



Tonga

EVIDENCE ACT

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EVIDENCE ACT

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EVIDENCE ACT

*Acts No. 11 of 1924, 20 of 1926, 10 of 1927, 11 of 1945,
9 of 1958, 10 of 1974, 4 of 1976, 12 of 1977,
22 of 1978, 23 of 1986, 46 of 1988*

AN ACT TO DECLARE THE LAW OF EVIDENCE

Commencement [17th August, 1926]

1 Short title.

This Act may be cited as the Evidence Act.

2 Interpretation.

In this Act —

“**Court**” means the Chief Justice and any judge, magistrate, or other person legally authorized to take evidence;

“**fact in issue**” means any fact in which in the course of any proceeding it becomes material for the Court to inquire in order to ascertain the respective rights and liabilities of the parties;

“**document**” means any matter expressed or inscribed for the purpose of recording such matter upon any substance by means of letters, figures or designs.

Illustration—

Words printed or photographed are documents. An inscription on a metal plate or stone is a document.

PART I - ADMISSIBILITY OF EVIDENCE

OF EVIDENCE GENERALLY

3 Facts which may be given in evidence.

In any proceeding, evidence may be given of the existence or non-existence of any fact in issue and also of—

- (a) any facts which though not in issue are so closely connected with any fact in issue as to form part of the same transaction whether they occurred at the same time and place or at different times and places;
- (b) any facts which are the cause or effect immediate or otherwise of any fact in issue or which afforded an opportunity for its occurrence;
- (c) any facts which explain the circumstances under which any fact in issue is said to have happened or which fix or help to fix the time or place of its occurrence;
- (d) any facts which show or constitute a motive or preparation for any fact in issue;
- (e) any fact tending to identify any person or thing whose identity is a fact in issue;
- (f) any facts in civil cases which may assist the Court to decide upon the amount of damages which ought to be awarded.

Illustrations—

A. is tried for causing B's death by beating him with a club with the intention of causing his death. Evidence may be given of the following facts which are in issue at A's trial—

A's beating B with the club;

A's intention to cause B's death by the beating;

A's causing B's death by such beating.

A sues B for the price of goods sold to him. B admits receipt of the goods but says he paid for them on a certain date which A denies. Payment or non-payment for the goods on that date is a fact in issue, and evidence given by B that on that date he posted a cheque or postal order for the

amount to A and received a receipt from him is admissible as evidence of a fact in issue.

A sues D for the price of goods sold to him. D denies receipt of the goods. Delivery or non-delivery of the goods is a fact in issue, and evidence that the goods were delivered by A to B, B to C, and C to D is admissible under (a) as evidence of facts so closely connected with the fact in issue as to form part of it.

A is accused of the murder of B by shooting him. Evidence that a witness who was in a room with B just before B was shot saw a man with a gun in his hand pass the window and exclaimed “There's the butcher” (nickname of the accused) is admissible under (a) as evidence of facts so closely connected with the fact in issue as to form part of the same transaction.

A is tried for stealing money from the person of B. The facts that just before the robbery B went to the races with money in his possession and that he showed it to other persons are admissible under (b) as evidence of facts which afford an opportunity for the occurrence of the fact in issue.

The question is whether A murdered B. Marks on the ground indicative of a struggle at or near the place where the murder was committed are admissible under (b) as facts which are the effect of the fact in issue.

The question is whether A poisoned B. Evidence is admissible under (b) of the state of B's health before the symptoms ascribed to poisoning, and of any habits of B known to A which would have afforded an opportunity for A to administer the poison.

The fact in issue being which of two vessels is to blame for a collision, evidence of the following facts is admissible under (c): the hour of the day or night; the state of the wind, weather, and tide; the course and speed of the two vessels at the time; the lights carried by each, and the parts of the vessels which came into collision.

A is charged with being a member of an unlawful assembly and failing to obey an order to disperse. The cries of the assembly are admissible under (c) as explanatory of the nature of the assembly.

A is tried for the murder of B. Evidence of the following facts is admissible under (d)— that B shortly before he was murdered had given evidence against A on a criminal charge, and that A had been heard to declare that he would be revenged on B; that a few days before the murder A had bought a knife which could have inflicted the wound that caused B's death; that before the murder A was observed near the place where it was committed (it may be proved in explanation by A that he had some independent reason for being there).

The question being whether a certain crime was committed by A or some other person, the opinion of a witness who was present when it was

committed that it was or was not A who committed it is admissible under (e).

4 Evidence of fellow conspirator.

Where in the opinion of the Court there is reasonable ground to believe that two or more persons have conspired together to commit an offence or civil wrong, evidence may be given against each of such persons of anything said, done, or written by any one of them in furtherance of their common purpose.

Illustrations—

A and B conspire to assault C with their fists. In the struggle C is killed by a blow from B. A and B are each criminally answerable for C's death.

A and B conspire to assault C with their fists. In the struggle B catches up an axe and kills C. A is not responsible for B's act as it was not done in furtherance of the common purpose.

A and B, employees at the Custom House, are charged with conspiring to pass goods through the Custom House without paying full duty. False entries made in the books by A for the purpose of carrying out the fraud are admissible against B.

5 Custom.

Where in any proceeding a question arises as to the existence of any right or custom evidence may be given of—

- (a) any transaction by which the right or custom in question was created, modified, recognised, asserted or denied or which was inconsistent with its existence;
- (b) particular instances in which the right or custom was claimed, recognised, or asserted, or in which its exercise was disputed, asserted, or departed from.

Illustration—

To prove a custom or usage of a trade evidence of particular instances in which the custom was acted on is admissible.

6 Course of business.

Where there is a question whether a particular act was done evidence may be given of the existence of any course of business according to which it naturally might or would have been done.

Illustrations—

To prove the posting of a letter: Evidence may be given that it was delivered to a clerk who, though he had no recollection of that particular letter, habitually took all letters delivered to him to the post. The question being whether A paid B his wages: A may show that his practice was to pay all his workmen regularly every Saturday night: that B was seen waiting with the rest to be paid and had not afterwards been heard to complain.

7 Acts showing intention.

Where there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, evidence may be given that the act formed part of a series of similar occurrences in each of which the person doing the act was concerned.

Illustrations—

A is accused of burning down his house in order to obtain money for which it is insured. The fact that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of such fires A received payment from a different insurance company, are admissible as evidence that the fires were not accidental. A is accused of attempting to pass coin knowing it to be counterfeit: The fact that other counterfeit coins were found in his possession, and that he had previously or subsequently uttered counterfeit coins of the same or different descriptions are admissible to show his knowledge.

8 Possession of stolen goods: evidence of previous conviction.

Where any person who has been previously convicted of any offence involving fraud or dishonesty, is found in the possession of stolen goods, evidence of such previous conviction shall be admissible as evidence of his knowledge that such goods have been stolen, and in any proceedings taken against him with reference to his having been found in possession of such goods proof may be given of his previous conviction before evidence is given of his having been found in possession of such stolen goods:

Provided that not less than 3 days written notice shall be given to such person that proof is intended to be given of his previous conviction.

Illustration—

A is tried for being in possession of certain property knowing it to be stolen. A has been convicted of theft a year previously and of obtaining money by false pretences 2 years ago. If the prosecution has given written notice to A not later than 3 days before his trial that proof of the 2 previous convictions will be given at the trial, the prosecution can give

proof of such convictions before giving any evidence of his having been found in possession of the stolen goods.

9 Possession of other stolen goods: evidence of other stolen goods.

Where proceedings are taken against any person for having in his possession stolen goods knowing them to have been stolen, evidence may be given that there were found in the possession of such person other goods stolen within the preceding period of 12 months, and such evidence may be taken into consideration for the purpose of proving that such person knew the goods to be stolen.

10 Evidence of state of mind, bodily feeling, etc.

Evidence showing the existence of any state of mind (such as intention, knowledge, good faith, negligence, ill-will or good-will towards any particular person) or showing the existence of any such state of body or bodily feeling may be given whenever the existence of any such state of body or bodily feeling is in issue or relevant:

Provided always that such evidence shall be strictly confined to showing that the state of mind or body existed in regard to the particular matter in question only and not generally.

Illustrations—

A sues B for negligence for hiring out to him a motor car not reasonably fit for use whereby A was injured. Evidence may be given of the fact that B's attention was drawn on other occasions to the defect of that particular car. Evidence that B was habitually negligent about the motors he let for hire is not admissible, being evidence not of B's negligence in relation to the particular matter in question but of B's general negligent disposition.

A sues B in a civil action for damages caused by B's dog attacking him. In order to show that B knew of the dog's mischievous propensities before it attacked A the facts that B had offered to pay compensation to another person that it had bitten, and had warned somebody else to beware of it, are admissible, so, too, is evidence that complaints about the dog's rushing at people had been made to B's wife who had charge of his business in his absence.

The question is what was A's state of health at the time when an assurance of his life was effected. Statements by A as to the state of his health at or near the time are admissible.

A is charged with dishonestly misappropriating property which he had found, and the question is whether he believed at the time of appropriating it that the real owner could not be found. The fact that public notice of the

loss of the property had been given in the town where A lives is admissible in evidence as showing that A did not in good faith believe that the true owner of the property could not be found.

11 Evidence of complaint in sexual offences.

In all criminal proceedings for rape or other sexual offences in order to corroborate the testimony of the person injured by the commission of the crime which forms the subject of the charge, evidence that such person at or shortly after the crime was committed voluntarily made a statement relating to its commission may be given. Such statement shall not in anywise be considered as constituting additional or independent evidence of the crime but only as showing that the person's conduct is consistent with his evidence at the trial.

(Amended by Act 11 of 1945.)

Illustration—

A is tried for the rape of B. Evidence may be given that a complaint was made by B shortly after the time when the offence is alleged to have been committed, and also of the particulars of such complaint so far as they relate to the charge against B.

12 Statements in historical books, records, charts, etc.

Statements relating to facts in issue or relevant facts and made in historical books and records or in maps or charts, either generally offered for sale to the public or prepared under the authority of the Government, are admissible as evidence of any matters of general information contained therein, but are not admissible to prove facts of a private nature.

13 Court's discretion with regard to statements in books, etc.

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

14 Meaning of relevancy.

When either party proposes to give evidence of any fact the Court may ask the party proposing to give the evidence in what manner the alleged fact if proved

would be relevant to the issues before the Court, and the Court shall admit the evidence if it thinks that the fact, if proved, would be relevant to the issue and not otherwise. Any fact of which evidence is admissible under the provisions of this Part of this Act shall be deemed to be relevant to the issues before the Court.

15 Order in which evidence is to be given.

If any particular fact is not admissible in evidence unless another fact has first been proved the judge may, in his discretion, either permit evidence of such first mentioned fact to be given before the second fact is proved, or may require evidence of the second fact to be given before evidence is given of the first mentioned fact.

Illustration—

A is accused of receiving stolen property knowing it to have been stolen. The prosecution proposes to give evidence that A denied being in possession of the property. The relevancy of the denial depends on the property being first identified. The Court may, in its discretion, either require the property to be identified before evidence of the denial of possession is given, or may permit the denial of the possession to be proved before the property is identified.

EVIDENCE OF ADMISSIONS

16 Definition of admission.

An admission is a statement oral or documentary relating to any fact in issue tending to the prejudice of the person making it with reference to that fact, or to the prejudice of some person responsible for that person's statements.

17 When admissions may be given in evidence.

- (1) Subjection to the provisions of subsections (2) and (3), evidence may be given against any party to a proceeding of any admission made—
 - (a) by such party; or
 - (b) by any person who, in the opinion of the Court, is under the circumstances of the case, expressly or impliedly authorized by such party to make such admission on his behalf; or
 - (c) by any person who is to be regarded for the purpose of the proceedings as having identical interests with such party; or
 - (d) by any person jointly interested with such party in the subject matter of the proceeding, except that the admissions of co-defendants shall not be receivable against each other; or

- (e) by any person who with reference to the subject matter of the proceeding is privy in blood (e.g. an ancestor and his heir) or privy in law (e.g. a testator and his executor, an intestate and his administrator) or privy in estate (e.g. a lessor and the lessee, successive bishops); or
 - (f) by any person to whom such party has expressly referred the other party for information regarding the matter in dispute.
- (2) No evidence shall be given of any admission made by any of the persons mentioned in paragraphs (c), (d) and (e) of this section unless such admission was made during the continuance of the interest or privity of the person making such admission.
- (3) No evidence shall be given of any admission by a party suing or sued as a trustee, guardian, agent, or in any other representative character unless the admission was made while the party held that character.

Illustrations—

A sues B for the price of goods sold, an entry in A's shop books debiting C and not B with the goods is evidence against A to disprove the debt under (a).

The question is whether A has paid his rent to B. An entry of payment made by C, B's rent collector, in the rent book is admissible under (b) to prove payment by A. A receipt for the amount signed by C is likewise admissible.

A and B, partners, sue for the recovery of goods belonging to the partnership. An admission made by A during the continuance of the partnership that they were his sole property is admissible under (d) against A and B to defeat the joint claim.

A sues B to recover a watch which B the administrator of C claims as part of C's goods: a declaration by C that he had given the watch to A is admissible under (e) against B.

The question is whether a horse sold by A to B is sound. A before the action told B to "Go and ask C, he knows all about it". Any statement as to the soundness of the horse made by C to B will be admissible against A under (f).

A demands payment from B for goods sold. B says "I don't remember receiving them, but if C, your drayman, says he delivered them I'll pay you". C's statement that he delivered the goods is evidence of that fact against B under (f).

18 Limitation upon admission in civil proceedings.

No evidence shall be given in any civil proceeding of any admission which was made either upon an express condition that evidence of it should not be given, or under circumstances from which the Court can infer that the parties agreed that evidence of it should not be given:

Provided that nothing in this section shall exempt any lawyer from giving evidence of any matter of which he may be compelled to give evidence under section 135.

19 Admission under illegal compulsion.

No evidence shall be given of any admission which was made under illegal compulsion.

EVIDENCE OF CONFESSIONS**20 Definition of confession.**

A confession is an admission made at any time by a person accused of an offence stating or suggesting that he committed the confession offence.

21 Confession caused by inducement etc.; not admissible.

No evidence shall be given of any confession in any criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise relating to the charge, and proceeding either from the prosecutor or from some other person having authority over the accused person and sufficient in the opinion of the Court to afford the accused person reasonable grounds for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in regard to the proceeding against him:

Provided that where any fact has been discovered as the result of information contained in any such confession evidence may be given of such fact and of so much of the confession as strictly relates to such fact.

Illustration

B's watch is stolen. A is arrested on suspicion, and a police inspector tells him "you had better confess, it will be better for you". A thereupon makes a confession in the course of which he says "I hid the watch in a hole at the foot of a big ovava tree near the church at Vaini". The police discover the watch there. Without the discovery of the watch no part of A's confession would have been admissible, having been procured by the inducement of the police, but as the watch has been found as the result of

the confession, so much only of the confession as relates to the hiding of the watch would be admissible.

22 When confessions are admissible.

It shall be no objection to the admissibility in evidence of a confession that it was made—

- (a) under a promise of secrecy; or
- (b) in consequence of a deception practised on the accused person for the purpose of obtaining such confession; or
- (c) when the person making it was drunk; or
- (d) in answer to questions which the person making the confession need not have answered; or
- (e) without any warning having been given to the person making it that he was not bound to make such a confession and that evidence of it might be given against him:

Provided always that where a confession is alleged to have been made to a police officer by the accused person while in custody and in answer to questions put by such police officer, the Court may in its discretion refuse to admit evidence of the confession.

23 Confession in the course of proceedings.

It shall be no objection to the admissibility in evidence of a confession that it was made by a person while under examination as a witness in a judicial proceeding:

Provided always that if in the course of such examination he shall have refused to answer any questions and shall have been improperly compelled to do so evidence shall not be given of the answer to any such question.

EVIDENCE OF OPINION

24 General rule.

- (1) Where the Court has to form an opinion as to the identity or genuineness of handwriting, or upon any point of foreign law, or of science, art, trade, manufacture, or any other subject requiring special knowledge or skill, evidence of their opinions may be given by any persons who, in the opinion of the Court, are possessed of special knowledge or skill in the particular subject under consideration.

Written statement may be admitted.

- (2) In any proceedings in which expert evidence is to be adduced a statement by such expert containing—
- (a) his qualifications and experience; and
 - (b) such facts as are within his own knowledge; and
 - (c) such facts as have been communicated to him by others, identifying the sources of such facts; and
 - (d) his opinion; and
 - (e) his signature,

may, at the discretion of the Court, be admitted and shall be prima facie evidence of (a), (b), (d) and (e) herein:

Provided that a copy of the statement has been served on the accused in sufficient time for him to give effective notice that he requires the expert to attend for cross examination.

Provided further that if an accused person who has given such notice is convicted he may be ordered to pay the costs of the attendance of the expert. (*Inserted by Act 12 of 1977.*)

Illustrations—

The question being whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. Persons specially skilled in questions of handwriting may, after comparing the two documents, give evidence whether in their opinion the documents were written by the same or different persons.

The question being whether A's death was caused by poison. Medical witnesses who attended A at his death or who assisted at the post mortem or who analysed the remains may give their opinions upon the point.

The question being whether A at the time of committing a crime was by reason of unsoundness of mind incapable of knowing the nature of the act or of knowing that what he was doing was wrong or contrary to law. A medical witness who has examined A may give his opinion that the unsoundness of mind from which A suffers is of a kind that either renders persons incapable of knowing the nature of the acts they do or of knowing that what they do is wrong or contrary to law.

25 Expert may refer to books and writings.

An expert in giving his opinion may refer to books or writings in support of such opinion and the Court may consider and construe such books and writings in conjunction with his evidence.

26 Opinion of handwriting.

- (1) Where the Court has to form an opinion as to the person by whom any document was written or signed, any person acquainted with the handwriting of the person by whom such document is alleged to have been written or signed may give evidence that in his opinion it was or was not written or signed by that person.
- (2) A person shall be deemed to be acquainted with the handwriting of another person when he has either seen that person write, or has received documents purporting to be written by that person in reply to documents written by himself or by his direction and addressed to that person, or when in the ordinary course of business documents purporting to contain that person's handwriting have habitually come under his notice.

Illustrations—

The question is whether a certain letter is in the handwriting of A a person living in Australia. The opinions of B a person living in Tonga who has written to and received letters purporting to come from A, or of C, B's clerk who has constantly read such letters are admissible although neither B nor C have ever seen A write. To prove the handwriting of A, a deceased clergyman, to a document eighty years old, the opinion of B his successor who only knows A's writing from various old signatures of A in church registers in B's custody is admissible.

EVIDENCE OF REPUTATION**27 Existence of general custom.**

- (1) When the Court has to form an opinion as to the existence of any general custom or right, evidence may be given of general reputation with reference to such custom or right among persons who would be likely to know of its existence.
- (2) The expression “general custom or right” in this section includes any custom or right common to any considerable class of persons.

Illustration—

Evidence of the inhabitants of a town is admissible as to the boundaries of such town.

28 Existence of relationship.

When the Court has to form an opinion as to the relationship of one person to another evidence may be given of general reputation regarding such relationship among persons who would be likely to know of its existence:

Provided that no such evidence shall be admissible for the purpose of proving a marriage in prosecutions for bigamy.

Illustration—

The question being whether A was the legitimate son of B. Evidence that he was always looked upon and treated as such by the members of the family is admissible.

CHARACTER OF PARTIES IN CIVIL PROCEEDINGS**29 When evidence of good character may be given.**

In civil proceedings evidence may not be given that a party to the proceedings bears a good character in any respect unless—

- (a) the character of such party in that respect is a fact in issue; or
- (b) evidence has already been given to show that such party bears a bad character in that respect.

Illustrations—

A, a surgeon, sues B for damages for a libellous letter of B's alleging want of competence and skill on A's part as a surgeon in his treatment of B's wife. A may not give evidence of his general character for competence and skill as a surgeon, the fact in issue being, not A's general character in such respects but his competence and skill on a particular occasion.

A sues B for breach of promise of marriage. B as a defence to the action gives evidence that after the promise A became unchaste. A may give evidence of her good moral character.

30 When evidence of bad character may be given.

In civil proceedings evidence may not be given that a party to the proceedings bears a bad character in any respect unless—

- (a) the character of such party in that respect is in issue; or
- (b) damages are claimed for any wrong done to or in connection with such person and the evidence is tendered with a view to the reduction of such damages.

CHARACTER OF PARTIES IN CRIMINAL PROCEEDINGS.

31 Accused may give evidence of his good character.

In criminal proceedings evidence may be given of the good character of the person accused but evidence may not be given of his bad character unless evidence has been given or questions asked to show that he bears a good character.

32 Evidence of previous convictions in certain cases.

In the following cases; that is to say—

- (a) where a person is being tried in the Supreme Court for any crime not being a crime punishable with death, and such person has been previously convicted of any crime other than non-payment of taxes or neglect to clean town allotments or road frontages; or
- (b) where a person is being tried in a Magistrate's Court for larceny or for any offence declared to be punishable as larceny or for obtaining goods by false pretences or for receiving property knowing it to have been stolen or for any other offence involving fraud, and such person has been previously convicted of any crime other than non-payment of taxes or neglect to clean town allotments or road frontages,

if the person accused calls witnesses to show that he bears a good character or asks questions with that object, evidence may be given of such previous conviction or convictions.

33 Character of prosecutrix in rape, etc.

- (1) If at a trial any person is for the time being charged with rape or with indecent assault to which he pleads not guilty, then, except with the leave of the Judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.
- (2) The judge shall not give leave in pursuance of sub-section (1) for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant, and on such an application the Judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.

- (3) In subsection (1) “complainant” means a woman upon whom, in a charge for a rape or an indecent assault to which the trial in question relates, it is alleged that rape or indecent assault was committed, attempted or proposed.
- (4) Nothing in this section authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

(Substituted by Act 23 of 1986.)

34 Character evidence generally.

Evidence of character shall be confined to general reputation only and shall not relate to particular acts of good or bad conduct. *(Substituted by Act 23 of 1986.)*

PART II. - OF FACTS WHICH NEED NOT BE PROVED, GENERAL PRESUMPTIONS: AND PRESUMPTION AS TO DOCUMENTS

FACTS WHICH NEED NOT BE PROVED

35 Judicial notice.

No matter which this Act provides that the Court shall take judicial notice of, need be proved.

36 Subjects for judicial notice.

The Court shall take judicial notice of the following matters—

- (a) any laws or rules having the force of law now or heretofore in force or which may hereafter be in force in the Kingdom;
- (b) the course of proceedings of the Legislature of the Kingdom;
- (c) the accession and the sign manual of the Sovereign for the time being of the Kingdom;
- (d) the Seals of the Superior Courts of any Commonwealth territory, the Seal of the Privy Council, and Seals of all Courts of the Kingdom, the Seals of all Notaries Public in any Commonwealth territory, and all seals which any person is authorized to use by any law in force for the time being in the Kingdom; *(Amended by Act 23 of 1986.)*

- (e) the names, titles, functions and signatures of the persons filling for the time being any public office in any part of the Kingdom if the fact of their appointment is notified in the Gazette;
- (f) any Commonwealth territory; (*Substituted by Act 23 of 1986.*)
- (g) the commencement, continuance, and termination of hostilities between any State and any other State or body of persons; (*Amended by Act 23 of 1986.*)
- (h) The names of the members of the Courts of the Kingdom and of their subordinate officers and clerks, and also of all lawyers authorized to appear and act before the Courts of the Kingdom;
- (i) the rule of the road on land or at sea;
- (j) all other matters which the Court is directed by any Statute to notice.

37 Court may resort to works of reference.

- (1) In all cases enumerated in section 36 and also on all matters of public history, literature, science or art, the Court may resort for its assistance to appropriate books or documents of reference.
- (2) If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until the person produces any such book or document as it may consider necessary to enable it to do so.

38 Admitted facts.

No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands:

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

GENERAL PRESUMPTIONS

39 Official capacity.

Where a person is proved to have done any act in any official or judicial capacity the Court shall presume until the contrary is shown that all conditions were fulfilled which were necessary to give validity to such act.

40 Possession of stolen property.

Where a person is found in the possession of property proved to have been recently stolen he shall be presumed to have stolen it or to have received it knowing it to have been stolen unless he shall give some satisfactory explanation of the manner in which it came into his possession.

41 Continuance of life.

Where a person is proved to have been alive at any date the Court shall presume until the contrary is shown that he continued alive up to any subsequent date which it may consider reasonable having regard to the age of the person and the other circumstances.

42 Death after 7 years.

Where any person is proved not to have been heard of for 7 years after proper inquiry by those who naturally would have heard of him if he had been alive the Court shall presume until the contrary is shown that he is dead, but the Court shall not make any presumption as to the time of his death, and the burden of proof that he died at any particular time shall be on the person who asserts it.

43 Validity of marriage.

Where a marriage is proved to have been celebrated the Court shall presume unless the contrary is conclusively proved that all conditions were fulfilled which were necessary to give validity to such marriage.

44 Legitimacy.

Where a person is proved to have been born during the continuance of a valid marriage between his mother and any man, or is proved to have been born after the dissolution of such marriage by death or a decree of divorce, the mother remaining unmarried and the birth of the person occurs within the natural period of gestation reckoning the same from the date of the dissolution of the marriage, the Court shall presume conclusively that he is the legitimate son of that man, unless it is shown by evidence, other than that of the parties to the marriage, that such parties had no access to each other at any time when he could have been begotten.

45 Incapacity.

A boy under the age of 13 years shall be conclusively presumed to be incapable of committing rape.

46 Innocence.

The Court shall not presume in the absence of evidence that any person has committed any crime.

PRESUMPTIONS AS TO DOCUMENTS**47 Proper signing and sealing of documents.**

When any document is produced before a Court purporting to be a document which by any Act at the time in force is admissible in evidence if signed or stamped or sealed or otherwise authenticated as required by this Act, the Court shall presume, until the contrary is shown—

- (a) that the signature, stamp, seal or other authentication of the document is genuine; and
- (b) that the person signing, stamping, sealing or otherwise authenticating it had at the time he did so the official or other position which he purported to have.

48 Truth of documents of record.

Whenever any document is produced before any Court purporting to be—

- (a) a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding in any Court,
- (b) a statement or confession by any prisoner or accused person taken in accordance with law,

and purporting to be signed by any judge, magistrate, or by any clerk whose duty it is to take down and transcribe such evidence, the Court shall presume until the contrary is shown—

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

49 Adoption of English rule.

When any document is produced before any Court, and it is proved to the satisfaction of the Court that by the law in force for the time being in England such document would be admitted in evidence of any Court of Justice in England without proof of the seal or signature authenticating it, or of the judicial

or official character of the person by whom it purports to be signed, the Court shall presume until the contrary is shown—

- (a) that the seal, stamp or signature is genuine;
- (b) that the person authenticating it held at the time of doing so the judicial or official character which he purported to have.

50 Genuineness of documents.

The Court shall presume until the contrary is shown the genuineness—

- (a) of every notice purporting to be a Government notice in any document purporting to be the official newspaper or the official Gazette of the Kingdom;
- (b) of every document purporting to be the London Gazette or the Government Gazette of any Commonwealth territory; (*Amended by Act 23 of 1986.*)
- (c) of every document purporting to be a newspaper or journal;
- (d) of every document purporting to be a document directed by law to be kept by any person if the document is kept substantially in the form required by law and is produced from the proper custody as defined by section 57 of this Act;
- (e) of the contents of every document executed or authenticated either by a Tongan Notary Public or by a Foreign Notary Public. (*Inserted by Act 4 of 1976.*)

51 Government publications.

The Court shall presume until the contrary shown the genuineness—

- (a) of every book purporting to be printed or published under the authority of the Government or of the Legislature of any country and contain any of the laws of such country;
- (b) of every book purporting to contain reports of decisions of the Courts of that country.

52 Powers of attorney.

The Court shall presume until the contrary is shown that every document purporting to be a power of attorney and to have been executed and authenticated by a notary public or any court, judge or magistrate in any Commonwealth territory or by a High Commissioner (Consul or Vice-Consul) or other representative of a Commonwealth territory was so executed and authenticated. (*Amended by Act 23 of 1986.*)

53 Maps, charts, books.

The Court may presume, until the contrary is shown, that any book to which it may refer for information on matters of public or general interest and that any published map or chart, which is produced for its inspection, was written and published by the person and the time and place by whom or at which it purports to have been written or published.

54 Telegraphic Messages.

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

55 Documents called for and not produced.

The Court shall presume, until the contrary is shown, that called for every document called for and not produced after notice to produce given under section 68 hereof was attested, stamped, and executed in the manner required by law.

56 Ancient documents.

Where any document purporting or proved to be 30 years old is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of the document which purports to be in the handwriting of any particular person is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

57 Definition of proper custody.

For the purposes of section 56 and section 50(d), documents are said to be in proper custody if they are in the place in which, and under the care of the persons with whom, they would naturally be expected to be found; or if they are in any custody which is proved to have had a legitimate origin, or which the Court considers legitimate.

58 Alterations in deeds, wills and documents.

The Court shall presume, until the contrary is shown—

- (a) that any alteration or interlineation appearing on the face of a deed was made before the deed was completed;
- (b) that any alteration or interlineation appearing on the face of a will was made after the will was executed;
- (c) that any alteration or interlineation appearing on the face of any document was made at such a time and under such circumstances as not constitute an offence against the law.

59 Effect of material alteration.

A person producing a document which appears on the face of it to have been altered in any material particular shall not be permitted in any proceeding to claim against any party thereto or his representative in interest any right created by such document, unless the alteration was made before the completion of the document, or with the consent of the party to be charged under it or his representative in interest, or unless he shall prove to the Court that the alteration was made unintentionally or under a mistake or without his authority. An alteration for the purposes of this section shall be deemed material when if it had been made with the consent of the party affected thereby it would have affected his interest or varied his obligations under the document.

PART III. - OF ORAL AND DOCUMENTARY EVIDENCE AND OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

ORAL EVIDENCE

60 Contents of documents not provable by oral evidence.

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

61 Definition of direct evidence.

Oral evidence must in all cases whatever be direct; that is to say—

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

- (c) if it refers to a fact which could be perceived by any other sense or in other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner;
- (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

DOCUMENTARY EVIDENCE

62 Documents proved by primary evidence.

The contents of documents must be proved by primary evidence except that in the cases mentioned in sections 66 and 67 they may be proved by secondary evidence.

63 Definition of primary evidence.

Primary evidence means the document itself produced to the Court, and—

- (a) where a document is executed in several parts each part is primary evidence of the document;
- (b) where a document is executed in counterpart each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it;
- (c) where a number of documents are all made by printing, photography or other uniform process, each is primary evidence of the contents of the others; but where they are all copies of a common original they are not primary evidence of the contents of the original.

64 Definition of secondary evidence.

Secondary evidence means and includes —

- (a) certified copies given under the provisions contained in 92 and 93;
- (b) copies made from the original by mechanical processes which insure accuracy of the copy and copies compared with such copies;
- (c) copies made from or compared with the original;
- (d) counterparts of documents as against the parties who did not execute them;
- (e) oral accounts of the contents of any document given by some person who has himself seen it.

Illustrations—

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

A copy transcribed from a copy but afterwards compared with the original is secondary evidence, but if the transcribed copy is not compared with the original it is not secondary evidence of the original even though the copy from which it was transcribed was compared with the original.

Neither an oral account of a copy compared with the original nor an oral account of a photograph or machine copy of the original is secondary evidence of the original.

65 Production of documents and objection to produce.

The Court may order any person summoned before it in the course of any proceeding to produce for the purpose of primary evidence any document in his possession or power, except in the following cases—

- (a) where the document is a document of title and the title of a person may be affected by the production of such document;
- (b) where the production of the document may tend to expose the person producing it or the husband or wife of such person to a criminal charge or to any penalty or forfeiture;
- (c) where he holds the document as mortgagee or pledge;
- (d) where he holds a lien on the document as against the person claiming its production;
- (e) where he holds the document under the authority of some person entitled to refuse its production and such person has refused to allow it to be produced;
- (f) where the person is a public officer and the document is a communication made to him in official confidence, and the Minister in control of the Department concerned considers the public interests would be likely to suffer by its disclosure; (*Amended by Act 23 of 1986.*)
- (g) where the document is an unpublished record relating to affairs of state and the Minister in control of the Department concerned withholds his permission to its production; (*Amended by Act 23 of 1986.*)
- (h) where the document is a communication made by a wife to her husband or by a husband to his wife during the continuance of the marriage.

66 Secondary evidence admissible if objection is upheld.

Where a person has been subpoenaed to produce a document, or being called as a witness has been asked to produce a document, and has objected to do so on any of the grounds mentioned in section 65, and his objection has been upheld by the Court, secondary evidence may be given by another person of the existence and contents of such document, except in cases (f), (g) and (h) of section 65. In no case shall the person whose objection has been so upheld by the Court be asked any question as to the contents of the document.

67 Secondary evidence of lost evidence.

Secondary evidence may also be given in the following cases of the existence and contents of any document which would itself be admissible in evidence—

- (a) when the original has been destroyed or lost and proper search has been made for it;
- (b) where the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved; and when after the notice mentioned in section 68 he does not produce it;
- (c) when the original is of such a nature as not to be easily moveable or is in a country or place from which its removal is not by law permissible;
- (d) when the original is a public document within the meaning of section 91;
- (e) when the original is a document of which a certified copy is permitted by this Act or any other Act in force for the time being in the United Kingdom to be given in evidence;
- (f) when the original consists of numerous accounts of other documents which cannot conveniently be examined in Court and the fact to be proved is the result of a whole collection;
- (g) any entry in a banker's books provided that it is proved either orally or by affidavit—
 - (i) that the book in which the entry appears was at the time of making the entry one of the ordinary books of the bank;
 - (ii) that the book is in the custody or control of the bank;
 - (iii) that the entry was made in the usual and ordinary course of business;
 - (iv) that the copy of the entry tendered in evidence has been examined with the original entry and found correct.

In cases (a), (b) or (c) any secondary evidence is admissible. In cases (d) or (e) a certified copy of the document but no other kind of secondary evidence is admissible.

In case (f) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents.

68 Secondary evidence after notice to produce, etc.

Secondary evidence of the contents of the documents referred to in paragraph (b) of section 67 shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, such notice to produce it as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—

- (a) when the document to be proved is itself a notice which has been served on the adverse party;
- (b) when from the nature of the case the adverse party must know that he will be required to produce it;
- (c) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (d) when the adverse party or his agent has the original in Court;
- (e) when the adverse party or his agent has admitted the loss of the document.

69 Proof of facts necessary to render secondary evidence admissible.

Any witness while giving evidence may be asked whether any contract or disposition of land or property as to which he is giving evidence was not contained in a document, and if he says it was, the adverse party may object to such evidence being given until such document is produced or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

70 Court may require production of documents.

Where a witness while giving evidence is about to make any statement as to the contents of a document which, in the opinion of the Court, ought to be produced, the Court may require such document to be produced or the proof of such facts

as would entitle the party who called the witness to give secondary evidence of such document.

71 Proof of attested document by calling attesting witness.

Any document which is required by law to be attested shall not be used as evidence until one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive who is subject to the jurisdiction of the Court and capable of giving evidence. The calling of an attesting witness shall not be excused on the ground that the document has been lost or destroyed.

Illustration—

A sues B on foot of a Tohi Aleabau for \$25 for goods sold. A must call the attesting witness to the Tohi Aleabau to prove its execution, for by section 6 of the Contract Act a Tohi Aleabau is required to be attested by at least one witness.

72 Proof of handwriting of attesting witness.

If no such witness to a document required by law to be attested can be found or if the document purports to have been executed in the United Kingdom, Australia, or New Zealand it must be proved that the attestation of one attesting witness at least is in handwriting and that the signature of the person executing the document is in the handwriting of that person.

73 Non-recollection by attesting witness.

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

74 Admission of part to attested document.

The admission of a party to an attested document that it was executed by him shall be sufficient proof of its execution as against him even if it is a document which is required by law to be attested.

75 Modes of proof of unattested documents.

An attested document not required by law to be attested may be proved as if it were unattested; that is to say where the document is alleged to have been signed or to have been written wholly or in part by any person the signature or the handwriting of so much of the document as is alleged to be in that person's

handwriting must be proved to be in his handwriting. Such proof may be given in any of the following ways:

- (a) by calling such person; or
- (b) by calling a witness who saw the document signed; or
- (c) by calling a witness who has acquired a knowledge of such person's writing in any of the ways mentioned in section 26(2); or
- (d) by the admissions of the party against whom the document is tendered; or
- (e) by the comparison of the handwriting with any other document which is proved to the satisfaction of the Court to be in such person's handwriting.

76 Comparison of handwriting.

In order to ascertain whether any signature or writing is that of the person by whom it purports to have been written, any signature or handwriting or writing admitted or proved to the satisfaction of the Court to have been written by that person may be compared by a witness or by the Court or the jury with the one which is to be proved, although that signature or writing would not be admissible as evidence for any other purpose.

77 Power of Court.

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

EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

78 General rule.

Save as in this section hereinafter provided where—

- (a) any judgment of any Court or any other judicial or official proceeding, or
- (b) any contract or disposition of land or property, or
- (c) any other transaction required by law to be in documentary form,

has been reduced to the form of a document or documents, no evidence shall be given of the terms thereof except the document itself, or secondary evidence of its contents in cases where secondary evidence is admissible under section 66 or 67:

Provided that

- (a) oral evidence of any transaction shall not be excluded by reason of the fact that a memorandum not intended to have any legal effect was made of such transaction;
- (b) oral evidence of the fact that a person has discharged the duties of a public office shall be admissible as evidence that such person holds that office although he was appointed thereto in writing;
- (c) wills admitted to probate in the Kingdom may be proved by production of the probate.

79 Oral evidence inadmissible to vary or contradict a document.

Save as in this section hereinafter provided where any transaction has been reduced to the form of a document, no evidence of any oral agreement or statement shall be admitted as between the parties to such document or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:

Provided that—

Exceptions to rule.

- (a) evidence may be given to any fraud, duress, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, error in date, mistake of fact or any other matter which would invalidate the document or entitle any person to any order or relief relating thereto;
- (b) evidence may be given to any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms if the Court from the circumstances of the case infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them;
- (c) evidence may be given of any separate oral agreement constituting a condition precedent to the attaching of any obligation under a document;
- (d) evidence may be given of any distinct subsequent oral agreement to rescind or modify the terms of a document provided that the transactions set out in the document are not required by law to be put in the form of a document;
- (e) evidence may be given of any usage or custom by which any incident not expressly mentioned in any agreement is annexed to contracts of that description unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract;

- (f) evidence may be given of any fact which shows in what manner the language of a document is related to existing facts.

Illustrations—

A sends to B a written application for repayment of his debt and encloses a receipt for the amount. B keeps the receipt but does not send the money, and when sued for the amount says he has paid it and produces the receipt as evidence. A may prove under (a) the circumstances under which B got possession of the receipt.

A sells B a horse and verbally warrants him sound. A gives B a paper in these words “Bought of A a horse for \$20”. If the horse proves unsound B may sue for damages and prove under (b) the verbal warranty.

A sues B for non-fulfilment of a written agreement. Evidence is admissible under (c) that B signed the document on the understanding between himself and A that it was not to operate as an agreement unless a certain condition was performed.

A sues B for the price of goods sold to B under a Tohi Aleabau. Oral evidence that after the Tohi Aleabau had been executed it was agreed verbally between A and B that B should not be called on to pay for the goods for a period which is still unexpired is not admissible because the transaction set out in the Tohi Aleabau is one which is required by section 3 of the [Contract Act](#) to be in writing.

A employs B as a labourer and gives him a paper in these words “Wages \$1 per week”, Evidence that it is a customary incident of contracts with labourers in Tonga that the employer provides their food is admissible.

80 Ambiguous or defective documents.

When the language used in a document is on its face ambiguous or defective no evidence shall be given of facts which would show its meaning or supply its defects:

Provided that nothing herein contained shall be deemed to take away the power of the Court to order documents to be rectified or other like equitable relief or remedies.

Illustrations—

A will leaves \$100 to..... No evidence is admissible to supply the missing name. Similarly if a Tohi Aleabau or a Lease contains

blanks evidence cannot be given of facts which would show how they were meant to be filled.

A agrees in writing to sell a horse to B for \$50 or \$60. No evidence can be given to show which price was to be given.

81 Documents applying accurately to existing facts not to be contradicted.

When the language used in a document is plain in itself and when it applies accurately to existing facts evidence shall not be given accurately to show that it was not meant to apply to those facts.

Illustration—

A by his will bequeaths to B his four-roomed wooden house at Houma. A has a wooden house at Houma containing four rooms. Evidence may not be given that the house was situated at a different place and of a different size

82 Documents unmeaning in reference to existing facts.

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

Illustration—

A by his will bequeaths to B “my house at Foui”. A had no house at Foui but it appears that he had a house at Nukunuku of which B was in possession at the time the will was executed. These facts may be proved to show that the will related to the house at Nukunuku.

83 Identification of person or thing mentioned in document.

When the facts are such that the language used in a document might have been meant to apply to any one and could not have been meant to apply to more than one of several persons or things. evidence may be given of facts which show to which of those persons or things it was intended to apply.

Illustrations—

A agrees to sell to B for \$20 “my white horse”. A has two white horses. Evidence may be given of facts which show which horse was meant.

A by his will leaves \$20 “to my niece Jane”. A has two nieces of that name. Evidence may be given to show which niece was intended.

84 Conflicting set of facts.

When the language used in a document applies partly to one set of existing facts and partly to another set of existing facts but the whole of the language does not apply correctly to either set of facts evidence may be given to show to which of the two it was meant to apply.

Illustration—

A agrees to sell to B “my house at Neiafu in the occupation of C”. A has a house at Neiafu but not in the occupation of C, and he has a house in the occupation of C, but it is not at Neiafu. Evidence may be given to show which he meant to sell.

85 Illegible or special terms.

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

Illustration—

A by his will leaves “to B the sum of i.x.x. and to C the sum of o.x.x.” Evidence may be given that A was a jeweller by trade, and had habitually used those symbols to represent £100 and £200 respectively.

86 Evidence of collateral agreement.

Evidence may be given on behalf of persons who are not parties to a document or their representatives in interest, of any facts tending to show a contemporaneous agreement varying the terms of such document.

Illustration—

A and B make a contract in writing that B shall sell A certain sugar to be paid for on delivery. At the same time they make an oral agreement that 3 months credit shall be given to A. Owing to section 79(b) evidence of this oral agreement could not be given as between A and B but it might be given by C in any suit if it affected his interests.

87 Rule as to wills.

The rules prescribed by sections 80 to 86 shall apply to the construction of wills.

PART IV. - HEARSAY EVIDENCE

88 Definition of hearsay evidence.

Where it is sought to prove any fact by evidence except in oral or written statement made by any person not called as a witness, such evidence is called hearsay evidence.

89 General rule.

The Court shall not admit hearsay evidence except in the following cases:

Exceptions.

- (a) Where the statement forms part of the fact or transaction which is being investigated by the Court;
- (b) where the death of any person is the subject of a criminal charge and a statement as to the circumstances relating to his death was made by such person while in the actual expectation of death and without hope of recovery;
- (c) where the statement was made in the presence and in the hearing of the person against whom the evidence is tendered and where the person had an opportunity of replying to such statement;
- (d) where the statement is an admission or confession made by or to the prejudice of the party against whom it is sought to be proved but subject to the provisions of sections 17 to 23;
- (e) where the knowledge, intention, motive or state of mind or of body of any person is a fact in issue and the statement proves or disproves the said knowledge, intention, motive or state of mind or body;
- (f) where the statement refers to a fact in issue or a fact relevant to a fact in issue and is contained in any official book, register or record and was made by a public servant in discharge of his official duty or by any other person in performance of a duty enjoined by the law of the country in which such book, register or record is kept;
- (g) where the statement was made in the ordinary course of business by a person since dead and is an account or record of some act done by that person which it was both his duty to do and to record or near the time of its being done;
- (h) where the statement was made either by a person since dead or by some person authorized to make such statement on his behalf and was made against his pecuniary or proprietary interest provided the person making it had no interest to misrepresent the matter stated.

A statement charging a person with a liability in one part of it and in another part discharging him from such liability is a statement against his pecuniary or proprietary interest;

- (i) where the statement was made by a person since dead and gives the opinion of such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware and if such statement was made before any controversy as to the right custom or matter had arisen;
- (j) where the existence of any relationship by blood or marriage is a fact in issue and the statement relates to the existence of such relationship and was made by a person since dead, and provided it is proved to the satisfaction of the Court that such person was himself related by blood or marriage to the parties thereto and that the statement was made before the question in dispute had arisen;
- (k) where the statement was made as to his testamentary intentions by a deceased testator either before or after the execution of his will and such statement tends to show—
 - (i) what documents constitute a will; or
 - (ii) that a will in the testator's custody and not forthcoming at his death had not been destroyed or cancelled by him; or
 - (iii) what were the contents of his will which has been lost;
- (l) where the statement consists of evidence given by a witness in any previous civil judicial proceeding or in a previous stage of the same civil judicial proceeding—
 - (i) when the witness is dead; or
 - (ii) has become insane; or
 - (iii) he is so ill that he will probably never be able to attend the Court; or
 - (iv) is out of the jurisdiction of the Court:

Provided always—

- (A) that the person against whom the evidence is tendered had the right and the opportunity to cross-examine the person giving the evidence;
- (B) that the proceeding was between the same parties or their representatives in interest, and
- (C) that the questions at issue are substantially the same;
- (m) where in a criminal trial before the Supreme Court and jury the statement consists of a deposition taken before a magistrate and the

provisions of sections 44 and 45 of the Magistrates' Courts Act have been complied with; (*Amended by Act 9 of 1958.*)

- (n) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if—
 - (i) the document is, or forms part of, a record relating to any trade or business or finance or money operation and compiled in the course of that trade or business or finance or money operation from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and
 - (ii) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied:

Provided always that—

- (A) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this paragraph, the court may draw any reasonable inference from the form or content of the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a registered medical practitioner or Medical Officer as defined under the Public Health Act, *Cap. 74*.
- (B) In estimating the weight, if any, to be attached to a statement admissible as evidence by virtue of this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person who supplied the information recorded in the statement did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person or any person concerned with making or keeping the record containing the

statement, had any incentive to conceal or misrepresent the facts.

- (C) In this paragraph, “business” includes the activities of the Post Office.

(Inserted by Act 10 of 1974.)

Illustrations—

The question being whether A spoke certain words alleged to be defamatory: A witness who was present may testify under (a) what words were used by A.

The question being whether a crowd of persons was assembled for the purpose of conspiring to break the law or resist the lawful authority of the Government. Evidence of the cries of the crowd is admissible under (a) as showing the nature of the assembly.

A is tried for the murder of B: a statement by B “I am getting worse I am going to die, it was A who stabbed me with the knife” is admissible under (b).

A sues B for money which A as surety for B has paid to C. Evidence of a statement by A to B that A had paid the money to C which statement B did not at the time deny is admissible under (c) against B.

For illustrations of (d) see illustrations under sections 17 and 21.

A is accused of misappropriating property which he had found and the question is whether when he appropriated it he believed in good faith that the real owner could not be found. The fact that public notice of the loss of the property had been given in the town where A was is admissible under (e) as showing that A did not in good faith believe that the real owner could not be found.

The question is whether A's death was caused by poison. Statements by A during his illness as to his symptoms are admissible under (e).

The question is what was A's state of health when he took out a policy of insurance. Statements made by A as to his state of health at or near the time are admissible in evidence under (e).

Evidence is admissible under (f) of entries in the Registers of Births and Deaths kept by the magistrates' clerks in discharge of their official duties; of entries in the register of taxpayers which the tax clerks are by law required to keep; so too, of entries in the liquor sales to members books which every registered club is required by law to keep.

To prove that A delivered certain goods to B, an entry of the delivery made in A's books the same evening by his drayman (since deceased), whose duty it was to deliver the goods during the day and afterwards to make the entry, is admissible under (g).

To prove the payment of rent by A to B a statement made by B's deceased agent when handing money to B that he had received the rent from A is admissible under (h) as a statement against interest.

To prove that A since deceased was illegitimate: A statement by him in his lifetime that he was illegitimate is admissible under (h) as a statement against interest.

Evidence of statements by deceased persons in their lifetime as to boundaries of towns or districts are admissible under (i) as these are matters of public or general interest, but statements by deceased persons as to the boundaries of other persons' hereditary estates, leaseholds or tax allotments are not admissible as these are matters of a private nature only.

The question being whether B and C were cousins of A: a declaration by A's widow (deceased) that B and C were his cousins or that A had told her they were his cousins is admissible under (j).

A makes his will in favour of B, and at his death the will is not forthcoming. It is proved to have been in his keeping. A declaration by A made after its execution and shortly before his death that he had left all his property to B and that his will would be found in a particular drawer is admissible under (k) to show that he had not destroyed or cancelled the will. If after search for the will in the drawer mentioned and elsewhere it cannot be found, then the verbal instructions by him as to the provisions he was about to make in it, would be admissible to prove its contents.

90 Matters in contradiction or confirmation also admissible.

Whenever any statement under section 89 is proved all matters may be proved either in order to contradict or corroborate it or in order to impeach or confirm the credit of the person by whom it was made which might have been proved if that person had been called as a witness.

PART V. - PUBLIC DOCUMENTS

91 Definitions.

The following documents are public documents:

- (a) Documents forming the acts or records of the acts of—
 - (i) the Sovereign authority,
 - (ii) official bodies and tribunals,
 - (iii) public officers, legislative, judicial and executive;

- (b) public records of private documents;
- (c) registers of births, marriages and deaths kept in obedience to any law.

92 Certified copies.

A certified copy of a document is a copy of the document or of part of the document with a certificate written at the foot thereof that [it](#) is a true copy of the document or of part thereof, such certificate being signed by the officer who has the official custody of the document with his name and official title and being further authenticated by the seal of the officer if he is an officer authorized by law or usage to make use of an official seal.

93 Public officer to issue certified copies.

- (1) Every public officer having the custody of a public document which any person has a right to inspect shall on demand give that person on payment of the proper fees therefore a certified copy thereof.
- (2) Such certified copy may be produced on proof of the contents of the public document or part of the public document of which it purports to be the copy.

94 Mode of proof of particular documents.

The following public documents may be proved as follows:

- (a) Proclamations, orders, regulations, notices or other instruments issued by the authority of the Privy Council, Cabinet, or any department of the Government—
by production of the Gazette containing such proclamation, order, regulation, notice or other instrument; (*Amended by Act 23 of 1986.*)
- (b) the proceedings of the Legislative Assembly—
by the minutes of the Assembly or by the record of its proceedings published in the Gazette;
- (c) acts of the Government in any of its departments—
by the records of the departments certified by the heads of those departments respectively, or by any notice appearing in the Gazette, or by any document printed with the sanction of the Government;
- (d) the acts of the Executive or proceedings of the Legislature or proclamations of a foreign state—
by copies authenticated by the seal of the foreign state;

- (e) judgments, judicial orders or other judicial proceedings of a foreign state—
by copies authenticated by the seal of the Court to which the original document belongs, or, if such Court have no seal, endorsed with a statement signed by a judge of such Court that the Court has no seal;
- (f) All other public documents of a foreign state—
by the original document or by a certified copy certified by the person having the official custody of the original document, accompanied by a certificate issued by the Secretary for Foreign Affairs that the person so certifying the copy is the person having the official custody of the original, and upon proof of the nature of the document according to the law of the foreign state; (*Amended by Act 23 of 1986.*)
- (g) Acts, orders or notifications of the Government of any Commonwealth territory—
by Government notices appearing in any paper purporting to be the official Gazette of the territory; (*Amended by Act 23 of 1986.*)
- (h) judgments, orders, or other judicial proceedings of a Commonwealth territory—
by copies authenticated by the seal of the Court to which the original document belongs, or, if such Court have no seal, containing a statement signed by a judge of such Court that the Court has no seal; (*Amended by Act 23 of 1986.*)
- (i) all other public documents of a Commonwealth territory—
by the original document or by a certified copy certified by the person having the official custody of the original document, accompanied by a certificate under the seal of a notary public that the person so certifying the copy is the person having the official custody of the original, and upon proof of the nature of the document according to the law of the territory. (*Amended by Act 23 of 1986.*)

95 Proof or conviction.

Where any person has been convicted by any Court of any offence, such conviction may be proved in any subsequent proceedings in which proof thereof is admissible as evidence by the production of a certificate signed by a clerk of the Court by which such conviction was made and containing the substance and effect of the charge and the conviction.

PART VI. - JUDGMENTS

96 Judgments conclusive as to their legal effect.

Every judgment is conclusive proof for or against all persons of the date on which it was given and of its legal effect, but not of the correctness of the decision.

Illustrations—

A is tried and acquitted for a crime against B and afterwards sues B for malicious prosecution. The judgment in the criminal trial is conclusive evidence that A was acquitted, but it is no proof either that A was innocent or that B was actuated by malice.

A who is surety for B is sued by C for the amount for which he is surety and judgment recovered against him. In an action by A to recover from B the amount A has been compelled to pay C the judgment obtained by C against A is evidence of the amount A has had to pay but not that he was liable to pay it.

97 Judgment *in rem*: effect of.

A final judgment or order of a competent court in the exercise of probate, matrimonial, admiralty or bankruptcy jurisdiction possessed by it which confers upon or takes away from any person any legal character or which declares any person to be entitled to any such character or to be entitled to any specific thing not as against any specified person but absolutely is in a civil proceeding conclusive proof, and in a criminal proceeding prima facie proof—

- (a) that any legal character which it confers or to which it declares any such person to be entitled accrued to that person at the time when the judgment or order declares it to have accrued to that person;
- (b) that any legal character which it takes away from any such person ceased at the time from which the judgment or order declared that it had ceased or should cease;
- (c) that any thing to which it declares any person to be so entitled was the property of that person at the time from which the judgment of order declares that it has been or should be his property.

Illustration—

A obtains probate of B's will (which he has forged) and sues C for a debt due to B. The grant of probate by which the legal character of executor is conferred on A is conclusive proof under (a) until revoked that A is B's executor.

98 Presumption of jurisdiction.

Where a judgment either on the face of it or when read in connection with the proceedings to which it relates shows that, assuming the truth of the facts stated in the judgment, the Court delivering such judgment had jurisdiction to deal with the subject matter of the proceedings, no evidence shall be given to show that the facts were otherwise than as stated in the judgment in order to charge the Court with want of jurisdiction:

Provided always that the protection of this section shall not extend to cases in which the Court shall have acted without jurisdiction either wilfully or under a mistake of law.

99 Effect in subsequent proceedings.

Every judgment is conclusive proof in all subsequent proceedings between the same parties or their privies of facts directly in issue in the case actually decided by the Court, but not of facts which were only collaterally or incidentally in issue even though the decision of such facts was necessary in order to enable the Court to decide the case.

100 Evidence in explanation of effect of judgment.

In order to prove for the purpose of section 99 that any fact was directly in issue in the former proceedings, evidence may be given—

- (a) of the judgment itself;
- (b) of observations made by the Court in delivering the judgment;
- (c) of the proceedings in the case prior to the judgment.

101 No effect against person not party to previous proceedings.

A judgment delivered in previous proceedings may not be given in evidence in subsequent proceedings, either for or against a person who was not a party to the previous proceedings, for the purpose of proving the facts adjudicated in such previous proceedings unless—

- (a) it constitutes an admission by the person against whom it is tendered in evidence; or
- (b) it relates to a matter of public or general interest or to the existence of any public right or custom so as to be admissible under section 89(i).

Illustration—

A pleads guilty to a crime and is convicted; the record of judgment upon this plea is admissible under (a) against him

in a civil action as a solemn judicial confession of the fact. If A on the other hand pleads “Not Guilty” and is convicted, the record of judgment will not be receivable against A in a civil action as an admission.

102 Evidence rebutting effect of judgment.

Any party in any proceedings against whom any judgment is offered in evidence may prove—

- (a) that the Court which gave it had no jurisdiction; or
- (b) that it had been reversed on appeal; or
- (c) that it was obtained by any fraud or collusion to which neither he nor any person to whom he is a privy was a party; or
- (d) that the decision was not given upon the merits of the case.

PART VII. - ESTOPPEL

103 Estoppel defined.

- (1) If a person by his words or conduct wilfully endeavours to cause another to believe in a state of things which the first knows to be false, and if the second believes in that state of things and acts upon his belief, he who knowingly made the first statement is estopped from averring afterwards that such a state of things did not in fact exist.
- (2) If a person, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it is acted upon in that way in the belief of the existence of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.
- (3) If a person, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.
- (4) If during the course of a transaction which has resulted in litigation, one person has led another to believe in a certain state of facts by conduct of culpable negligence calculated to have that result, and that culpable negligence has been the real cause of leading and has led the other to act

in the transaction by mistake founded on that belief and to his prejudice, the first person cannot be allowed in the litigation as against the second to show that the state of acts referred to did not exist.

PART VIII. - OF JUDICIAL PROCEDURE

THE BURDEN OF PROOF

104 Meaning of “Burden of Proof”.

- (1) Whoever desires the Court to give judgment in his favour as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
- (2) Where a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Illustration—

A desires a Court to give judgment that B shall be punished for a crime which A alleges B has committed. A must prove that B committed the crime.

105 Where burden lies generally.

The burden of proof at the beginning of any judicial proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustration—

A sues B for land of which B is in possession and which A says he is entitled to as heir of his grandfather. If no evidence were given on either side B would be entitled to retain possession. Therefore, the burden of proof is on A.

106 Burden of proving particular facts.

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

Illustration—

B is prosecuted for theft, and the prosecution wishes the Court to believe that B admitted the theft to C. The prosecution must prove the admission.

B wishes the Court to believe that at the time the admission is alleged to have been made he was elsewhere. B must prove this.

107 Facts enabling other evidence to be given.

The burden of proving any fact necessary to be proved in order to enable evidence of some other fact to be given, rests on the person who wishes to give the evidence.

Illustrations—

A wishes to give evidence of a dying declaration made by B (under paragraph (b) of section 89). A must first prove B's death.

A wishes to prove the contents of a document which is alleged to have been lost. A must first prove that the document has been lost.

108 Accused not within exception or exemption.

- (1) In any criminal proceeding the burden of proving that the accused person does not come within any exception or exemption contained in the Act under which the charge has been brought, shall lie upon the prosecution.

Special defences.

- (2) In any criminal proceedings in which the accused person wishes to produce evidence of a special defence such as insanity or alibi, no such evidence shall be admissible without the leave of the Judge unless the accused person has given written notice of such defence to the prosecution within 7 days of the accused's committal for trial. Such written notice shall contain (in the case of a defence or alibi) details of the place in which the accused states he was at the relevant time and the names and addresses of the witnesses he intends to call.

(Inserted by Act 22 of 1978.)

109 Ownership in disputed cases.

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

110 Good faith in particular cases.

When persons stand in such a relation to each other that one of them necessarily reposes confidence in the other, or is under his authority, control or influence,

the burden of proof as to the good faith of any transaction between them from which such other person derives advantage, shall be upon such other person.

Illustration—

If the good faith of a sale by a person to his lawyer is in question in an action brought by such person against the lawyer, the burden of proving the good faith of the transaction is on the lawyer.

111 Alteration of established relationship.

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

OATHS AND AFFIRMATIONS

112 Evidence to be given on oath.

Save as by section 115 provided and save as provided in any special enactment in that behalf all evidence shall be given on oath.

113 Authority of Courts to administer oaths.

Every Court shall have authority to administer an oath to all witnesses legally called before it.

114 Forms to be binding on conscience of witness.

If upon the swearing of any witness any question arises as to the form or manner of administering the oath, the oath shall be administered in such form and manner as the witness declares to be binding on his conscience.

115 Affirmation in lieu of oath.

- (1) If any person when about to make an affidavit or when called as a witness objects to be sworn on the ground that the taking of an oath is contrary to his religious belief, or that he has no religious belief, he shall be permitted to make his solemn affirmation instead of taking an oath.
- (2) Any person who after making such affirmation shall wilfully and corruptly give false evidence shall be liable to prosecution sentence and punishment in all respects as if he had committed perjury.

116 Unsworn evidence of child in criminal proceedings.

Where in any proceeding against any person for any offence any child of tender years who is tendered as a witness does not in the opinion of the Court understand the nature of an oath, the evidence of such child may be received though not given upon oath, if in the opinion of the Court the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. The evidence of such child though not on oath shall be taken down by the magistrate's clerk in the same manner as the evidence of any other witness:

Evidence must be corroborated.

Provided always that no person shall be convicted of any offence unless the evidence of any child admitted under this section and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused:

Penalty for false unsworn evidence.

Provided also that any child whose evidence is received as aforesaid and who wilfully gives false evidence, shall be liable on conviction thereof before a magistrate to imprisonment for any term not exceeding 2 years, or if such child is a male, he shall be liable to be whipped in accordance with the law for the time being in force regulating the punishment by whipping of children convicted in the Magistrates' Courts.

COMPETENCY OF WITNESSES**117 Sovereign not compellable.**

The Sovereign of Tonga for the time being shall be a competent but not compellable witness.

118 Person mentally deficient not competent.

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind.

Illustration—

A lunatic is not incompetent to testify unless his lunacy is such as to prevent him from understanding the questions put to him and giving rational answers to them.

119 Dumb persons competent.

A person called as a witness who is unable to speak, shall not be deemed incompetent to testify but may give his evidence in any other manner in which he can make it intelligible, as for example by writing or by signs, but the writing or the signs must be made in open court. Evidence so given shall be deemed to be oral evidence.

120 Husband and wife of party competent in civil cases.

In all civil proceedings the parties to the suit and the husband or wife of any party to the suit shall be competent witnesses.

121 Persons charged with an offence are competent witnesses for the defence. Rules as to evidence of such persons.

- (1) Every person charged with an offence and the wife or husband, as the case may be, of the person so charged shall be a competent witness for the defence at every stage of proceedings whether the person so charged is charged solely or jointly with any other person: (*Amended by Act 9 of 1958.*)

Provided as follows:

- (a) a person so charged shall not be called as a witness except upon his own application;
- (b) the wife or husband of the person charged shall not— save in the criminal proceedings mentioned in sub-section (4) of this section— be called as a witness except upon the application of the person so charged;
- (c) the failure of any person charged with an offence, or of the wife or husband as the case may be, of the person so charged, to give evidence shall not be made the subject of comment by the prosecution;
- (d) nothing in this section shall make a husband compellable to disclose any communication made to him by his wife during the marriage or a wife compellable to disclose any communication made to her by her husband during the marriage;
- (e) a person charged and being a witness under the provisions of this section may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;
- (f) a person charged and called as a witness in pursuance of this section shall not be asked and, if asked, shall not be required to answer, any question tending to show that he has committed or

been convicted of or been charged with any offence other than that wherewith he is now charged, or is of bad character, unless —

- (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
 - (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character, or the nature of the defence is such as to involve imputations on the character of the prosecutor or any of the witnesses for the prosecution; or
 - (iii) he has given evidence against any other person charged with the same offence;
- (g) every person called as a witness in pursuance of this section shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the witnesses give their evidence;
- (h) nothing in this section shall affect the provisions of section 34(4) of the Magistrates' Courts Act or any right of the person charged to make a statement without being sworn. (*Amended by Act 9 of 1958.) Cap. 11*
- (2) Where the person charged is called as a witness for the defence he shall be the first witness examined for the defence after the close of the evidence for the prosecution.
- (3) A person charged and called as a witness who gives evidence against any other person charged jointly with him with the same offence or whose evidence affects the defence of such other person may be cross-examined by such other person.
- (4) In any of the criminal proceedings mentioned in the Schedule hereto the wife or husband of the person charged with an offence may be called as a witness for the prosecution or defence without the consent of the person charged.

122 Prosecution's right of reply.

In any criminal proceeding the prosecution shall have a right of reply notwithstanding the fact that the person charged was the sole witness called for the defence.

NUMBER OF WITNESSES

123 Two witnesses in treason and sedition.

In trials for treason or sedition no person shall be liable to be convicted except upon the testimony of two witnesses to such treason or sedition.

124 Corroboration in perjury.

In trials for perjury no person shall be liable to be convicted unless the falsity of the statement alleged to have been sworn to by such person is proved by two witnesses or by a witness corroborated by material and independent circumstances.

Illustration—

Evidence of a verbal or written admission made by the defendant either before or after he is alleged to have committed perjury contradicting his own evidence may be sufficient corroboration of a single witness.

125 Corroboration in breach of promise of marriage.

In actions for breach of promise of marriage no plaintiff shall be entitled to succeed unless his or her testimony shall be corroborated by some material evidence in support of such promise.

126 Uncorroborated testimony of accomplice.

An accused person shall not be convicted upon the testimony of an accomplice unless it is corroborated in some material particular by other evidence.

127 Number of witness in other cases.

Save as provided in sections 123 to 126 and save as provided in the proviso to section 116 no particular number of witnesses shall in any case be required for the proof of any fact.

PRIVILEGES OF WITNESSES AS TO CERTAIN QUESTIONS

128 Spouses not compelled to disclose communication made during marriage.

Save as provided in section 129 no husband shall be compelled to disclose any communication made to him by his wife during marriage and no wife shall be

compelled to disclose any communication made to her by her husband during the marriage.

129 Exceptions to preceding section.

Where—

- (a) a husband is charged with an offence against his wife or a wife is charged with an offence against her husband, or
- (b) a husband or wife is charged with an offence against any member of their family living with them at the time of the commission of the crime,

the husband or wife, as the case may be, of the person charged, whether called as a witness for the prosecution or the defence, shall not be entitled to refuse to answer any question on the ground that the answer thereto would disclose a communication made during the marriage or that it would tend to incriminate the husband or wife of the witness as to the offence charged.

130 Privilege of witness in divorce proceedings.

The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked, or be bound to answer, any question tending to show that he or she has been guilty of adultery, unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

131 Privilege of judges and magistrates.

No judge and (except upon the special order of the Supreme Court) no magistrate shall be compelled to answer any questions as to his own conduct in Court as judge or magistrate or as to anything which came to his knowledge in Court as such judge or magistrate, but he may be examined as to other matters which occurred in his presence while he was so acting:

Provided always that the protection afforded by this section shall not apply to any judicial proceeding against a magistrate in respect of anything done in the execution of the duties of his office.

Illustrations—

A on his trial before the Supreme Court says that the evidence of a witness was improperly taken by B, the committing magistrate. B cannot be compelled to answer questions as to this except upon the special order of the Supreme Court.

A is accused of assaulting a police officer while on his trial before the Chief Justice. The Chief Justice may be examined as to what occurred.

132 Privilege of public officer.

No public officer shall be compelled to disclose communications made to him in official confidence if the head of his department considers that the public interests would suffer by the disclosure.

133 Unpublished official records.

No one shall be permitted to produce any unpublished official records relating to any affairs of state or to give any evidence derived therefrom except with the permission of the officer at the head of the department concerned who may withhold such permission if in his opinion such production or evidence would be prejudicial to the public service.

134 Information for detection of crime privileged.

No magistrate or police officer shall be compelled to say where he derived any information as to the commission of any offence and no officer employed in the business of any branch of the public revenue shall be compelled to say whence he got any information as to the commission of any offence against the public revenue or any law relating thereto. (*Amended by Act 46 of 1988.*)

Illustration—

B a tax clerk prosecutes A for being in possession of a firearm without a licence. B cannot be compelled to say from whom he got the information that A was in possession of a firearm.

135 Communications between lawyer and client: lawyer's privilege.

No lawyer except with the express consent of his client shall at any time be permitted to disclose in evidence—

- (a) any communication made to him by or on behalf of his client in the course and for the purpose of his employment as such lawyer; or
- (b) the contents of any document with which he has become acquainted in the course and for the purpose of his employment as such lawyer; or
- (c) any advice given to him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

- (i) anything done or any communication made in furtherance of any illegal purpose; or
- (ii) any fact observed by any lawyer in the course of his employment as such showing that any crime of fraud has been committed since the commencement of his employment.

Illustrations—

A says to a lawyer “I wish to obtain property by means of a forged writing and I want you to take proceedings”. This communication being made in furtherance of a criminal purpose is not protected from disclosure.

A charged with embezzlement employs B a lawyer to defend him. During the proceedings B notices that an entry has been made in A's account book which entry was not in the book at the time B's employment began. This being a fact observed by B in the course of his employment as a lawyer, showing that fraud had been committed since the commencement of the proceedings, is not protected from disclosure.

136 Client's privilege.

No one shall be compelled to disclose to the Court any confidential communication which has taken place between himself and his lawyer.

137 Witness not compelled to answer question tending to expose him to risk of prosecution.

Save as provided by section 121(e) and by section 129 a witness shall not be compelled to answer any question which would tend to expose the witness or the wife or husband of the witness to a criminal charge or to a penalty or forfeiture.

EXAMINATION AND CROSS-EXAMINATION OF WITNESSES

138 Examination.

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

Cross-examination.

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

Re-examination.

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

139 Order of examination.

Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined then (if the party calling them so desires) re-examined.

140 Examination and cross-examination must be relevant.

The examination and cross-examination must relate to facts which in the opinion of the Court are relevant to the issues before the Court but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

141 Re-examination confined to matters arising in cross-examination.

The re-examination shall be confined to the explanation of matters referred to in cross-examination; but if by permission of the Court new matter is introduced in re-examination, the adverse party may further cross-examine upon the matter.

142 Power of Court to recall witness.

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

143 Cross-examination as to previous statements.

A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject matter of the proceedings without such writing being shown to him; but if it is intended to contradict such witness by the writing then before such contradictory proof can be given his attention must be called to those parts of the writing which are to be used for the purpose of contradicting him:

Provided always that the Court may at any time during the trial require the writing to be produced for its inspection, and may thereupon make such use of it for the purpose of the trial as it thinks fit.

144 Questions as to convictions.

Subject to the provision of section 121(f) a witness in any proceeding may be questioned as to whether he has been convicted of any offence and being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction.

145 Testing accuracy, veracity or credibility of witness.

A witness on cross-examination may in addition to the questions referred to in sections 143 and 144 be asked any questions which tend—

- (a) to test his accuracy, veracity or credibility;
- (b) to shake his credit by injuring his character:

Provided always that the Court may disallow any question which appears to it vexatious or scandalous and not relevant to any matter proper to be inquired into in the proceedings:

Provided also that the Court shall forbid any question which appears to it to have been put for the purpose of insult or annoyance only.

146 When a witness may be contradicted.

Save as provided in section 144 when a witness has been asked and has answered any question which is only relevant to the inquiry in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him, but if a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.

147 Hostile witness: leave of Court.

- (1) A witness may neither be cross-examined nor his credit impeached by the party calling him except by permission of the Court which permission shall only be granted when in the opinion of the Court the witness has shown himself to be a hostile witness.
- (2) A hostile witness for the purpose of this and the following section shall mean a witness who from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the Court.

148 Methods of impeaching credit of witness.

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

- (a) by the evidence of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit;
- (b) by proof that the witness has been bribed or has received any other corrupt inducement to give his evidence;
- (c) by proof of former statements inconsistent with any part of his present evidence.

(Amended by Act 23 of 1986.)

Illustration—

A person who declares another witness to be unworthy of credit may not on his examination-in-chief give reasons for his belief but he may be asked his reasons in cross-examination, and the replies he gives cannot be contradicted, though if they are false, he may afterwards be charged with perjury.

149 Person summoned to produce a document not a witness.

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

LEADING QUESTIONS

150 Definition of “leading question”.

Any question suggesting the answer which the person putting it wishes or expects to receive, or putting disputed matters to a witness in a form permitting the reply “Yes” or “No”, is called a leading question.

151 Leading question in examination or re-examination.

- (1) Leading questions must not be asked in an examination-in-chief or in a re-examination except with the permission of the Court.
- (2) The Court shall permit leading questions as to matters which are introductory or undisputed or which have in its opinion been already sufficiently proved.

152 Permissible in cross-examination.

Leading questions may be asked in cross-examination, but the questions put must not assume that facts have been proved, or that particular answers have been given, if such is not the case.

153 Court's discretion.

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

REFRESHING MEMORY**154 Writing made by witness at time of transaction.**

- (1) A witness may while under examination refresh his memory by referring to writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.
- (2) The witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid if when he read it he knew it to be correct.

155 Copies of documents.

Whenever a witness may refresh his memory by reference to any document, he may with the permission of the Court refer for such purpose to a copy of the document:

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

156 Reference to professional treatises.

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

157 Documents kept in ordinary course of business.

A witness may also testify to facts mentioned in any such document as is mentioned in section 154, although he has no specific recollection of the facts themselves, if he is sure that the facts are correctly recorded in the document.

Illustration—

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

158 Documents referred to by witness to be open to adverse party.

Any writing referred to by a witness under the provisions of section 154, 155 or 156 in order to refresh his memory, must be produced and shown to the adverse party if he requires it and he may if he pleases cross-examine the witness thereupon.

PRODUCTION OF DOCUMENTS**159 Party calling for document bound to give it in evidence if party producing it so requires.**

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

160 Effect of refusal to produce.

When a party refuses to produce a document which he has had notice to produce he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration—

A sues B on an agreement and gives B notice to produce it at the trial. At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B then attempts to produce the document itself to contradict the secondary evidence given by A or in order to show that the agreement is not stamped in accordance with the law. He cannot do so.

161 Witness summoned to produce document must bring it to Court.

A witness summoned to produce a document shall if it is in his possession or power bring it to Court notwithstanding any objection there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court which may take other evidence to enable it to decide whether the document is admissible in evidence or not.

GENERAL POWERS OF THE COURT**162 Court's power to ask question.**

The Court may in its discretion ask any question in any form at any time of any witness:

Provided that by the leave of the Court any party may cross-examine the witness upon any answer given in reply to any question:

Provided also that this section shall not authorize the Court to compel any witness to answer any question which the witness would be entitled to refuse to answer under section 128 or sections 130 to 137 both inclusive if such questions were asked by the adverse party.

163 Court may require any person present to give evidence or to produce document.

Any person present in Court whether a party to the proceedings or not may be called upon and compelled by the Court to give evidence and produce any document then and there in his actual possession or in his power in the same manner and subject to the same rules as if he had been summoned to appear and give evidence or to produce the document and may be punished in like manner for any refusal to obey the order of the Court.

164 Power as to inspection and view.

In any proceeding the Court may require the production of the subject matter of the evidence for its inspection and may itself proceed to view and investigate the subject matter of the evidence by an inspection thereof and shall be entitled to access to any land or other property for the purpose of such inspection.

165 Decisions not to be reversed on sole ground of improper admission or rejection of evidence.

The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the Court before which the objection is raised that independently of the evidence objected to and admitted there was of sufficient evidence to justify the decision or that if the rejected evidence had been received it ought not to have altered the decision.

166 Commonwealth judgments to have persuasive authority.

Judgments of superior courts of Commonwealth territories will be regarded as having persuasive authority. (*Inserted by Act 23 of 1986.*)

THE SCHEDULE**[SECTION 121(4).]**

Criminal Proceeding in which wife or husband of person charged may be called as a witness without such person's consent.

1 - Proceedings against a husband charged with an offence against his wife or against a wife charged with an offence against her husband.

2 - Proceedings against a husband or wife charged with an offence against any member of their family living with them at the time the offence was committed.

3 - Proceedings for bigamy.

4 - Proceedings under sections 116 to 134 of the Criminal Offences Act.

(Amended by Act 9 of 1958.)