have also held that there is no proof that the defendants claimed to hold under a rent-free grant to the knowledge of the plaintiff prior to 1931, and that what all has been established by them is non-payment of rent for a considerable but unascertained period of time. That, in itself, is not sufficient to make their possession adverse. It was only in 1931 that the defendants could be said clearly to have asserted a hostile title, and the suits are within time from that date. There is no substance in this plea, which is accordingly rejected.

In the result, the appeals are allowed, the decrees of the District Court and of the High Court are set aside, and those of the District Munsif restored with costs in this Court and in the two Courts below. The decrees of the District Munsif will stand as regards costs in that Court.

Appeals allowed.

SHREEKANTIAH RAMAYYA MUNIPALLI

v.

THE STATE OF BOMBAY
(With Connected Appeal)

[MUKHERJEA, S. R. DAS and VIVIAN BOSE, JJ.]

Criminal Procedure Code, (Act V of 1898), s. 197—Prevention of Corruption Act, 1947 (II of 1947), s. 5(2)—Charge thereunder and charge under s. 409 of the Indian Penal Code (Act XLV of 1860—Separated from each other—Sanction granted under s. 5(2) of the Prevention of Corruption Act—Whether could be extended as to cover prosecution under s. 409 of the Indian Penal Code—S. 197 of the Code of Criminal Procedure—Scope and construction of—Indian Penal Code, s. 34—Essence of—Whether the person must be physically present at the actual commission of the crime.

The three accused—Government servants—were jointly charged with an offence punishable under s. 5(2) of the Prevention of Corruption Act, 1947 and all three were further jointly charged with having committed breach of trust in furtherance of the common intention of all under s. 409 of the Indian Penal Code read with s. 34. Then followed a number of alternative charges in which each was separately charged with having committed criminal breach of trust personally under s. 409. As a further alternative, all three were

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jointly charged under s. 409. read with s. 109 for having abetted each other in the commission of a criminal breach of trust under s. 409. On objection taken to these charges, the trial for the offence under s. 5(2) of the Prevention of Corruption Act was separated from the trial under s. 409 of the Indian Penal Code. The charges were reframed. One under s. 5(2) was dropped while others remained. On 27-10-1949 the Governor-General acting under s. 197 of the Code of Criminal Procedure sanctioned the prosecution of the first accused (appellant No. 1) for offences under ss. 120-B, 409, 109 for having conspired with the other two to commit criminal breach of trust in respect of properties belonging to Government and for having thus abetted the commission of that offence and also for having committed it. Similar sanction was not given against the other two accused and was limited only to the first accused. On the same date sanction was given for the prosecution of the first accused under s. 5(2) of the Prevention of Corruption Act, 1947 and a similar sanction was given against the second accused. The question was whether this sanction against the second accused could be extended to cover his prosecution under s. 409 and whether his trial was valid.

Held, (answering the question in the negative) that under s. 197 of the Code of Criminal Procedure the sanctioning authority was the Governor-General. Under the Prevention of Corruption Act, 1947 the sanctioning authority was the Central Government, Either one, or two, Government authorities were given the right and invested with the duty of making an election. If two Government authorities are given the right to choose and neither can encroach upon the preserve of the other, then the Governor-General has not sanctioned the present prosecution against the second accused (appellant No. 2) and no other authority has the power to do so. Therefore the sanction given to prosecute under s. 5(2) of Act II of 1947, could not be used to cover the present trial, because it was given by an authority not competent to give it.

If, on the other hand, the two authorities are really one, then the election has been made clearly. The sanction under s. 5(2) of the Prevention of Corruption Act, 1947 as amended by Act LIX of 1952 and Act LXVI of 1952 is to proceed in special courts with a special procedure so the present trial against the second accused was incompetent.

It is well-settled that a defect of this nature is fatal and cannot be cured when s. 197 applies and, as it did, sanction was necessary so the trial was vitiated from the start. The proceedings were accordingly quashed.

If s. 197 of the Code of Criminal Procedure is construed too narrowly it can never be applied for it is no part of an official's duty to commit an offence and never can be. But it is not the duty of an official which has to be examined so much as his act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The section has content and its language must be given meaning.

In the case of the first accused there was misdirection in the charge to the Jury under s. 34. The essence of the misdirection consisted in the Sessions Judge's direction to the jury that even though a person may not be present when the offence is actually committed and even if he remains "behind the screen" he can be convicted under s. 34 provided it is proved that the offence was committed in furtherance of the common intention. This is wrong because the essence of the section is that the person must be physically present at the actual commission of the crime.

The misdirection is plain and goes to the root of the case because the jury returned a verdict of guilty under s. 409 read with s. 34 alone and not under s. 409 read with s. 109, I.P.C.

Held, that in cases which raise questions of substance and importance the High Courts should not pass summary orders of rejection without giving some indication of their views on the points raised before them.

Mushtak Hussein v. *The State of Bombay* ([1953] S.C.R. 809), *The State* v. *Gurucharan Singh* (A.I.R. [1952] Punjab 89), *Gokulchand Dwarkadas* v. *The King* (A.I.R. [1948] P.C. 82), *Hori Ram Singh* v. *The Crown* ([1939] F.C.R. 159), *Madan Mohan* v. *The State of Uttar Pradesh* (A.I.R. [1954] S.C. 637), *Lieutenant Hector Thomas Huntley* v. *The King-Emperor* ([1944] F.C.R. 262), and *Barendra Kumar Ghosh* v. *The King-Emperor* ([1924] L.R. 52 I.A. 40), referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos. 89 and 90 of 1954.

Appeals by Special Leave from the Judgment and Order dated the 23rd November 1953 of the High Court of Judicature at Bombay in Criminal Appeal No. 1213 of 1953, and from the Judgment and Order dated the 25th August 1953 of the High Court of Judicature at Bombay in Criminal Appeal No. 1121 of 1953 arising out of the judgment and decree dated the 6th August 1953 of the Court of Sessions Case No. 36 of 1952.

S. Narayanaiah and *Dr. C. V. L. Narayan,* for the appellant in Criminal Appeal No. 89 of 1954.

C. Sanjeevarow Nayadu and *R. Ganapathy Ayyar,* for the appellant in Criminal Appeal No. 90 of 1954.

M. C. Setalvad, Attorney-General of India (*G. N. Joshi* and *Porus A. Mehta,* with him) for the respondent.

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1954. December 22. The Judgment of the Court was delivered by

BOSE J.—These two appeals arise out of the same trial. The two appellants, Shreekantiah (the first accused in the trial Court and the appellant in Appeal No. 89 of 1954) and Parasuram (the second accused and the appellant in Appeal No. 90 of 1954) were tried with a third accused Dawson on a number of different charges centering round section 409 of the Indian Penal Code: criminal breach of trust by a public servant. The trial was by jury and all three were found guilty of an offence under section 409 read with section 34. They were convicted and sentenced as under :

Accused No. 1. Shreekantiah to one year and a fine of Rs. 500 with four months in default;

Accused No. 2. Parasuram to two years and a fine of Rs. 500 with six months in default; and

Accused No. 3. Dawson to six months and a fine of Rs. 200 with two months in default.

The appeal of the second accused to the High Court was dismissed summarily on 25-8-1953 with the one word "dismissed". The first and third accused appealed separately. Their appeal was heard by another Bench and was admitted, and a reasoned judgment followed on 23-11-1953. This, to say the least, was, in the circumstances of this case, anomalous. The appeals arise out of the same trial and are from one judgment and relate to the same charge to the jury, and what is more they raise substantially the same points. This Court was constrained to express its disapproval of the summary rejections of appeals which raise issues of substance and importance. We draw attention to the remarks in *Mushtak Hussein* v. *The State of Bombay*(1). Those observations apply with even greater force in the present case.

The three accused are Government servants. At all material times, the first was the Officer Commanding the Military Engineering Stores Depot at Dehu Road near Poona. He was in over-all charge. The

1) [1953] S.C.R. 809, 820.

second was under him as the officer in charge of the Receipts and Issue control section. The third worked directly under the second as the Assistant Stores Officer.

The depot is maintained by the Central Government and covers an area of some 150 acres. Government stores worth several lacs of rupees are kept there. On 11-9-1948 iron stores worth about Rs. 4,000 were illegally passed out of the depot and were handed over to one Ibrahim Fida Hussain, an agent of the approver Mohsinbhai (P.W. 1). The case for the prosecution is that the three accused, who were in charge of these stores and to whom they had been entrusted in various capacities, entered into a conspiracy to defraud Government of these properties and that in pursuance of this conspiracy they arranged to sell them to the approver (P.W. 1) for a sum of Rs. 4,000. The money is said to have been paid and then the stores were passed out of the depot. The money is said to have been pocketed by the three accused and not credited to Government.

On these facts a number of charges were framed. The first set was drawn up on 9-7-1953. All three accused were jointly charged with an offence punishable under section 5(2) of the Prevention of Corruption Act, 1947 and all three were further jointly charged with having committed criminal breach of trust in furtherance of the common intention of all under section 409 of the Indian Penal Code read with section 34.

Then followed a number of alternative charges in which each was separately charged with having committed criminal breach of trust personally under section 409.

As a further alternative, all three were jointly charged under section 409, Indian Penal Code read with section 109 for having abetted each other in the commission of a criminal breach of trust under section 409.

Objection was at once taken to these charges and the one which concerns us now was couched in the following terms:

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"It is further submitted that the trial under section 5(2), Corruption Act, 1947 with Indian Penal Code section 409 is likely to embarrass the accused in their defence as it would be difficult to efface the evidence (if any) of the accused persons given on oath from the minds of the Jurors when considering the charge under section 409, Indian Penal Code.

It is therefore prayed that the charges under section 409, Indian Penal Code and section 5(2) of the Corruption Act may not be tried together in one trial".

The Assistant Public Prosecutor said he had no objection to separating the charges and leaving the one under section 5(2) for another trial. The Court then made the following order on 10-7-1953:

"Thus, though a joint trial for offence under section 5(2) of the Prevention of Corruption Act and the offences under the Indian Penal Code is legal and valid, I think, in view of the circumstances mentioned above, it would be in the interest of justice and also in the interests of the accused themselves if the trial for the offence under section 5(2) of the Prevention of Corruption Act is separated. I therefore grant the application to this extent and order that the charge should be amended accordingly".

In view of this the charges were re-framed on 11-7-1953. The only difference of substance is that the charge under section 5(2) was dropped. The others remained.

Now it will be observed that the accused are all public servants and they contend that as, according to the prosecution, they purported to act in the discharge of their official duties, sanction was necessary under section 197 of the Criminal Procedure Code. There is sanction so far as the first accused is concerned but the second accused contends that there is none in his case to justify the present trial, so his trial, conviction and sentence are bad.

The position about this is as follows: On 27-10-1949 the Governor-General, acting under section 197 of the Code of Criminal Procedure, sanctioned the prosecution of the first accused for offences under sections

120-B, 409, 109 and so forth, for having conspired with the other two to commit criminal breach of trust in respect of the properties with which this case is concerned and thus for having abetted the commission of that offence, and also for having committed it. Similar sanction could easily have been given against the other two accused but it was not. The sanction for these offences was limited to the first accused.

On the same date sanction was also given for the prosecution of the first accused under section 5(2) of the Prevention of Corruption Act and a similar sanction was given against the second accused. The question is whether this sanction against the second accused can be extended to cover his prosecution under section 409 of the Indian Penal Code. In our opinion, it cannot.

At the date of the sanction the unamended Prevention of Corruption Act (II of 1947) was in force. Criminal breach of trust under section 409 of the Indian Penal Code was included in the definition of "criminal misconduct" under section 5(1)(c) of the Act of 1947. Therefore, an offence under section 409 could be tried under the Act of 1947 and the question arose whether it would have to be tried under that Act, or whether it could also be tried in the ordinary way by the ordinary Courts. The Punjab High Court held in *The State* v. *Gurucharan Singh*(1) that it could not. Because of this the Act of 1947 was amended in 1952 by Act LIX of 1952 and section 4 of the amending Act makes it clear that the trial can be under either law. But in the same year the Criminal Law Amendment Act, 1952 (Act XLVI of 1952) was passed and because of this Act trials under section 5(2) of the Prevention of Corruption Act must be before a Special Court and a special procedure must be followed. Therefore, the position which these various Acts created was this. First, a choice was conferred on some authority to choose whether any given accused should be tried in a special Court with a special procedure and be subject to a lesser punishment under section 5(2) or whether he should be tried in the ordi-

(1) A.I.R. 1952 Punjab 89.

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nary way under section 409 of the Indian Penal Code with the risk of a higher punishment.

The question then is who is to do the choosing. Under section 197 of the Code of Criminal Procedure the Governor-General was at that date the sanctioning authority though the words "exercising his individual judgment" had by that time been deleted. Under the Prevention of Corruption Act the sanctioning authority was the "Central Government". Now it may well be that the two mean the same thing because of section 8(a) of the General Clauses Act but that makes no difference at the moment. The fact remains that either one, or two, Government authorities were given the right, and invested with the duty, of making an election. They had the right to say whether a certain class of public servant who had committed criminal breach of trust should be tried for that offence under section 409 of the Indian Penal Code in the ordinary courts of the land according to the normal procedure obtaining there and be subject to a maximum penalty of ten years plus an unlimited fine or be tried for the same offence under another name in a special court by a special procedure and be subject to no more than seven years plus a fine which is also unlimited.

At this stage of the arguments we asked the learned counsel for the appellants whether they intended to challenge the *vires* of this law under article 14 of the Constitution because, if they did, the matter would have to go to a Constitution Bench as we, being only three Judges, would have no power to decide it. The learned Attorney-General at once objected because the point had not been raised at any stage and was not to be found even in the grounds of appeal to this Court. The learned counsel for the appellants replied that they did not wish to take the point. Accordingly, we have to proceed in this case on the assumption that the amending Act of 1952 (Act LIX of 1952) is valid. That results in the position we have outlined above. There is a choice, not only of forum, but also of procedure and the extent of the maximum penalty. If two separate authorities are given the right to

choose and neither can encroach upon the preserve of the other, then the Governor-General has not sanctioned the present prosecution against the second accused and no other authority has the power to do so. Therefore, in that event, the sanction given to prosecute under section 5(2) cannot be used to cover the present trial because it is given by another authority not competent to give it.

On the other hand, if the two authorities are really one, then the election has been made clearly and unequivocally. The sanction is to proceed in the special courts with the special procedure and the second accused is not to be exposed to the risk of the higher penalty. In that event, the present trial against the second accused is incompetent.

That a defect of this kind is fatal and cannot be cured is well settled. See the Privy Council in *Gokulchand Dwarkadas* v. *The King*(1), the observations of Varadachariar, J. in *Hori Ram Singh* v. *The Crown*(2) and the decision of this Court in *Madan Mohan* v. *The State of Uttar Pradesh*(3). But the learned Attorney-General argued that no sanction was necessary because, according to him, despite what the second accused says, by no stretch of imagination can he be said to have been acting, or even purporting to act, in the discharge of his official duty. The argument ran as follows :—The act complained of here is the breach of trust and the prior abetment of it: the breach occurred as soon as the goods were loaded on Mohsinbhai's lorries: it was no part of this accused's official duties to permit an unauthorised removal of the goods: therefore, when he allowed that he neither acted, nor purported to act, in the discharge of his official duties. Reference was made to the decision of the Federal Court in *Lieutenant Hector Thomas Huntley* v. *The King-Emperor*(4) where Zafrullah Khan, J. held that "it must be established that the *act complained of* was an official act", and to the observations of Varadachariar, J. in *Hori Ram Singh* v. *The Crown*(5)

(1) A.I.R. 1948 P.C. 82.
(2) [1939] F.C.R. 159, 184.
(3) A.I.R. 1954 S.C. 637, 641.
(4) [1944] F.C.R. 262, 269.
(5) [1939] F.C.R. 159, 186.

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where, dealing with section 409 of the Indian Penal Code, he says—

"Though a reference to the capacity of the accused as a public servant is involved both in the charge under section 409 and in the charge under section 477-A, there is an important difference between the two cases, when one comes to deal with the *act complained of*. In the first, the official capacity is material only in connection with the 'entrustment' and does not *necessarily* enter into the later act of misappropriation or conversion, which is the act complained of".

What this argument overlooks is that the stress in the passage quoted is on the word "necessarily" which we have underlined. A later passage at page 187 explains this:

"I would observe at the outset that the question is substantially one of fact, to be determined with reference to the act complained of and the attendant circumstances; it seems neither useful nor desirable to paraphrase the language of the section in attempting to lay down hard and fast tests".

With that we respectfully agree. There are cases and cases and each must be decided on its own facts.

Now it is obvious that if section 197 of the Code of Criminal Procedure is construed too narrowly it can never be applied, for of course it is no part of an official's duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The section has content and its language must be given meaning. What it says is—

"when any public servant.....is accused of any *offence* alleged to have been committed by him while acting or purporting to act in the discharge of his official duty...."

We have therefore first to concentrate on the word "offence".

Now an offence seldom consists of a single act. It is usually composed of several elements and, as a rule, a whole series of acts must be proved before it can be

established. In the present case, the elements alleged against the second accused are, first, that there was an "entrustment" and/or "dominion"; second, that the entrustment and/or dominion was "in his capacity as a public servant"; third, that there was a "disposal"; and fourth, that the disposal was "dishonest". Now it is evident that the entrustment and/or dominion here were in an official capacity, and it is equally evident that there could in this case be no disposal, lawful or otherwise, save by an act done or purporting to be done in an official capacity. Therefore, the act complained of, namely the disposal, could not have been done in any other way. If it was innocent, it was an official act; if dishonest, it was the dishonest doing of an official act, but in either event the act was official because the second accused could not dispose of the goods save by the doing of an official act, namely officially permitting their disposal; and that he did. He actually permitted their release and purported to do it in an official capacity, and apart from the fact that he did not pretend to act privately, there was no other way in which he could have done it. Therefore, whatever the intention or motive behind the act may have been, the physical part of it remained unaltered, so if it was official in the one case it was equally official in the other, and the only difference would lie in the intention with which it was done: in the one event, it would be done in the discharge of an official duty and in the other, in the purported discharge of it.

The act of abetment alleged against him stands on the same footing, for his part in the abetment was to permit the disposal of the goods by the doing of an official act and thus "wilfully suffer" another person to use them dishonestly: section 405 of the Indian Penal Code. In both cases, the "offence" in his case would be incomplete without proving the official act.

We therefore hold that section 197 of the Code of Criminal Procedure applies and that sanction was necessary, and as there was none the trial is vitiated from the start. We therefore quash the proceedings

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against the second accused as also his conviction and sentence.

We now turn to the appeal of the first accused. He has been convicted under section 409 of the Indian Penal Code read with section 34. The main point here concerns a vital misdirection in the charge to the jury about section 34. The learned Additional Sessions Judge misunderstood the scope and content of this section and so misdirected the jury about the law.

The section was expounded at length in paragraphs 15 and 16 of the charge and though some of the illustrations given are on the right lines, there is much there that is wrong and which, if acted on, would cause a miscarriage of justice. The essence of the misdirection consists in his direction to the jury that even though a person "may not be present when the offence is actually committed" and even if he remains "behind the screen" he can be convicted under section 34 privided it is proved that the offence was committed in furtherance of the common intention. This is wrong, for it is the essence of the section that the person must be physically present at the actual commission of the crime. He need not be present in the actual room; he can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger or wait in a car on a nearby road ready to facilitate their escape, but he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or other at the time the crime is actually being committed. The antithesis is between the preliminary stages, the agreement, the preparation, the planning, which is covered by section 109, and the stage of commission when the plans are put into effect and carried out. Section 34 is concerned with the latter. It is true there must be some sort of preliminary planning which may or may not be at the scene of the crime and which may have taken place long beforehand, but there must be added to it the element of physical presence at the scene of occurrence coupled with actual participation which, of

course, can be of a passive character such as standing by a door, provided that is done with the intention of assisting in furtherance of the common intention of them all and there is a readiness to play his part in the pre-arranged plan when the time comes for him to act.

The emphasis in section 34 is on the word "done": "When a criminal act is *done* by several persons....." It is essential that they join in the actual *doing* of the act and not merely in planning its perpetration. The section has been elaborately explained by Lord Sumner in *Barendra Kumar Ghosh* v. *The King-Emperor*(1). At page 52, he explains that "*participation* in *action*" is the leading feature of section 34. And at page 53 in explaining section 114 of the Indian Penal Code, he says—

"Because participation *de facto* (as this case shows) may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that *actual presence* plus prior abetment can mean nothing else but *participation*. The presumption raised by section 114 brings the case *within the ambit of section 34*".

At page 55 he says about section 34 that—

"*participation* and joint action *in the actual commission of crime* are, in substance, matters which stand in antithesis to abetments or attempts".

The misdirection is plain and it goes to the root of the matter because the jury returned a verdict of guilty under section 409 of the Indian Penal Code read with section 34 alone and not under section 409 read with section 109.

It is part of the defence of the first accused that he was not present when the goods were loaded nor was he present when they were allowed to pass out of the gates, that is to say, that he was not present when the offence was committed. It is true there is evidence to show that he was there when the lorries left but apart from the fact that there is a small discrepancy on the point, there is nothing to indicate that this evidence was believed. If he was not present he

(1) [1924] L.R. 52 I.A. 40.

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cannot be convicted with the aid of section 34. He could have been convicted of the abetment had the jury returned a verdict to that effect because there is evidence of abetment and the charge about abetment is right in law. But the jury ignored the abetment part of the charge and we have no means of knowing whether they believed this part of the evidence or not.

There is also non-direction on an important point which may have caused a miscarriage of justice. The case for the prosecution is that the accused disposed of the goods to Mohsinbhai for a sum of Rs. 4,000 which was duly paid to the second accused on the 10th. The learned trial Judge told the jury that—

"the evidence led by the prosecution about the payment of the Rs. 4,000 is proved to be utterly useless",

and in telling them why he gave them a number of reasons. But he omitted to follow this up by telling them that if they rejected this part of the prosecution case, as he invited them to do, then the strongest part of the case against the accused collapsed because officers in the position of the accused do not commit illegal acts like this and expose themselves to a prosecution and possible disgrace unless they are prompted by some strong motive, usually self interest; and though a conviction can be based on evidence which does not disclose a motive if the facts proved justify such a course, yet it would ordinarily be unsafe to convict in a case like the present in the absence of proof indicating an adequate reason for criminal behaviour on the part of the accused. Had the jury been told this, as they should have been, it is possible they would not have returned a verdict of guilty.

In the circumstances, we have no alternative but to quash this conviction also.

We have now to consider whether there should be a retrial. As the present trial cannot proceed against the second accused, and as all the accused are said to have acted in concert each playing an appointed part in a common plan, we do not think it would be right

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to direct a retrial though this is the normal course when a jury trial is set aside on the grounds of misdirection and non-direction. We therefore discharge (not acquit) both the appellants leaving it to Government either to drop the entire matter or to proceed in such manner as it may be advised. We do this because the accused expressly asked that the charge under the Prevention of Corruption Act should be left over for a separate trial. The two convictions are therefore quashed and also the sentences. We are told that the first accused has already served out his sentence. The fine if paid, will be refunded. The bail bond of the second accused will be cancelled.

1955

January 21

MAHANT SALIG RAM
v.
MUSAMMAT MAYA DEVI.

[S. R. Das, Bhagwati and Syed Jafer Imam JJ.]

Custom-succession—Non-ancestral property—Daughter versus collateral within fourth degree—Saraswat Brahmins of Pathankot in the District of Gurdaspur—Riwaj-i-am—Entries therein—Value of —Riwaj-i-am of Gurdaspur District of the year 1913—Whether a reliable document—Answer to questions 16 and 17—Value of.

It is now well-settled that the general custom of the Punjab being that a daughter *excludes* the *collaterals from succession to the self-acquired property of her father* the initial onus, therefore, must, on principle, be on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father has been varied by a special local custom excluding the daughter which is binding on the parties.

It is also well-settled that though the entries in the Riwaj-i-am are entitled to an initial presumption in favour of their correctness irrespective of the question whether or not the custom, as recorded, is in accord with the general custom, the quantum of evidence necessary to rebut that presumption will, however, vary with the facts and circumstances of each case. Where, for instance, the Riwaj-i-am lays down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace that presumption; but where, on the other hand, the custom as recorded in the Riwaj-i-am is opposed to the custom generally prevalent, the presumption will be considerably weakened. Likewise,