

8. LAW OF EVIDENCE

LAW OF EVIDENCE

1. § Meaning of the word Evidence

Like most of the words used in the statutes the word has a popular as well as technical meaning.

Popular meaning

Evidence in its ordinary sense signifies that which makes apparent the truth of the matter in question.

4 Mad. 393.

Technical meaning

The word however is used in the Evidence Act in a technical sense.

Section 3 defines the sense in which the word evidence is used in the Evidence Act. According to that Section

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 fact under enquiry;

(2) All documents produced for the inspection of the Court.

This definition of the term 'Evidence' is incomplete.

The depositions of witnesses and documents which only are included in the term evidence as defined by the section are the two principal means by which the materials upon which the judge has to adjudicate are brought before him. The examination of witnesses is generally indispensable and by means of it, all facts except the contents of documents may be proved (Sec. 59). For the proof a document as a statement made by the person by whom it purports or is alleged to have been made, oral Evidence is required. (Sec. 67-73).

As compared with the definition of the word "Proved" this definition of the word "Evidence" is narrow. According to the definition of the word "Proved",

"A fact is said to be proved when, after considering **the matters before it**, the Court believes it to exist"

The Expression **matters before it** is much wider than what the word Evidence is said to include.

Evidence does not include :

- (1) Statement made by the parties and accused persons.
- (2) demeanour of witnesses.
- (3) Results of local inspection.
- (4) Facts judicially noted.
- (5) Any real and personal property, the inspection of which may be material in determining the question at issue such as weapons, tools or stolen property.
- (6) Questions put to the accused by the Magistrate and the answers.

But all these are included in the expression “matters before it”.

The point is that the definition of evidence is strictly applicable to matters dealt with in the Evidence Act. It does not apply to evidence as dealt with by other Acts.

2. § Genesis of the Indian Evidence Act.

1. The Law of Evidence in India is contained in Act I of 1872.

§ Diversity of the Law of Evidence

2. There were two sets of Courts in British India ever since 1773 when the Regulating Act was passed by Parliament with a view to control the administration by the East India Company of its Indian possessions. There were the Supreme Courts established by Royal Charter in the Presidency Towns of Bombay, Madras and Calcutta. In the Muffassils, there were Courts established by the East India Company, Civil and Criminal. The rules of Evidence followed by the Supreme Courts were different from the rules of evidence followed by the mufassil Courts.

3. The Supreme Courts followed such of the rules of evidence as were contained in the Common and Statute Law which prevailed in England before 1726 and which were introduced by the Charter of that year in India. Some others were rules to be found in subsequent statutes of Parliament expressly extended to India ; while others again, had no greater authority than that of use and custom.

4. For the Courts outside the Presidency Towns and not established by the Royal Charter no complete rules of Evidence were ever laid down or introduced by authority. Regulations made between 1793 and 1834 contained a few rules. Others were derived from a vague **customary law of evidence** partly drawn from the Hedya and **Mohomedan Law Officers**. Others were drawn from English text books.

§ Efforts towards Uniformity:

5. The first Act of the Governor General in Council which dealt with evidence, strictly called, was **Act X of 1835** which applied to all the Courts in British India and dealt with the proof of the Acts of the Governor General in Council.

This was followed by **eleven enactments passed at intervals** during the next twenty years, which effected various small amendments of the law of evidence and applied to the Courts in India several of the reforms in the law of Evidence made in England.

In 1855, Act II of 1855 was passed for the further improvement of the law of evidence which contained many provisions applicable to all the Courts in British India.

6. Notwithstanding this attempt at uniformity there continued to be a great deal of disparity between the rules of Evidence applicable in the Presidency Towns and those applicable in the Muffassil. This disparity continued to be the subject of frequent judicial comment.

To remedy this state of affairs, Act I of 1872 was passed.

§ Construction of the Act:

1. An Act may be (1) to *consolidate* or (2) to *amend* or (3) to *consolidate and to amend* or it may be to *define* i.e. to codify. The construction of an Act would differ according as it is a consolidating Act or a Codifying Act.

2. **Construction of a Codifying Act:** The rule of construction in regard to a Codifying Act is laid down in (1891) A. C. 107 (120).

Bank of England vs. Vagliano.

Lord Halsbury observed:

P.120.

“I am wholly unable to adopt the view that where a statute is expressly said to Codify the law, you are at liberty to go outside the Code, so created, because before the existence of that code another law prevailed.”

Lord Harschell observed:

P. 144

“The proper cause is in the first instance to examine the language of the Statute and to ask what is its natural meaning, **uninfluenced by the considerations derived from the previous state of the law** and not to start with enquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words will bear an interpretation in conformity with this view.”

3. The object of codification of a particular branch of the law is that, on any point specifically dealt with by it, such law should be sought for in the codified enactment, and is ascertained by interpreting the language used.

4. **Construction of a Consolidating Act:** The rule of Construction in regard to a Consolidating Act is laid down in (1894) 2 Ch. 557.

Shitty J. (P. 561) observed after referring to the rule of construction laid down in *Bank of England* vs. *Vagliano* in regard to a codifying Act. in Lord Halsbury

“ But I have here to deal, not with an Act of Parliament codifying the law, but with an Act to amend and to consolidate the law and therefore it is I say these observations (of lord Halsbury) do not apply and I think it is legitimate in the interpretation of the section in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the legislature.”

5. The object of consolidation with or without amendment is merely to assemble together the scattered parts of the Existing law. It is merely a re-enactment of the old law. It is not a new enactment of the law. Prima facie the same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted.

6. The Indian Evidence Act is as stated in the Preamble an Act to *Consolidate, define and amend* the law of evidence.

It is not a statute which merely consolidates and amends the evidence i.e. it codifies the law of evidence. Its constructions will be governed by the rule laid down in *Bank of England vs. Vagliano* and not by the rule laid down in it.

§ Scope and Extent of the Act

1. The scope of the Act is defined in *Section 2*. Under section 2 the law of evidence is contained:

(i) In the Evidence Act and

(ii) In other Acts or statutes which make specific provision on matters of evidence and which are not expressly repealed.

This Section in effect prohibits the employment of any kind of evidence not contained in the Act or any other statute or Regulation not expressly repealed.

Section 2:—The following laws shall be repealed.

(1) All rules of Evidence not contained in any Statute Act or Regulation in force.

(2) All such rules contained in Regulation as have acquired the force of law under Section 25 of the Indian Councils Act, 1861.

(3) Enactments mentioned in the Schedule.

2. The Evidence Act and other Acts relating to Evidence—

(1) The Evidence Act is a separate statute dealing with an important branch of law and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope unless it is clearly proved that they have been repealed or altered by another statute.

7 Lah. 84.

§ Application of the Act

Section 1 prescribes the application of the Act

(1) Territorial Application

It extends to the whole of British India and therefore applies to the Scheduled Districts.

It extends to places where it has been declared to be in force.

(2) Application to Tribunals

It applies to all judicial proceedings **in or before any Court.**

(i) WHAT IS MEANT BY A JUDICIAL PROCEEDINGS?

There is no definition.

An inquiry is judicial if the object of it is to determine a jural relation between one person and another or a group of persons or between him and the Community generally ; but even a Judge acting without such an object in view is not acting judicially.

12 Bom. 10 M. I. A. 340.

An inquiry under section 32 of the Bombay Land Revenue Code is not a Judicial proceeding.

22 Bom. 936.

2. The Act applies to all judicial proceedings i.e. to **civil** as well as **criminal**.

3. The Act speaks of proceedings not merely suits and trials. Proceedings is a wider term. Inquiry under *Section 107* or *144* of the Criminal Procedure Code is not a trial but is a proceeding. Similarly execution of a decree is not a suit but is a proceeding. Consequently the Act applies to proceeds other than trials and suits.

(ii) What is a Court

1. Section 3 which is an interpretation clause speaks of the sense in which the word Court is used in the Act. According to this Section—

“Court includes all Judges and Magistrates, and all persons, except Arbitrators, legally authorised to take evidence.”

2. **This Section does not define what is a Court.** It merely says what is to be included in the meaning of the word Court i.e. what functionaries are to be treated as a Court.

3. Where in an interpretation clause it is stated a term includes this and that, the meaning is that the term retains its ordinary

meaning and the clause enlarges the meaning of the term and makes it include matters which the ordinary meaning would not include.

23 A. L. J. 845.

4. The Court means all persons except Arbitrators who are legally authorised to take evidence. That being so the word Court is not to be confined to persons presiding over a Civil tribunal or a Criminal tribunal.

A Registrar holding an enquiry and taking evidence under the Registration Act is a Court.

15 Mad. 138.

A Commissioner appointed under order XXVI R. 1-10 of the Civil Procedure Code and under Section 503-508 of the Criminal Procedure Code is a person legally entitled to take evidence and as such he is a court.

5. Judges.

No definition of the word “Judges” is given in this Act. Section 2 (8) of the Civil Procedure Code defines the word ‘Judge’ to mean the presiding officer of a Civil Court.

Section 19 of the Indian Penal Code, also gives definition of the word Judge. According to this definition a Judge is a person designated as a Judge also a person who is empowered by law to give, in any legal proceeding, civil or criminal a definitive judgment.

6. Magistrates.

No definition of this term is given in the Act. The General Clauses Act (X of 1897) lays down the following definition of the term:—

Magistrate shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force.

7. The peculiarities of these definitions is that they are neither uniform nor are they co-extensive.

(i) The basis of the definition of Judge in the Civil Procedure Code is the presidency of the officer.

The basis of the definition of the same word under the Indian Penal Code is his authority to give the Judgement. The basis of the definition under the Evidence Act is the power to take evidence.

(ii) The definition of a Judge under the Criminal Procedure Code would not include a Magistrate. But the definition in the Indian Penal Code would include a Magistrate.

(iii) The Evidence Act would not include Arbitrator either Judges or Magistrates. But the definition of 'Judge' in the Indian Penal Code would include Judges, Magistrates as well as Arbitrators.

The conclusion is that the definition of the word Court in the Evidence Act is framed only for the purpose of the Act itself and should not be extended beyond its legitimate scope.

§ Proceedings to which the Evidence Act does not apply

1. The Act does not apply to :—

(i) Judicial proceedings in or before a Court Martial convened under the Army Act or Air Force Act.

(ii) Affidavits presented to any Court or officer.

(iii) Proceedings before an Arbitrator.

Proceedings before a Courts Martial

1. The Act does apply to the proceedings of a Courts Martial under the Indian Army Act i.e., it applies to **Native Courts Martial. Act VIII of 1911.**

2. The Act also applies to all proceedings before the Indian Marine Courts.

Act XIV of 1887 s. 68.

Act V of 1898.

Act XVII of 1898.

Act I of 1899.

3. The Act does not apply to the proceedings of a Court Martial convened under the British Army or Air Force Act.

Questions relating to evidence are determined by **Ax 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.

The law of evidence which governs the proceedings before a court is the **Ax fori**.

This provision of the Evidence Act is an exception to this general principle.

II. Affidavits.

1. Ordinarily the evidenced witnesses shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge (Order 18 R. 1. Cl. P. C).

2. An Affidavit is a evidence contained in a statement or a declaration in writing on oath or affirmation before a person having authority to administer oath or affirmation.

3. Matters relating to affidavit are regulated by the Civil Procedure Code.

4. Affidavit is evidence not taken before the Court and not subjected to cross examination.

5. The safeguards for truth in affidavits are two :

(i) Provisions for the production of the witness for cross Examination.

(ii) Provisions of the Penal Law relating to giving of false evidence.

III. Proceedings of the Arbitrator.

He gives rough and ready justice and cannot be bound by the technicalities of the Law of Evidence.

§ Proper approach to the study of the Evidence Act.

1. The Indian Evidence Act divides the subject matter of evidence into three parts :

Part I deals with Relevancy of facts—what facts can be proved.

Part II deals with Proof.

Part III deals with Production and Effect of Evidence—Burden of Proof.

2. This may be a logical order. It may be a scientific order. But this certainly does not appear to be a natural order, natural from the point of view of the litigant.

3. The rules of Procedure regulate the general conduct of litigation ; the rules of pleading help to ascertain for the guidance of parties and the Court, the material facts in issue in each particular case. Then arises the question of proof i.e. the Establishment of the facts in issue by proper legal means to the satisfaction of the Court.

4. The first question which faces the litigant is **who must prove the issue ?** The questions bow and by what sort of evidence he can prove them are secondary questions to him. We must therefore begin with **Burden of Proof.**

PART I

BURDEN OF PROOF

(1) What is meant by Burden of Proof.

Description, letter, then definition :

The judge or jury can decide a case only by considering the truth and value of the several facts alleged and proved by the parties and as the facts are unknown to both judge and jury. They must be established by evidence. The question at once arises, which party must adduce evidence ? The responsibility for adducing such evidence as will establish any allegation is called the “Burden of Proof”.

2. The subject-matter of the Burden of Proof as applied to judicial proceedings falls into two parts :

1. Burden of Proving an issue.
2. Burden of Proving a particular fact.

THE NECESSITY FOR MAKING THIS DIVISION.

1. The Proof of an issue may involve the proof of many facts as they may involve the proof of only one fact.

Illustration :

1. Issue is, Did *A* commit murder of *B* ?
2. Issue is, Is the signature on the document that of *A* ?

Issue No. 2 involves the proof of one fact only.

Issue No. 1 may involve the proof of many facts.

e, g. Was *A* present ?

Could *C* see him ?

Is the bloodstained shirt his ? and so on.

§ Burden of Proving an issue.

3. The framing of an issue presupposes an assertion of the existence of a certain set of facts and circumstances by one party and the denial of them by the opposite party. There are

two ways by which the issue may be adjudicated upon (1) By proving that the circumstances alleged do not exist or (2) By proving that the circumstances alleged do exist. Question is which of the two modes of proving the issue to be adopted—the mode of proving the affirmative or the mode of proving the negative.

4. Where there are no reasons for holding :

(a) that what is asserted is more probable than what is denied

and

(b) where the means of proof are equally accessible to both the parties

then the rule is that the party which alleges the existence of the facts must prove that they exist. The burden is on him who states the affirmative of the proposition. He who denies need not prove that they do not exist

This rule is laid down in Section 101.

5. Reasons why the law requires the affirmative to be proved instead of the negative.

(1) The man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not on the want of right or the weakness of proof in his adversary.

Illus. *Midland Rail Co. vs. Bromby* —17 C B 372.

Doe vs. Longfield—16 M & W 497.

17 C.B. 372

P. 380

(2) A simple negative by reason of its indefiniteness is difficult if not impossible of proof. A person asserts that a *certain event took place*, not saying when, where, or under what circumstances. How can a person disprove that, and convince others that at no time, at no place and under no circumstances has such a thing occurred. The utmost that could possibly be done in most instances would be to show the

impossibility of the supposed event and even this would require an enormous mass of presumptive evidence.

A negative averment must be distinguished from a contradiction of a positive averment, technically known as a "traverse".

Illustrations:

Malicious Prosecution.

In an action for Malicious Prosecutions the Plaintiff makes two main allegations.—

(1) That the Defendant prosecuted him,

(2) That the Defendant had no reasonable cause for the prosecution.

The first being affirmative the second a negative averment. The burden of proof of both of them is on the Plaintiff.

Negligence.

The Defendant did not take reasonable and proper care.

This is not a negative but a negative Averment

6. Two things must be noted with regard to the rule of evidence that the affirmative of a proposition must be proved

12 Mad. 526-15 Jur. 544-545.

What is a traverse.

1. It is a matter which relates to the law of pleadings. Before Judge is asked to decide any question which is in controversy between litigants, it is in all cases desirable and in most cases necessary, that the matter to be submitted to them for decision should be clearly ascertained. The defendant is entitled to know what is it that the plaintiff alleges against him ; the plaintiff in his turn is entitled to know what defence will be raised in answer to his claim. The defendant may dispute every statement made by the plaintiff or he may admit or admit and allege other facts which put a different complexion on the case.

To put it technically a Defendant may either :

- (1) Admit
- (2) Deny
- (3) Deny and allege other facts.

2. When a defendant denies the allegation of the Plaintiff in the Plaint, he is said to traverse it. A traverse is the express contradiction of an allegation of fact in an opponent's pleading. It is generally a contradiction in the very terms of the allegation. It is as a **rule framed in the negative** ; because the fact which it denies is as a rule alleged in the affirmative. These traverses of affirmative allegations must be distinguished from a **negative allegation** which is in truth a positive allegation.

If a party asserts affirmatively, and it thereby becomes necessary to his case to prove that a certain state of facts does not exist, or that a particular thing is insufficient for a particular purpose, and such like—these although they resemble negatives,—are not negatives in reality : they are in truth possible averments, and the party who makes them is bound to prove them.

Plaintiff may have to prove negative in order to prove his positive **assertion**.

A negative averment if in truth it is a positive averment must be proved by the plaintiff.

Sale and Mortgage-Adequacy of price. Price is not inadequate ?

II. To remember that the affirmative and the negative of the issue mean the affirmative and negative of the issue **in substance** and not merely its affirmative and negative **in form**.

Illustrations :

- (1) Moody and Robinson 464. *Amos vs. Hughes*.

Fact alleged in the Plaint.

That the defendant did not emboss the Calico in a workmanlike manner.

Fact alleged in the Written Statement.

The Defendant did emboss the Calico in a workmanlike manner. On whom is the burden ? If **form** alone was considered the burden would be on the Defendant. If substance was taken into account the burden must be on the Plaintiff. Although put in the negative he affirms that the workman embossed the Calico in an unworkman like manner.

(2) 7 Carrington and Payne 612. *Loward vs. Leggatt*.

Fact alleged by the Plaintiff.

That the Defendant did not repair the premises as bound by the covenant

Fact alleged by the Defendant.

That the Defendant did repair.

In form the burden is on the Defendant.

In substance it is on the Plaintiff.

The Burden of proving the issue in Criminal Trials

1. Section 101 is a general section and applies to both civil as well as criminal proceedings.

Section 105 is another section which relates to the burden of proving an issue as distinguished from the burden of proving a fact but applies to criminal proceedings only.

2. To understand this section it is necessary to know the scheme of the Indian Penal Code. The Indian Penal Code defines various offences such as theft, murder, cheating etc. Some 400 in all. The task of framing definitions which would be exact, neither too wide, nor too narrow has been very difficult and with the best of efforts the authors of the Code have failed to frame exact definitions. They have however erred in making them too broad. Consequently they found it necessary to limit these definitions by enacting exceptions. Some of these exceptions are common to all the offences as defined by the Code. Other exceptions are specifically applicable to a particular offence.

Illustration (1):

(1) Whoever causes hurt 323

(2) Whoever steals 379

Whoever = Any person who does etc.,

Any person = Any person of whatever age so that the definition as given in the section would make even a child 1 year old guilty. But the Penal Code recognises that a child below 7 has no *mens rea* = criminal mind which is the essence of the offence. To exempt children from the liability of an offence it would be necessary to say whoever above 7 years etc., in every section of the Indian Penal Code.

(1) Whoever takes any property belonging to another from his possession without his consent—378.

(2) Whoever wrongfully confines—342.

(3) Whoever enters into or upon property in the possession of another—441.

(4) Whoever assaults or uses criminal force—352.

It is obvious that under these definitions a Bailiff who acted under the order of his superiors in levying the attachment would be guilty of theft /378 and criminal trespass /441. Similarly a police officer who arrested a person in the discharge of his duty would be guilty of assault /353 and wrongful confinement /342.

That was not the intention of the framers of the Penal Code. It recognizes the necessity of exempting Public Servants from the penal consequences of their acts done in discharge of their duty. To exempt public servants from the scope of the definitions of offences it would be necessary to say in each one of these sections “Whoever not being a public servant in the discharge of his duty”.

Instead of repeating these limiting words in so many different sections to which they are common the Penal Code has grouped them together in Chapter IV which is called **General Exceptions** and which cover sections 76 to 106.

There are also limiting clauses which apply to some specific offence as defined in the Penal Code.

Illus—

Section 499. Defamation.

Definition is so wide that there are **ten** Exceptions.

The necessity of 9th Exception—protection of interest
Such Exceptions are special Exceptions as distinguished from General Exceptions.

Proviso—

Illus Sec. 92 I. P. C.

Question is who should prove that the case of the Accused falls within the Exception, General or Special. Exception or the Proviso as the case may be ? The prosecution who alleges that it does not or the Accused who alleges that it does ? **The Answer is given in Section 105.** The burden is on the Accused to prove.

This is a departure from the previous law. Under it the burden was on the prosecution to prove that the case did not fall within the Exception,

§ Burden of Proving an Exception to a Civil Law—

1. There is no specific section in the Evidence Act which regulates the Burden of Proof in respect of an exception to a Civil Law. The rule is however the same as in Criminal Law. Namely that the Defendant must prove that his case falls under the Exception.

Illus—15 Cal. 555

“The suit is governed by Section 37 of **Bengal Act XI of 1859** (Revenue Sale Act)—and that section dealing separately with encumbrance and under tenures, lays down that the Auction purchaser shall be entitled to avoid all under tenures and to eject the holders of them **with certain exceptions**, and then goes on to set out the Exceptions. It appears to us that the presumption is in favour of the general proposition of law laying down that all under tenures are voidable, and that pleading a certain exception is bound to bring himself within it. That being so, **it will be for the Defendant in this case to bring himself within the exception** which he pleads.”

§ Burden of Proving an Exception a proviso/or a condition precedent in an Agreement.**1. Distinction between a Proviso and an Exception.**

A Proviso is properly speaking the statement of some thing extrinsic of the subject-matter of a covenant which by the terms of the covenant is to go in discharge of that covenant by way of defeasance.

An Exception is a taking out of the covenant some part of the subject-matter of the covenant.

Whether particular words form a proviso or an exception will not in any way depend on the precise form in which they are introduced, or the part of a deed in which they are found.

2. The rule of pleading is that a Plaintiff need never state a proviso in his plaint, but he must always state an exception.

Aga Syud Saduck vs. Raji Jackariah Mahomed.

2 Ind. Jur. N.S. 308(310)

310. Markby J.

In the Note to *Thursby vs. Plant* 1 Wms. Saund. p. 2336 it is laid down that a proviso is properly the subject of some thing extrinsic of a subject-matter of a covenant by way of defeasance. An exception is a taking out of the Covenant some part of the subject-matter of it. Of these be right definitions a Plaintiff need not never state a proviso, but always state an exception.

3. Although this is laid down as a rule of pleading it also holds good as a rule of burden of proof. So if a clause in an instrument such as a policy of assurance, be an exception, the Plaintiff must only state it, but show that it is not applicable. If it be a proviso the Defendant must state it, and show that it applies.

2 Ind. Jur. N.S. 308, 310

2. Ind. Jur. N. S. 308.

1867

A sued B. & Co. on a policy of insurance on the ship "Alaya" from noon of the 24th November 1865 to noon of the 24th February 1866 "and to all ports and places", The words "and to all ports and places" were written, the rest being printed. B & Co. in their Written Statement admitted the policy, but set up the following exception: "All risks or losses arising from the detention *etc.*; also from storms and gales of wind, or other perils of the sea; while touching or trading on the Coast of Coromandel from Point Palmyras to Ceylon and within surroundings between the 15th October and 15th December inclusive are here by excepted, which risks or losses are to be borne by the assured and not by the Assurers, notwithstanding anything to the contrary hereinbefore expressed."

3. Akiks

4. Condition Precedent = Proviso.

In this connection the law of evidence has appointed three principles.

I. The burden of proof of a fact is on a person who wants to benefit himself by the special facilities provided by the law of evidence for the proof of that fact.

Section 104 is an illustration of this principle.

2. § Burden of proving a particular fact.

1. The rule is the same as in the case of burden of proving an issue. That is the burden of proving a particular fact is on the party who affirms the existence of the fact and not upon the party who denies it. The rule is contained in Section 103 and the reasons of the rule are the same in both cases.

2. There are however certain facts the burden of proving which is placed by law upon a particular person irrespective of the question whether he asserts its existence or denies its existence. Sections 104 to 111 specify the cases in which the law of evidence places the burden on particular persons.

3. The principles underlying these sections and which justify this departure from the general rule relating to Burden of Proof seem to be four.

I. The burden of proving a fact should be on a party who wants to take the benefit of the **special** facilities provided by the law of evidence for the proof of that fact.

II. Where parties are unequal in their relative position the burden of proving a particular fact should rest on the one who is comparatively in a better or stronger position.

III. Where things have continued to exist the burden of proving their discontinuance is on the party who alleges discontinuance.

IV. Where one fact is a mere legal incident of another fact the burden of proving that the incident should not be attached to the fact is on the party who alleges that it should not be.

§ Sections illustrative of the First principle.

1. Section 104 is an illustration of the First Principle. This deals with the burden of proof of a fact, the proof which is a necessary prerequisite for the proof of another fact.

2. The law of evidence lays down certain conditions which must be fulfilled before evidence of a particular fact is given. Similarly the law of evidence lays down certain conditions which must be fulfilled before a particular method of proving a fact can be resorted to.

Illus-I.

Nothing is evidence unless it is given before and in the presence of the Court. Ordinarily therefore the statement made by a person who is dead is not evidence. The law of evidence however permits evidence being given of anything said by a deceased person if it is relevant to the issue on the condition that the fact of his death is proved.

Illus-II.

The law of Evidence requires that the contents of a document must be proved by the production of the original. The law however permits secondary evidence being given on the condition that the loss of the original is proved.

3. The question is who must prove the fact of death or the fact of the loss of the original document ? In general who must prove these prerequisites ? Section 104 lays the burden on the party who wishes to profit by these special facilities.

§ Sections illustrative of the Second Principle.

1. Section 106 and 111 illustrate the Second Principle.

Section 106.

1. This section deals with the burden of proof of a fact which is especially within the knowledge of one of the Parties.

(i) If A alleges a certain fact and if B denies it then by virtue of the rule contained in Section 103, A must prove it because A affirms it.

(ii) But if the fact is especially within the knowledge of B then by virtue of this section the burden of proof in respect of it rests on B.