Section 113A:

This section deals with 'Presumption as to abetment of suicide by a married woman'. It reads as follows:

> "113A: When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative or her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.
>
> Explanation.- For the purposes of this section, 'cruelty' shall have the same meaning as in section 498-A of the Indian Penal Code (45 of 1860."

This section was introduced by the Criminal Law (Second Amendment) Act 46 of 1983. 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.

The section requires proof that (1) that her husband or relatives subjected her to cruelty and (2) that the married woman committed suicide within a period of seven years from the date of her marriage.

If these facts are proved, the court 'may' presume. The words are not 'shall' presume. Such a presumption can be drawn only after the court has taken into account all the circumstances of the case. The inference would then be that the 'husband or relatives' abetted her suicide.

If there is no evidence of cruelty, the section does not apply. State of Punjab vs. Iqbal Singh: AIR 1991 SC 1532. In State of Himachal Pradesh vs. Nikku Ram: AIR 1996 SC 67, it was held that in the absence of any evidence to show that the diseased was being harassed within the meaning of Explanation I(b) of section 498A IPC, the presumption under sec. 113A cannot be raised.

The Supreme Court, in State of West Bengal vs. Orilal Jaiswal AIR 1994 SC 1418 considered the question as to 'standard of proof'. It observed that in a criminal trial, the degree of proof is stricter than what is required in a civil proceeding. In a criminal trial, however intriguing may be the facts and circumstances of the case, the charges made against may be in the realm of surmises and conjectures. 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. Although, the

Court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubt must depend upon the facts and circumstances of the cases and the quality of evidence adduced in the case and the materials placed on record. The doubt must be of a reasonable man and the standard adopted must be a standard adopted of a reasonable and just man for coming to the conclusion considering the particular subject matter. Reasonableness of the doubt must be commensurate with the nature of the offences to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. The court should be extremely careful in assessing evidence under sec. 113A for finding out if cruelty was meted out. If it transpires that a victim committing suicide was hyper sensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court would not be satisfied for holding that the accused charged of abetting the offence of suicide was guilty.

The section has also been interpreted in Lakhjit Singh vs. State of Punjab: 1994 Suppl (1) SCC 173 and Pawan Kumar vs. State of Haryana: 1998(3) SCC 309 and Shanta vs. State of Haryana 1991(1) SCC 371.

Courts have held that from the mere fact of suicide within seven years of marriage, one should not jump to the conclusion of abetment unless cruelty was proved and the court, which has the discretion to raise or not to raise the presumption, because of the words 'may presume', must take into account all the circumstances of the case, which is an additional safeguard. See Nilakantha Pati vs. State of Orissa: 1995 Crl LJ 2472 (Vol.3).

The legal presumption provided in sec. 113A clearly includes past instances of cruelty spread over a period of seven years (Vasanta vs. State of Maharashtra: 1987 Crl LJ 901 (Bom).

The presumption, even if it is raised in a given case, is rebuttable: Prem Das vs. State of Himachal Pradesh 1996 Crl LJ 951 (HP).

Having noted the case law and the problems which have come before the courts in the last 18 years, we do not find anything wrong in the section which requires amendment. While cases of cruelty and dowry death are rampant, a new phenomenon is the abuse of these provisions in some cases.

Some of these cases have come up before the High Courts and the Supreme Court. In some cases complaints are made against husbands in

spite of there being no cruelty. In some other cases, where there is material against the husband, the husband's parents or sisters living elsewhere or far away are all roped in. The result in some cases is that the entire case would fail due to over zealousness of the complainants or the police. But, in our view, the words 'may presume' and the requirement that 'all the other circumstances' of the case will provide sufficient ground for the court to deal with such false cases. We do not, therefore, think that any special amendment is necessary to prevent abuse of sec. 113-A.

In the result, sec. 113-A does not require any amendment.

Section 113-B:

This section deals with 'Presumption as to dowry death'. It reads as follows:

> "113-B. When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand to dowry, the court shall presume that such person had caused the dowry death.
>
> Explanation: For the purpose of this section, 'dowry death' shall have the same meaning as in sec. 304-B of Indian Penal Code'.

Under the section, it is first necessary to prove that such woman has been subjected by such person to cruelty or harassment and secondly, such cruelty should have been or in connection with any demand for dowry and thirdly that this must have been soon before her death. If these are proved, the court 'shall presume' the person caused the dowry death. Of course, the words 'shall presume' mean that the court is, in such circumstances, bound to presume that such person had caused the dowry death but still the presumption is rebuttable.

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'.

In Shamlal vs. State of Haryana: AIR 1997 SC 1830, the Supreme Court had occasion to deal with sec. 113-B. It stated that it is imperative, for invoking the presumption under sec. 113-B, to prove that 'soon before her death' she was subjected to such cruelty or harassment. Where the prosecution could only prove that there was persisting dispute between the two sides regarding the dowry paid or to be paid, both in kind and in cash, and on account of the failure to meet the demand for dowry, the wife was taken by the parents to their house about one and a half years before her death and further that an attempt was made to patch up between the two sides for which a panchayat was held in which it was resolved that she

would go back to the nuptial home pursuant to which she was taken back by the husband in his house about 10-15 days prior to the occurrence, but there was nothing on record to show that she was either treated with cruelty or harassed with the demand for dowry during the period between her having been taken to the parental home and her death, it is not permissible to take recourse to the legal presumption under sec. 113B.

Irrespective of the fact whether the accused has any direct connection with the death or not, he shall be presumed to have committed dowry death provided the ingredients of the section have been proved. Where the death of the wife was concurrently found to be unnatural viz. by strangulation, and there was demand for dowry and also there was cruelty on the part of the husband, the presumption under sec. 113B must be held to be rightly drawn (Hemchand vs. State of Haryana AIR 1995 SC 120).

In Gurbachan Singh vs. Satpal Singh: 1990 Crl LJ 562 (SC), the circumstantial evidence showed that the wife was compelled to take the extreme step of committing suicide as the accused person had subjected her to cruelty by constant taunts, maltreatment and also by alleging that she had been carrying an illegitimate child. The suicide was committed within seven years after the marriage. The Supreme Court held that presumption under sec. 113-B could be drawn.

In a case where the parents and the brother of the victim girl were not informed of the death and the accused hurriedly cremated the dead body, the presumption was held attracted: (Shanti vs. State of Haryana) (1991 Crl LJ 5 1713 (SC).

In this connection, it may be noted that there are a few differences between sec. 113-A and sec. 113-B. Whereas in sec. 113-A, the legislature used the words 'may presume' and the words 'having regard to all the circumstances of the case', sec. 113B uses the words 'shall presume' and does not use the words 'having regard to all the circumstances of the case'. On the other hand, sec. 113B uses the words 'soon before the death' and these words are absent in sec. 113A. Section 113B deals with dowry death under sec. 304-B, while sec. 113A deals with 'abetment of suicide'.

We do not think that sec. 113-B should use the words 'may presume' or 'having regard to all the circumstances of the case'. Having regard to the fact that in spite of all the new provisions introduced in 1986, dowry deaths are still a regular feature, the existing provision of 'shall presume' must, in our view, be retained. As stated earlier, even so, the presumption is rebuttable.

We, therefore, do not suggest any amendment to sec. 113-B.

Section 114:

This section is a classic one and has as its basis various aspects of human conduct. It refers to facts which the court 'may' presume. It is followed by nine illustrations ill. (a) to (i) which are in the nature of 'maxims' and they are followed by nine more paragraphs which refer to the facts which have to be taken into consideration for the purpose of the 'maxims' referred to in illustration (a) to (i).

We shall first refer to the main section. We shall then separately refer to each of the nine illustrations and to the corresponding requirement as to the other facts to be taken into account in the case of each illustration.

The main section 114 reads as follows:

> "114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.'

The section enables the court to presume the 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.

Sir James Stephen, while introducing the Bill, stated, in regard to sec. 114 as follows:

> "The effect of this provision is to make it perfectly clear that courts of justice are to use their own common sense and experience in judging the effect of particular facts, and that they are to be subject to no particular rules whatever on the subject. The illustrations given are for the 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 which it is difficult either to understand or to apply, but which will be swept away by the section (114) in question."
>
> (Proceedings in Council, Gazette of India, 30th March, 1872, supplement, pp 234-35).

It is also important to note that the section uses the words 'may presume'. It is for the court to raise the presumption or not (R vs. Shibnath: AIR 1943 F.C. 75). The presumption, even if drawn, is rebuttable. But no

presumption can be safely drawn from another presumption. (U.S. vs. Ross: 92. U.S. 281).

Once a presumption is satisfactorily rebutted, it simply vanishes. It cannot again come back once again. In a famous quotation, (Council Blulb RR) Lamm J observes in Mackowik vs. Kansas city St. James & CBR Co. (94. S.W. 256, 262) = 196 MO, 550 that

> "presumptions are like bats, flitting in the twilight but disappearing in the sunshine of facts"

The relevant passage reads as follows:

"It would seem from his own testimony that this unfortunate plaintiff foolishly shook dice with danger and lost on the throw; for in his testimony at Savannah he says he made a 'run' to get across, and in his testimony at the last trial he said he 'thought he could make it". Learned Counsel somewhat rely upon the proposition that plaintiff had the right to presume that defendant was obeying the ordinances and governed his actions accordingly…..But will the law indulge presumptions where the parties to the actual occurrence are alive and go upon the stand and the facts are fully disclosed? If plaintiff knew of the ordinances and relied on the fact that defendant was obeying their provisions and acted on that reliance, could he

not have said so? Under such conditions, reliance would seem to be a fact susceptible of proof as are other facts, and should be proved by the best evidence which the case would admit. He of all men knew what the facts were: and, having declined to speak, may he invoke the aid of friendly presumptions? "Presumptions", as happily stated by a scholarly counselor, are "tenuous", in another case, "may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts". That presumptions 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' (Wigmore, 1981, para 2491, page 305) (see also G. Vasu vs. Syed Yaseen (AIR 1987 AP 139) (FB) where the above American case was quoted) approved by the Supreme Court in Bharat Barrel and Druna Mfg. Co. vs. Amin Chand Pyarelal: 1999 (3) SCC 35.

At page 311, Wigmore quotes Bohler 'The Effect of Rebuttable Presumptions of Law upon the Burden of Proof' (1920) 68, U.Pa.L.Rev 307) (reprinted in Bohler, Studies in the Law of Torts, 636 (1926))

> "In all these, the need is satisfied when evidence is provided. Having accomplished their purpose they have, of course, no further effect. Like Maeterlinck's male bee, having functioned, they disappear…"

We shall now take up the words "common course of natural events, human conduct and public and private business". The word 'common course'

qualifies not only natural events but also the words 'human conduct' and 'public and private business'. When the court is prepared to accept the direct evidence of a witness or an expert, sec. 114 does not come into play. It is only in their absence, that sec. 114 is resorted to. As to what is 'common course of natural events, human conduct and public and private business' depends upon the common sense of the Judge acquired from experience of worldly and human affairs, tradition or convention.

We shall next take up each of the illustrations (a) to (i) and the relevance of certain facts in relation to each of them, as stated in sec. 114, and mentioned in the latter part of the illustrations.

Before we do so, we may however, point out that the illustrations are not intended to lay down rules of law which are exhaustive. They are merely examples and it is always open to the Court to go back to the section and apply it Debi Prasad vs. R AIR 1947 Allahabad 191 (FB).

But in as much as the 69th Report commented on each illustration, we also do so.

"Ill.(a): The Court may presume (a) that a man who is in the possession of stolen goods soon after the theft is either the thief or has

received the goods knowing them to be stolen, unless he can account for his possession.

But the court shall have regard to the following: (a) A shopkeeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business."

The illustration uses the word 'may' and the court may or may not draw an inference. Even otherwise, it is rebuttable.

The illustration has been taken from Taylor (sec. 140) who quotes R vs. Langmead: 9 Cox CC 464. In Tulsiram vs. State AIR 1954 SC.1, 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. In Gulabchand vs. State of M.P.: AIR 1995 SC 1598, the recovery was within 3 or 4 days. In Earubhadrappa vs. State of Karnataka AIR 1983 SC 446 a period of one year was not treated as too long. It all therefore depends on the facts of each case.

The second aspect is that the burden of proving the guilt of the accused does not shift but the evidential burden may shift to the accused.

Though, he may give evidence, by cross examination of the prosecution witness, he may take benefit by showing that there was an alternative case which can throw doubt on his guilt. In Karnal vs. State : AIR 1976 SC 1097, the Supreme Court observed that the court may draw presumption to convict the accused where the circumstances indicate that no other reasonable hypothesis except his guilty knowledge. See also Baiju vs. State AIR 1978 SC 522 and Mohanlal vs. Ajit: AIR 1978 SC 1183. In fact, in Trimbak vs. State AIR 1954 SC 319 it was held that it is not a correct way to infer his guilt merely because he had no explanation.

The presumption under sec. 114 (a) is not confined to cases of theft. It can apply to other offences also, like breach of trust etc.

But, the more important question is whether in the case of recovery of such goods and absence of an explanation and no other explanation is possible, question arises whether the accused must be held guilty for theft under sec. 411 IPC, for possession of stolen goods.

In Union Territory of Goa vs. Boaventura D'Souza: AIR 1992 SC 1199, it was held that presumption cannot be extended to say that the person in possession of stolen goods must have also committed the murder – in a case of murder to commit robbery – unless there are circumstances to connect the accused with the offence of murder. Otherwise, the presumption is only that he is guilty of an offence of theft under sec. 411 of IPC. Similar

was the position in Surjit Singh vs. State: AIR 1994 SC 110. However, in Gulab Chand vs. State of M.P. : AIR 1995 SC 1598 it was proved that murder and robbery were integral part of the same transaction and a presumption under ill (a) was drawn not only that the accused committed also robbery of the ornaments of the deceased lady but also murder. On the other hand, in Amar Singh vs. State of M.P.: AIR 1982 SC 129, it was held, on facts, that the presumption could not be extended to the offence of dacoity. Similar was the position in Sanwat Khan vs. State: AIR 1956 SC 54.

The 69th Report stated in para 56.11 that no amendment is necessary in this illustration. We are of the same view in as much as the decisions of the Supreme Court give the court enough guidance otherwise.

Ill (b) and sec. 133: The Court may presume that (b) an accomplice is unworthy of credit, unless he is corroborated in material particulars.

This has to be read with two other illustrations in the second half of sec. 114. We shall refer to them at a later stage when we deal with the alleged inconsistency between sec. 133 and 1ll(b).

The rule of practice regarding the credibility of an accomplice is based on human experience and the court will look for corroboration (Sheikh

Zakir vs. State of Bihar: AIR 1983 SC 911); Niranjan Singh vs. State of Punjab: AIR 1996 SC 3254.

This illustration has to be read with sec. 133 of the Evidence Act. Sec. 133 reads as follows:

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

This section does not rule out the possibility of conviction on the basis only of the evidence of an accomplice, while ill (b) requires corroboration. The case in C.R. Mehta vs. State of Maharashtra: 1993 Crl LJ 2863 (Bom) is on point. There two persons tried to bribe a Minister for a favour, the Minister informed the Anti Corruption Bureau and the accused persons were arrested in a trap. On the basis of the evidence of the Minister, whose general integrity was of a high order, the persons who offered the bribe were convicted.

There is some apparent inconsistency between illustration (b) and sec. 133 in that the former requires 'corroboration' while the latter suggests that

there is nothing illegal if a person is found guilty on the basis of the "uncorroborated" testimony of an accomplice.

This aspect was dealt with in the 69th Report while dealing with sec. 133 in chapter 73 and after a very elaborate discussion, it was suggested that sec. 133 be deleted and ill (b) to sec. 114 be retained. (The question is whether ill (b) is to be deleted and sec. 133 amended?)

No doubt, Sri Vepa P Sarathi has, in its comments, stated that there is no inconsistency at all between sec. 114, ill.(b) and sec. 133. Section 133 provides the normal rule that conviction can be based on the sole testimony of an accomplice, just as in the case of the evidence of a single witness or a dying declaration alone. But, in a particular case, the court might feel that it is not safe to convict a person on the sole testimony of that accomplice, just as in a particular case, the court may feel that it is not safe to convict a person on the sole testimony of a single witness or on the basis of a dying declaration only. If in a particular case, the court feels that corroboration is necessary for the evidence of an accomplice, it may resort to it under sec. 156. According to Sri Sarathi, the confusion has arisen, because, the law in R vs. Baskerville 1966 (2) KB 658 (the rule of procedure has become a rule of English law) is, as usual, unnecessarily imported into India, where the law is different. The law in India, according to him, is different, because the accomplice's statement, before he is treated as an approver, is given to a Magistrate who is expected to take all precautions to see that the accomplice is not giving his statement because of police torture. Section 133 is inserted

to show that an accomplice is like any other witness. The illustration in sec. 156, though it refers to 'accomplice', the main section deals only with a 'witness'.

While these comments are somewhat forceful, we feel that the question is not whether there is no inconsistency between sec. 133 and ill.(b), but that the two aspects should be brought together at a single place rather than be allowed to remain separate.

We, therefore, feel that the proper thing would be to amend sec. 133 by bringing in the aspects covered by illustration (b) into sec. 133 and to delete illustration (b).

In fact, in the commentary in Sarkar (15th Ed., 1999, page 2076) it is stated that the conflict has arisen because sec. 114 is in Ch. VII while sec. 133 is in Ch.IX. It was suggested:

> "It would seem that the 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."

At pp 2076 and 2077 of Sarkar, on Evidence, it was pointed out that newly recruited judicial officers, if they did not harmonise sec. 133 and ill.(b) to sec. 114, they may feel that it is not legal (i.e. not unlawful) to find a person guilty on the only evidence of an accomplice without there being any corroboration.

We shall now refer to the two illustrations in the latter half of sec. 114 regarding illustration (b): The Court shall have regard to these illustrations too as to ill.(b):, A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself: "a crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable."

It has been, however, pointed out that, in the absence of special circumstances of the nature indicated in the two further illustrations to ill.(b), an accomplice is to presumed unworthy of credit. The two further illustrations are not exhaustive. They are given by way of guidance only, and in order that a party may test the facts of a particular case to see whether anything has emerged to show that the evidence of an accomplice need not

be corroborated in material particulars (R vs. Nag Myo: AIR 1933 Rang 177 (FB).

The Privy Council in Bhubani vs. R : AIR 1949, P.C. 257 also laid down this rule.

Precisely what was stated in Sarkar at pp 2076-2077 is a part of the judgment in S.C. Bahri vs. State of Bihar: AIR 1994 S.C. 2420, that sec. 133 be amended by bringing the gist of ill. (b) to sec. 114, as an Explanation or a proviso to sec. 133.

In Nga Aung vs. R : AIR 1937 Rang 209, Roberts CJ described sec. 133 as a rule of law to this extent triumphs over the rule of practice that if special circumstances exist which render it safe, in an exceptional case to act upon the uncorroborated testimony of an accomplice and upon that alone, the Court will not merely for the reason that the conviction proceeds upon such uncorroborated testimony say that the conviction is illegal.

In R vs. Baskerville: 1916(2) KB, 658, in a judgment of five learned Judges, the entire law on this subject has been reviewed and the Supreme Court in Biva Doulu vs. State: AIR 1963 SC 599 quoted Lord Abinger in R vs. Farler 8.C.P. 106 and Lord Reading in R vs. Baskerville. The principle in R vs. Baskerville was reiterated by the Supreme Court earlier in

Ramashwar vs. State: AIR 1952 SC 54 and Vemireddy Satyanarayan Reddy vs. State: AIR 1956 S.C. 379. The rules propounded in R vs. Baskerville have been summarized at p. 2102 of Sarkar (15th Ed., 1999) as follows:

> "(1) It is not necessary that there should be independent confirmation in every detail of the crime related by the accomplice. It is sufficient if there is a confirmation as to a material circumstance of the crime.
>
> (2) The confirmation by independent evidence must be of the identity of the accused in relation to the crime, i.e. confirmation in some fact which goes to fix the guilt of the particular person charged by connecting or tending to connect him with the crime. In other words, there must be confirmation in some material particular that not only has the crime been committed but that the accused committed it.
>
> (3) The corroboration must be by independent testimony, that is by some evidence other than that of the accomplice and therefore one accomplice cannot corroborate the other.
>
> (4) The corroboration need not be by direct evidence that the accused committed the crime, it may be circumstantial.

A Full Bench of the Rangoon High Court in Aung Hla vs. R: 9 Rang 404 (FB) laid down six propositions and the fifth one was that one 'approver' may be corroborated by another approver, but this proposition has not been

approved in some other cases. In Mahadeo vs. R: 1936(3) All ER 813 (PC), Sir Sidney Rowlatt, while referring to the principle that one accomplice cannot corroborate another, treated it as "now virtually a rule of law".

However, while agreeing with Bhuboni's case (AIR 1949 P.C. 257) the Supreme Court observed in Kashmira vs. State (AIR 1952 SC 159) that "the testimony of an accomplice can in law be used to corroborate another though it ought not to be used save in exceptional circumstances and for reasons disclosed".

In the light of the above discussion, leaving out the various other principles laid down by the Supreme Court, it will be necessary to recommend shifting ill.(b) in sec. 114 and redrafting sec. 133 and shifting the illustration to the latter part of sec. 114 in relation to ill.(b) to sec. 133, as follows: Our recommendations are:

(1) delete ill.(b) in sec. 114.

(2) Delete both the paragraphs in the later part of sec. 114 starting with the words "As to illustration (b)".

(3) Redraft sec. 133 as follows: by shifting the principle of illustration (b) to sec. 133. It is also proposed to shift the two paras, in the latter part of sec. 114, which deal with illustration (b).

Accomplice

"133. An accomplice shall be a competent witness against an accused person but his evidence is unworthy of credit unless he is corroborated in material particulars:

Provided that where the accomplice is a person whose evidence, in the opinion of the Court, is highly creditworthy as not to require corroboration, a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Illustrations

(a) A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally of good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself. The evidence of B shall have to be considered by the Court, while deciding on the negligence of A.

(b) A crime is committed by several persons. A, B and C, three of the criminals are captured on the spot and kept apart from each other – each gives an account of the crime implicating D, and the accounts corroborate each in such a manner as to render the previous concert highly improbable. The variance in the different accounts of facts given by A, B, C as to the part of D shall be taken into account by the Court while deciding if D was an accomplice."

We recommend accordingly so far ill. (b) in sec. 114 and sec. 133 are concerned.

Illustration (c):

Illustration (c) – The Court may presume that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration. This has to read with the latter part of sec. 114 in relation to ill. (c). It says: The Court shall have regard to the fact that "A, the drawer of a bill of exchange, was a man of business. B, the acceptor was a young and ignorant person, completely under A's influence".

In Sri Lanka this illustration (c) has been omitted and the remaining paragraphs have been designated as (c) to (h) respectively.

Similarly, in the latter part of sec. 114, the para relating to ill. (c) has been omitted and the other latter paras are redesignated as (c) to (h) respectively.

Now, while sec. 114 ill.(c) says that a Court 'may' presume that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration and gives discretion to the court to draw the presumption or not, sec. 118 of the Negotiable Instruments Act requires that the court 'shall' draw a presumption that every bill of exchange and promissory note has been executed for consideration. The presumption, once raised under both provisions, is rebuttable Kundan vs. Custodian of Evacuee Property AIR 1961 SC 1316).

No doubt, in sec. 118 of the Negotiable Instruments Act, the presumption is against the maker. In ill.(c) of the Evidence Act, the presumption is against the acceptor, as stated by Sri Vepa P. Sarathi. But still, the word 'may' is in the ill.(c), while sec. 118 uses the word 'shall'. Both provisions are complementary to each other and cannot be treated as totally independent.

In view of the apparent difference between ill. (c) and sec. 118 of the Negotiable Instruments Act, it was recommended in para 56.26 of 69th Report that ill. (c) and the latter part of sec. 114 which refers to ill. (c) and gives an example, have to be deleted. We agree.

Illustration (d):

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.

In the latter part of sec. 114, in so far as cl. (d) is concerned, it is stated that the Court has to bear in mind – if it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course.

It is pointed out by Taylor (Evidence sec. 190) that where the existence of person, or a personal relation, or a state of things is once established by proof, the law presumes that the person, relation or state of things continues to exist as before till the contrary is shown, or till a different presumption is raised from the nature of the subject in question.

Wigmore points out (sec. 437)(as quoted in Sarkar, 15th Ed., 1999 page 1658) "that Mt. Everest was in existence ten years ago is strong evidence that it exists yet; whether the fact of a tree's existence a year ago will indicate its continued existence today will vary according to the nature of the conditions of life in the region."

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.

In fact, in A.P. Thakur vs. Kamal Singh AIR 1966 SC 605, the Supreme Court held that in appropriate cases, an inference of the continuity of a thing or state of things backwards may be drawn under this section though on this point there is no illustration.

In Anangamanian vs. Tripura Sundari (14 I.A. 101) the Privy Council observed that the presumption of continuance may operate retrospectively also.

For example, if existence of Mt. Everest is proved ten years ago, it can be presumed that it existed earlier. If an aged Banyan tree is there now, its prior existence can be presumed.

Though the 69th Report did not go into this aspect, we are making a recommendation for adding an illustration as 'da' as follows:

> "(da) 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";

and in the latter part of sec. 114, the following may be added

> "As to Illustration (da) : It is proved that a river is running in a certain course this year, but it is known that there have been floods for several years earlier, which might have changed its course." ;

Illustration (e):

The court may presume under ill.(e) that judicial and official acts have been regularly performed. It may be noted that this refers to judicial as also official acts.

In the latter part of sec. 114, it is stated, in connection with "illustration (e) as follows:

> "as to illustration (e) – a judicial act, the regularity of which is in question, was performed under exceptional circumstances."

We have noted that sec. 80 deals with 'presumption as to documents produced as record of evidence.' It refers to a presumption of genuineness.

The ordinary rule is "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. (Brooms Legal Maxims).

In State of Haryana vs. Hari Ram Yadav, AIR 1994 SC 1262 it was pointed out that in cases where the exercise of statutory power is subject to the fulfillment of a condition, then the recital about the said condition having been fulfilled in the order raises a presumption about the fulfillment of the

condition, and the burden is on person who states that the condition is not fulfilled to prove the same.

Again, 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. It is open to the person who claims that such opinion was in fact formed, to produce the record or minutes recorded before the order was passed, to prove that such an opinion was formed before the order was passed. (Swadeshi Cotton Mills Co. Ltd. vs. State of UP: AIR 1961 SC 1381.

There are a large number of decisions of the Supreme Court where presumption of regularity was raised in respect of forensic or medical or other technical reports.

Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the disputed arena. Judgments cannot be treated as mere counters in the game of litigation. The statement of Judges cannot be allowed to be contradicted by statements at the Bar, or by other evidence, placed in the appellate Court. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word in the subject. (State of Maharashtra vs. Ramdas Shrinivas Naik AIR 1982 SC 1251).

In fact, in several cases, when a counsel contends in an appellate Court that a point argued was not dealt with or when it is contended that a concession by counsel recorded in the judgment was never made, the appellate Court does not call for a report from the lower court but will ask the parties to move the same Court which recorded such a statement, for review.

The presumption under ill. (e) is 'optional' and is no doubt rebuttable.

In the 69th Report, para 56.29, it was said that no comments are necessary so far as Ill. (e) was concerned.

But, we recommend that in the latter part of sec. 114, referable to ill. (e), the words 'or official act' have to be added, after the word 'judicial'.

Illustration (f) – The Court may presume (f) that the common course of business has been followed in particular cases.

In the latter part of sec. 114, it is stated that the Court may keep in mind –

> "as to illustration (f) – 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."

While the main illustration is general and refers to 'common course of business', the latter part of sec. 114 refers to a specific situation of a letter. Sections 16 and 32(2) of the Evidence Act also refer to 'course of business'.

See also section 27 of the General Clauses Act, 1897.

The presumption under this illustration is not mandatory and further, when raised, it is rebuttable. In fact, a certificate of posting a letter is not treated as falling within the scope of this section. The Supreme Court said such a certificate is easy to produce and does not inspire confidence. (Gadhak Y.K. vs. Balasaheb: AIR 1994 SC 678). See also Mst. LMS. Ummu Saleema vs. B.B. Gujaral: AIR 1981 SC 1191. On the other hand, registered postal receipt along with a copy of the letter containing the court notice and bearing correct address raises a presumption that it was duly received by the addressee, in spite of the absence of a return of acknowledgment. (Anil Kumar vs. Nanak Chandra: AIR 1990 SC 1215). But if the evidence of the addressee that it was not delivered is believable and is believed, the presumption stands rebutted. (Radha-Kishan vs. State: AIR 1963 SC 822). See also Green Radio Service vs. Laxmibai Ramji: AIR 1990 SC 2156. No presumption can be drawn that the sealed envelop was

opened and the addressee read it. Such things do not happen when the addressee is determined to decline to accept the sealed envelop. (Harchand Singh vs. Shiv Ram: AIR 1981 SC 1284).

When the notices sent to a party are received back unserved because of refusal of the addressee, they must be presumed to have been served. Jagdish Singh vs. Nathu Singh: AIR 1992 SC 1604. A denial of service may be found to be incorrect from a party's own admission or conduct: Puwada vs. Chidamana AIR 1976 SC 869.

Section 27 of the General Clauses Act, 1897 also raises a presumption but that presumption and the one under sec. 114(f) are different. (Gangaram vs. Phulwati: AIR 1970 All 446 (F.B.)).

Sec. 27 of the General Clauses Act, 1897 reads as follows:

"Sec. 27: Meaning of service by post: Where any Central Act or Registration made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'service' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre paying and posting by registered post, a letter containing the

document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

But, if endorsement shows service 'refused', the Court has to examine whether it was really refused or such an entry was got up UOI vs. Ramgopal AIR 1960 All SC 672. But see Harcharan's case AIR 1981 SC 1284 where both sec. 27 and sec. 114 were referred to, refusal was treated as service. See also Jagdish Singh vs. Natthu Singh AIR 1992 SC 1604.

It will be noticed that while ill. (f) of sec. 114 refers to mere posting of a letter, i.e. by ordinary post, sec. 27 of the General Clauses Act deals with a letter sent by registered post with proper address, prepaid. The sections deal with different methods of communication by post. On the question whether an endorsement of refusal, in the case of a letter sent by registered post, amounts to service or not, there appears to be some need for clarification. The appropriate statute where the clarification can be given is the General Clauses Act, 1897 because that question arises only in the case of registered letters. We, therefore, do not propose to make any amendment in illustration (f) in as much as the said illustration does not directly deal with registered letters. The 69th Report did not refer to this aspect (see para 56.29) but it did not also recommend any change. We agree.

Illustration (g):

Illustration (g): It states that the Court may presume (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

The latter part of sec. 114 in so far as it relates to ill. (g) states that the Court may also take into consideration other situations. It says that 'as to illustration (g),

> "a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family".

The main ill. (g) deals with all types of evidences, oral or documentary. The explanation in the second half of sec. 114 refers to a case of documentary evidence.

This rule is contained in the maxim: omnia praesumuntur centra solenniter. Adverse inference can be drawn only when there is withholding of evidence.

If a party considers a document irrelevant, he need not produce it. If the opposite party is dissatisfied he may apply by affidavit seeking its production for inspection (Bilas vs. Desraj: A 1915 PC 96).

But in Murugesam vs. Gnana AIR 1917 PC 6, the Privy Council made strong observations stating:

> "a practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to third party, this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordship's opinion, an inversion of sound practice for those deserving to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

The principle was applied by K. Subba Rao J in Kundan vs. Custodian of Evacuee Property: AIR 1961 SC 1316 by holding that the presumption under sec. 118 of the Negotiable Instrument Act that every negotiable instrument is executed for consideration could be rebutted by the defendant by asking the Court to draw an adverse inference if the plaintiff who is a businessman maintaining accounts is withholding the said accounts from Court. The

Court could draw an adverse inference that the accounts of the plaintiff, if produced, would not show that the plaintiff had advanced any monies to the defendant and hence it should be presumed that the negotiable instrument was not supported by consideration.

There are a number of other cases where the principle is applied.

As to non-production of documents after notice, we have already examined section 65, 66. As to presumption of due execution, attestation of documents, we have already seen that in sec. 89. Section 164 further provides that when a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or order of the Court.

So far as criminal cases are concerned, there is no duty cast on the accused to call any evidence and no adverse inference can be drawn as to his guilt if he chooses not to offer evidence. Non examination of the Investigating Officer does not per se vitiate the trial in a criminal case (Bihari Prasad vs. State: AIR 1996 SC 2905).

In S.Gopal Reddy vs. State of AP: AIR 1996 SC 2184, where the allegation of the complainant was that the accused cancelled the marriage for non-fulfilment of dowry demand and it was based on a letter allegedly

written by the accused, failure to produce the letter invites adverse inference to be drawn.

The presumption under ill. (g) is discretionary and so in the event of non-examination of a witness by the prosecution, the Court is not bound to infer that if examined, he would have given a contrary version, unless there are other circumstances (Harpal Singh vs. Devinder Singh: AIR 1997 SC 2919.

See also Sarwal vs. State: AIR 1974 SC 778. But where evidence of interested eye witness suffered from various infirmities, non examination of independent witnesses could lead to adverse inference. (Bir Singh vs. State: AIR 1978 SC 59). Where independent eye witness are kept back deliberately, adverse inference can be drawn: Karnesh vs. State AIR 1968 SC 1402; Dalbir vs. State: AIR 1977 SC 472. But where the eye witness not examined belong to the faction opposed to the victims, their non-examination is not material Ram Avatar Rai vs. State of UP: AIR 1985 SC 880. Where the defence never questioned the prosecution statement that a witness was won over by the accused, no adverse inference can be drawn on account of non-examination of the witness (Gurmej Singh vs. State of Punjab: AIR 1992 SC 214.

We have referred to the case law only to show that there are always a variety of situations, based on human conduct, as to why adverse inference could be drawn or not drawn.

We agree with para 56.30 of the 69th Report that no amendment of ill.(g) is necessary.

Illustration (h):

Illustration (h): Illustration (h) in sec. 114 states that a Court may presume (h) "that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

The latter part of sec. 114, relevant to ill. (h) requires the Court to consider:- "as to ill (h):- a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked."

As to questions which one is not compelled to answer see sections 121 to 129. See also sec. 148(4) of the Evidence Act which says (while dealing with questions which have to be answered (see sections 132 and 147) with regard to such witnesses that:

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

We agree with para 56.30 of the 69th Report that this illus. does not require any amendment.

Illustration (i):

Illustration (i): This illustration states that the Court may presume (i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

The latter part of sec. 114 in relation to ill. (i) states that the Court may consider the facts: "as to illustration (i),:- a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it."

Section 81 of the Negotiable Instruments Act states that when a bill of exchange is produced by the acceptor, the presumption, is that it has been paid. The presumption is that a debtor, who had executed (say) a promissory note,- if he (debtor) is in possession of the promissory note,- has discharged

the debt and taken away the promissory note from the possession of the creditor. But it is rebuttable presumption. He may have in a given case, stolen it from the lender.

Where the mortgagor produces a deed of mortgage with an endorsement of payment of money under the signature of the mortgagee who is the plaintiff, the onus is on the mortgagee-plaintiff to prove that the endorsement was got by dishonest means or was a forgery (Chaudhari Md vs. Sri Mandir: 39 I.A. 184 (PC).

The ill.(i) is illustrated by the judgments of the Privy Council in Bhoy Hong Kong vs. Ramanathan: 29 I.A. 43.

We agree with para 56.31 of the 69th Report that ill. (i) does not need any change.

Section 114A: This section deals with 'presumption as to absence of consent in certain prosecutions for rape. It reads as follows:

> "114A. In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of subsection (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual

> intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."

This section was inserted by the Criminal Law (Amendment) Act 1983 (43 of 1983) w.e.f. 25.12.1983. This section was introduced because of the increasing number of acquittals of accused in cases of rape. If she had been raped at a place where none could have witnessed – as it happens in most cases – the prosecution would find it difficult to prove the offence beyond reasonable doubt. Sometimes, medical or DNA evidence is available and more often, it is not available.

The presumption is mandatory but is rebuttable.

There are several judgments of the High Courts which have applied sec. 114A in cases of rape under sec. 376 of the Indian Penal Code. But we prefer to refer to the two Supreme Court judgments on the point.

In Gagan Bihari Savant vs. State of Orissa: 1991(3) SCC 562 the evidence of the prosecutrix showed that she had protested and struggled while she was subjected to forcible sexual assault by accused persons. It was held that evidence showed absence of consent on the part of the victim,

even apart from the legal presumption under sec. 114-A. The Supreme Court confirmed the conviction of all the persons involved in the gang-rape.

But, in a recent case in Dilip vs. State of M.P.: 2001(9) SCC 452, the presumption was raised but it was held that in view of the infirmities in the evidence, the place of rape was not proved. It was held that while the sole testimony of the prosecutrix could be acted upon and made the basis of conviction without being corroborated in material particulars, in view of the infirmities in the sole testimony of the prosecutrix which contradicted the 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. On the question of consent, though presumption under sec. 114A was raised, no finding, it was held, need be recorded because of the finding that the prosecutrix was a willing party. The appeal was allowed and the appellant was acquitted in the Supreme Court.

In 172nd Report, there was an amendment 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, as the said Report is not yet implemented, we leave sec. 114A as it is now.

Section 114B: (As proposed in the 113th Report of the Law Commission).

This section is not yet included in the Evidence Act, 1872 though recommended in the 113th Report of this Commission. 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 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. The Human Rights Commission in its reports has also been referring to custodial violence as well as to custodial deaths and recommending compensation. When the police officers concerned are prosecuted, there is considerable difficulty in proving custodial violence and if the victim had died, it becomes more difficult.

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 : AIR 1983 SC 378. The 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: AIR 1993 SC 1960, 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.

In Joginder Kumar vs. State of UP (AIR 1994 S.C. 1349) it was stated that the arrestee has a right to have his friend, relative or some other person informed about his arrest.

A letter of a Bar Association containing allegations of torture by police was treated as a writ petition in Secretary, Hailakandi Bar Association vs. State of Assam: 1995 Suppl (3) SCC 736 and after rejecting the report of the Superintendent of Police regarding absence of injuries, the CJM was directed to enquire. In Kewal Pati vs. State of UP: 1995(3) SCC 600, it was held that the Jail authorities have the responsibility to ensure life and security of prisoners.

In one of the classic judgments, the Supreme Court in D.K. Basu vs. State of WB: AIR 1997 SC 610 referred to custodial violence by way of torture, rape and death in police custody or in police lock-up and held that such violence breaches basic human rights and Art. 21 of the Constitution of India. Torture involves not only physical suffering but also mental agony. Eleven directives were issued to the police to prevent such torture. 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.

In People's Union for Civil Liberties vs. Union of India: AIR 1997 SC 1203, compensation was demanded in the case of two persons who were shot, in what are called, fake encounters at an isolated place.

Reference was in fact made by the Supreme Court to the 113th Report of the Law Commission in State of MP vs. Shyam Sunder Trivedi: 1995(4) SCC 262. It was pointed out that in cases of custodial death or police torture, it is difficult to expect direct occular evidence of the complicity of the police. Bound as they are by the ties of brotherhood, often police personnel would not come forward to give evidence and more often than not, police officers could – as happened in that case – feign total ignorance about the matter. Courts should not, in such cases, show an exaggerated adherence to the principle of proof beyond reasonable doubt. There will hardly be any evidence available to the prosecution to implicate the police. The Court called deaths in police custody as the "worst kind of crimes in civilized society, governed by rule of law. Men in 'khaki' are not above the law." Section 330, 331 of the Penal Code make it punishable for persons who cause hurt for the purpose of extorting the confession by making the offence punishable with sentence upto 10 years of imprisonment but convictions, in such cases, are fewer because of the difficulties in proving evidence. The Court observed:

> "Disturbed by this situation, the Law Commission in its 113th Report recommended amendments to the Indian Evidence Act so as to provide that in the prosecution of a police officer for an alleged

offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in the police custody, the Court may presume that the injury was caused by the police officer having the custody of that person during that period unless the police officer proves to the contrary. The onus to prove the contrary must be discharged by the police official concerned."

The Court further observed:

"Keeping in view the dehumanising aspect of the crime, the flagrant violation of the fundamental rights of the victim of the crime and the growing rise in the crimes of this type, where only a few come to light and others don't, we hope that the Government and legislature would give serious thought to the recommendation of the Law Commission and bring about appropriate changes in the law…."

Now the 113th Report was submitted to the Government on 29.7.1985 and it is unfortunate that, 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'.

(Even after 1995, there are a number of cases decided by the Supreme Court on this aspect – see Watchdog International vs. Union of India: 1998(8) SCC 338, Murti Devi vs. State of Delhi: 1998(9) SCC 604 and Union of India vs. Luithukla: 1999(9) SCC 273).

The text of sec. 114B as recommended in the 113th Report was as follows:

> "114-B. (1) In a prosecution (of a police officer) for an offence constituted by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the court may presume that the injury was caused by the police officer having custody of that person during that period.
>
> (2) The court, in deciding whether or not it should draw a presumption under sub-section (1), shall have regard to all the relevant circumstances including, in particular,
>
> (a) the period of custody,
>
> (b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence,

(c) the evidence of any medical practitioner who might have examined the victim, and

(d) evidence of any magistrate who might have recorded the victim's statement or attempted to record it."

We reiterate the recommendation, subject to adding a third subsection as stated below. We also feel 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 subclause and before the words 'the victim's statement'.

Sri Vepa P. Sarathi, has suggested that, if the police follow the procedural law in sec. 41, 151 CrPC, and sec. 56, 57 and 76 are strictly followed, there will be no violation of human rights. But, today, rules are observed more in breach.

In the light of D.K. Basu, we are of the view that 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.

We recommend that a new section 114B be inserted as follows:-

Presumption as to bodily injury while in police custody

"114 B. (1) In a prosecution of a police officer for an offence committed by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the Court may presume that the injury was caused by the police officer having custody of that person during that period.

(2) The Court, in deciding whether or not it should draw a presumption under sub-section (1), shall have regard to all the relevant circumstances including, in particular,

(a) the period of custody;

(b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence;

(c) the evidence of any medical practitioner who might have examined the victim; and

(d) evidence of any magistrate who might have recorded or attempted to record the victim's statement ."

(3) For the purpose of this section, the expression 'police officer' includes officers of the para-military forces and other officers of the revenue, who conduct investigation in connection with economic offences."

Section 115:

This section and sections 116, 117 are in Ch. VIII and deal with 'estoppel'.

Section 115 refers to 'Estoppel' and reads as follows:

"115. When one person has, by his declaration, act or omission, 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."

There is an illustration below sec. 115 and it reads as under:

"Illustration - A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title."

This section deals with a very important principle of law and is broadly in use in a larger number of cases not only in civil cases but also in public law issues. Principles of 'Promissory estoppel' have also become our law on account of several rulings of the Supreme Court and the High Courts.

In the 69th Report, after considerable discussion of the principle of estoppel and promissory estoppel, it was recommended in para 57.24 that an Explanation be added dealing with the position of 'minors'.

Section 115 has been the subject of numerous decisions of the Supreme Court and the High Courts before the 69th Report was submitted in 1977 and afterwards. We do not think it necessary to refer to them. Most of the aspects arising out of sec. 115 are covered by judgments of the Supreme Court and there does not appear to be any area where either there is some conflict of views or some thing to be corrected in the language of the section.

There are different types of estoppels – estoppel by deed, estoppel by record or judgment, estoppel by conduct in the UK. In our country, it is only of one kind, estoppel by conduct. The crucial words in sec. 115 are 'declaration, act or omission'. The word 'intentionally' was used (see Lord Shand in Sarat vs. Gopal ILR 20 Cal. 296 (PC)) to mean the same thing as 'wilfully' used by Lord Denman CJ in Pickard vs. Sears: 6 A&E 469. Question is whether a reasonable person could have taken the representation to be true and believe that it was meant to be acted upon.

So far as 'promissory estoppel' is concerned, the principle was first laid down in the High Trees case viz. Central London Property Trust Ltd. vs. High Trees House Ltd. 1947 (1) KB 130. It was applied first in Union of

____ vs. Anglo Afghan Agencies: AIR 1968 SC 716. The views expressed rather widely in 1979 in Motilal Padampat Sugar Mills Ltd. vs. State of UP: AIR 1979 SC 621 were deviated from in Jit Ram Shiv Kumar vs. State of Haryana: AIR 1980 SC 1285 and in Union of India vs. Godfrey Philips Ltd.: AIR 1986 SC 806. It is sufficient to refer to the recent cases in State of HP vs. Ganesh Wood Products: AIR 1996 SC 149; STO vs. Shree Durga Mills: AIR 1998 SC 591; State of Rajasthan vs. Mahaveer Oil Industries: AIR 1999 SC 2302. The principle is one of equity and the court's jurisdiction to grant relief is guided by principles now well settled. On grounds of public interest, relief can be refused. Further, the principle has been developed more as a principle in Administrative Law. We do not think that any special proviso be made in the Evidence Act, dealing with 'promissory estoppel'.

In regard to the applicability of sec. 115 to 'minors', it was pointed out in para 57.11 to 57.17 in the 69th Report, that the word 'person' in sec. 115 must, according to one view, was referable only to persons who have a capacity to contract. It was noticed that the Privy Council had left this question open in Mohori Bibee vs. Dharmo Das Ghosh: (1903) ILR 30 Cal 539 (PC). In Sadiq Ali Khan vs. Jai Kishore: AIR 1928 PC 152 the Privy Council held that a deed made by a minor was a nullity and incapable of finding a place in estoppel.

Now the Supreme Court, in Sales Tax Officers vs. Kanahayyalal: AIR 1959 SC 135 approved the observations of Lord Portam in Thurston vs. Nottingham P.B. Society: 1903 AC 6 that

> "…..a court of equity cannot say that it is equitable to compel a person to pay moneys in respect of a transaction which, as against that person, the legislature has declared void".

Same view was expressed in the Full Bench decision in Ajudhia vs. Chandan: 1937 All 610 (FB); Gadigeppa vs. Balangowda: AIR 1921 Bom 561 (FB); Hari vs. Roshan: 71 IC 161 (FB); Khan Gul vs. Lakha: AIR 1928 Lah 609 (FB). Same view was expressed in Koduri vs. Thumuluri: AIR 1926 Mad. 607; Gulab Chand vs. Seth Chuni: AIR 1929 Nag 156; Nakul vs. Sasadhat : 45 CWN 906; Ganganand vs. Raameshwar: AIR 1927 Pat 271. There are also cases of fraudulent representation by a minor that he was a major.

The law in England is the same: Leslie vs. Sheill: 1914(3) KB 607. See Phipson (1999, 15th Ed, para 5.04). The principle is also applied to a married woman under coverture Cannam vs. Farmer: (1849) (3 Ex. Ch. 698), or a trustee in bankruptcy Re vs. Ashwell: 1912 (1) KB 300 and to a Corporation in regard to acts which are ultra-viras (British Mutual Banking Co. vs. Charnwood (1887) 18 QBD 714; Rhyl UDC vs. Rhyl Amusements Ltd.: 1959(1) WLR 465.

That is why the proposal in para 57.24 for adding an Explanation is made applicable to "minor or other persons under disability". But, in para 57.15, while it was accepted that in matters not relating to contracts or transfers of property (i.e. where sec. 11 of Contract Act did not apply), the principle of estoppel must apply. Sub-para (c) in para 57.17 says:

> "(c) But this does not mean that a minor can never be estopped.– Under section 116, for example, (estoppel between landlord and tenant), a minor can be estopped. This is because sec. 11 of the Contact Act does not come in the way where the original tenancy was not entered into by a minor, who has now succeeded to the tenancy."

It was to cover such cases also that in para 57.24, a recommendation was made to add the following Explanation:

> "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."

Going back to sub-para (c) of para 57.17, we do not really see why it is necessary to make a further qualification. In the example that is given, if the tenancy was with his father, the minor, as successor to his father cannot

deny the tenancy. He is estopped not because cases of landlord and tenant are an exception but because the contract of tenancy was entered into by his father, who was not suffering from any disability. In fact, sec. 116 which deals with estoppel of tenants also uses the words 'or person claiming through such tenant'.

We, therefore, think that the first part of the Explanation "This section applies to a minor or other person under disability" is not necessary. In fact, it gives a wrong notion about the proposed Explanation.

The second part, in our view, requires some re-drafting. We, therefore, recommend 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."

Section 116:

This section refers to 'Estoppel of tenant and of licensee of persons in possession'. It reads as follows:

> "116. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had title to such possession at the time when such licence was given."

The section deals with estoppel against a tenant/licensee. The lease/licence may be from the real owner. But, at other times, it may also be one granted by a person not having 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. It is obvious that this estoppel must operate during the period of the lease/licence. But the section says that the prohibition against denial of title is to operate 'during the continuance of the tenancy'. This qualification is not there in the second part of the section which deals with a licence. It also states that the tenant cannot deny the title which the grantor had "at the beginning of the tenancy" or 'at the time licence was given'. Another question is as to whether the estoppel will apply to a person to whom the tenant attorns, because he recognizes the original landlord as his landlord.

So far as limiting the estoppel 'during the continuance of the tenancy; does is 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?

The position in law is that estoppel continues (Md Mujibur vs. Shk Issb: AIR 1928 Cal 546; Bilas vs. Desraj: AIR 1915 PC 96. The 69th Report refers to judgments of the other High Courts also. Therefore, after the words 'during the continuance of the tenancy', the words 'or at any time after termination of the tenancy' must be added.

The words 'at the beginning of the tenancy' are of course understandable. If the landlord dies and is succeeded by his heirs, even then, the tenant cannot dispute the title of the predecessor landlord to whom the said heirs have succeeded.

But the above words have resulted in some conflicting decisions as to whether the estoppel applies to a person who is already in possession, though not as a tenant, but who later executes a lease deed. (See discussion on the conflicting judgments in Sarkar (15th Ed., 1999, pp 1927 to 1931)). We do not see any good reason as to why a person in prior possession without authority to be in possession, should be allowed to go back to that anterior stage if he had later on accepted a person as his landlord.

Of course, if a tenant has a case that the lease was vitiated by undue influence, fraud or coercion or mistake, the ban under this section, it is well settled, does not apply. But barring such cases, there is no reason why the estoppel should not apply to a person already in possession.

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.

We agree with above recommendation with slight modification that the words "or the person claiming through such tenant" should also be added after the proposed words "if the tenant".

The other aspect refers to the cases of 'attornment'. This aspect has been dealt with elaborately in the 69th Report (paras 58.20 to 58.29). After attornment, a 'new tenancy' is created in the technical sense. But, notwithstanding some conflict of decisions to which the Report refers, it was felt that, because the person to whom the original tenant surrendered has, by virtue of the attornment, recognized the original landlord, the estoppel must apply, unless he pleads, fraud, undue influence or coercion or mistake. The 69th report recommended insertion of new sub-section (2) for dealing with the issue of attornment.

We are not dealing with cases arising under Rent Acts where the tenant in possession becomes a statutory tenant. Some State statutes which

provide for eviction upon denial of title, do permit a denial of title provided it is bonafide. It is not necessary to deal with those cases.

We, therefore, broadly accept the recommendation in para 58.31B by the 69th Report. Now section 116 as recommended in the 69th Report requires that the existing provisions of sec. 116 should be redesignated as subsection (1) with the addition of the words "or any time thereafter if the tenant continues in possession after termination of the tenancy".

We therefore recommend that section 116 should be substituted as follows:-

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.

(2) 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'. It reads as follows:

> "117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall 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.
>
> 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."

The first part of the section refers to an identical principle in vogue in England but the first Explanation differs from English law in the sense that the acceptor is not permitted to show that the signature of the drawer is a forgery for he is held to be bound to know his own correspondent's signature (Sanderson vs. Collman (1842) 11. LJPC. 270). This section is

supplemented by sections 41 and 42 of the Negotiable Instruments Act, 1881. By sec. 41, an acceptor is bound by a forged document, if he knew or had reason to believe the endorsement to be forged. By sec. 42, an acceptor is liable though the bill is drawn in a fictitious name. By section 20 of that Act, the maker and acceptor are estopped from denying the capacity of the payee to endorse. By sec. 122 of that Act, the endorser is estopped from denying the signature or capacity of prior party. (Sarkar, 15th Ed, 1999, para 1948).

In Sadasuk vs. Kishen: AIR 1918 PC 146, it was held that in an action upon a bill of exchange or pronote against a person whose name properly appears as party to the instrument, it is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.

So far as bailment is concerned, the relevant provisions of sections 148 to 181 of the Contract Act, 1872 would be relevant. Sec. 167 refers to the right of a third party to claim the goods bailed.

Licences under this section are different from the licence referred to in sec. 116. Here, the reference is to licensees of patent or trade marks from their owners.

In the 69th Report, it was pointed out (see para 59.5) that in the 11th Report of the Commission (at p. 66, para 164) it was 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. (See also page 113, draft of sec. 104 and p 151 of Appendix III of the 11th Report). But, in the 69th Report there is no positive recommendation for such transfer. No doubt in para 59.7, the 69th Report states that no amendment is required in the remaining part of the section.

We do not think that it is 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. contatined 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.

We, therefore, do not recommend any amendment to sec. 117.

Section 118:

Sections 118 to 134 are in Chapter IX of the Evidence Act and are dealt with under the heading 'Of Witnesses'.

Section 118 deals with the subject 'who may testify'. It reads as follows:

> "118. 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."

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.

So far as evidence of children is concerned, a principle is laid down that ordinarily sec 118 requires corroboration. Requirement of corroboration is, of course, not a rigid rule. In Rameshwar vs. State of Rajasthan: AIR 1952 SC 54, the Supreme Court held that a girl aged 8 years who was alleged to have been raped, was a competent witness. The Oaths Act has no relevancy on the question of competency. Judges and Magistrates, it was held, must record their opinion that the child understands the duty of speaking truth and state why they think that the evidence of a particular

child-witness was or was not credit-worthy. But, even if such an opinion is not expressed in the judgment, it can be gathered whether the Magistrate or Judge was of that opinion or not, from the circumstances of the case. Merely because the Judge said that he was not administering the oath because the girl would not understand the significance of an oath, that did not mean that Judge stated the fact that the girl was not a competent witness. It was held that the "tender years of the child, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary". "There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand". Adverting to ill (f) in sec. 8 and sec 157 of Evidence Act, it was held that the previous statement of an accomplice or a complainant would, in the given facts of a case, be accepted as corroboration. See also Tehal Singh vs. State of Punjab: AIR 1979 SC 1347; Rameshchandra vs. Champabai: 1964(6) SCR 814; Janardan vs. State of Bihar:1971(3) SCC 927; Nathu Singh vs. State of MP: 1974(3) SCC 584.

A boy of about 14 years of age, it was held, can give a proper account of murder of his brother and if he had the occasion to witness the murder, it will not be proper to assume that he was tutored (Prakash vs. State of MP: AIR 1993 SC 60). When the witness is not only a teenager but also an eye-witness, her evidence has to be scrutinized with care and caution. But merely, because a person is a rustic, the evidence cannot be brushed aside. (Shivji vs. State: AIR 1973 SC 55). See also Baby Kandayanathil vs. State of Kerala: 1993 Crl LJ 2605. The fact that the police took the child for

production in court is not relevant if the child's evidence is otherwise convincing. Mangoo vs. State of MP: AIR 1995 SC 946; See also Dattu Ram Rao vs. State of Maharashtra 1997 (3) Mah LJ 452 (SC).

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.

As to the competency of a lawyer in a case to testify in the same case, there is considerable case law. Rule 13 of Chapter II of Part VI of the Bar Council of India Rules provide as follows:

> "An advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness and if he being engaged in a case, it becomes apparent that he is a witness on a material question of fact he should not continue to appear as an advocate if he can retire without jeopardizing his client's interest."

Evidence of a counsel in the case was accepted in Biradhmal vs. Prabhawati: AIR 1939 PC 152. A counsel is a competent witness if in case of malicious

prosecution if he speaks about the good faith of his client in an earlier case (Corea vs. Peiris : 14 CWN 86 (PC)).

A power of attorney holder under sec. 2 of the Power of Attorney Act, is not competent to appear as witness on behalf of the party appointing him.

Under sec. 342A in the Code of Criminal Procedure (Now sec. 315(1) of the Code of 1898), 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.

The clause in Art. 20(3) of the Constitution of India 'to be a witness' is different from 'to appear as a witness' (see Sharma vs. Satish: AIR 1954 SC 300. See also State vs. Kathi Kalu: AIR 1961 SC 1808.

Executors are competent witnesses to prove the execution of the will. (see sec. 68 of the Indian Succession Act. This section is extended to Hindus and others by sec. 57 and Schedule III of that Act).

As to lunacy, the Explanation is clear. In R vs. Hill (1851) 2 Den. 254, the witness believed that he had 20,000 spirits personally appertaining to him. On all other points, he was perfectly sane. His testimony in all other

matters was accepted (Norton p. 305) (This case was also referred in para 60.12 of 69th Report).

In R vs. Barratt: (1996) Crim L.R 495 C.A where the witness's fixed belief paronia caused her to have bizarre beliefs about her private life but it was held that did not render her incompetent to give evidence of finding finger prints.

At common law, atheists and such non-Christians as were atheists, (but not those who believed that God would punish for false swearing) were incompetent to be sworn to testify. These disqualifications were removed by UK Evidence Further Amendment Act, 1869.

Incompetency for giving evidence by reason of conviction for crime was abolished by UK Evidence Act, 1843.

In as much as the principles pertaining to sec. 118 have all crystallized and in para 60.12 of the 69th Report, it was recommended that there is no need to amend sec. 118, and we agree with it.

Section 119:

This section deals with 'dumb witnesses'. It reads:

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

The words 'unable to speak' can include deaf or dumb persons or persons who are both deaf and dumb. It may also relate signs of a dying woman (see R vs. Abdullah: 7 All 385 (FB).

In Godrej Soap Ltd. vs. State: 1991 Crl. LJ 828 (Cal), the Court assumed that a body corporate is unable to speak but held that it can still give 'evidence in writing' and the evidence so given has to be treated as 'oral evidence'.

As pointed out in para 60.15 of the 69th Report, in UK and USA, in the case of a deaf or dumb (or deaf and dumb) witness, an interpreter can be employed. In the 69th Report it was assumed: "Not much difficulty, however, seems to have been caused by the absence of a provision on the subject in India."

But in a ruling after 1977, in Kumbhar vs. State: AIR 1966 Gujarat 101, 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.

In view of the conflicting judgments and the prevailing position in UK and USA, it appears that an Explanation is necessary though it was felt unnecessary in 1977 when the 69th Report was given.

We, accordingly, recommend for insertion of an Explanation below sec. 119.

> "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 reads as follows:

> "120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

At the outset, it is clear that the word 'suit' has to be replaced by the word 'proceeding'.

So far as civil proceedings are concerned, there is no need to make any amendment in this section. But, so far as criminal proceedings against a spouse are concerned, the need to balance family harmony and the quest for truth has to be balanced. In the 69th Report, it was pointed out in Chapter 61 that such a balance though not available earlier, was achieved in England.

Under Lord Brougham's First Evidence Act, 1851, sec. 2 made parties (but not their spouses) competent and compellable. Section 3 made an exception in criminal proceedings. Sec. 4 made exceptions in proceedings instituted in consequence of adultery and in actions for breach of marriage.

Under Lord Brougham's Second Evidence Act, 1853, sec. 1 made spouses competent and compellable. Sec. 2, however, made exceptions to sec. 1 in criminal proceedings and 'in any proceeding instituted on consequence of adultery.

Under Evidence Further Amendment Act, 1869, sec. 1 the exceptions made in the 1851 and 1853 Acts in respect of actions for breach of marriage and proceedings instituted in consequence of adultery were repealed.

Under the Criminal Evidence Act, 1898 none of these statutes applied to criminal cases, so that the common law rule of the competence of parties and the spouses continued to apply. The Act of 1898 made the accused competent, but not compellable as a witness. It also made certain statutory changes pertaining to the wife of the accused. The Act made her a competent witness for the prosecution in certain special cases but she is still not compellable.

In 1977, when the 69th Report was prepared, the law in England was summarised as follows: (see para 61.5)

> "The present position in England, is that the parties and their spouses are (subject to privilege) competent and compellable in civil cases. The accused is competent, but not compellable. The spouse is not competent or compellable except in a few cases. This, of course, is a very broad statement of the position".

The 69th Report then stated, in a very detailed discussion that while ascertainment of truth is important, to compel a wife or husband to give evidence in criminal cases against each other may lead to family disharmony and this was accepted in England except in a few types of cases. This aspect was adumbrated by the House of Lords in Leach vs. R: 1912 AC 305 and passages from the speeches of Lord Atkinson and Earl Loreborn L.C, were quoted. (para 61.15). Finally in para 60.16 it was stated that in criminal cases the spouse should not be compelled to give evidence against the other spouse and in para 61.17, a proviso was drafted for addition below sec. 120.

We shall now refer to the position after 1977. Of course, there is protection against self-incrimination under Art. 20(3) of the Constitution. Under sec. 313 of the Code of Criminal Procedure protection still remains. The accused has however, the option to examine himself as a witness for the defence. If the accused has, however exercised the option, he has to take the oath. His position is that like that of any other witness, and he can be cross-examined. So the accused in India is now competent but not compellable witness.

In the Report of the Commission on 'Right to Silence' (180th Report), the Commission noticed that some changes were made in England in 1994, under the Criminal Justice and Public Order Act and by the Youth Justice and Criminal Evidence Act, 1999 permitting adverse inference to be drawn against an accused if he does not answer certain questions. It was pointed out that the Australian Law Commission, in a recent Report did not think it

desirable to follow the changes in UK. Then the 180th Report stated that having regard to Art. 20(3) of the Constitution of India, it was not possible to make inroads into the right against self-incrimination and get into serious problems found in UK today while examining the accused and his lawyer, as to the reasons for his silence. 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.

In England, as far as the evidence of spouses in concerned, there was a further amendment under sec. 80 of the Police and Criminal Evidence Act, 1984 (see para 44.51 of Phipson, 15th Ed., 1999). Further, sec. 80 of the 1984 Act has been amended by the Youth and Criminal Evidence Act, 1999. (see para 8.2 to 8.25 of Phipson, 15th Ed., 1999). The position in England now is as follows: (a) So far as the competence of the wife or husband of the defendant is concerned, the husband or wife of a defendant is always competent to give evidence on behalf of the defendant or a co-defendant and is competent to give evidence for the prosecution unless he or she is himself or herself also charged in the proceedings. (b) So far compellability of the wife or husband of the defendant, for the defendant is concerned, subject to the same exception, the husband or wife of a defendant is compellable to give evidence on behalf of the defendant. (c) However, so far as the compellability of the wife or husband of the defendant <u>for the prosecution</u> is concerned, the spouse is also compellable to give evidence for the prosecution, again subject to the same exception, in respect of any offence involving either

(1) An assault on, injury or threat to that spouse; or

(2) An assault on, injury to, threat of injury to or sexual offence in respect of a person who was under 16 at the time of the alleged offence:

A person who is compellable for prosecution is compellable against any person charged with one of the specified types of offence. Thus a spouse of a defendant can be compelled to give evidence in relation to a specified offence for the prosecution against a co-defendant of his or her spouse. (d) So far as compellability of the wife or husband of the defendant for a co-defendant is concerned, a spouse or a defendant is concerned, the spouse of a defendant is compellable for a co-defendant in respect of the same offences for which he or she would be compellable for the prosecution. It is the co-defendant who seeks to compel the spouses who must be charged with one of the specified offences. (see para 8.25, Phipson).

Thus, while at one time, at common law, even parties to the suit were incompetent witnesses on the ground of self-interest – "Nemo in propria causa testis esse debet" (No one can be witness in his own cause) and husband or wife was also incompetent to give evidence either for or against one another, all these were swept away except for a few exceptions.

Sarkar (15th Ed., 1999, page 1973) points out that in Sri Lanka sec. 120 has been redrafted. Two recent cases are noticed. In K. Saroja vs. Valliammal Ammal: 1997 AI HC 1959, in a suit for specific performance of contract of sale, when the wife who was the purcharser pleaded that she was not aware of any previous contract but the wife had not appeared as a witness, and instead her husband appeared as a witness, the husband was held to be a competent witness for the wife in civil proceedings.

But in Public Prosecutor vs. Abdul Majid, 1994(3) Malayan L.J 457, the acused's wife, it was held, could be compelled to give evidence for the prosecution. It was precisely this aspect that came up for consideration before the Commission in the 69th Report and they quoted the following observations of Lord Atkinson in Leach vs. R (1912) A.C. 305 (HL):

> "The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and think if it is to be overturned, it must be overturned by a clear, definite and positive enactment…"

Earl Loreburn observed in the same case:

> "It is very desirable……that you ought not to compel a wife to give evidence against her husband in matters of criminal kind"

We however do not want to enact the long winding provision in the English Act of 1884 and 1999.

We agree that, as recommended in para 61.17, the following proviso be added below sec. 120:

"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:

This section refers to privilege for Judges and Magistrates from being compelled to give evidence. It reads as follows:

"121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge

or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting."

There are three illustrations (a), (b) and (c) below sec. 121. The first one says if there is any allegation that a deposition was improperly taken by a Magistrate, he cannot be compelled to answer question on that allegation, except upon an order of a superior Court. Ill. (b) says that where it is alleged that an accused spoke falsehood before a Magistrate, the Magistrate cannot be examined on the issue, except upon an order of a superior Court. Ill. (c) refers to the exception and says that if a person attempted to murder a person during the course of the Sessions trial in the Court, the Sessions Judge may be examined without permission of a superior Court.

In Banke vs. Mahadeo: AIR 1953 All 97, it was held that for the purpose of granting a special order to examine a subordinate judicial officer, the Superior Court may call for a report from the said officer.

This is based on public policy and expediency.

The 69th Report, after some discussion, did not recommend any amendment to sec. 121. But we find that in England, the privilege is extended to arbitrators but the protection offered to them is narrower. According to Phipson (15th Ed., 1999, para 24.30)

> "Arbitrators may give evidence as to what transpired in an arbitration, and to state what matters were included in the submission, but they must not be asked questions about the reason for their award".
>
> (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).

Sec. 3 of the Indian Evidence Act, 1872 which describes Court does not include arbitrators. In Amir Begam vs. Badruddin: ILR 36 All 336 (PC), Lord Parmor stated:

> "An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence, which he can give, is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or of partiality, is not used for a different purpose; namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction, and on which his decision is final".

When a matter was referred to an umpire upon difference between arbitrators, the arbitrator could be called to give evidence to explain the differences (Bourgeois vs. Weddell & Co. 1924.1.KB 539). An arbitrator could be examined in connection with clerical or accidental omission (Narayanan vs. Devaki: AIR 1945 MAD 230).

In Union of India vs. Orient Eng. Works: AIR 1977 SC 2445, it was held that the arbitrator cannot be summoned merely to show how he arrived at the conclusion. If a party has a case of malafides and makes out a prima facie case that the charge is not frivolous or has other reasonably relevant matters to be brought out, the Court may summon the arbitrator. The Court approved Khublal vs. Bishambar: AIR 1925 All. 103.

From the above, it will be seen that the extent of privilege so far as arbitrators are concerned, is not the same as in the case of judicial officers, particularly if malafides or misconduct or bias is alleged. The Commission is of the view that having regard to the various aspects covered by case law, it is not possible nor desirable to frame a straight jacket formula in the form of a section so far privilege of arbitrators is concerned. We, therefore, do not propose any special provision.

In a recent decision of the Court of Appeal in England in Warren vs. Warren: 1996(4) All ER 664 (CA), it was held that although there is a clear constitutional distinction between High Court and other Judges – it does not

follow that the distinction provides a reason for distinguishing between judges of superior and other Courts as to the compellability to give evidence. It was held that Judges of superior Courts too are not compellable. Lord Woolf M.R. expressed the opinion that although not compellable, judges could be relied upon to give evidence in any situation where it was vital for them to do so.

We agree with the view of Lord Woolf M.R. and therefore, do not think it necessary to make any provision in sec. 121 as to compellability of High Court and Supreme Court Judges to give evidence.

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: ILR 3 All 573); (D.J. Vaghela vs. Kantibhai Jethabhai: 1985 Crl. LJ 974 (Guj).

The 69th Report (para 63.7, 63.8) as well as Sarkar (15th Ed., 1999 pp 1979-80) refer to some more cases of Magistrate deciding a case on merits where he has given evidence himself. No recommendation was made regarding such cases.

On an overall consideration of various aspects arising under sec. 121, we do not think any amendment is necessary. What is not covered by the section is covered by case law and there is not much of serious conflict which requires to be resolved by legislative amendments.

We leave section 121 as it is.

Section 122:

This section deals with 'communications during marriage' between a husband and wife and as to what extent they are privileged. It reads as follows:

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

The section bears some resemblance to sec. 120 which has already been dealt with in connection with competency and compellability of one spouse

to be witness against the other. We have already referred to the amendments proposed to sec. 120 by the 69th Report which we have accepted.

The first part of the section refers to the witness-spouse who cannot be compelled to disclose any communication made to him or her; the second part relates again to "any such communication: i.e. made to the witness, which, in case he volunteers (i.e. otherwise than under compulsion), he cannot unless the other spouse who has written it (or his/her representative) consents. The third part deals with two exceptions (1) inter se action between the spouses (2) proceedings in which one of the spouses is prosecuted for any crime committed against the other.

The section does not speak of communication by the witness-spouse to the other spouse. The 69th Report referred (see para 64.4 and 64.37) to rules which refer to communication between spouses. The New Jersey Rules of Evidence say:

> "No person shall disclose any communication made in confidence between such person and his or her spouse."

This includes communication received by the witness spouse as also those sent by the witness. Similar is Rule 215 of the Model Code of Evidence

framed by the American Law Institute. It refers to privilege in regard to "communication between spouses".

If the paramount reason for protecting such communications was the preservation of family harmony – a concept on which there is no difference of opinion anywhere – sec. 122 must be amended by granting the immunity not only to the communications received by the witness spouse but also to those which emanate from him or her.

A question arises whether a letter which is written by the husband to the wife, if it falls in the hands of a third party or the police, it could be put in evidence. The House of Lords held in Rumping vs. D.P.P. 1962(3) All ER 256, that no privilege attaches to such a communication in the hands of a third party. Viscount Redcliffe dissented. The Supreme Court of India in M.C. Varghese vs. T.T. Ponnan AIR 1970 SC 1876 appear to have accepted the majority view in the above judgment (see para 15). They say after referring to the above ruling that, if the spouse who received the letter comes as a witness, then she alone can object. In para 14, they say that, even if the spouse witness who received it objects, that does not mean that no other evidence is barred under sec. 122.

In the 69th Report, in para 64.45, the Commission felt that it sounds reasonable to extend the provision (i.e. see 122) to communications overheard or intercepted by others also. The fundamental object is to

preserve family harmony. In order to substantiate this proposal, the Commission quoted extensively from the speech of Viscount Radcliffe. He said:

> "Ought the law to apply a different rule merely because the letter has miscarried and has come into the hands of the police? Considering the history and the nature of the principle that lies behind the special rules governing testimony of husband and wife in criminal trials, I do not think it should."

He even refers to eaves dropping, and cases where a letter is snatched (say) from the wife's hands. In all such cases, it is said the trophy can be carried into Court by the prosecution but that cannot be permitted. He referred to the principle of ensuring 'conjugal confidence' and the legal policy behind the provision.

Sarkar says (15th Ed., 1999, page 1986) that under English and American rule, third persons are allowed to give evidence of communication between married persons made in their presence or overheard by them (R vs. Smithies 5. C & P. 332: R vs. Simmons: 6 C & p. 540; State Bank vs. Hutchinson: 62 Kan 9 (Am).

Before we go further, we shall refer to other decisions of the Supreme Court, under this section though, in our view, they do not throw much light on the question. Ram Bharosey vs. State AIR 1954 SC 704 was a case of a wife deposing in respect of the acts of her husband in relation to a crime which she saw. It was said sec. 122 was not attracted as she was deposing to his acts and not his communication.

In a recent case in Shanker vs. State of TN: 1994(4) SCC 478 (see para 28) where the husband, accused in the case, told the witness about his killing the deceased. It was held that the witness was not the legally wedded wife of the accused and was his mistress, (the first marriage of the accused still subsisting) and hence sec. 122 was not attracted.

We have already referred to R vs. Simmons (1834)6. C & P 540. There Alderson B said

> "What a person is overheard saying to his wife or even saying to himself is evidence."

Phipson (15th Ed., 1999, para 28.10) thus refers even to a 'soliloquy' as being evidence. Also refers to R vs. Sippels (1839) a case of a statement made in sleep. R vs. Spilsbury 1835-7 C & P. 187 is a confession of a drunk

followed by the Cape Provincial Division of the Supreme Court of South Africa in R vs. Rimmer 1954 (1) SA 489.

We have given serious consideration to the proposal made in the 69th Report for excluding evidence of third parties in relation to communication between spouses which falls in their hands. Of course, Viscount Radcliffe laid stress on 'family harmony' principle and the duty of the prosecution to prove the guilt of accused. The point here is that a written communication which falls into hands of third parties is not a communication "made to him". It has not reached the person to whom it was meant, it does not fall within the scope of the privilege. If a soliloquy is not inadmissible, why should not a written communication which has not reached the other spouse be admissible? (Then, question is if a letter received by the other spouse, if it reaches a third party, should it not be admissible). The question may arise whether a statement made by a spouse to another in the presence of servants or third parties. Why should the third party be shut out from giving evidence? Today, police are able to intercept phone conversation and hear them simultaneously along with the other spouse. In some cases they are also able to obtain transcript of full telephone conversation on cell-phones. Should all these be excluded is the question? If a terrorist's talk with his wife on cell phone is intercepted, should it be held inadmissible? The way crime is increasing with the help of technology, we think that these statements should not be protected? When a husband (or wife) calls his wife on phone and speaks about a crime committed by him, any interception of the phone by the police – must be allowed to be used in the Court. This

principle must apply to civil as well as criminal proceedings, because Indian law makes no such distinction.

We, accordingly, disagree with the opinion expressed in the 69th Report to make inadmissible, information received by third parties in relation to spouse-to-spouse communications. We are of the view that between 1977 and 2002 there is a lot of difference because of development in technology and new types of litigation and also because of increase both in technology and crime. Hence, subsection (2) has to be introduced covering this aspect.

The third aspect discussed in the 69th Report concerns the exception to the rule of privilege. As it is sec. 122 excepts two classes of cases (1) suits between the married persons (2) proceedings in which one married person is prosecuted for crime committed against the other. The third exception recommended related to proceedings where one married person is prosecuted for any offence committed against a child of the other person or a child of the first mentioned person or a child of to whom either of them stand in the position of a parent. (The language is similar to the recommendation in sec. 120).

As already stated earlier, communication received or sent must both be protected.

We, therefore, recommend with slight modification of the recommendation in the 69th Report (para 64.47) that section 122 should be substituted as follows:

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 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:

This section and the next section and sec. 162 are important and have to be dealt with together. Section 123 deals with privilege in regard to privilege as to "affairs of State" while sec. 124 deals with privilege in respect of 'official communications'. Section 162 deals with production of documents in Court. The two sections read as follows:

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

> "124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure."

This section has to be considered in the light of subsequent developments in the laws in various countries including England. Section 162 (Evidence Act) has also to be kept in mind. That section reads as follows:

"Section 162. Production of documents – A witness summoned to produce a document shall, if it is in his possession or power, bring it to the Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility

Translation of documents ……..."

In the 69th Report, in Chapter 65, the discussion relating to section 123, 162 is contained in page 645 to 686. The discussion is under the following headings.

(I) Introductory; (II) History and Rationale; (III) Essential Conditions; (IV) Affairs of State; (V) Authority Competent; (VI) Procedure; (VII) Illustrative Case from Andhra; (VIII) English Law; (IX) Position in USA - (1) Criminal Proceedings; (2) Civil Proceedings with State as plaintiff; (3) Civil Proceedings with State as defendant; (4) State not a Party; (5) Public Authorities other than Central Government; (X) Other Countries – Australia, France, Scotland, Kenya, Sweden; (XI) Result of the

Comparison; (XII) Points for Amendment; (XIII) National Security; (XIV) Case law disallowing claim; (XV) Recommendation regarding sec. 123.

Recommendations regarding sec. 162 are contained at page 671, paras 65.83A and 65.85 of the 69th report.

So far as section 124 is concerned, it is dealt with in the 69th Report in Chapter 66. The discussion is under the following headings: (I) Introductory; (II) English Law; (III) Points for Amendment; (IV) Meaning of official confidence; (V) Recommendation.

In regard to amendment to sec. 123 and 124, there were reservations by Justice Dhawan and Shri Sen Verma.

Order 16 Rule 6 of the Code of Civil Procedure, 1908 and Sec. 91(2) of the Code of Criminal Procedure, 1973 refer to the procedure to be followed by the Court for summoning documents.

We may here also refer to the 88th Report of the Law Commission (7th January 1983) where several recommendations were made in connection with sections 123, 124 and 162.

Section 123:

The discussion in regard to the amendments to sections 123, 124 and 162 must naturally take into account the developments in law in India and England which have taken place since the 69th Report was submitted in 1977.

One of the crucial issues debated both in India and England was as to how the Court could decide, without looking into the document in respect of which privilege is claimed that it indeed relates to affairs of the State. Should not the Court have power, in case it has doubts whether the document is of that class, to look into the contents and decide whether indeed it relates to affairs of the State. If the State produces material before the Court, other than the document itself, from which the Court is satisfied that the document relates to sensitive affairs of the State, the problem may not arise. But, where such collateral material is not sufficient to satisfy the Court, should the Court not be the final arbiter or should the opinion of the officer and the head of the department (referred to in sec. 123) or of the public officer (referred to sec. 124). If the first part of sec. 162 permits the Court to decide upon the validity of the objection for production, is para 2 of sec. 162 not an obstacle for inquiry because it prohibits the Court from inspecting the document if it refers to matters of State. Though the last part of the para 2 of sec. 162 permits the Court to 'take other evidence to enable it to determine on its admissibility' what is to happen if such other evidence leaves a doubt as to whether the document relates to matters of State?

In some judgments, a distinction is made between a class of specific documents which must be considered invariably to be related to 'affairs of State' precluding any further inquiry whatsoever by the Court, and certain other documents which a department may seek to withhold in 'public interest' though they do not relate to 'affairs of the State' and that the power of the Court to summon and inspect such documents cannot be disputed.

The law which precluded Court inspection was first laid down in Duncan vs. Cammell Laird 1942 A.C. 624 and was followed in India. This was disputed in Glasgow Corpn. vs. Central Land Board: 1956 S.C. 1(HL). But once that law was reversed in Convay vs. Rimmer 1968 A.C. 910, Indian Courts had to consider if the law needed a change, notwithstanding para 2 of sec. 162. In England, there have been further judgments of the House of Lords – see Rogers vs. Home Secretary: 1973 A.C. 388 (HL); D vs. NSPCC : 1978 AC. 171 (HL); Science Research Council vs. Nasse : 1980 AC 1028; Burmah Oil vs. Bank of England: 1980 A.C. 1090; Air Canada vs. Secretary of State for Trade (NUL): 1983(2) A.C. 394; the Scott Report (1996) and R vs. Chief Constable of the West Midlands, ex P Wiley: 1995(1) A.C. 274. There are also a large number of rulings of the judges in the High Court and the Court of Appeal.

The 69th Report, submitted in 1977, had the benefit of the change in English law in 1968 in Convay vs. Rimmer: 1968 AC 910. The Report also

referred to State of Punjab vs. Sukhdev Singh AIR 1961 SC 493 which followed Duncan's case of 1942, and to State of UP vs. Raj Narain: AIR 1975 SC 865 which did refer to the change of law in England in 1968. But, the 69th Report did not have the benefit of the later judgment of the Supreme Court in S.P. Gupta vs. Union of India: 1981 Suppl. SCC 87 which overruled State of Punjab vs. Sukhdev Singh and laid down the law on par with the changes in England. There are a few later judgments of the Supreme Court but are mainly decisions on facts.

With the above background, we shall also refer briefly to the changes in the law in England from Duncan in 1942 to Exp. Wiley (1995) and to a few later cases.

Development of the law in England:

The history of the development is contained in Phipson (15th Ed., 1999) Ch.24.

In Duncan vs. Cammell Laird 1942 AC 624, the documents in respect of which 'crown privilege' was claimed under sec. 28 of the Crown Proceedings Act, 1947, related to the sinking of a submarine, on which secret equipment was installed during trials, with the loss of crew. The House of Lords held that a Court could not reject a claim of privilege if it was made in proper form.

In 1956, (197 H.L. Deb. Col. 741) the Lord Chancellor announced that public interest immunity would not be claimed in respect of certain classes of document including medical reports of doctors of the Crown and document relevant to the defence in criminal proceedings (see also 237 H.L. Deb. (1962) Col. 1191).

The first blow came in 1956 from the House of Lords in Glasgow Corporation vs. Central Land Board 1956 SC 1 (HL) holding that the Court had inherent power to override Crown objection to production of documents and that the Court had power, in appropriate cases, to inspect the document and form its own opinion as to the public interest.

The final blow came in 1968 in Conway vs. Rimmer: 1968 AC 910. A former police probationer who was acquitted of stealing of a torch sued for malicious prosecution and the Home Secretary refused to produce five reports, four dealing with the officer's conduct as a probationer and the fifth leading to his prosecution. Privilege was claimed on the ground of injury to public interest. The House of Lords held that the ministry's certificate and affidavit were not final and that it was for the Court to decide whether public interest immunity was attracted. A distinction was made between a 'class' of documents which required protection and others whose immunity depended only on their 'contents'. Cabinet minutes and documents relating to policy-making within government departments were treated as belonging

to this class. Further for inclusion in the 'class claim', the proper test was whether withholding of the document because it belonged to a particular class was really necessary for the proper functioning of the public service. The two kinds of public interest (apart from the third which we have referred to earlier) were explained by Lord Reid 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."

In that case, the House of Lords directed the documents to be made available for inspection and ordered disclosure.

These principles were reiterated in Rogers vs. Home Secretary: 1973 AC 388. In fact there, the use of the term 'crown privilege' was deprecated because in the normal connotation of the said words, there was no special privilege in favour of the crown. In that case, the applicant had requested a - gaming licence from the Gaming Board but on advice of the police, licence was refused. The applicant obtained, by improper means, a copy of the letter from the police and sued the Board and the police for libel. He sought to call the Secretary of the Gaming Board as a witness in order that he might produce the letter. The House of Lords held that the letter was covered by public interest immunity and the contents could not be proved by oral evidence or by production of the original. Where facts are excluded on grounds of public policy, they cannot be proved by secondary evidence.

In D vs. National Society for the Prevention of Cruelty to Children (NSPCC): 1978 AC 171 (H.L), the plaintiff claimed damages after an officer of the NSPCC had falsely alleged that she (the plaintiff) had mistreated her child. The Society acted on the information given to it in confidence and the plaintiff sought discovery of documents which would disclose the identity of the informant. Although the decision not to permit disclosure of the identity rested on the well-established principles applicable to police informers, Lord Hailsham observed that the "categories of the public interest are not closed and must alter from time to time whether by restriction or extension as social conditions and social legislation developed". Lord Edmund Davies said that the "sole touchstone is public interest – and not whether the party from

whom disclosure is sought as acting under a duty". 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.

In Science Research Council vs. Nasse: 1980 A.C. 1028, a complaint was filed with the Industrial Tribunal alleging discrimination on ground of sex and marital status. Petitioner requested papers relating to confidential assessments of each employer to be summoned. The Tribunal ordered disclosure and the Appellate Tribunal confirmed the same. The House of Lords set aside judgment and held that no principle of public interest immunity protected such confidential assessment and they were not immune merely because of their confidentiality. That may be one of the circumstances to be taken into account. The tribunal can inspect the documents for coming to the conclusion whether public interest required their non-disclosure.

Next we shall refer to Burmah Oil vs. Bank of England 1980 AC 1090 (HC). There an agreement was entered into between Burma Oil and the Bank of England. The Bank was acting under the direction of the Government with a view to rescuing the Company from financial difficulties. One part of the agreement was the sale of certain shares in British Petroleum (BP) to the Bank at a price below the current market evaluation. The shares of BP continued to rise. Therefore Burma Oil sought

to set aside the sale and called for documents relating to the directions of the Government to the Bank, including Bank memo of high level meeting attended by government ministers as well as meetings attended only by government officials. The Bank had made available documents relating to the conduct of the Bank but it objected to these documents as it amounted to a fishing inquiry. The refusal to produce the letters was rejected by the House of Lords but after perusing the documents it was held they were not significant enough to override the public interest that may be protected by non-disclosure. Lord Scarman rejected a plea for absolute protection of Cabinet minutes. He said:

> "A Cabinet minute, it is said must be withheld from production. Documents relating to the formulation of policy at a high level are also to be withheld. But, is the secrecy of the 'inner workings of the government machine', so vital a public interest that it must prevail over the most imperative demands of justice? If the contents of a document concern the national safety, affect diplomatic relations or relate to some sort of state secret of high importance, I can understand an affirmative answer. But if they do not (and it is not claimed in the case that they do), what is so important about secret government that it must be protected even at the price of injustice in our Courts?
>
> …….In striking a balance, the Court may always, if it thinks necessary, itself inspect the documents.
>
> Inspection by the Court is, I accept, a power to be exercised only if the Court is in doubt, after considering the certificates, the issues in the

> case and the relevance of the documents whose disclosure is sought. Where documents are relevant (as in this case they are), I would think a pure 'class' objection would by itself seldom quieten judicial doubts, particularly if, as here, a substantial case can be made for saying that disclosure is needed in the interest of justice."

At the beginning of the above passage, Lord Scarman made an important observation:

> "I do not accept that there are any classes of document which…may never be disclosed."

On Cabinet minutes, we shall presently refer to another passage from the next case which we propose to discuss -, namely, Air Canada vs. Secretary of State for Trade: 1983(2) A.C. 394. In that case, the airlines using Heathrow airport challenged increased landing charges and brought an action against the Trade Secretary and the British Airports Authority (BAA) arguing that the former had forced the BAA into this action and had taken irrelevant matters into account. They sought discovery of ministerial documents which related to the formulation of the policy. The House of Lords rejected the argument that Cabinet minutes were automatically immune from disclosure but considered that the information contained in the minutes added little to the plaintiff's case. Lord Wilberforce referred to other documents, the White Paper, the statement of the Secretary of State in

the House of Commons and a letter from the Department of Trade to the BAA which were on record and which were the basis for the Cabinet Minutes. Even so Lord Fraser observed:

> "I do not think that even Cabinet minutes are completely immune from disclosure in a case where, for example, the issue in litigation involves serious misconduct of a Cabinet Minister."

The view of several authors is that the 'class' exemption concept is practically dead. Steve Uglow in his "Evidence, Text & Materials', 1997, says that the "class claim" appears to have received a quietus and there is no category of document which in all circumstances is automatically exempt.

In regard to police misconduct, there is a line of cases which cultimated in Ex parte Wiley 1995(1) AC 274 (HL) to which we shall presently refer, where Lord Woolf said that the 'recognition of a new class-based interest immunity requires clear and compelling evidence that it is necessary. The existence of this class tends to defeat the very object it was designed to achieve." While agreeing with Lord Hailsham in D vs. NSPCC 1978 AC 171, that the categories of public interest are not closed and may go up or down, Lord Woolf observed:

"In my opinion, no sufficient case has ever been made out to justify the class of public-interest recognized in Neilson" (Neilson vs. Laugharne: 1981 QB 736).

Hehir vs. Commr of Police of the Metropolis 1982(2) All ER 335; Makanjuola vs. Commr of Police: 1992(3) All ER 617; Halford vs. Sharples 1992(3) All ER 624 were all overruled.

In Ex parte Wiley, 1995(1) AC. 274, the applicant had made complaints against the police which were being investigated by the Police Complaints Authority. The applicant requested that the Chief Constable should give an undertaking not to use the documents arising out of the investigation or to rely on any information in those documents, in civil proceedings by the applicant. The Chief Constable refused to give the undertaking. The application for judicial review of the refusal reached the House of Lords and the House refused to create of new class of privilege. (The Scott Report in the Matrix Churchill case specifically recommended that the public interest immunity claims should never be made on a class basis).

Lord Woolf in Ex parte Wiley said that whenever a public interest immunity plea is raised, "A rubber stamp approach to public interest immunity by the holder of a document is neither necessary nor appropriate."

(see also Allan T "Public Interest Immunity and Minister's Responsibilities" 1993. Crim L Rev 600; A-Zuckerman 'Public Interest Immunity – A Matter of Prime Judicial Responsibility" (1994) 57 Mad. L. Rev. 703; Webb R "Public Interest Immunity: The Demise of the Duty to Assent: 1995 Crim L R 556.

In England, under 'Interception of Communications Act, 1985, intercepts of communications by post or by means of a public telecommunication system may be authorized under sec. 2(1) by the Home Secretary to predict or detect serious crime. Section 9 of that Act imposes a prohibition on revealing in evidence the existence of such intercepts, whether authorized or not. In essence, an accused will be unable to ask any question in regard to who authorized or who carried them out. This protects the Home Secretary's sources of knowledge and methods of surveillance adopted by police or other agencies. The prosecution is under no duty to disclose the fact or contents of the intercepts. See R vs. Preston 1993(4) All ER 638. See also Home Office Guidelines, 1984 where only senior officers are authorized in this behalf.

Indian Law:

In this discussion, after referring to Sukhdev's case : AIR 1961 SC 493, we shall be elaborately referring to the discussion in S.P. Gupta's case: 1981. Suppl. SCC 87 from the Judgment of Bhagwati J (as he then was), which has practically settled the law on the subject finally. In fact, we will

be referring to several passages from S.P. Gupta's case in our discussion hereinbelow.

The first case to which reference has to be made is the one in State of Punjab vs. Sodhi Sukhdev: (AIR 1961 SC 493). In that case a Judicial Officer in Punjab was removed by the President, during President's Rule and while considering his representation for reinstatement, the State Council of Ministers,- after the revocation of President's Rule,- called for the views of the Public Service Commission and instead of reinstating, decided to re-employ the officer. This action was questioned by the officer and he called for the Report of the Service Commission to be produced. The Supreme Court treated the report of the Service Commission as part of the Minutes of the Minister and held it to be protected under Art. 163(3) of the Constitution of India read with sec. 123 of the Indian Evidence Act.

But in S.P. Gupta's case 1981 Suppl. SCC 87, Bhagwati J (as he then was) held that there was no basis mentioned in the judgment in Sukhdev's case as to how the Report of the Commission was treated as part of the minutes of the State Cabinet and held Art. 163(3) could not be invoked. The learned Judge referred to openness of government as a basic feature of democracy (see paras 65, 66) and referred to the Report of the Franks Committee in UK and to the opinion of Mathew J in State of UP vs. Raj Narain (AIR 1975 S.C. 865), in regard to the right to know. After referring to Art. 19(1)(a) of the Constitution (see para 67), the learned Judge referred to the interpretation of sec. 123 of the Evidence Act so as to restrict secrecy.

Adverting to Sukhdev's case in the context of sec. 123, Bhagwati J stated that he agreed that 'public interest' was an important consideration while dealing with disclosure, with a view to see if there would be 'public injury'. He did not agree with Sukhdev that whenever a plea was raised that the document related to 'affairs of state', by way of a certificate of the head of the Department, the Court must fold its hands. The balancing act of protecting public injury and duty of disclosure required that the document be looked into by the Court (see para 68). But, if the question whether the document related to 'affairs of state' was in issue, and if Sukhdev said such objections have to be decided, then unless the document is seen, such an issue cannot be decided. (para 69). If therefore the Court is to decide, then there is no point in giving finality to the certificate. "There may be a few cases" where by reference to the class of the document it may be possible to hold that it related to 'affairs of state'. But "by and large", once the Court "has found that the document is of such a character that its disclosure will cause injury to public interest, it would be futile to leave it to the head of the Department to decide whether he should permit its production or not." On this reasoning, Bhagwati J in S.P. Gupta's case dissented from Sukhdev. The learned Judge observed: (see para 69):

> "The Court would allow the objection if it finds that the document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to affairs of State or that public interest does not compel its non-disclosure or that public interest in the administration of justice in the particular case before it overrides all

> other aspects of public interest, it will overrule the objection and order or disclosure of the document. The final decision in regard to the validity of an objection against disclosure raised under sec. 123 would always be with the Court by reason of section 162."

Earlier, Bhagwati J (see para 63) remarked that sec. 123 is a "statutory provision of old vintage" because it was interpreted in a particular manner in Sukhdev's case twenty years earlier. He observed:

> "It is an instrument which can speak again in a different voice in the content of a different milieu."

Bhagwati J observed that whenever a certificate is filed claiming injury to public interest as the reason for non disclosure, "the Court will be slow to question the opinion of the official unless there can be shown to exist some factor suggesting either "lack of good faith or an error of judgment or an error of law" on the part of the minister or head of the department. He observed:

> "But even in such cases, it is now well settled that the Court is not bound by the statement made by the minister or the head of the department in the affidavit and it retains the power to balance the

> injury to the State or the public interest against the risk of injustice, before reaching its decision."

The learned Judge relied upon the Burmah Oil Co. Ltd. vs. Bank of England: 1978 AC referred to earlier. The learned Judge then observed (see para 70) that there is a class of documents which is protected and it includes

> "cabinet minutes, minutes of discussion between heads of department, high level inter-departmental communications and dispatches from ambassadors abroad"

and referred to Conway vs. Rimmer 1968 1 ALL ER 874; Reg vs. Lewes Justus, ex parte Home Secretary 1973 A.C. 388. He then held the protection extended to papers brought into existence for the purpose of preparing a submission to cabinet. (Lanyon Property Ltd. vs. Commonwealth: 129 C.L.R. 650; and to documents which relate to the framing of governmental policy at a high level (Re, Grosvenor Hotel, London: 1964(3) All ER 354 (CA). However, having said so, Bhagwai J, again added:

> "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

> 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."

He stated in para 71 that there is some reason why this special class of documents is protected. It is because, in Government, there must be complete freedom and candour in stating facts, tendering advice and exchanging views and opinions and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. It was noticed by Bhagwati J that in Conway vs. Rimmer 1968 AC 910 (952, 973, 979, 987, 993) Lord Reid dismissed the 'candour argument' summarily and so did Lord UpJohn at p. 952, by Lord Morris at p. 957 that candour would be encouraged rather than inhibited. The Court, according to Justice Bhagwati, has to balance public interest in non-disclosure and public interest in justice, even with regard to the so-called protected class of documents. Bhagwati J then stated:

> "This balancing between two competing aspects of public interest has to be performed by the Court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, because there is no absolute immunity for documents belonging to such class. Even in Conway vs. Rimmer at p 952, Lord Reid recognized an exception that cabinet minutes and the like can be

disclosed when they have become only of historical interest, and in Lanyon Property Ltd. vs. Commonwealth, (129 CLR 650, Australia) Menzies, J, agreed that there might be "very special circumstances" in which such documents might be examined. Lord Scarman also pointed out in the course of his speech in Burmah Oil Co. Ltd. vs. Bank of England, that he did not accept "that there are any classes of documents which, however harmless their contents and however strong the requirement of justice, may never be disclosed until they are only of historical interest."

Bhagwati J then quoted Lord Scarman further as follows:

"But, is the secrecy of the 'inner workings of the government machine' so vital a public interest that it must prevail over even the most imperative demands of justice? If the contents of a document concern the national safety, affect diplomatic relations or relate to some State secret of high importance, I can understand an affirmative answer. But if they do not (and it is not claimed in this case that they do), what is so important about secret government that it must be protected even at the price of injustice in our courts?

After referring to the two reasons of high level policies and need for candour in government records, Lord Scarman (as quoted by Bhagwai J) said in Burma Oil Co. case, as follows:

> "I think both reasons are factors legitimately to be put into the balance which has to be struck between the public interest in the proper functioning of the public service (i.e. the executive aim of the government) and the public interest in the administration of justice. Sometimes the public service reasons will be decisive of the issue; but they should never prevent the Court from weighing them against the injury which would be suffered in the administration of justice if the document was not to be disclosed."

Similar view of Gibbs ACJ in Sankey vs Whitlam (1978) 21 Aust. L. Rep. 505 were extracted by Bhagwati J to say that even in regard to the special category of documents, the Court's power to inspect is not taken away.

Bhagwati J then held as follows (see end of para 73):

> "There is nothing sacrosanct about the immunity which is granted to documents because they belong to a certain class. Class immunity is not absolute or inviolable in all circumstances. It is not a rule of law to be applied mechanically in all cases. The principle upon which class immunity is founded is that it would be contrary to public interest to disclose documents belonging to that class, because such disclosure would impair the proper functioning of the public service

> and this aspect of public interest which requires that justice shall not be denied to anyone by withholding relevant evidence. This is a balancing task which has to be performed by the Court in all cases."

In para 74, Bhagwati J observed that in some special situation the class doctrine may include some new type of documents. But, the balancing act is again of the Court.

In para 76, it is stated by Bhagwati J that the procedure of the concerned head of department filing affidavit has to be followed. But, even otherwise, the court can, suo motu, consider that a document is such that its contents should not be disclosed. In para 77 adverting to Sukhdev, Bhagwati J said that there is no need for Indian courts not to follow the developments in English law in this branch. The court must have the residual power. He observed:

> "It is true that under Section 162, the Court cannot inspect the document if it relates to affairs of State, but this bar comes into operation only if the document is established to be one relating to affairs of State. If, however, there is any doubt whether the document does relate to affairs of State, the residual power which vests in the Court to inspect the document for the purpose of determining whether the disclosure of the document would be injurious to public interest

and the document is therefore one relating to affairs of State, is not excluded by Section 162."

The observation in Raj Narain (AIR 1975 SC 865) of Ray CJ to the following effect (in the context of the Blue Book) were quoted:

"If the Court would yet like to satisfy itself the Court may see the document. This will be the inspection of the document by the Court",

and "if the Court in spite of the affidavit wishes to inspect the document, the Court may do so."

Bhagwati J pointed out that Mathew J in Raj Narain's case referred to Amar Chand's case (AIR 1964 SC 1658) where the Court looked into the document.

Bhagwati J then said (see para 77) as follows:

"There can therefore, be no doubt that even where a claim for immunity against disclosure of a document is made under Sec. 123, the Court may, in an appropriate case, inspect the document in order to satisfy itself whether its disclosure would, in the particular case before it, be injurious to public interest and the claim for immunity must therefore be upheld. Of course, this power of inspection is a power to be sparingly exercised, only if the Court is in doubt, after

> considering the affidavit, if any, filed by the Minister or the secretary, the issues in the case and the relevance of the document whose disclosure is sought."

In para 78, Bhagwati J said "The Court is not bound by the affidavit made by the minister or the secretary" for the said authorities are not concerned with the second aspect relating to injury to the judicial administration. It is for the Court to decide the relative strength. (In para 79, he stated that, a document concerning liberty of a detainee, must be disclosed). In para 80, it was said the burden of proof to prevent disclosure, is in the State. In para 80, he observed:

> "The doctrine of class immunity is therefore no longer impregnable; it does not anymore deny judicial scrutiny; it is no more a mantra to which the court pays obeisance….. And this exercise has to be performed in the context of the democratic ideal of an open government".

The above views of Bhagwati J were accepted by a majority of Judges among the seven in S.P. Gupta's case.

We have considered the above views closely.

We are of the view that today the English law and the Indian law are almost the same, the residual power is with the Court to decide upon disclosure by balancing the injury to public interest and the injury to administration of justice. There is no special class of documents which have

absolute protection from scrutiny by Court. Sec. 162 of the Evidence Act as also sec. 123 have to be read in the light of what was decided in S.P. Gupta.

Sri Vepa P. Sarathi has stated that our law relating to departmental communications is wider and gives full powers to court to inspect, which is not there under English law. But so far as 'affairs of State' are concerned, he opines that the said words should be restricted to 'defence, law and order and diplomatic relations with other countries'.

Before we go into other details as to secs. 123, 124 and 162, we have to refer to the Freedom of Information Act, 2002 (Act 5 of 2003) published in the Central Gazette Extraordinary, Part II, Section 1 on 7.1.2003 at p.1.

That Act is intended, as stated in the Preamble, to provide for freedom to every citizen to secure access to information under the control of public authorities, consistent with public interest, in order to promote openness, transparency and accountability in administration and in relation to matters connected therewith or incidental.

The Act in sec. 2(f) defines public authority, as any authority or body established or constituted

(i) by or under the Constitution.

(ii) by any law made by appropriate government and includes certain other bodies financed.

So far as the exemptions in sec. 8 are concerned, they do refer to records of government. Therefore, sec. 2(f) has to be construed widely as including 'government' also.

So far as the impact of Act 5 of 2003 on secs. 123, 124 and 162 of the Evidence Act, 1872 is concerned, we may point out that (a) documents of which information is permitted under the above Act 5/2003, (b) information which is exempted under sec. 8 of the said Act,- all of them are controlled by secs. 123, 124 and 162, whether they relate to affairs of the State or are communications made to public officers, or not.

S.P. Gupta's case, as accepted in the 88th Report (and its principle, accepted earlier in the 69th Report) and the principles accepted by us that the court can always call for and look into any document, a power which is absolute and universally accepted in all countries, governs even the exempted items in sec. 8.

As the law is clear, it is not, in our view, necessary to make any special provision in regard to Act 5/2003 in the Evidence Act.

We are, however, of the view that the words 'unpublished official records relating to affairs of State' need not be restricted to any particular class and is best left to the courts. It is not necessary to recognise any class of documents inasmuch as the court is entitled to inspect all documents, if it thinks it necessary, while performing the balancing task referred to above.

We shall now refer to some other aspects which arise in connection with sections 123, 124 and 162.

(a) Under sec.123, the objection to the production of the document may occur in a court subordinate to the High Court or in a High Court or in the Supreme Court of India. There is no difficulty for a decision thereon if the objection is raised in the High Court or the Supreme Court of India. But, if it is raised in a Court subordinate to the High Court and the objection that it concerns 'affairs of State' is rejected by a reasoned order, it will result in public disclosure of the contents of the record before an authoritative decision is given by the High Court. The 88th Report of the Law Commission no doubt recommended a right of appeal to the High Court to be given against the decision of such a court rejecting the objection, whether in a civil or criminal proceeding. But in our view, if the court which is subordinate to the High Court rejects the objection as to production of the record, by a detailed order, the contents may indirectly get into public domain even before the appeal is filed in the High Court. In order to maintain confidentiality of the contents of the record before the question is authoritatively decided by the High Court, we would think that the subordinate court should, as soon as the objection is raised, whether in a civil or criminal proceeding, make a 'reference' to the High Court.

(b) The next question is about the power of the civil or criminal court, subordinate to the High Court, to make a reference.

Here, one other problem may have to be referred to. Under sec.113 of the Code of Civil Procedure, 1908 every civil court can refer a question of law to the High Court. But, the power of reference under sec.395 (2) of the Code of Criminal Procedure, 1973 is available only to the Sessions court and Metropolitan courts and not to other criminal courts. In order to get over this problem, we propose to introduce a non-obstante clause in the proposed subsection of sec.123 which would enable any court subordinate to the High Court to make a reference to the High Court, whether it is a civil court or criminal court.

(c) As pointed out in the 69th and 88th Reports of the Commission, there is some overlapping between sec.123 and sec.124. If a record relates to 'affairs of State' falling under sec. 123 and also to an 'official communication' disclosed to an officer in official confidence, falling under sec. 124, then the certificate of the head of the department under sec. 123 (1) is necessary and the public officer has also be take a decision under sec.124. Thus, both sections 123 and 124 have to be complied with. In order to avoid such overlapping, we are proposing, as done in the 69th and 88th Reports, a separate provision in sec.124 that sec.124 shall not apply if 'affairs of State' are involved in such confidential communications to an officer. Where the objection relates to record or evidence derived from such record, relates to affairs of State, as under sec. 123 (the record not having been published), or to official communications, which are related to affairs of State, as under sec. 124, we are in agreement with the 69th and 88th Report that sec.123 alone should apply and not sec.124.

(d) In para 66.9 of the 69th Report, while dealing with sec.124 and the overlapping of the provisions, it was stated that sec.123 should be confined to 'records' and sec.124 to 'oral' communication made to the officer.

We differ from the 69th Report here. Under sec.123 (1) the words used are 'evidence derived from unpublished official records' and hence the objection may relate not only to production of such unpublished record but also to oral evidence which is derived from the record. In both situations, it may relate to 'affairs of State'. The only distinction between secs.123 and 124 to be made is that all objections as to 'affairs of State' must come under sec.123 only and not under sec.124. But sec.123 cannot be confined to 'record' and sec. 124 to oral communications and in our view, sec. 123 applies both to oral evidence derived from record, concerning affairs of State.

(e) Likewise, the statement in para 66.19 of the 69th Report that sec.124 refers to communications, made to an officer which are oral and not documentary, is in our view, not correct. The public officer may be asked to disclose what is orally communicated to him or as to the contents of any document communicated to him. The word 'communication' need not necessarily be oral.

(f) 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.

After considering the recommendations in the 69th and the 88th reports and development of case law, we recommend that section 123 should be substituted as follows:

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"

We have elaborately discussed sec. 162 while dealing with sec. 123.

In paras 65.85 and 65.92 and para 93.109 of the 69th Report and in the 88th Report, it was recommended that the words "matters of State" in the second para of section 162 be deleted.

Following the same, we recommend that in the second para of sec.162, the words, 'unless it refers to matter of State' be deleted.

Section 124: "Official communications"

Section 124 deals with 'official communications' and reads as follows:

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

In Bhalchandra vs Chandbasappa AIR 1939 Bom 237, it was stated that where the document relates to affairs of State, the more detailed procedure in sec.123 of obtaining certificate from the head of the department alone should apply and not the procedure in sec.124 of obtaining opinion of the officer. The court should finally decide on injury to public interest. The 69th Report referred (see para 66.10) to an archives document, with reference to which Mr. P S Melville, Officiating Judicial Commissioner, Central Provinces said, to the following effect:

> "It might be well to add to this section the words 'unless with the permission of the Court'. It is sometimes very necessary for the ends of justice that the source whence information was derived, especially by the police, should be known."

The following observations of Viscount Dilhorne in Norwitch Pharmacol Co. vs Customs Commissioner 1973 (2) All ER 943 (HL) (quoted in para 66.21 of the 69th Report) are relevant:

> "I do not accept the proposition that all information given to a government department is to be treated as confidential and protected from disclosure but I agree that information of a personal character obtained in the exercise of statutory powers, information of such a character that the giver of it could not expect it to be used for any purpose other than that for which it is given, or discloses to any

person not concerned with the purpose, is to be regarded as protected from disclosure, even though there is no statutory prohibition for its disclosure."

(a) We have, while dealing with sec.123, referred to the differences in sec.123 and in sec.124, as they now stand. When a document refers both to and contains 'affairs of State', 'communications in confidence', both the procedures in secs. 123 and 124 overlap and today both procedures have to be followed. Instead, it is proposed to recommend that sec.124 be confined to communications in confidence made to a public officer where 'affairs of State' are not involved.

(b) In our discussion under sec.123, we differed from para 69.13 of the 69th Report which stated that sec.124 deals only with oral communications and that sec.123 deals with 'records'. We have pointed out that both sections deal with documentary and oral evidence. We added an Explanation below sec.123 (1). We propose to add a separate provision in sec.124(2) on this aspect.

On the basis of the above discussion, we agree in principle with the 69th Report.

(c) In the 88th Report, it was, in addition, recommended that question arising under sec. 124, when they are decided in a pending case, whether in a civil or criminal proceeding, there should be an appeal to the High Court. Amendment of the Code of Civil Procedure, 1908 and Code of Criminal Procedure, 1973 was recommended to provide for an appeal both for purposes of sec. 123 and 124. (In the 69th Report, no such procedure was recommended for deciding the objection under sec. 123 or under sec. 124.)

While we agree with the 88th Report that the Courts subordinate to the High Court should not be allowed to decide issues as to 'affairs of State' under sec. 123 and we provided a procedure for reference to the High Court, we do not think an appeal or reference is necessary in case the objection under sec. 124 is rejected for disclosure of official communications made in confidence. Now that sec. 124 cannot apply if issues of 'affairs of State' arise which will be dealt with under clause (b) of subsection (1) of section 123, therefore, we do not think that there should be any appeal or reference. All these years, there has been neither an immediate appeal nor reference under sec. 124 if the objection is negatived by a Court subordinate to the High Court. Hence, we differ from the 88th Report and are not proposing an appeal or reference, if the objection is raised in a Court subordinate to the High Court.

We recommend that sec.124 be revised as follows:

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:

This section refers to 'information as to commission of offences'. It reads as follows:

"125. No Magistrate or Police-officer, shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

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

Similar principle is found in sections 162 and 172 of the Code of Criminal Procedure, 1973. It has been held that the discretion for production of a

document under sec. 91 of Cr.P.C. (old sec. 94) concerning a criminal offence should be exercised so as not to conflict with sec. 125 of the Evidence Act. (R vs. Bilal Md: AIR 1940 Bom 768).

In the 69th Report, the Commission referred to the earlier English law which gave protection in regard to identity of informers where the disclosure would help the accused (see Marks vs. Beyfus: (1890) 25 Q.B.D. 494 (CA); Roggers vs. Secretary of State: 1972(2) All ER 1057 (HL); Regina vs. Richardson (1863) 3F&F 693, Hardy (1794)24 St. Tr. 751.)

In paras 67.17 to 67.21 in the 69th Report, the Commission considered the need for change and dealt with cases of malicious prosecution. It was felt that it would be difficult for the plaintiff to produce evidence unless he knew the name of the informant on whose information another person made a false complaint to the police or who started a criminal proceeding in a Court.

The Commission then referred to three alternative proposals (see para 67.21) and finally came to the conclusion that the third one which gave discretion to the Court was the best. It said that the section requires some relaxation.

> "Such a relaxation would not be in conflict with the principle underlying the section. A person honestly – even mistakenly – giving information of an offence should have nothing to fear by such disclosure. At the same time, a person dishonestly giving false

information does not deserve protection where the person aggrieved by his conduct wishes to pursue his lawful claim for compensation."

We may add that an informant who has given information which is correct and true about a crime must also be protected, in as much as any disclosure of his identity can be harmful to him. Such disclosure may be harmful to public interest if honest informants should feel inhibited from informing about crime. They may remain silent for fear of reprisals.

We shall refer to some important aspects covered by sec. 125 and in that context first refer to the English law and then the Indian law.

Cases of complaints by citizens against police officers resulting in investigation by the departments against the officers have already been dealt with in Ex parte Wiley: 1994(3) All ER 420 while dealing with sec. 123 and as to how far the record relating to the police officers can be summoned and disclosed. But here we are concerned with informants to the police and their privilege.

In Thomas Hardy's case (1794) 24 How St. Tr., 199, Eyre J observed (see Phipson, 1999, 15th Ed para 24.05) "that the identity of informants should not 'unnecessarily' be disclosed. If it can be made to appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to sign it". Lord Esher M.R. in Marks vs. Beyfus: (1890) 25 QBD 494 observed that while the non-disclosure is a matter of public policy, however if upon the trial of a prisoner, the Judge should be of the opinion that the

disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy which must prevail. This line of authority was accepted by Lord Lane CJ in R vs. Hallett : (1986) Crl. L.R. 462. This was accepted by the Court of Appeal in R vs. Agari (1990) 90 Cr. App Rep 318.

The case of places used for surveillance and to identification thereof, so far as police observation posts are concerned were dealt with in R vs. Rankine : (1986) 83 Cr. App. Rep 18 and the same principles were extended thereto.

In R vs. Governor of Brixtone Prison ex parte Osmam (1992)(1), All ER 108 which was a criminal case, a further refinement was laid by Mann LJ that the Judge should balance the public interest in non-disclosure against the interest of justice in the particular case, and that the weight to be attached to the interests of justice in a criminal case touching and concerning liberty was greater. The earlier criminal cases under law such as R vs. Hallett were not cited. But when the matter came before the Court of Appeal (criminal Division) in another case, R vs. Keane (1994) 99 Crl. Appl. Rep 1, all the authorities were cited. The Judgment of Lord Esher in Marks vs. Beyfus and of Mann LJ in Osman's case were approved. It was observed:

> "We prefer to say that the outcome in the instances given by Lord Esher and Mann LJ results from performing the balancing exercise not from dispensing with it. If the disputed material may prove the

> defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it."

See also 'Public interest and criminal proceedings' by Andrews in (1988) 104 L.Q.R. 410 and also R vs. Preston:: 1993(4) All ER 638 (HL), R vs. Horseferry Road Magistrates, ex. p. Bennett (No2) 1994(1) All ER 289.

Phipson says (15th Ed., 2000, para 24.23) in regard to 'protection of sources and informant' as follows:

> "The importance of informants to statutory and quasi-statutory organizations in carrying out their functions was recognized by the House of Lords in D vs. NSPCC: 1978. A.C. 171, where documents identifying an informer who had suggested a mother was beating her child were withheld. Lord Hailsham said that the categories of public interest are not closed and must alter from time to time whether by restriction or extension as social conditions and social legislation develop…..There may be a distinction to be drawn between investigators who have statutory or quasi-statutory powers to obtain information and those who rely on voluntary information."

But, as pointed in our comments under sec. 123, Lord Woolf in ex parte Wiley 1994(3) All ER 420 (at 425)(HL) while agreeing with the above statement clarified that normally the class of immunities should not be extended.

Phipson says that the principle of non-disclosure of the identity of a person in civil and criminal proceedings can be traced to the eighteenth century (R vs. Hardy (1794) 24 St. Tr. 199) and other cases referred to earlier. He says that the only exception is where the disclosure of the name of the informant would help in establishing the person's innocence. Once that is shown, the Court must perform the balancing act and if it helps in proving innocence, it must be disclosed but only after proper scrutiny. The author again cites the cases earlier referred to in R vs. Keane etc.

Immunity, he says, can also attach to certain police techniques (Goodwin vs. Chief Constable of Lancashire(The Times Nov. 3, 1992 (CA); but the opposite view was given in R vs. Brown and Daley (1988) 87 Crl.A. Rep. 52 while dealing with unmarked police cars.

The Canadian Supreme Court had to deal with this problem of anonymous informers in the context of a defence under the Canadian Charter of Rights and Freedoms in R vs. Leipert: (1997) 143 DLR (4^{th}) 38 (SCC). It stated that the principle of non-disclosure of identity of informants is intended to prevent retribution and referred to Bisaillon vs. Keable :1983(2) SCR 60 (105) and R vs. Scott: (1990)(3) SCR 979 (994). The Court referred to the US case from California in People vs. Callen: (1987) 194 Cal App (3d) 558 or 587 which was a case of an anonymous informant as was the case in R vs. Leipert. The Court held that the police had no duty to determine or disclose the identity of anonymous informers. Such an investigating burden would be onerous. Anonymity was the key to certain

programmes by 'Crimestoppers' and others. The informer's privilege belonged to the Crown: Solicitor General of Canada vs. Royal Commission of Inquiry into Confidentiality of Health Records of Ontario: 1981 (2) SCR 494. The Crown cannot waive the informer's privilege without his consent. In that sense it belongs to the informer. "Crime stoppers" remain anonymous on telephone. The only exception is to cases of "innocence at stake", that is where it would be necessary from the point of view of proving the innocence of the accused. Otherwise the privilege remains and there should not be revelation even of a small aspect pertaining to the informants lest there may be danger (R vs. Garofoli) 1990(2) SC R 1421. The "innocence at stake" exception was laid down by Lord Esher as an exception in Mark vs. Beyfus (1890) 25 QBD 494 (CA). In R vs. Leipert, above referred to, McLachlin J referred to a plea that there could be another exception necessitated by the Canadian Charter and held that to the extent the informant's identity would help the accused to prove his innocence, the Charter would help. It was held that there was basically no inconsistency between the Charter's right to disclosure of Crown documents as affirmed in R vs. Stinchombe 1991 (3) SCR 326 and the common law rule of informer privilege.

The procedure, it was stated in the above case, was for the accused to show some basis that the identity of the informant was helpful to prove his innocence and then the Court may review the information to determine whether the information was necessary to prove the accused's innocence. If the Court concluded that disclosure was necessary, the Court should only reveal as much information as is essential to prove innocence. But before

disclosing, the Crown should be given an opportunity to disclose the identity to help the accused to prove his innocence.

Having reviewed the case law in England and Canada, we may now refer to the Indian view.

Before the Indian Evidence Act, 1872, the law in India was narrower. The Calcutta High Court held in In re Mohesh Chandra: (1810)13 W.R. page 1 (Cal) that the rule that a witness could not be examined about the information given by him to the Government for the discovery of an offender, was confined to offences against the State or breach of revenue laws. That was also the English law at that time (para 67.4. of 69th Report).

In our view, section 125 of the Act is too narrow and is not on par with today's concepts in England, Canada and other countries. It does not contain any provision to seek disclosure of identity of a informant if that is likely to help the accused prove his innocence. Further, if the identity is not known, cases of defamation and malicious prosecution will be seriously handicapped. A person who gives false information to police or a Magistrate may, in certain circumstances, be liable for malicious prosecution or for damages. The Privy Council, in Gaya Prasad vs. Bhagat Singh (1908) ILR 30 All 525 accepted that not only the person who made the formal complaint to a Court but a person who made a false complaint to the Police who set the criminal law in motion could also be sued. The Allahabad,

Orissa, Patna, Madhya Pradesh and Andhra Pradesh High Courts have applied this principle in several cases. (see case law cited in para 67.18 of the 69th Report). In some of these cases, it was held that the person who gave the information to the police is the real prosecutor who is liable.

There are other problems as seen from the earlier case law referred to in Sarkar 15th Ed., 1999, pp 2020-2024. In State vs. Randhir AIR 1959 All 727, it was held that the police officer can refuse to disclose the source of his information as to the commission of any offence, while public policy demands that no adverse influence be drawn against the prosecution for withholding the information at the trial. In Amritalal vs. R: ILR 42 Cal. 957, it was held, following the English rule that witnesses for the Crown in criminal prosecution undertaken by the State are privileged from disclosing that channel through which they received or communicated information. So, the defence is not entitled to elicit from individual prosecution witnesses whether he was a spy or informer, and also discover from police officials, the names of persons from whom they had received information. It was however held that a detective could not refuse on grounds of public policy to answer a question as to where he secreted the information. In Majju vs. Lachman ILR 46 All 671, it was held that a report made to a police station though not within the rule of absolute privilege is prima facie privileged, that is to say, the person making has a right to make it if he honestly believes in it and the person receiving has a duty to receive. But a qualified privilege can provide only a qualified protection and the person charged with defamation must prove that he used the privilege honestly believing the truth of what he said or in other words, having reasonable grounds for making the

statement. The privilege applies only to the identity of the informant and not to the contents of the communication to the prosecutor. It has been held that the police, Magistrate and the Revenue officers can claim privilege from disclosing the name of the informant in respect of offences under the Customs Act, without any other consideration coming in (Asstt. Collector of Central Excise, Madras vs. T.K. Prasad 1989 Crl. LJ (NUC) 28 : 1988 Mad L.W (Cri) 338 (DB).

The source of information as to the commission of an offence is only prohibited and not the custody of any document or other materials that might have been seized and tendered in the evidence (Public Prosecutor vs. Govindaraja: AIR 1954 Mad 1023). The privilege contemplated is merely in respect of the source of information (Munna Singh Tomar vs. State of MP: 1989. Crl LJ 580 (MP).

Sarkar says (ibid p. 2024) that statements made to the police are in their nature confidential and sec. 162 of the Code of Criminal Procedure illustrates the limited purpose for which their protection should be required. Questions mentioned in sec. 125 (or sections 121, 124) are not barred. They only deal with a privilege which can be waived (Md Ally vs. R. 4 Bur LT 113). The section rests upon public policy and protects the name of a spy or informant and the nature of the information and it has no application to an informant who lays sworn information and thereby initiates criminal proceedings (Liladhar vs. R : 8. Sind L.R. 309 : 29 I.C. 79) Examination of a

spy or informant of the police is neither necessary nor desirable (State vs. Dhanpat: AIR 1960 Pat 582.

In our view, the above case law in India, does not either cover cases where the identity of the accused may help the accused to prove innocence,- a principle as old as Lord Esher's judgment in Marks vs. Bevfus (1840) 25 QBD. 494 (CA) nor help a plaintiff in a suit for defamation or malicious prosecution wants to sue the proper person. It does not help one to know who the real prosecutor is. The law in England, Canada and in USA is not so rigid as it is in sec. 125. Finally, discretion has to be vested in the Court.

In the circumstances, we agree that the third alternative stated in para 67.21 of the 69th Report and the recommendation for insertion of an 'Exception' as stated in para 67.22 below sec. 125. We agree with the said recommendation.

Thus, below sec. 125, we recommend the following Exception to be added:

> "Exception: Nothing in this section shall apply where it appears to the Court that the giving of the information is a fact in issue on which the liability of a party depends or is otherwise a material fact, and the Court, for reasons to be recorded and in the interests of justice, directs the disclosure of such information by the Magistrate, Police officer or Revenue officer".

Sections 126, 127, 128, 129 to go together.

Section 126:

It reads as follows:

"126. No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Provided that nothing in this section shall protect from disclosure –

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

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

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

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

There are three illustrations below sec. 126. Illustration (a) says that when a client tells his attorney that he had committed forgery and seeks his professional help for defence, the communication is protected for a lawyer is bound to defend a man known to be guilty. Illustration (b) refers to a client's statement informing his attorney that he proposes to forge a deed to obtain some property and says, such a communication is not protected as it shows a criminal intent. Illustration (c) refers to a case of a client charged with embezzlement of funds, the attorney observes a new entry in the account book which was not there when he was employed and which appeared to have been interpolated by his client to get out of the charge, the said fact is not protected from disclosure.

We shall entrust the sections 127, 128 and 129 here.

Section 127: bears the heading 'Section 126 to apply to interpreters etc.' It reads:

> "127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils."

Section 128: bears the heading 'Privilege not waived by volunteering evidence'. It says:

> "128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose."

Section 129: bears the heading "Confidential communications with legal advisers". It reads as follows:

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

It will be noticed that while sec. 126 precludes the legal practitioner from disclosing any communication made to him in the course of and for the purpose of his employment as legal practitioner etc., sec. 129 is complementary and protects the client from being compelled to disclose any confidential communication between him and his legal professional adviser. Section 127 refers to non-disclosure by the interpreter or lawyer's clerk, or servant. Section 128 protects any party to a suit from revealing any communications even where he gives evidence, either on his own or otherwise; but the same section permits disclosure by the legal practitioner if any party to the suit calls his legal practitioner as a witness and questions him in regard to those communications etc.

Now, there will be no difficulty if the words barrister, pleader, attorney and vakil in sec. 126, 127, 128 are substituted by the word 'legal practitioner', as suggested in Ch. 68 of the 69th Report. Explanation 2 has been proposed; defining 'legal practitioner'. Section 129 uses the word 'legal professional adviser' and it is left as it is in the 69th Report. It can be left as it is.

The word 'employed' used in sec. 126, in the main section and in the proviso and in illustration (c) can be replaced as stated in 69th Report. The 69th Report suggested a new exception to be incorporated in the proviso to sec. 126 to say that the privilege will not apply in an action between the client and the legal practitioner, be it a civil or criminal action. There can be no objection to this recommendation also.

But, certain other aspects which have not been referred to in the 69th Report may have to be referred to because of recent developments in the law. Question arises whether such new developments require any changes in the law or whether the framework of this group of sections should not be disturbed.

We have seen, right from sec. 123 to sec. 125 & 162 that wherever a privilege against non disclosure was there in the original Act, an exception has been suggested enabling the Court to order disclosure if 'judicial administration requires such disclosure while balancing it against the public injury that may be caused if the information is disclosed'. Question is as to why the same principle should not be extended to the communication between a legal practitioner and his client and whether the matter should be left to the Court?

At one time in R vs. Barton: 1972(2) All ER 1192 and in R vs. Ataou 1988(2) All ER 321, it was laid down that if there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused person, then no privilege is attracted. It was also laid down that the 'balancing of conflicting interest' exercise has to be done by the Court.

But, both these decisions have been overruled recently by the House of Lords in R vs. Derbyshire Magistrates Court ex parte B 1995(4) ALL ER 526. In that case, the facts were that in 1978, the applicant was acquitted of murder, having made various statements admitting the killing but later retracting these and instead accusing his step-father of the murder. In 1992, the step-father was charged with murder and at the committal proceedings, the applicant was called as a witness for the Crown. Counsel for the step father sought to cross examine him about instructions he had given to his solicitor in 1978 which were inconsistent with his statement implicating his step father. The applicant declined to waive his privilege and counsel applied under sections 4, 5 of the Criminal Procedure Act, 1865 to the magistrates for those instructions to be produced. The magistrate directed the applicant to produce these documents on the ground that they were likely to be material evidence and on the ground of public interest in securing that all relevant information was before the Court. But Lord Taylor held that sec. 97 was not affected by the duty of disclosure in the prosecution under R vs. Keane 1994(2) All ER 478. The entire history of the privilege of the lawyer was traced. The reason given was that once the lawyer is required to disclose, the 'client's confidence is necessarily lost'. That may require every

lawyer to accept the engagement subject to being compelled to disclose the communication in certain circumstances and such a qualified engagement of counsel would undermine the principle of confidence. As to the 'public interest' and balancing by court, he stated that merely because it had to be done in other cases, it need not necessarily be extended to the lawyer and the client relationship. Lord Taylor observed:

> "As for the analogy with public interest immunity, I accept that the various classes of cases in which relevant evidence is excluded may, as Lord Simon of Glaisdale suggested, be regarded as forming part of a continuous spectrum. But it by no means follows that because a balancing exercise is called for in one class of case, it may also be allowed in another. Legal professional privilege and public interest immunity are as different in their origin as they are in their scope. Putting it another way, if a balancing exercise was ever required in the case of legal professional privilege, it was performed once for all in the sixteenth century, and since then has applied across the board in every case, irrespective of the client's individual merits.
>
> ……it is not for the sake of the appellant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason, I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established."

Lord Taylor called in aid the European Convention on Human Rights to justify the assertion that legal professional privilege is a fundamental condition on which the administration of justice rests.

Lord Nicholls called the balancing exercise a 'will-o'the-wisp'.

But, some commentators (see Steve Uglow, Evidence Text & Materials, 1997 p 207) point out that the very Convention on which Lord Taylor relied says in Art. 5 that right to liberty is a fundamental concept. He says that if a person's liberty is dependent upon the disclosure of communication between a third party (client) and his or her lawyer, "it is bizarre" to state that legal professional privilege must 'in all circumstances' outweigh the injury that would occur if an innocent person received a lengthy prison sentence. The public confidence in the rule of law, and in the criminal justice system, would surely be severely dented, says the author.

The author also points out that the law under the Convention on this aspect is different. In AM & S Europe Ltd. vs. E.C. Commission 1983(1) All ER 705 (E.C.) Advocate-General Warner referred to the law in the European Community as follows:

> "They (The appellant) submitted that the right to confidential communication between lawyer and client was a fundamental human right. I do not think it is. There is. There is no mention of it, as such, in the European Convention….or, seemingly, in the constitution of any member State; and your Lordships have already seen that, in England and in France at least, it is acknowledged to be a right that can be overridden or modified by an appropriately worded statute…In my opinion it is a right that the laws of civilized countries generally recognize, a right not lightly to be denied, but not one so entrenched that, in the Community, the Council could never legislate to override or modify it."

The question before us is whether, we should insert a provision permitting the Court to conduct a balancing exercise?

In this context, we would like to refer to the practical difficulties pointed out in the speech of Lord Nicholas in the Derbyshire Magistrates case of 1995. Let us take a situation where C, an accused wants disclosure of what another co-accused A told A's lawyer B. Then if A had told his lawyer B that A had committed the offence and not C, by directing B to disclose the communication, one would be jeopardizing the case of A. The prosecution can neither ask A or nor his lawyer to produce evidence of A's guilt even if such communication may absolve C of the offence. Lord Nichols observed as follows: (see 1995 (4) All ER at p 545):

"There are real difficulties here. In exercising this discretion the Court would be faced with an essentially impossible task. One man's meat is another man's poison. How does one equate exposure to a comparatively minor civil claim or criminal charge against prejudicing a defence to a serious criminal charge? How does one balance a client's risk of loss of reputation, or exposure to public opprobrium, against prejudicing another person's possible defence to a murder charge? But the difficulties go much further. Could disclosure also be sought by the prosecution, on the ground that there is a public interest in the guilty being convicted? If not, why not? If so, what about disclosure in support of serious claims in civil proceedings, say, where a defendant is alleged to have defrauded hundreds of people of their pensions or life savings? Or in aid of family proceedings, where the shape of the whole of a child's future may be under consideration? There is no evident stopping place short of the balancing exercise being potentially available in support of all parties in all forms of court proceedings. This highlights the impossibility of the exercise. What is the measure by which judges are to ascribe an appropriate weigh, on each side of the scale, to the diverse multitude of different claims, civil and criminal, and other interests of the client on the one hand and the person seeking disclosure on the other hand?

> In the absence of principled answers to these and similar questions, and I can see none, there is no escaping the conclusion that the prospect of a judicial balancing exercise in this field is illusory, a veritable will-o'-the wisp. That in itself is a sufficient reason for not departing from the established law. Any development in the law needs a sounder base than this."

We are in agreement with the above view that there are very weighty reasons as to why one should not make an encroachment into this branch of the law. Therefore, we agree with the 69th Report that the provision of sec. 126 need not be modified so as to include a provison like the one we recommended in sec. 123 enabling the court to have the final say on the question of injury to public interest.

Before we proceed to the recommendations, we shall briefly refer to some of the Court decisions since 1977 when the 69th Report was given. In P.R. Ramakrishnan vs. Subbaramma Sastrigal: AIR 1988 Kerala 18, it was stated that the interdict provided in sections 126 and 127 and the protection of the communication embodied in sec. 129 are intended to keep the communications confidential as between the advocate and his client. In N. Yovas vs. Immanueal Jose: AIR 1996 Kerala 1, it was stated that counsel is debarred, in view of sec. 126, from divulging anything gathered from his client or stating the contents of any document with which he has become acquainted in the course of his professional employment. Nor could he disclose any advice which he gave to his client. Outside the parameters of

such inhibitions, what is the use of his testimony? There is a practical consequence when counsel is made a witness. Then he would be obliged to relinquish his engagement in the case. This was an earlier norm of professional ethics and now has been transformed into a rule of conduct under Rule 13 of Chapter II of Part VI of the Bar Council of India Rules.

In Mandesan vs. State of Kerala: 1995 Crl LJ 61 (Ker) it was held that the privilege embodied in sec. 126 in favour of the client cannot be melted down on the ground of waiver or acquiescence of the client. A failure on the part of the client to claim privilege cannot be stretched to the extent of amounting to "express consent" envisaged by sec. 126.

In V. Ravi vs. State of Kerala, 1994 Crl LJ 162 (Ker) it was held that the evidence of a practicing lawyer that he was residing half a kilometer away from the place of occurrence and that the accused alone came to his house on the intervening night, does not fall under sec. 126.

An advocate summoned to prove the sending of a notice to the defendant cannot claim privilege under sec. 126. There is nothing confidential in the contents of a notice which was communicated to the other side (P.G. Anantasayanam vs. Miriyala Sathiraju AIR 1998 AP 336; P. Rajamma vs. Chintaiah 1997(2) An WR 253 (see Sarkar 15th Ed., 1999, page 2035). What is stated in a reply notice by a lawyer is evidently what he has disclosed to others and more particularly to the opponent's lawyer and so it

cannot continue to have the protection of sec. 126: Rev. Fr Bernard Thattil vs. Ramachandran Pillai : 1987 Crl LJ 740 (Ker).

A register maintained by a lawyer containing instructions given by the client for the purpose of cross examination is a privileged document and the lawyer is entitled to refuse to show that register to the Court (Supdt. & Remembrancer of Legal Affairs, W.B. vs. Satyen Bhowmick: AIR 1981 SC 917.

In one case, in respect of a Motor Accident, there was an attempt to compromise the matter with the Insurance Company. The file of the company relating to the compromise, the Delhi High Court held, could not be ordered to be produced because the communication between counsel for the claimant and the Insurance Company is also privileged. (R. Ramalingam vs. P.R. Thakur AIR 1982 Del 486).

We agree with the limited changes suggested in para 68.37 of the 69th Report. We recommend that section 126 be revised as follows:

Professional communications

"**126**. No legal practitioner shall, at any time, be permitted, except with his client's express consent, to disclose any communication made to him in the course of and for the purpose of his professional engagement, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course of and for the

purpose of such engagement, or to disclose any advice given by him to his client in the course of and for the purpose of such engagement:

Provided that nothing in this section shall protect from disclosure –

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any legal practitioner in the course of his engagement as such, showing that any crime or fraud has been committed since the commencement of his engagement.

(c) any such communication when required to be disclosed in a suit between the legal practitioner and the client arising out of the professional engagement or in any proceeding in which the client is prosecuted for an offence against the legal practitioner or the legal practitioner is prosecuted for an offence against the client, arising out of the professional engagement.

Explanation 1:– The obligation stated in the section continues after the engagement has ceased.

Explanation 2:- In this section and in sections 127 to 129, the expression ‘legal practitioner’ or ‘legal professional adviser’ includes any person who, by law, is empowered to appear on behalf of any other person before any judicial or administrative authority; and the expression ‘client’ shall be construed accordingly.

Explanation 3:- For the purpose of clause (b) of the proviso to this section, it is immaterial whether the attention of such legal practitioner was or was not directed to such fact by or on behalf of his client.

Illustrations.

(a) A, a client, says to B, a legal practitioner – "I have committed forgery, and I wish you to defend me."

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

(b) A, a client, says to B, a legal practitioner – "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

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

(c) A, being charged with embezzlement, retains B, a legal practitioner to defend him. In the course of proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his professional engagement.

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

Sections 127, 128:

So far as sections 127 and 128 are concerned, we recommend that for the words, "barristers, pleaders attorneys and vakils" in these respective sections, the words "legal practitioners" should be substituted.

Section 129:

The section deals with confidential communications with legal advisors. There is no change proposed in sec. 129.

Section 130:

This section deals with 'production of title deeds of witness not a party'. It reads as follows:

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

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 to produce if they were in his possession. Under sec. 132 a witness need not answer a question which incriminates him.

In England, this rule is now abolished as far as civil proceedings are concerned and a person can now be compelled to produce such document (sec. 16(2) of the Civil Evidence Act, 1968). The Law Reform Committee thought it best to abolish this privilege so far as civil proceedings are concerned (16th Report, 1967, Cmnd. 3472). The 69th Report recommended deletion of reference to title deeds because today almost all title deeds of value above Rs.100, are bound to be registered and there is no secrecy.

Section 130 does not apply to parties to the suit. But in civil and criminal proceedings, if the document does not 'incriminate' him, the privilege of sec. 130 is not attracted. Under Order 16 rule 6, CPC, any person may be summoned to produce a document, without being summoned to give evidence. Under sec. 162 of the Evidence Act, a witness has to bring the document even if he wants to claim privilege. Under sec. 165, a judge is not authorized to compel a witness to produce any document which he would be entitled to refuse to produce under ss. 121-131 (except in relation to sec. 123, 124 and 162 as stated earlier).

Application for discovery and inspection of documents in the possession of a witness who is not a party to the suit are regulated by Order 11 CPC.

The section is based upon the principle that a party should not be allowed to make a fishing and roving inquiry into the title of the property of a witness. Best says (ss. 128, 128A) that the principle is that in a proceeding between two or more parties, the title to some other property of the witness

should not become an issue upon which the court would pronounce a verdict.

From what is stated in paras 69.2 and 69.3 of the 69th Report and by Sarkar as to English law (15th Ed., 1999 p. 2053), if all documents of title are subject to compulsory registration, the first part of sec. 130 does not serve any purpose. That was why such a principle to a like effect in England was abrogated in 1968 by statute. The 69th Report recommended likewise, saying that 'most' documents concerning immovable property are compulsorily registrable in India.

But, we have considerable doubt, as to how far it will be correct to assume that most documents of title are registrable. Take the case of wills, they are not liable for compulsory registration. Take the case of a mortgage by deposit of title deeds where the language of the memoranda of deposit – as is usually obtained by Banks in standard formats – does not require registration. There are again cases of family settlements, acquisition of title by adverse possession, possession under an agreement of sale falling within the principle of part performance under sec. 53A of the Transfer of Property Act or where property is 'by treatment' included in the 'property of a firm' by a partner when it becomes firm's property. If a witness whose title is referable to any of these categories, he would be liable to answer questions, if the first part of sec. 130 is deleted. These aspects were not taken into account in the 69th Report. We, therefore, disagree with the recommendation in para 69.10 for dropping the words 'his title deeds to the property'. The other suggestion of using the singular for documents (in the second para) is also not necessary if the word 'documents' in the first para is retained.

We, therefore, recommend, only a limited change, as stated above, and as revised, the section should be amended as follows:

For the words, "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" the following shall be substituted, namely:-

> "unless such witness has agreed in writing with the party so requiring him or with a person claiming through such party."

Section 131:

This section was amended by Act 21/2000 and refers to 'production of documents or electronic records which another person, having possession, could refuse to produce'. It reads as follows:

> "131. No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession or control, unless such last-mentioned person consents to their production."

Sec. 131 refers to documents of another person in the possession of a witness i.e. documents which, through physically in the possession of the witness, are indeed the property of another person who has a right to object to their production. It extends to the agent e.g. the lawyer of the owner, servant or trustee, mortgagee etc., i.e. possessor of the document, the same privilege which is enjoyed by the person whose property it is. Of course, if

the owner gives consent, the witness having possession, cannot refuse to produce this document.

The section, on a plain reading, does not, however, reveal that it means what we have stated in the last paragraph. In the 69th Report it was rightly pointed that the person in possession is referable to one having 'temporary possession'. In our view, 'temporary' is a word of imperfect connotation and should be omitted. The word 'control' should be also omitted. It was also recommended that the word 'compellable' should be replaced by the word 'permitted' for otherwise the privilege may be understood to mean the privilege of the person in possession such as the agent who could waive the privilege. But, in reality, the agent cannot be allowed to waive the privilege of the principal.

We agree that sec. 131 should be so revised. Sec. 131 as proposed in para 69.12 of the 69th Report reads as follows:

> "131. No one shall be <u>permitted</u> to produce documents in his <u>temporary</u> possession which <u>any other</u> person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production."

But, in our view, the words 'any person' does not convey the real principle behind the section. We are of the view that the following format will be better:

Production of documents or electronic records which another person, having possession could refuse to produce

"**131.** No person who is in possession or control of documents or electronic records belonging to another, shall be compelled to produce the said documents or electronic records, if the person to whom they belonged, would have been entitled to refuse to produce them if they were in the possession or control of that person:

Provided that the person in possession or control of such documents or electronic records belonging to another, may be compelled to produce them, if the person to whom they belong, consents to their production."

We recommend accordingly.

Section 132:

The section refers to the subject 'Witness not excused from answering on ground that answer will criminate'. It reads as follows:

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

Proviso.– Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or

> be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

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 that when he is an accused, his answer which incriminated him cannot be used against him either for arrest, prosecution or in any criminal proceeding. The sole exception is a criminal proceeding for punishing him for 'perjury'.

The provisions of Art. 20(3) of the Constitution of India against self-incrimination do not apply unless the person is one accused of an offence in the criminal case. An accused person has the right to silence and the burden of proving guilt beyond reasonable doubt is on the prosecution. But, when a person is examined in a case where he is not accused of an offence, he does not have the protection. 'Offence' is defined in sec. 3(38) of the General Clause Act, as an act punishable under the Indian Penal Code or any special or local law.

The 69th Report was submitted in 1977 and by that date there were three judgments of the Supreme Court, two in 1968 and one in 1971. 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. As we shall show, these judgments have a bearing on the recommendations made in the 69th Report because of the Supreme Court's interpretation of Art. 20(3) and sec. 132.

Now Article 20(3) is a protection against self-incrimination of a person 'accused' of an 'offence' and the protection in the proviso to sec. 132 is and has been held to be on the same lines. The word 'compelled' is used in the proviso to sec. 132 (but not in the main part). Questions have arisen in High Courts, as discussed in the 69th Report, as to whether a person who volunteers a statement gets the protection of the proviso to sec. 132 or whether a person who refuses to answer but is compelled by the court, should alone get the protection or whether every person duly summoned under statutory powers should be treated as 'compelled' to give evidence. Before we deal with the High Court judgments, we shall first refer to the Supreme Court judgments because the interpretation of the word 'compelled' is something common to Art. 20(3) and sec. 132.

In Laxmipat Choraria v. State of Maharashtra, AIR 1968 SC 938, the appellants were convicted under sec. 120B of the Penal code and sec. 167 of the Sea Customs Act. The case involved smuggling of gold into India. In that case, PWI an employee of Air India was an accomplice but not an accused. She was examined and her statements were recorded under sec. 171A of the Sea Customs Act in which she spoke against the accused but also spoke about her own role in sharing part of the gold. The Supreme Court held that under sec. 118 of the Evidence Act, she was a competent witness. Under sec. 132 she was bound to answer even if the questions incriminated her but the section gave protection if she later became an accused. Hidayatullah J (as he then was) observed that "In India, the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection (i.e. under proviso to sec. 132). The protection is further fortified by Art. 20(3) which

says that no person accused of any offence shall be compelled to be a witness against himself. This Article protects a person who is accused of an offence and not those questioned as witnesses." He then clarified:

> "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. In this respect the witness is in no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of a co-accused. There too the accused waives the privilege conferred on him by the Article since he is subjected to cross-examination and may be asked questions incriminating him. The evidence of Elthyl Wong (PWI) cannot, therefore be ruled out as that of an incompetent witness. …….. her evidence is accomplice evidence."
>
> ……
>
> "Elthyl Wong (PWI) was protected by sec. 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness…… The same expression is used in the proviso to sec. 132 of the Indian Evidence Act and there it means a criminal trial and not investigation."

We shall then move to Tukaram G. Gaokar v. R.N. Shukla, AIR 1968 SC 1050. Here the appellant had sought a writ of prohibition against penalty being imposed on him pursuant to a notice under sec. 112 of the Customs Act as also for confiscation pursuant to a notice under sec. 111 of the said

Act. The notices issued under sec. 111 and sec. 112 were questioned as violating Art. 20(3) of the Constitution. A regular criminal case was also pending against him in regard to gold smuggling under sec. 120B of IPC and sec. 135 of Sea Customs Act. In para 6 of the judgment, it was accepted that the appellant was an 'accused person'. It was however observed: "But, it is not possible at this stage to say that he is compelled to be a witness against himself. There is no compulsion on him to enter the witness box. He may, if he chooses, not appear as a witness in the proceedings under ss. 111 and 112. The necessity to enter the witness box for substantiating his defence is not such a compulsion as would attract the protection of Art. 20(3). Even in a criminal trial, any person accused of an offence is a competent witness for the defence under sec. 342A of the Criminal Procedure Code (1898) and may give evidence on oath in disproof of the charges made against him. It may be very necessary for the accused person to enter the witness box for substantiating his defence. 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. The appellant is not compelled to be a witness if he voluntarily gives evidence in his defence." (Sec. 342A of the old Code corresponds to sec. 315(1) of the 1973 Code).

The Supreme Court then added:

"Different considerations may arise if he is summoned by the Customs authorities under sec. 108 to give evidence in the proceedings under ss. 111 and 112. But he has not yet been summoned to give evidence in those proceedings. We express no

> opinion on the question, whether in the event of his being summoned he can claim the protection under Art. 20(3) and whether in the event of his being then compelled to give incriminating answers he can invoke the protection of the proviso to sec. 132 of the Indian Evidence Act against the case of those answers in the criminal proceedings. It may be noted that counsel for the Customs authorities gave an undertaking in the High Court that they would not use in any criminal proceedings the statement, if any, that might be made by the appellant during the course of the adjudication proceedings."

This judgment makes it clear that though a person is an accused in a criminal case but before the trial therein, in a separate proceeding under the Customs Act, if he has to show cause to notices for penalty or confiscation, it cannot be said that he is asked to be a 'witness' against himself. This is not a proceeding asking him to come before the authority to give 'evidence'. Hence, Art. 20(3) does not apply. Even where an accused is on trial, if he volunteers to give evidence, he loses the protection against self-incrimination under present sec. 315(1) of the Code of 1973. The question whether if he is summoned to give evidence in the penalty proceedings or confiscation proceedings, when he comes as a witness, he will have protection of Art. 20(3) or of the proviso to sec. 132 was not decided in the above case.

We shall now refer to the case in Hira H. Advani v. State of Maharashtra, AIR 1971 SC 44. In that case, appellants were prosecuted under sec. 167 of the Sea Customs Act and sec. 5 of the Import and Exports (Control) Act, 1947. They were, therefore, accused persons. The

admissibility of earlier statements under sec. 171A by the accused before the Customs authorities fell for consideration. In para 30, reference was made to sec. 171A and the power of customs officers to summon any person, reference was made to subsection (3) thereof which requires all persons so summoned to 'state the truth'. It was argued that the proceedings before the Customs authorities were 'judicial proceedings' to which sec. 132 applied. Reliance was placed on sec. 171A(4) which stated that the inquiry shall be deemed to be a judicial proceeding within the meaning of ss. 193 and 228 of the Indian Penal Code. This plea was rejected holding that proceeding before the Customs authorities were not judicial for purposes of sec. 132 of the Evidence Act. Even though the statements under sec. 171A(4) were made under oath, the provision of the Oaths Act did not make those proceedings judicial proceedings. It was also observed (see para 36, p. 54) that sec. 171A(3) does not compel a person to make a statement but that, if he makes a statement, he must speak the truth. "He is not a witness giving evidence in a court". In para 38, the Supreme Court considered the plea that though sec. 132 was not applicable, the principle behind it applied to Customs authorities. There is no question of applying the principle unless the case was within the four corners of sec. 132.

The above judgment makes it clear that sec. 132 main part which refers to the principle that a witness may be compelled to incriminate, is applicable in proceedings to which Evidence Act applies and not to processes before the Customs authorities. Such prior statements before Customs authorities containing incriminating material are admissible in a subsequent criminal prosecution.

In Raghbir Singh Gill v. Gurcharan Singh Tohra, AIR 1980 SC 1362, the special exception in sec. 94 of the Representation of People's Act (1951) which precludes any witness from being required to state for whom he voted at an election was held to be an exception to the main part of sec. 132 of the Evidence Act. After referring to Art. 20(3) and sec. 132, it was held that but for sec. 44, a witness would have been liable to disclose to whom he voted because sec. 95 of the Act and sec. 132 of the Evidence Act would have led to that result.

In State (Delhi Administration) v. Jagjit Singh, AIR 1989 SC 598, an accused became an approver and was pardoned under sec. 306(4) of the Code of Criminal Procedure, 1973. The approver would have to be examined in the Committal Court as well as at the trial. But, 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. The court relied upon Laxmipat Choraria v. State of Maharashtra, AIR 1968 SC 938.

Summarising the position, the following principles can be gathered:

1) In a criminal trial where a person is accused of an offence (offence as defined in the General Clause Act refer to offences under the Penal Code or Special Acts) under Art. 20(3), the accused cannot be put questions which will incriminate him. He cannot be

compelled to answer such questions. This is a prohibition against being questioned.

2) In a criminal trial, it is open to the accused to waive the privilege by volunteering to give evidence under sec. 315 and in that event, he will lose the protection under Art. 20(3).

3) A person who is accused in a criminal case, if he opts to become an approver, he ceases to be an accused. If he is not in the position of an accused, he is in the position like any other witness who is not an accused and does not have the protection of Art. 20(3).

4) All witnesses (who are not accused) can under sec. 132 of Evidence Act be put questions which incriminate them but such answers cannot be used, in view of the proviso to sec. 132, to arrest the witness or to prosecute him or to impose a penalty or forfeiture.

5) An accomplice who is not an accused can be asked incriminating questions and such statements can be used against other accused. But so far as the accomplice is concerned, such statements cannot be used, in view of proviso to sec. 132, to arrest him or her or prosecute him or her or levy any penalty or forfeiture. L. Choraria v. State of Maharashtra was a case of an accomplice who volunteered to give evidence and it was held that she still had the protection under the proviso to sec. 132. This case was followed in the case of an approver, who volunteered to give evidence i.e. State vs. Jagjit Singh 1989 SC 598. These two decisions show that protection under proviso to sec. 132 is available even if a witness volunteered to give evidence and was put incriminating questions.

Having summarized the law on the basis of the rulings of the Supreme Court, we shall now refer to the problem discussed in the 69th Report as 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 controversy has arisen 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 case-law here goes back to 1878 when Queen Empress v. Gopal Das: (1878) ILR 3 Mad 271. (FB) where the majority took the narrow view that the protection in the proviso applies only to such witnesses who raised objection and then answered (i.e. compelled) while Muthuswami Aiyer J gave a wider interpretation to the word 'compelled' as including any witness who felt he has to comply with the mandate in the main clause of sec. 132, and who did not object to the question.

The 69th Report elaborately considered the views of various High Courts 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 and, in our view, rightly accepted the view of Muthuswami Aiyer J who stated as follows:

> "It seems to me incongruous that the Legislature should have directed the judge never to excuse a witness from answering a criminative question relevant to the matter in issue, and at the same time commanded the witness to ask the judge to excuse him from answering such a question."

The 69th Report observed in para 70.53 that, in the case of witness 'compulsion', it must be taken to have arisen by force of law (i.e. the statutory directive in the main part of sec. 132, where a court has no power to excuse a witness). This in our view is the only reasonable construction.

We may add that if the main part of sec. 132 is indeed mandatory and the court has no power to excuse a witness from answering an incriminating question, an objection by witness is absolutely futile and if that be so, the distinction between a witness who objected and another who had not objected but felt bound by the main part of sec. 132 loses significance. For this additional reason also, we agree with the 69th Report that the main part of sec. 132 must be treated as a statutory compulsion.

We also agree with the 69th 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.

Another important aspect concerns an accused who volunteers to give evidence on oath under sec. 315 CrPC. He 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, except a prosecution for giving false evidence by such answer.

The proposal in the 69th Report is as follows. The main part of sec. 132 is redesignated as subsection (1) and extends to the spouse also. Subsection (2) as proposed relating to the compellability of an accused who volunteers under sec. 315 CrPC. There is no difficulty about subsection (2). In subsection (3) as proposed, the words "obligation imposed by subsections (1) and (2)" are used to refer to the directive in the main part of sec. 132 and covering a witness and an accused who volunteers under sec. 315 CrPC. This is intended to show that main part of sec. 132 (proposed sec. 132(1)) contains a statutory compulsion. Another aspect is that in subsection (3), it is said that the evidence can be used in 'any criminal proceeding' i.e. the words in the proviso are repeated. But now the new subsection (3) will apply not only to a witness but also to an accused who has volunteered under sec. 315 CrPC. In the case of the witness, the word 'criminal proceeding' refers to a latter proceeding.

But, in the case of the accused who has volunteered under sec. 315 CrPC, the language of proposed subsection (3) 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. Surely, that is not the idea.

In the light of this, we are of the view that sec. 132 as proposed in the 69th Report be further revised as follows:

Witness or accused not excused from answering on ground that answer will criminate

"132(1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness or the spouse of the witness or that it will expose, or tend directly or indirectly to expose, such witness or spouse to a penalty or forfeiture of any kind.

(2) An accused person who offers himself as a witness under section 315 of the Code of Criminal Procedure, 1973, shall not be excused from answering any question as to any matter relevant to the matter in issue in the prosecution, on the ground that the answer to such question will criminate or may tend directly or indirectly to criminate the accused or the spouse of the accused; or that it will expose, or tend directly or indirectly to expose, the accused or the spouse to a penalty or forfeiture of any kind.

(3) Where any witness or accused is bound or feels bound to answer a question, under the provisions of this section whether he has objected to it or not, no such answer which-

(a) the witness gives to that question shall subject the witness or the spouse of the witness, as the case may be, to arrest or prosecution or be proved against them
(b) the accused gives to that question shall, save as otherwise provided in sub-section (2), subject the accused or the spouse of the accused , as the case may be, to arrest or prosecution or be proved against them in any criminal proceeding,

Provided that nothing contained in this sub-section shall apply to any answer which may amount to giving of false evidence."

Sec. 132A as proposed in the 69th Report:

The 69th Report recommended the insertion of sec. 132A dealing with privilege of family counsellors. It was stated that the privilege belongs to the family counsellor and this privilege has to be created in the interest of society, so that the family counsellor can function effectively. In para 71.10, it was proposed that the privilege should apply to counsellors appointed by the court and not to those counsellors who are appointed by parties.

Since the 69th Report, we have now the Arbitration and Conciliation Act, 1996. Part III deals with Conciliation (ss. 61 to 81). Four sections of this Act are relevant. One is sec. 70 (Disclosure of Information); sec. 75 (Confidentiality); sec. 80 (Conciliator as witness); sec. 81 (Admissibility of evidence in other proceedings).

Sec. 70 reads as follows: 'Disclosure of information': "When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate:

Provided that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party".

Sec. 75 reads as follows: 'Confidentiality': "Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement

agreement, except where its disclosure is necessary for purposes of implementation and enforcement".

Sec. 80: 'Role of conciliator in other proceedings' reads as follows: "Unless otherwise agreed by the parties, (a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings; (b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings".

Sec. 81: Admissibility of evidence in other proceedings: "The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings, –

(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of the conciliation proceedings; (c) proposals made by the conciliator; (d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Sec. 61(1) applies Part III to conciliation of disputes arising out of legal relationships whether contractual or not and to all proceedings relating thereto. It must, however, be noted that sec. 61(2) says that this Part (Part III) shall not apply where, by virtue of any law for the time being in force, certain disputes may not be submitted to conciliation.

Under sec. 62, conciliation commences when the other party accepts in writing the invitation to conciliation. Sec. 64 deals with appointment by parties. It does not speak of appointment by court, in the absence of agreement between parties as in the case of arbitration.

In the view of the Commission, a conciliator under the 1996 Act includes one who conciliates matrimonial disputes also and in view of the elaborate provisions made in the Act, it is not necessary to enact a separate provision in the Evidence Act. We, therefore, think that the recommendations in para 71.12 for insertion of sec. 132A as proposed need not be given effect to.

So far as mediators are concerned, the High Courts can make rules under sec. 89(d)(2) of the Code of Civil Procedure, 1908 and in those rules a provision can be made as to privilege of mediators.

Sec. 132A as proposed in this Report:

In the place of sec. 132A (privilege of family counsellors), as proposed in the 69th Report, we are of the view that it is necessary to make a specific provision in relation to journalists' resources.

In this context, we have perused the 93rd Report of the Law Commission (1983) on "Disclosure of source of information by mass media".

The above issue came into serious focus during the recent enactment of Prevention of Terrorism Act, 2001. Finally, the Government appears to

have acceded to the request of journalist groups that the provision be dropped. The dropping of the provision was, in our view, more in the wake of the agitation by the media. But today the law is otherwise. Sources of media have no absolute protection elsewhere. Public interest may require revelation.

Before going into the question of revelation of the source of publication, we shall refer to 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.

In our view, the above 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. It is this latter aspect that falls for consideration before us.

In England, in British Steel Corporation v. Granada Television: 1981 AC 1096, the House of Lords approved the view of Denning M.R. in AG v. Mulholland: 1963(2) QB 477 (489) while stating that the clergyman, the bank or the medical man are not entitled to refuse to answer when directed by a judge, it was held that even so, the judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is proper and, indeed, necessary, to put the question in aid of justice to seek an answer. A judge is the person entrusted, on behalf of the community, to weigh these conflicting interests – to weigh on the one hand the respect due to confidence in the profession and on the other hand, the

ultimate interest of the community in justice being done. If the judge determines that the journalist must answer, then no privilege will avail him to refuse.

The above decision which dealt with the narrow nature of the journalists' privilege, led to sec. 10 of the UK Contempt of Courts Act, 1981 which reads as follows:

> "Sec. 10. No court may require a person to disclose, nor is any person guilty of contempt of court for refusing 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 court has, therefore, to carry on this balancing exercise.

In Secretary of State for Defence and another v. Guardian Newspapers Ltd., 1984 (3) All ER 601 it was noticed that the nature of the protection under sec. 10 of the UK Contempt of Courts Act, 1981 is the removal of compulsion to disclose in judicial proceedings, the identity or source of any information contained in a publication. Lord Diplock pointed out (see p. 607) that the exceptions include no reference to the 'public interest' generally and that the expression 'justice', the interests of which are entitled to protection, is not used in a general sense as the antonym of 'injustice' but in the technical sense of the administration of justice in the course of legal proceedings in a court of law or by reason of the extended definition of

'court' in sec. 19 of the 1981 Act, before a tribunal or a body exercising the judicial power of the State. In that case, a photocopy of memorandum prepared by the Ministry of Defence, concerning the installation of nuclear weapons at a Royal Airforce base and sent to the Prime Minister was 'leaked' by an unknown informant to the defendant newspaper, which subsequently published it. The Crown requested the return of the copy so that it could attempt to identify the informant from the markings made in the document. The newspaper claimed privilege for the markings stating that they may lead to the identification of the informant. The House of Lords, by majority, affirmed the directions given by the courts below for return of the copy. The prohibition against the court making an order requiring disclosure of the source was subject only to some exceptions, namely, 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'. Lord Diplock approved the view of Griffiths LJ in the Court of Appeal (1984) (1) All ER 453. Griffiths LJ had observed (p. 459):

> "The press have always attached the greatest importance to their ability to protect their source of information. If they are not able to do so, they believe that many of their sources would dry up and this would seriously interfere with their effectiveness. It is in the interests of us all that we should have a truly effective press, and it seems to be that Parliament by enacting sec. 10 has clearly recognized the importance that attaches to the ability of the press to protect their sources…… I can see no harm in giving a wide construction to the opening words of the section because by the latter part of the section

> the court is given ample powers to order the source to be revealed where in the circumstances of a particular case, wider public interest, makes it necessary to do so."

Thus, public interest in the source, was treated as an exception.

In Re an Inquiry under the Company Securities (Insider Dealing) Act, 1985, 1988 (1) All ER 203, (HL), the House of Lords interpreted the word 'necessary' as 'really needed'.

In Goodwin's case, i.e. X Ltd v. Morgan-Grampian (Publishers) Ltd and Others: (1990 (2) All ER p. 1) (known as Goodwin's case) Lord Oliver said that the discretion is exercised by the court only once when it considers whether the disclosure is 'necessary' and there is no further discretion, once that is established, as to whether to direct disclosure or not. Lord Bridge explained Lord Diplock's dictum in Granada Television case by stating that 'interests of justice' does not mean 'administration of justice' but is wider and applies to legal rights of parties and the need to protect those rights by directing disclosure and it was not necessary that there should be legal proceedings pending in a court. Lord Oliver was of the same opinion. In the above case Morgan-Grampian were publishers and Mr Goodwin was the journalist employed by the publishers, were defendants. The plaintiffs, two private companies, prepared a business plan for negotiating a bank loan and a copy of the draft plan was stolen from the plaintiff and an unidentified source phoned Mr Goodwin giving details of the draft. The journalist telephoned the plaintiffs for checking the facts to prepare an article. The plaintiff sued for injunction and applied for an order requiring the journalist

not to disclose the same and to prevent publication. Disclosure was ordered and affirmed by the Court of Appeal and the House of Lords. Lord Bridge observed (p. 9):

> "the greater the legitimate public interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing inequity."

On further appeal in the same case before the European Court of Human Rights (Goodwin v. UK) (1996) 22 EHRR 123, the judgment was reversed and it was observed (p. 143):

> "Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of contracting states and is affirmed in several international instruments of journalistic freedoms. Without such protection, sources may be deterred from assisting the press in

> informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect of an order or source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Art. 10 of the Convention unless it is justified by an overriding requirement in the public interest."

The European Court held that the injunction against publication of the information was sufficient protection. There was no need to direct disclosure of the source of information inasmuch as under Art. 10(2) of the Convention the freedom of press could be restricted if it was 'necessary' in a democratic society. The requirement of 'necessity' requires an inquiry if there was a 'pressing social need' for the restriction and, in making their assessment, the national authority have a certain 'margin of appreciation'. In the present context, however, the national margin of appreciation is circumscribed by the interest of democratic society in answering and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under Art. 10(2), whether the restriction was "proportionate" to the legitimate aim pursued. In sum, limitations on the confidentiality of journalistic resources call for the most careful scrutiny by the Court. The Court's task is not to take the place of the national authorities (we may add, as it is done in the case of Wednesbury rules applicable to cases other than fundamental rights) but rather to review under Art. 10 of the decision they have taken pursuant to their power of

appreciation. In so doing, the Court must look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authority to justify it are 'relevant and sufficient'. (This is what we may recall is the proportionality exercise). The fact that the plaintiff would not be able to stop such further dissemination of the contents of the plan or for recovery of the missing copy of the document is not a relevant ground consistent with freedom of the press in a democratic society requiring revelation of the source in public interest. That was not sufficient to 'outweigh the public interest' in the protection of the applicant's journalistic source. There was no "reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means employed to achieve that aim".

The judgment of the European Court in Goodwin's case came up for consideration in Saunders v. Punch Ltd., 1998 (1) ALL ER 234 before Lindsay J. The defendant published an article referring to meetings between the plaintiff and former solicitors. Plaintiff obtained injunction against further publication. Plaintiff wanted a disclosure of the source of information and question was whether the legal professional privilege which was absolute in the sense that it was not amenable to a balancing exercise by the Court, could be overridden by the journalistic privilege, which was subject to the balancing discretion of the Court. The Court while rejecting the request for revelation referred to Goodwin's case which went up to the European Court, held that the injunction granted against future publication would provide the plaintiff with a high degree of protection in respect of privileged communications in future and it was unlikely that the plaintiff would suffer if the directive to reveal the source was refused. Although

legal professional privilege was extremely important in the administration of justice, the need to protect or enforce it was not such that it had inevitably and always to preponderate in the balancing exercise which the Court was required to carrying out in determining whether disclosure of a source of information was necessary in the interests of justice. Here, in fact, the interests of justice were not so pressing as to require the bar on disclosure to be overridden. Though the House of Lords had held in R v. Derby Magistrate's Court exp. B 1995 (4) ALL ER 526 (see our discussion under sec. 126) that the privilege regarding communication between a lawyer and his client was however absolute and was not subject to a balancing exercise by the Court, still, on a careful weighing up of the conflicting public interest, a case for disclosing the source of information was not made out. But, the privilege of the journalist is not absolute as regards the sources of his news.

We are aware that in several countries across the world, journalistic sources are protected when public interest in the context of the information is not in dispute, if sources have to be disclosed in such cases, then none would confide such valuable information with the media and there would be greater damage to public interest if all such important information dries up.

While referring to the above case law, Phipson (15th Ed, 1999, para 24.25, 24.26) states as follows:

> "There is therefore statutory protection for the sources of a journalist and the Court must carry out a balancing act required under sec. 10 (of the Contempt of Court Act, 1981) before ordering disclosure."

We shall now refer to the position in some other countries.

In the USA, it was held in 1937 in Associated Press v. N.L.R.B. (1937) 301 US 103 that

> "The business of the Associated Press is not immune from regulation because it is an agency of the Press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of Court. He is subject to the anti-trust laws. Like others, he must pay equitable and non-discriminatory taxes on his business."

In Branzburg v. Hayes: (1972) 408 US 665, the question arose whether a journalist could be subpoenaed by a grand jury to disclose the identity of two hashish makers. The news item had carried a story in the name of the journalist about two young residents of the Jefferson county synthesizing hashish from marihuana, an activity which, they asserted earned them about $ 5,000 in three weeks. The US Supreme Court held that information concerned a crime and no privilege attached to the information. In that context, the Court referred to Associated Press v. NLRB and reiterated that a journalist was like any other witness and had no special protection. White J observed:

> "The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to

publish its sources of information or indiscriminately to disclose them on request…….

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability…… It was there held (Associated Press), a news-gathering and disseminating organization, was not exempt from the requirements of the National Labour Relations Act. "the right to speak and publish does not carry with it the unrestricted right to gather information"…….

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, Courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. The grand jury's authority to subpoena witnesses is not only historic, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the long standing principle that "the public…… has a right to every man's evidence", except for those persons protected by a constitutional, common law, or statutory privilege, is particularly applicable to grand jury proceedings.

A number of States have provided newsmen a statutory privilege of varying breadth, but the majority have not done so, and none has been

> provided by federal statute. Until now, the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process."

and held that 'public interest' in law enforcement required that the journalist comes before the grand jury. It was argued that informants may "refuse to talk to newsman if they fear identification by a reporter in an official investigation". The Court held that it could 'not accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the Press by informants and is thus deterring the commission of such crimes in future…."

The next case is the one in Zurcher v. Stanford Daily (1978) 436 US 547. There was a violent incident between a group of demonstrators and police and several police officers were injured. A special edition of Stanford Daily carried articles and photographs in regard to the violent clash. A warrant was obtained by the District Attorney's Office from the Municipal Court for an immediate search of the Daily's office for negatives, film and pictures showing the events and occurrences. Of course, the affidavit in support of the search did not make any allegation of involvement of the

press photographer or other staff of the Daily. If the Magistrate had been specific about the place and had taken a reasonable decision to permit the search, there is no occasion or opportunity for officers to rummage at large or intrude into or deter normal editorial and publication decisions. White J observed:

> "Nor are we convinced, any more than we were in Branzburg v. Hayes, 408 US 665 (1972) that confidential sources will disappear and that the press will suppress news because of fears of warranted searches……..……
> ……
> We note finally that if the evidence sought by warrant is sufficiently connected with the crime to satisfy the probable-cause requirement, it will very likely be sufficiently relevant to justify a subpoena and to withstand a motion to quash."

It will be noted that both Branzburg and Zurcher related to information about crimes.

In Cohen v. Cowles Media Co. (1991) 501. US 663, the point arose in a case of libel. Cohen who was associated with one party's political campaign, gave Court records concerning another party's candidate for Lt. Governorship, to reporters after receiving a promise of confidentiality. The Court records showed that the candidate was earlier charged with three counts of unlawful assembly and one was convicted in a case of theft (later vacated). The newspaper's editorial staff did not keep the promise but published Cohen's name, Cohen was then fired from his job. He sued the

journalist for breach of a promise. White J for the Court held that the First Amendment did not bar a cause of action and reversed the State Supreme Court and restored the judgment of the first Court. It was held that, it was permissible for the State to apply a law of general applicability such as a law of promissory estoppel and that does not target or single out the press. The matter was remanded and later, the Minnesota Supreme Court awarded $ 200,000 as damages.

After Zurcher in 1978, Congress responded by enacting the Privacy Protection Act of 1980 (codified as 42. U.S. CA Sec. 2000 aa to 2000 aa-12). The Act applies to any government officer or employee, State or Federal. Such person, in connection with the investigation or prosecution of a criminal offence, may not search or seize any work product (i.e. materials, including mental impressions, prepared in anticipation of communicating such materials to the public, other than materials that are the fruits or instrumentalities of the crime) 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) that is in, or affecting, interstate or foreign commerce. These restrictions, on seizure power, the Act said, were not applicable if the materials relate to

> 'national defence, classified information or restricted data', or if there is reason to believe that immediate seizure is necessary to prevent death or serious bodily injury'. Similar restrictions apply to search or seizure of documentary materials (i.e. materials upon which information is recorded, such as written or printed materials or photographs, but excluding the fruits or instrumentalities of a crime,

possession by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast or similar form of public communication affecting interstate or foreign commerce. These restrictions are also subject to certain exceptions. For example, the seizure of documentary materials is usually not prohibited if there is reasonable cause to believe that the person possessing the materials has committed or is committing a criminal offence to which the materials relate, or immediate seizure is necessary to prevent death or serious bodily harm, or giving notice would result in destruction, alteration or concealment of materials. This portion of the Act also does not apply to national defence, classified information, or restricted data. The entire Act is not applicable to border searches.

A person subjected to search or seizure, which is unlawful under the Act, has a civil cause of action for damages against the United States or a State (if the latter has waived its sovereign immunity under the Constitution) and against the State employee or officer (if the State has not waived its sovereign immunity). The damages shall be actual damages but not less than liquidated damages of $ 1000 plus reasonable attorney's fees at cost.

We may refer to some more literature from the international scene. Art 19 of the Universal Declaration of the Human Rights states as follows:

"Art. 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The International Covenant on Civil and Political Rights (1966)(ICCPR) states in para 2 of Art. 19(1) as follows:

> "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The right may be subject to certain reasonable restrictions as stated in Article 19(3) of the ICCPR.

> "The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public) or of public health or morals."

This right is also incorporated in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights, 1979.

In Vol. 20, Human Rights Quarterly (1998), in an Article on "Johannesburg Principles on National Security, Freedom of Expression and Access to Information (p 1 to 80), the position of law in various countries as

to 'Journalists' sources is considered at pp 68-70, in the Context of Principle 18, as follows (p. 68)

> "Principle 18 states that protection of national security may not be used as a reason to compel a journalist to reveal a confidential source. This Principle reflects the law of Australia and France, and the reasoning of Norway's Supreme Court. Courts of several countries, as well as the European Court of Human Rights, have recognized the crucial need for the press to be able to protect the confidentiality of its sources if it is to fulfil effectively its public function as a watchdog of government.
>
> In Austria and France, a journalist may not be compelled to reveal the source of information, even concerning matters relevant to national or state security, if the information was received in confidence in the course of his or her journalistic activity (Press Law and Practice: A Comparative Study of Press Freedom in Europe and other democracies; Walter Burke (Austria) and Roger Errere (France) para 19) (French Code of Crl. Procedure amended by Act 94 Jan 1993 reads: Any journalist who appears as a witness concerning information gathered by him in the course of journalistic activity is free not disclose its source).
>
> The Supreme Court of Norway established the principle that "the more important the interest violated, the more important it will be to protect the sources." (Kontrolluvalget vs. Johansan 1992 (1) L.N. R 39……. In Germany, Sweden and the

majority of States of the United States, a journalist may not be compelled to reveal the source of information concerning matters relevant to national or state security unless publication of the information actually harmed a legitimate security interest, the party seeking the information convincingly establishes that the identity of the source is necessary to prove a central claim in a court proceeding, and there is no alternative way to obtain the necessary information. This right to refuse in turn provides considerable protection for public sector employees who 'blow the whistle' on governmental misconduct.

Germany's Constitutional Court (FCC) reasoned that the Basic Law's constitutional guarantee of press freedom permits journalists to protect confidential sources if the interest in promoting press freedom is found to outweigh the interest in the enforcement of justice (see 64 FCC 108 (1983)). The constitutional right to protect confidential sources is interested primarily to protect the role of a free press in controlling government abuse.

The Sapporo District Court of Japan, sustained by the appellate Courts, held that journalists may refuse to divulge, even to a Court, information about a source as "an occupational secret" unless the information is necessary for a fair trial 30 Minsh 403 (Sup Ct 8 Man 1980). The High Court of Lagos State (Nigeria) ruled that protection of the journalistic privilege must be all the stronger where the published information concerns a matter of general public interest (Oyegbemi vs. Att.Gen of the Federation and Others: (1982) FNL R 192."

The Article on Human Rights Quarterly then refers to the passage already quoted by us from Goodwin vs. UK (1996(2) Rep. Judgement & Decisions 483, 505) that the source cannot be directed to be disclosed "unless it is justified by an overriding requirement in the public interest".

In the light of the privilege accepted across the world in several countries, we are of the view that, a provision must be included in our Evidence Act also.

Indian Courts have taken note of the development of law in UK and US. In Re Resident Editor & Ors of the Hindustan Times: 1989 PLJR 821 (Pat) a Division Bench of the Patna High Court, after referring to Maxwell v. Pressdram Ltd, 1987 (1) WLR 298 and Branzburg v. Hayes: (1972) 408 US 665 observed as follows:

> "The position of the press freedom to publish news, information or views in India is thus no better than the position of newsman either in United Kingdom or United States. They may be called upon in a Court of Law to depose and answer all questions, including disclosure of the source, if the source is involved in committing any offence or its knowledge is relevant to any issue involved in the proceeding in the Court. A Court, however, shall not ordinarily compel a newsman to disclose its source because a free flow of information also is a cause of the public and it is always in public interest to protect it by extending immunity to pressmen to preserve the confidentiality of the source. It will, however, be only in the cases where the interests of justice would demand disclosure of the source, the Court shall be

> within its right to command a newsman to be a witness in a proceeding before it and answer all the questions including the question as to the identity of the source, and the newsman in such a case shall be obliged to answer all such questions. His refusal to answer any such question shall be a cause of action against him for violating the rule of law.
>
> The Court shall, however, always take notice of the aforementioned public interest of free flow of information and any other public interest that may be pleaded by the newsman before it, but if there is no public interest outweighing the interest of administration of justice or there is no public interest at all to be pleaded to maintain confidentiality of the disclosure of the source, the newsman will disclose the source."

Sri Samaradiya Pal in his Commentary on the Contempt of Courts Act, 1971 (2nd Ed, 1996 at p. 90) quotes McNae's Essential Law for Journalists (10th Ed, p. 158) to the following effect: "it is a matter of professional principle that a Reporter does not reveal his source of information…… The journalist's job is to discover and record news. Wherever he looks, he will find people with vested interests trying to prevent him from doing so……. For this reason, to get his story, he must often rely on information passed to him by people who would be injured if it became known that 'they had done so'." Sri Pal says that at common law, judges had a discretion to order a person who has received certain types of information to disclose the name of his source and a failure to comply with such an order, could result in committal (The Legal Implications of Disclosure in the Public Interest by

Yuonre Crippl, 2nd Ed, p. 254). As far as journalists are concerned, the non-disclosure argument has failed when such disclosure was considered necessary in the interest of national security (AG v. Mulholland: 1963 (2) QB 477; AG v. Clough, 1963 (1) QB 773). The author then refers to British Steel Corporation v. Granada Television Ltd., 1980 (3) WLR 774 to say that while there is no immunity against disclosure of source of information, the Court may feel public interest requires in refusing discovery.

A similar case arose in the Delhi High Court in "Court on its own motion" vs. The Pioneer: Vol 68 (1997) Delhi Law Times 529. There the journalist who published a news item criticizing the judiciary was issued a contempt notice. The High Court directed him to reveal the source of the information. Information was then revealed that the news item was based upon an interview with a senior Delhi Government functionary. The apology filed was accepted. In the course of the judgment, the High Court referred to Grenada TV and to sec. 10 of (UK) Contempts of Courts Act, 1981 and held that the court has power to direct disclosure of the source of information, when considered necessary in the interests of justice.

Summarising the position, it is clear that initially at common law, there was no special privilege in favour of journalists enabling them not to disclose their sources. But, in 1963, Lord Denning in AG's vs. Mulholand: 1963 (2) QB 477 laid down that the journalist's source can be confidential, like those of clergyman, banker or medical men but the privilege is subject to the power of the court. The Judge will respect the confidence but if the Judge thinks that such information is necessary in the interests of justice, he will weigh the conflicting interests keeping the interests of the community

and in justice being done. This view was accepted by the House of Lords in British Steel Corporation vs. Granade Television: 1981 AC 1096. This led to a statutory recognition of the principle to sec. 10 of the (UK) Contempt of Courts Act, 1981 in sec. 10 of that Act, under which the courts can direct disclosure "in the interests of justice or national security or for the prevention of crime". The above provision came to be interpreted by the House of Lords in The Secretary of State for Defence and another vs. Guardian Newspaper Ltd: 1984 (3) ALL ER 60 and in Re an Inquiry under Company Security (Inside Dealing) Act, 1985, 1988 (1) ALL ER 203 (HC) and in X Ltd vs. Morgan-Grampion Publishers 1990 (2) ALL ER page 1. The last case went up to the Europe Court in Goodwin vs. UK 1996, 22. EHRR 123 where while holding that the right of the Press not to disclose its source is a right which has to be protected under the European Convention, it was held to be subject to disclosure if ordered by the court in 'public interest'. Goodwin's case has been followed later in UK in 1998.

In the USA also, the right of the Press to keep the source secret is not absolute under the First Amendment but is subject to the power of the court to direct disclosure in the interests of criminal investigation or before the Grand Jury, security of person and property, and public interest. The Congress enacted the Privacy Protection Act, 1980, which contains certain exceptions like national defence etc. This is also the law in Japan, Germany and Sweden and in a majority of States in USA.

The Patna and Delhi High Courts, as mentioned above, have also held that while the privilege is there, it is subject to the power of the court to direct disclosure in the interests of justice, public order etc.

In the 173rd Report on Prevention of Terrorism Bill, 2000 the Commission referred to Art. 19(1)(a) and observed that the Supreme Court has repeatedly held that the rights and privileges of the Press are no greater than that of any of the citizens of India and that even in UK and the USA, no immunity in favour of journalists/Press is recognized and a passage from D.D. Basu's Commentary on 'Law of the Press' (3rd Ed) (1996) was quoted to the following effect:

> "The same view, as in UK, has been arrived at by the American Supreme Court, recently, holding that 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. They are, accordingly, bound to disclose the information gathered by journalists, with their sources, even though such information may have been obtained under an agreement not to disclose, provided such information is relevant to the investigation, in a particular case, and they are not compelled to disclose more than is necessary for such purpose."

There is another passage which requires to be quoted from Basu's book.

We find that the passage extracted above is preceded in Basu's book where a reference is made to the four exceptions in sec. 10 of the UK Contempt of Courts Act, 1981 in British Steel Corpn v. Granada Television (1981) 1 ALL ER 417 which led to the passing of that Act and to Secy of State v. Guardian Newspapers: 1984 (3) ALL ER 601. It is however clear that the judgment

of the European Court and subsequent case law show that there are exceptions to the privilege.

In the Prevention of Terrorism Ordinance, 2001, in sec. 3(8) it was 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. But the proviso to sec. 3(8) exempted the cases of legal practitioner of the accused.

When the Ordinance was substituted by the Prevention of Terrorists Act, 2002 later, sec. 3(8) was altogether dropped mainly on account of the representation of journalists. But, we wish to make the legal position clear that, in law, there is no absolute privilege in regard to a journalist's sources and if public interest or interests of justice require, he can be compelled to disclose the source. The privilege of the journalist is not absolute as in the case of a lawyer.

In the 93rd Report already referred to, the Commission stated in Chapter IX (page 34) that the privilege of the journalist is not absolute and the Court must have discretion and the matter must be elastic. The Commission, however, said that they are not recognizing any privilege. When they formulated sec. 132A, they did not refer to any discretion vested in the Court to direct revelation of the source of publication. We, however, think that there should be a specific provision for revelation in public interest, for the various purposes, which we will mention in the proposed section.

In the light of the above discussion, we recommend the insertion of sec. 132A as follows:

Disclosure of source of information contained in publication

132A. (1) No Court shall require a person to disclose the source of information contained in a publication for which he is responsible, unless it is established to the satisfaction of the Court that such disclosure is necessary in the 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.

Explanation.- For the purposes of this sub-section,

(a) 'publication' means any speech, writing, symbols or other representation disseminated through any medium of communication including through electronic media in whatever form, which is addressed to the public at large or to any section of the public.
(b) "source" means the person from whom, or the means through which, the information was obtained.

(2) The Court while requiring any person to disclose the source of information under subsection (1), shall assess the necessity for such disclosure of the source as against the right of the journalist not to disclose the source."

Sec. 132B (as proposed in the 69th Report) and also section 132C (as proposed in this report) :

In Chapter 72, it was recommended that there should be a separate provision dealing with the privilege of 'patent agents' governed by the provisions of secs. 126, 127 of the Patents Act, 1970. By virtue of these provisions, a patent agent can practice not only in the High Court but also before the Controller-General of Patents, Designs and Trade Marks referred to in sec. 73 of the Patents Act. A patent agent can prepare all documents, transact all business and discharge other functions prescribed in connection with proceedings before the Controller. Section 126 of the Patents Act refers to a Register of Patent Agents. The functions of a patent agent are analogous to those of professional legal advisers. In the 69th Report, reference was made (see para 72.2) to the UK Civil Evidence Act, 1968 which dealt with the "privilege for certain communications relating to patent proceedings".

The position now in UK is governed by the (UK) Copyright, Designs and Patents Act, 1988. The said Act refers to the privilege in communication with not only 'patent agents' but also with 'trademark agents'. Sec. 280 of that Act refers to the patent-agent communications and precludes from disclosure "any matter relating to the protection of any invention, design, technical information, trademark, or service mark, or as to any matter involving passing off". Sec. 284 refers to privilege communications with trademark agents relating to "the protection of any designs trademark or service mark or as to any matter involving passing off".

The India Trade Marks Act, 1958 speaks of 'trademark' agents in sec. 123. Though the 69th Report referred only to the privilege concerning

'patent agents', in the light of the UK provision of 1988, we are of the view that there should be two separate provisions, sec. 132B for 'patent agents' and sec. 132C for 'trademark agents'.

The privilege attaches only to the extent covered by the proposed statute. It does not protect anything done outside the proposed sec. 132B and 132C. This is clear from English cases. Outside the statute, it was held that patent agents have no protection (Wilden Pump Engineering Co. v. Fusfeld: 1985 FSR 159; nor for trade mark agents: Dormeuil Trade Mark (1983) RPC 132.

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 secs. 280 and 284 of the (UK) Copyright Designs and Patent Act, 1988, we propose to redraft sec. 132B, so far as patent-agents are concerned on the lines of sec. 280 and recommend a further provision as sec. 132C, so far as trademark agents are concerned.

In this connection, one has also to note that under our Patents (Amendment) Act, 2002 (38 of 2002), an 'Appellate Board' has been constituted under sec. 116 and sec. 2 states that for the words 'High Court' wherever they occur in secs. 21, 43 and 71, the word 'Appellate Board' and for the word 'Court' occurring in secs. 21 and 71, the word 'Board' shall be substituted. (The word 'Court' is the same as 'High Court' and the word 'Board' is the same as the 'High Court'). From the provisions of sec. 2 (n) in the Principal Act, 1970 as introduced by sec. 3(i) of the Act of 2002, where the word 'prescribed' is used, it is clear that there can still be some

role for the High Court. Sec. 125 of the Principal Act, 1970 as substituted by sec. 52 of the Act of 2002, refers to the 'Register of Patents'. In sec. 130 of the Principal Act, 1970 for the words 'Central Government', the word 'Controller' is substituted by sec. 55 of the Act of 2002.

We shall first refer to certain differences between sec. 15 of the (UK) Civil Evidence Act, 1968 and sec. 280 of the (UK) Copyright Designs and Patents Act, 1988. The provision of sec. 15(1) referred to therein, mentioned 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. Subsection (4) defined 'Controller', 'Patent Agent' and 'party'.

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'. Subsection (2) refers to the communication being privileged in legal proceedings in England in the same way as between a person and solicitor. Subsection (3) defined 'patent agent' and subsection (4) refers to legal proceedings in Scotland. In other words, the use of the word 'legal proceedings' takes in proceedings before various bodies, which are not enumerated. Further, the privilege under the 1988 Act does not exclude criminal proceedings. Obviously, because of the provision in the European Convention regarding the right against self-incrimination, the privilege is extended to criminal proceedings also (see Phipson para 20.12, 1999, 15 Ed). In the 69th Report, sec. 132B as proposed extended the

privilege to criminal proceedings also. We too extend the privilege to criminal proceedings also in view of Art. 20(3) of the Constitution (see para 72.5). Similar language is adopted in sec. 284 which deals with privilege of 'trademark agents'.

We propose to adopt the format in the UK Act of 1988. The provision regarding privilege of 'patent agents' and 'trade mark agents' should be as follows:

Communication with patent agents:

"132B (1) Any communication as to any matter relating to the protection of any patent or as to any matter involving passing off.–

(a) between a party and his patent agent, or

(b) for the purpose of obtaining, or in response to a request for information which a party is seeking for the purpose of instructing his patent agent,

is privileged from disclosure in legal proceedings in the same way as a communication between a client and his legal practitioner or, as the case may be, a communication for the purpose of obtaining, or in response to a request for, information which a client seeks for the purpose of instructing his legal practitioner.

(2) For the purposes of subsection (1) –

(a) 'patent agent' means

(i) a patent agent registered as a patent agent in the register of patent agents maintained pursuant to the provisions of the Patent Act, 1970, or

(ii) a partnership entitled to describe itself as a firm of patent agent;or

(iii) a body corporate entitled to describe itself as a patent agent.

(b) 'party' in relation to any contemplated proceedings, means a prospective party thereto.

(c) 'legal practitioner' means a person as defined in Explanation 2 of section 126.

:

Communication with Trademark Agent

132C. (1) Any communication, as to any matter relating to the protection of any trademark or as to any matter involving passing off.–

(a) between a party and his trademark agent; or

(b) for the purpose of obtaining, or in response to a request for information which a party is seeking for the purpose of instructing his trademark agent,

is privileged from disclosure in legal proceedings in the same way as a communication between a client and his legal practitioner or, as the case may be, a communication for the purpose of obtaining, or in response to a request for, information which a client seeks for the purpose of instructing his legal practitioner.

(2) For the purposes of subsection (1)-

(a) 'trademark agent' means

(i) a trademark agent as defined under section 145 of the Trade Marks Act, 1999**;**

(ii) a partnership entitled to describe itself as a firm of registered trademark agents, or

(iii) a body corporate entitled to describe itself as a registered trademark agent.

(b) 'party' in relation to any contemplated proceedings means a prospective party thereto.

(c)'legal practitioner' shall have the same meaning assigned to it in Explanation 2 of section 126."

Section 133:

This section deals with relevancy of 'accomplice' evidence. It reads as follows:

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

We have already dealt with this section while dealing with sec. 114(b). As stated there, this section has to be and has been read always with the words of caution found in illustration (b) to sec. 114 which reads thus:

"Ill. (b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars."

After an elaborate discussion, we have said in our discussion under sec. 114 illustration (b) 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 ill. (b) be deleted from section 114 and this aspect be referred in this section. We had also suggested deletion in the later part of sec. 114, two paragraphs

starting with the words "As to illustration (b)".We recommended redrafting sec. 133 as follows and also add some illustrations below sec. 133:

Accomplice

133. An accomplice shall be a competent witness against an accused person but his evidence is unworthy of credit unless he is corroborated in material particulars:

Provided that where the accomplice is a person whose evidence, in the opinion of the Court, is highly creditworthy as not to require corroboration, a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Illustrations

(a) A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally of good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself. The evidence of B shall have to be considered by the Court, while deciding on the negligence of A.

(b) A crime is committed by several persons. A, B and C, three of the criminals are captured on the spot and kept apart from each other – each gives an account of the crime implicating D, and the accounts corroborate each in such a manner as to render the previous concert highly improbable. The variance in the different accounts of facts given by A, B, C as to the part of D shall be taken into account by the Court while deciding if D was an accomplice."

Section 134:

The section refers to 'number of witnesses' and reads as follows:

"134. No particular number of witnesses shall in any case be required for the proof of any fact."

There is an elaborate discussion about this section in Chapter 74 of the 69th Report. In particular, reference was made to the earlier law in sec. 28 of Act 2 of 1855 which read as follows:

"28. Except in cases of treason the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such court or before any such person. But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury."

We do not propose to refer to all those cases referred to in the 69th Report inasmuch as ultimately the 69th Report stated (see para 74.29) that sec. 134 does not call for any modification.

Section 135:

This section is in Chapter X bearing the heading: "Of the examination of witnesses" and consists of secs. 135 to 166.

Sec. 135 refers to the 'Order of production and examination of witnesses'. It reads as follows:

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

Sarkar (15th Ed, 1999, p. 2142) says that: 'The authorities on the subject present almost a chaos'. This was the position long back and now, there is no such chaos.

There are cases arising under the civil and criminal procedures. There are again special statutory provisions which lay the onus of proof on the defendant in civil cases. In criminal cases, the onus is always on the prosecution. Some statutes say that upon the prosecution proving certain basic facts, the burden shifts to the accused in certain circumstances. Again, in civil cases, there may be various issues and the initial burden of proof may lie in the case of some issues on plaintiff and in the case of some other issues, on the defendant. There may be counter-claims and questions arise in regard to the issues raised in the counter-claim as to when the defendant should speak to them or whether, the plaintiff while dealing with his main claim is entitled simultaneously to adduce evidence in regard to the counter-claim even before the defendant has spoken about it. If burden of proof on different issues is oscillating, nice questions arise as to who should start and on what issue evidence is to be adduced. No wonder, there is considerable confusion in the trial Courts on the procedure.

In civil cases, the Code of Civil Procedure regulates this procedure in Order 18 Rules 1 to 3.

Order 18 Rule 1 says that the plaintiff has the right to begin. Order 18 Rule 2 says that the party having the right to begin shall state his case and produce evidence on which he relies. Then the other party shall do the same. The party beginning may then reply Order 18 Rule 2(4) (inserted in 1976), empowers the Court to direct or permit any party to examine any witness at any stage for reasons to be recorded.

Order 18 Rule 3 states that where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on these issues or reserve it by way of answer to the evidence produced by the other party.

Witnesses are to be examined orally in open Court as per the provisions of Order 18 Rule 4. Witnesses are exempted from personal attendance by reason of residence outside certain distance and these matters are provided in Order 16 Rule 19 and secs. 75 to 78 (PC). Women who, according to custom, do not appear in public (sec. 132 CPC) and certain persons of rank (sec. 133 CPC) are exempt from personal appearance in Court. Such persons and persons who are unable to attend Court on account of sickness or infirmity may be examined on Commission (Order 26 and ss. 75 to 78 CPC). As to examination of witness about to leave jurisdiction, provision is made in Order 18 Rule 16.

By introduction of Rule 3A in Order 18 (under the 1976 Amendment of the CPC), the practice of litigants giving evidence at the and after other witnesses on their side have been examined, has been stopped. Now the

party has to examine himself first unless the Court, for reasons to be recorded, allows him to examine himself later.

Rule 17 of Order 18 permits the Court to recall and examine a witness. Under Order 16 Rule 7, any person present in Court may be required by the Court to give evidence.

In criminal cases, the prosecution always starts. As to the opening of the case and mode of trial in summons cases, there are provisions in secs. 251 to 259 of the Code of Criminal Procedure, 1973. So far as warrant cases instituted on a police report are concerned, the provisions of ss. 238 to 243 apply; other warrant cases are governed by ss. 244 to 249. The procedure in sessions cases is contained in ss. 225 to 237.

Sec. 234 of the Code of Criminal Procedure, 1973 refers to the accused's right to reply. When the examination of witnesses (if any) for the defence is complete and the prosecutor sums up his case, the accused is entitled to reply.

There are various principles laid down by Courts to supplement the provision. In civil cases, a person whom a party to the cases proposes to examine as a witness on his side must not be present when other witness of the same party are being examined until after the evidence of such witness is over. If he is present in Court, the Court has power to order him to go out of the Court (Achyutani v. Gorantla: AIR 1961 AP 420).

There are other rules laid down which govern the right of parties to examine number of witnesses and as to whether or when the Court may refuse to examine a witness.

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.

We agree with para 75.12 of the 69th Report that no amendments are necessary in sec. 135.

Section 136:

This section says: 'Judge to decide as to admissibility of evidence'.

It reads as follows:

> "136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.
>
> If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

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

There are four illustrations below sec. 136. Illustration (a) shows that if person relies on the statement of a person alleged to be dead, under sec. 32, he must prove the death of that person. Ill. (b) says that if a person wants to prove a copy on the ground that the original is lost, he must first prove the loss of the original. Ill. (c) refers to a case where when there was a charge against a person that he received stolen property knowing it to be stolen, the person denied even possession of the property. In such a case, the relevancy depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial (of the possession) is proved, or permit the denial to be first proved before the identity is proved. Ill. (d) states that if it is proposed to prove a fact A, which is said to be the cause and effect of a fact in issue, then there are several intermediate facts (B, C and D) which must be shown to exist before the fact A can be regarded as the cause or effect of the fact in issue, the Court may, either permit the fact A to be proved before proof of facts B, C or D is proved, or may require proof of facts B, C and D before permitting proof of A.

Questions of admissibility, being questions of law, have to be determined by the judge. Sec. 5 of the Act declares that "evidence may be given in any suit or proceeding of the existence or non-existence of every

fact in issue and of such other facts as hereinafter declared to be relevant and of no others". Relevancy and admissibility are not the same always. Relevancy is based on commonsense and logic while admissibility is governed by rules of law.

Take the case of an unregistered document affecting immovable property of value more than Rs.100. It may be relevant but it will be inadmissible in evidence for want of registration except as stated in the proviso to sec. 49 of the Registration Act. Likewise, a statement made under sec. 162 of the Code of Criminal Procedure, 1977 may relate to relevant facts but the statement is inadmissible.

Para 2 of sec. 136 has to be read with sec. 104 and the two illustrations attached thereto. Sec. 104 deals with 'burden of proving a fact to be proved to make evidence admissible'. The two examples there given are similar to ill. (a) and (b) below sec. 136.

Order 13 Rule 3 of the Code of Civil Procedure, 1908 states that the Court may, at any stage of the suit, reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection. Order 13 Rule 4 requires an endorsement by the Court as to whether a document is admitted in evidence in the suit. Order 41 Rule 27 permits appellate Courts to permit additional evidence to be adduced.

As pointed in para 76.6 of the 69th Report, in India, the judge has no discretion to exclude evidence if it is relevant and admissible and is not excluded by any provision of law. In some cases, the Court has some

limited powers to permit a party to cross-examine his own witness. But in England, the Courts' powers are wider. A discretion is recognized, at least in criminal cases, particularly when the evidence is prejudicial to the accused.

We agree with recommendations in para 76.10 of the 69th report that sec. 136 does not require any amendment.

Section 137:

Section 137 deals with 'Examination-in-chief', 'cross-examination' and 're-examination'. It reads as follows:

> "137. Examination-in-chief.- The examination of a witness by the party who calls him shall be called his examination-in-chief.
> Cross-examination.- The examination of a witness by the adverse party shall be called his cross-examination.
> Re-examination.- The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination."

In para 77.23, after considerable discussion of these steps in a trial, the 69th Report stated that sec. 137 does not require any amendment.

We agree but we feel that the third paragraph of this section can be restructured as follows:

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

Section 138:

It refers to 'Order of examination'. It reads as follows:

"138. Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

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

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

The 69th Report recommended numbering of the paragraphs. We agree. As stated below in the opening clause, for 'witnesses', the words 'A witness' have to be substituted.

We find that in Sri Lanka, these three paragraphs are numbered as (1), (2) and (3) and a fourth paragraph was inserted as follows:

"(4) The Court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and

> if the Court does so, the parties have the right of further cross-examination and re-examination respectively."

We may explain the second para relating to cross-examination which permits a person to be cross-examined on matters relevant but not referred to in the chief examination. For example, a plaintiff might have spoken to what he stated in the plaint but may not have referred to certain relevant facts alleged in the written statement. It is open to the defendant to cross-examine the plaintiff not only with reference to what the witness stated in the chief examination but also with reference to the written statement. But, re-examination is normally confined to facts stated in cross-examination and the witness is given an opportunity to clarify. However, para 3 makes it clear that if any new matter comes out in the re-examination, there could be further cross-examination. Such things do happen when a person is cross-examined in respect of answers to the questions which, even if it related to the chief examination, is not complete unless some new facts are stated.

There is considerable discussion in the 69th Report on sec. 138 but only a minor amendment was suggested in para 77.23 that in the last paragraph as follows:

> "The last paragraph should use the singular 'witness' in view of the singular 'him' which occurs in the section. We recommend that sec. 138 should be so amended."

We are not clear what the Commission meant by this recommendation. We find that para three has not used the word 'witness'. Probably the reference is to the first para which uses the word 'witnesses'.

We recommend the use of "A witness" in the place of "witnesses" in para one.

We also recommend that the three paras be numbered (1), (2), (3) and that a fourth para be added as done in Sri Lanka.

We recommend that section 138 should be substituted as follows:-

Order of examinations

"138.(1) A witness shall be first examined-in-chief, then (if the adverse party so desires) cross examined, then (if the party so desires) re-examined.

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

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

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

Section 139:

The section refers to 'cross-examination of person called to produce a document'. It reads as follows:

> "139. 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."

Any person summoned merely to produce a document shall be deemed to have complied with the summons, if he causes such document to be produced instead of attending personally to produce the same. (Parameshwari v. State: AIR 1977 SC 403).

In this connection, Order 16 Rules 6 and 15 of the Code and sec. 91(2) of the Code of Criminal Procedure, 1973 are relevant.

Omission to produce a document when required by a Court is an offence under sec. 175 of the Indian Penal Code. See sec. 345 of the Code of Criminal Procedure, 1973 also.

We agree with para 78.3 of the 69th Report that no amendment is necessary in sec. 139.

Section 140:

This section refers to evidence of a witness as to 'character'. It reads as follows:

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

The law in this respect is different from the law in England where, the practice is not to cross-examine, except under special circumstances. Sec. 140 is intended to say that in India, such a practice need not always be followed. The section uses the word 'may'.

In this connection, ss. 52 to 55 which deal with relevance of 'character' may be noticed and to the recommendations made in regard thereto.

We agree with para 78.4 of the 69th Report that no amendments are necessary to sec. 140.

Secs. 141, 142 & 143:

These sections deal with 'leading questions'.

(a) Section 141: This section reads as follows:

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

We are of the view that no amendment is necessary in sec. 141.

(b) Section 142:

Sec. 142 refers to 'when they must not be asked'. It reads as follows:

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

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

We are of the view that no amendment is necessary in sec. 142.

(c) Section 143:

Sec. 143 refers to 'when they (leading questions) may be asked'. It reads:

"143. Leading questions may be asked in cross-examination."

It will be seen that leading questions 'shall' not be objected to if they are introductory or undisputed or which, in the Court's opinion, have been already sufficiently proved. But often leading questions, whether in chief examination or re-examination require permission of Court. But so far as cross-examination is concerned, they can be asked without Court's permission.

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. Reference was made to the position in USA (see para

79.13) that the Court may forbid leading questions in cross-examination, where the witness is biased in favour of the cross-examination and would be susceptible to the influence of questions that suggested the desired answer.

Such a provision was also introduced by way of a separate clause in sec. 143, in Ceylon.

The Commission then felt that on the same lines as in US and Ceylon, a proviso be added in sec. 143 but on the ground that one of the Members had some reservations, no recommendation was made.

In this context, we may refer to the fact that Phipson, in earlier editions advocated that the right to put leading questions in cross-examination must be controlled but has given up that view in the latest edition. He says (Phipson, Evidence, 15th Ed, 1999, para 11.18):

> "Though leading questions may be put in cross-examination, whether the witness is favourable 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 was stated in previous editions that the latter course was certainly improper, <u>but it would not now be regarded as objectionable</u>."

We, therefore, do not propose any amendments to secs. 141, 142 and 143 and leave them as they are.

Section 144:

This section refers to 'evidence as to matters in writing'. It reads as follows:

> "144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.
>
> Explanation.- A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts."

There is one illustration below sec. 144 as follows:

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

The illustration, according to para 80.5 of the 69th Report, deals with a declaration about a mental element present contemporaneously (sec. 14). It

is stated further that the illustration satisfied the test mentioned by the Privy Council in Subramaniam v. Public Presentor: 1956(1) WLR 465 (PC). In that case, the accused's conviction was questioned in the Privy Council because the trial judge had wrongly excluded evidence tendered by the accused that he had done the act with which he was charged, under duress, because he had been threatened with death if he acted otherwise. It was immaterial whether or not the threats would have been carried out, that is whether or not they were true, but what is important is whether or not the accused believed the statements made to him. (see Phipson, 15th Ed, 1999, para 25.08). The author also says – "If, for example, the purpose is to tender the statement as evidence of the speaker's state of mind, then it may be admissible as original evidence". In the foot note 46, the author says that it may be equally tendered as evidence of the hearer's state of mind and refers to the above case when the defence was one of duress and evidence of statements alleged to counter threats made to the accused was admissible. It can also be relevant as res gestae.

In paras 80.6 and 80.7, 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. We agree that such an amendment would be useful. In fact, in the first situation, the word 'evidence' is used and in the second, the word 'statement' is used.

We agree with para 80.7 of the 69th Report for redrafting sec. 144 as follows:

"(1) Any witness may be asked, while under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, 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 has called the said witness, to give secondary evidence of it; and if, in the opinion of the Court, the document ought to be produced, the objection shall be upheld.

(2) If a witness, while under examination, is about to make any statement as to the contents of any document, the adverse party may object to such statement being made until such document is produced, or until facts have been proved which entitle the party who has called the said witness to give secondary evidence of it; and, if in the opinion of the Court, the document ought to be produced, the objection shall be upheld."

(The Explanation and illustration as at present remain.)

Section 145:

It refers to 'cross-examination as to previous statements in writing'. It reads as follows:

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

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. This section is one of the most important sections in the Evidence Act. This section applies both to civil and criminal cases. Before we proceed further, we shall refer to a few judgments of the Supreme Court and Privy Council, some decided before 1977 (when the 69th Report was given) and some decided later.

In Balgangadhar Tilak v. Srinivasa: AIR 1915 PC 7, 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 case related to an adoption and the previous statements were those given in an earlier criminal case which were whole-sale imported into the subsequent civil case without the statements being put to the witnesses. Lord Shaw observed:

> "Mr. Tilak was for five days under cross-examination before the Subordinate Judge; but not one of these things was put to him; and he was not asked in the witness-box to give one single explanation with regard to any of these expressions or omissions which are now alleged to compromise him."

The observations were approved in Tara Singh v. State (AIR 1951 SC 441) by the Supreme Court. That case related to statements made under sec. 288 of the old Criminal Procedure Code in the Committal Court. The previous testimony could be used as substantive evidence only if the witness was contradicted as provided in sec. 145. The same views were expressed in Bhagwan Singh v. State of Punjab, AIR 1952 SC 214; Chittaranjan Das v. State of W.B., AIR 1963 SC 1696. The above principles have been applied in a larger number of cases. See Narayanan v. State of Kerala, 1994(5) SCC 728; Malkait Singh v. State of Punjab, 1994(4) SCC 341; State of UP v. Pubal Nath, 1994 (6) SCC 29; Surjit Singh v. State of Punjab, 1993 Suppl. (1) SCC 208; Onkar Namdeo Jadhav v. Second Addl. Sessions Judge, 1996(7) SCC 498; Binay Singh v. State of Bihar, 1997 (1) SCC 283; Nathew Yadav v. State of Bihar, 1997 SC 1808; State of Rajasthan v. Teja Ram, 1999 (3) SCC 507; Bhaosar v. Sadiq, 1993 (3) SCC 95; Babu Singh v. State of Punjab, 1996 (8) SC 699.

Only those passages in the previous statements should be proved, which clearly contradict some portion of the testimony of the witness before the Court. The whole of the previous statement cannot be put in without marking the particular passages: Kehar Singh v. State, AIR 1988 SC 1883.

We shall now refer to three crucial issues concerning sec. 145 which were considered in the 69th Report (see para 81.15). These are:

(a)(i) Is the section applicable to oral statements?

(ii) In particular, is the section applicable to tape-recorded statements?

(b) What is the position regarding documents which are lost?

We shall elaborate these issues:

(a)(i) Is the section applicable to oral statements? This section and sec. 155(3):

We have already stated that sec. 155(3) which refers to previous statements being used to impeach the credit of a witness if they are inconsistent with his present evidence. That section does not speak of 'statement in writing or reduced to writing', whereas sec. 145 permits a previous statement to be used, upon contradicting the witness, as substantive evidence only if it is in writing or has been reduced to writing. In other words, on the language as it stands now, sec. 145 does not apply to 'oral statements' made earlier and such statements cannot be used for contradiction except under sec. 155(3).

In this context, reference has to be made to secs. 4 and 5 of the (UK) Criminal Evidence Act, 1865 (Lord Denman's Act). These provisions of the said Act are elaborately discussed in Phipson (Evidence, 1999, 15th Ed, paras 11.29 to 11.31). Sec. 4 refers to mode of proof of previous inconsistent statement, (i.e. may be oral or written) while sec. 5 deals with cross-examination on a previous inconsistent written statement.

So far as previous written statement is concerned, sec. 5 of the (UK) Criminal Procedure Act, 1865 states as follows:

> "Sec. 5 A witness may be cross-examined as to previous statements made by him in writing, or reduced to into writing, relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit."

So far as previous oral statement is concerned, sec. 4 of the same Act stated as follows:

> "Sec. 4 If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

The use of the words 'indictment' or 'proceeding' in both secs. 4 and 5 show that the provisions are applicable to criminal and civil proceedings alike.

The Orissa High Court, while dealing with sec. 145, held that the principle of sec. 145 is applicable also to previous oral statements. (State v. Minaketan, AIR 1952 Orissa 207). But, the Rajasthan High Court in Ram Ratan v. The State, AIR 1956 Raj 196 took the view that sec. 145 cannot be applied to contradict earlier oral statements. In para 81.21 of the 69th Report, it was stated that justice requires that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradiction, whether the statement be written or oral.

It was also pointed out that in Sri Lanka, a separate subsection has been added in sec. 145 on the lines of sec. 4 of the UK Act of 1865. Sec. 54 of the Evidence Act, (1898-1954) of New South Wales also contains such a provision.

(a)(ii) So far as prior tape recorded statement is concerned, for purposes of another section, viz., sec. 155(3), which refers to impeachment of credit, (which does not state that the prior statement must be in writing) – it has been accepted by the Supreme Court in Pratap Singh v. State, AIR 1964 SC 72 and in Rama Reddy v. V.V. Giri, 1970 (2) SCC 340 that sec. 155(3) applies to statements which are tape recorded, if there is no proof of tampering. The Supreme Court approved the judgment of Bhandari CJ in Rupchand v. Mahabir, AIR 1956 Punjab 173.

In Rupchand's case, the Punjab High Court while it held that the taped statement could be used for impeaching the credit of the witness under sec. 155(3), it held that the tape could not be used for purposes of sec. 145. The

reason given was that the tape record cannot be equated as a statement in writing or reduced to writing.

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".

It is true that the Information and Technology Act, 2000, the definition of 'Evidence' in sec. 3 has been amended and clause 2 of sec. 3 states that Evidence includes all documents (including electronic records) produced in the Court. But, in our view, it would be advantageous to add the words 'statement recorded mechanically or by electronic record'.

(b) <u>The next question is as to what should happen if the document containing the earlier statement is lost.</u>

Phipson (15th Ed, 1999, para 11.31) states as follows: "Where a document is lost or destroyed or filed in another Court, secondary evidence will be admissible; and proof may be given that it is in the hands of the opponent, who has had notice to produce it, but has refused."

Sarkar (Evidence, 15th Ed, 1999, p. 2222) states (quoting Taylor sec. 1447, Ros N.P. 180 and Halsbury, 3rd Ed, vol. 15, para 808) as follows:

> "The Evidence Act says nothing as to whether a copy can be used instead of original where the document has been lost or destroyed or for any other reasons not forthcoming. The following is the English

> procedure. If it should appear from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been lost or destroyed, the provision that the judge may require its production, will, of course, become inoperative. It is apprehended that in such cases, the witness might be cross-examined as to the contents of the paper, notwithstanding its non-production; and that if it were material to the issue, he might be afterwards contradicted by secondary evidence. Still the question remains, as to whether the cross-examining party might first interpose evidence out of turn, to prove the loss or destruction of the document or to show that it is in the hands of the opponent, that he had notice to produce it, and that he refused to do so; and might then cross-examine the witness as to its contents."

In the 69th Report, after referring to Taylor Evidence (para 1447 cited by Woodroffe), it was observed as follows: "We are of the view that a sutiable provision regulating the contradictions of the witness by secondary evidence should be inserted. A case for secondary evidence must, of course, be made out before it can be used for contradiction."

The result of the foregoing discussion is that

(a)(i) a separate subsection must be inserted in sec. 145 to permit contradiction by using earlier oral statements so that such contradictions could be treated as substantive evidence;

(a)(ii) there is no need to make a specific provision for tape-recording or for evidence recorded mechanically or by electronic record, because of the amendment of definition of 'Evidence' in sec. 3;

(b) provision to be made to prove the prior statement by secondary evidence if the original is lost or cannot be found or is with the opposite party, provided that first evidence is adduced by the party cross-examining, laying such foundation for adducing secondary evidence. So far as this aspect is concerned, in para 81.25, 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. We agree with para 81.27 of the 69th Report that the following two subsections be added, after designating the existing section as subsection (1). (We also substitute the words "can be given" in subsection (2) by the words "is used").

Thus, we agree with the recommendation in para 81.27 of the 69th report that the following subsections (2) and (3) be added after renumbering the existing provisions of sec. 145 as subsection (1):

> "(2) Where a witness is sought to be contradicted by his previous statement in writing by a party entitled to produce secondary evidence of the writing in the circumstances of the case, his attention must, before such secondary evidence can be given for the purpose of contradicting him, be called to so much of it as is to be used for the purpose of contradicting him.

(3) If a witness, upon cross-examination as to a previous oral statement (including a statement recorded by mechanical process or through electronic means) made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and where such a statement is inconsistent with his present evidence, denies that he made the statement or does not distinctly admit that he made such statement, proof may be given that he did in fact make it, but before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statement."

Section 146:

The section bears the heading 'Questions lawful in cross-examination'. It reads as follows:

"146. When a witness is cross-examined, he may, in adition to the questions hereinbefore referred to, be asked any questions which tend-

(1) to test his veracity,

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

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."

There is something in common between this section and sec. 132 which states that a witness is not excused from answering on ground that the answer will "incriminate, or may tend directly or indirectly to expose, such witness, to a penalty or forfeiture of any kind". We have noted under sec.

132, that the proviso prohibits the statement being used to arrest or to prosecute the witness or for being used in a criminal proceeding (other than one for perjury). This aspect is also relevant under sec. 147 which we shall be considering hereinbelow.

The present section, and in particular, clause (3) confers a corresponding right on the person who cross-examines a witness.

In Sri Lanka, in clause (1), for the word 'veracity', the following words are substituted, by adding two more words, namely, 'accuracy' and 'credibility', as follows:

"accuracy, veracity or credibility"

In para 82.13 of the 69th Report, it was stated that while to some extent, 'credibility' can be tested by putting to the witness his previous 'inconsistent' statements as permitted by sec. 145, that could not be the only basis for impeaching the creditworthiness of a witness and hence it is necessary to add, as done in Sri Lanka, the words 'accuracy and credibility' in clause (1). This change is necessary in clause (1) of section 146.

So far as clause (2) of sec. 146 is concerned, we agree with para 82.14 of the 69th Report that no amendment is necessary.

In this connection, sec. 148 is also relevant.

Safeguards introduced in sec. 148 may be needed to be inserted in sec. 146 also. Sec. 148, as pointed by Sarkar (15th Ed, 1999, p. 2231) lays down that if any question as to credibility or character is not directly material to the issues but is relevant to the matter only in so far as it affects the credit of the witness by injuring his character, it is for the Court to decide whether or not the witness shall be compelled to answer it. In England, Order 36 Rule 38 of the Rules of the Supreeme Court says that: 'The Judge may, in all cases, disallow any question put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter'. There does not appear to be a similar provision in the Code of Civil Procedure, 1908. Of course, under sec. 151 of the said Code, the Court has inherent power 'to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court'. Sec. 148 however contains these safeguards.

In this context, it must be stated that there is considerable abuse of the right of cross-examination, prevalent in India and which, writers say, is present even in UK though not so much in the continent. Sarkar (15th Ed, 1999, p. 2227-2228) quotes Wellman to say that sometimes reckless cross-examination by counsel goes unchecked by the Court and witnesses shudder to come into the witness box, particularly if they are women and their personal life and privacy are probed. No doubt, the author says that sometimes such cross-examination has the opposite effect as it evokes more sympathy from the Court than would have otherwise arisen. He describes these lawyers as 'forensic bullies'. But, Lord Cockburn CJ (as quoted in Sarkar) was clear that such abuse of the right to cross-examine as prevalent

in England is not seen in the continent. He opined that it is the Judge's duty to curb the unwholesome questioning of the witness's character.

Phipson (15th Ed, 1999, para 19.22 to 19.28) considers this aspect elaborately and refers to the special provisions relating to cases of Rape and Allied Offences (paras 19.29 to 19.51) under the Sexual Offences (Amendment) Act, 1976 which provisions have been superceded by ss. 41 to 43 of the Youth Justice and Criminal Evidence Act, 1999.

Similar aspects have been dealt with by the Law Commission of India in its 172nd Report (2000).

Phipson also considers the matter in the context of cross-examination of an accused person – separately from para 17.20 to 19.18. Questions of considerable importance arise as to whether the Court can be vested with powers to disallow questions even if they are relevant to the points in issue. Sometimes the questions are the ones put to the accused while sometimes they are questions put by the accused to the complainant or to the prosecution witnesses or even in regard to the character or untrustworthiness of particular police witnesses.

The 69th Report has devoted a separate chapter (Ch. 99) as to 'Discretion of the Judge' at the end of the Report but felt no separate provision is necessary in that behalf and that sec. 148 is sufficient.

Yet another aspect of the matter is whether the word 'character' would include 'disposition' where previous wrong actions relating to the

accused or witnesses (including police officers are the subject matter of questions). There is a large body of case law as to the balancing exercise to be conducted in this behalf by the Court and we shall refer to those aspects when we come to sec. 148. For the present, we may state that today, evidence of 'disposition' as part of 'character' is treated as relevant though cross-examination can be controlled by the Court. In fact, Explanation to sec. 55 refers to 'general reputation' and to 'general disposition'. We may here refer to the fact that the (UK) Criminal Law Review Committee, 1972 recommended that the word 'character' must include 'disposition' (see Phipson, 15th Ed, para 19.21, footnote 75).

We may here add that Parliament has recently amended sec. 146(3) by the Indian Evidence (Amendment) Act, 2002 (Act 4 of 2003) by inserting a proviso below sec. 146(3) as follows:

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

We notice the recent addition of a proviso below section 146(3) by Indian Evidence (Amending) Act, 2002 (Act 4/2003) but that is too narrow and the proposal in the 172nd Report (2000) of the Law Commission covers wider ground. We commend the format in the 172nd Report as extracted above and to drop the proviso as inserted by Act 4/2003.

Further clause (4) as recommended in the 172nd Report is wider but the definition of 'sexual assault' introduced in sec. 376 of IPC has not been

incorporated. Further the 172nd Report also includes section 376E but that section has not yet been incorporated in the IPC.

Hence, clause (4) of sec. 146 as recommended in the 172nd Report cannot, for the present, be introduced here fully.

We also recommend that the words 'accuracy and creditability' be added after the word 'veracity' in clause (1).

We recommend that

(a) in clause (1) of sec. 146, after the word 'veracity', the words 'accuracy and credibility' be inserted;

(b) the proviso after clause (3) shall be deleted;

(c) after clause (3), the following clause and Explanation shall be inserted, namely,

> "(4) In a prosecution for an offence under section 376, 376A, 376B, 376C or 376D or for attempt to commit any such offence, where the question of consent is in issue, 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.
>
> Explanation: 'character' includes 'reputation and disposition'."

Section 147:

This section bears the heading, "when witness compelled to answer". It reads as follows:

> "147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of sec. 132 shall apply thereto."

Sec. 132 deals with compellability. That means that while sec. 146 deals with the permissibility of questions relating to credit or which are injurious to the character of a witness', sec. 147 is intended to refer to the compellability of the witness.

We have to go in for a long discussion in regard to this section.

In the 69th Report, in para 82.16, in a very brief paragraph, it was recommended that the words "matter relevant to the suit or proceeding" should be changed as "matter relevant to the matter in issue in the suit or proceeding". Two reasons were given as follows:

> "82.16. With reference to section 147, only a verbal point needs to be mentioned. The words "relevant to the suit or proceeding" in this section refer to what is relevant to a matter in issue, as in section 132. It would be desirable to make this clear, since the next section – section 148 – makes a distinction between questions (strictly) relevant to the matter in issue and questions which are "relevant to the suit or proceeding" only because they affect the credit of the witness by injuring the character of the witness. We, therefore, recommend that

> in section 147, after the words "relevant to", the words "the matter in issue in" should be added."

We have considered the recommendation in the 69th Report in depth. It can be argued that for purposes of sec. 147, one may have to refer to events of prior conduct of the witness outside the suit. A look at sec. 148 makes it clear that such questions to impeach credit of the witnesses are permissible but should not be too remote. In fact, in the commentary under sec. 148, Sarkar refers to a quotation from Stephen's General View of Criminal Law (See Sarkar, 15th Ed, 1999, p. 2232) as follows:

> "….. if a woman, said Sir Stephen, prosecuted a man for picking her pocket, it would be monstrous to inquire whether she had an illegitimate child 10 years before, although circumstances might exist which might render such an inquiry necessary."

We may give some other examples. If the matter in issue is one relating to forgery of a document by the plaintiff and the witness claims to be an attestor, questions can be put to him that when he earlier gave evidence in relation to execution of another document, a Court of law held the document to be forged. Or it may refer to a finding that he had himself forged an earlier document. Insofar as compellability of witnesses is concerned, it is obvious that, even if the question relates to events outside the suit, they must be proximate enough to affect the opinion of the court on the credibility of the witness on the actual matters in issue in the suit or proceeding.

Sri Vepa P. Sarathi states that sections 147 and 148 deal with two different types of question, though they both relate to questions injuring the character of the witness. Section 147 deals with questions which are relevant (irrelevant under ss. 6 to 55) to the suit or proceeding; and sec. 148 deals with questions which are not relevant to the suit or proceeding – but affect the credibility of the witness. According to him, answers to questions referred to in sec. 147 are compellable (because they are relevant); but the answering of questions under sec. 148 would depend upon the opinion of the court that the imputation suggested does or does not affect the credibility of the witness. He then says that ss. 147 and 148 be left as they are. While the above observations are pertinent, we do not see why the words "relevant to" should not be qualified by the words to "the matter in issue". For the reasons earlier given, we feel that the proposal is only clarificatory.

After an in depth consideration of the recommendation in the 69th Report, we have finally decided that it is not necessary to deviate from it.

One other aspect is that sec. 147 applies sec. 132 so far as compellability of the witness is concerned.

Does it attract the entire sec. 132 including the proviso (and the further recommendation which we made under sec. 132)?

In our view, the questions permitted by sec. 147 are those relating to credibility of the witness or which are injurious to the character of the witness and such questions and to answers thereto, which are compellable. Sec. 147 refers to 'such questions' meaning thereby those under sec. 146.

Clause (3) of Sec. 146 does say such questions relating to credibility or character may also incriminate or expose one to a penalty or forfeiture.

Therefore, it is obvious that the entire sec. 132 applies so far as protection to the witness is concerned.

We, therefore, recommend that in sec. 147, after the words "relevant to", the words "the matter in issue in" should be added and no other amendment is necessary.

Section 148:

This section says 'Court to decide when question shall be asked and when witness compelled to answer'. It reads as follows:

> "148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations-
>
> (1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;
>
> (2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or

would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

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

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

In the 69th Report, in para 83.3 it was stated that insofar as the section applies to ordinary witnesses, they had no comments on it. The position of the accused as a witness, however, required some discussion, according to the 69th Report. The discussion then starts with Makin v. AG of New South Wales (1894) AC 57 and the observations of Lord Herschell.

The law has developed in England from what it was stated when Makin's case was decided in 1894. By 1991, the law has crystallized into new principles as to whether the Court must have discretion in allowing certain questions relating to the character and credibility of witnesses, whether they are accused or non-accused witnesses and though sec. 148 specifically grants discretion to the Court in allowing questions, still this section does not include the principles laid down recently by the House of Lords in DPP v. P, 1991 (2) AC 447: 1991 (3) All ER 337, referred to hereinbelow.

The 69th Report suggested that so far as witnesses are concerned, i.e. other than those accused – there is no need to make any further provision

than what is there now in sec. 148. The Report concentrated on the safeguards necessary in the case of an accused-witness and to what extent questions relating to his credibility or character should be controlled by the Court. The Report contains a draft of sec. 148(2) in that behalf after a full discussion.

If we add subsection (2) to sec. 148, as proposed, the section becomes very lengthy. In our view, it would be better if a new sec. 148A is introduced on the lines of the draft proposed in the 69th Report for sec. 148(2). There too, the proposals require a few further changes: (1) adding the principle stated in DPP v. P: 1991 (2) AC 447 to which we shall presently refer; (2) deleting the clause relating to questioning a woman in rape cases about her disposition towards sexual offences, in the light of the Law Commission's 172nd Report.

We shall, therefore, first deal with sec. 148 i.e. insofar as it deals with questioning witnesses (other than accused) and to the discretion of the Court.

Now, in sec. 148, there is need to redraft the language in the opening part. The way it is drafted, it can give a meaning which is just the opposite of what is intended.

The opening part of sec. 148 reads thus:

"148. If any such question relates to a matter not relevant to the suit or proceeding, except insofar as it affects the credit of the witness by

injuring his character, the court shall decide whether or not the witness shall be compelled to answer it….."

The word 'except' is like to mislead as it gives an impression that if the questions relate to the 'credit of the witness by injuring his character', the Court has no discretion to disallow the question and that the witness is compelled to answer it. But, the purport of sec. 148 is just the opposite. The section is intended to protect a witness in respect of these very questions which may hurt his character.

This aspect is clarified in Sarkar (15th Ed, 1999, p. 2231) as follows:

"Sec. 148 therefore lays down that if any such question is not directly material to the issue, but is relevant to the matter only insofar as it affects the credit of the witness by injuring his character, it is for the court to decide whether or not the witness shall be compelled to answer it……"

It is therefore our view, that the opening part the sec. 148 should be amended as follows:

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.

The next aspect concerns the development of the law since Makin in 1894 in England. That development is relevant both for witnesses who are

accused and for witnesses not accused. [Insofar as witness-accused are concerned, we shall, as already stated, include the new principles in a new sec. 148A rather than have sec. 148(2)]. The further aspect so far as sec. 148 is concerned is the addition of an Explanation to cover cases of defamation, as proposed in the 69th Report. We shall now take up these two matters.

Before we deal with the further developments of the law, we shall first refer to the position as stated in Makin case (HC). Lord Herschell said in that case as follows:

> "…… the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Thus, as the law was laid down in 1894, questions relating to credibility or character could be put to a witness and the House of Lords did not feel that some discretion is to be given to the Court, in certain situations, to refuse permission to such questions. Questions relating to previous wrong-doing would go unobstructed. The same view was expressed in R v. Kennaway: 1917 (1) K.B. (at p. 29) by Lord Reading CJ as follows:

> "It is not necessary to repeat what has often been stated in this court, that evidence which is otherwise admissible will not be inadmissible

> merely because it may show that the prisoner has committed other offences."

The trend changed in Hobbs v. Tinling and Co.: 1929 (2) KB 1 (51) (CA) where Sankey LJ said that the Court has a discretion to refuse to compel a witness to answer questions about discreditable acts. He expressly referred to the provisions of sec. 148 of the Indian Evidence Act, 1872, and said that in England, the Judge should have regard to the considerations listed in sec. 148 of the Indian Evidence Act, 1872.

There are dicta in DPP v. Boardman, 1975 AC 421 in the speeches of Lord Wilberforce and Lord Cross that the Court must have a discretion.

Finally, the law became settled in DPP v. P: 1991 (2) AC 447: 1991 (3) All ER 337 (HC). Lord Mackay observed that the Court must consider whether "the evidence must have sufficient probative value so as to outweigh its prejudicial effect". The following passage from that judgment brings out the principle clearly: (p. 346 of All ER)

> "From all that was said by the House in Boardman v. DPP, I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed…..But restricting the

circumstances in which there is sufficient probative force to overcome prejudice of evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle ……

Once the principle is recognized, then what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises, demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must, in case, be a question of degree."

Thus the principle laid down in DPP vs. P is qualitative as against Maken of 1894 which simply permitted prior evidence as a matter of quantity.

The above cases were cases of accused witnesses being questioned about that character or disposition.

Phipson has considered the question as to the applicability of the principle in DPP vs. P to a witness who is not an accused. He referred to R vs. Edwards 1991(1) WL R 207(CA) in which the police witnesses were sought to be questioned as to their previous conduct relating to obtaining

forcible confessions. The question was disallowed. In R vs. Irish 1995 CrL R 195, questions to show complainant was aggressive were disallowed.

Phipson, after referring to R vs. Murray 1995 RTR 239 and R vs. Kricker 1995 Crim LR 819 (CA) asks why the benefit of DPP vs. P principle should not be extended to witness (other than accused)(para 19.09)(19.11) Dicta in R vs. Viola 1982(1) WLR 1138 (CA) are confusing, though questions were admitted against a woman in a rape case.

We notice that sec. 148 does give a discretion to the Court in the case of all witnesses (accused or not) and gives four guidelines. However DPP vs. P principle is now proposed to be added to them.

The above principle of DPP vs. P has, therefore, to be introduced into sec. 148 in so far as non accused witnesses are concerned (and in proposed sec. 148A in so far as accused-witnesses are concerned). We propose to add one clause in sec. 148 in the manner stated below.

Now, we shall come to the third aspect concerning sec. 148. This aspect is covered by paras 83.25 to 83.27 of the 69th Report.

In the discussion under sec. 55 (“character as affecting damages”) it is stated that in civil cases, the fact that the character of any person is such as

to affect the amount of damages which he ought to receive, is relevant. The section has an Explanation that 'character' includes 'reputation and disposition'. See also sec. 146.

In the 69th Report, a recommendation was made for insertion of a suitable proviso to the Explanation to sec. 55, with the object of limiting roving cross examination under the head of facts which are relevant to character.

That recommendation was made in the context of relevancy. But now the question is to be considered, whether in regard to sec. 148 also, it is desirable to give any indication to a similar effect. Of course, sec. 148 is wider than sec. 55 as it permits question to impeach the credit of the witnesses, even where they are not relevant to the issue. The Court must be vigilant, in regard to the cross examination of the plaintiff in a suit for defamation. (see para 83.26). Section 148 itself throws a duty on the Court to determine the propriety of questions likely to influence character and sets out some guidelines. It would not be inappropriate to draw the attention of the Court more particularly to those guidelines in regard to defamation suits. (para 83.27).

We agree that, therefore, an Explanation be added below sec. 148 that the Court must consider if such questions are 'proper'.

Sri Vepa P. Sarathi has suggested that inasmuch as the discretion of the court is wide, should we make any change. In our view, the proposed amendment merely explains the scope of the discretion of the court.

In the light of the above aspects mentioned, for clause (4) of section 148, the following clauses and Explanation be also substituted and we recommend accordingly:

> "(4) The court shall have regard as to whether such evidence has or will have sufficient probative value to outweigh its prejudicial effect, in the circumstances of the case.
>
> (5) The court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.
>
> Explanation:- Where, in a suit for damages for defamation for injury to the reputation of a person, an aspect of the character of that person, other than that to which the matter alleged to be defamatory relates, is likely to be injured by a question under this section, the court shall have particular regard to the question whether, having regard to the considerations mentioned in this section, such question is proper".

Section 148A:

We are proposing sec. 148A in the place of sec. 148(2) proposed in the 69th Report.

As stated in the discussion under sec. 148, we have modified the recommendation in respect of sec. 148(2) in the 69th Report to become sec. 148A instead, in so far as it is proposed to make a special provision for the protection of accused-witnesses. Here too, as already stated, the proposal must include the balancing principle in DPP vs. P referred to in our discussion under sec. 148. A further correction is necessary in the proposals made in the 69th Report, namely, that the permissibility of putting question to a woman complainant in a rape case should no longer remain in view of the 172 Report of the Law Commission. This has already been done by Central Act 4/2003 by introducing a proviso in sec. 146(3) but, we have enlarged it a little more by omitting the proviso and proposing a wider provision in sec. 146(4).

In the 69th Report, reference was made to the position in Australia where a provision similar to the one in sec. 1(f) of the Criminal Evidence Act, 1898 of England, permitting previous convictions of the accused to become an issue only if, inter alia, the nature or the conduct of his defence is such as to involve imputations on the character of prosecution witnesses. In Victoria, the proviso to sec. 399 of Crimes Act, 1958 states that permission be applied before the Judge in the absence of the jury, for such cross examination. In Dawson vs. The Queen: 106 C.L.R. page 1, Dixon CJ said that the provision gives absolute discretion to the Judge. In New South Wales, by statute 55 Vic. No.5, sec. 6(189), it was enacted that every person charged with an indicatable offence "shall be competent but not compellable, to give evidence in every court on the hearing of such change."

The section contains a proviso as follows: (see proviso NUL to se. 407 of the Crimes Act, 1900 NSW) (see para 83.12)

> "Provided that the person so charged shall not be liable to be called as a witness on behalf of the prosecution nor to be questioned on cross-examination without the leave of the judge as to his or her previous character or antecedents."

Even in Victoria, sec. 399 above referred, contains an exception as follows:

> "unless the nature or the conduct of the defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution:
>
> Provided that the permission of the Judge (to be applied for in the absence of the jury) must first be obtained."

These provisions have been referred to in Ch. 83 of the 69th Report. Reference was also made to Rule 21 of the Uniform Rules of Evidence in USA and to Rule 25 of the New Jersey Rules. Reference was made to Brown vs. US: (1958) 356 US 148 which enables an accused to be cross examined when he decided to take the stand in his own defence. His

credibility can be then impeached and his testimony assailed like that of any other witness. Reference was also made in the 69th Report to the judgment of the 7th Circuit in US ex. Rel. Indin vs. Date: 357 F ed. 911 (915-916) in relation to permissibility of waiver by the accused of the right of self incrimination.

In para 83.23, it was recommended that in view of the special considerations to which they had referred and were the basis of the legislative provisions in other countries, certain restrictions as to the scope of questions as to character be inserted, so far as the accused are concerned. The recommendations in para 83.24 are as follows:

"(a) An accused person who offers himself as a witness in pursuance of sec. 315 of the Code of Criminal Procedure, 1973, may be compelled to answer questions which incriminate him as to the offence charged;

(b) An accused so offering himself as a witness, shall not, however, be compelled to answer questions tending to show that he has committed, or has been convicted of, or been charged with, any other offence, nor shall he be compelled to answer questions showing that he is of bad character, except in the following cases:-

(i) where proof of commission or conviction or charge of such other offence is relevant to a matter in issue (i.e. relevant to the very offence with which he is now charged);

(ii) where he himself has asked questions to a witness to establish his good character, or has given evidence of his good character; or

(iii) where the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or prosecutrix, provided leave of the court is obtained.

(iv) where the accused has given evidence against any other person charged with the same offence."

(In the (iii) type of cases, sec. 155(4) permits such evidence but in the 172nd Report of the Law Commission, on the lines of the UK Sexual Offences (Amendment) Act 1976, replaced by the Youth Justice and Criminal Evidence Act, 1999, it has been recommended that such questions cannot be put to a woman and that sec. 155(4) should be deleted. This has already been done by the Indian Evidence (Amendment) Act, 2002 (Act 4/2003) by omitting sec. 155(4).

In the result, sec. 148A (in the place of sec. 148(2)) as recommended (para 83.24) in the 69th Report will read as follows - (1) after adding the principle in DPP vs. P at the end and (2) after deleting the clause in the draft proposals regarding cross examination of complaint-prosecutrix by the accused:-

Accused person not to be asked certain questions

"148A. An accused person who offers himself as a witness in pursuance of section 315 of the Code of Criminal Procedure, 1973, shall not be asked and if asked, shall not be compelled to answer, any question tending to show that he has committed or has been convicted of or been charged with any offence other than that with which he is then charged, or that he is of bad character unless –

(i) the proof that he has committed or been convicted of such other offence is relevant to a matter in issue; or
(ii) he has personally or by his advocate asked questions of the witness for the prosecution with a view to establishing his own good character, or has given evidence of his good character, or
(iii) the nature or conduct of the defence is such as to involve imputations on the character of the witnesses for the prosecution,(other than the character of the prosecutrix) without obtaining the leave of the Court for asking the particular question; or
(iv) he has given evidence against any other person charged with the same offence;

and unless the court is satisfied that such evidence of which the witness is compelled as aforesaid, has or would have sufficient probative value which outweighs the prejudice that may be caused."

We recommend accordingly.

Section 149:

This section refers to the subject "Question not to be asked without reasonable grounds". It reads as follows:

"149. No such question as is referred to in sec. 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded."

There are four illustrations (a) to (d) below sec. 149. Ill. (a) refers to a question by a barrister, instructed by an attorney or vakil that an important witness is a dakait: It is permissible; Ill. (b) A pleader is informed by an 'informer' that an important witness is a dakait. The pleader is entitled to put the question; Ill. (c) A witness of whom nothing whatever is known, is asked at random if he is a dakait. The question cannot be permitted; Ill. (d): A witness of whom nothing is known is unable to give answers to his source of living. He can be asked if he is a dakait. (Of course, in these illustrations, it is necessary now to use the word 'legal practitioner').

In Sri Lanka, the word 'barrister' is changed as 'advocate' and 'dakait' as 'thief' in Ills. (a) to (c); in (d) for 'dakait', the word 'professional gambler' is used.

In chapter 84 of the 69th Report, considerable literature has been referred to as to duties of a lawyer while questioning witnesses but finally in para 84.9, no amendments were suggested. It was only recommended that the word 'advocate' be used in the illustrations. (draft not given)

We recommend revising the four illustrations as follows:

"(a) A legal practitioner is instructed by another legal practitioner that an important witness is a thief. This is a reasonable ground for the first legal practitioner for asking the witness whether he is a thief.

(b) A legal practitioner is informed by a person in Court that an important witness is a thief. The informant, on being questioned by the legal practitioner, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a thief.

(c) A witness, of whom nothing whatever is known, is asked by a legal practitioner at random whether he is a thief. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned by a Legal practitioner as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a thief."

Section 150:

The section refers to the 'procedure of Court in cases of questions being asked without reasonable grounds'. It reads as follows:

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

Of course, the words 'barrister' etc. have to be substituted by the word 'legal practitioner' to have the same meaning that word is given as in sec. 126.

After considerable discussion, the 69th Report suggested (see para 84.32) that a verbal change is needed by replacing the word legal practitioner for advocate etc. We are of the view that reference should be to the appropriate Bar Council under the Advocates Act, 1961. In 1872, the High Court had disciplinary jurisdiction over the Bar, but that jurisdiction is now shifted to the Bar Councils. 'Other authority' is to be dropped.

This aspect was not considered in the 69th Report. We propose that section 150 should be revised as follows:

Procedure of Court in case of question being asked without reasonable grounds

"**150.** If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any legal practitioner, report the circumstances of the case to the appropriate Bar Council established under the Advocates Act, 1961 to which such legal practitioner is subject in the exercise of his profession."

Section 151:

This section refers to 'Indecent and scandalous questions'. It reads as follows:

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

In the 69th Report (see para 84.38), after some discussion, no amendment was recommended for sec. 151. We agree.

Section 152:

This section relates to 'questions intended to insult or annoy'. The section reads as follows:

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

In the 69th Report, in para 84.40, it was suggested that sec. 151 does not require any amendment. We agree.

Section 153:

This section refers to the subject "Exclusion of evidence to contradict answers to questions testing veracity". It reads as follows:

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

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

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

There are four illustrations (a) to (d) below sec. 153.

In the 69th Report, after referring to sec. 6 of the (UK) Criminal Evidence Act, 1865, no recommendation is made for amendment (see para 85.12).

In Ram Reddy v. V.V. Giri, 1970 (2) SCC 340 sec. 153, Exception II was considered. In Bhaskaran Nair v. State of Kerala, 1991 Crl LJ 23, (Ker), it was held that sec. 153 cannot be overcome by giving evidence in advance on matters shaking the credit or injuring the character of a witness yet to be examined.

We may here point out that in Phipson (15th Ed, 1999, para 19.26) after referring to the above and to sec. 1(3)(ii) of the Criminal Evidence Act, 1898, the author refers to other exceptions. He refers to the (UK) Rehabilitation of Offenders Act, 1974 under which one must take account of the impact of the 'spent convictions'. In civil proceedings, question cannot be put about 'spent convictions'. (see also para 18.79, 18.80 of Phipson) This is a special provision in a special Act and need not be brought into our Evidence Act.

In para 18.79, it was stated by Phipson that it is now accepted that once a person's convictions have acquired a certain age, particularly if they relate to the youthful period, it is less reasonable to hold them against that person or to take them as demonstrating present bad character. In the case of someone aged 21 or over, sec. 16(2) of the Children and Young Persons Act, 1963 provides that:

> "any offence of which he was found guilty while under the age of fourteen shall be disregarded for the purposes of any evidence relating to his previous convictions."

The provision goes on to say that he may not be cross-examined about them under the 1898 Act.

Such a provision, in our view, need not be made here because they will be covered by sec. 148(2) being questions relating to a matter 'remote in time'. In R v. Ghulam Mustafa, ILR 36 All 371 it was clearly held that a magistrate should refuse to allow a question as to a previous conviction to be put, upon the ground that it related to a matter which had happened 30 years ago and was so remote in time that it ought not to influence his decision as to the fitness for being a surety.

We are of the view that sec. 153 need not be amended.

Section 154:

This refers to 'Question by party to his own witness'. It reads:

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

This section refers to what is called, the evidence of the 'hostile witness'. We shall first refer to the judgments of the Supreme Court rendered before 1977 when the 69th Report and also those rendered after 1977 up to date.

In Dahyabhai Chhaganbhai Thakker v. State of Gujarat, AIR 1964 SC 1503 it was held that the stages mentioned in sec. 137 as chief examination, cross and re-examination are not relevant here and that under sec. 154 of the Act, a discretionary power is vested in Court to permit a person who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. Sec. 154 does not in terms or by necessary implication confine the exercise of the power by the Court before the examination in chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the Court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is to make it ineffective in practice. But then an opportunity must be given to the accused to cross-examine the witness on the answers which do not find place in the examination in chief.

In Sat Paul v. Delhi Admn., 1976 (1) SCC 727, it was 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. It was further observed that the Indian position is different from that under the English law. The decision to the contrary in Jagir Singh v. State (Delhi), 1975 (3) SCC 562 was overruled.

In Bhagwan Singh v. State of Haryana, 1976 (1) SCC 389, the Court reiterated the view in Sat Paul. In that case, the complainant, the principal witness for the prosecution was examined under sec. 154 since he specifically did not refer to the co-accused in his examination in chief.

Since the entire case rested on his evidence, the accused objected to the conviction based on his testimony after the witness was declared hostile. This plea was rejected and it was held that the evidence remains admissible at the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. On facts, it was held that this test was satisfied.

In State of UP v. Ramesh Prasad Misra, AIR 1996 SC 2766 the prosecution witnesses resiled from their earlier statements under sec. 161 of the Code of Criminal Procedure. It was held that the evidence of a hostile witness should not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. The fact that the hostile witnesses having given the statements about the facts within their special knowledge under sec. 161 recorded during investigation, and having resiled from correctness of the versions in the statements without giving any reasons as to why the investigating officer could record statement contrary to what they disclosed, shows that they had no regard for truth; they fabricated the evidence in their cross-examination to help the accused which did not find place in their sec. 161 statements.

In Parveen v. State of Haryana, 1996 (11) SC 365, it was held that witness of fact, when they turned hostile and were cross-examined by the prosecution, their evidence cannot be relied by the defence.

In State of Gujarat v. Anirudh Sing, AIR 1997 SC 2780, the Court followed Khujje v. State of MP, 1991 (3) SC 627 and State of UP v. Ramesh Prasad Misra, 1996 SC 2766 and held that merely because the witness turned hostile, his evidence cannot be rejected in its entirety.

Recently, in Koli Lakhmanbhai Chanebhai v. State of Gujarat, 1999 (8) SCC page 624, 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, can be relied upon to convict the accused. Bhagwan Singh v. State of Haryana, 1976(1) SCC 389 and Sat Paul's case, 1976(1) SCC 727 were followed.

In the year 2001, there are three judgments. The first one is in Guru Singh v. State of Rajasthan, AIR 2001 SC 330, where it was held that mere fact that the prosecution witnesses differed from the prosecution case was not sufficient to treat them hostile. In Bhola Ram Kushwaha v. State of MP, AIR 2001 SC 229, it was held that it is enough to peruse the statements of all the prosecution witnesses and ascertain whether their testimonies inspire confidence for holding the accused guilty. In Anil Rai v. State of Bihar, 2001 (7) SCC 318, it was held that if the evidence of the hostile witness is corroborated by other reliable evidence, the conviction can be based thereon.

In the 69th Report, reference was made to the law in England and in India. It was noticed that the law in England is just the opposite of what it is in India and the Report referred to Sat Paul v. The State, AIR 1976 SC 294 and the earlier judgment in Naryan Nathu Naik v. Maharashtra State, AIR 1971 SC 1656. It noticed conflicting views of the High Courts and observed

that a provision be added in sec. 154 that 'nothing in the section shall disentitle the party so permitted to rely on any part of the evidence of such witness'. We agree because this is also what the Supreme Court has stated in all the cases referred to above.

We recommend that sec. 154, as it now stands, should be redesignated as subsection (1) of that section and subsection (2) be added as follows:

> "(2) Nothing in this section shall disentitle the party so permitted, to rely on any part of the evidence of such witness."

Section 155 and proposed section 155A:

Section 155 deals with 'Impeaching credit of witness'. It reads as follows:

> "155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him –
>
> (1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;
>
> (2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;
>
> (3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;
>
> (4) When a man prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of general immoral character. (This clause was deleted by Act 4/2003.)

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

There are two illustrations below the section. In ill. (a), evidence is admissible against a witness (a third party to a suit) who claims to have delivered goods to another person, to state that he had made a similar claim earlier; ill. (b) evidence may be given that a witness (a third party) who on a previous occasion made a similar claim in another criminal case that the deceased was hit by the same accused. Evidence is admissible under ill. (a) or (b) of the Evidence Act to contradict him. Both illustrations are referable to clause (3) of sec. 155 which deals with 'contradiction' of a witness.

So far as clause (4) of sec. 155 is concerned, in the 172nd Report, the Law Commission recommended its deletion. This has been done now by Parliament by Indian Evidence (Amendment) Act, 2002 (Act 4 of 2003).

Woodroffe points out that the credit of a witness can be impeached by following one or other of four methods:

(a) by cross-examination (that is, by eliciting, from the witness himself facts disparaging him);
(b) by calling other witnesses to disprove his testimony on material points (the credit of a witness is indirectly impeached by evidence disproving the facts which he has asserted);

(c) by contradiction on matters affecting credit, through other witness;

(d) by independent proof given by other witnesses as to character.

Sec. 155 deals with methods (c) and (d).

Sec. 155 deals with a subject different from what secs. 52, 146 or secs. 138, 140, 145, 148 deal with. Sec. 155 deals with the character of witnesses and prosecutrix. Sec. 52 deals with character evidence in regard to the subject matter of the suit. Secs. 138, 140, 145, 146 and 154 provide for impeaching the credit of a witness by cross-examination. In particular, sec. 146 permits questions injuring the character of a witness to be put to him in cross-examination. Sec. 155 lays down a different method of discrediting a witness – by allowing even independent evidence to be adduced.

(1) Clause (1) of Sec. 155: In the 69th Report, it was suggested (see paras 87.11 and 87.24) that clause (1) of sec. 155 should be amended, as a matter of clarification, by using the words, "impeach his credibility, accuracy or veracity" instead of "believe him to be unworthy of credit".

We agree with this recommendation.

(2) Clause (2) of Sec. 155: In para 87.12 of the 69th Report, it was stated that no amendment is necessary in regard to this clause. We agree.

(3) Clause (3) of Sec. 155: So far as this clause is concerned, two recommendations were made in the 69th Report:

(a) One was that, for procedural purposes, it must be made clear that as per the decision of the Privy Council in Bal Gangadhar Tilak v. Shrinivas Pandit, AIR 1915 PC 7, the previous contradictory statement must be put to him. In other words, it must be made clear that clause (3) of sec. 155 is subject to sec. 145.

(b) The second recommendation concerns the words 'his evidence which is liable to be contradicted'. These words have been interpreted differently in different cases.

Sarkar (15th Ed, 1999, p. 2267) says:

"Contradiction by previous inconsistent statement must, however, be confined to matters relevant to the issue, as no contradiction is allowed on irrelevant matters, except in the two cases mentioned in sec. 153. That the previous inconsistent statement must relate to matters relevant to the issue is borne out by the expression "inconsistent with any part of the evidence which is liable to be contradicted". As pointed by Wilson J, an irrelevant matter requires no contradiction, as it is not admissible in evidence under sec. 5. The expression 'which is liable to be contradicted' in clause (3) of sec. 155 is equivalent to "which is relevant to the issue". (Khadija Khanam v. Abdul Kareem, ILR 17 Cal 344). The Supreme Court however, has said that this proposition is too broad and the various clauses in sec.

155 do not warrant such an interpretation (Rama Reddy v. V.V. Giri, 1970 (2) SCC 340. The third sub-clause refers to a former statement which is inconsistent with the statement made by the witness in evidence in the case and it is permissible that the witness be contradicted about that statement (Kehar Singh v. State, AIR 1988 SC 1883)."

We shall refer to a few Supreme Court judgments in connection with sec. 155. Where a statement was said to be made by a witness who declined to affix his thumb impression, the statement could not be used for contradicting the testimony (State v. Harpal, AIR 1978 SC 1530). The credit of a witness can be impeached by proof of any statement which is inconsistent with any part of his evidence in Court: Binay Kumar Singh v. State of Bihar, AIR 1997 SC 322.

Previous inconsistent statement recorded on tape recorder is admissible for contradiction. See Rama Reddy v. V.V. Giri, 1970 (2) SCC 340 approving Rupchand v. Mahabir (AIR 1956 Punjab 173). (We have referred to these cases while dealing with sec. 153). But statements recorded on tape can be treated as inadmissible if there is any reason to hold that they may have been tampered with (Pratap v. State, AIR 1964 SC 72). In Yusuf Ali v. State, AIR 1968 SC 147 the prosecution sought to rely upon certain conversation alleged to have taken place between the accused and the complainant which was recorded on a tape recorder. It was held that the conversation did not attract the applicability of sec. 162, Code of Criminal Procedure and was admissible.

It is well-settled that unless a First Information Report can be tendered in evidence under any provision in Chapter II of the Act, such as sec. 32(1) or sec. 8, it can ordinarily be used only for the purpose of corroborating, contradicting or discrediting (under secs. 157, 145 and 155) its author, if examined, and not any other witness (Shankar v. State, AIR 1975 SC 757).

The statement of law as laid down by Wilson J in Khadija v. Abdul, ILR 17 Cal 344, has not been accepted, as stated above, by the Supreme Court in Rama Reddy v. V.V. Giri. Further, Cunningham has raised the query whether these words do not refer to any part of the evidence which relates to a fact in issue or relevant fact, or which falls within the exceptions to sec. 153. The latter interpretation is correct (see para 87.13 of 69th Report) and Sarkar (ibid) p. 2267 already referred to).

Therefore, it is necessary to clarify clause (3) of sec. 155 by further adding, 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, we recommend the addition of the following words in the beginning of clause (3) :-

"subject to the provisions of sec. 145"

We recommend accordingly.

(4) Clause (4) of Sec. 155: We reiterate the recommendation in the 172nd Report for deletion of this clause. But now the said recommendation

has been carried out by Indian Evidence (Amendment) Act, 2002 (Act 4 of 2003).

(5) A further question remains as to the position of an accused. Sarkar (ibid p. 2274) considers this aspect separately.

While dealing with sec. 155 which deals with 'impeaching the credit of a witness', as in the case of sec. 148 – which gives discretion to the Court to intervene, when in cross-examination, questions can be put to affect the credit of a witness by injuring his character –, we have to consider whether some control must be provided when the credit of an accused is impeached.

So far as sec. 155 is concerned, two situations arise. If an accused volunteers to give evidence under sec. 315 of the Criminal Procedure Code, 1973 he can be cross-examined like any other witness and cannot claim the protection against self incrimination as under cl. (b) of Art. 20 of the Constitution. But, he still requires some protection – when his credit is impeached – as in the case of other witnesses. We have already recommended sec. 148A (instead of sec. 148(2) to protect the witness – accused by conferring powers on the Court).

Under sec. 155, there is no need to make another provision so far as the witness-accused is concerned, in respect of questions that may be put to him in cross-examination. Sec. 148A is in our view sufficient.

The 69th Report considered the question, in the context of clause (3) of sec.155 which permits independent evidence. This aspect was considered in para 87.23 of the 69th Report. It said:

> "We have disposed of the four clauses of sec. 155 as it now stands. It remains to consider one point which does not concern any particular clause of the section, but is relevant to the entire section. This point arises because since sec. 155 speaks of impeaching the credit of a 'witness'. Literally, it may become applicable also to the accused who offers himself as a witness. So far as cross examination of the accused on matters in issue is concerned, the matter will be taken care by the relevant earlier sections, in regard to which we have made suitable recommendations for dealing with the problem of the accused as a witness. The question how far the accused's character can be attacked under 155, by independent evidence, however, still remains since it falls outside sections 132 and 148."

The problem posed is that in the case of an accused who offers to be a witness under sec. 315 of the Code of Criminal Procedure, 1973, his credibility can be impeached by

(1) cross-examining him or

(2) cross-examining other witnesses who are examined by the accused".

Even though, the accused loses protection under Art. 20(3) of the Constitution, vis-à-vis the charge in issue in the Criminal proceeding, when he is asked questions relating to other offences not in issue in the criminal case concerned, protection is necessary so far as other offences are concerned under cl. (3) of Art. 20. It is here that we have already provided protection under sec. 148A (instead of sec. 148(2) as proposed in the 69th Report). In fact we added the additional principle in DPP vs. P : 1991(2) AC 447 both in sec. 148 and 148A.

(6) Now what remains for consideration is the protection of the accused in respect of other offences not in issue in the case but where, his witnesses are questioned about other offences committed by the accused. This is not covered by sec. 132 and 148 which deal with the credibility of the witness.

The 69th Report, therefore, further explains in para 87.23 as follows:

"When the credit of an accused-witness is attacked under section 155, the danger arises that not only his credibility as a witness (in the restricted sense) would be attacked, but also there may be a certain amount of mental harassment and a likelihood of prejudice by such

> cross-examination, if it is allowed without some qualification. We have discussed the relevant aspects under sec. 148, and stressed the need for special provisions. It seems to us that the best course would be to create, in sec. 155 also, a separate provision substantially on the same lines as we have recommended in relation to sec. 148 as regards the cross-examination of the accused on matters affecting his credit."

In the last sentence, there appears to be a clear mistake, it should read as 'as regards the cross-examination of any witness other than the accused who is asked questions in cross-examination about the credibility of the accused'. This is clear when we read the recommendation for enacting sec. 155(2) (which we recommend to be an independent sec. 155A, so that sec. 155 does not become very lengthy). The same sub-clause which we recommend for sec. 148A will have to find place in sec. 155A. The principle in DPP vs. P that the Court must treat the question or answer admissible only if the probable value of the answer is likely to outweigh the prejudice that may be caused to the accused, is added at the end of both sections 155 and 155A.

In the result, we recommend the following changes in sec. 155 as recommended in para 87.24 of the 69th Report. (In the place of sec. 155(2), we propose sec. 155A.) In both sections, apart from the protections already there, it is necessary to include the protection as per the new principle in DPP vs. P.

Section 155 will apply where the accused has not opted to give evidence under sec. 315 of Cr.P.C. Section 155A applies where the accused resorts to sec. 315 of the Cr.P.C.

Sri Vepa P. Sarathi has suggested that the proposed Explanation does not fit into clause (1). But the Explanation is intended to clarify what the witness need not say in his chief-examination. This is purely procedural.

We recommend section 155 should be revised as follows:

Impeaching the credit of witness

"**155.** The credit of a witness may be impeached in the following ways by the adverse party, or with the permission of the Court, by the party who calls him-

(1) by the evidence of persons who, from their knowledge of the witness, could impeach his credibility, accuracy or veracity;

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

(3) subject to the provisions of sec. 145, by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted, 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 section 153;

and provided that the Court is satisfied that the probative value of the answer to the question has or would override the prejudicial effect thereof.

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

Illustrations:

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

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

The evidence is admissible.

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

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

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

The evidence is admissible."

The other provision, instead of sec. 155(2) as recommended, will be sec. 155A. (We change the word 'he' in the 69th Report as 'accused'. We omit the case of questioning the prosecutrix as done under sec. 155(4)).

Impeaching the credit of the accused while examining him as a witness

"155A. When an accused person offers himself as a witness in pursuance of section 315 of the Code of Criminal Procedure, 1973, it shall not be permissible to put questions to another witness and such witness, if asked, shall not be compelled to answer, questions which tend to show that the accused has committed or has been convicted or been charged with any

offence other than that in which the accused is charged or that the accused is of bad character, unless –

(i) the proof that the accused has committed or has been convicted of such other offence is relevant to a matter in issue; or

(ii) the accused has personally or by his legal practitioner asked questions of the witness for the prosecution with a view to establishing his own good character, or has given evidence of his good character; or

(iii) the nature of the conduct of the defence is such as to involve imputations on the character of the witness for the prosecution (other than the character of the prosecutrix) without obtaining the leave of the Court for asking the particular question; or

(iv) the accused has given evidence against any other person charged with the same offence,

and the Court is satisfied that the probative value of the answer to the question has or would outweigh the prejudice that may be caused."

Section 156:

This section deals with 'Questions tending to corroborate evidence of relevant fact, admissible'. It reads as follows:

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

There is an illustration below sec. 156 which reads as follows:

> "A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.
>
> Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself."

This section is the reverse of 'contradiction' of a witness. Contradiction impeaches credit while corroboration confirms it. As stated in para 88.6 of the 69th Report, one of the best methods to check the truthfulness of a witness is to ascertain the accuracy of his evidence as to surrounding circumstances though they are not immediately connected with the relevant fact. However, corroboration is not the only method of confirming truthfulness of a witness.

Section 156 deals with the nature of questions that may be put to a witness for purpose of corroboration while sec. 157 refers to what may be proved to corroborate a witness's evidence.

Section 156, it was stated in para 88.89 of the 69th Report, does not require any serious change except to add the words "fact in issue or" before the words 'relevant facts' in sec. 156. We agree.

Section 157:

Section 157 says 'Former statements of witness may be proved to corroborate later testimony as to same fact'. It reads as follows:

> "157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

This section provides for the admission of evidence given for the purpose, not of proving a relevant fact, but of testing the witness's truthfulness. Consistency of statements can be of some help in finding out if the witness is truthful but merely because there is consistency there is no guarantee that the witness is truthful for if a person has a motive to mislead, he can be consistent in making false statements. Section 8 may make a complaint of a woman raped given soon after the rape relevant under sec. 8 (see ill (j)) and sec. 157 may taken in, statements other than complaints.

What is admissible under sec. 157 is not substantive evidence.

In Ramratan vs. State: AIR 1962 SC 124, it was held that the witness to be corroborated need not state in his testimony that he had made a former statement to another witness who is corroborating him. Of course, if he also says so in his testimony, that would add to the weight of the evidence of the person who gives evidence in corroboration. Thus, sec. 157 is quite useful.

In Rameshwar vs. State: AIR 1952 SC 154, the Supreme Court held that the previous statement may be relevant but the weight to be attached to it may differ in each case. The time factor may also vary from case to case.

Next question is as to the last part of sec. 157 "or before any authority legally competent to investigate the fact."

The word 'investigation', according to sec. 2(h) of the Code of Criminal Procedure, is applicable only to proceedings taken by the police or by any person, other than a Magistrate, who is authorized in this behalf.

The word 'investigate' in sec. 157 is not to be understood in the narrow sense it is used in the Code of Criminal Procedure. It must carry its ordinary meaning in the sense of 'ascertainment of facts, sifting of materials,

search for relevant data etc.' (State vs. Pareswar: AIR 1968 Orissa 20). It is broader than what it is under Cr.P.C. As to 'investigate' under Cr.P.C. See H.N. Rishbud vs. State, AIR 1955 SC 196).

It has held that the meaning of words 'legally competent to investigate the fact', is having power under some law, statutory or otherwise. (R vs. Kumar Muthu, 1919 MWN 199)

As to the First Information Report, the Supreme Court held it is not substantive evidence. It can only be used for corroboration under sec, 157 or for contradiction under sec. 145 (Nisar Ali vs. State : AIR 1957 SC 366; Aghnoo vs. State: AIR 1966 SC 119. See also Haisb vs. State AIR 1972 SC 283; Damodar vs. State AIR 1972 SC 622; Shanker vs. State: AIR 1975 SC 755.

Statements can be made to police officers under sec. 161 of the Code of Criminal Procedure and sec. 162 prescribes the mode of recording statements. Under sec. 162, when any witness who is examined by the Police is called for the prosecution at an inquiry or trial in respect of any offence under investigation, his previous statement or record thereof shall not be used for any purpose except (1) the contradiction of such witness by the accused under sec. 145; (2) the contradiction of such witness also by the prosecution but with leave of the Court and (3) the re-examination of the witness if necessary. The statement cannot be used for corroboration for

contradiction of defence witnesses (Sat Paul vs. Delhi Admn: AIR 1976 SC 294). The statement cannot be used for corroboration (Tehsildar vs. State AIR 1959 SC 1012).

So far as statements made before a Magistrate under sec. 164 Code of Criminal Procedure are concerned, they are admissible in evidence to corroborate the statement made by the witness before the committing Magistrate. Bhagwan vs. State of Punjab AIR 1952 SC 214; Dhanabal vs. State: AIR 1980 SC 628. Here the Supreme Court enlarged the meaning of the word 'investigation'. See also Manarli vs. R 37 CWN 1066 (Sarkar 15th Ed., 1999, p. 2284). Statement under sec. 164 Cr.P.C. is not substantive evidence but it can be used to support or challenge evidence given by the person who made the statement (Bhuboni vs. R : AIR 1949 PC 257).

Statements made before a magistrate during test identification are admissible under sec. 157. Section 164 Cr. P.C. covers the case where a magistrate acts under this section and records a statement made to him (Samiruddin vs. R: AIR 1928 Cal 500).

In the 69th Report, it was observed (para 88.34) that in as much as a statement before a Magistrate during identification parade is relevant under sec. 157 though technically it is not 'investigation' as understood under sec. 2(h) of the Code of Criminal Procedure, and to cover statements under sec. 164 Code of Criminal Procedure, or "under other statutory provisions by

authorities other than police such as Judicial Magistrates, an amendment of sec. 157 is desirable in view of the obscurity prevalent on the subject."

It was recommended in para 88.35 (see also para 88.36A) that sec. 157 "be modified by a suitable amendment to provide for the above matter. In brief – this is not a draft – the amendment should bring within the fold of the section "authorities" (H.N. Rishbud vs. State of Delhi AIR 1965 SC (96) which are under law competent to inquire into or to record statements".

The format was not given. If we insert an Explanation that the 'statements' shall include statements before all authorities competent to inquire into a fact or to record statements, there is the danger of including statements under sec. 162 of the Criminal Procedure Code, 1973 also which it is not permissible. To avoid such a contingency, we suggest adding an Explanation as follows:

> "Explanation: 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."

Proposed Section 157A:

In para 88.36B, the 69th Report recommended a comprehensive provision for confirming the credit of a witness by independent evidence, as in England and USA. At present, such confirmation of the credit can be

made (i) by way of providing corroborative evidence under ss. 156-157 (ii) by cross examining the witness produced to impeach the credibility, or (iii) by substantive evidence on the main issues. 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.

The following provision is recommended in para 88.38 and we agree that such a provision on the lines of sec. 146 be inserted:

Establishing credit of witness by independent evidence

"**157A**. Where the credit of a witness has been impeached by any party , the adverse party may, notwithstanding anything contained in section 153, in order to re-establish his credit, introduce independent evidence concerning his accuracy, credibility or veracity or to show who he is and his position in life."

[So far as sub section (2) of the above new sec. 157A is concerned, it was so recommended in the 69th Report to the effect that "when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally good character." We are of the view that such a provision may enable the accused to produce contrary evidence of her bad character. As we have reiterated the 172nd Report that sec. 155(4) be deleted, we are not in favour of sub-section (2) of sec. 157A as proposed]. In fact, sec. 155(4) has been deleted by the Indian Evidence (Amendment) Act, 2002 (Act 4 of 2003).

Section 158:

The heading of this section reads: "What matters may be proved in connection with proved statement relevant under section 32 or 33. It reads as follows:

> "158. Wherever any statement, relevant under section 32 or 33, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested."

This section relates to 'credit of persons who are not witnesses'. The statements are of those who are dead (sec. 32) or cannot be found or is incpapable of giving evidence or is kept out of the way by the opposite party (see sec. 33), or whose presence cannot be obtained without any amount of delay or expense. Sarkar says (15th ed. 1999 p. 2291), the object of this section is to expose statements by such persons to every possible means of contradiction or corroboration in the same manner as that of a witness before Court under cross-examination. No sanctity attaches to the statement of a person because he is dead or is not available.

No amendment is called for in sec. 158.

Section 159:

This section deals with 'Refreshing Memory'. It reads as follows:

"159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

The witness may use copy of document to refresh memory – whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises."

(In Ceylon, paras 1, 2, 3 and 5 have been numbered as sub-sections (1), (2), (3) and (4) respectively).

The word 'writing' has been held to include printed matter (Ram Ch vs. R: AIR 1930 Lah. 371). In order that the document or memorandum allowed to be looked at for the purpose of refreshing memory, may be reliable, certain conditions have been laid down in sec. 159 – (1) The writing must have been made by the witness himself contemporaneously with the transaction to which he testifies or so soon afterwards that the facts were fresh in his memory, or (2) if the writing is made by some one else, it must have been read by the witness within the aforesaid time and known by him to be correct i.e. he must have read it when the facts were fresh in his memory and recognized its accuracy.

Section 159 has reference to 'present recollection' and sec. 160 to 'past recollection'. Section 160 says that a witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of facts themselves, if he is sure that the facts were correctly recorded in the document.

Sarkar quotes (15th Ed., 1999, p 2293-94) Green Leaf sec. 439(a) on past and present recollection as follows:

> "There are two sorts of recollection which are properly available for a witness – post recollection and present recollection. In the latter and usual sort (present) the witness has either a sufficient clear recollection or can summon it and make it distinct and actual if he can stimulate and refresh it, and the chief question is as to the propriety of certain means of stimulating it – in particular, of using written or printed notes, memoranda, or other things as representing it. In the former sort (past) the witness is totally lacking in present recollection and cannot revive it by stimulation, but there was a time when he did have a sufficient recollection and when it was recorded, so that he can adopt this record of his then existing recollection and use it as sufficiently representing the extent of his knowledge on the subject."

Para 40.6 of the 69th Report says that under sec. 159, the document is resorted to in order 'to revive a faded memory' and the witness swears to his actual recollection of the facts which the document evokes. In the sub-section under sec. 160, there is no reference to memory not revived.

It is also the English law that so far as present recollection is concerned, the document must be 'contemporaneous'.

There is a long list of admissible documents based on case law (para 90.8). A solicitor may refer to his diary, or an ordinary witness may refer to a newspaper report read by him when the facts were fresh in his mind. An

official shorthand writer may refer to his notes at trial, even though copies of these may be privileged from production to a non-party who has sub-ponoed him. A workman's time book may be used to refresh the memory of the cashier, who read in every fortnight, when paying wages in accordance therewith, etc.

A document inadmissible for want of stamp or registration can also be allowed to be read. This is so in England. In Jiwanlal v. Neelmani, AIR 1928 PC 80 it was held that a document rejected by reason of a rule of procedure Order 13 Rule 2 of the Code of Civil Procedure, 1908 – can still be used under sec. 159. In Jhaku Mahton, ILR 8 Cal 793, it was held that a witness cannot be compelled to refresh his memory.

The 69th Report refers (see para 90.13) to a case from British Columbia R v. Pitt (1968) 68 DLR (2d) 513 (Canada) where the wife of the accused who was accused of murdering her husband was, at the instance of her counsel, allowed to be hypnotized and give evidence from memory – refreshed by a hypnotic trance. The evidence was used.

In para 90.14, a suggestion for mild restructuring the section was made (para 90.14), and also to include printed matter as excluded in 'writing' or use the word 'document' instead. It can also be a photograph. As regards experts, it may be useful to allow reference to periodical literature which may not otherwise fall within 'treatises'.

We shall refer to a few cases. A writing can be used by the witness to refresh his memory regarding the facts deposed by him if the writing be

made either at the time of the transaction or shortly after the transaction, namely, the occurrence (Indira Mohan Brahma v. State of Assam, 1982 Crl LJ NOC, 127 (Gaur)).

A document not included among the documents produced with the plaint may be used (Ramji v. Ramgayya 1 MHC R 168) (one 07 v 18(2)). It cannot be rejected because it was not in the last (case of horoscope) under Order 7 v 14 (Banwari v. Mahesh, AIR 1918 PC 118). Account books not produced in time were not admitted in evidence but court may, under sec. 159, allow a witness to refresh his memory by reference to such account books (Jewan Lal v. Nilmani, AIR 1928 PC 80). A horoscope can be used to help in proving the date of birth stated in it – under sec. 159 or 160 (Savitri Bai v. Sitaram, AIR 1986 MP 218).

The principles as to refreshing memory have also been recently referred in R v. Da Silva, 1990 (1) All ER 29 (CA) and it was observed that a witness can refresh his memory, even after he started the evidence.

A statement otherwise falling under sec. 162 CrPC would not become admissible because it can be brought under sec. 158 or 159 (Bhondu v. R, AIR 1949 All 364. A memorandum of facts prepared after the occurrence, by a witness and handed over to the investigating officer is a statement under sec. 162 CrPC and cannot be used under sec. 159 (Supdt. & Rem v. Sahiruddin, AIR 1946 Cal 483. In Simion v. State of Kerala, 1996 CrLJ 3368 (Ker) it was held that a witness cannot be allowed to refresh his memory by referring to his earlier statement given to the police under sec. 161 CrPC. On this aspect, we do not propose to make any provision for

permitting such statements to be included because of the general principles applicable to criminal law. In England (see para 11.50 of Phipson 1999, 15th Ed) witnesses are allowed to look into their prior statement out of Court:

> "It is not usual practice for witnesses to see before trial the statements they made. This was recognized in a Home Office Circular in 1969, issued with the approval of Lord Parker CJ and the judges of the Queen's Bench Division. The practice was approved in R v. Richardson (referred to in circular 82/1969) although obviously it would be wrong if several witnesses were handed statements in circumstances which enabled one to compare with another what each said (R v. Skinner, (1994) 99 Cr Ap Rep 212). It has been said that if prosecution witnesses are allowed to see their statement out of court, it is desirable but not essential that the defence should be informed, (Worley v. Bentley (1976) 62 Cr Ap R 239) but the practice is now so usual that the defence will assume that they are likely to have seen them. If a witness has made a statement, it is permissible to show him a video recording of the events he describes and for him to make a further statement correcting any errors he wishes: (1990) 90 Cr Ap R 233; R v. Cheng (1976) 63 Cr ap Rep 20 (CA)."

We agree (see para 90.15 of 69th Report) that sec. 159 be revised as follows:

Refreshing memory

"**159.** (1) A witness may, while under examination, refresh his memory by referring –

(a) to any document made by the witness himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory;
(b) to any such document made by any other person, and read or seen by the witness within the time aforesaid, if, when he read or saw it, he knew it to be correct;
(c) to a copy of such document, with the permission of the Court, provided the Court is satisfied that there is sufficient reason for the non-production of the original.

(2) An expert may refresh his memory by reference to professional treatises or articles published in professional journals."

Section 160:

This section bears the heading 'Testimony to facts stated in document mentioned in sec. 159'. It reads as follows:

"160. A witness may also testify to facts mentioned in any such document as is mentioned in sec. 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document."

There is an illustration below sec. 160 and it reads as follows:

"A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books

were correctly kept, although he has forgotten the particular transactions entered."

This section deals with cases where the memory cannot be revived. We have, in a way, referred to the difference between sec. 159 and this section, while dealing with sec. 159.

Sec. 160 uses the word 'document' and we have recommended the word 'document' to be used in sec. 159 also.

The Supreme Court in Kanti v. Purshottamdas, AIR 1969 SC 851 while overruling certain judgments of the High Court held that it is not necessary that a witness should specifically state that he has no specific recollection of the facts and that he is sure that the facts were correctly recorded in the document before the document can be used. It is enough if it appears from his evidence that these conditions are established.

Sec. 160 permits a witness to testify the facts mentioned in the document referred to in sec. 159, although he has no recollection of fact themselves if he is sure that facts were correctly recorded in the document and the horoscope in the case (Savitri Bai v. Sitaram, AIR 1986 MP 218).

In Ziyauddin v. Brij Mohan, AIR 1975 SC 1788, it was held that full shorthand transcript made by those who heard the speeches can be used to refresh their memory. In Laxminarayan v. Returning Officer, AIR 1974 SC 66, it was held that the writing does not become inadmissible merely because the adverse party cannot decipher it.

The special diary of a police officer may be used by him but not by other witnesses: R v. Mannu, ILR 19 All 390 (FB) approved in Dalsingh v. R, AIR 1917 PC 25.

Reading over the police statement to the witness before he enters the witness box does not amount to contravention of the prohibition in sec. 162(1) of the Code of Criminal Procedure, though the fact of reading of the statement may affect the probative value of the evidence of the witness (Nathu v. State, AIR 1978 Guj 49 (FB)). (See discussion under sec. 154)

In para 91.6 of the 69th Report, it was observed that sec. 160 does not require any change. We agree.

Section 161:

The section refers to the 'Right of adverse party as to writing used to refresh memory'. It reads as follows:

> "161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon."

This refers to sec. 159 and 160 and as per the language of sec. 159, this applies to documents used to refresh memory while a witness is 'under examination'.

But, it has been held that the defence counsel cannot be permitted to cross-examine the Police Officer regarding the entries in the case-diary unless the police officer uses it to refresh his memory. (Gurucharan Singh v. State, ILR 1984 (2) Del. 627 (B) = 1985 Crl.LJ (NUC) 56.

In para 92.3 the only amendment suggested was to substitute the word 'document' for 'writing' in conformity with section 159, as proposed to be amended, as also in conformity with present section 160. We recommend accordingly.

Section 162:

This section refers to 'production of documents' – A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents – If for such a purpose, it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and, if the interpreter disobeys such direction, he shall be held to have committed an offence under sec. 166 of the Indian Penal Code (45 of 1860)".

This section has been examined while dealing with sec. 123 and we have proposed amendment to sec. 162. The recommendations made in our discussion under sec. 123 may be looked into. We have recommended deletion of the words 'unless it refers to matter of State' from sec. 162. The entire procedure for record or communication relating to affairs of State will now come under sect. 123.

Section 163:

This section bears the heading 'Giving, as evidence, of document called for and produced on notice'. It reads as follows:

> "163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so."

In the 69th Report, it was stated in para 94.8 that no amendment is required in this section.

This section says that if (i) a party produces a document upon notice (see sec. 66) of another party and (ii) the latter party inspects the document, then (iii) the party calling is bound to use it as his evidence, if the party producing the document require it. It applies both to Civil and Criminal trials (Govt. of WB v. Santiram, AIR 1930 Cal 370). The document must be

relevant to matters in issue. The basis of the rule is stated in Sarkar (1999, 15th Ed, p. 2315) as follows:

> "….. it would be manifestly unjust and unfair to permit one to gain an undue advantage by looking into the documents of his opponent without being obliged to use it as evidence for both of them…… finding that they did not suit his purpose or went against him……"

See also Rajeswari v. Bal Kishen, ILR 9 All 713 (PC) which states that it rests on the party who calls for and inspects a paper, to adduce evidence as to its genuineness, if that be not admitted.

We agree that no amendment is necessary in sec. 163.

Section 164:

The section bears the heading 'using, as evidence, of document, production of which was refused on notice'. It reads as follows:

> "164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court."

There is an illustration below sec. 164. It reads as follows:

> "A sues B on an agreement and gives B notice to produce it. At the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document

itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so."

Under ill. (g) to sec. 114 of the Evidence Act, the judge may also presume that the document withheld is unfavourable to the party who does not produce it. Under sec. 89, there is a presumption that the document called for and not produced was attested, stamped and executed in the manner required by law. It was observed in Doe v. Cockell, (1834) 6 C&P 527: "You must either produce a document when it is called for or never."

In Sham Das v. R: 36 CWW 1127, a doubt was raised as to whether sec. 164 was applicable to criminal proceedings. It was suggested to the Commission which prepared the 69th Report that the section be amended to confine it to civil proceedings. The Commission declined to do. We are also of the same view.

Section 165:

This section deals with "Judges power to put questions or order production". It reads as follows:

"165. The judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to

cross-examine any witness upon any answer given in reply to any such question.

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under sections 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

This section is very important section.

This section supplements the provisions of Order 11 Rule 14, Order 13 Rules 1, 2, Order 16 Rule 17, Order 18 Rules 17, 18 of the Code of Civil Procedure, 1908 and sec. 311 of the Code of Criminal Procedure, 1973. The power of the Court under sec. 311 CrPC are wider. Under sec. 310 of the CrPC, the Court can make a local inspection (see also Jamatraj v. State, AIR 1968 SC 178.

The main part of sec. 165 permits the judge to ask any question as he pleases, in any form, at any time, of any witness, of the party, about any fact, 'relevant or irrelevant', or order production of any document or thing.

Parties cannot object to the question or order, nor, without leave of Court, cross-examine any witness.

But, whatever be the nature of questions, the judgment must be based upon facts which are 'relevant' and 'duly proved'.

Now, there is a difference between 'relevancy' and 'admissibility' as pointed out in Chapter XXV of the 69th Report. The Evidence Act, in sec. 3 defines the words 'relevant', 'evidence' and 'proved'. Sec. 5 of the Act states that evidence may be given in a suit on facts in issue and relevant facts. Explanation to sec. 5 reads as follows:

> "Explanation: This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to civil procedure."

While sec. 5 and other sections speak of relevancy, some others speak of 'admissibility'. Sec. 65 speaks of 'admissibility' of secondary evidence. So does sec. 65B; secs. 91 to 94 exclude certain types of evidence; secs. 123 to 131 prohibit certain questions; sec. 136 permits the judge to decide about the 'admissibility' of evidence. Secs. 148, 149 give power to Court to prohibit certain questions; so does secs. 151, 152, 153 etc. Secs. 24 to 27 of the Evidence Act prohibit certain questions or preclude certain answers being used by the Court.

Apart from the Evidence Act, 1872, there are other statutes which prohibit certain oral and documentary evidence. Sec. 35 of the Stamp Act

prohibits any unstamped document being admitted in evidence. Sec. 17 of the Registration Act, 1908 prohibits certain documents which are compulsorily registrable, to be used as evidence of the transaction contained; sec. 162 of the Code of Criminal Procedure, 1973 prohibits the use of a statement made during investigation from being used except for contradiction or otherwise as stated in that section.

Clause (3) of Art. 20 of the Constitution prohibits any questions which incriminate or tend to incriminate an accused under a prosecution.

We need not propose here to give an exhaustive list of questions which a party is prohibited from putting to an adverse party or a list of answers or documents which are inadmissible in law.

Question arises, if on grounds of policy, a party is not permitted to put certain questions or to bring on record certain inadmissible oral or documentary evidence can a Court of law be allowed to put the same questions and elicit answers which are inadmissible or use such evidence merely because the said questions are not the ones covered by secs. 121 to 131 or 148 or 149 of the Evidence Act, referred to in the second proviso to sec. 165?

Sarkar (1999, 15th pp. 2319 etc.) says that a judge is entitled to take a proactive role in putting questions to ascertain the truth and to fill up doubts, if any, arising out of inept examination of witnesses. But, as stated by Lord Denning in Jones v. National Coal Board, 1957 (2) All ER 155 (CA), the

judge cannot 'drop the mantle of a judge and assume the role of an advocate'.

Of course, that the judge cannot be a passive spectator but has to take a proactive role is emphasized by Phipson (Evidence, 1999, 15th Ed, para 1.21). Phipson says:

> "When the form of the English trial assumed its modern institutional form, the role of the judge was that of a neutral umpire. This is still broadly the position in criminal cases. In civil cases, the abandonment of jury trial except in a few exceptional cases led to some dilution of this principle. The wholesale changes in 1999 of the rules governing civil procedure has emphasized the interventionist role of the modern judge. Whereas formally the tribunal was a 'reactive judge (for centuries past at the heart of the English Common Law – concept of the independent judiciary) instead we shall have a proactive judge whose task will be to take charge of the action at an early stage and manage its conduit."

This was what was stated in the preface to the new Civil Procedure Rules of U.K.

As to criminal cases, recently, in State of Rajasthan vs. Ani : AIR 1997 SC 1023, the Supreme Court clarified that "reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But, there is nothing wrong in his becoming active or dynamic during trial

so that criminal justice being the end, could be achieved. Criminal trials should not turn out to be a combat between two rival sides with Judge performing the role of a spectator or even an umpire to pronounce finally who won the race."

It is in the above background that section 165 must be understood. It gives power to the Court to take a pro-active role to put questions to ascertain truth, where the parties or counsel have not done a good job. That being the object of sec. 165, it would, in our opinion, be not right to allow questions which are not permissible if asked by a party. May be, sections 148, 149 permit the parties to put some questions not relevant to the issues in the suit or proceeding when they have to discredit a witness's evidence or to refer to his character. The Court can also go to that extent. Barring such questions, the parties are not allowed to put questions or elicit answers on irrelevant aspects. The Court is also bound by the same rules.

All that section 165 means is that the Judge has a discretionary power to put questions or summon a document. If the discretion is not exercised judicially, an appellate Court may find fault with the wrong exercise of discretion. As stated in R vs. Hari Lakshman, ILR 10 Bom 185, the Judge can put an irrelevant question for the purpose of discovery of relevant facts or proof of relevant facts. Such interrogation on irrelevant matters may result in securing "indicative evidence", (which Benthan called evidence of evidence)(Sarkar, 15th Ed., 1999, p 2320).

In Krishna vs. Balkrishna: ILR 57 Mad 635, it was held that under sec. 165, the Court cannot order the production by a party if any document

or thing, except with the object of obtaining 'indicative evidence' which may lead to discovery of something relevant.

Sarkar (ibid, p 2320) says that there is further limitation:

> "A further limitation of the power will be found in the first proviso, which lays down that judgments must be based on relevant facts which have been duly proved. It is clear therefore that the judge cannot in any case admit illegal or inadmissible evidence for basing his decision or place it before the jury for their verdict. In this respect the section is in accord with the English law. (see post:Best sec. 86)".

What is crucial here is that the decision must be, based on 'relevant facts', 'duly proved', though questions could be irrelevant. Due proof here means that irrelevant or inadmissible evidence (even if it is otherwise relevant) cannot be the basis of any findings.

Even if questions by the Judge are relevant, they can still be admissible or inadmissible. Under sec. 165, even irrelevant questions can be put with a view to lead to relevant evidence – such questions may be either admissible or inadmissible. Relevancy is a bigger circle while irrelevancy is a small circle within that bigger circle.

Can inadmissible questions – which a party is not entitled to put – be allowed to be put by the Judge?

On this aspect, it appears to be clear from several decisions of the High Courts that the Judge cannot put questions which are not permitted by the Evidence Act or other statutes to be put by the opposite party. But the Supreme Court in Raghunanden vs. State of UP : AIR 1974 SC 463, held that questions which are inadmissible can be put by the Judge of such questions are not the ones specifically excluded in the second proviso to sec. 165, viz. questions covered by sections 121-131, 148 and 149.

We shall refer to a few decisions of the High Courts and then to the judgment of the Supreme Court above referred to.

The power conferred on the Judge cannot be used for proving a confession to police which is shut out by sec. 25, or a confession made while in police custody except as mentioned in sec. 27, or for eliciting a statement which sec. 162 of the Code of Criminal Procedure forbids for being used for any purpose at any inquiry or trial (Pullamma vs. R: 1932 MWN 625). Section 165 of the Evidence Act cannot be used for the purpose of introducing evidence in contravention of the law (Rahijaddi vs. R) (ILR 58 Cal 1009). Such statements cannot be used by the Court in order to show that the witnesses had made contradictory statements to the police officer Veramat vs. R 42 CLJ 528; Maung Htin vs. Mg Po ILR 4 Rang. 471. A document prepared by the police during investigation does not become

evidence merely because it is formally proved and exhibited (Yaru vs. R: 99 I.C. 240 (Lah).

It was however held in R vs. Lal Mia: ILR 1943(1) Cal 543 that a judge can look into the previous statements of witnesses recorded in the police diary, even though the defence neither requested him nor applied for copies of such statements; and if the interests of justice demand, the Judge may himself under sec. 165 put questions to witnesses to bring out the discrepancies of vital nature between such statements and the evidence of those witnesses in Court. In re Molagan: AIR 1953 Mad. 179, it was held that the Judge, having the police diary before him, can in the interests of the accused, put to the police officer any question regarding the accused's statement to the police which goes in his favour. In P. Rajeswan vs. Hotel Imperial: AIR 1989 Mad 34 it was held that the Motor Accident Claims Tribunal is obliged to find out from the evidence available or to get at the evidence as provide under sec. 105, or give further opportunity to either side tio produce necessary evidence, such documents that were prepared during the course of investigation.

In Mohanlal vs. Sankla 6 Bom LR 789, it was held that it is improper for the Court to receive any information of any kind in reference to case, whether it be relevant or not, other than such as comes before it in the way which the law recognizes in the form of legal evidence. In Amarnath vs. R: 851 C 143(L) it was held that a Judge has no right to test evidence given in

Court by material which had not legally been made evidence and that it is improper to stigmatise a witness as perjured on such material.

We then come to two decisions of the Supreme Court which are, more or less, conflicting. In Raghunandan vs. State of UP: AIR 1974 S.C. 463, the Supreme Court said that the ban imposed by sec. 162 of the Code of Criminal Procedure, 1973 against use of a statement of a witness recorded by the police during investigation, does not operate against the special powers of the Court under sec. 165, to question a witness in order to secure the ends of justice. The second proviso prevents only questions falling under ss 121-131, 148 and 149 but not sec. 162 of the Code of Criminal Procedure.

On the other hand, in Hari Ram vs. Hira Singh : AIR 1984 SC 396, it was held (para 5):

> "To begin with, the High Court seems to have been under the impression that the Court had ample powers to direct production of any document under sec. 165 of the Indian Evidence Act. In doing so, with due deference, the High Court overlooked that the Representation of the People' Act was a special Act and provisions of the Evidence Act or the Code of Civil Procedure would only apply where they are not excluded. Thus, at the very outset, with due respect, the approach of the High Court was legally incorrect".

The Supreme Court then referred to Rule 93 of Rules for Conduct of Elections and held that the rule makes a clear distinction between ballot papers and other election papers; ballot papers may be inspected only under the order of a competent Court or tribunal, but other documents are, subject to certain conditions, open to public inspection". So far as the counter foils are concerned there is a clear prohibition for opening them unless the Court is satisfied that a cast-iron case is made out for the same.

Therefore, if under the other provisions of the Evidence Act – apart from sec. 121 to 131, 148 and 149 – certain questions which parties are precluded either from putting those questions for the purpose of their respective pleas, then the Court cannot be deemed, because of the wide language of sec. 165, to put such questions for arriving at a finding. The Stamp Act, Registration Act, or Representation of Peoples Act, our recommendation in the 172nd Report regarding 'Rape Law' may preclude certain questions and the Court does not have a special power to put the prohibited questions in these or other areas.

We are, therefore, of the view that there is need to modify the principle enunciated in Raghunandan's case. In our view, while the judge may put irrelevant questions, he cannot put inadmissible questions.

Sri Vepa P. Sarathi has suggested that sec. 165 be modified as recommended in the 69th Report, that is, by making a few structural changes. He has not favoured the other proposals suggested by us with regard to restricting the power of the court to put irrelevant or inadmissible questions. The reason given by him is that the Act contains nothing but rules of natural justice and their application will not affect the speedy disposal of cases. English and American laws of evidence have several rules of exclusion but that under law the distinction is between different types of evidence depends only on the weight to be attached thereto. But here, from what we have stated above, the question is whether the wide powers of the court could be used to violate express provisions in other statutes.

Therefore, though in the 69th Report, only certain structural changes were suggested in sec. 165, while accepting the same, we propose to make it clear that the power under sec. 105 cannot be used to put questions which are prohibited by the Evidence Act or any other statute.

We recommend that the restructured section 165 should read as follows:

Judge`s power to put question or order production

"**165** (1) Subject to the provisions of sub-sections (2), the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing:

Provided that the parties or their agents shall not be entitled –

(a) to make any objection to any such question or order, or,

(b) without the leave of the court, to cross-examine any witness upon any answers given in reply to any such question.

(2) Nothing in sub-section (1) shall authorize a Judge to-

(a) ask or compel a witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce, under the provisions of this Act or under any other law for the time being in force, if the questions were asked or the documents were called for by the adverse party; or

(b) dispense with primary evidence of any document, except in the cases hereinbefore excepted.

(3) Notwithstanding anything contained in this section, the judgment of the Court must be based upon facts declared relevant under this Act and duly proved."

Section 166:

This section refers to 'Power of Jury or assessors to put questions.' It reads as follows:

> "166: In cases tried by Jury or with assessors, the jury may nput any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper."

In the 69th Report, see Ch. 97, it was suggested (para 97.2) that the system of trial by jury has since been abolished in India. So far as assessors are concerned, special laws which deal with the role of assessor make adequate provision. Hence sec. 166 be deleted.

We agree.

Section 167:

This section is contained in Chapter XI which bears the following heading – "No new trial for improper admission or rejection of evidence." It reads as follows:

> "167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the avidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence has been received, it ought not to have varied the decision."

The word 'decision' applies to both civil and criminal cases. The section recognises and affirms a principle which has been applied in several cases both before and after the passing of the Evidence Act. The rule laid down in the section is applicable to civil as well as criminal proceedings in a Court. (R vs. Abdul Rahim : AIR 1946 P.C. 82). See also Mohar Singh vs. Ghuriba: 8. Beng LR 495 = 15 WR 8 (PC).

As regards rejected evidence, the question is not so much whether the evidence rejected would not have been accepted against the other testimony or record as to whether 'that evidence' ought not to have varied the decisions' (Narayan vs. State: AIR 1959 SC 484).

Section 99 of the Code of Civil Procedure and sec. 465 of the Code of Criminal Procedure lay down similar principles as mentioned in this section.

The expression "the Court before which such objection is 'raised'", includes the appellate Court also (R vs. Pitamber ILR 2 Bom 61).

In Stewart vs. Hancock AIR 1940 PC 128, the Privy Council stated that in order that an alleged wrongful admission of evidence may be a ground for a new trial, it must have caused substantial wrong or miscarriage of justice where certain evidence was admitted conditionally subject to proof of other matters, there was a sufficient direction that unless those conditions were fulfilled, it was not evidence to the case, and no substantial wrong can be said to have occurred.

If a statement under sec. 313 of the Code of Criminal Procedure cannot be taken as evidence, there is no question of drawing upon sec. 167 (Ranjit Mandal vs. State : 1997 Crl LJ 1586 (Cal).

There is indeed a large body of case law relating to the scope of interference by appellate courts, civil and criminal, and in regard to the discretion of the courts. It is not necessary to refer to them.

The 69th Report stated that it was not recommending any amendment to sec. 167 and we agree.

Transitory provision:

We propose that the amendments recommended in this report, so far as those applicable to evidence in pending civil proceedings, should apply only if the evidence of witnesses (including that of the party witnesses) has not commenced by the date of commencement of the Indian Evidence (Amendment) Act, 2003, Bill in respect of which is annexed with this report.

We may also state that because documents have to be marked under Order 13 of the Code of Civil Procedure, 1908 during the evidence of a witness, the amendment so far as admitting documents also, will be applicable only where the evidence of witnesses (including that of party witnesses) has not commenced by the date of commencement of the said Amending Act.

We further state that in respect of amending provisions in the proposed Amendment Act wherein only Explanation clause is recommended for insertion in the respective provision and there is no other change proposed in that existing substantive provision, then the said amended provision shall be applicable to all suits or civil proceedings pending at the commencement of the proposed Amendment Act, irrespective of whether the examination of witnesses including parties, has commenced or not.

So far as the proposed amendments which apply to criminal proceedings are concerned, those will not apply to offences committed before the commencement of the Amending Act and pending in the court. They will apply only in regard to criminal proceedings relating to offences committed after the commencement of the Amending Act.

The Transitory Provisions read as follows:

Transitory provisions

“ (1) All suits or civil proceedings pending at the commencement of this Act, in which the examination of witnesses including parties, has commenced before the date of commencement of this Act, shall, save as otherwise provided in sub-section (2), be disposed of in accordance with the provisions of the principal Act as it stood immediately before the commencement of this Act, as if this Act had not come into force.

(2) Following provisions of the principal Act as amended by this Act, shall apply in so far as they relate to the procedure in a suit or civil proceeding pending in a Court at the commencement of this Act,, namely :-

(a) the provisions of section 11 of the principal Act as amended by section 6 of this Act;
(b) the provisions of section 13 of the principal Act as amended by section 8 of this Act;
(c) the provisions of sub-section (1) of section 57 of the principal Act as amended by section 34 of this Act;
(d) the provisions of section 67 of the principal Act as amended by section 41 of this Act;
(e) the provisions of section 74 of the principal Act as amended by section 43 of this Act;
(f) the provisions of section 76 of the principal Act as amended by section 44 of this Act;
(g) the provisions of section 77 of the principal Act as amended by section 45 of this Act;
(h) the provisions of section 119 of the principal Act as amended by section 68 of this Act.

(3) All criminal proceedings relating to offences committed before the commencement of this Act and pending at the commencement of this Act, shall be disposed of in accordance with the provisions of the principal Act, as it stood immediately before the commencement of this Act, as if this Act had not come into force.”