

2. Illustrations.

22 Cal 164.

Haradhan had 2 daughters—twins about a year old—sold one of them to Karuna a prostitute for Rs. 9 and within 10 days sold to Karuna who she had brought up from her infancy and who was then living with her and leading the life of a prostitute.

Question. On a prosecution under Sec. 372/373 for buying and selling minors for prostitution the question was who should prove that the intention was that the girls were to be used for prostitution. By the accused-being a matter within their knowledge.

23 All 124.

Several persons were found at 11 O'clock at night on a road just outside the city of Agra all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry arms, and none could give reasonable explanation of his presence at the spot.

On a charge under Section 402 held burden of intention on the Accused.

Section 111.

1. This section deals with the burden of proof in respect of the *good faith* of a transaction.

2. Definition of good faith.

(1) Good faith is not defined in the Evidence Act.

(2) It is defined in Section 52 of the Indian Penal Code. Nothing is said to be done or believed in 'Good faith which is done or believed without due care and attention.

(3) It is also defined in Section 3 (20) of the General Clauses Act X of 1897.

"A thing shall be deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not".

(4) The difference between the two definitions is that the *question of honesty* is immaterial to good faith as defined by the Penal Code. But it is the very core of the definition as given in the General Clauses Act.

(5) The term good faith as used in the Evidence Act is used in the sense in which it is used in the General Clauses Act.

3. The General rule regarding Burden of proving good faith.

(i) It is a general principle of law to hold that all persons in their dealings act fairly. Nothing dishonourable or odious is to be attributed to any person. Law will not impute vice and immorality. That being so the person who wishes to impeach the conduct of any person as being dishonest or unfair has the burden of proving dishonesty and unfairness. In other words the burden of proof in respect of good faith is upon the person who allege the absence of good faith. The motive must be proved.

(ii) Section 111 enacts an exception to this general rule and prescribes the circumstances in which a person must prove affirmatively the presence of good faith.

If the good faith of a transaction between two parties is questioned by one of them and the two are so related that one stands to the other in a position of *Active confidence* the burden of proving good faith affirmatively is on the person who stands in the position of active confidence.

This Exception applies only where the two parties to the transaction are so related that one stands to the other in a position of active confidence.

(IV) Meaning of the “Position of Active Confidence” :

(i) Position means legal relationship.

(ii) Active confidence means habituated to consult and act on advice.

Position of Active confidence therefore means such legal relationship between the parties as gives rise to the habit in one party to consult the other for the protection of his interest and imposes upon the other the duty to see that his advise is such as will safeguard his interest.

The section contemplates *legal relationship* between the parties such that it becomes the duty of the person taken in confidence to protect the others interests.

<i>Coulson vs. Allison</i>	The rule applies because parties
<i>2.D.F.&J. 581.</i>	were husband and wife.
<i>Hargeave vs. Everard</i>	The rule was not applied because
<i>6.Ir.Ch.R.278.</i>	parties were not husband and wife but mistress and paramour.

A transaction between *Trustee and beneficiary, solicitor and client, father and son or husband and wife* would be subject to this rule if the issue of good faith were raised.

(V) The rule although confined by the Section to *cases* where one person stands to the other in a position of active confidence it is extended by the Court to all cases where a person has domination over another and is in a position to exercise undue influence.

Sections 107-108.

1. They must be read together because 108 is only a proviso to the rule contained in Section 107.

2. The sections do not deal with the question, how long was a person alive.

3. The sections do not deal with the question at what *time* he died.

4. The sections do not deal with the question whether he was alive or dead at some antecedent date.

5. The sections deal with the question whether a person is alive or dead at the time when the question is raised, that is at the date of the suit.

Sections illustrative of the third Principle.

Sections 107, 108 and 109

Sections 107 deals with the burden of proof where the *question is whether a man is alive or dead.*

According to this section where it is proved that the person in question was alive within the last 30 years then the burden is upon the party who asserts that he is dead. Where it is not proved that the person in question was alive within the last 30 years then the burden is on the person who alleges that he is alive.

Section 108 deals with the burden of proof where the question is whether the man who has not been heard of is alive or dead.

According to the section :

(1) if the man is not heard of for *seven* years

and

(2) by those who would *naturally* have heard of him the burden is upon the party who *affirms that he is alive.*

Comment—

The death of any party once shown to have been alive is a matter to be determined by the Court. As the presumption is in favour of the continuance of life the *onus* of proving the death lies on the party who asserts it. But the presumption of continuance of life ceases at the expiration of 7 years from the period when the person in question was last heard of. And the *burden* of proving that the person was alive within the seven years is upon the person asserting it

But a Court may find the fact of death from the lapse of a shorter period than seven years, if other circumstance concur.

Re.: Walker (1909) P. 115.

Application of Sections 107-108.

The question for which provision is made in these two sections is whether a person is alive or dead at the time the question is raised. These sections do not apply where the question is whether the man died at a particular time. If any one seeks to establish the precise time of death the burden of proof is upon him.

Section 109. This section deals with the burden of proof as to continuance or discontinuance of three relationships.

(1) Partners.

(2) Landlord and tenant.

(3) Principal and agent

This section provides that once it is shown that two persons have stood in the relationship of partners, Landlord and Tenant or Principal and Agent the burden of proving that they have ceased to stand in that relationship is on the party who alleges that they have ceased.

§ Section illustrative of the 4th Principle—

Section 110. This section deals with the burden of proof regarding title to property when the competition is between a person in possession and the owner who is out of possession.

1. The rule laid down in Section 110 is that the burden of proof that the person in possession is not the owner is on the person who alleges that he is not the Owner.

Reason for the Rule—

Ownership chiefly imports the right to exclusive possession and enjoyment of a thing. The owner in possession has the right to exclude all others from possession and enjoyment of it; and if he is wrongfully deprived of what he owns, he has the right to recover possession of it.

Ownership also imports the power to dispose of property, to sell, mortgage or donate.

Right to possession and Right to dispose of are therefore incidents of Ownership. Where there is ownership there goes with it the right to possession and the right to dispose.

The law therefore holds that a person would not be in possession of property unless he was the owner and places the burden on his opponent.

The principle of the section does not apply in the following cases—

(i) Where the possession is merely judicial as distinguished from actual present possession.

(ii) Where possession is obtained by fraud or force.

BURDEN OF PROOF

1. The Law requires the person to discharge the Burden of Proof which is placed upon him.

2. In discharging the Burden of Proof attention must be paid to two considerations.

(i) There are Matters of which Proof is not required.

(ii) There are Matters the Proof of it is not allowed.

3. We must therefore proceed to consider these matters and the rules regulating them.

I. BURDEN OF PROOF

(i) Matters of which Proof is not required.

§ Facts of which Proof is not required.

1. Matters of which Proof is not required fall under three heads:

- (1) Facts Judicially noticed.
- (2) Facts admitted by the Parties.
- (3) Facts the existence of which is presumed by law.

§ (i) Facts judicially noticed.

1. Sections 56 and 57 deals with facts judicially noticed.

2. Section 56 says no fact of which the Court will take judicial notice need be proved.

3. Sec. 57 lays down 13 matters of which the Court *must* take judicial notice.

4. Principle of the Section. Certain matters are so notorious and are so clearly established that it would be useless to insist that they should be proved by evidence.

Illus.—

- (1) Commencement and Continuance of hostilities.
- (2) Geographical Divisions.

5. The last two paras are important and read with section 56. They furnish a clue to the proper understanding of them. The effect is that when a matter enumerated in Section 57 comes into question, the parties who assert the existence to the contrary need not produce any evidence in support of their assertions. The judge must come to a conclusion without requiring any formal evidence.

(1) The Judge's own knowledge may be sufficient. If it is not he must look the matter up.

(2) The Judge can also call upon the parties to assist him, if he thinks it necessary.

(3) The Judge in making this investigation is emancipated entirely from all the rules of evidence laid down for the investigation of facts which the law require s a person to prove.

(ii) Facts admitted by parties.**Section 58**

1. There are two sorts of admissions which must be distinguished.

(1) Formal admissions made touching matters related to a proceeding in a Court and made intentionally by parties so as to dispense with their Proof.

(2) Informal admissions alleged to have been made by a party to the proceedings but not made in the course of the proceedings.

2. Section 58 applies only to formal Admissions.

Formal admissions may be made by parties in 6 different ways :

(i) On the pleadings.

(ii) In answer to interrogatories.

(iii) In answer to a notice to admit specified facts.

(iv) In answer to produce and admit documents.

(v) By the Solicitor of a party during the litigation.

(vi) In open Court by the litigant himself or by his Advocate.

3. Proof of such facts would be futile. The Court has to try the questions on which the parties are at issue and not on which they are agreed.

4. Applicability of Sec. 58 to criminal trials is a matter on which there is a difference of opinion.

(i) **Norton** says that it does not apply to criminal trials.

(ii) **Cunningham** says that it does.

30 Bom. L. R. 646.

Section 58 makes no exception in regard to criminal proceedings.

Rat. Un. Cr. C. 769.

Section 58 makes no exception in regard to Criminal Proceedings.

39 Mad. 449.

On general principals of Jurisprudence Sec. 58 ought not to be applied to criminal trials.

“The question remains whether the Provisions of the Act are exhaustive and whether we can invoke the aid of the principles of Jurisprudence or of English Law as supplementing and explaining the rules of Evidence given in the Act.” 12 All. 1. English rules of Evidence apply.

The rule is not an absolute rule. The section provides that a fact which is admitted may be required by the Judge to be proved by evidence by the party on whom the Burden of Proof lies.

This is a safeguard intended to protect simple and ignorant persons against mistakes.

It is probably under this proviso that admissions in Criminal trials are not permitted.

§ Facts the Existence of which is presumed by Law.

1. Definition of presumption.

A presumption is a conclusion or inference drawn from a certain fact.

2. Principle underlying the rule of Presumption :

(1) The universe is no doubt composed of diverse elements and the motives that operate upon people are different.

Notwithstanding this there is a certain amount of regularity and uniformity.

(2) With respect to **things** the order and changes of the seasons, the rising, setting and the course of heavenly bodies, and the known properties of matter-magnetism-specific-gravity show a certain regularity and uniformity of movement and occurrence.

(3) With respect to **persons** the natural qualities, powers and faculties which are incident to the human race in general are more or less uniform.

(4) With respect to **Conduct** of men more or less the uniformity.

They are actuated by the same uniformity.

3. Given this uniformity it is possible to say that given one thing another can be said to follow.

4. It is on this principle Section 114 is based.

1. It empowers the Court to presume the existence of a fact if that fact is a **likely result** of a particular fact.

2. The test is—

- (i) common Course of natural events.
- (ii) human conduct.
- (iii) Public and private business.

3. It gives 9 illustrations of what would be likely results of certain facts.

4. **Explain.**—Illustrations (not given in MS—ed)

5. An event likely in one circumstance may very unlikely in another circumstance. Therefore in drawing a presumption the Court must have regard to the facts of the particular case.

Explanations to illustrations (not given in MS—ed)

6. There can be no general codification of presumptions because the likely result must vary under circumstances.

7. The effect of presumption is to relieve a person from the Burden of Proof.

8. Presumption of Law and Presumptions of fact.

9. Rebuttable and Irrebuttable Presumptions.

Norton P. 381.

II. Analogous presumptions are maxims of law. They are also called presumptions in the loose sense of the word.

1. There are certain maxims of Law which are also called Presumptions.

2. Illustrations of Maxims of Law :

(1) The law will presume that every body knows the law.

(2) The law will presume that every person intends the natural consequences of his acts.

(3) The law will presume that an accused person is innocent.

(4) The law will presume that every human being is endowed with the power of understanding.

(5) The law will presume that no man will throw away his property for instance, by paying money not due.

(6) The law will presume that money advanced by a Parent to his child is intended as a gift, and not as a loan.

(7) The law will presume that a parent prefers his own children to those of others.

These maxims are related to burden of Proof. They help to fix the burden.

§ Presumptions as to Documents 79-90

1. Presumption as to the genuineness of certified copies. 79
2. Presumption as to the genuineness of documents Produced as record of evidence. 80
3. Presumption as to the genuineness of gazettes, Newspapers. 81
4. Presumption as to documents—In England without proof of seal or signature. 82
5. Presumption as to maps or plans made by authority of Government. 83
6. Presumption as to books of law and report of decisions. 84
7. Presumptions as to powers of attorney. 85
8. Presumptions as to certified copies of foreign Judicial records. 86
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Burden of Proof

(ii) Matters of which Proof is not allowed

1. § Matters which parties are debarred from asserting. (conclusive evidence).
2. § Matters which parties are estopped from proving. (Estoppel).
3. § Matters stated without prejudice.
4. § Matters which are irrelevant.

1. § Matters which parties are debarred from asserting—

Matters which parties are debarred from asserting are spoken of in the Evidence Act as Matters of Conclusive proof or commonly spoken of as irrebuttable presumptions or presumptions of Law.

They are dealt with in Sections 41, 112 and 113.

II. Section 112

1. This section deals with the Question :

How to prove that A is the legitimate child of **B** and his wife **C** ?

2. There are two ways of proving this fact according to two different contingencies.

(i) If the contingency is that the child is born during wedlock.

(a) Prove lawful marriage between **B** and **C**.

(b) Prove the Existence of Marital relations between **B** and **C** **at the date of the birth of A.**

On proof of these two facts the Law will conclude that **A** is the legitimate son of **B** and **C**.

(ii) If the Contingency is that the child is born after dissolution of the marriage between **B** & **C**—Either by death of the father or divorce.

(a) Prove that **A** was born within 280 days after the dissolution of the marriage by death or divorce.

(b) Prove that the mother had remained unmarried during that period of 280 days.

On Proof of these two facts the law will conclude that **A** is the legitimate son of **B** and **C**.

Points to be noted

1. The deciding factor in the question of legitimacy is not the time of the conception of the child but the time of the birth of the child. Whoever was the husband of the woman at the time of the birth of the child is the father.

Illus.

1. *Pal Singh vs. Jagir*. 7 Lahore 368.

Harnam Kaur married Hari Singh. Hari Singh died on the 10th January 1919. Harnam Kaur married Sohan Singh on

25th February 1919. Jagir was born to Harnam Kaur on the 17th October 1919 i.e. 279 days after the death of Hari Singh and **198 days after her marriage to Sohan Singh.**

On a question being raised whether Jagir was the son of Hari Singh, **Held** that he was the son of Sohan Singh and not of Hari Singh.

2. *Palani vs. Sethu. 49 Mad. 553.*

Pechi Ammal married Subramanya in October 1903. That marriage was dissolved in June 1904.

Pechi married Thirumani in July 1904.

Palani was born during the second week in September 1904 i.e. 4 months after the dissolution of Pechi's marriage with Subramanya and 3 months after her marriage with Thirumani.

Whose son is Palani ? of Subramanya or Thirumani.

Held he was the son Thirumani.

2. This is treated as case of conclusive proof. This is treated so not because the truth is beyond dispute. A woman although married lawfully to one man may be in the keeping of another and her children may well in fact be the children of her paramour. This is so treated because for reasons of public policy or in the interests of Society an artificial probative value is given by the law to certain facts and no evidence is allowed to be produced with a view of combating that effect. Under Section 112 artificial probative value is to the following facts.

(1) The fact of marriage.

(2) The fact of access.

So that where these two facts exist the law concludes that issue born must be legitimate i.e. it must be issue born of the husband.

(2) This conclusion can be demolished only by giving evidence of non-access.

It must be proved that the parties to the marriage had no access to each other at any time when the child could have been begotten.

Meaning of non-access.

1934. 38 Bom. L.R. 394.

Karapaya vs. Mayandi.

Access does not imply actual cohabitation. It means no more than opportunity of intercourse.

Kerapaya, a Madras Hindu acquired considerable property in Burma. He died a lunatic in 1923.

Karapaya first married Karapayi and then married Nachiama. Kerapaya lived with Nachiama at Tamagyo while Karayappi was living at Houlmein with her mother and brother.

In December 1911 an agreement made between (Left incomplete—ed.)

(3) The conclusion cannot be demolished by giving evidence of inability to cohabit.

29. I. A. 17

1901

Narendra vs. Ram Govind.

Upendra was married to Tilottama. Upendra died on July 15 from the effects of a Carbuncle in his back, from which he had been suffering for sometime.

After the death of Upendra, Tilottama gave birth to a son Narendra on April 18, 1887 i.e. 9 months 10 days or 280 days after the death of Upendra.

There were three questions to be considered :

1. Was Narendra the child of Tilottama—Upendra ?
2. Was he born within 280 days from the death of Upendra ?
3. Is it proved that he and she had no access to each other at any time when the appellant could have been begotten ?

On the last issue the evidence was as follows:

Tilottama was married when she was quite a child and lived with her parents. But shortly before his death in July 1886 she went to live with her husband. How long before it is not clear. Some witnesses said five or six days others said ten or twelve days.

The important circumstances in the case were two :

(1) That Upendra died from the effects of a Carbuncle from which he had been suffering for a fortnight.

(2) That Upendra had made will on the 14th July 1886 appointing Tilottama as his Executrix and directing her to adopt a son.

The contention was that if he was ill he could not have cohabited. The contention was negative.

(3) Inability to cohabit must be distinguished from genital inability. 1935. (All India Reporter) *P.O. 199* (for Physical inability).

Query-If he was impotent.

The Section abrogates the rules of Hindu and Mahomedan Law regarding Legitimacy. 10. *All. 289*.

1. According to Mahomedan Law a child born six months after marriage or within two years after divorce or death of the husband is presumed to be her legitimate offspring.

2. According to Hindu Law it is ten months after divorce or death of the husband.

The section does not prohibit a person born after 280 days from proving he is the legitimate son. Only the burden of proof is upon him.

24 *All. 445*. 357 days after the death of the father.

There is a difference between the English and Indian Law of Evidence regarding the competency of the Husband and wife on the issue of access when the question of the Legitimacy of the child arises.

1. Under the English Law they are incompetent.

2. Under the Indian Law they are competent.

38 *Mad. 466*.

28 *Bom. L.R. 207*.

Section 113

1. The section deals with the Burden of Proof regarding the cession of a territory.

How is it to be proved that a certain territory which was once a part of British India has ceased to be part of British India.

The question is not merely academic. It is of great practical importance. It goes to the root of the question of the jurisdiction of the Court. If a territory is not a part of British India then it is not subject to the Jurisdiction of any Court.

2. Provision was made in Section 113. It said that a notification in the Gazette of India that a British Territory has been ceded to any native State Prince or Ruler should be taken as a conclusive proof that a valid cession of such territory took place at the date mentioned.

3. This Section has been declared to be *ultra vires* of the Indian Legislature and therefore void and of no legal effect by the Privy Council.

1. Bombay 367 *Damodar Gordhan vs. Deoram Kanji.*
P.O.1876

The Governor General in Council being precluded by the 24-25 Vic. O. 67 Sec. 22 from legislating directly as to sovereignty or dominion of the crown on any part of its territory in India or as to the allegiance of British subjects cannot by legislative Act (E. G. Evidence Act. S. 113) purporting to make a notification in the Government Gazette conclusive proof of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of that cession.

Judgements as conclusive Proof.

1. Just as certain facts are deemed to be conclusive proof of certain other facts, similarly the Evidence Act treats **certain** Judgements as conclusive on certain issues. **Sec. 41.**

2. The judgements which are declared to be conclusive are :—

(1) **Final** Judgement, order or decree of a **Competent** Court in the exercise of

- (1) Probate
- (2) Matrimonial
- (3) Admiralty
- (4) Insolvency Jurisdiction

which confers a legal character or takes away a legal character or declares a person to be entitled to a legal character or to a thing not against any specified person but absolutely.

Are conclusive Proof:

- (1) That the legal character as given or taken away.
- (2) That it is given or taken away on the date of the Judgement.

Section 41.

This section deals with use of Judgements of Courts of Law for the proof or disproof of certain questions.

Question is:

- (1) The right of a person to a certain status
- (2) When did such right accrue to him.

Question is :

- Did (1) A particular person cease to have a status
- (2) If so, when.

Question is whether any particular person was entitled to a certain property.

The Section declares that **certain Judgements** will be conclusive evidence of these facts.

What are these Judgements :

- (1) It must be a Judgement of a **Competent Court**.
- (2) It must be a Judgement in the exercise of
 - (i) Probate
 - (ii) Matrimonial
 - (iii) Admiralty
 - (iv) Insolvency

1. Which declares conferring or taking away of a legal character on or from any person.

2. Which declares a person entitled to any specific thing not against any specified person but absolutely.

3. If it is a final Judgement, order or decree.

Probate Jurisdiction.

The Courts exercise testamentary and intestate jurisdiction under:

- (1) Indian Succession Act.
- (2) The Hindu Wills Act.

(3) The Probate and Administration Act.

Matrimonial Jurisdiction.

Exercised under the Indian Divorce Act and other Acts relating to marriage and divorce.

Admiralty Jurisdiction.

Letters Patent of the High Court and the Colonial Courts Admiralty Act. 1890.

Insolvency Jurisdiction.

Charters and the Insolvency Acts.

§ Matters which parties are estopped from Proving.

1. The law of Estoppel is contained in Sections 115, 116, 117. Section 115 states the general rule of estoppel. Sections 116 and 117 enact particular kinds of estoppels.

2. Section 115.

(i) Comparison of Section 115 with Section 31.

Estoppel is like an Admission inasmuch as it is a statement of a fact. Most admissions can be withdrawn by the party who makes them. The fact that they were made remains, but the party who made them can be heard to explain that he made them rashly and carelessly or under an honest misapprehension. Even he could be heard to say that he knew what he said to be false. But a statement may be made by one person to another in such an unequivocal manner and under such circumstances that it has a decisive effect on the conduct of the other. The law will not permit a person making such a statement to contradict it. The margin between an estoppel and an admission is very narrow and the answer to the question whether a statement is a mere admission or is a estoppel depends upon the nature of the statement and the circumstances appertain to it.

(ii) What are the legal requirements of the Rule of Estoppel ?

The rule of Estoppel comes into operation when the three following conditions are satisfied. *37 Bom. L. R. 544 P. C.*

(i) A statement amounting to a representation of the existence of a fact has been made by the defendant or an

authorised agent of his to the Plaintiff or some one on his behalf.

(ii) With the intention that the Plaintiff should act upon the faith of the statement.

and

(iii) The Plaintiff does act upon the faith of the statement.

§ Statement must amount to representation.

(1) Representation may be by **word** or by **conduct**,

A. If it is by word it may be **active misrepresentation** made deliberately with a knowledge of their falsehood.

Illus.-

*McCance vs. London and Nother Western Railway Co.,
(1861)7 H. & N. 477.*

M entered into a contract with the Railway Co., to carry his horse in trucks which should be reasonably fit and proper for the carriage of horses from Edge Hill near Liverpool, to Wolverhampton. The Railway agreed to provide trucks which should be reasonably fit and proper.

M filled in a declaration form in which he stated that the value of a horse did not exceed £10 per horse. Under the system followed by the Railway there were modes of transporting horses. One was to send them in trucks allowing the owner to place as many horses as he liked in each truck. The other was to send them in horse boxes, each horse being placed in a separate stall. The rate of carriage by the latter mode being three times as much as when carried by the former mode. There was a further rule that the Railway would take horses above the value of £10 in trucks.

In transit some horses were injured owing to the defective state of the trucks provided by the Railway. The damage sustained by M on the basis that the value of each horse was £10 came to £25 which amount the Railway Company was agreeable to pay as they admitted that the trucks were defective. The Plaintiff claimed that the real value of a horse was £40 and the damages came to £55.

This is a case of active misrepresentation.

Illus. (2) Munnoo Lal vs. Lalla Choonee Lal.

1. I.A. 144

Reep Singh was in debt but possessed considerable Estate. M had been his Banker. On 9th October 1863 M obtained a mortgage from R of a property to secure a debt of Rs. 20,000 owed by R. On 9th August 1863 R sold the same property to C. When negotiations for the purchase took place between R and C, M was present and took part in same and in answer to inquiries by C gave him to believe that he had no lien upon the Estate.

In 1868 M filed a suit against C to enforce the payment of his mortgage bond. He was estopped.

This is also a case of active misrepresentation.

B. Representation may be innocent misrepresentation

Illus. Gould vs. The Bacup Local Board.

(1881)50 L.J.(M.C.)44.

Certain premises belonging to Gould were kept in a very insanitary condition. The Board asked him to do certain improvements which he refused to do. The Board then served a notice upon him stating that if he did not carry out the improvements within a given time the Board would execute them.

There were two modes of recovering the expenses which were prescribed by the Act, one was by Section 213 and another by Section 240. Section 213 allowed the Board to recover them by additions to the local rate levied by the Board and Section 240 allowed them to recover them independently in lump sum. In the notice served upon Gould it was stated that the recovery would be under Section 213. But in the suit the Board sought to recover the amount as provided by section 240. The Board was estopped. This is a case of innocent misrepresentation.

(2) Representation may be by words or may be by silence. Silence under certain circumstances may be eloquent and may amount to a representation as good and as real as is made by the spoken word.

But every case of silence cannot be taken as equivalent to speech. Because the law does not require a person to speak out what is in his mind on each and every occasion. The law requires

a person to speak only when there is a duty upon him to speak and to disclose his mind. Otherwise silence is golden.

Silence therefore to raise an estoppel must imply an obligation to speak. In considering the effect of silence it has to be seen whether there was any occasion for words and any reasonable occasion for silence. This ought to be done before relying on silence as a legitimate ground for inference.

(1896) A. C. 231 (238)

2 Br. C.C. 400(419)

6 Bom. L.R.

Illus. (1) **Silence no ground for Estoppel.**

10 Bom. L.R. 297.

A decree was obtained against the father by a judgment creditor. In execution the property was managed by the Collector and the proceeds were sent to the creditor. While this was going on, the father died and the son inherited the property. The Joint Creditor sought to execute the decree against the son who contended that he was not liable as the debts were improper. It was contended that the son was estopped because his silence was representation that he accepted the decree; Held that it was not because there was no duty.

Illus. (2) **Silence ground for Estoppel**

15 I.A. 171.

Sale by Court in Execution proceedings by a proclamation which described the rights of the Judgment-debtor very imperfectly. The result is that the property worth of Rs. 40,000 sold for Rs. 20,000. Suit was brought by the Joint Debtor to set aside the sale. Contention was that *silence was Estoppel*. Held it was, as there was a duty to come forward and get the proclamation corrected.

Representation may be by conduct

1. Conduct may amount to representation or it may not—

(i) Where it does amount to representation 19 I. A. 203.

(ii) Where it does not. 19 I. A. 221.

II. Conduct is either Active or Passive.

Passive conduct is either

(1) Indifference.

(2) Acquiescence.

Passive conduct to raise an estoppel must amount to acquiescence. It must not merely be conduct of indifference.

Conduct of Acquiescence may be described as follows—

“If a person having a right and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce a person committing the act, and who might otherwise have abstained from it, to believe that he asserts to its being committed, is a conduct which amounts to conduct of acquiescence”.

2 Bh. 117 (123)41 E.R. 886.

Imp. 45 Bom. I. L R. 80.

14 All. 362 (364).

Acquiescence may occur while the act acquiesced in is in progress or it may occur only after it has been completed.

For the purposes of Estoppel it must occur while the infringement is in progress. *Ch. D. 286 (314).*

Points to be noted.

1. Misrepresentation must be as to existing facts and not of mere intention. *5 R. L. Cases 185.*

Illus.—

I. A person has a legal right but between the time of its creation and that of his attempt to enforce it, he has made representation of his intention to abandon it.

2. There can be no estoppel where the truth of the matter is really known to *both parties*.

30 Cal. 539 P. C. Mohori Bibee vs. Dharemdas Chose.

On the 20th of July 1895 Damodar Das executed a mortgage in favour of one Brahma Dutt, a money lender. Brahma Dutt was absent throughout the transaction and the transaction was carried through by his attorney Kedar Nath, the money being found by Dedraj the local manager of Brahma Dutt. While the transaction was going on, the mother of Damodar Das wrote a letter to Kedar Nath the attorney that Damodar Das was a minor and any one advancing him any monies would do so at his own risk.

On the date of the mortgage Kedar Nath took a long declaration from Damodar Das that he was major.

On the 10th September 1895 the mother filed a suit for cancellation of the Deed of Mortgage on the ground that D was a Minor.

Contention of B was that D was estopped. Held he was not because facts was known to **B**.

Actually knowing the fact is different from having the means of knowing it.

L. R. 20 Ch. D. 1. Redgrave vs. Hurd.

The Plaintiff represented that his business brought in about £ 300 a year and produced 3 Summaries showing about 2/3rd of that together with some papers which Defendant did not examine. Upon the faith of this Defendant signed an agreement to purchase the Plaintiffs business and paid a deposit. Finding the business worthless he refused to complete and Plaintiff sued him for specific performance. Contention of Plaintiff was that Defendant was estopped from alleging that the representation of Plaintiff was false because he had the means of knowing the truth.

Jessel M. R. P. 21.

“Where one person induces another to enter into a contract by a material representation which is untrue, it is no defence to an action to rescind the contract that the person to whom the representation was made, had the means of discovering or might with reasonable diligence have discovered that it was untrue. It must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms or shewed clearly by his conduct, that he did not rely on the representation.”