

Qanoon e Shahadat Law of Evidence

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Topic Addressed:

RECORDING OF EVIDENCE
THROUGH COMMISSION

SCOPE OF STUDY

- Procedure of Handling Objections raised during Examination-in-Chief of Cross Examination.
- Reference to Court in case of Conflict/Dispute/Objection Raised by any Other Party during Evidence.
- Procedure to seek Time if Evidence is not Completed in Time.

INTRODUCTION

❖ What is Evidence:

- Most Important stage for Administration of Justice
- Foundation of Justice
- Means the Available Body of Facts or Information Indicating a Belief or Proposition is True or Valid.

➤ Evidence in Islam:

- Concealing of Evidence is a Sin (2/283)
- Always Speak the Truth Even if be Your Near Relative (6/125)
- Standout Firmly for Justice Even if it be Against Yourself, or Parent, or Kin, or Rich or Poor. (4/135)

➤ Impact on Final Decision if not Recorded Properly.

➤What is a Document.

➤How to Prove a Document.

➤Document as Secondary Evidence.

➤Rules as to Notice to Produce Documents.

❖ Qanoon-e-Shahadat Order 1984

➤ Documentary Evidence

- Primary Evidence, Article 73 (See Attached)
- Secondary Evidence, Article 74 (See Attached)
- Proof of Documents by Primary Evidence, Article 75 (See Attached)
- Cases in which Secondary Evidence may be given, Article 76 (See Attached)
- Notice to produce (Rules), Article 77 (See Attached)
- Proof of Signatures, Article 78 (See Attached)

- Proof of Execution of Documents, Article 79 (See Attached)
- Proof when Attesting Witness not Found, Article 80 (See Attached)
- Comparison of Signatures, Article 84 (See Attached)
- Public Documents, Article 85 (See Attached)
- Proof of Certified Copies, Article 88 (See Attached)
- Proof of Other Public Documents, Article 89 (See Attached)
- Presumption of Documents, Article 90 (See Attached)

➤ Checklist for Proof of Execution of a Document

- Original Document or Secondary Evidence.
- When Document is Admitted in Evidence.
- Being a Statement of Witness and cross, which will prove or disprove, contents of a document (Primary or Secondary)
- Documentary Evidence Excludes Oral Evidence.

- Mode of Proving Handwriting, Articles 61, 78, 84, & 164:

- a) By Writing Himself
- b) By Calling Witness
- c) By Expert
- d) By Comparison
- e) By Acquaintance
- f) By Self Admission
- g) By Statement of Deceased
- h) By Circumstantial Evidence
 - 30 Year old Document
 - 30 Year attested Copy
 - Official Record
 - Legitimate Custody

- Modern Devices: Allow to Produce Modern Devices & Techniques, Article 164 (See Attached)
- Execution of Documents

❖ OBJECTIONS THAT CAN BE TAKEN

➤ Relevance to the Subject

➤ Unfair / Prejudicial Question

➤ Leading Question

a) Where Allowed

b) Where Not to be Allowed

➤ Compound Question

• Where More than one Question is Contained in one Question

HANDLING THE OBJECTIONS WHILE RECORDING EVIDENCE

Burden of Proof:

Articles 117-120 of Qanun-e-Shahadat Order deal with the subject of burden of proof. It is cardinal principle of law that whosoever asserts a fact or intends to believe others about existence of a fact of execution of a document, or otherwise, burden of proof thereof rests upon him. Article 118 ibid clarifies that burden of proof in suit or proceedings on that person who would fail if no evidence at all is given on either side.

Applicability of Qanoon-e-Shahadat Order:

While taking up cases under some special laws, like Rented Premises Act 2009 wherein applicability of Qanun-e-Shahadat Order is excluded, and hence objection regarding violation of any provision of Qanun-e-Shahdad Order in such proceedings may be repelled due to such statutory provisions. However, a trial court may borrow the wisdom enshrined in Qanun-e-Shahadat Order while dealing with such matters so that principle of natural justice are not violated.

Relevancy:

Section 2(C) defines evidence as follows:-

- (i) All statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry, such statements are called oral evidence and

(i) all documents produced for inspection of the court:
such documents are called documentary evidence.

As such evidence may be given about a fact in issue and not otherwise proceedings of existence or non-existence of fact in issue and of such other facts as may be declared relevant under Chapter III of Qanun-e-Shahadat Order, and of no others.

Evidence may be given regarding part of sale transaction (Article 18);
about the occasion, cause or effect of fact in issue (Article 20);
about motive, preparation, previous or subsequent conduct) in reference to any fact in issue (Article 21);
about facts necessary to explain or introduced relevant facts (Article 22);
about conspiracy in reference to common design (Article 23);
about facts inconsistent with any fact in issue or making the existence or non-existence of any fact in issue or relevant fact, highly probable or improbable (Article 24);
about facts enabling the court to determine the amount of damages to be awarded in suit for damages (Article 25);
about facts pertaining to right or custom (Article 26);
about facts showing existence of state of mind or body or bodily feeling (Article 27);
about facts to establish the act as accidental or intentional (Article 28);
facts to establish existence of course of business (Article 29).

A good presiding officer is always conscious of contents of issues framed in a civil suit, and of a charge in a criminal proceeding, and to keep in mind throughout the recording of evidence, and to judge every question put to a witness, and every document brought on record, on the test of relevancy vis a vis issues so framed, and charge so cast.

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Admissibility:

When a fact likely to be adduced as evidence through a witness, or a document, passes the test of relevancy, the court has to examine the nature of statement, or of document, on the test of admissibility. Every relevant fact may not be admissible in evidence. A document may be relevant, but in its present form, not admissible in evidence, like an unregistered sale deed, or an unattested copy of public document, or hearsay portion of a witness's statement. Article 131 ibid requires a court to decide the question of relevancy and admissibility, whenever agitated before it.

Certified Copies of public documents are admissible only when coming up to the test of Article 87 *ibid*, and of a document maintained by a public officer, which may be inspected by a person as a matter of right, and is certified to be a true copy. Mere putting signatures.

Evidence Not Required on Facts Which Are Judicially Noticeable:

Article 111 *ibid* requires a Court to take judicial notice of:

All Pakistan laws, course of proceedings of the Legislature, seals of all the Courts, divisions of time, geographical divisions of the World, public festivals, notified holidays, names of members and officers of the Court, and of all advocates and other persons authorized by law to appear or act before it, rule of the road on land or at sea, and on all matters of public history, literature, science or art, for which the court may resort for its aid to appropriate books or documents of reference.

However, Court is competent not to take judicial notice of any fact, if the person inviting, is unable to produce any such book or document as it may consider necessary to enable it to do so. (Article 111).

No evidence will be admissible in any suit or proceeding to deny the truth of such fact for which any person, by his declaration, act or omission, intentionally caused or permitted the other to believe as true. (theory of estoppels, Article 114).

an official on a Photostat or just putting an 'attested' stamp, does not make it a certified.

Dealing With Evidence Recording:

Article 133 required the witnesses, first, to be examined in chief, then permitted to be cross examined, and finally may be re-examined by the calling party, but it must be confined to relevant facts, though cross-examination may extend even to such relevant facts, which were not testified by witness in examination in chief.

If some new matter is introduced in re-examination, with permission of Court, such witness may be further cross examined.

Handling the Leading Questions:

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Impeaching Credit of a Witness in Cross Examination:

During cross examination, a witness may be asked any question to test his veracity, identity, position in life, or for shaking his credit, by injuring his character, though the answer may incriminate him or expose to penalty or forfeiture. (Article 141).

However, it is discretion of the Court to disallow a question so put to a witness, or to permit a witness not to answer, or to compel to answer (Article 143) but if a witness refuses to answer, despite command of the Court, inference may be drawn against him.

Moreover, while putting such questions under Article 143 *ibid*, there must be some reasonable ground with questioner, for thinking that the imputation so being made, is well founded. (Article 144).

The Court may forbid any question or inquiries which it regards as indecent or scandalous, although such question or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed. (Art. 146).

The court shall forbid any question which appears to it to be intended to insult or annoy or which though proper in itself appears to the court needlessly offensive in form. (Article 148).

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Liability of Advocates:

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Refreshing The Memory:

A witness may, while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at the time fresh in his memory. The witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid if when he read it he knew it to be correct. Such witness may, with the permission of the court, refer also to a copy of such document for refreshing the memory, and court may permit, if it is satisfied that there is sufficient reason for non production of the original.

Similarly, an Expert may refresh his memory by reference to professional treatise. (Article 155).

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A document used for refreshing the memory may be examined by the party cross examining him. (Article 157)

Article 17 *ibid* requires in matters pertaining to financial or future obligations, if reduced to writing, that such instrument 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.

Confidentiality or Secrecy of Documents summoned to be Produced:

No person summoned to produce a document can refuse to produce the same before the Court, but if he has some objection to its production or admissibility, validity of such objection shall be decided by the Court. And the Court may, if it sees fit, inspect such document, unless it refers to matters of State. The court may also seek translation of such document, for deciding the question of relevancy or objections against production (Art. 158).

Power Of The Judge To Put Questions:

Article 161 ibid empowers a Judge to ask any question he pleases, in any form, at any time, of any witness, or of the parties, in order to discover or to obtain proper proof of relevant facts, about any fact relevant or irrelevant and may order the production of any document or things. Neither the parties, nor their agents shall be entitled to make any objection to any such question or order nor, without the leave of the court, to cross examine any such witness upon any answer so given to the Court.

However, a Judge cannot compel to answer a question or to ask for production of a document, which such witness may refuse to answer or produce, under Articles 4 to 14 ibid.

It may be reminded that thorough study of Qanun-i-Shahdat Order, Criminal Procedure Code and Volume III of High Court Rules and Orders, coupled with the Judgments of Hon'ble Superior Courts on the subject of evidence and procedure, is imperative to be a good lawyer or a good judge, and there is no shortcut to success.

➤ Argumentative Question.

➤ Repeating a question.

➤ Foundation Issues.

- Where the Answer is Related to a Certain Background and which is not on Record or Not been Posed or Stated by the Witness.

➤ Non Responsive

- Where a witness starts responding to a question with unrelated information. This is important when one is looking for a 'yes' or 'no' as answers.

➤ Speculation- Can be on Two Occasions:

- Witness does not know the Facts to give a Correct Answer. It is Necessary that the Witness should have Personal Knowledge.
- A Question that is Speculative.

➤ Opinion

- Opinion of a Witness, if Technical, of which he is not an Expert cannot be Allowed. It should be the 'Expert Witness' to give an Opinion not a Witness who is not an Expert.

➤ Hearsay evidence.

- A Person can only Testify of what he/ she has Personal Knowledge, not what he/ she may have Heard from Someone else.

➤ Question on Assumed Facts.

➤ Question beyond the Scope of the Case or Beyond the Examination in Chief.

- Can be Allowed, but Should only be Where it Relates to going to Prove the Case and Where it can be Shown that the Fact has been Concealed or Misstated.

➤ Best Rule Evidence.

- Where the Original Document is already on Record and the Question Reiterates the Contents of the Document.

➤ Completeness.

- Introduction of Documents which have not been Disclosed may not be Permitted, Except with Proper Procedure being Followed.

❖ PROCEDURE OF HANDLING OBJECTIONS RAISED DURING EXAMINATION-IN-CHIEF OR CROSS EXAMINATION:

- a. Remain Cool;
- b. If an Objection is Taken ask the Reason from the Counsel Taking the Objection giving Detailed Reasons for the Objections:
 - i. If the Objection is not within the Law the Objection should be Overruled and the Proceedings should be Allowed to Continue, whether in Examination-in-Chief, or in Cross Examination.

- ii. If the Counsel Insists, Note the Question and then, while Citing the Reasons – Overruled or Sustain the Objection. The Reasons should be in Writing. In Case the Objection is Overruled then direct the Proceedings to Continue. If the Objection is Sustained, then ask the Counsel to Proceed with some other Question. The Commissioner, while Deciding, is Required to Record the Reasons for his / her Decision in Writing.
- c. If the objections are in Relation to the Production of Documents, the same Procedure as mentioned above has to be followed.
- d. In the Event there is Further Insistence the Matter may be Referred to the Court for a Decision. The Reference shall be in Writing.

❖ REFERENCE TO COURT IN CASE OF CONFLICT/
DISPUTE / OBJECTION RAISED BY EITHER PARTY
DURING EVIDENCE.

- a. In the Event of a Dispute on a Question of Law, the Commissioner has no Authority to decide the Legal Question, Whether it be as to Production of Document, or of Objection, or any other Legal Issue. Thus, the Matter has to be Referred to Court for a Decision as to the Question of Law.
- b. While Referring to Court for any Reason, the Commissioner shall give a Detailed Writeup of the Situation that Led to the Commissioner Referring the Matter to Court. The Commissioner shall do the Following:
 - i. Give the Relative Facts that Led to the Objection or Dispute.

- ii. Put Down the Exact Question that Requires the Decision of the Court.
 - iii. Give the Details of the Arguments Raised by Both the Sides on the Question Referred.
 - iv. A Brief of the Entire Evidence Led, a Brief of the Demeanor of the Witnesses Examined and a Brief of the Proceedings with the Dates of Hearing.
 - v. The Entire Record of Evidence and the File to be Returned.
- c. Where the Dispute is in Relation to the Commissioner, he Should Resign and Return the File with the Reasons and Details as Stated Above.

❖ PROCEDURE TO SEEK TIME IF EVIDENCE IS NOT COMPLETED WITHIN THE TIME GIVEN FOR THE COMMISSION

- a. The Time given by Court for the Commission to be Completed should usually be Adhered to.
- b. The Commissioner should Insist on Proceeding with the Case and try to Finish the same within the Prescribed Period.
- c. In Case Adjournment is being Requested, an Application should be taken and the Order Sheet should reflect the Application and the Reason for the Adjournment being Granted.

- d. In Case the Adjournment is given for any Other Reason, for a Specific Date, the Reason should be Reflected in the Order Sheet.
- e. In Case the Time Expires, the Matter should be Immediately Referred to the Court for Seeking Additional Time. This can be done in Two Ways:
 - i. An Application is made by Either of the Parties Seeking the Extension of Time for the Completion of the Evidence before the Commissioner.
 - ii. The Commissioner can Make such an Application, where the Commissioner shall give the Reasons for the Delay in Writing, Attaching the Order Sheets Maintained by him/ her.

THANK YOU