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LAWS OF SARAWAK

CHAPTER 47

SYARIAH EVIDENCE ORDINANCE, 2001

An Ordinance to make provisions relating to the law of evidence for the Syariah Court.

[*1.12.2004*]
*(*Swk. L.N. 158/2004)*

Enacted by the Legislature of Sarawak—

PART I

RELEVANCY

CHAPTER 1

PRELIMINARY

Short title and commencement

1. This Ordinance may be cited as the Syariah Evidence Ordinance, 2001, and shall come into force on such date as the Chief Minister may, by notification in the **Gazette*, appoint.

Application

2. This Ordinance shall apply to all judicial proceedings in or before any Syariah Court.

Interpretation

3.—(1) In this Ordinance, unless the context otherwise requires—

"'*aqil*" means of sound mind;

"*baligh*" means the age of puberty in accordance with Islamic Law;

"*bayyinah*" means evidence which proves a right or interest and includes *qarinah*;

"computer" means any device for recording, storing, processing, retrieving or producing any information or other matter, or for performing any one or more of those functions, by whatever name or description such device is called; and where two or more computers carry out any one or more of those functions in combination or in succession or otherwise howsoever conjointly, they shall be treated as a single computer;

"Court" or "Syariah Court" means the Syariah Subordinate Court, Syariah High Court or the Syariah Appeal Court, as the case may be, constituted under section 3 of the Syariah Courts Ordinance, 2001 ***[Cap. 42]***;

"document" means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of—

(*a*) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;

(*b*) any visual recording (whether of still or moving images);

(*c*) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;

(*d*) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (*a*), (*b*) or (*c*),

or by more than one of the means mentioned in paragraphs (*a*), (*b*), (*c*) and (*d*), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter;

ILLUSTRATIONS

A writing is a document.

Words printed, lithographed or photographed are documents.

A map, plan, graph or sketch is a document.

An inscription on wood, metal, stone or any other substance, material or thing is a document.

A drawing, painting, picture or caricature is a document.

A photograph or a negative is a document.

A tape recording of a telephonic communication, including a recording of such communication on transmitted over a distance, is a document.

A photographic or other visual recording, including a recording of photographic or other visual transmission over a distance, is a document.

A matter recorded, stored, processed, retrieved or produced by a computer is a document;

"evidence" includes—

(*a*) *bayyinah* and *syahadah*;

(*b*) all statements which the Court permits or requires to be made before it by a witness in relation to matters of fact under inquiry: such statements are called oral evidence;

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

"fact" means and includes—

(*a*) any thing, state of things or relation of things capable of being perceived by the senses;

(*b*) any mental condition of which any person is conscious;

ILLUSTRATIONS

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

(*b*) That a person heard or saw something is a fact.

(*c*) That a person said certain words is a fact.

(*d*) That a person 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 person has a certain reputation is a fact;

"fact in issue" means 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;

ILLUSTRATION

A is charged for an offence of *khalwat* with *B*.

At his trial the following facts may be in issue:

that *A* and *B* were together in a closed room;

that *A* and *B* were together in a vehicle parked in a dark place;

"film" means and includes a microfilm and any negative;

"Islamic Law" means Islamic Law according to *Mazhab Syafie* or any one of *Mazhab Maliki*, *Hanbali* or *Hanafi* as may be determined by the Majlis;

"Judge" means the Chief Syariah Judge, the Judge of the Syariah Appeal Court, the Syariah High Court or the Syariah Subordinate Court, as the case may be, appointed under section 4, 5, 6 or 8 of the Syariah Courts Ordinance, 2001 ***[Cap. 42]***;

"microfilm" means any transparent material bearing a visual image in reduced size either singly or as a series and includes a microfilm;

"negative" means a transparent negative photograph on any substance or material, and includes any transparent negative photograph made from the original negative photograph;

"*Peguam Syarie*" means a person admitted as *Peguam Syarie* under section 28 of the Syariah Courts Ordinance, 2001 ***[Cap. 42]***;

"*qarinah*" means fact connected with the other fact in any of the ways referred to in this Ordinance;

"*syahadah*" means any evidence adduced in Court by uttering the expression "*asyhadu*" to establish a right or interest;

"'*urf* " means custom or practice recognized by society or certain class of people whether in the form of word or deed;

"*witness*" does not include a plaintiff, defendant or an accused person.

(2) In this Ordinance, unless the context otherwise requires—

(*a*) 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;

(*b*) a fact is said to be "not proved" when such fact is neither "proved" nor "disproved" according to this Ordinance;

(*c*) 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.

(3) For the avoidance of doubt as to the identity or interpretation of the words and expressions used in this Ordinance that are listed in the Schedule, reference may be made to the Arabic Script for those words and expressions as shown against them therein.

Presumption

4.—(1) Whenever it is provided by this Ordinance that the Court may presume the existence of a fact, it may either regard the fact as proved unless and until it is disproved, or may call for proof of it.

(2) Whenever it is provided by this Ordinance that the Court shall presume the existence of a fact, it shall regard the fact as proved unless and until it is disproved.

CHAPTER 2

QARINAH

GENERAL

Evidence may be given of facts in issue and *qarinah*

5. 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 *qarinah*, and of no others.

Explanation — This section shall not enable any person to give evidence of a fact which he is disentitled to prove by the law relating to civil procedure.

ILLUSTRATION

A is charged with beating *B*, his wife, with a club with the intention of illtreating her.

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

A's beating *B* with the club.

A's hurting *B* with the beating with the intention of illtreating her.

Facts forming part of same transaction are *qarinah*

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are *qarinah*.

ILLUSTRATION

A is accused of beating *B*, his wife. Whatever was said or done by *A* or *B* or bystanders at the beating or so shortly before or after it as to form part of the same transaction is *qarinah*.

Facts which are the occasion, cause or effect of facts in issue or relevant facts

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

Motive, preparation and previous or subsequent conduct

8.—(1) Any fact is *qarinah* which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

(2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that 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 *qarinah* if the 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 section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Ordinance.

Explanation 2 — When the conduct of any person is *qarinah* any statement made to him or in his presence and hearing which affects his conduct is *qarinah*.

ILLUSTRATIONS

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

The fact 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 lawyers in reference to making the will, and that he caused drafts of other wills to be prepared of which he did not approve are *qarinah*.

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

The fact that *A* absconded after receiving a letter warning him that an inquiry was being made for the crime and the contents of the letter are *qarinah*.

(*c*) *A* is accused of a crime.

The fact that after the commission of the alleged crime he absconded or attempted to conceal things which were or might have been used in committing it is *qarinah*.

Facts necessary to explain or introduce fact in issue or relevant fact

9. Facts necessary to explain or introduce fact in issue or relevant fact 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 any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are *qarinah* so far 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 is *qarinah*.

(*b*) *A* is accused of a crime.

The fact that soon after the commission of the crime *A* absconded from his house is *qarinah* under section 8 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 *qarinah* as tending to explain the fact that he left home suddenly.

Things said or done by conspirator in reference to common design

10. 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 those persons, in reference to their common intention after the time when the intention was first entertained by any one of them, is *qarinah* as against each of the persons believed to be so conspiring, as well as 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.

When facts become *qarinah*

11. Facts become *qarinah*—

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

(*b*) 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 Kuching on a certain day.

The fact that on that day *A* was at Ipoh is *qarinah*.

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 *qarinah*.

(*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 *qarinah*.

In suits for damages facts tending to enable Court to determine amount are *qarinah*

12. 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 *qarinah*.

Facts which becomes *qarinah* when right or '*urf* is in question

13. Where the question is as to the existence of any right or '*urf*, the following facts are *qarinah*:

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

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

Facts showing existence of state of mind or of body or bodily feeling are *qarinah*

14. Facts showing 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 *qarinah* when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

Explanation I — 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 particular matter in question.

Explanation 2 — Where upon the trial of a person accused of an offence, the previous commission by the accused of an offence is *qarinah* within the meaning of this section, the previous conviction of that person shall also be *qarinah*.

ILLUSTRATIONS

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

Expression of their feelings towards each other shortly before or after the alleged cruelty are *qarinah*.

(*b*) *A* is tried for a crime.

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

The fact that he said something indicating a general disposition to commit crimes of that class is not *qarinah*.

Facts bearing on question whether act was accidental or intentional

15. When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that the act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is *qarinah*.

ILLUSTRATION

A is employed to receive *fitrah* as *amil* from the public. 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 fact 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 *qarinah*.

When existence of course of business is *qarinah*

16. 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 *qarinah*.

ILLUSTRATIONS

(*a*) The question is whether a particular letter was despatched.

The fact 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, is *qarinah*

(*b*) The question is whether a particular letter reached *A*.

The fact that it was posted in due course and was not returned through the Dead Letter Office is *qarinah*.

Iqrar

Iqrar defined

17.—(1) An *iqrar* is an admission made by a person, in writing or orally or by gesture, stating that he is under an obligation or liability to another person in respect of some right.

(2) An *iqrar* shall be made—

(*a*) in Court, before a Judge; or

(*b*) outside Court, before two male witnesses who are *'aqil*, *baligh* and '*adil*.

(3) An *iqrar* which relates to any fact in issue or relevant fact is *qarinah*.

Admissibility of _iqrar_

18.—(1) The following *iqrar* is inadmissible:

(*a*) *iqrar* of a person who is not *'aqil* and *baligh*;

(*b*) subject to subsection (2), *iqrar* of a minor;

(*c*) *iqrar* of a lunatic or a mentally retarded person (*m'tuh*),

(*d*) *iqrar* of *wali* or guardian made on behalf of a person under his custody and responsibility;

(*e*) *iqrar* which is not made voluntarily; or

(*f*) *iqrar* of a person who is restrained under any written law to administer his property (*Mahjur 'alaih*).

(2) An *iqrar* made by a *mumayyiz* minor who has been authorized by his *wali* or guardian to carry on any business or dealing shall be admissible in so far as it relates to such business or dealing.

(3) The party who benefits from an *iqrar* need not necessarily be a person who is *'aqil* and *baligh*.

Explanation — If a person making an *iqrar* states that the goods or property is for the benefit of a minor who is not *mumayyiz*, his *iqrar* is admissible and the person making the *iqrar* shall be bound by his statement.

Iqrar **made in a state of** ***marad-al-maut***

19. An *iqrar* made by a person in a state of *marad-al-maut* in relation to his liability or obligation to another person shall be admissible.

Statements by Persons
who cannot be called as Witnesses

Cases in which statement of relevant fact by person who is dead or cannot be found, ***etc*****., is** ***qarinah***

20.—(1) 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 *qarinah* in the following cases:

(*a*) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question; such a statement is *qarinah* whether the person who made it was or was not at the time when it was made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

(*b*) when the statement was made by any 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;

(*c*) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;

(*d*) when the statement gives the opinion of any such person as to the existence of any public right or '*urf* 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 the statement was made before any controversy as to the right, '*urf* or matter had arisen;

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

(*f*) 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 the statement was made before the question in dispute was raised;

(*g*) when the statement is contained in any document which relates to any transaction as is mentioned in section 13(*a*);

(*h*) 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 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 *qarinah*.

(*b*) The question is whether *A* was in Kuching on a given day.

A statement in the diary of a deceased advocate regularly kept in the course of business that on a given day the advocate attended *A* at a place mentioned in Kuching for the purpose of conferring with him upon specified business is *qarinah*.

(*c*) The question is whether *A* and *B* were legally married.

The statement of a deceased *Kadi* that he married them under circumstances that the celebration would be invalid is *qarinah*.

(*d*) 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 *qarinah*.

(*e*) The question is whether *A*, who is dead, was the father of *B*.

A statement by *A* that *B* was his son is *qarinah*.

(*f*) 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 *qarinah*.

(*g*) 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 *qarinah*.

(2) The evidence of such statement shall be given by at least two male witnesses or one male and two female witnesses.

(3) The evidence relating to such statement shall not be admissible under the following circumstances:

(*a*) when the person who made the statement forbids the statement to be given as evidence;

(*b*) when the person who made the statement ceases to be competent to give evidence;

(*c*) when the person who made the statement refuses to give evidence on the ground that he has no evidence relevant to the dispute or that he did not make the statement or that he made a mistake in relation to the said statement.

Relevancy of certain evidence for proving in subsequent proceeding the truth of facts therein stated

21. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is *qarinah* 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 it 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—

(*a*) the proceeding was between the same parties or their representatives in interest;

(*b*) the adverse party in the first proceeding had the right and opportunity to cross-examine;

(*c*) 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 section.

When entries in books of account are *qarinah*

22. Entries in books of accounts regularly kept in the course of business are *qarinah* whenever they refer to a matter into which the Court has to inquire, but the entries shall not alone be sufficient evidence to charge any person with liability.

When entry in public record made in performance of duty is *qarinah*

23. An entry in any register, record or any public or other official book, 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 the performance of a duty specially enjoined by the law of the country in which the register, record or book is kept, is itself *qarinah*.

Statements in maps, charts and plans are *qarinah*

24. 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 Government of Malaysia or of any States as to matters usually represented or stated in such maps, charts or plans, are themselves *qarinah*.

Statement as to fact of public nature contained in certain legislation or notifications are *qarinah*

25. 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 an Act, Ordinance, Enactment, or in a Federal Government or any State Government notification published in a Federal or State *Gazette*, is *qarinah*.

Statement as to any law contained in law books are *qarinah*

26. When the Court has to form an opinion as to a law of any country, any statement of that law contained in a book purporting to be printed or published under the authority of the Government of that country, and to contain any such law, and any report of a ruling of the courts of that country contained in a book purporting to be a report of such rulings, is *qarinah*.

How much of a Statement to be proved

What evidence to be given when statement forms part of a conversation, document, book or series of letters or papers

27. 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.

When Judgments of Courts are Qarinah

Previous judgments relevant to bar a second suit or trial

28. 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 *qarinah* when the question is whether the Court ought to take cognizance of the suit or to hold the trial.

When certain judgments in probate, *etc*., are *qarinah*

29.—(1) A final judgment, order or decree of a Court, in the exercise of probate or matrimonial 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 *qarinah* when the existence of any such legal character or the title of any such person to any such thing is *qarinah*.

(2) Such judgment, order or decree is conclusive proof—

(*a*) that any legal character which it confers upon any person accrued at the time when the judgment, order or decree came into operation;

(*b*) that any legal character to which it declares any such person to be entitled accrued to that person at the time when the judgment, order or decree declares it to have accrued to that person;

(*c*) that any legal character which it takes away from any such person ceased at the time from which the judgment, order or decree declared that it had ceased or should cease; and

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

When judgments, orders or decrees are *qarinah*

30. Judgments, orders or decrees, other than those mentioned in section 29, are *qarinah* if they relate to matters of a public nature relevant to the inquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

When judgments, *etc*., are not *qarinah*

31. Judgments, orders or decrees, other than those mentioned in sections 28, 29 and 30, are not *qarinah* unless the existence of such judgments, orders or decrees is a fact in issue or is *qarinah* under any other provision of this Ordinance.

Fraud or collusion in obtaining judgment or incompetency of Court may be proved

32. Any party to a suit or other proceeding may show that any judgment, order or decree which is *qarinah* under section 28, 29 or 30, 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.

When Opinion of Third Persons is Qarinah

Opinion of experts

33.—(1) When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions or relating to determination of *nasab*, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions or relating to determination of *nasab*, are *qarinah*.

(2) Such persons are called experts.

(3) Two or more experts shall be called to give evidence where possible but if two experts are not available, the evidence of one expert is sufficient. If two experts give different opinions a third expert shall be called to give evidence.

ILLUSTRATIONS

The question is whether a certain 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 *qarinah*.

Facts bearing upon opinions of experts

34. Facts not otherwise *qarinah* are *qarinah* if they support or are inconsistent with the opinions of experts when such opinions are *qarinah*.

When opinion as to handwriting is *qarinah*

35. 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 was supposed to have been written or signed, that it was or was not written or signed by that person, is *qarinah*.

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 from *A* to his wife.

The evidence is given by *B* who is the secretary of *A* and her duty is to examine and file *A's* correspondence.

The opinion of *B* on the question whether the letter is in the handwriting of *A* is *qarinah*, though *B* never saw *A* write.

When opinion as to existence of right or *'urf* is *qarinah*

36. When the Court has to form an opinion as to the existence of any right or *'urf*, the opinions as to the existence of such right or '*urf* of persons who would be likely to know of its existence, if it existed, is *qarinah*.

Explanation — The expression "right or *'urf*" includes right or *'urf* common to any considerable class of persons.

When opinion as to usages, tenets, *etc*., is *qarinah*

37. When the Court has to form an opinion as to—

(*a*) the usages and tenets of any body of men or family;

(*b*) the constitution and government of any religious or charitable foundation; or

(*c*) the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon are *qarinah*.

When opinion as to relationship is *qarinah*

38. 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 *qarinah*.

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 *qarinah*.

(*b*) The question is whether *A* was a legitimate son of *B*.

The fact that *A* was always treated as such by members of the family is *qarinah*.

When ground of opinion are *qarinah*

39. Whenever the opinion of any living person is *qarinah*, the grounds on which his opinion is based are also *qarinah*.

ILLUSTRATION

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

When Character is Qarinah

In civil cases character to prove conduct imputed is not *qarinah*

40. 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 not *qarinah* except so far as his character appears from facts which are *qarinah*.

In criminal proceedings, previous good character is *qarinah*

41. In criminal proceedings, the fact that the accused person is of a good character is *qarinah*.

Previous bad character not *qarinah* except in reply

42. In criminal proceedings, the fact that the accused person has a bad character is not *qarinah* unless evidence has been given that he has a good character, in which case it becomes *qarinah*.

Explanation 1 — This section 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.

PART II

PROOF

CHAPTER 1

FACTS WHICH NEED NOT BE PROVED

Facts judicially noticeable need not be proved

43. No fact of which the Court will take judicial notice need be proved.

Facts of which Court must take judicial notice

44.—(1) The Court shall take judicial notice of the following facts:

(*a*) all laws having the force of law now or heretofore in force or hereafter to be in force in Malaysia;

(*b*) articles of war for the armed forces or any visiting force lawfully present in Malaysia;

(*c*) the course of proceedings in Parliament and in the Legislature of any State in Malaysia;

(*d*) the accession of the Yang di-Pertuan Agong and the accession of the Ruler of any State in Malaysia and the appointment of a Yang di-Pertua Negeri;

(*e*) the seals of all the courts of Malaysia, all seals which any person is authorized to use by any law in force for the time being in Malaysia and of notaries public;

(*f*) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in Malaysia, if the fact of their appointment to such office is notified in the *Gazette* or in any State *Gazette*;

(*g*) the ordinary course of nature, natural and artificial divisions of time, the geographical divisions of the world, the meaning of Malay, English and Arabic words, public festivals, fasts and holidays notified in *Gazette* or in any State *Gazette*;

(*h*) 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 *Peguam Syarie* and other persons authorized by law to appear or act before it;

(*i*) the rules of the road, sea regulations and the rules of the air;

(*j*) all other matters which it is directed by any written law to notice.

(2) In all these cases, 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 the person produces any such book or document as it considers necessary to enable it to do so.

Facts admitted need not be proved

45.—(1) Subject to section 17(2), 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 of pleading in force at the time they are deemed to have admitted by their pleadings.

(2) The Court may, in its discretion, require the facts admitted to be proved otherwise than by such *iqrar*.

CHAPTER 2

ORAL EVIDENCE

Proof of facts by oral evidence

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

Oral evidence must be direct

47.—(1) Oral evidence shall in all cases whatever be direct, that is to say—

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

(*b*) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(*c*) if it refers to a fact which could be perceived by any 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;

(*d*) 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.

(2) 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 productions of the treatise.

(3) If oral evidence refers to the existence or condition of any material thing including a document, the Court may, if it thinks fit, require the production of that material thing or the document for its inspection.

CHAPTER 3

DOCUMENTARY EVIDENCE

Proof of contents of documents

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

Primary evidence

49. 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 counterparts, 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.

Explanation 3 — A document produced by a computer is primary evidence.

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.

Secondary evidence

50. Secondary evidence includes—

(*a*) certified copies given under the provisions hereinafter contained;

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

(*c*) copies made from or compared with the original;

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

(*e*) oral accounts of the contents of a document given by some person who has himself seen or heard it or perceived it by whatever means.

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.

Proof of documents by primary evidence

51. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Cases in which secondary evidence relating to documents may be given

52.—(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:

(*a*) when the original is shown or appears to be in the possession or power—

(i) of the person against whom the document is sought to be proved;

(ii) of any person out of reach of or not subject to the process of the Court; or

(iii) of any person legally bound to produce it,

and when after the notice mentioned in section 53 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 admitted in writing before a Judge or Commissioner for Oaths who is a Muslim;

(*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 the original is of such a nature as not to be easily movable;

(*e*) when the original is a public document within the meaning of section 57;

(*f*) when the original is a document of which a certified copy is permitted by this Ordinance or by any other law in force for the time being in Malaysia to be given in evidence;

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

(2) (*a*) In the cases referred to in subsection (1)(*a*), (*c*) and (*d*), any secondary evidence of the contents of the document is admissible.

(*b*) In the case referred to in subsection (1)(*b*), the written admission before a Judge or Commissioner for oaths who is a Muslim is admissible.

(*c*) In the case referred to in subsection (1)(*e*) or (*f*), only a certified copy of the document is admissible.

(*d*) In the case referred to in subsection (1)(*g*), evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents.

Rules as to notice to produce documents

53. Secondary evidence of the contents of the documents referred to in section 52(1)(*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 *Peguam Syarie* or other persons authorized by law to appear or act before it, 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:

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

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

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

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

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

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

Proof of signature and handwriting of person alleged to have signed or written document produced

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

Admission of writing, signature or seal

55.—(1) Admission as to of writing, signature or seal shall be admissible as an admission of the person who wrote or executed such document.

(2) An admission made in a document which is written or caused to be written by a person under his signature or seal and handed over to another person shall be admissible as an *iqrar*, provided that section 17(2) is complied with.

Proof of document

56.—(1) Where the executant of a document denies the writing or the liability created therein, the writing and the execution of such document shall be proved at least by two witnesses to the document.

(2) Where witnesses to the document cannot be found, the writing and the execution of the document shall be proved by two persons who can identify the writing and signature of the writer and executant of the document.

(3) Where witnesses to the document or the persons referred to in subsection (2) can identify the writing and signature, the executant of the document shall be bound by any liability created therein.

(4) Where witnesses to the document or the persons referred to in subsection (2) do not completely identify the writing and signature on the document, the writing and signature on the document shall be authenticated by at least two experts.

(5) Where the writing and signature on the document has been authenticated by the experts, the executant of the document shall be bound by any liability created therein.

(6) Where a document cannot be proved in any of the aforesaid manner, the person who denies the writing and execution of the document shall, on the request of the person who alleges that the aforesaid person is the executant of the document, take the oath, and if he refuses to do so, the person who alleges may take the oath and thereafter establish his claim.

Public Documents

Public documents

57. The following documents are public documents:

(*a*) documents forming the acts or records of the acts of—

(i) the sovereign authority;

(ii) official bodies and tribunals; and

(iii) public officers, legislative, judicial and executive, whether Federal or State or of a foreign country; and

(*b*) public records kept in Malaysia of private documents.

Private documents

58. All documents other than those mentioned in section 57 are private.

Certified copies of public documents

59. 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 therefor together with a certificate, written at the foot of the copy, that it is a true copy of the document or part thereof, as the case may be, and the certificate shall be dated and subscribed by the officer with his name and his official title, and shall be sealed whenever the officer is

authorized by law to make use of a seal, and the copies so certified shall be called certified copies.

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

Proof of documents by production of certified copies

60. Copies certified in the manner set out in section 59 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.

Proof of certain official documents

61. The following public documents may be proved as follows:

(*a*) acts, orders or notifications of the Federal Government or any State Government in any of its departments—

(i) by the records of the departments certified by the heads of those departments respectively;

(ii) by a Minister in the case of the Federal Government, and by the Menteri Besar or the Chief Minister, a State Minister (if any), or the State Secretary in the case of a State Government; or

(iii) by any document purporting to be printed by the authority of the Government concerned;

(*b*) the proceedings of Parliament or of the legislature of any State, by the minutes of the body or by the published Acts of Parliament, Ordinances, Enactments or abstracts or by copies purporting to be printed by the authority of the Government concerned;

(*c*) the proceedings of a municipal body, town board or other local authority in Malaysia, by a copy of the proceedings certified by the lawful keeper thereof, or by a printed book purporting to be published by authority of that body;

(*d*) the acts of the Executive or the Proceedings of the legislature of a foreign country, by *Gazette* 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 Ordinance or Act of Malaysia;

(*e*) public documents of any other class in a foreign country, by the original or by a copy certified by the lawful keeper thereof, with a certificate under the seal of a notary public or of a consular officer of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and upon proof of the character of the document according to the law of the foreign country.

Presumption as to documents

Presumption as to genuineness of certified copies

62.—(1) The Court shall presume to be genuine 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 Government officer in or outside Malaysia who is duly authorized thereto:

Provided that the 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 the document.

Presumption as to documents produced as record of evidence

63. 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 in a judicial proceeding or before any officer authorized by law to take such evidence, or to be an *iqrar* by any prisoner or accused person, taken in accordance with law and purporting to be signed by any Syariah Judge, High Court Judge, Sessions Court Judge or Magistrate or by any such officer as aforesaid, the Court shall presume that—

(*a*) the document is genuine;

(*b*) any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, is true; and

(*c*) such evidence, statement or *iqrar* was duly taken.

Presumption as to *Gazettes*, newspapers, *etc*.

64. The Court shall presume the genuineness of every document purporting to be a *Gazette* of the Federal Government or any State Government or to be a newspaper or journal and of every document purporting to be a document directed by any law to be kept by any person, if the document is kept substantially in the form required by law and is produced from proper custody.

Presumption as to maps or plans made by authority of Government

65. The Court shall presume that maps or plans purporting to be made by the authority of the Federal Government or any State Government were so made and are accurate.

Presumption as to collection of laws and reports of decisions

66. The Court shall presume the genuineness of every book purporting—

(*a*) to be printed or published under the authority of the Government of any country and to contain any of the laws of that country; or

(*b*) to contain reports or decisions of the courts of that country.

Presumption as to powers of attorney

67. The Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Judge or consular officer of Malaysia was so executed and authenticated.

Presumption as to certified copies of foreign judicial records

68. The Court may presume that any document purporting to be a certified copy of any judicial record of any foreign country is genuine and accurate if the document purports to be certified in any manner which is certified by any representative of the Yang di-Pertuan Agong in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

Presumption as to books, maps and charts

69. The Court may presume that any book to which it may refer for information on Islamic Law or any matter of public or general interest, and that any published map or chart the statements of 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.

Presumption as to telegraphic messages

70. The Court may presume that a message forwarded from a telegraph office to the person to whom it 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 the message was delivered for transmission.

Presumption as to due execution, *etc*., of documents not produced

71. The Court shall presume that every document called for and not produced, after notice to produce was given under section 53, was attested, stamped and executed in the manner required by law.

PART III
PRODUCTION AND EFFECT OF EVIDENCE

CHAPTER 1
BURDEN OF PROOF

Burden to produce evidence in civil case

72. The burden to produce evidence in a civil case lies on the person who alleges or asserts a fact (*al Mudda'ii*) and the person who takes the oath to deny or disputes a fact (*al Mudda'a 'alaih*).

Burden of proof

73.—(1) Whoever desires any Court to give judgment as to any legal right or liability which is 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.

ILLUSTRATION

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.

On whom burden of proof lies

74. 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.

Burden of proof as to particular fact

75. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence.

ILLUSTRATION

A wishes the Court to believe that at the time in question he was elsewhere.

He must prove it.

Burden of proving fact necessary to be proved to make evidence admissible

76. 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 the evidence.

ILLUSTRATIONS

(*a*) *A* wishes to prove *marad al-maut* by *B*.

A must prove *marad al-maut* and *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.

Burden of proving that case of accused comes within exceptions

77. When a person is accused of any of fence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions provided in the Syariah Criminal Offences Ordinance, 2001 ***[Cap. 46]*** is upon him, and the Court shall presume the absence of those circumstances.

ILLUSTRATIONS

(*a*) *A* is accused of unlawful cohabitation with *B*.

The prosecution produces evidence to show that *A* had divorced his wife *B*.

A claims that he was forced to divorce his wife.

The burden of proving that he was forced lies on *A*.

(*b*) *C* is accused of committing unlawful sexual intercourse with *D*.

C claims that he had already married *D* in a foreign country.

The burden of proving that such marriage took place lies on *C*.

Burden of proving fact especially within knowledge

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

ILLUSTRATION

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.

Burden of proving death of person known to have been alive within thirty years

79. 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.

Burden of proving that person is alive who has not been heard of for four years

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

Burden of proof as to ownership

81. When the question is whether any person is the 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.

Court may presume existence of certain facts

82. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of 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 judicial and official acts have been regularly performed;

(*b*) that the common course of business has been followed in particular cases.

CHAPTER 2

WITNESSES

Who may testify as witnesses

83.—(1) Subject to this section, all Muslims shall be competent to give *syahadah* or *bayyinah* as witnesses provided that they are '*aqil*, *baligh*, '*adil*, have a good memory and are not prejudiced.

Explanation — A Muslim is deemed to be '*adil* if he carries out his religious obligations, performs the prescribed religious duties, abstains from committing capital sins and is not perpetually committing minor sins.

(2) A non-Muslim shall be competent to give *bayyinah* for a Muslim if his testimony is admissible according to Islamic Law.

Explanation — The *bayyinah* of an expert who is a non-Muslim against a Muslim, if required, is admissible.

(3) A person who is not '*adil* is competent to give *bayyinah* but not competent to give *syahadah*.

(4) A person who is not *baligh* or a person who is of unsound mind is competent to give *bayyinah* but not competent to give *syahadah*.

Explanation — The *bayyinah* of a minor in the case of an injury caused by some minors upon others is admissible provided that there is no misunderstanding between them and they were present at the scene of the incident.

(5) A person who has a weak memory or is forgetful or suffers from lapses of memory is competent to give *bayyinah* but not competent to give *syahadah*.

(6) A person whose credibility is suspected because of his good relationship with and who has an interest in the adverse party is competent to give *bayyinah* but not competent to give *syahadah*.

(7) A person whose credibility is suspected because of his bad relationship with the adverse party is competent to give *bayyinah* but not competent to give *syahadah*.

Dumb witnessess

84.—(1) A witness who is unable to speak may give his *bayyinah* in any manner in which he can make it intelligible such as by writing or by signs.

(2) The *bayyinah* referred to in subsection (1) shall be given in open Court.

(3) Evidence so given shall be deemed to be oral evidence.

Evidence of husband, wife, parent and child

85.—(1) Evidence of a husband against his wife and that of a wife against her husband is admissible as *syahadah* and *bayyinah*.

(2) Evidence of a child against his parent and that of a parent against his child is admissible as *syahadah* and *bayyinah*.

(3) Evidence of a husband for his wife and that of a wife for her husband is admissible as *bayyinah*.

(4) Evidence of a parent for his child and that of a child for his parent is admissible as *bayyinah*.

Number of witnesses

86.—(1) A claim by a person who is known to be rich that he has become a pauper is not sufficient to prove his claim unless it is corroborated by the evidence of three male witnesses.

Explanation — In the collection of *zakat*, admission of a rich man that he has become pauper shall not constitute sufficient proof unless it is corroborated by the evidence of three male witnesses.

(2) In the case of sighting of the new moon, the evidence of one male person who is *'adil* shall be sufficient to prove such fact.

(3) The evidence of one male person shall constitute sufficient proof in the following circumstances:

(*a*) evidence of a teacher in a case involving school children;

(*b*) evidence of an expert in the valuation of damaged goods;

(*c*) evidence as to the acceptance and rejection of witnesses;

(*d*) notification of dismissal of a representative;

(*e*) evidence as to the defects in any goods for sale.

(4) Evidence of a female person is sufficient to prove any fact which is usually seen or within the knowledge of a female person.

ILLUSTRATION

Evidence of a female who breast fed a child or that of a midwife in matters relating to menstruation, birth and breastfeeding.

(5) Except as otherwise provided in this section, evidence shall be given by two male witnesses or by one male and two female witnesses.

Manner of giving evidence

87.—(1) In a civil case, evidence shall be given by the plaintiff and the defendant, and if the defendant denies the claim made against him he shall be required to take an oath according to Islamic Law.

(2) (*a*) Where the defendant takes the oath under subsection (1), the claim made by the plaintiff shall be dismissed.

(*b*) If the defendant refuses to take such oath, the Court may ask the plaintiff to take the oath upon which his claim shall be accepted.

(3) In a criminal case, evidence shall be given for the prosecution and the accused unless the accused pleads guilty.

Evidence by a single witness and oath by plaintiff

88. Where in a civil suit, there is only one witness produced by the plaintiff, the evidence of such witness shall only be admissible if his evidence is given together with the oath of the plaintiff.

ILLUSTRATION

In a claim for the repayment of a debt by the plaintiff against the defendant, the evidence of a witness produced by the plaintiff given together with the oath of the plaintiff shall constitute sufficient proof of his claim.

CHAPTER 3

EXAMINATION OF WITNESSES

Order of production and examination of witnesses

89. 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 applicable to the Court respectively, and in the absence of any such law by the discretion of the Court.

Court to decide as to admissibility of evidence

90.—(1) When either party proposes to give evidence of any fact, the Court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be *qarinah*; and the Court shall admit the evidence if it thinks that the fact, if proved, would be *qarinah*, 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 the fact and the Court is satisfied with the undertaking.

(3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Court may, in its 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 *qarinah* under section 20.

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.

Examination-in-chief, cross-examination and re-examination

91.—(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) Where a witness has been cross-examined and is then examined by the party who called him, such examination shall be called his re-examination.

Order of examination and direction of re-examination

92.—(1) Witnesses shall be first examined-in-chief, then, if the adverse party so desires, cross-examined then, if the party calling them 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 upon that matter.

(4) The Court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

Cross-examination of person called to produce a document

93. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and may not be cross-examined unless and until he is called as a witness.

Witnesses to character

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

Leading questions

95. Any question suggesting the answer which the person putting it wishes or expects to receive or suggesting disputed facts as to which the witness is to testify, is called a leading question.

When leading questions may not be asked

96.—(1) Leading questions may 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.

When leading questions may be asked

97.—(1) Leading questions may be asked in cross-examination, subject to the following qualifications:

(*a*) the question may not put into the mouth of the witness the very words which he is to echo again; and

(*b*) the question may not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact.

(2) The Court, in its discretion, may prohibit leading questions from being put to a witness who shows a strong interest or bias in favour of the cross-examining party.

Evidence as to matters in writing

98. 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 document which in the opinion of the Court ought to be produced, the adverse party may object to the evidence being given until the document is produced or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation — A witness may give oral evidence of statements made by other persons about the contents of documents if the 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." The 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.

Cross examination as to previous statements in writing

99.—(1) 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 in the suit or proceeding in which he is cross-examined, without the 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.

(2) If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he made such statement.

Questions lawful in cross-examination

100. When a witness may be cross-examined he may, in addition to the questions hereinbefore referred to, be asked any question which tends—

(*a*) to test his accuracy, veracity, or credibility;

(*b*) to discover who he is and what is his position in life; or

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

Court to decide when question shall be asked and when witness compelled to answer

101.—(1) If any question relates to a matter not relevant to the suit or proceeding, except so far 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 does not think fit to compel him to answer the question, warn the witness that he is not obliged to answer it.

(2) In exercising its discretion, the Court shall have regard to the following considerations:

(*a*) the 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 testifies;

(*b*) the 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 a slight degree the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(*c*) the questions are improper if there is a great disproportion between the importance of the imputation made against the witnesses character and the importance of his evidence;

(*d*) the Court may, if it sees fit, draw from the witnesses refusal to answer, the inference that the answer, if given, would be unfavourable.

Question not to be asked without reasonable grounds

102. No such question as is referred to in section 101 shall be asked unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.

ILLUSTRATIONS

(*a*) A *Peguam Syarie* is instructed by another *Peguam Syarie* or reliable source that an important witness is a professional gambler. This is a reasonable ground for asking the witness whether he is a professional gambler.

(*b*) A *Peguam Syarie* is informed by a person in Court that an important witness is a professional gambler. The informant, on being questioned by the *Peguam Syarie*, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a professional gambler.

(*c*) A witness of whom nothing whatever is known is asked at random whether he is a professional gambler. 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 professional gambler.

Procedure of Court in case of question being asked without reasonable grounds

103. If the Court is of the opinion that any such question as is referred to in section 101 was asked without reasonable grounds, it may, if it was asked by a *Peguam Syarie*, report the circumstances of the case to the Majlis Islam Sarawak or other authority to which the *Peguam Syarie* is subject in the exercise of his profession.

Indecent and scandalous questions

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

Questions intended to insult or annoy

105. 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.

Exclusion of evidence to contradict answers to questions testing veracity

106. When a witness has been asked and has answered any question which is relevant to the inquiry only so far 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 any crime and 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 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.

(*b*) *A* affirms that on a certain day he saw *B* at Malacca. *A* is asked whether he himself was not on that day at Penang. He denies it.

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

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

(*c*) *A* is asked whether he has not said that he would be revenged on *B*, against whom he gives evidence. He denies it.

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

Questions by party to his own witness

107. 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.

Impeaching credit of witness

108. 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:

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

(*b*) 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;

(*c*) by proof of previous statements inconsistent with any part of his evidence which is liable to be contradicted.

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 shall not be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Questions tending to corroborate evidence of relevant fact admissible

109. 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 the relevant fact occurred, if the Court is of the opinion that the circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact to which he testifies.

ILLUSTRATION

A, an accomplice, gives an account of an offence in which he took part. He describes various incidents, unconnected with the offence, 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 offence itself.

Previous statements of witness may be proved to corroborate later testimony as to same fact

110. In order to corroborate the testimony of a witness, any previous statement made by him whether written or verbal, on oath, or in ordinary conversation, 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.

What matters may be proved in connection with proved statement which is *qarinah* under section 20 or 21

111. Whenever any statement declared to be *qarinah* under section 20 or 21 is proved, all matters may be proved either in order to contradict or to 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.

Refreshing memory

112.—(1) A witness may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at 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 with the time aforesaid, if, when he read it, he knew it to be correct.

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

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

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

Testimony to facts stated in document mentioned in section 112

113. A witness may also testify to facts mentioned in any such document as is mentioned in section 112 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.

Right of adverse party as to writing used to refresh memory

114. Any writing referred to under section 112 or 113 shall be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

Production of documents and their translation

115.—(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 such objection shall be decided on by the Court.

(2) The Court, if it sees fit, may inspect the document unless it refers to affairs 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.

Giving as evidence of documents call for and produced on notice

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

Using as evidence of document production of which was refused on notice

117. When a party refuses to produce a document which he has had notice to produce, he may not 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* 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 may not do so.

Judge's power to put questions or order production

118. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, 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 thing; 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 Ordinance to be *qarinah* and duly proved.

SPECIAL PROVISIONS RELATING TO TESTIMONY OF WITNESSES

Determining that a witness is '*adil*

119. Where a witness has given his evidence by way of *syahadah* and the Judge has reason to believe that he is not *'adil*, the Judge shall order such witness to be examined as hereinafter provided.

Explanation — If it appear to a Judge that a witness who has given *syahadah* is unworthy of credit, he shall cause such witness to be examined to determine whether he is *'adil* or otherwise.

Witness to be examined through parties related to him

120. The examination referred to in section 119 shall be carried out by means of secret examination and, if the Judge so requires, in an open Court through parties related to him.

ILLUSTRATIONS

(*a*) If the witness is a student, he shall be examined through his teacher.

(*b*) If the witness is a member of the armed forces, he shall be examined through his commanding officer.

(*c*) If the witness is a civilian, he shall be examined through a trustworthy resident of the place where he resides.

Secret examination

121.—(1) A secret examination shall be conducted by means of a secret letter in which a Judge will write the name of the defendant or the accused and the subject matter of the claim or the charge, as the case may be, the name of the witness, his identification, occupation and place of residence.

(2) The secret letter shall be enclosed in a sealed envelope and delivered by the Court to the person appointed as the secret examiner.

(3) On receipt of the secret letter and after reading its content, the secret examiner shall write below the name of the witness specified therein the word '*adil*, or the words "*tidak* '*adil*" (*jurh*), according to his evaluation, and shall forthwith return the letter to the Judge.

(4) Where the secret letter is returned to the Judge with the words "*tidak* '*adil*" or "*Wallahu a'alam*" or any other words to that effect written thereon, or if there is nothing written thereon, the Judge shall not admit the evidence of such witness and may request another witness to be produced.

Number of secret examiners

122. The secret examination may be conducted by one or more secret examiners as may be determined by the Judge.

Open examination

123.—(1) A Judge may order a witness to be examined in open Court although such witness has been subject to a secret examination and found to be '*adil* by the secret examiners.

(2) An open examination of a witness shall be conducted by the secret examiners in open Court before a Judge in the presence of the parties to the proceedings.

Testimony in open examination forms part of *syahadah*

124. The testimony of a witness in an open examination conducted under section 123 shall form part of his *syahadah*.

When witness need not be examined

125. A Judge is not required to examine any witness who has been examined and found to be '*adil* under this Part if he becomes a witness before the same Judge in a latter proceeding and the interval between the two proceedings does not exceed six months.

Denial *(ta'n)* over a witness

126. When any party to a proceedings declares as not '*adil* any witness of the adverse party, either before or after an examination of the witness under section 121 or 123 by adducing any evidence which could prevent the admission of his evidence, the Judge shall require him to prove that fact.

Explanation — When a defendant proves that any witness is not *'adil*, the Judge shall reject the evidence of the witness but if the defendant fails to prove his fact, the Judge shall proceed with the examination of the witness if he has not done so or give his decision according to the evidence if he has conducted the examination.

When findings of witness examiners differ

127. Where the examination of a witness under section 121 or 123 is conducted by two or more examiners and a majority of such examiners are of the opinion that the witness is not '*adil*, the Judge shall not make a decision based on the evidence of such witness.

Dead or missing witness

128. Whenever a witness dies or disappears after giving evidence in any matter relating to *mu'amalat*, the Judge may conduct an examination on his evidence and can give a decision based on such evidence.

When witness required to take the oath

129. If the circumstances so require or an examination of a witness under this Part cannot be carried out and a party to the proceeding makes an application to the Judge for the witness to take the oath as a witness of truth so as to strengthen his evidence, the Judge shall order such witness to take such oath and shall remind the witness that if he fails to do so his evidence shall not be admitted.

PART IV

GENERAL

Reference to Islamic Law

130.—(1) Any provision or the interpretation of any provision in this Ordinance which is inconsistent with Islamic Law shall, to the extent of such inconsistency, be void.

(2) If the event of a lacuna or where there is any matter which is not expressly provided for by this Ordinance, the Court shall refer to Islamic Law.

Repeal

131. The Ordinan Keterangan Syariah, 1991 ***[Ord. No. 9/91]*** is repealed.

SCHEDULE

(Section 3(3))

ARABIC SCRIPT FOR CERTAIN WORDS AND EXPRESSIONS

'adil	—	عادل
'aqil	—	عاقل
al Mudda'a 'alaih	—	المدّعى عليه
al-Mudda'ii	—	المدّعى
amil	—	عامل
asyhadu	—	أشهد
bayyinah	—	بيّنة
baligh	—	بالغ
fitrah	—	فطرة
iqrar	—	إقرار
jurh	—	جرح
Kadi		قاضي
Mahjur 'alaih	—	محجور عليه
marad al maut	—	مرض الموت
Mazhab	—	مذهب
ma'tuh	—	معتوة
mu'amalat	—	معاملات
mumayyiz	—	ممیزّ
nasab	—	نسب
qarinah	—	قرينة
syahadah	—	شهادة
ta'n	—	طعن
'urf	—	عرف
wali	—	ولي
Wallahu a'alam	—	والله أعلم

[List of Amendments]

LAWS OF SARAWAK

Chapter 47

SYARIAH EVIDENCE ORDINANCE, 2001

LIST OF AMENDMENTS

Amending Law	Short Title	In force from
Swk. L.N. 158/2004	Date of Commencement of the Ordinance	1.12.2004