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LAW OF EVIDENCE

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THE LAW OF EVIDENCE

Volume 2

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

32. *Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.* Statements, written or verbal, of relevant facts made by a person who 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 of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :

(1) *When it relates to cause of death;* When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) *Or is made in course of business;* When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

(3) *Or against interest of maker;* When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or a suit for damages.

(4) *Or gives opinion as to public right or custom, or matters of general interest;* When the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

(5) *Or relates to existence of relationship;* When the statement relates to the existence of any relationship ¹[by blood, marriage or adoption] between persons as to whose relationship ¹[by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) *Or is made in will or deed relating to family affairs;* When the statement relates to the existence of any relationship ¹[by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) *Or in document relating to transaction mentioned in Sec. 13, clause (a);* When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, clause (a).

(8) *Or is made by several persons and expresses feelings relevant to matter in question;* When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth.

1. Ins. by the Indian Evidence (Amendment) Act, 1872 (18 of 1872), S. 2.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market.

A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window.

The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

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|---|--|
| s. 3 ("Relevant.") | s. 38 (Relevancy of depositions.) |
| s. 3 ("Fact.") | s. 80 (Presumptions as to documents produced as record of evidence.) |
| s. 3 ("Evidence.") | s. 114, Ill. (f) (Presumption as to course of business.) |
| s. 3 ("Court.") | s. 8, Ills. (j), (k) (Examples of dying declaration.) |
| s. 3 ("Document.") | ss. 13, 48 (Public and general customs or rights.) |
| s. 118 (Who may testify.) | s. 22 (Judgments relating to matters of a public nature.) |
| s. 158 (What matters may be proved in connection with proved statement relevant under s. 32.) | s. 65, cl. (d) (Secondary evidence.) |
| s. 21, cl. (1), Ills. (b), (c) (by or on behalf of person making it.) | s. 50 (Opinion on relationship when relevant.) |
| s. 90 (Ancient Documents.) | |
| ss. 47, 67 (proof of handwriting.) | |
| s. 104 (Burden of proving fact to be proved to make evidence admissible.) | |

Dying Declaration.—Steph. Dig. Art. 26; Wigmore, Ev., ss. 1430–1452; Taylor, Ev., ss. 714–722; 3 Russ. Cr., 354–362; Best, Ev., s. 505; Phipson, Ev., 11th Edn., 384; Roscoe, Cr. Ev. 16th Edn., 32–37; Powell, Ev., 9th Edn., 81–88; Wills, Ev., 3rd. Edn., 201–204; Norton, Ev., 175–177. Declarations in the course of business.—Steph. Dig. Art. 27; Taylor, Ev., ss. 697–713; Best, Ev., s. 501; Roscoe, N.P. Ev., 60–62; Wigmore, Ev., ss. 1517–1561; Powell, Ev., 9th Edn., 316–323; Smith L. C. Note to Price v. Torrington; Wharton, Ev., ss. 238–257; Phipson, Ev., 11th Edn., 397–399; Wills, Ev., 3rd Edn., 182–188; Norton, Ev., 177–179. Declarations against interest.—Steph. Dig. Art. 28; Wigmore, Ev., ss. 1455–1477; Taylor, Ev., ss. 668–696; Phipson, Ev., 9th Edn., 292–300; Best, Ev., s. 50; Roscoe, N. P. Ev., 55–59; Smith L. C. Note to Higham v. Ridgway, Powell, Ev., 9th Edn., 366; Wharton, Ev., 226–237; Wills, Ev., 3rd. Edn., 189–200; Act IX of 1908 (Limitation), s. 20 (see now Act XXXVI of 1963, s. 19), Norton, Ev., 179–184. Declaration as to public rights.—Steph. Dig. Art. 80; Taylor, Ev., ss. 607–634; Best, Ev., 48–51; Powell, Ev., 9th Edn., 338–349; Wills, Ev. 3rd Edn., 227–240; Norton, Ev., 184–188. Declarations as to relationship.—Steph. Dig. Art. 31; Wigmore, Ev., ss. 1480–1510; Taylor, Ev., ss. 635–637; Best Ev., s. 498; Phipson Ev., 11th Edn., 420–428; Wills, Ev., 3rd. Edn., 217–225; Roscoe, N. P. Ev., 44–48; Hubback's Edn., of Succession, 648–711; Wharton, Ev., ss. 201–225; Powell, Ev., 9th Edn., 349–357; Norton, Ev., 188–190; Statements in documents relating to transactions mentioned in S. 13; Norton, Ev., 190–192. Statements by a number of persons expressing feelings or impressions—Norton, Ev., 192–193; Cases cited.

SYNOPSIS

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|---|-------------------------------------|
| 1. Principle. | proof. |
| 2. Scope. | 7. "Statements, written or verbal". |
| (a) Sections 32 and 33. | (a) General. |
| (b) Sections 11 and 32. | (b) "Statement". |
| (c) Sections 13 and 32. | 8. "Of relevant facts". |
| 3. Evidence admitted is substantive evidence. | 9. "By a person". |
| 4. Requisites for admissibility. | 10. "Dead or cannot be found." |
| 5. Burden of proof. | 11. "Incapable of giving evidence". |
| 6. Section relates to relevancy, not | 12. "Delay or expense". |

[Note—After heading 12 the commentary on clauses 1 to 8 starts. For convenience the synopsis are given separately under each clause.]

1. Principle. The general ground of admissibility of the evidence mentioned in this section is that in the cases there in question no better evidence is to be had.²

The provisions in the section constitute further exceptions to the rule which excludes hearsay.³ As a general rule, oral evidence must be direct. (Sec. 60). The eight clauses of section 32 may be regarded as exceptions to that general rule. The purpose and reason of the hearsay rule is the key to the exceptions to it, which are mainly based on two considerations, a necessity for the evidence, and a circumstantial guarantee of trustworthiness. Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the tests applied to admissible evidence, namely, the oath and cross-examination. But where there are special circumstances which give a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source.

But it has not always been a question of absolute necessity. Sometimes practical convenience, sometimes inability to get evidence of the same value from the same or other sources, have been regarded as sufficient. Impossibility, convenience, expediency have all played a part. It may be impossible, or it may cause unreasonable expense or delay, to procure the attendance of a witness who, if present before the Court, could give direct evidence on the matter in question; and it may also be that this witness has made a statement, either written or verbal, with reference to such matter under such circumstances that the truth of this statement may reasonably be presumed. In such a case, the law, as enacted by Sec. 32, dispenses with direct oral evidence of the fact and with the safeguard for truth provided by cross-examination, and the sanction of an oath, the probability of the statement being true depending upon other safeguards which are mentioned in the following paragraphs. The truth of the declaration is deemed to be *prima facie* guaranteed by the special conditions of admissibility imposed. All the eight clauses of the section are based upon the principle that the statements are of such a nature or were made under such circumstances, as to guarantee their being true.⁴ An important difference between the law in India and in England is, that, in the latter country, this class of evidence can only be received where the author of the statement is dead. The ground for its admissibility being the absence of any better evidence, the other conditions mentioned in the section, under which, in India, such evidence is receivable, are consonant with reason and general convenience. These conditions of admissibility apply to all the eight classes of evidence which it comprises. It is for the Judge, in his discretion, to say, whether the alleged expense and delay is such as justifies the admission of the evidence, without insisting on the attendance of the author of the statement.⁵ The statements referred to in all the eight clauses of Sec. 32, are evidence against all the world, unlike statements receivable under the sections relating to admissions, which may only be proved as against the person who makes them or his representative-in-interest.⁶ But an admission may be proved by or on behalf of the person making it, when it is of such a nature that, if

2. Steph, *Introd.*, 165.

3. See *Sturla v. Freccia*, (1880) L.R. 5 App. Cas. 639, per Lord Blackburn; *Mst. Biro v. Atma Ram*, 1937 P.C. 101; 64 I.A. 92; I.L.R. 1939 All. 280; 167 I.C. 346.

L.E.—118

4. *Soney Lal v. Darbdeo*, 1935 Pat. 167, 171; I.L.R. 14 Pat. 461; 155 I.C. 470 (F.B.).

5. *Norton, Ev.*, 174, 175.

6. *Ib.* 143, 132, 133.

the person making it were dead, it would be relevant as between third persons under the thirty-second section.⁷

2. Scope. (a) *Sections 32 and 33.* This section is not controlled by Sec. 33.⁸ It makes relevant statements by a deceased person as to the cause of his death; Sec. 33 makes relevant evidence given by a witness when the witness is dead or cannot be found, etc. These are two quite distinct cases, the first relating to a statement, whether given in evidence or not, made by a deceased person as to the cause of his death, the second to a previous statement made by a deceased witness in any kind of legal proceeding, civil or criminal. In the latter instance, there is a qualification which is obviously necessary, that the former evidence must have been taken subject to cross-examination. There is no such qualification as regards the first instance, but the statement made to a Magistrate, authorized to take it, is evidence within the meaning of the definition already quoted. It cannot be said that Sec. 33 governs Sec. 32, for, if it did so, no statement made under Sec. 32 to a Magistrate empowered to record it would be relevant at all unless the accused has had an opportunity of cross-examination.⁹ The depositions of deceased witnesses will, in some cases be admissible even against strangers: as, for instance, if they relate to a custom, prescription, or pedigree, where reputation would be evidence, for, as the unsworn declarations of persons deceased would be here received, their declarations on oath are *a fortiori* admissible.¹⁰ A statement not made before a Court may be admissible, under this section.¹¹ Section 273 (old Sec. 353) of the Cr. P. C. is subject to it.¹² And Sec. 10-A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) does not override the provisions of Sec. 32.¹³

If the terms of a deposition, made by a person since deceased, are such that it does not come within the provisions of these sections and also it will not be admissible under Sec. 11.¹⁴ But, it has been held that statements of a deceased person, inadmissible under this section may be admissible as conduct of the person.¹⁵ Whenever any statement relevant under Sec. 32 or 33 is proved, all matters may be proved either in order to contradict or corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.¹⁶

(b) *Sections 11 and 32.* These sections cover different fields and there is no question of any overlapping, if properly construed. This section is an exception to the rule of hearsay, and it is not proper to read Section 11 as an exception to this section. Section 11 deals with "facts" while this section deals with "statements". The scope of Section 11 is very wide. There is no justification for the view that it will become otiose if "statements" falling under

7. S. 21, cl. (1), ante; ib. Ills. (b), (c): as to cess-returns, see Cess Act, IX (B.C.) of 1880.

8. Shyamanand Das v. Ramakanta Das, (1904) I.L.R. 32 Cal. 6; Sulaiman v. The King, 1941 Rang. 301; 197 I. C. 131; Aboobucker v. Sahib-khatoon, 1949 Sind 12; I.L.R. 1947 Kar. 224.

9. Sulaiman v. The King, 1941 Rang. 301; 197 I. C. 131.

10. See, e.g., P.C. 33-1754-55.

11. Abdul Aziz v. The Crown, 1950 Lah. 167; 51 Cr.L.J. 1350.

12. Ram Singh v. The Crown, I.L.R. 1950 Punj. 209; 1951 Simla 178.

13. Gurunath v. Mallappa, 1950 Bom. 340; 52 Bom. L. R. 288.

14. Bela v. Mahabir, 34 A. 341; 14 I. C. 116.

15. Chennupati v. Nelluri, A. I. R. 1954 Mad. 215; (1954) 1 M.L.J. 194; 66 L.W. 841.

16. See Sec. 158, *post*.

this section are excluded from its scope. The several clauses of this section, in a measure, take in portions of a few other provisions contained in this Act. This indicates that this section exhaustively deals with the law relating to relevancy of statements made by persons mentioned therein.¹⁷ As a general rule, Sec. 11 is controlled by Sec. 32 where the evidence consists of statements of persons who are dead : and the test whether such statement is relevant, under Sec. 11 though not relevant under Sec. 32 is this : it is altogether immaterial whether what was said was true or false, but highly material that it was said :¹⁸ *Sethna v. Mahomed Shirazi*.¹⁸⁻¹ Obviously, there is a difference between the existence of a fact and a statement as to its existence. Section 11 makes the existence of facts admissible, and not statements as to such existence, unless of course the fact of making that statement is itself a matter in issue.¹⁹ It has, however, been held that where the religion of a deceased person is a fact in issue, any solemn declaration made by him as to his religion is relevant and if such declaration is made in a formal document, for example in his will, it is relevant as an admission under the provisions of Secs. 11 (2), 14 and 21 (2) and is entitled to very great weight in deciding the question.²⁰ In a case, the Madras High Court has held that where the statements are attempted to be proved, not as statements made by the deceased but only to establish his conduct, there is no legal objection to the admission of the statements, even if they are not admissible under this section.²¹

(c) *Sections 13 and 32.* Section 13 lays down what facts are relevant when a right or custom is in question, while this section enumerates the cases in which the statement of a relevant fact by a person who is dead or cannot be found, etc., is relevant ; and clause (4) of this section enacts that a statement is relevant, if it gives the opinion of any person who is dead or cannot be found, etc., as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen. Where the statement of a third party is relied upon to prove the existence of a right or custom, there must be evidence, according to the provisions of this section, that that third person is either dead or cannot be found, etc., or that the third person must be examined in the case. If that third person is neither proved to have been dead, etc., nor has he been examined in the case, the statement made by him as to the right or custom cannot be held in law as admissible against a party to the suit or other proceeding. Thus, statements made about the boundaries in documents, cannot be held in law as admissible against a party, unless the third person making the statement is either examined in the case, or is proved

17. *Ravjappa v. Nilakanta*, A. I. R. 1962 Mys. 53.

18. *Ambica Charan v. Kumud Mohan*, 1928 Cal. 893 ; 110 I.C. 521; see also *Sethna v. Mohamed Shirazi*, (1907) 9 Bom. L. R. 1047; *Mst. Naima Khatun v. Basant Singh*, 1934 All. 406; I.L.R. 56 All. 766; 149 I.C. 781 (F.B.); *Munnalal v. Kameshwari Dat*, 1929 Oudh 113; 114 I.C. 801; *Latafat Hussain v. Onkarmal*, 1935 Oudh 41; I.L.R. 10 Luck. 423; 152 I.C. 1042; *Luchumanlal Pathak v. Kumar Kamakshya Narain Singh*, 1931 Pat. 224; 131 I.C. 788 ; 12 P.L.T. 891; *Sevu-*

gan Chettiar v. Raghunatha Doraisingham, 1940 Mad. 273; 1939 M.W. N. 841; See also *Thakurji v. Parmeshwar Dayal*, A.I.R. 1960 All. 339.

18-1. 9 Bom.L.R. 1047.

19. *Mst. Naima Khatun v. Basant Singh*, 1934 All. 406; I.L.R. 56 All. 766; 149 I.C. 781 (F.B.).

20. *Leong Hone Waing v. Leon Ah Foon*, 1930 Rang. 42; I.L.R. 7 Rang. 720; 121 I.C. 796.

21. *Venkatasubbamma v. N. Narayanaswami*, 1954 Mad. 215; (1954) 1 M.L.J. 194; 66 L.W. 841.

to be dead, etc.²² And a statement in a document by a third person, as to the relationship or right of a party to the litigation, is not admissible in evidence under this section, when that third person is still alive and there is no explanation for his non-examination. The statement as to the relationship, not being admissible under this Section cannot be held relevant under Section 11, nor can it be admitted under Section 13, because the determination of alleged relationship is neither a question of any right nor custom within the meaning of that Section.²³

Where a person asserts his right in his written statement in a previous suit and after his death, the same right is in dispute between his heirs and a third person, the fact that the deceased asserted his right in a previous suit is relevant under Section 13, and the person asserting the right in the previous litigation having died, it becomes relevant under clause (7) of this Section and the written statement in the previous suit is admissible in evidence.²⁴

3. Evidence admitted is substantive evidence. Evidence admitted under this section is substantive evidence.²⁵ A *jamabandi*, which can be used only as corroborative evidence under Sec. 34 can be used as substantive evidence, if it is relevant under this section.¹ But where a statement made by a person as a witness is used as evidence under this or the following section, a previous statement of his, which was used to contradict him under Sec. 158, does not become substantive evidence.²

In determining the market-value of land acquired on the relevant date, recital in a document of sale of other properties is not substantive evidence unless it amounts to an admission or falls within this section.³

4. Requisites for admissibility. The conditions upon which the statement may be tendered are the same as those mentioned in Sec. 33 (see notes to Sec. 33 post), with the exception that Sec. 33 adds the case of the witness being kept out of the way by the adverse party.

Before any statement can be admitted under this section, unless the person, making it is examined as a witness, it must be proved that the maker thereof is either dead, or too old and blind and unable to move about,⁴ or cannot be found, or has become incapable of giving evidence, or that his attendance cannot be procured without unreasonable delay or expense.⁵ State-

22. See Ramautar v. Sheonandan, A. I. R. 1962 Pat. 273; 1962 B. L. J. R. 11.

23. Bhogal v. Nabihan, A. I. R. 1963 Pat. 450.

24. Satyadeo Prasad v. Chanderjoti, A. I. R. 1966 Pat. 110; 1965 B. L. J. R. 800.

25. In re Karuppan Samban, 1916 Mad. 1211; 31 I.C. 359; 16 Cr. L. J. 759.

1. Charitter Rai v. Kailash Behari, 1918 Pat. 537; 44 I.C. 422; 3 P.L.J. 306; 4 P.L.W. 213; see also Jonab Biswas v. Siva Kumari Debi, 1927 Cal. 855; 104 I.C. 733; 46 Cr. L. J. 253.

2. Niamat Khan v. Emperor, 1930 Lah. 409; 127 I.C. 850; following R. v. C. C. Kutti, I.I. R. (1902) 26 Mad. 191 and Bishan Datt v. Emperor, 1927 All. 705; 105 I. C. 677; 28 Cr.

L. J. 965; 25 A.L.J. 994.

3. State of Kerala v. Mariamma Abraham, I.L.R. (1969) 1 Ker. 455.

4. Bhim v. Magaram, A. I. R. 1961 Pat. 21.

5. Abdul Baqi v. Kunja Behari Pandey, 1920 Pat. 697; 56 I.C. 818; Lakshan Chandra Mandal v. Takim Dhali, 1924 Cal. 558; 80 I.C. 357; 39 C.L.J. 90; 28 C.W.N. 1033; Karapaya v. Mayandi, 1933 Rang. 212; 147 I.C. 414; Gunga Prasad Gupta v. Emperor, 1945 Cal. 360; 221 I.C. 24; 46 Cr.L.J. 683; 79 C.L.J. 149; Raja Ram v. State, 1954 All. 214; 1955 Cr.L.J. 455; 1953 A.L.J. 686; Nallakuruppan v. Commissioner, I. L. R. (1965) 2 M. 404; A.I.R. 1966 M. 99; 78 I.W. 404; Ambika Yadav v. State, 1972 B.L.J.R. 107.

ments are not to be taken in evidence, if the Tribunal did not take steps to enforce the attendance of witnesses.⁶

Where there is no proper proof of statements, in the absence of the examination of the deponents or in the absence of evidence that they are dead besides the circumstances which would make them admissible under this section, the statements are not admissible in evidence.⁷

5. Burden of proof. The provisions of this section are in the nature of exceptions, and the onus of establishing circumstances that would bring a statement within any of the exceptions contemplated by it lies clearly upon that party which wishes to avail itself of the statement.⁸

6. Section relates to relevancy, not proof. The section relates only to the relevancy of evidence, not to the manner of its proof.⁹

7. "Statements, written or verbal". (a) *General.* What is relevant and admissible under clause (1) of this section is the statement actually made by the deceased (as to the cause of his death or of the circumstances of the transaction which resulted in his death) and not what he omits to state. In other words, no argument can be built upon what he has not said in his declaration. His declaration must be distinguished from the deposition he would have made, if he were alive. One could have drawn some inference from his failure to mention a fact in his deposition, but one cannot draw any inference from his failure to mention it in the dying declaration.¹⁰ The statements may be oral or written. But a mere statement of a rumour that the deceased had heard is not admissible under this section.¹¹ An affidavit of a deceased person has been held to be inadmissible under this or the next section.¹² In the case of an affidavit of a living person, the only basis, on which it can be acted upon as admissible evidence, is, that it should be capable of being regarded as a statement in writing complying with the conditions of this section.¹³ The expression "written statements made by a person who is dead" means that the written statements must have been actually made by the deceased person.

A person may make a written statement either by writing it out himself, or by dictating it to somebody else. Usually a person who is in immediate expectation of death is too feeble to be able to write out his statement himself, but if any written statement is produced in Court purporting to have been

6. Nani Gopal v. Abdul, A.I.R. 1959 Assam 200.

7. Sri Chidambareswara Sivagami Ambigai Temple v. Commissioner, H.R. E., Madras, I.L.R. (1965) 2 Mad. 404; (1966) 1 M.L.J. 109; 78 M. L.W. 404; A.I.R. 1966 Mad. 99, 102; Raj Bali Singh v. Dy. Director Consolidation, A.I.R. 1972 All. 291; Prabhakar Lal v. Shyam Lal (1972) 1 Mys.L.J. 473.

8. Abdul Gani v. Emperor, 1943 Cal. 465, 467; I.L.R. (1943) 1 Cal. 423; 209 I.C. 105; 45 Cr.L.J. 71; 47 C.W.N. 332.

9. See B. Nagaraja Rao v. Koothapan, 1941 M. 602; (1941) 1 M.L.J.

759; 1941 M.W.N. 518; 53 L.W. 634; Dogarmal v. Sunam Ram, 1944 Lah. 58; 212 I.C. 416; 45 P.L.R. 441.

10. Ram Bali v. State, 1952 All. 289, 297; 1953 Cr.L.J. 600; Balkari v. State of Rajasthan, 1975 Raj.L.W. 435.

11. Ram Krishna Roy v. The State, 1952 Cal. 231; 1953 Cr.L.J. 623.

12. Doraiswami Ayyar v. Bal Sundaram Ayyar, 1927 Mad. 507; 102 I.C. 243; 52 M.L.J. 477.

13. Marneedi Satyam v. M. Venkataswami, 1949 Mad. 689; (1949) 1 M. L.J. 434; 62 L.W. 256; Saligram v. Laxmi Narainji, 1955 Ajmer 28.

made by a person who is dead, it must be shown, if that person did not write that statement himself, that he dictated the statement, and that he did not make the statement in answer to any questions except such a question as "Will you please state what it is you wish to be written down?" and there must be guarantee that the dictation has been taken down correctly.¹⁴ Declarations by signs and gestures amount to "verbal statements".¹⁵ The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed.¹⁶ A declaration does not cease to be a dying declaration merely because the declarant lingered on for some days.¹⁷

(b) "Statement". The word "statement" is not defined in this Act. Hence, the dictionary meaning of the word should be looked to in order to discover its meaning. Assistance may also be taken from the use of the word "statement" in other parts of the Act to discover in what sense it has been used therein.¹⁸

8. "Of relevant facts". A statement to be admissible under this section, must be of a relevant fact.¹⁹ In one case,²⁰ the Bombay High Court has held that this Act only permits hearsay evidence to be given under this section of statements of relevant facts and not of statements of facts in issue. But the authority of this ruling has been doubted in a case by a Bench of the same Court.²¹ As pointed out in the case last cited, in many of the illustrations to the section, the statements said to be admissible are statements of facts in issue, and not merely of relevant facts; the line between a fact in issue and a relevant fact is often a very narrow one; and the authority of the earlier Bombay decision has been considerably impaired by the decision of their Lordships of the Privy Council in *Mst. Biro v. Atmaram*,²² where a statement of a fact in issue was held to be not inadmissible. In another Privy Council case, a statement made in a document which was a copy of the original was held to be admissible as a statement made by a deceased person in a document relating to a relevant fact.²³

9. "By a person". The word "person" must not be read as "persons". If a statement, written or verbal, is made by several persons, and one or some of them is or are dead, and one or others is or are alive, the statement of the deceased person or persons is admissible under this section notwith-

14. *Nga Mya Da v. Emperor*, 1936 Rang. 42, 43, 44; 160 I.C. 597; 37 Cr.L.J. 299.

15. See note post under the heading 7(b) "Statement", supra and notes under the heading Clause (i), "From of Statement" and "Statement by signs and gestures", Post.

16. *P. Narayana Swami v. Emperor*, 1930 P.C. 47; 66 I.A. 66; I.L.R. 1939 Kar. 123; 180 I.C. 1; 40 Cr. L.J. 364; 1939 A.L.J. 298; 41 Bom. L. R. 428; 69 C.L.J. 273; 43 C.W.N. 473; (1939) 1 M.L.J. 756; 1939 M.W.N. 185; 20 P.L.T. 265.

17. *Thakur Singh v. Emperor*, 1929 Lah. 64; 113 I.C. 177; 30 Cr. L. J. 65.

18. *Bhogilal v. State of Bombay*, 1959

S.C.J. 240; A.I.R. 1959 S.C. 356; 1959 Cr.L.J. 389; 61 Bom.L.R. 746; 1959 M.L.J. (S.C.) 101; 1959 All. W. R. (H.C.) 156.

19. *Marneedi Satyam v. M. Venkataswami*, 1949 Mad. 689; (1949) 1 M. L. J. 434; 62 L.W. 256.

20. *Patel Vandran Jekisan v. Patel Manilal Chunilal*, I.L.R. 16 Bom. 470.

21. *Jadav Kumar Liladhar v. Pushpabai*, 1944 Bom. 29; 211 I.C. 315; 45 Bom. L.R. 924; *Ambika Yadav v. State*, 1972 B.L.J.R. 107.

22. 1937 P.C. 101; 64 I.A. 92; 167 I.C. 346; 39 Bom. L. R. 726 (P.C.).

23. *Seethayya v. P. Subramanya Somayajulu*, 1929 P.C. 115; 56 I.A. 146; I.L.R. 52 Mad. 453; 117 I.C. 507.