Qanun-e-Shahadat Order , 1984.

THE QANUN-E-SHAHADAT ORDER, 1984
[P.O. NO. 10 OF 1984]
_____ [Gazette of Pakistan, Extraordinary, Part I,]
28th October, 1984, pp. 587-642]

No. F. 17 (2)/84-Pub. — The following Order made by the President on the 30th Muharram-ul-Haram, 1405 (26th October, 1984), is hereby published for general information: —

WHEREAS it is expedient 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 Holy Quran and Sunnah;

NOW, THEREFORE, in pursuance of the Proclamation of the fifth day of July, 1977, and in exercise of all powers enabling him in that behalf, the President is pleased to make the following Order: –

PART I
RELEVANCY OF FACTS
CHAPTER I
PRELIMINARY

1. Short title, extent and commencement. (1) This Order may be called the Qanun-e-Shahadat , 1984.

(2) It extends to the whole of Pakistan and applies to all judicial proceedings in or before any Court, including a Court martial, a Tribunal or other authority exercising judicial or quasi-judicial powers or jurisdiction, but does not apply to proceedings before an arbitrator.

(3) It shall come into force a once.

COMMENTARY

Provisions of Qanun-e-Shahadat apply to proceedings before any Court, Court martial, a Tribunal or other authority exercising judicial or quasi-judicial powers. Qanun-e-Shahadat, however, does not apply to proceedings before an arbitrator.

Deputy Commissioner and Tribunal under Criminal Law (Special Provisions) Ordinance (II of 1968) are "Tribunals" within meaning of Art. I. Proceedings before them are governed by provisions of Order/1984.

2. Interpretation. (1) In this Order, unless there is anything repugnant in the subject or context,—

(a) "Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence;

(b) "document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter;

Illustrations

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.

(c) "evidence" includes:—

(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

(ii) all documents produced for the inspection of the Court; such documents are called documentary evidence;

(d) "fact" includes—

(i) anything, state of things, or relation of things capable of being perceived by the senses; and

(ii) any mental condition of which any person is conscious.

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

(2) One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Order relating to the relevancy of facts.

(3) The expression "facts in issue" includes any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation. Whenever, under the provisions of the law for the time being in force relating to civil procedure, any Court records on issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustrations

A is accused of the murder of B.

At his trial the following facts may be in issue:–

that A caused B's death;
that A had intended to cause B's death;

that A had received grave sudden provocation from B;

that A, at the time of doing the act which caused B's death, was by reason of unsoundness of mind, incapable of knowing its nature.

(4) A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

(5) A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

(6) A fact is said not to be proved when it is neither proved nor disproved.

(7) Whenever it is provided by this order that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

(8) Whenever it is directed by this Order that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

(9) When one fact is declared by this Order to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

COMMENTARY

Facts alleged by prosecution are to be proved by evidence on oath in Court. Evidence provides a basis for proof of such facts which consequently result in conviction of accused.

Evidence, Agreement to sell. Plaintiff is to succeed on the basis of his own evidence and not on the basis of weakness of the evidence of the defence. Civil matter is to be decided on the basis of preponderance of evidence and the Court is to consider the entire evidence on record, whether it is of the plaintiff or of both plaintiff and defendant, in order to arrive at correct conclusion. Once the evidence is brought on record, the question of burden of proof loses its significance.

Dying declaration. Dying declaration having not been subjected to cross-examination, needed to be scrutinized closely and could be accepted only if it received satisfactory corroboration from the physical circumstances of the case.

Proof. Standard of proof in civil cases. Rules of evidence for civil and criminal cases, are, in general, identical but some provisions in Qanun-e-Shahadat are peculiar to criminal cases while others are peculiar to civil cases. In civil cases all that was necessary to insist upon was that proof adduced in support of a fact was such that should make a prudent man to act upon the supposition that it in fact existed. Whether alleged fact was either a fact in issue or a relevant fact, Court could draw no inference from its existence till it believed it to exists; and belief of Court in the existence of a given fact ought to proceed upon grounds, altogether independent of the relation of the fact to the object and nature of proceedings in which its existence was to be determined.

Revision. Appellate Court applying its mind to real controversy between parties and the admission of main witness. Appraisal of evidence by Appellate Court was strictly in accordance with rules of evidence. No misreading or non-reading of material evidence which might have affected judgment of Appellate Court was pointed out. No exception could be taken to concurrent findings of Courts below on specific issues. Findings of Courts below were maintained in circumstances.

Evidence, appreciation of. Mere deposition of a close relative (uncle) of a party in favour of its rival would not by itself be a ground to attach absolute evidentiary value to his testimony particularly when such witness had admitted to be on inimical terms with his defendant relative. To place implicit reliance on the evidence of such a highly interested witness was not warranted.

Proof. Probative force of individual material in establishing the general truth. Essentials. Proof must rest on evidence. Conclusion should not be based on mere conjectures and surmises.

Evidence, appreciation of. Witnesses produced in evidence. Testimony of such witnesses was not shaken in cross-examination. Defendant's plea, that witnesses produced by plaintiff in proof of his claim for damages were not "independent" but "interested" was fallacious, for no enmity or mala fides, whatsoever, had been alleged; the fact that such witnesses were in similar profession as that of plaintiff would not mean that statements given on oath by them were false, especially those which remained unshaken during cross-examination.1

General statement of a witness. Evidentiary value. Statement of a witness which was general in nature would be hardly of any worth in proof of a specific issue.2

Educational institution. Unfair means allegedly used in examination. Rustication of examinee for three years. Punishment by way of rustication challenged before Civil Court which dismissed examinee's suit. Examinee's appeal against decision of trial Court met the same fate. Validity. Scrutiny of evidence showed that reliance had mainly been placed by examinee on certificate of innocence issued by Deputy Superintendent and one invigilator of the examination centre to the effect that no unfair means whatsoever had been used by examinee. Such officials of the examination centre were not, however, produced in evidence in support of "certificate of innocence". Certificates issued by such officials carried title weight for they were not produced as witnesses to be subjected to cross-examination because it could not be inferred otherwise as to what extent contents of their certificate could be relied upon. "Certificate of innocence" thus, could not be considered in evidence in circumstances.3

CHAPTER II

OF WITNESSES

3. 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 year, 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 Quran 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.

Explanation. A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

COMMENTARY

Child witness. Evidentiary value. Evidence of child witness is to be assessed with care and caution.4

Child witness, evidence of. Value. Evidence of a child witness being a delicate matter, was not safe to rely upon unless corroborated.5

Witness. Who may testify.6

Child witness. Competency. What the law requires is not the factor of age, but the intelligence of a particular child witness in the circumstances of the case.7

Competency of persons to testify. Rule enunciated in Art. 3 of Qanun-e-Shahadat , 1984, is not an absolute or inflexible rule.8

4. Judges and Magistrates. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions, as to his own conduct in Court as Judge or Magistrate, or as to anything which come to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations

(a) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) A is accused before the Court of Session of having given, false evidence before B, a Magistrate, B cannot be asked what A said except upon the special order of the superior Court.

(c) A is accused before the Court of Session of attempting to murder a police-officer whilst on his trial before B, a Sessions Judge, B may be examined as to what occurred.

5. Communications during marriage. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative-in-interest consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

6. Evidence as to affairs of State. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of state, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Explanation. In this Article "official records relating to the affairs of State" includes documents concerning industrial or commercial activities carried on, directly or indirectly, by the Federal Government or a Provincial Government or any statutory body or corporation or company set up or controlled by such Government.

COMMENTARY

Preventive detention. Grounds for. Privilege claimed. Under provisions of Qanun-e-Shahadat, privilege can be claimed. Held: It is open to Court to inspect material and give finding whether such claim should be allowed or not.9

Document. Privilege in respect of. Claim of. If in a criminal trial, such important and sensitive document covering national security was required by an accused in his defence and was not allowed to be produced on ground of privilege, fate of accused would be deemed. Held: Whether such a claim for privilege would not obstruct or debar an accused from fully and fairly

meeting prosecution case or asserting his defence and thus vitiate whole trial on ground of its suffering from an inherent vice or being against elementary principle of natural justice, would call for careful examination.1

7. Official communications. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Explanation. In this Article, "communications" includes communications concerning industrial or commercial activities carried on, directly or indirectly, by the Federal Government or a Principal Government or any statutory body or corporation or company set up or controlled by such Government.

8. Information as to commission of offences. No Magistrate or Police Officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Explanation. In this Article, "Revenue Officer" means any officer employed in or about the business of any branch of the public revenue.

9. Professional communications. No advocate shall at any time be permitted. Unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this Article shall protect from disclosure—

(1) any such communication made in furtherance of any illegal purpose; or

(2) any fact observed by any advocate, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to such fact by or on behalf of his client.

Explanation. The obligation stated in this Article continues after the employment has ceased.

Illustrations

(a) A, a client says to B, an advocate "I wish to obtain possession of property by the use of a forged deed on which I request you to sue".

The communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(b) A, being charged with embezzlement, retains B, an advocate, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book charging A

with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

10. Article 9 to apply to interpreters, etc. This provisions of Article 9 shall apply to interpreters, and the clerks or servants of advocates.

11. Privilege to waived by volunteering evidence. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such discourse as is mentioned in Article 9, and, if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to such disclosure only if he questions such advocate on matters which, but for such question, he would not be at liberty to disclose.

12. Confidential communications with legal advisors. No one shall be compelled to disclose to the Court, Tribunal or other authority exercising judicial or quasi-judicial powers or jurisdiction any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

13. Production of title deed of witness, not a party. No witness who is not a party to a suit shall be compelled to produce his title deeds to any property or any document in virtue of which he holds any property as pledge or mortgagee or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

14. Production of documents which another person, having possession, could refuse to produce. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

15. Witness not excused from answering on ground that answer will criminate. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceedings, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceedings, except a prosecution for giving false evidence by such answer.

COMMENTARY

Statement of witness in Court in judicial proceedings whether privileged. Qualified protection. Witness enjoys absolute privilege as the ultimate object of dispensing justice may rest on his testimony which in all probability must convey truth relating to the inquiry. Placing any fetters on witness may detain him from deposing truth or at least all that he knows about the point in issue and the same might misdirect the course of justice. Even alternate case of giving qualified privilege to witnesses' statement had to be confined to his deposition, which being available in its entirety on the record was scrutinized at length by the Court in revision for neither of the Courts below had expressed opinion as to whether the statement in question, could not be afforded qualified protection. Remarks of witness, during judicial proceeding did not appear to have been wanton, reckless or beyond the plea of inquiry.2

Defamatory remarks made by a witness in his testimony in judicial proceeding against counsel in answer to a question in cross-examination. Privilege. Extent of. Plaint, in suit for damages against such witness showed that no motive or ulterior reason was attributed therein to witness in having made such typical remarks against the counsel. Element of malice was thus missing in the plaint; instead plea taken was that those remarks were made deliberately which expression was not synonymous with the motive besmearing thinking of witness against the counsel. Remarks attributed to witness related to a case wherein, the property in question, as "Tarka" of the propositus on whose demise partition thereof, was being sought. Witness in answer to a question, had explained lamenting how the counsel earlier persuaded him to make a typical statement before Court on the pretext that it was conducive to the interest of the minor orphans: witness thought in his own way that the statement obtained from him by the counsel was detrimental to the interest of minor orphans; and in that context he had dubbed counsel to be cruel. Witness had reiterated in the later part of his statement that his testimony before the Court presumably against the interest of orphans, was the result of deceitful and unconscionable promptings of counsel. Witness, while making such remarks against counsel was feeling qualms of conscience in recalling that he was obliged to make involuntarily a statement against the interest of orphans because of counsel's careless and unconscionable attitude. Such remarks having been obtained in cross-examination were not voluntary and were, thus, privileged. Defamatory remarks made voluntarily were, however, not privileged. Remarks attributed to witness were not unconnected or irrelevant to the matter in issue; remarks in question were evoked when witness was apparently confronted with his previous statement and were deeply relatable to the subject-matter of suit; purport where of was, to express how a false suggestion was made to witness pertaining to the interest of orphans in the property. Remarks attributed to witness were germane to the matter in inquiry and were fully protected.3

Defamatory remarks made by a witness in his testimony in judicial proceeding whether privileged. Witness was bound to say all that he knew even though defamatory. Such latitude to witness was indispensable for searching truth to render justice. Where statement of a witness dealt with a matter which was not in any reasonable sense germane to the subject-matter in issue, the protection of privilege should not be extended to that statement. Test applicable to the statement of a witness was that he was not showing malice; was not trying to degenerate the privilege into a licence; was stating something quite connected with and relevant to the issue in question; and was not dealing with a matter not germane to the point in issue; where there were indications that witness was actuated by any of such considerations, his statement would not be protected.4

16. Accomplice. An accomplice shall be a competent witness against an accused person, except

in the case of an offence punishable with hadd; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

COMMENTARY

Evidence of accomplice, admissibility of. Evidence of an accomplice against co-accused is inadmissible only in cases of 'Hadd' and 'Qisas', and though admissible in cases relating to offences liable to 'Tazir' only but conviction in such cases cannot be based solely on the uncorroborated testimony of such accomplice.5

Provision relating to conviction on sole testimony of accomplice as provided in Art. 16 declared, for reasons stated in judgment, to be repugnant to Injunctions of Islam w.e.f. 31st December, 1991 whereafter Art. 3 would become void and shall be of no effect.6

Uncorroborated evidence of an accomplice can be made basis of conviction in all criminal cases except those punishable with Hadd. Courts, however, as a rule of prudence seeking corroboration in material particulars of evidence of an accomplice before making it basis of conviction.7

17. 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 Quran 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.

COMMENTARY

In criminal cases, where accused is being proceeded against for awarding Tazir punishment, Tazkiya-al-Shahood is not required. Court can legitimately act on evidence without Tazkiya which, to satisfaction of Court, establishes guilt of accused beyond reasonable doubt.8

Court can convict an accused person on the testimony of one dependable witness. Law attaches more importance to quality than to quantity of evidence.

Proof of a fact would depend upon the character of witnesses and their competency to speak to that fact.9

Clause (1) of Art. 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.1

Tazkiyah-al-shuhood – Non observance of — Effect: – Contention that the process of tazkiyah-al-shuhood was not resorted to, therefore, the appellants could not have been punished on the basis of the statements of the P.Ws, — repelled. It was held, the record does not indicate that the requirements of tazkiyah-al-shuhood as envisaged by section 7 of the Hudood Ordinance, in the case were satisfied yet, the fact remains that statements of the witnesses which other-wise were, recorded on oath, could not have been straight away rejected No doubt, tazkiyah-alshuhood is a condition precedent to impose the sentence of hadd, yet, it cannot be said that ta'zir punishment, cannot be inflicted on an accused, if it has not been undertaken. Since, every Muslim is a competent witness and he is ordained to speak the truth therefore, his testimony, so far as ta'zir punishment is concerned, cannot be discarded, if it is otherwise, believable. In a number of cases, where the requirements of tazkiya-al-shahood, were not fulfilled testimonies of the witnesses were believed, by the court, to award ta'zir punishments.[P-39]D1a

CHAPTER III
OF THE RELEVANCY OF FACTS

18. Evidence may be given of facts in issue and relevant facts. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation. This Article shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue:—

A's beating B with the club;

A's causing B's death by such beating;
A's intention to cause B's death.

(b) A suitor does not bring with him and have in readiness for production at the first hearing of the case, a bond on which he relies. This Article does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the law for the time being in force relating to Civil Procedure.

19. Relevancy of facts forming part of same transaction. Facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or, shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against Pakistan by taking part in an armed insurrection in which property is destroyed, troops are attacked, and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

COMMENTARY

A portion of the statement of a witness based on personal observation and knowledge of the witness cannot be regarded as hearsay. — because statements made under immediate influence of a transaction being resiesdae are admissible under Article 19 of the Qanun-e-Shahadat Order 1984. — Hearsay testimony would be admissible if it is proved that the object of the maker of the statement was to elucidate and explain the circumstances connected with the same transaction provided the possibility of concoction or distortion, to the advantage of the maker or to the disadvantage of the accused, is ruled out.1b

Statement made immediately after murder occurrence under influence of occurrence in order to characterize it and explain circumstances connected therewith would be admissible under Art. 19 as res gestate evidence.2

Statement made by an independent witness of murder occurrence would be relevant under Art. 19 for determining guilt of accused.3

20. Facts which are the occasion, cause or effect of facts in issue. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations

(a) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third person, are relevant.

(b) The question is, whether A murdered B.
Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) the question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B. Known to A, which afforded an opportunity for the administration of poison, are relevant facts.

21. Motive, preparation and previous or subsequent conduct. (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

(2) The conduct of any party, or any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1. The word "conduct" in this clause does not include statements, unless those statements accompany and explain acts other than statements but this explain is not to affect the relevancy of statements under any other Article of this Order.

Explanation 2. When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Illustrations

(a) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public are relevant.

(b) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required only for a particular purpose, is relevant.

(c) A is tried for the murder of B by poison; the fact that, before the death of B. A procured position similar to that which was administered to D, is relevant.

(d) The question is whether a certain document is the will of A.

The facts that, not long before the date of the alleged will A made inquiry into matters to which the provisions of the alleged will relate, that he consulted advocates in reference to making the will, and that he caused drafts of other wills to be prepared of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts that, either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is whether a robbed B.

The facts that, after B was robbed, C said in A's presence;

The Police are coming to look for the man who robbed B, and that immediately afterwards A ran away, are relevant."

(g) The question is whether A owes B Rs. 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing: "I advice you not to trust A, for he owes B 10,000 rupees", and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the compliant was made are relevant.

The fact that, without making a complaint, she said, that she had been ravished is not relevant as conduct under this Article though it may be relevant as a dying declaration under Article 46m paragraph (1), or as corroborative evidence under Article 153.

(k) The question is, whether a was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this Article, though it may be relevant as a dying declaration under Article 46, paragraph (1), or as corroborative evidence under Article 153.

22. Facts necessary to explain or introduce relevant facts. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant facts happened, or which show the relation of parties by whom any such fact was transacted, are relevant insofar as they are necessary for that purpose.

Illustrations

(a) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A; B affairs that the matter alleged to be libelous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under Article 21, as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant except insofar as they are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A, C, on leaving A's service, says to A "I am leaving you because B has made me a better offer." This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give to A's wife. B, says as he delivers it: "A says you are to hide this." B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of mob are relevant as explanatory of the nature of the transaction.

COMMENTARY

Identification parade. When culprits were not known to the witnesses and witnesses had only a monetary glimpse of the culprits at the time of occurrence, prosecution was bound to prove that culprits, soon after their arrest, were put to identification test and got identified by eye-witnesses through an identification test/parade held in presence of a Magistrate.4

Identification test. Nature. Holding of identification test was not a requirement of law but was only one of the methods to test veracity of evidence of an eye-witness who had an occasion to see accused and claimed to identify the culprit.5

Identification test. Nature. Identification test was not a requirement of law, but it was only one of the methods to test the veracity of evidence of an eye-witness who had an occasion to see accused and claimed to identify him.6

Identification parade. Delay in holding identification parade was not always fatal to case of prosecution. Credibility of identification parade depended upon a host of circumstances including type of witnesses, manner in which same was carried out including proportion of innocent persons to be mixed with suspects and fact as to how and in what manner and circumstances prosecution witnesses came to pick out a particular accused and details of part which that accused had, in fact, taken in crime. Delay simpliciter in conducting identification parade, would not prejudice capability, if otherwise enough, of eye-witnesses to identify culprits.8

23. Things said or done by conspirator in reference to common design. — Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustrations

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against Pakistan.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Peshawar for a like object, D persuaded persons to join the conspiracy in Karachi. E published writings advocating the object in view at Multan, and F transmitted from Lahore to G at Kabul the money which C had collected at Peshawar and contents of a letter written by H giving an account of the conspiracy are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him and although they may have taken place before he joined the conspiracy or after he left it.

24. When facts not otherwise relevant become relevant. Facts not otherwise relevant are relevant —

(a) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(a) The question is, whether A committed a crime at Peshawar on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C, or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D, is relevant.

25. In suits for damages facts tending to enable Court to determine amount are relevant. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

26. Facts relevant when right or custom is in question. Where the question is as to the existence of any right or custom, the following facts are relevant:—

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed recognized or exercised, or in which its exercise was disputed, asserted or departed from.
Illustrations

The question is whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours are relevant facts.

27. Facts showing existence of state of mind, or of body, or bodily feeling. Facts showing in the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

Explanation 1. A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally but in reference to the particulars matter in question.

Explanation 2. But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this Article, the previous conviction of such person shall also be a relevant fact.

Illustrations

(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(b) A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the (sic) its delivery, A was possessed of a number of other pieces of counterfeit (sic) relevant.

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.

(c) A sues B for damages done by a dog of B which B knew to be ferocious.
The facts that the dog had previously bitten X, Y and Z and that they had made complaints to B, are relevant.

(d) The question is whether a, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that A knew tht the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards b is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there was no previous quarrel between A and b, and A repeated the matter complained of as he heard it, are relevant, as showing that A did not intended to harm the reputation of B.

(f) A is sued by B for fraudulently representing to B that C was solvent whereby B, being inducted to trust C, who was insolvent, suffered loss.

The fact that at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B, upon a house of which A is owner by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and whished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(i) A is charged with shooting at B with intent to kill him. In order to show A's intent the fact of A's having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letter previously sent by A to B may be proved, as showing the intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(l) The question is whether A's death was caused by poison. Statements made by A during his illness as to his symptoms are relevant facts.

(m) The question is, what was the state of A's health at the time an assurance on his life was effected.

Statement made by A as to the state of his health at or near the time in question are relevant facts.

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasion to the defect of that particular carriage is relevant.

The fact that B was habitually negligent about the carriages which he let to hire is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead.

The fact A on other occasions shot at B is relevant as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.

(p) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicated general disposition to commit crimes of that class is irrelevant.

28. Facts bearing on question whether act was accidental or intentional. When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrence, in each of which the person doing the act was concerned, is relevant.

Illustrations

(a) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from different insurance officers, are relevant as tending to show that the fires were not accidental.

(b) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false and that the false entry is in each case in favour of A, are relevant.

(c) A is accused of fraudulently delivering to B a counterfeit rupees.

The question is, whether the delivery of the rupee was accidental.
The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant as showing that the delivery to B was not accidental.

29. Existence of course of business when relevant. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations

(a) The question is, whether a particular letter was dispatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place are relevant.

(b) The question is, whether a particular letter reach A.

The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

ADMISSIONS

30. Admission defined. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

COMMENTARY

Admission of fact by plaintiffs. Effect. Plaintiff in his statement before Court had admitted part of defendant claim viz. value of tube well. Such payment would be made by plaintiffs in addition to payment of decretal amount.7

Judgment on admission. Essentials. Party to suit can seek decree on admission made in pleadings or otherwise without waiting for determination of any other question between parties. Admission sought to be the basis of decree was in fact qualified admission of an official of the defendant and inter-departmental communications which would not amount to conceding plaintiff's claim. Any admission as contemplated by O.XII, R. 6, C.P.C. has to be unequivocal admission which could amount to estoppel against the party making such admission. Defendant had yet to file written statement while application in terms of O.XII. R. 6, C.P.C. had been filed before defendants had submitted their written statement. Plaintiffs were thus, not entitled to decree on basis of qualified admission in terms of O.XII, R. 6, C.P.C.8

31. Admission by party to proceeding or his agent, etc. (1) Statement made by a party to the proceedings, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

(2) Statements made by 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.

(3) Statements made by—

(a) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

(b) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions if they are made during the continuance of the interest of the persons making the statements.

COMMENTARY

Admission of fact by illiterate lady. Effect. Where illiterate lady who did not understand the meaning of legal words, like "decree" had admitted in her statement factum of decree against here and in the same statement denied the existence of any such decree, decree in question, was not proved in absence of production of copy of decree/judgment in question.1

32. Admission by persons whose position must be proved as against party to suit. Statements made by persons, whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statement would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustrations

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

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

Illustrations

The question is, whether a horse sold by A to B is sound.

The says to B: "Go and ask C: C knows all about it." C's statement is an admission.

34. Proof of admissions against persons making them, and by or on their behalf. Admission are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative-in-interest, except in the following cases:—

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Article 46.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbably.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under Article 46, paragraph (2).

(c) A is accused of a crime committed by him at Peshawar.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-marks of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under Article 46, paragraph (2).

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

35. When oral admissions as to contents of documents are relevant. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such documents under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

36. Admissions in civil cases when relevant. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation. Nothing in this Article shall be taken to exempt any advocate from giving evidence of any matter of which he may be compelled to give evidence under Article 9.

37. Confession caused by inducement, threat or promise, when irrelevant in criminal proceedings. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supporting that by making it he would gain any advantage or avoid and evil of a temporal nature in reference to the proceedings against him.

COMMENTARY

Confessional Statement. Omission by recording Magistrate to ask question whether confessional statement was made under promise by Police, would not affect evidentiary value of confessional statement when accused did not say in their statement u/s. 342 and u/s. 340(2), Cr.P.C. that their confessional statement was made under promise.2

Extra-judicial confession. Extra-judicial confession was weakest type of evidence which required that before it was relied upon, it must be supported by some independent circumstantial evidence coming from an unimpeachable source.3

38. Confession to police officer not to be proved. No confession made to a police officer shall be proved as against a person accused of any offence.

COMMENTARY

Confession by accused before Police would inadmissible in evidence under Art. 38.3a

39. Confession by accused while in custody of police not to be proved against him. Subject to Article 40, no confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation. In this Article, "Magistrate" does not include the head of a village discharging magisterial functions unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1898 (Act V of 1898).

COMMENTARY

Mere pointing out the place to police as being the place where children had been thrown by accused but such pointing out did not lead to discovery of any fact. Held: For purpose of Art. 40, this evidence cannot be relied upon as corroboratory evidence.4

Confession. Retracted confession. Constitution of Pakistan, 1973, Art. 185 (3). Leave to appeal was granted to consider the contentions of accused that if the Courts below would have considered the retracted confession as a whole, the accused would not have been awarded the death penalty and that the confession was retracted, and, therefore, in order to convict the accused there should have been corroboration and further that the confession should have been read as whole and reliance should not have been placed merely on the inculpating part and ignoring the other portion.5

40. How much of information received from accused may be proved. When any fact is deposed to as discovered in consequence of information received form a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.
COMMENTARY

Recovery made on pointation of accused is relevant under Art. 40.6

Place of occurrence. Discovery. Place of occurrence known to everyone and site plan having been prepared prior to the pointation of the same by the accused, such pointation could not be treated as a discovery to bring it within the four corners of Art. 40 of Qanun-e-Shahadat, 1984.7

41. Confession made after removal of impression caused by inducement, threat or promise, relevant. If such a confession as is referred to in Article 37 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

42. Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practiced on the accused

person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him:

43. Consideration of proved confession affecting person making it and others jointly under trial for same offence. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons is proved, —

(a) such confession shall be proof against the person; making it; and

(b) the Court may take into consideration such confession as circumstantial evidence against such other person.

Explanation.— "Offence", as used in this Article, includes the abetment of, or attempt to commit, the offence.

Illustrations

(a) A and B are jointly tried for the murder of C. It is proved that A said: "B and I murdered C". The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said: "A and I murdered C".

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

44. Accused persons to be liable to cross-examination. All accused persons, including an accomplice, shall be liable to cross-examination.

45. Admission not conclusive proof but may estop. Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.

COMMENTARY

Admissions made in pleadings and evidentiary admissions. Connotation. Effect. Admission embodied in Art. 113, Qanun-e-Shahadat is a rule of procedure while Art. 45 thereof, is to be given effect through the rule of evidence. Admissions in pleadings were conclusive but not the others. Admissions in pleadings would have overriding role which does not permit that admissions through evidence or unrebutted statements be made basis of adjudication in exclusion to admissions in pleadings. Defendants having admitted ownership of plaintiff's predecessor in their written statement and thereafter, claiming themselves to be the owners thereof, onus to prove such ownership should have been on defendants. Plaintiff's job to prove ownership ends successfully when admission of their ownership had been made in written statement by defendants. Defendant's oral statement that they had become owners of property in question, through decree of Court, without producing on record such decree or copy of judgment was of no effect and their ownership of property in question, was not established.

Oral evidence could not be of any value in absence of production of available documentary evidence.9

STATEMENT BY PERSONS WHO CANNOT BE
CALLED AS WITNESSES

46. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:—

(1) When it relates to cause of death. When the statement is made by a person as to cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the causes of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

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

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

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

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

(6) Or is made in will or deed relating to family affairs. When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made and when such statement was made before the question in dispute was raised.
(7) Or in document relating to transaction mentioned in Article 26, paragraph (a). When the

statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Article 26, paragraph (a).

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

Illustrations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The statement made by the Captain, whose attendance cannot be procured, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B.
A statement by A that B was his son is a relevant fact.

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

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

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

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

(n) A sues B for a libel expressed in a pointed caricature exposed in a shop window. The question is as to the similarity of the caricature and its libelous character. The remarks on a crowd of spectators on these points may be proved.

COMMENTARY

Dying declaration. Nothing was available on record that official had not recorded the dying declaration in verbatim, though in the translated form. Nothing could be brought out in the cross-examination of recording Magistrate which could cast doubt as to the veracity of the contents of the dying declaration which was made in Urdu and translated into Sindhi and English. Contention that dying declaration was liable to be discarded as it was not recorded in the language namely Urdu, in which it was made, particularly in the absence of any material that the Recording Magistrate was well conversant with Urdu, Sindhi and English languages, was repelled. Dying declaration, if did not suffer from any infirmity, was sufficient to warrant conviction for an offence.1

Dying declaration. Presence of relatives around the deceased. Effect. Dying declaration made in presence of relatives be always taken with a pinch of salt and the same renders the dying declaration doubtful. Prompting of relatives to the deceased at the time of recording of dying

declaration. Effect. No sanctity can be attached to a dying declaration where the relatives are present around and where the names of the accused are prompted by such relatives.2

Admissibility of depositions and former testimony. Depositions taken by Magistrate who was incompetent to do so, cannot be transferred under provisions of Art. 47. Requirements of Art. 47 must be proved in letter and spirit before depositions of witnesses are transferred to file of Sessions Court. It was held that in circumstances of case, depositions of witnesses brought on record of Sessions Court could not be treated as evidence.3

Dying declaration. No mandatory pre-requisites of law exist that a dying declaration cannot be made before a police officer or that it should always be in writing. Dying declaration can be oral and communicated by means of gestures when the victim cannot speak due to his critical condition.4

Dying declaration. Admissibility. Admissibility of dying declaration not affected by S. 164, Cr.P.C. Provisions of S. 164, Cr.P.C. do not in any way affect the admissibility of a statement made by a person if it falls within the terms of Art. 46 of Qanun-e-Shahadat, 1984.5

Oral dying declaration. Admissibility. Dying declaration is admissible even if orally made.6

Dying declaration. Sufficiency to sustain conviction thereon. Conditions. Dying declaration, by itself, was sufficient to sustain conviction thereon provided there was no chance of mistaken identity; deceased was capable of making statement; the time elapsed after sustaining injury before deceased made statement; whether statement rang true; statement was free from promptness of others and deceased was not a man of questionable charcter.6a

Appreciation of evidence. Dying declaration. Great caution is to be taken before placing reliance on a dying declaration because it is a weak piece of evidence as its maker is not subjected to cross-examination.7

47. Relevancy of certain evidence for proving, in subsequent proceedings, the truth of facts therein stated. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:
Provided that—
the proceeding was between the same parties or their representatives-in-interest;

the adverse party in the first proceeding had the right and opportunity to cross-examine;

the questions in issue were substantially the same in the first as in the second proceeding.
Explanation. A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this Article.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

48. Entries in books of account when relevant. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to enquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustration

A sues B for Rs. 1,000, and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

COMMENTARY

Banker and customer. Entries in account of account-holder by bank alleged that credit entries in the account of account-holder were made by Bank by oral instructions of the account-holders thus making deviation from the rule or practice of the Bank. Burden would shift to the Bank alleging aid deviation to prove that said credit entries were made on oral instructions of the account-holder. Where the Bank failed to discharge the burden to prove the oral instructions, presumption would be that account of account-holder was credited by the Bank only after receiving the proper advice and cash.8

49. Relevancy of entry in public record made in performance of duty. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

COMMENTARY

Entries in death register maintained in regular course of business would be conclusive. Presumption of correctness of such entries shall prevail over conflicting entries about date of death in inheritance mutation.9

Death entry made in 1918 when there was no dispute between parties. It remained in existence ever since which enhanced its evidentiary value. Held; There was no warrant for Courts below to have kept such death entry out of consideration.1

Long-standing entry made in Register of Deaths in 1918. Evidentiary value. Entry of death in Register of Deaths kept as a public record and having remained in existence ever since 1918, had enhanced its evidentiary value. Courts below in keeping such entry out of consideration had committed an illegality justifying High Court to interfere in its revisional jurisdiction.2

Original register maintaining death entries. Such register on the face of it appeared to have been duly maintained in regular course of business and contained death entry of person in question. Entries in such register were relevant under Art. 49, Qanun-e-Shahadat, 1984.3

50. Relevancy of statements, in maps, charts and plans. Statements of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans

made under the authority of the Federal Government or any Provincial Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

51. Relevancy of statements as to facts of public nature, contained in certain Acts or notifications. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of the Central Legislature or of any other legislative authority in Pakistan or in a Government notification appearing in the official Gazette is a relevant fact.

52. Relevancy of statements as to any law contained in law-books. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

COMMENTARY

Foreign law. Mode of proof. Foreign law can be proved by producing a book purporting to be printed or published under the authority of the Government of the country concerned containing a statement of the relevant law. Expert opinion on a foreign law is also a relevant fact and therefore, an expert can also be examined.4

HOW MUCH OF A STATEMENT IS TO BE PROVED

53. What evidence to be given when statement forms part of a conversation, document, book or series of letters of papers. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT

54. Previous judgments relevant to bar a second suit or trial. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

55. Relevancy of certain judgments in probate, etc., jurisdiction. A final judgment, order or decree of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued, at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;
that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

56. Relevancy and effect of judgments, orders or decrees, other than those mentioned in Article 55. Judgments, order or decrees other than those mentioned in Article 55 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustrations

A sues B for trespass on his land, B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

57. Judgments, etc. other than those mentioned in Articles 54 to 56, when relevant. Judgments orders or decrees, other than those mentioned in Articles 54, 55 and 56, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Order.

Illustrations

(a) A and B separately sue C for a libel which reflects upon each of them, C in each case says that the matter alleged to be libelous is true, and the circumstances are such that it is probably true in each case, or in neither.
A obtains a decree against C for damages on the ground that C failed to made out his justification. The fact is irrelevant as between B and C.

(b) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime C says that she never was A's wife.

The judgment against B is irrelevant as against C.

(c) A prosecutes B for stealing a cow from him, B is convicted. A afterwards sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

(e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant and under Article 21 as showing the motive for the fact in issue.

58. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Article 54, 55 or 56, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

OPINION OF THIRD PERSONS WHEN RELEVANT

59. Opinions of experts. When the Court has to form an opinion upon a point of foreign law, of science, or art, or as to identity of hand-writing or finger impressions, the opinion upon that point of persons specially skilled in such foreign law, science or art or in questions as to identity of hand-writing or finger impressions are relevant facts.

Such persons are called experts.
Illustrations

(a) The question is, whether the death of A was caused by poison. The opinion of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether A at the time of doing a certain act, was by reason of unsoundness of mind, incapable of knowing he nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether ascertain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

COMMENTARY

Opinion of finger-point expert taken on file without objection. Objection to mode of proof at revisional stage. Competency. Opinion of finger-point expert was taken on file by trial Court without any objection having been raised about its made of proof. Neither in lower Appellate Court nor in grounds of revision objection about improper admission of opinion of finger-print expert in evidence was taken. Defendant in default of clear objection at appropriate time was precluded from objecting to mode of proof regarding admission of opinion of expert or his examination on commission in revision.5

Expert opinion. Objection to mode of proof. In default of clear objection taken at the appropriate time, defendant was precluded from objecting to the mode of proof regarding admission of the opinion of expert or his examination on commission. Such evidence was rightly read in evidence in Courts below.6

Criminal trial. Whether the opinion of a person who had investigated the case does or does not fall within the ambit of Arts. 59 to 65 of Qanun-e-Shahadat and whether such an opinion could or could not be brought on record as legal evidence. Statement of an Investigating Officer that according to his investigation a particular person was innocent or guilty, as the case may be, is an expression of opinion which expression or statement is irrelevant and inadmissible in evidence.7

Opinion of a witness. Evidentiary value. Exception.8

Belated and unilateral examination of disputed signatures with those obtaining on record by trial Court, without providing adequate opportunity of hearing to contestants, would not only be irregular but even illegal, being violative of principles of naturals justice.9

Disputed handwriting or signatures of a person. Proof. Best way of proving disputed handwriting or signature of a person. Natural variations in the signatures of a person. Factors.1

Handwriting Expert, opinion of. Evidentiary value. Opinion of Handwriting Expert supported by reasons deserves preference if the opinion is in accord with the direct evidence.2

Appeal to Supreme Court. Suit for specific performance of agreement to sell property. Allegation of forged signatures of executant on agreement to sell and other contended documents. Handwriting Expert's opinion and concurrent findings of all the three Courts below was that signatures were not forged. Valuable property being involved in the case and there being wild allegations of fraud, Supreme Court made an exercise of comparison of the signatures of the executant with the help of magnifying glass and found the reasonings advanced by the expert quite plausible and convincing. Concurrent finding of fact of the three lower forums regarding the genuineness of the agreement to sell also did not suffer from any legal infirmity, misreading or non-reading of evidence. Supreme Court declined interference in appeal.3

60. Facts bearing upon opinions of experts. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations

(a) The question is, whether A was poisoned by a certain poison. The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

61. Opinion as to hand-writing when relevant. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation. A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration

The question is, whether a given letter is in the hand-writing of A, a merchant in London.

B is merchant in Peshawar, who has written letters addressed to A and received letter purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising him thereon.

The opinions of B, C and D on the question whether the letter is in the hand-writing of A are relevant, though neither B, C or D every saw A write.

COMMENTARY

Traced forgery becomes virtually identical in outward form with the genuine signature and unless a person is fully conversant with the signature and handwriting of the other, it is not safe to base conviction upon such opinion alone.4

Handwriting Expert's opinion. Opinion of Handwriting Expert is nothing more than a mere opinion of the person / Handwriting Expert who purports to have issued the same and such opinion is not evidence until the person who has given it is brought before the Court and is subjected to the test of cross-examination.5

62. Opinion as to existence of right or custom, when relevant. When the Court has to form an opinion as to the existence of any general custom or right, the opinion, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation. The expression "general custom or right" includes custom or rights common to any considerable class of persons.

Illustration

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this Article.

63. Opinion as to usages, tenets, etc., when relevant. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people.

the opinions of person having special means of knowledge thereon, are relevant facts.

64. Opinion on relationship when relevant. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact;

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Divorce Act, 1869 (IV of 1869), or in prosecutions under section 494 or 495 of the Pakistan Penal Code (Act XLV of 1860).

Illustrations

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

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

COMMENTARY

Family affairs. Best evidence. Best evidence regarding family affairs, would be that of a close relative of both the parties. Witness produced by plaintiff claiming that he was related to both

parties yet he could not tell parentage of father of parties and admitted in cross-examination that his nephew was married to plaintiff's daughter. Evidence of such witness did not inspire confidence and thus, same could not be relied upon.6

Witnesses deposing as to relationship of parties did not belong to the concerned village and were not on visiting terms with the relevant families. Such persons would not be presumed to have special means of knowledge as to the relationship of parties concerned. Concurrent findings of Courts below on such aspect of the case was eminently just, which neither suffered from any misreading of evidence nor any non-reading of evidence nor was in defiance of any rule of appraisement of evidence. Concurrent findings of Courts below were affirmed in circumstances.7

Conduct evidence. Opinion of a person expressed by conduct. Evidentiary value. Person whose opinion was sought to be given in evidence, must be proved to have special means of knowledge and then alone his opinion would be evidence. Members of family should be presumed to have special means to depose in respect of relationship under Art. 64, Qanun-e-Shahadat, 1984.8

65. Grounds of opinion when relevant. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

CHARACTER WHEN RELEVANT

66. In civil cases character to prove conduct imputed irrelevant. In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except insofar as such character appears from facts otherwise relevant.

67. In criminal cases previous good character relevant. In criminal proceedings the fact that the person accused is of a good character is relevant.

68. Previous bad character not relevant, except in reply. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1. This Articles does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2. A previous conviction is relevant as evidence of bad character.

69. Character as affecting damages. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation. In Articles 66, 67, 68 and 69 the word "character" includes both reputation and disposition: but, except as provided in Article 68, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation of disposition were shown.

CHAPTER IV

OF ORAL EVIDENCE

70. Proof of facts by oral evidence. All facts except the contents of documents, may be proved by oral evidence.

COMMENTARY

Evidence, oral and documentary. Misreading by Courts below. Effect. Three Courts below misread evidence on the question whether plaintiffs were daughters of vendors and failed to give proper consideration to material facts which had direct bearing on such question. Admitted piece of evidence viz. Nikahnamas of plaintiffs showed vendor as the father of plaintiffs; such document was corroborated by the statement of Pesh Imam who had performed Nikah of plaintiffs and such statement was further reinforced by Nikah Registrar who had registered Nikah of plaintiffs. Nothing was brought out in cross-examination to shake evidence of those witnesses who were independent witnesses. Birth certificates being not clear were rightly discarded by Courts below. If Birth certificates were to be excluded, documentary and oral evidence was sufficient for concluding that plaintiffs were daughters of vendor. No reliable evidence was produced in rebuttal. Evidence produced by vendees on such question did not inspire confidence. Veracity of statement of plaintiff about the pedigree of her father was not challenged in cross-examination. Plaintiffs were proved to be the daughters of vendor. Three Courts below having misread evidence on the question of relationship of plaintiffs with vendor had failed to give proper consideration to material facts. Findings of three Courts below on such question was set aside and plaintiffs were proved to be the daughters of vendors on basis of material on record.9

Proof of facts by oral evidence. Oral statement would not be of any value where documentary evidence in support of such fact being available was not produced.1

71. Oral evidence must be direct. Oral evidence must, in all cases whatever be direct, that is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by an other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treaties if the author is dead, or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided further that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection:

Provided further that, if a witness is dead, or cannot be found or has become incapable of giving evidence, or his attendance cannot be procured without an amount of delay or expense which under the circumstances of the case the Court regards as unreasonable, a party shall have the right to produce shahadaala-alshahadah by which a witness can appoint two witnesses to depose on his behalf, except in the case of Hudood.

COMMENTARY

Application of Art. 71, Qanun-e-Shahadat, 1984. Oral evidence means the evidence recorded by the Court. Article 71 of Qanun-e-Shahadat, 1984 applies to oral evidence which means the evidence recorded by the Court and does not apply to first information report lodged with the police.2

CHAPTER V
OF DOCUMENTARY EVIDENCE

72. Proof of contents of documents. The contents of documents may be proved either by primary or by secondary evidence.

COMMENTARY

Arts. 72, 75, 78, 79. Court can consider a document admissible if a document produced is on record but Presiding Officer has not put exhibit number on the document. 2a

Evidence, admissibility of. Petitioner contended that copies of forms regarding sanction of plan were not public documents and could not have been exhibited without formal proof. Held: No objection having been raised when such documents were tendered in evidence and exhibited, no objection could be allowed to be raised at later stage in revision.3

Non-production of original document before Settlement Authorities. Effect. Joint allotted of shop in dispute. Defendant claimed that plaintiff had surrendered his claim to the extent of his ½ share in shop in question and had executed deed of surrender in his favour. Such deed, however, having not been placed before Settlement Authorities, could not be verified and accepted after notice without recording the statement of plaintiff. Deed of surrender, therefore, had no value and on basis thereof, P.T.D. for the whole shop should not have been issued in favour of defendant alone. Permanent Transfer Deed issued in favour of defendant to the extent of plaintiff's share in shop in question, was thus not valid.4

73. Primary evidence. “Primary evidence” means the document itself produced for the inspection of the Court.

Explanation 1. Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2. Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

COMMENTARY

To prove contents of documents, claimant is bound to produce primary or secondary evidence unless execution of the same is admitted by the opponent.5

74. Secondary evidence. — “Secondary evidence” means and includes—

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

(a) A photograph of an original is secondary evidence of its contents though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy, compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

COMMENTARY

Report of Magistrate would be enough to justify attraction of Art. 76(c) for purpose of production of secondary evidence in terms of Art. 74.4a

Qanun-e-Shahadat Order is applicable to Provincially Administered Tribal Areas including Malakand Division. Murder cases cannot be decided on basis of Qasamat as it is not recognized as a mode of evidence under Qanun-e-Shahadat Order. Courts in PATA should follow provisions of Qanun-e-Shahadat Order, particularly Art. 17, in their true perspective.

75. Proof of documents by primary evidence. — Documents must be proved by primary evidence except in the cases hereinafter mentioned.

COMMENTARY

Execution of sale-deed by a person claiming to be holding power-of-attorney from the owner. Owner denying having executed any power-of-attorney in favour of said person. Original power-of-attorney was not produced in Court, Photostat copy produced could not, in the absence of original, be taken into consideration. Person holding purported power-of-attorney did not appear in Court to contest suit by the owner (plaintiff). Defendant (vendee) acknowledge in his statement before Court that he was not supplied original power-of-attorney at the time of execution of sale-supplied original power-of-attorney at the time of execution of sale-deed. Power-of-attorney was thus, a forged document and person executing sale-deed on basis thereof, had no authority to execute any sale-deed on behalf of the owner (plaintiff). Sale-deed executed in favour of vendee-defendant was, thus, not valid.6

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

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court; or of any person legally bound to produce it; and when, after the notice mentioned in Article 77 such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative-in-interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when, due to the volume or bulk of the original, copies thereof have been made by means of microfilming or other modern devices;

(e) when the original is of such a nature as not to be easily movable;

(f) when the original is a public document within the meaning of Article 85;

(g) when the original is a document of which a certified copy is permitted by this Order, or by any other law in force in Pakistan, to be given in evidence;

(h) when the originals consists 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;

(i) when an original document forming part of a judicial record is not available and only a certified copy thereof is available, certified copy of that certified copy shall also be admissible as a secondary evidence.

In cases (a), (c), (d) and (e), any secondary evidence of the contents of the document is admissible.
In case (b), the written admission is admissible.

In case (f) or (g), certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (h), 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 document.

COMMENTARY

Secondary evidence of report of identification parade cannot be allowed or permitted to be adduced when no effort had been made to locate the original report of identification parage.6a

77. Rules as to notice to produce. — Secondary evidence of the contents of the documents referred to in Article 76, paragraph (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is prescribed by law; and, if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case;

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1) when the document to be proved is itself a notice;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

78. Proof of signature and handwriting of person alleged to have signed or written document produced. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature of the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

COMMENTARY

Suit for specific performance of agreement to sell property. Disputed signatures. Plaintiff is required to prove the signatures of the executant of the agreement.7

79. Proof of execution of document required by law to be attested. If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence:
Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

COMMENTARY

Revisional jurisdiction, exercise of. Courts below had recorded very cogent reasons for decreeing plaintiff's suit by placing reliance upon circumstantial evidence as also on evidence on record for coming to conclusion that neither document in question, was proved to have been executed nor the same was verified in accordance with law. Original document was also not placed on record. Findings recorded by Courts below on the question of execution of alleged document being lawful could not be interfered with. Judgments and decrees of Courts below were maintained in circumstances.8

Proof of execution of private document. Execution of such document had to be proved by examining the scribe and an attesting witness. Such persons having not been examined, document in question, would be deemed to have not been proved and could be excluded from consideration.9

Agreement to sell. Proof and admissibility. Scribe of document when a competent witness. Evidence of one marginal witness and scribe. Evidentiary value of. Agreement to sell was proved through the statement of one marginal witness and scribe of the document in question. Ordinarily a scribe who had merely scribed a document and handed it over to parties for their

signatures and the signatures of attesting witnesses would not become competent attesting witness, if such document was executed elsewhere in his absence. Where, however, document in question, was actually executed in presence of scribe and parties and attesting witnesses had signed the same in his presence, he (scribe) could be treated as attesting witness although he had not signed the document in that capacity.1

Agreement to sell. Execution of. Proof of. Parties had executed document in presence of scribe and signed it. Even attesting witnesses had signed document in presence of scribe. Scribe can be treated to be an attesting witness although he has not signed it in that capacity. Requirements of provisions of Article 79 read with Article 17 of Qanun-e-Shahadat have been substantially complied with. Admittedly original document as placed on record, but record having been burnt, was reconstructed under orders of High Court. No objection was raised at time of reconstruction of file regarding genuineness of agreement to sell. Held: No jurisdiction defect in impugned judgments and decrees of Courts below or any misreading or non-reading of evidence has been pointed out to justify interference in concurrent findings of fact recorded by Courts below. Petition dismissed.2

Marginal witnesses of disputed deed. Evidentiary value of. No lacuna in the evidence of marginal witnesses was apparent or pointed out, therefore, their veracity could not be described. Evidence of such witnesses, alone was sufficient to prove the document in question, even if other evidence was altogether ignored.3

Proof of execution of document required by law to be attested. Exception. Documents required by law to be attested would not be used as evidence until two attesting witnesses, who if alive were amenable to jurisdiction of Court and capable of giving evidence were produced. Not necessary to call attesting witnesses to prove execution of a documents, which was (not a will) registered in accordance with Registration Act, 1908, unless execution thereof, was specifically denied by the person who allegedly executed the document. Document in question, being registered one, and its existence having not been denied, its execution could be proved by certified copy thereof.4

80. Proof where no attesting witness found. If no such attesting witness can be found, it must be proved that the witness have either died, or cannot be found and that the document was executed by the person who purports to have done so.

81. Admission of execution by party to attested document. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

82. Proof when attesting witness denies the execution. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

83. Proof of document not required by law to be attested. An attested document not required by law to be attested may be proved as if it was un-attested.

84. Comparison of signature, writing or seal with others admitted or proved. (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made any signature, writing or seal admitted or proved to the satisfaction of

the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

(2) The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

(3) This Article applies also, with any necessary modifications, to finger-impressions.

COMMENTARY

Comparison of signatures. Genuineness. Trial Court's competency to compare signatures. Where parties had not brought forward any expert witness to given opinion about genuineness of signatures in question, trial Court would be competent to form its own opinion by comparing disputed signatures with admitted signature.5

Comparison of signatures. High Court compared signatures of vendee on disputed document with his signatures on admitted document to find out if the signatures were in fact of the same person i.e., vendee.6

Comparison of signatures on questioned document with signatures on admitted documents by Court. Deceased, whose signatures were in dispute being illiterate could not affix proper signatures, therefore, his signatures would fall in the category of "shaky signatures". Close scrutiny of signatures on questioned documents when compared with admitted signatures, revealed, prima faice that those signatures were of one and the same person. Trial Court had thus, correctly discharged its duty while making comparison of disputed signatures with admitted signatures.7

85. Public documents. The following documents are public documents: —

(1) documents forming the acts or records of the acts—

(i) of the sovereign authority;

(ii) of official bodies and tribunals; and

(iii) of public officers, legislative, judicial and executive, of any part of Pakistan, or of a foreign country;

(2) public records kept in Pakistan of private documents;

(3) documents forming part of the records of judicial proceedings;

(4) documents required to be maintained by a public servant under any law; and

(5) registered documents the execution whereof is not disputed.

86. Private documents. All other documents are private.
87. Certified copies of public documents. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation. Any officer, who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this Article.

88. Proof of documents by production of certified copies. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

89. Proof of other public documents. The following public documents may be proved as follows: –

(1) Acts, orders or notifications of the Federal Government in any of its departments, or of any Provincial Government or any department of any Provincial Government by the records of the departments, certified by the Heads of those departments respectively, or by any document purporting to be printed by order of any such Government;

(2) the proceedings of the Legislatures,– by the journal of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of the Government concerned;

(3) the Acts of the Executive or the proceedings of the Legislature of a foreign country,– by journals published by their authority, or commonly received in that country as such or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some Federal Act;

(4) the proceedings of a municipal body in Pakistan,– by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body;

(5) public documents of any other class in a foreign country,– by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of a Pakistan Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of foreign country.

COMMENTARY

Foreign document. Mode of proof. Foreign document can be proved by the original or by certified copy thereof, which must be certified by legal keeper of document, certificate of Notary

Public and Pakistan's Diplomatic Agent in that country. Presumption of genuineness and accuracy would attach to certified copies of foreign judicial record, if they were certified in said manner.8

PRESUMPTION AS TO DOCUMENTS

90. Presumption as to genuineness of certified copies. (1) The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Federal Government or a Provincial Government to be genuine:

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

(2) The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such document.

91. Presumption as to documents produced as record of evidence. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness is a judicial proceeding or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by the Judge or Magistrate or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

92. Presumption as to genuineness of documents kept under any law. The Court shall presume the genuineness of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

93. Presumption as to maps or plans made by authority of Government. The Court shall presume that maps or plans purporting to be made by the authority of the Federal Government or any Provincial Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

94. Presumption as to collections of laws and reports of decision. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country, and of every book purporting to contain reports of decision of the Courts of such country.

95. Presumption as to powers-of-attorney. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, Pakistan Consul or Vice-Consul, or representative of the Federal Government, was so executed and authenticated.

96. Presumption as to certified copies of foreign judicial records. (1) The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Pakistan is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Federal Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

(2) An officer who, with respect to any territory or place not forming part of Pakistan, is a Political Agent therefore, as defined in section 3, clause (40), of the General Clauses Act, 1897 (X of 1897), shall for the purposes of clause (1), be deemed to be a representative of the Federal Government in or for the country comprising that territory or place.

97. Presumption as to books, maps and charts. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements or which are relevant facts and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

98. Presumption as to telegraphic messages. The Court may presume that message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

99. presumption as to due execution, etc., of documents not produced. The Court shall presume that every document, called for and produced after notice to produce, was attested, stamped and executed in the manner required by law.

100. Presumption as to documents thirty years old. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that persons; handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation. For the purposes of this Article and Article 92, documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or it the circumstances of the particular case are such as to render such an origin probable.

Illustrations

(a) A has been in possession of landed property for long time. Her produces from his custody deeds relating to the land, showing his titles to it. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B's possession which were deposited with him by B for safe custody. The custody is proper.

COMMENTARY

Presumption about genuineness of documents thirty years old. Raising of presumption or refusing to raise presumption is discretionary with Court as Art 100 lays down that the Court "may presume" and not that Court "shall presume". However, like all other discretions, discretion under Art. 100 should be exercised indicially. Court may refuse to raise presumption where it has reasons to believe the document to be a fabrication or when grave suspicion attaches to it.10

101. Certified copy of documents thirty years old. — The provisions of Article 100 shall apply to such copy of a document referred to in that Article as is certified in the manner provided in Article 87 and is not less than thirty years old; and such certified copy may be produced ill proof of the contents of the document or part of the document of which it purports to be a copy.

CHAPTER VI
OF THE EXCLUSION OF ORAL BY DOCUMENTARY
EVIDENCE

102. Evidence of terms of contracts, grants and other disposition of property reduced to form of documents. — When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1. When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2. Wills admitted to probate in Pakistan may be proved by probate.

Explanation 1. This Article applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2. Where there are more originals than one, are original only need be proved.
Explanation 3. The statement, in any document whatever, of a fact other than the facts referred to in this Articles, shall not preclude the admission of oral evidence as to the same fact.

Illustrations

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of ex change must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contracts, in writing with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) A gives B a receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible.

COMMENTARY

Oral evidence relating to contents of documents was inadmissible.1

Exclusion of oral evidence by documentary evidence. Where payment of consideration was evidence by document only that document would be considered as proof of such consideration and no oral evidence would be admissible.2

103. Exclusion of evidence of oral agreement. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last Article, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives-in-interest, for the purpose of contradicting, varying adding to, or subtracting from, its terms;

Proviso (1). Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2). The existence of any separate oral agreement as to an matter on which a document is silent, and which is not inconsistent with its terms may be proved. In considering whether or not to this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3). The existence of any separate oral agreement,, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4). The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, may be proved, except in case in which such contract, grant or disposition or property is by law required to be in writing, or has been registered according to the law inforce for the time being as to the registration of documents.

Proviso (5). Any usage of custom by which incidents not expressly mentioned in any contract are usually annexed to contract of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6). Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

(a) A policy of insurance is effected on goods "in ships from Karachi to London". The goods are shipped in a particular ship which is last. The fact that particular ship was orally excepted from the policy cannot be proved.

(b) A agrees absolutely in writing to pay B Rs. 1,000 on the first March, 1984. The fact that, at the same time, an oral agreement was made that the money should not be paid till the thirty-first March cannot be proved.

(c) An estate called "the Khanpur estate" is sold by a deed which contains a map of the property sold, the fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(e) A institutes a suit against B for the specified performance of a contract and also prays that the contract may be reformed as to one of its provisions, as that provisions was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of B by letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words "Bought of A a horse for Rs.500". B may prove the verbal warranty.

(h) A hires lodging of B, and gives a card on which is written "Rooms, Rs. 200 a month." A may prove a verbal agreement that these terms were to include partial board.

A hires lodging of B for a year, an regularly stamped agreement, drawn up by an advocate is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(i) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not sent the money. In a suit for the amount A may prove this.

(j) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

COMMENTARY

Art. 103 — Exclusion of evidence of oral agreement — Party cannot be permitted to adduce oral agreement or statement to contradict or vary the terms of proved agreement executed by him.1a

Pre-emption suit. Compromise. Document of compromise was not stamped and element of consideration was conspicuously missing in the same. Such document being not a contract, grant, or other disposition of property reduced to the form of document to exclude evidence of oral agreement within the contemplation of Art. 103. Qanun-e-Shahadat, case was not covered by O.XXIII, R. 3, C.P.C.3

Pre-emption suit. Compromise. If the document is silent with regard to matter about which oral agreement exists, then the same is allowed to be proved provided that same is not inconsistent with the document.4

Liquidated damages. Omission in agreement to sell to describe property which was intended to be sold. Such omission could validly be proved by oral evidence that specific property was agreed to be sold. Parties to a document could show by other evidence that a writing executed by them did not represent a completed transaction. Extrinsic evidence to determine the effort of an instrument was permissible where there was doubt as to its true meaning. Conduct of parties was admissible where a document was obscurely framed or any of its clauses contained a doubt as to its true meaning. Courts below on basis of oral evidence had rightly decided that defendant had been guilty of breach of contract and was liable for such breach to pay agreed amount as damages.5

Agreement to sell. Document of. Whether oral evidence could be led to prove property which was intended to be sole. Question of. No doubt Article 102 excludes extrinsic evidence in proof of a contract, grant or other disposition of property. Under proviso (2) to Article 103, parties to a document may show by other evidence that a writing executed by them does not represent a completed transaction. Extrinsic evidence is also permissible to determine effect of an instrument where its true meaning are doubtful. Held: Other evidence is admissible to prove property which was intended to be sold but was omitted to be described in agreement. Petition dismissed.6

104. Exclusion of evidence against application of document to existing facts. When language used in a document is plain in itself, and when it applied accurately to existing acts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration

A sells to, by deed, "my estate at Rangpur containing 100 bighas." A has an estate at Rangpur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was not situated at the different place and of a different size.

105. Evidence as to document unmeaning in reference to existing facts. When language used in a document in plain is itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration

A sells to B, by deed "my house in Karachi."

A had no house in Karachi, but it appears that he had a house at Keamari, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Keamari.

106. Evidence as to application of language which can apply to one only, of several persons. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or thing, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations

(a) A agrees to sell to B, for Rs. 1,000 "my white horse." A has two white horses. Evidence may be given of acts which show which of them was meant.

(b) A agrees to accompany B to Hyderabad. Evidence may be given of facts showing whether Hyderabad in the Dekkhan or Hyderabad in Sindh was meant.

107. Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration

A agrees to sell to B "my land at X in the occupation of Y". A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is to at X. Evidence may be given of facts showing which he meant to sell.

108. Evidence as to meaning of illegible characters, etc. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, absolute, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration

A a sculptor, agrees to sell to B, "All my mods."

A has both models and modeling tools. Evidence may be given to show which he meant to sell.

109. Who may give evidence of agreement varying terms of document. Persons who are not parties to a document, or their representatives-in-interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration

A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months credit shall be given to A. This could not be show as between A and B, but it might be shown by C, if it affected his interest.

110. Saving of provisions of Succession Act relating to wills. Nothing in this Chapter contained shall be taken to affect any of the provisions of the Succession Act, 1925 (XXXIX of 1925), as to the construction of wills.

PART II
ON PROOF
CHAPTER VII
FACTS WHICH NEED NOT BE PROVED

111. Fact judicially noticeable need not be proved. No fact of which the Court will take judicial notice need be proved.

112. Facts of which Court must take judicial notice. (1) The Court shall take judicial notice of the following facts: —
(a) All-Pakistan laws:

(b) Articles of War for the Armed Force;

(c) the course of proceeding of the Central Legislature and any person is authorized to use by any Legislature established under any law for the time being in force in Pakistan;

(d) the seals of all the Courts in Pakistan and of all Courts out of Pakistan established by the authority of the Federal Government or the Government representative, the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public and all seals which by any Act or Regulation having the force of law in Pakistan;

(e) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in Pakistan, if the fact of their appointment to such office is notified in the official Gazette;

(f) the existence, title and national flag of every State or Sovereign recognized by the Federal Government;
(g) the divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official Gazette;

(h) the territories under the dominion of Pakistan;

(i) the commencement, continuance and termination of hostilities between Pakistan and any other State or body of persons;

(j) the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all Advocates and other persons authorized by law to appear or act before it;

(k) the rule of the road on land or at sea.

(2) In all cases referred to in clause (1), and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

(3) If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

COMMENTARY

Official Gazette notification can be looked into by Court and judicial notice can be taken under Art. 112.6a

113. Facts admitted need not be proved. — No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

COMMENTARY

Suit for specific performance of agreement to sell — Respondent admitted the execution of agreements in her first written statement and in her cross-examination, but she subsequently in amended written statement took the plea that agreements were fictitious, forged and fraudulent — Trial Court decreed the suit, but was set aside by Appellate and Revisional Court — Validity — Admission made by respondent in her first written statement would be binding on her under Art. 113 of Qanun-e-Shahadat, 1984 — Such admission stood corroborated by her own further statement made in cross-examination with regard to due execution of agreements and passing of consideration, besides overwhelming oral and documentary evidence of appellant and her marginal witnesses — Subsequent denial of execution of agreements and receipt of amounts stated therein, and non-mentioning of Identity Cards of respondent and marginal witnesses in the agreements would not make them doubtful — Respondent could not be allowed to lead oral agreement or make statement to contradict, vary, add or subtract the terms of agreements, which were reduced into writing under Art. 103 of Qanun-e-Shahadat, 1984 — Inconsistent conduct and denial of admitted facts by respondent proved that she had not come to Court with clean hands — Supreme Court allowed the appeal and set aside the impugned judgments and decrees and restored that passed by the Trial Court.7

CHAPTER VIII
ESTOPPEL

114. Estoppel. When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

COMMENTARY

Estoppel. If a party, by it conduct obliges the Court to adopt a course which is contrary to its practice, that party will be debarred from raising objection as to the procedure on the very salutary principle that after having led the Court to do a certain thing for the benefit of the parties, none of them can be allowed to challenges the same.7

Estoppel. Once a mode (procedure) is adopted by the High Court on the request of the parties, the decision given in pursuance of that mode should be given effect to. Necessary corollary of such rule would be that the same parties were estopped from subsequently challenging that mode of decision in an appeal.8

Estoppel. Party accepting a benefit under a compromise, an award, or a partition was estopped from questioning the transaction.9

Non-raising of question of limitation would neither be waiver nor estoppel.1

Estoppel. Where a party persuaded a Tribunal to adopt a particular course for determining the issue in question and accepted benefit of such, arrangement, he cannot be allowed to repudiate when it comes to liabilities and obligations thereunder.2

Estoppel. Benefit or rule of estoppel. Entitlement of only that party who, while acting on the representation of another person had changed its position to its prejudice could claim benefit of rule of estoppel. Where, however, correct factual position was within knowledge of the represented or would have come to his knowledge, on making inquiry as he ought to have reasonably made, rule or estoppel was not attracted.3

115. Estoppel of tenant and of licensee of person in possession. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by

the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when which license was given.

COMMENTARY

A person entering premises as tenant cannot be permitted to deny that status as estoppel under Art. 115 would operate and principle "once a tenant always a tenant" would apply.4

Once a tenant always a tenant. Tenant having been inducted as a tenant cannot claim adverse to what was acquired by him in a lawful manner. Tenant's claim that he had acquired title through sale having not been established, no period of limitation would stand against owners to seek declaration of title against such person.5

Tenancy of land once entered upon would continue until determined in accordance with requirement of law.6

116. Estoppel of acceptor of bill of exchange, bailee or licensee. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailer or licensor had, at the time then the bailment or license commenced, authority to make such bailment or grant such license.

Explanation 1. The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.
Explanation 2. If a bailee delivers the goods bailed to a person other than the bailer, he may prove that such person had a right to them as against the bailor.

PART III
PRODUCTION AND EFFECT OF EVIDENCE
CHAPTER IX
OF THE BURDEN OF PROOF

117. Burden of proof. (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies be true.

A must prove the existence of those facts.

COMMENTARY

Burden of proof. Transfer of property through mutation. Burden of proof in case of transfer of property through mutation is on vendee.8

118. On whom burden of proof lies. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
Illustrations

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.
If no evidence were given on either side. B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B say that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

COMMENTARY

Tort. Damages. Publication of article in the magazine owned and edited by defendant relating to murder case of ex-Prime Minister. Plaintiff's conduct in said murder case as counsel was ridiculed and his reputation as a lawyer was injured. Defendant claiming truth of allegations. Initial onus of proving that contents of said article were true and publication was not made with mala fides but by intelligent zeal in public interest, was to be discharged by defendant, who failed in doing so. Anything published against a person rendering him ridiculous and, contemptible was nothing but defamation. Defendant was, thus, liable to pay damages to plaintiff for publishing article in question, against him.1

119. Burden of proof as to particular fact. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft, to A, A must prove the admission.

(b) B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

120. Burden of proving fact to be proved to make evidence admissible. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations

(a) A wishes to prove a dying declaration by B. A must prove B's death.

(b) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

121. Burden of proving that case of accused comes within exceptions. When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code (Act XLV of 1860), or within any special exception of proviso contained in any other part of the same Code, or in any law defining the offence, is upon hi, and the Court shall presume the absence of such circumstances.
Illustrations

(a) A accused of murder, alleges that by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b) A, accused of murder, alleged that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Pakistan Penal Code (Act XLV of 1860), provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances bringing the case under section 335 lies on A.

122. Burden of proving fact especially within knowledge. When any fact is especially within the knowledge of any person, the burden to proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with traveling on a railway without a ticket. The burden of proving that he had a ticket is on him.

123. Burden of proving death of person known to have been alive within thirty years. Subject to Article 124, when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

124. Burden of proving that person is alive who has not been heard of for seven years. When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

125. Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

126. Burden of proof as to ownership. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

127. Proof good faith in transactions where one party is in relation of active confidence. When there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.
Illustrations

(a) The good faith of a sale by a client to an advocate is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the advocate.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

128. Birth during marriage conclusive proof of legitimacy. (1) The fact that any person was born during the continuance of a valid marriage between his mother and any man and not earlier, that the expiration of six lunar months from the date of the marriage or within two years after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless–

(a) the husband had refused, or refuses, to own the child; or

(b) the child was born after the expiration of six lunar months from the date or which the woman had accepted that the period of iddat had come to an end.

(2) Nothing contained in clause (1) shall apply to a non-Muslim if it is inconsistent with his faith.

129. Court may presume existence of certain facts. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course to natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume—

(a) that a man who is in possession of stolen good soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;
(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of thins usually cease to exist, is still in existence;

(e) that judicial and official acts have been regularly performed;

(f) that the common course of business has been followed in particular cases;

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(h) that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(i) that when a document creating an obligation is in the hands of the obliger, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it;

as to illustration (a). A shopkeeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;

as to illustration (b). A, person of the highest character, is tried for causing a man’s death by an act of negligence in arranging certain machinery, B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself;

as to illustration (b). A crime is committed by several persons. A, B and C, three of the criminals, are captured on the shop and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;

as to illustration (c). A, the drawer of a bill of exchange, was a man of business, B, the acceptor, was a young and ignorant person, completely under A's influence;

as to illustration (d). It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;

as to illustration (e). A judicial act, the regularity of which is in question, was performed under exceptional circumstances;

as to illustration (f). The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;

as to illustration (g). A man refuses to produce a document which would bear on a contract of small importance on which he is used, but which might also injure the feelings and reputation of his family;

as to illustration (h). A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;

as to illustration (i). A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

COMMENTARY

Summons sent in properly addressed and prepaid envelopes. Presumption. Presumption under Art. 129 (e), Qanun-e-Shahadat Order, 1984 and S. 27, General Clauses Act, 1897, would be that summons in question, were duly served on defendants by registered post. Such presumption although was rebuttable but nothing was brought on record to rebut such presumption.2

Official acts are presumed to have been performed with regularity.3

Presumption. Sale of land. Question that the seller of land was a person of unsound mind. Trial Court and Appellate Court had noted that although sale-deed was presented for registration on 2nd January, 1964 but it was registered only after 18th July, 1964 when it was represented. Trial Court had also taken into account interpolation made in the endorsement which was evident on the face of the document. Written statement showed that medical certificate was produced by appellants, before the Sub-Registrar at the time of registration of sale-deed but the said certificate had not been produced but was withheld by appellants. Courts below, held, were justified to draw presumption against the appellants.4

Registered document. Presumption. Presumption of truth is attached to registered document.5

Evidence withheld by a party. Held: Inference can be drawn that such evidence should have adversely affected party with-holding evidence.6

CHAPTER X
OF THE EXAMINATION OF WITNESSES

130. Order of production and examination of witnesses. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

131. Judge to decide as to admissibility of evidence. (1) When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant, and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

(2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

(3) If the relevancy of the one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under Article 46.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(c) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property.

The Court may in its discretion, either require the property to be identified before the denial of the possession is proved or permit the denial of possession to be proved before the property is identified.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact-in-issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact-in-issue. The Court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

132. Examination-in-chief, etc. (1) The examination of a witness by the party who calls him shall be called his examination-in-chief.

(2) The examination of a witness by the adverse party shall be called his cross-examination.

(3) The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

133. Order of examinations. (1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

(2) The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine that matter.

COMMENTARY

Witness can be re-examined with permission of Court in case any ambiguity crops up during cross-examination which needs clarification or elucidation.6a

Order of examination as prescribed in Arts. 133, 150 is meant to elicit true facts from the witness, the party at whose instance the witness has been produced would of course examine and as such put forth its case. Thereafter, to test the credibility or veracity of the witness, the adverse party has been granted the right of cross-examining him. If some ambiguity or confusion has arisen during cross-examination, the party can re-examine the witness and if some new fact has been introduced then the adverse party can cross-examine him further.6b

The examination-in-chief, cross-examination and re-examination all make one statement. The whole exercise is undertaken to extort truth so that complete justice may be dispensed. During course of statement, if a witness produced by prosecution deviates from true facts and the same are being suppressed in order to extend concession or due to some other ulterior motive, the Court can permit the party to cross-examine his own witness.6c

Re-examination of a witness. It is possible that during the course of re-examination a witness while clarifying or elucidating a fact may suppress the truth or state something which appears to be palpably false or self-contradictory or for some allied reason, then permission can be sought from Court to cross-examine that witness. In such case Court may grant permission to cross-examine the witness in the interest of justice.7

134. Cross-examination of person called to produce a document. A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.

135. Witnesses to character. Witnesses to character may be cross-examined and re-examined.

136. Leading questions. Any question suggesting to answer which the person putting it wishes or expects to receive is called a leading question.
137. When leading questions must not be asked. (1) Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

(2) The Court shall permit leading questions as to matters which are introductory or undisputed; or which have, in its opinion been already sufficiently proved.

138. When leading questions may be asked. Leading questions may be asked in cross-examination.

139. Evidence as to matters in writing. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any documents, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle that party who called the witness to give secondary evidence of it.

Explanation. A witness may give oral evidence of statement made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration

The question is, whether A assaulted B.

C deposes that he heard A say to D "B wrote a letter accusing me of theft. And I will be revenged on him". This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

140. Cross-examination as to previous statements in writing. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

COMMENTARY

State counsel unauthorized to cross-examine his own witness with leave of Court if witness does not support prosecution during trial. If, however, permission under Art. 140 is not sought and witness was not got declared hostile, Court is bound to give credit to statement of witness

and give whatever benefit from evidence of such witness goes to accused. Benefit of such evidence, however, would not be extended to all accused facing trial, but would be extended only to accused in whose favour such evidence has been given. For this reason alone, prosecution case against other accused persons shall not be disbelieved.9

141. Questions lawful in cross-examination. When a witness cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend–

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such question might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

142. When witness to be compelled to answer. If any such question relates to a matter relevant to the suit or proceeding, the provisions of Article 15 shall apply thereto.

143. Court to decide when question shall be asked and when witness compelled to answer. If any such question relates to a matter not relevant to the suit or proceeding, except insofar as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:–

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testified;

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testified;

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

144. Question not to be asked without reasonable grounds. No such question as is referred to in Article 143 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.

Illustrations

(a) An advocate is instructed by an attorney that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.

(b) An advocate is informed by a person in Court that an important witness is a dakait. The informant, on being questioned by the advocate, given satisfactory reasons for his statement. This is reasonable ground for asking the witness whether he is a dakait.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakait.

145. Procedure of Court in case of question being asked without reasonable grounds. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any advocate, report the circumstances of the case to the High Court or other authority to which such advocate is subject in the exercise of his profession.

146. Indecent and scandalous question. The Court may forbid any question or inquiries which it regards as indecent or scandalous, although such questions 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 on not the facts in issue existed.

147. Procedure of Court in cases of defamation, libel and slanders. When a person is prosecuted or sued for making or publishing an imputation of a defamatory, libelous or slanderous nature, the Court shall, not, before it has recorded its findings on the issues whether such person did make or publish such imputation, and whether such imputation is true, permit any question to be put to any witness for the purpose of injuring the character of the person in respect of whom such imputation has, or is alleged to have, been made, or any other person, whether dead or alive, in whom he is interested, except insofar as any such question may the necessary for the purpose of determining the truth of the imputations alleged to have been made or published.

148. Questions intended to insult or annoy. 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.

149. Exclusion of evidence to contradict answers to questions testing veracity. When a witness has been asked and has answered any question which is relevant to the inquiry only insofar as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1. If a witness is asked whether he has been previously convicted of nay crime denies it, evidence may be given of his previous conviction.

Exception 2. If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations

(a) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty.

He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Faisalabad. He denies it.

Evidence is offered to show that A was on that day at Faisalabad.

The evidence is admissible, not as contradicting A on a fact which effects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d) A is asked whether his family has not had a blood-feud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

150. Question by party to his own witness. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

151. Impeaching credit of witness. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation. A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations

(a) A sues B for the price of goods sold and delivered to B, C says that A delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(b) A is indicated for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

152. Questions tending to corroborate evidence of relevant fact admissible. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration

A, an accomplice, gives an account of robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

153. Former statements of witness may be proved to corroborate later testimony as to same fact. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

154. What matters may be proved in connection with proved statement relevant under Article 46 or 47. Whenever any statement, relevant under Article 46 or 47, is proved, all matters may be proved either in order to contradict or corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

155. Refreshing memory. (1) A witness may, while under examination of afresh 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 that time fresh in his memory.

(2) 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.

(3) Whenever a witness may refresh memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided that Court be satisfied that there is sufficient reason for the non-production of the original.

(4) An expert may refresh his memory by reference to professional treatise.

156. Testimony to facts stated in document mentioned in Article 155. A witness may also testify to fact mentioned in any such document as is mentioned in Article 155, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

157. Right of adverse party as to writing used to refresh memory. Any writing referred to under the provisions of the two last preceding Articles must be produced and shown to the adverse party if he requires it such party may, if he pleases, cross-examine the witness thereupon.

158. Production of document. (1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any objection shall be decided on by the Court.

(2) The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

(3) If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and, if the translator disobeys such direction, he shall be held to have committed an offence under Section 166 of the Pakistan Penal Code (Act XLV of 1860).

159. Giving, as evidence, of document called for and produced on notice. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the partly calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

160. Using, as evidence, of document production of which was refused on notice. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.
Illustration

A sues B on an agreement and gives B a notice to produce it.

At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

161. Judge's power to put question or order production. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he places, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or things and 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 witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Order to be relevant, and duly proved:

Provided also that this Article shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Articles 4 to 14, both inclusive, if the question was asked or the document was called for by the adverse party: nor shall the Judge ask any question which it would be improper for any other person to ask under Article 143 or 144; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted.

CHAPTER XI
OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE

162. No new trial for improper admission or rejection of evidence. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independent

of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

CHAPTER XII
DECISION OF CASE ON THE BASIS OF OATH

163. Acceptance or denial of claim on oath. — (1) When the plaintiff takes oath in support of his claim, the court shall, on the application of the plaintiff, call upon the defendant to deny the claim on oath.

(2) The Court may pass such orders as to costs and other matters as it may deem fit.

(3) Nothing in this Article applies to laws relating to the enforcement of Hudood or other criminal cases.

COMMENTARY

Special oath by one of the plaintiffs. Effect. During proceedings of second appeal, one of plaintiff/appellant filed application wherein he stated that if the specified defendant, swore on Holy Quran and stated that consideration for the sale had been paid to the appellant, he would not object to the decree passed in favour of defendants being maintained. Defendants accepted the challenge and took the special oath, whereupon High Court dismissed the second appeal. Petitioner's plea in petition for leave to appeal, was that the plaintiff making the offer of special oath had been authorized to make it only on behalf of favour of sisters and himself, but he had no authority to make any statement in Court or compromise the suit, appeal, etc. On behalf of remaining three brothers viz. Petitioners herein, and hence special oath taken by the defendant did not bind them. Supreme Court, however, found that the Advocate in second appeal was jointly engaged by all the plaintiffs including the present petitioners and that such Advocate was present in Court throughout the proceedings; special oath was taken before him and order of court was also passed in his presence. No plea was raised before High Court to the effect that the appeal of present petitioners could not be dismissed in pursuance of the statement on oath by the defendant, in pursuance of the offer of their brother as the latter did not represent them. Supreme Court declined to exercise its discretionary jurisdiction to grant leave to appeal petitioners on the basis of plea raised by them, before the Supreme Court.8

Provisions as to oath apply to civil cases. They do not apply to criminal or hudood cases. Working of Trial Court applying Art. 163 to criminal cases cannot be approved.9

Provisions of special oath under Art. 163 do not apply to criminal proceedings.10

Denial of claim by defendant on Oath. Effect. Parties to suit taking Oath, one affirming the claim and the other denying the same. Trial Court dismissed suit, also the Appellate Court, High Court in revision, remanding case to Trial Court for decision on basis of evidence which stood already recorded. Validity. Provision of Art. 163, Qanun-e-Shahadat, 1984 does not lay down what would be the consequences if defendant does or does not deny plaintiff's claim on Oath. Order of remand passed by High Court, thus, seemed to be proper, warranting no interference. Leave to appeal was refused in circumstances.11

Applicability of Art. 163, Qanun-e-Shahadat, 1984 to criminal cases. Procedure of swearing on the Holy Qur'an (oath proceedings) is not applicable in criminal cases.7

CHAPTER XIII
MISCELLANEOUS

164. Production of evidence that has become available because of modern devices, etc. — In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques.

165. Order to override other laws. — The provisions of this Order shall have effect notwithstanding anything contained in any other law for the time being in force.

166. Repeal. — [The Evidence Act, 1872 (I of 1872) is hereby repealed.]

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