

1. What is evidence? Define various types of evidence. (May-June-2023)
2. Define fundamental principles and objectives of Evidence Law. (November/December-2022)
3. Define Evidence. What are the various kinds of evidence? (December-2019/January-2020)
4. Define evidence. Discuss kinds of evidence. (May-June-2022)
5. Write historical development of Evidence Law. What are characteristics of Indian Evidence Act, 1872? (April-2019).
6. Define Evidence. What are the various kinds of evidence? (April- 2018)
7. Discuss nature, scope and features of law of evidence. (November/December-2018)
8. What is Evidence? Explain the nature, Nature & Applicability of law of evidence. (March/April-2017)
9. What is Evidence? Discuss nature and applicability of Indian Evidence Act.(January-2018).
10. What are the fundamental Principles of Evidence Law? (March/April-2016)

Nature and Functions of the Law of Evidence

Introduction

The object of every judicial investigation is the enforcement of a right or liability that depends on certain facts. The law of evidence can be called the system of rules whereby the questions of fact in a particular case can be ascertained. It is basically a procedural law but it has shades of substantive law. Law of Evidence is one of the fundamental subjects of law. The Indian Evidence Act, 1872 is largely based on the English law of Evidence. The Act does not claim to be exhaustive. Courts may look at the relevant English Common Law for interpretation as long as it is not inconsistent with the Act.

Preamble– Whereas it is expedient to consolidate, defines and amends the Law of Evidence; it is hereby enacted as follows:-

The preamble **consolidates laws¹**, defines and amends the laws of evidence. It is a special law and hence, will not be affected by any other enactment containing provisions on matter evidence unless and until it is expressly stated in such enactment or it has been repealed or annulled by another statute. Parties cannot contract to exclude the provisions of the Act. Courts cannot exclude relevant evidence made relevant under the Act. Similarly, evidence excluded by the Act will be inadmissible even if essential to ascertain the truth. The term ‘evidence’ owes its origin to the Latin terms ‘evident’ that mean ‘to sow clearly, to discover, to ascertain or to prove.’

Structure of Evidence Act, 1872:-

Particulars	Details
Name of the Act	The Indian Evidence Act, 1872
Came into force on	September 1, 1872
Preamble to the Act	Present
Total Parts	3
Part 1	Relevancy of Facts
Part 2	On Proof

¹ A law that combines existing laws relating to a particular subject.

Part 3	Production and Effect of Evidence
Total Chapters	11
Chapter 1	Preliminary terms and their meanings
Chapter 2	Regarding Relevancy of Facts
Chapter 3	Facts which need to be proved
Chapter 4	For Oral Evidence
Chapter 5	Regarding Documentary Evidence
Chapter 6	Regarding exclusion of oral by documentary evidence
Chapter 7	Burden of proof
Chapter 8	Estoppel
Chapter 9	Regarding Witnesses
Chapter 10	Regarding improper admission and rejection of evidence
Chapter 11	Regarding improper admission and reflection of evidence
Total Schedules to the Act	One (repealed)
Total Sections	167

EXTENT AND APPLICATION OF EVIDENCE ACT

Section-1

Whole of India-except State of Jammu and Kashmir

Applies to all judicial proceedings in or before any court including court martial, but not to affidavits nor the proceedings before an arbitrator.

Judicial proceedings: Includes any proceeding in the course of which evidence is or may be legally taken on oath.

- **Administrative Tribunals**—includes any proceeding in the course of which evidence is or may be legally taken on oath.
- **Commission of inquiry**---not bound to follow the technical rules of evidence—principles of natural justice.
- **Income tax tribunals**-certain powers of civil court exercised in certain specified matter-judicial proceedings only for limited purposes-bound to follow the technical rules of evidence for limited purpose.
- **Election tribunals**-bound to follow the technical rules of evidence-subject to the provisions of the Representation of Peoples Act.
- **Industrial tribunals**-deemed to judicial proceedings-bound to follow the technical rules of evidence.

- **Departmental proceedings**-not bound to follow the technical rules of evidence-principles of natural justice.
- **Court martial**-Act applies to court martial proceedings other than court martial convened under the Army Act, the Naval Discipline Act, or the Indian Navy (Discipline) Act 1934 or the Air Force Act.
Evidence law applies to all native court martial but not to foreign court martial.
- **Affidavits**- not bound to follow the technical rules of evidence-principles of natural justice.
- **Arbitration proceedings**-not bound to follow the technical rules of evidence-principles of natural justice.

Function/Object is to find out Truth:-

Every case that comes before a court of law has a fact story behind it. Facts out of which cases arise keep happening in the ordinary course of life. The facts which led up to the climax will have to be recaptured or reconstructed before the court, so that the judge is able to appreciate the real happening. Only then he will be in a position about the rights and liabilities of the parties.

Thus, whenever a judge is called upon to pronounce upon the rights and liabilities of parties arising out of facts, certain information about the facts involved must be submitted to him which will create a belief in his mind as to what the real facts are. Facts must be proved in the first instance and then only the matter is ripe for application of relevant laws. ²

The practical reality is that the truth or merits of a case are worthless unless they can be proved to the acceptance of the judge and thereby to enable him to act on them. **The means by which facts are proved are governed by the law of evidence.** The function of the law of evidence is to lay down rules according to which the facts of a case can be proved or disproved before a court of law. **The means which can be used to prove a fact are all controlled by the rules and principles laid down by the law of evidence.**

Nobel Laureate and French theorist, Andre Gide,³ once said,

“Truth should be the guiding star in the entire judicial process. Truth is the foundation of justice. Dispensation of justice, based on truth, is an essential feature in the justice delivery system. **People would have faith in courts when truth alone triumphs. The justice based on truth would establish peace in the society”.**

Thus it is the well-established rule that discovery of truth is the chief goal of justice delivery system of any country. The law in this regard is well settled that it is the fundamental duty of the Court to ascertain the truth and do justice on the basis of truth.

²A legal decision means application of law to facts : Facts + Law= Decision

³Andre Paul Guillaume Gide (22 November 1869- 19 February 1951)

Krishna Iyer J in *Jasraj Inder Singh*⁴ described truth and justice as under:

“8...**Truth, like song, is whole, and half-truth and can be noise.** Justice is truth, is beauty and the strategy of healing injustice is discovery of the whole truth and harmonizing human relations. Law’s finest hour is not in meditating on abstractions but in being the delivery agent of full fairness”.

Meaning of Evidence-

‘Evidence’ is a word which derived from the Latin word ‘*evidentia*’ which means to show clearly, to make clear to the sight to discover clearly certain, to ascertain or to prove.

1. According to Blackstone-

Evidence “signifies that which demonstrates, makes clear or ascertains the truth of the facts or points in issue either in one side or the other”.

2. According to Taylor-

Evidence describes as “all means which tend to prove or disprove any matter, fact, the truth of which is submitted to judicial investigation”.⁵

3. According to Dr. Johnson’s Dictionary,

The word evidence signifies “the state of being evident, that is plain apparent or notorious”.

4. According to Bentham-

‘Evidence’ as “any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion affirmative or disaffirmative, of the existence of some other matter of fact”⁶

5. According to Wigmore-

“Evidence” as representing “any knowable fact or group of facts, not a legal or logical principal, considered with a view to its being offered before a legal Tribunal for the purpose of producing a persuasion, positive or negative, on the part of the Tribunal, as to the truth of a proposition, not of law, or of logic, on which the determination of the Tribunal is to be asked”.⁷

6. According to Stephen-

“It sometimes means words uttered and things exhibited by witnesses before a Court of Justice. At other times, it means the facts proved to exist by those words or things and regarded as grand

⁴*Jasraj Inder Singh vs. Hemraj Multanchand*, (1977) 2 SCC 155.

⁵ Taylor, ‘Evidence’, Section 1.

⁶Bentham, ‘Judicial Evidence’ p. 17.

⁷Wigmore, 3rd Ed. Vol. I, p. 3

work of inference as to other facts not so proved. Again, it is sometimes used as meaning to assert that a particular fact is relevant to the matter under inquiry”.⁸

7. According to Phipson-

Evidence means testimony, whether oral or documentary or real, which may be legally received in order to prove or disprove some facts in dispute.

8. According to Best-

“Evidence is any matter of fact, the effect, tendency or design of which is, to produce in the mind, a persuasion, affirmative or disaffirmative of the existence of some other matter of facts”.⁹

Section 3 of the Indian Evidence Act defines –

“Evidence means and includes-

1. All statements which the Court permits or requires to be made before it by witnesses in relation to matters of facts under enquiry; such statements are called oral evidence.
2. All documents including electronic records produced for inspection of the Court, such documents are called documentary evidence.”

General description:

Facts in issue: the existence of the information or facts, which is in the question of law that either to be asserted or denied to resolve the case.

Relevant facts: it is the information related or connected to the facts in the issue. The concept of the relevancy of the fact has dealt with under Section 5 to 55 of the Act.

Objection as to definition u/s. 3-

The definition of evidence given in the Act is objected to be too narrow as it does not include the following –

1. Material things other than documents e.g., weapons, articles of stolen property;
2. Statements made out of Court or before the Court by the parties;
3. A thing like struggle in the case of murder;
4. The result of local inquiry or inspection;
5. Identification proceedings.

The answer to the objection can be given that S. 3 is an interpretation clause which only explains the evidence. The definition of “evidence” considered with the definition of “proved” in the Act, will not give rise to such objection.

⁸ Stephen, Introduction to the Law of Evidence.

⁹ Best, Evidence”.

THE LAW OF EVIDENCE IS THE LEX FORI:-

Law of evidence is part of the law of procedure. That is why it is called the lex fori or the law of the court or forum. It means that Indian courts know and apply only the Indian law of evidence. Thus, the competency of a witness, whether a fact is proved or not is determined by the law of the country where the question arose, where the remedy is sought to be enforced and where the court sits to enforce it.

For ex., if a legal proceeding is going on in Sri Lanka and evidence is taken in India for the said proceeding where by commission or by assistance of courts in India, the laws which will be applied during such recording of evidence will Sri Lankan Law of Evidence.

THE LAW OF EVIDENCE SAME IN CIVIL AND CRIMINAL PROCEEDINGS:-

Civil case of will and murder will have the same law of evidence. For ex. The date of death has to be clarified or confirmed for the will to come into existence and a murder date has to be set for proceeding further with the criminal investigations too. There are, however, certain sections that apply exclusively to civil matters and others that apply exclusively to criminal cases. In civil cases, mere preponderance of evidence may be enough but in criminal cases the prosecution must prove its case beyond reasonable doubt and leave the other alternatives presented very unlikely and highly suspect.

WHAT IS PROOF? HOW DOES IT DIFFER FROM EVIDENCE?

Anything that can make a person believe that an assertion is true or false. It is distinguishable from evidence such that proof is a broad term comprehending everything that may be adduced at a trial, whereas evidence is a narrow term describing certain types of proof that can be admitted at trial. A case that goes to trial must be strong in its legal submission and satisfy the Court of the claims made by producing evidence. To do this, there are certain documents and objects that are taken into consideration while deciding on a matter of evidence. The Law of Evidence governs this aspect of criminal proceedings. The level of proof in a criminal case is a strict requirement and the party alleging the crime must prove the claim beyond all reasonable doubt. This standard is examined by looking at whether a reasonable man would be convinced by the allegations leveled in the face of evidence to the contrary. This can be done by producing relevant documents, or eye-witnesses to the offending incident or circumstantial evidence that increases the probability of the incident.

‘Evidence’, ‘Testimony’ and ‘Proof’ –

- ‘Evidence’ means that which **makes evident**.
- ‘Testimony’ is derived from “testes” which means witness. Testimony means **statement of witness**. Testimony is also evidence.
- ‘Proof’ is the **result or effect of evidence** either in affirmation or negation of an alleged fact.
- ¹**Fact in issue** simply means “the disputed facts”. In litigation or proceedings, generally, one-party claims that certain facts exist, while other party denies the existence. In this case, the fact that it is accused by one party but denied by the other party is called a fact in issue.

- Fact: is a truth as opposed to fiction or mistake. The term 'Fact' means a 'an existing thing'. But under Evidence Act, the meaning of the word is not limited to only what is tangible and visible or, is in any way, the object of sense. According to S.3 of the Indian Evidence Act, 1872 Fact means and includes:
 - 1. Anything, state of things or relation of things capable of being perceived by the senses.
 - Illustration: a) That a man heard or saw something is a fact.
 - b) That a man said certain words is a fact.
 - 2.) any mental condition of which any person is conscious
 - Illustration:
 - a) A person has an intention to commit murder.
 - b) That a man has certain reputation is a fact.

Thus, the 'evidence' means the fact which proves a fact and 'proof' is the effect of evidence.

BASIC PRINCIPLES OF EVIDENCE:-

The Act deals with Relevancy of Facts, Mode of Proof and Production and Effect of Evidence. The following principles are called the basic principles and the exceptions to the above principles, the exact application has been set out very clearly in the Act:-

- Evidence must be confined to the matters in issue
- Hearsay evidence may not be admitted.
- The best evidence must be given in all cases.
- All facts having rational probative value are admissible in evidence, unless excluded by a positive rule of paramount importance.

There are two fundamental principles of trial in the all judicial system, firstly, it must ensure that parties to the case are given full opportunity to prove their case, and secondly every dispute must come to an end. These two rules which are juxtaposed (bring near, bring together) to each other must be balanced and this is done by the blending of procedural law and rules of evidence.

PURPOSE OR SIGNIFICANCE OF EVIDENCE LAW:-

Evidence is the "Key" which a court needs to render a decision. Without evidence there can be no proof. Evidence provides the court with information. Proving facts through the presentation of evidence means convincing court to accept a particular version of events. Of course, one can search truth even through violating the constitutional rights of the parties. However, evidences obtained through unlawful means could not contribute for the maintenance of justice in the future. So the process of proof should be regulated by evidentiary rules and principles in order to achieve accelerated, fair and economic Justice.

In both criminal and civil proceedings, the law of evidence has a number of purposes. In short, the law of evidence regulates the process of proof. The rule of civil and criminal evidence,

in conjunction with the rules of procedure, establish the frame work for the process of proof and the conduct of litigation, so that a lawyer advising his client or preparing his case for trial or presenting it to the court or tribunal will know what issues his client must prove in order to succeed.

The law of evidence also has amoral purpose by establishing and regulating the rules relating to the process of proof in proceedings in courts and tribunals. Whilst this moral dimension is important in civil proceedings, it has special currency in criminal cases as it reflects the powerful public interest in bringing the guilty to justice, whilst allowing the innocent to go free. In some cases the rules of evidence may actually prevent the truth from being discovered in the wider public interest.

Moreover, especially in criminal cases, law of evidence stands to protect the accused's right to a fair trial for instance, by containing many rules which excludes potentially relevant evidences like the general rule that evidence of the defendant's character and previous convictions will not be admitted at trial (see Art 138 of Cr.p.c. and Rule-145 of DER)

Salient Features of the Indian Evidence Act 1872:-

The Indian Evidence Act or The Law of Evidence is a subject which cannot be understood without understanding these important features which forms the basis of the Law of Evidence. For a good Lawyer skills and hands on the subject these features are a must on tips. Only then can you jump on to the next level to understand and study the Law of Evidence. These important features are—

1. Court
2. Fact
3. Relevant fact
4. Facts in issue
5. Document
6. Evidence
7. Proved
8. Disproved
9. Not proved
10. Affidavit
11. Motive
12. Circumstantial Evidence
13. May presume
14. Shall presume
15. Conclusive proof

1. **Court:-**

Court includes all Judges

The Law of the Forum (or Court) or the lexfori:

Lexfori means the law of the place of action or the law of the forum of the nation. According to Lord Brougham, “The law of evidence is the lexfori which governs the Court, constitute the basis of the law of evidence. Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not; that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced and where the Court sits to enforce it.”

The law of evidence is lexfori which governs the Courts whether a witness is competent or not whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not, these and the like questions must be determined not *lege loci contractus* but by the law of the country where the question arises where the remedy is sought to be enforced and where the Court sits to enforce it.¹⁰

The law of evidence is part of the law of procedure i.e. the procedure which a Court has to follow. This is expressed by saying that it is the law of the forum (or Court) or the lexfori. If foreigners come before an Indian Court, they cannot insist upon their law of evidence being followed. The Indian Courts know only the Indian law of evidence and follow it. The evidence, being a procedure has to be governed by the law of the country where the proceedings are taken place. Hence Indian Evidence Act, 1872 extends to the whole of India except the State of Jammu and Kashmir but not to any foreign country as law changes from one country to another country basing on its peculiar circumstances, living style, social, economic, political etc.

Where evidence is taken in one country in aid of a suit or action (i.e. proceeding) in another country, either on ordinary commission or with the assistance of the local Courts, the law applicable to the recording of the evidence, would be the law prevailing in the country where the proceedings going on.

Evidence given before any Indian Court pertaining to any cause of action that has arisen in Russia or Canada, the USA or the UK etc. will be governed by the law of India only, but not by the Law of Russia or Canada or the USA or the UK etc.

Total Sections: There were 167 sections and one Schedule in the original Act of 1872. Section 2 along the Schedule was repealed by the Repealing Act 1938 (1 of 1938). Several amendments were made by changing the existing sections and inserting some new sections.

¹⁰[Bain vs. Whitehaven and Furness Junction Railway Co., (1850) 5 HLC 1(19)]

The newly inserted sections are: 22A, 47A, 53A, 65A, 65B, 73A, 81A, 85B, 85C, 88A, 90A, 111A, 113B, 114A. Sixteen sections have been newly inserted and one section (i.e. Sec.2) has been repealed. Now there are 182 sections in total.

Parts and Chapters:

Parts:

The Indian Evidence Act, 1872 has been divided into **three parts and eleven chapters**.

Part I:

Part I deals with relevancy of facts and consists of **Chapters I & II (Sections 1 to 55)**.

Chapter I: Namely, 'Preliminary consists of **Sections 1-4**'.

- Section 1 deals with title, extent and commencement of the Act.
- Section 2 Repeal of Enactments.
- Section 3 deals with interpretation clause.
- Section 4 deals with presumptions of fact and law.

Chapter II:

- It deals with the relevancy of facts and consists **Sections 5to 55**.
- Sections 5 to 16 deals with the relevancy of facts, sections 17 to 23 deals with admissions and Sections 24 to 31 deals with confession.
- Section 32 to 38 deals with statements.
- Sections 39 to 44 relates with judgment.
- Sections 45 to 51 deals with opinion.
- Sections 52to 55 deals with character.

Part II:

Part II deals with the mode of proof and consists of **Chapters III to VI (Sections 56 to 100)**.

Chapter III: It deals with facts which need not be proved.

- Sections 56 and 57 deal with the judicial notice.
- Section 58 deals with facts admitted need not be proved.

Chapter IV: It deals with the rules relating to oral evidence.

- Section 59 deals with proof of facts by oral evidence and
- Section 60 deals with oral evidence which must always be direct.

Chapter V: It is concerned with documentary evidence and consists of **Sections 61-90A**.

- Sections 61-66 deal with the mode of proof of contents of document.

- Sections 67-78 deal with the mode of proof of the execution of document. Sections 79-90 deal with certain presumptions to be raised in a judicial proceeding in respect of certain documents.

Chapter VI: This chapter deals with the execution of oral by documentary evidence. It consists of **Sections 91-100**.

- Section 91 deals with the evidence of terms of contracts etc.
- Section 92 deals with the exclusion of evidence of oral agreement.
- Section 93-100 deal with the patent and latent ambiguities contained in such documents.

Part III:

Part III deals with the production and effect of evidence and consists of **Chapters VII-XI (Sections 101 to 167)**.

Chapter VII: This chapter is related to the burden of proof and consists of **Sections 101 to 114**.

All these sections deal with the rules relating to burden of proof and person on whom the burden of proof lies to lead the evidence.

Chapter VIII: It deals with estoppel and consists of **Sections 115 to 117**.

- Section 115 deals with estoppel.
- Section 116 deals with estoppel of tenant and of licensee of person in possession.
- Section 117 deals with estoppel of acceptor of bill of exchange, bailee or licensee.

Chapter IX: This chapter deals with witnesses and consists of **Sections 118 to 134**.

- Sections 118 to 120 deals with competency of witnesses.
- Sections 121 to 134 deal with compellability of witnesses.

Chapter X: This chapter is related to the examination of witnesses and consists of **Sections 135-166**.

- **Sections 135-161** provide the rules of examination of witnesses in judicial proceedings as examination-in-chief, cross-examination and re-examination.
- This chapter also provides what questions can be put to a witness and what questions cannot be asked in examination-in-chief, cross-examination and re-examination.
- Finally this chapter deals with production of documents in **Sections 162-164**. **Section 165** deals with the Judge's power to put questions or order production.

Chapter XI: This final chapter consists only **one section i.e. Section 167** and deals with the provisions of improper admission and rejection of evidence.

The scope of all the sections can be grouped into five parts, namely:

1. Preliminary;
2. The relevancy of facts in issue;

3. The proof of facts according to their nature, by oral, documentary or material evidence;
4. The production of evidence; and
5. The procedure.

Adversarial System and Inquisitorial system:

In India, investigation system is '**Adversarial**' where the investigation of offences is done by the police or other investigating agencies, the investigation being free from judicial supervision or control.

As distinct from it, in **Inquisitorial System**, investigation is supervised by the Magistrates resulting in high rate of conviction.

The Committee on Reforms of Criminal Justice System (Malimath Committee) in its report submitted in March, 2003 felt that fair trial and in particular fairness to the accused, are better protected in the Adversarial system but it also felt that some of the good features of inquisitorial system as prevalent in France, Germany and other continental countries could be adopted in India, to strengthen Adversarial System which includes the duty of the court to search for truth, to assign a particular role to the Judges to give directions to the Investigating Officers and Prosecution agencies in the matter of investigation and leading evidence with the object of seeking the truth and focusing on justice to victims. The Committee has made recommendations on five points in this regard.

KINDS OF EVIDENCES & WITNESSES:-

Evidence includes everything that is used to determine or demonstrate the truth of an assertion. Giving or procuring evidence is the process of using those things that are either (a) presumed to be true, or (b) which were proved by evidence, to demonstrate an assertion's truth. Evidence is the currency by which one fulfills the burden of proof.

In law, the production and presentation of evidence depends first on establishing on whom the burden of proof lays admissible evidence is that which a court receives and considers for the purpose of deciding a particular case. Two primary burden-of-proof considerations exist in law. The first is on whom the burden rests. In many, especially Western, courts, the burden of proof is placed on the prosecution. The second consideration is the degree of certitude proof must reach, depending on both the quantity and quality of evidence. These degrees are different for criminal and civil cases, the former requiring evidence beyond reasonable, the latter considering only which side has the preponderance of evidence, or whether the proposition is more likely true or false. The decision maker, often a jury, but sometimes a judge, decides whether the burden of proof has been fulfilled. After deciding who will carry the burden of proof, evidence is first gathered and then presented before the court.

DIFFERENT FORMS OF EVIDENCE:-

1. Oral Evidence:- (S. 59 & 60)

Oral Evidence means all statement which the court permits or requires to be made before it by witnesses, in relation to matter of fact under inquiry. S. 59 of the Indian Evidence Act reads as 'all facts, apart from the contents of a document or electronic records shall be considered as oral evidence'.

When it comes to recording statements, most of the evidence is given orally hence everything in a way is oral evidence. Even if a witness cannot communicate orally whatever they say in writing or any other format to the court will still fall under the category of oral evidence.

The oral evidence of a witness cannot be dismissed on the grounds of non-production of medical evidence. For ex. If the witness/victim is a person whose throat has been slit and she can point out to the accused, then her statement would still fall under the category of oral evidence.

S. 119 of Indian Evidence Act states that witness 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. S. 119 is an extension of Oral Evidence.

Oral is a different form of the word Verbal in case of **Queen Empress vs. Abdullah**¹¹ Hon'ble chief Justice of Allahabad W.C. Petheram discuss the difference between Verbal and Oral, Berbal means by word, it is not necessary that the words should be spoke. If the term used in the section were oral, it might be that the statement must be confined to words spoken by the mouth. But the meaning of Verbal is something wider.

S. 60 of the Indian Evidence Act states that Oral evidence must, in all cases, whatever, be direct; that is to say—

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

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

¹¹ 27th February 1885

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

It was held under the case of **State vs. Rajal Anand** that S. 60 of the Indian Evidence Act only includes the word “direct” and excludes hearsay. Any evidence given must be direct and the hearsay evidence does not hold any area under oral evidence as it is not direct. But the doctrine of Res-gestae has been observed as an exception to the rule of hearsay which explained that any person who has experienced any series of relevant facts, his testimony after the incident even if he has not seen the crime being committed will be accepted.

All those statements which the court permits or expects the witnesses to make in his presence regarding the truth of the facts are called Oral Evidence. Oral Evidence is that evidence which the witness has personally seen or heard. Oral evidence must always be direct or positive. Evidence is direct when it goes straight to establish the main fact in issue.

2. Documentary Evidence:- (S. 61 to 73A)

Vox Audita Perit, Littera Scripta Manet is an Ancient Roman Proverb which means “**the Spoken word vanishes, the written word remains**”. The law of evidence recognizes the superior credibility of documentary evidence as against oral evidence.

Section 3 of The Indian Evidence Act provides that documentary evidence means all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

Documents are divided into two categories, Public Documents and Private Documents. The production of Documents in Court is regulated by Civil Procedure Code and the Criminal Procedure Code. The contents of documents must be proved either by the production of document which is called Primary Evidence of Secondary Evidence.

The Contents of documents may be proved either-

- A. By primary evidence i.e. by producing the document itself
- B. By Secondary Evidence

A document which is proved to be genuine and satisfied the requirement of law should be relied upon in the case of **Afzauddin Ansari vs. State of Bengal**, 1997 it was held that ‘A man may lie but a document will never lie’.

All those documents which are presented in the court for inspection such documents are called documentary evidences. In a case like this it is the documentary evidence that would show the actual attitude of the parties and their consciousness regarding the custom is more important than any oral evidence.

3. Primary Evidence:- (S. 62)

S. 62 of Indian Evidence Act provides for the provision of primary evidence. Primary evidence means the documents itself produced for the inspection of the Court. Primary evidence is considered to be the superior class of evidence. Such evidence is an original document that needs to be submitted before the court for inspection. It is admissible without any prior notice. Such evidence must be presented before the court before the secondary evidence. Secondary evidence can be presented only in the absence of primary evidence by explaining the reason for the absence of such evidence. Primary evidence, more commonly known as best evidence, is the best available substantiation of the existence of an object because it is the actual item. It differs from secondary evidence, which is a copy of, or substitute for, the original. If primary evidence is available to a party, the person must offer it as evidence.

Elements of Primary Evidence:-

- The original document itself produced for the inspection of the court
- When the Document is executed in several parts, each part is the primary evidence of the document.
- When the Document is executed in Counter parts, each counter will be primary evidence against the parties executing it or signing it for example, in the case of cheque, the main cheque is signed by the drawer so that it is primary evidence against him and the counterfoil may be signed by the payee of the cheques so that it will be primary evidence against the payee.
- Where several documents are made by one uniform process, but they are copies of the common original, they are not primary evidence of the contents of the originals. Example, by printing, lithography or photography. In the matter of **Prithvi vs. State of H.P.** it was held that the carbon copy was made by uniform process of the certificate of a doctor (as to condition of rape victim) given in performance of professional duty. It was held to be primary evidence within the meaning of the explanation to the S. 62. S. 276 of the succession Act, 1925 requires that an application for probate or letters of administration should be made with the “will” annexed. Since this does not necessarily mean “original will”, a copy certified by sub registrar was allowed to be annexed.

In the matter of **Murarka Properties Pvt. Ltd. vs. Bihari Lal Murarka** 1978 it was held by the Supreme Court that where there is a documentary evidence available, the oral evidence must not be given much weight.

In other words, Primary Evidence is the Top-Most class of evidences. It is that proof which in any possible condition gives the vital hint in a disputed fact and establishes through documentary evidence on the production of an original document for inspection by the court. It means the document itself produced for the inspection of the court.

In Lucas vs. Williams Privy Council held “Primary Evidence is evidence which the law requires to be given first and secondary evidence is the evidence which may be given in the absence of that better evidence when a proper explanation of its absence has been given.

4. **Secondary Evidence:-** (S. 63)

S. 63 provides for Secondary Evidence means and includes:

- Certified copies
- Copies made from original by a mechanical process and copies compared with such copies
- Copies made from or compared with the original
- Counterparts of documents against the party who did not execute them
- Oral accounts of the contents of document by a person who has seen it.

These are those evidence which are entertained by the court in the absence of the primary evidences. Therefore it is known as secondary evidence.

If the parties want to prove a fact by secondary evidence then they have to satisfy the conditions given in the S. 65 of the Indian Evidence Act.

S. 64 of Indian Evidence Act state that Document must be proved by primary evidence except in the cases hereinafter mentioned i.e. in S. 65.

In the matter of **Malay Kumar Gangulay vs. Sukumar Mukherjee**, 2010 it was held that the document which is otherwise inadmissible cannot taken in evidence only because no objection to the admissibility thereof was taken.

S. 65 exception to the rule laid down in S. 64.

S. 65 of Indian Evidence Act state that Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

a. When the Original Document is in possession of:

1. A person against whom it is to be proved, or
2. Any person out of the reach of, or not subject to the process of the court, or
3. Any person who is legally bound to produce it, does not produce it even due notice has been given.

b. When the existence, condition or contents of the original have been proved to be admitted in writing.

c. When the original has been destroyed or lost.

d. When the original is of such a nature as not to be easily movable.

e. When the original is a public document within the meaning of S. 74.

f. When the original is a document of which a certified copy is permissible.

g. When the originals consist of numerous accounts or other documents.

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

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

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

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

In the matter of **Satyam Kumar Sah vs. Narotic Control Bureau**, 2019 it was held that S. 65 does not contemplate the filing of any application or seeking prior permission of the court for leading secondary evidence.

A party producing secondary evidence before a court has to satisfy the condition mentioned in S. 65 of the Indian Evidence Act and only when the condition of S. 65, Indian Evidence Act are satisfied, secondary evidence would be admissible.

In the matter of **Dhanpat vs. Sheo Ram (Deceased) Through Lrs. & Ors** on 19th March 2020, held that as per terms of S. 65(c) of the Evidence Act, there is no requirement to file an application during producing secondary evidence to put on record. Further, the Hon'ble Court observed that the court cannot deny considering the secondary evidence on the basis that the application for permission to lead the secondary evidence was not filed.

Admissibility of Electronic Evidence (S. 65B of Indian Evidence Act, 1872):

S. 3 of the Evidence Act, 1872 defines evidence as under:

“Evidence”—Evidence means and includes: all documents including electronic records produced for the inspection of the court. Such documents are called documentary evidence.

Electronic Records: S. 2(t) of the Information Technology Act, 2000 “electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro fiche.

Electronic Certificate:

An electronic certificate is a set of data enabling identification of the holder of the certificate, secure exchange of information with other persons and institution, and electronic signing of data sent in such way as to enable verification of its integrity and origin.

S. 65B of Indian Evidence Act, 1872 deal with the admissibility of the electronic records. In this section clause 1 to 5 provide the information regarding which electronics records can be produced before the court, which electronics records treated as deemed document, when document will be admissible in the court and which certificates required producing the Electronic document before the court.

Let's understand the clauses 1 to 5 of S. 65B of Indian Evidence Act, 1872.

S. 65B (1):

Notwithstanding anything contained in this Act, any information contained in an electronic record:

- Which is printed on a paper, stored, recorded or
- Copied in optical magnetic media
- Produced by a computer

Shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

In the matter of **Abdul Rahaman Kunji vs. The State of West Bengal**, The Hon'ble High Court of Calcutta while deciding the admissibility of email held that an email downloaded and printed from the email account of the person can be proved by virtue of S. 65B r/w S. 88A of Evidence Act. The testimony of the witness to carry out such procedure to download and print the same is sufficient to prove the electronic communication.

S. 65B (2): The conditions referred to in sub-section (1) of S. 65B in respect of a computer output shall be the following, namely:

- The computer from which the record is generated was regularly used
- Information was fed in computer in the ordinary course of the activities of the person having lawful control over the computer
- The computer was operating properly, and if not, was not such as to affect the electronic record or its accuracy Information reproduced in such as is fed into computer in the ordinary course of activity.

S. 65 B (3): The following computers shall constitute as single computer:

- By a combination of computers operating over that period; or
- By different computers operating in succession over that period; or
- By different combinations of computers operating in succession over that period; or
- In any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

S. 65B (4): Regarding the person who can issue the certificate and contents of certificate, it provides the certificate doing any of the following things:

- Identifying the electronic record containing the statement and describing the manner in which it was produced;
- Giving the particulars of device

- Dealing with any of the matters to which the conditions mentioned in subsection(2) relate

And purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

In the matter of **Anvar vs. P.K. Basheer**,¹² it was held that the certificate required under S. 65B (4) is a condition precedent to the admissibility of evidence by way of electronic records.

In the matter of **Shafhi Mohammad vs. State of H.P.**¹³ the division bench had clarified that the requirement of certificate under S. 64B (4), being procedural, can be relaxed by the Court whenever the interest of justice so justifies would be where the electronic device is produced by a party who is not in possession of such device as a result of which such party would not be in position to secure the requisite certificate.

Law on admissibility of Electronic Evidence without Certificate under S. 65B of Evidence Act, 1872 the Supreme Court clarified that the required certificate under S. 65B (4) is unnecessary if the original document itself is produced.

Let's understand through the recent Judgment Passed by the Supreme Court in the matter of **Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal**, 2020 decided on 14.07.2020.

The three Judge bench in the above case, holding the Shafhi Mohamad judgment to be incorrect said “the major premise of Shafhi Mohammad that such certificate cannot be secure by person who are not in possession of an electronic device is wholly incorrect. An application always be made to a judge for production of such a certificate from the requisite person under S. 65B (4) in case in which such person refuses to give it.

The Court also clarified the confusion over the aforementioned sentence in the **Anvar P.V. case** which reads as “The clarification referred to above is that the required certificate under section 65B (4) is unnecessary if the original document itself is produced”. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the “computer” happens to be a part of a “computer system” or “computer network” and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information

¹² (2014) 10 SCC 473

¹³ (2018) 2 SCC 801

contained in such electronic record can be in accordance with S. 65B(1), together with the requisite certificate under S. 65B(4)".

Hence, Secondary Evidence is the inferior evidence. It is evidence that occupies a secondary position. It is such evidence that on the presentation of which it is felt that superior evidence yet remains to be produced. It is the evidence which is produced in the absence of the primary evidence therefore it is known as secondary evidence. If in place of primary evidence secondary evidence is admitted without any objection at the proper time then the parties are precluded from raising the question that the document has not been proved by primary evidence but by secondary evidence. But where there is no secondary evidence as contemplated by S. 66 of the Evidence Act then the document cannot be said to have been proved either by primary evidence or by secondary evidence".

5. Real Evidence:-

Real Evidence Real evidence, often called physical evidence, consists of material items involved in a case, objects and things the Court can physically hold and inspect. Examples of real evidence include fingerprints, blood samples, DNA, a knife, a gun, and other physical objects. Real evidence is usually admitted because it tends to prove or disprove an issue of fact in a trial. Real evidence is usually involved in an event central to the case, such as a murder weapon, clothing of a victim, narcotics or fingerprints. In order to be used at trial, real evidence must be relevant, material, and authentic. The process whereby a lawyer established these basic prerequisites is called laying a foundation, accomplished by calling witnesses who establish the item's chain of custody.

In the matter of **Marada Venkateshwara Rao vs. Oleti Vana Laxmi**¹⁴ the property in dispute was self-acquired property of mother. The suit for partition was filed by the plaintiff (Daughter). The son was defendant. He stated that the plaintiff and her brother were destitute and not born to his mother. As such they had not right of inheritance. The Court said that the maternity of the parties was thus disputed. The Court directed both the parties to undergo DNA test.

Hence, Real Evidence means real or material evidence. Real evidence of a fact is brought to the knowledge of the court by inspection of a physical object and not by information derived from a witness or a document. Personal evidence is that which is afforded by human agents, either in way of disclosure or by voluntary sign.

In other words, real evidence refers to anything tangible, such as a photo of a person holding up their phone during the accident. This could include things like weapons, clothing, or even DNA evidence.

For ex., Contempt of Court, Conduct of the witness, behavior of the parties, the local inspection by the court. It can also be called as the most satisfactory witness.

6. Hearsay Evidence:- (S. 60)

¹⁴ AIR 2008 AP 195.

Comprising two words, 'hear' and 'say', the term hearsay defines a testimony based not on direct communications but what a witness may have heard others say over an out-of-court conversation. It is a piece of second-hand information. As per the definition provided under Merriam-Webster- Hearsay is: "Evidence-based not on a witness's personal knowledge but on another's statement not made under oath".

In simple words, evidence that is given by a person who was heard from another person is hearsay evidence.

Hearsay Evidence is weak evidence. It is only the reported evidence of a witness which he has not seen either heard. Sometime it implies the saying of something which a person has heard others say.

In **Lim Yam Yong vs. Lam Choon & Co.** the Hon'ble Bombay High Court adjudged "Hearsay Evidence which ought to have been rejected as irrelevant does not become admissible as against a party merely because his counsel fails to take objection when the evidence is tendered."

So finally we can assert that Hearsay Evidence is that evidence which the witness has neither personally seen nor heard, nor has he perceived through his senses and has come to know about it through some third person. There is no bar to receive hearsay evidence provided it has reasonable nexus and credibility. When a piece of evidence is such that there is no prima facie assurance of its credibility, it would be most dangerous to act upon it. Hearsay evidence being evidence of that type has therefore, to be excluded whether or not the case in which its use comes in for question is governed by the Evidence Act.

In the matter of Subramaniam's case¹⁵ the Accused was charged with unlawful possession of ammunition. His defense was that he had been captured by terrorist and was acting under duress. The issue that arose whether the statement made by the terrorist to the appellant which he will be killed if he did not carry the ammunition amounted to hearsay?

The trial judge held that the evidence of his conversation with terrorist was inadmissible unless the terrorist testified. Subramaniam was convicted. He then filed appeal.

The Privy Council allowed his appeal. The hearsay rule was not infringed because his evidence about what the terrorists had said to him was not adduced in order to show that what the terrorists had said to him was not adduced in order to show that what the terrorists had said was truth but in order to show that threats had in fact been made.

The reason why hearsay evidence is not received as relevant evidence are:

- a. The person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility i.e., every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood. If the person giving

¹⁵ MLJ 220.

hearsay evidence is cornered, he has a line of escape by saying "I do not know, but so and so told me",

- b. Truth is diluted and diminished with each repetition and
- c. If permitted, gives ample scope for playing fraud by saying "someone told me that..." It would be attaching importance to false rumour flying from one foul lip to another. Thus statement of witnesses based on information received from others is inadmissible.

Exceptions to hearsay:

1. Res gestae under S. 6 of Indian Evidence Act:

The statement of a person may be proved through another person who appears as a witness if the statement is a part of the transaction issues.

Facts which though not in issue are so connected with the facts in issue so as to form a part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places".

2. Statement in Public Document – (S. 74):-

The statement in Public Document such as the Acts of the Parliament, official books, and registers can be proved by the production of document and it is not necessary to produce before the court the draftsman of the documents.

3. Admission and Confession: - S. 17, 23 & 24¹⁶:-

4. Dying Declaration:- S. 32-

(1) When it relates to cause of death-

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made

¹⁶ **S. 17-Admission-** An admission is a statement, [oral or documentary or contained in electronic form], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

S. 23- Admissions in civil cases when relevant- In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation. -- Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

S. 30- Consideration of proved confession affecting person making it and others jointly under trial for same offence- When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

[Explanation. -- "Offence" as used in this section, includes the abetment of, or attempt to commit, the offence.]

Illustrations

(a) A and "B are jointly tried for the murder of C". It is proved that A said B and I murdered C. The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said -- "A and I murdered C".

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

them was or was not, at the time when they were made, under exception of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

5. Evidence given in the former proceedings (S. 33)—

It is provided that evidence given by a witness in the proceeding can be used as an evidence of the truth of the facts stated in any subsequent proceedings between the same parties, provided that the witness has died or is for some other reason not available.

6. Statement of experts in treaties (S. 60)-

Provides that opinion are proved by production of such treaties if the author is dead or cannot be found or become incapable of giving evidence.

7. Judicial Evidence:-

Evidence received by court of justice in proof or disproof of facts before them is called judicial evidence. The confession made by the accused in the court is also included in judicial evidence. Statements of witnesses and documentary evidence and facts for the examination by the court are also Judicial Evidence.

8. Non-Judicial Evidence:-

Any confession made by the accused outside the court in the presence of any person or the admission of a party are called Non-Judicial Evidence, if proved in the court in the form of Judicial Evidence.

9. Direct Evidence:-

Direct evidence is evidence that will prove the point in fact without interpretation of circumstances. It is any evidence that can show the court that something occurred without the need for the judge to make inferences or assumptions to reach a conclusion. An eyewitness who saw the accused shoot a victim would be able to provide direct evidence. Similarly, a security camera showing the accused committing a crime or a statement of confession from the accused admitting to the crime could also be considered direct evidence. Direct evidence should not be confused with the concept of direct examination, which is the initial examination and questioning of a witness at trial by the party who called that witness. And, although each witness who provides evidence could, in theory, be providing direct testimony of their won knowledge and experiences, that evidence is often not direct evidence of the offence itself.

In other words, Evidence is either direct or indirect. Direct Evidence is that evidence which is very important for the decision of the matter in issue. The main fact when it is presented by witnesses, things and witnesses is direct,, evidence whereby main facts may be proved or established that is the evidence of person who had actually seen the crime being committed and has described the offence. The evidence of the witness in Court is direct evidence as opposed to testimony to a fact suggesting guilt. The statement before the police only is called circumstantial evidence of, complicity and not direct evidence in the strict sense.

10. Circumstantial Evidence or Indirect Evidence:-

Circumstantial evidence is an Evidence that relies on an inference to connect it to a conclusion of fact. Such as a fingerprint at the scene of a crime.

Peter Murphy defines Circumstantial Evidence as “Evidence from which the desired conclusion may be drawn. The evidence which requires the court not only to accept the evidence presented but also draw an inference from it.

Supreme Court has given the guidelines for admissibility of the Circumstantial Evidence in the matter of **Bodh Raj vs. State of Jammu and Kashmir** as follows:

- The Circumstance from where conclusion of guilt is to be drawn ought to be established. The circumstances involved “must” or “should” and not “may be” established.
- The facts, therefore, established ought to be as per the hypothesis of the guilt of the accused.
- Circumstances ought to be conclusive in nature and tendency.
- There should be complete sequence of proof so as to not leave any affordable ground for the conclusion in line with the innocence of the defendant and should show that the offence must have been committed by the defendant.

Circumstantial Evidence is especially important in civil and criminal cases where direct evidence is lacking.

In the matter of **Ramawati Devi vs. State of Bihar**, it was held that in a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances.

So, there is no difference between circumstantial evidence and indirect evidence. Circumstantial Evidence attempts to prove the facts in issue by providing other facts and affords an instance as to its existence. It is that which relates to a series of other facts than and effect that it leads to a satisfactory conclusion.

In Hanumant Vs. State of Madhya Pradesh, The Hon’ble Supreme Court Observed, “In dealing with circumstantial evidence there is always the danger that suspicion may take the place of legal proof. It is well to remember that in cases where the evidence is of a circumstantial nature the circumstances from which the conclusion of guilt is to be drawn should in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. In other words there can be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

In the case of Ashok Kumar vs. State of Madhya Pradesh, the Hon'ble Supreme Court held—

1. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
2. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of accused.
3. The circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.
4. The Circumstantial Evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

DIRECT EVIDENCE VS. CIRCUMSTANTIAL EVIDENCE:-

The question that which evidence is superior is going from a long time, on this subjects jurists differ in their views. Some jurists hold that direct evidence is superior evidence. When a particular says that he had seen a particular event happening then undoubtedly his evidence is superior, but even relying on direct evidence at once is also hazardous because a witness can make a completely false statement. In the same manner in the case of circumstantial evidence circumstances are also proved by witnesses. Particularly the manner in which the court draws inferences from circumstances they can be wrong and also and thus circumstances also become false.

In the case of **Kallu vs. State of Uttar Pradesh**, the accused was tried for the murder of the deceased by shooting him with a country made pistol. A cartridge was found near the bed of the deceased. The accused was arrested at a distance of 14 miles from the village which was the place of occurrence. He produced a pistol from his house which indicated that he could have alone have known of its existence there. The fire-arms expert proved that it was the same pistol from which the shot was fired and deceased was killed. The Hon'ble Supreme Court while convicting the accused held "Circumstantial Evidence has established that the death of the deceased was caused by the accused and no one else."

DIFFERENT KINDS OF WITNESSES

The witness can be divided mainly into two categories-

1. Eye Witness
2. Circumstantial Witness

Witness can be further divided into following kinds-

1. Prosecution Witness-

Prosecution is the institution or commencement of criminal proceeding and the process of exhibiting formal charges against an offender before a legal tribunal and pursuing them to final judgment on behalf of the state or government by indictment or information. A prosecution exists until terminated in the final judgment of the court to write the sentence, discharge or acquittal, a witness which appears on behalf of the prosecution side is known as a Prosecution Witness.

2. Defense Witness:-

Defense side in a criminal proceeding is opposing or denial of the truth or validity of the prosecutor's complaint, the proceedings by a defendant or accused party or his legal agents for defending himself. A witness summoned on the request of the defending party is known as a Defense Witness.

3. Expert Witness-

An 'expert' is not a 'witness' of fact. His evidence is really of an advisory character. The duty of an 'expert witness' is to furnish the judge with the necessary scientific criteria for testing the accuracy of the conclusion so as to enable the judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data furnished which form the basis of his conclusions.

4. Eye Witness-

A witness who gives testimony to facts seen by him is called an eye witness, an eye witness is a person who saw the act, fact or transaction to which he testifies. An eye witness must be competent (legally fit) and qualified to testify in court. A witness who was intoxicated or insane at the time the event occurred will be prevented from testifying regardless of whether he or she was the only eyewitness to the occurrence. Identification of an accused in Court by an 'Eye witness' is a serious matter and the chances of a false identification are very high. Where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. "It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs".

“Indeed, conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye witness is a wholly unreliable witness that his testimony is discarded and no amount of corroboration can cure that defect”.

On a conspectus of these decisions, it clearly comes out that there has been no departure from the principles laid down in **Vadivelu Thevar case** and, therefore, conviction can be recorded on the basis of the statement of a single eye witness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the court, at the same time, is convinced that he is a truthful witness. The court will not then insist on corroboration by any other eye witness particularly as the incident might have occurred at a time or place when there was no possibility of any other eye witness being present. Indeed, the courts insist on the quality, and, not on the quantity of evidence”.

5. Hostile Witness-

The witness who makes statements adverse to the party calling and examining him and who may with the permission of the court, be cross examined by that party. Now it is true that in *Coles vs. Coles*, and it may be in other cases, a hostile witness has been described as a witness who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court. This is not a very good definition of a hostile witness and the Indian Evidence Act is most careful in Section 154 not to restrict the right of ‘cross-examination’ even by committing itself to the word ‘hostile’.

This Court in **Bhagwan Singh vs. State of Haryana**¹⁷ held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness.

In **State of U.P. vs. Ramesh Prasad Misra** the SC. Held that the evidence of a hostile witness would not be totally rejected if spoken in evidence which is consistent with the case of the prosecution or defense may be accepted.

In **Balu Sonba Shinde vs. State of Maharashtra**¹⁸ the SC. Held that the declaration of a witness to be hostile does not ipso facto reject the evidence. The portion of evidence being advantageous to the parties may be taken advantage of, but the Court should be extremely

¹⁷ AIR 1976 SC 202

¹⁸ 2003 SCC (Cr.) 112

cautious and circumspect in such acceptance. The testimony of hostile witness has to be tested, weighed and considered in the same manner in which the evidence of any other witness in the case.

Thus we can finally conclude that in order to provide justice Evidence and witnesses are very necessary and they hold a very important place in the Law. With the help of Evidence the judge reaches a verdict. The evidence heard by the court is the most important factor in determining whether the judgment will be in favour of Prosecution side or Defense side.

6. Child Witness-

In *State vs. Allen*,¹⁹ it was observed that the burden of proving incompetence is on the party opposing the witness. Courts consider 5 factors when determining competency of a child witness. Absence of any of them renders the child incompetent to testify. They are-

1. An understanding of the obligation to speak the truth on the witness stand;
2. The mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it;
3. A memory sufficient to retain an independent recollection of the occurrence;
4. The capacity to express in words his memory of the occurrence; and
5. The capacity to understand simply questions about it.

¹⁹ 70 Wn2d 690, 424 p. 2nd 1021 (1967)

PRESUMPTIONS OF LAW AND PRESUMPTIONS OF FACT

Presumption:-

An idea that is taken to be true on the basis of probability

Presumption of Law:-

1. Discretion of Court—

No discretion is vested in the Court at all. The law peremptorily requires a certain inference to be made whenever the facts appear which the law assumes as the basis of the inference.

2. Rules of law-

Presumptions of law are, in reality rules of law and part of the law itself.

3. Presumptions of law must be drawn.
4. Kinds—

There are two kinds of presumptions of law—rebuttable and irrebuttable.

Presumptions of Fact:-

1. A discretion, more or less extensive as to drawing the inference, is vested in the tribunal.
2. Resumptions of fact are not rules of law.
3. Presumptions of fact may or may not be drawn.
4. There is no such division in the case of presumptions of fact.

Conclusive Presumptions are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong.

Rebuttable presumptions are rules defining the nature and the amount of the evidence which is sufficient to establish a prima facie case and to throw the burden of proof upon the other party; and, if no opposing evidence is offered, the Court is bound to come to a conclusions in favour of the presumption.

Mixed presumptions or presumptions of law and fact, lie in –between the above two, and consist mainly of certain presumption inferences which attract the observation of the law.

‘Presumption’ and ‘Proof’:-

“Proof” is that which leads to the conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Proof may be effected by (1) evidence, (2) admissions, or (3) judicial notice. Thus, presumptions are the means, and proof is the end, of judicial inquiry. Presumption is merely an inference. When a rebuttable presumption operates in favour of a party, it is for the opponent to disprove it by adducing evidence to the contrary.
