

CHAPTER 10:02
EVIDENCE IN CIVIL PROCEEDINGS

ARRANGEMENT OF SECTIONS

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Proc. 1891,
Proc. 36, 1909,
Cap. 13, 1959,
Proc. 36, 1959,
L.N. 84, 1966,
Act 26, 1977.

An Act declaring in certain respects the law of evidence.

[*Date of Commencement: 10th June, 1891*]

PART I
General (ss 1-34)

1. Short title

This Act may be cited as the Evidence in Civil Proceedings Act.

2. No person to be excluded from giving evidence, except on valid legal objection

From and after the passing of this Act no person shall be excluded from being sworn as a witness or from giving evidence in any court, except in respect of a legal objection to his competency made, and appearing, to such court to be valid.

3. Court to decide on admissibility of evidence

It shall be competent for the court alone in which any case may be depending to decide upon all questions concerning the competency of any witness or the admissibility of any evidence.

4. Incompetency from insanity and intoxication

No person appearing, or proved, to be afflicted with idiocy, lunacy or insanity, or labouring under imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall in any case be competent to give evidence while under the influence of any such malady or disability.

5. Children who understand the obligation of an oath competent

(1) No child shall in any case be excluded from being sworn as a witness, or be deemed incompetent to give evidence in respect of age, provided such child understands the nature and recognises the religious obligation of an oath.

Children to be examined on oath

(2) It shall not be competent to examine any child as a witness except upon oath; and when any child cannot be sworn in consequence of want of sufficient understanding it shall not in any case be competent to admit in evidence any account or statement which such child may have given or made to any other person as the evidence of such child on the subject-matter or such account of statement.

6. Form of oath

In all cases the oath to be administered to any person as a witness shall be administered in the form which shall most clearly convey to him the meaning of the oath, and which he shall consider to be binding on his conscience.

7. Competency notwithstanding consanguinity or affinity

No person shall in any case be incompetent to give evidence in respect of any relation, either by consanguinity or affinity, subsisting between such person and the person for or against whom he shall be produced to give evidence.

8. No witness compellable to answer questions which spouse might decline

No person shall in any case be bound, or be legally compellable, to answer any question, or to give any evidence, which question or evidence the husband or wife of such person, if under examination as a witness in such case, might lawfully refuse, and could not legally be compelled to answer or give.

9. Spouses incompetent after divorce as to matters occurring during the subsistence of the marriage, as to which they would have been incompetent during the marriage

No husband or wife, after the dissolution of their marriage for adultery, or any other lawful cause, shall in any case be competent, or admitted, or bound, or legally compellable to give evidence, as to any matter or thing which occurred during the subsistence of their said marriage, and as to which such husband or wife would not have been competent, or admitted, or bound, or legally compellable to give evidence, if their said marriage had still continued to subsist at the time when such case is tried.

10. Privilege of professional advisers

No advocate, barrister, attorney, or solicitor duly admitted to practice in any court within Botswana, or elsewhere, shall in any case be competent or legally compellable to give evidence against any person by whom he has been professionally employed or consulted,

without the consent of such person, as to any fact, matter or thing as to which such advocate, barrister, attorney or solicitor by reason of such employment or consultation, and without such consent, would not be competent nor legally compellable to give evidence in any similar case depending in the Supreme Court of Judicature in England:

Provided always, that no such advocate, barrister, attorney or solicitor shall in any case by reason of any such employment or consultation be incompetent or not legally compellable to give evidence as to any fact, matter or thing relative to or connected with the commission of any crime or offence for which the person by whom such advocate, barrister, attorney or solicitor has been so employed or consulted is in such case prosecuted; and which fact, matter or thing has come to the knowledge of such advocate, barrister, attorney or solicitor before he shall have been professionally employed or consulted for or with reference to the defence of such person against such prosecution.

11. Court may find and give judgment on any issue of fact, on evidence of single witness

It shall and may be lawful for the Court by which any civil suit shall be tried to find on any issue of fact, and in respect of such finding to give judgment for or against any party to such suit, on the evidence of any single, competent and credible witness.

12. Inadmissibility of irrelevant evidence

No evidence as to any fact, matter or thing shall in any case be admissible which is irrelevant or immaterial and cannot conduce to prove or to disprove any point or fact in issue in such case.

13. Evidence of character, when admissible

No evidence as to the character of any of the parties to any case shall be admissible or inadmissible which would be inadmissible or admissible in any similar case depending in the Supreme Court Judicature in England.

14. Admission of facts or points in issue on the record

It shall not be necessary for any party in any case to give evidence to prove, or competent for any such party to give evidence to disprove, any fact or point admitted on the record of such case.

15. Necessity of best evidence of fact to be proved

Every party on whom in any case it shall be incumbent to prove any fact, matter or thing, shall be bound to give the best evidence of which from its nature such fact, matter or thing shall be capable; and no evidence as to any such fact, matter or thing shall be admissible in any case in which it was in the power of the party who proposes to give such evidence to produce, or cause to be produced, better evidence as to such fact, matter or thing, except by consent of the adverse party to the suit, or when such adverse party shall by law be precluded

from disputing any such fact, matter or thing, by reason of any admission proved to have been made by such party.

16. Proof of appointment to public office

Any evidence which would be admissible, and if credible, would be deemed in any case depending in the Supreme Court of Judicature in England to be in law sufficient proof of the appointment of any person to any public office, or of the authority of any person to act as a public officer, shall be admissible, and if credible shall be deemed to be in law sufficient proof of such appointment or authority.

17. Proof of records and instruments in writing

Nothing herein contained shall extend, or be construed to affect, alter or repeal any law, respecting the proof of any record, act, deed, instrument, or writing, or the effect thereof, or of any copy or extract thereof, as evidence.

18. Examination of witness *de bene esse*

Nothing herein contained shall extend, or be construed to prevent the court from allowing the deposition of any witness, who, by virtue of any rule or order of such court, has been examined *de bene esse*, to be admitted as evidence at the trial of any civil case in which any such rule or order shall have been made.

19. Admissibility of testimony of absent or deceased witness

The testimony of a deceased or absent witness, who has been examined on oath, on the trial of any former civil action between the same parties, shall be admissible in every case in which, and may be proved and given in evidence in the same manner in which the testimony of such deceased or absent witness would be admissible and might be proved and given in evidence in any similar case depending in the Supreme Court of Judicature in England.

20. Hearsay evidence

No evidence which is of the nature of hearsay evidence shall be admissible in any case in which such evidence would be inadmissible in any similar case depending in the Supreme Court of Judicature in England.

21. Witness excused from answering questions, the answers to which would expose him to penalties, or degrade his character

Every witness may refuse, and shall not be legally compellable, to answer any question which such witness, if he were under examination in any similar case depending in the Supreme Court of Judicature in England, might refuse and would not be legally compellable to answer by reason that the answer of such witness might have a tendency to expose him to any pains, penalty or punishment, or forfeiture, or to a criminal charge, or to degrade the character of such witness.

22. Witness not excused from answering question because answer would establish civil claim

A witness cannot by law refuse to answer a question relevant to the matter at issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of the State, or of any other person or persons.

23. Privilege on ground of public policy, or regard to the public interest

(1) Subject to subsection (2), no witness shall in any case be legally compellable or permitted to give evidence as to any fact, matter or thing, or as to any communication made to or by such witness, as to which, if the case were depending in the Supreme Court of Judicature in England, such witness would not be legally compellable or permitted to give evidence, by reason that such fact, matter, or thing or communication on a principle or public policy, and from regard to public interest, ought not to be disclosed, and is privileged from disclosure.

(2) Notwithstanding the provisions of subsection (1), a husband or a wife shall be competent but not compellable to give evidence in any proceedings to prove that matrimonial intercourse did or did not take place between them during any period, or to prove that a child to which the wife has given birth is or is not the off spring of the husband.

24. Impeachment and support of witness's credibility

It shall in every case be competent for any party to impeach or support the credibility of any witness produced against or for such party, in any manner, or by any evidence, in and by which, if the case were depending in the Supreme Court of Judicature in England, the credibility of such witness might be impeached or supported by such person, and in no other manner and by no other evidence whatever.

25. Spouses not compellable to disclose communications between them

No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

26. Witnesses not compellable to answer certain questions

Nothing in this Part contained shall be construed so as to compel any person whomsoever adduced as a witness to answer any such questions as by law witnesses are not compellable to answer.

27. Parties to a suit not entitled to expenses when giving evidence in their own behalf

No person being a party to any suit, action or proceeding, and who shall be adduced as a witness therein in his own behalf, shall (except as hereinafter excepted) be entitled, in the

taxation of any costs which may be awarded against the opposite party, to any expenses as a witness:

Provided that it shall be competent for the court upon the application of any such party so adduced as a witness to direct, at its discretion, that such party shall be allowed his expenses in case the said court shall be of opinion that such party was a necessary witness.

28. When adduced by opposite party, expenses receivable

Any party to any suit, action or proceeding who shall be adduced as a witness by the opposite party shall be entitled to his expenses as a witness in like manner as any other witness.

29. When affirmation be substituted for oath

If any person called as a witness or required or desiring to make an affidavit or deposition shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following:

"I, *A.B.*, do solemnly, sincerely and truly affirm and declare that the taking of any oath is according to my religious belief unlawful: and I do also solemnly, sincerely and truly affirm and declare," etc:

which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.

30. When unsworn testimony admissible

Persons produced for the purpose of giving evidence, who from ignorance arising from youth, defective education, or other cause shall be found not to understand the nature, or recognise the religious obligation, of an oath, shall and may be admissible to give evidence in any court, without being sworn upon oath:

Provided, always, that before any such person shall proceed to give evidence, the judge or magistrate before whom he shall be offered as a witness shall admonish him to speak the truth, the whole truth, and nothing but the truth, and shall further administer or cause to be administered to such person any form which shall either from his own statement or other source of information appear to be calculated to impress his mind and bind his conscience, and which shall not, as being of an inhuman, immoral or irreligious nature, be obviously unfit to be administered : and provided, also, that any such person who shall wilfully and falsely state anything which, if sworn, would have amounted to the crime of perjury shall be deemed to have committed the said crime, and shall, upon conviction, be subject to such punishment as is or shall be by law provided for in regard to the said crime.

31. Evidence of the genuineness of disputed writings

Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to the court in any case as evidence of the genuineness or otherwise of the writing in dispute.

32. Certified copies or extracts of documents admissible

Whenever any book or other document is of such a public nature as to be held admissible in evidence on its mere production from the proper custody, and no law exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding four cents for every folio of ninety words.

33. Punishment for false certificate

If any officer authorized or required by this Part to furnish any certified copies or extracts shall wilfully certify any document as being a true copy or extract knowing that the same is not a true copy or extract as the case may be, he shall be liable upon conviction to imprisonment for a period not exceeding 18 months.

34. Who empowered to administer oaths

Every court, judge, justice, officer, commissioner, arbitrator, or other person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence is hereby empowered to administer an oath, affirmation or admonition respectively as aforesaid to all such witnesses as are legally called before them respectively.

PART II

Bankers' Books (ss 35-42)

35. Entries in certain books admissible in evidence in certain cases

Entries in ledgers, day-books, cash-books and other account-books of any bank shall be admissible in all legal proceedings as *prima facie* evidence of the matters, transactions and accounts therein recorded, on proof being given by the affidavit in writing of one of the directors, managers or officers of such bank, or by other evidence, that such ledgers, day-books, cash-books, or other account-books are or have been the ordinary books of such bank, and that the said entries have been made in the usual and ordinary course of business, and that such books are in or come immediately from the custody or control of such bank.

36. Examined copies also admissible

Copies of all entries in any ledgers, day-books, cash-books or other account-books used by any such bank may be proved in all legal proceedings as evidence of such entries, without production of the originals, by means of the affidavit of a person who has examined the same, stating the fact of the said examination, and that the copies sought to be put in evidence are correct.

37. Notice that such evidence will be adduced must be given, and liberty given to inspect

No ledger, day-book, cash-book or other account-book of any such bank, and no copies of entries therein contained, shall be adduced or received in evidence under this Part, unless ten days' notice in writing, or such other notice as may be ordered by the court, containing a copy of the entries proposed to be adduced, and of the intention to adduce the same in evidence, shall have been given by the party proposing to adduce the same in evidence to the other party or parties to the said legal proceedings, and that such other party or parties is or are at liberty to inspect the original entries and the accounts of which such entries form a part.

38. Party receiving notice may apply to a judge for liberty to inspect

On the application on any party to any legal proceedings who has received such notice, a judge may order that such party be at liberty to inspect and to take copies of any entry or entries in the ledger, day-book, cash-books or other account-books of any such bank, relating to the matters in question in such legal proceedings, and such orders may be made by such judge, at his discretion, either with or without summoning before him such bank or the other party or parties to such legal proceedings, and shall be intimated to such bank at least three days before such copies are required.

39. Judge may order that entries and copies shall not be admissible

On the application of any party to any legal proceedings who has received notice, a judge may order that such entries and copies mentioned in the said notice shall not be admissible as evidence of the matters, transactions and accounts recorded in such ledgers, day-books, cash-books and other account-books.

40. Bank not compelled to produce any books unless ordered by judge

No bank shall be compelled to produce the ledgers, day-books, cash-books or other account-books of such bank in any legal proceedings unless a judge specially orders that such ledgers, day-books, cash-books or other account-books should be produced at such legal proceedings.

41. Part not to apply to proceedings to which bank is a party

Nothing in this Part contained shall apply to any legal proceedings to which any bank whose ledgers, day-books, cash-books or other account-books may be required to be produced, shall

be a party.

42. Interpretation

In this Part-

"bank" means any joint-stock company trading as bankers in Botswana;

"court" means the court, judge, Master of the High Court, arbitrator or other person authorized to preside over the said legal proceedings for the time being, and shall include all persons, judges or officers having jurisdiction and authorized to preside over the said legal proceedings or the procedure or any steps therein;

"judge" means any judge of the court seized of the legal proceedings and in the case of a subordinate court means a magistrate;

"legal proceedings" includes all proceedings in courts of justice, and all proceedings by way of arbitration, examination of witnesses, assessment of damages, compensation or otherwise in which there is power to administer an oath.