

DOCUMENTARY EVIDENCE FROM ISLAMIC PERSPECTIVE

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DOCUMENTARY EVIDENCE FROM ISLAMIC PERSPECTIVE

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AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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Hadzrul Fadillah Bin Perlin
Tenom,
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ABSTRAK

Menurut kajian undang-undang keterangan, pembuktian secara bertulis merupakan salah satu cara pendakwaan terhadap sesuatu hak. Sepetimana yang terkandung dalam Akta Keterangan 1950 (Act 56) dalam seksyen 61 hingga seksyen 65. Kajian ini merupakan kajian perpustakaan terhadap bukti bertulis. Kajian ini bertujuan untuk mengetahui pandangan Islam terhadap bukti bertulis samada bukti ini boleh digunakan sebagai bukti dalam perbicaraan kes atau tidak. Untuk memperolehi data dan maklumat, kajian ini telah menggunakan data sekunder yang mana boleh didapati dalam bentuk tulisan seperti buku-buku teks dan jurnal. Hasil kajian yang telah dilakukan menunjukkan bahawa keterangan bertulis boleh digunapakai sebagai bukti sepertimana yang termaktub di dalam Akta Keterangan 1950 (Act 56) dalam seksyen 61 hingga seksyen 65. Dalam pandangan Islam, bukti bertulis juga boleh digunapakai sebagai bukti, walaubagaimanapun, ia hendaklah bebas dari pemalsuan dan diketahui oleh hakim. Dapatan hasil kajian juga telah menunjukkan bahawa keterangan bertulis memainkan peranan yang penting sebagai pendakwaan pada masa kini.

ABSTRACT

According to the research of Evidence law, found, the documentary evidence is one way to prosecute any certain rights. It has been stated in the section 61 to section 65 under the law of Evidence Act 1950 (Act 56). This study is library research towards documentary evidence. The aim of this research is to find out about documentary evidence through the Islamic view, either this evidence can be used as one of the proof in the case proceeding or not. For gathering data and information, the secondary data, which are available in written form for example, textbooks and journal are being used. The result of this research showed, the documentary evidence can be used in proving the cases that equal to the laws which had provided under the section 61 to 65 in Evidence Act 1950 (Act 56). In Islamic view, the documentary evidence also can be used in proving, however, it should be free from any forgery and known to the judge. From this research, it shows the documentary evidence had played important role in processing the prosecution for nowadays.

ملخص البحث

هذا البحث يتعلق بالقانون الإثبات التي يشير أن البرهان في إثبات الخطاء بطريقة الكتابة، وهي إحدى من طرق عند لإثبات الدعوى على المخطئين. هذه الحالة تتضمن في قانون الإثبات 1950 (Act 56)، من قسم 61 إلى قسم 65. وهذا البحث من نوع البحث المكتبة أن يكون على الدلالة المكتوبة. يهدف هذا البحث إلى معرفة آراء العلماء الإسلامية عن استعمال هذه الدلالة في المحكمة لإقامة الدعوى سواء كانت تجوز أم لا. ولحصول على المعلومات الهامة، قد استعمل هذا البحث، من حيث وجد من مصدر الكتابة مثلا الكتب المراجعة والمجلات. وثمره البحث تجد أن عبارة الكتابة تمكن لاستعمال لتكون دليلا في المحكمة كما وردت في قانون الإثبات 1950 (قانون 56) في قسم 61 إلى 65. ولدى الشريعة الإسلامية، أنها تجوز استعمال عبارة الكتابة كدليل بشرط أنها حالية من التحريف ومعرفة عند القاضي. وأخيرا، أن عبارة الكتابة تلعب دورا هاما لإقامة الدعوى في هذا العصر.

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6,27,30-
31,35-36,38-39.

GLOSSARY

<i>Ahadith</i>	Plural of <i>hadith</i> sayings of the Prophet Muhammad s.a.w.
<i>Al-Bayyinah</i>	Evidence.
<i>a.s</i>	Abbreviation of “Alaihi Al-salām” meaning “Upon him the peace”. Only reserved for prophets other than Muhammad s.a.w.
<i>ayah</i>	Signs.
<i>ayāt</i>	Plural of <i>ayah</i> , verses of the Qur’an.
<i>Baligh</i>	Of the age of majority.
<i>‘ilm al-qadi</i>	Personal knowledge of a judge.
<i>fard ‘ain</i>	An obligation upon every person in the community.
<i>fard kifayah</i>	When someone in the community performs it.
<i>Fatwa</i>	Opinion upon a point of law.
<i>Fiqh</i>	Jurisprudence.
<i>Fuqaha</i>	Islamic jurists.
<i>Had</i>	a specific form of punishment laid down in the Qur’an.
<i>Hadith</i>	Sayings of the Prophet Muhammad s.a.w.
<i>Hudūd</i>	Several specific crimes and punishments laid down in the Qur’an.
<i>Hukm</i>	Legal rule.
<i>ijma’</i>	Consensus of opinion of the ‘ulama.
<i>ila’</i>	Oath of a husband not to have sex with his wife for four months or more, or within an unspecified period of time.
<i>Iqrar</i>	Admission
<i>Jināyāt</i>	Crimes.
<i>Khabar</i>	News or information.
<i>khabar ahad</i>	Information coming only from a single source.
<i>khabar mutawatir</i>	Knowledge with unbroken chain of transmission therefore authentic.
<i>Kitabah</i>	Documentary evidence.
<i>Lauth</i>	Signs.

<i>li'an</i>	Accusing one's wife of committing adultery or fornication by way of imprecation.
<i>Mazahib</i>	Schools of jurisprudence.
<i>Messenger</i>	Arabic " <i>Al-Rasūl</i> ", the prophet.
<i>nas shar'I</i>	Authority.
<i>nisab al-shahadah</i>	The minimum number of witnesses required for a particular case.
<i>Qadi</i>	Judge.
<i>Qarīnah</i>	Circumstantial evidence.
<i>Qisas</i>	Law of retaliation or retribution.
<i>Qiyāfah</i>	Evidence or to prove paternity.
<i>r.a.</i>	Abbreviation of " <i>Radhi Allahu 'An Hu</i> " meaning "Upon him the Blessings of Allah.
Rights of Allah	<i>Hudud</i> , matters of worship etc.
Rights of Man	Property, debts, <i>qisas</i> etc.
<i>s.a.w.</i>	Abbreviation of " <i>Sallallahu 'Alaihi Wa Sallam</i> " meaning "peace be upon him". It is compulsory for a Muslim to utter this blessing whenever he hears the Prophet Muhammad's name being mentioned.
<i>Sahabah</i>	Companions of the prophet s.a.w.
<i>Sahih</i>	Valid.
<i>Shahadah</i>	Testimony of a witness.
<i>shar'i</i>	Legally recognised by the <i>shari'ah</i> .
<i>Shubhah</i>	Doubt.
<i>Sunnah</i>	Sayings, deeds and approvals of the Prophet s.a.w.
<i>Surah</i>	Chapter of the Qur'an. The number preceding colon denotes the Chapter number while the numbers after the colon denotes the verse number.
<i>ta'zir</i>	Discretionary punishment for offences not amounting to hudud.
<i>thabat al-haq</i>	Testimony to prove a right.
<i>'udūl</i>	Plural of <i>'adil</i> .
<i>'ulama</i>	Plural of <i>'alim</i> , Islamic jurists.

<i>Ummah</i>	The global Muslim community.
<i>Wājib</i>	Mandatory or obligatory.
<i>Wahm</i>	Fancy.
<i>Wakil</i>	Agent, representative.
<i>Wali</i>	Legal guardian.
<i>Yamīn</i>	Oath.
<i>Yaqīn</i>	Certain beyond any doubt.
<i>Zina</i>	Adultery or fornication.

ABBREVIATIONS

AS	‘alayh al-salām
Comp.	Compiler/compiled by
Def.	Definition
ed.	Editor/edition/edited by
n.a.	No author/no artist
Trans.	Translator/translated by
RA	radiya Allah ‘anhu / ‘anhā / ‘anhum
rev.	Review/revision of
SAW	salla Allah ‘alayh wa sallam
SWT	subhānahu wa ta‘ālā
vers.	Version
Vol.	Volume
Writ.	Written

Chapter I

Introduction

1.1 Statement of Problem

Documentary evidence is an important type of evidence today. It becomes the main evidence in all community activities to convict any claim beside witnesses, admission, and oath. *Bayyinah Khaththiyah* (written evidence) is also authentic evidence that can be deemed as the most important to show the truth of any claims today (T.M Hasbi Ash Shiddieqy (Prof) 1964: 133).

Documentary evidence is defined as in many respects considered better than the evidence furnished by witnesses, about which there has always been a certain amount of suspicion. Documentary evidence differs considerably from the evidence of witnesses and is dealt with under special rules (Heinrich Nagel 2002:1).

Documentary evidence is referred as documents, statements or notes written by someone who may be in a position of authority or a judge or an ordinary citizen. The writings may be made on official parchment paper and sealed or otherwise (Mahmud Saedon A. Othman 2003:139).

Criteria for establishing the authenticity of documents are only important if authenticity is contested. This is often impossible, however, if a presumption favoring the authenticity of a public document exists (Heinrich Nagel 2002:1).

The scenario in our country has raised many ways of the proving in the claim, nowadays. As mentioned under Evidence Act 1950 (Act 56). One of the ways is documentary evidence. However, there are many problems related to the using of documentary evidence such as what the position or Islamic perspective about the documentary evidence and whether documents may be used as proof in all cases or only in *non-qisas* or *non-hudud* cases such as those with regards to property, bequests.

1.2 Research Aim

The aims of this research are two fold. The first aim is to look and to know what documentary evidence is and what the documents that includes in the documentary evidence that may be used as proof according to Evidence Act 1950 (Act 56).

The second aim of this research is to know and to study what is the position of documentary evidence from Islamic perspective whether documents may be used as proof in all cases or only in *non-qisas* or *non-hudud* cases.

1.3 Scope of the research

The main scope of this research is to explore the position of documentary evidence in Islamic perception based on the Muslim scholars or contemporary scholars whether it will be used as proof in all cases or only in *non-qisqs* or *non-hudud* cases.

1.4 Research Methodology

The research is designed based on the secondary source which are available in written form from the textbook, journals, academic research and discussion. The researcher also obtained the source available from the Internet and based on the statute namely Evidence Act 1950 (Act 56), Syariah Courts Evidence (Federal Territories) Act 1997 and Kelantan Evidence Enactment Of The Syariah Court 1991 to look at the position of documentary evidence in Malaysian Law and Islamic Law.

1.5 Literature Review

As mentioned by Heinrich Nagel (2002:2) explained that the documentary evidence is a better proof or evidence than the evidence furnished by witnesses. Documentary evidence differs considerably from the evidence of witnesses and is dealt with under special rules. This is because there are criteria's for establishing the authenticity of documents, as it is important if authenticity is contested.

According to Graham Roberts (1998:533) who mentioned that neither a document nor an item of real evidence tendered to the court could be self-authenticating. There must be admissible evidence to establish that the document or item is what it purports to be and is relevant to the issues before the court. Thus, if it is intended to rely on a written contract to show that the defendant entered into a contract with the plaintiff and what the terms of that contract were, it is not enough simply to tender the document. It is true that the document will state that the defendant was one of the parties to it and it will contain a signature purporting to be that of the document at their face value would be to accord a quite arbitrary effect to the medium of the written word, and this is something that the courts have refused to do.

While, Mahmud Saedon A. Othman (2003:139) wrote that the documentary evidence are documents, statements or notes was written by person or someone who may be in a person of authority or a judge or an ordinary citizen and also the writings may be made on official parchment paper and sealed or otherwise. He also mentioned that the documentary evidence in indeed very important in today and it would be best for us to consider it as a form of *qarinah* and leave it up to the courts to weigh and test its strengths and authenticity.

Besides that, Abdul Rahman Mustafa (1988:99-101) stated that the written evidence also can be called *kitabah* is the evidence appliance to convict any claims. He also mentioned that written evidence including documents is the impressive way for evidence and it is needed for today. He also mentioned that written evidence is very important not only in Islamic perception but also in the Malaysian evidence Law. For the scenario today, written evidence is the strongest appliance for evidence.

As mentioned by Prof. T.M. Hasbi Ash Shiddieqy (1964:133,134) stated that written evidence is very important especially today to convict the truth of evidence. In the past, written evidence is not famous because the total of people that expert is a lot. He also mentioned that this evidence will be used if it is needed for example in case of postpone debt.

According to Prof. Dr. Haji Mohd. Akram Shair Mohamed (1997:124,126) he stated that document is the fact of relevance conclusion for any question. He also mentioned that document is not relevance conclusion for any question. In the other circumstances, the document itself can be the fact of question. Besides that, the writer or any person that have a responsibility for the preparation on that document should give the explanation about such document. It is important to make sure that the testimony from any person can be used. However, the conditions of the document evidence must be writing by the person who had been appointed to do so.

As the conclusion, the writer agrees with some of the opinions in the mentioned literature reviews. Where documentary evidence is one proof, which better than evidence furnished by witnesses and one of important and efficient proof as the one way to convict any claim, nowadays. This is because; documentary evidence is one of everlasting proof and not changes especially in the matters that relation with the debt questions. This research will highlight on the position of documentary evidence under the Islamic law and to what extend documentary evidence can be accepted as proof in the court of law.

Chapter II

Evidence

2.1 Definition of Evidence

Evidence is that which tends to prove the existence or nonexistence of some fact. It may consist of testimony, documentary evidence, real evidence and when admissible, hearsay evidence. The law of evidence comprises all the rules governing the presentation of facts and proof in proceedings before a court, including in particular the rules governing the admissibility of evidence and the exclusionary rules (Elizabeth A. Martin 2002: 187).

In all the legal, evidence means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation; as follows: (1) Oral: statements made by witnesses in court. (2) Documentary: including public and private documents, and statements of relevant facts made by persons in writing. (3): Conclusive: evidence of a fact which the court must take as full proof of it, and which excludes all evidence to disprove it. (4) Direct: evidence of a fact actually in issue; evidence of a fact actually perceived by a witness with his own senses. (5) Circumstantial: evidence of a fact not actually in issue, but legally relevant to a fact in issue. (6) Real: evidence supplied by material objects produced for the inspection of the court. (7) Extrinsic: oral evidence given in connection with written documents. (8) Hearsay. (9) Indirect: circumstantial or hearsay evidence. (10): Original: evidence which has an independent probative force of its own. (11) Derivative: evidence, which derives its force from some other source. (12) Parol: oral, extrinsic evidence. (13) Prima facie: evidence of a fact, which the court must take as proof of such fact, unless disproved by further evidence. (14) Primary: evidence of a document is the document itself, or duplicate original. (15) Secondary: evidence other than the best evidence, and which is rejected if primary evidence is available; example oral evidence of the contents of a lost document such as a will. Evidence must be given in open court *viva voce*, but provision is made

where a cause or matter is pending, for depositions to be taken from witnesses who will be unable to attend the hearing (Sherman 1998: 119).

Evidence means anything that may legally be submitted to a court to prove an assertion about a matter of fact. The result of evidence is proof in the legal sense, and one of the methods of evidence is by oral testimony. It also means the whole body of rules, established both by courts and statutes (Sinha, Dheeraj 1996: 72).

Besides that, evidence is also defined as testimony and production of documents and things relating to the facts into which the court enquires and the methods and rules relating to the establishing of those facts before the court. "That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue"; Blackstone. Evidence may be classified as: direct and circumstantial; primary and secondary; conclusive and inconclusive (L B Curzon 1993: 144).

While, under Evidence Act 1950 (Act 56), Section 3, evidence includes: (a) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence; (b) all documents produced for the inspection of the court: such documents are called documentary evidence (Evidence Act 1950 (Act 56) 2003: 13).

Under Syariah Court Evidence (Federal Territories) Act 1997 (Act 561), section 3, also stated what the Evidence Act 1950 (Act 56) given before this where evidence includes: (a) *bayyinah* and *syahadah*; (b) all statement 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 (Syariah Court Evidence (Federal Territories) Act 1997 (Act 561) 1997: 151).

According to Kelantan Evidence Enactment of the Syariah Court 1991, section 3, also stated with the Syariah Courts Evidence (Federal Territories) Act 1997 (Act 561) which, evidence includes: (a) *bayyinah* and *syahadah*; (b) all statement 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 (Kelantan Evidence Enactment of the Syariah Court 1991 1998: 8).

Besides that, the term “evidence” is principally used to refer to the material offered in court during trial for the purpose of enabling the finder of fact (that is, the jury for the purposes of this book) to reach a decision on the issues in dispute (Adrian Keane 2000: 1).

While, the definition of evidence by Islamic Jurists, in the Islamic law of evidence, evidence is known by the term “*Al-Bayyinah*”. In the literal sense “*bayyinah*” means “clearness”. The term *bayyinah* in Islamic law of evidence refers to a thing, which clarifies or explains a right or interest (Mahmud Saedon A. Othman 2003:7-8).

Thus Ibn Qayyim’s definition of evidence or *bayyinah* is comprehensive in the sense that it refers to anything which clarifies, explains or proves a position, right or interest which a court or judge may consider in rendering justice to the rightful party or in delivering a just decision. This means that *bayyinah* encapsulates all forms of evidence in Islam including those types agreed upon by the ‘ulama such as *iqrar*, *yamin* and *shahadah* and also the forms of evidence on which ‘ulama disagrees such as *al-‘ilm al-qadi*, *khobar mutawatir*, *firasah* and others. Ibn Qayyim further stressed that anything which may help clarify, elucidate or explain any right; matter or interest in a dispute is a *bayyinah*, which can be forwarded for the court’s deliberation (Mahmud Saedon A. Othman 2003:7-8).

In short, evidence can be defined as one fact or proof or argument that can be used in front of the court or during the proceeding to prove any offences or any right. Besides that, evidence also will be defined as anything or material that may legally be submitted to a court or offered in court during trial to prove any matter or right. From Islamic jurists, evidence can be defined as a “*Al- Bayyinah*” that means “clearness” and indirect refers to a thing, which clarifies or explains a right or interest according any way agreed upon by the ‘ulama such as *iqrar*, *yamin* and *shahadah*.

2.2 Types of Evidence

As we know, proof is some form of or methods that be used as a prove or argument to explain a right or interest or tend to any matter of fact before the court or during trial. Therefore, there are various ways, which can be used as the proof for conviction in any right to be claimed such as *Al-Iqrar*, *Al-Shahadah*, *Khabar* (Hearsay evidence), *Al-Yamin*, *Al-Qarinah*, *Al-Ra'yu Al-Khabir*, *Al-Qiyafah*, *Al-Kitabah*, *Al-'Ilm Al-Qadi*, *Al-Qasamah*, *Lian* and *Al-Qur'ah* (Voting). Based on the types of evidence above, some of it can be said as having relation with documentary evidence but some of it was not. This matter will be discussed according to its type after this.

2.2.1 *Al-Shahadah* (Evidence by Testimony)

Testimony is the types of evidence that means oral statement of a witness made on oath in open court and offered as evidence of the truth of that which is asserted. 'Direct testimony' is a term used to describe a witness's statement that he perceived a fact in issue, relevant fact or collateral fact with one of his five senses. In other words, it is testimony relating to facts of which the witness has or claims to have personal or first-hand knowledge (Adrian Keane 2000:9).

In the literal sense, *shahadah* means news or information, which is authentic (undoubted). While other 'ulama who gave the opinion that *shahadah* means being actually present and witnessing an event. Some other 'ulama gave their views about *shahadah* which they treat as a form of knowledge. This is because the word *shahadah* itself is taken from the word "*al-I'lam*". This is based on the Qu'anic ayah, which reads:

﴿شهد الله أنه لا إله إلا هو والملائكة وأولوا العلم قائما بالقسط،

لا إله إلا هو العزيز الحكيم﴾

*There is no god but he: That is the witness of Allah, His angels, and those endowed with knowledge, standing firm on justice. There is no god but He the Exalted in power, the Wise.*¹

(Surah Ali 'Imran 3:18)

Ibn Al-Humam who is a Hanafi jurists say that *shahadah* is a form of notice, which is authentic to prove a right or interest through the use of specific words in the course of a judicial proceeding. While, Sheikh Shihabuddin a Shafi'i jurists, *shahadah* is information about a right or interest for the benefit of another person preceded by the words. Abdul Salam madkur, *shahadah* means informing the truth during the course of a judicial proceeding using specific words of *shahadah* to prove a right or interest for the benefit of another person or party. According to Ahmad Fathi Bahansi, *shahadah* means to tell about a right or interest for the benefit of another person against another person's interest with regards to a right which belongs to Allah or a right with regards to others (Mahmud Saedon A. Othman 2003:44-45)

Shahadah also is the true information in judiciary conference with saying (*lafaz*) of *shahadah* or for proving and convicting the right of other people. *Shahadah* was be named as *al-bayyinah* namely the evidence because it was explain anything which, have in the soul of people and explain the true right in anything which been conflicted (Dr. Abdul Karim Zaidan 1993:76-77).

According to all opinions mentioned before, a conclusion can be made, *shahadah* is oral statement by witness or news or information, which is authentic. The true information in judiciary conference will be present by the witness to prove right or interest for another person before the court. *Shahadah* also has relation with documentary evidence, which is informed of written. It's mean; the witness can give his witnesses based on his memory of what he sees from the writing but he cannot give his witnesses from his own written because it can be same with another written by another person. So, the *shahadah* can also given based on written, with condition

¹ (All Quranic translations in this writing are based on Syed Vickar Ahamed, Prof. n.d. *The Holy of Al-Qur'an, Intrepretation of the meaning of The Glarious Qur'an*. New Jersey: Holmdel. Translation from other sources will be cited accordingly)

the witness can give his witnesses based on his memory on what he sees from the written not by his own written.

2.2.2 Hearsay Evidence or *Khabar*

Hearsay is also the one of types of evidence that is used to describe statements, often gossip, that one hears but does not know to be true. In the law of evidence, the word is used in a broader technical sense. It may be defined as any statement, other than one made by a witness in the course of giving his evidence in the proceedings in question, by any person, whether it was made on oath or unsworn and whether it was made orally, in writing or by signs and gestures, which is offered as evidence of truth of its contents (Adrian Keane 2000:9-10).

Hearsay evidence or *khabar* has three *khabar* such as *Khabar Mutawatir*, *Khabar Masyhur* and *Khabar Ahad*. *Khabar Mutawatir* is regarded as the most authentic form of hadith and it is a most convincing kind of evidence from the Islamic law of evidence. While *Khabar Masyhur* is of a lower standard than *khabar mutawatir*. Ibn Qayyim said that *khabar masyhur* is one of the clearer forms of evidence and the ways of obtaining information, which is free from *tuhmah* about a witness. In the science of hadith, a *masyhur hadith* may only reach a level of *tuma'ninah* (a knowledge which may bring a feeling of sureness) but it does not reach the standard of *yaqin* (certainty) (Mahmud Saedon A. Othman 2003:82-83).

Based on the hearsay evidence or *khabar*, the writer was mentioned that hearsay evidence or *khabar* is evidence that used to describe statements, often gossip, that one hears but does not know to be true. There are three types of *khabar*, *khabar mutawatir*, *khabar masyhur* and *khabar ahad* but the best is *khabar mutawatir*. Hearsay evidence or *khabar* also has relation with documentary evidence because nowadays, the hearsay or *khabar* can be get in writing such as *khabar mutawatir*, which is regarded as the most authentic form of *hadith* and can be get in writing book of *hadith*. So, hearsay evidence or *khabar* also have relation with documentary evidence.

2.2.3 *Al-Kitabah* (Documentary Evidence)

Beside that, *al-kitabah* or documentary evidence is also the types of evidence. It consists of documents produced for inspection by the court. It includes not only documents in writing, but also maps, plans, graphs, drawings, photographs, disc, tapes, video-tapes, films and negative. It may be produced to show their contents, their existence or their physical appearance. The contents of a document may be received as evidence of their truth, by way of exception to the hearsay rule, or for some other purpose (Adrian Keane 2000:10-11).

Al-Kitabah also is documents, statement or notes written by someone who may be in a position of authority or a judge or an ordinary citizen. The writings may be made on official parchment paper and sealed or otherwise. The 'ulama are divided in their views that some of them say that the documentary evidence may not be used as a means of proof even in property cases as writings may bear resemblance with other writings and may be copied or forged. Other 'ulama accept it's to safeguard the interest society (Mahmud Saedon A. Othman 2003:139).

According to *al-kitabah* or documentary evidence, the writer will make a conclusion. *Al-kitabah* or documentary evidence consist documents, documents in writing and material things. Maps, plans, graphs, drawing, photographs, disc, tapes, videotapes, film and negative can be considered under this type of evidence too. The writer also mentioned that the *al-kitabah* is statements or note written by someone that will be used as a prove for right or interest in the court.

2.2.4 Real evidence

Real evidence usually takes the form of some material object produced for inspection in order that the court may draw an inference from its own observation as to the existence, condition or value of the object in question. The material object that include in the real evidence likes documents, also include the physical appearance of person and animal, the demeanor of witnesses, the intonation of voices on a tape recording, that is inspections out of court (Adrian Keane 2000:11).

The writer concludes that the real evidence have a similarity with documentary evidence because the real evidence usually in the same form of the material object likes documents. Evidence under *al-kitabah* also mentioned that the evidence consist documents and material.

2.2.5 AL-Qarinah (Circumstantial evidence)

Under circumstantial evidence, it also can be divided into two parts, general and examples. For general, the circumstantial evidence has already been defined as evidence of relevant facts (facts from which the existence or non-existence of a fact in issue may be inferred). It is contrasted with 'direct evidence', a term which is used to mean testimony relating to facts in issue of which a witness has or claims to have personal or first-hand knowledge. It may take the form of oral or documentary evidence (including admissible hearsay) or real evidence. While, in examples the circumstances in which a fact may be said to be relevant to a fact in issue, in the sense that the existence of the former gives rise or an inference as to the existence or non-existence of the latter, are many and various. It also has examples of circumstantial evidence are less demanding and more typical likes motive, which supply a motive for a particular person to do a particular act is often received to show that it is more probable that he performed that act. Another example is plans and preparatory acts, facts which tend to suggest that a person made plans or other preparation for the performance of a particular act are relevant to the question of whether he subsequently performed that act. Capacity also examples of circumstantial evidence are less demanding and more typical. Evidence of a person's mental or physical capacity or incapacity to do a particular act has an obvious relevance to the question of whether he in fact performed it. In opportunity, is evidence of the fact that a person was present or absent at the time and place of some act allegedly performed by him. While, in identity often takes the form of expert testimony that the fingerprints of the accused or sample taken from his body match those discovered on or taken from some material object at the scene of the crime or the victim of the offence in question. Circumstantial evidence of continuance, the fact that a certain act or event was taking place at one point in time may justify the inference that it was also taking lace at some prior or subsequently point in time. Examples of circumstantial evidence are less

demanding also is failure to give evidence or call witnesses which one party's failure to give evidence or call witnesses may justify the court in drawing all reasonable inferences from the evidence which has been given by his opponent as to what the facts are which the first party chose to withhold in civil cases. Failure to provide evidence also one of examples of circumstantial evidence are less demanding which the paternity of any person falls to be determined, the court directs a party to undergo a blood test and that party fails to obey the direction, the court may draw such inferences as appear proper in the circumstances and the last examples is standards of comparison where it is necessary to decide whether a person's conduct meets some objective standard of behavior (Adrian Keane 2000:12-19).

In other meanings *qarinah* means, "together, accompany or related". It also means a thing, which explains something. In the Arabic language *qarinah* can be divided into two types. The first type is the *qarinah* based on metaphor known as the *qarinah maqaliah*, *qarinah lafziyyah* or *qarinah ma'nawiyyah*. For example "I have seen a lion writing" "A lion writing" here means "someone who is as fearless as a lion is writing". The second type of *qarinah* is based on circumstances and surroundings. This is known as the *qarinah haliyyah* (Mahmud Saedon A. Othman 2003:117).

Qarinah here also mean sign that can be use as have the proof or to deny anything. For example, any people was saw out from the house in afraid situation, in his hand have the knife with many blood and at the same time have the one people died in that house because of slaughter, so, it can be proof that person was did that killing without to look at that situation of kill. In the way of prove with *Qarinah* other 'ulama fiqah was take care and be the *Qarinah* as the one way for proving and judiciary. But some of the 'ulama have different opinion. Therefore, was to be taken and to be as the proving. (Dr. Abdul Karim Zaidan 1993:153-156). Allah said in Al-Qur'an, which means:

﴿وَجَاءَ عَلِيٌّ قَمِيصَهُ بَدْمٌ كَذِبٌ، قَالَ بَلْ سَوَّلَتْ لَكُمْ أَنْفُسُكُمْ أَمْرًا فَصَبِرْ جَمِيلًا﴾

﴿وَاللَّهُ الْمُسْتَعَانُ عَلَىٰ مَا تَصِفُونَ﴾

They stained his shirt with false blood. He said: "Nay, but your minds have made up a tale (that may pass) with you, (for me) patience is most fitting: against that which ye assert, it is God (alone) whose help can be sought".

(Surah Yusuf 12: 18)

According to Al-Qurtubi in his commentary, the jurists have employed this *ayah* as justification for using "signs which points to the existence of something" in solving *fiqh* related problems example by using the circumstantial evidence of *qasamah* and others. In this context the '*ulama* are unanimous in their view that the Prophet Ya'qub (Jacob) a.s. have treated the bloodstained shirt of Yūsuf a.s. as evidence that Yūsuf a.s. is still alive as the shirt though bloodstained is not torn as it should be if Yūsuf a.s. was really attacked by wolves as had been claimed by his brothers. In one narration it was said that the Prophet Ya'qub a.s. had asked when told that his son Yūsuf a.s. had been mauled by wolves, "when did wolves became so clever that they could eat Yūsuf a.s. without tearing open his shirt?". Based on the story above it clearly showed that the Prophet Ya'qub a.s. had restored to *qarinah* as a means of proving that the allegations from the brothers of Yūsuf a.s. are false. It is usually the case that a person who is mauled by wolves would have his shirt torn to pieces but this did not happen to Yūsuf a.s. and this fact clearly raises a doubt on the allegations coming from his brothers (Mahmud Saedon A. Othman 2003:121).

Based on *al-Qarinah*, the writer mentioned, that *al-qarinah* is means together, accompany or related and things, which explain something and it also means sign that, can be use as the proof or to deny anything. The *qarinah* will be say as to have a relation with documentary evidence. For example, someone is was went out from a house in afraid situation, in his hand is knife covered with blood. At the same time, the house has a camera to record the situation. So, the camera will be the prove that mentioned before as documentary evidence.

2.2.6 Al-Iqrar (Evidence by Admission)

Al-Iqrar also the type of evidence that means admission or recognition from the literal sense. However, the meanings of *iqrar* can be divided two definitions. The

first is Shafi'i definition and the second is Hanafi definition. The Shafi'i definition's *Al-iqrar* is a testimony of the existence of a proved right against the maker of the admission himself. It also means defined as recognition (*I'tiraf*). While, the Hanafi's definition *Al-iqrar* is an admission of the existence of the right of another person against the maker of the admission himself. It also means testimony of the existence of a right or interest (*thabat al-haq*) for the benefit of another person and detrimental to the right or interest of the maker of the admission himself through the use of specific wordings. Hanafi's definition also admission of a right enforceable against oneself for the benefit of another. *Al-iqrar* also means a statement, oral, documentary or using gestures, made by a person meaning to show that he is under some obligation to another person in respect of some right. *Al-iqrar* also as a means of proof, indeed Allah has said:

﴿بل الإنسان على نفسه بصيرة، ولو ألقى معاذيره﴾

Nay, Man will be evidence against himself even though he were to put up his excuses.

(Surah Al-Qiyamah 75: 14-15)

Allah further says:

﴿فليكتب وليملل الذي عليه الحق وليتق الله ربه﴾

So let him write. Let him who incurs the liability dictate but let him fear his Lord Allah.

(Surah Al-Baqarah 2:282)

Allah also says:

﴿يأيتها الذين ءامنوا كونوا قومين بالقسط شهداء لله ولو على أنفسكم﴾

O ye, who believe, stand out firmly for justice, as witnesses for Allah, even as against yourselves...

(Surah Al-Nisa' 4:135)

The admission has three types such as oral admission that made orally by witness who is capable of giving an oral testimony. Admission by signs that given by a person who is mute and dumb and written admission that made using ordinary paper (Mahmud Saedon A. Othman 2003:30-34).

According by fuqaha' *Al-iqrar* means inform a person will be convicted the right of other people to his self although for the time will be coming. But, not only as to inform, in the reality from the one part *iqrar* is *ikhbar* (one of the inform) and in other part that mean *insya'* (to create something) (Dr. Abdul Karim Zaidan 1993:70-71).

Besides that, the writer also mentioned that *al-iqrar* is admission or recognition, testimony of the existence of a proved right or interest against the maker of the admission himself. It also means a statement, oral, documentary or using gestures made by a person to show that he is under some obligation to another person in respect of some right. The *iqrar* have a relation with documentary evidence, which is in written. For example, if a person writing his admission or *iqrar* about property, after that somebody asks him either he made it as his admission. If he said yes, so it will be considered as admission or *iqrar*. If he said no, it is not admission. So, the *iqrar* also has a relation with documentary evidence, which is in written.

2.2.7 Al-Yamin (Evidence by Oath)

Al-yamin means "the right side" in the literal sense. It also means as "oath", a person who takes an oath usually does so by putting up his right hand. It also known as "*al-halaf*", "*al-istihlaf*" and "*al-qasam*". In the technical sense an oath is an utterance accompanied by the invocation of the name of Allah for purposively stating

by way oath. Oath is defined as the purposive improbable matter and strengthening such statement by invoking the name of Allah or by invoking one of his Attributes. Oath also is purposive way of making a statement over a probable matter or improbable matter coupled with the invocation of the name of Allah or His Attributes. It also used to strengthen or to clarify a thing so as to make it clear and therefore it will help towards clearing ambiguities. An example “*Wallahi*” and it also be taken by invoking the Attributes of Allah such as “*Al-Rahman*” and “*Al-Rahim*” (Mahmud Saedon A. Othman 2003:86-88). There are various evidence from the Qur’an and Sunnah, which proves that the oath is an acceptable means of proof. Allah says:

﴿لَا يَأْخُذُكُمْ اللَّهُ بِاللَّغْوِ فِي أَيْمَانِكُمْ وَلَكِنْ يُؤْخِذُكُمْ بِمَا عَقَدْتُمُ الْأَيْمَانَ، فَكَفَرْتُمْ إِطْعَامَ

عَشْرَةِ مَسْكِينٍ مِنْ أَوْسَطِ مَا تَطْعَمُونَ أَهْلِيكُمْ أَوْ كَسْوَتَهُمْ أَوْ تَحْرِيرَ رَقَبَةٍ فَمَنْ لَمْ يَجِدْ فَصِيَامَ

ثَلَاثَةِ أَيَّامٍ، ذَلِكَ كَفْرَةٌ أَيْمَانِكُمْ إِذَا حَلَفْتُمْ، وَاحْفَظُوا أَيْمَانَكُمْ، كَذَلِكَ يَبَيِّنُ اللَّهُ لَكُمْ آيَاتِهِ

لَعَلَّكُمْ تَشْكُرُونَ﴾

Allah will not call you to account for what is void in your oaths, but he will call you to account for your deliberate oaths: for expiation, feed ten indigent persons, on a scale of the average for the food of your families; or clothe them; or give a slave his freedom. If that is beyond your means, fast for three days. That is the expiation for the oaths ye have sworn. But keep to your oaths. Thus doth Allah make clear to you his Sign, that ye may be grateful?

(Surah Al-Ma'idah 5:89)

In another ayah Allah says:

﴿وَأَوْفُوا بِعَهْدِ اللَّهِ إِذَا عَاهَدْتُمْ وَلَا تَنْقُضُوا الْأَيْمَانَ بَعْدَ تَوْكِيدِهَا

وَقَدْ جَعَلْتُمُ اللَّهُ عَلَيْكُمْ كَفِيلًا، إِنْ اللَّهُ يَعْلَمُ مَا تَفْعَلُونَ﴾

Fulfill the Covenant of Allah when ye have entered into it, and break not your oaths after ye have confirmed them; indeed ye have made Allah your surety; for Allah knoweth all that ye do.

(Surah Al-Nahl 16:91)

Al-yamin also mean, ‘*al-Yamin al-Syar’iyyah*’ namely the oath of syari’e which it was be offered to the people which be claimed, where to oath with the name of Allah, like what was mentioned by many ulama’, because can’t oath with the other name other than Allah. (Dr. Abdul Karim Zaidan 1993: 126).

According to *al-yamin*, the writer concludes that *al-yamin* is “oath” or “the right side”, where the person who take an oath usually do it by putting up his right hand and invoking the name of Allah or by invoking one of his Attributes.

2.2.8 Al-Ra’yu Al-Khabir (Evidence by an Expert)

Al-ra’yu Al-khabir or expert evidence also one of the types of evidence or proof that accepted by Islam. It means “the testimony of a person skilled in a certain field”. In another definition, expert opinion is the opinion, evidence or testimony given by someone who is skillful in a field or issue (Mahmud Saedon A. Othman 2003:132-133). Islam has recognized expert opinion as a means of proof. The main argument of the ‘ulama for the admissibility of expert opinion are the following ayah of the Qur’an where Allah says:

﴿وَمَا أَرْسَلْنَا مِنْ قَبْلِكَ إِلَّا رِجَالًا نُوْحِيْ اِلَيْهِمْ، فَسْئَلُوْا اَهْلَ الذِّكْرِ اِنْ كُنْتُمْ لَا تَعْلَمُوْنَ﴾

And before thee also the messengers We sent were but men, to whom We granted inspiration: if ye realize this not, ask those who possess the message (Wisdom).

(Surah Al-Nahl 16:43)

Based on *al-ra'yu al-khabir*, the writer mentioned that it means “testimony of a person who is skilled in a certain field” or evidence that given by someone who is skillful in a field or issue.

2.2.9 *Al-Qiyafah* (Evidence to Establish Paternity)

Al-Qiyafah is the proving of a person’s *nasab* or paternity based on apparent similarities between that person and another person. A person skilled in the field of *qiyafah* is known as “*al-qa'if*”. During the early period of Islam the tribe of *Madlaj* was renowned for their expertise in the field of *qiyafah* (Mahmud Saedon A. Othman 2003:135).

The writer also concludes that *al-qiyafah* is a types of evidence that used to proving a person’s *nasab* based on apparent similarities between a person and another person. It also has relation with documentary evidence, which is the DNA report from medical center. Early period of Islam is different with nowadays. They use tribe of *madlaj* was renowned for their expertise in the field of *qiyafah* but nowadays report from medical center. So the medical report is a document in writing that include under the documentary evidence.

2.2.10 *Al-'Ilm Al-Qadi* (Evidence based on Personal Knowledge of a Judge)

Al-'ilm Al-qadi (knowledge of a judge) that mean here is information about the matter of claim (Dr. Abdul Karim Zaidan 1993: 138). In this evidence, there are two source knowledge and information from which the judge could have known about the facts and circumstances surrounding the case before him. Firstly, the judge could have obtained such knowledge in his capacity as an ordinary citizen of the state. In this situation it would not be proper for him to hear and try the case. Secondly, the judge could have also obtained such knowledge in his capacity as a judge of the trial and observing the parties to the case, their witnesses, inspection of site of crimes, exhibits (Mahmud Saedon A. Othman 2003:149).

While, according to *al-'ilm al-qadi*, the writer mentioned about the information or knowledge by the judge about a matter of claim. It also a two source, knowledge and information which a judge known about a facts and circumstances round the case before him, the main source of *al-'ilm al-qadi* is the judge should have obtained such knowledge in his capacity as an ordinary citizen of the state and the judge should have obtained such knowledge in his capacity as a judge of trial and observing the parties to the case.

2.2.11 *Al-Qasamah* (Oath to Deny Involvement in Murder)

Al-qasamah is Arabic word from *قسما أقسام* that mean *حلف حلفا* (oath) and what mean with *qasamah* from (fuqaha) is oath which be repeated in the case of claim to kill with the certain conditions. It was not to be obligation when know who the killer and the witnesses were gave the evidence of the offences by that Killer. In the reality that *qasamah*, obligation when don't know the killer although there have 'lauth' (the weak evidence) that *syubhah* or hazy in that killing where should be punish according by that evidence and it can be proved the true claim (Dr. Abdul Karim Zaidan 1993: 159)

Al-qasamah is also a way to avoid culpability for murder by taking an oath, which is repeated fifty times. The fifty oaths will be taken either by the accused or the accuser. In the literal sense *qasamah* means "oath". According to the legal sense, *qasamah* is a type of oath, which is repeated in a murder trial, uttered by fifty men amounting to fifty oaths. According to the Hanafis, *qasamah* is a type of proof to deny the charge against the accused. The majority of the jurists however are of the opinion that *qasamah* are a means of attributing liability for murder on the accused if there are no other means of proof available. There are various authorities from the Qur'an and Sunnah for validity of *Qasamah* as source of Evidence. Allah says:

﴿و من قتل مظلوما فقد جعلنا لولية سلطنا فلا يسرف في القتل،﴾

﴿إنه كان منصورا﴾

And if anyone is slain wrongfully, We have given his heir authority (to demand Qisas or to forgive...)

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(Surah Al-Isra' 17:33)

It has also been reported that the Prophet Muhammad s.a.w. had allowed qasamah to be used just as it was practiced during the jahiliyyah period.

The purpose of *qasamah* is to protect lives from being transgressed against; to ensure that murderers do not get away with murder and it stresses on the need for joint accountability in society as well as joint responsibility for ensuring the peace (Mahmud Saedon A. Othman 2003:159,161,162).

Besides that, based on *al-qasamah*, the writer concludes that *al-qasamah* is oath which be reported in the case of claim to kill with certain conditions. It will repeat fifty times. It also means attributing liability for murder on the accused if there are no other means of proof available.

2.2.12 *Li'an*

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Lian or otherwise known in English as “imprecation” is an oath taking process resulting in the separation of a husband from his wife due to his inability to prove a charge of adultery against his wife. In the literal sense *li'an* means to turn away or to exclude oneself from Allah's mercy, as a person who invokes *li'an* will also invoke the wrath of Allah if he is lying. From the shar'i sense, *li'an* consists specific and understood words used as argument for those who invoke it for the purpose of accusing their wife of *zina* or to deny their paternity over a child (Mahmud Saedon A. Othman 2003:173). The authority (*dalil*) for the admissibility of *li'an* in Islamic law of evidence stems from the Qur'anic ayah:

﴿والذين يرمون أزواجهم ولم يكن لهم شهداء إلا أنفسهم فشهادة أحدهم أربع شهادات

بالله إنه لمن الصادقين(6) والخمسة أن لعنت الله عليه إن كان من الكاذبين(7) ويدروا عنها

العذاب أن تشهد أربع شهد بالله إنه لمن الكذابين(8) والخمسة أن غضب الله عليها إن

كان من الصادقين (9) ﴿

And for those who launch a charge against their spouses, and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness four times (with an oath) by Allah that they are solemnly invoke the curse of Allah on themselves if they tell a lie. But it would avert the punishment from the wife, if she bears witness four times (with an oath) by Allah that (her husband) is telling a lie; and the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if (her accuser) is telling the truth.

(Surah Al-Nur 24:6-9)

According to *li'an*, the writer mentioned that *li'an* is an oath taking by a husband from his wife due to his inability to prove a charge of adultery against his wife. It means, to turn away or to exclude oneself from Allah's mercy. It consists specific and understood words that used as argument for those who invoke it for the purpose of accusing their wife of *zina* or to deny their paternity over a child.

2.2.13 Al-Qur'ah (Voting as Means of Evidence)

Sometime the voting can determine the right and to determine such as like to divide between the person in the Firm. The vote also can determine the person who will benefit of the right between them, which have the similar about the condition to take the benefit from that right. Nevertheless, maybe can be assume the vote is the one way for proving and the channel of punishment, but the ranking is last in the list of proving. The authority (*dalil*) for the accepted *al-qur'ah* or voting as a means evidence stems from the Qur'anic. Allah says:

﴿فساهم فكان من المدحضين﴾

He (agreed to) cast lots, and he was of the rebutted...

(Surah Al-Saffat 37:141)

Al-Qarafi said in his book “*al-Furuq*” mean that when any problem can be know or confirm the right to him, so can’t to do the vote with him and other people. But if existed similarity any right and important thing, so the vote must be do. It is because for avoid grievance and jealous. So they will alleviate what was happened. (Dr. Abdul Karim Zaidan 1993: 171-172).

Al-Qur’ah or voting also is a procedure to determine the person or party that is entitled to enjoy a right or interest among claimants who are equally entitled to such right or interest. At other instances voting may also be utilized as a means to differentiate classes of rights and to allocate or ascribe such rights to the parties who are partners in a business. It is not a method of giving evidence or proof but it is a way to determine and identify rights among those who are in partnership. Voting has also been the accepted practice of the previous Prophets. Allah says:

﴿ذَلِكَ مِنْ أَنْبَاءِ الْغَيْبِ نُوحِيهِ إِلَيْكَ، وَمَا كُنْتَ لَدَيْهِمْ إِذْ يُلْقُونَ أَقْلَمَهُمْ أَيُّهُمْ يَكْفُلُ مَرْيَمَ﴾

﴿وَمَا كُنْتَ لَدَيْهِمْ إِذْ يَخْتَصِمُونَ﴾

This is part of the tidings of the things unseen, which We reveal unto thee (O Prophet!) by inspiration: Thou wast not with them when they cast lots with pens, as to which of them should be charged with the care of Mary

(Surah Ali-Imran 3:44)

This ayah describes the case where the Prophet Zakaria (Zachariah) a.s. and the religious leaders of Palestine had at one time decided by way of voting to determine the guardianship over the Virgin Mary (Mahmud Saedon A. Othman 2003:193-194).

Based on *al-qur’ah*, the writer concludes that *al-qur’ah* is voting that use to differentiate the right and to determine something such as to divide between the person in the firm. The vote also can determine the right between them that have a

similarity with the condition. Nevertheless, the vote can differentiate the right, which is similar about the condition between them.

As the conclusion, according to the types and the ways of that proving is where every way of proving is important to convict any claim or the right of somebody, which used according by the claim. So, have also the ways and types of that proving which cause the different opinion between the fuqaha' in take the proving as the proof in their claim. Nevertheless, every claim must to take in the way of proving according by the types or the way of that proving and based on the types of evidence also some it can be said as having relation with documentary evidence but some of it was not.

Chapter III

Documentary evidence

3.1 What is Document?

Document is a something that records or transmits information, typically in writing on paper for the purposes of providing evidence to a court, documents include books, maps, plans, drawings, photographs, graphs, discs, tapes, soundtracks, and films. Some legal documents are only valid if they meet certain requirements. Documents that are to be used in court proceedings must be disclosed to the other party in a procedure known as disclosure and inspection of documents (Elizabeth A. Martin 2002: 160).

Document is also something on which things are written, printed or inscribed, and which gives information: any written thing capable of being evidence (Sherman 1998: 105). Beside that, document also means as follow; the first is written instrument, which may be used as evidence in a court. The second is a document of title gives the person holding it authority to deal with the goods represented thereby. The third is Public documents are documents of public record, example statutes, judgments, records of births, deaths and marriages, etc. and the last is private documents include contracts, wills, deeds, etc (Sinha&Dheeraj 1996: 63).

Document also means a paper, which can be relied upon as proof, or in support, of something. Under the Civil Evidence Act 1968(United Kingdom), section 10, a document was defined as, in addition to a document in written form: “(a) any plan, map, graph or drawing; (b) any photograph; (c) any disc, tape, soundtrack or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with without the aid of some other equipment) of being reproduced there from and (d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced there from”(L.B Curzon 1993 : 125).