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Comments and Suggestions on the 185th REPORT OF LAW COMMISSION OF INDIA ON INDIAN EVIDENCE ACT, 1872

Research Report
November 2013

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INTRODUCTION

The 94th report of the Law Commission of India delves into the arena of evidences which have been taken illegally or improperly and how such illegality would affect the admissibility of these evidence. Indeed the report raises the question on whether such illegality in collecting the evidences actually even affects the admissibility of the evidence.

The traditional approach of the Indian Courts has been that in absence of a specific statutory or constitutional provision which provides for the exclusion of certain type of evidence, the fact that evidence was obtained illegally, does not affect the admissibility of the evidence. However, in the common law world there exists four varying models on which the decision regarding the admissibility of evidence would be considered.

- In the first instance, the strictest approach is adopted by certain countries. India is included within this category. Here the illegality or impropriety of the evidence does render the evidence legally inadmissible. However, such admissibility may be questioned if there exists some specific statutory or constitutional provision which prohibits such evidence from being considered in a court of law.[1]
- In the second category the admissibility criteria of countries like Australia and Scotland can be considered where the admissibility of illegal or improper methods in collecting evidence is decided by the stage at which the trial is and rests on the discretion of the judge.

[1] An example of this can be Section 123 of the Indian Evidence Act which prohibits unpublished records of the Government from being called as evidence unless and until prior sanction is taken from the Head of the Department/Minister.

- In the third category the evidence is excluded from admissibility by some specific statutory provision and such admissibility is in violation of some substantive norm of conduct.[2]
- In the fourth category (where countries like USA are included) a constitutional guarantee or a judicial construction of a constitutional guarantee, excludes certain evidence from use at the trial, where the evidence has been obtained in the violation of such constitutional guarantee. In the United States the Fourth Amendment (protection against unreasonable search and service) and the Fourteenth Amendment (the Due Process Clause) provides for such protection.

The Approach under the Different Jurisdictions

The Indian Law

As mentioned above the Indian Courts and the legal system sway towards the first approach in judging the admissibility of evidence which has been obtained by illegal or improper ways, i.e., the admissibility of such evidence is not affected by such illegality and they are mostly admitted in a Court of law as evidence except when a statute forbids the admissibility of such evidence. This is because the codification of substantive and procedural law in India took place quite early, before the common law principles developed and thus they failed to incorporate the same into the code. Thus the courts were hesitant to employ principle outside the preview of the Codes. Further the Privy Council in *Lekhraj v Mahipal*[3] held that the "essence of a Code is to be exhaustive in respect of all matters dealt with by the Code". This statement by the Privy Council became *locus classicus* whereby it was cited on every occasion where an attempt was made to travel outside the code. This position was only strengthened by the exhaustive provisions regarding the admissibility of confessions. Judges thus became even more reluctant to delve into

[2] Reference for the same can be looked into Section 24 of the Indian Evidence Act
[3] ILR 5 Cal. 744 (P.C.)

common law provisions in the interpretation of the Indian Evidence Act and instead chose to confine themselves within the four corners of the Code.

The Code of Criminal Procedure, 1973 lays down the procedure for the carrying out of searches by the police during the investigation of the offence. These provisions also lay down a number of safeguards that have to be observed by the police in carrying out these searches. However, when the question arose about the admissibility of evidence which contravened these procedures, particularly the requirement wherein two independent witnesses are required to be present during the search, the court adopted a legalist approach and held that such evidence would not be *per se* inadmissible.[4] There rests no discretion with the judge to exclude evidence obtained through search which has not been conducted with the accordance of the provisions of law. The only impact that such illegality in procuring of such evidence may be strictures against the police and can affect the weight of the evidence but the legality of the evidence remains unaffected by the defect in the search.[5]

In the *locus classicus* case on this point, *R.L.Malkhani v State of Maharashtra*[6] , the Supreme Court held that illegality in gathering of the evidence did not affect its admissibility. In this case the admissibility of a tape record conversation that took place over the telephone was in question. The charge was related to bribery of the Coroner of Bombay who demanded a bribe of Rs. 20,000 from a Doctor from Bombay. The conversation was recorded by attaching a recorder to the Doctor's telephone. The Apex Court rejected the argument that the evidence was inadmissible (on the basis that that it was illegal to tamper with telephone communication) and held the evidence to be inadmissible. A feeble attempt to cover this illegality within the scope of Article 21 of the Constitution also failed.

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[4] *Valayudhan v The State* AIR 1961 Ker. 8 (FB); *Kau Sain v The State of Punjab* AIR 1974 SC 329; *Govindhan* AIR 1959 Mad.544.
[5] *Sunder Singh v The State* AIR 1956 SC 411
[6] AIR 1973 SC 57

English and Scottish Law

The English position on the admissibility of such evidence can be gathered from the classical case of *Kurma v R.*[7] which represents the *dicta* on such. The evidence of the accused's unlawful possession of ammunition was discovered after illegal search of the accused's person was held to admissible. The Privy Council relied on earlier English decisions and held that this evidence was admissible, but the person against whom such evidence was taken might have civil remedy against the person who obtained it and may later lead to disciplinary and even criminal proceedings.

However, the case of *R. v Sang*[8] shows a change in this position. The question that was raised by the Court of Appeal and which was considered by the House of Lords was: "Does a trial court judge have a discretion to refuse to allow evidence-being evidence other than evidence of admissions-to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?" The House of Lords gave a decision as under:-

1. "A trial judge at a criminal trial always has the discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative.
2. Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after his commission of the offence, he (the trial court judge) has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained."

In 1975, a study[9] by M.S. Weinberg enumerated the situations in which the judge can exercise his discretion:-

- Illegally obtained evidence
- Improperly obtained evidence
- Evidence of similar facts
- Cross-examination of the accused as to character

[7] (1995) 1 All ER 236 (PC)
[8] (1979) 3 WLR 263
[9] M.S. Weinberg, "Judicial discretion to exclude relevant evidence", (1975) 21 McGill Law Journal 1

- Confessions
- Admissions by accused persons
- Evidence calculated to prejudice the course of the trial.

In Scotland, the trial judge has the discretion to exclude evidences which have been obtained illegally. However, the discretion leans more towards inclusion than exclusion.

Australia and New Zealand

The position taken up by the Australian High Court in *Bunning v Cross*[10] relied on public policy and held that the judge in a criminal trial has discretion to exclude evidence. The High Court placing emphasis on the need to protect the right of citizens, held that, "*It is not fair play that is called in question...but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into daily affairs of private life may remain unimpaired."*

The factors that are to be considered by the judge while exercising discretion are:-

- Whether the law was deliberately or recklessly disregarded by those whose duty it is to enforce it;
- Whether the nature of the illegality affected the cogency of the evidence is not generally a factor to be considered, whether the illegality was deliberate or result of recklessness;
- Case of compliance with the law;
- The nature of the offence charged;
- Whether there was a violation of statutory procedures;
- The urgency of protecting perishable evidence;
- The availability of alternate, equally cogent, evidence;

United States of America

[10] (1978) 19 ALR 641

As mentioned earlier the United States through its Fourth and Fourteenth Amendment guarantees the protection of its citizens against evidences which has been procured illegally. Evidence which has been obtained as a violation of the federal Constitutional prohibition against illegal government sponsored searches and seizures cannot be admitted as substantive evidence in a criminal case as against the person whose rights were invaded. For the violation of constitutional rights there are available in the United States not only ordinary civil, criminal and equitable sanctions but also the privilege to exclude evidence obtained in breach of such rights. Such a privilege is also granted by some jurisdiction in USA to civil matters but the Supreme Court does not favour this.[11] In the case of *Escobedo v Illinois*[12] the Supreme Court refused to entertain evidence of the accused who had not been told about his right to remain silent and had not been provided with a counsel for his defence. The evidence that he gave upon interrogation was held to be inadmissible

Latest Approach and Position in India

The Supreme Court constitutional bench in *Pooran Mal v Director of Inspection*[13] discussed the validity of evidence which has been gathered as a result of illegal search and seizure and presented before the court for admission as valid evidence. The Court discussed the action taken by Income Tax Authorities under Section 132 of the Income Tax Act by the way of search and seizure of certain premises on the authority of the Director of Inspection or the Commissioner. Here the court entertained 4 writ petitions from various High Courts and considered whether evidence which has been obtained in violation of Section 132 should be held as admissible evidence. Though various submissions were raised by the Appellants that the exclusion of the evidence would violate their constitutional rights, the constitutional bench held that as far an India is concerned, its law of

[11] *U.S. v Janis* (1976) 428 U.S. 433
[12] (1964) 378 US 473
[13] (1974) 93 ITR 505 (SC)

evidence is modeled on the rules of evidence which prevailed in English Law, and the Courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it was obtained by illegal search or seizure However, the court in 1994[14] did not accept the contention of the respondents and did not accept this constitutional bench decision of the Supreme Court. Holding that the judgement in *Pooran Mal* referred to search and seizure under the Income Tax Act and not the Narcotic Drugs and Psychotropic Substances Act, the Apex court held that a violation of Section 50[15] of the NDPS Act would render the evidence obtained by the police officials as inadmissible.

For the judgment in the *Ali Mustaffa* case the Supreme Court relied upon the judgment given by the Supreme Court in *State of Punjab v Balbir Singh*[16] wherein the Court held that any arrest and search of a person without confirming with the provisions of the NDPS Act would lead to such evidence not being admissible. The object of the NDPS Act was to make stringent provisions for control and regulation of operations relating to those drugs and substances, and to avoid harm and innocent persons by avoiding the abuse of the provisions by the officers and insuring that the certain safeguards provided were observed strictly. The Court held that Section 50 of the NDPS Act was a non-derogable and that in order to secure a conviction the procedure under Section 50 must be complied with.

A discordant note was however struck by a two-Judge Bench in *State of H.P. v.Pirthi Chand*[17] relying upon the judgment in *Pooran Mat* case when it held that the evidence collected in a search in violation of law did not become inadmissible in evidence under the Evidence Act. The Court further observed that even if the search was found to be in violation of law, what weight should be given to the

[14] *Ali Mustaffa Abdul Rahman Moosa v State of Kerela* (1994) 6 SCC 569
[15] This section mentions that that person of the accused cannot be searched except in the presence of a gazetted officer or a Magistrate.
[16] (1994) 3 SCC 299
[17] 1996CriLJ1354

evidence collected was a question to be gone into during trial. The same view was reiterated by a two-Judge Bench in *State of Punjab v. Labh Singh*[18] with the observation that any evidence recorded and recovered in violation of the search and the contraband seized in violation of the mandatory requirement did not *ipso facto* invalidate the trial.

As recently as 6th September 2013 the Supreme Court in *Umesh Kumar v State of Andhra Pradesh*[19] held that it is a settled legal proposition that even if a document is procured by improper or illegal means, there is no bar to its admissibility if it is relevant and its genuineness is proved. If the evidence is admissible, it does not matter how it has been obtained.

[18] 1996CriLJ3996
[19] 2013(11) SCALE 28

SECTION 24

Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.-

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.[20] The 69th Law Commission Report did not recommend any changes to the said section. However, in light of the discussion under section 27, the 185th Law Commission Report, has suggested changes such as addition of words such as "coercion, torture and violence" in the body and title of the section. Hence in order to appreciate the recommendation here, discussion under section 27 must be looked into first.

Conclusion:

It is significant to note that with regards to fact admissible under section 27 as a result of a certain confession due to inducement, promise or threat and coercion, torture and violence, the differentiation is being made in section 24 itself. This is because according to the recommendation of the 185th Report, facts obtained as a result of confession due to inducement, promise or threat shall be admissible under section 27 but not facts obtained as a result of confession due to coercion, torture and violence. I am against this proposition, because of the fact that I do not see any intelligible differentia operating here.

[20] http://www.indiankanoon.org/doc/967059/

Firstly, the former reasons shall fall under manipulation alone whereas the latter shall fall under the category of manipulation along with physical assault. If various international statutes and domestic legislation are to be referred, it can be noted that activities performed under inducement, promise or threat are invalid under the law. For instance, the highly significant Indian Contract Act 1972, invalidates a contract signed under promise or threat. A more apt comparison would be with a law governing the criminal justice system. Despite the fact that India is not a signatory to Rome Statute of International Court of Crime, its provisions regarding the issue at hand bears mammoth significance when it comes to international standing on the issue. The point is that even the Rome Statute of International Court of Crime invalidates a confession obtained as a result of inducement, promise or threat and coercion.

Apart from that it needs to be noted as has stated in the DK Basu case that rights of the accused need to be balanced with public interest at large. Similarly, it must not be forgotten that India is a country with low literacy rate, as a result of which awareness among public with regards to their legal rights is low and they are more vulnerable to police and other government officials. In light of the conditions prevailing in the society, the differentiation should not be made.

However, even then if there seems to be strong justification for adopting the recommendation of the 185th Report, then I believe that incorporation of the DK Base guidelines, in the Criminal Procedure Code is not sufficient to protect the rights of the accused. The legislation immediately needs to incorporate the safeguards provided in UK in the section 76 of Police and Criminal Evidence Act 1984. The relevant provision shall be discussed at length later, while discussing another section.

The recommendation in the 69th Report has been to introduce a new section namely section 26A instead of making any amendments to section 25. The section contains that confessions made to the police under subject to certain circumstances is admissible and on those statements the bar given under section 25 and 26 would not apply. 185th Report has in the light various judgments and reports analyzed if the section should be included.

The 48th Law Commission Report with regards to Criminal Procedure had made a similar suggestion, where it had been recommended the same. It shall be noted that apart from this particular Report no other document in support of the said proposition has been referred.

First Report of the Indian Law Commission on the basis of evidence of Parliamentary Committee on Indian Affairs indicated that there is gross abuse of powers by the police in order to obtain extortions. On a similar line of thought, Law Commission in its 113th Report had proposed for the introduction of section 114B, which would raise a presumption against the police officer in case of custodial death of prisoner. This particular proposal was made in the light of the judgment given in State of UP vs. Ram Sagar Yadav by the Supreme Court. In Nandini Satpathy vs. P.L. Dani[21], the Supreme Court, while dealing with the investigation by police in India, stated that Act 20(3) is applicable at the stage of both investigation and trial. It quoted from the Wickersham Commission Report and Miranda v Arizona[22]. It also brought section 161 of Criminal Procedure Code, section 25 of the Evidence Act and article 22(1) of the Constitution of India into consideration. Special training and sensitization of constitutional values was emphasized upon.

[21] AIR 1978 SC 1025
[22] 384 US 436

The Supreme Court also referred to the 4th Report of the National Police Commission which while admitting the notoriety of the police suggested that such confessions could at least be taken as a piece of evidence in Kartar Singh v State Of Punjab[23]. The plea of indiscriminate distinction under Article 14 was also rejected in the same case and five guidelines were given to the police for recording of confessional statements. But as the guidelines were not incorporated in to the special Act, the Supreme Court, in a recent decision of Lal Singh_vs. State of Gujarat[24], was constrained to hold that a confession recorded where the guidelines were not followed, was not invalid.

The Supreme Court in D.K. Basu case had issued a number of directions which were later incorporated in section 41 of the Criminal Procedure Code, after making references to Joginder_Kumar vs. State of UP[25] and Nilabati Behera_vs. State of Orissa[26]. It was also stated that a correct balance has to be struck between right to interrogate and right against self-incrimination. The need for such provisions in TADA and POTA was also justified on the basis of classification as special class of serious offenders. It was also held that due to the nature and threat of terrorism, stringent measures are indeed needed to be taken for public safety. However, such provisions do not need to be extended to acts with usual crimes. Jurisprudence developed by the Supreme Court for awarding compensation by the state for torture by the police was also well appreciated. Experience of Law Commission with regards to the Law of Arrest and annual human rights commission report also indicates to widespread affirmation by the police community in favor of use of force for extracting confession.

The safeguards suggested in the 69th Report are as follows: (in regard to confession to Superintendents of Police or higher officers).

[23] 1994(3) SCC 569
[24] 2001(3) SCC 221
[25] 1994(4) SCC 260
[26] 1993(2) SCC 746

(a) The said police officer must be concerned I

(b) With investigation of the offence;

(c) He must inform the accused of his rights to consult a legal practitioner of his choice, and he must give the accused an opportunity to consult such legal practitioner before the confession is recorded;

(d) At the time of making and recording of the confession, the counsel for the accused, if he has a counsel, must be allowed to remain present. If the accused has no counsel or if his counsel does not to remain present, this requirement will not apply;

(e) Police officer must follow all the safeguards as are now provided for by section 164 Criminal Procedure Code in relation to confessions recorded by Magistrates. These must be followed whether or not a counsel is present;

(f) The police officer must record that he has followed the safeguards at (b), (c) and (d) above.

It should be noted that although the conditions are similar, two different paragraphs are given for confession to police junior to superintendent and above. The 185th report by citing the following reasons has rejected the recommendation made by the 69th Report:

1. Recommendation of 69th report is in violation of article 14, 21 and
2. 48th report does not make difference between grave offence and ordinary offence
3. Till today, the guidelines or precautions indicated in D.K. Basu have not been implemented by the police. In a pending public interest case when the Supreme Court asked the States to submit whether D.K. Basu guidelines were being followed by the police in various States, the amicus curiae is reported to have stated that the reports from States are that the said guidelines were not being followed.

4. It would practically put an end to the guarantee in Art. 21 of the Constitution as to a fair trial and to the principles of liberty enshrined in the Universal Declaration of Human Rights, 1948 and in the International Convention on Civil and Political Rights, 1966 to which India is a party and violate Art. 14 also.

Conclusion:

Human rights of prisoners under Article 21 need to be preserved and the guidelines given in the Kartar Singh judgment must be condensed in the form of a statue so that it has an authority of law. However, it also must be noted that the way there have been more instances of police torture according to the Reports in the recent years, there has been a rise in crime as well in the country. Moreover, the documentary evidence used by the Law Commission tilted in favor of protection of prisoners but no document was used to track the rising crime in the country. Hence it is suggested that the recommendation of the Law Commission with regards to Evidence should be incorporated. However, caution must be taken while drafting the section, so that it does not cause undue hardship to the police authorities.

If the end result of the recommendation of the 185th Report in section 24 and the rejection of section 26A proposed by 69th Report are to be read together, the conclusion is that a confessional statement taken by police in custody is not admissible in the court of law but the same statement if taken outside extra judicially by inducement it will be admissible. The implication for the society is that India largely being a family oriented closely knit structure, the people in authority would get unbridled powers. Especially institutions such as Khap Panchayat which are notorious for carrying out a parallel unconstitutional decision making body would be the most significant beneficiary.

Thus, it can be stated that since previous attempts to sensitize the police authorities to constitutional values and human rights have failed, it should now be made a statutory requirement incorporated in Police Training itself to be trained in just and humane treatment of prisoners.

SECTION 26

No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." Explanation: In this section, 'Magistrate' does not include the head of a village discharging magisterial functions in the Presidency of Fort. St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)

In the 69th Report, the recommendation was to revise the section as follows, after omitting the Explanation: "Section 26: No confession made by any person whilst he is in the custody of a police officer, shall be proved as against such person, unless it is recorded by a Magistrate under section 164 of the Code of Criminal Procedure, 1973".

In view of certain proposals for adding sec. 164A in the 154th Report of the Commission on Code of Criminal Procedure, 1973, the Law Commission in its 185th Report found it necessary to omit the words "under section 164" and add "in accordance with Ch. XII". With that modification, the section, after omitting the Explanation, will read as follows:

Section 26: Confession by accused while in custody of Police not to be proved against him

"26. No confession made by any person whilst he is in the custody of a police officer, shall be proved as against such person, unless it is recorded by a Magistrate in accordance with Chapter XII of the Code of Criminal Procedure, 1973."

SECTION 27

How much of information received from accused may be proved.- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police- officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

This section affects criminal proceedings and human rights implementation in the country in a very significant way as has been pointed out even by Sarkar. In both Pakala Narayan Swamy v Emperor and Udai Bhan v State of UP it has been categorically held that section 27 is definitely a proviso to section 26. In the latter case a plea was made that if section 27 is considered proviso only to section 26 and not section 25, that would be in violation of Article 14 of the Constitution. It was pointed out by the majority that:-

(a) If there is a surrender under section 46 of Criminal Procedure Code, only under such a circumstance the statement given by the accused is admissible under section 27 of the Evidence Act

(b) Information given by a person not in custody to a police officer in the course of the investigation of an offence is not provable under section 27 as it is not permissible under section 162 of the Criminal Procedure Code

(c) The understanding is that the reason for the plea being rejected lies in the Criminal Procedure Code and not the Evidence Act. Justice Subba Rao had given a dissenting opinion and had held that the difference in the approach of section 27 towards section 25 and 26 is indeed in violation of Article 14 of the Constitution.

However, in later cases such as Chinnaswamy case[27], Aghnoo Nagesia vs. State[28], Sanjay vs. State Govt. of Delhi[29], Pandurang Kalu Patil & Anr vs. State of

[27] AIR 1962 SC 1788
[28] AIR 1966 SC 119
[29] AIR 2001 SC 979

Maharashtra[30] it was held that discoveries made pursuant to statements falling under section 25 by people not in custody are also admissible.

According to the 169th Report, section 27 is a proviso to both section 25 and 26. The second issue is to examine if the word 'or' is required to be introduced in sec. 27 between the words 'from a person accused of any offence' and the words 'in the custody of a police officer'. In order to answer this, a detailed examination of the legislative history of the section needs to be made.

In the Criminal Procedure Code, 1861 before the Evidence Act of 1872 was enacted, there were three sections namely–

(a) Section 148 which made confessions or admissions of guilt to police officers inadmissible

(b) Section 149 to confessions or admissions of guilt whilst a person is in custody of a police officer, which was inadmissible unless made in the immediate presence of a Magistrate

(c) The relevant section for our discussion here is section 150 which related to 'discoveries' and it is reproduced as follows:-

"When any fact is deposed to by a police officer as discovered by him in consequence of information received from a person accused_of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence."

Here the phrase 'in the custody of a police officer' is altogether missing, hence it was interpreted that sec. 150 was wide enough to apply to statements by persons in custody or not in custody. The reference has been taken from Sarkar. By means of the Amending Act 8/1869, sec. 150 of the said Criminal Procedure Code came to

[30] 2002 (1) JT SC 229

be read as follows: "Sec. 150: Provided that any fact that is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, or in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence."

This section is clear so as to cover statements by those in custody as well as not in custody. Moreover, Sir James Stephen himself opined that he based section 25, 26 and 27 of the Evidence Act completely on section 148, 149 and 150 of Criminal Procedure Code 1861. Sarkar concluded that when the Act was enacted in 1872 (i.e. when sec. 27 was enacted in 1872), sec. 150 was transferred to the Evidence Act by omitting the word 'or' and putting a comma instead. No possible reason is however conceivable when the information coming from any person whether in custody or not in custody satisfied the same test of relevancy in sec. 27, viz., the discovery of a fact in consequence of information received from the accused. Sec. 27 is based on the theory of confirmation by discovery of subsequent facts. In fact in the Allahabad High Court in Deoman vs. State of U.P. (AIR 1960 All p.1) (reversed by the Supreme Court in State of U.P. vs. Deoman Upadhyaya AIR 1960 SC 1283) decided in 1960, the dissenting opinion of Desai J. says that if 'or' was a deliberate omission, the comma just before it should have also be deleted.

Further, it has been pointed out by Sri Vepa P. Sarathi, if what is admissible under sec. 27 is (a) the discovery of the material object, (b) the place where it was discovered and (c) the knowledge of the accused about the object, then such facts are relevant and admissible even when the accused is not in police custody. This fact is relevant either under sec. 8 (subsequent conduct) or under 9 (being facts necessary to explain or introduce relevant facts). Therefore there is no reason therefore for not applying sec. 27 to statements leading to discovery made under sec. 25.

In the 69th Report, it was proposed that the words 'Notwithstanding anything in sections 25 and 26', be added at the beginning of sec. 27. That means the discoveries under sec. 25 will also be admissible. In that proposal, the Commission also introduced the word 'or' and added some more words. The relevant portion read:

> "received from a person accused of any offence, being information given to a police officer or given whilst such person is in the custody of a police officer"
>
> Hence, it can be observed that the 69th Report firmly had the opinion that the "or" had been deleted unintentionally and made provisions to rectify the error by suggesting suitable amendment for the section.
>
> In the 152nd Report of the Commission relating to 'Custodial Crimes', two alternatives were suggested. The first one was that sec. 27 should be altogether repealed while the second alternative was to redraft sec. 27 in the following manner:

SECTION 27

Discovery of facts at the instance of the accused: When any relevant fact is deposed to as discovered in consequence of information received from a person accused of any offence, whether or not such person is in the custody of a police officer, the fact discovered may be proved, but not the information, whether it amounts to a confession or not."

This would have purported to have the same effect as would have the amendment recommended in 69th Report. After the first draft of this Report by us, Sri Vepa P. Sarathi suggested that the word 'or' be not introduced in sec. 27 and that the omission of the word 'or' in sec. 27 when the Evidence Act was drafted in 1872 by Sir James Stephen was deliberate but not accidental. Considering the relevant cases and the legislative history of the section and in light of the recommendations given

by other reports, 165th Report also supported the addition of the word or in section 27.

Principle of confirmation of facts was laid down in R v Warickshall, which means that if a fact exists at all, must exist invariable in the same manner whether the confession from which it is derived be in other respects be true or false. Justice Hidayatullah in Deoman Upadhyay case upheld the principle of confirmation even against those statements given under section 24. In fact the concept was bodily taken from the judgment of R v Lockhart. The 69th Report in view of public policy considerations and respect for human rights, has recommended for exclusion of section 24 from the purview of section 26. It was also done with a motive to not let the statements of the accused be manipulated by a person in authority and believed it to be a universal guiding principle. References had also been made to *Durlay vs. Emperor*[31] and *Emperor vs. Misri*[32]

In position in UK is such that, the Revised Judges Rules made by the Judges of the Queen's Bench Division deal with admissibility of such statements as evidence at the trial of any person. However, these rules do not have the force of law but still the Court has discretion to admit the evidence as has been held in R_vs. Smith[33] 972 but no cross-examination of the prisoner is permissible. These rules govern police conduct all professional investigation. The Police and Criminal Evidence Act, 1984, sec. 76(4) makes admissible any facts discovered as a result of an excluded confession. Evidence that a fact was discovered as a result of such a confession is not admissible unless evidence of how it was discovered is given by or on behalf of the defendant, in which case it would be relevant to the accused's credibility as a witness as well.

[31] AIR 1932 Cal 297
[32] (1909) ILR 31 All 592
[33] 1961(3) All ER

In US it is stated that as per Miranda_vs. Arizona, an involuntary confession is inadmissible, regardless of its truth or falsity and this is so even if there is ample evidence aside the confession to support the confession and the conviction is invalid if based on any part of such a confession. However, it is it is not clear, as to whether facts discovered_because of the confession, as distinguished from the confession itself, are admissible in evidence. Many of the State Courts have admitted evidence of the inculpatory facts discovered by reason of an inadmissible confession, but other cases have held or indicated that evidence of such facts is inadmissible under the 'fruit of the poisonous tree' doctrine. In still other cases, the courts have established an exception to the admissibility of evidence obtained by aid of an inadmissible confession to the effect that thing found must be identified by evidence other than the confession.

In the light of the above discussion, 165th Report has recommend that the words "Notwithstanding anything to the contrary contained in sections 24, 25 and 26" be placed at the beginning of sec. 27 and that thus the non-obstante clause should cover sec. 24 also and not merely sec. 25 and 26, as recommended in the 69th Report. The word 'or' is to be introduced as recommended in the 69th and 152nd Reports. The word 'such' and 'distinctively' should be dropped. Instead of 'so much of the information', the 'facts' discovered will be treated as admissible. A proviso is proposed to sec. 27 limited to making facts inadmissible if those facts were discovered from statements made under sec. 24 where the statements were the result of 'threats, coercion, violence or torture'. Facts discovered from statements made under sec. 24 by 'inducement or promise' and facts discovered from statements made under sec. 25 and 26, would also be admissible.
The proposal for sec. 27 should be is as follows:

Discovery of facts at the instance of the accused

"27. Notwithstanding anything to the contrary contained in sections 24 to 26, when any relevant fact is deposed to as discovered in consequence of information received from a person accused of any offence, whether or not such person is in the custody of a police officer, the fact so discovered may be proved, but not the information, whether it amounts to a confession or not:
Provided that facts so discovered by using any threat, coercion, violence or torture shall not be provable."

It is suggested that the particular addition of or in section 27 is not justified until and unless the background of the omission itself is carefully observed with the omission of or has not been considered in any of the Reports. Moreover, the concept of constructive police custody as given in the Aghnoo Nageshia judgment and the reasons given thereof, do indicate a strong tendency of violence being used against the accused in order to obtain confession. Hence, in order to implement human rights of the prisoners and at the same time establish an effective criminal justice system, the kind of safeguards which are given under the American legal system, to prisoners should be adopted.

In US the law of confession is a conglomeration of constitutional law, federal law, state laws and traditional practices. Right against self-incrimination is derived out of the Fifth Amendment. The Fifth Amendment along with the fourteenth amendment formed the basis of the free and voluntary rule which is a major test in the law of confession. The voluntariness test takes both objective and subjective circumstances in order to assess upon how freely the confession was made. The fruit of poisonous tree doctrine has been reiterated in Miranda v Arizona. A discussion on relevant judgments in order to substantiate the recommendation is in order. It has been stated in Lewis and United States[34] that to the false statement and representations to the accused concerning the evidence against him, the

[34] (1934, CA9 Idaho) 74 F2d 173

generally recognized rule was that to obtain the confession by direct statements of this sort does not render the confession involuntary. Similarly it was held in People v Connely[35] that while the indulgence in deceptive methods or false statements is not morally justifiable or a commendable practice, this alone does not render a confession of guilt inadmissible. In People v Pendarvis[36] the court stated that a deception will not render a confession inadmissible unless the misrepresentations are of such a nature as would probably result in untrue statements. However in United States ex rel. Everett v Murphy[37], the court said that while the deception of the accused as to the victim's survival of the attack might be ignored if it stood alone, it had been used to make more plausible the promise of assistance in order to induce confession, and concluded that a confession induced by police falsely promising assistance on a charge far less serious than the police knew would actually be brought could not be considered a voluntary confession. On the basis of these judgments it is recommended that a new section be introduced in the Evidence Act, which is based on the principle of confirmation, where a true statement obtained by false representation or misrepresentation alone is admissible in the court of law provided the statement is true.

With regards to section 24 specifically, views are given above. However, Vepa Sarthi's comment that the facts that have been discovered as a result of confession are relevant under section 7 and 9 of the Act, is highly significant. It shows that the evidentiary value of the facts would not be lost to the investigating authorities.

SECTION 28

If such a confession as is referred to in sec. 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is relevant.

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[35] (1925) 195 Cal 584
[36] (1961) 189 Cal App 2d 180
[37] (1964, CA2 NY) 329 F2d 68

The 185th Report recommended that in the light of the amendment proposed in sec. 24 in this Report, in sec. 28, for the words "inducement, threat or promise", the following words be substituted in the body of sec. 28 and the title, namely, "inducement, promise, threat, coercion, violence or torture". The 185th Report also stated that sec. 28 should not be renumbered as section 24A and there is no need to delete sec. 28as had been suggested by the 69th Report.

Conclusion: It is suggested that the title of the section should be amended according to the changes incorporated in the relevant section. Considering the close nexus between section 24 and section 28, it is argued that section 28 should be renumbered as section 24A. The deletion of section 28 is opposed. This is because this will lead to confusion as regards to if a confessional statement is admissible in the court after the removal of threat, inducement and promise. Moreover, if the matter is considered at length later, legislative history would indicate that such a statement might not be admissible as the section was intentionally deleted.

SECTION 33

There was a committal procedure in the Old Criminal Procedure Code, 1898. Where the magistrate examined the witness at the committal stage itself, and could not be cross examined there. However, the evidence that was produced by the witness in the committal court should not be used against the accused in the session's court. This particular section is applied to both civil and criminal cases. If before a Magistrate, there was opportunity to cross examine and a defense counsel did not choose to cross examine a witness, the evidence in the committal proceeding could be used in the later proceedings and the defense, which did not avail of its right to cross examine before the Magistrate, would not be able to complain.

The first proviso "Provided that the proceedings was between the same parties or their representatives" would lead us to conclude that the parties or their representatives gave the deposition in earlier proceedings by a witness, should be the same. There was a question that arose, that can the parties of the latter proceedings should be a part of earlier proceedings. "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'." [38]

On the question regarding whether there is any such provision in Hindu Law where parties to an earlier litigation could claim through manager who is a party to latter litigation. The position stands clear that no there is no such provision.

There were many problems that were created because "inversion" and thereafter court had to stretch meaning up to "Representative-In- interest"

However in *Chandreswar vs. Bisheswar AIR 1927 Pat 61* the court said that "representative-in-interest" are not available for all purposes that are synonymous with the expression "the person claiming under as is section 11of CPC. Thus, it is a suggestion that the section can be amended as per Sir James Stephens Digest as referred by Veepa Sarthi also. This can be done as similar situation is available under section 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

[38] Veepa Sarthi, Law of Evidence, 5thed. , EBC, 2002, p.155

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[39], 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.

SECTION 34

Under the present Act, the section states that when the entries of the book of accounts are not used to charge a person with any kind of liability whether civil or criminal may be used as an "independent evidence" without any further corroboration. However if one sought to make anyone liable, the entries would require corroboration. The entries can be significant under other provisions of the act, such as section 32(2) or under section 159. Lack of an entry in the book is not pertinent under section 34 but can turn out to be pertinent when covered under sections 9 and 11. The section was in scrutiny L.K. Advani vs. CBI (1997) Crl LJ 2559 (Delhi High Court Judgment) and the decision was then affirmed in Supreme Court 'Hawala Case' CBI vs. V.C.Shukla AIR 1998 SC 1406 that – "that it was not

[39] 69th Law Commission Report

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, activity carried on continuously in an organized manner with a set purpose to augment one's own resources may amount to business."

The same have been affirmed in various judgments also previously - State Bank of India vs. Ramayanapu Krishna Rao: (AIR 1995 SC 244), in Mahasay vs. Narendra: AIR 1953 SC 431 that "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."

This section does not necessitate any considerable amendment apart from for a verbal change by replacing the words "such entries" for the words "such statement". The same has been corroborated in 185th Law Commission Report and 69th Law Commission Report.

SECTION 35

This section is relevant to the entries in Public Record that is made in performance of duty. Public Servant is defined in section 21 of IPC therefore for the section the entries are supposed to be made by a public servant or by a person so enjoined by a law. Section 74 deals with acts or records of public functionaries as Public Documents. This second is laid down under the presumption that the public officials and the person statutorily enjoined would perform their duties correctly so that even after lapse of several yearS they would be available to provide evidence.
When the first information is take under Section 154 of Cr.P.C. It would amount as an entry by a public servant. But it does not act as substantive evidence, it needs

corroboration. Anything that does not fall under this section should necessarily fall under section 9 or 11. Thus the recommendation is to bring slight modification that the entry under this section is emphasizes on "public and official character" of the entry and not the statutory character & that the entry which must be made in performance of a statutory duty is applicable only to the latter-half of the section.

SECTION 36

This section is required to see the relevancy of statements in maps, charts and plans. Firstly, 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, 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[40].

However in the case of *Ram Kishore Sen vs. Union of India, AIR 1966 SC 644,* it was clearly stated that government has to establish independently the facts stated in plans or maps or charts.

SECTION 37

This section talks about the statements of "Public Nature" that are available in form of Acts or Notifications would be relevant. There is only one suggestions for this particular section that which involves redrafting of this section for the convenience of interpretation: The section should be divided in clauses and the third clause should begin "as respect to the period before 15th day August 1957" and then sub clauses referring to Parliament of UK or London Gazette or Dominion or Crown Representative.

[40] 185th Law Commission Report.

SECTION 38

This section is the last one under the heading "Statements made under special circumstances". This section speaks about "Relevancy of statements as to any law contained in law books". This section has raised an important issue that when "Law of any country" is referred the court may require proof as mentioned in the section or calling of an expert. But with regard to law in force in India the Court is bound to take judicial notice of the same, it should not be proved under this section. In the 69th Law Commission report also, it was pointed out that it is an obligation on our courts to decide any question before them as per the Indian Law and that it cannot be a matter of proof. The rulingS of Indian courts are not a matter of evidence. Under section 3 of Indian aw Reports Act it becomes a question of authority. Thus, it is suggested that we narrow down the scope of the section, to achieve the objective, so as to exclude Indian Law from its application. The words "Any other country" should be added after the words "Any country".[41] It has also been pointed out 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'[42]. However we can add the words "Outside India" rather than "Any other country".

SECTION 39

This section is a single section which is dealt under the heading of 'How much of a statement is to be proved". This section needs some improvements. This section put froths two situations:

a) Wasteful or inadmissible parts of a statement, conversation should not be allowed to place before the court by a party.
b) Also that one does not simply rely on trimmed parts of statements & conversation etc.

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[41]Sarkar. *Law of Evidence*, 15th ed. Lexis Nexis, 1999, p. 809.
[42] Veepa Sarthi, Law of Evidence, 5thed. , EBC, 2002, p.169

Sarkar 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'.[43] There was a reference made to section 145 and 161 of the Indian Evidence Act in this case. Therefore, that there needs to be an addition of subsection that whenever there is a failure on part of one party to give necessary statement, conversation etc. then the other party can give that part of evidence. Also the "as the court considers necessary" which provides courts discretion should be removed and that discretion should be given to other party.

SECTION 40

This section deals with "Previous Judgments Relevant to bar a second suit or 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 allows whether a court can take cognizance of a suit or holding a trial when there exists a relevancy of an earlier judgment, order or decree for deciding. 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

[43]Sarkar. *Law of Evidence*, 15th ed. Lexis Nexis, 1999, p. 814

judgments which bar the trial, not of a whole case, but of a particular issue, known as 'issue estoppel'.[44]

In the present section 40 it intends to bring up rulings interparty but for which there is no provision in CPC. Therefore a 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.

Thus the suggestion stands that there should be redrafting that there can be bar of 'issues' rather than merely to suits and trials. There needs to be addition of words "or determining a question" after "taking cognizance of a suit or issue or holding a trial". Also in the end of the section addition "or determining such questions" after "Court ought to take cognizance of such suit or issue, or to hold such trial."

SECTION 41

This section is lengthy and deals with Relevancy of certain judgments in probate, etc. jurisdiction (Including matrimonial, admiralty or insolvency jurisdiction). Such judgments, order, decree is "conclusive proof". This section refers to only 4 types of cases and is based on public policy. This section is not restricted to court in India but also includes judgments pronounced by foreign courts in respect of these four matters.

"Order refusing probate' negative orderdoes not fall within section 41. This observation was made 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.

[44] 185th Law Commission Report

The Bombay High Court *in Ganesh vs. Ram Chandra, (1887) ILR 21 Bom 563* in its probate jurisdiction held that the execution of the will was not proved. The judgment was held not to block a suit by the same claimant as a person who was a beneficiary under the will. : "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 *Kalyan Chand vs. Sita Bai, AIR 1914 Bom 8 (FB).* , the probate was declined on the ground the testator was not of lucid mind. Thus it is recommended that there should be a clarification in the aspect of refusal to grant a probate and that it does not fall under this section.

SECTION 42

This section deals with Relevancy and effect of judgments, orders or decrees, other than those mentioned in Section 41 and declares them as conclusive proof. However they are they are relevant only in matters of public nature. 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.

Vepa P. Sarathi[45] summarises 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

[45] Veepa Sarthi, Law of Evidence, 5thed. , EBC, 2002, p.173

section of the Act relating to relevancy, as a fact in issue, or a motive under sec. 8 or a transaction under sec. 13."

Veepa 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)." [46]

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."[47] Thus, there is no such need to bring any changes in this provision. Various judgments and precedents are enough for courts to help decide the scope of this section. Also, to this support is the divergent views of House of Lords and Privy Council.

[46] Veepa Sarthi, Law of Evidence, 5thed. , EBC, 2002, p.173
[47] Veepa Sarthi, Law of Evidence, 5thed. , EBC, 2002, p.173

SECTION 43

We have briefly discussed section 43 in section 42, but we are going to look into this section more specifically now. This section deals with Judgments, etc. other than those mentioned in Sections 40 to 42, when relevant. The section does not deal with inter parties but instead judgments. On reading this section, it is clear and sufficient thus there is no need of change in this section.

SECTION 44

The section deals with Fraud or collusion in obtaining judgment, or incompetence of Court, may be proved. On referring to various minority views in cases it was decided that perjured evidence cannot be a ground laid down on the dictum in *Kadirvelu Nainar vs. Kuppuswami Naickar, 1919 Mad 1044* that if such ground is accepted then there would be no end to litigation in India. Therefore even though there is a supreme court judgment saying to include 'negligence' as a separate ground in *Bishun Deo vs. Seogem Ray, AIR 1951 SC 280 at 283 (para 23)* but merely because of one judgment it would not be strong and sufficient to add a separate clause. Thus, no addition is required in this section.

SECTION 45

This section refers to opinion of experts. There are three illustrations set out in this section they deal with opinion as to 'poisoning', 'unsoundness of mind' &'identity of handwriting' respectively. For this particular section is having a lot of intricacies we should have to refer 185th Law commission report and the recommendations given by the draftsmen to include two more sections along with Section 45, that will be section 45A and Section 45B. The Commission recommended 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.

The proposed section 45A is as under 185th Law Commission 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) *summarize 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."*

Sec. 45B was proposed to cover expert opinion on 'foreign law' as in the British statutes of 1859, 1861 with two sub sections. The proposed section 45B is to be the following effect, as per 185th Law Commission Report:

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".

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.

SECTION 46

The section refers to facts bearing upon opinions of expert. This section does not require any changes, it can be accepted the way it stands.

SECTION 47

This section speaks of opinions as to handwriting, when relevant. This section does not require any changes however in case Section 45A is brought in force through and an amendment then both of these sections have to be read together.

SECTION 47A

This section was inserted through an amendment in 2000 speaking about the opinion as to digital signature, when relevant. This section does not require further amendments.

SECTION 48

This section says where 'opinion as to existence of right or customs, when relevant. There needs to be a slight change in this section this section has to be read with section 32(4) and section 49. . 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 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 since the draftsmen would not have intended this section to be broader than sec. 32(4).

SECTION 49

This section specifically deals with 'opinions as to usage, tenets etc.' where relevant. This section does not require any changes just have to be read along in the lines of section 48.

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. This section refers only to Indian Divorce Act 1869. However since then the right to divorce has been included in several family systems, hence now it has become necessary to add 'any other enactment providing for dissolution of marriage'.

It has been pointed out 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"[48] (*Vadde Rama Rao vs. State of A.P.) (1990) Crl LJ 1666 or 1671 (A.P.*). Thus it is important that the new drafting is included stating that all such opinion shall matter, either in civil or criminal proceedings, where one has to prove that the marriage existed.

SECTION 51

This section deals with 'Grounds of opinion, when relevant. As discussed above that incase section 45A is incorporated this section has to be read in consonance of section 45A. Hence there are no changes required in this particular section.

SECTION 52

This section refers to the questions as to when in civil cases, character to prove conduct imputed can be relevant or irrelevant. There are no changes required in this section since anything that was required has been changed in the 2000 Amendment.

[48]Sarkar. *Law of Evidence*, 15th ed. Lexis Nexis, 1999, p. 959

SECTION 53

Both Section 53 and 54 refer to relevancy of character in criminal cases and are to be read together. Section 53 refers to relevancy of previous 'good character' in criminal cases while section 54 refers to relevancy of bad character "in reply". This section does not require any changes. However there is a proposal to add section 53A that is: "53A. In a prosecution for an offence under section 354, section 354A, section 3548, section 354C, section 3540, section 376, section 376A, section 3768, section 376C, section 3760 or section 376E of the Indian Penal Code 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 such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.".[49] This is because there was a proviso added to section 146(3), but that proviso covers only section 376 of IPC. Thus adding this section as proposed in 172nd Law Commission Report. Section 53A will be wider than the proviso to section 146 (3) that was introduced by the amendment act 2003.

SECTION 54

The main object of the section is not to be disturbed however we need to make some amendments so that the words "unless evidence has been given that he has good character" should concur with Section 315 and 140 of this act (that is evidence that is extracted during cross examination). Thus, in this case it is necessary that we include that words "in which every case it becomes relevant" so as to provide the opportunity in cross examination to both the defense and prosecution. There have been guidelines laid down in R vs. Mcleod: 1994(3) All. ER. 254 as to the nature of questions that may be put in cross examination or evidence in rebuttal.

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[49] http://www.advocatekhoj.com/library/bareacts/criminallawamendment/25.php?Title=Criminal%20Law%20(Amendment)%20Act,%202013&STitle=After%20section%2053%20of%20the%20Indian%20Evidence%20Act,%201872%20(hereafter%20in%20this%20Chapter%20referred%20%20%20%20to%20as%20the%20Evidence%20Act),%20the%20following%20section%20shall%20be%20inserted,%20namely (Last referred on 10th November 2013, 17:30 hours)

SECTION 55

This section refers to relevance of "Character" as affecting damages. There was a suggestion made in one of the Law commission report to include 'libel action'. However it becomes the courts duty to elaborate the section and provide the required judgments and decision. We hereby, believe that there is no need of any changes in this section.

SECTION 56

This section states "Facts Judicially Noticeable need not be proved". This section does not need any changes.

SECTION 57

This section refers to "facts of which the court must take judicial notice". This particular section is too lengthy and has 13 clauses. But there are a few things that has to be brought to notice. We would like to concur with the changes made in 69th Law Commission Report and quote the same here. "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. 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 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."

SECTION 58

This section talks about the fact that are admitted need not be proved again. The section does not apply to criminal proceedings. Therefore the change that is needed is that after the words "Any other proceedings" on needs to enter "Other than criminal proceedings". In Mota *Bhoy vs. Mulji 42 Ind. App. 103* it has been held that whenever an admission is made it must be accepted subject to the conditions laid down below or not accepted at all.

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.[50]

[50]Sarkar. *Law of Evidence*, 15th ed. Lexis Nexis, 1999, p. 1022

SECTION 59

This section deals with proof of facts by oral evidence. After having considered the different provisions enumerated in the Acts of different counties like Singapore, US and England, Law Commission has recommended including the evidence through live video/live television links in Indian Evidence Act as such. Going through the above mentioned provisions and keeping in view the rights of the accused person that the accused person must be given an opportunity to get the witness be cross examined by his lawyer. On the other hand it imposes a duty upon the court to observe the demeanor and credibility of the witnesses. Therefore it is incumbent upon the court to view the method of operation of live video meticulously after having obtained the consent of parties.

SECTION 60

Section 60 lays down that oral evidence must be direct. The Law commission has recommended addition of following proviso to the section and it is agreed that the given proviso will give the requisite clarity: "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 61

This particular section deals with 'proof of contents of documents'. Document has been defined in section 3 of the evidence act. It reads, "Document means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter". The most common document with which we have to deal is a document, which is described by letters. The contents of the document must be proved either by primary or secondary evidence. It means that there is no other method allowed by law for proving the contents of documents. In the view of Law Commission, no amendment as such is required for Section 61. The view of Law commission is justified in this regard.

SECTION 62

This particular section deals with primary evidence. It signifies physical presentation of the original document. If the document is executed in counterparts, each of which is executed by one or some of the parties only, each counterpart would be considered as primary evidence. As per Phipson, the same document can be primary as well as secondary depending on the purpose of the same. The first portion of the first explanation of the section refers to what are known as duplicate, triplicate or the like original. Sometimes, it is convenient that each party to transaction should have complete document in his possession. To fulfil this purpose, the document is written as many times as there are parties and each document is signed by all the parties and all of them are originals. Copies made by copying machine are regarded as secondary evidence of the originals. The 185th Law Commission Report agrees with the same and prescribes no change for the said section and the same is valid in every context.

SECTION 63

Secondary evidence of a document is defined in section 63. It includes the following:

1) Certified copy of the original document
2) Copies, which are made from the original by mechanical process, which in themselves assure the accuracy of the copy and copies compared with such copies.
3) Copies made from or compared with the original.
4) Counterpart of a document is a secondary evidence against the party which didn't sign it.
5) Oral account of the content of the document by the person who has himself seen it.

The above mentioned types of secondary evidence do not constitute as between themselves the degree of secondary evidence. All the categories mentioned above are of equal ranking. Law makes no distinction between one class of secondary evidence and another.

The Allahabad High Court has held that section 63 is not exhaustive of all kinds of secondary evidence. The court allowed evidence of draft note from which the final notice was prepared. The court stated that section 63 leaves enough scope for other types of cases not enumerated herein. In the case of *Quamarul Islam* vs. *S.K. Islam,*[51] the Supreme Court didn't take into account a newspaper report of speech of a winning candidate. The court said the reporter should have been produced or at least his original report should have been submitted.

In the case of *U Shree.* v. *U.Srinivas*[52], it was held by the court that mere admission of a document in evidence does not amount to it's proof-therefore, it is the obligation of court to decide question of admissibility of a document in secondary

[51] AIR 1994 SC 1773
[52] (2013) 2 SCC 114

evidence before making endorsement thereon. The question was whether a photo state copy of a letter alleged to have been written by the wife to her father could have been admitted as secondary evidence. The high court observed that when the said letter was summoned from the father, he denied its existence. Thus, the High court opined that when the efforts were made to get the primary evidence (i.e. the aforesaid letter) and it could not be obtained, the secondary evidence (i.e. the photocopy of the letter) could be adduced and that would be admissible under Section 65 of the Evidence Act.

Mere admission of a document in evidence does not amount to its proof. Therefore, it is the obligation of the court to decide the question of admissibility of a document in secondary evidence before making endorsements thereon. In the present case, the Family Judge (i.e. the trial Judge) has not discussed anything relating to foundational evidence. The High Court has only mentioned that when the letter was summoned and there was a denial, the secondary evidence is admissible. Such a view is neither legally sound nor in consonance with the pronouncements of the Supreme Court. Hence the said photocopy of the letter was inadmissible in evidence.

The report agrees with the 69th Report that in clause (3) for the words "made from or compared" the words "made from and compared" shall be substituted.
The report mentions that clause 63(5), which relates to oral account of contents given by those who have 'seen' the document. In the opinion of the Law Commission, 'read' is a better word. The commission also recommended deletion of the word 'means and' in the opening portion of section 63 and substituting the words 'read' for 'seen' in clause (5) of section 63 and also substituting the words "made from and compared" in clause (3) of section 63 for the words "made from or compared".

SECTION 64

This section embodies one of the underlying principles that a document must be proved by its primary evidence. The meaning of the expression primary evidence has been explained in section 62.

SECTION 65

It refers to cases in which secondary evidence relating to contents of documents may be given. The circumstances in which secondary evidence can be given are strictly regulated by the Act. Such circumstances are listed in section 65. The section provides that secondary evidence can be given in following cases:

1. When the original is shown or appears to have been in the possession or power-

a. of a person against whom the document is sought to be proved
b. of any person out of reach of, or not subject to the process of the court, or
c. any person legally bound to produce it, and although due notice has been given to him in accordance with the terms of section 66, he does not produce it.

2. When the existence, condition or contents have been proved to be admitted in writing by the party against whom the document is to be proved or by his representative-in-interest.
3. When the original has been destroyed or lost, or when the party offering evidence of its content cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time
4. When the original is of such nature as not to be easily movable. This would include case of bulky documents.
5. When the original is a public document within the meaning of section 74.
6. When the original is a document of which the Evidence Act or any other law of the country permits certified copies to be given in evidence.

7. When the original consists of numerous accounts or other documents which cannot be conveniently examined in the court and the fact to be proved is the general result of the whole collection

Types of secondary evidence in different situations

Where the documents in the possession of a party who does not even after notice produce it, or when the original has been lost or destroyed or when it is not easily movable, any kindof secondary evidence can be given. When the contents of the document have been admitted by the party against whom it has to be proved his written admission can be given as secondary evidence. Where the original is a public document or is a document of which the law permits certified copies and no other secondary evidence is admissible then the certified copies and no other secondary evidence can be given. Where the original is a bulky document, which cannot be conveniently examined in the court, the only kind of secondary evidence allowed is the evidence of the general result of the document given by the person who has himself examined it and is an expert or is skilled in the examination of such documents.

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. 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."

It was suggested by the 69th Law Commission that the words "unless some other clause of this section applies" be added in the penultimate paragraph after the words 'is admissible'. The 185th Law Commission agreed with the same. The said

change is required for the clarity of purpose. Section 65(a) refers to non-production of document by a person legally bound to produce it. In such case, the secondary evidence with respect to its content can be produced. The moot question that came in front of law commission was whether it intended to cover a situation in which original document is in possession of person not bound to produce it. To avoid all types of confusion the Law Commission has rightly recommended adding the category of the person not bound to produce it to the section. The commission hasn't recommended any change in section 65(b) to (g).

SECTION 65 A & 65 B

These two sections were added by Information Technology Act, 2000. These two sections are regarding the rule of admissibility of electronic record. The Law Commission hasn't recommended any changes for them in its report.

SECTION 66

Clause (a) of section 65 lays down that where the original document is in possession of an opponent he should be given notice to produce the document and if he fails to comply with the notice, secondary evidence of the document becomes admissible. It is in reference to this that Section 66 lays down rules as to produce original documents. This section requires that the party who has possession of the original or his attorney or pleader, should be given notice to produce. Notice should be given in a manner as is prescribed by the law in a particular case and if there is no law on the point, such notice should be given as the court considers reasonable under the circumstance of the case.

Exceptions- when notice not necessary

(1) When the document is a notice by itself

Illustration**:**One K was a director of a company. He was charged for having wrongfully kept possession of articles belonging to the company. The defense for K was that a sum of Rs. 29450 was due to him from the

company as arrears of salary, for which he had issued a registered notice to the directors of company and hence he was prosecuted. At the trial, the accused filed a certified copy of that notice. He did not give to the company a notice to produce the original notice. The magistrate refused to admit the paper on the ground that the original had not been summoned. His Lordship of the Madras High held,

"When a document sought to be summoned is itself a notice sent by one party to the other and a copy of notice is produced by the sender, it seems to me that under section 66, it is not obligatory to summon the original notice."

(2) When the nature of the case itself makes it clear to the party in possession that he will be required to produce it.

In a prosecution case under Motor Vehicles Act, 1939 (Sec.112) the owner and driver know the requirement to produce the original permit. If they do not care to produce the original, the prosecution is entitled to produce secondary evidence. The rational is that a party who fails to produce original is likely to throw light on the point of controversy must be subjected to an adverse inference that it would have gone against the party`s own contention on the point.

(3) When it appears or is proved that the other party has obtained possession of the original by fraud or by force.

(4) When the adverse party or his agent already has the original in the court.

(5) When the original party or his agent has admitted that the original has been lost.

(6) When the person in possession of the original is out of reach of the Court or is not subject to the process of the court, for e.g., that he is a foreign ambassador and, therefore, the court has no jurisdiction over him.

Effect of refusal after notice

Subject to the exceptions mentioned above, where the original is in possession of the opposite party, a notice has to be given to him to produce the original and it is only upon his refusal to do so that secondary evidence can be given. But, there may arise a situation, where the opposite party fails to produce the original when demanded, but at a subsequent stage of trial offers to produce the original one. He cannot be allowed to do so. This rule was laid down in the case of *Doed Thomson* vs. *Hodgson*[53]. Therefore, if a person has an opportunity, and had declined to produce the writing he can`t afterwards bring forward its content.

In the case of *Nawab Singh* vs. *Inderjit J.Kaur*[54], where the original rent note was alleged to be in possession of the opposite party and he didn't produce it despite several notices and adjournments, it was held that the plaintiff`s application for production of secondary evidence should not have been rejected on the ground that the copy of the note was of doubtful veracity. No amendment was found required by the Law commission in its report

SECTION 67

Mere filing of a document in court is not enough to make the document a part of the record. This is preliminary to be attended to before the contents of the document can be regarded as evidence. This is called authentication of writing or the proof of genuineness. This section lays down that when a document filed before a court, is alleged to have been signed or written wholly or partly by any person it must be proved, that it was signed or written by that person whose signature or writing it purports to be. The executants can be called to prove his own handwriting and signature. Where the document is written by one person and signed by another, the handwriting of former as well as that of the latter has to be proved.

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[53] (1860) 9 L.J.Q.B. 327
[54] AIR 1999 SC 1668

The modes of proving a signature are as follows:

(1) By calling a person who signed or wrote a document.

(2) By calling a person in whose presence the document was signed or written

(3) By calling a handwriting expert

(4) By calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written.

The report suggested addition of following explanation to the section which can be construed necessary for the clarity and the same is as under: "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. No change for this particular section was suggested by the Law Commission.

SECTION 68

The word 'execution' means that the party by affixing his signature or mark has signified to the contents of the document in presence of at least two witnesses. These witnesses are known as attesting witnesses and the document will be signed with their addresses as the proof that the document has been executed in their presence. According to Section 68, whenever a document which requires compulsory attestation and such a document is produced before the court as documentary evidence, then at least one attesting witness shall be called and

examined to prove the execution of the document. The principle will apply only if at least one of the attesting witness is alive, capable of giving evidence and subject to the process of the court. The section further provides that no attesting witness need to be called in the case of document not being a will which has been registered according to the provisions of Indian Registration Act of 1908. But, if the party whose signature the document purports to bear has specifically denied it then at least attesting witness shall have to be called. Thus an examination of attesting witness is necessary only when the execution of the document has been specifically denied. If not so denied, the evidence furnished by the registration certificate under section 63 of the registration act coupled with the presumption under illustration (e) of Section 114 of the Evidence Act would be more than sufficient.

In the case of a 'will' the only attesting witness surviving and summoned was able to prove nothing, the will was held to be not proved.[55] Where the defendant admitted that the mortgage deed was executed but that its purpose was to circumvent the new Rent control legislation it was held that execution of deed was not specifically denied and therefore it wasn't necessary to call any attesting witness.[56] The legal requirement is complied with when one of the attesting witness is produced. Neither it is necessary to produce the other witness even if available, nor is there any obligation to explain why the other witness has not been produced. What is to be done if no attesting is available? Section 69 provides the answer.

In the case of *Rasommal I. Fernandez vs. Joosa Mariyan*[57], the question in proof of execution in suit for partition was house. Plaintiff denied the execution of gift deed. It was held that when the execution of gift deed was denied by the

[55] *Rameshwari Devi v Shyam Lal,* AIR 1980 All. 292
[56] *State of Haryana v Raj Kaur,* AIR 2001 P & H 322
[57] AIR 2000 SC 2857

executants there was no need of calling the attesting witness but the denial shouldn't be vague. While recording findings as to denial pleading of the parties must be considered. But if the defendant denies that execution of deed other than will the attesting witness must be called but if he plaintiff himself denied the execution of the deed attesting witness would not be called.

The Law commission has recommended redrafting of the section as follows:

> ""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."

This recommendation should be implemented to remove the ambiguities and make the application of the section easier.

SECTION 69

If no attesting witness is available or if the document is executed in United Kingdom, two things should be proved, firstly it should be proved that the

signature of the person executing the document is in his handwriting and secondly that the signature of at least one attesting witness is in his handwriting. Where all the attesting witness of a will were dead, the court allowed the will to be proved in the manner of any other document.[58] The law commission, in order to remove the anomalies of the section suggested following replacement, "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

Another situation of not calling attesting witness is when the executants himself or his representative-in-interest has admitted the execution of the document. It means that when a party admits execution of the document, he also admits the entire series of facts which would give validity to the document. The admission of execution means not only admission of signature but also of attestation of signature. The admission under the section should be clear and unqualified. If there is any controversy about the execution of the document then this section would not apply and an attesting witness would be called to prove the execution as required under section 68. Another condition for the application of section 70 is that the document must be duly attested and required by law to be attested.

SECTION 71

It provides that if the attesting witness denies or do not recollect the execution of the document, other independent evidences may be adduced to prove it.

(1) Sometimes it happens that the attesting witness colludes with the opposite party and denies the attestation of the document, or

(2) The attesting witness does not remember the execution of the document, or

[58] *Balwant v Minavbai*, AIR 1991 MP 11

(3) The attesting witness turns hostile and tries to mislead the court about the execution of the document.

Then the court may discard his evidence and may direct the party concerned to prove the execution of the document by any other evidence. 'By other evidence' includes the calling of second attesting witness, or other person including expert and non-expert witnesses. Thus this section is another exception to the general principle laid down in section 68. The revision of the same was recommended by Law Commission in its report as under: "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

If a document is not required to be attested by law, but the parties get it attested by witnesses, it may be proved like a deed which is not required by law to be attested. The Law Commission recommended the new section in following form which simplifies the section to a large extent. "An attested will or other document not required by law to be attested may be proved as if it was unattested."

SECTION 73

It lays down that when the court has to satisfy itself about the genuineness of the seal or signature on a document, it may compare the same with another signature or seal which is admitted or proved to be that of the person concerned. But it is necessary that the handwriting with which the comparison is to be attempted should itself be the original writing and not a photograph of it. The comparison may be done by the court itself, or it may appoint an expert to do the same. According to a decision of the Patna High Court, the Court can direct even a stranger to give a specimen of his handwriting. The Court directed a defendant`s

son who was present in the Court to give sample of his handwriting though he was not a party to the case.

In the case of *Garre Mallikharjuna Rao* v. *Nalabothu Punniah*[59], the opinion of handwriting expert is fallible/liable to error like that of any other witness, and yet it cannot be brushed aside as useless. There is no legal bar to prevent the court from comparing signatures or hand-writing, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwriting to be same or different, as the case may be, but in doing so, the court cannot itself become an expert in this expert and must refrain from playing the role of an expert, for the simple reason that the opinion of the court may also not be conclusive. Therefore, when the court takes such a task itself, and findings, are recorded solely on the basis of comparison of signatures or handwriting, the court must keep in mind the risk involved, as the opinion formed by the court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The court therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the court may then apply its own observation by comparing the signatures, or handwriting for providing a decisive weight or influence to its decision.

The Law Commission recommended the following amended section:

(1) "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

[59] (2013) 4 SCC 546

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

(4) finger impressions, palm impressions, footprints and type-writing.

(5) 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 73 A

It was inserted by Information Technology Act, 2013. The Law commission did not suggest any change for the same.

SECTION 74

As per this section public documents are of two kinds:

(1) Documents forming acts or records of the act of the sovereign authority namely, the Parliament and the legislative assemblies, or of the official bodies and tribunals, and of public officers, legislative, judicial and executive, of any part of India or of common wealth, or of a foreign country.

(2) Private documents that are registered in public offices also become public documents. For example, the memorandum and articles of a company. Public document is prepared by public servant in discharge of his public duties.

In the case of *Smt. Rekha and Ors* v. *Smt. Ratnashree Jain*[60], the primary issue to be determined was whether a sale deed (duly registered) is a public document or a

[60] AIR 2006 MP 107

private document. In determination of the above issue, the Court observed that a deed of sale is a conveyance and the deed of conveyance or any other document being executed by any person is not an act or record of any sovereign authority. Further, a sale deed(or any other deed or conveyance) when presented for registration under the registration act, is not retained by government authority but is returned to the person who presented such document for registration, on completion of process of registration, and hence an original registered document is not a public record kept in state of a private document.

In view of the same, a deed of sale or other registered document will not fall in either of the two classes of documents described in section 74, as 'public documents'. It was further held that any document which is not a public document is a private document. The court therefore concluded that a registered sale deed (or any other registered document) is not a public document but a private document. The Law Commission proposed a modified explanation to be added to clause 1 of section 74 using the word "deemed". The modified explanation is as follows: "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

This section says that all other documents are private. "All other documents" mean document other than those mentioned in section 74. The Law commission hasn't suggested any change to the given section.

SECTION 76

It provides the method of getting a certified copy of public document. It lays down that if a public document is open to inspection, its copy may be issued to any person demanding it. The copy of the public document must be issued on payment

of legal fee and there shall be attached a certificate to it containing the following particulars:

(1) That it is the true copy
(2) The date of issue of the copy
(3) The name of the officer and his official title
(4) The seal of the office, if there any
(5) It must be dated

Whether a person will be entitled to copy of public document will depend on the question whether he is entitled to inspect it. If a person has right to inspect the document, he will be entitled to get a copy and if he has no right to inspect it, he cannot get a copy of it.

The law commission recommended Explanation 2 as per 69th report and Explanation 3 in the form prescribed by it: "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- 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."

SECTION 77

It lays down that when the contents of public documents are to be proved before the court of law, the original need not be produced before the court. Instead, a certified copy taken from the office according to section 76 may be produced before the court and the court will accept it. The idea underlying this principle is

that the record of the court should not be taken away from its place of custody into courts. If public records are summoned in courts, it would make it impossible for others to use the records. Cases take years to be decided and during the time the case lingers on in the court, it would become impossible for the other individual to get access to it if it is deposited in the court. The certified copy of public document can be received without proof.[61] The Law Commission suggested addition of following explanation to the section: " 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 provides the method of proof of the documents mentioned in the section. A newspaper is not one of the documents mentioned in section 78.

The law commission rightly recommended several changes to this section which can be enumerated as under:

(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:

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

[61] *Ramanappa* v *Bojjappa,* AIR 1963 SC 1633

original, and upon proof of the character of the document according to the law of the foreign country."

(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

It lays down that a court shall presume the genuineness of a certified copy of a public documents which is produced before it along with the certificate as mentioned in section 76. It further says that if the document has been signed or certified by an officer, it shall be presumed that the person signing the document held that office at the time when he did so. But these presumptions are permissible only if the certified copy is in the form and the manner provided by the law. Where a Patwari issued a certified copy of Khatauni without complying with the provisions of law governing its issue, it was held that court is not bound to draw the presumption in regard to its genuineness.[62] The following recommendations were put forth by Law Commission:

(A)We recommend as follows: There must be a provision relating to the presumption in regard to genuineness 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:-

[62] *Bhenka* vs. *Charan Singh,* AIR 1959 SC 960

"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." The Law Commission gave the recommendation as under: "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: "Or to be a statement recorded by a Magistrate under section 164 of the Code of Criminal Procedure, 1973".

SECTION 81

This section provides for presumption of different kinds of Gazettes and newspapers. Presumptions regarding newspaper under this section cannot be about the proof of facts published in it the absence of the maker of the statement appearing as a witness. Judicial notice cannot be taken of the facts stated in newspapers being in the nature of hearsay evidence unless proved by evidence. It must be proved by the person giving the statement in the newspaper that the news is true according to hi perception. The law commission recommended amendment

of the section 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

Section 81A (as incorporated by Act 21/2000) stands as follows: 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." The Law commission hasn't recommended any change for the same

SECTION 82

This section refers to presumption as to document admissible in England without proof of seal or signatures. The Law Commission has recommended deletion of the same.

SECTION 83

This section says that the court shall presume that maps or plans purporting to be made by the authority of central government or any state government were so made and are accurate but maps or plans made for the purpose of any cause must be proved to be accurate. The Law commission revised the section as under:

"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

As per this section the court shall presume the genuineness of every book purporting to be printed or published under the authority of government of any country, and to contain laws of that country, and of every book purporting to contain reports of decisions of the Court of such country. The only clarification provided by law commission with respect to this section is that the words 'any country' include India also.

SECTION 85, 85A, 85B, 85C and 86

The Law Commission of India has not recommended any amendments to the given sections which deal with presumption as to power of attorney etc.

SECTION 87

This provision is with regard to "presumption as to books, maps and charts". The Report adequately reviews this provision and its inter-relation with Section 57, 83, 86 and 114 and discusses that while Section 87 raises a presumption of genuineness, it does not presume complete accuracy like that of Section 83 and 86 and Section 114 which allows presumption of accuracy in certain cases falling under this provision. It recommends that Section 87 should be redrafted in line of the proposal given by the 69th LCI Report viz.

(a) addition of the word 'plans' and

(b) clarity with regard to the phrase "Statement of facts".

SECTION 88

This provision lays down presumption with regard to telegraphic messages which enable the court to presume that the message forwarded from the telegraphic

office is the same which is purported to be sent to the concerned person but contains a bar of making any presumption as to the person by whom the message was handed in for transmission or set, when the original has not been proved to be in the handwriting of the alleged sender. This was aptly discussed in *Kishore* vs. *Ganesh.*[63] However, such proof of authorship may be given by circumstantial evidence. For instance in *Mobarak* vs. *State*[64]it was laid down that such proof of authorship can be afforded by the contents of the message in the context off the chain of other correspondence. The Report also discusses various case laws which lay down other instances wherein circumstantial evidence is used to establish such proof viz. *Henkel* vs. *Pape*[65], *R.* vs. *Regan*[66],*Mr. Abba* vs. *Suresh*[67]and *British And American Tel. Co.* vs. *Colson*[68]. However, the presumption under this provision can be rebutted by producing messages actually received by the person who wants to rebut the presumption as laid down in *Manchalal* vs. *Shah Manikchand*[69]. The relevance of Section 62, Explanation (2) and Section 63 (2) with respect to Section 88 has been aptly considered by the report and concurring with the 69th Report, this Report also opines that no amendment is required in this Section. As the provision is clear on its objective and with landmark case laws on the point, this view seems to be adequate.

SECTION 88A

The presumption contained in this provision is on similar lines with that of Section 88, the only difference being the presumption is with regards to electronic messages. This section explains the meaning of the words "addressee" and "originator" which are very important to pinpoint liability when it comes to electronic correspondence. But as such, the law being clear on the point, the

[63] AIR 1954 SC 316.
[64] AIR 1957 SC 857.
[65] LR 6 Ex. 7.
[66] 16 Cox CC 203.
[67] 1984 AIR NOC 131 (Del)
[68] LR 6 Ex. 122.
[69] AIR 1988 Karn. 221.

Report does not suggest any amendment. This seems appropriate except for the fact that as the provision discusses an intrinsic matter pertaining to information technology, it can be amended so as include clear references to the Information Technology Act, 2000.

SECTION 89

This provision read with Section 65(a) and Section 66 is with regard 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 is based on the maxim, '*Omnis praesumuntur contra spoliatoren*' i.e. nobody shall be allowed to take the advantage of his own wrong. Though the Court is initially bound to draw it, it is rebuttable during the proceedings. One essential point to be noted is that this presumption does not extend to the correctness of the contents of the documents. In *Manilal* vs. *Surat Mun* [70]it was held that 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 the production does not arise. The very same principle is discussed in several English Cases such as *Crisp* vs. *Anderson*[71] , *Closmadeuc* vs. *Carrel*[72], *Marine Investment Co.* vs. *Haviside*[73]which are duly considered by the Report. The Report analyses this provision in line with the view of 69th Report and states that no changes are required to be carried out. But if thought upon, it can be inferred that Report does not consider the fact of non-extension of the provision to the correctness of the contents of the documents. If the correctness is not checked and addressed by amending the provision then the corollary legal compliance will hold no value.

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[70] AIR 1978 Guj 193.
[71] 1 Stark 36.
[72] 18 C.B. 36.
[73] L.R.5 HL 624. Also See Raja of *Bobbili* vs. *Inuganti:* 26 I.A. 262 (P) and *Ahmed Raza* vs. *Saiyid Abid*: 43.IA 264 (P-C).

SECTION 90

This provision is with regard to 'presumption as to documents thirty years old'. It states that if any document produced before the Court, is purported or proved to be thirty years old, then the Court can presume that the signature and every such other part of the document which is purported to be in the handwriting of any particular person, is in that person's handwriting. The same presumption is applicable with respect to execution and attestation of a thirty year old document by any particular person. The Section further contains an explanation as to meaning of "proper custody". The Report considers the amendments made under UP Act, 1954 while suggesting changes to this provision and on the same line proposes renumbering Section 90 as Section 90(1) reducing 30 years to 20 years and an addition of subsection (2) which refers 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 Sec. 90(1) was applicable to the original of the certified copy of the registered document[74] followed by insertion of Section 90A which applies with respect to presumption as to execution of certain documents(original registered document or duly certified copy of the same or one certified from a court of record) less than 20 years old provided the original shows on its face the name of the person by whom is purports to have been executed. This Section does not contain any presumption as to handwriting or as to attestation and furthermore, Sec. 90A (2) excludes application of presumption under Sec. 90A (1) to any document which is the basis of a suit of suit or of a defense or is relied upon in the plaint or written statement.

While proposing this amendment attention is drawn towards Section 4 of the Evidence Act, 1938 of England, wherein the period for presumption of ancient documents was reduced to 20 years owing to the difficulty of producing witnesses

[74] *Sardaran* vs.*Sunderlal* AIR 1968 All 363; *Babu Nandan* vs. *Board of Revenue* AIR 1972 All 406.

connected with ancient documents.[75] Emphasizing on the words "may presume", it has been held that 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. The Report also discusses various case laws on important points viz.

In *Haradhan Mahatha* vs. *Dukhu Mahatha*[76]it has been held that if the executants or attesting witness are dead, the Court can consider whether the document can be proved by the procedure in Section 69 rather than raising a presumption under Section 90. In *Kartar Singh* vs. *Collector, Patiala*[77]it was held that entries in revenue records more than 30 years old can be presumed to be authentic. This presumption has been applied to wills by the Privy Council in *Basant* vs. *Brijraj*[78]. The presumption under Section 90 applies only to originals and not to copies as held in *Kalidindi* vs. *Chintalapati*[79] . However, in *Satyapramoda* vs. *Mull Gunnayya*[80], a certified copy of a special vakalatnaama 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. Section 57(5) and Sec 60(2) of the Registration Act is resorted to, in case of certified copies[81]. If the original copies are lost, then only the certified copies may be admissible as evidence.

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[75] Initially, the period was 40 years. In *R vs. Farrington* (1788) 2 T.R.466, it was reduced to 30 years and in 1938 to 20 years. Also refer to Halsbury's Laws of England, 4th Ed., (Vol.17, para 129) wherein it is stated that such ancient documents prove themselves notwithstanding the fact that one of the subscribing witnesses is alive.

[76] AIR 1993 Pat. 129. Also See *D. Ramanatha Gupta* vs. *S. Razack* AIR 1982 Karn. 314 and *State of Karnataka* vs. *Veeranagouda* AIR 1995 Karn. 361, wherein it was held that if the document is not proved to be 30 years old, the presumption cannot be drawn.

[77] 1996 AIHC 1538 (P&H).

[78] AIR 1935 P.C. 132.

[79] AIR 1968 SC 947

[80] AIR 1982 A.P 24. Also See *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.

[81]*Karupanna* vs. *Kolandaswami* AIR 1954 Mad 495*; Kashibhai* vs. *Vinayak* AIR 1956 Bom 65: Admission of execution before the Registrar under Section 60(2) of the Registration Act.

Section 90A of the UP Amendment was considered by the Commission owing a discussion of a landmark case viz. *Ram Jos* vs. *Surendra*[82]wherein 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) singularly applied. While proposing Section 90A, which corresponds to the Section 90A of the UP Amendment Act, the Commission kept in mind the decision given in *Ram Jos case* and a recommendation of the 69th report which proposed a provision like Section 90A (1) (2) of the UP Amendment with slight changes viz. with regard to certified copies 'judicial records' referred to Sec 90A(1), the presumption should be confined to (a) registered document (b) documents adjudged to be genuine in an earlier case.[83] As already discussed, the Report, after taking the above views into consideration recommends a revised Section 90 and Section 90A which seems appropriate as it will enable a better and detailed application.

SECTION 90A

This provision was introduced by Act 21/2000. The Commission recommended that it shall be renumbered as Section 90B.

SECTION 91

This section and Sections 92 to 100 contained in Chapter VI of the Act deal with "exclusion of oral by documentary evidence." Section 91 bearing the heading "Evidence of terms of contracts, grants and other dispositions of property reduced to the form of a document" lays down the following -When the terms of a contract or of a grantor of any other disposition of property have been reduced to the form

[82] AIR 1980 All 385.
[83] Para 41.38 of the 69th LCI Report.

of a document, and when any matter is required by law to be reduced to the form of a docu-ment, —

No evidence can be given in proof of the terms of such contract, grant, etc., except—

(i)The document it-self, or

(ii) Secondary evi-dence of its con-tents, in case in which secondary evidence is ad-missible.

The first exception to this provision is 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 and the second exception is with regard to wills admitted to probate in India may be proved by the probate.[84] Explanation 1 states that 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 which they are contained in more documents than one. Explanation 2 states that where there are more originals than one, only one original needs to be proved and Explanation 3 states that the statement, in any documents whatever, of a fact other than the facts referred to in this section, and does not preclude the admission of oral evidence as to the same fact.

This provision 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).

[84] Probate means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator. Probate of a will is evidence of the contents of the will against all the parties interested there under. Probate is secondary evidence, but it is made admissible by this section.

In such 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 Section 65 and 66 of the Act. 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 is admissible. Section 91 applies as between persons who are parties or even to non-parties unlike section 92.

The Commission in this Report refers to 69th Report and agrees with its recommendation that there is no need of amendment in this Section. Nevertheless, the report discusses this provision at length owing to the fact that Section 91 is complementary to section 92 (as suggested by the 69th Report.) But as no amendments were found to be required the Report instead of elaborately discussing the case laws cites important references such as *Sarkar* and *Vepa Sarathi* and the *Apex Court Judgments* therein[85], which is appropriate as the provision lays down very clear principles.

SECTION 92

This provision deals with 'exclusion of evidence of oral agreement'. Aside from the principal part it contains provisos 1 to 6. In order to understand the recommendations proposed by this Report in consonance with the 69th Report the provision can be understood as follows-

When a transaction has been reduced to writing, either by requirement of law or by agreement of the parties, the writing becomes the exclusive memorial thereof, and no extrinsic evidence is admissible, either to prove the transaction independently or to contradict, vary, add to or subtract from, the terms of the document, though

[85] 15th Ed. 1999 p. 1267 to 1305 and 5th Ed., 2002 at p. 299 respectively.

the contents of such a document may be proved either by primary or secondary evidence.

This rule is based on two grounds:

(1) That to admit inferior evidence when the law requires superior evidence would be to nullify the law; and

(2) That when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves that they intended the writing should be placed beyond the reach of future controversy, bad faith or treacherous memory.

All parole testimony of conversation held between parties, or declarations made by either of them, whether before, or after, or at the time of a contract, will be rejected, because such evidence would tend to substitute a new and different contract for the one actually agreed upon. This section excludes the evidence of oral agreements, and it applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under S. 91; in other words, it is after the document has been produced to prove its terms under S. 91, that the provisions of S. 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. The application of this rule is limited to cases between parties to the instrument or their representatives in interest.

The Commission while analyzing this provision referred the recommendations of 69th Report according to which Sec. 92 is to be split up as Section 92(1) (a) referring to contract, grant or other disposition of property and 92 (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 not constituting a transaction between two or more parties.This recommendation was the outcome of reference to

observations of Supreme Court in *Bai Hira Bai Devi* vs. *Official Assignee, Bombay*[86]wherein the Apex Court opined 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 former and latter part of sec. 92 applies 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,

(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.

The Report agrees with this recommendation proposed by the 69th Report and further recommends exclusion of oral evidence in the case of certain unilateral documents over and above the stated format of the provision in 69th Report, as well as addition of the words- "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". However, instead of bringing it on 92(2), the Report recommended that this should be laid down in new section 92A and suggested the draft of amendment in the same lines. As far as the provisos are concerned the Report does not suggest any amendments for the same, the

[86] AIR 1958 SC 448.

emphasis clearly being on amendment of the main part. The amendments suggested are appropriate, as the bifurcation and elaborate explanations make the application easier.

SECTION 93

This provision deals with exclusion of evidence to explain or amend ambiguous document and states that 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. This section read with Sections 94-98 deal with interpretation of documents. The ambiguity or defect 'on its face' as dealt with by this section is known as 'patent ambiguity' which is distinct from 'latent ambiguity' separately referred to in sections 95, 96 and 97. Extrinsic evidence is not admissible to explain 'patent' ambiguity. Parallel analogy is drawn to Section 29 of the Indian Contract Act, under which agreements the meaning of which is not clear or capable of being clear are void. The case law discussed on this point is *Keshavlal* vs. *Lalbhai*[87] wherein 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.

The Report in line with the 69th report does not propose any amendment to this Section. Though the principle expressed is clear, it would been better if an explanation could be added to the provision by effecting an amendment which clearly differentiates patent and latent ambiguity.

SECTION 94

This provision deals with 'exclusion of evidence against application of document to existing facts' and states that if the language is clear and applies correctly or definitely to facts, no evidence can be allowed to say that the parties intended to

[87] AIR 1958 SC 512.

mean something else. It does not refer to any patent or latent ambiguity. The Report, once again referring to the 69th report on this point does not propose any change in this section which seems to be appropriate as it seeks to favor clarity and helps in deterring frivolous evidence.

SECTION 95

This provision refers to 'evidence as to document in unmeaning reference to existing facts'. This section refers to latent ambiguity of a specific type as referred to under Section 93. It states that 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 specific / peculiar sense. For instance error in survey numbers can be disregarded by relying upon the boundaries of the property covered by a document. The Report further discusses an illustration to clarify the same. Sections 95, 96, and 97 deal with latent ambiguities and 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'* i.e. A false description does not vitiate a document. Section 95 is to be read with Section 97 which refers to 'language' and applies to two sets of facts.

Like that of 69th Report, this Report also does not suggest amending this provision. The Commission should have considered including a few more illustrations by amending the provision.

SECTION 96

This provision also dealing with a latent ambiguity refers to 'evidence as to application of language which can apply to one only of several persons' which is also known as 'interpreting an equivocation'. It states that 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. The Report discusses the Illustrations appended to the provision to explain the same[88] but concurs with the 69th report that this provision does not require amendment.

SECTION 97

It deals with 'evidence as to application of language to one of the two sets of facts, to neither of which the whole correctly applies'. It states that 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 Report in consonance with the 69th Report does not recommend any amendment to this provision.

SECTION 98

This Section refers to evidence as to meaning of illegible characters, etc. and states that 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. The Report, after analyzing the provision as well as the Illustrations concurred with the 69th Report that no amendment is required in this provision.

SECTION 99

This provision deals with the question of who may give the evidence of the agreement varying terms of document. It states that 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

[88] 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).

document. The Report referred to the 69th Report and agreed with the three suggested amendment with a slight modification.

In accordance with the 69th Report, the amendments suggested and the resulting revised amendment draft proposed by this Report can be understood as follows- Firstly, 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 allows evidence to vary. Herein the Commission in this report suggested addition of the words 'contradict, add or subtract' which are used in other sections in this amended provision. Thirdly, so far as the third parties to the document are involved, there must be an exception, like that of in England.[89]An illustration is then appended to the provision for better understanding of the same. The proposed amendment seems appropriate as any more changes would then vitiate the purpose of the section.

SECTION 100

This Section lays down saving of provisions of Indian Succession Act, 1865 relating to construction of wills. Referring to the 69th Report which recommended that the words "Indian Succession Act, 1865(10 of 1865)" be substituted by the words "Indian Succession Act, 1923 (39 of 1925)", and concurring with the same, this Report does not recommend any further changes. This seems appropriate because if the substitution is not suggested then the provision will contain a technical flaw in terms of time-line

SECTION 101

This provision deals with 'burden of proof' and states that whoever desires any court to give any judgment as to any legal right or liability dependent on the

[89] The Commission while drafting the 69th Report 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'.

existence of facts which he asserts, must prove those facts exists. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. In Chapter 45 of the 69th Report, the Commission referred to the broad principle in civil cases with respect to burden of establishing a case, better known as the legal or persuasive burden which never shifts and the evidentiary burden which shifts during the trial from one side to another. Though there may be special statutes requiring the accused to prove certain facts whenever the prosecution has proved certain other facts.

As these principles are well known and basic, the Commission in this report agreed with the 69th Report and did not suggest any changes to the provision which seems appropriate so as to preserve the fundamental principles included therein.

SECTION 102

This Section refers to the question 'On whom the burden of proof lies'. It states that 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. In concurrence with 69th Report that this provision was an elementary provision, the Commission did not see any need to amend this provision. The pros and cons of the same would depend on the onset of judicial precedents.

SECTION 103

This provision refers to 'Burden of proof as to particular fact'. It states that 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. The provision is appended by an Illustration (a). It is not followed by subsequent Illustrations. The Commission does not feel the need to amend this provision but recommends that the letter (a) can be dropped in the illustration which is justified in order to eliminate the minor flaw.

SECTION 104

This provision refers to the 'Burden of proving fact to be proved to make evidence admissible'. It states that 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. Concurring with the 69th Report, the Commission recommended that no change is necessary in Section 104.

SECTION 105

This provision deals with "Burden of proving that case of accused comes within exception". It states that when a person is accused of any offence, then 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 any law defining the offence, is upon such person, and the Court shall presume the absence of such circumstances.

The Report discusses a few important case laws on this point- The settled position as decided by the Apex Court in *Dahyabhai* vs. *State of Gujarat*[90] is that the burden of proof is on the prosecution to prove the guilt of the accused. In *Yogengra Morarji* vs. *State of Gujarat*[91]and in *Periasami* vs. *State of TN*[92]it has been held that under Sec. 105, where the accused pleads any special defenses open to him, the burden lies on the accused and he can prove the defense by 'preponderance of probabilities' and need not prove his defense beyond reasonable doubt. 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'

[90] AIR 1964 SC 1563.
[91] AIR 1980 SC 660.
[92] 1996(6) SCC 457.

The Commission discusses the question of burden of proof in criminal matters where the cases of pleas of 'insanity' have received special consideration and referred to the 69th Report wherein reference was made to the *McNaughten's Case*[93] which led to the formulation of *Mcnaughten Rules.* While the English Law is that the burden to prove insanity would remain on the defense on the basis of balance of probabilities, reference was made in the 69th Report to the law in most States in US, to place the burden on the prosecution to prove "absence of insanity" wherein 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'. Other cases like *Davis* vs. *United States*[94] and *In re Winship*[95]were also referred from which it is evident that the recent trend is in favor of the former. The English Law, as inferred by the Commission continues to remain the same.[96]The 69th Report noticed that Australia followed the balance of probabilities rule.[97] Another important point noted by the 69th Report is that 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.[98]

However, the present report notes that whatever be the position elsewhere, the Indian Law still continues to be in line with the *Dahyabhai's* case and *Periasami's* case, which was further applied to other landmark cases like *State of P* vs. *Gian Chand*[99]. The Commission in this report has justifiably agreed that it is not desirable to make any relaxation so far as the defense of insanity is concerned, and suggested the provision be left as it is.

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[93] (1843) 10 cl. &Fn 200.
[94] (1959) US 469.
[95] (1970) 397 US 358.
[96]*See R* vs. *Carr-Briant* 1943 KB 607*; R* vs. *Brown* (1971) 55 Cr. App. For other case laws refer Phipson, 15th Ed., para 4.33.
[97] Reference to the view of the Australian High Court in *Sodeman* vs. *R (*1936) 55. C.L.R. 192 (228) which was affirmed by the Privy Council in *R* vs. *Sodeman* 1936 (2) All ER 1138 (PC).
[98]R vs. *Grant* (1960) Crl.L. R 424.
[99] 2001 (6) SCC 71. Also see *Laxman* vs. *State of Karnataka.*

SECTION 106

This provision states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The Report discusses several case laws and statutes from Indian as well as other Legal systems. In *Shambhu Nath* vs. *State of Ajmer*[100]the SC pointed out that the section cannot be applied to an accused guilty of murder on the plea that if he has murdered, he has must know more.[101] That would amount to first presuming that he is the murderer. It must be a special case, the word 'especially' is important. Hence the emphasis is on the word 'especially', which indicates that the person who has the knowledge of a fact is expected by the law, to discharge the burden. In *Seniviratne* vs. *R*[102], the Privy Council pointed out that this section does not cast the burden of proving innocence on the accused. The Commission, in this report also discusses the Right to silence of the accused in light of judgment of the European Court – *Murray* vs. *UK*[103]and finds that 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. However, such an inference is permitted 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.[104] The report further analyses the criticism of the procedure followed in UK for requiring the accused and his lawyer to give evidence in light of Indian Law wherein it can violate the guarantee in Art. 20(3) of our Constitution against self-incrimination and refers to the 180th Report on Right to Silence wherein it was recommended that the right to silence cannot be diluted. Hence, after thorough analysis, the Commission agreed with the 69th report and stated that no amendment is required. However, the rights

[100] AIR 1956 SC 404.
[101] SC has further considered this provision in *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.
[102] AIR 1938 PC 289.
[103] 1996 Vol. 22, EHRR 29.
[104] Also see *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 advice of his lawyer.

of the accused being a much debated arena, the Commission could have deliberated a bit more in this area.

SECTION 107

This Section refers to the 'Burden of proving death of person known to be alive within thirty years.' It states that 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. The Commission referring to the 69th Report agreed that there is no need to reduce the period as the longer the period, the lesser the strength of the presumption. Further the 69th report suggested that a proviso should be added to Section 107 as it stands giving discretion to the Court where it appeared to the Court likely that the person concerned was involved in an accident or calamity. The Commission referred to various cases as discussed in the 69th Report, such as *Shankarappa vs. Shivarudrappa*[105]herein the Mysore High Court suggested deletion of Sec. 107 in as much as in an age of aero planes and sputniks, death can take place at an unknown place and under unidentifiable circumstances. The Commission observed[106] that even so, it is difficult for ordinary men not to believe that a person who was earlier alive is not alive.

It is further examined that Section 108 dealing with presumption of death if a person is not heard for in seven years is a proviso to Section 107- If Section 108 is attached to a case, then Section 107 can have no application.[107] Discussing so, the Commission recommended that the proviso as suggested by the 69th Report should be added to Sec. 107 and suggested a draft of amended section. The Commission should have considered appending a few more Illustrations explaining the proviso.

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[105] AIR 1963 Mys. 115.
[106] Para 48.9, 69th LCI Report.
[107] *Sarojini* vs. *Sivabandhan* AIR 1956 T-C 129.

SECTION 108

This provision states that if a man is not heard of for seven years, the burden of proving that he is alive is shifted to the person who affirms it.

The Report examines two questions –

1. As to position at the end of the period of seven years and the other and
2. About the burden of proof within the period of seven years.

After due examination of the case-laws in England and in India such as *In re Phene's Trust*[108] in which it was held 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 subsequently followed by the Privy Council in *Lalchand* vs. *Mahant Rup Ram*[109], and problems regarding succession and re-marriage, in regard to both these situations, the Commission recommended modifying Section 108 in a slightly different manner than that of 69th Report which can be understood as follows-

As far as the first situation is concerned, at the end of seven years, a presumption arises that the person is not alive and the burden shifts then to the party who claims he is alive after expiry of seven years to prove it failing which, it will be presumed that the person died at the expiry of seven years. Further, an explanation covering the second situation was proposed which says that within the period of seven years, there is no presumption of death and it will be for the person who says that a person died on a particular day within the seven years to prove that fact. This proposed draft of Section 108, if accepted will enable clear application of principles embedded therein.

SECTION 108A

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

[108] (1869) LR 5 Ch. 139.
[109] AIR 1926 P.C. 4

which is usually dealt with by the Courts and Commentators as a part of Section. 108. The presumption here is called as 'Presumption of survivorship'. From Indian Case laws like *K.S Agha Mir Mohamad* vs. *Mudassirshah*[110]it is inferred that in India, there has been no presumption of survivorship arising from age or sex, nor was there any legislative enactment. The Report also observes Section 21 of the Hindu Succession Act. 1956 in relation to this provision, which states that until the contrary is proved, it shall be presumed that the younger person survives the elder one, in such situations. It is solely applicable to Hindus, in respect of testamentary or intestate succession. [111] The 69th Report sought to repeal Section 21 and introduce the principle of assumption by means of a new section i.e. Section 108A. However, the Commission, in this report though agreeing with the views of the 69th Report, sought to make some changes in the latter part of the provision concerning the death of husband and wife. The Report discusses an example to clarify the changes that the suggested draft of the amendment of Section 108Aseeks to incorporate viz. 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 (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 an 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.

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[110] AIR 1944 PC 100.

[111] *In Re Mahabir Singh* AIR 1963 Punjab 66.

While suggesting this change the Commission took due consideration of the case laws and statutes discussed in the 69th Report both with respect to Indian Laws and English Law and has given a wholesome and practical view of the same.

SECTION 109

This provision deals with the 'Burden of Proof as to relationship in the case of partners, landlord and tenant, principal and agent'. It is based on the principle of 'continuance' and is related to Illustration (d) of Section 114.[112] It states that 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 presumption drawn herein for principal and agent as well as landlord and tenant is similar to continuance of partnership as provided in Section 256 of the Indian Contract Act, 1872 which later became Section 47 of the Partnership Act, 1932. The Commission agrees with the 69th Report and recommends that this provision be left as it is. This seems to be appropriate as the provisions of the Statutes on which the presumption is based have clear principles embedded in them.

SECTION 110

This section refers to 'Burden of proof as to ownership'. It 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 i.e. possession requires prima facie proof of ownership. The Commission referred to certain related aspects dealt with by the 69th Report including Articles 64 and 65 of the Limitation Act, 1963 dealing with suits for possession, Section 6 of the Specific

[112] Illustration (d): It says that the Court may presume that (d) a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence.

Relief Act through the case of *Nair Service Society* vs. *Alexander*[113], Section 145 of the Criminal Procedure Code and the principle with respect to vacant lands regarding possession being with the deemed owner but finally concurred with the 69th Report that no amendment is required. This view seems appropriate as the section is supported by clear provisions of ancillary statutes.

SECTION 111

This provision deals with proof of good faith in transactions where one party is in relation of active confidence. It states that 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.This is a general provision and is not confined to contracts. There is a related provision in Section 16 of the Indian Contract Act.

The Commission in this Report agreed with the 69th Report that no changes are required in this provision owing to the following reasons-

Firstly, Sec. 111 is general and was applicable to all transactions while Sec. 16 is confined to contracts. Secondly, Section 111 placed the burden of proof on the person who was in a position of confidence whereas sec. 16(3) of the Contract Act defined 'undue influence' and 16(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. This provision being simple, clear and straightforward, this view seems appropriate.

SECTION 111A

This provision was introduced by the Terrorist Affected Areas (Special Courts) Act, 1984 and deals with 'Presumption as to certain offences'. It was not the

[113] AIR 1968 SC 1165. It was held that if a person is dispossessed by the real owner, he may not be able to recover possession under Section 6 of the Specific Relief Act, after the period of 6 months has elapsed.

subject matter of the 69th Report. This presumption is with regard to offences under Section 121, 121-A, 122, 123 and criminal conspiracy or attempt to commit, or abetment of, an offence under Section 122 and 123 of the Indian Penal Code, 1860. Owing to the enactment of the Prevention of Terrorists Act, 2002, the Commission, in this report does not suggest any amendment to the provision which seems justified as the separate legislation incorporates the required deterrent provisions.

SECTION 112

This Section deals with 'Birth during marriage, conclusive proof of legitimacy.' It states that 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.

It lays down the rule of 'conclusive proof' as to legitimacy of a child born in the above mentioned situations. The Commission after continual reference to the 69th Report, suggested a draft amendment of the provision with a few more changes majorly involving exceptions like impotence or sterility, blood tests proving a man is not the father and DNA tests proving a man is not the father. The reference to the 69th Report also involved analysis of important case laws of which the a few significant judgments are- *Kanti Devi* vs. *Poshi Ram*[114]wherein the Court gave priority to social parentage over biological parentage and thereby rejected DNA evidence by observing that though the result of a genuine DNA test is said to be scientifically accurate, it is not enough to escape from the conclusiveness of section 112 of the Evidence Act, 1872 and *Goutam Kundu* vs. *State of West Bengal*,[115]wherein

[114] (2001) 5 SCC 311.
[115] (1993) 3 SCC 418.

while determining the question whether a direction can be given for conducting a DNA test in proceedings for the issuance of a succession certificate, declined the same and held that DNA test is not to be directed as a matter of routine. It was held by the Court that even though the result of a genuine DNA test is said to be scientifically accurate but it is not enough to escape the conclusiveness of section 112 of the Evidence Act. According to the Court if a husband and wife are living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain un-rebuttable. Therefore, in law, this presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities.

The suggested draft amendment can be extracted as follows-

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, either after the marriage was declared nullity, the mother remaining unmarried or after the marriage was avoided by dissolution, the mother remaining unmarried then such a birth shall be conclusive proof that such person is the legitimate child of that man. The exceptions to the main provision are 1) Proof that the parties to the marriage had no access to each other at any time when the child could have been begotten or 2) the otherwise is conclusively established by tests conducted at the expense of the concerned man which include medical tests showing impotence or sterility, blood tests proving a man is not the father and DNA tests proving a man is not the father. The draft further states that these tests can be considered only if the Court is satisfied that they have been conducted in a scientific manner and at least two of the three tests have resulted in the identical verdict that the man is not the father of the child and if the man refuses to undergo the stated tests then it would be deemed that he had waived his defense to any claim of paternity made against him. The draft provision also contains two explanations- the first one

explaining the meaning of DNA Test and the second one explaining the meaning of 'valid marriage.'

If the above recommendation is accepted and incorporated in the Evidence Act, it may be the first Indian legislation to give statutory acceptance to DNA investigations conducted by consent of parties. Furthermore, it will dispel the existing requirement of proof where other than non-access of parties, even DNA investigations are not considered conclusive proof to rebut legitimacy.

SECTION 113

This section deals with 'Proof of cession of territory'. It states that 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[116] 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.
The purpose of Section 113 is to preclude a judicial inquiry by courts into the validity of the acts of the Government.

The Commission referring to the 69th Report discusses certain case laws-
In *Damodar* vs. *Deoram*[117], the Privy Council 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. Hence the PC actually held that inspite of Sec. 113, such notification cannot be conclusive proof and the courts can inquire into the nature and lawfulness of the cession i.e. the section is ultra vires of the powers of the Governor-General. The

[116] 26. Geo 5 Ch.2.
[117] ILR 1 Bom 367 (PC).

question became moot as post-independence as there was no longer any British Territory as held in *Maganbhai* vs. *Union of India*[118]. In concurrence with the 69th Report, the Commission herein agreed that this provision should be deleted which is justified as its presence does not serves no application in the present cases pertaining to the Indian Territory and the Acts of the Government thereof.

SECTION 113- A:

The report has very elaborately analysed this Section which deals with 'Presumption as to abetment of suicide by a married woman'. This Section was introduced by the Criminal Law (Second Amendment) Act [119] where in the Indian Penal Code, the Code of Criminal Procedure, 1973 and the Evidence Act were amended keeping in view the dowry death problems in India. This Section puts forward 2 conditions namely:

(1) Husband or relative subject the woman to cruelty

(2) And woman commits suicide within 7 years of marriage.

If these 2 proofs are adequately established then the court "may" presume after taking into consideration all circumstantial evidence that husband or her relatives abetted her suicide. The report further details about the meaning of 'cruelty' as having same meaning given in Sec 498-A[120] of the Indian Penal Code. It further justifies this position by citing various precedents like *State of Punjab* vs. *Iqbal Singh*[121], *State of Himachal Pradesh* vs. *Nikku Ram*[122] in which it was laid down that in absence of any evidence to prove 'cruelty' by husband or relatives the presumption cannot be raised. The test of 'standard of proof' was very elaborately discussed and laid down in *State of West Bengal* vs. *Orilal Jaiswal*[123] which laid down that the charges

[118] AIR 1969 SC 783.
[119] Act 46 of 1983, Sec 7
[120] Meaning of Cruelty given in Explanation 1(b)-it means any willful conduct to coerce women or her relatives to meet any unlawful demand.
[121] AIR 1991 SC 1532
[122] AIR 1996 SC 67
[123] AIR 1994 SC 1418

have to be proved beyond reasonable doubt depending upon the facts and circumstances of each and every case.

The requirement of proof beyond reasonable doubt does not stand altered even after the introduction of sec. 498-A in the Indian Penal Code and section 113-A in the Evidence Act. So court should also look into all possibilities whether the women was hyper sensitive to ordinary differences, discord in domestic married life and whether any reasonable prudent person in similar circumstances would not have committed suicide. Also the discretionary power of court to raise presumption and it is rebuttable was held in *Prem Das* vs. *State of Himachal Pradesh.*[124]

Current situation: Owing to the Section's adequately representing all the requirements the Commission has suggested no changes in this Section. The main observation of this Report regarding this Sec is that it addresses a very rampant misuse of this Sec that has been witnessed in recent times. It takes into consideration false complaints that have been made by women against husbands even after absence of cruelty to falsely claim compensation and amount for harassment.

Thus the use of the word "may presume" sufficiently provides protection to the husband and their relatives too against the exploitation of the protection granted in this Sec when courts will have to be convinced beyond reasonable doubt about the cruelty and harassment to charge them under this Section. So no amendment recommended in this Sec is justified and well explained.

[124]1996 Crl LJ 951 (HP)

SECTION 113- B:

This Sec deals with 'Presumption as to dowry death'. This Sec was introduced in the Evidence Act by **Dowry Prohibition (Amendment) Act, 1986**[125]43 of 1986 due to the rising incidents of demand of dowry leading to suicide being committed by women under pressure and coercion by husband and relatives.

This Sec put forwards 3 conditions:

(1) Woman has been subjected by such person to cruelty or harassment

(2) Such cruelty should have been or in connection with any demand for dowry

(3) That this must have been soon before her death

When all these conditions are proved the Section provides for a mandatory presumption on part of court by using the word "shall presume" that in such circumstances, such person had caused the dowry death but still the presumption is rebuttable.

The Report further illustrates and mentions a similar sec 304-B in Indian Penal Code and Sec 2 of Dowry Prohibition Act, 1961 in which 'dowry death' and 'dowry'is explained[126]. The need for insertion of section 113-B as also sec. 304B in the Penal Code has been stated in the 91st Report of the Law Commission (1983) on 'Dowry Deaths and Law Reform'. The report explains this position by various case laws like *Shamlal* vs. *State of Haryana.*[127]

Facts: The brief facts of the case were that there were constant disputes and fights between the wife and husband regarding demand of dowry owing to which she was taken by her parents 1.5 years before this incident. Subsequently a Panchayat was called and she was asked to go back and she went back to her in-laws 10-15 days before the incident. But there was nothing to prove that she was subjected to

[125]Inserted by Act 43 of 1986, section 12 (w.e.f. 5-1-1986)

[126]Dowry means any property or valuable security given by one party to the other party at time of marriage.
Dowry death means any death caused by burns or bodily injury by a women subjected to cruelty by husband or his relatives in connection with demand of dowry.

[127]AIR 1997 SC 1830

cruelty and harassment by husband before her death. So it was held by the court that legal presumption under Sec 113-B is not attracted.

Case laws where recourse to Sec 113-B was permissible as cited in the report are *Hemchand* vs. *State of Haryana*[128],*Gurbachan Singh* vs. *Satpal Singh*[129], *Shanti* vs. *State of Haryana*[130]where the facts indicated that wife's death was caused unnaturally by strangulation, maltreatment and allegation that she is carrying an illegitimate child. All these incidents happened just before her death. Thus the courts found these circumstances sufficient enough to raise the legal presumption under this Sec and hold the husband or her relatives guilty of causing 'dowry death'.

The report has also highlighted few differences between Sec 113-A and Sec 113-B like 'may presume' is used in earlier section while 'shall presume' in the latter section. It also justifies the use of 'shall presume' in this Sec because of dowry deaths occurring as a regular feature in our rural and urban society.

Thus the Commission after analysing various case laws and provisions was of the view that this Sec is sufficient and addresses all the issues of dowry death adequately so no amendment is needed which is validly justified.

SECTION 114

This Section explains 9 situations through 9 illustrations (a) to (i) which allows court to consider various facts whenever it has to presume existence of any fact which the court thinks likely to have happened, regard being had to (a) the common course of natural events; (b) human conduct; and(c) public and private business. The Report has also referred to the observation by Sir James Stephen while introducing the Bill of Evidence in 1882[131] that illustrations given are for the

[128]AIR 1995 SC 120
[129]1990 Crl LJ 562 (SC)
[130]1991 Crl LJ 5 1713 (SC)
[131]Proceedings in Council, Gazette of India, 30th March, 1872, supplement, pp 234-35

most part, cases of what in English law are called "presumptions of law": artificial rules as to the effect of evidence by which the court is bound to guide its decisions, subject however, to certain limitations.

The importance of presumption in Evidence is explained by an English Case *U.S.* vs. *Ross*[132]in which it was held that presumptions even if raised are rebuttable and no presumption can be inferred from another presumption. Another landmark English case *Mackowik* vs. *Kansas city St. James & CBR Co*[133]which has been also quoted by Supreme Court in Indian cases like *G. Vasu* vs. *Syed Yaseen*[134] and *Bharat Barrel and Druna Mfg. Co.* vs. *Amin Chand Pyarelal*[135]which has raised an important question of law on presumption that they have no place in the presence of the actual facts disclosed to the jury, or where plaintiff should have known the facts had he exercised ordinary care, as held in many cases'.

The report has after explaining the importance of 'presumption' further explained the words "common course of natural events, human conduct and public and private business". It explains that recourse to such conditions by court will depend on their own common sense of the Judge acquired from experience of worldly and human affairs, tradition or convention.

The Report has then explained the relevancy of facts with the 9 illustrations given in this Section. Ill (a) raises a presumption with regard to possession of stolen goods with thief who has stolen it unless he accounts for its possession. This illustration was explained with the help of case laws *Tulsiram* vs. *State*[136] , *Gulabchand* vs. *State of M.P*[137] and *Earubhadrappa* vs. *State of Karnataka.*[138]

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[132]92. U.S. 281
[133]94. S.W. 256, 262
[134]AIR 1987 AP 139
[135]1999 (3) SCC 35
[136]AIR 1954 SC.1
[137]AIR 1995 SC 1598
[138]AIR 1983 SC 446

In all these cases, the Supreme Court observed that the presumption permitted to be drawn under sec. 114, Ill.(a), has to be read along with time factor. If several months have expired in the interval, the presumption cannot normally apply. Another aspect which was highlighted in this reference was that the burden of proving the guilt of accused does not shift but the evidential burden may shift to the accused. The presumption under this is not confined to only theft but also applies to other offences like breach of trust etc. So by elaborately explaining this illustration the Commission also refers to its 69th Report and suggests that no amendment is required.

Illustration (b): regards to an accomplice's unworthiness of credit, unless corroborated in material particulars. The main discussion has been referred to 69th Report which has pointed out *inconsistency between this illustration and Sec 133* which establishes accomplice as a competent witness on whose allegations accused can be convicted. So the former requires corroboration while the latter does not. So 69th Report suggested that Sec 133 be deleted and Ill(b) should be retained.

Changes Recommended: The Report has thereby brought an important recommendation of bringing the two aspects together at one place and has suggested that the correct position will be to delete Ill(b) and amend Se 133. This recommendation finds it justification in the Commentary of Evidence by Sarkar[139] which also suggest insertion of an explanation to sec. 133 in terms of ill.(b) to sec. 114 would have been of more help in understanding the true meaning of sec. 133. This has also been reiterated in a Supreme Court Judgement *S.C. Bahri* vs. *State of Bihar*[140]which has suggested a similar proposition. It has also recommended to Delete both the paragraphs in the later part of sec. 114 starting with the words "As to illustration (b).

[139] 15th Ed., 1999, page 2076
[140] AIR 1994 S.C. 2420

Current situation: This has been a very useful recommendation but unfortunately the legislators have not been very mindful of such a useful change and have still not made any amendment as per the proposed recommendations.

Illustration (c): This Ill raises a presumption that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration. It has given reference to the position in Sri Lanka which has deleted this illustration and the relevant paragraphs related to this Illustration.

In Indian context it highlights the differences this Illustration bears with Sec 118 of Negotiable Instruments Act which requires that the court 'shall' draw a presumption that every bill of exchange and promissory note has been executed for consideration. So while 118 raises presumption against the maker of bill, Ill(c) raises it against the acceptor.

Changes recommended: So it was recommended by 69th report that Ill(c) be deleted which was accepted by 185th Report too.

*Illustration (d):*It raises a presumption that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence. The Report analyses that the presumption under this section has been applied to 'possession'. Once prior presumption is proved with a person, he is presumed to continue in possession, unless disproved. Case laws by which such position was explained are *A.P. Thakur* vs. *Kamal Singh*[141], *Anangamanian* vs. *Tripura Sundari*[142]in which it was laid down that an inference of the continuity of a thing or state of things

[141]AIR 1966 SC 605
[142]14 I.A. 101

backwards may be drawn under this section though on this point there is no illustration.

Changes recommended: It has mentioned that 69th report hasn't dealt with this illustration but this Report has suggested a recommendation adding 'da' which provided that a thing or state of things which has been shown to be in existence at a point of time, was in existence earlier within a period shorter than within which such things or state of things usually cease to exist".

Current situation: This suggestion too has not been incorporated and implemented in the present Indian Evidence Act, 1882.

Illustration (e): It presumes that judicial and official acts have been regularly performed. This has been explained by giving reference to Sec 80 of Evidence Act which presumes genuineness of records given as evidence. Also Brooms Legal Maxims *omnia praesumuntur rite at solenniter esse acta donec probetur in contrarium* meaning *everything is presumed to be rightly and duly performed until the contrary is shown* is also providing aid to better understand this illustration. It referred to certain cases like *Swadeshi Cotton Mills Co. Ltd.* vs. *State of UP*[143]it was laid down that the absence of a recital as to formation of an opinion in an executive order does not lead to the inference that no such opinion was formed before the order was passed.

Changes recommended: 69th Report does not make any recommendation about this illustration but this Report has suggested a minor suggestion of introducing the words 'or official act' have to be added, after the word 'judicial.

Current situation: Again this recommendation has not been implemented but this recommendation is extremely important to implement keeping in the mind the

[143]AIR 1961 SC 1381

recent Scams and irregularities being done by Government Officials. So such a blanket protection should not be available to such official acts even if it is rebuttable.

Illustration (f): It raises a presumption that the common course of business has been followed in particular cases. This refers to a very general presumption but the latter part of sec. 114 refers to a very specific situation where the question is whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances. It then also refers to Sec 27 of General Clauses Act, 1897which deals with a letter sent by registered post with proper address, prepaid.

Changes recommended: So no change has been recommended in this illustration as this does not specifically deal with registered posts or letters.
Illustration (g): A presumption raised is that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

Changes recommended: In this illustration too by referring to 69th Report no change was recommended.
Similarly no changes or any suggestion of Amendment has been made in *Illustraion (h)* and *Illustration (i).*

SECTION 114-A:

This section is of significance because it deals with 'presumption as to absence of consent in certain prosecutions for rape'. This section has been introduced by Criminal Law (Second Amendment) Act, 1983 and has also been recently mentioned in the latest Criminal Law (Amendment) Act, 2013[144]due to the rising incidents of acquittals of accused in rape cases. The presumption in this case is

[144]No 13 of 2013(w.e.f from 3rd February 2013)

mandatory but is rebuttable. The two most important Supreme Court Judgements which have referred to this Sec are *Gagan Bihari Savant* vs. *State of Orissa*[145]in which this legal presumption was raised and conviction was granted to accused.

However in another recent case of *Dilip* vs. *State of M.P*[146]the legal presumption though raised was failed because the testimony of the prosecutrix had some infirmities and irregularity with medical evidence as well as the evidence of the aunt of the victim to whom she had narrated the incident soon after the commission of the rape, it was difficult to accept that consent was not there.

Changes recommended: In 172nd Report, an amendment was proposed in sec. 376 of the Indian Penal Code defining 'sexual assault'. Consequent changes were proposed to be made in sec. 114A, in the 172nd Report. But the said Report is not yet implemented, so no changes have been proposed by this Report too.

SECTION 114-B:

This Section has been proposed by 113th Report of the Law Commission. The Report observes that this section is not yet included in the Evidence Act, 1872 though recommended in the 113th Report of this Commission. This Sec raises a presumption that whenever any bodily injury or harm is caused to an accused while in custody of a police officer it may be presumed that that police officer has caused such bodily injury. Such presumption should be considered taking into account various conditions like period of custody, statement of medical officer, Magistrate recording evidence etc.

It has been rightly pointed out by this report and has analysed the present scenario that custodial violence leading to injuries, rape or deaths of suspects or accused has become very common in our country and the High Courts and the Supreme Court

[145]1991(3) SCC 562
[146]2001(9) SCC 452

have been passing strictures against the police and awarding compensation to the person concerned or the families of the deceased.

While in police custody, third degree methods are employed to extract information or confession. In various judgements Supreme Court has diligently dealt with such incidents and has delivered justice to the victims suffering. Such landmark cases which have been analysed in this report are *Sheela Barse vs. State of Maharashtra.*[147] Torture and ill-treatment (including rape) in police lock-ups, especially in the case of women came up for consideration in *Sheela Barse* vs. *State of Maharashtra* in which Torture and ill-treatment (including rape) in police lock-ups, especially in the case of women came up for consideration. In view of this Supreme Court gave several guidelines regarding need for presence of lady police officers, excluding other male accused, grant of legal aid and allowing the detainee to call a friend or a relative. Judicial officers have to make surprise inspections. In *Nilabati Behara* vs. *State of Orissa*[148], it was held that the safety of persons in custody has to be protected and the wrongdoer is accountable if a person is deprived of his life while in custody. There can be no plea of sovereign immunity which was the main ruling given in this landmark case.

One of the most important and landmark cases of the Supreme Court is *D.K. Basu vs. State of WB*[149] referred to custodial violence as something which breaches basic human rights and Art. 21 of the Constitution of India. It also laid down that failure to observe the directives could lead to departmental action as well as contempt and in regard to contempt, proceedings could be initiated in the High Courts. The requirements of Art. 21 apply to police as well as para-military forces and the Revenue intelligence or other governmental agencies.

[147]AIR 1983 SC 378
[148]AIR 1993 SC 1960
[149]AIR 1997 SC 610

In yet another important case of *State of MP* vs. *Shyam Sunder Trivedi*[150] reference was made by the Supreme Court to the 113th Report of the Law Commission in which it was ruled that whoever is responsible for custodial torture it will be punishable with sentence up to 10 years of imprisonment but convictions, in such cases, are fewer because of the difficulties in proving evidence.

Changes recommended: It has been observed sadly that even though the 113th Report was submitted to the Government on 29.7.1985 and even after the observations of the Supreme Court in the year 1995, the recommended provision of sec. 114-B has not yet been incorporated in the Evidence Act. It is to be seen that the section as proposed only used the words 'may presume' and not the words 'shall presume'. Thus this report also suggests that 114-B be inserted in the Indian Evidence Act, 1882. It has recommended some minor changes in the proposed section like insertion of another subsection (3) be added below the proposed sec. 114B that 'police officer' in this section means, officers belonging to police, the para-military forces and the officers of Revenue Department such as those of the Customs, Excise and the officers under Revenue Intelligence.

Also it suggests that the words 'or attempted to record' must be deleted at the end of sec. 114B(2)(d) and must be brought after the word 'recorded' in the same sub-clause and before the words 'the victim's statement'. Thus keeping in view the dehumanising aspect of the crime it is being hoped that the Government and legislature would give serious thought to the recommendation of the Law Commission and bring about appropriate changes in the law.

SECTION 115

The Report has elaborately analysed this Section which deals with a very important principle of law called 'Promissory estoppel'. This section briefly enumerates that

[150] 1995(4) SCC 262

whenever any person has by his act, declaration etc. has intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

The Report has then referred to U.K laws for describing several types of estoppels namely-estoppel by deed, estoppel by record or judgment, estoppel by conduct. But in our system it is only of one kind, estoppel by conduct. The report further refers to various case laws to explain this doctrine. The principle was first laid down in the *High Trees case viz. Central London Property Trust Ltd.* vs. *High Trees House Ltd*[151]. Indian Cases which have widely covered this principle are *State of HP* vs. *Ganesh Wood Products*[152], *STO* vs. *Shree Durga Mills*[153], *State of Rajasthan* vs. *Mahaveer Oil Industries*[154].

With regard to application of this Sec to 'minors' 69th report has made an observation that the the word also means and includes minor within its ambit. In England this Sec has wide application as the word person also means and includes a married woman under coverture, or a trustee in bankruptcy or to a Corporation in regard to acts which are ultra-virus.

Changes recommended: So in order to clear the position regarding minors a proposal was made for adding an Explanation to include "minor or other persons under disability".

[151]1947 (1) KB 130.
[152]AIR 1996 SC 149
[153]AIR 1998 SC 591
[154]AIR 1999 SC 2302

The Explanation so proposed to be added read as follows: "Explanation: This section applies to a minor or other person under disability; but nothing in this section shall affect any provision of law whereby the minor or other person under disability becomes incompetent to incur a particular liability." But the Current Report has not considered it correct to introduce such explanation where its first part which says that this section applies to a minor or other person under disability is not necessary. It has even considered that it gives a wrong notion about the proposed Explanation. Therefore the 185th Report has also recommended that the second part also requires some re-drafting. They have thus recommended that instead of an Explanation, a proviso be added below sec. 115 as follows:

"Provided that nothing contained in this section shall apply to minors or other persons under disability for the purpose of enforcing any liability arising out of a representation made by such persons, where a contract entered into by such persons incurring a like liability would have been null and void." The report has done a brilliant job in critically analysing such Explanation and thereafter proposing a Proviso instead of an Explanation which now correctly explains and justifies the position of minors with regard to application of principle of promissory estoppels.

SECTION 116

This section refers to 'Estoppel of tenant and of licensee of persons in possession'. This section deals with estoppel against a tenant/licensee that they will not deny the title of the real owner during the continuance of their tenancy. The lease/licence may or may not be granted by real owner having a title but once a person derives his right to possession from either of these persons, he is estopped from denying the right of the grantor to grant the lease or licence.

An important point of law that was considered by this Report was the question of limiting the estoppel 'during the continuance of the tenancy; does this mean that once a notice of termination is given under sec. 106 of the Transfer of Property

Act, the tenant is free to dispute the landlord's title? This was answered by referring to an old case of *Md Mujibur* vs. *Shk IssbBilas vs. Desraj*[155] and 69th Report which suggested the position that even after the words 'during the continuance of the tenancy', the words 'or at any time after termination of the tenancy' must be added. But one more point that was considered was that if a tenant has a case that the lease was vitiated by undue influence, fraud or coercion or mistake, the ban under this section, does not apply. estoppel should still apply to a person already in possession. This was explained with the help of an illustration which is as follows:
If a person becomes a tenant of A first and later enters into a tenancy agreement with B, even so, the estoppel applies against both A and B, whether A or B was the owner or even if A or B were not the real owners. Having obtained possession from A under the first lease, he cannot be allowed to get out of the estoppel by executing a tenancy agreement with B. If A files a suit, the tenant is estopped from disputing A's title and cannot say that it was B who put him later in possession.

Changes recommended: This report has agreed with the recommendation of 69th report with slight modification that the words "or the person claiming through such tenant" should also be added after the proposed words "if the tenant". Another important Recommendation which was elaborately discussed in 69th Report was cases of 'attornment'. This aspect has been dealt with elaborately in the 69th Report (paras 58.20 to 58.29). The 69th report recommended insertion of new sub-section (2) for dealing with the issue of attornment. But this report did not deal with cases arising under Rent Acts where the tenant in possession becomes a statutory tenant and is permitted a denial of title provided it is *bona fide*.
So the following recommended and altered Sec 116 as proposed by this report is as follows:

[155]AIR 1915 PC 96

Estoppel of tenant and of licensee of person in possession

116 (1). No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy *or any time thereafter*, if the tenant or the person claiming through such tenant, continuous in possession after termination of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such property; and no person who came upon any immoveable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

(3) Where a tenant in possession of immoveable property is attorned to another, the tenant or any person claiming through him shall not, during the continuance of the tenancy, or at any time thereafter if the tenant or the person claiming through him continues in possession after termination of the tenancy, be permitted to deny that the person to whom the tenant was attorned had, on the date of the attornment, title to such immoveable property; but nothing in this sub-section shall preclude the tenant or the person claiming through him from producing evidence to the effect that the attornment was made under mistake or was procured by fraud."

SECTION 117

This section deals with 'Estoppel of acceptor of bill of exchange, bailee, or licensee. This Sec provides that no acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill nor any bailee or licnesee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence. Two Explanations that are appended to such Section are:

Explanation (1) - The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2) - If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

Changes recommended: The 69th Report, (in para 59.5) after referring to 11th Report of the Commission recommended that the portion of section 117 which relates to the acceptor of a bill of exchange, be transferred to the Negotiable Instruments Act as sec. 104. But, in the 69th Report no positive recommendation for such transfer was made. Therefore in the present Report it is not considered necessary to shift the first part of sec. 117 to the Negotiable Instruments Act. For that matter, there are presumptions relating to landlord and tenant and other relationships of bailees, etc. contained in the Evidence Act and if there is no need to transfer them to the Transfer of Property Act or the Contract Act, there is equally no need to transfer the first part of sec. 117 to the Negotiable Instrument Act

SECTION 118

This Sec deals with the subject 'who may testify'. It provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

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

A significant question of considering child witnesses as competent witness was discussed in *Rameshwar* vs. *State of Rajasthan*[156] in which it was held that far as

[156]AIR 1952 SC 54

evidence of children is concerned the ordinary rule is that sec 118 requires corroboration but it is not to be treated as a rigid rule.

The report has referred to the position in England regarding competency of child witnesses. It provides that the requirement of corroboration of a child witness has been abolished by sec. 34(2) of the Criminal Justice Act, 1988. The unsworn testimony of a child six years old was accepted to convict a person. In the 69th Report, this section is dealt with in paras 60.1 to 60.9 but none of the paras states that any amendment is necessary.

In England, the requirement of corroboration of a child witness has been abolished by sec. 34(2) of the Criminal Justice Act, 1988. The unsworn testimony of a child six years old was accepted to convict a person in R vs. Z: 1990(2) All E.R. 971 (A), holding that the child was a competent witness. Another important point referred was sec. 342A in the Code of Criminal Procedure which provides that an accused has the option to examine himself as a witness for defence and in such case he has to take oath. He can then be cross-examined.

Changes recommended: Reference has been made to 69th Report which has not made any substantial changes. So even this Report has not recommended any change in this Section and hold it to be self-sufficient.

SECTION 119

This section deals with 'dumb witnesses' and provides that whoever is unable to speak may give his evidence in a manner in which he can make it intelligible, but such writing must be written and the signs made in open Court and the evidence so given shall be deemed to be oral evidence. The report points out that the words 'unable to speak' can include deaf or dumb persons or persons or signs of a dying woman or also a body corporate is unable to speak.

A reference has been made to the position of dumb witness in UK and USA in 69th Report that in the case of a deaf or dumb witness, an interpreter can be employed. But such a provision was absent in Indian law but no such difficulty has been caused by its absence. But in a ruling after 1977, in *Kumbhar* vs. *State*[157], the Court held, in view of the words "by writing or signs", that the signs must be of witness and not of the interpreter. But, an opposite view was taken in *Kadungothi Alavi vs. State of Kerala* 1982 Crl L.J. 94 (Ker) that, in the case of a deaf and dumb person, her ideas could be conveyed to the Court by an expert.

Changes recommended: So in view of the conflicting opinions and the prevailing position in UK and USA, it was proposed in 69th Report that an Explanation is necessary which was also similarly accepted and agreed in this report too and which is as follows: "Explanation: The interpretation of the signs of a person unable to speak, by an expert, shall be treated as oral evidence of the person who made the signs."

SECTION 120

This section deals with the evidence of wives or husbands in civil and criminal cases. It provides that in both civil and criminal proceedings both the husband or wife of any party to the suit, shall be competent witnesses. It has been diligently observed that as far as civil proceedings are concerned, there is no need to make any amendment in this section but when it comes to criminal proceedings against a spouse, the need to balance family harmony and the quest for truth has to be balanced.

So such balance which was proposed to be achieved was made by referring to the position of England Under their Criminal Evidence Act, 1898. In 1977, when the 69th Report was prepared, the law in England was that the parties and their

[157]AIR 1966 Gujarat 101

spouses are (subject to privilege) competent and compellable in civil cases. But in criminal cases the accused is competent, but not compellable. The spouse is not competent or compellable except in a few cases. So in 69th Report it was stated that in criminal cases the spouse should not be compelled to give evidence against the other spouse and, a proviso was drafted for addition below sec. 120. Position after 1977 was also thoroughly observed by referring to position in different countries. Such as in England in 1994under their Criminal Justice and Public Order Act and by the Youth Justice and Criminal Evidence Act, 1999 which permitted that adverse inference can be drawn against an accused if he does not answer certain questions. But this was not accepted by the Australian Law Commission. Then Another Report which was referred was 180th Report on 'Right of Silence' which stated that having regard to Art. 20(3) of the Constitution of India, it guaranteed fundamental right of an accused against self-incrimination. The Commission did not think it desirable to follow the alternative suggested by the Australian Law Commission. That is still the position so far as the accused is concerned.

Changes recommended: The Report held that that they do not want to enact the long winding provision in the English Act of 1884 and 1999 and recommended a proviso to be added below sec 120 which is as follows: "Provided that the spouse of the accused in a criminal prosecution shall not be compelled to give evidence in such prosecution except to prove the fact of marriage unless –

(a) such spouse and the accused shall both consent, or

(b) such spouse is the complainant or is the person at whose instance the first information of the offence was recorded, or

(c) the accused is charged with an offence against such spouse or a child of the accused or a child of the spouse, or a child to whom the accused or such spouse stands in the position of a parent."

SECTION 121

The above stated section gives immunity to the judges and the magistrates for giving evidences. The section states that no judge or magistrate will be compelled to answer any question as to his own conduct in the court in the capacity of judge or magistrate or regarding any information which came to their knowledge in court in that capacity except in the cases where there has been an order by a court not subordinate to that court. However the exception to this general rule being that the judge and magistrate can be examined in matters that occurred in his presence whilst he was so acting.

There are three illustrations which highlight below this section which highlights this point. The first amongst them states a situation where there is an allegation that the deposition was taken improperly, in which case the magistrate cannot be asked to give an answer to that except on the order of a superior court. However the third illustration talks about the exception and says that if there was an attempt to murder in the court during trial then the judge can be asked to give his deposition without the permission of the superior court. It was held in *Banke v. Mahadeo*[158] that while granting the permission or order for compelling a judge or magistrate to depose the superior court may call for a report from that officer.

It was observed by the commission that the protection also extended to arbitrators however it was much narrower in scope. According to Phipson Arbitrators have to give evidence as to what happened in the arbitration but they cannot be asked questions about their reasons for the award. Some of the cases which reiterate this are: (Buccleugh vs. MB Works, (1872) L.R. 5 H.L. 418; Ward vs. Shell Mex B.P 1951(2) All ER 904; Falkingham vs. Victoria Rly. Commissioner: 1900 A.C. 452; Reccher vs. North British Co. 1915(3) KB 277; Leiserach vs. Schalit: 1934(2) KB 353). However, Section 3 of the evidence act does not include arbitrators. In *Amir*

[158]AIR 1953 All 97

Begam vs. Badruddin[159]: on the lines of the English position it was stated by Lord Parmar that an arbitrator is bound to give evidence when there is a charge of dishonesty or partiality against him however it should be seen that the evidence is not used for scrutinising the decision of the arbitrator. The same thing was repeated in many cases like (*Bourgeois vs. Weddell & Co.*[160]) and (*Narayanan vs. Devaki*:[161]). Hence it is clear from the cases that so far as arbitrators are concerned they don't have the same immunity as judges and magistrates. They can be called to give evidence in questions of their dishonesty and impartiality but they cannot be asked to give evidence when the question is regarding the decision they took. The Commission felt that there is no need for the change in the section to include arbitrators as there cannot be a straitjacket rule for them. They did not recommend any changes in this regard.

Also a recent English decision was also discussed by the commission namely *Warren v. Warren* Warrenvs. Warren[162]) where it was held that there is no distinction between high court and other jusges with respect to this section. It applies to all judges. The commission agreed with this view. A Sessions Judge while trying a case, cannot compel a Magistrate to answer questions as to his own conduct in Court as such magistrate, except under the special order of the Court to which he is subject (*R vs. Chidda Khan:*[163]*);* (*D.J. Vaghelavs. KantibhaiJethabhai*: [164]

Changes recommended: The Commission also looked into some other aspects and felt there was no need for change in this section.

[159]ILR 36 All 336 (PC)
[160]1924.1.KB 539
[161]AIR 1945 MAD 230
[162]: 1996(4) All ER 664 (CA
[163]ILR 3 All 573
[164]1985 Crl. LJ 974 (Guj).

SECTION 122

This section deals with the protection given to spouses to not give evidence in respect of any communication done during the time when the marriage was subsisting. The section briefly states that "No person shall be compelled to disclose any information that he communicated with his spouse during the marriage unless the other person has given his consent for the same". Also the same law will not apply in the cases of suits between married persons, or in cases where one married person is being prosecuted for crime done against the other.

The commission noted that the section does not speak about the communication of the witness spouse to the other spouse, whereas in the New Jersey rules of evidence they have included the communications made by the witness spouse to the other spouse. Similarly American Law Institute's model code of evidence has also included communication between spouses.

If the reason for including this section is to maintain family harmony then this section must be amended to include the communication done by the witness spouse. Another question that arose before the Commission was whether if a third party overheard the communication between spouses whether that can be given the privilege under section 122 or not. It was held by the House of Lord in *Rumping v. D.P.P* [165]that the third party will not be entitled to the privilege under section 122. The Supreme Court in *M.C. Verghese v. TT Ponnan*[166] has accepted the above judgment. However the Commission in its 69th report was of the view that the third party overhearing a communication should also be brought under section 122. To substantiate their point they have referred to the speeches of Viscount Radcliff and referred to the principle of conjugal confidence for that. Sarkar[167] has pointed out that under English and American law also the third party is not

[165]1962(3) All ER 256
[166]AIR 1970 SC 1876
[167]15th Ed., 1999, page 1986

entitled to the benefit. This was reiterated in the cases of *(R vs. Smithies 5. C & P. 332: R vs. Simmons: 6 C & p. 540; State Bank vs. Hutchinson: 62 Kan 9 (Am).*

The Commission also discussed two cases *Ram Bharosey v. State*[168] in which the wife deposed against the husband for a crime he had committed. The Supreme Court held that this section will not be attracted because the evidence is not regarding any communication between them but rather about general conduct of the person.
The Commission made some serious contemplation with regard to the proposal made in the 69th report regarding the third party overhearing the communication between the spouses should be brought under section 122. The current Commission was of the opposite view holding that the third parties evidence should not be excluded. They also cited that now a days police can hear many telephonic conversations. Why their evidences should be excluded under section 122. Hence the Commission disagreed with the view of the 69th report. They also pointed out that between 1977 and 2002 there have been huge changes in technology and hence there is a need for change in the Evidence Act. The third change that the 69th report suggested was the inclusion of a third exception that is the crime committed by one person against the child of the other spouse. After perusal of all these points the commission suggested the following section 122 instead of the current section.

Changes recommended:

Communication during marriage

"122 (1). No person who is or has been married, shall be compelled to disclose any communication made during marriage, between that person and any person to whom that person is or has been married; nor shall that person be permitted to disclose any such communication, unless the person to whom that person is or has

[168]AIR 1954 SC 704

been married or that person`s representative in interest, consents, or unless the proceedings are of the nature specified in sub section (3).

(2) Any person other than the person referred to in sub-section (1) who has overheard or has acquired possession of or has intercepted, in accordance with law, any communication as is referred to in subsection (1), may be permitted to disclose any such communication without the consent of the spouses or their representatives in interest.

(3) The proceedings referred to in sub section (1) are-

(a) proceedings between married persons;

(b) proceedings in which one married person is prosecuted for any offence committed against the other;

(c) proceedings in which one married person is the complainant or is the person at whose instance the first information of the offence was recorded, and the other married person is the accused;

(d) proceedings in which one married person is prosecuted for an offence committed against a child of the other person or a child of the first mentioned person or a child to whom either of them stands in the position of a parent."

SECTIONS 123, 124 & 162

Sections 123,124 and 162 are interrelated and hence are discussed together. Section 123 deals with the privilege in regards to the affairs of state while section 124 deals with the privilege in regards to official communication while section 162 is a generic section regarding the production of documents in the court.

Section 123 states that no person will be allowed to give unpublished information in regard to the affairs of the state except with the prior consent of the head of the department

Section 124 states that any public servant will not be compelled to disclose any information which was given to him in official confidence when he feels that the public interest will suffer because of that.

Both of these sections have to read along with section 162 which states that any person who is in possession of any document to be produced as evidence shall bring it to the court notwithstanding any objection which may be given. The validity of the objection will be decided by the court itself. The second part of the section states that the court will inspect the documents unless it refers to matters of state or take any evidence which determines its admissibility. It is to be noted that Order 16 Rule 6 of the Code of Civil Procedure 1908 and sec 91(2) of the code of criminal Procedure code refer to the procedure to be followed for summoning of documents.

The 88th Law Commission Report has also been discussed which made several recommendation in connection with sections 123,124 and 162. One of the most important issues debated was as to how the court would decide without looking into the documents that the affairs were indeed in regards to the affairs of the state. The Commission also pondered over the fact whether the court should have power to see the documents to ascertain that the documents are indeed in regard to the affairs of the state. The second part of section 164 puts some restrictions in cases of documents relating to affairs of the state. In some judgments there has been made a distinction between some documents which should be deemed to be documents relating to the affairs of the state and in which there is no requirement of further inquiry.

The law which precluded court inspection was laid out in Duncan v. Cammell Laird[169] and was followed in India. That law was reversed in *Conway v. Rimmer*[170].

[169]1942 A.C. 624
[170]1968 A.C. 910

The commission referred to the history of case laws in England and its impact on the position now. In *Duncan vs. Cammell Laird* 1942 AC 624, the House of Lords held that the Court could not refuse the privilege if it was made in the proper form. However this position was reversed in the case of *Glasgow Corporation vs. Central Land Board*[171] stating that the court had inherent power to overrule crown's decision and the court can inspect the documents. In 1968 case of *Conway vs. Rimmer*: 1968 AC 910 the same position was reiterated. They also discussed two classes of public interest which is as follows: "It is universally recognized that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done." He further observed: "…Courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice." The following position was reiterated in the case of *Rogers vs. Home Secretary:*[172]. It was also held that the seal of confidentiality could not be broken if that would endanger public interest. While disclosure is the normal rule, exclusion can be allowed only if it is felt that exclusion would serve public interest better than if disclosure was ordered. It was held in *Ex parte Wiley*[173]that the rubber stamp approach should not be resorted to whenever the plea of public interest is raised.

In India there are two important cases Sukhdev's Case[174] and the in *S.P. Gupta's case:*[175]. In the Sukhdev's case a judicial officer was removed from his post. In the court the report of the service commission was asked to be produced. The

[171]1956 SC 1 (HL)
[172]1973 AC 388
[173]1995(1) AC 274 (HL)
[174]AIR 1961 SC 493
[175]1981. Suppl. SCC 87

Supreme Court treated the report to be a part of the Minutes of the Minister and held it to be protected under section 123. But in *S.P. Gupta* case, the Supreme Court reversed this position and held that openness of the government functionary was the basis of democracy. The Court agreed that public interest should be protected but it does not mean that whenever the question of public interest is raised the Court should fold its hands. There should be a balancing act. The Court should generally be allowed to peruse the document to ascertain whether the document relates to the affairs of the state. The Judge also stated that there are some documents which are protected and these documents include: "It is not necessary for us for the purpose of this case to consider what documents legitimately belongs to this class so as to be entitled to immunity from disclosure, irrespective of what they contain. But, it does appear that cabinet papers, minutes of discussions of heads of 332 departments and high level documents relating to the inner working of the government machine or concerned with the framing of government policies belong to this class which in the public interest must be regarded as protected against disclosure."

The SC also held that even these documents don't have absolute immunity as they can also be perused by the court. Judge Bhagwati J further observed that the court will have residual power to determine whether the documents are relating to the affairs of the state or not. The Commission also agreed with the views of the SC in the case and held that there should be a balance of the public interest and the injury to the administration of justice should not be hampered.

Some other aspects relating to these sections were also discussed as follows:-

1. It was found that if courts below High court reject the immunity then it would amount to leakage of various documents into the public domain which may not be good. Hence an appeal against this may be allowed and till the appeal is not satisfied the information should not be leaked into the public domain.

2. Another thing is that the power of reference by the lower court to the higher court is not available to the criminal court. This should be changed and there should be a clause in section 123 which would enable such reference.

3. Also there is some overlap in section 123 and 124 as the affairs of the state may also be the official communication. For removing this overlap the commission has recommended a change to section 124 saying that it excludes those official communications which are not affairs of the state.

4. The 69th report suggested that the Section 123 should relate to record deposition while section 124 relates to oral communication. The commission however did not agree with this.

5. To make this clear, we recommend adding a separate Explanation in both sec. 123 and a separate provision in sec.124. In sec.124, it is further to be made clear by subsection (3) that the communication to a public officer, if it relates to affairs of State, will fall only under sec.123.

Changes recommended:

After considering the 69th report and the 88th report and the position in India and England the Law Commission recommended the sections to changed to this:

Evidence as to Affairs of State

"123 (1) Save as otherwise provided in this section, ,-

(a) no person shall give evidence derived from unpublished official records relating to any affairs of State; or

(b) no public officer shall be compelled to disclose any oral, written or electronic communication relating to any affairs of the State made to him in official confidence, unless the officer at the head of the department concerned, has given permission for giving such evidence.

Explanation:- For the purposes of clause (a), the expression 'evidence derived from unpublished official records' includes the oral evidence derived from such records and the record itself.

(2) The officer at the head of the department concerned referred to in sub-section (1), shall not withhold such permission, unless he is satisfied that the giving of such evidence would be injurious to the public interest; and where he withholds such permission, he shall file an affidavit in the Court, raising an objection and such objection shall contain a statement to that effect and his reasons therefor.

(3) Where the objection referred to in sub-section (2) is raised in a Court subordinate to the High Court, whether in a civil or criminal proceeding, the said Court, notwithstanding anything in any other law for the time being in force, shall have power and shall refer the question as to the validity of such objection to the High Court for its decision.

(4) The High Court, on a reference under sub-section (3), shall decide upon the validity of the said objection, in accordance with the provisions of sub sections (5) to (7) and transmit a copy of the judgment to the Court which made the reference to enable the said Court to proceed further in accordance with the Judgment.

(5) Where the High Court, on a reference under sub-section (3) is of the opinion that the affidavit filed under sub section (2) does not state the facts or the reasons fully, the High Court may require such officers or, in appropriate cases, the Minister concerned with the subject, to file a further affidavit on the subject.

(6) The High Court, after considering the affidavit or further affidavit as the case may be, and if it thinks fit, after examining such officer or, in appropriate cases, the Minister, orally, shall

(a) issue summons for the production of the unpublished records in chambers; and

(b) inspect the records in chambers, and

(c) determine the question whether the giving of such evidence would or would not be injurious to the public interest, recording its reasons therefor.

(7) Where the High Court determines under clause (c) of subsection (6) that the giving of such evidence would not be injurious to the public interest and rejects the objection raised under sub-section (2), the provisions of sub section (1) shall not apply to such evidence and such evidence shall be received.

(8) Where the objection referred to in sub section (2) is raised in the High Court or in the Supreme Court, whether in a civil or criminal proceeding, the said Court shall decide the validity of such objection in accordance with the procedure in sub sections (5) to (7), as if the validity of the said objection had been referred to it."

Section 162: "Production of documents"

It was suggested that in the second paragraph of section 162 the words 'unless it refers to matters of state 'should be removed.

After perusing some case laws and the 69th and 88th Law Commission report the Commission suggested the new section 124 to be as such

Official Communications

124. (1) Subject to the provisions of section 123, no public officer shall be compelled to disclose any oral, written or electronic communication made to him in official confidence, when the Court considers that public interest would suffer by such disclosure.

(2) Where a public officer who is a witness is asked a question which might require the disclosure of any such communication, and he objects to answering the question on the ground that public interest would suffer by its disclosure, the Court shall, before rejecting his objection, ascertain from him, in chambers, the nature of his objection and reasons therefor."

SECTION 125

The section refers to the protection of the informants name and source of information. It says that any magistrate or police officer shall not be compelled to give their source of information and also the revenue officer will be compelled to give the information in regards to the commission of a revenue offence. The commission referred to the 69th report which suggested a change to this section. The commission felt that it would be difficult for the plaintiff to produce evidence if the plaintiff did not know about the name of the informant. It will not be good for cases where the information is false and given for malicious reasons. The commission thus suggested a relaxation by giving the discretion to the court to see if there is no harm in disclosing the informant's name. The commission refered to the English and Indian Law. They saw that in *the Thomas Hardy's case,* [176] it was stated that the name of the informant should not be unnecessarily disclosed however if there is a need to disclose the name for justice sake then it should be so done. Phipson has reiterated the same thing in the case *R vs. Hardy*[177]. The Canadian SC also discussed the question of informant's anonymity under the Canadian charter of rights. However they have also suggested a change to see whether the informant's identification is necessary to prove innocence in which case it will be revealed. The Commission also referred to various Indian case laws.

The commission concluded that this position has changed and it is not good for malicious cases and hence the following exception has to be added. It recommended an exception which stated that the court will have discretion to see that the disclosure is not a material fact or a fact in issue in which the liability of the party depends in which case the name will be disclosed.

[176]1794) 24
[177](1794) 24 St. Tr. 199

SECTIONS 126, 127, 128, 129

Section 126 states that no barrister attorney or pleader shall be allowed to disclose any information with regards to any communication that happened between him and the client or any document that was given by the client to him except with the prior permission of his client. But there are two exceptions to this:- (1) When the communication is for illegal purpose. (2) Any fact showing that an illegal act has been done since his employment. Section 127 states that the provisions of section 126 shall also apply to the servants , pleaders and interpreters of the lawyers. Section 128 states that this immunity is not waived when the party to a suit gives the evidence himself. Section 129 states that no one shall be compelled to give evidence of the communications between him and his lawyer unless he volunteers himself as the witness in which case he will be compelled to disclose any such communication related to his evidence and no other. The 69th report has suggested that the word legal practitioner should be substituted for the words barrister , pleader, attorney and vakil. An explanation can be added explaining legal practitioner. The word employed as used in sec 126 should also be removed.

Except for these two changes as suggested by the 69th report the commission also looked into whether there was a need to give a discretionary power to the court to decide whether there is a need to give immunity or not . The commission looked in various case laws of England and India and decided that there was no need for the same.

Changes recommended: The commission hence incorporated the two minor changes as suggested by the 69th report.

SECTION 130

The section states that any witness who is not a party will not be compelled to produce the title deed of the property if the production of the document will incriminate him unless he has agreed in writing with the person who seeks such

production. This section should be read with sec. 131 and 132. Section 131 prohibits the production of a document in the possession of a person, which any other person would be entitled to require producing if they were in his possession. Under sec. 132 a witness need not answer a question which incriminates him. In England this rule has been removed. The 69th report also suggested its removal as now all title deeds are compulsorily registrable and hence there is now no need of this section. However the commission has observed that not all documents are registrable. Like the will which is not compulsorily registrable.

Changes recommended:

The commission therefore held that there is no need to change the section except for a minor change of substitution of "unless such witness has agreed in writing with the party so requiring him or with a person claiming through such party." Instead of, "unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims"

SECTION 131

The section states that no person who is in possession of any document shall be compelled to produce them as evidence if the person whose document it is entitled to refuse to produce that document.

Changes recommended: The commission has proposed few minor changes like addition of temporary in front of possession and 'any other person' to be replaced by 'another'.

SECTION 132

The section refers to the subject of witness not to be excused from answering on ground that answer will criminate, in any civil or criminal proceeding or on the ground of exposure, direct or indirect, to penalty or forfeiture of any kind. The

principle here is that the right against self-incrimination is available only to a person who is 'accused of' an 'offence' and not to a witness except when the witness is an accused as provided for in the proviso. In that case his answer which incriminated him cannot be used against him either for arrest, prosecution or in any criminal proceeding. The only exception is that such matter will be incriminating against him in a trial of perjury against him. The protection of Article 20(3) of the Constitution of India against self-incrimination does not apply unless the person is one accused of an offence in the criminal case. After 1971, there are two, one in 1980 and another in 1989. These decisions concern various aspects of sec. 132 and also interpret Art. 20(3) of the Constitution of India. The questions with regard to the word "Compelled" used in proviso to Section 132 have arisen which also invokes Article 20 (3). The report discusses *Laxmipat Choraria v. State of Maharashtra*[178] where Supreme Court held that under sec. 132 the witness who was also an accomplice was bound to answer even if the questions incriminated her but the section gave protection if she later became an accused. A person who voluntarily answers questions from the witness box waives the privilege which is against being compelled to be a witness against himself because he is then not a witness against himself but against others. Sec. 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself. It then discusses *Tukaram G. Gaokar v. R.N. Shukla*, [179]where it was clarified that the necessity to enter the witness box for substantiating his defense is not such a compulsion as would attract the protection of Art. 20(3) it may be very necessary for the accused person to enter the witness box for substantiating his defense. But this is no reason for saying that the criminal trial compels him to be a witness against himself and is in violation of Art. 20(3). Compulsion in the conduct of Art. 20(3) must proceed from another person or authority

[178]AIR 1968 SC 938
[179]AIR 1968 SC 1050

Referring to *Hira H. Advani v. State of Maharashtra*[180] where the admissibility of earlier statements under sec. 171A by the accused before the Customs authorities fell for consideration, it was observed that sec. 132 main part which refers to the principle that a witness may be compelled to incriminate, is not applicable to processes before the Customs authorities as they are not considered Judicial Proceedings. Such prior statements before Customs authorities containing incriminating material are admissible in a subsequent criminal prosecution. Referring to *State (Delhi Administration) v. Jagjit Singh*[181] the report analyzed an approver's right against self-incrimination as per Article 20(3) once he became an approver, he would cease to be an accused. Once he ceased to be an accused, he would lose the protection against self-incrimination. He can be questioned under sec. 132. Though, he may make a statement which could incriminate him, still sec. 132 proviso would protect him against prosecution. After summarizing the controversies that have arisen through various Supreme Court cases, the 185th Report addresses the controversy discussed in the 69th Law Commission Report. The issue relates to whether the protection of the proviso to sec. 132 is available only to a witness who objects to an incriminating question and answer to it or to others who answer an incriminating question because of the statutory directive in the main part of sec. 132?

The problem arises because the main part of sec. 132 which requires every witness to answer questions which incriminate him does not use the word 'compelled' while the protection in the proviso against arrest, prosecution etc. is given only to those witnesses who are 'compelled' to answer incriminating questions. The 185th Report concurs with the view in the 69th Report and felt that the directive in the main clause that every witness was bound to answer incriminating question must be deemed to be the compulsion in law and no other factual compulsion need be proved. In the case of witness 'compulsion', it must be taken to have arisen by

[180]AIR 1971 SC 44.
[181]AIR 1989 SC 598

force of law. The report added that the main part of sec. 132 is indeed mandatory and the court has no power to excuse a witness from answering an incriminating question.

The 185th Report concurs with the 65th Report that the duty to answer applies to questions incriminating the witness or his spouse but the protection must extend to the witness as well as his spouse. An important change is with regards the voluntary evidence given by an accused on oath u/s 315. The report affirms the 65th Reports clarity in that the accused waives his waives the protection so far as the particular charge is concerned. But, if he is compelled to answer any incriminating questions not related to the charge, then such evidence cannot be used against him in any criminal proceedings relating to other charges. However it adds that now the new subsection (3) will apply not only to a witness but also to an accused who has volunteered under sec. 315 CrPC i.e. for latter criminal proceedings. It criticizes the language used for 132(3) which is likely to give an impression that the incriminating evidence cannot be used even in so far as it related to the charge in the case in which he waived his privilege under sec. 315. In its draft for 132(3), it thus specifically excludes 132(2) from the immunity granted against incriminating evidence which seems appropriate as it will enable a better and detailed application ridding the Section of the residual ambiguity

SECTION 132A, SECTION 132B, 133, 145 & 146

The 185th Report purports to change the entire subject of 132A as has been recommended by the 65th Commission Report dealing with privilege of family counselors. It was stated that the privilege belongs to the family counselor and this privilege has to be created in the interest of society, so that the family counselor can function effectively. It was proposed that the privilege should apply to counselors appointed by the court and not to those counselors who are appointed by parties.

According to the 185th Report it is not necessary to enact a separate provision in the Evidence Act with regards a family counselor & 132A as proposed need not be given effect to. This is because after the 65th Commission Report, we have now the Arbitration and Conciliation Act, 1996. Part III deals with Conciliation which provides in depth rules regarding disclosure of information by the conciliator, admissibility of evidence of conciliation in any other proceeding, role of the conciliator and confidentiality. Sec. 61(1) applies Part III to conciliation of disputes arising out of legal relationships whether contractual or not and resulting also to matrimonial disputes and in view of the elaborate provisions made in the 1996 Act, it is not necessary to enact a separate provision in the Evidence Act. This modification is a dynamic one and shows that the 185th Report has kept pace with time and the latest changes in the legal paradigm have been incorporated while making the recommendations

Section 132A as proposed by 185th Report

The Report has perused the 93rd Report of the Law Commission (1983) on "Disclosure of source of information by mass media" instead of the 65th report.

This was in the wake of Prevention of Terrorism Act which stated that all persons receiving or in possession of information which he knows or believes to be of material assistance in prevention of terrorists acts etc., will be permissible if he withholds the information without reasonable cause. Finally, the Government acceded to the request of journalist groups that the provision be dropped so as to enable them to not reveal their sources of information. According to the commission the dropping of the provision was due to the agitation by the media but that the law must not provide absolute protection to the journalists anywhere in the world. And revelation of sources may be done in the event of public interest. The Report discusses sec. 15(2) of the Press Council Act, 1978, which precludes information being furnished by a newspaper, news agency, editor or journalist to disclose the source of any news or information. It analyzes whether such

preclusion is applicable to the Court's Power. According to the Commission the section does not deal with the power of the Court, for purposes of evidence, to ask a person to reveal the source of publication, in public interest, and it does not limit the same to that extent.

The Report cited Sec. 10 of the UK Contempt Act which states no court may require a person to disclose the source of information contained in a publication for which he is responsible, *unless* it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

The commission considered various judgments given by the House of Lords in Secretary of State for Defence and another v. Guardian Newspapers Ltd.[182] The prohibition against the court making an order requiring disclosure of the source was subject to some exceptions only, i.e. if the disclosure was "necessary" in the interests of justice or national security or for the prevention of disorder or crime. *The onus is on the person who seeks disclosure to make out a case of 'necessity'.* The Report tracing the Judicial evolution of the privilege of non-disclosure in Europe through a number of cases like the *Goodwin Case*[183]& the House of Lords decision in *R v. Derby Magistrate's Court Exp*[184] regarded that it was to be noted that unlike communication between a lawyer and his client and the requirement of non-disclosure there-in, the privilege of the journalist was not absolute as regards the sources of his news. The Report analyzed US Supreme Court decisions *In Branzburg v. Hayes* [185]*& Associated Press v. NLRB* [186] where it was reiterated that journalist was like any other witness and had no special protection.

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[182]1984 (3) All ER 601
[183]*Goodwin vs. Chief Constable of Lancashire*(The Times Nov. 3, 1992 (CA);
[184]B 1995 (4) ALL ER 526
[185](1972) 408 US 665
[186](1937) 301 US 103

The Report reviewed the Privacy Protection Act of 1980 where it prohibits a government officer in pursuance of a criminal investigation to seize or search any material if such materials are possessed by a person reasonably believed to have a purpose to disseminate to the public by a public communication (such as newspaper, book, or broadcast). These restrictions, on seizure power, were not applicable if the materials relate to 'national defence, classified information or restricted data'.

The Report also takes into account international literature in the form of Article 19 of Universal Declaration of Human Rights and the International Covenant on Civil and Political Right 1966 which provide for freedom of opinion and Expression. It is to be noted however that these freedoms are subject to reasonable restrictions as stated in Article 19(3) of ICCPR. These are subject to (a) respect of the rights or reputations of others; (b) the protection of national security or of public order (ordre public) or of public health or morals." This privilege is nowhere recognized in any law, which is why the Report seeks its inclusion as 132A in the Evidence Act. The Indian Position is shown by the Delhi High Court in *"Court on its own motion" vs. The Pioneer*[187]where it was held that the court has power to direct disclosure of the source of information, when considered necessary in the interests of justice.

D.D. Basu's Commentary on 'Law of the Press'[188] was recorded the guarantee of freedom of the Press does not immunize the Press to render assistance to the investigation of crimes which obligation lies on every citizen. Thus tracing various international stands on the matter and the Indian viewpoint the Report concludes by saying that there exists a privilege for the Journalists for non-disclosure of their source of information but there are exceptions to this privilege. This privilege is not an absolute one like sec. 3(8) of the Prevention of Terrorism Act, exempted

[187]Vol. 68 (1997) Delhi Law Times 529

[188](3rd Ed) (1996)

the cases of legal practitioner of the accused which excused the legal representative from any disclosure. The Report moreover subscribes discretion to the Court to decide if there exists a matter of interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to Contempt of Court or incitement to any offence which allows the privilege to be breached. The emphasis is placed by the Report on the Court's responsibility while exercising its discretion to balance the privilege against the necessity of Public Interest. This recommendation is well-balanced; however care needs to be taken while curbing the social media's rights in the light of recent events in India and the disputes emerging regarding 66A of the Information Technology Act. If the discretion given to the Court is exercised in the wrong hands or my the government in furtherance of its political motivations it can lead to miscarriage of justice and a collapse of the democratic social values on which Indian social set up is based.

SECTION 132B & SECTION 132C

Section 132B

Sec. 132B as drafted in the 69th Report of 1977 was based upon sec. 15 of the (UK) Civil Evidence Act, 1968 (see para 72.5). But, in the light of sections 280 and 284 of the (UK) Copyright Designs and Patent Act, 1988, that were enacted after 65th Report the 185th Report proposes to redraft Sec. 132B, so far as patent-agents are concerned on the lines of sec. 280 of the UK Copyright Designs and Patent Act, 1988 and recommends a further provision as Sec. 132C, so far as trademark agents are concerned.

The provision of sec. 15(1) referred to mention that communications will be protected before the Comptroller or Appellate Tribunal, while sec. 15(2) refers to legal proceedings (other than criminal proceedings) and states that the privilege will be the same as between a solicitor and party in the High Court. Sec. 280(1) of the

(UK) Act of 1988 which applies to 'patent agents' refers to protection of communications in relation to 'invention, design, technical information, trademark or service mark or as to any matter involving passing off'. The Information as in the New UK Act is privileged from disclosure in legal proceedings in the same way as a communication between a client and his legal practitioner. Moreover the privilege under the 1988 Act does not exclude criminal proceedings. In the 69th Report, Sec. 132B as proposed extended the privilege to criminal proceedings also. The 185th Report too seeks extend the privilege to criminal proceedings also in view of Art. 20(3) of the Constitution. The extension to criminal proceedings is a step in the positive direction with sound legal principle of Article 20(3) backing it. Moreover the superior laws of of the (UK) Act of 1988 have been sought to apply to Patents in India.

SECTION 132C

A similar addition is sought to be done for the purpose of Communication with a Trademark Agent and the Party *inter-se* by creation of Section 132C. Similar language is adopted as in sec. 284 which deals with privilege of 'trademark agents'. Since the format remains the same as that of Patents the change is likely to have as positive an effect as the afore-mentioned Change.

SECTION 133

This section deals with relevancy of 'accomplice' evidence. The relevancy of Section 133 which makes an Accomplice a competent witness and states a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. There is material contradiction between S 133 & Section 114 which states that an accomplice is unworthy of credit, unless he is corroborated in material particulars. The 185th Report suggests that instead of deleting sec. 133 and amending the illustration (b) as recommended in the 69th Report, it is better if sec. 133 is amended and illustration (b) be deleted from

section 114 and be added in Section 133. The suggested Section strikes a fine chord of balance by first giving the indispensability of material evidence and then succeeding it with adding subjectivity by allowing Court discretion in case of accomplice's testimony being credit-worthy in the eyes of the Court.

SECTION 134

This Section speaks about the number of witnesses which says that no particular number of witnesses is required for proof of any fact. An elaborate discussion about this section was undertaken in Chapter 74 of the 69th Report, where treason was made an exception otherwise one witness was made enough for other offences. However the 185th Report seeks no recommendation in the said Section. This is rightly so since the 69th Report placed too much stake on the earlier law in sec. 28 of Act 2 of 1855 which cannot be said to be efficient enough to address the issues of today

SECTION 135

This Section is the first one in Chapter X of the Act which deals with "Examination of Witnesses". The Section refers to Order of Production & Examination of Witnesses. The Section presently provides the order in which witnesses are produced and examined to be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court. The Report clarifies that authorities in the civil & criminal jurisprudence are well established about these principles. However if burden of proof on different issues is oscillating, questions arise as to who should start and on what issue evidence is to be adduced. The Evidence to be produced in Civil Cases is to be regulated through the procedure in Order 18 Rules 1 to 3. The report discusses in detail the various provisions of the CPC that could be relevant. In criminal cases, the prosecution always starts.

The Report ends by stating that in the light of the elaborate provisions in the Civil and Criminal Procedure Codes, and the guidance available from case law, there is 'no chaos' now in the procedure and thus seeks no change from the view taken by the 69th Report. This is perceptively done as in the cases where burden of proof is oscillating a statutory remedy cannot be provided as it is which will help the Court decide the presentation of Evidence as this will differ from a case to case basis.

SECTION 136

This Section talks about the Judge's power to decide about the admissibility of Evidence. The Report concurs with the 69th Report in that the powers of Judge to decide regarding the relevancy of evidence and its effect on the fact in Issue are entirely upon the objectivity of the Judge and such practicable factors cannot be statutorily stated. The report does however discusses the various instance of admissibility of evidence which is good particularly for conceptual clarity

The Report distinguishes between Relevancy and admissibility, where relevancy depends on facts and logic admissibility is a matter governed by law and reiterates what is stated in 69th Report that Judge has no discretion to exclude evidence if it is admissible and not excluded by any provision of law.

SECTION 137

Section 137 deals with 'Examination-in-chief', 'cross-examination' and 're-examination. It defines all these three terms and the 69th Report does not subscribe for any change. 185th Report concurs but for a change in the definition of Re-Examination where the words "the further examination of a witness by the party who called him" have been substituted instead of "the examination of a witness"

This is a good change since it removes the earlier ambiguity left by the Section.

SECTION 138

It refers to the Order of Examination. The 185th Report agrees with the 69th Report in that it advocates the numbering of all three parts of the Section. The first relates to Order of Examinations. Second that examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. The third relates to the direction of re-examination. The Report further seeks to borrow a fourth part regarding the discretion of a court to call any witness for examination or cross-examination. And further re-examination or cross examination after such a procedure will be allowed. This too is fine addition as it statutes what already happens in practice thus validating its existence and giving it a legal backing. Such an enabling procedural provision goes a long way in cases where trials have multiple parties or where testimonies are hard to come by.

SECTION 139

The section refers to 'cross-examination of person called to produce a document'. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness. The Report concurs with the 69th Report that no change is required to be incorporated.

SECTION 140

This section refers to evidence of a witness as to "character". It states that Witnesses to character may be cross-examined and re-examined." The Report points out that the practice in India is different from England in that respect since there cross-examination as for character is a rare practice. It also points out that in India too such a practice is not a compulsion since the word may is used. It concurs with the 69th Report and does not recommend changes.

SECTIONS 141, 142 & 143

These Sections deal with 'leading Questions'

- Section 141 defines Leading questions where no amendment is sought.
- Section 142 specifies the validity of leading questions; it states that where the opposite party objects to a leading question, it may not be asked in re-examination or examination in chief without the court's permission. The Court is instructed to permit those leading questions that are introductory or undisputed or which have already been sufficiently proved. No amendment to this Section has been sought.
- Section 143 provides for leading questions to be asked in cross examination, In the 69th Report, there is discussion as to whether in sec. 143, there should be some provision to control the leading questions that can be put in cross-examination but this view is not supported by the 185th Report because of Phipson's latter argument[189] that though leading questions may be put in cross-examination, whether the witness is favorable to the cross-examiner or not, yet where a desire to serve the interrogator is betrayed, it may lessen the value of the evidence to put the very words into the mouth of the witness which he is expected to echo back. It thus seeks no change to the Section.

SECTION 144

This section refers to 'evidence as to matters in writing'. It mandates the requirement of written documentation if any contract, grant or other disposition of property, as to which witness is giving evidence, was not contained in a document, and if he says that it was which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it. The explanation however provides that an

[189]Phipson, Evidence, 15thEd, 1999, para 11.18

oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts can be given.

The illustration appended to this section according to the 69th Report, deals with a declaration about a mental element present contemporaneously it was pointed out that the section needs some improvement. The proposal was to split up the two categories of cases mentioned in sec. 144 into two separate subsections, keeping the Explanation and illustration intact. The 185th Report has suggested incorporation of these changes. Keeping the illustration intact will enable a wholesome understanding of the Section and the placement of proof regards two different situations of evidence and statement can be differentiated now.

SECTION 145

It refers to 'cross-examination as to previous statements in writing'. The Report distinguishes between Section 145 and Section 155(3). Sec. 155(3) deals with 'impeaching the credit of a witness' by "proof of former statements inconsistent with any part of his evidence which is liable to be contradicted". The difference is that under sec. 155(3) the previous statement can be oral and need not be in writing or reduced to writing. But sec. 155(3) relates only to impeaching credit of the witness. The report discusses In *Balgangadhar Tilak v. Srinivasa*[190], it was observed that before proof is given to contradict a witness, he must be told about the circumstances of the supposed statement and he must be asked whether or not he has made such a statement. This is an essential step, the omission of which contravenes not only general principles but the specific provisions of sec. 145.

The Report addressed three crucial issues:

1. Does Section 145 apply to Oral evidence? In other words, on the language as it stands now, sec. 145 does not apply to 'oral statements' made earlier.

[190]AIR 1915 PC 7

2. Is the section applicable to tape-recorded statements? In the 69th Report, it was opined that this view of the Punjab High Court is correct and that therefore, the sec. 145 should be amended to include a "statement recorded mechanically, however it would be advantageous to add the words 'statement recorded mechanically or by electronic record'.
3. What is the position regarding documents which are lost? The 69th Report stated that this aspect is perhaps covered by section 155(3) so far as the use of secondary evidence. The report also said that the applicability of section 145 is doubtful. They therefore did not include this aspect in their sub sections (2) and (3) as drafted. 185th Report agrees with para. 81.27 of the 69th Report.

SECTION 146

This section says that during cross-examination, in addition to the questions asked he may be asked questions in order to test his veracity, test his position in life or shake his credit by injuring his character. This section is held to share similarities with section 132. The commission discussed the changes made to this section in 2003 in relation to cases of rape and attempt to rape. The commission discussed 172nd report wherein clause (4) was suggested. The Commission recommended the addition of the words 'accuracy and creditability' be added after the word veracity in clause (1). Also the commission recommended that proviso to clause (3) should be deleted. Along with that an explanation should be added after clause (3). The explanation says in a prosecution for an offence under section 376, 376A, 376B, 376C or 376D for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to her general immoral character, or as to her previous sexual experience with any person for proving such consent or the quality of consent. The explanation says ´character´ includes reputation´ and ´disposition´.

SECTION 147

This section is with reference to the situation where the witness is compelled to answer. It says that if any such question relevant to the suit is there, then the provision of section 132 will follow. It talks about compellability of witness meaning that the witness cannot take exemption to testifying in the court. The matter concerns only which is relevant to the issue. The commission recommended that in section 147, after the words "relevant to", the words "the matter in issue in" should be added." Under this section one may also refer to the events of prior conduct of the witness outside the suit. Also if the questions are outside the purview of the suit they should be proximate enough to affect the opinion of the court on the credibility of the witness. The commission also referred to Sir Vepa P. Sarathi who said that section 147 deals with the question relevant to the suit. Commission considered the 69th Report and decided there is no need to deviate from it. Commission after thorough discussion said that section 132 completely applies to section 147.

SECTION 148

This section gives discretion to the court to decide whether the witness needs to be compelled to answer a question when it is not relevant to the matter in the suit. It affects the credit of the witness though by injuring his character. The court while deciding will consider whether the question is of such a nature that the truth will seriously affect the opinion of the court. The question will be improper if the answer does not affect the opinion of the court, there is great disproportion between imputation against witness's character and importance of evidence. Referring to 69th Report, the Commission said that it did not have any comment with reference to ordinary witness. The commission recommended addition of section 148A for the witness-accused on the lines of draft proposal in 69th Report with a few changes in relation to question of a woman in rape cases in the light of

the Law Commission's 172nd Report. The Commission felt there was a need to amend the opening lines of section 148. For the words "If any such question relates to a matter not relevant to the suit or proceeding except", the words "If any such question is not material to the issues in the suit or proceeding but is admissible" shall be substituted.

SECTION 148A

An accused if offers himself as victim under section 315 of Code of Criminal Procedure, 1973 shall not compelled to answer any question tending to show that he has committed or convicted of or charged other then the which he is then charged. The exception can be made in case the proof of his committing the offence is relevant to the matter in issue, he or his advocate have asked question to the witness to establish his good character, nature of the offence is such as to involve imputation on the character of the witnesses for prosecution (prosecutrix not included) without obtaining the permission of the court or he has given evidence against any other person charged with the same offence.

SECTION 149

This section says that no question referred to in section 148 should be asked unless the person asking them has reasonable ground for it. Commission referred to the 69th Report wherein duties of a lawyer while questioning but no amendment was suggested. Commission recommended revision of the illustration. The questions can be asked if one legal practitioner informs the other, court informs the legal practitioner, witness of whom nothing is known then he can be asked or the witness given unsatisfactory answers of general questions.

SECTION 150

If a lawyer asks a question without any reasonable ground then the court may report the same to the court to whose jurisdiction he is subjected to. The

commission said that the reference under the section should be made to the Bar Council under the Advocate Act, 1961.

SECTION 151

Under this section, the Court may forbid any indecent or scandalous question apart from the case here it is necessary to determine a fact or have some bearing on the question in issue. Commission agreed with 69th Report wherein no recommendation was made after some discussion.

SECTION 152

This section forbids any question which is intended to annoy or insult the witness or appears needlessly offensive to the court. The Commission felt that no amendment was needed.

SECTION 153

Under this section if a witness answers a question relevant to the enquiry then no evidence shall be given to contradict him as it tends to shake his credit by injuring his character. Although he gives false answer, he may be later charged with false evidence. Exception to this section says that if a witness has been asked about his previous conviction and he denied the same then it can be proved by giving evidence. He may also be contradicted if he is asked about any question tending to impeach his impartiality and he denies it. The Commission discussed laws in other countries in relation to non-consideration of offence committed by a witness before a long time. Commission held that in India the same is covered by section 148(2) relating to a matter ´remote in time´. Commission also mentioned R v. Ghulam Mustafa[191] wherein the court refused to consider a crime which was committed 30 years ago. The Commission thus said that no amendment was required.

[191]ILR 36 All 371

SECTION 154

This section allows the person who calls the witness to ask a question which may later be asked during cross-examination by the adverse party. This section refers to hostile witness. The Commission considered Supreme Court decisions before 69th Report and after that. The Commission referred to Dahyabhai Chhaganbhai Thakker v. State of Gujarat[192] wherein the court held that section 154 is the discretion of the court. Also the commission referred to Sat Paul v. Delhi Admn.,[193] wherein the court held that the entire evidence of the hostile witness need not be discarded and reliance on any part of the statement of such a witness by both parties is permissible. Commission discussed the recent case of Koli Lakhmanbhai Chanebhai v. State of Gujarat[194] wherein it was held that evidence of the witness who has turned hostile to the extent it supports the prosecution version, is admissible in the trial and if corroborated by other reliable evidence. Commission agreed with 69th Report which stated that a provision should be added to the section that nothing in the section will disentitle the party to rely on any other evidence. The same was recommended.

SECTION 155 AND PROPOSED SECTION 155A

This section says that the credit of a witness may be impeached by the adverse party with the consent of the court by evidence of person who testify that they believe the witness to be unworthy of character, proof that the witness has received bribe or any other inducement, proof of former statement being inconsistent with any part of his evidence. The explanation to the section says that the witness declaring the unworthiness of credit of another witness may be asked to give reason during cross-examination. These reasons will not be contradicted but in case of false response, he may later be charged with false evidence. The Commission referred to Woodroffe who points out the methods of impeaching

[192]AIR 1964 SC 1503
[193]1976 (1) SCC 727
[194]1999 (8) SCC page 624

the credit of a person. The applicable methods are by cross-examination, by calling other witness to disprove by testimony on material points and by contradiction of matter affecting credit through other witness. Commission agreed with the recommendation of 69th Report of using the words "impeach his credibility, accuracy or veracity" instead of "believe him to be unworthy of credit". With reference to clause (3), 69th Report makes two recommendations. Firstly this clause is subject to section 145 and secondly the words 'his evidence which is liable to be contradicted' need to interpret as per the case. Commission recommended that addition after the words liable to be contradicted' the following words: "that is to say, evidence on a fact in issue or a relevant fact or evidence relating to any matter referred to in the First or Second Exception to sec. 153." Further it was recommended that in the beginning the words" subject to the provisions of sec. 145" should be added. With reference to clause (4), the commission recommended deleting it agreeing with 172nd report. The Commission felt a need to create an additional provision on the same lines as section 148 as regards the cross-examination of the accused on matters affecting his credit. Commission based on 69th report proposed creation of section 155A. This section will apply where the accused resorts to sec. 315 of the Cr.P.C.

SECTION 156

This section gives the court the power to allow the question in relation to any other circumstances near the time or place of occurring of the event to the witness who gives evidence of any relevant fact. The Commission said that this section does not require any major change except to add the words "fact in issue or" before the words 'relevant facts'.

SECTION 157

This section states that in order to corroborate any statement of a witness any former statement of his in relation to the same fact may be proved. This section

helps determine the truthfulness of the victim. Evidence under this section is not substantive. The Commission held that the word investigation under the section should be given a broad meaning. The commission recommended addition of an explanation. This explanation said "The statements made before any authority, legally competent to investigate the fact include statements made before a Judicial Magistrate in an identification parade and also statements made before such a Magistrate under section 164 of the Code of Criminal Procedure, 1973."

SECTION 157A

The Commission agreed with 69th Report which said that there is, however, no comprehensive provision permitting independent evidence to be given confirming the credit of a witness, though there is a provision for impeaching credit.

SECTION 158

This section says that statement relevant under section 32 or 33 when proved then all matters may be proved either to contradict or corroborate it or impeach or confirm the credit of a person by whom it was made. The statements herein are by the persons who are either dead, cannot be found or are incapable of giving evidence. Commission held that there is no need of any amendment to this section.

SECTION 159

Under this section a witness may refresh his memory by referring to any writing made by him at any time of the transaction concerning which he is questioned. He may also refer to the writing by some other person of which he knew would be correct. Commission recommended the revision of the section. The witness may refresh his memory by referring to any document made by him at the time of the transaction or made by any other person read or seen by witness if when he read it he knew it was correct. He may also refer to the copy of any document if the court is satisfied that there is sufficient reason for non-production of original. Also an

expert may refer to professional treaties or articles published in professional journals. The word document should be used.

SECTION 160

This section states that a witness may testify any fact mentioned in the writing referred to in section 159 if he knew that the information entered is correct. The fact that he does not recollect it now can be ignored. The commission feels that there is no need for any change in this section.

SECTION 161

This section gives the right to the adverse party to cross-examine the witness in relation to writings presented under section 159 and 161. Commission recommended the substitution of the word 'document' for 'writing' in conformity with section 159, as proposed to be amended, as also in conformity with present section 160.

SECTION 162

This section provides for summoning of a witness to produce a document shall if it is in his possession or power notwithstanding any objection. The validity of such objection will be decided by the court. The Court, if it sees fit, may inspect the document, unless it refers the matter to state or take other evidence. The court may also order for translation of document if it deems fit. The Commission held that it had examined this section along with section 123. Therefore the recommendation under section 123 should be looked into. Commission recommended the deletion of the word unless it refers to matter of State' from sec. 162. The entire procedure for recording communication related to affairs of the states should come under section 123.

SECTION 163

This section requires that if a party has given notice to another for production of a document and such document is produced and inspected by the party calling for it then he is bound to give it as evidence. Commission says that this section applies to both civil as well as criminal trials. Commission feels no need for any amendment in this section.

SECTION 164

This section says that when a party had refused the production of a document asked under the notice then he cannot later use it as evidence without the consent of other party or court. Commission does not agree with 69th Report which asked for confining this section to only criminal proceedings.

SECTION 165

Under this section a judge may in order to discover or obtain proof of any relevant fact may at any time ask any question to the witness or any party about any fact relevant or not. The court may order for the production of any document or thing and no objection can be raised regarding the same without the permission of the court. The proviso to this section says that judgment must be based on facts relevant under the act. Also court cannot compel a witness to answer a question or produce a document for which he is entitled to refuse under section 121 to 131. In case the documents or questions were asked by the adverse parties then the judge may not ask any question which would be improper to ask by any other person other section 148 or 149. Judge will not dispense with primary evidence of any document except for the cases which are accepted. The commission accepted the structural changes suggested by 69th Report and also held that he power under sec. 105 cannot be used to put questions which are prohibited by the Evidence act or any other statute. The commission suggested a proviso to this section which did not allow any witness to cross-examine upon any answer without the permission of

the court. The commission generalized the exceptions and removed the reference to section 121 to 131. Also the commission recommended that a judge could not be allowed to dispense with primary evidence of any document except in case of excepted cases. Also the commission provides for basing judgments on facts declared relevant under this act.

SECTION 166

In cases of trial by jury or with assessor, the jury may ask any question with the permission of judge which he might consider proper and put forward. Commission agreeing with 69th Report said that trial by jury has been abolished in India. Thus this section should be deleted.

SECTION 167

As per this section, rejection of evidence or improper evidence cannot be taken as a ground for new trial or reversal of ant decision if the court is satisfied that the evidence received were considered or that there was sufficient proof for the decision. Commission held that the word decision applies to both civil as well as criminal cases. The commission agreed with the report and held that no amendment was needed.