

“bankers record” (銀行紀錄) includes

- (a) any document or record used in the ordinary business of a bank; and
- (b) any record so used which is kept otherwise than in a legible form and is capable of being reproduced in a legible form;

(Replaced 37 of 1984 s. 2)

“court” (法院、法庭) includes the Chief Justice and any other judge, also every magistrate, justice, officer of any court, commissioner, arbitrator, or other person having, by law or by consent of parties, authority to hear, receive, and examine evidence with respect to or concerning any action, suit, or other proceeding civil or criminal, or with respect to any matter submitted to arbitration or ordered to be inquired into or investigated under any commission; (Amended 50 of 1911; 62 of 1911 Schedule; 27 of 1912) [cf. 1851 c. 99 s. 16 U.K.]

“Government Chemist” (政府化驗師) means the person appointed as such by the Governor and such other person as the Governor may appoint in writing to carry out examinations or analyses of articles or substances and to sign certificates under section 25 in relation thereto. (Added 31 of 1969 s. 2. Amended 42 of 1973 s.2)

[2.01] Enactment history

The definition of bank was amended pursuant to the Schedule to the Law Revision (Miscellaneous Amendments) Ordinance 1950 (9 of 1950), commencing 5 May 1950. It was further amended pursuant to s 11 of the Evidence (Amendment) Ordinance 1984 (37 of 1984), commencing 15 June 1984.

The definition of bankers record was substituted pursuant to s 2 of the Evidence (Amendment) Ordinance 1984 (37 of 1984), commencing 15 June 1984.

The definition of court was amended pursuant to the Law Revision Ordinance 1911 (50 of 1911), commencing 29 November 1911; the Schedule of the Law Revision (No 2) Ordinance 1911 (62 of 1911), commencing 29 December 1911; and The Full Court Ordinance 1912 (27 of 1912), commencing 1 December 1912.

The definition of Government Chemist was added pursuant to s 2 of the Evidence (Amendment) (No 2) Ordinance 1969 (31 of 1969), commencing 4 July 1969. It was further amended pursuant to s 2 of the Evidence (Amendment) (No 2) Ordinance 1973 (42 of 1973), commencing 22 June 1973.

[2.02] England

The wording of the definition of court is similar to s 16 of the Evidence Act 1851 c 99 [Eng].

[2.03] General note

By virtue of the Evidence (Amendment) Ordinance 1995 (70 of 1995) s 1, this section does not apply in relation to:

- (a) any trial; or
- (b) any committal proceedings within the meaning of the Magistrates Ordinance (Cap 227) s 71A, that commenced before the commencement of the Evidence (Amendment) Ordinance 1995 (70 of 1995), ie 28 July 1995.

Schedule 8 of the Interpretation and General Clauses Ordinance (Cap 1), added pursuant to s 6 of the Hong Kong Reunification Ordinance 1997 (110 of 1997), commencing 1 July 1997, provides that any reference to the Colony of Hong Kong and the Governor of Hong Kong shall be construed as a reference to the Hong Kong Special Administrative Region and the Chief Executive of the Hong Kong Special Administrative Region, respectively.

[2.04] Bank

This is defined in s 2(1) of the Banking Ordinance (Cap 155) to mean a company which holds a valid banking licence.

[2.05] Banker's record

The repeal and substitution of the definition of banker's book with that of banker's record recognises the progress of technology as used in the keeping of business records today, for example in the form of tapes, computer printouts, microfilms and fax transmissions: see generally *R v Law Ka Fu* [1996] 1 HKC 333 for the meaning of banker's record.

A banker's record is not confined to copies of ledger sheets but includes documents received by banks and copies of documents sent by them in the ordinary course of business: see *Keung Cam Yuen v R* [1986] HKLR 916.

[2.06] Company

This is defined in s 2(1) of the Banking Ordinance (Cap 155) to mean a corporate body:

- (a) incorporated under the Companies Ordinance (Cap 32);
- (b) incorporated by any other Ordinance; or
- (c) incorporated outside Hong Kong.

[2.07] Ordinance

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean

- (a) any Ordinance enacted by the Legislative Council;
- (b) any Ordinance adopted by virtue of Article 160 of the Basic Law as a law of the Hong Kong Special Administrative Region;
- (c) any subsidiary legislation made under any such Ordinance except any such subsidiary legislation which has pursuant to Article 160 of the Basic Law been declared to be in contravention of the Basic Law; and

- (d) any provision or provisions of any such Ordinance or subsidiary legislation.

[2.08] Document

This is defined in s 2(1) of the Banking Ordinance (Cap 155) as including any publication (including a newspaper, magazine, journal or other periodical publication, a poster or notice, a circular, brochure, pamphlet or handbill, or a prospectus) - (a) directed at, or likely to be accessed or read (whether concurrently or otherwise) by, members of the public; and (b) whether produced mechanically, electronically, magnetically, optically, manually or by any other means.

It is also defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean any publication and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks, or by more than one of these means.

It is further defined in Schedule 1 Part 1 of Securities and Futures Ordinance (Cap 571) as including any register and books, any tape recording and any form of input or output into or from an information system, and any other document or similar material (whether produced mechanically, electronically, magnetically, optically, manually or by any other means).

[2.09] Court

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean any court of the Hong Kong Special Administrative Region of competent jurisdiction.

[2.10] Chief Justice

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the Chief Justice of the Court of Final Appeal.

[2.11] Judge

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the Chief Justice, a judge of the Court of Final Appeal, the Chief Judge, a Justice of Appeal, a judge of the Court of First Instance, a recorder of the Court of First Instance and a deputy judge of the Court of First Instance.

[2.12] Magistrate

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean any person appointed to be a permanent or special magistrate under the Magistrates Ordinance (Cap 227).

[2.13] Justice

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean a person appointed to be a justice of the peace under the Justices of the Peace Ordinance (Cap 510).

[2.14] Law

This is defined in s 3 of the Interpretation and General Clauses Ordinance

(Cap 1) to mean any law for the time being in force in, having legislative effect in, extending to, or applicable in, Hong Kong.

[2.15] Parties

A party is defined in s 2 of the High Court Ordinance (Cap 4) as including every person served with notice of or attending any proceedings, although not named on the record.

[2.16] Action

This is defined in s 2 of the High Court Ordinance (Cap 4) to mean a civil proceeding commenced by writ of summons or in such other manner as may be prescribed by any law. Action is also defined in s 2 of the Bills of Exchange Ordinance (Cap 19) to mean action or suit and includes counterclaim and set-off.

[2.17] Government Chemist

More than one person may validly sign a certificate. The chemist may rely on tests conducted by his laboratory assistants: see *R v Leung Chi Kin* [1970] HKLR 25 and *R v Yip Wai Por* [1989] 1 HKC 182. The form of the certificate is not important as long as it is clearly intended to be a Government Chemists certificate: see *R v Chak Kin Wing* (unreported, HCMA 1077/1986, Roberts CJ, 13 November 1986).

[2.18] Governor

Section 11 of Schedule 8 of the Interpretation and General Clauses Ordinance (Cap 1) added pursuant to s 6 of the Hong Kong Reunification Ordinance 1997 (110 of 1997), commencing 1 July 1997, provides that any reference to the Governor of Hong Kong shall be construed as a reference to the Chief Executive of the Hong Kong Special Administrative Region. Chief Executive is defined in s 3 of the Interpretation and General Clauses Ordinance to mean (a) the Chief Executive of the HKSAR; (b) a person for the time being assuming the duties of the Chief Executive according to the provisions of Article 53 of the Basic Law.

PART II

ADMISSIBLE WITNESSES AND EVIDENCE

3. Incompetency from immature age or soundness of mind

The following persons only shall be incompetent to give evidence in any proceedings--

*(a)

(Repealed 70 of 1995 s. 2)

(b) persons of unsound mind, who, at the time of their examination, appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly; and no person who

is known to be of unsound mind shall be liable to be summoned as a witness without the consent previously obtained of the court or person before whom his attendance is required.

Note:

* Please note section 1(2) of 70 of 1995. It reads as follows-

"Sections 2 and 3 do not apply in relation to-

- (a) any trial; or
- (b) any committal proceedings within the meaning of section 71A of the Magistrates Ordinance (Cap 227), that commenced before the commencement of this Ordinance." 70 of 1995 commenced operation on 28 July 1995.

[3.01] Enactment history

Section 3(a) was repealed pursuant to s 2 of the Evidence (Amendment) Ordinance 1995 (70 of 1995), commencing 28 July 1995.

[3.02] England

There is no equivalent to this section in English legislation.

[3.03] General note

By virtue of the Evidence (Amendment) Ordinance 1995 (70 of 1995) s 1, this section does not apply in relation to:

- (a) any trial; or
- (b) any committal proceedings within the meaning of the Magistrates Ordinance (Cap 227) s 71A,

that commenced before the commencement of the Evidence (Amendment) Ordinance 1995 (70 of 1995), i.e. 28 July 1995.

Following the repeal of s 3(a) there is no need for the magistrate or judge to inquire into the competency of a child witness and a determination on whether the evidence should be admitted: see *R v Lam Chi Keung* [1997] 2 HKC 250(CA).

[3.04] Persons of unsound mind who appear incapable

Whether a person is incapable is a question of fact. If a person of unsound mind has a defect that has no effect on these abilities or which is transitory then his evidence may be admissible: see *R v Hill* (1851) 20 LJMC 222, 5 Cox CC 259. The evidence of a person of unsound mind did not require corroboration: see *R v Bagshaw* [1984] 1 WLR 477, [1984] 1 All ER 971(CA), although the House of Lords in *R v Spencer & Ors; R v Smalls &*

Ors [1987] 1 AC 128, [1986] 2 All ER 928(HL) has subsequently overruled *R v Bagshaw*.

*4. Evidence given by children

- (1) In this section, "child" (兒童) means a person under 14 years of age.
- (2) A child's evidence in criminal proceedings shall be given unsworn and shall be capable of corroborating the evidence, sworn or unsworn, given by any other person.
- (3) A deposition of a child's unsworn evidence may be taken for the purposes of criminal proceedings as if that evidence had been given on oath.

(Replaced 70 of 1995 s. 3) Note:* Please note section 1(2) of 70 of 1995. It reads as follows-"Sections 2 and 3 do not apply in relation to

- (a) any trial; or
 - (b) any committal proceedings within the meaning of section 71A of the Magistrates Ordinance (Cap 227), that commenced before the commencement of this Ordinance".
- 70 of 1995 commenced operation on 28 July 1995.

[4.01] Enactment history

This section was substituted pursuant to s 3 of the Evidence (Amendment) Ordinance 1995 (70 of 1995), commencing 28 July 1995.

[4.02] England

This section is to the same effect as s 33A of the Criminal Justice Act 1988. The provision in subs (2) that a child's evidence is capable of corroborating evidence, sworn or unsworn, given by someone else, is to the same effect as s 34(3) of that Act, where it is believed the reference to s 52 of the Criminal Justice Act 1991 should have been to s 33A. However, the Act provides that a child's evidence shall be received unless it appeared to the court that the child was incapable of giving intelligible testimony but there is no similar provision in the present Ordinance.

[4.03] General note

The effect of this section, combined with s 3 above is that a child's unsworn testimony must be received whether or not the child would otherwise have been competent. Even if a child is unable to articulate the importance of telling the truth, his evidence is still admissible. If a child is of sufficient understanding it is wise for the judge to bring home to him the importance of telling the truth. But this is a matter for the judge's discretion: see *R v Lam Chi Keung* [1997] 2 HKC 250(CA), endorsed by the Court of Final Appeal in *Lam*

[43.05] Definitions

For "proceedings", see s 45 below.

44. Power to order proof of specified facts by affidavit with or without attendance of deponent

The court may at any stage of any proceedings by order direct that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination, notwithstanding that a party desires his attendance for cross-examination and that he can be produced for that purpose.

(Added 6 of 1939 s. 2)

[cf. 1938 c. 28 s. 5 U.K.]

[44.01] Enactment history

This section was added pursuant to s 2 of the Evidence Amendment Ordinance 1939 (6 of 1939), commencing on 24 March 1939.

[44.02] England

The wording of this section is to the same effect as s 5 of the Evidence Act 1938 c 28 [Eng].

[44.03] Affidavit

As to meaning, see [20.09] above.

[44.04] Without the attendance of the deponent for cross-examination

The non-availability of the deponent was a relevant matter for the court to consider when exercising its discretion on whether to allow specified facts to be proved by affidavit: see *R v Dawe* [1981] HKC 19.

[44.05] Party

As to meaning, see [2.15] above.

[44.06] Definitions

For "court", see s 2 above; for "proceedings", see s 45(1) below.

45. Interpretation and savings

- (1) In sections 42 to 44, unless the context otherwise requires, "proceedings" (法律程序) includes arbitrations and references.

- (2) Nothing in sections 42 to 44 shall prejudice the admissibility of any evidence which would apart from the provisions of those sections be admissible.

(Replaced 25 of 1969 s. 5)

[cf. 1938 c. 28 s. 6 U.K.; 1968 c. 64 s. 20(2) U.K.] Note: Section 45 and Part IV came into operation on 1 December 1970 for the purposes of the following civil proceedings

- (a) proceedings (other than proceedings in bankruptcy) in the High Court and the District Court;
- (b) proceedings before any tribunal, other than a court, to which the strict rules of evidence apply;
- (c) arbitrations and references to which the strict rules of evidence apply;
- (d) applications and appeals arising out of the proceedings mentioned in paragraphs (a) to (c).

(See *L.N. 154 of 1970*)

[45.01] Enactment history

This section was substituted pursuant to s 5 of the Evidence (Amendment) Ordinance 1969 (25 of 1969), commencing 1 October 1969. See the Note for a different commencement date for certain civil proceedings.

[45.02] England

The wording of this section is to the same effect as s 6 of the Evidence Act 1938 c 28 [Eng] and s 20(2) of the Civil Evidence Act 1968 c 64 [Eng].

PART IV**HEARSAY EVIDENCE IN CIVIL PROCEEDINGS****46. Interpretation**

In this Part, unless the context otherwise requires

"civil proceedings" (民事法律程序) means civil proceedings, before any court, in relation to which strict rules of evidence apply, whether as a matter of law or by agreement of the parties, and references to "the court" (法院、法庭) and "rules of court" (法院規則) shall be construed accordingly;

“copy” (副本), in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;

“court” (法院、法庭) includes any tribunal;

“document” (文件) means anything in which information of any description is recorded;

“hearsay” (傳聞)

(a) means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated;

(b) includes hearsay of whatever degree;

“oral evidence” (口頭證據) includes evidence which, by reason of a defect of speech or hearing, a person called as a witness gives in writing or by signs;

“original statement” (原陳述), in relation to hearsay evidence, means the underlying statement, if any, made by

(a) in the case of evidence of fact, a person having personal knowledge of that fact;

(b) in the case of evidence of opinion, the person whose opinion it is;

“statement” (陳述) means any representation of fact or opinion, however made.

(Replaced 2 of 1999 s. 2)

[cf. 1995 c. 38 ss. 1(2), 9(4), 11 & 13 U.K.]

Note: Part IV came into operation on 1 December 1970 for the purposes of the following civil proceedings-

- (a) proceedings (other than proceedings in bankruptcy) in the High Court and the District Court;
- (b) proceedings before any tribunal, other than a court, to which the strict rules of evidence apply;
- (c) arbitrations and references to which the strict rules of evidence apply;
- (d) applications and appeals arising out of the proceedings mentioned in paragraphs (a) to (c). (See *L.N.*, 154 of 1970)

[46.01] Enactment history

This section was substituted pursuant to s 2 of the Evidence (Amendment) Ordinance 1999 (2 of 1999), commencing 1 June 1999.

[46.02] England

This section is based on s 13 of Civil Evidence Act 1995 c 38 [Eng]. The definition of hearsay is the same as that contained in s 1(2), *ibid.* The definition of civil proceedings is to similar effect as that contained in s 11, *ibid.*

[46.03] General note

The provisions on hearsay evidence in civil proceedings contained in Part IV of the present Ordinance were replaced in 1999. The new provisions are based on the English Civil Evidence Act 1995 c 38 which implemented the principal recommendation of the UK Law Commission in their report

The Hearsay Rule in Civil Proceedings (1993: Law Com 216) that in civil proceedings evidence should not be excluded on the grounds that it is hearsay. In its 1991 consultation paper (No 117), the commission observed that there was little doubt that the rule excluding hearsay was the most confusing of the rules of evidence, posing difficulties for courts, practitioners and witnesses and any reform which succeeded in improving the clarity of understanding of its purpose and the manner in which it was to be applied would do much to improve evidence law as a whole. A similar exercise was undertaken by the Hong Kong Law Reform Commission, which in 1992 published a consultation paper, and finally a report in July 1996, making similar recommendations to those contained in the report of its English counterpart.

A. The development of the rule against hearsay

The rule against hearsay has never been definitively formulated either statutorily or judicially, but may be stated as an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted (see *Cross and Tapper on Evidence* (8th Ed, Butterworths, London, p 46). This formulation was approved by the House of Lords in *R v Sharp* [1988] 1 All ER 65 at p 68, [1988] 1 WLR 7 at p 11. Prior to the beginning of the seventeenth century there was no rule against hearsay evidence, as jurors were required to enquire into the facts of a case before the day of trial and were selected for their local knowledge. Considerations as to what a witness should and should not be allowed to relate developed only when the system for bringing witnesses to court, rather than sending jurors out to enquire and find out the facts, came into being. Awareness of the need for good and sufficient witnesses began to throw doubt on the propriety of depending on extra-judicial assertions, moreover the developing adversarial system did not favour extra-judicial assertions that could not be subjected to cross-examination. The development of the adversarial system has frequently been cited as the reason for the creation of the rule, but as Lord Reid observed in *Myers v DPP* [1964] 2 All ER 881, [1965] AC 1001, [1964] 3 WLR 145(HL), “many reasons for the rule have been put forward, but we don’t now know which of them directly influenced the judges who established the rule”.

B. Erosion of the rule

The rule has never been absolute and has gradually been eroded by the creation of exceptions, brought about either by practical considerations or the acceptance that certain types of hearsay evidence were, in fact, inherently