

SUMMARIES AND SECONDARY EVIDENCE: TRANSNATIONAL LEGISLATIVE BORROWING IN COLONIAL INDIA

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This paper traces the historical origins of §65(g) of the Indian Evidence Act, 1872, which permits summaries of voluminous documents to be admitted in evidence. Even though it was the English common law which was ostensibly codified in British India, no such rule now exists in the U.K. It will be seen that the words contained in §65(g) were quietly borrowed, without attribution, by the Briton Sir James Fitzjames Stephen, Law Member of the Viceroy's Council in British India, from a draft civil procedure code prepared in New York in 1850 by a prominent American lawyer, David Dudley Field. This paper will discuss the broader implications of the transplant of evidentiary rules from 19th century America or Britain to India (where the distinction between judge and jury is, and always has been, very narrow).

I. INTRODUCTION

Under the Indian Evidence Act, 1872 ('Evidence Act'), documentary evidence must ordinarily be proved through primary evidence, i.e., by production in court of the original document itself.¹ This is known as the "best evidence"² rule, i.e., the rule that the best evidence for proving a document is the document itself. Under certain circumstances, for instance, if the original is lost or destroyed, the Evidence Act permits copies of original documents to be tendered as secondary evidence. There is, however, a peculiar provision in the Evidence Act contained in §65(g), which excuses a party from producing original documents, where the originals are so unwieldy or voluminous that they "*cannot conveniently be examined in Court*". In such cases, rather than offering the original documents in evidence, the Evidence Act permits a party to furnish the "*general result*" of the collection of documents, in other words a summary

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¹ The Indian Evidence Act, 1872, §64.

² See *Bank of Baroda v. Shree Moti Industries*, 2008 SCC OnLine Bom 486 (Daga, J); Sir JOHN WOODROFFE & SYED AMIR ALI, *LAW OF EVIDENCE* 100-103 (Dr. V. Kesava Rao, 18th ed., 2008).

of the documents, in evidence. Interestingly, there appears to be no rule at the common law in England today, which compares with this evidentiary rule.

This paper traces the historical origins of §65(g) of the Evidence Act, seeking to investigate how a provision of this nature made its way to India where there appears to be no comparable rule now in England, given that it was the common law which was ostensibly codified in British India. It will be seen that many of the words contained in §65(g) were quietly borrowed, without attribution, by the Briton Sir James Fitzjames Stephen, Law Member of the Viceroy's Council in British India, from a draft civil procedure code prepared in New York in 1850 by a prominent American lawyer, David Dudley Field. It will be hypothesized that British legislators in colonial India did not admit their use of the American draft, because doing so might have weakened the philosophical underpinnings of British colonialism in India. After tracing the history of §65(g) of the Evidence Act, this paper will discuss the broader implications of the transplant of evidentiary rules from 19th century America or Britain to India (where the distinction between judge and jury is, and always has been, very narrow). This paper is also partly doctrinal in its orientation. As such, this paper will examine how §65(g) has been interpreted by courts in India, and the various tests which have been employed by U.S. courts to determine when summaries can be admissible as evidence in place of voluminous documents. It will be seen that after its adoption in India, over the years, the High Courts in India have imposed limits over the applicability of §65(g). Perhaps most notably, several High Courts now require that a party seeking to submit a summary of voluminous documents in evidence must make the underlying documents available for inspection by the other side and, in some cases, even produce the documents in court.

II. HISTORICAL ORIGINS OF SECTION 65(G)

A. OF TRANSNATIONAL BORROWING

In 1850, a legislative commission in the state of New York, headed by U.S. attorney David Dudley Field, whose brother, Stephen J. Field, was later a U.S. Supreme Court justice, completed their draft of a code of civil procedure for the state of New York.³ Field was educated at Yale, and by the 1860s was

³ See Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988). Field's famous procedural code of 1848 was adopted by the legislature of New York. The 1848 Code, popularly called the "Field Code", had 400 sections. The 1850 draft had 1800 sections. Kellen Funk, *The Influence of the Field Code: An Introduction to the Critical Issues* (September 1, 2014), available at <http://kellenfunk.org/field-code/the-influence-of-the-field-code-an-introduction/> (Last visited on December 27, 2015). See also LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 253-254, 266-270 (2002); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 434-454 (3rd ed., 2005).

one of the wealthiest lawyers in the U.S.,⁴ but was not a barrister.⁵ The draft of Field's Code of 1850, though not adopted in the state of New York,⁶ contained a provision, §1688, which enabled summaries of voluminous documents to be admitted in evidence. The language contained in §1688, which was subsequently adopted by several states within the U.S.,⁷ was as follows:

*“There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases: ... 5. When the originals consist of numerous accounts, or other documents, which cannot be examined in court, without great loss of time, and the evidence sought from them, is only the general result of the whole.”*⁸ (emphasis supplied)

At the time, there was no comparable statutory rule in British India. Thus, Act II of 1855,⁹ the precursor to the Evidence Act, contained no comparable provision. The initial task of drafting an Evidence Bill for British India was entrusted to the Indian Law Commission, which, under the Chairmanship of Jeremy Bentham's friend¹⁰ Sir John Romilly, presented a draft Evidence Bill to the Crown along with its fifth report on August 3, 1868.¹¹ However, though

⁴ Andrew P. Morriss, Scott J. Burnham & James C. Nelson, *Debating the Field Civil Code 105 Years Late*, 61 MONT. L. REV. 371, 373 (2000). Interestingly, though quite tragically, Field's grandson, a midshipman in the U.S. navy, died in the harbor of Bombay a few months after Field's death in the U.S. See HENRY M. FIELD, *THE LIFE OF DAVID DUDLEY FIELD* 338-339 (1898).

⁵ The legal profession in England was divided between barristers (the relatively more prestigious and upper-class segment of the legal profession) and attorneys/solicitors, whereas this distinction did not take hold in the U.S. See FRIEDMAN, *supra* note 3, 350-353. The distinction between attorneys and solicitors in England seems to have disappeared with the blending of the common law and equity courts in the 19th century. See ROBERT ROBSON, *THE ATTORNEY IN EIGHTEENTH-CENTURY ENGLAND* (1959); DANIEL DUMAN, *THE ENGLISH AND COLONIAL BARS IN THE NINETEENTH CENTURY* (1983); DANIEL DUMAN, *THE JUDICIAL BENCH IN ENGLAND, 1727-1875: THE RESHAPING OF A PROFESSIONAL ELITE* (1982).

⁶ Subrin, *supra* note 3, 317; See Morriss, *supra* note 4.

⁷ See Benjamin H. Dewey, *Evidence: Best Evidence Rule: Use of Summaries of Voluminous Originals*, 37 MICHIGAN LAW REV. 449 (1939).

⁸ THE COMMISSIONERSON PRACTICE AND PLEADINGS, *Report on The Code of Civil Procedure of the State of New York* (1850), available at <https://archive.org/stream/codecivilproced00fielgoog#page/n5/mode/2up> (Last visited on December 26, 2015).

⁹ This was “An Act for the further improvement in the Law of Evidence.” There were two provisions in this statute which dealt with primary and secondary evidence. These were §35 (“An impression of a document (sic) made by a copying-machine shall be taken without proof to be a correct copy”) and §36 (“When an original document is out of the reach of the process of the Court, it shall be lawful for the Court, on application to it in any Civil suit or proceeding, and on notice to the opposite party at a reasonable time before the hearing, to make an order for the reception of secondary evidence of its execution and contents”). A full text of this Act is available in H.T. PRINSEP, *THE CODE OF CRIMINAL PROCEDURE* 374 – 383 (3rd ed., 1869), available at <http://catalog.hathitrust.org/Record/011564820> (Last visited on December 12, 2015).

¹⁰ Gunther A. Weiss, *The Enchantment of Codification in the Common Law World*, 25 YALE J. INT'L L. 435, 484 (2000).

¹¹ The draft was signed by six members. The report and draft are available at the British Library, India Office Records, L/PJ/5/434. See SIR GEORGE CLAU RANKIN, *BACKGROUND TO INDIAN LAW*

John Romilly later told David Dudley Field that his New York Codes were “*of great service to his commission, in the preparation of the Indian codes*”,¹² the draft prepared by the Indian Law Commission contained no provision similar to §65(g) either.¹³ Later that year, on December 4, 1868, the Law Member of the Viceroy’s Council, Sir Henry Maine, introduced the Law Commission’s draft to the Viceroy’s Council and set up a “Select Committee” to prepare a report on the draft Bill.¹⁴

Soon, Sir James Fitzjames Stephen took over from Maine as Law Member of the Viceroy’s Council. A product of Eton and Cambridge, and called to the Bar at the Inner Temple in London, Stephen had taken Silk prior to coming to British India, and would eventually become a judge of the High Court in England in 1879.¹⁵ In fact, soon after his appointment as Law Member, Stephen was offered the prestigious Chief Justiceship of the Calcutta High Court, which he declined.¹⁶ Stephen was instrumental in drafting much legislation in British India, most notably the Indian Contract Act, 1872 and the Evidence Act. Stephen had a very low opinion of the draft prepared by the Indian Law Commission. As he wrote to his friend, Sir M. Grant Duff, in a letter in March 1870,¹⁷ “*Between ourselves [the Indian Law Commissioners] evidence act appears to me so very bad*”, and Maine had “*put off the evil day*” of resolving the draft until Stephen got to India. The Select Committee under Stephen presented its draft Evidence Bill to the Viceroy’s Council on March 31, 1871.¹⁸ It was this draft which contained, for the first time, the provision which would become §65(g).¹⁹ Thus, it is clear that §65(g) was drafted and inserted into the Evidence Act by Sir James Stephen and his colleagues on the Select Committee, between 1869-1872.

46 (1946).

¹² DAVID DUDLEY FIELD, *LAW REFORM IN THE UNITED STATES AND ITS INFLUENCE ABROAD* 13 (1891).

¹³ §15 dealt with “Proof of the Contents of Documents by Secondary Evidence”. The Commissioners stated in their report that “*We have...laid down rules for the evidence to be required of the proper execution of documents, and retaining the distinction between primary and secondary evidence, have provided against the admission of the latter where the former is procurable.*” *Supra* note 8.

¹⁴ PROCEEDINGS OF THE LEGISLATIVE COUNCIL, British Library, India Office Records, V/9/9-11 (1868).

¹⁵ See K.J.M. Smith, *Stephen, Sir James Fitzjames, First Baronet (1829–1894)* in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004).

¹⁶ LESLIE STEPHEN, *THE LIFE OF SIR JAMES STEPHEN, A JUDGE OF THE HIGH COURT OF JUSTICE*, BY HIS BROTHER 235 (2nd Edition, 1895).

¹⁷ *Letter sent by Sir James Stephen & addressed to Sir M. Grant Duff* (March 22, 1870), British Library, India Office Records, Mss EUR F234/13.

¹⁸ See, PROCEEDINGS OF THE LEGISLATIVE COUNCIL, British Library, India Office Records, V/9/11-12 457 (1868). Both reports of the Select Committee are fully extracted in HENRY RAYMOND FINK, *THE INDIAN EVIDENCE ACT (NO. I OF 1872)* (1872), available at <http://catalog.hathitrust.org/Record/100343688> (Last visited on December 12, 2015).

¹⁹ The Second Report of the Select Committee, presented to the Viceroy’s Council on 30 January 1872, dealt only with a few matters, and § 65(g) was unlikely to have been amended between the two reports.

§65(g) reads as follows:

“65. Cases in which secondary evidence relating to documents may be given. Secondary evidence may be given of the existence, condition or contents of a document in the following cases: -

...

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

...

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.” (emphasis supplied)

§65(g) of the Evidence Act drafted by Sir James Stephen in the early 1870s was remarkably similar to §1688 of Field’s Code of 1850. True, §65(g) was not identical to §1688. For example, where Field’s Code referred to documents which could not be examined in court “without great loss of time”, the Evidence Act spoke of documents which could not “conveniently” be examined in court.²⁰ The Evidence Act also required the summary to be prepared by a person who has examined the documents and “who is skilled in the examination of such documents”. Yet, several important words used in both provisions appeared to be identical. Thus, both provisions were to be invoked “where the originals consist of numerous accounts or other documents” which “cannot... be examined in court”, and where the evidence was only for “the general result of the whole”.

B. STARKIE AND PEAKE ON EVIDENCE

There was no suggestion by either Stephen or the Select Committee that provisions from the New York Code were being lifted or borrowed. In his speech to the Viceroy’s Legislative Council, made on the same day as the date on which the Select Committee’s report was presented to the Council, while Stephen repeatedly referred to English text-writers, he made no reference to Field or to the New York Code.²¹ Neither Stephen nor the Select Committee attributed the rule contained in §65(g) to §1688 of Field’s Code of 1850. In a book

²⁰ However, this might have been inspired by Taylor’s treatise on evidence. *See, infra* “The demise of the rule in England”.

²¹ HENRY RAYMOND FINK, *THE INDIAN EVIDENCE ACT (NO. I OF 1872)*, Appendix (1872), available at <http://catalog.hathitrust.org/Record/100343688> (Last visited on December 12, 2015).

Stephen subsequently wrote in England in the 1870s,²² he did not do so much as even mention Field or the New York Code. Instead, he attributed the rule to two early 19th century cases, viz. *Meyer v. Sefton*²³ and *Roberts v. Doxon*,²⁴ which he appeared to have found in two well-known English treatises on the law of evidence, Starkie²⁵ and Peake²⁶ on evidence.

In the early 19th century, law reports did not exist in the manner that we know them today. Authors like Thomas Starkie and Thomas Peake published digests or compendia of cases. These books did not contain the actual text of judgments, but only contained the author's note, summary or synopsis of the facts of the case and the principles stated therein, comparable with the modern-day headnote. Thus, it was the headnotes of the cases *Meyer v. Sefton* and *Roberts v. Doxon* prepared by Starkie and Peake respectively, which were claimed to have been relied on by Stephen to create §65(g) of the Evidence Act. Yet, the language contained in Starkie and Peake on evidence, and in the said cases cited in these treatises, was not so similar to both §1688 of Field's Code and §65(g) of the Evidence Act, that one could arrive at the conclusion that Field and Stephen had both obtained the words contained in their respective drafts from the same source.

Starkie had the following to say about the rule:

“Of the class of facts which require proof by means of indirect evidence, there are some of so peculiar a nature that juries cannot without other aid come to a direct conclusion on the subject. In such instances, where the inference requires the judgment of persons of peculiar skill and knowledge on the particular subject, the testimony of such as to their opinion and judgment upon the facts, is admissible evidence to

²² JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE (2nd ed., 1876), available at: <http://catalog.hathitrust.org/Record/008594907> (Last visited on December 12, 2015). In this book, Stephen provided a footnote to reveal the source of this rule, viz., *Roberts v. Doxon*, Peake 116; *Meyer v. Sefton*, 2 Star 276. See also JAMES FITZJAMES STEPHEN, THE INDIAN EVIDENCE ACT (1 OF 1872) WITH AN INTRODUCTION OF THE PRINCIPLES OF JUDICIAL EVIDENCE (1872). Apart from Starkie and Peake, Stephen also relied on treatises on the English law of evidence prepared by Roscoe and Best. See ROSCOE'S DIGEST OF THE LAW OF EVIDENCE ON THE TRIAL OF ACTIONS AT NISI PRIUS (William Mills and William Markby, 11 ed., 1866); W.M. BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE WITH ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES (5th ed., 1870).

²³ *Meyer v. Sefton*, 2 Star 276.

²⁴ *Roberts v. Doxon*, Peake 116. See also *Spencer v. Billing*, 3 Campb 310; *Lott and Pidgeon*, Assignees of *Smark v. Melville*, (1841) 3 Manning & Granger 40.

²⁵ See THOMAS STARKIE, ESQ., A PRACTICAL TREATISE OF THE LAW OF EVIDENCE AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS, Vol. 1 (3rd ed., 1842), available at <http://catalog.hathitrust.org/Record/007703564> (Last visited on December 12, 2015).

²⁶ THOMAS STARKIE, ESQ., CASES DETERMINED AT NISI PRIUS (3rd ed., 1820). See also THOMAS PEAKE, ESQ., A COMPENDIUM OF THE LAW OF EVIDENCE (2nd ed., 1804) (hereinafter, “STARKIE”); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE (5th ed., 1822).

enable the jury to come to a correct conclusion. Thus the relation between a particular injury inflicted on a man's body and the death of that man, is an inference to be made by medical skill and experience, and may be proved by one who possesses those qualifications. So again, where the question is as to a general result from books or accounts of a voluminous nature, the general result from them may be proved by the testimony of one who has examined them."²⁷ (emphasis supplied)

Starkie also added:

*"Although a witness cannot be examined as to the contents of a written document not produced, yet he may, in some instances, be examined as to the general result from a great number of documents too voluminous to be read in court."*²⁸

The case of *Roberts v. Doxon*, from which the rule contained in §65(g) was obtained, was decided on August 1, 1791.²⁹ In that case, involving the law of bankruptcy, a witness was called to the stand to depose to the fact that the debts of the two insolvents were far higher than their credits. The witness "*produced no papers, but said he collected his information from having inspected their accounts*". Lord Kenyon held that the witness "*could not state the particulars of the books without producing them, yet that he might speak to the general amount, not by saying that one page was so much and another so much, but what from his general observation he perceived to be the general state of their accounts.*"

The case of *Meyer v. Sefton*,³⁰ from which the rule contained in §65(g) was further sourced, was decided in around 1817. In that case, once again involving bankruptcy, the Plaintiff called a witness who had examined the books of account of an insolvent person, though the books of account had not been produced in court. The witness was asked to ascertain the value of the property of the insolvent. This was objected to by the defendant. It was held that "*from the very nature of the case, such an inquiry could not be made in court, and therefore evidence on such a point must be given by some one who had had the means of inquiry, and who could state the result*".³¹

²⁷ STARKIE, 69.

²⁸ STARKIE, 175.

²⁹ THOMAS PEAKE, ESQ., CASES DETERMINED AT NISI PRIUS 116 (3rd ed., 1820).

³⁰ *Meyer v. Sefton*, 2 Star 276. THOMAS STARKIE, ESQUIRE, REPORTS OF CASES, DETERMINED AT NISI PRIUS, IN THE COURTS OF KING'S BENCH AND COMMON PLEAS, AND ON THE CIRCUIT, 1816-1819, Vol. II 244-246 (1st ed., 1823).

³¹ *Id.*

The two English common law cases cited above and the quotations extracted from Starkie and Peake clearly suggest that the rule contained in both §1688 of Field's Code and §65(g) of the Evidence Act had its doctrinal origins in 19th century English common law. It is not like Field came up with this rule himself – he had clearly found it in the prevalent English common law. Thus, it cannot be said that in drafting §65(g) of the Evidence Act, Stephen was borrowing a doctrinal rule of American evidentiary law with no basis in the English common law.

However, at the same time, it is also quite clear that the precise and exact words contained in §1688 of Field's Code and §65(g) of Stephen's draft did not come from Starkie, Peake, or the two cases cited therein. Though Starkie referred to a “general result from books or accounts of a voluminous nature”, and Lord Kenyon spoke of the “general state” of accounts, none of these sources used the exact sequence of words “numerous accounts or other documents” and “general result of the whole”, which were used in both Field's Code and Stephen's draft. It is therefore quite clear that while both §1688 of Field's Code and §65(g) of the Evidence Act had a basis in 19th century English common law, the draftsmanship of §65(g) of the Evidence Act was heavily influenced by §1688 of Field's Code of 1850, without attribution. It can certainly not be said that Field's Code, insofar as it related to the law of evidence, was lifted wholesale into the Indian Evidence Act. However, it does appear that some provisions, such as §65(g) were borrowed from Field's Code without this source being cited.

It was probably Field, not Stephen, who first found the rule in Starkie and Peake. After all, Field claimed that most of his code was drawn from the common law.³² In fact, many English law treatises, including Starkie and Peake on evidence, were very popular in the U.S. and had come out in U.S. editions.³³ For example, Starkie was published in a Boston edition in 1826,³⁴ and in a Philadelphia edition in 1830,³⁵ decades before Field's 1850 Code was

³² Andrew P. Morriss, *Codification and Right Answers*, 74 CHICAGO-KENT L. REV. 355, 374 (1999).

³³ Many 19th century English law treatises were very popular in the U.S. Perhaps the most popular English treatise on law in the U.S. was Sir William Blackstone's 'Commentaries'. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 17, 95, 114, 361 (3rd ed., 2005). Several English treatises on the law of evidence were subsequently published in U.S. editions, including books written by Sir James Stephen himself [See SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE (George Chase, 2nd ed., 1904); and SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE AS ESTABLISHED IN THE UNITED STATES (William Reynolds, 1879)].

³⁴ THOMAS STARKIE, ESQ., A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS, Vol. 1 (1826).

³⁵ THOMAS STARKIE, ESQ., A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS, Vol. 3 (Metcalf & Ingraham, 3rd ed., 1830). See also THOMAS STARKIE ESQ., A PRACTICAL TREATISE OF THE LAW OF EVIDENCE (Dowdeswell and Malcolm, 10th ed., 1876), available at: <http://catalog.hathitrust.org/Record/007703563> (Last visited on December 12, 2015).

published. In fact, a case decided in the state of Nevada in 1871 made reference to the voluminous records rule by citing Starkie on the law of evidence.³⁶

C. SOME HINTS THAT THERE WAS BORROWING

It is puzzling why the Britons made no mention of Field's Code in their public speeches and notes on the Evidence Act. Instead, they claimed to have derived the rules contained in the Evidence Act from treatises on the English law of evidence written by well-known English authors like Starkie and Peake. As the Select Committee wrote in its first report:

“In general, it has been our object to reproduce the English Law of Evidence with certain modifications, most of which have been suggested by the Commissioners, though with some this is not the case. The English Law of Evidence appears to us to be totally destitute of arrangement....we have discarded altogether the phraseology in which the English text-writers usually express themselves, and have attempted first to ascertain, and then to arrange in their natural order, the principles which underlie the numerous cases and fragmentary rules which they have collected together.” (emphasis supplied)

Stephen was clearly responsible for drafting the Evidence Act. Yet, he did not acknowledge using sources like Field's 1850 Code. As he said to the Law Amendment Society in England in 1872-73:

*“The Evidence Act, for which in its present shape I am in a great measure responsible, is founded on a draft prepared by the Indian Law Commissioners. It includes, I think, everything which was contained in that draft, but is considerably longer, and is arranged on a different principle.”*³⁷

However, there are several hints which might suggest that §65(g) was partly borrowed from §1688 of Field's Code. Stephen was not merely aware of but had also read Field's New York Code. In the same address to the Law Amendment Society, Stephen proposed that even the law on eleven subjects in England could be codified. He added that several of these subjects had been treated in the “*New York Civil Code*”.³⁸ Field was a figure known in legal circles in England. He visited London in 1852, where, at a dinner held in his honour at the Law Amendment Society, one Briton delivered a speech saying that Field

³⁶ State of Nevada v. Henry A. Rhoades, 6 Nev. 352, 1871 WL 3340 (Nev.).

³⁷ James Fitzjames Stephen, QC, *Codification in India and England* in THE LAW MAGAZINE AND REVIEW, Vol. 1, 977 (1872).

³⁸ *Id.*, 982.

had “not only essentially served one of the greatest States of America, but...he had also provided a cheap and satisfactory code of law for every colony that bore the English name.”³⁹ Field visited London again in 1867, where he met several English reformers.⁴⁰ In 1872, the “Legal Gossip” section of *The Law Magazine and Review*, published in London, referred to “the American system, where a man like D.D. Field, who is reported to be making 40,000l. a year, appears as a counsel before a judge making 400l.”⁴¹

The following words in the first report of the Select Committee, dated March 31, 1871, provide a hint that the New York Code was being looked at by the Select Committee in preparing the Evidence Act for British India:

*“We have not followed the precedent of the New York Code in laying down a long list of presumptions, agreeing with the Indian Law Commissioners in the opinion that it is better not to fetter the discretion of the Judges. We have, however, admitted one or two such presumptions to a place in the Code, as, in the absence of an express rule, the Judges might feel embarrassed.”*⁴²

Interestingly, Stephen was accused, even in his own time, of unoriginality and of borrowing extensively from English law treatises and from other statutes in British India.⁴³ It is possible that Stephen’s failure to acknowledge the New York Code was in keeping with his general failure to acknowledge the other sources from which he had borrowed, for instance, English treatise writers on the law of evidence. Yet, the sense one gets is that Stephen and the Select Committee were generous in their general references to English treatise writers, and were quite proud of the fact that they were relying on English treatise writers to prepare their draft. On the other hand, the New York Code barely found any mention in any of their speeches or reports. Thus, though Stephen made numerous speeches in the Viceroy’s Legislative Council about the proposed Evidence Act, and wrote at least two books on the law of evidence, he omitted to mention that he might have borrowed some provisions from Field’s New York Code.

It appears that Field’s Code subsequently developed a poor reputation among English jurists. In the first edition of the classic treatise published in 1905 on the Indian Contract Act, jurist Sir Frederick Pollock had the following

³⁹ EXTRACTS FROM NOTICES OF DAVID DUDLEY FIELD, 51 (University of California Reviews, 1894), available at: <https://archive.org/stream/extractsfrom00fielrich#page/48/mode/2up> (Last visited on December 30, 2015).

⁴⁰ *Id.*, 52-53.

⁴¹ THE LAW MAGAZINE AND REVIEW, Vol. 1, 242 (1872).

⁴² FINK, *supra* note 21, xix.

⁴³ J.D. Heydon, *The Origins of The Indian Evidence Act*, 10 OXFORD UNIV. COMMONWEALTH L.J. 22-23 (2015).

harsh things to say about the use by colonial legislators of Field's New York Code in drafting the Indian Contract Act, 1872, which do not, however, appear to have had currency at the time that the Evidence Act was drafted:

“Another source of unequal workmanship, and sometimes of positive error, is that the framers of the Indian Codes, and of the Contract Act in particular, were tempted to borrow a section here and a section there from the draft Civil Code of New York, an infliction which the sounder lawyers of that State have been happily successful so far in averting from its citizens. This code is in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced. It is constantly defective and inaccurate, both in apprehending the rules of law which it purports to define and in expressing the draftsman's more or less satisfactory understanding of them...Whenever this Act is revised everything taken from Mr. Dudley Field's code should be struck out, and the sections carefully recast after independent examination of the best authorities.”⁴⁴

On the other hand, Field was aware of the influence that his codes were having on the codification movement in British India. In a speech he made before the Judiciary Committee of the legislature of the state of New York in 1873, he said: *“Besides these results in our own country, I should mention the very sensible influence these Codes have had upon legislation in India, and upon law reform in England.”*⁴⁵ Interestingly, in that speech, Field also extensively quoted from a speech made by Stephen in India in 1872 on codification.⁴⁶ Yet, it seems that Field was taken by surprise when he learned of the extent to which his codes had been borrowed by the codes of British India. Field's

⁴⁴ SIR FREDERICK POLLOCK & DINSHAH FARDUNJI MULLA, *THE INDIAN CONTRACT ACT: WITH A COMMENTARY, CRITICAL AND EXPLANATORY* iv-v (1st ed., 1905). Pollock and Mulla referred to Field's New York Code as the *“evil genius behind this Act”* in reference to the Indian Contract Act, 1872. *Id.*, 136. With reference to § 27 of the Indian Contract Act, dealing with contracts in restraint of trade, these two scholars opined that *“It looks as if the New York clause had been simply copied without reflection by the draftsman of the Indian legislative department.”* *Id.*, 137.

⁴⁵ *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD*, Vol. I 366 (A.P. Sprague, 1884). Field repeated this in a book he wrote in 1891, where he said: *“Let us now pause for a moment to review the influence which the legislation of New York has exerted upon the legislation of other communities. In civil procedure it has turned and guided the current in twenty-three States and two Territories of the American Union; it has done the same in England, Ireland and India and in sixteen English colonies...”* DAVID DUDLEY FIELD, *LAW REFORM IN THE UNITED STATES AND ITS INFLUENCE ABROAD* 16 (1891). In 1884, Field wrote an essay where said that the law of partnership had been codified in India *“by provisions taken in part from our Civil Code”*. See also *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD*, Vol. II 495 (A.P. Sprague, 1884).

⁴⁶ *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD*, Vol. I 372-373 (A.P. Sprague, 1884).

brother and biographer, Henry M. Field, wrote that when Field traveled to India only a year later in 1874, merely two years after the Evidence Act was enacted in India, he was surprised to find his words on the Indian statute books:

*“It was not long before the American Codes of Procedure were adopted in substance in Great Britain and the Colonies. A few years later (in 1874) Mr. Field went round the world, and found to his surprise his system of practice in use in the courts in India! He could hardly believe his eyes when he was confronted by the rules that he had prescribed, word for word as he had written them in his library in New York...”*⁴⁷

Interestingly, this passage suggests that when Field discovered the borrowing of his work in India, he was flattered, not annoyed.

D. THE UNDERLYING PRINCIPLE

§65(g) of the Evidence Act appeared to be based on two competing principles, firstly, that all relevant evidence must be admitted, and secondly, that courts should not break down because of relevant, yet burdensome, evidentiary material. Interestingly, while Starkie’s articulation of the rule contained in §65(g) suggests that it was to be a species of expert evidence, neither §1688 of Field’s Code nor §65(g) treat the rule as involving expert testimony.

The first principle was perhaps best articulated in the Indian Law Commission’s fifth report in 1868, in which an attempt was made to distinguish England, with its lay juries, from British India, with its professional judges.⁴⁸ The Commission stated in its report that in England that there was a worry that lay persons on a jury would get swayed by low quality evidence. This was not a cause for worry in India, said the Law Commission, where it was better to allow professional judges to see all the evidence in a matter, even if only slightly relevant:

“In England the aim has been to avoid presenting to the consideration of the jury whatever it was thought could not safely be presented to an unprofessional tribunal. In order to obtain this end, various kinds of evidence, which were deemed little worthy of credit, were pronounced inadmissible, and a great deal of evidence which, if duly weighed and dispassionately considered, would tend to the elucidation of truth, is absolutely excluded. On the other hand, evidence is admitted which is at least as dangerous as that which is shut out....In

⁴⁷ HENRY M. FIELD, *THE LIFE OF DAVID DUDLEY FIELD* 96 (1898).

⁴⁸ On juries in British India, see, Kalyani Ramnath, *The Colonial Difference Between Law and Fact: Notes on the Criminal Jury in India*, 50 INDIAN ECON. & SOC. HIST. REV. 341 (2013).

a country like India, where the task of judicial investigation is attended with peculiar difficulties, and where it is the duty of the judge in all civil, and in some criminal cases, to decide without a jury, there is greater danger of miscarriage from the mind of the Court being uninformed than from its being unduly influenced by the information laid before it. It seems, therefore, better to afford every facility for the admission of truth although with some risk that falsehood or error may be mixed with it, than to narrow, with a view to the exclusion of falsehood, the channels by which truth is admitted.”⁴⁹ (emphasis supplied)

The second principle is discernible from the speech made by Sir Henry Maine to the Viceroy’s Council on December 4, 1868, whilst introducing the Law Commission’s Evidence Bill. Maine was worried that admitting far too much evidence would lead to a break down of courts. He said:

“[S]ome evidence must be excluded. If all evidence were admitted, nay, even if all relevant evidence were admitted, if everything were let in which tended to throw light on the matters in issue, the Courts would be overwhelmed. Even in England they would break down, and it would be quite impossible for the Courts to discharge their functions in this country with the notorious habit of its Natives of attempting to help on the proof by accumulating everything which has even the remotest bearing on it.”⁵⁰ (emphasis supplied)

Thus, §65(g) was perhaps enacted to help reconcile these two conflicting principles by ensuring that professional judges in India would get to see all the relevant evidence necessary to arrive at a decision, and yet be able to cope with the volume of evidentiary materials on hand.

E. SUBSEQUENT MODIFICATION

Sir James Stephen served in India as Law Member until April 1872,⁵¹ after which he returned to England.⁵² Upon his return to England, he

⁴⁹ *Supra* note 11.

⁵⁰ PROCEEDINGS OF THE LEGISLATIVE COUNCIL, British Library, India Office Records, V/9/9-11 (1868).

⁵¹ Stephen was quite proud of his creation, the Evidence Act of British India. As he wrote in his book: *“In the years 1870-1871 I drew what afterwards became the Indian Evidence Act (Act 1 of 1872). This Act began by repealing (with a few exceptions) the whole of the Law of Evidence then in force in India, and proceeded to re-enact it in the form of a code of 167 sections, which has been in operation in India since Sept. 1872. I am informed that it is generally understood, and has little judicial commentary or exposition.”* STEPHEN, *supra* note 22.

⁵² Smith, *supra* note 15.

was asked by the Attorney General there, Lord Coleridge, in autumn that year, to prepare an Evidence Bill for England. Stephen prepared such an Evidence Bill, modeled on the Evidence Act of British India, and discussed its provisions with Coleridge in “*frequent consultations*”.⁵³ Though this Bill was never enacted in England, Stephen wrote a book in which he set out a draft modeled on his Evidence Bill for England.⁵⁴ §67(g) of the draft was nearly identical with §65(g) of the Evidence Act of British India:

“Secondary evidence may be given of the contents of a document in the following cases... (g) When the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection: provided that the result is capable of being ascertained by calculation.... In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.” (emphasis supplied)

Thus, in Stephen’s subsequent draft, the words “numerous accounts or other documents” contained in §65(g) of the Evidence Act were replaced with the words “numerous documents”, and a proviso was added under which a summary could only be admitted in evidence if it contained quantitative, not qualitative, information. Further, Stephen’s subsequent draft contained a footnote which provided the clarification that “*The books & c., should in such a case be ready to be produced if required*”, i.e., the underlying documents must be ready to be produced in court if required.⁵⁵

III. INDIAN HIGH COURT DECISIONS

Since its enactment in 1872, only a handful of cases, mostly decided by the Indian High Courts, have dealt with §65(g) of the Evidence Act. These cases essentially appear to impose limits on the scope of the provision. Courts have been particularly concerned with ensuring that an adequate opportunity is available to the opposite side for testing the veracity of the summary. Courts have therefore held that where a party seeks to rely on a summary under §65(g), the underlying documents must be produced before the Court (even if they are not marked as exhibits), and that inspection of the documents must

⁵³ STEPHEN, *supra* note 22, iii.

⁵⁴ Stephen’s Evidence Bill for England cannot be found. See J.D. Heydon, *The Influence of Sir James Stephen on the law of evidence*, THE NSW BAR NEWS ASSOCIATION 45 (2011), available at <http://www.austlii.edu.au/au/journals/NSWBarAssocNews/2011/12.pdf> (Last visited on December 30, 2015).

⁵⁵ Stephen cited the case of *Johnson v. Kershaw*, 1 De G & Sm 260, 264, in support of this proposition.

be given to the other side.⁵⁶ In *Sancheti Food Products v. Registrar of Ships* ('Sancheti Food Products'),⁵⁷ the plaintiff had called three witnesses to compute loss of profits arising out of the plaintiff's inability to use ships purchased by the plaintiff from the defendant. The Managing Director of the Plaintiff undertook to keep all the files and vouchers, on the basis of which the witnesses arrived at their conclusions, in court. These documents, though not exhibited, were disclosed and offered for inspection to the other side. The witnesses' computation of loss of profits on the basis of these documents was held permissible by a Single Judge of the Calcutta High Court. Similarly, in *Kishan Lal v. Sohanlal*,⁵⁸ the Rajasthan High Court held as follows:

*"We are of opinion that S. 65(g) has nothing to do with the admissibility of Exs. D 2, D 5 and D 6. That clause deals with well-known cases where there are too many documents, whether it be books of accounts or other documents which are available to the Court, but which it is inconvenient for the Court to examine. Clause (g) has nothing to do with documents which are not available to the Court. The very fact that Cl. (g) provides secondary evidence of the result because the documents cannot conveniently be examined in Court shows that the documents are there for the Court to examine if it so likes to do. But where, as in, this case, no attempt was made to produce the original documents from which the original of Ex. D 2 was prepared, S. 65(g) cannot, in our opinion, be used for the admission of Ex. D 2."*⁵⁹ (emphasis supplied)

It has already been seen that after drafting the Evidence Act, Sir James Stephen also believed it necessary that the underlying documents must be ready to be produced in court if so required. Further, Sir Henry Maine's speech made in the Viceroy's Council in 1868 suggests that the Evidence Act was concerned with the convenience of the court and not of the parties. Thus, a party seeking to rely on a summary prepared under §65(g) may not be able to argue that it would be unduly harsh or burdensome for it to produce the documents in court or to offer inspection of the documents to the other side.

⁵⁶ Order XI Rule 15 of the Code of Civil Procedure, 1908 provides that if a reference is made in a party's pleading or affidavit to any document, the other side can inspect the document and "take copies" of it. However, the court is empowered by this provision to excuse a party from doing so, for sufficient reasons. Thus, a court has the discretion to hold that a party need not furnish copies of its documents to the other side, for sufficient reasons.

⁵⁷ *Sancheti Food Products Ltd. v. Registrar of Ships*, (1995) 100 CWN 760.

⁵⁸ *Kishan Lal v. Sohanlal*, 1954 SCC OnLine Raj 47.

⁵⁹ *Kishan Lal v. Sohanlal*, 1954 SCC OnLine Raj 47, ¶18.

However, a contrary view appears to have been taken by the Lahore High Court. In *Muhammad Sher v. Court of Wards*,⁶⁰ one of the parties sought to introduce in evidence an abstract of mutation records. The abstract contained the results of a quantitative analysis, showing that the total number of alienations through sales/mortgages made by members of a certain tribe were 354 out of which 84 were mortgages and 270 were sales. Despite the fact that the mutation records were not available for production before the court, the Court permitted the abstract as evidence under §65(g). It was held as follows:

*“In our opinion the [summary] produced appropriately comes under clause [(g)] Section 65 of the Evidence Act which provides that, when the original consists of numerous accounts or other document which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection, secondary evidence may be given by producing an extract. This is what exactly happened in this case. An examination of the vernacular record shows that the original files of the mutation records were not sent by the revenue authorities on the ground that there was a specific rule on the subject which prohibited their transmission. The Court then directed the Naib Sadr Kanungo to prepare an extract and produce it before it. In our opinion the [summary] in this case is a very valuable piece of evidence.”*⁶¹

Courts have also been particularly keen to ensure that the summary must be prepared by the person who carried out the investigation, and that such person must be available for cross-examination by the opposite side. In *Krishna Dayal v. Emperor*,⁶² the Allahabad High Court was considering the admissibility of a certificate prepared by an accounts officer of the department of posts and telegraph based on a search of the records in the audit office, which stated that an amount of surcharge had not been received by the department. The accounts officer admitted, during the course of his evidence, that he had not conducted the search himself, but that it had been conducted under his supervision. The officer was also unable to name the clerks whom he had employed to carry out the search. It was held as follows:

⁶⁰ *Muhammad Sher v. Court of Wards*, 1931 SCC OnLine Lah 325. *See also* *Krishna Nandan Prasad Verma v. State*, 1957 SCC OnLine Pat 121, where it was argued that as the originals were lost, §65(g) did not apply. However, the court in that case did not apply its mind to the question.

⁶¹ *See further*, *Phulwanti Kunwar v. Janeshuar Das*, 1924 SCC OnLine All 532, 600-602 (per Lal J). However, this view was not accepted by Lindsay J, at 583-584.

⁶² *Krishna Dayal v. Emperor*, 1945 SCC OnLine All 104. *See also* *Collector v. Chaturbhuj Panda*, 1961 SCC OnLine MP 113 : 1964 J LJ 288, partly reversed by the Supreme Court in *Chaturbhuj Panda v. Collector*, AIR 1969 SC 255 though with no material bearing on the § 65(g) point.

*“He, therefore, does not answer the test laid down by Section 65 of the Act in that he had not examined the documents.... The insistence by the Legislature on the presence in the witness-box of a person who has examined the documents or of someone “who is skilled in the examination of the documents” is intended to afford an opportunity to the opposite party to find out the truth by means of the cross-examination of such a witness.”*⁶³ (emphasis supplied)

The Calcutta High Court has held, however, that it is permissible for the summary under §65(g) to be prepared with the aid of a team of persons. In *Sancheti Food Products*,⁶⁴ the summary had been prepared by the accountants with the aid of a team. It was held as follows:

“Mallick and Guha Roy themselves did not actually see each and every figure and each and every relevant entry of the numerous books and voucher files which were identified by Katela. §65(g) in its terms does not require this. It requires that the voluminous documents and records be examined by an expert examiner. Examination of these audited books and vouchers by an expert accountant is not done in the same manner today as it was done in 1872 or before that time. It is quite permissible for an expert and a top accountant like Mr. Mallick to engage a team and make random checks, and thus bring to bear upon those documents the entirety of his accountancy expertise. When he does that and when he signs a report it cannot but be said that he has examined the documents and being satisfied he has put his signature to the report.”

It has been held by the Bombay High Court that the person who has examined the documents and prepared the summary need not be the author of those documents.⁶⁵ Thus, §65(g) of the Evidence Act, in a sense, operates as an exception to the rule against hearsay. However, it has also been held by the Calcutta High Court that §65(g) cannot be used to prove the contents of each of the underlying documents, but only *“to prove the general result of the examination of the whole of the record”*.⁶⁶

Incidentally, it may be noticed that there is a disconnect between §63 and 65 of the Evidence Act, both of which deal with secondary evidence.

⁶³ *Krishna Dayal v. Emperor*, 1945 SCC OnLine All 104, ¶14.

⁶⁴ *Sancheti Food Products Ltd. v. Registrar of Ships*, (1995) 100 CWN 760.

⁶⁵ *Bratindranath Banerjee v. Hiten P. Dalal*, 1993 SCC OnLine Bom 170 : (1994) 4 Bom CR 237.

⁶⁶ *Rani Sundar Koer v. Chandreshwar Prosad Narayan Sing*, 1907 SCC OnLine Cal 29 : (1907) 11 CWN 501.

§63 provides a definition for secondary evidence, stating that it “means and includes” certified copies, other kinds of copies enumerated therein, counterparts of documents, or oral accounts of documents. However, §63 does not include a summary of voluminous documents within the definition of secondary evidence. On the other hand, §65 of the Evidence Act deals with circumstances in which secondary evidence may be given as to the existence, condition or contents of a document, and includes the “general result” or summary of numerous documents within its ambit. A vigorous debate took place amongst the members of the Law Commission of India within the pages of its 69th Report⁶⁷ in 1977 under the Chairmanship of Justice P.B. Gajendragadkar, as to whether this means that §63 is not exhaustive as to the kinds of secondary evidence which are admissible, or whether §65(g) cannot be considered secondary evidence at all. The six members of the Law Commission were equally divided over the subject.

The historical development of §65(g) discussed in this paper almost sheds no light on the doctrinal development of the provision. It is interesting, however, that none of the cases set out above identify Field’s Code as a possible source for the provision, or consequently rely on U.S. law extensively to aid its interpretation.

IV. RULE 1006, U.S. FEDERAL RULES OF EVIDENCE

The Federal Rules of Evidence were adopted in the U.S. in 1975.⁶⁸ Rule 1006 permitted summaries to be admitted in evidence.⁶⁹ It now reads as follows:

“The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at

⁶⁷ Law Commission of India, *Report on the Indian Evidence Act, 1872*, Report No. 69, 413-424 (May 1977), available at <http://lawcommissionofindia.nic.in/51-100/Report69.pdf> (Last visited on December 14, 2015).

⁶⁸ LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 268 (2002).

⁶⁹ For a discussion of Rule 1006, see, Becky Thorson, *In Summary of Summaries*, 57 *THE FEDERAL LAWYER* 41 (2010); Richard L. Gabriel, *Rule 1006: Admissibility of Summary Evidence*, 22 *COLO. LAW. REV.* 35 (1993); Emilia A. Quesada, *Summarizing Prior Witness Testimony: Admissible Evidence, Pedagogical Device, or Violation of the Federal Rules of Evidence?*, 24 *FLA. ST. U. L. REV.* 161 (1996); Brandon L. Bigelow, *Summary and Expert Witnesses: A Distinction With A Difference*, 9 *SUFFOLK J. TRIAL & APP. ADVOC.* 1 (2004); James J. Hippard, Sr., *Article X: Contents of Writings, Recordings, and Photographs*, 30 *HOUS. L. REV.* 1093 (1993).

*a reasonable time and place. And the court may order the proponent to produce them in court.*⁷⁰

The Advisory Committee, responsible for drafting and enacting the rule, wrote the following comment in support of the enactment of the rule: *“The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury.”*⁷¹

The well-known U.S. treatise on the law of evidence, *Wigmore*, contains the following statement on the rule:

*“Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements – as, the net balance resulting from a year’s vouchers of a treasurer or a year’s accounts in a bank ledger – it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper.”*⁷²

⁷⁰ See Federal Rules of Evidence, Rule 1006 (U.S.A.), available at https://www.law.cornell.edu/rules/fre/rule_1006 (Last visited on December 27, 2015). Prior to 2011, the provision read as follows: *“The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.”* See Federal Rules of Evidence, Public Law 93-595 (January 2, 1975), available at http://federalevidence.com/pdf/FRE_Amendments/1975_Orig_Enact/1975-Pub.L._93-595_FRE.pdf (Last visited on December 27, 2015).

⁷¹ See Federal Rules of Evidence, Rule 1006 (U.S.A.), available at https://www.law.cornell.edu/rules/fre/rule_1006 (Last visited on December 27, 2015).

⁷² JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, Vol. 4 535 (James H. Chadbourn, 1972). The commentary in RATANLAL RANCHHODDAS AND DHIRAJLAL KESHAVLAL THAKORE, RATANLAL & DHIRAJLAL’S THE LAW OF EVIDENCE (24th ed., 2016), quotes from the 7th Edition of Stephen’s Digest on the law of evidence. I have not been able to find a copy of the 7th Edition of Sir James Stephen’s Digest on the law of evidence, though earlier editions of Stephen’s Digest on the law of evidence have been cited or referred to herein. However, it is noteworthy that the quotation extracted in Ratanlal and Dhirajlal from Stephen’s book appears to be strikingly similar to the passage from Wigmore extracted above. It reads as follows: *“In the case of voluminous documents, accounts, records, etc., it is obvious that it would often be practically out of question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Upon the same principle, summaries of official or corporate records might be presented; and*

In *United States v. Bray*,⁷³ the Sixth Circuit of the United States Court of Appeals has held that there are five requirements for the admission of a summary. First, the documents must be sufficiently numerous as to make comprehension difficult and inconvenient. It is not necessary for the documents to be so voluminous as to be literally impossible to examine. Second, the proponent of the summary must make the underlying documents available to the other side at a reasonable time and place, in order to enable it to attack the authenticity or accuracy of the summary. What may be considered to be a “reasonable time” depends on the facts and circumstances of the case. Thus, in one case, Judge Richard Posner of the Seventh Circuit of the U.S. Court of Appeals held that providing the underlying documents to the other side thirty days prior to the trial was sufficient, where the other side was represented by “*a huge law firm that could easily have spot checked the summaries for accuracy immediately upon receiving them...*”⁷⁴ It is sufficient if the party seeking to introduce the summary into evidence provides a list or description of the documents supporting the summary, and states when and where the document may be reviewed.⁷⁵ It is not necessary for the proponent to send copies to the other side.⁷⁶ Third, the proponent must establish that the underlying documents are admissible in evidence.⁷⁷ Thus, if the underlying document is hearsay and not admissible under an exception to the rule against hearsay, then the summary is inadmissible. This limitation imposed by U.S. courts on Rule 1006 of the Federal Rules of Evidence appears to be far more extensive than the limitations imposed by the Indian High Courts on §65(g) of the Evidence Act. In India, there is no requirement that the underlying documents must be admissible in evidence. However, according to the D.C. Circuit, the underlying documents need not actually be admitted in evidence; they merely need to be admissible.⁷⁸ Fourth, the summary must be accurate and not misleading. In other words, the summary should not be embellished or annotated with conclusions or inferences. Fifth, the summary must be introduced by the person who prepared it.

In short, the doctrinal development of Rule 1006 of the Federal Rules of Evidence in the U.S. has been largely similar to that of §65(g) of the Evidence Act in India. However, U.S. courts have imposed the additional limitation that the underlying documents must be admissible in evidence, which is

testimony, by one who has examined records, that no record of a specific tenor is there contained, is receivable instead of producing the entire mass for perusal in the court-room.” It is possible that Stephen (or the editor of the 7th Edition of the book) was quoting from or citing Wigmore in support of this statement.

⁷³ *United States v. Bray*, 139 F 3d 1104 (6th Cir 1998). *See also* *White Industries v. Cessna Aircraft Co.*, 611 F Supp 1049, 1070 (1985).

⁷⁴ *Fidelity National Title Insurance Co. of New York v. Intercounty National Title Insurance Co.*, 412 F 3d 745, 753 (7th Cir 2005).

⁷⁵ *Air Safety, Inc. v. Roman Catholic Archbishop of Boston*, 94 F 3d 1, 8 (1st Cir 1996).

⁷⁶ *United States v. Jamieson*, 427 F 3d 394, 409-410 (6th Cir 2005).

⁷⁷ *See also* *United States v. Johnson*, 594 F 2d 1253 (9th Cir 1979).

⁷⁸ *United States v. Hemphill*, 514 F 3d 1350 (DC Cir 2008).

not a requirement in India. Further, Rule 1006 appears to have been used far more extensively in the U.S. than §65(g) has been used in India.

V. THE DEMISE OF THE RULE IN ENGLAND

It seems that the rule contained in §65(g) of the Evidence Act gradually disappeared or was narrowed down at the common law in England. The cases of *Roberts v. Doxon* and *Meyer v. Sefton*, from which the rule was originally derived, appear to have scarcely been followed since they were decided in 1791 and 1817 respectively. *Topham v. McGregor*,⁷⁹ decided in 1844, scaled the rule back. The question in that case, a testamentary suit, was whether the sister of the deceased shared a good relationship with the deceased prior to his demise. In order to establish her case, the sister of the deceased called a witness who testified that the sister had sent him many letters, over the years, which established her case, but that the letters were “*long since destroyed*”. The witness was then asked by the sister’s lawyer about the “*general contents of those letters*” and “*the impression thereby produced on his mind, with reference to the degree of friendship which subsisted between the testator and his sister.*” An objection was taken by the other side as to the admissibility of this evidence, and the objection was upheld.

The 1848 edition of a treatise on evidence law written by John Pitt Taylor⁸⁰ in England described the rule contained in §65(g) as follows: “*A sixth relaxation of the rule demanding primary proof has been admitted, where the evidence required is the result of voluminous facts, or of the inspection of many books and papers, the examination of which could not conveniently take place in court.*” In support of this statement, Taylor cited the well-known treatise, *Phipson on Evidence*. Interestingly, in his own time, Stephen was accused of having borrowed heavily from Taylor on evidence.⁸¹ It is therefore quite plausible that the words “cannot conveniently be examined in court” which are found in §65(g), instead of the words “cannot be examined in court, without great loss of time” in §1688 of Field’s 1850 Code, were inspired from this formulation in Taylor’s treatise on the law of evidence. The 1891 edition of Taylor’s treatise also contained the same formulation.⁸² However, several decades later, in the 1931 edition⁸³ of the same treatise by Taylor on evidence law, the aforesaid rule had disappeared. Only a much narrower and whittled down version of the rule survived, as follows: “*the contents of writings may be proved by secondary*

⁷⁹ *Topham v. McGregor*, (1844) 1 Carrington and Kirwan 320.

⁸⁰ A TREATISE ON THE LAW OF EVIDENCE, AS ADMINISTERED IN ENGLAND AND IRELAND; WITH ILLUSTRATIONS FROM THE AMERICAN AND OTHER FOREIGN LAWS, Vol. 1 415-416 (1848), available at <https://archive.org/details/atreatiseonlawe06taylgoog> (Last visited on January 8, 2016).

⁸¹ Heydon, *supra* note 43, 31.

⁸² A TREATISE ON THE LAW OF EVIDENCE, AS ADMINISTERED IN ENGLAND AND IRELAND; WITH ILLUSTRATIONS FROM THE AMERICAN AND OTHER FOREIGN LAWS 421-422 (1891).

⁸³ JUDGE PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE 303-304 (R.P. Croom-Johnson & G.F.L. Bridgman, 1931).

evidence, when their production is either physically or legally impossible, or highly inconvenient. Thus, inscriptions on walls and fixed tables, mural monuments, gravestones, surveyors' marks on boundary trees, notices warning trespassers affixed on boards, and the like, may be proved by secondary evidence, since they cannot conveniently, if at all, be produced in court."

At the common law in England today, the rule contained in §65(g) seems to now exist in in this narrow form.⁸⁴ According to *Phipson on Evidence*, originals need not be produced when "*production of the original is physically impossible or highly inconvenient, e.g. inscriptions on walls, tombstones, etc.*"⁸⁵ Likewise, another author of English evidence law opines that secondary evidence of a document is admissible "*where the production is either physically impossible, for example because it is an inscription upon a tombstone or wall or legally impossible, for example because the document in question is a notice which is required by statute to be constantly affixed at a factory or workshop.*"⁸⁶ Under the Evidence Act, this rule is contained in §65(d) and not §65(g). §65(d) permits secondary evidence "*when the original is of such a nature as not to be easily movable*".

Secondary evidence of documents in England is, in some cases, permitted where the production of primary evidence is inconvenient. For example, under the Bankers' Books Evidence Act, 1879,⁸⁷ a copy of an entry in a bankers' book can be received as prima facie evidence of the entry, under certain circumstances. According to one author, this rule exists because of "*the inconvenience which would have been occasioned by the necessity of producing the originals*".⁸⁸ A similar statute exists on the statute books in India, viz., the Bankers' Books Evidence Act, 1891. However, this exception to the best evidence rule does not permit summaries to be tendered in evidence, and is therefore not comparable with §65(g) of the Evidence Act.

⁸⁴ The rule contained in § 65(g), however, appears to have found a home elsewhere in the common law world. In Australia, §50 of the Evidence Act, 1995, permits a party to adduce evidence of the contents of two or more documents in the form of a summary "*if the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question*", but only if the opposite party is given a reasonable opportunity to examine or copy the underlying documents. The Evidence Act, 1995, §50 (Australia). In New Zealand, § 133 of the Evidence Act, 2006, permits a party to give evidence of a "*voluminous document or a voluminous compilation of documents by means of a summary or chart*", either upon production of the underlying documents in court or upon making them available to the other side for examination and copying at a reasonable time and place. The Evidence Act, 2006, §133.

⁸⁵ PHIPSON ON EVIDENCE 1426-1427 (Hodge M. Malek et al, 18th ed., 2013).

⁸⁶ ADRIAN KEANE, THE MODERN LAW OF EVIDENCE 182 (3rd ed., 1994).

⁸⁷ The Bankers' Books Evidence Act, 1879, § 4 (U.K.).

⁸⁸ COLIN TAPPER, CROSS AND TAPPER ON EVIDENCE 757-759 (8th ed., 1995).

VI. CONCLUSION

The findings presented in this paper are interesting for several reasons. While Field's Code is considered, by some sources, to have been the inspiration for the Anglo-Indian Codes generally,⁸⁹ very few scholars have been able to pinpoint the connection between Field's Code and the Evidence Act. In his impressive paper on the origins of the Indian Evidence Act, J.D. Heydon, justice of the High Court of Australia (as he then was), believed that there might have been four potential sources of material for the Evidence Act: English law, Indian legislation, the Indian Law Commission Bill, and Hindu/Muslim law.⁹⁰ However, Heydon missed out a fifth source- Field's 1850 New York Code. No popular treatise on the law of evidence in India has, as yet, identified that §65(g) owes its origins to Field's 1850 Code for the state of New York.⁹¹ In fact, a prominent author on the law of evidence in India opines that "*The [Evidence Act] is based entirely on the English law of Evidence and the industry and care with which the great mass of principles and rules of English law have been codified, and that too within a very narrow compass, must need to excite the admiration and wonder of all....*"⁹² Even Stephen's own brother, Leslie Stephen, thought that in drafting the Indian Evidence Act, Stephen had done no more than "*(boil) down the English law*" and "*(strain) off all the mere technical verbiage*" of English treatise writers, "*to extract a few common-sense principles and to give their applications to practice in logical subordination and coherence*".⁹³ In a case decided in 1960, the Supreme Court of India believed that Stephen did nothing more than consolidate the English law of evidence.⁹⁴

Why is it that British legislators in colonial India relied on Field's Code, but made no mention of it in their public speeches and notes on the Evidence Act? True, Stephen did not engage in utter word-for-word plagiarism while drafting §65(g) of the Evidence Act – he modified §1688 of Field's 1850 Code. Yet, a substantial portion of it was borrowed from §1688. One can venture a few guesses why this happened, though these are certainly not supported by any evidence. Perhaps Britons like Stephen felt it an odd irony that the law that Britain was proudly bringing to its colony in India was drafted in a country which had violently overthrown British colonialism itself. Or perhaps Stephen

⁸⁹ See ENCYCLOPEDIA BRITANNICA, *David Dudley Field*, available at <http://www.britannica.com/biography/David-Dudley-Field> (Last visited on December 26, 2015); Weiss, *supra* note 10.

⁹⁰ Heydon, *supra* note 43, 22-23.

⁹¹ See RATANLAL RANCHHODDAS AND DHIRAJAL KESHAVLAL THAKORE, *RATANLAL & DHIRAJAL'S THE LAW OF EVIDENCE* 419 (21st ed., 2004); RATANLAL RANCHHODDAS AND DHIRAJAL KESHAVLAL THAKORE, *RATANLAL & DHIRAJAL'S THE LAW OF EVIDENCE* 1069 (24th ed., 2016); *LAW OF EVIDENCE* 1248 (Dr. H.K. Saharay, 14th ed., 2006); SIR JOHN WOODROFFE & SYED AMIR ALI'S *LAW OF EVIDENCE*, Vol. II, 3136-3138 (Dr. V. Kesava Rao, 2012); SUDIPTO SARKAR & V.R. MANOHAR, *LAW OF EVIDENCE*, vol. 1, 1465-1466 (17th ed., 2010).

⁹² SARKAR, *id.*, 3-4.

⁹³ Stephen, *supra* note 16, 274. Leslie seems only to have been aware about a criticism that Stephen had borrowed from Taylor on Evidence.

⁹⁴ *State of Punjab v. Sodhi Sukhdev Singh*, AIR 1961 SC 493 : (1961) 2 SCR 371 ¶93.

felt odd admitting that he had borrowed from a draft prepared by an attorney who did not belong to his posh, Cambridge-Etonian-Silk background. It is possible that Stephen's failure to acknowledge the New York Code was part of Stephen's general failure to give credit to all the sources he had relied on, including English treatise writers, though one does get the sense that Stephen and the Select Committee were far prouder of the fact that they were referring to English treatise writers in the codification exercise- by contrast, the New York Codes hardly found any mention in their speeches or reports.

However, the fact that principles of evidence law were imported from the U.S. or from 19th century English common law to India is important for other reasons. The division between judge and jury was a very distinct one in 19th century England, as it continues to be in the U.S. It would be safe to presume that several rules of evidence of the common law at that time were designed towards ensuring that lay jurors did not get carried away with what litigants placed before them in the guise of evidence. However, such concerns ought not to have been applicable in a place like British India where the judge was (and continues, in independent India, to be) both a trier of fact and an expositor of law. The scope of jury trials was limited in colonial India,⁹⁵ and with some rare exceptions, juries have been abolished in independent India. It has been seen that the Law Commission in British India was particularly aware of the substantial absence of the institution of the jury as trier of fact in British India. Therefore, the fact that an American code of evidentiary rules based on the prevalent English common law was used as a source for drafting the Evidence Act of British India is particularly interesting. After all, much of the Evidence Act in India deals with questions of what evidence may be considered "relevant", and with the distinction between the admissibility and weight of evidence. These questions ought to be of special concern where there are lay jurors, not trained judges as in India. Judges would be less likely to get influenced with irrelevant or inadmissible documents (which, they would have to see anyway, in order to rule on any objections relating to their admissibility).

However, it cannot be said that §65(g) of the Evidence Act finds no useful place on the statute books in India today. True, the provision was originally designed, in the 1850 New York Code, to ensure that juries did not get overwhelmed with excessive evidentiary paperwork. On the other hand, a trained judge, in the habit of routinely parsing through bulky documents, would be less likely to get overwhelmed with voluminous documentary evidence. Further, modern pre-trial discovery proceedings are more extensive in the U.S., and are more often subject to abuse in the U.S.,⁹⁶ than they are in India.

⁹⁵ On juries in colonial India, see Kalyani Ramnath, *The Colonial Difference between Law and Fact: Notes on the Criminal Jury in India*, 50 INDIAN ECON. & SOCIAL HIST. REV. 341 (2013).

⁹⁶ See, Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 25 (1987-88); Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618 (1996).

Document production requests in the U.S. are likely to yield more substantial and voluminous documents than they are in India. Though modern discovery proceedings in the U.S. emanated from the Federal Rules of Civil Procedure of 1938,⁹⁷ and not Field's 1850 Code, the existence of Rule 1006 of the Federal Rules of Evidence in the U.S. is particularly justifiable today because of the voluminous nature of documentary materials which might emerge from pre-trial discovery proceedings. This is not a concern in India where courts will frown upon fishing and roving inquiries. Even so, in many modern, complex commercial disputes in India, documents voluntarily produced by parties could run into tens of thousands of pages, and the utility of §65(g), even for trained judges, is hard to ignore.

⁹⁷ Wolfson, *id.*, 21.

