Law of Evidence in Pakistan

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The Qanun-e-Shahadat Order 1984[1] is very important piece of legal document in Pakistan. It repealed the Evidence Act of 1872. Qanun-e-Shahadat Order was made law by President Zia-ul-Haq in 1984. It governs the law related with evidence in all law courts of Pakistan. The Qanun-e-Shahadat 1984 is an objective law. It is the compendium of rules of procedure/practices according to which the court is to record evidence of the parties. It prescribes rules, methods with regard to evidence of parties. This order except with few exceptions, and the repealed Evidence Act, 1872 are subjectively the same but objectively they are poles apart. It is an admitted position that all Articles or the Order 1984 are substantially and subjectively mere reproduction of all sections of the repealed Act with exceptions of Article 3, Article 4 to 6(with reference to Hudood), addition of Article 44 and addition of a proviso to Article 42 if compared with corresponding sections of the repealed Act. Similarly the term “Qanun-e-Shahadat” is only an Urdu or Arabic translation of English term “Law of Evidence”. The significant change made in the Qanun-e-Shahadat is that “Courts-Martial” covered under the Army Acts besides a tribunal or other authority exercising judicial or quasi-judicial powers or jurisdiction have been included. The repealed Evidence Act, 1872 was applicable to “affidavits” but in the Qanun-e-Shahadat Order, 1984, affidavits are not immune from its application. Only the proceedings saved are the proceedings before an Arbitrator, the reason thereof is obvious that award, if any, announced by the Arbitrator is subject to strict scrutiny under the Arbitration Act, 1940.

The Object of Qanun-e-Shahadat Order is evident from its preamble which has never been the object of the repealed Evidence Act. With reference to the preamble, Intention of object of introduction this Order, as stated therein, is to bring the all laws of evidence in conformity with the injection of Islam as laid down in the Holy Quran and Sunnah. As interpretation of all articles of Qanun-e-Shahadat must be done in conformity with the injection of Islam as laid down in the Holy Quran and Sunnah instead of adopting old interpretation of the repealed Evidence Act, 1872. However, principles of Islamic Law of evidence so long as they are not codified or adopted by Qanun-e-Shahadat, 1984 are not per se applicable Order apply to all judicial and quasi-judicial proceedings. All technicalities have to be avoided and callas for doing substantial justice between parties are to be heeded.

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[1] http://punjabpolice.gov.pk/system/files/qanun-e-shahadat-order-1984.pdf

The Tribunals especially in cases where they are required to adjudicate upon the civil rights of the parties are under an obligation to act judicially and are bound to follow the fundamental rules of evidence and fair play which are embodied in the principles of natural justice. They are required to give an opportunity to the party affected, make some kind of inquiry, and give a hearing and to collect evidence, if any. Considering all the facts and circumstances bearing on the merits of the controversy before any decision is given by them. There are the essential elements of a judicial approach to the dispute. Prescribed forms of procedure are not necessary to be followed provided in coming to the conclusion these well-recognized norms and principles of judicial approach are observed by the tribunal. Jurisdiction of a court within whose territorial limit, cause of action or part thereof would arise cannot be contracted out by parties.

Kinds of Evidence under Qanun-e-Shahadat Order 1984

Evidence is the most important part of procedural law. Term "*evidence"* has been derived from Latin term, and this Latin term is evident or evidere, which means to show clearly, to discover, to ascertain or to prove. Evidence refers to anything, which is necessary to prove a certain fact. In short words, evidence is a mean of proof. There can be different kinds of evidence.

Definition of Evidence

According To Salmond:
"Evidence may be defined as any fact which possesses probative force."

Meaning of Probative force

A probative force means the quality by virtue of which the Court presumed that one fact is evidence of another fact.

Various Kinds of Evidence

Following are most prominent kinds of evidence:

1. Original Evidence

Original evidence means production of documents in their original forms.

Explanation

Following points are important for explanation of original evidence
(i) Original evidence is, in fact, primary evidence.
(ii) Original evidence relates to documents
(iii) In most of cases, original evidence is given more importance over oral evidence.

(iv)Written documents, which can be public or private documents, are usually produced as original evidence.

2. Un-original Evidence

Un-original evidence means production of copy of document in place of original document.

Explanation

Following points are important for explanation of un-original evidence.

(i) Secondary evidence

Un-original evidence is, in fact, secondary evidence.

(ii) Insufficient Evidence

Usually un-original evidence is considered insufficient evidence. Therefore, it is not relied upon in most of cases. It is only relied upon when it is proved through other evidence that production of original document has become impossible and therefore, its copy has been produced.

(iii) When can un-original evidence be given?

Un-original evidence can be given when original document is not available or is lost or is destroyed or is in possession of some person, who does not produce. There can also be other reason due to which un-original evidence can be given.

3. Direct Evidence

Direct evidence means that evidence, which relates to real disputed question of case and which is sufficient to determine responsibility.

(i) Direct evidence can be oral evidence. In fact, Qanoon-e-Shahadat Order has provided that oral evidence should be direct in all cases.
(ii) Even direct evidence can be documentary evidence too.
(iii) Direct evidence is based on personal knowledge or observation.
(iv) Direct evidence cannot be based in inference or presumption.

4. Real Evidence

Real evidence usually takes from of some kinds of material object, which is produced before court.

Explanation
Following points are important for explanation of real evidence

(i) Material or physical evidence
Real evidence is also termed as material or physical evidence.

(ii) Purpose of Real evidence
One purpose of real evidence can be to prove existence of some material object and real evidence can be to make inference about use of some material object in commission of some offence. And also to prove presence of any material object at some place or possession of some person can be purpose of real evidence.

5. Circumstantial Evidence

Circumstantial evidence means that evidence, which is based on inference and which is not based on personal knowledge or observation.

6. Personal Evidence

When some person himself sees any incident or situation and gives statement about it in court, such statement is called personal evidence.

Refreshing Memory

The rule of law of evidence is that a witness should state the facts in his knowledge in the court; and if he remembers any fact but does not recollect the exact detail; he can have a resort to any document containing the detail. Same rule is enacted under Articles 155 through 157 of the Qanun-e-Shahadat Order, 1984. But if a witness has refreshed his memory; there is a right to inspect and use the same for the purpose of cross-examination.

Relevant Provisions:
Articles 155 through 157 of Qanun-e-Shahadat Order, 1984.

Concept of Refreshing of Memories:

A witness may refresh his memory while giving evidence; Justice Munir stated this concept in his book Law of Evidence in following words; *"Although a witness should always state what he himself remembers he may nevertheless while giving evidence*

refresh his memory as to details by referring to documents made by himself or by his order at or very shortly after the date on which the event in question occurs"[2]
Scope of Articles 155-157:

Sections 159-161 of the Evidence Act, 1872 (Articles 155-157 of Qanun-e-Shahadat Order, 1984) deals with the extent to which and the mode in which a witness may refer to a writing in order to refresh his memory while giving evidence. (Justice Munir, The Law of Evidence)[3]

Purpose of rule Envisage under Articles 155-157:

The reason of the rule of refreshing of memory is to protect witness from suffering from a mistake and enable him to explain an inconsistency (Holiday vs. Holgate)[4]

Persons who can refer their memory as provided under Qanun-e-Shahadat Order, 1984:

Following persons are allowed to refresh their memory;

1. an expert witness;
2. witness who recollects the facts; and
3. Witness who does not recollect fact.

Refreshing of memory by an Expert Witness:

Under Article 155 (4) an expert may refresh his memory by referring to professional treatise made by him with reference to case under consideration.

Refreshing of memory by the person who recollects the facts:

[2] "The Law of Evidence" by Justice Muhammad Munir, 2nd edition

[3] "The Law of Evidence" by Justice Muhammad Munir, 2nd edition

[4] Holiday v.Holgate, 17 LT 18 473

Under Article 155 a witness may refresh his memory by referring to any writing made by him; if he actually recollects the circumstances to which he is deposing by reference to that writing, he can with the help of the writing swear to the facts.

Condition precedents to invoke the provision of Article 155:

1. While asking for refreshing of memory the witness must ensure that;
2. He actually recollects the facts of the case;
3. Writing so intended to be used was made or read by him;
4. Writing was made at the time of transaction or soon afterward;
5. Witness believes that writing is correctly made.

Scope of Article 155:

Article 155 contemplates a case where a witness on being shown writing made or read by him at the time when the facts were fresh in his mind can recall in his mind the fact recorded therein and having thus revived his memory deposed to those facts.

Refreshing of memory where the witness does not recollects the facts of the case:

Article 156 facilitate a witness testifying facts as mentioned in Article 156 without specific recollection; if he is sure that the facts deposed were correctly recorded by him in the document.

Requirements of Article 156:

1. Witness has no recollection of facts;
2. Witness had made or read document;
3. Writing was made or read at the time or soon after the transaction;
4. The witness is sure that the document was correctly made.

Parameter to determine correctness of record made:

Article 156 requires the witness to affirm that he is sure that the facts were correctly recorded in the document. The witness's reliance on correctness of document rests on two reasons;

1. Recollection of facts;
2. General practice.

On first hand he may distinctly recollect his state of mind at the time of making or first seeing the record and may thus passed judgment upon and know the record's correctness. (Wigmore 747).[5]

On the other hand he may know from his general practice in making such records or from other indications on the paper that he must have passed judgment upon and knows the correctness of record. Here he nonetheless knows the correctness of the record although he has no present recollection of the specific state of mind. (Taylor 1412)[6]

Probative force of evidence under Article 156:

A statement by the witness that he is sure that the facts were correctly recorded in the document is not conclusive.

Scope of Article 156:

If the witness though has no recollection is sure that the facts were correctly represented in the document at the time he wrote it or read the same; the document may be given in evidence on the witness swearing to that fact.

Right of cross-examination of Adversary:

Article 157 gives the opposite party a right of inspection of document used in the court for the purpose of refreshing memory of the witness. And for this purpose court requires

[5] Statement Am. Bar Assn. Committee on the Improvement of the Law of Evidence, cited 3A Wigmore on Evidence, ss. 924a, p. 747

[6] The Law of Evidence see Taylor p. 1412

the party using document for refreshing of memory to produce it in the court. The adverse party has right to see it and to cross examine the party using the document to refresh memory.

Expert opinion

General rule is that the opinions of a witness, who have not seen, heard or perceive the alleged incident by him is not relevant. However Article 59 to 65 is exceptions to this rule. It is provided that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove.

Relevant Provisions:

Article 59 of Chapter III of the Qanun-e-Shahadat Order, 1984

Definition of term “Expert”

Expert is a person professionally acquainted with science or practice. (Strickland)

Powell define the term “Expert witness” in following words; “An expert witness is one who has devoted time and study to a special branch of learning and thus is specially skilled on the point on which he is asked to state his opinion”

Qualifications of an expert:

Lord Russal determined; that the expert is one who is “Peritus, skilled and has adequate knowledge”[7]

Opinion of an expert under Article 59:

Under Article 59 the opinion of an expert is permissible any of the following matters are in issue;

[7] AIR1931 PC 189

Foreign Law: Although court can take judicial notice of foreign law; what the whole law of foreign country is at a particular time can't be proved except by calling an expert.[8]

Science or Art:

Under Article 59 opinion of an expert is relevant where a question of science or art is involved. The term science is constructed by the court as a "great proficiency, dexterity and skill based on long experience and practice"[9]

Identity of hand writing:

For the purpose of proving the hand writing the opinion of experts or of the persons having acquaintance with it is admissible. However the evidence of handwriting expert is neither only nor the best method of proving hand writing.

Finger impression:

The opinion of an expert formed by a comparison of thumb impression on the document with those taken in the court or before the sub-registrar is admissible in evidence.[10]

Electronic documents:

Authenticity and integrity of electronic document made by or through an information system is to be checked by expert as to the functioning, specification programming and operation of information system.

Necessity of expert witness on expert witness:

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[8] AIR 1956 Cal 48

[9] AIR 1959 Pat 534

[10] AIR 1926 Cal 531

Evidence of experts on the expert opinion is necessary when occurrence is not witnessed by eye witnesses and case entirely depends upon the circumstantial evidence.

Value of expert witness:

The evidence of expert witness is only a piece of evidence whish has to be examined and appraised like any other evidence. [11]

Expert witness should be examined by the court.

Court should satisfy itself as to the value of evidence of an expert in the same way as it must satisfy itself of the value of other evidence.

Expert evidence may be corroborated.

Conviction can't be based upon expert witness.

The value of expert witness rests upon the skills of expert and the cogency of reasons on which it is based; however the court should pay attention to the expert opinion where it is purely of scientific nature.

Scope of Article 59:

The evidence of experts can only be admitted where Qanoon-e-Shahadat Order allows and not otherwise.

Leading Question

A question that suggest the witness its answer; that the person putting the question desires to get in it is said to be the leading question. Leading question can't ordinarily be asked during examination in chief or re- examination because the witness is presumed to be biased in favor of the party examining him and might thus be prompted. But leading question is almost always allowed during cross-examination.

[11] 1991 PCrLJ 2049

Relevant provisions:
Article 136 through 138 of Chapter X of the Qanoon-e-Shahadat Order, 1984
Cross Reference:
Article 132, 133, 150 and 143 of the Qanoon-e-Shahadat Order, 1984
Meaning of leading question:

A leading question is suggestive question, i.e. a question which suggests the answer that the interrogator wishes or expects to receive, or which embodying a material fact admits of conclusive answer by a simple negative or affirmative.[12]

The term leading question is defined under Black's Law Dictionary in following words;

"A question that suggests the answer to the person being interrogated; esp. a question that may be answered by a mere yes or no"

Determination of leading question:

It is the discretionary power of the court to determine; whether leading question should be permitted and the responsibility for that permission entirely rests on the court.

Leading Questions are not in generally allowed to be put in examination in chef and re-examination:

Leading question cannot be asked in examination-in-chief or re-examination only if objected by other party such question therefore can be asked if they are not objected by other party.

Reason of rule:

The reason of rule is that the witness is presumed to be favorable to the party calling him who knowing exactly what the former can be proved might prompt him to give only the advantageous questions.

[12] Nicholl vs. Dowding 18 RR 746

Discretion of the court:

Even where a leading question is objected; it is discretion of the court to allow it or disallow it and discretion will not be interfered with by a court of appeal or revision except in extreme case.

Exceptions to the principle of unacceptability of leading question during examination-in-chief:

There are some well-known exception to the rule that leading question can't be asked in examination-in-chief and re-examination.

Introductory question:

Leading question is allowed when a witness is asked about matter preliminary to the main topic of controversy.

Undisputed matters:

Matters essential to be brought before the court; but are not themselves in controversy such a witness's name, age, residence, relationship to the parties and the like. There is no danger of improper suggestions therefore; the rule disallowing question is relaxed in favor of questions as to such matter.[13]

Matters sufficiently proved:

To abridge the proceedings and bring the witness as soon as possible on to the material points on which he is to speak, counsel may lead him on to that length and may recapitulate to him the acknowledged facts of the case which have been already established.[14]

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[13] Wigmore on Evidence, ss. 924a, p. 747 775

[14] The Law of Evidence see Taylor p. 1404

As to identity of person or things:

For the purpose of identifying a person or things the attention of the witness may be directly pointed to them.

Witness to contradict another witness:

Where one witness is called to contradict another as to expression used by the latter the former may be asked not merely what was said, but whether the particular expression were used, since otherwise a contradiction might never be arrived at. [15]

To assist memory of the witness:

Where the witness is unable without extraneous aid to revive his memory on the desired point, i.e. where he understand what he is desired to speak about but can't recollect what he knows; his recollection being exhausted may be aided by a question suggesting the answer.[16] (Wigmore 778)

Hostile witness:

Under Article 150, leading questions are generally allowed to be put to a witness who, by his conduct in the witness-box obviously appears to be hostile to the party calling him.

Witness's want of understanding:

Where the witness is a child or an illiterate or an alien and doesn't appreciate the tenor of the desired details and is therefore, unable to say anything about it, a question calling attention specifying to the details may be allowed when other means have failed.

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[15] Phipson on Evidence 6th edn 468-469

[16] Wigmore on Evidence, ss. 924a, p. 778

Permission of the court:

Where the court while exercising its discretionary power to allow leading question; the same can be asked.

Objection has not been raised:

Where the adverse party doesn't raise objection as against the leading question put on witness; it is allowed.

Leading question can be asked during cross-examination:

Leading question may be asked in cross-examination. The purpose of cross-examination being the test of accuracy, credibility and general value of the evidence given and sift the fact already stated by the witness; it sometimes become necessary for a party to put leading question in order to elicit facts in support of his case, even though the fact so elicited may be entirely unconnected with facts testified to the examination-in-chief.

Exception to the rule that leading question may be asked in cross-examination:

There are certain exceptions to the rule that leading question may be asked in cross examination. These are as follow;

The counsel is not allowed to go to the length of putting the very words into the mouth of the witness which he is to echo back.[17]

A question which assumes facts as proved which have not been proved or which assumed that particular answer have been given in fact have not been given is not permissible either in examination-in-chief or cross-examination.[18]

[17] The Law of Evidence by Taylor

[18] The Law of Evidence by Taylor

Privileged Communication

Article 4 through 15 of Qanoon-e-Shahadat Order 1984, explains the necessity of privileged communication such privileges are provided for public purpose and or the benefit of defense counsel. However it can be waived if falls within exception enunciated by law.

Relevant provisions:
Article 4 through 15 of Qanoon-e-Shahadat Order, 1984
Definition of “Privileged Communication”:

Under Black’s Law dictionary this term is defined in following words, “A communication that is protected from forced disclosure”

Types of privileged communication:

Basically there are two types of privileged communication recognized under Qanoon-e-Shahadat Order, 1984. On one hand there are certain communications which can’t be disclosed even if the person having knowledge is willing to disclose them; the bar on this type of communication is absolute while on other hand there are certain communications which can be disclosed at the instance of person subject to law.

Communications declared privileged under Qanoon-e-Shahadat Order, 1984:

Article 4 through 14 of the Qanoon-e-Shahadat Order, 1984 laid down the communication declared to be privileged under this order; these are as follow;

1. Conduct of Judge or Magistrate under Article 4;
2. Communication during marriage under Article 5;
3. Evidence as to affairs of state under Article 6;
4. Official communication under Article 7;
5. Communication as to commission of offences under Article 8;
6. Professional communication;
7. Privilege from production of title deed of witness, not a party;

8. Production of document which another person having possession, could refuse to produce.

Communication during marriage:

Article 5 of Qanoon-e-Shahadat Order, 1984 protect from disclosure of communication between husband and wife. The protective provision is based on the wholesome principle of perceiving domestic and conjugal confidence between spouses.

Ingredients of Article 5:

“A person who is or has been married” here the word “Married” denotes the couple bind in legal wed lock and illegal or void marriage is not subject to this Article.

“Compelled to disclose” this expression implies that the party concerned is made or allowed to say or do something by a way of disclosing a communication made during marriage.

“During marriage” means a communication made to the woman before marriage is not protected but the privilege continues even after the marriage has been dissolved either by death or divorce.

“Permitted to disclose any such communication”:

The term permitted indicates that even if the witness is willing to disclose in a criminal trial a confession made to the witness by the husband or wife of the accused the statement will be inadmissible.

Basis of Article 5:

The rule enunciated under this Article rest on the obvious ground that the admission of such testimony would have a powerful tendency to disturb the peace of family, promote domestic broils and to weaken if not destroy feelings of mutual confidence which is the most endearing solace of married life.

Two fold application of Article 5:

Article 5 is of two fold application; it deals with;

1. Privilege of witness; and
2. Privilege of witness's spouse.

Privilege of witness covers all cases where the witness does not wish to disclose the communication. Whereas privilege of witness's spouse is also guaranteed as the communication made during the subsistence of marriage is protected even is the witness is willing to disclose the matter.

Waiver of privilege:

There are certain situations where the privilege under Article 5 has been waived out; either by lawmaker or by court of law; these cases are as follow;

1. Consent of spouse;
2. Suit between married parties;
3. Criminal proceedings against the spouse;
4. Matrimonial communication may properly be proved by the evidence of stranger.

Nature of Article 5:

The prohibition enacted by the Article rest on no technicalities that can be waived but is founded on a principle of high import which no court is entitled to relax.

Professional communication:

Under Article 9 through 12 neither the adviser nor his interpreter, clerk or servant is permitted to disclose any communication made to him in the course and for the purpose of professional employment of such legal adviser.

Principle envisage under Article 9 through 12:

Article 9 to 12 deal with professional communication; between a legal adviser and a client the same are protected from disclosure.

Basis of rule laid down under Article 9 to 12:

The rule is founded on the impossibility of conducting legal business without professional assistance and on the necessity in order to render the assistance effectual, for securing full and unreserved intercourse between the two.[19]

Rational behind the principle envisaged under Article 9 to 12:

If such communication were not protected; no man would dare to consult a professional adviser with a view to his defense or to the enforcement of his right and no man could safely come to the court with a view to enforce or defend his right.

Professional communication under Article 9:

Under Article 9 communication between the counsel and his client are privileged whether at the time they were made; there was not any pending or prospective litigation and whether the client is or is not a party to the proceedings.

Essential ingredients of Article 9:

“No Advocate”

The word advocate has been used for every type of legal practitioner; whether he be a barrister or lawyer of a lower court.

“At any time be permitted”

[19] Phipson evidence 12th edn 242

A communication is privileged where the case has been refused by the advocate and even after the relationship cease to exist.

“By or on behalf of client”

Such communication is privileged if made by the person other than a client only if he made so in the course or for the employment of such advocate.

Right when can be waived:

1. With the consent of client;
2. Communication made in furtherance of illegal purpose;
3. Where some kind of fraud has been committed;
4. Where court order to produce document in possession of lawyer;
5. Where lawyer attests document as a witness;
6. Where legal adviser’s knowledge of fact is not derived through communication;
7. Where same legal adviser is engaged by both of the parties;
8. Suit by the legal adviser against client.

The privilege extends to interpreter, clerk and servants of lawyer:

The protection though confined to communications between a client and his legal adviser is extended by Article 10 to all necessary organs by which such communications are effected; therefore an interpreter, clerk or servant of a lawyer can’t disclose which his master cannot.

Confidential communication with legal advisers under Article 12:

Under Article 12 the client cannot be compelled disclose anything he communicated to his lawyer; unless he offers himself as a witness.

Admissions

Admission is a statement oral or documentary which suggest any inference as to any fact in issue or relevant fact and which is made by any of the person under particular

circumstances; admissions are admissible evidence in civil as well as in criminal law if made against the interest of the maker because making any statement which is against the general nature of human being.

Relevant provisions:
Articles 30 through 36 of the Qanoon-e-Shahadat Order, 1984 cover the topic of admissions.

Meaning of the term “Admission”

Stephen defines admissions in following words; ”An admission is a statement, oral or written suggesting an inference as to any fact in issue or relevant fact or deem to be relevant to any such fact made by or on behalf of any party to any proceeding”

An admission is concession or voluntary acknowledgement made by a party or someone identified with him in legal interest of the existence of certain facts which are in issue or relevant to an issue in the case.[20]

Admission as an admissible piece of evidence:

Under Article 30 of the Qanoon-e-Shahadat Order, 1984 admissions are admissible piece of evidence. Under common law admission is considered to be the genesis of confession which can become the sole ground of conviction. Admission can be declared a conclusive proof against the maker. Subject to certain exceptions, the general rule in both civil and criminal cases is that any relevant statement made by a person is evidence against himself.[21]

Rational behind the admissibility of admission as evidence:

A statement made by the person against his interest is presumed to be true.

Persons whose statements are admissions:

[20] AIR 1957All 1

[21] Phipson on Evidence (Page 231 9th edn.1952

1. A statement is admission only if is made by any of the following person;
2. Statement by the parties to the proceedings under Article 31;
3. Statement made by the agent authorized by such person under Article 31;
4. Statement made by the representatives of the parties;
5. Statement made by the parties jointly interested in the subject matter of proceedings;
6. Persons from whom the parties to the suit derived their interest or title of subject matter of suit;
7. Persons whose position or liability is necessary to prove against party to the suit;
8. Persons expressly referred to by the party to the suit.

Explanation of each:

Statement by the parties to the suit:

With respect to the persons whose statement are receivable as admission, the general rule is that the statement must be either, of a party to the proceeding or one other identified in interest with the party to the proceedings.

Admissions by the agent:

Law of agency construes every act done by agent or every statement given by him under the cover of his agency as the act or statement of principal himself. Thus admission made by agent is admissible for or against principal. This rule is called rule of “Legal identity.” Admissions by following persons amount to admission by agent.

- Admissions by Government servants on behalf of Government;
- Admissions by officers of corporation and firms;
- Admissions by counsel or solicitor on any question of fact;
- Admission by guardian or manager of court of wards.

The fact of agency must be somehow evidenced before the alleged agent’s declaration can be received as admission.

Statement by the representatives:

Under Article 31 any admission by a person in his representative character is also admissible. Following are valid examples of representatives;

1. An Executor;
2. An administrator; and
3. A trustee.

Circumstances where the admission in representative character is admissible:

Under Article 31 the statements made by the parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Admissions by the persons jointly interested in the subject matter of the proceedings:

Statements made by the persons who have any propriety or pecuniary interest in the subject matter of the suit are receivable as admission; e.g. admission by the predecessor-in-title of the parties; by trustee; by joint contractor or joint tenants; by co-plaintiff or co-defendants. But this type of admissions is admissible only if the admission relates to the subject matter in dispute and is made by the person declaring in the character of the person interested with the party against whom the evidence is tendered.

Admissions by the persons from whom parties derive their interests:

Admission is relevant if made by the persons from whom the parties to the suit have derived their interest in the subject matter of the suit during the continuance of the interest of such person.

Admissions by the person whose position must be proved as against the party to the suit:

Under Article 32 an admissions of third person against his own interest when it effects his position or liability and when the position or liability and when the position or liability has to be proved against a party to the suit; is relevant against the party.

Illustration:“A” undertakes to collect rent for “B”. “B” sues “A” for not collecting rent from “C” to “B”. “A” denies that the rent was due from “C” to “B”; a statement by “C” that he

owed “B” rent is an admission and it is relevant against “A” if “A” denies that “C” did owe rent to “B”.

Admissions by the persons expressly referred to by the parties to the suit:

Under Article 33 if a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it as much as has been done or said by himself.

Article 33:

“Statements made by persons whom a party to the suit has expressly referred for information in reference to matter in dispute are admissions”

In English law, admission by referee on matter of law is as much provable as those of matter of facts.

General rule as to admissibility of admission in evidence:

Generally admissions are admissible against but not in favor of the parties to the suit or their representatives; this rule is enacted under Article 34 but there are certain exceptions to this rule enunciated by the same Article. These exceptions are;

1. Statements which are relevant under Article 46;
2. Statement as to state of mind; and
3. Statements other than admissions.

Statements which are relevant under Article 46:

Under Article 46 written or verbal statements of relevant facts are relevant if;

1. Made by the persons subject to Article 46;
2. Made under circumstances mentioned under Article 46

Made by the person subject to Article 46:

Statement of a person is subject to Article 46 if;

1. He is dead;
2. He can't be found;
3. He has become incapable of giving evidence;
4. His attendance can't be procured without unreasonable delay.

Circumstances stated under Article 46:

1. When it relates to cause of death of the maker;
2. When it is made in the course of his business;
3. When it is against the pecuniary or propriety interests of the maker;
4. When the statement would expose the maker to the criminal prosecution or suit for damages;
5. When it gives opinion as to public right or custom or matters of general interest and it was made before any controversy as to such right or custom has arisen;
6. When it relates to the existence of any relationship between persons; as to whose relationship the maker has special means of knowledge and the statement is made before the question in dispute arose;
7. When it relates to the existence of any relationship with deceased persons if it is made in any will, deed or family pedigree etc and was made before any question in dispute arose;
8. When the statement is contained in any deed of will or other documents related to transaction mentioned under Article 26;
9. When made by several persons and expresses feelings relevant to matter in question.

Admission/Confession

The Qanun-e-Shahadat deals with admission as follows:-

1. Article 30 has defined admission and Article 31 has elaborated five kinds of persons who can make admission. According to Article 30 is a statement, oral or documentary, which suggests any inference, as to any fact in issue or relevant fact, and which is made by— I. a party to the proceeding; II.an agent authorized by such party; III. a party suing or sued in a representative character making admission while holding such character; IV. a person who has a proprietary or pecuniary interest in the subject-matter

of the suit during the continuance of such interest; V. Article 31 says that if a person from whom the parties to the suit have derived their interest in the subject-matter of the during the continuance of such interest. VI. According to Article 32 a person whose position is necessary to prove in a suit, if such statements would be relevant in a suit brought by or against himself; VII. According to article 33 when a person to whom party to the suit has expressly referred for information in reference to a matter in dispute;

2. Article 34 lays down two rules (a) an admission is relevant and may be proved against the person who makes it or his representative in interest; (b) an admission cannot be proved in favor of the person making it or his representative in interest. However, there are some exceptions which are: (1) when it is of such a nature that, if the persons making it were dead, it would be relevant as between third person under Article; (2) when it consists of a statement of the existence of any state of mind or body made at or about the time when such state of mind or body existed and is accompanied by conduct rendering its falsehood improbable; (3) if it is prevalent otherwise than as an admission

3. Article 35 enacts that oral admission as to the contents of a document are equally excluded except in two cases; (1) the party proposing to prove them show that he is entitled to give secondary evidence of the contents of such documents, or (2) According to article 35 the genuineness of the document produced is in question;

4. According to article 36 an admission is not relevant in a civil case it if it is made: (1) upon an express condition that evidence of it is not to be given, or (2) under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given;

5. Article 45 says that an admission is not a conclusive proof of the matter admitted, but it may operate as estoppels; [22]

Confession: In Article 30 admission has been defined which a generic term applicable both to civil and criminal proceedings. Article 37 has laid down the law of confession as : 1. A confession is irrelevant,-- (1) if it is obtained by any (a) Inducement, (b) threat, or (c) Promise; (2) such inducement, etc., must have reference to the charge; (3) such inducement, etc., must proceed from a person in authority; (4) such inducement, etc., must be sufficient to give the accused avoid an evil of a temporal nature in reference to the proceedings against him; However, according to Article 41 a confession made after the removal of the impression caused by such by inducement, threat, or promise, is relevant; 2. Article 38 says that a confession made to a police officer is not admissible; 3. Article 39 says that a confession made by a person in police custody is not admissible, unless it is made in the presences of Magistrate; 4. According to Article 42 if

[22] The Qanun-e-Shahadat 1984 with the commentary of M.Iqbal

confession is otherwise relevant, then it does not become irrelevant if it is made.[23] (1) under a promise of secrecy; or (2) in consequence of a deception practiced on the accused; or (3) when the accused was drunk; or (4) in answer to questions which the accused need not have answered; or (5) Because he was warned that he was not bound to make such confession, and the evidence of it might be given against him. However, this article shall not apply to trials of Hudud cases. 5. Article 43 provides that where an accused confesses his own guilt some time implicates another person who is tried jointly with him for the same offence, his confession may be taken in to consideration against himself and against such other person as a circumstantial evidence.[24] From Islamic perspective all the aforementioned articles are in total consonance with the teachings of Islam. However, the Qanun-e-Shahadat 1984 is silent about the different of modes and quantum of Admission/Confession. Article 16 is about the confession of a co accused which says. “An accomplice shall be competent witness against an accused person except in the case of an offence punishable with Hadd; and conviction is not illegal merely because it proceeds upon uncorroborated testimony of an accomplice.” In this article the testimony of accomplice has not been considered valid foe Hadd crimes, it is in consonance with the teachings of Islam, but according to Islamic law his testimony is also not valid for Qasis.

Competency of Witnesses

Article 3 of the Qanoon-e-Shahadat Order, 1984 deals with the competency of witness; Witness is a person who depose some fact in issue or some relevant fact in order to prove or disprove any matter in question. It is worth to note here that the competency to testify as a witness is a condition precedent to administer witness on oath; it is distinct matter from the credibility of witness.

Relevant Provisions:
Article 3 and 17 of the Qanoon-e-Shahadat Order, 1984

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[24] The Qanun-e-Shahadat 1984 with the commentary of M.Iqbal

Interpretation of relevant terms:

Witness:

Competency:

Competency of witnesses as provided under Article 3 of the Qanoon-e-Shahadat Order, 1984:

Article 3 provides that in general every person is competent to testify before court only parameter to determine the competency of the witness is satisfaction of the court that the person before the court is capable of giving testimony. However this general principle is qualified by the Article itself by providing following exceptions to it;

Incapacity to be rational:

In general if a person is unable to under the question put on them or to give rational answer; he is barred to testify as the witness to the suit.

Extreme old age:

If a person has lost his consciousness due to extreme old age to that extend that he is unable to understand question put on him or to give rational answer to that question; his testimony is inadmissible before the court.

Tender age:

A minor is restrained to testify any fact before the court if he's not yet got rationality to understand question put on him or to give rational answer to those questions. But if his minority or tender age has not created any obstacle to understand question or to give rational answer; in that case his testimony will be counted as valid.

Any bodily injury:

If some bodily injury is of that type which render the witness unable to understand question put on him or to give rational answer; even in that matter witness is

inadmissible. Blindness, dumbness, deafness are some examples of it but if such inability can be overcome witness becomes valid.

Any mental injury:

A mental incapacity also put a bar on the ability to testify any fact in issue.

Perjury:

Perjury is an offence of deliberately giving of false evidence before the court of law. Any person who has been convicted for perjury is debarred from testifying any fact before the court because he can't be considered as trustworthy witness. However if the court is of the opinion that he is penitent; his testimony can be accepted.

Females in Haddod laws:

Under Hadood laws the woman testimony is inadmissible.

Witness of accomplice in Hadood cases:

Under Article 16 of the Qanoon-e-Shahdat Order, 1984 witness of an accomplice is inadmissible piece of evidence.

Touchstone to determine the competency of witness:

Under Article 3 and 17 it is expressly stated that the Quran and Sunnah is the only criteria to determine the competency of the witness. Now it can be construed as the duty of the court to keep in mind the injunctions of Islam as laid down in the Holy Quran and Sunnah. It is determined by the court in PLD 185 Lah 730 that it is only when the competence of a witness is challenged that the court is required to determine such incompetence in accordance with qualifications prescribed by injunctions of Islam as laid down by the Holy Quran and Sunnah.

Rule of determination of competence of a witness according to injunctions of Islam:

The jurist put forward the concept of Tazkiya al Shahood as a rule to determine competency of witness according to injunctions of Islam. They are of the view that only this rule contains all necessary instructions relating to competency of witness.

Concept of Tazkiya al Shahood:

In Dictionary of Islam the concept of Tazkya al Shahood is defined as the “Purigation of witness”

Modes of conducting Tazkiya:

According to Fatawa-e Alamgiry there are two mode of conducting tuzkiya; these are;

1. Open inquiry as to competency of witness; or
2. Secret inquiry in the competency of witness.

Open inquiry is conducting by asking people to give their opinion by either raising hands or by oral testimony. However secret inquiry is conducted through writing; this method is called “Masturah”

Persons who can be inquired:

The help of following person can be taken in conducting tazkiya;

1. Persons who are reliable;
2. Persons who are acquainted with the life and character of the witness whose competency is challenged.

Purpose of inquiry:

Purpose of inquiry is to make independent inquiry into the conduct of the witness through independent and reliable source so that person may not be condemned on “evidence of unjust person.”

Number of witnesses:

Here Article laid down that the guidance as to the required number of witnesses in order to prove or disprove any fact in issue shall be taken from injunctions of Islam as laid down in the Holy Quran and Sunnah. However this Article embodied the required number of witnesses in various circumstances.

Number of witnesses in financial matters:

In financial matters the witness of 2 males or one male and two female witnesses so that one may remind the other if one forgets is sufficient.

Number of witnesses required in cases of future obligations:

Witness of two males or one male and two female witnesses is sufficient.

In criminal matters:

Witness of one male or one female is sufficient.

In Hadood cases:

Matter in this case may be proved either by confession of accused or by testimony of two or four (varies from cases to case) is required.

Equity Regards That As Done Which Ought To Have Been Done

The very difference between law and equity is that law looks into the actions of a person while equity gives credence to the conscience. Equity construes the undertaking given by someone as his act. It means that a person is presumed to do what he undertakes. In a simplest way we can say that equity regards undertaking as a complete, finished act.
Equity treats a contract to do a thing as if the thing was already done though only in favor of parties entitled to enforce the contract.

Illustrations to Understand Maxim:

Under law of equity all agreements for value are considered as done
All agreements for leases are considered as leases

Principle Envisaged by the Maxim:

According to Justice Story the maxim lays down the principle that equity will treat the subject matter of the contract with relation to its consequences and incidents in the same manner as if the acts, contemplated, agreed or undertaken by the contract has been done or performed.

Essential Requirements to Invoke the Maxim:

The essentials requirements to put the maxim in action were discussed in Walsh vs. Lansdale; these are enlisted below;

1. There should be a contract to transfer legal title;
2. There must be a substantial evidence to prove the existence of that contract;
3. This contract should be capable to enforce;
4. The suit must be brought by the parties within the specific time;
5. The title so sought to obtain must have legal support.

Scope of the Maxim:

The scope of this maxim is limited because it recognizes the right of performance of an agreement between the parties to the contract only. The maxim is applicable only to the contractual obligations; favoring the person who is entitled to get enforced a contract against a person who is under an obligation to perform it.

Cardinal Rule Governing the Maxim:

The rule of *Pacta Sunt Servenda* is governing principle of this maxim.

Inadequacy of the Maxim:

This maxim can't be applied against public at large or in simple words it can't bound any person who is not concerned with the contract. This rule is applicable only and only between the parties to the suit.

Principles which are governed by this Maxim:

This maxim is applicable on the principle of;
Conversion;

- Executory contracts
- Part-performance

Competency and Credibility of Women Witness

Status of women's testimony has always remained controversial especially after the Qanun-e-Shahadat ordinance of 1984. When the Western world encounters Islamic law, it tends to misunderstand and misrepresent it, often drawing conclusions which belittle the Shariah. These misrepresentations constitute a disservice to Islam and its rich legal heritage. It is far worse, however, when because of these misrepresentations or because of any other reasons Muslims themselves tend to misunderstand or misapply their own Islamic law. This, unfortunately, seems to have occurred in Pakistan in the case of Qanun-e-Shahadat ordinance of 1984.
There is often a misconception that the Qanun e shahadat order makes distinction between men and women or woman evidence in Islam is considered half that of a man. In order to look whether Qanun-e-Shahadat makes any distinction, as regards to competence and credibility, between men and women we shall look at the related provisions of the Qanun-e-Shahadat Order. Article 3 of this Order reads as:
"Who may testify: All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind:
Provided that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence:
Provided further that the provisions of the first proviso shall not apply to a person about whom the Court is satisfied that he has repented thereafter and mended his ways:
Provided further that the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the injunctions of Islam as laid down in the Holy Qur'an and Sunnah for a witness, and. where such witness is not forthcoming the Court may take the evidence of a witness who may be available."
We see that Qanun e shahadat order does not put any embargo on a woman to give evidence in the court of law, neither it says that her evidence is deficient in nature or half that of a man. It only says that the court will determine the competence of a witness as laid down in Holy Quran and Sunnah. Certain provision and certain laws place certain requirements on number of witness or competence of witness to proof a certain fact etc. Let's discuss Article 17 of the Qanun-e-Shahdat Order, 1984. Article 17 of the Qanun-e Shahdat is reproduced below:

“Competence and number of witnesses: (1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance With the injunctions of Islam as laid down in the Holy Qur’an and Sunnah:
(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law: —
(a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly ; and
(b) in all other matters, the Court may accept, or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.”
If we look closely both these provisions specifically mention that the competence of a witness will be determined in accordance with the injunctions of Holy Quran and Sunnah. There is nothing in these sections which can prove that women witness is any less than the male witness. However, with respect to financial transactions or future obligations there is a requirement of two female witnesses if one male witness is not available. This law which had been infringed in the Qanun e Shahadat Order had been derived from the Quranic verse which can be read as under:

“O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses – so that if one of the women errs, then the other can remind her.”

Mr. Khalid Ishaque in International conference on Islamic laws and women in the Islamic world discuss the Holy verse 282. He states that: “*Verse: 282 mentions one man and two women, so that if one woman falters or forgets then the other woman may remind her. It does not say the both women will be examined as witnesses. The role of the second woman is to remind the first woman if she falters or forgets. If she does not falter or forgets then the second woman has no role to play.”*

This shows that the testimony of a woman is as good as that of a man. Further, in the books of Mo’in-ul-Hukkam, they make it clear that in olden days only one woman was examined. This was a privilege given to a woman to have a companion because attending trials and courts was not an ordinary business for them. Moreover, professor Qammar-ud-Din Khan, a very learned professor on the law of evidence, wrote that

"there are nine verses in Holy Quran relating to evidence. In eight of these verses both men and women are equal. Only in one verse a slight distinction has been made on the basis of exigency. A comprehensive interpretation of Quran demands that the rule supported by the majority of the verses be the essential principle."

According to Qanun e Shahadat Order, the court shall determine the competence of witness in accordance with the qualifications provided by the Quran and Sunnah. Now Quran and Sunnah are interpreted differently by Muslims. Rashida Patel comments: "There is a serious danger to the rights of the witness of witnesses by keeping the door wide open for the hundreds of courts in Pakistan to determine the competence of a witness. And, by allowing the several courts to decide what is or is not in accordance with the injunctions of Islam."

In the same way Justice retired A.R. Changez marked:

"I would like to add qualifications as required by the third proviso of article 3, to determine the competence of a witness, should have been prescribed and should not have been left for decision by each judicial officer. I am afraid it would open a Pandora's box."

Clause (1) of Article 17 of Qanun-e-Shahadat is not exhaustive because it enjoins a Judge or a Qazi to find out for himself from the Holy Qur'an and Sunnah the competence and number of witnesses in a given case. Islam gives only one reason for fixing the requirement of two female witnesses instead of one male witness while becoming a witness of an instrument pertaining financial or future obligation and that is one woman may remind another. Thus inference that can draw from this requirement fixed by Allah in matters pertaining to financial matters or future obligations is that in no way evidence of a women has been declared deficient that of a man, but only we can draw an inference that her responsibility has been reduced to certain extent and she has been facilitated in matters relating to financial matters or future obligations
There is no bar in the Quran or the hadith against the admissibility of the evidence of a woman or against her being a competent witness without a male witness. This question came up for consideration in Fida Husain v Naseem Akhtar[25]. It was held that the suit for dissolution of the marriage could be decreed in the favor of the plaintiff on her evidence alone. It was also held that Islam does not fix any particular number of witnesses to prove a case (of civil nature). The judge observed that traditions of the Holy Prophet (P.B.U.H) also do not lay down any fix or rigid rule. The Holy Prophet (P.B.U.H) decided a case –

[25] PLD 1977 Lahore 238

1. On the testimony of a woman plaintiff
2. On the testimony of any of one female witness
3. On the evidence produced by both parties
4. On the evidence of witness and the oath of the plaintiff
5. On the oath of the defendant, and
6. On the evidence of two or more witnesses and on the oath of the defendant.

The above discussion shows that Quran and Sunnah do not make any distinction in matters pertaining to the evidence of man and woman. Sunnah of the Holy Prophet (P.B.U.H) proves that he (P.B.U.H) decided disputes on the solitary evidence of the woman. This shows that the evidence of even one woman is decisive.
From the above discussion, one can conclude that there is nothing in the Qanun e Shahadat Order which makes distinction as regards to competence and credibility between men and women. The only object which has created misconceptions is the interpretation of Islamic laws by the Shariah Courts. Begum Rana Liaqat Ali Khan states that: *"thousands of courts in Pakistan would have power to decide the competence of a witness under Quran and Sunnah."* She queried whether the various judges are competent to do so correctly. "Differing interpretations may led to confusion and discrimination."

The Divine rationale mentioned in the Quranic text is fully revered and accepted, but an important question is to be directed to the jurists who generalize the situation. Is forgetting details of a debt contract such as amount, numbers, due date, guarantees and other conditions, the same as forgetting a witnessed criminal act? Debts are usually long term contracts mostly containing minute details, and forgetting one of them is very much expected, particularly at that time when it was not as feasible to commit everything down to writing as it is today due to the lack of stationary and the rampant illiteracy of early times. But there is nothing much to forget in witnessing a thief breaking into a house, a person drinking liquor, a couple engaging in an illicit sexual act, in hearing slanderous words or statements that are tantamount to Riddah, or a robber holding up a goldsmith. These are not as easily forgotten as debts details. Furthermore, the testimony of the woman who witnessed the crime can be heard instantly, or in the next few days. In fact, these things may stay in a woman's mind more than they would in a man's mind.

Moreover, a woman's testimony, like all other testimonies, will be subjected to scrutiny, examination and cross examination and to all advanced methods of verifications and trustworthiness. Therefore, to persist in the requirement that a woman's testimony in crimes is inferior to that of a man's – only half of it – will certainly hinder the law from taking its course. It will be an impediment to the cause of justice and will undercut the effectiveness of the rule.

Another area which had been greatly criticized as regards to female testimony is the requirement of witnesses in Zina cases. If we look at the provisions of Qanun e Shahdat there is nothing prescribed about zina cases except that it should be interpreted according to the injunctions of Quran and Sunnah. The responsibility is rest upon the Shariah courts to interpret the Islamic laws.

The Courts in Pakistan have given land mark judgments interpreting principles contained in Qanun-e-Shahdat Order, 1984.

Banker's Books Evidence Act, 1891

The Banker's Books Evidence Act, 1891 is also applicable in Pakistan which is the Law of Evidence with respect to Bankers' Books.[26]

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[26] Banker's Books Evidence Act, 1891

XVIII OF 1891

[ACT No. XVIII OF 1891]

An Act to amend the Law of Evidence with respect to Bankers' Books

WHEREAS it is expedite to amend the Law of Evidence with respect to Bankers' Books; It is hereby enacted as follow:

1. Title and extent. (1) This Act may be called the Banker's Books Evidence Act, 1891. 8[(2) It extends to the whole of Pakistan] 9[* * *]

[* * * * * * *]

2. Definitions. In this Act, unless there is something repugnant in the subject or context:

1(1) "company" means a company registered under any of the enactments relating to companies for the time being in force in any part of His Majesty's dominations or incorporated by an Act of Parliament 2[of the united Kingdom] or by a 3[Pakistan] law or by Royal Charter or by Letters Patent ;]

(2) "bank and "banker" means:

(a) any company carrying on the business of bankers:

(b) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided;

4(C) any post office saving bank or money order;]

(3) bankers' books include ledgers, day-books, cash-books account-book and all other books used in the ordinary business of a bank ;

(4) "legal proceeding" means any proceeding or inquiry in which evidence is or may be

given and includes an arbitration;

(5) "the Court" means the person or persons before whom a legal proceeding is held or taken;

(6) "Judge" means a Judge of a High Court;

(7) "Trial" means any hearing before the Court at which evidence is taken; and

8. Subs. by the Central Law (Statute) Reforms. Ordinance. 1960 (21 of 19(0). S. 3 and 2nd Sch. with effect from the 14th October. 1955. for the original sub-section (2) as amended by A. 0., 1949, Arts. 3 (2) and 4.
9. The word "and" at the end of sub-section (2) and sub-section (3) rep. by the Repealing alld Amending Act, 1941 (10 of 1(14).
I. Subs. by A. 0., 1937, for previous definition which had been Subs. for original definition by the l3ank~r Run,,", evidence Act. 1900 (12 of 1(00).
2. Ins. by A. 0., 1961, Art. 2 and Sch. (with effect from the 23rd March. 1(56) .
3. Subs. by A. 0.,1949 Sch. for "India."
4. CI (c) was added by S. 2 of the Bankers' 13noks Evidence Act. 1893 (I of 18(3).
5. Subs. by A. O. 1937 for "L. G."

8) "certified copy" means a copy of any entry in the books of a bank together with a

certificate written a the foot of such copy that it is true copy of such entry that such entry is continued in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book is still in the custody of the bank, -such certificate being dated and subscribed by the principal accountant or manager or the bank with his name and official title.

3. Power to extend provisions of Act. The 5[Provincial Government] may, from time to time by notification in the official Gazette extend the provisions of the Act to the books of any partnership or individual carrying on the business of bankers within the territories under its administration, and keeping a set of not less than three ordinary account books, namely a cash book, a day-book, or a journal and a ledger and may in the like manner rescind any such notification.

4. Mode of proof of entries in Banker's books. Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall, be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as the original entry itself is now by law admissible, but not further or otherwise.

5. Case in which officer of bank not compellable to produce books. No officer or a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause.

6. Inspection of books by order of Court or Judge. (I) On the application of any party to legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner herein before directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3) The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order.

7. Costs. (I) The costs of any application to the Court or a Judge under or for the purposes of this Act and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2) Any order made under this section of the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs, may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself:

Provided that nothing in the sub-section shall be construed to derogate from any power which the Court or Judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs.

Electronic Transactions Ordinance 2002

The Electronic Transactions Ordinance 2002, was promulgated providing legal recognition of electronic documents, records, information, communications and transactions.

The law states that no document, record, information communication or transaction will be denied legal recognition, admissibility, validity, proof or enforceability on the ground that it is in electronic form and has not been attested by any witness.

The law also provides legal recognition to electronic signatures. It says that “the requirement under any law for affixation of signatures shall be deemed satisfied where electronic signatures or advanced electronic signatures are applied.”

It further says that an electronic signature might be proved in any manner, in order to verify that the electronic document is of the person that has executed it with the intention and for the purpose of verifying its authenticity or integrity or both.

The law provides for the establishment of an electronic certification accreditation council within 60 days of the promulgation of the ordinance.

It says: “Notwithstanding contained in Stamp Act 1899 (II of 1899) for a period of two years from the date of commencement of this Ordinance or till the time the provincial government devised and implemented appropriate measures for payment and recovery of stamp duty through electronic means, whichever is later, no stamp duty shall be payable in respect of any instrument executed in electronic form.

“No electronic document would require attestation and notarization for a period of two years from the date of commencement of this ordinance or the time appropriate authority devised and implement measures for attestation and notarization of electronic documents, which is later.

“Where any law requires or permits the production of certified copies of any records, such requirements or permission shall extent to printouts or other forms of display of electronic documents wherein addition to fulfilment of the requirements as may be specified in such law relating to certification, it is verified in the manner laid down by the appropriate authority.”

Conclusion

Qanoon-e-Shadat order 1984 is a code of rules and laws which provides guidelines in the field of evidences, to the effect to finish ambiguity in cases and to bring the court at the right conclusion of justice. The object of Qanoon -e- Shadat order is to provide structure, to the effect that any fact intended to be established has to be in accordance with scheme and rules oe Qanoon-e-Shadat, and if any argument which is based on plausibility and on mere presumptions would have no effect. The aim of Qanoon-e-Shahadat is to revise, amend and consolidate the law of evidence, so as to bring it in conformity with the injunctions of islam as laid down in the Holly Quran and Sunnah. The Qanoon-e-Shahadat Order 1984, applies to all judicial proceedings, e.g, civil proceedings, criminal proceedings, etc. before any court, but it does not apply to proceedings which are not judicial.
It can be concluded that Qanoon-e-Shadat order provides rules, kinds, types of evidences and the manner of recording evidences of witnesses as well as consideration of documents in evidence, etc.
It can be stated that concept of evidence is an old concept. Inquisitorial principle and adversary principle played important role in development of concept of evidence. According to inquisitorial principle, judge was to search for facts, listen to witnesses and experts, examine documents, and order to take evidence. Contrary to this, parties and their counsels are primarily responsible for finding and presenting evidence and judge does not investigate facts according to adversary principle.

The Qanun-e-Shahadat prescribes procedure and methods with regard to recording of evidence of parties for the purpose of proving facts and documents.

If we carefully examine the provision of Evidence Act, 1872 and Qanun-e-Shahadat Order we find that except with few exceptions the Qanun-e-Shahadat Order is subjectively the same as of Evidence Act with exception of Article 3, Article 4 to 6, addition of Article 44 and addition of a proviso to Article 42. Articles 163 to 166 were also added in the new law. It is said that almost all the provisions of the Evidence Act, 1872 with a few amendments have been kept intact because most of the provisions of Evidence Act, 1872 were not repugnant to Islamic principles of law.

Article 163 deals with acceptance or denial of claim on oath. When the Plaintiff takes oath in support of his claim the court shall, on the application of the Plaintiff call upon defendant to deny the claim on oath.

Article 164 deals with the evidence that has become available because of modern device etc. In such cases as the court may consider appropriate, the court may allow to be produced any evidence that may be become available because of modern devices or techniques. The telegraphic messages can be produced in evidence.

Video recording, audio cassette, video film can also be produced in evidence. The production of these materials is subject to prove that the same is genuine and not tempered one.

By insertion of Article 165 the new law was given overriding effect and by insertion of Article 166 the earlier Evidence Act, 1872 (I of 1972) was repealed.

The Order has 13 Chapters and 166 Articles. It has been noticed that sections 82, 93, 113, 119, 120 and 166 of the old act have not been incorporated in the new order. All other sections of the act were available in the new law.

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