HISTORICAL BACKGROUND OF THE INDIAN EVIDENCE ACT, 1872

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Introduction

IN THE FOLLOWING pages I have attempted to give an account of the Hindu system of the law of evidence, the Muslim system and finally the British system as applied in India. While the Hindu system seems to be more elaborate, the Muslim system was free from the superstitious trial by ordeal. But what should strike the reader (it has struck me as a pleasant surprise) is the extreme modern flavour which both the earlier systems, namely, the Hindu and the Muslim, had. Both these systems were not fanatic about excluding hearsay evidence, which is a great advance when compared with the systems now prevalent in the U.K. and in the United States. The British system was introduced into India by a series of progressive legislations, sometimes keeping pace with the law of England and sometimes leaping forward, and it has now reached, in the present Evidence Act, a happy stage which even today is full of vitality and vigour, capable of meeting modern situations.

I. Judicial system in ancient India

Ancient India was divided into independent states, some of which were monarchies and others tribal republics. The concept which pervaded Hindu life, thought, and action was *Dharma*. It is an elusive term difficult of definition and may mean, according to the context, religion, custom, rights, privileges and duties and obligations, or some or all of these ideas together. Whether it was the king or a tribal elected chief that wielded power, he understood his function to include the protection of *Dharma*. Though he was the supreme authority in the state, he was not above *Dharma* and had to strictly follow the rules of *Dharma* applicable to him. He, with his minister who was the chief priest and his military commander, tried to do his duty and govern the country and the people to the best of his ability.

Administrative units

Each state was divided into what may be called in modern terminology, provinces, and each province into districts and each district into villages. The village panchayat, consisting of five leading men, dispensed justice to the villages. They dealt with simple matters both civil and

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criminal. In towns, judges were appointed by the head of the state and they dealt with the more important criminal cases. The judge was also a court of appeal from the panchayat and the tribunals which dealt with disputes relating to professional guilds. A further appeal lay to the head of the state. It was a healthy practice that no decision could ever be given by a person singly; and even the monarch consulted *Brahmins* and other advisers learned in the *Dharma Sastras.*

There is no evidence of a separate institution of lawyers and advocates, though representation of one person by another was known.

Judicial procedure consisted of four stages, the filing of the plaint, the reply, the trial and the judgment or decision. During the trial the parties adduced evidence to prove their respective cases.

II. The Hindu law of evidence

Relevancy

A person with a grievance, civil or criminal made a representation to the court. If the court felt that the complaint was just, the defendant was summoned. Then, in the presence[1] of each other, each had to write down his complaint and answer respectively. Thereafter, the complainant, on whom generally the burden of proof was laid, had to submit his evidence.[2] Narada[3] lays down that the evidence should be relevant to the document, presumably the plaint or written statement.

Kinds of evidence

According to Hindu Law, proof was of two kinds—divine and human. The former consisted of ordeals, and the latter of witnesses, documents, possession, and inference from circumstances.[4] For example:

> It should be known that one carrying a firebrand in his hand is an incendiary; one taken with a weapon in his hand is a murderer; and where a man and the wife of another sieze each other by the hair, the man must be an adulterer. One who goes about with a hatchet in his hand may be recognised as a destroyer of bridges and one carrying an axe may be declared as a destroyer of trees and one whose looks are suspicious is likely to have committed an assault.[5]

As regards the relative importance of the various kinds of evidence, Katyayana seems to declare that it depends upon the subject-matter of litigation.[6]

1. II *Yajnavalkya*, 5-7 and II *Narada* 1-2.
2. *Yajnavalkya, supra* note 1 at 7.
3. *Narada* (I Title of Law), 232.
4. *Id.* at 69.
5. *Id.* at 172-174.
6. III *Mitakshara*, 22.

A witness could give evidence of what he heard, including statements of an actual witness. Such a witness was generally one to whom an actual witness communicated what he knew while going abroad or on his death bed.

Oral evidence to be direct

Subject to the above exception, which is reminiscent of sections 32 and 33 of the Evidence Act, 1872, oral evidence was to be direct. Manu[7] says, 'the evidence which accords with what he has seen or heard is admissible', that is, evidence must be based on direct perception of facts. It should not be the evidence of what he has heard from a person who had himself perceived the fact about which evidence is sought to be given.

Circumstantial evidence

Circumstancial evidence was given great importance both in civil and criminal cases. At the same time, the law-givers were also aware of the possibility of mistakes in inferences drawn from circumstances and hence insisted upon a careful investigation of all the surrounding circumstances. The necessity for such investigation is exemplified by the story of Ani Mandavya in the *Mahabharata*.[8] Mandavya was a sage who had taken a vow of silence and was absorbed in meditation. Some thieves, to ward off the chase by the guards, hid the property which they had stolen in the hut of the sage and hid themselves nearby. When the guards came and asked Mandavya if he had seen any one running away, he kept silent on account of his vow The guards searched his hut, recovered the stolen property and arrested Mandavya as well as the thieves. They were all convicted for theft by the king and sentenced to death. The thieves were hanged, but Mandavya was speared. The story, however, proceeds that even then he did not die and the king then realised his mistake and begged the forgiveness of Mandavya.

Confessions

Kautilya[9] permits torture for extracting truth from accused persons, though he also notices that a conviction based solely on a confession may lead to injustice.

Burden of Proof

The rules relating to burden of proof enunciated in *Dharma Sastrsa* are amazingly modern.[10] The rules are as follows :

(*i*) If the defendant admits the charge or claim, no evidence is necessary.

(*ii*) If the defendant totally denies the charge, the burden is on the plaintiff.

7. VIII, Manu 74.
8. *Adiparva.*
9. IV *Arthasastra* Chapter 8.
10. II *Mitakshara on Yajnavalkya*, 7, 17, 80.

(*iii*) The party who alleges a fact states the affirmative and the opposite party, denying the allegation asserts the negative. Since the negative cannot be proved, he who asserts the affirmative is the person on whom the burden lies.

(*iv*) When the defendant relies on a plea that the plaintiff had already sued him on the same cause of action and failed (the plea of *res judicata*) the burden is on the defendant.

(*v*) If the defendant takes the special plea of admitting a fact but qualifying it in such a manner as to make it appear as an attack—for example, admitting the taking of a loan but contending that it was returned, in such a case also, the burden of proof is on the defendant.

(*vi*) When both parties assert the affirmative as when each lays claim to property, the burden is on the party who comes to court first.

(*vii*) It is not always the person who first lays claim that is subject to the burden. It may also be laid on the person whose claim is based on a priority of title.

(*viii*) Suppose that in an action for money, the defendant admits the claim to a part, asserts that he has repaid another part and denies having ever borrowed the rest. The burden will be determined according to the above rules with respect to each item.

(*ix*) The order in which issues are taken up for trial is determined according to their importance, and if no such distinction is possible, according to the discretion of the judge.

(*x*) Denial is regarded as merged in a counter claim when they relate to the same matter, that is, the burden, instead of being on the plaintiff as in the case of denial, is shifted to the defendant as in the case of a claim.

Oral evidence : Kinds of witnesses

Manu[11] divides witnesses into those entered in the deed and those not so entered but who know about the transaction. Narada and Brihaspati divide them into those appointed at the time of the transaction and those not so appointed but who know all about a particular transaction.

The former, or appointed witnesses, are of six kinds : (1) one who enters in a deed his name; (2) one whose name in entered in the deed by someone else; (3) one who is present at the transaction but secretly and in hiding unknown to the defendant; (4) one who was present at the transaction and is constantly reminded about it; (5) one who was present at the transaction by chance; and (6) an indirect witness.

The latter, those not appointed, are also of six kinds : (1) villagers who can give evidence of matters concerning the villagers; (2) the chief judge or other judges who can be witnesses at a later trial; (3) the king himself as to matters within his knowledge; (4) one to whom information had been conveyed by both parties; (5) a family member who can speak about family matters; and (6) a messenger, presumably sent by the judge,

11. *Supra* note 7 at 76

to the parties, to bring about a compromise.

Obviously all these witnesses are with reference to civil proceedings only.

The value of the evidence given by any of the witnesses depends only on their competence. At one time, there was an artificial rule that evidence would be relevant only if given by a witness within a particular period of the transaction.

Competency of witnesses

A long list of competent witnesses may be made from the *Dharma Sastras* and one can notice two things about them : (1) the competency is made to depend on the truthful nature of a witness and his capacity to resist temptation; and (2) instead of prescribing these qualities, persons, who are likely to have these qualities, are named, such as persons simple by nature, of virtuous conduct, charitable persons, person who practise religion, or are of noble birth and those who are obviously free from malice *etc.*

Ordinarily women could only be witnesses for women and witnesses should be of the same caste as the party for whom they give evidence.[12]

Persons who are regarded as incompetent to be witnesses are those : (1) who are interested in the subject-matter and therefore likely to be partial, including parties; (2) want of reasoning capacity like children[13] and old persons; (3) who are irreligious; (4) who were fickleminded, and (5) who belong to a low status.

(1) Incapacity of parties on the basis of interest persisted in English law till Charles Dickens ridiculed the rule in his description of the trial of *Bardell* v. *Pickwick* in the *Pickwick Papers*[14] published in 1837.

In criminal cases, though the accused was not a competent witness, he could be subjected to an inquisitorial interrogation. While this may help him to explain away incriminating circumstances it has the inherent defect of assuming his guilt instead of presuming his innocence. A notable example is the conviction of the Brahmin Charudatta for the murder of his mistress Vasantasena in the play *Mricchakatika* by King Sudraka. It was Charudatta's inability to explain away incriminating circumstances that was treated as proof of his guilt. John Dowson[15] puts the play as written in the first or second century, though other historians give it a later date. But, whatever its date may be,

> it is a curious and interesting picture of national manners free from all exterior influence or adulteration. It is a portrait purely Indian. It represents a state of society sufficiently

12. *Id.* at 68 and *Yajnavalkya, supra* note 1 at 70.
13. *Supra* note 7 at 66. *Yajnavalkya, supra* note 1 at 70, 71 and *Narada. supra* note 3 at 178.
14. Vepa P. Sarathi, *Elements of the Law of Evidence* 7 (1970).
15. *A Classical Dictionary of Hindu Mythology* (11th ed. 1968).

advanced in civilization to be luxurious and corrupt...[16]

An accomplice[17] was also treated as incompetent on the ground of interest.

Close relatives, including spouses, slaves, servants, and friends and enemies of the parties, were also deemed incompetent.

(2) John D. Mayne points out that minority in Hindu law according to some authorities is fifteen years and according to others sixteen. Best[18] points out :

> The general rule of the Civilians, subject however to certain exceptions, was that persons under the age of puberty were incompetent to give evidence. Some of their authorities say that minors under 20 years were rejected in criminal cases. The jurisprudence of ancient Rome rejected the testimony of minors in general. Sir Edward Coke in his First Institute states broadly that a person "not of discretion" cannot be a witness; and in anoher part of the same book, he defines the age of discretion to be 14 years.

Idiots, drunks and lunatics (literally possessed by an evil spirit) were considered incompetent. So also deaf-mutes. Those suffering from acute hunger or thirst, burning with lust and extremely angry persons were also considered incompetent.[19]

(3) Since taking an oath to speak the truth was a necessary condition before a witness could give evidence, belief in religion and a divine being who would punish mendacious persons becomes an absolute necessity for the efficacy of the oath; and in *Narada*[20] are listed a set of persons who were incompetent on this ground.

The Hindu oath[21] consisted of a religious part and an admonition. In an age when out of superstitious ignorance persons believed in divine punishment, the oath certainly created awe and fear in a witness. But when agnosticism had taken the place of superstition, an oath had not much force to compel a person to be truthful. The imposition of a fine, banishment, mutilation or other forms of corporal punishment, which were the punishments for perjury, must have had greater efficacy in compelling a witness to speak truth for, if religion was really compulsive there was no need for physical punishment.

(4) Women, in a man's world, were always considered fickleminded! Even a modern writer[22] points out that 'women, in cases concerning their

16. *Id.* at 209-210.
17. *Manu, supra* note 7 at 64 : *Yajnavalkya, supra* note 1 at 70 : *Narada, supra* note 3 at 177.
18. *On Evidence*, 139, 140 (12th ed. 1922).
19. *Manu. supra* note 7 at 67.
20. *Supra* note 3 at 179-187, 198.
21. *Manu, supra* note 7 at 80-102.
22. Wills, *Circumstantial Evidence* 269 (7th ed, 1936).

dishonour lie so artistically that caution and vigilance are necessary'. The warning perhaps is necessary to guard a male judge against a natural bias in favour of an attractive, soft spoken witness, who complains of injury caused to her.

(5) While modern law does not treat a person of low status as an incompetent witness, it allows the status of a person to be considered in weighing his evidence.[23] This attitude must change in a modern democratic society. One should adopt the criterion of Robert Burns that the "rank is but the guinea stamp and a man is a man for a' that".

Two other classes of persons, namely, one who is likely to go away on a long journey and one who is likely to go beyond the seas were also considered incompetent.

Number of witnesses

Though there was a general agreement that it was not quite safe to rely on a single witness, no particular number of witnesses was required to prove a fact. Even a sole witness was accepted,[24] though it was better to look for 'many' witnesses. The necessity for a plurality of witnesses is not peculiar to Hindu law. Best says :

> The law of Mahomed demanded that a woman could only be convicted of adultery on the testimony of *four* male witnesses.[25]

Compellability and privileges

The king could not be compelled to be a witness but he could waive his privilege and give evidence in cases where he had personal knowledge. A class of persons known as *Strotriyas* or *reciters* of hymns were not compellable, because, they were constantly engaged in duties enjoined by the *Vedas*, though, they also could waive their privilege.

Parties had to produce their witnesses, whose attendance was compelled by fines or by making them liable for damages.

Examination of witnesses

The examination of witnesses was to take place after observing certain rituals in open court.[26] The examination, in civil cases, was near the object of dispute; and in criminal cases near objects connected with the crime. If an event was witnessed by several persons at the same time, all of them should be examined together (it is not clear how this can be done). It was laid down that a witness should not be vexed or harshly treated. His character may be attacked but not without sufficient cause. It was open to the opposite party to contradict the evidence regarding character. There is no evidence that cross-examination as we know it, was resorted to.

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23. See s. 146(2) of the Evidence Act.
24. *Manu*, *supra* note 7 at 60, 77.
25. *Supra* note 18 at 57, 58.
26. *Manu*, *supra* note 7 at 79.

Documentary evidence : Public and Private documents[27]

Documents were divided into private and public or official. The distinction was that public documents emanated from persons in authority while private documents related to daily transactions among the people.

Private documents are deeds of partition, gift deeds, documents of sale and purchase, and those relating to mortgage or pledge *etc.*

Copies of originals could be given in evidence in circumstances where secondary evidence will be admissible today.[28]

A document can be shown to be a forgery by showing that it contains latent and patent defects. The former has to be pointed to the court by the party. Comparison of the handwriting of the scribe or attesting witnesses and other evidence, direct and circumstantial, was permitted for this purpose. Importance was also placed on the custody from which it was produced.[29]

Public documents were of many kinds, the two most important being *Sasana* and *Jayapatra.*

The former referred to grants by the king to learned Brahmins and to others who had done some special services. They were on copper plates. The granting king, the grantee and the land granted were fully identified. They bore the royal seal.

The latter was the judgment in a legal proceeding and was given to the victorious party. It also bore the royal seal, the signature of the judge or judges and contained all matters which one finds in a modern judgment.[30]

Weight of evidence

Demeanour of a witness was an important consideration in weighing evidence.[31] Though more emphasis was placed on the number of witnesses, the quality of evidence and the truthfulness of the witnesses were not ignored.[32]

Trial by ordeal

This was of five kinds, namely, (*a*) by balance, (*b*) by fire, (*c*) by water, (*d*) by poison, and (*e*) by consecrated water. They are fully described by Abbe Dubois in his *Hindu Manners, Customs and Ceremonies*[33]. The earliest instance of trial by ordeal is mentioned in the *Chandogya Upanishad* (c800B.C.) :

27. *Vyawahara Mayukha*, 16, 17.
28. *Yajnavalkya, supra* note 1 at 91 and *Narada, supra* 3 at 146.
29. *Narada, supra* note 3 at 144.
30. See (1920) 24 C.W.N. 149, 153. (Numbers 37 and 38).
31. *Manu, supra* note 7 at 25, 26.
32. *Narada, supra* note 3 at 160, *Manu, supra* note 7 at 73 and *Mitakshara on Yajnavalkya, supra* note 10 at 78.
33. See Abbe Dubois, *Hindu Manners, Customs and Ceremonies* appendix VI, 717-722 (1959).

Purusam, saumya, uta hasta-grihitam anayanti, apaharsit, steyam akarsit, parasum asmai tapata iti: sa yadi tasya karta bhavati, tata evanrutam atmanam kurute, so 'nvtabhisandho' nvtena'tmanam antardhaya parasum taptam pratigrhnati, sa dahyate' tha hanyate.[34]

> Also, my dear, they lead up a man seized by the hand, saying, 'He has stolen, he has committed a theft, heat the axe for him,' If he is the doer thereof (*i.e.* if he has committed the theft) then he makes himself untrue (a liar). Being given to untruth, covering himself by untruth he takes hold of the heated axe and is burnt. Then he is killed.[35]

The *Ramayana* mentions that Sita had to go through the fire ordeal to establish her chastity during her captivity by Ravana. Notwithstanding such proof she was banished by Rama to the forest; and Lakshmana, who was charged with the task of abandoning her was so deeply distressed that one who reads the relevant passage in the epic will be moved by the emotion with which the whole passage is charged.

III. Judicial system under the Muslim rulers

By the time the Slave Dynasty established by Kutubuddin came to an end, that is, when the Muslim rulers had well-established themselves in India, the Islamic idea of justice was also well-established in the country. The Delhi Sultans were rigid observers of the law, because, they believed that no amount of worship could equal the acts of justice. This notion is very similar to the Hindu idea of *Dharma*. But what surprises one is that with such similar lofty motives, there should have developed so much hostility between Hindus and Muslims in India instead of a fusion as took place is England between the Normans and Saxons. Perhaps it is due to emphasising the differences instead of concentrating on the similarities and enlarging the areas of coincidence.

Before the Moghuls came on the Indian scene, India had once again divided into smaller independent kingdoms. However, the pattern of administration set up at Delhi was copied and imitated by the rulers of the various kingdoms.

Administrative units[36]

The Sultan was assisted in the administration of his kingdom by a council of ministers, each minister being in charge of a particular department.

The kingdom was divided into *Subahs* corresponding to provinces, each *Subah* was divided into *Sarkars* or districts and each district into

34. VI *Chandogya Upanishad*, 1, 16.

35. S. Radhakrishnan, *The Principal Upanishads*, 446 (1968).

36. V.D. Kulshreshtha, *Landmarks in Indian Legal History and Constitutional History* 16-36 (1968).

Parganas or groups of villages. Therefore, the village continued to be the unit of administration.

For a sub-group of villages the tribunal was the local panchayat, whose chairman, known as the *Sarpanch*, was appointed by the *Nazim* or the Governor of the Province. The panchayat dealt with local civil and criminal matters.

At the *Pargana* town, there were two courts : (*a*) *Kazi-e-Pargana* who dealt with all civil and criminal cases, and (*b*) the *Kotwal* who dealt with petty criminal cases.

At the *sarkar* headquarters, there were six kinds of courts: (*a*) the *Kazi* who dealt with civil and criminal cases and appeals from the *Pargana Kazis*, *Kotwals* and village panchayats; (*b*) *Dadbaks*, who dealt with civil cases of a petty nature; (*c*) *Faujdars*, who dealt with petty criminal cases; (*d*) *Sadr*, who dealt with cases relating to grants of land and registration; (*e*) *Amils*, who dealt with Revenue cases; and (*f*) *Kotwals* who dealt with petty criminal cases.

At the provincial capital, there were four courts: (*a*) *Adalat Nazim Subah* or Governor's courts which had original jurisdiction and appellate jurisdiction over the *Faujdars*; (*b*) *Adalat Kazi-e-Subah* or the Chief Law court having original jurisdiction and appellate jurisdiction over the *Dadbaks*; (*c*) the *Diwan-e-Subah* or Revenue court with original jurisdiction and appellate jurisdiction over the *Amils*; and (*d*) the *Sadr Subah* or the ecclesiastical court.

At the capital of the kingdom were five courts, namely, (a) the *Diwan-e-Mazalim*, the highest court of criminal appeal (*b*) *Diwan-e-Risalat*, the highest court of civil appeal; (*c*) the Sultan's court with unlimited jurisdiction over every kind of case; (*d*) the court of *Kaziul Kuzat* or the Chief Justice's court with a similar jurisdiction; and (*e*) the court of *Sadr Jahan*, or ecclesiastical court.

Sher Shah had made certain reforms which, however, are not relevant for our present purpose. A system, similar to the one described under the Sultans, with some modifications, continued to prevail under the Moghuls also.

The law applicable

Non-Muslims, especially Hindus, were not subjected to Islamic law. Their affairs were regulated according to the principles of their own religion especially in matters of inheritance, marriage *etc.*, that is, in matters which we would now refer to as subject to the personal laws. The Hindu law was applied to Hindus with the aid of *pundits* or *shastris* who were attached to the courts. But the Islamic criminal law applied to all equally.

Representation of clients was permitted and the persons so representing were known as *vakils*. They were expected to act in good faith. They had a right of audience in the court, were paid by the state and could be elevated to the bench as *Kazis*.

Judicial procedure

(*a*) *Civil cases* : The plaintiff had to file his claim before the judge and if the claim was not obviously absurd, the judge had to summon the defendant. If he did not admit the plaintiff's claim, the plaintiff had to adduce evidence in support of his claim and the defendant could adduce his evidence in rebuttal. The judgement would follow after the court weighs the evidence.

(*b*) *Criminal cases* : In criminal cases, when the complaint was presented to the judge, he could either summon the defendant-accused, or hear the evidence of the complainant and his witnesses. If the accused was summoned thereafter, the witnesses had to be re-called. The judge could also make an extra-judicial inquiry, and very often even the king went on a voyage of discovery to get information incognito. Gibbon[37] gives one remarkable instance :

> From the paths of blood, and such is the history of nations, I cannot refuse to turn aside to gather some flowers of science or virtue. The name of Mahmud the Gaznevide, is still venerable in the East, his subjects enjoyed the blessings of prosperity and peace; his vices were concealed by the veil of religion....As he sat in the diwan, an unhappy subject bowed before the throne to accuse the insolence of a Turkish soldier who had driven him from his house and bed. "Suspend your clamours", said Mahmud; "inform me of his next visit, and ourself in person will judge and punish the offender". The sultan followed his guide, invested the house with his guards, and, extinguishing the torches, pronounced the death of the criminal, who had been seized in the act of rapine and adultery. After the execution of his sentence the lights were rekindled, Mahmud fell prostrate in prayer, and, rising from the ground, demanded some homely fare, which he devoured with the voraciousness of hunger. The poor man, whose injury he had avenged, was unable to suppress his astonishment and curiosity; and the courteous monarch condescended to explain the motives of this singular behaviour. "I had reason to suspect that none, except one of my sons, could dare to penetrate such an outrage; and I extinguished the lights that my justice may be blind and inexorable. My prayer was a thanksgiving on the discovery of the offender; and so painful was my anxiety, that I had passed three days without food since the first moment of your complaint.

The final judgment was ordinarily pronounced in open court.

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37. 6 *Decline and Fall of the Roman Empire* 4 (Everyman's edn. 1957).

IV. The Muslim law of Evidence[38]

Relevancy

No theory of or insistence on relevancy is mentioned, but since it was obligatory on the party to produce evidence *in support of his case*, it may be presumed that he was required only to produce relevant evidence.

Kinds of evidence

According to the Hanafi law, evidence is, (*a*) *Towatur* or fully corroborating evidence; (*b*) *Ehad* or testimony of a single individual; and (*c*) *Iqrar*, meaning admissions or confessions. Such evidence could be adduced through witnesses or documents and reliance could also be placed on circumstantial evidence. Trial by ordeal was unknown to strict Islamic law. Hearsay evidence was not altogether excluded

Oral evidence to be direct

Direct evidence was however preferred to hearsay evidence. For conviction of theft and adultery the evidence had to be very convincing, probably because of the punishments involved. The punishment for theft was cutting off of the guilty person's hand and for adultery, the punishment was stoning to death. Gibbon[39] describes the origin of the strict rule of evidence in the case of adultery as follows :

> Ayesha was doubtless a virgin, since Mohammed consummated his nuptials (such is the premature ripeness of the climate) when she was only nine years of age. The youth, the beauty, and the spirit of Ayesha gave her a superior ascendant : she was beloved and trusted by the Prophet; and after his death, the daughter of Abubekar was long revered as the mother of the faithful. Her behaviour had been ambiguous and indiscreet: in a nocturnal march she was accidentally left behind, and in the morning Ayesha returned to the camp with a man. The temper of Mohammed was inclined to jealousy; but a divine revelation assured him of her innocence : he chastised her accusers, and published a law of domestic peace, that no woman should be condemned unless four male witnesses had seen her in the act of adultery.

Winwood Reade[40] says :

> Whatever laws he made respecting women and slaves were made with the view of improving their condition. Instead of repining that Mahommed did no more, we have reason to be astonish-

38. M.B. Ahmed, *The Administration of Justice in Mediaeval India*, chapter VI. 212-222 (1941).

39. See *supra* note 37 at 276 vol. 5.

40. *Martyrdom of Man* 219 (Thinker's library 1932).

> ed that he did so much. His career is the best example that can be given of the influence of the individual in human history.

Circumstantial evidence.

It was called *Karinah* and could be relied upon if it was of a conclusive nature. An interesting incident showing the value of circumstantial evidence was as follows. A Hindu scribe sued a Mogul soldier for seducing his wife. The woman, however, denied that she was the wife of the complainant. She was asked by the judge to fill the ink-pot in the court with ink, and this she did with such a practised hand that the judge had no difficulty in concluding that she was, indeed, the wife of the complainant scribe. He was given relief and the soldier was expelled from service. With respect to the passage quoted above relating to adultery, Gibbon[41] adds a footnote thus :

> In a memorable case, the Caliph Omar decided that all presumptive evidence was of no avail; and that all the four witnesses must have actually seen stylum in pyxide.

Commenting on this, Best[42] says :

> The Caliph Omar decided, with reference to this law, that all circumstantial evidence, however proximate and convincing, was of no avail and that the four male witnesses must have witnessed the very act in the strictest sense of the word.

Admissions and confessions

In a civil case a decree could be passed on an unconditional admission and in a criminal case a confession was admissible as evidenee. But a confession of an accused was not conclusive against a co-accused. Even against the confessing accused courts always looked for further corroborating evidence. In fact, Muslim jurists attached great importance to corroboration. If a confession was induced by fear it was inadmissible.

Burden of proof

No specific rules seem to have been laid with regard to the onus of proving one's case. The rules regarding presumption of legitimacy under the Muslim law are :

(1) A child born within less than six months after marriage is illegitimate.

(2) A child born after six months from the date of marriage is presumed to be legitimate unless the putative father disclaims the child by li'an, that is, testimony confirmed by oath and accompanied by imprecation.

(3) According to Hanafi law a child born within two years after the termination of the marriage is presumsd to be legitimate unless disclaimed by li'an.

41. See *supra* note 37 at 276; vol. 5.
42. *Supra* note 18 at 57, 58.

Under section 112 of the Evidence Act a child born even a day after the marriage is legitimate. A child born after 280 days but within 2 years would be legitimate by the Hanafi law.

Oral evidence : Competency of witnesses

All believers were competent witnesses and it was assumed that the believers in the *Koran* were always truthful and that their evidence was to be preferred to that of a non-Muslim. But there have been cases where the statement of a non-Muslim was accepted as sufficient for the conviction of a Muslim-accused even when the witness was a solitary witness. It was said that in the trial relating to the murder of Sultana Razia, the extra-judicial confession made by the Muslim-accused in the hearing of a Hindu shopkeeper was accepted as admissible and sufficient.

Oaths were administered according to the religion of the witness.

Women were competent witnesses but one woman had to be corroborated by another. Close relatives like father, son, and wife were not competent witnesses except to prove relationship.

Opinions of experts were relevant. The evidence of convicted persons and gamblers was assumed to be unreliable.

Number of witnesses

We have already seen that four male eye witnesses were necessary for conviction for adultery. Except in this case, and for a claim to be adjudged insolvent, in all other cases, no particular number of witnesses was required to establish the case, either civil or criminal.

While documentary evidence was relevant, unlike modern law, oral evidence was preferred to documentary evidence.

The court was entitled to take judicial notice of well-known facts and evidence could be taken on commission in the presence of the *Kazi* of that place. The principles of estoppel and *res-judicata* were also known to Muslim law.

V. Judicial administration under the East India Company

When the East India Company established its factories in some Indian towns it never undertook the responsibility of administering justice to Indians who were not in its service. When the island of Bombay became British territory by cession to Charles II by the Portuguese, he transferred it to the Company in 1668. The Company was then empowered to establish a court of justice and to make laws for the island consonant to reason, and not repugnant to, but as far as possible in accordance with the English laws. Matters relating to religion and pure customary law were referred to Hindus or Muslims who were deemed to have knowledge of these matters, namely, the *pundits* and the *moulvies* . A similar system came into vogue in Madras in 1654 and in Calcutta in 1694,

In 1726, Royal Courts were established in the three Presidency towns,

specially to protect the Englishmen and their estates; and, this naturally raised the question of jurisdiction of those courts over the Indians. It was provided that the courts were not to exercise jurisdiction over Indians unless they submitted to their jurisdiction.

Outside the Presidency towns, the Islamic law was being applied, but presumably not very efficiently in these chaotic and uncertain times. Matters came to a head after the Battle of Plassey, 1757, because, the responsibility of restoring order and maintaining it by law, in Bengal, fell squarely on the Company. The Company, therefore, established civil courts outside Calcutta. These courts were presided over by Collectors of Revenue who were the English servants of the Company, and appeals from their decisions lay to the Sadr Diwani Adalat, namely, the Governor-in-Council. Matters relating to inheritance, marriage, caste, religious usages both of Hindus and Muslims, in short, all personal laws were to be administered as expounded to the English judges by *pundits* and *moulvies*. In other areas, if a specific direction was given by the Governor-in-Council, it had to be followed, otherwise, the collectors had to decide the matters according to justice, equity and good conscience.

Criminal cases were dealt with according to Islamic law, by magistrates who were muslims. A criminal court was established in each district under the superintendence of the collector. An appeal was provided to the Sadr Nizamat Adalat or the Governor-in-Council.

In 1773, Supreme Court of Judicature was established in Calcutta, but this court refused to recognise the orders passed by the muffasil courts presided over by the Company's servants. The Supreme Court was presided over by an English judge, Sir Elijah Impey, who was directly appointed. This led to disputes between the executive and the judiciary, and so, in 1781, an Act was passed limiting the jurisdiction of the Calcutta Supreme Court to Indians in Calcutta only and not to those living outside the Presidency town. A similar system of dual jurisdiction was introduced in Madras in 1801 and in Bombay in 1823.

There was thus a dual system of courts. Further, there was also a dual system of law. The area of personal law in the Presidency towns and in the muffasil varied. Also, whereas in the Presidency towns the residuary law was the English law, in the muffasil, subject to certain matters covered by Regulations, it was justice, equity and good conscience. Not only did the law in each Presidency town differ from the law in the muffasil of that Presidency, the laws in the muffasil of the three Presidencies also differed widely from each other. The phrase 'justice, equity and good conscience' was also too elastic and it was felt that the dual system should soon be put an end to.

But before such a fusion of the substantive laws could take place, it was felt essential that the system of procedure in the two sets of courts should be assimilated.

For example, in matters relating to evidence the courts in the

Presidency towns followed English rules of evidence, while in the muffasil courts a great deal of uncertainty prevailed. Sometimes, it was the Muslim law of evidence that was followed, but more often it was the English law, as understood by the servants of the Company in all matters except those covered by certain Regulations.

Under Bengal Regulation III of 1793 a bond had to be proved by the witnesses to the signature, or the consideration had to be proved. But generally all documentary evidence was received by the court, without any proof, unless specifically objected to. Even secondary evidence in the form of copies was so received. Some rules as to witnesses were framed by Bengal Regulations 4 of 1793, 9 of 1796, 4 of 1797, 8 of 1803, 50 of 1803, 3 of 1812, 23 of 1814, and 24 of 1814. In Madras, the Regulations were : 3 of 1802, 4 of 1802, 5 of 1802, 7 of 1809, 12 of 1809, 4 of 1816, 5 of 1816, 6 of 1816, 7 of 1816, 10 of 1816, 14 of 1816, 4 of 1821, 1 of 1825, 6 of 1829 and 8 of 1832. In Bombay, the relevant Regulations relating to evidence and witnesses were : 4 of 1827, 12 and 13 of 1827.

In 1833, the First Law Commission with Lord Macaulay as its chairman started functioning and various enactments were passed. As regards the law of evidence, the first Act of Governor-General-in-Council was Act 10 of 1835. It applied to all courts in India whether in the Presidency towns or muffasil. It provided that Acts passed by the Governor-General-in-Council might be proved by the production of the concerned gazette. Act 19 of 1837 removed the incompetency of a witness arising from a conviction. Act 5 of 1840 enabled Hindus and Muslims to affirm instead of taking an oath. It also provided that a mere irregularity in administering the oath or making an affirmation would have no effect on the legal proceedings. This Act was replaced by the present Oaths Act, (10 of 1873). The next Act 9 of 1840 provided that if a witness was objected to on the ground that the judgment would be evidence for or against him, that is, on the ground he was interested in the result, the witness may still be examined and the judgment could not be relied upon for or against him. The position was clarified further by Act 7 of 1844 by providing that a person was not rendered incompetent as a witness on account of his interest or by reason of his conviction for a crime. But this did not apply to parties who were incompetent as witnesses. The incompetency of parties as witnesses was removed by Act 15 of 1852, except in criminal proceedings for adultery or breach of promise of marriage. Under this Act, a judge could compel parties to allow inspection of their documents. It enabled a judge to take judicial notice of acts of state, other judicial proceedings, the register of British ships and certificates of registry. But the Acts 9 of 1840, 7 of 1844 and 15 of 1852 were applicable only to the Supreme Courts in the Presidency towns. Act 19 of 1853, however, extended the above reforms to the Company's courts also in Bengal. It also enabled a husband and wife to give evidence for or against one another, the judge to compel a party to give evidence and produce documents, the judge to exempt a witness from

the production of his title deeds and documents relating to affairs of state. A party was not to be compelled to produce documents which were not material or relevant, or correspondence between him and his legal adviser. In fact, communications between clients and their legal advisers were declared to be privileged. The court could also compel any person present in court to give evidence and produce documents. An absconding witness was liable for damages.

In 1855, Act 2 of 1855, an Act for the further improvement of the law of evidence, was passed. It applied to all courts in British India. In sections 2 to 6 it provided for judicial notice of most of the matters in section 57 of the present Act. Sections 7 and 8 dealt with judicial notice of government gazettes, section 9 with judicial notice of facts stated in public Acts, and section 10 with matters proporting to be published by authority. Under sections 6 and 11 courts might refer to books, maps and charts. Under section 12, foreign codes and reports were admissible as evidence. Under section 13, maps not prepared for the purpose of the litigation were admissible. Section 14 provided that children under 7 years of age were incompetent as witnesses as also insane persons. Sections 15 and 16 provided for affirmation instead of oath in cases of children and persons of doubtful religious belief. Parties, and husbands and wives as witnesses against each other in civil proceedings, were declared to be competent by sections 17 to 20. Privilege with respect to affairs of state, with respect to documents which cannot be compelled to be produced and with respect to confidential correspondence with legal adviser was provided for in sections 21 and 22. Advocates could not be compelled to disclose professional communications without their clients' consent under section 24. Under section 25, persons present in court could be compelled to give evidence; and under section 27 a witness called upon to produce documents need not appear personally. Except in the case of treason there was no provision for any specific number of witnesses (section 28). But corroboration was insisted upon in the case of an accomplice-witness. Section 29 provided for dying declarations, section 30 for cross-examining a hostile witness and section 31 for corroboration by prior statements. Under section 32 a witness was bound to answer incriminating questions, but the answer could not be used against the witness except in cases of giving false evidence. A witness was permitted to be asked about previous convictions (section 33) and may be cross-examined with reference to prior statements in writing (section 34). Copies by copying machine were deemed to be correct and secondary evidence was permitted in certain cases (sections 35 and 36). Under section 37, documents which did not require attestation could be proved even though attested, as if they were unattested. Admission of execution of a document was deemed to be *prima facie* proof under section 38. Entries in books in the course of business were admissible against the person making them and for identifying the payer or receiver under sections 39 and 40. Receipts were

admissible against third parties in certain cases under sections 41 and 42. Books and documents as corroborative evidence could be received under sections 43 and 44. Under sections 45 and 46, witnesses were allowed to refresh their memory by reference to documents or their copies. Evidence of illegitimate children and intimate acquaintances was admissible under section 47 to prove relationship. Comparison of signatures was permitted under section 48. Under section 49, a power of attorney purporting to be executed before a notary public could be proved by its production. Letter books can be used for proving despatch and receipt of letters under sections 50 and 51. Section 56 makes an official document admissible, and under section 57, the improper admission or rejection of evidence was not a ground for retrial, if there was other evidence justifying the decision.

Matters not provided for by this Act were to be decided according to Islamic law, so that, the uncertain mixture of English and Muslim laws continued to prevail outside the Presidency towns, leaving several matters as nebulous as before. Act 10 of 1855, another Act of the same year provided that if a person, who was summoned as a witness, did not attend or produce the document which he was asked to produce, then he would be liable for damages to the party who lost his case because of the omission.

After the British Crown took over the direct government of India as a result of the Mutiny three more Acts relating to evidence were passed before the enactment of the present Act. They are Act 8 of 1859, Act 25 of 1861 and Act 15 of 1869.

The first contained provisions for summoning, for the attendance and for the examination of, witnesses in court and on commission and for the examination of parties. The second contained provisions relating to confessions to police, examination of the accused, matters connected with investigation, evidence of civil surgeons and of chemical examiners. The last provided facilities for obtaining the appearance and attendance of prisoners as witnesses.

Therefore, it will be seen that courts outside the Presidency towns had no fixed rules of evidence except those contained in Act 19 of 1853 and Act 2 of 1855. For the rest, the courts were to follow the Islamic rules of evidence.

In *Zaminder of Karvetinuggar* v. *Venkatadri*[43] the Privy Council said :

> Objections have been taken to the admissibility of this document as evidence and it has been contended to be a copy of a copy. With regard to the admissibility of evidence in the Native Courts in India, we think that no strict rule can be prescribed. However highly we may value the rules of evidence as acknowledged and carried out in our own courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the Native Courts in

43. (1865) Sutherland Weekly Reporter (PC) 121.

> the East Indies, where it is perfectly manifest that the practitioners and the judges have not that intimate acquaintance with the principles which govern the reception of evidence in our own tribunals; we must look to their practice, we must look to the essential justice of the case, and not hastily reject any evidence, because it may not be accordant with our own practice. We must endeavour, as far as the materials allow us, having received the evidence, to ascertain what weight ought properly to be ascribed to it, and, more especially, where we find that it has been the practice of the Court to receive documentary evidence, without the strict proof which might here be considered necessary, we must not reject that evidence; indeed, the consequence of so doing must inevitably be, if the strict rule were adhered to, to reject the most important evidence, not only in this case, but almost in every other.

These observations by the Privy Council would not have been necessary, unless, English judges in India were freely following English rules in all matters not provided for by the Acts or Regulations, instead of the Islamic rules.

For example, in *Narappa* v. *Gapayya*[44], declarations made in pleadings in suits instituted before the then Code of Civil Procedure was enacted were held to be inadmissible of the facts stated therein on the basis of Taylor on *Evidence*[45], and *Boileau* v. *Rutlin*[46] was quoted as an authority.

In *Kazi Gulam Alli* v. *H.H. Aga Khan*,[47] a witness was sought to be contradicted by producing evidence *contra*, and the court held :

> It is frequently a nice question whether a particular matter is one upon which a witness may be contradicted by other witnesses. The reason of the rule which restricts the right to do so is, that it is an object of great importance to confine the attention *of the jury* as much as possible to the specific issues. Without some rules, many collateral questions of fact might be raised in the course of a long trial...According to Pollcok C.B. the test is whether the matter is one which the party proposing to contradict would have been allowed to prove in evidence. *Attorney General* v. *Hitchcock* 1 Ex. 91, 99. Now to apply the test in the present case...

VI. The Indian Evidence Act (1 of 1872)

In this state of affairs, the Third Law Commission of India prepared a draft of an Evidence Act and it was introduced by the law member Sir

44. (1864-66) 2 Bom. HCR 341.
45. Taylor, 2 *On Evidence* § 1560 (12th ed. 1931).
46. 2 Ex. 665.
47. (1869) 6 Bom. HCR (CCJ) 93.

Henry Maine, but it was rejected as unsuited to Indian conditions. Mr. Whitley Stokes in his *Anglo-Indian Codes*[48] states :

> It was far from complete : it was ill-arranged : it was not elementary enough for the officers for whose use it was designed : and it assumed an acquaintance with the law of England which could scarcely be expected from them.

But Professor Alan Gledhill[49] says :

> In the draft on evidence produced by the Third Indian Law Commission in 1868, there was no marked anxiety to impose on Indians the English rules, which the Commissioners regarded as peculiar to England and open to criticism of excluding much useful material and of permitting publication of facts at least as dangerous as those excluded. They believed it more important in India to ensure that the Court was sufficiently informed than to exclude material which might prejudice the Court; they proposed to admit anything bearing on the issue unless specifically excluded, and they relaxed the English rules of exclusion, particularly with regard to hearsay. The Commissioners' draft, however, found no favour in India, and experience suggests that in India, more than in England, it is important to have rules which exclude matters only remotely bearing on the points for determination, ensure judgment of the cause and not the litigant, and curtail the duration and expense of trials.

There is thus a contradiction between Mr. Whitley Stokes and Professor Alan Gledhill as to the content of the draft code. Be that as it may, it fell to Sir James Fitzjames Stephen to bring about a brilliant compromise in the present Evidence Act, 1 of 1872.

In his introduction this is what is says :

> It may possibly be argued that the effect of the second paragraph of s. 11 would be to admit proof of such facts as these. It may, for instance, be said : A (not called as a witness) was heard to declare that he had seen B commit a crime. This makes it highly probable that B did commit that crime. Therefore, A's declaration is a relevant fact under section 11(2). This was not the intention of the section, as is shown by the elaborate provisions contained in the following part of Chapter II (ss. 17-39) as to particular classes of statements, which are regarded as relevant facts either because the circumstances

48. Whitley Stokes, *2 Anglo-Indian Codes*, 817 (1882).
49. *Republic of India* 241 (2nd ed. 1964).

under which they are made invest them with importance, or because no better evidence can be got. The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designedly left in the wording of the section (in compliance with a suggestion from the Madras Government) on account of the variety of matters to which it might apply. The meaning of the section would have been more fully expressed if words to the following effect had been added to it :

"No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act."

The reasons why statements as to facts made by persons not called as witnesses are excluded, except in certain specified cases (sections 17-39), are various. In the first place it is matter of common experience that statements in common conversation are made so lightly, and are so liable to be misunderstood or misrepresented, that they cannot be depended upon for any important purpose unless they are made under special circumstances.

It may be said that this is an objection to the weight of such statements and not to their relevancy, and there is some degree of truth in this remark. No doubt, when a man has to inquire into facts of which he receives in the first instance very confused accounts, it may and often will be extremely important for him to trace the most cursory and apparently futile report. And facts relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case, criminal or civil, would neglect his duty altogether if he shut his ears to everything which was not relevant within the meaning of the Evidence Act. A Judge or Magistrate in India frequently has to perform duties which in England would be performed by police officers or attorneys. He has to sift out the truth for himself as well as he can and with little assistance of a professional kind. Section 165 is intended to arm the judge with the most extensive power possible for the purpose of getting the truth. The effect of this section, is that in order to get to the bottom of the matter before it the court will be able to look at and inquire into every fact whatever. It wiil not, however, be able to found its judgment upon the class of statements in question.[50]

This exposition of Sir James Stephen has provoked criticism from two

50. Sir James Stephen, *The Evidence Act* 122-124 (1872).

eminent authorities Mr. Field and Mr. Justice West. The latter had said [51]:

> This section (section 11) is expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connexion with another, so as to have a bearing upon a point in issue, may possibly held to be relevant within its meaning. As the connexions of human affairs are so infinitely various and so far-reaching, that thus to take the section in its widest admissible sense, would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties. One of the objects of a law of Evidence is to restrict the investigations made by Courts within the bounds prescribed by general convenience, and this object would be completely frustrated by the admission, on all occasions, of every circumstance on either side having some remote and conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a determination of fresh collateral issues, growing up in endless succession, as the inquiry proceeded.

Obviously the learned judge has missed the whole point of section 11. It is not 'any fact which can by a chain of ratiocination, be brought into connexion' or 'every circumstance on either side having some remote and conjectural probative force' mentioned by the learned judge that is included in section 11; but only facts, which make the existence of a fact in issue *highly probable or improbable*, that are contemplated by the section.

Mr. Field had stated :

> The section (s. 11) can hardly be limited as has been suggested to those facts which are relevant under some other provisions of the Act, for this would render the section meaningless.[52]

Apparently this criticism is well founded, but that is because Sir James Stephen did not explain his intention properly.

When Oliver Goldsmith published his poem, 'The Traveller', Chamier asked him what he meant by its first line, 'Remote, unfriended, melancholy, slow'. He asked Goldsmith: 'What do you mean by "slow" the last word in the first line? Do you mean tardiness of locomotion?' and Goldsmith answered 'Yes'. Dr. Johnson, who was hearing the conversation, interrupted: 'No, Sir, you do not mean tardiness of locomotion; you mean that sluggishness of mind which comes upon a man

51. 11 Bom. H.C. 91.

52. As quoted in Sarkar, *Evidence* 109 (11th ed. 1964).

in solitude.'[53] Similarly, when Bernard Shaw wrote 'The Perfect Wagnerite' an interpretation of the Nibelungen Ring Music dramas, Wagner wrote to Shaw that that was not what he intended and that Shaw had misrepresented him. Shaw answered, 'You hush your mouth and stick to your business of writing music and music dramas. That is your function. My function as a critic is one of interpretation. You did not fully realise what you were saying, you were not fully aware of the implication of your work. It is my business to tell the public, and to tell you what you really meant.'

I have no intention of emulating these two extraordinary men—Dr. Johnson and George Bernard Shaw—but I am afraid Sir James Stephen has to submit to the indignity of an explanation by me.

The entire passage by Sir James Stephen, quoted by me above, indicates that he was anxious that an Indian court should look into any fact however remotely connected with the matter in controversy, choose out of them those facts which make the existence of the fact in issue highly probable or improbable, that is, which are relevant to the fact in issue, consider them all together and come to a conclusion on facts. The section was deliberately left elastic to include facts which form hearsay or *res inter alios actae* if they make the existence of the facts in issue *highly* probable or improbable. The kind of hearsay where A says that he heard B commit a crime, can never make the fact in issue that B committed the crime *highly* probable. Such hearsay is naturally excluded, but if an item of hearsay evidence, makes the existence of the fact in issue *highly* probable or improbable, it could be received as relevant evidence under the section. This is what Sir James Stephen meant by his explanation. A fact, before it can be considered by a court, should be relevant under some section of the Evidence Act. If however that is *res inter alios actae* or hearsay, and hence not otherwise relevant, then it has also to satisfy the additional test in section 11, namely, it should make existence of the fact in issue *highly* probable or improbable.

One objection may be raised to this interpretation of section 11. It may be said if section 11 includes hearsay also, what is the necessity for section 32. It fact what is the necessity for sections 7 and 9 also? The answer is, under sections 7 to 9 and 32, facts which are covered by them are relevant and no question as to whether they are such as to make the existence of the fact in issue *highly* probable arises. If the fact comes under those sections it is automatically received in evidence and considered whether or not it makes the fact is issue highly probable or improbable at the end of the trial. But if the fact is exclusively brought under section 11 then before it is received as a relevant fact, it must also satisfy the test laid down in the section, namely, it should make the existence of a fact in issue *highly* probable or improbable.

53. As quoted in *Selections from Goldsmith* 208-209 (Methuen's English classics, 9th ed. 1948).

One other section the history of which has been considered by the Supreme Court of India is section 27. This section provides that if a fact is discovered in consequence of information furnished by an accused person in police custody, so much of the information as relates to the fact discovered would be relevant. In *State of U.P.* v. *Deoman Upadhyaya*,[54] the question arose as to why the accused person should be in police custody. If an accused person makes a statement to the police and if he was *not* in police custody his statement would be irrelevant either under section 25 of the Evidence Act or section 162 of the Criminal Procedure Code, and this would be the position even if a fact is discovered as a result of the statement. But, if the accused person is in police custody, the statement would be relevant under section 27. The majority of the judges saved the section from an attack under article 14 of the Constitution by holding that the rule of admissibility does not depend upon an uncommon or abnormal class of persons. Mr. Justice Subba Rao in his dissenting judgment observed :

> The proviso introduced by Act VIII of 1869 (in the Criminal Procedure Code) was in *pari materia* with the provisions of section 27 of the Evidence Act with the difference that in the earlier section the phrase "a person accused of any offence" and the phrase "in the custody of a police officer" were connected by the disjunctive "or"... Can it be said that in 1872 the legislature excluded confessions or admissions made by a person not in custody to a police officer from the operation of section 27 on the ground that such cases would be rare? .. The omission appears to be rather by accident than by design.[55]

The difficulty out of which the majority extricated themselves would never have arisen, and Sir James Stephen would not have been accused of accidental omissions by Mr. Justice Subba Rao, had section 27 been treated, as it was intended to be, as a proviso to section 26 only and not of section 25. The scheme of the three sections 25, 26 and 27 and section 162 of the Criminal Procedure Code is that all confessions and statements *to police*, whether they lead to discovery of facts or not, are irrelevant under section 25 of the Evidence Act, and section 162 of the Criminal Procedure Code. Under section 26, if a person is in police custody and he makes a confession *to a person other than a police officer*, even then his confession would be irrelevant except in two instances : (*a*) when it is made to a competent magistrate under section 164 of the Criminal Procedure Code, and (*b*) when it leads to the discovery of a fact, under section 27 of the Evidence Act. The words 'in the custody of the police' are found only in sections 26 and 27, and since the latter section starts 'Provided that',

54. [1961] 1 S.C.R. 14.
55. *Id.* at 43.

it is only a proviso to section 26. Just as section 108 is a proviso to section 107 of the Evidence Act and starts with 'Provided', so also section 27 is a proviso only to section 26 *and not to section 25*. That is, the information contemplated by section 27 is given only *to a person other than a police officer*. If this interpretation was accepted, then the controversy raised in *Upadhyaya's* case would never have arisen.[56]

If the Evidence Act is to be amended, I respectfully submit that the interpretation of sections 11 and 27 as suggested above may be clarified.

56. *Supra* note 14 at 269-274. Appendix II.