, A has to prove the fact. But, if B raises a plea of alibi; he has to prove it.

The section does not require any amendment. But in the illustration, the brackets and letter "(a)" can be dropped. It is recommended accordingly.

Section 104:

This section refers to the 'Burden of proving fact to be proved to make evidence admissible'. It reads as follows:

> "104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

There are two illustrations (a) and (b) below sec. 104. They read as follows:

> "(a). A wishes to prove a dying declaration by B. A must prove B's death.
>
> (b) A wishes to prove, by secondary evidence, the contents of a lost document. A must prove that the document has been lost."

In the 69th Report, in para 45.22, it was recommended that no change is necessary in sec. 104 and we agree with that recommendation.

Section 105:

The section deals with 'Burden of proving that case of accused comes within exception'. It reads as follows:

> "105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exception in the Indian Penal Code (XLV of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

There are three illustrations below section 105. They read as follows:

"(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Indian Penal Code (XLV of 1860) provides that whoever, except in the case provided for by sec. 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under sec. 325. The burden of proving the circumstances bringing the case under sec. 335 lies on A".

Case law lays down the following principles.

(1) The law under sec. 105 settled by the decision of the Supreme Court in Dahyabhai vs. State of Gujarat: AIR 1964 SC 1563. The decision points out that the burden of proof is on the prosecution to prove the guilt of the accused (Woolmington vs. D.P.P. 1935 AC 462); (2) But, where the accused pleads any special defences open to him, the burden lies on the accused and he can prove the defence by 'preponderance of probabilities' (as in civil cases) and need not prove his defence beyond reasonable doubt; (3)

he can rely on oral or documentary evidence, presumption or admissions or even on prosecution evidence if it satisfies the tests of a 'prudent man'; (4) the evidence so placed by the accused even if it is not sufficient to discharge the burden placed on him under sec. 105, if it raises a reasonable doubt in the mind of the Judge as regards one or other of the necessary ingredients of the offence itself, it is sufficient for him. The proposition (4) was reiterated in Yogendra Morarji vs. State of Gujarat: AIR 1980 SC 660 and in Periasami vs. State of T.N.: 1996(6) SCC 457 where the above rulings were followed.

While on the question of burden of proof in criminal matters, cases of pleas of 'insanity' have received special consideration. In the 69th Report (see paras 46.14 to 46.17) reference was made to McNaughten's case (1843) 10 cl. & Fn 200 and the McNaughten Rules which came to be formulated on the basis of that case and from latter cases.

While the English law is that the burden to prove insanity would remain on the defence on basis of balance of probabilities, reference was made in the 69th Report to the law in most States in the United States, to place the burden on the prosecution to prove 'absence of insanity', quoting Glueck, Mental disorder as a Defence in Criminal Law p.41. That was also adopted in a draft Model Penal Code in 1948 (See Grunhut, p. 436). That too is the rule on the Continent (See Peter Clark, 'The Insanity Defence in Pennsylvania (Fall 1971) 45. Temple Law Quarterly, 63). It is stated (see para 46.10) in the 69th Report that in one half of the States in USA, the burden is placed on the prosecution to prove defendant's 'sanity', beyond reasonable doubt, while the other half (including Pennsylvania), require the

defendant to prove 'insanity'. It is said the recent trend is in favour of the former (Quoting, Weihofenon Mental Disorder as a Criminal Defence, 1954, pp 212-13, 238 and McCormick, Evidence, sec. 321). Reference was made to Davis vs. United States: (1959) US 469 & other cases and In re Winship (1970) 397 US 358.

In para 46.18, the 69th Report noticed that in Australia the burden of proving insanity is on the accused and he can do so by establishing a balance of probability and the view of the Australian High Court in Sodeman vs. R (1936) 55. C.L.R. 192 (228) was affirmed by the Privy Council in R vs. Sodeman 1936 (2) All ER 1138 (PC).

English law continues also to be the same – see R vs. Carr-Briant: 1943 KB 607; R vs. Brown (1971) 55 Cr. App/ Re[478 (CA); R vs. Swaysland: The Times: April 15, 1987 CCA) (see Phipson, 15th Ed., para 4.33).

We may refer to more literature on the subject:

(i) P. Roberts: 'Taking the Burden of Proof Seriously (1995) Crl. Rev. 783 (785-7)

(ii) T.H. Jones: 'Insanity, Automatism, and the Burden of Proof on the accused' (1995) 111 L.Q.R. 475.

(iii) T.H. Jones: 'Insanity and the Burden of Proof on the accused: A Human Rights Approach' in the book 'Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence (1997).

The above articles are referred in the book on Evidence (Texts and Materials) by Andrew Choo, 1998 (pp. 42-43).

The author also states as follows: "The Supreme Court of Canada has been confronted with the issue of whether the presumption of sanity embodied in the Canadian Criminal Code violated the presumption of innocence guaranteed in the Canadian Charter of Freedom. The majority of the Supreme Court held that it did, but that the placing of the legal burden on the accused constituted a reasonable limit within the meaning of sec. 1 of the Charter."

The author also states (p.43) that 'where an accused charged with the murder raises the defence either of insanity or of diminished responsibility, sec. 6 of the Criminal Procedure (Insanity) Act, 1964 of UK permits the prosecutor to adduce evidence to prove the other evidence. In this situation the legal burden of proof falls on the prosecutor. In a similar vein, sec. 4 of the same Act allows the issue of unfitness to plead and stand trial to be raised by the defence or by the prosecutor, and where raised by the prosecutor, the legal burden of proving the issue falls on the prosecution. (R vs, Robertson) 1968(1) WLR 1767.

The author also refers to 'The Presumption of Innocence in English Criminal Law' by A. Ashworth and M. Blake 1(1996) Criminal Law Review 306 (315).

Phipson (1999, 15th Ed., para 4.07) says that where the accused raises a plea of insanity in defence, the persuasive burden lies on him to prove insanity. (refer to McNaughten's case, Woolmington case, Sodeman vs. R and R v. Carr-Briant already referred to by us)

The author says (para 4.08) that there are cases in which both insanity and the defences such as diminished responsibility are raised (Bratty vs. A.G. (Northern Ireland) 1963. A.C. 386 (Automatism). Thus when the defendant raises the issue of either insanity or diminished responsibility on a charge of murder, the prosecution is allowed to adduce evidence to prove the other of those issues." (R vs. Grant (1960) Crl.L. R 424.

Whatever be the position elsewhere, the law in India continues to be what the Supreme Court laid down in 1964 in Dahyabhai's case and it continues to be good law today as declared in Periasami vs. State of TN 1996(6) SCC 457. Dahyabhai was applied in State of HP vs. Gian Chand 2001(6) SCC 71 at p 83; Laxman vs. State of Karnataka.

The 69th Report drafted a special provision in regard to insanity defence (see para 46.35) not to reverse the law in Dahyabai but only to reaffirm that the burden lies on the accused and he could discharge it "if there is evidence of any fact creating a reasonable doubt about the sanity of the accused". But, later in para 46.36, the Commission did not proceed further as some of the then Members felt that even this limited relaxation may affect the operation of sec. 105 in case of other defences.

Having examined the matter in depth, we agree that it is not desirable to make any relaxation so far as the defence of insanity is concerned and we agree with the 69th Report that no amendment is called for.

Section 106:

This section refers to the question 'Burden of proving fact especially within knowledge'. It reads as follows:

> "Section 106: When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".

There are two illustrations below sec. 106. These are as follows:

> "(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
>
> (b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."

The word 'especially' indicates that the person who has the knowledge of a fact is expected by the law, to discharge the burden. The Supreme Court cautioned in Shambu Nath vs. State of Ajmer: AIR 1956 SC 404 which was a case of an accused having travelled in second class in a train without paying the fare that 'an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit'. The Court pointed out that ill. (b) is a special situation

because railways will find it impossible where a passenger has started his journey or what is his destination. The Supreme Court pointed out that this section cannot be applied to an accused guilty of murder on the plea that if he had murdered, he must know more. That would amount to first presuming that he is the murderer. It must be a special case, the word 'especially' is important. The section has been considered by the Supreme Court in a large number of cases after 1956, the latest being Vishal vs. Veerasamy: 1991(2)SCC 375; Jawaharlal Vadi vs. State of J&K: 1993 (2) SC 381; Balram vs. State of Bihar: 1997 (9) SCC 338; Sanjay Kumar Bajpai vs. Union of India: 1997(10) SCC 312. The Privy Council pointed out in Seniviratne vs. R : AIR 1938 PC 289 that the section does not cast the burden of proving innocence on the accused.

In England, quite recently, the right to 'silence' of the accused has been restricted by sections 34, 36 and 37 of the Criminal Justice and Public Order Act, 1994, whereby if the suspect or the accused does not, after certain facts are proved, answer when he is reasonably expected to speak, the Court may draw such inference from such failure as it may appear reasonable. The judgment of the European Court in Murray vs. UK 1996 Vol. 22, EHRR 29, however, permitted such an inference only if the suspect or accused, if he had been told of his right to the presence of a lawyer at the time of interrogation. Or else, Art. 6 of the European Convention could be said to have been violated. This led to insertion of such a requirement in these three sections by sec. 58 of the Youth Justice and Criminal Evidence Act, 1999. In another case Condron vs. UK: (2001) 31 EHRR 1, in the year 2001 before the European Court, it re-affirmed this view but it referred to

the answer of the suspect/accused and to the advise of his lawyer. See also Averill vs. UK (2001) 31 EHRR 839.

A lawyer might advise his client to remain silent. Even if the lawyer's advice was wrong, the accused would suffer. There is a lot of criticism of this procedure in UK for requiring the accused and his lawyer to give evidence. This could, in India violate the guarantee in Art. 20(3) of our Constitution against self-incrimination. Recently, the Australian Law Commission has refused to adopt the English amendments.

All these aspects have been referred to in the Report given recently in (our Report No. 180) on Right to Silence wherein it was recommended that in our country, the right to silence cannot be diluted.

The Irish Law Commission has recently given a Report [Report of the Committee to Review the Offences Against the State Act, 1939-1988, May 2002] and chapter 8 thereof deals with the Right to Silence. After pointing out various difficulties that are being faced by courts in Ireland, consequent to dilution of the right to silence, the Commission also referred to the two recent cases of the European Court in Condron v. UK (2001) 31 EHRR 1 and Averill v. UK (2001) 31 EHRR 839 and held that for want of compliance by the police of the condition of informing the accused of his right to call for a lawyer, the accused in the aforementioned cases have to be acquitted.

We agree with para 47.28 of the 69th Report that sec. 106 does not require any amendment.

Section 107:

This section refers to 'Burden of proving death of person known to have been alive within thirty years.' It reads as follows:

> "107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it."

This section is based upon the principle of the continuance of things in the state in which they have once existed, as stated in sec. 114, illustration (d). As pointed in para 48.5 of the 69th Report and para 6.18 of Phipson (15th Ed., 1999), in England, the law is the same but is not treated as a presumption of 'law'. The 69th Report also pointed out in para 48.6 and 48.7 that there is no need to reduce the period. The longer the period, the lesser the strength of the presumption.

Though there is a presumption of continuance of life, the law ought not to assume that which, in view of the usual duration of human life, is practically impossible. (Spring vs. Moale: 92. Am Dec. 698; Taylors 2000, Sarkar 15th Ed., 1999 page 1555). In the 69th Report, reference was made to a suggestion in a judgment of the Mysore High Court in Shankarappa vs. Shivarudrappa AIR 1963 Mys. 115 for deletion of sec. 107 in as much as in an age of aeroplanes and sputniks, death can take place at an unknown place and under unidentifiable circumstances. The Commission observed in para 48.9 that even so, it is difficult for ordinary men not to believe that a person who was earlier alive is not alive.

But in para 48.10, the Commission recommended addition of a proviso giving a discretion to the Court where it appeared to the Court likely that the person concerned was involved in an accident or calamity. The proviso below sec. 107 as recommended in para 48.11 of the 69th Report reads as follows:

> "Provided that where it appears to the Court from the evidence that the person concerned had been involved in an accident or calamity in circumstances which render it highly probable that the accident or calamity caused his death, the Court may, for reasons to be recorded, direct that the provisions of this section shall not apply."

We may, in this context refer to the combined discussion on sec. 107 (Continuance of life within 30 years) and sec. 108 (presumption of death if a person is not heard for seven years), in Sarkar 15th Ed., 1999, page 1555: the learned author echoes the same idea propounded in the 69th Report:

> "If a person leaves by an aircraft which does not arrive at its destination long after it was due and there is no trace of it on account of a crash somewhere on a mountain or into the sea, should not his death be presumed before the end of seven years because his body was not found? Even if his life was spared by some fortuitous circumstance, he could have communicated the fact to his relations or friends within a few days. In such and other special cases, the law should allow presumption of death before the lapse of seven years and Court should be invested with such a discretion."

In fact, sec. 108 is also a proviso to sec. 107. It has been held that it is erroneous to seek to apply both sec. 107 and 108 to one and the same case, in the same way as a person cannot, at the same time, both be alive and dead.

Section 108 comes as a proviso to sec. 107: To a case where the proviso (i.e. sec. 108) is attached, sec. 107 can have no application (Sarojini vs. Sivabandan: AIR 1956 T-C. 129).

The Malaysian High Court has held that sec. 108 does not prevent the Court from finding on circumstantial evidence, that the death of a person occurred before the expiry of seven years from the date of disappearance (Osman Bin Bachit, Re. 1997(4) Malayan LJ 445 (Melaka HC).

Of course, when a person absconds from justice in order to evade trial on a charge of murder, the presumption in sec. 108 (regarding death) does not apply, as he would not naturally communicate with his relations (East Punjab vs. Bachan AIR 1957 Punjab 316).

In the light of the above, we agree that a proviso in the manner referred to in para 48.11 of the 69th Report as extracted above can be added below sec. 107 as it now stands.

Section 108:

The section refers to the 'Burden of proving that person is alive who has not been heard of for seven years'. That sections reads as follows:

> "108. Provided that where the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

The principle involved in this section is taken out from the one laid down in England in "In re Phene's Trust" (1869) LR 5 Ch. 139 and according to the 69th Report, (Para 49.5) it is traceable to a statement of law of the year 1603. The period of seven years is also referred to in sec. 494. Indian Penal Code, in the Exception to section 27(h) of the Special Marriage Act, 1954 and section 13 (viii) of the Hindu Marriage Act, 1955. In para 49.10, the Report refers to English cases where a woman, in the honest belief that her husband is dead, he not having been heard of for seven years, was held not guilty of bigamy. The law could be the same in India for sec. 79 of the Indian Penal Code also refers to the defence of mistake of fact or law or action in good faith.

The real controversy under sec. 108 is with regard to the "date of death". The Privy Council in Lalchand vs. Mahant Rup Ram: AIR 1926 P.C. 4 stated, following the English case in 'In Re Phene's Trusts', referred to above, that there is no presumption that death must be deemed to have taken place on the date of expiry of the period of seven years referred to in the section. The Supreme Court in Jaya Lakshmi Ammal (N) vs. R. Gopalal Pathar: AIR 1995 SC 995 has also held that the question of whether a person was alive or dead at a given date will be decided on the evidence available at

the date of the hearing. It would be advantageous to refer to the observations of the Privy Council in Lalchand's case:

> "Following these words in the case of Re Phene's Trusts, it is constantly assumed – not perhaps unnaturally – that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. But, this is not accurate. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or four periods of seven years. It would be accurate to say that the period of disappearance should be 'seven years or more' or 'not less than seven years'.

The Privy Council further observed that, on this aspect, the English law and Indian law were the same – there is no presumption that a person not heard of for seven years should be treated as dead on the date of expiry of seven years.

Sarkar however refers (see 15th Ed;, 1999, page 1560) to a large number of decisions of various High Courts, starting from Jeshankar vs. Bai Divali : AIR 1920 Bom 85 and other judgments of the High Courts of Madras, Calcutta, Punjab & Haryana and Rajasthan to the effect that once the period of seven years has lapsed, and a suit is filed later, it can be presumed that the person died by the date of suit. But Sarkar points out that these decisions being contrary to English law and the Privy Council having

stated that the English law and Indian law are the same, the above views are not correct.

There does not, however, appear to be any change in the law in England (see Phipson, Evidence, 1999, 15th Ed. para 4.24 to 4.25). But it is pointed out that in sec.19 of the Matrimonial Causes Act, 1973, it is provided that a petitioner can present a petition to have a marriage dissolved after seven years' absence where the petitioner has no reason to believe that other party has been living within that time. (Thompson vs. Thompson: 1956 (1) All ER 603)

Section 27(h) of the Indian Special Marriage Act, 1954 and section 13 (vii) of the Hindu Marriage Act, 1955 provide that if a person has not been heard of as being alive for seven years or more by those who would have naturally heard of him,- had that person been alive – it is a ground for divorce at the instance of the other spouse.

The 69th Report suggested that the presumption in sec. 108 has not been helpful and that in cases of remarriage relying on the presumption of death by date of marriage, insurance claims made after seven years, and testamentary succession, prejudice is caused to a party because he or she is not able to prove the exact date of death (see para 49.18 and 49.19). The Commission suggested that section 108 be redrafted in the manner stated in para 49.20 by stating that (a) the burden of proving that he is alive after the expiry of seven years – shifts to the person who affirms it and (b) the Court shall, as respects the period after seven years, presume that he is dead. Now so far as the first proposal in clause (a) mentioned above, it is nothing new

but only a clarification of what is already contained in sec. 108, namely that the burden shifts to the other party who states he is alive. But so far as recommendation (b) above is concerned, it says the "the Court shall, as respects such period (i.e. after seven years), presume that he was dead". The Commission inserted the word 'and' between the two clauses. The question then is about clause (b).

We recommend that clause (b) as recommended should be modified on the following lines: "if the said burden is not discharged, the Court shall, as respects such period starting from the expiry of seven years, presume that the person was dead." We shall give the draft of the provision afterwards.

The reason for adding these words is as follows: Section 108 first states that when it is proved that a person has not been heard of for seven years by those who would have heard of him if had been alive, the burden proving that he is alive i.e. after seven years, is shifted to the other party who says he is alive. Once the evidentiary burden thus shifts to the opposite party who contends that even after seven years, the person was alive, and that person does not discharge that burden which has so shifted to him, the Court should draw the presumption that the person is dead, after that period expires.

Presuming death after the expiry of seven years (if the person on whom the burden has shifted does not prove that the person is alive after seven years) does not in our view offend the principle laid down in In Re Phene's Trusts: (1870) 5 Ch 139; (1861-1873) All ER 514. The principle laid down in that case that there is no presumption as to date of death was

with reference to the period within the seven years. This is clear from the facts of that case as well as the proposition laid down. In that case, the testator died in Jan 1861, leaving his estate to his nieces and nephews. One nephew had not been heard of since August 1858 or seven months before the testator's death (which takes us to June 1860) when he deserted from the US Navy. A claim was made for his share of the estate on the presumption of his death. But the Court would not presume that he had survived the testator, as the period between disappearance and testator's death was small and a presumption could have been drawn that he was alive by Jan. 1861 when the testator died. In that case, the seven year period would expire only by 1867 and there could be a claim by the nephew's heirs thereafter provided they contended that the nephew of the testator must be presumed to have died by 1867 and called upon the opposite side to prove he was alive after 1867, failing which he could be presumed dead by 1867. But, the crucial point here is that the nephew could not have been presumed to have died before Jan. 1861 (date of the death of testator), and such a contention, is put forward by the opposite parties, to exclude the nephew's heirs, it would not be acceptable to the Court. The heirs of the nephew could easily contend that the presumption is that the nephew survived the testator who died in 1861. Steve Uglow (Evidence, Texts & Materials: 1996 page 699) observes

> "The Court did not apparently consider the strong factual inference that he had survived the testator".

In fact, applying the principle contained in sec. 107 (that a person shown to be alive within thirty years is presumed to be alive within that period unless the contrary is proved), the court could have said that if the

nephew was alive immediately before June 1860, there would be a presumption that he was alive at least in January 1861 when the testator died – and that he would have been entitled to a share which could have gone to the nephew's heirs, by applying the presumption of death after seven years and before suit (as in sec. 108).

We shall once again refer to what was stated in Re Phene's Trusts:

> "If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he dies is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which the fact is essential".

This applied to the opponents of the heirs of the nephew.

But, it is not clear why there should not be a presumption that a person living in June 1860 was living in Jan. 1861 unless the other party proved that he died before Jan. 1861. Whatever be the decision on facts, the fact remains that the passage in Phene's Trusts refers only to the presumption of death within seven years. The case is not an authority for the proposition that once the period of seven years is over death cannot be presumed.

The amendment proposed in the 69th Report does not clearly say that a person must be presumed dead once the seven years have lapsed. In our

view, under sec. 108 if it is proved that a person has not been heard of for seven years and if the opposite party does not show that the person was alive after expiry of seven years, the person can be presumed to be dead after the expiry of seven years. We are not stating that a person should be presumed to have died on any particular date 'during the period of seven years.'

We shall also examine the facts in Lalchand's case decided by the Privy Council. In that case, a Mahant made various alienations, without necessity, and the properties were sought to be recovered by his successor. There were two stages of the litigation. The case came up to the Privy Council from the second litigation started on 30.11.1916. The Mahant who made the alienations had assumed office in 1880 and he is said to have made over the Mutt to the plaintiff, (his chela) in 1892 and according to the evidence of a co-chela, the Mahant died on 27.4.1892. The first litigation to recover the properties from the alienee - limitation being 12 years from the date of succession – was initiated on 16.4.1895. The plea that the Mahant died on 27.4.1892 was rejected as the defendant adduced evidence that he was seen alive in 1895, after the suit was filed on 16.4.95. The suit was dismissed on 27.1.1896 as premature, since there was no proof that succession opened in favour of the chela. The decree was confirmed in appeal by the High Court on 30.11.1897. As the appeal was also dismissed, it was assumed by the plaintiff, when he filed the second suit, that it must be assumed that the Mahant did not die even by 30.11.1897. Otherwise, the High Court could hold that pending appeal, the cause of action arose and it could have given relief. That was the plantiff's assumption. (Of course, he conveniently forgot that in the earlier suit it was found that the Mahant was last seen in 1895 and seven years would have expired by 1902.)

The plaintiff waited for about 19 years more and filed the suits (which went up in appeal to the Privy Council), contending that on 30.11.1897, the Mahant was treated as alive by the High Court, that, as prescribed under sec. 108, for seven years from 30.11.1897, the Mahant's whereabouts were not known and that he must be deemed to have died by 30.11.1904 (an expiry of seven years) and the present suits filed on 30.11.1916 were in time. The trial Judge dismissed the suits as barred by time, being beyond 12 years from the date when succession opened. But the High Court reversed the said decree holding that it was for the defendants to prove that the Mahant was alive once seven years had elapsed from the date of the earlier judgment of the High Court on 30.11.1897 and granted mesne profits for three years from 30.11.1896, implying that the Mahant must have died by 1903. The High Court held that the plea of the plaintiff in the earlier suit that the Mahant died on 27.4.1892 was not accepted and that finding was binding on both parties, that defendant could not say the Mahant died on 27.4.1892, and that the plaintiff could not now be told in the second suit that in the earlier suit of 16.4.1895 he had pleaded that the Mahant died on 27.4.1892 that his suit was barred. To dismiss the earlier suit as premature on the ground that there was evidence that the Mahant was alive even after April 1895 and to dismiss the present suit as time barred was something like blowing hot and cold. But, surprisingly, the Privy Council held the suit was barred being beyond 12 years from 27.4.1892, the date pleaded by the plaintiff in the earlier suit as the date of the Mahant's death, though that date was not accepted by the trial court and High court, in the earlier litigation. It is in that context that Phene's Trust case was referred and followed.

On facts of the case, it will be noticed that the earlier suit was dismissed as premature after disbelieving the plea of the plaintiff that the Mahant died in 1892 but the latter suit was again dismissed by the Privy Council as time barred because plaintiff pleaded in the earlier suit that the Mahant died in 1892. The High Court held that once the plea of death of the Mahant in 1892 was disbelieved in the earlier suit, that finding was binding on the parties and the plaintiff could not, in the second suit, be non suited on the basis of his plea in the earlier suit. To us, it appears that the reasoning of the Privy Council does not appear to be correct. We shall give alternative reasons for those given by the Privy Council for supporting the ultimate judgment. But, whatever that be, the proposition laid down in Lalchand's case is only a repetition of what was laid down in Re Phene's Trusts, namely, that there can be no presumption of death on any particular date 'during the seven years'.

In Lalchand's case, if the earlier suit was dismissed on the ground that the Mahant was last seen in 1895, (after April) then a presumption of his death arises by 1902 (after April) (i.e. after the High Court decision on 30.11.87 in the earlier suit) and the second suit was filed on 30.11.1916. The plaintiff assumed however that the Mahant must be deemed to be alive upto 30.11.1897, the appellate judgment in the earlier case. That assumption was wrong. The crucial date is 1895 (after April) and seven years end by 1902 (after April). The plaintiff who filed the suit on 30.11.1916, should have noticed that the Mahant must be presumed to have died by 1902 (after April) but the suit was filed on 30.11.1916. The defendants could have raised this plea. The plaintiff was obliged then to prove that, even after the 1902, he lived upto 30.11.1904. This, he has not proved and the suit was

liable to be dismissed. Thus, while the conclusion of the Privy Council, on facts, may be correct, though for different reasons, they could not say that Phene's Trusts case decided that, even after seven years expire, death could not be presumed from the date of expiry of seven years.

In other words, the principle in Phene's Trusts was that in the first seven years of one's disappearance, one cannot say that the person must be deemed to have died on any particular date within the period of seven years. The principle is not that you cannot presume his death even after the expiry of seven years and shift the burden to the opposite party that the person was alive even after seven years.

We find that the US Uniform Probate Code (1972) states (para 1-107) (quoted in para 2531, page 605 of Vol. IX Wigmore, 1981) reads thus in clause (3):

> "(3) a person who is absent for a continuous period of 5 years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His death is presumed to have occurred at the end of the period, unless there is sufficient evidence for determining that death occurred earlier."

This provision in the US Code puts the matter beyond doubt that death must be presumed to have occurred at the end of the prescribed period, subject to the same being disproved by the party who says he was alive after seven years. The absence of presumption of death is related only during the

period prescribed and no doubt, if anybody wants to say that death occurred during the prescribed period, he has to establish it. (American law relating to insurance however creates special contract clauses and longer periods so that a person does not deliberately go underground to enable his heirs at law or nominees to claim the amount insured. Wigmore p. 613 para 2531 a).

Wigmore (1981) says clearly (para 2531 page 610) that the rule of the presumption extends merely to the fact of death from and after the end of the period; it is not to be understood to specify anything time of death within that period.

Presumption before the end of the period has been confined to cases of 'specific point' (para 2531(a)). See Dave vs. Briggs: (1878) 97 US 628.

We are, therefore, convinced that from the date a person's whereabouts are not known, as stated in sec. 108, a presumption arises about his death at the end of seven years and then, as provided in sec. 108, after seven years, the burden shifts to the party who wants to prove that he was alive thereafter, to prove that fact. If that burden is not discharged, a presumption of death on the expiry of seven years must follow. It must also be made clear however that if a person wants to contend that a person whose whereabouts are not known had died on any particular date within the seven years, then, of course, as stated in Re Phene's Trusts and Lalchand's case, the burden must be on him to prove that fact.

We have already referred to the new sec. 108 as proposed in the 69th Report and our suggestion to add some further words therein. In the light of

the above discussion, the proposed section requires another Explanation that there is no presumption of death during the seven years.

The format of section 108 proposed in the 69th report is being modified in the draft recommended below. The proposed sec. 108, in our view should read as follows:

Burden of proving that a person is alive who has not been heard of for seven years

"**108.** Notwithstanding anything contained in section 107, where the question is whether a man is alive or dead, or was alive or dead at a particular time, and it is proved that he has not been heard of for seven years or more by those who would naturally have heard of him if he had been alive, the burden of proving that he was alive during any period after the expiry of seven years shall be upon the person who affirms it and if the said burden is not discharged, the Court shall, as respects such period starting from the expiry of seven years, presume that the person was dead.

Explanation:- If any question is raised that the man died on any particular date during the period of seven years aforesaid, the burden of proving that he died on such date during that period, shall be on the person who so affirms, and the presumption referred to in this section has no application.

Section 108A: (as proposed in the 69th Report)

This section relates to presumption in case of death of several persons in a single catastrophe, like an accident, drowning, air-crash, battle, earth quake or the like.

This aspect is dealt with by courts and commentators as part of sec. 108. We agree that there should be a separate section like the proposed sec. 108A to deal with the presumption arising in such cases.

The relevant presumption here is called the 'presumption of survivorship' (Commorientes). When more than one person dies in catastrophes like the ones mentioned above, it is difficult to prove who died first. The order of death may be relevant in matters relating to succession.

In India, there has been no presumption of survivorship arising from age or sex, nor was there any legislative enactment (see K.S. Agha Mir Mohamad vs. Mudassirshah, AIR 1944 PC 100). Section 21 of the Hindu Succession Act, 1956 provided that until the contrary is proved, it shall be presumed that the younger person survives the elder one, in such situations. The section does not apply in relation to succession to persons other than Hindus. Sec. 21 of the Hindu Succession Act, 1956 reads as follows:

> "Section 21: Presumption in cases of simultaneous deaths.- where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder."

Section 21 applies to testamentary or intestate succession (In Re Mahabir Singh: AIR 1963 Punjab 66).

In England, sec. 184 of the Law of Property Act, 1925, reads as follows, and it relates to title to property:

> "184. In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such death shall (subject to an order of the Court), for all purposes affecting the title to property, be presumed to have occurred in the order of seniority, and accordingly the younger shall be deemed to have survived the elder."

The words 'subject to the order of the Court' refers to an order allowing rebuttal (para 50.11 of 69th Report, footnote 5). Phipson says (15th Ed., 1999, para 4.25, footnote): "See, however, sec. 46(3) of the Administration of Estates Act, 1925, added by sec. 1(4) of the Intestates Estates Act, 1952 (while disposing of estate of intestate, where spouses die in circumstances rendering it uncertain who survived the other, spouse treated as having predeceased intestate.) This provision is fully quoted in para 50.12 of the 69th Report and reads as follows:-

> "Sec. 46(3): Where the intestate and intestate's husband or wife have died in circumstances rendering it uncertain which of them survived the other, and the intestate's husband or wife is, by virtue of section 184 of the Law of Property Act, 1925, deemed to have survived the intestate, this section shall nevertheless, have effect as respects the intestate as if the husband or wife had not survived the intestate."

The principle appears to be that if an intestate (whether male or female) died along with the spouse in such catastrophes, it shall be presumed that the spouse other than the one whose succession is in question, has died earlier, thereby permitting the heirs of the intestate alone to succeed to the intestate and so that the property of the intestate does not go to the heirs of the other spouse, who also died in the same catastrophe.

In Hickman vs. Peacey: 1945 A.C. 314, the House of Lords held that four persons who died in a bomb explosion must be held to have died according to who was, by reason of his age, older to the other. The principle was held applicable even to a 'common calamity'.

There is an interesting discussion in the 69th Report (see para 50.19) about what transpired in 1872 at the stage the Bill was prepared for the purpose of the Evidence Act of 1872. It is pointed out in the general section, which is now sec. 103 which was clause 95 of the Bill, contained an illustration, which was dropped at the stage the Act was passed, and that related to this very question. It was like this: 'A and B, husband and wife, are both drowned in the same wreck. C is entitled to certain property if B survived, while D is entitled to that property if A survives. If C claims the property, he must prove the survival of A'. It appears that one Major Alfred Wilkinson, offg. Dy. Commissioner, Lucknow, objected to the illustration on good grounds: He pointed out that if D is in possession after the death of A and B, D will win in a suit by A; likewise if C is in possession in a suit by D, C will win. He said:

> "In the illustration given, it would appear impossible to prove whether A or B died first, so if C sued D for property, D will win; if D sues C, C will win: the effect would be that whichever first gets possession of the property, would keep it. But if the property were in the possession of E, (A's executor), he E, might retain it; though it would clearly belong to either C or D, neither of them would be able to get a decree."

The difficulty with sec. 103 is that it requires the person who asserts a fact to prove it. But if it is impossible to ascertain who, in a case of a catastrophe resulting in more than one death, died first,- whoever is the plaintiff will fail because it is impossible for him to prove that the person to whom he would succeed died first. The 69th Report therefore suggests that the rigour of sec. 103 can be reduced only if the statute provides for a presumption to be raised as under section 184 of the Law of Property Act, 1925 in England, along with the further provision referred to in sec. 46(3) of the Administration of Estates Act, 1925 (brought in by the Intestates Estates Act, 1952). It must be noted that while sec. 184 of the English Act raises a presumption, sec. 46(3) of the other English Act deems the other spouse as having pre deceased, and it does not raise any presumption of the other spouse having pre deceased.

The reason was that in most cases, wives are younger and under sec. 184, they will all be deemed to have survived. The husband and the husband's property may not go to his heirs. This is how it was explained in para 50.13 of the 69th Report. It was felt, in UK, it would help the families of the wife, if she gets the whole and the entire property including the estate

of the husband would go to her heirs, after her death and that therefore it was not just.

Now sec. 184 of the Law of Property Act, 1925 (already extracted) is simple and raises a presumption that the elder of the persons must be deemed to have died first. So far as the modification of this rule in the case of deaths of a husband and wife in the same catastrophe, with the view that the legal heirs of one are not deprived of succession, it is provided that, in the case of simultaneous death of husband and wife, it shall be deemed that "the husband or wife (of the intestate) had not survived the intestate."

In the 69th Report, it was explained in para 50.13, that in that event sec. 184 would not apply and the intestate succession to whose estate is in question, must have died without a spouse (i.e. Section says other spouse has not survived the intestate).

In the 69th Report, the above principles relating to presumptions were sought to be introduced by means of a new sec. 108A. We shall extract the same but we have a small comment to make on the latter part of the provision concerning death of husband and wife. If (say) the claim is made by a person as the legal heir of the husband, the proposal – as under sec. 46(3) of the (UK) Administration of Estates Act, 1925 (as amended in 1952) is that the succession must be reckoned as if the wife died earlier (or vice-versa). But, in the above example, if the wife is also one of the heirs of the husband, along with others who are claimants, should she be considered as not entitled to a share and should her heirs be deprived of the right to claim to her share?

For example, under the Hindu Succession Act, 1956, if a male dies, intestate, the heirs in class I are his wife, mother, sons and daughters. Let us assume that the male and his wife died in the same accident. Now the claim, if it relates to the estate of the male, it is to be deemed (mind you, no presumption is being raised here) that his wife predeceased him and she will not get even her share along with other heirs. It is therefore logical to make a further exception that if she is also a heir to the estate of the deceased husband, then the fraction of the share that would have gone to her if she survived the husband shall first devolve on her and to the extent of that fraction, the further entitlement will be of her heirs. The reason is that when by statute, in the case of an uncertainty, wants to introduce some certainty and a deeming fiction not even raise a presumption – that one spouse died earlier to the intestate, we cannot deprive that spouse of her share, and then her heirs, if she was entitled to a share. That does not mean that the entire property would go to the spouse other than the one whose estate is in question.

The 69th Report refers to an article in (Vol. 119) New Law Journal (UK) and to another one (1962) Vol. 36, Australian Law Journal, p. 193.

In USA, instead of an evidential rule of presumption, a rule for the distribution of property is laid down by statute (see Vol IX Wigmore, para 2532(a), pages 622-623). This is contained in the Uniform Simultaneous Deaths Act as adopted in 1940 and amended in 1953 by the National Conference of Commissioners on Uniform State Laws. A clear statement of the plan and purpose of the Act and reasons for its adoption is given in the

Prefatory Note of the Commissioners. The text of the Act (as reproduced in Wigmore pp 622-623) is as follows:

> "No Sufficient Evidence of Survivorship: Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this act."

Then we have sec. 2 of the US Act which prescribes rules as between beneficiaries, sec. 3 which prescribes rules as to Joint Tenants or Tenants by the Entirety. Section 4 deals with 'community property' of husband and wife, sec. 5 deals with 'Insurance Policies'. Section 6 excepts cases of special provisions in wills, living trusts, deeds, contracts of insurance. Section 4 divides the 'community property' of husband and wife who died in a catastrophe between the heirs of the husband and heirs of the wife, in equal status.

The 69th Report proposed repeal of sec. 21 of the Hindu Succession Act, 1956 and insertion of sec. 108A (see para 50.26) as follows:

> "108A. Presumption in case of simultaneous deaths: Where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall, for all purposes, be presumed to have occurred in order of seniority, of age and accordingly the younger shall be deemed to have survived the older.

Provided that where the question arises in respect of title on intestacy or testamentary rendering it uncertain which of them survived the other, and the husband or wife is, by virtue of this section, deemed to have survived the intestate.

or the testator, then the law of succession shall, nevertheless, have effect as respects the intestate or the testator, as if the husband or wife had not survived the intestate or the testator".

We agree with this recommendation with modifications and recommend insertion of new section 108A as follows:-

Presumption in case of simultaneous deaths

108A. (1) Subject to the provisions of sub-section (2), where two or more persons have died in circumstances rendering in uncertain which of them survived the other or others, such deaths shall, for all purposes, be presumed to have occurred in the order of seniority of age and until the contrary is proved, the younger shall be presumed to have survived the elder.

(2) In the case of husband and wife dying in circumstances rendering it uncertain which of them survived the other and

(a)where the question arises in respect of title on intestacy or testamentary succession to the property of a deceased spouse; and

(b)the husband or the wife is, by virtue of sub-section (1) presumed to have survived intestate or the testator, being the younger of the two,

then succession, whether intestate or under the testament shall, nevertheless have effect as respects the intestate or testator, as if the younger spouse has predeceased the intestate or the testator:

Provided that where the younger spouse, who is so deemed to have predeceased the intestate or the testator is, according to law, the sole heir or heir along with others, to the estate of the intestate or the testator, then the younger spouse shall not to be so deemed to have predeceased the intestate or the intestate under this sub-section and the property of the intestate or testator shall devolve according to law on the younger spouse and the heirs of the said spouse may claim the estate of the said spouse.

Illustrations

(a) Two brothers A and B die simultaneously in an accident and in that event, B, the younger brother, shall be deemed to have survived A.

(b) The husband A and his wife B die simultaneously in an accident. The husband A has agricultural land and the wife has house property. In respect of succession to the estate of A, the husband, by the husband's heirs, it shall be presumed that B the wife died earlier and B's heirs' shall not therefore be entitled to claim the husband's estate. In respect of succession to the estate of B, the wife, by the wife's heirs, it shall be presumed that A, the husband died earlier and A's heirs shall not be entitled to claim the wife's estate.

(c) In the first part of Illustration (b), if the wife B is younger to the husband A, but is to be deemed to have predeceased her husband, because of sub-section (2), she will not be so deemed where, if she had survived the husband A, she would have been the sole heir or have to a share along with others to her husband's estate, whether by virtue of intestacy or testamentary succession and in that event, once such property of A, the husband devolves on the wife B, her heirs would be entitled to claim the same.

(d) In the second part of Illustration (b), if the husband A is younger to the wife B, but is to be deemed to have predeceased his wife, because of sub-section (2), he will not be so deemed where, if he had survived the wife B, he would have been the

> sole heir or heir to a share along with others to his wife's estate, whether by virtue of intestacy or testamentary succession and in that event, once such property of B, the wife devolves on the husband B, his heirs would be entitled to claim the same."

Section 109:

This section deals with the 'Burden of proof as to relationship in the case of partners, landlord and tenant, principal and agent'. That section reads as follows:

> "109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it."

The section is also based on the presumption of 'continuance' and is related to illustration (d) of sec. 114.

The presumption as to continuance of a partnership was provided in sec. 256 of the Contract Act, 1872 as originally stood and that section has now become sec. 47 of the Partnership Act, 1932.

Similarly, there is a presumption of continuance of the relationship of landlord and tenant.

So is the case of the relationship of principal and agent. In the 69th Report, in para 51.6, it was stated that this section does not call for any changes. We agree.

Section 110:

The section deals with 'Burden of proof as to ownership'. It reads as follows:

> "110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

The section states that if a person is in possession and the question arises as to title, the burden to start with, will be on the person who contends that the person in possession is not the owner. In other words, possession affords prima facie proof of ownership.

There are some related aspects. Under the Limitation Act, 1963, Art. 64 and 65 deal with suits for possession. Art. 65 deals with the opposite situation as to how a person having title can lose it in favour of a trespasser who is in possession adversely for twelve years.

There is another aspect. If a person is in possession, be he the true owner or a trespasser, and he is dispossessed by another person, he can, without proving title seek a summary remedy for restoration of possession

under sec. 6 of the Specific Relief Act, 1963, if such suit is filed within six months of the dispossession.

The law is also that a person in possession can defend his possession against everybody except the real owner. If a person is dispossessed by the real owner, he may not be able to recover possession under sec. 6 of the Specific Relief Act, 1963, after the period of six months has elapsed (Nair Service Society vs. Alexander: AIR 1968 SC 1165. There is yet another principle in regard to vacant lands that possession is to be deemed to be with the real owner. If one trespasser is dispossessed, the first trespasser can get back possession only on the basis of his prior possession. Section 145 of the Code of Criminal Procedure is also relevant on the question of disputes as to possession.

In the 69th Report, there is some discussion of the related aspects and it has been finally stated in para 52.1 that this section does not require any change. We agree.

Section 111:

This section deals with 'Proof of good faith in transactions where one party is in relation of active confidence'. The section reads as follows:

> "111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

There are two illustrations below this section. They read as follows.

> "(a): The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.
>
> (b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction in on the father."

Section 111 is a general provision and is not confined to contracts. There is a related provision in sec. 16 of the Indian Contract Act. Section 16 states in sub section (3) that the provision of sec. 16 shall not affect the provision of sec. 111 of the Indian Evidence Act, 1872.

The 69th Report considered (see paras 53.4, 53.5) various aspects and came to the conclusion that there is no need to unify the two provisions. One reason was that sec. 111 is general and was applicable to all transactions while sec. 16 is confined to contracts. Section 111 placed the burden of proof on the person who was in a position of confidence whereas sec. 16 of the Contract Act defined 'undue influence' and sub section (3) thereof required that initially it must be established that the contract, on the face of it or on the evidence adduced, was unconscionable, and only then the burden would shift to the other side.

The 69th Report stated in para 53.5 that sec. 111 does not call for any amendment. We agree.

Section 111A:

This section was introduced by the Terrorist Affected Areas (Special Courts) Act, 1984 and deals with 'Presumption as to certain offences'. This section, obviously, was not the subject matter of the 69th Report.

It reads as follows:

"111A. (1) where a person is accused of having committed any offence specified in sub-section (2), in –

(a) any area declared to be a disturbed area under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order; or

(b) any area in which there has been, over a period of more than one month, extensive disturbance of the public peace,

and it is shown that such person had been at a place in such area at a time when fire-arms or explosives were used at or from that place to attack or resist the members of any armed forces or the forces charged with the maintenance of public order or acting in the discharge of their duties, it shall be presumed, unless the contrary is shown, that such person had committed such offence.

(2) The offences referred to in subsection (1) are the following, namely:-

(a) an offence under section 121, section 121-A, section 122 or section 123 of the Indian Penal Code (45 of 1860)

(b) criminal conspiracy or attempt to commit, or abetment of, an offence under section 122 or section 123 of the Indian Penal Code (45 of 1860)."

Since 1984, terrorist acts have been on the increase and have reached their zenith on 11th Sept., 2001. Thereafter, Parliament has passed the Prevention of Terrorists Act, 2002. In the circumstances, we do not find that the presumption in sec. 111A needs any amendment.

Section 112:

This section reads as follows:

"112. Birth during marriage, conclusive proof of legitimacy: The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when it could have been begotten."

This section is based on the maxim pater est quem numtioe demonstrant which means 'he is the father whom the marriage indicates'. This section lays down a rule of 'conclusive proof' as to legitimacy of a child born

(1) During the continuance of a valid marriage between the child's mother and any man, or

(2) If the child was born within 280 days after the dissolution of marriage, the mother remaining unmarried.

The only exception provided in the section is where 'it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten'.

The presumption is rebuttable and can be displaced only by a strong preponderance of evidence and not by a mere balance of probabilities (Goutam Kundu vs. State of W.B.) (AIR 1993 SC 2295). See also S.P.S. Balasubramanyam vs. Suruttayan: AIR 1997 SC 756.

Section 112 has no application when maternity is in dispute and not paternity (Nand vs. Gopal: AIR 1940 PC 93). Upon proof of a marriage on a certain date, the Court may regard as proved the subsistence of a marriage on a subsequent date unless and until it is disproved or else, in its discretion, call for its proof (Ismail vs. Monin: AIR 1941 P.C. 11). If the people, especially the relatives, treat and acknowledge a person as the legitimate son of his father by forging a bond of matrimony, it is a strong piece of evidence to hold that the person is a legitimate offspring of this father (K. Govinda Raju vs. K. Muniswami Gounder: AIR 1997 SC 10; Mahabhat vs. Md. Ibrahim: AIR 1929 PC 135.

Unless absence of access is established, presumption of legitimacy cannot be displaced (Perumal vs. Ponnuswami AIR 1971 SC 2532 relying on Venkateswarlu vs. Venkatanarayana : AIR 1954 SC 176 and Ammathayee vs. Kumaresan: AIR 1967 SC 569.

Access or non-access mean no more than existence or non existence of opportunities for marital intercourse (Venkteswarlu vs. Venkata Narayana AIR 1954 SC 176). The section requires the party disputing paternity to prove non-access in order to dispel the presumption. Access does not mean actual cohabitation (Goutam Kundu vs. State of WB: AIR 1993 SC 2295).

In Krishnayya vs. Mahipathi: 40 CWN 12 (PC), the Privy Council did not consider whether on an issue of legitimacy, evidence of impotency could be admitted. (The section as such does not permit such evidence). The presumption is conclusive and can only be displaced by proof of non-access at the relevant time. There must be positive proof of non-access. (Venkateswarlu vs. Venkatnarayana : AIR 1954 SC 176); see also Kanta Devi vs. Poshi Ram AIR 2001 SC 2226.

The fact that the wife had a paramour (G.R. Sane vs. D.S. Sonavane & Co. AIR 1946 Bom 110) or that the husband had undergone vasectomy operation (unless there is reliable evidence that the vasectomy operation was successful) [Chandramathi vs. Pazhetti Balam : AIR 1982 Ker 68; Chirutha Kutty vs. Subramaniam AIR 1987 Ker 5], is not suffient to rebut the presumption. Nor is the serious illness of the husband sufficient (Narendra vs. Ram Gobind: ILR 29 Cal. 114 (PC).

In Smt. Duktar Jahan vs. Mohammed Farooq : AIR 1987 SC 1049, it was held that the fact that the child was born about seven months after the marriage, could not lead to the conclusion that the child could have been conceived before the date of consummation of the marriage.

The Hindu Law and Mohammedan Law raise similar presumptions as stated in the section, regarding legitimacy, but while English law gives importance to the time of birth, Mohammedan law gives importance to the time of conception.

The policy of English law until 1949 was that neither the testimony, nor the declaration, out of court, by parents were admissible to prove access or non access during marriage for bastardising a child. The rule was abolished in England by the Law Reform (Miscellaneous Provisions) Act, 1949 and sec. 45(1) of the Matrimonial Cause Act, 1965 now provides:

The discussion under sec. 112 can now be divided into two parts A and B. (We are omitting from consideration cases of artificial insemination, surrogate motherhood, cloning which require separate treatment).

(A) Whether questions of paternity under sec. 112 should include cases arising out of void marriages which are declared void but where, children of such marriages are made legitimate by any law, and whether a provision deeming such marriages also valid for the limited purposes of sec. 112, should be introduced?

(B) Whether any exceptions, other than 'non-access' should be introduced in sec. 112 such as impotence or sterility, proof that a person is not the father as perk blood tests or DNA tests?

(A) Whether void marriages should be brought within sec. 112 apart from viodable marriages:

In the 69th Report, after discussing various aspects of the law, reference was made to the fact (see para 54.9) that the statutory of law of marriage, particularly in the case of Hindus, has gone through various changes.

The section requires that the 'valid marital status' must be obtaining on the date of 'birth' of the child. Here the section states that there must be valid marriage at the time of 'birth' (see 69th Report para 54.17, 54.18, 54.26). Under the English Common law the child need not be conceived during the marriage. It is sufficient if the parents are married as on the date of birth (para 54.19). The 69th Report points out that the Privy Council was wrong in Pedda Amani vs. Zemindar of Marungapuri (1874) LR 1. 1A 293 (PC) in holding that the English law and the Indian law were the same (see para 54.25 to 54.27).

Having pointed out these aspects, the 69th Report refers to the need to amend the words "or within two hundred eighty days of its dissolution" to be enlarged to cover cases of birth 'within two hundred eighty days of its being declared void or avoided". (see paras 54.29 to 54.37).

Section 112 speaks of a 'valid marriage' and a person born (a) during the continuance of a valid marriage or (b) within 280 days after 'its dissolution', the mother remaining unmarried (i.e. remaining unmarried during those 280 days). Then, unless 'non-access' is proved, the husband is treated as the 'father' and as the section uses the word 'conclusive'. Except 'non-access', there is no other plea permissible by the husband.

The 69th Report considered whether, apart from cases of voidable marriages which are already included, marriages null and void should also be included.

In that behalf, it is necessary to note, refer to the changes in the Hindu Marriage Act, 1955. So far as the Hindu Marriage Act, 1955 is concerned (before the 1976 Amendment), it contained a provision in 1955, in the context of 'legitimacy' as follows:

> "Section 16: Where a decree of nullity is granted in respect of voidable marriages under sec. 11 or sec. 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity, shall be deemed to be their legitimate child notwithstanding the decree of nullity.
>
> Provided that nothing in this section shall be construed as conferring upon any child of a marriage which is declared null and void, annulled by a decree of nullity any rights in or to the property of any person other than that of the parents in any case where, but for the

passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."

Under the section, as it stood in 1955, a void marriage required parties to the marriage under section 11 to file a petition in Court. (Section 12 referred to voidable marriages which may be annulled by a decree of nullity). In cases under sec. 11, where the marriage was void and where none files a petition, the benefit of sec. 16 of the 1955 Act was not accruing to the child born out of such a void marriage.

Hence, in 1976 sec. 16 was amended to make legitimate such children even if none filed a petition for declaring the marriage a nullity.

After the 1976 Amendment to sec. 16 of the Hindu Marriage Act, 1955, it reads as follows:

"Section 16. Legitimacy of children of void and voidable marriage,-

(1) Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriages had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the

marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the degree of nullity.

(3) Nothing contained in sub-section (1) or sub section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

There is a similar provision in the Special Marriage Act; and, even earlier, in sec. 21 of the Indian Divorce Act, 1869.

The Supreme Court, in PEK Kalliani Amma vs. K. Devi: AIR 1996 SC 1963, in a judgment having far reaching effects and implications (see Mulla, 18th Ed., 2001, Vol. 2 p. 173) examined subsection (1) of sec. 16 and observed that by virtue of the words 'notwithstanding that a marriage is null

and void under sec. 11', this section stands independent of sec. 11. The amended provision which intended the conferment of legitimacy on children born of a void marriage, will operate despite the provisions in sec. 11 which has the effect of nullifying only those marriages held after the Act came into force and which are performed in contravention of sec. 5. By virtue of the legal fiction, children born of a void marriage would have to be treated as legitimate for all purposes including succession to the property of their parents. The net effect being that the benefit of legitimacy is conferred upon any child born either before or after the date of amendment. That would mean that even if a marriage had been contracted at the time when there was a legislative bar to such a marriage, the offspring of such a marriage would be treated as legitimate. Such a child would be entitled to succeed to the property of his or her parents (ibid, Mulla, p. 174).

Subsection (2) relates to children of a voidable marriage in respect of which a decree of annulment may be granted by sec. 12. Even when the validity of the marriage is challenged by either party and still the marriage is not annulled, it would be a void marriage, and the children of the parties to such a marriage would undoubtedly be legitimate. If, on the other hand, the marriage is annulled at the instance of either party, the children born of such marriage are, by operation of subsection (2), to be deemed to be their legitimate children for all interests and purposes, except that by virtue of subsection (3) such children cannot claim any rights in or over property of any person other than parents. (Mulla, ibid, p. 174).

The Supreme Court stated that that law as it stood before the 1976 amendment to the Hindu Marriage Act, 1955 was unsatisfactory. In the

earlier edition of Mulla, it was pointed out that a child born of a void marriage would not get the protection of section, unless a decree was passed by the Court at the instance of one of the parties. Now subsection (1) states, after the 1976 Amendment, that in the case of a void marriage, the child shall be legitimate (whether born before or after the 1976 Amendment), and

> "whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held void otherwise than on a petition under this Act."

This new provision overrules the principle laid down in Thulasi Ammal vs. Gowri Ammal AIR 1964 Mad 118 and other cases, where the Court held, under the old sec. 16, that unless a decree of nullity is passed the child begotten or born before the decree cannot be treated as legitimate. Section 11 applies to marriages after the 1955 Act whereas section 12 applies whether the marriage was solemnized before or after the commencement of the 1955 Act.

We may now summarise.

(a) Firstly, going back to the 69th Report, it was stated, (see para 54.30) that the section so far as 'paternity' is concerned, which referred to a 'Valid' marriage, dissolved, must apply also to 'void' marriages, though the section apparently covered voidable marriages. The defects in the old sec. 16 of the Hindu Marriage Act, 1955 and in the old sec. 26 of the Special Marriage Act, 1954 were referred to in that context. It was pointed out that sec. 21 of

the Indian Divorce Act, 1854 applied to children born before the decree and such a policy must be reflected in the above Acts also (see para 54.31).

(b) Secondly, it was stated in the 69th Report (see para 54.33) that there was a doubt if a decree for nullity was different from one of dissolution, as referred to in old sec. 16 of the Hindu Succession Act, 1955. (present in sec. 16 (2) after the 1976 Amendment). The doubt remains, it is said, even in relation to other Acts. Further section 16(2) requires conception before a decree to be proved first, before the deeming provision can apply.

The position, it was stated, was different under the Evidence Act under which the date of conception need not be proved, and proof of the date of birth is sufficient to legitimacy.

(c) Thirdly, the 69th Report referred to void marriages. The 69th Report, having stated that sec. 112 should apply to cases of void marriages also under sec. 112, both in the first and second parts of sec. 112, by appropriate amendment, the 69th Report formulated a draft of sec. 112, as follows:

> "112. The fact that any person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution or after it was annulled or avoided, the mother remaining unmarried, shall be condusive proof that such person is the legitimate child of that person, unless it came to be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

> Explanation: Where, by any enactment for the time being in force, it is provided that the children of any marriage which is annulled or avoided shall nevertheless be legitimate, the marriage shall, for the purpose of this section, be deemed to be valid until it is annulled or avoided."

One would wonder why in the opening part of sec. 112 after the words, 'valid marriage', the words 'void marriage' are not included in spite of the recommendation that 'void' should be used in both parts. It will be noticed that this was accomplished so far as the opening part was concerned, by the Explanation which, for purposes of sec. 112, deems a marriage valid, even if it was void, where there are laws made legitimising children of such void marriages. Obviously, 'legitimacy' of such children and right to deem a man, a father or not, must have some nexus. That is why the Explanation was added. In that event, once the Explanation is added like that, it does not become necessary to add the words 'void marriages' in the opening part of sec. 112 because the Explanation deems them valid if there is a law legitimizing children of such void marriage. In our view, with great respect, this was the proper way to draft and bring 'void marriages' within the scope of sec. 112. Obviously, the Explanation covers void marriages under sec. 16(1) of the Hindu Marriage Act, 1955 (before and after the 1976 Amendment), and those under the Special Marriages Act, 1954. The Commission stated that there is already a similar provision in sec. 21 of the Indian Divorce Act, 1869. Under the Explanation, such void marriage are to be deemed 'valid' in the opening part of sec. 112 till annulled by Court. Further, the word 'annulled' proposed to be added in the body of sec. 112 covers cases of void marriages while the words 'dissolved' or 'avoided'

refer to valid marriages avoided. We do not understand why both the words 'dissolved' or 'avoided' are both used in sec. 112. In our view, it would be better to use the words 'declared nullity' for marriages which are void and use the words 'avoided by dissolution' for voidable marriages.

In our view, sec. 112 and its proposed Explanation could be redrafted also (subject to some more additions as stated hereinafter) and also by redrafting the Explanation by highlighting the deeming of a void marriage as valid).

We shall next deal with issue (B) as to whether grounds other than 'non-access' have to be introduced.

(B) Non-access – whether any other exception should be added?

Section 112, as already noticed, uses the words, "conclusive proof" and refers to 'non-access' as the sole exception. Therefore, as the language of the section stands, no other evidence is permissible except non access, to prove that a person is not the father. This was what was held in several decided cases and also recently by the Supreme Court in Kanti Devi vs. Poshi Ram 200(CS) SCC 311 = AIR 2001 SC 2266. That case concerned DNA evidence but the Supreme Court refused to permit the evidence on the ground that except 'non-access' no other evidence is permissible to prove that a person is not the father.

Successive Marriages:

But before we refer to 'impotence', we shall dispose of a plea based on successive marriages. In respect of this plea, we do not think that any provision be recommended. It was pointed out that if a woman was married soon after dissolution of an earlier marriage, and then a child is born, the second husband is to be presumed to be the father of the child. This is called 'turbatio sanguints' in continental jurisprudence. Such a situation could arise also in cases where a statute required a gap between dissolution of the first marriage and the date of the second marriage. No doubt, in England, it is permissible to prove that the child was born of the first marriage. (Inre Overbury vs. Mathews: 1954(3) All ER 307 (see para 54.47 of 69th Report). The 69th Report says (para 54.24) that a man who marries a woman who was pregnant must be deemed to be the father of the child (see Halsbury's Laws of England, Vol. 1, para 691, notes 12, 13). Quoting Coke on Littleton para 244(a). See also Gardner vs. Gardner: (1877) A.C. 723; Lloyd vs. Powell Duffry Steam Coal Co. Ltd.: 1914 AC. 733; R vs. Luffe : (1807)8 East 198 (p. 208).

The law is the same in USA in several States. We may refer to Wingmore Evidence (1981) (Suppl 2000-2001)(para 2527 at p. 1279) in so far as this aspect is concerned. In Zaperach vs. Beoven: 6 Ohio App. (3d)17(1982), it was observed:

> "….a man who marries a women knowing her to be pregnant is presumed in law to be the father of the child when it is born without formal acknowledgment"

The principle is based on the common law rules of human conduct that normally a man may cohabit with a woman before marriage and after the woman becomes pregnant, he marries her. But, if he knows he is not the father, he may not marry her at all. We do not therefore think that any specific provision be made in the matter of a pregnant woman marrying another person and the birth of a child thereafter..

Having dealt with the above type of case, we shall now take up the new exceptions like (1) impotence or sterility (2) blood tests proving a man is not the father and (3) DNA tests proving a man is not the father.

(1) Impotency:

In spite of the rigidity of the section, some High Courts had indeed added the exception of 'impotency' (see Ruzarid vs. Ingles: ILR 18 Bom 468; Birendar vs. Hemlata 24. CWN 914)(Sarkar, ibid, p 1614). The case is Kushnayya vs. Mahopatra 40 CWN 12 (PC) decided by the Privy Council related to a husband who was too young and immature. It was argued that the person was too young and was 'physically incapable'. The Privy Council rejected the plea and held that all possibility of premature virility should also be excluded. They said that according to some medical books, it could not be said that a boy of 13 years was incapable of sexual intercourse.

In regard to the impotency of the husband, the statute is not as rigid as in India. Sec. 26 of the Family Law Reform Act, 1961 reads as follows: (see also Phipson, 15th Ed., 1999, para 4.20)

> "26. Any presumption of law as to legitimacy or illegitimacy of any person may, in civil proceedings be rebutted by evidence which shows that it is more probable than not that the person is illegitimate or legitimate, as the case may be, and it should not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption."

In other words, the proof of legitimacy or illegitimacy can now be established by preponderance of probabilities rather than beyond all reasonable doubt. Further sec. 23 of the same Act authorizes the Court to draw inference as appears proper in the circumstances where the person concerned does not comply with the directions of the Court for blood tests.

English law permits 'impotency' to be proved. (See Halsbury's Law of England)(Vol. 1, 4th Ed., para 691) quoting Barnbury Peerage case 1(811) 1 Sim & St 153; Legge vs. Edmonds (1855) 25 L.J.Ch. 125. On facts, in W vs. W: (1953)(2) All ER 1013 and Francis vs. Francis: 1959(3) All ER 206, the husband's testimony that he was using contraceptives could not rebut the presumption.

In US too 'impotency' is a permissible plea. Case law of various States is quoted in Wigmore Evidence, (Vol. IX, para 2527, at pp 585 to 589). Further in several States, the statutes specifically refer to 'impotency' as a permissible ground. See sec. 621 of the California Evidence Code (as amended in 1975) and the new sec. 621(as amended in 1984).

In Sri Lanka, sec. 112 has been amended by making 'impotency' on permissible plea. (See Sarkar, 15th Ed., 1999, page 1603, 1614).

In India, under several marriage laws, 'impotency' is a valid ground for avoiding marriage (see sec. 12(a) of the Hindu Marriage Act, 1955. the Supreme Court in Digvijay Singh vs. Pratap Kumari AIR 1970 SC 137 and several High Courts have dealt with 'impotency' as a valid ground for dissolution of marriage. O course, 'impotency' may be physical or may be a mental-state vis-à-vis a particular person, who is either a husband or a wife. The fact that 'impotency' is ground for divorce under our marriage laws is a factor to be taken into account while deciding whether 'impotency' can be an additional ground under our law.

In our view, having regard to the law in several other countries and also in Sri Lanka, it is time to include 'impotency' of the husband in sec. 112 but we are of the view that 'impotency' must be conclusively established, i.e. beyond all reasonable doubts, by medical tests. Mere preponderance of probabilities will not suffer. While 'non-access' can be proved by very strong evidence, as decided by the Supreme Court in several cases, we are of the view that the proof required to prove 'impotency' must be a conclusive one, leaving no other choice to the Court.

2. Blood tests

As regards blood groups, the 69th Report gives the following example in para 54.50. As a scientific principle, a child will inherit the blood group of one or other of his parents. If O is the blood group of the mother and A is that of the child, a person with blood group B cannot be the father. But, if the blood of the male in question is also A, like the child's, it is not possible

to say that the person is the father. This is the position in Europe and USA in the states also. (see para 54.56 of the 69th Report).

So far as blood tests are concerned, American statutes require that, where more than one expert is examined there must be total unanimity. As already stated, where the blood tests show on an analysis of blood groups, that the husband is not the father, such a result is today accepted as conclusive and that the husband is not the father. The exclusion test is definite but the inclusive test, is equivocal, as stated earlier. The Supreme Court, in Gautam Kundu vs. State of W.B. AIR 1993 SC 2295 has laid down four conditions in the context of sec. 112 before blood test can be ordered. They are as follows:

(1) that courts in India cannot order blood test as a matter of course;
(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood-test cannot be entertained;
(3) there must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under sec. 112;
(4) the Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman;
(5) no one compelled to give sample of blood for analysis.

(That is why sec. 23 of 1969 the English statute of 1969 permits the Court to draw an adverse inference in civil cases, if a party refuses to give blood).

The California Law & Evidence Code sec. 621 as amended (quoted in Wigmore, 2000-2001 Suppl. Page 1278, para 2527 includes impotency and sterility also and reads as follows: (West Suppl. 1984)

"Sec. 621: (a) Except as provided in sub-division (b), the issue of a wife cohabiting with the husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage;

(b) Notwithstanding the provision of subdivision (a), if the court finds that the conclusion of all experts, as disclosed by the evidence based upon blood tests performed pursuant to Uniform Act on Blood Tests to Determine Paternity are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under sub-division (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion for blood tests under sub division (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the Court acknowledging paternity of the child.

(e) The provision of sub division (b) shall not apply to any case coming within the provisions of section 7005 of the Civil Code or to

any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

(f) The notice of motion for the blood test pursuant to sub division (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the Court. This requirement shall not apply to any case pending before the Court on September 30, 1980.

(g) The provisions of sub division (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980".

Wigmore (Vol. IX, 1981 para 2527, pp 585-586) also refers to California Civil Code para 7004 (as amended in 1975) (It is not clear what is sec. 7005 referred to in sec. 621 quoted above). Sec. 7004 reads thus:

"Sec. 7004: (a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in sec. 621 of the Evidence Code or in any of the following sub-divisions.

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after the decree of separation is entered by a Court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a Court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order

(3) After the child's birth he and the natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named a child's father on the child's birth certificate, or

(ii) He is obliged to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

(c) Except as provided in sec. 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each

> other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child in another man."

Having regard to the above position so far as blood tests are concerned, we are of the view that blood group tests yield a result with certainty to say that a person is not the father, though they are not conclusive to say that a person is a father. In the current state of science and the position elsewhere in other countries, we are of the view that blood test analysis of the mother and the man (taken with their consent) and that of the child (taken with the court's permission) do not enable a Court to decide that a person is the father. We are also of the view that, if there are more than one tests conducted, the result must be unanimous.

DNA Tests:

We have elaborately referred to DNA tests in our discussion under sec. 9. We have pointed out that according to the developments in science today, DNA tests can result in proving definitely that a person is not the father, where the samples do not match. But where the samples match, the controversy remains – and volumes have been written about statistical probabilities and their relevance. It is now settled that where samples match, the probability about the identity of the person depends on the probability of there being similar matches in the male population of the country about

whom DNA records are available. If the DNA data is less and does not cover the whole population of a country, the matching is weak evidence. Where the DNA data is available for a larger population or for the whole country, naturally, the probability will be far less than in a smaller population. Even so, several countries have permitted DNA evidence even if the samples match, they permit expert evidence so that the Court or jury may take them into account. In England, in the cases referred to in sec. 9, the Bays theorem theory of adding up probabilities, has not been accepted.

Therefore, as in the case of blood-group tests, science has progressed to this extent that where the samples of the male and the child do not match, it is certain that the male is not the father. But, where they match, it leads us to a theory of probability. We propose that as in the case of blood tests, there can be evidence by way of DNA tests to prove that a person is not the father. But DNA evidence cannot be used to say that a person is the father.

Further, as laid down by the National Association of Testing Authorities Australia (NATA), non-paternity can be declared only if there were at least two tests inconsistent with paternity. See B. Atchison & N. Red,am (2000) 32. Aust LJ of Forensic Sciences 75. (quoted by Australian Law Reform Commission at p. 18 (fn. 66). We would extend this requirement applied to DNA, to the other two tests viz., medical tests to prove impotency and blood tests to prove non-parentage.

A person refusing to consent to medical tests for proving his plea of impotency or refusing to allow blood tests or DNA tests, will be compelled to waive his defence that he is not the father.

For medical tests to prove impotency, or for blood tests and DNA tests to prove a person is not the father, we propose to use the word 'conclusively proved'. This is intended to eliminate erroneous procedures being used in the medical, blood or DNA tests being relied upon. The Court must be satisfied that the procedures for the tests have been properly followed according to accepted scientific standards.

In the light of the above discussion, we propose to add three more exceptions, (i) medical tests to prove impotency, (ii) blood tests, (iii) DNA test. The proposed section 112 is as follows:

Birth during marriage conclusive proof of legitimacy except in certain cases

"112 The fact that any child was born during the continuance of a valid marriage between its mother and any man, or within two hundred and eighty days,

(i) after the marriage was declared nullity, the mother remaining unmarried, or
(ii) after the marriage was avoided by dissolution, the mother remaining unmarried,

shall be conclusive proof that such person is the legitimate child of that man, unless

(a) it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten; or
(b) it is conclusively established, by tests conducted at the expense of that man, namely,

(i) medical tests, that, at the relevant time, that man was impotent or sterile, and is not the father of the child; or

(ii) blood tests conducted with the consent of that man and his wife and in the case of the child, by permission of the Court, that that man is not the father of the child; or

(iii) DNA genetic printing tests conducted with the consent of that man and in the case of the child, by permission of the Court, that that man is not the father of the child; and

Provided that the Court is satisfied that the test under sub-clause (i) or sub-clause (ii) or sub-clause (iii) has been conducted in a scientific manner according to accepted procedures, and in the case of each of these sub-clauses (i) or (ii) or (iii) of clause (b), at least two tests have been conducted, and they resulted in an identical verdict that that man is not the father of the child.

Provided further that where that man refuses to undergo the tests under sub clauses (i) or (ii) or (iii), he shall, without prejudice to the provisions of clause (a), be deemed to have waived his defence to any claim of paternity made against him.

Explanation I: For the purpose of sub clause (iii) of clause (b), the words 'DNA genetic printing tests' shall mean the tests conducted by way of samples relatable to the husband and child and the words "DNA" mean 'Deoxyribo-Nucleic Acid'.

Explanation II: For the purposes of this section, the words 'valid marriage' shall mean a void marriage till it is declared nullity or a voidable marriage till it is avoided by dissolution, where, by any enactment for the time being in force, it is provided that the children of

such marriages which are declared nullity or avoided by dissolution, shall nevertheless be legitimate."

We recommend sec. 112 as above drafted be substituted.

Section 113:

This section deals with 'Proof of cession of territory'. It reads as follows:

"113. A notification in the (Official Gazette) that any portion of British territory has before the commencement of Part III of the Government of India Act, 1935 (26. Geo 5 Ch.2) has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.'

Section 113 is intended to preclude a judicial inquiry by courts into the validity of the acts of the Government but the Privy Council in Damodar vs. Deoram (1875)3 I.A. 102 = ILR 1 Bom 367 (PC) has held that the Governor General, being precluded by Act 24 and 25 Vict c.67, section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any legislative Act, purporting to make a notification in a

Government Gazette which is conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession".

In other words, such notification cannot, in spite of sec. 113, be conclusive proof and the courts can inquire into the nature and lawfulness of the cession. Thus, the Privy Council has practically held that the section is ultra vires of the powers of the Governor-General.

The question has now become academic as there is no longer any British territory (Maganbhai vs. Union of India: AIR 1969 SC 783) (As to the Governor General in Council's power to legislate see, Alter Caufran vs. Govt. of Bombay: ILR 18 Bom 636.)

Whittney Stokes had stated that the section should be repealed as an ultra-vires provision (Anglo-Indian Codes Vol.II, p. 835) (quoted by Sarkar, 15th Ed., 1999, page 1626).

We agree with para 55.3 of the 69th Report that this section 113 be deleted.