Pakistan Journal of Social Research
ISSN 2710-3129 (P) 2710-3137 (O)
Vol. 4, No. 3, September 2022, pp. 446-455.
www.pjsr.com.pk

THE BEST EVIDENCE PRINCIPLE: MEANING, DEVELOPMENT, CONSEQUENCES AND ITS APPLICATION IN PAKISTAN

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ABSTRACT
The obligation of parties to bring the best available evidence is one of the major pillars of evidence. However, there is lack of research on how this principle can be explained in light of the various rules contained in Qanoon e Shahdat Order (hereinafter QSO). The present study had two main objectives; firstly, to explore the best evidence principle in common law countries and secondly, how this principle can be explained in the context of QSO. After doctrinal analysis, the present study found that the best evidence principle was invented by courts which meant that original evidence and not its derivatives would be produced to prove a fact if original could be presented. The study also found that the principle excludes only that evidence which itself indicates the existence of more original sources of information. Similarly, QSO contained various general principles and exceptions to the best evidence principle. It is hoped that the present study will be helpful in understanding the scope and application of this principle in Pakistan.
Keywords: Best Evidence, Original Evidence, Hearsay Evidence, Consequences of Failure to Produce Best Evidence, Official Documents

INTRODUCTION
In the literature, there is difference of opinion as to the number of fundamental principles of the English law of evidence regarding the production of evidence. For instance, Greenleaf (1899) believes that English law of evidence has four major pillars. Firstly, evidence must be given regarding allegations; secondly, it is sufficient if the substance only of the issue be proved. Thirdly, burden of production of evidence is on the party who affirms the existence of any fact and lastly, best evidence, while keeping in mind the nature of case, must be produced (Greenleaf, 1899). On the other hand, Stephen (1902) held the view that English law of evidence had three major principles about the production of evidence namely, evidence must be confined to the fact in issue, hearsay evidence is no evidence and the best available evidence must be produced (Stephen, 1902, p. 3). Despite the difference of opinion regarding the major principles of English law of evidence, all the researchers agree that the obligation to produce the best available evidence is one of the major principles of the English law of evidence as compare to civil law system where the production of the best evidence in the judicial proceedings holds no ground (Pejovic, 2001, p. 817).

The best evidence principle was invented by courts which meant that substitutionary evidence would not be given to prove a fact if original evidence could be presented in the court. However, the principle is not violated when there is no replacement of evidence but rather a choice of weaker proofs rather than stronger ones or a failure to provide all available evidence (Greenleaf, 1899, p.170). The topic of best evidence principle is very complex in general and in Indian Evidence Act (a predecessor of QSO) is particular. However, there is scarcity of research on this topic in the context of QSO. The present study intends to fill this gap by exploring the meaning, development, consequences of this principle and how this principle can be explained with various rules contained in QSO. The present study has the following three research questions: What was and is the meanings of the best evidence principle? What were the consequences of failure to produce the best evidence? How can this

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principle be explained in the context of QSO? The purpose of this research is to do a hermeneutical study by deploying doctrinal research techniques about the best evidence rule, its development and consequences of failure to bring the best evidence in the courts. This present study has five major sections other than introductory section. The second section discusses the meaning, historical development, exceptions and recent status of the best evidence principle in common law countries especially in USA and UK. The third section discusses the effects of the best evidence principle and the fourth section discusses the application of the principle in QSO. The last section concludes the present study.

The Best Evidence Rule- Meaning, Historical Evolution, Exceptions and Consequences

It has been pointed out in the introductory section that the present study has two objectives; firstly, to explore how the principle of the best evidence was originated and developed in various common law countries and secondly, how this principle incorporated in QSO. In addition, three research questions of the present study have been mentioned in the introductory section. This section is devoted to address the first two questions of the current study. For that purpose, this section intends to trace the definition, origin, development and current status in various common law countries by focusing on USA and UK. The discussion and the conclusions of this section will serve as the conceptual framework for the discussion in the ensuing sections and to address the third research question.

The obligation to produce the best available evidence is considered as a component of due process of law which requires the state officials to use the best available evidence against any person before depriving him of his life, property or liberty. The principle to produce "the best available evidence" is based on the doctrine o*profert in curia* which means that a party would have extinguished any right that the original documents had established if they could not submit the original document in court. The origin of this principle is associated with the 16th century practice of copying documents by hands by the clerks of courts. The practice of copying documents leaving possibility for substantial error in the copied documents and as a matter of precaution, this rule was invented.

The examination of various writings in the common law countries on the law of evidence reveals that the invention of the principle to produce the best available evidence in courts is associated with Holt C.J and Lord Hardwicke in two American judicial decisions namely Ford versus Hopkins (1700) and Omychund versus Barker (1745). Holt, C. J., stated that they must pay attention to trade customs; "the best proof that the nature of the item will offer is only required" in the former case while permitting a jeweler's entry of money as evidence against a stranger to establish the fact that he received the money. This principle was also used in other cases by Holt C.J to create exceptions to this principle. For instance, in Altham v. Anglesea (1709), the content of writing was allowed to be proved by the deposition of the writers instead of calling him in the court. In this case, the witness was unavailable as he went abroad. The prosecution intended to prove the content of document by the report of the commission verified by the witness which was allowed to be used. Holt, C. J observed that it was a legal requirement that the best evidence must have been produced. However, he further added that the best evidence principle must have been applied while considering the position of witness's testimony and if he was here, his testimony via deposition was not the best, but in these circumstances the evidence was the best. Similarly, Bacon (1736) pointed out in his abridgment that this was the agreed principle that to prove a fact, the highest evidence would be produced which the nature of the thing is capable of. Despite the discussion on the best evidence principle in various judicial decisions and books, the most celebrated case in which the principle was discusses is Ford versus Hopkins (1745). Lord Hardwicke pointed out in this case that there is just one general rule of evidence: the greatest possible evidence that the circumstances of the case will permit will be allowed to produce in courts (Mann, 1929, p. 1). After the introduction of this principle in various judicial decisions, numerous writers interpreted this principle in many senses. For instance, Phipson (1990) pointed out that the rule in these cases were used in three somewhat dissimilar senses, the best evidence for a fact is that evidence which the nature of the fact admitted, or the evidence which the circumstances would allow, or that evidence which the party could produce. However, he pointed out that this principle was never applied to justify the use of less reliable evidence, such as hearsay evidence, testimony of interested witnesses, or copies of copies of documents, in the lack of or inability to get best evidence (Phipson, 1990, p. 19-20).

Similarly, the best evidence principle got great prominence when prominent writers on law of evidence of that era started discussing it. For instance, Chief Baron Gilbert (1756) discussed this principle in his book and called it as the chief rule of the whole subject. While talking about the meaning of this principle, he argued that the first and most important guideline about production of evidence is that a man must bring the strongest evidence possible given the circumstances. He also added that the rule's underlying intent is to prevent evidence from being presented that gives the hint that there is still more evidence in the parties' custody or control (Gilbert, 1756, p. 4). Phipson (1990) observed that Gilbert intended to disqualify hearsay evidence, secondary evidence, and proof of attested documents other than by calling the attesting witnesses (Phipson, 1990, p.118). Similarly, Lord Burke (1794) remarked that the principle of best evidence was not of independent and substantive nature. On the other hand, he continued that the principle governed all the subordinate rules while considering the particular facts of a case (Works of Burke (Little & Brown's ed.), xi. p. 77; Thayer's Cases on Evidence, p. 732). Christian (1792), following the same line of thought, highlighted a few drawbacks of this theory. No rule of law, he said, is invoked or understood incorrectly more often than this one. When properly understood, it is undoubtedly true, but its applicability and scope are severely constrained. Simply put, it means that the next best legal evidence will be admitted if the best evidence is not possible to produce. He continued by saying that, generally speaking, the inclusion of hearsay, interested witnesses, copies of copies, etc. can never be justified by a lack of better evidence (Thayer, p.494). The importance and the place of this principle in the law of evidence were also discussed in some judicial decisions of that era. For instance, Lord Lough borough in Grant v. Gould, (1792) agreed with the proposition that all the courts in common law countries should proceed upon the general rule that the best evidence should have been produced which the nature of the case would admit.

After the introduction and discussion of this principle in judicial decisions and numerous books in the eighteenth century, the best evidence rule was seen as a mean to exclude hearsay evidence, secondary evidence, and proof of documents by non-attesting witnesses. However, various judicial decisions decided in the same century suggest that the courts used this principle to exclude various other types of evidence. For instance, the courts excluded circumstantial evidence if direct evidence could be produced (Williams v. East India Co., 1802), real evidence if it was not brought in courts (Chenie v. Watson 1797), opinion evidence regarding handwriting if the writer was available and could be called as witness (R. v. Smith 1768), any other evidence to prove the consent of a party if he was alive and could be called as witness and any evidence other than the report of a commission to prove attested document when witness was abroad (Barnes v. Trompowsky, 1797).

In the nineteenth century, the best evidence principle went through many changes due to various judicial decisions and opinion of experts on law of evidence expressed in text books. The judges and authors not only explained this principle or excluded various types of evidence from judicial consideration but also they created many exceptions to this principle. For instance, Williams v. East India Co (1802) was an important case of nineteenth century in which the court held that circumstantial evidence would not be admitted if parties could have produced the direct evidence. In this case, two witnesses, one from plaintiff and other from defendant side were directly familiar with the facts of the case. The plaintiff's witness died and instead of calling defendant's witness, the plaintiff intended to produce circumstantial evidence to prove that fact. The court did not permit the plaintiff to adduce circumstantial evidence and observed that the plaintiff must have produced the witnesses whose duty was to receive and deliver the good on board. The court further held that if one of such witnesses was dead, the plaintiff could not be allowed to rely on the inferences suggested by circumstantial evidence. Another important development of this principle can be seen in 1820 in a treatise on law of evidence in which the application of this principle was declared as the general principle of English law of evidence. The author pointed out that since the evidence is unquestionably the best way to learn something, no less-than-perfect evidence might be presented if the person or thing could be brought into the courtroom (Glassford on Evidence, 1820 pp.). However, the requirement to produce material objects in the courts was refuted in Queen v. Erancis in 1874. It is important to mention that the text writers in nineteenth century also started discussing the exceptions to this principle. For instance, Thayer (1898) pointed out that if a witness could not attend court proceedings due to his health issues, his deposition would be the best evidence. He also pointed out that hearsay would be admissible if a witness had died (Thayer, 1898, p. 490-491).

Similarly, Greenleaf (1899) interpreted the principle in two steps: firstly, the original writing must be produced to prove the contents of that writing and secondly, if original is not produced, it must be explained with legally justified reasons for its non-production. He further discussed the definition and numerous instances of the application of this principle in his book. Regarding the definition, he made the point that the duty to produce the best evidence means that, as long as the original evidence is available, no evidence shall be accepted that is purely substitutive in nature. He added that the rule excludes only that evidence which itself indicates the existence of more original sources of information. He believed that the rule was not disturbed if a party failed to present all of the evidence that may have been produced, or where the party produced weaker evidence as a substitute to stronger evidence (Greenleaf, 1899, p. 169-170). In addition to this, he elaborated and explained various situations in which the best evidence principle was used as a rule of evidence. He pointed out that the principle was used to require the production of original document to prove its content, to exclude the admission of hearsay evidence especially the testimony of such witnesses who did not testify on oath and were not subjected to cross examination, and to require the production of specific witnesses whom law considered superior witnesses before calling other witnesses. In addition, the principle was used as a rule to require the attesting witnesses to prove the content of document, to bring all available and known witnesses having more information than others, to establish the exchange of consent with direct evidence and to consider certain forms of documentary evidence as superior to other form of evidence to prove the same matter like the report of a coroner. He further added that the principle was used as a rule of evidence to prefer certain official records or reports to other evidence on the same issue, and to treat the record of a court as the best evidence of its proceedings as compared with other testimony or with the clerk's minutes or docket-entries (Greenleaf, 1899, p. 179-181).

It is important to point out that till that era, the majority of the writers not only acknowledged this principle but also they interpreted it in such a way which expanded its scope. However, various judicial decisions mostly given in UK resisted against the expansion of this principle. These decisions circumvented the scope of this principle in two ways. Firstly, the courts refused to apply or acknowledge this principle and secondly, the courts established the principle that the question of the production of best evidence was related to the weight of evidence and not its admissibility. For instance, in Barnes v. Trompowsky, Lord Kenyon allowed opinion evidence to prove the handwriting of a witness living abroad and he refused to send a commission abroad to examine the witness. He remarked that proving hand writing by opinion evidence was the exception to best evidence principle. Similarly, in R. v. Cox (1898), while determining the question of age, the court held that the best evidence principle was not concerned with the admissibility of evidence rather it was concerned with the sufficiency or weight of evidence. On the same line of reasoning, the judges and the text writers kept on truncating the best evidence principle in the twentieth century. It is important to mention that 20th century brought significant shift in judicial approach regarding this principle. Nevertheless, text writers kept on discussing and expanding the scope of this principle. For instance, Best (1908) pointed out that the principle was very often misunderstood and he suggested to analyze this principle from three perspectives. Firstly, the judges or juries must not adjudicate facts with their own knowledge, secondly, the original evidence would exclude the derivative form of the original evidence and thirdly, evidentiary facts must clearly be connected with principle facts (Best, 1908, p. 128-129). On the other hand, various judicial decisions rendered in 20th century show that the English courts resisted against the expansion of this principle especially with regard to hearsay evidence. The English courts, mostly after the mid of 20th century, truncated this principle in four ways. Firstly, the courts pointed out that the question of the production of the best evidence was related to both the weight and admissibility of evidence. Secondly, the courts limited the application of this principle to the extent of the production of original documents. Thirdly, the courts held the dictum that derivative evidence should have been excluded and an adverse inference should have been drawn if the party failed to produce the original. Fourthly, the courts refused to acknowledge this principle and observed that the principle was no more applied. For instance, in Teper v R (1952) Lord Normand observed that hearsay evidence was not the best evidence hence it could not be used in evidence. Likewise, in R v Quinn (1962), the court of criminal appeal used this principle and excluded a film which was subsequently reconstructed to show strip teasing in a house. Ashworth J observed that the objections against this evidence were related to the weight and admissibility of evidence. He declared that it was

not the best evidence. The application of the best evidence principle was further made limited to some exceptional cases and finally the divisional court in Kajala v. Noble (1982) held that the best evidence principle is applicable to the extent that original document must have been produced if it was in party's control. Likewise, the meaning of "party having the possession of document" and the effect of failure to produce the best evidence were made clear in R. versus Governor of Pentonville Prison (1989). The court held that these words mean that a party who has the original of the document with him in court, or could have it in court without any difficulty. The court also held that if a party does not produce the best evidence, the court will not only draw an adverse inference but also exclude the inferior evidence. The most important English case on the best evidence principle in the twentieth century was Springsteen v Flute International Ltd, in which the court pointed out that the principle was no more applicable.

Despite the judicial resistance against this principle, a very few writers kept on discussing and explaining it during this time period. For instance, Nance (1987) defined the best evidence from two perspectives namely epistemic perspective and cynical perspective (p. 240). To him, such evidence is epistemically the best evidence which is reasonable and most helpful for the adjudication of a case. He added that such evidence is concerned with the rational dimensions of the process of proof. On the other hand, he argues that evidence is cynically best if the evidence maintains a balance between probative value and probative dangers of such evidence. As a result of judicial attitude against the best evidence principle, great majority of the contemporary writers point out that the best evidence principle as envisaged in the past two centuries is almost extinct now. For instance, Keane & McKeown, (2012) pointed out that the principle held in Omychund v Barker was in fact an inclusionary rule but it was never used in that sense. On the other hand, as he pointed out, the rule was used by the courts as an exclusionary rule. He further adds that the best evidence principle as inclusionary or exclusionary rule has no application in the modern times. However, he notes that the best evidence principle is now limited to the extent of requiring a party to produce the original document if he intends to establish the contents of documents in courts (Keane & McKeown, 2012, p.28-29). Similarly, Murphy & Glover (2013) pointed out that today the responsibility to produce the best evidence is only confined to the production of original documents to prove its contents (p. 5). They also added that the best evidence theory was superseded by the concept of relevance, which was developed in the nineteenth century, and refined by Sir James Fitzjames Stephen. He also points out that now theory of relevancy and admissibility is preferred in England (Murphy & Glover, 2013, p.5). Similarly, Heydon (2015) defined the best evidence principle in the same way as Lord Hardwicke defined. He holds the view that Lord Hardwicke used this principle in inclusionary and exclusionary sense. However, he believes that contemporary evidence law has abandoned the inclusionary and the exclusionary aspects of the best evidence principle. He adds that the best evidence principle now refers to proving a document by producing the same document in court unless its absence can be explained (Heydon, 2015, p. 100-102).

The discussion in this section leads to some specific conclusions which may be divided into major and minor conclusions. As far as the minor conclusions are concerned, these are not directly related to the research questions and these may be stated in the following three points. Firstly, the principle of the best evidence rule was invented, developed and truncated by various judicial decisions. Secondly, this principle is based on the maximum *profert in curia* which means that a party would have be deprived of any rights established by the documents if he or she was unable to show the originals in writing before the relevant court of law. Thirdly, the reason behind the invention of the best evidence principle was the possibility of errors in copying the original documents.

Likewise, the following seven major conclusions (these are directly relevant to the research question) can be drawn from the above discussion. Firstly, the best evidence principle means that parties will produce such evidence in courts which will not indicate that better evidence is in the possession or power of the party. In other words, only such evidence will be excluded which itself implies the presence of more original sources of evidence. Secondly, there is difference of opinion among the researchers regarding the nature of this principle. Some believed that it was exclusionary rule; some held the view that it was exclusionary and some viewed it as both inclusionary and exclusionary rule. Thirdly, the best evidence principle in exclusionary sense was used to exclude hearsay evidence, secondary evidence, proof of documents by non-attesting witnesses, circumstantial evidence, real evidence when it is not produced in courts, proof of handwriting by opinion evidence,

proof of consent otherwise than by calling consenting party, and proof of attested documents otherwise than by the issue of a commission to take his oral testimony. Similarly, the best evidence principle also excluded witnesses' testimony which was without oath and was not subjected to cross examination, personal knowledge of judges to establish facts, derived evidence when original could be produced and evidence which does not show a link between primary fact and evidentiary facts. Fourthly, the best evidence principle in inclusionary sense required to prove documents by producing the original, to produce specific types of superior witnesses before he is allowed to resort to others, to require the attendance of attesting witnesses, and to require producing all available witnesses in criminal cases. In addition, the best evidence principle required to produce superior witnesses in term of quantity of information about the issue at hand. Likewise, the best evidence principle treated certain type of documentary evidence as better than other documentary or oral evidence like official record or reports, and judicial record of courts' proceedings. Fifthly, the courts reacted against this principle by creating exceptions to this rule or by refusing to apply it. Sixthly, the principle in its inclusionary or exclusionary form is almost dead now in common law countries. Lastly, the application of this principle in the contemporary common law world is limited to the requirement of the production of the original document to prove its contents. After discussing the definition and the historical evolution of this principle, the next section describes the effects of this principle.

Consequences of the Best Evidence Principle

This section addresses the second research question of the present study and it will cover several effects of the best evidence principle.

The analysis of text writings and judicial rulings reveals that the directive to produce the best evidence has the following five effects. Firstly, some writers believe that when the parties withheld the best available evidence, the court would draw specific inferences like possibility of fraud or presence of some sinister motives (Phipson, 1990, p. 119**).** Secondly, some writers are of the view that if parties fail to produce the best available evidence without explaining the reason of its non-production and relied upon inferior evidence, the courts would draw adverse inference (Keane & McKeon, 2012, p. 29; R. versus Governor of Pentonville Prison, 1989). Thirdly, it was also thought that if the parties did not produce the best available evidence, the inferior evidence might be slighted or rejected (Adriane Keane and Paul McKeon, 2012, pp.28-29, see also R. versus Governor of Pentonville Prison, 1989). Fourthly, a party's failure in producing the best evidence, if it was in his possession or power, will offer robust reasons of doubt to the courts (Thayer, 1898, p. 507). Fifthly, the documentary evidence has been classified into primary and secondary evidence as a result of the best evidence principle (Greenleaf, 1899, p. 170-171). It is important to mention that the best evidence rule does not apply to tangible objects and secondary evidence may be given without any objection regarding the material objects. However, failure to produce material objects in courts will affect the weight of evidence (Murphy, 2013, p. 695).

The above discussion shows that the principle enable the judges to draw adverse inference against a party who fails to take the best available evidence in the court. In addition, the principle has resulted in the partition of documentary evidence into primary and secondary evidence. After discussing the effects of the best evidence principle, the next section offers discussion on how the principle can be explained in the context of QSO.

Application of and the Exceptions to the Best Evidence Principle in QSO

After constructing a conceptual framework in second and third section of the present study by exploring the meaning, development, current status and consequences of the best evidence principle, this section is devoted to address the third research question of the present study. This research question was coined to understand the scope of the best evidence in QSO.

Production of Original Document and its Exceptions

As pointed out in first section that the best evidence principle requires proving a document with primary evidence. The principle was incorporated in article 75 of QSO which states that primary evidence will be produced to prove the contents of a document. In this connection, article 73 defines primary document as the original document. However, this principle has certain exceptions in QSO. In article 75, it has been provided that the documents may be proved with secondary evidence and article 74 defines secondary evidence. Accordingly, certified copies, photocopy of original document through machines, copies made from or compared with original and oral account of the document are the secondary evidence. Similarly, article 73 discusses the various situations in which secondary

evidence may be given regarding presence, condition or substance of a document. These situations include when original is in the possession of person against whom it is to be given and he failed to produce the document after receiving the notice. Likewise, the secondary evidence about a document may be given when original has been lost, destroyed, or when contents of a documents are admitted in writing, or when a party cannot produce the document in reasonable time not due to his own negligence, or when document is gigantic or huge or cannot be easily transportable, or when original is a public document, or when a certified copy is acceptable, or when a document cannot be expediently inspected in the court, or when certified copy of original record of judicial proceedings and certified copy of certified copy is also admissible. Similarly, article 161 provides that judges will not ask the parties to produce any document against whom such person may claim privilege under the law and the content of such document will be proved by secondary evidence.

Proof of Document by Attesting Witnesses

Similarly, it has been learnt in the first section that the principle of the best evidence required that the document must be proved by calling the attesting witnesses. This principle is found in QSO in article 79. This article requires that a document legally required to be attested must be proved by calling at least two attesting witnesses, if they were alive or could be summoned by courts and could give evidence before the document is used as evidence. This rule has certain exceptions like many other rules based on the principle of the best evidence have exceptions. The same article states that there is no need to calling witnesses to prove a legally required registered document which is registered according to law. Similarly, article 80 provides another exception to this principle. This article requires that if attesting witnesses cannot be found, the party will prove that either witnesses have been died or cannot be found and then the party may prove the execution of document by other evidence. On the same line of reasoning, article 81 provides that if execution of a document is admitted by a party, then there will be no need to calling two attesting witnesses. Similarly, article 82 provides another exception and it states that when attesting witnesses denied the execution or cannot recall the execution, the document may be proved by any other evidence.

Official Documents

It has been mentioned in first section that the best evidence principle treated certain official documents like Connor's report as the best evidence as compare to other oral or documentary evidence on the same point. There are many instances in QSO where certain official documents are treated as superior than other types of evidence. For instance, article 55 states that the judicial decisions given in probate, matrimonial, admiralty or insolvency jurisdiction and which confer or take away any right, such decisions will be conclusive evidence of such conferring and taking away the rights. Similarly, article 96 deals with the foreign judicial decisions and it states that courts will be justified in presuming that any document seemingly to be a certified copy of any judicial record is genuine and correct. Similarly, there are various provisions in QSO which require the courts to draw certain presumptions regarding specific official documents as compare to private documents on the same matter. For instance, article 90 states that it will be presumed that certified copy of public document is genuine. It is important to point out that the courts will not draw such presumption regarding private documents on the same matter rather party producing such document will be required to prove the content of document. In the same vein, article 91 states that when any document, written and prepared as per legal requirements and signed by judge, and which is seemingly the record of evidence is produced in courts, it will be treated as correct. In addition, article 92 deals with the documents kept under any law and this article states that the courts will presume that such documents are genuine.

Exclusion of Oral Evidence by Documentary Evidence

It has also been learnt in the first section that this is one of the dimensions of the best evidence principle that when terms of a contract, grant or other disposition of property are reduced to writing, the original document will be the best evidence. In addition, the best evidence principle excludes the oral agreement which is not in line with such written agreement. This principle is called parole evidence rule in English law and common law countries. The same principle is found in QSO in article 102, 103 and 139. Article 102 states that when the conditions of a contract, or of a grant, or of any other disposition of property are in a document, whether it was legally required to be in written form or not, such conditions will be proved by producing the original document. However, this article admits a few exceptions when secondary evidence may be given: the secondary evidence may be

given of such terms if party is justified in tendering secondary evidence, no letter of appointment is necessary to prove the appointment of public officer if he is shown to acting in that position, and proof of registered wills by probate. The same is true for article 103, which specifies that no proof of an oral agreement or statement, as between the parties to any such instrument or their representatives-in-interest, shall be admitted for the purpose of negating, modifying, adding to, or removing from its terms. Nevertheless, this article provides six exceptions. Firstly, any information that would invalidate a document or provide someone the right to a decree or order relating to one may be proven. Secondly, an oral agreement will be admissible if it relates to certain matter on which the written contract is silent, thirdly, agreement containing condition precedent for obligation may be admitted, fourthly, any oral agreement rescinding the contract contained in written form (if law does not require writing and registration), fifthly annexures dealing with customs which are not inconsistent or mentioned in the written contract, and lastly, any fact may be proved which shows in what manner the language of a document is relied upon to existing facts. Similarly, article 139 states that when a witness is about to testify about the conditions contained in an agreement, grant or disposition of property, the court will require that the original document must be produced before he testifies about such facts.

Oral Evidence

It has also been learnt in the first section that the best evidence principle requires that the oral evidence must be direct. The principle is found in QSO in article 71 which states that oral evidence must be direct i.e. it must be the evidence of such person who has himself perceived the facts. Similarly, the article also requires that the opinion is admissible if the person holding the opinion himself testifies in the court. However, this article contained an exception according to which a party has the right to present "shahada ala al-shahadah," (which allows a witness to appoint two witnesses to testify on his behalf, except in Hudood cases), if the witness is deceased, cannot be located, has become incapable of providing testimony, or his attendance cannot be secured without a certain amount of delay or expense. In addition to this, it has also been learnt from the discussion in the first section that the best evidence principle treated certain person as superior witnesses and their testimony was preferred in courts. This principle is found in QSO in article 3 which states that first; the court will accept the testimony of such witnesses who fulfill the criterion of "Tazkiya Tusshahood". However, this article allows the courts to admit the testimony of any other witness if such witnesses are not found or come forward to testify.

Likewise, first section of the present study has also highlighted that the best evidence principle requires that witnesses intending to give evidence must come in court and be subjected to cross examination. However, there are various exceptions in QSO to this principle in which oral evidence may be admitted of a person who did not perceive the facts himself or was not subjected to cross examination. For instance, article 46 contains exceptional cases when such oral evidence may be admitted. This article allows admitting hearsay evidence if it is concerned with cause of death, or prepared in the course of business, or against interest of maker, or it is opinion concerning general public rights or associated to existence of relationship, and a statement contained in a will about family affairs. It is significant to note that such testimony is relevant when a witness is deceased, cannot be located, has lost the ability to testify, or whose attendance cannot be secured without a significant amount of time or expense. Similarly, article 47 provides another exception to this principle. The article states that the testimony given by a witness in judicial proceedings may be used in other judicial proceedings or in the same proceedings but at later stage if the 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.

Similarly, QSO allows admitting oral opinion about specific matters but it is necessary that the person who holds the opinion must himself give his opinion in the court (article 61 and 71 of QSO). Article 71 covers the opinion and grounds of opinion of an expert and it states that when opinion or grounds of opinion of an expert are tendered as evidence in courts, it must be testimony of the person who holds that opinion on those grounds. Article 71 provides an exception to this rule, stating that in cases where the author of an opinion is deceased, unable to be located, unable to give testimony, or unable to be called as a witness without undue delay or expense, the opinions of experts expressed in any treaties that are frequently offered for sale, as well as the foundations for such opinions, may be proven by producing such treaties.

Decision of Cases with Knowledge of Judges

It has been discussed in first section of the present study that the best evidence principle requires that judges will not adjudicate the cases with their knowledge. On the other hand, they will decide the cases with such evidence which shows a link between principal fact and evidentiary facts. This principle is found in article 2 (4) of QSO. This article provides the definition of proved and gives guidelines to the judges that when they will believe that an alleged fact has been proved. According to this article, a fact is considered to be proven when the court either believes it to exist or finds its existence to be so plausible that a prudent individual would act on the presumption that it exists under the circumstances of the specific case. It is argued that words "after considering the matter before it" means that the fact will be considered proved after analyzing the evidence which is tendered to prove the fact. However, there are two exceptions in QSO where the courts can use their personal knowledge to assume the existence of an alleged fact. The first exception is found in article 111 which state that there is no need to prove a fact of which the courts are required to take judicial notice. In addition, article 113 provides a list of the facts of which the courts must take judicial notice. It is important to point out that the various facts discussed in article 113 require the general knowledge of judges. On the same line of inquiry, the second exception is found in article 129 which allows the judges to use their common sense to assume the existence of certain facts. According to this article, a court may assume the existence of any truth that it believes is likely to have occurred, taking into account the usual course of human behavior, natural phenomena, and public and private business in relation to the facts of a particular case.

Material Evidence

It has been discussed in the first section that the best evidence principle did not require that material objects must be produced in the courts. Article 71 of the QSO, however, provides a paradoxical regulation that states that if oral testimony indicates to the presence or state of any material object other than a document, the court may, if it deems it appropriate, order the production of such object for inspection.

Failure to Produce the Best Evidence

It has been mentioned in third section that when parties fail to bring the best available evidence in court, the courts were required to draw inference against such party. The same principle is found in QSO in article 129 and 160. Illustration g to article 129 states that when the evidence which could be and is not produced, the court may presume that if such evidence was produced, it would have been un-favorable to the person withholding it. Similar to that, according to article 160, a party who refuses to deliver a document for which he has been given notice is not permitted to utilize it as evidence later on without the other party's permission or a court order.

CONCLUSIONS

The present study had three research questions which were mentioned in the first section. The discussion in the present study on these questions leads to some specific conclusions which are discussed in the following lines.

As far as the first research question is concerned, it can be concluded that the invention of this principle is the result of judicial decisions. The principle meant and means that the parties would and will produce the best available evidence in courts while keeping in view surrounding circumstances and the facts of each case. The best evidence principle in common law countries has gone through various phases in the last three centuries. In the beginning, the principle was applied frequently in its crude form, and in the second phase, the principle was further explained and its scope was widened. In the third phase, the courts and text writers created exceptions to this principle. In the fourth phase, the courts sometimes refused to apply this principle and sometimes they held that the question of producing the best available evidence related to weight of evidence and not to admissibility of evidence. At the fifth phase, the courts refused to apply this principle in any of its form except requiring the production of original document to prove its contents. Similarly, it can be concluded regarding second research question that the principle resulted in the classification of documentary evidence into primary and secondary evidence. In addition, when the parties fail to produce best available evidence, the courts will draw hostile suggestion against the party who failed to produce the best evidence. As far as the third research question is concerned, it can be concluded that the principle and its various related exceptions have been incorporated in QSO in numerous forms. As a general

principle, QSO requires that oral evidence must be direct, original documents must be produced, oral agreements contradicting or varying terms contained in written documents will not allowed to adduce, judges will decide the disputed facts with evidence, attesting witnesses will be called and witnesses will be called in the courts and subjected to cross examination. These general principles have resemblance with the best evidence principle in common law countries. Moreover, every general principle has exceptions which are operative when original evidence, whether it is oral or documentary cannot be produced in the courts due to reasons beyond the party's control.

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