

On the other hand if the witness was required to give his testimony in the form of answers to questions, two objects will be achieved:—

(i) his testimony could be made to confine to relevant matters only not being permitted to wander and

(ii) the Court can immediately check and rule out the introduction of irrelevant testimony.

3.

4. With regard to the examination of witnesses, there are two questions which are distinct and which are regulated by different law. The *order* in which parties are to produce their witnesses for examination, and the *course* of Examination to which each witness is to be subjected when he is produced before the Court, are two separate questions.

Sections 135,138

The order in which witnesses are to be produced by the parties is a matter which is regulated by the Civil and Criminal Procedure Codes. While the course of examination to which a witness is to be subjected, when produced, is laid down by the Evidence Act.

§ Order of Production of Witnesses

1. <i>In Civil cases</i>	<i>In Criminal cases</i>	
Order XVIII Rule 1.	Summons cases	224 Cr. P. C.
	Warrant cases	252
		254
		257
	Summary cases.	262

Rule seems to be this.

1. The first question to be determined is who has the right to begin.

2. The right to begin depends upon on whom is the burden of proof.

§ Course of Examination

1. The Course of examination of a witness prescribed by the Evidence Act is to consist of 3 parts.

Section 138

- (i) Examination in chief.
- (ii) Cross Examination.
- (iii) Re-Examination.

2. Examination in chief is the Examination of the witness by the party who calls him.

Section 137

Cross Examination is the examination of the witness by the adverse party.

Re-Examination is the examination of the witness by the party who called him subsequent to his cross examination by the adverse party.

Questions to be considered

3. Examination in chief is a matter of choice. No one can compel a party to call witnesses. But if witnesses are called and examined in chief, then the question that arises is this:— Is Cross-Examination and Re-Examination a matter of *right* or a matter of *privilege*, which may be granted or withheld according to the discretion of the Court ?

The answer to this question is that Cross-Examination and Re-examination are matters of right and not of privilege. The Court cannot stop a party from Cross-examining or Re-examining a witness who has been examined in chief by the party. What about a witness who is *called by the Court* and not by any party to the proceedings ? Is there any right to cross examine such a witness ? If so which party ? The Evidence Act makes no provision for such a case. It has however been held that a witness summoned and examined by the Court *cannot* as of right be Cross-Examined by either party without the permission of the Judge.

(1894) 2 Q. B. 316,

3 B. L. R. 145

11 W.R. 110

24 Col. 288

5 Cal. 614

16 W. R. 257.

4. When can the right to Cross examine be exercised ?

As to this, there is a difference between civil cases and criminal cases.

(i) In *Civil Cases*, the right must be exercised immediately. It cannot be postponed to a future date.

(ii) In *Criminal Cases*, in a summons case before the Magistrate and in the Sessions case the right must be exercised immediately. But in a warrant case, the accused has a right to postpone the Cross-examination of the prosecution witness to the next date of hearing.

The case of a person who is called as a witness by both the parties : In a litigation between A and B, C is cited as a witness by both A and B. First he is called as a witness by A on his behalf. After his cross-examination by B and Re-Examination by A, he is called as a witness by B on his behalf.

Can B Cross-examine C ?

There is no specific provision answering this question in the law of evidence. It is a question of judicial opinion. On this question there is a divergence of view.

(1) One view is that, when a person once gets a right to Cross-examine a witness, that right continues to him at all subsequent stages of the case against that witness, no matter in what role the witness reappears, so that, even if he comes as his own witness he can Cross-examine him. This view is based on the theory that every witness is favourably disposed towards the party calling him.

(2) The other view is that, each party should alternatively have the right of X Examining such a witness as to his adversary's case, while both should be precluded in the course of the respective Examinations-in-Chief from leading questions with regard to their own case. So that a Plaintiff may Cross-Examine any of his own witnesses, on hearing afterwards called on behalf of the Defendant.

The better opinion is that the right to X Examine does not survive and he cannot be asked leading questions on his Second Examination. If the adversary again called the same witness who has been examined by the other side and Cross-examined by him, he could clearly examine him in-chief.

This rule appears to have been adopted by the Evidence Act

5. Does this prescribed course of Examination apply to every witness ?

1. There are three sorts of witnesses who are called before the Court:

- (i) Those who are called to depose to relevant facts.
- (ii) Those who are called to speak to character.
- (iii) Those who are called to produce documents.

2. With regard to witnesses who are called to depose to relevant facts or to speak to character, they are subject to the full prescribed course of examination, Cross-examination and Re-examination. But the witness, who is called to produce documents, stands on a different footing. He is not a witness and therefore cannot be cross-examined.

6. Can one Co-accused Cross-examine a witness called by another co-accused ? Can one Co-defendant Cross-examine another co-defendant or the witness called by a co-defendant ?

(1) The Section does not make special provision for the case of Cross-examination by co-accused and co-defendants.

(2) The Evidence Act gives a right to Cross-examine witnesses called by the *adverse* party and to no other. Consequently, it follows that one co-accused can cross-examine a witness called by another Co-accused only when the case of the second is adverse to that of the first.

21 Cal. 401.

(3) The rule of English law in this respect is different. Under the English law the right of a defendant (and *a fortiori* an Accused) to Cross-examine a co-defendant or co-accused is, according to the English-cases, is unconditional and not dependent upon the fact that the cases of the accused and co-accused are adverse or that there is an issue between the defendant and his co-defendant. And one co-defendant may Cross-examine a co-defendant's witness and the co-defendant if he gives evidence.

The reasons for this English rule are :

(i) It is settled that the evidence of one party cannot be received as evidence against another party unless the latter has had an opportunity of testing it by Cross-examination.

Allen vs. Allen. L. R. P. D. (1894) 248/254.

(ii) It is also scaled that all evidence taken, whether in examination-in-chief or Cross-examination, is common open to all the parties.

Lord vs. Coloin. 3 Drewry 222.

(iii) It follows that if all evidence is common and that which is given by one party may be used for or against another party, the latter must have the right to Cross-examine.

7. What is the effect of a default in the course of the examination of a Witness prescribed by law ?

(1) This question can arise only when there is a default in Cross-examination or Re-examination. Until there is Examination-in-Chief, there is no evidence at all in the legal sense of that term.

It is only when evidence has been given by the witness in his Examination-in-Chief that this question can arise. The question to be considered reduces itself to the effect of default of Cross-examination or Re-examination on the testimony of a witness.

(2) Such default takes place when the witness dies or falls ill, becomes insane or paralytic or disappears after his Examination-in-Chief or before X Examination.

(3) The Evidence Act does not in clear terms state in express terms what the effect will be. Whether, for want of Cross-examination or Re-examination of a witness, his testimony given in Examination-in-Chief will cease to be evidence in the legal sense of the word and will have to be cancelled and excluded from the consideration of the Court or whether it will merely affect its evidentiary value, is not stated in the Evidence Act. The question is determined by Judicial interpretation.

According to judicial interpretation, two propositions are well established.

(1) Such default does not make the evidence inadmissible. It only affects its credibility.

(2) Whether it would be credible or incredible, must depend upon the reasons for the default in Cross-examination.

There are two ways in which default in X Examination may take place:

- (i) Where a party could have X Examined but did not do so.
- (ii) Where a party would have X Examined but could not do so.

The question of credibility could arise only in the second case. It could not arise in the first. The Law can give an opportunity and nothing more. If opportunity is not taken, the law holds there is no injury.

§ Regular Course of Examination

1. The Course of examination of a witness must be *regular*.
2. A Course of Examination to be *regular* must be in accordance with the rules laid down in the Evidence Act ?

3. The rules for a Regular Course of Examination relate to :

- (i) Scope of Examination.
- (ii) Manner of Examination.
- (iii) Limits of Examination.

§ Scope of Examination of a witness

Under this head, we must deal with matters on which it is permissible to a party to ask questions to a witness.

1. The objects underlying the examination of a witness are chiefly two :

- (i) to elicit from him what he knows.
- (ii) to test the truth of what he states.

2. The object of testing the truth of what the witness has stated can be achieved, only if, the Examination of the witness is extended to such questions as relate :

- (i) to the corroboration and contradiction of the witness.
- (ii) to the confirmation or impeachment of the credit or character of the witness.

3. Under *Scope of examination*, we shall therefore be concerned with Rules relating to the following subjects:

- (i) Rules relating to matters which can or cannot be elicited in the course of the Examination of the witness.
- (ii) Rules for testing the credibility or incredibility of a witness.
- (iii) Rules regarding the corroboration or contradiction of matters deposed to by the witness.

1§ Matters which can or cannot be elicited in the course of an Examination

1. This question is dealt with by Sections 138 and 146. The effect of these sections is that there are two kinds of matters which can be elicited from a witness in the course of his examination.

- (i) Matters which are relevant to the issue and
- (ii) Matters which relate to the credibility of the witness.

These are the only two matters on which a witness can be examined.

2. But every party is not entitled to examine a witness on both these matters

(1) With regard to matters which are relevant, both parties are entitled to examine the witness, the party who called him and the adverse party. Indeed the rule is not that the party is entitled to examine the witness on all relevant matters ; the rule is that the examination of a witness must be confined to relevant facts.

This rule applies not only to Examination-in-Chief but also to Cross-examination. The only difference is that Cross-examination need not be confined to matters raised in Examination-in-Chief. It may be extended to other matters not raised in Examination-in-Chief. But these other matters must also be *relevant* matters. Nothing that is irrelevant is permissible either in Examination-in-Chief or Cross-examination.

There is therefore no difference in the scope of the Examination-in-Chief or Cross-examination so far as relevant matters are concerned.

(Here concludes Page 203 of the M.S. Page 204 is missing. Following text starts from Page 205—ed.)

There is agreement on the absence of the particular virtue of truth telling has the necessary effect of shaking the man's credit and therefore such questions as relate to this aspect of the witness character are always permissible and can be asked in Cross-examination.

But there is no general agreement as to the absence of general good character on the veracity of a witness.

There are two views on the subject. One is that, bad general character necessarily involves an impairment of the truth telling capacity and therefore to show general moral degeneration is to show an inevitable degeneration in veracity. The other view is, a bad general disposition does not necessarily or commonly involve a lack of veracity and that, therefore, a bad general disposition is of no probative value for the purpose of shaking a witness's credit.

Under the English law, for the purposes of shaking credit by injury to character, general character is excluded and character for veracity only is taken into account.

§ Impeachment of Character otherwise than by Cross-examination

Section 155

1. Impeachment of character of a witness is permitted by the production of independent evidence under the provisions of Section 155.

2. *This again is a right of the adverse party.* So that a party who calls a witness cannot impeach the character of that witness by evidence of other persons.

3. *The impeachment may be undertaken in the following ways :*

(1) by evidence of persons who testify from personal knowledge that the witness is unworthy of credit.

(2) by proof that has been bribed or accepted the offer of a bribe or has received other corrupt inducement to give his evidence.

(3) by proof of former statements *inconsistent* with any part of his evidence which is liable to be contradicted.

(4) by proof in rape that the prosecutrix was of generally immoral character.

3 § Rules regarding corroboration and contradiction of a witness

1. *Definition of a Corroborative Evidence*—Corroborative evidence simply means evidence which has the effect of confirming the truthfulness of the testimony of a witness. It is evidence which makes the assurance of a witness doubly sure.

2. *Kinds of Corroborative Evidence.*—The Evidence Act recognises two kinds of Corroborative Evidence.

(i) Evidence of facts other than relevant facts.

(ii) Additional evidence of.

Section 156.

§ Corroborative Evidence of facts other than relevant facts

There are two requirements which must be fulfilled.

(i) The Corroborative circumstance of which evidence is being given must have been observed by the witness *at or near to the time* at which the relevant fact occurred.

(ii) The Court must be of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact

Illus.

A and B jointly committed robbery at a certain place. B is charged and A, the accomplice gives evidence against him. In his evidence A describes various incidents unconnected with the robbery which occurred on the way.

Prosecution call independent witnesses to prove the truth of the testimony of the accomplice relating to the *incidents on the way*.

The relevant question is whether *B* committed robbery. The Evidence tendered by the prosecution does not relate to the relevant question. Still it will be allowed as a corroborative evidence if the Court is of opinion that it will help to corroborate the testimony of the accomplice as to robbery.

§ Corroborative Evidence by way (of)* Additional Evidence of relevant facts

Section 157.

1. *This can be done by giving evidence of any former statement made by the witness relating to the same fact.* This is based upon the principle that he, who is consistent, deserves to be believed. The mere fact of a man, having on a previous occasion made the same assertion, may add little or nothing to the truthfulness. One may persistently adhere to falsehood once uttered, if there is a motive for it so that if consistency was conclusive nothing would be easier for designing and unscrupulous persons to procure the conviction of any innocent man, who might be obnoxious to them, by first committing offences and afterwards making statements to different people and at different times or places implicating the innocent man. *R. vs. Malappa, 11 Bom. H. C. R. 196 (198).*

2. The previous statement may be a statement made on oath or otherwise and either in ordinary conversation or before some persons who had authority to investigate and question the person who made it. It may be verbal or in writing. *There is one distinction between a previous statement made before a person who has authority to investigate and a previous statement made before a person not so authorised.* If not made before any

*Word inserted—ed.

person legally complain to investigate the fact, then to be admissible, must have been made at or about the time when the fact took place. This condition does not apply to a previous statement made before a person having authority to inquire.

25 Mad. 210.

Illus.

(i) A statement by a girl, alleging that she was raped made immediately after the rape, is admissible.

(ii) The dying declaration of a man, who chances to live, is admissible as a corroborative piece of evidence.

(iii) The first information given to the police is admissible as corroborative evidence of the testimony of the informant.

(iv) The Panchnama is admissible as a corroborative.

Two points must be urged by way of caution.

(1) The use of statements made to the police in the course of investigation under Section 162, Criminal Procedure Code. These are also *previous statements* made before a person who is authorised to investigate.

Can they be used for the purposes of corroboration ?

At one time it was held that they could be so used.

36 Cal. 281.

35 Mad. 397.

39 Bom. 58.

The Amendment to Section 162 of the Criminal Procedure Code excludes both the written record and *viva voce* statement made to the Police. Though previous statements, they cannot be used as a corroboration.

(2) The distinction between corroborative evidence and substantive evidence is important, because, on this depends the use of corroborative evidence. Corroborative evidence is not substantive evidence.

Illus.

In a trial of a prisoner, the depositions of witnesses given in a previous trial of other persons charged with having been

engaged in the same offence, were used against him. The witnesses instead of being examined in the ordinary way, were re-sworn and said "I gave evidence before in this Court and that evidence is true".

Held that this evidence was inadmissible. It was only corroborative evidence and could be used only when substantive Evidence is given. If substantive Evidence is not given, then corroborative evidence cannot be given.

12 W. R. Cr. 3.

Similarly—If a panch does not identify the accused, the Panchanama of identification as corroborative evidence could be inadmissible.

In this connection there arises the question of giving corroborative evidence of a person who cannot be called to give substantive evidence by reason of the fact that the witness is dead or who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense, which under the circumstances the Court thinks unreasonable.

Section 158 permits corroborative evidence being given although no substantive evidence is tendered. This is an exception to the general rule. That exception applies only *if the witness cannot be procured*.

This is an exception created by Statute. Another exception created by Statute is contained in Section 288 of the Criminal Procedure Code. By that Section, evidence before the committing Magistrate is treated as evidence before the Sessions Court for *all* purposes i.e. substantive Evidence of all facts deposed therein.

§ 3/2 § Rules regarding the contradiction of a witness

1. This is a matter which must necessarily be governed by two considerations :

(i) The object of inquiry by the Court is to get at the truth and therefore contradiction must be permitted.

(ii) If contradiction is permitted, the inquiry will be endless and therefore there must be some limit on the process of contradiction.

2. In what cases can a witness be contradicted ?

The Section which deals with the contradiction of a witness is Section 153. For the purposes of contradiction, the Section divides the answers of the witness into two classes (1) Answers to questions relating to relevant facts and (2) Answers to questions relating to the credit of a witness.

3. Are the answers of a witness to questions relating credit liable to contradiction ?

The answer given in Section 153 is positive to the effect that such answers shall not be contradicted.

There are only two exceptions to the rule :

(i) If previous conviction is denied, you can contradict it by evidence.

(ii) If the witness denies partiality he may be contradicted.

In this connection, it must be borne in mind that under the provisions of Section 155, the answers of a witness giving reasons in X-Examination for his belief in the untrustworthiness of another witness are not liable to be contradicted.

In all these cases, where the answers of a witness to questions relating to credit are not liable to contradiction, the law provides that if their answers are false they may afterwards be charged with giving false evidence.

4. Are answers of a witness to questions on relevant facts liable to contradiction ?

(1) Section 153 is negative in character and merely states cases in which contradiction is not allowed. It does not state in what cases contradiction will be allowed.

(2) It does not include answers to relevant questions in its prohibition. By implication it seems to permit contradiction of such answers.

(3) There is illustration (c) to Section 153 which shows that the legislature intended to permit contradiction of such answers.

5. Section 153, therefore, lays down the rule that you can contradict answers to relevant questions. But you cannot contradict answers to questions on credit.

§ Contradiction on relevant facts

1. The next question is; *Is such contradiction permitted to the party who called the witness or Is it permitted to the adverse party only?*

2. That, a party may contradict the answers given by the witness called on behalf of the adverse party, is beyond question and is always permissible. The defence witnesses are thereto contradict. But it does not seem to be quite so obvious in the other case. A witness is called on behalf of a party. In answer to a question on a relevant fact, he gives a particular answer which the party who called him feels is untrue. Can the party, who called him, call another witness to contradict him?

3. *The answer is that he can.* The law seems to make difference between discrediting his own witness by attacking his general character and showing that in a particular respect his testimony is incorrect.

§ Manner of Examination of a Witness

1. *Manner of Examination means the manner of interrogating the witness, i.e. the manner of putting questions.*

2. This matter is left not to the discretion of the party interrogating the witness, but is regulated by law.

3. From the standpoint of the manner of putting questions, questions are either leading questions or not leading questions.

4. A leading question is generally said to be a question which can be answered by a mere yes or no. Although, all such questions undoubtedly come within the rule, the character of leading question is not limited to them.

The Evidence Act defines a leading question as one, which suggests a particular answer, which the questioner expects to have from the witness. ?

Illus.

On a charge for murder by stabbing, to ask a witness 'Did you see the accused covered with blood and with a knife in coming away from the corpse?' is a leading question.

5. A distinction must be made between two sorts of leading questions,

(i) A leading question which suggests the answer.

(ii) A leading question which directs the attention of the witness to the *subject* respecting which he is questioned.

As an illustration of the second sort of leading question, take the following:

A was sued for defamation by B for having said in a conversation to C that B was in bankrupt circumstances and that his name would appear in the London Gazette among bankrupts. Question was asked to the witness.

“Was anything said about the Gazette ?”

This is not a leading question in the sense of a question which suggests an answer. It is a leading question which directs the attention of the witness to the *subject* about which he is being questioned.

The manner of interrogation in Examination-in-Chief varies from the manner of investigation in Cross-examination.

In Cross-examination, a witness may be interrogated in the form of leading questions. But leading questions must not be asked in Examination-in-Chief, if objected to by the opposite party.

In Examination-in-Chief, the witness must be asked merely such question as “What did you see ?” “What did you hear ?” “What happened next ?”

Reasons for the Rule

(1) A witness has a bias in favour of the party calling him and hostile to the opponent. He is, therefore, likely to agree to the answers suggested to him by the pleader of the party.

(2) That the party calling a witness has an advantage over his adversary, in knowing before hand what the witness will prove, or at least expected to prove ; and that, consequently, if he were allowed to lead, he might interrogate him in such a manner as to extract only so much of the knowledge of the witness as

would be favourable to his side, or even put a false gloss upon the whole.

Exceptions to the Rule.

Leading questions are permissible in Examination-in-Chief in the following cases :—

(i) Where the matters are merely introductory, such as a name, occupation of a witness.

(ii) Identification of persons or thing.

(iii) About matters which are not in dispute.

(iv) When a question from its very nature cannot be put except in a leading form.

(v) To contradict evidence already given by a witness on the other side.

E. G.—If the Plaintiff has sworn that the defendant said, “The goods need not all be equal to sample”, the Defendant can and should be asked, “Did you ever say to the Plaintiff that the Goods need not all be equal to sample or any other words to that effect?”

(vi) Where the witness is hostile. Difference between a hostile and a witness who is unfavourable.

A Witness should always state what happened according to his own personal recollection, and not according to what he has since been told.

Suppose the witness cannot recall the facts and his memory fails, what is to be done?

There are two ways open :

(1) To assist the memory of a witness by leading questions.

(2) To permit him to refresh his memory by permitting him to refer to any writing which is a record of the fact.

Examples of writings used to refresh memory are—

(i) Entries in diaries.

Entries in call books.

Entries in account-books.

Entries in Railway time-tables.

A witness may refresh his memory by referring to any writing or document *made by himself*. But he may also refresh his memory from documents made by other persons under his immediate observation.

The only condition is that the document must have been made at the time when the transaction was fresh in his mind or was *read by him*, if made by another person, at the time when the transaction was fresh in his memory and knew it to be correct.

A copy may be used if the original cannot be produced for reasons which satisfy the Court for its non-production.

Refreshing memory by inspecting a writing or document does not make it documentary evidence. So that a document which could be inadmissible in evidence for want of stamp would be admissible for refreshing memory.

There is a difference between referring to a writing for refreshing memory and using a document for corroboration.

A document which could not be used for corroboration can be used for refreshing.

Example : USE OF POLICE DIARIES

In connection with a document used for refreshing memory, it must be ascertained whether a memorandum does assist the memory or not.

The law, therefore, requires that such writing shall be produced and shown to the adverse party, if he requires it and he may cross-examine the witness thereupon, if he so desires.

8 Cal. 739 (745).

The grounds upon which the opposite party is permitted to inspect are threefold ; (i) to secure the full benefit of the witness's recollection as to facts; (ii) to check the use of improper documents and (iii) to compare his oral testimony with his written word.

Can the adverse party compel the witness to refresh his memory by referring to the writing.

It may be very advantageous to an accused person that Police Officer should state a certain fact. The Police Officer does not recall fact and would not refresh his memory by reference to his diary.

(8 Cal. 154), (8 Cal. 739) Says he cannot be compelled.

A. 1. R, (1924) Pat. 829, Says he can be compelled.

§ On the Limitations on the Examination of a witness

1. The subject-matter to be considered under this head relates to the questions a witness is bound or is not bound to answer.

2. The general rule is that a witness must answer *all* questions put to him.

Section 132.

Section 132 puts the matter negatively.

3. This rule is subject to *two* qualifications:

(i) Certain questions a witness cannot be *compelled* to answer.

(ii) Certain questions a witness is not to be empowered to answer.

4. Sections which deal with questions which cannot be *compelled* to answer are : 121, 122, 124, 125, 129.

5. Sections which deal with questions which a witness is not empowered to answer are : 123, 126, 127, 128.

DISCHARGE OF THE BURDEN OF PROOF

1. Effect of Evidence may be :

- (i) To prove a fact.
- (ii) To disprove a fact.
- (iii) To fail to prove and therefore disprove.

2. Burden of Proof is discharged when :

- (i) The fact required to be proved is proved.
- (ii) The fact required to be disproved is disproved.

3. Burden of proof is *not* discharged when the Party on whom the Burden lies fails to prove or disprove as the case may be.

4. When can a fact be said to be proved or disproved ? And when can it be said to be not proved.

The answer to this question is given in section 3.

NOTE.— Two things must be noted.

- (i) Proof does not mean rigid mathematical demonstration.
- (ii) Moral conviction is not proof.

Proof means Evidence.

But such evidence as would induce a reasonable man to come to some conclusion.

(1911) *I. K. B.* 988 (995).

31 *Bom. L.R.* 516.

The question of proof is one of probability and not of certainty.

Discharge of Burden of Proof and Quantum of Evidence

(I) Under the English Law corroboration is necessary in certain cases:

- (1) High Treason—Two witnesses.
- (2) Perjury—
- (3) Breach of Promise—
- (4) Bastard—Mother's testimony must be corroborated.

(II) Under the Indian Law the rule is absolute. The Court may act on the testimony of a single witness even though uncorroborated.

Exception.

PART V

