



**NATIONAL OPEN UNIVERSITY OF NIGERIA**

**SCHOOL OF LAW**

**COURSE CODE: LAW 446**

**COURSE TITLE: LAW OF EVIDENCE II**

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**Course Guide**

**LAW 446 LAW OF EVIDENCE II**

This is the second part of the Law of Evidence. It is a 400 level course of 4 Credit Units.

You dealt with Law 445, Law of Evidence I in the last session. That material was based on the Law of Evidence Act, 2004. Shortly after, the National Assembly passed into Law, the Evidence Act 2011.

Many of the reference books were also written prior to the 2011. Those books are now valid only to the extent that the provisions of Evidence Act 2004 is neither repealed nor amended by the Evidence Act 2011. They are therefore to be read with caution. The same thing can be said of Case Law.

The Evidence Law Part II should be read in conjunction with the Evidence Act, 2011. Where there is no change in the statutory provisions the cases decided under them are valid. Where they depart, the principles applied in the cases based on them or the repealed portion may now be obiter dicta.

You would observe that the author cited cases and gave the year, without full citations. This practice is deliberate. It is to erase any impression that the author prefers one Law Report to another. This is by no means so. You already know how and where to find the law and any Law Report is as good as the other.

Other conditions which apply to Law 455 Evidence Law II, apply to all current courses with equal force.

Good luck.

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**COURSE TITLE:** Law of Evidence

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## **MODULE I**

### **UNIT 1 OPINION EVIDENCE**

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#### **1.0 INTRODUCTION**

The two words that feature prominently in the Law of Evidence are “proof” and “evidence”. Evidence is a means but proof or disproof is the end product. What requires proof or disproof are facts. A fact is something that actually exists, an aspect of reality, an actual or alleged event or circumstance as distinct from its legal effect, consequence or interpretation. On the other hand, opinion evidence is a testimony based on one’s belief or idea rather than a direct knowledge of the facts or issue. The witness’s opinion is usually excluded from evidence.

In this unit, you shall learn about opinion evidence, the reasons for its exclusion and its exceptions. You will be empowered to boldly make your own reasoned decision for or against the admissibility of opinion evidence.

#### **2.0 OBJECTIVES**

When you have studied this unit, you should be able to:

- Identify the circumstances in which opinion evidence is generally admissible.
- Rationalize the basis on which opinion evidence has been given and admitted or rejected.
- Explain who expert witnesses are

- Determine the extent of incursion into hearsay rule by expert opinion.
- Critique opinion evidence

### **3.0 MAIN CONTENTS**

#### **3.1 Fundamental Principle of Witness Evidence**

The purpose of calling a witness is to elicit from him or her evidence of facts which he or she has perceived by means of his or her senses. That is to say

What he or she saw with the eyes

What he or she tasted with the tongue.

How he or she felt.

What he or she heard with the ears.

What he or she smelt with the nose.

Opinion evidence is neither of the above. Rather it is an inference drawn from facts. But this is a function of the judge not of a witness – to make inference from or interpret facts in order to arrive at a verdict. Hence, generally a witness is not allowed to engage in inference – drawing which is a judicial function or to testify about opinion rather than about facts.

However, there are cases where the judge lacks the necessary experience to draw competently, appropriate inference from the facts that emerge from the proceeding. The court then allows someone with necessary expertise to do so. The purpose is to avail the court with experts opinion about facts to assist it in reaching a correct verdict.

An expert opinion may be received, therefore in evidence if it relates to a technical or scientific matter in which the competency to form an opinion cannot be acquired except by a course of special study or experience. Arts, science, trade, handwriting, banking or foreign law confers such competence through a special course of study. Should any question of competency in any of these fields arise, an expert testimony expressing his or her reasoned opinion is admissible. Otherwise such evidence is inadmissible. The reasons for exclusion of opinion evidence are that, it is:

- not a technical and not a scientific matter
- not susceptible to empirical proof or disproof
- a usurpation of the functions of the judge,
- being an inference drawn from an interpretation
- formed from materials that would normally be excluded from under the hearsay rule.

The exclusion of opinion evidence has been criticized on the ground that it is capable of depriving the court of most valuable testimony. Critics argue that opinion evidence ought to be admissible, leaving the judge in each case, to decide what weight to attach to it.

### **SELF ASSESSMENT EXERCISE**

Compare the prejudicial and the probative values of opinion evidence.

### **3.2 Expert Opinion**

An expert may be required to give evidence of:

1. A fact or facts which he perceived with one of his or her five senses,
2. His or her opinion on a matter in which the court considers him or her an expert.

The first is direct evidence. In this sense the expert is an ordinary witness to which no special rules apply.

The second is scientific or technical – a matter which involves knowledge of a technicality – like handwriting, foreign law etc. In this case of opinion evidence, special rules apply.

#### **3.2.1. The test of admissibility of expert evidence of opinion:**

The admissibility of expert opinion depends on the following:

- The court's competence to determine the matter without assistance
- The qualification of the expert – whether he or she is a member of a profession; his/her formal qualifications – doctor, engineer, pathologist, chemist, etc?

Formal qualification is important but it is not a condition precedent. For example, a solicitor may qualify as a handwriting expert if it was his hobby to study handwriting. Non-expert opinion is frequently accepted e.g. in areas of identification or value. In *R.V. Davies (1967)*, the accused was charged with driving a motor vehicle while intoxicated, he was unfit to drive. A non-expert witness was called to give evidence as to his drunken state or condition and he spoke as to the opinion he formed of the condition of the accused. The court, in regard to the non-expert witness, expressed the following opinion:

- i. That the non-expert witness might state his opinion, whether the accused had



taken liquor or not , but must give the facts upon which he relied in forming his opinion,

- ii. Not being an expert, he was not entitled to say whether the accused was fit or unfit to drive the vehicle. That was a matter for the trial court to decide, not the opinion of non-experts or ordinary witness.
- iii. The opinion of person other than experts may be admissible in regard to the state or condition of a person or thing, other than his/her mental condition. An examples are:-
  - (a) Where a fact in issue is the opinion of a person e.g. opinion of another of libel, who pleads fair comment or the opinion of a witness to whom a false pretence was addressed or the opinion of a person defrauded that what the fraudster said was true.
  - (b) Personal opinion or belief about facts in issue which is based on grounds of experience. Such evidence has been admissible to prove identity, handwriting, age, insanity, intoxication etc. It has even been used to prove the speed of a vehicle, the value of articles and the affection between persons, where more direct and positive evidence are not available.
  - (c) In interlocutory proceedings, a deponent may state his opinion and the ground of its foundation.

### **3.2.2 Competency of an expert or specialist**

The Evidence Act does not give us any guideline on how to identify an expert with any degree of certainty.

An expert is a person especially skilled in the field of foreign law, native law and Custom, , of science or art, handwriting and finger print analysis. His or her competency is for the judge to decide. Whether or not he or she acquired knowledge professionally goes to weight not admissibility. The test of an experts' relevance is whether he is specially skilled on the particular field in question.

When called as an expert witness, you must first state your qualification, experience, training, nature and duty or your office relative to your field so as to satisfy the court that you are an expert on the subject in which you are about to testify as well as justify the reception of your evidence as relevant evidence.

It has to be noted, however that not only the general nature but also the precise character of the question upon which the expert evidence is required, have to be taken into account

when deciding whether the qualifications of a person entitles him to be regarded as a competent expert: *Ajani v the Comptroller of Customs* (1954).

The credit or knowledge of the expert can be impeached by such evidence as bias or inconsistent opinions. An expert cannot form an opinion based on materials which are not before the court nor give opinion as to the legal or general merits of a case, except the expert is so asked. Such a situation arises where he or she is also a witness of the relevant facts and the issue is substantially one of science or skill.

As an expert, you may refer to textbooks and refresh your memory, correct or confirm your opinion and may be cross – examined.

### **3.3 Statutory Provisions**

#### **3.3.1 The Evidence Act.**

Section 68 (1) When the court has to form an opinion upon a point of foreign law, native law or custom or a science or art or as to identity of handwriting or finger print impressions, the opinions upon that point of persons especially skilled in such foreign law, customary law or custom, or science or art or in questions as to identity of handwriting or finger impressions are admissible.

(2) Persons so specially skilled as mentioned in sub-section (1) of this section are called experts.

#### **Section 67**

The fact that any person is of the opinion that a fact in issue or relevant to the issue does or does not exist is irrelevant to the existence of such a fact, except as provided in section 68 to 76 of the Act.

#### **3.3.2 Exceptions**

Although the basic principle is that a witness should testify about facts, experts may be allowed to give evidence of:

1. Facts which themselves require to be proved by admissible evidence.
2. Opinion based on the facts of the particular case.

Before giving an opinion evidence in a trial proceeding, the expert must first lay a foundation. The foundation refers to the ground or reasoning upon which the opinion is founded.

The court will dispense with an expert evidence where it is capable of forming its opinion as the expert e.g. Disputed points of etiquette or morality, not being professional etiquette or morality. The court sitting with Assessors as in admiralty cases which involve questions of nautical skills is just as capable of forming the

opinion as an expert.

3. Experts may refer to information relating to their field of expertise that has come to them as a second hand (this rule is an exception to the hearsay rule)

4. When giving evidence as an expert, you may refer to articles, journals, and other materials (published or unpublished) in support of your opinion.

Look at some illustrations or circumstances when the courts have received opinion evidence from persons skilled but are non professionals.

**(a) Foreign law**

*Ajani v the Comptroller of Customs (1952)*, the Judicial Committee of the Privy Council (JCPC) held that a banker was “specially skilled” to give opinions as to foreign law based on his experiences, position or status and duties relative to the subject matter.

*Bailey V Rhodesia Consolidated Ltd (1910)*, a Reader in Roman – Dutch law of the Council of Legal Education was held to be an expert in Roman Dutch law.

**(b). Native law and Customs**

Customary law is the mirror of accepted usage. It is “the dynamic or living law of the indigenous people regulating their lives and transaction. It is organic in that it is not static. It is regulatory in that it controls the lives and transaction of the community subject to it. Customary law probably goes further and import justice to the lives of all those subject to it”. *Okonkwo v. Okagbua (1994)*.

It is settled law that except where a rule of customary law has received judicial recognition, such rule is treated for purposes of proof as a matter of fact *Adegboyega v. Igbinosu (1969)*. Where the customary law is not judicially noticed, it may be proved by testimony, in court, of a witness acquainted with the particular law. Thus “in deciding questions of native law and custom, the opinions of native chiefs or other persons having special knowledge of the native law and custom and any book or manuscript recognised by the natives as a legal authority are relevant. Examples of such books, which judges have consulted are

*Ajisafe: Laws and Customs of the Yoruba people.*

*Folarin: The Laws and Customs of Egba Land (see Adeseye v Taiwo (1956)*

*Ward Price: Memorandum of Land Tenure in Yoruba Province (Adedibu v Adewoyin 1951)*

Both books were written by persons of Yoruba origin and received in support of the existence of certain Yoruba customs by the Supreme court in *Adesanya v. Taiwo* and *Suberu v. Sunmonu*

The Evidence Act section 68 is not exhaustive of areas where an expert opinion may be sought. In *Seismograph Services Ltd v. Ogbeni* (1976) P sued for nuisance and damage to his house from D's exploration exercise. P called for an expert to testify that the damage was caused by the vibration from seismic operation. The trial Judge rejected it, saying the court was capable of making the relevant inference without resort to experts. On appeal, the Supreme Court said.

"We are unable to agree with the learned trial judge that the evidence of an expert is not absolutely necessary to prove damage alleged to be caused by the vibration radiating from seismic operations taking place within a reasonable distance from the property damaged. These are phenomena beyond the knowledge of the unscientific and untrained in seismology and civil engineering", (Per Obaseki, JSC).

### **3.4 Other Instances of Opinion Evidence**

There have been other specific subjects of expert evidence, namely:

- i. Evidence as to identity
- ii. Handwriting
- iii. Other cases

#### **3.4.1 Evidence of Identification**

Evidence as to the identification of a person or a thing is an expression of opinion.

Examples are evidence of:

- a person's general resemblance to a photograph or a member of and identification parade.
- memory of goods stolen in comparison with actual goods recovered.
- the age of a person.
- Condition of a person or thing.

You can give evidence as to the identification in appropriate cases as an expert or non-expert.

#### **3.4.2 Handwriting**

Handwriting includes type-writing. When hand writing or type-writing is in dispute, an handwriting expert may compare a document proved to have been written

by the person whose handwriting it is sought with the document in dispute. After carrying out such a comparison, the hand-writing expert may be called to give his or her opinion.

Sometimes, the court may ask the person whose handwriting is disputed to write in the presence of the court and the court may form its opinion with or without expert guidance.

Sometimes, the witness need not be a specialist or an expert in handwriting analysis. It suffices that he or she is one who:

- forms an opinion based on mental comparison,
- sees or has seen the person (whose handwriting it is sought to compare) write on the particular occasions or
- is conversant with his or her writing having seen letters assumed to be in his or her writing or
- having read some document purportedly written by the person whose handwriting is in dispute.
- is skilled or has given consideration attention and study to the subject.

The courts have received opinion or expert evidences of handwriting from:

- Police officer R.V. Onitiri (1946).
- (Solicitor who studied finger print for 10years *R. V. Silverlock (1894)*).
- Handwriting analysts who are trained specialists in the field.
- Persons who are skilled in finger print impression analyses.

### **3.4.3 Others**

The court may also admit evidence opinion in other exceptional cases. Examples are opinion evidence of:

- general reputation
- ones belief truthfully of what the accused said
- speed of a motor car

### **3.4.4 Evidence of General Reputation and Opinion**

Evidence of general reputation and opinion is irrelevant and generally not admissible.

The reasons may be that:

- It is excluded by the hearsay rule (e.g. Evidence of a general reputation in a community)
- It is the function of the court, not of witness, to draw a conclusion from the facts proved.

However, the court may admit it in the following exceptional cases

- To prove marriage (other than bigamy or divorce cases)
- To prove character
- To prove evidence of public right
- to support a branch of a family tree in pedigree cases
- To prove identity (e.g. identity of a legatee)

### **3.4.5. Illustration**

Jonah and Rebecca lived together for 4 years in Suleja. Their friends and neighbours believed that they are husband and wife. Rebecca has died. Jonah married Ms Titi. much later, Jonah dies intestate.

The question for determination is who is or who are entitled to inherit.

There is no evidence that Jonah and Rebecca ever married. No marriage certificate, either. But they had four children while they lived together and their birth certificates showed that their parents – Jonah and Rebecca – were husband and wife.

If Jonah and Rebecca were not married, then the four children are illegitimate and cannot inherit. If they were, then the children would. The important question to be decided is whether Jonah and Rebecca were paramour lovers or husband and wife. In proof of this, there is no direct evidence but only evidence of friends and neighbour. Is this evidence receivable? Is there sufficient evidence upon which to assume that Jonah and Rebecca were married to each other.

The answer to both questions is YES, unless the contrary was clearly proved. Thus the rules of intestate succession, would apply as though Jonah and Rebecca had been duly married, Jonah having died without a Will. In case of divorce, however, marriage is not to be assumed. It has to be strictly proved.

Although the evidence of general reputation is generally excluded and may in appropriate case be admissible to prove marriage, the court may refuse to admit the fact of cohabitation to found a presumption of marriage in the following cases.

- charge of Bigamy

- case of matrimonial proceedings e.g. divorce

In this type of case, the fact of marriage must be strictly proved.

### **3.5 Expert Opinion**

An expert opinion is evidence about a scientific, technical, or professional issue given by a person qualified to testify because of familiarity with the subject or special training in the field.

Experts must be skilled in their subject; it is immaterial how the skill is acquired. You may not, as a witness, be specially qualified; yet you may be an expert for a particular purpose. An example would be where you have a special knowledge acquired by study of materials that are relevant to a particular case.

The court would consider your qualifications, experience and nature of duties in order to determine your suitability as expert. The court is at liberty to declare that a certain area of knowledge (e.g. psychological autopsy of a deceased person) is insufficiently developed to be a topic on which expert evidence will be admissible.

### **SELF ASSESSMENT EXERCISE**

1. Explain who may qualify as an expert

### **3.6 New Dimensions of Matters of Science and Art**

Matters of science and arts permit opinion of experts. The expression “science and arts” has been expanded beyond the well established disciplines and fields of knowledge under the two heads. It covers almost any matter, which is the subject of special knowledge. The expansion of the scope is occasioned by the advancement in science and technology outside the knowledge of judges e.g. blurred boundary between the abnormal and the normal mental states. Thus, a medical witness may give evidence of conduct indicative of insanity. If he has had the accused under observation, he may state as an “expert” that his opinion is that the accused is sane or insane. But he must not be asked whether or not the Accused is insane.

#### **3.6.1 Psychiatrists and Psychologists: Persons so especially skilled are experts Sec 68(2)**

The English courts have shown a readiness to receive psychiatrist or psychologist expert as to:

*a. reliability of a confession (Ragship and others, (1991); Walker (1998) and O.Brian*

(2000) these are foreign matters the Nigerian courts are unlikely to hold under Evidence act 2011

b. the defect or abnormalities of mind to impeach the credibility of the witness or witnesses or show that the patient is incapable of giving reliable evidence.

At the same time, the court has been reluctant to allow expert opinion as to:

1. Mens rea – its existence or non-existence *RV Turner* (1975). Compare *Lowery v Queen* (1974)
2. Truthfulness of a witness or evidence *Macknanney v Pinfield* (1981), *Browning* (1995)
3. Ultimate Issue: ultimate issue is for the judge to decide and pronounce a verdict and expert opinion is irrelevant. Sometimes the judge allows it. *Theodosi* (1993); *Stockwell* (1993). These decisions are guides only and for purpose of argument bearing in mind the doctrine of judicial precedent.

### **3.6.2 Foreign Law**

Expert opinion as to foreign law may be given by a person, who in his/her profession is acquainted with such law.

#### **3.6.3. Customary law and Custom**

The traditional rulers, chiefs, or other person having special knowledge of the Customary law and custom may testify as experts. The opinions are respected as those of experts and are admissible.

Furthermore matters of Customary law and Customs may be proved by reference to any book or manuscripts, which the indigenous people in the locality recognize as a legal authority.

#### **3.6.4 Facts bearing on Expert Opinion**

When opinion evidence is admitted in evidence, facts which may otherwise be irrelevant become relevant and admissible of the support or are inconsistent with the experts opinion.

So far you have dealt with opinions of experts. There are occasions when opinion of non-experts are relevant to these, we may now turn;

#### **3.6.5. Opinion of non-experts Section 72**

The opinion of non-experts may be admitted in proof of:

- (a) **Handwriting.**



Opinion as to a handwriting may be given by a person who is acquainted with the handwriting or a signature of its author.

- (b) Existence of general custom or right, including customs or rights common to any considerable class of persons.(section 73)

The Court would receive the opinion of non-expert who would be likely to know of the existed if it existed.

- (c) **Usages and tenets Section 74** - A non-expert opinion may be received as to:
  - (i) usages and tenets of anybody of men or family
  - (ii) the constitution and government of any religious of charitable foundation
  - (iii) the meaning of words or terms used in a particular district or particular class of people.

**3.6.6. Non-expert opinion;** it must be shown that the witness has special means of knowledge to the satisfaction of the court on the matter specified in (c) (i-iii) above.

- (d) Relationship of one person to another: Section 75

A member of the family or other person who has special means of knowledge on the subject may volunteer opinion expressed by conduct.

A non-expert opinion is irrelevant as to marriage in cases of

- (i) divorces or petition for
- (ii) petition for damages against adulterer
- (iii) Bigamy

## 4.0 CONCLUSION

It is a fundamental principle of witness evidence that a witness should testify as to facts and not as to their opinions from facts. Opinions may be products of secondary evidence-a hearsay. Opinion evidence, generally, is excluded from evidence. But where some thing has arisen, which is outside the experience of the court, opinion evidence becomes relevant and admissible. Thus expert opinion is receivable to prove foreign law and customary law and custom. Similarly non expert opinion may be relevant and admissible to prove on handwriting, general custom or right, usages and tenets, constitution and government of a religious or charitable foundation, meaning of words or terms used in particular locality or circumstance, and special relationship between one person and another. Facts not otherwise relevant are relevant if they support or are inconsistent with an expert opinion and when the opinion of a living person is admissible, the ground on which such opinion is based are also admissible.

## **5.0 SUMMARY**

In this unit, you learnt what opinion evidence is and the reasons for its exclusion from evidence. The evidence allows some exceptions to the rule, which you need to keep to the heart. You also learnt who may give an expert opinion. Any person subject to satisfying certain pre-conditioning, may give opinion of foreign law, native law and custom, handwriting (including typewriting) and fingerprint impression. You may note instances, where growth in science and technology has stretched the scope of expert opinion into areas of psychiatrist and psychologist opinion. Examples are areas of reliability of a confession, credibility of a witness and reluctance of the court to yield grounds when it touches the existence or non existence of mens rea, truthfulness of witness(es) or evidence and the ultimate issues of which the court is competent.

## **6.0 TUTOR MARKED ASSIGNMENT**

What is the fundamental principle of witness evidence and how has the hearsay rule been relaxed for expert witness.

## **7.0 REFERENCES/FURTHER READINGS**

Allen and Gush (2004) Evidence, University of London Press. UK.

Nwandialo F. (1999) 2<sup>nd</sup> Ed. Modern Nigerian Law of Evidence, Lagos University Press. Lagos.

FGN (2011) Evidence Act

AFE B. (2001) Law and Practice of Evidence in Nigeria.

## **MODULE 1;**

### **UNIT 2. PRESUMPTIONS**

#### **CONTENTS**

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  - 3.1 Definition
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#### **1.0 INTRODUCTION**

The gist of Law of Evidence is relevance, weight and admissibility or the proof and establishment of facts or disproof. A fact is not proved if it is neither proved nor disproved. A fact is proved when after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist. To this end, a person, who desires a court to give judgment as to any legal rights or liability dependent in the existence of facts, which he asserts, must prove that the facts exist (section 131 Evidence Act, 2011, *Elemor v. Gorriolende* (1968) Thus it lies not on the party who denies but on him who asserts (affirmatively or negatively) to prove the facts alleged. The law also provides exceptions to this rule that who asserts must prove and would require no evidence of certain facts. Rather, the law permits an inference or deduction, having regard to the rules of law and practice of courts. Such inferences or deductions are presumption – a kind of invocation of the rule of law, which compels a judge to reach a particular conclusion in the absence of evidence to the contrary. In

essence, a presumption is a substitute for evidence, or one way of establishing a matter other than by evidence. In this unit, you shall learn how law has defined ‘presumption’, its forms, applications and effects.

## **2.0 OBJECTIVES**

When you have studied this unit, you should be able to:

1. Explain what is meant by “Presumption”
2. Explain the classes and forms of Presumption
3. Distinguish Presumption of Law and of Facts
4. Gain awareness of requisite conditions for the application of Presumptions.
5. Present arguments in favour or against “Presumption”.

## **3.0 MAIN CONTENT**

### **3.1 Definition**

The Evidence Act, 2011 does not define the term “Presumption”. The Act merely states:

Section 145

- (i) Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it.
- (ii) Whenever it is directed by the Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved.
- (iii) When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

#### **3.1.1 Admission and Presumptions**

Presumptions, like admissions, are inferences as to any facts in issue or relevant facts, and require no prove or evidence to the contrary. But the court, in its discretion, may require facts (though admitted) to be proved otherwise than by admission. Once the requisites are fulfilled, the court must draw the necessary presumptions. See sections 20-27, Evidence Act, 2011.

### **3.1.2 `Judicial Notice and Presumptions**

What is Judicially Noticed is presumed and like presumptions are exceptions to the rule that who asserts must prove. If the court is called upon to take judicial notice of any fact in contradistinction from presumptions, it may refuse to do so in certain circumstances.

Presumption then may be defined as:

- (a) Assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.
- (b) An inference as to the existence of one fact from the existence of some other fact founded upon a previous experience of their connection.

A presumption implies that some facts are to be taken and deemed to be so taken without proof unless the court insists on proof. Most presumptions are rules of evidence which call for certain result in a given case unless the adversely affected party rebuts it with other evidence. In some cases, a presumption merely shifts the burden of producing evidence or persuasion to the opposite party, who can then attempt to overcome the presumption.

### **3.2 Classes**

Legal writers and jurists have classified Presumption in different ways:

1. Traditionally, the classes of presumptions are:
  - (a) Presumption of Law
  - (b) Presumption of Facts
2. According to some Legal Literature, presumption may be classified into:
  - rebuttable Presumptions
  - irrebutable Presumptions
  - presumption of law
  - presumption of fact
3. Glanville William, classified presumption into
  - Persuasive presumption
  - evidential presumption

4. Denning suggested a classification into:

- Conclusive presumption
- Compelling presumption
- Provisional presumption

### 3.3 Self Assessment Exercise

How may presumptions be classified?

### 3.4 Types of Presumptions

A number of presumptions which apply in both Criminal and Civil proceedings can be founded scattered in the Evidence Act, and other statutes. Let us look at some of them.

#### 3.4.1 Irrebuttable Presumptions (*Presumptio Juris et de jure*)

This type of presumption is conclusive and incontrovertible and does not admit of evidence in disproof.

Examples are:

- That a child under the age of seven years is *in doli incapax*, cannot have a guilty mind and therefore incapable of committing a criminal offence. He lacks criminal responsibility (Criminal Code, section 30 and Penal Code, section 50).
- That a boy who is under the age of twelve years is incapable of committing rape or other offences involving carnal knowledge as a principal offender. Criminal Code section 30.
- That if a marriage is celebrated with license or banns published, the parties is presumed to have been resident for the requisite period.
- That all men and women know the law
- Where an agent receives a bribe, it is presumed that
  - (a) The agent was influenced by the payment to the detriment of his principal, and;
  - (b) the principal has suffered damage at least to the amount of the bribe.

Lord Denning thought that it is a misuse of language to describe these types of prescriptions as conclusive. He described them as:

1. Procedural equivalents of substantive rules, which may have independent validity.
2. Merely meaning that “on the proof of certain facts, the court must draw a particular inference, whether true or not and it cannot be rebutted: (61 LQR 381: *Industrial and General Mortgage Co Ltd V Lewis* (1949)).

#### 3.4.2 Rebuttable Presumption (*Presumptio Juris*)

This type of presumption must be drawn once the requisite premises are established. Examples are:

- That a child who is seven but under twelve years has no *mens rea* see the *Constitution 1999*
- That a person who has not been heard of for seven years by someone who might be expected to hear of him is presumed dead. There is no presumption as to the time of death. Section 164.
- Every person charged with a criminal offence, whether in criminal or civil proceedings, shall be presumed to be innocent until he/she is proved guilty. The Constitution, 1999.
- Every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question until the contrary is proved. Criminal code S. 27.
- That a spouse is dead, if upon a petition by the other spouse, that spouse has been continuously absent from the petitioner for a period of seven years or more and within that time, the petitioner has had no reason to believe his or her spouse to be alive.
- That for all purposes affecting the title to property, where persons who are successively entitled to inherit property die in circumstances in which it is impossible to determine, who died first, they are presumed to have died in order of seniority. The junior is presumed to have survived the older unless it is proved that the elder survived the junior.
- That he is a legitimate son of a man, if he is born during the continuance of a valid marriage between his mother and the man within 280 days after its dissolution, the mother remaining unmarried. Section 165.
- That everyone intends the natural consequences of his or her own acts or omissions.

- That a bill of exchange was accepted for value and that the holder is a holder in due course.
- See Section 153 as to presumption as to message forwarded by a telegram

Glanville Williams has identified two classes of rebuttable presumptions:

*(a) Persuasive presumptions:*

These presumptions confer a legal burden on the party trying to avoid the presumption.

*(b) Evidential Presumption:*

This class of rebuttable presumption obliges a party to adduce a *prima facie* evidence.

Lord Denning is of the opinion that presumptions are either “Compelling” or “Provisional”

### 3.4.3 Compelling Presumptions:

These presumptions arise where a party proves facts from which the Court **MUST** in law draw an inference in his favour, unless the other side proves the contrary or proves other facts, which the law recognizes as sufficient to rebut the presumptions (61, LQR 380). It requires a strict proof to defeat a compelling presumption.

### 3.4.4 Provisional Presumptions

These are exceptions to Compelling Presumptions, Examples are:

- Presumption of innocence
- Presumption of sanity
- Presumption of death after seven years

Provisional presumptions are merely guides to the Court in deciding whether to infer the fact in issue or not. Relevant facts or circumstances are often said to raise a presumption or make a *prima facie* case and so they do in the sense that from these the fact in issue may be inferred but not in the sense that it must be inferred unless the contrary is proved. A suspicion suffices to counterbalance a provisional presumption.



### 3.5 Self Assessment Exercise

Give example of the following:

- (a) Presumptions of Facts
- (b) Presumptions of law

### 3.6 Further Presumptions

#### 3.6.1 Judicial Presumption of certain facts

The Evidence Act, Section 167 provides that:

“ Court may presume the existence of any fact which it deems likely to have happened, regard shall be had to the common course of natural events, human conduct and public and private business, in their relationship to the facts of the particular case, and in particular the court may presume that:

- (a) a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods, knowing them to be stolen, unless he can account for his possession;
- (b) a thing or state of things, which has been shown to be in existence within a period shorter than within which such things or state of things usually ceases to exist, is still in existence;
- (c) the common course of business has been followed in particular cases;
- (d) evidence which could be, and is not produced would, if produced, be unfavorable to the person who withholds it; and;
- (e) when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

Section 167 (a) is often referred to as evidence of Scierter.

Section 167 (b) is evidence of continuance. That is to say things, circumstances or positions, once proved to have existed at a certain date, continue to exist in such a state or condition for a reasonable time.

#### 3.6.2 Presumption of Continuance

This presumption of continuance applies to partnership, sanity, marriages and life.

A thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence. Section 167 (b)

The evidence which could be and is not produced would, if produced be unfavorable to the person, who withholds it. Section 167 (d)

When a document creating an obligation is in the hands of the obligation, the obligation has been discharged. Evidence Act, Section 167 (e).

3.6.3. All things are presumed against a wrong doer. The maxim is: *Omnia praesumuntur contra spoliatores*. Example:

An employer, who fails to follow the usual safety precautions in his or her trade, is presumed to be negligent.

If a person wrongfully takes a thing and detains it or converts it, it is presumed to have been the best of its kind.

If Bola, to whom a legacy has been left by Will, destroys a subsequent Will, it is presumed that the later Will had revoked the legacy.

A ship that is lost within a short time of sailing is presumed to be unseaworthy.

If a deed or Will is produced from a proper custody and is 20 years old. It is presumed to have been properly executed. (See Sections 145-168. Evidence Act, 2011.

3.6.4. Presumption of Negligence under the doctrine of (*Res ipsa loquitur*: the thing speaks for itself);

Where a thing is under the management of the defendant or his servants and an accident occurs, which is such that in the ordinary course of events, it would not have happened if those who had the management used proper care, it affords

reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

In other words if Ado suffers damage in consequence of one or more things, which were under the exclusive control of the defendant, or his servant, the presumption of negligence may be inferred.

#### 3.6.5 Equitable presumption or presumption in Equity.

- Where there is a fiduciary relationship, undue influence is to be presumed against the party in the fiduciary position in matters of contract and conveyance of property
- That if Kalu purchases property, but has it conveyed into Jenifer's name, Jenifer is a trustee for Kalu.

#### 3.6.6: **Presumption of Regularity:**

The presumptions which gives validity to acts are favoured. Examples:

- (i) when any judicial or official act is shown, to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.
- (ii) when it is shown that a person acted in a public capacity, it is presumed that he had been duly appointed and was entitled so to act.
- (iii) when a person in possession of any property is shown to be entitled to the beneficial ownership of it, there is a presumption that every instrument has been executed which was the legal duty of his trustees to execute in order to protect his title.
- (iv) when a minute is purported to be signed by the chairman of a company incorporated under the companies and Allied Matters Act and purporting to be a record of proceedings as a meeting of the company or of its directors, it is presumed, until the contrary is shown, that such meeting was duly held and convened and that all proceedings at the meeting have

been duly had and that all appointments of directors, managers and liquidation are valid.

The presumption of regularity is also described as *omnia praesumuntur rite esse acta* (all things are presumed to have been done rightly).

### **3.6.7 Further illustrations:**

Suppose it is sought to prove that a person has been appointed to the office of the Study Centre Director, it suffices to prove that Professor YZ has acted in that capacity.

The presumption applies only to appointments to public offices. In respect of private office appointments, there must be a strict proof of which may demand the production of the instrument of appointment coupled with the production of an official to verify it.

A marriage which has been celebrated in a place of worship is deemed to have been celebrated in a place duly authorized for that purpose.

A deed or Will is presumed to be properly examined if it is produced from proper custody and it is 20 years old. See *Ogbonifo v. Aiwerevba (1988)*. The Court may also presume the genuineness of the recital of such a document where a deed contains an alteration, the alteration is presumed to have been made before execution. If the alteration is in a Will, the alteration is deemed to have occurred after signature. Conversely statements of testator as to alteration must be made before, but not after execution to be admissible.

A document required by statute to be served by post is presumed to be duly received upon proof that:

- The envelope was properly addressed
- The envelope bore adequate stamping
- The document was duly posted
- The document was not returned

In *Albion Court Ltd. v. Rao Investment & Duo Ltd. & ors* (1992), the CA. (Lagos Division) held that the Court of law must presume the regularity of a judgment or ruling until it is set aside on appeal.

Statements by judges, magistrates or judicial officers are to be accepted as a correct account of what took place in court *Queen v. Thomas Ijoma* (1960)

3.6.8 *Omnia praesumuntur Contra Spoliatores* (all things are presumed against a wrongdoer)

A chimney-sweep's boy found a ring with a Jewel; He handed it to a goldsmith's assistant to value. The latter refused to return the jewel on demand and was held liable for tort of conversion. He could not produce the jewel and was made to pay the value of the best stone of the same kind. See *Armory v. Delamirie* (1722).

Thus a person, who wrongfully takes a thing and detains or converts it, is presumed to have taken the best of the kind.

D, by will, leaves a legacy for P who is found to have destroyed a subsequent Will, it is presumed that the latter had revoked the legacy.

### 3.7 Self Assessment Exercise

Explain and illustrate the following:

- Equitable presumptions
- *Omnia Presumuntur Contra spoliatores*
- *Res Ipsa Loquitur*

### 3.8 Presumptions as to genuineness

The Evidence Act empowers the court to presume the genuineness of:

- Official Gazette of Nigeria, any state, or of any country other than Nigeria  
Evidence Act, 2011, Section 148.

- Newspapers, Journal or copy of resolutions of the National Assembly printed by the Government Printer. (*National Electoral Commission & 3ors v. Sunday Ogonda Woidi* (1989).
- the Rental of a document, properly executed and purporting to be 20 years old: *Johnson v. Lawanson* (1971)
- A copy of every document purporting to be a certificate duly certified by any authorized officer Section 146, Evidence Act 2011.
- Document produced as record of evidence in a judicial proceeding or before any officer authorized to take such evidence, surrender or confession and purporting to be duly signed by a judge. Magistrate or any such officer. Evidence Act Section 147.
- Seal, stamp, or signature authenticating any document admissible in other countries without proof of seal or signature. Evidence Act 2011, Section 149.

3.9 You may have to read up other presumptions, namely;

Presumptions as to powers of attorney Evidence Act 2011, Section 150

Presumptions as to Public maps and charts, Section 151

Presumptions as to Books Section 152

Presumptions as to handwriting etc in documents 20 years old, Section 155

Presumptions as to proper custody, Section 156

Presumptions as to date of documents, Section 157

Presumptions as to stamp of a document, Section 158

Presumptions as to Sealing and delivery, Section 159

Presumptions as to alternative Section 160

Presumptions as to age of parties to a conveyance or instrument Section 161

Presumptions as to statements in document 20 years old, Section 162

Presumptions as to deeds of corporation, Section 163

Presumptions of death from seven years absence and other facts- Section 164

Presumptions as to legitimacy and marriage sections 165 and 166

### 3.10 Few more critical presumptions need to be emphasized.

#### 1. Presumptions as to telegraphic and electronic messages:

Section 153 provides:

- (1) The Court may presume that a message forwarded from a telegraphic office to the person to whom such 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 such message was delivered for transmission.
- (2) The Court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumptions as to the person to whom such messages was sent.

#### 3.10.2 Presumptions as to execution of documents not produced. Section 154 adds;

“The Court shall presume that any document called for and not produced after notice to produce given under section 91, was attested, and executed in the manner required by law’.

#### 3.10.3 Presumption as to existence of certain facts Section 167: The Court may presume the existence of any facts which is deemed likely to have happened, regard shall be added to the common course of natural events, human conduct, and public and private business, in their relationship to the facts of the particular case, and in particular the court may presume that:

- (a) a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods, knowing them to be stolen unless he can account for his possession.
- (b) a thing or state of things which has been shown to be in existence within a remarkable shorter time than that within which such things or states of things usually cease to exist, is still in existence.
- (c) the common course of business has been followed in particular cases.

- (d) evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. And
- (e) when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

#### **4.0 CONCLUSION.**

A presumption, in reality, is a rule of law and part of law itself. Whenever the requisites are established, the court must draw the inference. It is founded upon reasons of public policy, social convenience and safety, which are warranted by the legal experience of the court in its administration of justice. There are two classes of presumption – conclusive and irrebuttable and rebuttable or *prima facie*. Its effect is to establish a fact without any or complete proof, operating as substitute evidence and as a way of establishing a matter than by evidence. See Section 145-168, Evidence Act, 2011.

#### **5.0 SUMMARY**

In the law of Evidence, he who asserts must prove. But the Evidence Act provides a number of exceptions to this principle; permitting inference or deductions and empowering the court to reach particular conclusions in the absence of evidence to the contrary.

An example of such exceptions is a “presumption”. In this unit, you have defined the term Presumptions, and learnt about its classes and forms, and distinguished the presumption of law from presumption of facts. As you have seen, Lord Denning proffered a reclassification into compelling and provisional presumptions. You have learned examples or illustrations of presumptions that are conclusive (*praesumptiones juris et de jure*), rebuttable (*praesumptiones juris*), of facts (*praesumptiones hominis*). Where the presumptions conflict, they neutralize each other. Examples are presumptions that:

- A child born within a reasonable time of the dissolution of his mother’s marriage by the death of her husband is the legitimate child of such a union.
- A child born during the subsistence of a marriage is the legitimate child of the parties.



Look at the above presumptions critically and attempt to visualize the conflict. Attempt also to give more illustrations of the conflict.

#### 6.0 TUTOR MARKED ASSIGNMENT

1. Discuss the presumptions (if any) to be drawn from the following facts.
  - (a) Umaru sailed in a ship called “*AV Sokoto*” on 31 December 2004 and has since not been heard of.
  - (b) Obinna and Cletus, his brother, sitting in the basement of a house during Boko Haram bomb-scare and were killed by the same bomb.
  - (c) Goodluck contacted a skin disease while at work, Adewale, his employer failed to provide barrier cream in accordance with the practice throughout the trade.
2. What is the effect of conflicting presumptions?

#### 7.0 REFERENCES/FURTHER READING

Aguda T, (2007) *The Law of Evidence*, Spectrum Law Series, Ibadan.  
Afe, B (2001) *Law and Practice of Evidence in Nigeria*, Intec Printers, Ibadan  
Nwadialo F. (1999) *Modern Nigerian Law of Evidence*, University of Lagos Press, Lagos.  
FGN: Evidence Act, 2011.

## **UNIT 4 JUDICIAL NOTICE**

### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Contents
  - 3.1 Definition of Term
  - 3.2 What the Court may Judicially Notice
  - 3.3 Illustration through cases
  - 3.4 Facts which the Judge may not judicially Notice
- 1.0 Conclusion
- 3.0 Summary
- 1.0 Tutor Marked Assignment
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### **1.0 INTRODUCTION**

Judicial notice requires that the court should act upon its own knowledge or upon a notorious fact. It is an acceptance of the truth of a fact by the court without proof. For this reason judicial notice is being regarded as another expression for a conclusive facts or *prima facie* fact. This however has been contested, as you will see in this unit.

### **2.0 OBJECTIVES**

When you have studied this unit, you should be able to:

- define or explain the term judicial notice
- identify what the court would judicially notice
- identify what the court has declined to take judicial notice of
- critique the principles of judicial notice

### **3.0 MAIN CONTENT**

#### **3.1 Definition of Term**

Judicial notice is an acceptance by court of the truth of a fact without proof on the ground that it is within the court's own knowledge or not being out of professional knowledge of the judge himself.

The power of the court to take judicial notice may be obligatory, discretionary, conclusive or *prima facie*.

Judicial notice is obligatory where:

(a) Statute directs that a particular matter be judicially noticed. An example is the signature of judges of superior courts on official documents.

(b) The matters are what have been judicially noticed by well-established practice or judicial precedent.

Judicial notice is discretionary on matters, when the judge may notice, usually on the invitation of a counsel.

It is absolute or conclusive when no evidence in rebuttal is admissible. Conversely it is *prima facie*, where it is rebuttable.

### **3.2 What the court takes judicial notice of**

The facts which are judicially noticed need not be proved. The Evidence Act expressly provides that “no fact of which the court must take judicial notice need be proved” (section 122, Evidence Act 2011).

The facts of which the court must take judicial notice are enumerated in section 122 of the Evidence Act. (Refer to the Act). These may be subsumed as follows:

#### *( 1) Matters of Public law and government:*

- Existence and content of all public Acts of the National Assembly and Laws of the State Assemblies, unless the contrary is expressly provided.
  - Proclamations, orders in council and regulations issued by Government departments and printed by the government printing press;
  - Maritime Law of Nations
  - Public matters affecting the government of Nigeria e.g. Succession and demise of the President; Date and place of sittings of the National Assembly; existence and titles of recognized foreign sovereign, the Principal Officers of state and the heads of departments, past or present.
  - Wars in which the country is or has been involved.
2. The existence, extent and geographical position of Nigeria areas of Jurisdiction and of the territorial and administrative division of Nigeria into states, local governments, towns etc. but not whether a particular town is within a named local government or state.
  3. The law and custom of the National or States Houses of Assembly and courts; the existence and extent of the privilege of the each of the Houses of Assembly

and the order and course of their proceedings.

4. Well known (notorious) Facts.  
The ordinary events of nature or business (e.g. tides, movement of planets); period of gestation, Public currency and coins.
5. Meaning of common words and phrases, standard of weights and measure  
Does anyone need to be told that Lagos streets are crowded and dangerous, that Cats are domestic animals or that boys are naturally reckless and that the tiger is dangerous? Of course not. They are within the purview of common knowledge and are judicially noticed.
6. Some documents are judicially noticed if they purport to be printed by the Federal Government Printing Press. Examples are
  - Private Act of the National or State Assembly, official gazette of the federation and of the states.
  - Proclamations; and order in council.
7. Other matters that may be judicially noticed include:
  - Official seals and signatures of superior Courts to judicial or official documents,
  - The signatures of ambassadors and consults to affidavit sworn before them.
  - The seals of the Federal Republic of Nigeria, Medical register, Law List, the Army List, the Clerical List.
  - The seal of the patent office and of the Nigeria notary public.

### 3.3 Illustration through cases

Look at some cases illustrating facts which judges have judicially noticed: *Bakare v Ishola (1959)*.

During an altercation which preceded a fight, the defendant called the Plaintiff “*Ole, Elewon*, you are a thief, ex-convict; you have just come out of prison”. Held. It is a matter of common knowledge of which this court takes judicial notice that people commonly abuse each other as a prelude to a fight and call each other *ole! Elewon* (thief, ex-convict) which abuse no one takes seriously as they are words of anger, and are nothing but vulgar abuse”.

#### *France Izedonwen V IGP*

The accused, a police Officer was being accused of accepting a reward beyond his proper pay and emolument. (Section 99 Criminal Code). The court held that a judicial notice could be taken of the fact that the accused, a police officer, would receive

proper pay and emolument under the Police Act.

*Rotimi Williams v. West African Pilot* (1961)

In an action for libel, contained in a newspaper, the court would take judicial notice that the newspaper is a national daily and that it exercises immense influence on its readers.

### 3.4 Examples of notorious facts of which court may take judicial notice:

It is a notorious fact which the judge may judicially notice that:

- A postcard is an unclosed document, which can be read by anyone in the course of post.
- Two weeks is too small a period for human gestation,
- Goats, dogs, cats, camels are domestic animals,
- Young boys are naturally playful,
- A particular day was Sunday.
- Lagos – Ore or Abuja – Kaduna roads are Federal highways (Federal Highways) Declaration Order, No LN 101 of 1971).

A custom may be adopted if it can be judicially noticed. It is judicially noticed if it has been acted upon by a court of superior or coordinate jurisdiction in the same area to an extent, which justifies the court in assuming that the person or class of persons concerned in that area, look upon the same as binding. See Sections 16 and 20 of the Evidence Act.

### 3.5 Facts of Which the Judge May Not Judicially Notice

The judge may take judicial notice of a custom if it is of such notoriety and has been so frequently followed by the court. But it may refuse to take judicial notice of a solitary instance of the application of a custom.

Other examples where the judge has refused to take judicial notice are:

- 1) Internal arrangements of a government department or of government departments or of government corporations (*Mutete v NRC 1961*)
- 2) The fact that the general Hospital is a public place (*Cyril Arch V Cop (1959)*).
- 3) When certain elements go to constitute an offence, they must be strictly proved and the court cannot take judicial notice of such facts or act on its own private knowledge.

Aguda has pointed out that Sec. 73 (1) of the Evidence Act 2004(now section 122, Evidence Act 2011) is not a full catalogue of what the judge can judicially notice. He has argued that section 73(2) (now section 122) allows the judge to take judicial notice of other facts which are not expressly listed.

#### **4.0 CONCLUSION**

Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them or from enquiries to be made by himself for his own information from sources to which it is proper for him to refer. It is obligatory that the court takes judicial notice of the facts enumerated in section 122 (1) of the 2011 Evidence Act, while it exercises discretion in others.

#### **5.0 SUMMARY**

In this unit, you learnt about judicial notice. It is the acceptance of the truth of a fact without proof because it is within the court's own knowledge. You learnt what the court will take judicial notice of, for example, the courts in Nigeria take judicial notice of the Acts of the Federation, the Laws of the different states, the general or local customs and judicial precedent. This is not exhaustive. Parliamentary procedures and matters of common knowledge e.g. meaning of words, the facts that rain falls or that cats are domestic animals are other examples of facts which courts may judicially notice. You also learnt of the provision of section 122 and you were invited to consider whether or not the section is all inclusive and exhaustive.

#### **6.0 TUTORIAL MARKED ASSIGNMENT**

1. Explain the term "Judicial Notice"
2. How would you prove the following:
  - a) Udoh, aged 6, stole N1000 from a neighbour's house
  - b) A Public Act of National Assembly
  - c) A private Act of Kano State house of Assembly
  - d) That Abuja is in Nigeria
3. Mention some of the most important matters of which the court will take notice.

#### **7.0 REFERENCES/FURTHER READINGS**

Evidence Act, 2011.

Babalola Afe (2001): A Law & Practice of Evidence in Nigeria, Intec Printers Ltd.  
Ibadan

Nwadialo, Fidelis (1999) Modern Nigerian Law of Evidence, University of  
Lagos Press.

## **MODULE 2**

### **UNIT 1 ADMISSION**

#### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
- 3.1 Admission and confession
- 3.2 Types of admissions
- 3.3 Who may make admissions
- 3.4 Admissions which the court may admit
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Readings

#### **1.0 INTRODUCTION**

Admissions belong to the category of facts, which do not need proof. They are also exceptions to hearsay rule. Admission and confession are both acknowledgements of facts in issue but they are not synonymous with each other. They are different. This unit is concerned with admissions. You shall learn about confession in the next unit. Meanwhile you should read Evidence Act, Section 20-27 about admission, and section 28 – 32 about a confession.

#### **2.0 OBJECTIVES**

When you have studied this unit, you should be able to:

- Define admission.
- Identify when admissions may be admissible in evidence.
- Gain an awareness of judicial attitude towards admissions.
- Critique the rule of evidence concerning admission.

#### **3.0 MAIN CONTENT**

##### **3.1 What is admission?**

An admission is a statement oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and in any of the circumstances defined in the Evidence Act.

##### **3.2 Forms of Admission**

Admissions may take any of the following forms:

1. Formal admission



2. Informal Admission
3. Admission made in a representative capacity
4. Admission made “without prejudice”

### **3.2.1 Formal Admission**

This is an acknowledgement of facts in issue made by a party in a civil proceeding.

They may be contained in a party’s pleading.

Any party may, by leave of the court, call upon any other party by notice filed in court and duly served under an order of the court to admit any document or fact. A party may, on his or her own, file notice that he or she admits the truth of the whole or any part of the case stated or referred to in the writ of summons, statement of claim or of defence or other statement of any other party. It is also open for a party or his or her counsel to admit facts at the trial. Any fact admitted in this way may be taken as established.

Formal admission may be made as follows:

- by the pleadings
- by answers to a notice to admit facts
- by counsel or solicitor in the course of an action
- in answer to interrogatories
- by agreement made before or at the trial by the parties or their agents.

### **3.2.2 Informal Admission**

*Read Section 20. Evidence Act*

An informal admission is a written admission made before or at the proceedings, and admissible at subsequent criminal proceedings relating to the same matter. Informal admissions are admissible against the party in all cases where relevant. They may also be impeached on the ground that they are untrue or were made in error, ignorance or levity.

As an exception to hearsay rule, an informal admission is relevant and admissible provided it satisfies the specified conditions precedent. It is for the court to decide the question having considered the circumstance, under which it was made and what due weight is fairly to be attached to it.

You may ask if an admission by Mrs. X can bind M. The answer may turn out to be whether or not there has been a relationship of the type enumerated in section 122 of the Evidence Act. Under English Law an admission by a drunken person may be admissible even though he was given the alcohol in the hope that he would make the admission. It is most likely that a Nigerian court will follow this and admit in evidence an admission made by a drunken man.

It appears then that an admission may be voluntary or involuntary. Much depends on the weight, the particular judge or situation. The court may in its discretion require the facts admitted to be proved otherwise than such admission.

A statement made to oneself in soliloquy, if over heard by a stranger, may amount to an admission against the maker. Admission is a question of law not logic.

### **3.2.3 Admissions made in a representative capacity**

When a party sues personally, an admission made by him in a representative capacity is evidence against him or her, but not vice-versa.

### **3.2.4 Admission made without prejudice- section 26**

Admissions made “without prejudice” cannot be given in evidence. This exclusionary rule extends to:

- an answer to a letter where the original letter is marked “without prejudice” but the letter is not so marked.
- A letter followed by a later one in explanation when originally the letter is marked “without prejudice”

The rule is ousted in the following cases

- where both parties consent
- in criminal cases e.g. defamatory letter
- in proof of act of bankruptcy
- in proof of the terms of a compromise, which has been effected.

### **3.3 Who may Make Admission- section 21**

Admission may be made by any of the following:

- A party to a proceeding
- An agent or agents of the party
- A party suing in a representative capacity
- A party having proprietary or pecuniary interest
- A predecessor in title or person from whom an interest is derived
- A person whose position must be proved as against a party to the suit
- A party expressly referred to as a party to the suit or mentioned in a Will, who has a particular knowledge of the issue

### **3.4 Admission, which the court may admit**

An Admission constitutes a waiver of the ordinary requisites of proof as a party who

makes an admission against him or herself is presumed to be admitting the truth. Examples of the admissions, which the court may admit are the following:

- a. a party's statements against him or herself if such statements are legally relevant. (A person's admissions are not admissible for him or her).
- b. An admission by one person may be admissible in evidence against another e.g. admission made by one's privies. Other examples are:
  - i. Statements made by a trustee or agent within his or her authority, against the *cestui que trust* or principal.
  - ii. Partners are bound by each other's admissions concerning the partnership business
  - i. A wife may make an admission against her husband, if she is his agent, agency being implied in the case of purchase of necessities.
  - ii. A Solicitor or counsel's admission may bind their clients unless forbidden to so by the client.
  - iii. Admission by a real party in a litigation is admissible against a nominal party conducting the case. So also are:
    - Statement of interest in an insurance policy against those in whose name the policy is effected.
    - Statement by a ship owner against the master when the latter sues to recover freight.
    - A statement made by a nominal party may also be binding on the real party.
- iv. Parties who have a joint interest (other than in tort) bind each other. Examples are:
  - Admissions of joint tenants partners and co-contractors, provided – the interest is joint (not common) and the admission is made during the existence of joint interest.
  - An acknowledgement of a statute-barred debt made by one debtor does not revive the debt against the other; nor admission of co-defendants against each other.
- v. Predecessors in title's admission against successors, where the title to property is in question
- vi a statement made in the presence of a party (or his or her agent) whether by words or conduct, he or she can be deemed to have admitted its truth.
- vii A document in a party's possession, which he or she has adopted or acted upon.

Let us take further illustrations

*Akinbiyi V. Anike* (1959) P sues to recover a sum of money alleged to have been paid by him on behalf of D.D. counter – claimed for the return of some of her goods wrongly detained by P. In support, she sought to tender in evidence a list of her goods and value. P did not object nor also cross examined D as to the accuracy. Held failure

to cross-examine as to the accuracy of the list was an admission that it was correct.

*Oloko V Oloko* (1961)

R cross petitioned for dissolution of marriage with P. on grounds of adultery, R made allegation of adultery by P. to a police officer in her presence and to her hearing but P did not deny. Held failure to deny is insufficient proof of an admission of adultery.

*Basele V Stern* (1877)

P. sued D for breach of promise of marriage and called her sister who deposed to the fact that she heard P say to D. "You know, you always promised to marry me, and now you don't want to keep your words" D did not answer beyond giving her money to induce her to go away. Held silence amounted to an admission of promise to marry.

*Wieldemann v Walpole* (1981). It was held that D's failure to reply to letter from P. in which P stated that D had promised to marry her did not amount to a promise to marry. The court drew a distinction between a business letter and other correspondence. A failure to reply to a business letter may tantamount to an admission in several matters, it may be better on many occasions not to send replies.

One may add that an accused person is not obliged to say anything and silence cannot be an admission of the offence charged or fact in issue.

The court will look at the facts of each case in order to determine whether a failure to reply to a letter would amount to an admission. "*Mariaty V London Chatham and Dover Railway* (1870) it was held that the subordination of a witness to perjure in support of a claim for damages for injury in a railway accident was an admission that P's claims were false. In collusion cases, admission of fault by one of the drivers is an admission only against its maker, not the owner of the vehicle. You would observe from these cases that conduct (eg. Silence) has been held to be admissions in some cases and non-admission in others. Admission by conduct does not appear to be expressly mentioned in section 122 of the Evidence Act, but courts lean in favour of active conduct.

#### **4. 0. Conclusion**

An admission is a statement, oral or documentary or conduct which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and in the circumstance, mentioned in the Evidence Act (Section 20) includes admission by privy (Section 21). Admissions are not conclusive proof of the matters admitted but operate as estoppel.

## **5.0 Summary**

Admission may take the form of a statement, (oral or documentary), or conduct. It may be formal or informal, made in a representative capacity or without prejudice. The kind of admissions which the court may admit and illustrated in the Evidence Act.

## **6.0 Tutor Marked Assignment**

## **7.0 References/Further Reading**

1. Aguda T, (2007) The Law of Evidence, Spectrum Law Series, Ibadan.
2. Afe, B (2001) Law and Practice of Evidence in Nigeria, Intec Printers, Ibadan
3. FGN: Evidence Act, 2011.

## **MODULE 2**

### **UNIT 2: CONFESSION**

#### **CONTENT**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Contents
  - 1.1 Definition
  - 1.2 Voluntary Nature of Confession
  - 1.3 eProof of Voluntariness
  - 1.4 Attacks on Confession
- 5.0 Conclusion
- 6.0 Summary
- 7.0 Reference/Further Readings

#### **1.0 INTRODUCTION**

Matters relating to confessions are problematic and contentious areas of the Law of Evidence. Perhaps for this reason, the Evidence Act has provided certain safeguards against pitfalls and also imposed some duties and obligations on the agencies concerned with criminal investigations. You should be familiar with the topic for the purpose of examinations. In this unit, you shall learn what a confession is and about its admissibility, the effect of any confession that is wholly incriminatory or wholly exculpatory or mixed, the vexed question of a person in authority and protection of persons who are no more than suspects of crime(s).

#### **2.0 OBJECTIVES**

When you have studied this unit, you should be able to:

1. Define or Explain the term “Confession”
2. Distinguish Admission from Confession
3. Gain knowledge of the conditions precedent to admissibility of a confession.
4. Explain evidential implications of statements that are wholly or partly adverse to its maker.

5. Recognize the safeguards and the added duties imposed on State Agencies to enhance the voluntariness of a confession.
6. Critique the state of Law of Evidence on “confession”

### **3.0 MAIN CONTENT**

#### **3.1 Definition**

A confession is:

- an admission tending to establish the guilt of a person charged with a crime . It is an acknowledgement in express words by an accused of the truth of the main fact charged or of some essential part of it.
- An admission made at any time by a person charged with a crime, stating or suggesting the inference that he or she committed that crime.- Section 28
- if voluntary, deemed to be a relevant fact as against the person who has made it only;

Where more persons than one are charged jointly with a criminal offence and a confession made by one of such persons in the presence of one or more of the other persons so charged is given in evidence, the court or a jury where the trial is one with a jury, shall not take such statement into consideration as against any of such other person(s) in whose presence it was made unless he/she adopted the said statement by words of conduct.

Read: Evidence Act, 2011 Sections 28-29.

It is also an exception to the rule against hearsay.

#### **3.2 Admissions and Confessions**

Some writers and judicial opinions find no differences between admissions and confessions and sometimes use both terms interchangeably. See the case of *Commissioner of Customs and Excise V Harz (1967)* where the House of Lords expressed the view that there is no distinction between admission and confession

Others have found a distinction between an admission and a confession on the basis of facts from which guilt may be inferred and the express admission of guilt itself.

### 3.2.1 Voluntary Nature of a Confession

It is a fundamental condition of admissibility of evidence that a confession should have been made voluntarily and not by inducement, threat or promise, under the old law, a statement or a confession is voluntary if:

- It is not caused by any inducement, threat made by or in the presence of a person in authority.
- The promise or threat does not give the maker a reasonable ground for supposing that he or she will gain any advantage or avoid any disadvantage of a temporary nature as a result of making the statement.

Under the Evidence Act, 2011,

A confession, which is relevant to any matter in issue in the proceeding, is admissible if the court does not exclude it.

The Court would exclude it if:

- the confession was obtained by oppression of its maker.
- the confession was obtained in circumstances which render it unreliable except the prosecution proves beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provision of Section 29 of the Evidence Act.

Also note that a confession otherwise relevant does not become irrelevant merely because it was made:

- under a promise of secrecy
- in consequence of a deception
- when the maker was drunk
- in answer to question which need not be answered
- not under caution that he is not bound to make such statement and that it may be given in evidence.

See Sections 29 and 31, Evidence Act, 2011.

The often quoted principle is that:



“It has long been established as a positive rule of Criminal law that no statement by an accused is admissible in evidence against him or her unless it is shown by the prosecution to have been a Voluntary Statement, in the sense that it had not been obtained from him or her either by fear of prejudice or hope of advantage exercised or held out by a person in authority” Per *Lord Sumner in Ibrahim V R (1914)*

This principle is as old as Lord Hale and it has been referred to with approval by the House of Lords in *Commissioner of Customs and Exercise V Harz 1967*.

It is submitted that this case may not be good law in Nigeria today as the wording of section 28 of 2004 is different from section 31 of 2011.

If a threat or promise under which a statement was made still persists when a second statement is made, then the second statement also is inadmissible. Only if the time lag between the two statements and the circumstances existing at the time are such that it can be said that the original threat or inducement has been dissipated then can the second statement be admitted as a voluntary statement.

The whole of the confession, if relevant, is admissible (if admissible at all), even though some parts are favourable and the other unfavourable.

It needs to be emphasized that an accused can be affected only by his or her own confession. The confession by his or her agents, accomplices or strangers would bind the accused, if and only if, such confession was made in his presence or assented to by him or her. But a threat or promise made by a person in authority to a third party in the hope or expectation that it will eventually be communicated to the accused suffices to render the confession inadmissible.

Consider an allegation that a police officer promised an accused a glass of spirits, or permission to see his wife and the accused made a statement confessing to the crime

What about such declaration by the Police Officer as: “I need to take a statement from you” or even the suggestion that the accused would accompany him to the Police station because they need statement from him or her.

Admittedly, the Police officer is a person in authority but neither of the above fact situations can vitiate the admissibility of the statement of the accused or his/her confession.

### 3.2.2 A Person in authority

One of the differences between the Evidence Law prior to 2011 and after is the reference to person in authority.

He is a person in authority whom the accused might reasonably be supposed to be capable of influencing the course of the prosecution.

Examples of persons in authority are persons engaged in the arrest, detention, examination, prosecution, or punishment of the accused. That is to say: the Magistrate, the Police Officer, Prosecutor (Public and Private etc). Other Examples are Justices of the Peace, Military Police, Customs and Excise officials and Officers of the State Security conglomerate who may be engaged in criminal investigation. In some situations, it may include the village heads and owners of stolen property. The current law makes no reference to persons in authority.

### 3.3 Proof of Voluntariness

A condition precedent for admissibility of evidence prior to and under the Evidence Act 2011 is that it must have been made voluntarily and the burden of proving that a statement was voluntary lay on the prosecution. As Lord Sumer explained.

“It has long been established as a positive rule of Criminal law that no statement by an accused is admissible in evidence against him or her unless it is shown by the prosecutor to have been a voluntary statement, in the sense that it had not been obtained from him or her either by fear of prejudice or hope of advantage exercised or held out by a person in authority”. *Ibrahim v R (1914)*

Once the prosecution has first discharged his or her burden to prove that the statement is voluntary. It noted on the defence to prove that the statement was made involuntarily.

Some questions need to be asked:

What should be the proper concern of the Court?

Is it whether or not the statement was made voluntarily or as a result of fear of prejudice or hope of advantage for the purpose of determining its admissibility, or

Is it whether or not the statement was made voluntarily or as a result of fear of prejudice or hope of advantage for the purpose of determining what value the court should attach to the statement?

The burden is on the prosecution to prove that;

- (i) The statement had been made voluntarily and therefore admissible
- (ii) No threat, promise or inducement had been made to the accused
- (iii). If there was, its effect had been nullified before the accused made the statement in issue.

### 3.4 Threat, Promises etc

The presence of a threat or promise that was operational and had not been nullified or had not spent its force or dissipated would render inadmissible any subsequent statement made by the accused person under the old law.

“If a threat or promise under which a statement was made still persists when a second statement is made, then the second statement also is inadmissible. Only if the time lag between the two statements, the circumstance existing at the time, and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement”

It was the practice that after the prosecution has first discharged the burden of proving that the confession was voluntary, the onus shifts to the defence to prove that the statement is involuntary.

### 3.5 Confession under the old and the new law of Evidence:

The comparative provisions for confession are shown below:-

Old Law	New Law
1. Statute Evidence Act 2004	Evidence Act 2011.
2. Definition A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. (Sec. 27(1)).	A confession is an admission made at any time, by a person charged with a crime, stating or suggesting the inference that he committed that crime. (Section 28).
3. When confession is relevant confessions, if voluntary, are deemed to be relevant facts as	Section 29 (1) If, in any proceeding where the prosecution proposes to give in

<p>against the person who make them only. Section 27(2).</p>	<p>evidence, a confession made by a defendant, it is represented to the court that the confession was or may have been obtained:</p> <p>(a) by oppression of the person who made it;</p> <p>(b) In consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him, in such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.</p> <p>3. In any proceeding where the prosecution proposes to give in evidence a confession made by a dependant, the court may of its own motion require the prosecution as a condition of allowing it to do, to prove that the confession was not obtained as mentioned in either subsection 2(a) or (b) of this section.</p>
<p>Where more than one are charged jointly with a criminal offence and a confession made by one of such persons in the presence of one or more of the other</p>	<p>4. Where more persons than one are charged jointly with an offence, and a confession made by one of such persons in the presence of one or more</p>

<p>persons so charged is given in evidence, the court or a jury, shall not take such statement into consideration as against any of such other persons in whose presence it was made unless he adopted the said statement by words or conduct. Section 27(3).</p> <p>Confession caused by inducements (section 28)</p> <p>A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it, he would gain any advantage or avoid any evil of a temporal nature.</p> <p>Confession, it is relevant if it was made after impression caused by such inducement, threat or promise has, in the opinion of the court been fully removed (Section 30)</p>	<p>of the other persons so charged is given in evidence, the court shall not take such statement into consideration as against any of such other persons in whose presence it was made unless he adopted the said statement by words or conduct.</p> <p>2. In this section, “<i>oppression</i>” includes torture, inhuman or degrading treatment, and the use or threat of violence whether or not amounting to torture.</p>
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## ACTIVITY

The reason for rejecting an involuntary confession generates some controversy. Suppose a statement is relevant but was obtained by coercion. Do you think such relevant evidence should be denied admissibility?

Some critiques have argued that threat or fear of prejudice or hope of advantage should not affect the admissibility of an otherwise a relevant statement. Do you agree?

Let us consider some statements and their voluntary nature.

1. Adigwe believes that Ikem was sexually abusing her ward, Juliana. Adigwe dragged her into her room, with a piece of wood in her hand and said:  
“If you do not tell me all about it, I will send for the Police”  
Julian, kept mute. Adigwe called Oforji, a Police Officer. At the sight of the Police, Julian got frightened and confessed.
2. In a rage, Okafor said, pointing a gun to the accused, “If it was not Assize time. I would chop off your head”

In the above two illustrations, would you say the statements were induced. Obviously, neither of the statements can be said to be induced by operative threat or coercion.

Look at the case of *R v Williams (1968)*

In that case, the military Police questioned the accused, a soldier, about allegations of homosexual acts with a civilian. The military police informed him that they would not take proceedings against him but could not guarantee that the civil police would not. The accused made a statement. This soldier was subsequently handed over to the Civil Police, who after interview, also made a statement. The prosecutor sought to tender both statements at his trial before the ordinary court.

Held: The statement made to the military police is inadmissible by reason of improper inducement. The second statement made to the Civil Police is also inadmissible on the ground that even though made after caution, the inducement made before the first statement was still operating on the mind of the accused.

This decision arose under the old law. The decision may be different under the new law. A confession may now be rejected in evidence if it is obtained by oppression or in circumstances in which it can be said that the prosecution has not discharged his burden of proof beyond reasonable doubt that it was not obtained contrary to the Act (Section 29). Especially Section 31, without more, would not reject a confession merely because it was obtained in consequence of a deception practiced on the accused (Sec 31).

A confession otherwise relevant is not to become irrelevant because of promise of secrecy; Section 31. If a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practiced on the defendant for the purpose of obtaining it or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of these questions or because he was not warned that he was not bound to make such statement and that evidence of it might be given. Evidence Act, 2004 Section 31 and Evidence Act, 2011, Section 31.

In *R V Zaveekas (1970)*, the accused was charged with theft from a telephone booth. Before his trial, he asked a Police Officer;

If I make a statement, will you grant me bail now?"

The police officer replied "Yes" and the accused made a written confession.

The trial court admitted the confession and convicted the accused. Quashing the conviction, the Court of Appeal held that the confession was made as a result of a promise held out by a person in authority and that it made no difference that the question of bail was first raised by the accused himself. The case may be decided differently today. See Evidence Act 2011 section 29 and 31

*R V Deokinanan v R 1968*

The accused was charged with murder. The Police detained him, and locked him in a room with his best friend, B that both might freely talk. The accused confessed to B that he had committed the murder.

At the trial, the prosecutor sought to tender the confession by the accused to B, his best friend. The defence opposed the reception, arguing that it was induced by B's promise to help the accused, a promise which had been held out by B with the knowledge and consent of a person in authority to wit the police officer in charge of the case.

In overruling this objection, the court held that even if it had been, it would not be rendered inadmissible unless it was held out by a person in authority. Decision would not be different under the new law whether or not it was held by a person in authority.

At the time of the confession, B was merely a possible prosecution witness, not a person in authority. The accused, at all material times regarded B as a friend, not as a person in authority or in any way connected with or working with the police. The objection to the admissibility of this confession therefore could not be sustained.

Let us look at additional statements.

An investigating police officer arrested A, B, C, D for various offences. Each of them made a statement in response to the following admonition from the police officer.

- (a) Police to 'A': You need not say anything
- (b) Police to 'B' You need not say anything but anything you say will be given in evidence against you.
- (c) Police to 'C': You need not say anything but it could be better to speak the truth.
- (d) Police to 'D': You need not say anything to incriminate yourself.

The prosecution seeks to tender in evidence each of the statements made by A, B, C, and D The defence objects.

- (i) The attitude of the trial court is likely to be as follows:

The admonition to A and D by this Investigating Police officer leaves the accused persons with a choice to speak or hold his peace. There is no evidence of improper inducement. The objection to the admissibility of the statements by A and D is likely to be overruled.

- (ii). The words “against you” in C and the clause: “it could be better to speak the truth is likely to be fatal to the reception of the statements by B and C respectively. The first puts the maker (B) in anticipation of fear of harm. The second implies that it would be better for the maker (C) to say ‘something’ in violation of his or her fundamental right to silence.

If the court is satisfied that a confession is voluntary, it does not become inadmissible merely because the police failed to administer a caution. But the admonition to speak the truth coupled with an expression implying that it would be better for him or her to do so, may be objectionable and such as would render the resulting statements involuntary and inadmissible.

Suppose Chinyere, Paul and Komolafe are directors of ABS and Co Plc and sought to have a competitive advantage over or liquidate their arch rival company KYZ and Co Plc. Chinyere, Paul and Komolafe embarked on espionage mission; bugged the office of the Chief Executive, KYZ and Co Plc and also carted away their brain box and production secrets. The Police arrested Chinyere, scourged her in the interrogation room up the small hours of the morning. She confessed.



Acting upon her confession, the Police recovered the brain box from where it was buried in her flower bed behind her bedroom, and other components from the chimney in Paul's house.

At the trial, the persecution seeks to tender in evidence the following:

1. Chinyere's confession
2. The brain box
3. Other components

The defence has opposed vehemently, arguing that the confession is involuntary or oppressive. Furthermore, as a bad tree cannot bear good fruits, the brain box and other components which are products of involuntary and inadmissible evidence are also prejudicial and therefore inadmissible.

Fine argument; is it not?

Clearly Chinyere was coerced to make her statement: Such a coercion amounts to oppressive behaviour or improper inducement and capable of rendering the confession involuntary and inadmissible.

Although a confession is inadmissible by reason of threat, evidence may be given that in consequence of what the accused has said, some property (to wit: the brain box and other components), was found or other facts discovered. (*Re v Gould, 1840. R v barker (1941) R V Jonkins, 1822*)

Thus the fact that the brain box was found in the flower bed beside Chinyere's bedroom may be incriminating but may not by itself be sufficient to justify its admissibility or inadmissibility. For one thing, there is no evidence that Chinyere hid it there after it was stolen. But when, in addition, it is known that she had disclosed the where-about of the property (even though in an involuntary statement), the probative value becomes sufficiently strong to justify its admissibility.

In relation to the other components found in Paul's chimney, do not forget that a confession is admissible only against the person who made it. But the fact that the property was found in Paul's residence is of sufficient evidential value and weight justifying its reception.

There has been a line of cases since the 18<sup>th</sup> century where confessions were held inadmissible because they were improperly induced whereas the evidence of the fact that as a result of the confession, stolen property were found with the accused: (*R V Richards,*

1832, (*R V Warwickshal* – 1983) or in a pond: *R V Gould*; 1840). These cases may preferably go the same way under the Evidence Act, 2011.

### 3.7 Valid Attacks on Confession

That a confession has been obtained by fear of prejudice or under hope of advantage exercised or held out by a person in authority though a valid attack against the reception of a confession in evidence, under the old law may now be invalid.

What about an admonition to speak the truth, in a situation where a compulsion to say something is inherent in the expression: Take the example; ‘It would be better to speak the truth’

You would have noted that Section 29 of the Evidence Act, 2011 is silent on whether or not the part of such statement in favour of the accused is as admissible, as the incriminating part.

Brett/Ag CJ permitted the reception in evidence, a confession which is partly against and partly in favour of the accused because both sides are admissible at common law. This, with respect, is no more good law in Nigeria. Section 5(a) of the Evidence Act, 2004, made Common Law admissible but section 3 of the Evidence Act, 2011 now makes Common Law inadmissible as Common Law is not legislation validly in force in Nigeria. Hereinafter, all references to Common Law should be reviewed.

Compare and Contrast the following admonition:

- (a) You need not say anything to incriminate yourself;
- (b) It was better for you to speak the truth.
- (c) The Bank CEO said to his accountant:

“if you do not tell me all about it, I will send for the police.

The accountant said nothing until after the arrival of the police.

The investigating police officer (IPO) said to the suspect during interrogation: “If you fail to answer my question, you will be prosecuted, and he made certain admissions.

Read up *Deokinan v R* (1968) and *R v Williams* (1968).

Where an accused refuses to answer a question because it might tend to incriminate him and he is then improperly compelled to answer it, his answer is involuntary.

Where a statement is admitted, it is the whole of the statement that is admitted.

*Adekanbi v AG (WN (1960).*

Confessional Statement was tendered through the Accused during cross examination and was wrongly admitted. For this reason the conviction was quashed on appeal on the ground that the prosecution had not proved that it was made voluntarily.

*Inusa Saidn v The State (1984)*

The Confessional statement which was signed by its maker was held admissible unless it was obtained by force, trick, fraud, threat or inducement. In *R v Omokaro (1947)* in a free and voluntary confession of guilt by the accused, if it is direct and positive, duly made and satisfactorily proved, is sufficient to warrant a conviction, even if there is no corroborative evidence. In the current law, what may vitiate a confession is oppression or inability to prove beyond reasonable doubt that the statement was obtained in a manner not inconsistent with the provisions of the Evidence Act. *Anthony Ejinima v The State (1991)*

E was charged with murder of 3 children, Admitted killing the 3 children, but denied at the trial and said armed robbers killed the children. The Supreme Court received the confession, dismissed the appeal and adopted the test laid down in *R V. Sykes (1913)*, namely:

- (a) Is there anything outside the confession to show it was true?
- (b) Is it corroborated?
- (c) Are the statements made in it in fact true as far as they can be tested?
- (d) Was the prisoner the person who had the opportunity of committing the murder?
- (e) Is his confession possible?
- (f) Is it consistent with other facts, which have been ascertained and which have been proved?

A statement following a prolonged and Continuous questioning is as if it had been obtained by flinging or racking.

### **3.8 Limits of Improper Inducement**

A statement made upon any inducement, threat or promise made by or in the presence of a person in authority is involuntary and hence inadmissible under the old law but seems admissible under the Evidence Act 2011. Furthermore a confession otherwise admissible does not become inadmissible merely because it is made under certain promises.

Example is:

- A statement made under a promise of secrecy
- Statement made in consequence of a deception by the persecution on the accused
- A statement made because the person who made it was drunk at the time
- A statement made in answer to a question which the maker need not have answered.
- A statement made voluntarily in the absence of a caution.

When a statement is not an issue, neither the prosecution nor the defence is allowed to pick and choose the parts that are favourable to his or her case and omit those that may be prejudicial. The totality of the statement must be admitted or rejected.

### **3.9 Other safe Guards**

You have seen that a confession must be given freely and voluntarily

It must not to be obtained by oppressive behaviour like torture. The accused person who makes a confession must be properly cautioned as specified in the judge's rule.

## **4.0 CONCLUSION**

A confession is admissible if it is voluntary; it is inadmissible if it has been induced by oppression e. g. Torture, inhuman or disregarding treatment, use of threat of violence. A confession does not become involuntary merely because it was induced by a moral or religious exhortation, promise of secrecy, in countenance of deception, or drunkenness, or in answer to questions he need not answer. Remember that the basic rule is that what the accused says outside the court in contradiction from what he says when giving evidence at the trial is evidence only against him (the speaker) and not anyone else. The court would not "edit out" any part of confession incriminating the accused. Existing cases on confession need to be examined critically as they were divided against the background of Evidence Act 2004 and some of them may not be good law today in Nigeria.

## **5.0 SUMMARY**

A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he or she committed that crime. You learnt of the difference between admission and confession. A confession must be voluntary, and devoid of oppressive conduct. A confession is liable to be attacked under certain defined circumstances as where it is not beyond reasonable doubt that the statement is obtained in a manner that is not consistent with the provision of the Evidence Act, 2011.

## **6.0 TUTOR MARKED ASSIGNMENT**

1. Ringin has been charged with culpable homicide punishable with death of Dawodu. Ringin has now been informed that his brother Abdul has died as a result of a road accident and that just before he died, Abdul confessed to the killing of Dawodu. Can Ringin give evidence of Abdul's confession?
2. Fagbemi has been charged with house breaking and theft. He then accompanied the police officer to the station, where he made a statement admitting the house breaking. Much later, he informed the police where he hid the hammer with which he broke in. The police searched the spot and recovered the hammer. The police also found N50, 000.00 concealed in a newspaper wrapper under the flower. At the trial, Fagbemi said he had not been cautioned before making his statement. He said he was tortured to show them the instrument of offence and objected to the admissibility of the hammer and the N50, 000.00 exhibits.
  1. Is the statement admissible in evidence?
  2. Can the court admit the hammer and the N50, 000.00 in evidence?
  3. What are the conditions for the admissibility of confession?

## **7. REFERENCES/FURTHER READING**

1. Aguda T. (2007) 14<sup>th</sup> Ed. The Law of Evidence Spectrum book Ltd; Ibadan
2. FGN. The Evidence Act, 2011.

## **MODULE 2; UNIT 3: THE JUDGE RULES**

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- 7.0 References/Further Readings

### **1.0 INTRODUCTION**

In the early part of the 19<sup>th</sup> Century, there was hue and cry that the police “obtained” statements from suspects by use of force. The judicial authority was strong for admitting an accused’s statements in evidence even though they were obtained by constables, who had him in custody, by means of considerable insistence and even force during interrogation. The situation was clouded with uncertainty. Hence the judges of the Kings Bench Division (UK) at the request of the Home Secretary formulated what is now called the “Judge Rules”, for the guidance of the police and other official organizations involved in investigation of crimes. The rules were built up in 1912 and became effective in 1914 in Nigeria. In 1964, England revised the rules which now differ significantly from the 1912 rules that still operate in Nigeria.

### **2.0 OBJECTIVES**

When you have studied this unit, you should be able to:

- recite the judges rules
- recite the formal caution
- recite the short caution
- gain an awareness of when to apply the short or formal caution
- identify who may be concerned with the judge’s rules
- critique the judge’s rules

### 3.0 MAIN CONTENT

#### 3.1 Background

In 1912 – 1914, the judges formulated the Judges Rules. The rules were designed to guide the police and others who investigate crimes, when questioning any person suspected of committing a crime. The rules are mere administrative directions. They do not have the force of law, but the courts do act on them.

Thus in *Evbuowman v Police (1961)*, a police officer called an accused, read to him a confession, which a co-accused made against him. The accused kept mute and was convicted. On appeal, the court quashed the conviction on the ground that the police officer acted contrary to the judges' rules. Perhaps a stronger reason is that an accused is not obliged to say anything and the prosecution in the absence of the purported confession had not proved his case beyond reasonable doubt.

A confession that is voluntary does not become inadmissible because the judge rules are not followed. However, the courts may insist on the observance of the rules in order to ascertain the voluntariness of the confession and hence the admissibility of the statement. Thus, failure to observe the rules may found a ground for holding that a confession is involuntary.

You should be aware that it is always permissible for a police officer to question a person in custody with regard to the offence or offences other than offence(s) for which he or she is held. But it is important that the judge rules are followed. In this context "custody" means: "in custody of the police", *R v Buchan (1964)*, *R v Strappen (1952)*.

#### 3.2 THE RULES:

In Nigeria there are nine main rules, namely:

(a) **Rule 1: What Questions may be asked**

*"When a Police Officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not from whom he thinks useful information can be obtained".*

The suspect's answers to any questions put and any statement that he may volunteer should be reduced to writing. It is important that this procedure be followed for the following reasons:

- i. The suspect may be able to clear himself of suspicion.

- ii. If it is later decided to charge him, his statement will be available to check this story in the witness box.
- iii. It may disclose matters, which open new avenues of investigation.

**(b) Rule 2: When to caution.**

*“Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any question or any further questions, as the case may be.”*

**(c) Rule 3: Persons in Custody**

*“Persons in custody should not be questioned without the usual caution being first administered.”*

**(d) Rule 4: Voluntary Statement**

*“If the prisoner wishes to volunteer any statement, the usual caution should be administered.”*

**(d) Rule 5:**

**(i) Formal Caution**

‘The caution to be administered to a prisoner, when he is formally charged, should be in the following words:

*“Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence”.*

Care should be taken to avoid any suggestion that his answers can only be used in evidence **against him**, as this may prevent an innocent person from making a statement, which might assist to clear him of the charge.

**(ii) Short Caution**

Note: The words in Rule 5 are only applicable when the formal charge is made and can have no application when a violent or resisting prisoner is being taken to a police station. In that case before the formal charge is made, the short caution should apply, that is to say:



*“You are not obliged to say anything, but anything you say may be given in evidence.”*

In both instances, every suggestion that the statement is to be given in evidence **against** its maker must be avoided.

**(f) Rule 6: Statements Prior to Caution**

*“A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.”*

**(g) Rule 7: Questions which may be asked of a prisoner**

*A prisoner or a suspect making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. If, however he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.”*

**(h) Rule 8: Persons Jointly Charged**

*“When two or more person are charged with the same offence and statements are taken separately from them, the police should not read the statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.”*

The West African Court of Appeal in the case of *R v. Ajose and others* (2 W.A.C.A. 118) has added the following provision to rule 8:

*“Provided that when the person charged (other than the person who made the statement) is an illiterate, the statement may be read over and interpreted to him apart by some person other than a policeman. Anything said to such reader by the person charged when the statement is read shall not be admissible in evidence against him, but if, after the statement has been so read he shall be desirous of making a statement to the Police in reply, such statement shall be taken only after the usual caution has been administered.*

**(i) Rule 9: Statements**

*“Any statement made in accordance with these rules should whenever possible be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.”*

The judges rules do not apply to interrogation of members of the Armed and the Police Forces by their superior. (*R.v. Harris – Rivott*, 1956). In *R. v Bass* (1955), a Criminal Court of Appeal has expressed the opinion that if at the time the police questioned the accused, he was in custody and no caution had been administered to him, the jury should have been directed to consider whether, despite a breach of the judge’s rules, the accused had made his statements voluntarily. The conviction was quashed because the jury had not been so directed.

Where there is no jury as in the case of Nigeria, the judge must caution himself as to whether, despite the non-observance of the judges rules, the statement can be said to be voluntary. It should be on record that he has so cautioned himself.

**3.3 Application of the Judges Rules**

*R v Payne (1963)*

Following a car crash, P. was taken to the police station. He was asked and he agreed to be medically examined by the police doctor. Police informed P that it would be no part of the doctor’s duty to examine him in order to give an opinion as to his unfitness to drive.

Quashing his conviction for drunken driving, the appellate court held that if P had realised that the doctor would give evidence on that matter, P might have refused to be medically examined, and that the judge had exercised his discretion wrongly.

The mere fact that a confession is made in answer to a question put by a police officer is not sufficient to render the confession inadmissible. However, where the accused refused to answer a question on the ground that his or her answer tend to incriminate him or her and he or she is improperly compelled to answer it, such a confession would not be voluntary. The judge’s rules do not necessarily render a voluntary confession involuntary because it was obtained in violation of the judge’s Rules, but the trial judge has a discretion to exclude it.

In *R v Voisin (1918)* A corpse had been found with the words “Bladie Belgiam” written on a piece of paper. The police without cautioning the accused, asked him to write these words. He did but the police had not charged him and it was apparent that he had written

the words voluntarily making the same spelling mistakes. Held it was tantamount to a confession.

The court may come to the same conclusion in respect of the confession made in the belief that the answer to the question by the police was not being recorded in writing if he would not have answered had he known they were being recorded.

*R.V. Stewart (1970)*

A constable disguised as a prisoner and was put in the cell next to the accused person charged with breaking for purpose of eavesdropping. The prosecution sought to put in evidence, the evidence of over-hearing of a discourse about the concoction of an alibi and court held he was entitled.

In the same way, fingerprints obtained from the accused person with or without caution can be put in evidence, if it is relevant, unless it was obtained oppressively, by false representation, bribe or threat (*Callis v Gunn, 1963*).

The accused in *R.v. Ogwuogo (1936)* made a statement to the police. He was cautioned in a native dialect. He was convicted for murder. The accused did not understand the caution. Held the court must be satisfied that the statement is free and voluntary. If it is not satisfied, the onus is on the prosecution.

In dealing with illiterate suspects therefore, one must ensure that they understand what the caution is all about. There must be positive evidence that it was administered and understood.

An accused cannot be forced to present himself or herself for a photograph. He requires to be cautioned. See *Ugama v. R (1959) 4 FSC, 218*.

You should not forget that the judges rules offer safeguards to ensure that confessions are freely given and voluntary, that the accused is properly cautioned. They were to ensure the absence of any suggestion that a confession has been induced by threats or promises from someone in authority.

As a matter of practice, the Police Officer accepting a confession is obliged to take the accused and the statement before a superior police officer (i.e. an Assistant Superintendent or above) as early as possible. The Superior Police Officer is required to satisfy him or herself that the statement is free and voluntary. If the police officer is satisfied, he must ask the accused if he made the statement and whether it is true. If the

accused admits, the superior police officer endorses and signs the confession to that effect.

The mere fact that superior police officer has not endorsed a confession does not render it inadmissible. However, such endorsement has the value of assuring the court that it has been properly taken.

#### **4.0 CONCLUSION**

Judges rules are an extension of the rules on confession. The rules were built up to advance the voluntariness of confessions. They are not statutory provisions, judicial decisions, Practice directives or Court Rules. They are administrative rules to guide the police and other agencies that investigate criminal matters. They do not have the force of law but their observance assures the admissibility of a confession which otherwise would have been impeached. The judges rules in England have been revised since 1964, but those operating in Nigeria were those formulated in 1912-1914 and it is incumbent on police officers and every other person charged with the duty of investigating offences or charging offenders to comply with them as far as practicable.

#### **5.0 Summary**

Judges' rules are administrative directives built up in 1912 – 1914 for the guidance of the police and other agencies involved in criminal investigation. The rules are nine in number and they are treated under the following heads:

- 1) What questions may be asked
- 2) When to caution
- 3) Persons in custody
- 4) Voluntary statement
- 5) The formal caution (and short caution)
- 6) Statements prior to caution
- 7) Questions to a prisoner
- 8) Persons jointly charged
- 9) Statements

These rules once applied both in Nigeria and England. The latter, unlike the former has revised them but the revision is inapplicable in Nigeria.

#### **6.0 TUTOR MARKED ASSIGNMENT**

What do you understand as the “Judge Rules”

#### **7.0 REFERENCES/FURTHER READINGS**

Aguda T.A. The Law of Evidence, 14<sup>th</sup> ad. Spectrum Books Ltd, Ibadan 2007

Jones, R.V. The Nigeria Police Instruction Notes, Vol. 1. The Nigeria Police Press, Ikeja, 1976.

## **MODULE 3 UNT 1- HEARSAY**

### **Contents**

1. Introduction
2. Objectives
3. Main Contents
  - 3.1 Definition
  - 3.2 Why Hearsay Evidence is inadmissible
  - 3.3 Scope of the Rule
  - 3.4 Rule against Hearsay
4. Conclusion
5. Summary
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### **1. INTRODUCTION**

Hearsay is the testimony by a witness of what other persons have said, not what he or she knows personally. It is a statement which is not made by a person while giving oral evidence in a proceeding and which is tendered as evidence of the matters stated. The general exclusionary rule of hearsay evidence is that such a testimony is no evidence. The reasons may be that what the other person has said is not put on oath; the person who is to be affected by it has had no opportunity to cross-examine him or her; it is also not the best evidence. When faced with the issue of hearsay, you should consider the relevance of the items of the evidence and the interest shown by the party in the statement.

If you are consulting English books on evidence, you should pay attention to the age. The hearsay rule in criminal trials has undergone enormous revision in the U.K. it is no longer limited except and in the interest of justice by agreement, statute or common law unlike Nigeria. The U.K recognizes first hand, second hand or multiple hearsay. The hearsay rule has been abolished in the English Civil proceedings. In Nigeria, the

exclusionary rule is still a fundamental part of the Law of Evidence in both civil and criminal proceedings. In this unit you shall learn in some detail “This great hearsay Rule”, and its basic principles. You will be empowered to justify, with sound reasoning or otherwise, the desirability of hearsay rule in the Nigeria Law of Evidence.

## **2. OBJECTIVES**

When you have studied this unit, you should be able to

1. Define the term “Hearsay”
2. Identify the circumstances when hearsay evidence rule applies.
3. Comment critically on Wigmore’s assessment of the hearsay rule.

## **3. MAIN CONTENT**

### **3.1 Definition of the Rule against Hearsay**

Literarily, hearsay is:

What a witness has heard from another person of what the accused or defendant has said, not in the presence or to the hearing of the accused or defendant.

Traditionally, a testimony that is given by a witness who relays, not what he or she knows personally, but what others have said and is therefore dependent on the credibility of someone other than the witness. (*Black’s Law Dictionary*)

Generally a statement, written or oral, made by a person, who is not called as a witness (*Aguda (2007:11)*)

An oral or a written statement by a person who is not called as a witness;

Evidence of what someone else has said;

Hearsay are assertions of persons, who are not called as witnesses, made out of court in which they are being tendered for the purpose of proving the truth or falsity of the facts contained in the assertions (oral or written). The law of Evidence forbids a witness to repeat in court any statement (oral or written) made by a third party who is not called as a witness for the purpose of proving the truth of the facts stated. That would be ‘Hearsay’.

Statutory definition of hearsay

Hearsay Evidence generally means a statement:

- (a) Oral or written made otherwise than by a witness in a proceeding; or

- (b) Contained or recorded in a book, document or any record whatever, proof of which is not admissible under the provision of this Act (Evidence Act, 2011), which is tendered in evidence for the purpose of proving the truth of the matter stated in it.

### 3.2 Let us see some hearsay statements:

A policeman on beat sees a man jumping down through a window from a building and pursues him. He catches up. The man resists and engages the policeman in a fight. Zubairu observed it all.

Zubairu reports to the students Counselor what he saw. (*Direct evidence*), the students Counselor tells the Director what Zubairu told her, Zubairu was not present (first degree hearsay). Abu Katto and Igwe were present. At home Igwe told his wife that Zubairu said that one policeman beat up a man near independent square or so (second degree hearsay). Katto told her friends one of whom inform Jane (third degree hearsay) that there was a fight earlier in the day where the police as usual just beat up one man.

Do you notice the discrepancies in the in the different statements by different persons concerning one and the same incident? It is for this reason that hearsay is suspect.

Hearsay includes oral or written statement or conduct:

Nike and Ope are sitting on a bench in a field at the NOUN Special Study Centre. Foluke and Adeola are standing apart but at a hearsay distance. Listen to their conversation.

Nike : Ope “Lets go, it has begun to rain.

(Adeola hears what Nike has said.

Ope puts on her rain-cape

Foluke, Adeola: “The rain is heavy O!”

In the proceedings in the Court, the state of the weather is in issue. The prosecution proposes to call the following witnesses to depose to certain facts.

Nike: To say that it rained because she remembers saying to Ope, ‘Lets go, it has begun to rain”

Ope: To say it rained that day and she had to put on her raincape

Adeola: To say it rained that day because he heard Nike say to Ope “Let’s go, it has begun to rain”.



Foluke. To say it might have rained at the time because he remembered vividly saying to Adeola, her friend: The rain is heavy o!.

You may need to test each of these oral statements to see how the hearsay rule operates. Nike's statement to Ope: "let's go, it has begun to rain" is what she perceived with one of her senses – what she saw; it is direct, and admissible.

Ope's conduct (putting on her rain cap) is also direct and admissible.

Adeola repeated what someone else (Ope) has said outside the court. It is direct evidence of what Ope has said and to that extent, direct and admissible. But it is hearsay if the object of tendering the evidence is to prove the fact that it rained.

Foluke's statement is evidence of her previous statement or conduct. It is a statement or conduct in the nature of hearsay. It is not admissible as proof of the truth or falsity of any fact contained in such a statement or conduct.

### **3.3 Validity of the reasons for excluding hearsay evidence.**

Arguably some of the reasons above are practically valid. Some do raise dust.

Suppose an investigating Police Officer (IPO) is investigating a case of stealing (theft) against X; Y said to him. I saw X running away with the type of article in question. Such a "valuable" narration by the IPO is however, hearsay.

The Evidence Act makes provision for admission of evidence certain hearsay statement of relevancies under specified conditions. Examples are:

- statements of relevant facts by person who cannot be called as witness (Section 39).
- statements relating to cause of death (Section 40)
- statements made in the course of business (Section 41)
- statement against the interest of its maker (Section 42)
- statements by opinions as to public rights, customs and matters of general interest (Section 43).
- statement relating to the existence of a relationship (Section 44)
- declarations by testators (Section 45)

- statements of facts made in a prior judicial proceedings as proof in a subsequent judicial proceeding (Section 46)
- statement made under any criminal procedure legislation (Section 47)
- depositions at preliminary investigations or coroner's inquest (Section 48)
- written statements of the investigating Police officers (Section 49)
- entries in Gazettes, Books, Maps, Acts/Laws, Certificates, Judgments of Courts convictions etc. (Section 50-65)

### 3.4 Scope

Hearsay rule does not and should not exclude facts. Therefore a fact that is relevant does not become irrelevant merely because the party seeking to adduce evidence of it has adopted a method which the court does not accept.

Hearsay rule is a means of proof or of providing particular facts. It proscribes a method of proving them. In an era when substantive justice is taking precedent over procedure, the court should apply also the blue pencil rule, excising irrelevant aspects of an assertion (oral or written) and receive relevant facts.

You would have noted that hearsay connotes not a quality, but a purpose. You may repeat a statement as many times as you choose, what matters is your purpose and to the relevance of the item.

A statement may be made for the following purposes:

- a) To establish the truth of what it states, if the evidence is adduced for the purpose of establishing or deconstructing the truth or falsity of the averment, (the truth or falsity of what was stated). It is hearsay and must be excluded: *R v Sparks (1969)*, *R v Turner (1975)*.
- b) Some other reasons  
If the evidence is adduced to prove or emphasize the fact that such averment was made at all, it is not hearsay but a direct and an original evidence; *Subramanian v Public Prosecutor (1956)*; *Mawaz Khan v The Queen (1967)*

A statement made in a particular context may be performative and capable of affecting the state of another's mind and subsequent conduct; Examples are words of incitement to commit crime; make or accept an offer in a contractual transaction. Such statements are excluded from the hearsay rule.

So also is a statement by an accused if it is for the purpose of explaining his or her answers to the police as well as his or her conduct when charged (*Subramanian case*) *Woodhouse V Hall* (1980)

It needs to be mentioned that other than the definition in Section 37, there has been no substantive difference between the old and the new law and that Section 39-50 Evidence Act, 2011 are a repeat of Section 33-37 Evidence Act, 2004.

The Evidence Act, 2011 Section 38: Hearsay rule stipulates expressly that “hearsay evidence is not admissible except as provided in Part IV (Evidence Act) or by under any other provisions of this or any other Act.

The general rule is that oral evidence must be direct; and except the content of documents, all facts may be proved by oral evidence.

Subject to the provision of Part III of the Evidence Act (Relevance and Admissibility by certain evidence) oral evidence shall, in all cases, whatever, be direct if it refers to:

- (a) a fact which could be seen, it must be the evidence of a witness who says he saw that fact.
- (b) to a fact which could be heard, it must be the evidence of a witness, who says he heard that fact
- (c) to a fact which could be perceived by any other sense or in any 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. (Section 126, Evidence Act, 2011).

### **3.5 The Rule against Hearsay.**

The rule against hearsay consists in truth of two separate rules: see section 126 of the Evidence Act.

- (a) The rule requiring evidence to be first hand.  
This rule demands that evidence must be given by the percipient, because of the risk of the evidence being altered as it passes from one witness or potential witness to another.

(b) The rule requiring evidence to be given orally in court.

This presupposes that evidence must be given in the witness box, because of the importance attached to the Oath and to giving the opposing party or parties the opportunity to cross examine.

At common law, former statements of any person whether or not he is a witness in the proceedings, may not be given in evidence, if the purpose is to tender them as evidence of the truth of the matters asserted in them, unless they were made by a party or in certain circumstances by the agent of a party to those proceedings and constitute admissions of fact relevant to those proceedings. (*Phipson 12 Ed. P 263*).

This is identical with the hearsay rule in Nigeria. The rule is to the effect that: an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted.

In *Utteh V State (1992)*, the Supreme Court of Nigerian quoted with approval the judgment of this Judicial Committee of the Privy Council in *Subramanian V Public Prosecutor*, where the rule was expressed thus;

“Evidence of a statement made to a witness by a person, who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. it is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made”

### 3.6 Assumption

Hearsay has been described in terms of “statement”. We have glossed over the term: “statement”. We have been guilty of false assumption that you know what a “statement” means. You should be careful always to guard against false assumptions? Be critical about terms.

What is a statement? – A statement is an assertion.

What is an assertion?

For the purpose of evidence, does a statement or assertion include?

- Any representation of fact or opinion made by a person by whatever means (including statement, non-statement, assertive, non-assertive etc)?
- Statement only: i.e. representation by words?
- Non-statement: representation made in a sketch, photo fix or other pictorial form
- Assertive statement: Intelligible and complete statement?.
- Non assertive: i.e. incomplete statement, non-statement like a pictorial form of statement, sketches, photo-fix, or greetings, commands or questions, which tend to have implied assertions?

These may be wider than the present scope of the term: statement for future development of Law of Evidence. What then is a ‘Statement’?

A statement is any representation of fact or opinion made by a person by whatever means; and may be assertive non assertive or mixed. The English court has held that hearsay statement identifying marks on article infringes the hearsay rule: *Patel V Comptroller of Customs* (1965). Compare also *R v Brown* (1991) and *R v Rice* (1963).

#### 4.0 CONCLUSION

Hearsay are assertions of persons, who are not called as witnesses, made out of court in which they are being tendered for the purpose of proving the truth or falsity of the facts contained in the assertions (oral or written). In the law of Evidence hearsay is not admissible. However, there are, as we shall see later some statutory exceptions. The Court also may, in exercise of its discretion, admit hearsay evidence if he is satisfied that the interest shown by the party in the statement is probative, regardless of the truth of its content: *R v Lydon*, (1987), and *R v McIntosh* (1992).

Problems, however may arise as to whether the process of identifying the marks on articles amounts to hearsay, The answer may well depend on where it pleases the court to draw the boundaries of the term “statement” Does it include both statement and non-statement, assertive and non-assertive?.

#### 5.0 SUMMARY

In this unit, you learnt about the type of evidence, known as the hearsay evidence; and what the rule is. Section 37, Evidence Act, 2011 defines it as a statement; oral or written made otherwise than by a witness in a proceeding or contained or recorded in a book, document or any record whatever, proof of which is not admissible under the provisions

of the Acts, which is tendered in evidence for the purpose of proving the truth of the matter stated in it. You need to be careful about: False assumptions and be critical about language and terminologies. You are encouraged to make a practice of making your own examples of statements that would be caught by the hearsay rule. In the subsequent unit, you shall learn the exceptions to the general rule, which have either been developed by the courts or created by statutes.

### ACTIVITY

Read the following cases:

- (a) *Subramanian V Public Prosecutor* 1956), WLR. 965
- (b) *R v Turners* (1975) 60 Cr App R.80

### 6.0 TUTOR MARKED ASSIGNMENT

- (1) Define Hearsay and state the rule against it
- (2) Is hearsay rule justified or is it anachronism
- (3) Based on your understanding, of *R V Turner* (1975) and *Subramanian ) 1956*), comment on the judgment of the Appellate court on the latter.

### 7.0 REFERENCES

- 1. Allen C and Guest S (2004) Evidence, University of London.
- 2. Aguda , T. (2007) The Law of Evidence. Spectrum Law Series, Ibadan
- 3. Phipsons on evidence 12<sup>th</sup> Ed
- 4. Afe, B. (2001) Law and Practice of Evidence in Nigeria.

## **MODULE 3 UNIT 2**

### **GROUP OF EXCEPTIONS TO THE RULE AGAINST HEARSAY**

#### **Contents**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Contents
  - 3.1 Statements made by Persons who have since died
  - 3.2 Statements made in the Cause of Business.
- 4.0 Conclusion
- 5.0 Summary
- 6.0 References/Further Reading

#### **1.0 INTRODUCTION**

In the last Unit, you learnt about the exclusionary rule of hearsay evidence – its definition, scope and justification. As evidence of what a witness has heard another person, not the defendant or the Counsel say, not in the presence or hearing of that defendant or accused, hearsay evidence is generally inadmissible. However there is a large number of statutory exceptions to this rule. You will be learning some of them in this unit particularly as the rule relates to statements made by a deceased person on different situations in life.

#### **OBJECTIVES:**

When you have studied this unit, you should be able to

- Enumerate instances where statements made by deceased persons would not be caught by the hearsay rule.
- Formulate examples of statements made by deceased persons that would or would not be caught by the rule against hearsay.

### 3. MAIN CONTENT

Hearsay is an oral or written statement, made by a person, not called as witness or a statement contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of the Evidence Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it. (Section 37). Generally it is excluded from evidence, except as provided in any legislation (Section 38).

The exclusionary rule in both the Evidence Acts 2004 and 2011 are substantially similar, and as Aguda has said:

‘The general rule is that a witness can give evidence only of facts of which he has personal knowledge, something, which he has perceived with one of his five senses. His statement must be accepted as *prima facie* evidence of his possession of such knowledge for there would be an infinite regress if this fact had to be proved by another witness’.

There are a large number of exceptions to this general rule. Some of them are:

- Dying declaration Section 40
- Statement made by a deceased person in the ordinary course of business Section 41
- Statement by a deceased person against his pecuniary (financial) interest Section 42
- Statement as to pedigree by a deceased person Section 44
- Facts showing the existence of a state of mind or bodily feeling.
- Admission and confession Part III, Evidence Act.
- Depositions taken at the preliminary investigation under certain circumstances.
- Statements contained in Public documents Section 52
- Statements accompanying and explaining an act forming part of *res gestae*.
- Statements of affidavits especially in an originating summons or interlocutory proceedings.
- Other matters eg. Status, complaints in sexual offences.

We shall discuss some of these exceptions in greater detail.



### **3.1 Statements made by Persons who have since died see Section 39**

Among the exceptions to the rule of exclusion is the statement made by the following persons:

- Person who has since died. Section 39
- Person who is beyond the sea
- Person who is unfit as witness (i.e. incapable of giving evidence)
- Person who is kept out of the way by the adverse party
- Person who cannot be identified or found.
- Person who cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement.
- Person whose presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable.

It is not every statement made by persons in the category listed above that is admissible. The particular statement in issue must be one of the following:

- Statement made by them in the course of business
- Statement made by them against their own interest
- Statements as to Pedigree
- Statements as to Public and General Rights
- Statements by testators
- Dying declarations.

### **3.2 Statements made in the Ordinary Course of business.**

A verbal or written statement made in the ordinary course of business by a person, who has since died is admissible in proof of facts which was the person's duty to state on record.

The Evidence Act, 2011, Section 41 states:

“A statement is admissible when made by a person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books, *electronic device* kept in the ordinary course of business or in the discharge of professional duty, or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind or of a document used in commerce written or signed by him or of the date of a letter or other document usually dated, written or signed by him

“Provided that the maker made the statement contemporaneously with the transaction recorded or so soon thereafter that the court considers it that the transaction was at that time still fresh in his memory”.

In essence for a statement in issue to become admissible, you need to establish to the satisfaction of the court that:

1. The statement is written or verbal according to the course of business in question and it is relevant fact.
2. The maker of statement died before the evidence of the statement became necessary.
3. The statement relates only to the acts of the person making it and to no one else's.
4. It must have been made in the course of his or her duty.
5. If the statement is not made contemporaneously, it must have been made within a reasonably short time of the performance of the acts. (The court has rejected a record of collision which was made two days after the collision. Conversely, the admitted a drayman's record of delivery of beer made in the evening whereas the delivery was in the morning).
6. There must be a duty to act and to report or record such act.
7. The duty must be owed to a third party and the action recorded must have been performed by the maker him or herself.
8. The statement is only admissible as to the matters covered by the maker's duty.

Electronic device is an innovation bringing law of evidence in line with contemporary development. Unlike the old law, the Evidence Act 2011 demands that the statement has to be made contemporaneously with the transaction. The addition of the clause ‘or so soon thereafter that the court considers it likely that the transaction was at the time still fresh in his memory’ reflects judicial decisions such that it can be said that except for the introduction of electronic device, there is no material difference between the old and new law of evidence.

The Common Law requires additional pre-condition that the statement must have been made without any motive or interest to misrepresent the facts at the time of making the statement. The Evidence Act is silent on this.

In *R v Taoridi Lawani* (1959), The Prosecutor sought to tender in evidence a Police Report Book” in which entry was made by a Police officer who has since died. The book was not “a public or other book.” The deceased Police Officer did not personally perform the acts he had recorded. The statement was held admissible. The grounds for

allowing the entry was that the deceased Police officer made it in the cause of his business and that the entry relates to matters within his personal knowledge.

Suppose in a criminal proceeding, the place of arrest has become an issue requiring proof. Can the prosecutor prove this by putting into evidence a warrant by a deceased constable containing such a record?

The short answer is 'No'. The reason is simply because there is no duty imposed on the deceased to record the place of arrest on a warrant of arrest.

Admissibility of a statement of the category in discourse is of limited purpose. The statement is not accepted as proof of the whole contents. They are evidence only of these facts, which are within the maker's duty to record or report.

### 3.3 STATEMENT AGAINST PERSON'S OWN INTEREST

*Under the Evidence Act, 2011. Section 42*, a statement is admissible where the maker had peculiar means of knowing the matter stated and such statement is against his pecuniary or proprietary interest and

- (a) he had no interest to misrepresent the matter or
- (b) the statement, if true, would expose him to either criminal or civil liability

Section 42 (b) is novel, as it is not contained in the Evidence Act prior to 2011.

- The statement is admissible to prove collateral matters provided some part of the statement is against the maker's interest.
- The declarant must have known that the declaration was against his or her interest, at the time when it was made.
- It is not sufficient to show that the statement was against the maker's general interest.
- It must have been against his or her pecuniary or proprietary interest. For instant, an admission by a clergyman that he performed irregular marriage ceremony is unrelated to pecuniary or proprietary interest and therefore inadmissible.
- It is sufficient that the statement was *prima facie* contrary to his or her pecuniary or property interest even if it later turns out to the contrary.
- Pecuniary or proprietary interest encompasses.
  - A statement that the maker owes money

- A statement that the maker has received money owed to him or her contrary to his or her pecuniary interest.
- A statement tending to lessen the maker's interest in property.

### 3.4 ILLUSTRATION

A statement that the deceased paid rent is admissible to rebut the presumption of ownership of the property.

T seeks to renew his tenancy of Baba's premises. T promises to pay the rent the next day, pleading that he forgot his cheque book in the office. In anticipation of T paying him the rent the next day, Baba issues out a receipt to T. T defaults and shortly afterwards dies.

Baba's representatives seek to recover his unpaid rent from T who resists the claim and seeks to produce the receipt as evident of payment. Once it is shown that the maker knew that the statement, at the time it was being made, was against his or her interest, the matter is settled.

There is the inclination to hold that the statement against one's interest is probably true, otherwise it would not be made. The reasoning is that no reasonable person would, in the nature of human transaction, be expected to make an untrue statement against his or her interest.

You need to note that in relation to a statement against one's pecuniary interest, the motive to represent or mis-represent is not an essential condition precedent to its admissibility.

A statement against interest which contains collateral matters, which are connected with the statement against interest, is admissible even if it favours the interest of the maker as well.

The statement need not necessarily be contemporaneous with the facts stated.

There is a high authority for the views that the maker must have personal knowledge of the facts stated, as there are judicial decisions to the contrary. See *Sussex Peerage case* 1844; In that case, a clergyman who has since died made a statement exposing him to the risk of a criminal prosecution for irregular celebration of marriage. The House of Lords held that the statement did not come within the exception because the interest of the clergyman thus affected was neither pecuniary nor proprietary. See also *Crease V Barratt* (1835)

Examples of cases where statements against pecuniary interest have been accepted are:

*Taylor V Williams (1876)*. In this case, the deceased made entries in his day book stating that he made a loan to X and admitting also the repayment of interest and repayment of the loan to him, leaving some balances outstanding. The court admitted all these entries on the ground that the acknowledgement of receipts of interest and repayment of the loan to him were declarations against deceased pecuniary interest.

*Highman v Ridgeway*

- (2) The deceased was a male mid-wife. He made entry in his dairy acknowledging payment for the birth of a child on a peculiar day. This entry was admitted being a declaration against the deceased pecuniary interest.

Examples of a declaration of proprietary interest are illustrated in *Sly v Sly (1877)* and *Obawole V Williams cited in Nwandialo (1999:234.)*

In *Sly v Sly*, the deceased was an occupant of a land; He apparently held an absolute interest on the land but had declared that he only held a life interest under a Will with two named persons as Executors. The declaration was held to be against the deceased's (declarant's) interest and admissible.

The latter case of *Obawole v Williams* was a land dispute. The Supreme Court in that case, admitted the evidence of payment of rent to the ancestors of the defendants as a declaration against the proprietary interest of the Plaintiff's progenitor through whom they claimed title.

#### **4.0 CONCLUSION**

The evidence of statement written or oral, of relevant facts made by a person who is dead is itself relevant, where the statement is against the pecuniary or proprietary interest of the person making it and the said person had peculiar means of knowing the matter and had no interest to misrepresent it.

#### **5.0 SUMMARY**

In this Unit, you considered the Evidence Act, 2011, Sections 41 and 42. You learnt two exceptions to the hearsay rule. Among the exceptions to the rule against hearsay are the statements made by the deceased in the course of business or against pecuniary or proprietary interest. Some decided cases were cited to explain and illustrate the operation of the exclusionary rule and the exceptions.

## **6.0 TUTOR MARKED ASSIGNMENT**

1. State the hearsay rule, giving examples of its application.
2. In what circumstances may the evidence against a person's interest be permissible in Evidence?

## **7.0 REFERENCES/FURTHER READINGS**

Nwadiolo. F. (1999) 2<sup>nd</sup> Ed. Modern Nigerian Law of Evidence, University of Lagos Press, Lagos

Aguda T. (2007) The Law of Evidence, Spectrum Law Series, Ibadan

Afe, B. (2001) Law and Practice of Evidence in Nigeria, Printer, Ibadan.

## **MODULE 3 UNIT 3**

### **GROUP OF EXCEPTIONS TO THE RULE AGAINST HEARSAY EVIDENCE CONTNUED.**

#### **Content**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Statement as to Pedigree
  - 3.2 Statement as to Public and General Rights
  - 3.3 Dying Declaration
  - 3.4 Depositions
  - 3.5 Declaration by Testators
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Reading

#### **1.0 INTRODUCTION**

Hearsay evidence is not, as a general principle, admissible in evidence. In the last unit, you learnt, as exceptions to this rule that hearsay testimony is receivable if it is a statement made by the deceased in the ordinary course of his or her business or against his or her own pecuniary or proprietary interest. In this unit you shall learn more of the exceptions to the general rule. Specifically, you shall be looking at statements of a deceased person as to pedigree, public rights, dying declaration and depositions.

## 2.0 OBJECTIVES

When you have studied this unit, you should be able to

3. Define or explain the terms : dying declaration , deposition, recent complaints
4. Recognize statements as to pedigree, public and general rights and statements by a testator.
5. Gain awareness of the conditions precedent to their admissibility.

## 3.0 MAIN CONTENT

Pedigree means lineage, descent, and succession of families, line of ancestors from which a person descends genealogy; An account or register of a family relationship.

Section 44 Evidence Act 2011 relates to statements relating to the existence of a relationship. It states:

- (1) Subject to subsection (2) of this section, a statement is admissible when it relates to the existence of relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge. (Same as Evidence Act 2004 section 33 (1) (e).
- (2) A statement referred to in subsection (1) of this section shall be admissible under the following conditions:
  - (a) that it is deemed to be relevant only in a case in which the pedigree to which it relates is in issue, and not to a case in which it is only relevant to the issue; and
  - (b) that it must be made by a declarant shown to be related by blood to the person to whom it relates, or by the husband or wife of such a person provided that;
    - (i) a declarant by a deceased parent, that he or she did not marry the other parent until after the birth of the child is relevant to the question of the paternity of such child upon any question arising as to the right of the child to inherit real or personal property under any legislation; and



- (ii) in proceeding for the determination of the paternity of any person, a declaration made by a person who, if an order were granted, would stand towards the petitioner in any of the relationships mentioned in paragraph (b) of this subsection, is deemed relevant to the question of the identity of the parents of the petitioner; and
- (c) that the statement must be made before the question in relation to which it is to be proved had arisen, but it does not cease to be admissible because it was made for the purpose of preventing the dispute from arising.

From the foregoing, it can be deduced that statements written or verbal of relevant facts made by a person, who is dead are themselves relevant facts if they relate to the existence of a relationship.

Under the old law, (unlike the present law) a documentary declaration relating to a matter of pedigree would be received if that declaration would be admissible, had the Evidence Act not been enacted. The reason was that it was admissible at Common Law and therefore part of the Nigerian law by reason of Section 5(a) Evidence Act, 2004. This is no longer good law because under Section 3, Evidence Act, 2011, the only evidence now admissible in Nigeria is that made admissible by legislation validly in force in Nigeria. The Common law on evidence and judicial decision based on it or other source of law which do not form part of Nigerian law have become ineffectual.

### **3.1.2 Requisites for admissibility**

An oral or written statement made by a relative (who is now deceased) *ante litem motam* (i.e before the question in relation to which it is sought to be proved had arisen).is admissible to prove matters of pedigree in cases of pedigree

Written statements by pedigree may be found in Family Bibles, engravings in Jewelry, tomb stones, plaques or brasses in the churches. They commonly relate to dates of births, deaths and marriages and legitimacy.

A statement made in order to avoid a future dispute may not be admissible. Why? Because, the chances of these being disputed at all is already present in the maker's mind and this was capable of influencing him or her.

The statement must relate to the existence of a relationship, by marriage, blood or adoption between persons as to whose relationship by marriage, blood or adoption the maker had special knowledge.

The statement may not necessarily be contemporaneous nor made from personal knowledge. The statement may be oral or written (e.g. in the family Bibles or tombstones) or even by conduct (by treating the child as legitimate).

- The maker must have been related (e.g. by blood or marriage ) to the person to whom the statement refers
- The case in which the statement is sought must be one in which the relationship (i.e. Pedigree) is in issue.
- The statement is inadmissible if it is designed to serve the maker's own interest.

See the case of *Haines V Guthrie*, H took out an action for the price of goods sold to which the defence of infancy was pleaded; the date of birth being thus in question. A statement by the defendant's deceased father as to this date made in an affidavit in a previous action between different parties, was held inadmissible, this action, not being a pedigree case. As explained by Brett, M.R , the questions of family, whose son the defendant was, whether a legitimate or a natural son, the oldest or youngest or what position he occupied with regard to the rest of the family are all immaterial. The only question is "What was the date of the birth of the defendant". The statement by the defendant's deceased father in the present case is *prima facie* hearsay evidence and the general rule of law is that hearsay evidence is not admissible and this case does not fall within the recognized exceptions to the general rule.

### **3.2 Statement of opinion as to Public and General Rights or Custom and Matters of General Interest:**

- (1) A statement is admissible when such statement gives the opinion of a person as to the existence of any public right or custom or matter of general interest, the existence of which, if it existed, the maker would have been likely to be aware.
- (2) A statement referred to in subsection (1) shall not be admissible, unless it was made before any controversy as to such right, custom or matter, had arisen (Evidence Act 2004 Section 33 (1) (d); Evidence Act 2011 Section 43).

Before the statement is received in evidence, the following conditions must be satisfied:

- It is admissible only after the maker's death to prove the rights in question.
- The right must be a public right or a general right. A public right is one enjoyed by the public at large (e.g. the right to use the high way). A general right is one affecting a defined class of the population. Example is the right of common, which affects only the inhabitants of a village such as their boundary lines.

It must have been made by a person with competent knowledge who can reasonably be expected to have accurate knowledge of the facts.

The subject of the statements must be the existence or non existence of the right; No evidence which is neither of its existence nor of right, or evidence of collateral issues or of particular facts which may support or negate it. For instance, if the right of highway is in issue, it is not sufficient to adduce evidence that His Excellency, the Vice President of the Federal Republic of Nigeria planted a tree to mark this boundary.

The statement may be oral or written. The fact that the maker has an interest in this subject matter does not render the statement inadmissible unless it obviously was made to serve his or her own interest.

### **3.3 Declarations by Testators**

The declarations of a deceased testator as to his testamentary intentions and as to the content of his will are admissible when:-

- (a) his will has been lost, and when there is question as to what were its contents; or
- (b) the question as to whether an existing will is genuine or was improperly obtained; or
- (c) the question as to which of more existing documents than one constitute his will

(3) In the cases mentioned above, it is immaterial whether the declarations were made before or after the making or loss of the will. (Section 45).

a declaration, written or oral made by a Testator either before or after the execution of his (or her) Will is, in the event of its loss, admissible as secondary evidence of its contents.

The contents of a lost Will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached.

Thus, Section 45 allows in evidence, statements of persons who have since died if they relate to declarations by testators. The origin of this rule is traceable to the old case of *Singden v Lord St Leonard's* (1876). In that case, the Will of Lord St Leonard, a Lawyer and a famous judge was missing at his death and the question before the court was the content of the Will. His daughter knew most of the contents of the Will. She was able to quote most of it from her memory. She and some other witnesses were able to testify as to statements made by the deceased before and after the execution of the Will concerning its contents. The Court of Appeal held that the statements made by the deceased before or after he had executed the Will were admissible as exceptions to the hearsay rule.

This decision has been re-affirmed in *Re McGillivray* (1946) and also represents the law applicable in Nigeria.

### **3.3.1 Statements relating to cause of death.**

This is known as Dying Declaration and it is defined in Section 40, Evidence Act, 2011 as:

- (1) Statement made by a person as to the cause of his death or as to any of the circumstances of the events which resulted in his death in cases in which the cause of the person's death comes into question is admissible, where the person who made it believed himself to be in danger of approaching death although he may have entertained at the time of making it hope of recovery (Identical with Section 33(1) (a). Evidence Act, 2004)
- (2) A statement referred to in subsection (1) of this section shall be admissible whatever may be the nature of the proceeding in which the cause of death comes into question.

A dying declaration is a statement, not on oath of an injured and dying person who, at the time of making it, believes him or herself, to be in danger of approaching death, although he or she may have entertained hope of recovery as to the facts and circumstances which caused his or her death.

It is a statement made by the person, who is dead as to the cause of his or her death or as to the circumstances of the transactions which resulted in his death in the case where the cause of his or her death is an issue. Such a statement is relevant and admissible, subject to the following conditions:

- The declaration may be written or verbal and of relevant facts. Requisites of relevance are as follows:
  - (i) Declarant must have died before the evidence of the declaration.
  - (ii) It is admissible only in trials for murder (homicide not punishable with death) or manslaughter (homicide not punishable with death), where the accused is alleged to have caused the death of the deceased/declarant.
  - (iii) The statement must be made by the victim of the alleged crime (i.e. the deceased) and must relate to the cause of his or her own death.
  - (iv) The statement must contain some expression of hope of recovery or doubt as to his death. That is, the deceased-declarant, at the time of making this declaration, must have believed himself or herself to be in danger of approaching death, although he may have entertained hopes of recovery. The trial judge is required to make a specific finding that the deceased did in fact believe in the danger of approaching death when making the declaration.
  - (v) The declarant must have been a competent witness if he or she were alive. The declaration must not be or include hearsay; it may include an opinion.
  - (vi) The declaration can be oral, or written or by signs.
  - (vii) Where the declaration is admitted, it must be complete. It is not competent to sift the parts that are favourable from those that are not.

The statement must not have been elicited by leading questions but this does not necessarily make the declaration inadmissible, all else being equal.

It is immaterial that the declarant does not die after a prolonged period of time after making the statement. The principle of dying declaration is formulated in the belief that in the peculiar circumstances, and in the last stages of one's life, one will avoid any further occasions of sin and when faced with imminent death, one will tell the truth as he or she may soon face his or her maker.

who may record a dying declaration?

Any of the following may:

- Any person who happens to be present at the time.
- A Police Officer
- A Medical Doctor
- Other witness(es)

It is not a requirement of law that oath has to be administered but it is necessary that the records should show the exact words, and the questions and answers. If it is possible, it should be witnessed by the person(s) present.

Eyre, C.B explained the rationale of this rule as follows:

“The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful, is considered by the law as creating an obligation equal to that when is imposed by a positive oath administered in a Court of Justice” (*R V Woodcock (1789)*)

### **3.4 ACTIVITY**

For further elucidation, see the following cases:

*R V John Ogbuewu (1949) WACA 483*

*Momo Garuba and Another V R (1959) 4 Sec 162.*

### **3.5 DEPOSITION**

#### **What is a Deposition?**

A deposition may be defined as

- (i) A witness's out-of-court testimony that is recorded in writing, usually by a Magistrate for later use in court or for discovery purpose.
- (ii) A written record of the sworn evidence given by a witness, a deponent, before a Magistrate or other authorized person.

- (iii) A statement made on oath before a magistrate in the presence and to the hearing of the accused taken down in writing and signed by the person making it and the Magistrate.

The person making the statement is called the deponent and the statement he or she makes is the deposition.

### **3.6 Deposition of witness unable to attend**

Where any person, who is to give a material evidence in respect of an indictable offence in respect of which a preliminary inquiry is proceeding, is suffering from illness or injury, and unable to attend at the place where the Magistrate usually sits, any magistrate shall have power to take the deposition of such person at the place where such person is.

The Magistrate taking the deposition shall put all parties on reasonable notice of intention to take the deposition, time, and place.

Parties present shall have opportunity to cross examine the witness.

The deposition is recorded, read over to and signed by the deponent and the Magistrate.

It is then forwarded to the magistrate by whom the preliminary inquiry is being or has been held and such deposition shall be treated in all respects in the same way and shall be considered for all purposes as a deposition taken upon the preliminary inquiry.

A deposition taken down in a criminal proceeding may be admissible in a subsequent proceeding in the circumstance, where the deponent is dead, insane or too ill to attend trial or kept away by the adverse party.

A number of states have abolished Committal proceeding or preliminary inquiry (or PI) in their jurisdictions on the ground that:

- It is time consuming
- It is expensive
- Attendant publicity may be prejudicial to the trial of the case
- Possibility that evidence admitted at the PJ before the magistrate may be inadmissible at the trial.
- It is prejudicial to the accused

On the other hand, States that have retained PI argued for that:

- It safeguards the interests of the accused by allowing publicity.
- Witnesses, who would not have been, are informed of the circumstances of the crime for which accused is invited and sentenced
- Publicity prevents secret trial and malicious rumours
- Statutes provide for the admissibility of other written statements in criminal proceedings than Committal proceedings.

Value and purpose of deposition:

A deposition is a written record of what the deponent has said. It is a record in the trial in the absence of the deponent if it is proved that he or she is:

- Dead
- Beyond the seas
- Unfit to attend as a witness
- Incapable of giving evidence
- Cannot be identified or found
- Cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise.
- Being kept out of the way by the adverse party
- Unobtainable without unreasonable delay or expenses

#### **4.0 CONCLUSION**

Generally, hearsay evidence is irrelevant and therefore inadmissible. However, the court may admit, as exceptions to the rule, statements of deceased person which amount to a dying declaration, statements relating to existence of relationship or declarations by testators among others.

#### **5.0 SUMMARY**

In this unit, you learnt more of the exceptions to the rule against hearsay as enumerated on section 39-40 of the Evidence Act, 2011. In appropriate cases you looked at the statute and case law. There are conditions which must be satisfied before you can invoke or take advantage of the exceptions. These have been set out before you.

#### **6.0 TUTOR-MARKED ASSIGNMENT**



Adu is charged with murder of A, B and C by administering arsenic poison. They are grasping for breath when a team of policemen found them.

‘A’ said to the Police. “Adu poisoned me. Am dying, and there is no hope that I shall recover”.

‘B’ said, “Adu gave me a drink. Am worried; there is no hope that I can recover at present.

‘C’ said to the Police, It is terrible, Adu! Adu! Am dying; it is all hopeless. I cannot recover

C later told Constable “I may recover, I may not. I wish to God I can recover, Adu has killed me”

### **QUESTION**

1. Consider the admissibility or otherwise of statements by A and C
2. Comment on the phrase “ at present” in ‘B’ statement .

### **7.0 REFERENCE/FURTHER READING**

Afe. B (2001) Law and Practice Evidence Intec Printers , Ibadan,

Nwadialo F. (1999) Modern Nigeria Law of Evidence, University of Lagos Press

FGN : Evidence Act, LFN 2011.

Aguda . T (2007) The law of Evidence: Spectrum

## **MODULE 4, UNIT 1.**

### **ESTOPPELS**

#### **Contents**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main contents
  - 3.1 Doctrine of Estoppel
  - 3.2 Statutory Provision
  - 3.3 Nature of Estoppel
  - 3.4 Classification of Estoppel
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 Reference/Further Readings

#### **1.0 INTRODUCTION**

The doctrine of estoppels is a heritage from the English Criminal Law, which bars a party to a suit to resile from or doing the contrary of which he or she has led another to believe and the special case of relying on a previous judgment as conclusive of the issue or issues in dispute.

Statutory provision relating to Estoppels can be found in part X of the Evidence Act of 2011, the Matrimonial Causes Act, the Federal Republic of Nigeria Constitution, 1999 and the Rules of various High Courts of Justice. We shall refer to them in this unit. By its nature, estoppel is an admission – something which the law of evidence considers as conclusive and parties are not allowed to plead against it or advance contradictory evidence. The court considers it only fair that a person's own act or acceptance should prevent him or her from alleging the contrary.

#### **2.0 OBJECTIVES**

When you have studied this unit, you should be able to

- (i) Explain what estoppel is

- (ii) Demonstrate an understanding of the application of the directive of estoppels in the law of evidence.

### **3.0 MAIN CONTENT**

#### **3.1 Doctrine of Estoppels.**

“Estoppel”, says Lord Coke, “cometh of the French Word ‘estoupe’ from whence the English word stopped: It is called estoppel or conclusive because a man’s own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth” (Littleton. 352a).

There are variances of estoppels ranging from estoppel by conduct, by deed, by larches, by misrepresentation, by negligence to estoppels by judgment. It is all a question of procedure.

Estoppel may be defined or explained in various ways as:

- A legal result or conclusion arising from an admission which has either been actually made, or which the law presumes to have been made, and which is binding on all persons whom it affects.
- A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.
- A bar that prevents the re-litigation of issues.
- An affirmative defence alleging good faith, reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance.
- A rule by which a party is stopped by some previous act to which he or she was a party or a privy from asserting or denying a fact. It is a rule of exclusion making admissible proof or dispute of relevant facts.
  
- A rule by which a party to litigation is stopped from asserting or denying a fact.

The doctrine of estoppels is the rule of evidence, which prevents a party from denying the truth of some statement, formerly made by him or her. Thus a person would be stopped from denying the existence of facts which he or she has by words or conduct led another to believe

If X by a representation, induces Y to change his position, X cannot, on the face of it, be heard afterwards to deny the truth of his or her representation.

Look at how Belgore, JSC explained it:

“Where a person by clear and unequivocal representation of a fact either with knowledge of its falsehood or with the intention that it should be acted upon or has so conducted himself that another would, as a reasonable man in his full faculties, understand that a certain representation of fact was intended to be acted upon, and that other person in fact acted upon that representation whereby his position was thereby altered to his detriment, an estoppel arises against that person who made the representation and will not be allowed to aver that the representation is not what he presented it to be” *Oyerogba v Olaopa (1998)*”

### **3.2 Statutory Provision:**

#### **(a) The Constitution 1999.**

No person, who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence, having the same ingredients as that offence save upon the order of a superior court. Section 36(9).

#### **(b) Evidence Act, 2011**

##### **(i) Section 173**

Every judgment is conclusive proof, as against parties and privies, of facts directly on issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based;

##### **(ii) Section 174**

- (1) If a judgment is not pleaded by way of estoppel, it is as between parties and privies deemed to be a relevant fact, whenever any matter, which was , or might have been, decided in the action in which it was given, is in issue, or is deemed to be relevant to the issue, in any subsequent proceeding.
- (2) Such judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel.

##### **(iii) Section 65**

When any action is brought against any person for anything done by him in a judicial capacity, the judgment delivered, and the proceedings antecedent to it, are conclusive proof of the facts

stated in such judgment, whether they are or are not necessary to give the defendant jurisdiction, if assuming them to be true, they show that he had jurisdiction.

(iv) **Section 169**

When one person has either by virtue of an existing court judgment, deed or agreement or, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives in interest shall be allowed, in any proceedings between himself and such person or such person's representative in interest, to deny the truth of that thing.

(c) **Matrimonial Causes Act, 2004**

Section 26: Condonation and Connivance

Except where section 16(1) (g) of this Act applies, a decree of dissolution of marriage shall not be made if the petitioner has condoned or connived at the conduct constituting the facts on which the petition is based.

(d) **Rules of Court**

Most High Court Rules contains provisions to the effect that:

An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein Shall not be allowed unless it is made within a reasonable time and before the party applying has taken any first step after becoming aware of the irregularity.

What the provisions seem to show is that estoppel is not static; but has continued to expand in different varieties according to the facts of each particular case, and at the same time, breeding a myriad of problems.

Each of the specie may have its own peculiarity and what you find in one may not be in the other. For example estoppel by record or by deed does not bind the statement, but estoppel by conduct does.

Your consolation is several fold:

- i. The varieties are all under one proof: "Someone is estopped from saying something or other; or doing something or other, continuing or other". The rationale is that when a person, by words or conduct, has led another to believe

- in a particular state of affairs, that person will not be allowed to go back on it when it would be unjust or inequitable for him or her to do so.
- ii. The doctrine, whether as a rule of evidence or a rule of substantive law or in whatever form of estoppel, is rooted on the principle of justice and equity that no man should be allowed to profit from his own act or omission, which the other side has relied upon to his detriment or be allowed to raise a second time, a matter decided in a previous case.

The notion of estoppel is a combination of several elements:

- A clear and unqualified statement, which must be acted on:
- The action must act on the faith of the statement to the detriment to the actor

### **3.3 Nature of Estoppel**

Let us mediate on the term “Estoppel”

**What exactly is the nature of Estoppel?**

#### **3.3.1 Estoppel and Rule**

Estoppel may be looked at as a rule of evidence because it is contained in the statute, e.g. the Evidence Act, Part X Section 62-64 and Section 169-172

*In Ladega V Durosimi (1978)* Eso, JSC (as he then was) confirmed that Estoppel “is essentially a rule of evidence; any relevant evidence excluded by the doctrine of estoppels is inadmissible..

It is also a rule of criminal Procedure. See the Constitution 1999, CPA Part 19 and CPC, Section 223-224.

Estoppel looks more like a rule because it is set up by statute and also exclusionary, but unlike a rule. Estoppels may be pleaded.

#### **3.3.2 Estoppel and Substantive Law:**

Is Estoppel a substantive Law? A substantive law may be a cause of action. Generally the Evidence Act provides for estoppels and its proof. The Evidence Act is a substantive law; it contains a substantive law. Estoppel is a defence. But estoppel *per rem judicata* can also give rise to a cause of action.

Brett JSC in *Ijale V AG Leventis (1964)* said that “Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly

viewed as a substantive rule of law. See also *Haystead V Commissioner of Taxation (1926)*.

### 3.3.3 Estoppels and Pleadings

Estoppel, as well as the relevant and specific facts on which it relies, are required to be pleaded. Estoppel then is (though not entirely) a matter of pleading.

Estoppel looks like a rule because it set up by statute and also exclusionary, but unlike a rule, an estoppel is pleaded.

### 3.4 Classification of Estoppels

Estoppel may be classified as follows:

- (a). Estoppel in pais  
Estoppel in writing  
Estoppel by record  
Per Lord Denning: *West Midlands Police Force & Anor (1980)*
- (b). Estoppel by Representation  
Promissory estoppels  
Estoppel by deed  
Estoppel per rem Judicata  
*(Iyaji v Eyigebe (1987))*
- (c). Estoppel by record  
Estoppel by deed  
Estoppel by conduct  
Equitable estoppel

The various classes depend on the different ways estoppel may arise. The growing nature has made its typology difficult to put into watertight compartments. Hence Lord Denning likened estoppels to a big house with growing number of rooms; estoppels *per rem judicata*, issue estoppels, estoppels by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election, or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, etc. What you find in one may not be found in the others. What a complexity!

#### 3.4.1 Estoppel by Record

Estoppel by record includes:

## 1. Judgments of the Courts of Record

### (i). Cause of action estoppels

This is where a cause of action which has been litigated upon between the parties and finally determined by a court of record, having jurisdiction in the matter is brought again in a subsequent proceeding between the same parties

### (ii). Issue estoppels:

Issue estoppels arises where a fact in issue in the first cause of action has previously been decided and the same fact comes again in question in a different subsequent suit between the same parties

As regards estoppels by judgment, the general principle is that:

- i. it is for the common good that there should be an end to litigation and
- ii. no one should be sued twice on the same ground.

In essence, every judgment is conclusive evidence for or against all persons, whether or not they are parties, of its own existence, date and legal effect, except as to the accuracy of the decision. To create estoppels, therefore, the judgment must be unimpeachable, final, decided on the merit, pronounced by a competent court and obtained neither by fraud nor by collusion.

A judgment is not evidence of a fact, which was not directly decided; e.g. collateral matters or matters that were incidental or merely inferable from arguments. Accordingly, objections may be raised when the other party seeks to tender a judgment as evidence of the facts decided on the ground that:

- i. It is not a formal judgment. It is only a final judgment when the rights of the parties have been determined, even though an appeal is possible
- ii. It was not decided on merits; e.g. if it was dismissed for want of prosecution.
- iii. It is collusive, fraudulent or forged.

A judgment *in rem* is an adjudication as to the status or condition of some particular subject matter of a Tribunal, having competent authority for that purpose. Such judgment is *in rem judicata* e.g a divorce, declaration of legitimacy, condemnation of a prize court, or adjudications in bankruptcy. The estoppel that arises in subsequent proceeding on the same subject is estoppel *per rem judicatum* – a rule of evidence whereby a party



(or his privy) is precluded from disputing in any subsequent proceedings, matters which have been adjudicated upon previously by a competent court between him and his opponent.

A judgment is a conclusion for or against all persons, of whatever matter it settles, as to the status of persons or property, the rights or title to property or whatever disposition of property or proceeds of sale it makes or other matters actually decided. The reason is that public policy demands that questions of status and the like should not be left in doubt.

For example, A decree of dissolution or nullity of marriage on the ground that the marriage has broken down irretrievably, alters the status of the erstwhile spouses, and the ground of divorce binds the parties and privies but not strangers. Thus in *Hill V Hill* (1954,) W petitioned for divorce on grounds of cruelty, alleging several acts of violence against H. Dismissing the petition, the court held that the acts as were complained about did not amount to cruelty. H later petitioned for divorce on the ground of W's desertion. W pleaded justification based on acts of violence she had alleged on the previous proceedings. Held W is estopped. Also in *Ezenwani v Onwordi* (1987) the Supreme Court held that since the issue of traditional history has been decided in an earlier case between parties on the same land in dispute, it has become issue estoppel and inadmissible in a subsequent suit between the same parties.

*Res Judicata* operates not only against the party whom it affects but also against the jurisdiction of the court itself. The party affected is stopped *per rem judicatam* from bringing a fresh action before the court or from proving anything, which contradicts his previous acts or declarations to the prejudice of a party. The plea of *res judicata* prohibits the Court from inquiring into a matter already adjudicated upon. Its effect is to oust the jurisdiction of the Court.

### 3.4.2 Parties

The term 'Party' means not only a person named as such but also one, who, being cognizant of the proceedings and of the facts that a party thereto is professing to act in his interest, allows his battle to be fought by that party intending to take the benefit of the championship in the success.

### 4.3 Privies

In this context, Privy means *Privity*

*in blood*: (e.g. ancestors and heirs), privy in Law (e.g. bankrupt and trustee in bankruptcy), privy in Estate (e.g. Lessor and Lessee). For Privies to bind the party, the

party or privies must sue or defend in the same right and character. An action in a personal capacity cannot create estoppels in a subsequent action in a Representative capacity or as an Administrator.

Hence a civil action will not create estoppel in a criminal proceeding and vice versa for the obvious reason that parties are different.

A. Judgment does not create estoppels for or against a stranger unless he or she knowingly stood by and did nothing to intervene in proceedings in which he or she has an interest.

B. Judgments are admissible to prove facts and can be used to corroborate other evidence even though the judgment does not amount to an estoppel. Examples can be found in cases of:

- Bankruptcy (*Ex.Parte Anderson, re Tollemache* (1885))
- Divorce (*Parrington V Parrington and Atkinson* (1925)).

The following judgment would not constitute estoppels:

- Judgments obtained by consent;
- Judgment in default of appearance to the writ;
- Judgment of dismissal for want of prosecution, not being dismissal on the merit;
- Consent orders, though obtained by fraud, do estoppel the parties until it is set aside;

Aniagolu JSC explained the consequence as follows:

“A party to civil proceedings is not allowed to make an assertion against the other party, whether of facts or legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence, in a previous suit between the same parties or their predecessors in title, and was determined by a court of competent jurisdiction unless further material be found, which was not available, and could not, by reasonable diligence, have been available, in the previous proceedings”.

“So established is issue estoppels in the laws of the common law countries that it has been held that where a final decision of an issue has been made by a criminal court of competent jurisdiction, it was a general rule of public policy that the use of a civil action to initiate a collateral attack on the

decision was an abuse of the process of the court, unless there was fresh evidence”.

#### 3.4.4 Judgment in Personam

A judgment *in personam* is conclusive evidence only so far as the parties to the suit and their privies are concerned not only as the matters actually decided but also as to the grounds of its decision when these again come in controversy between the same parties and privies. Examples are ordinary judgment between parties in cases of contract, tort and crime, being against a person and not against a thing. The reason is that the public policy does not encourage litigation. The principle – *nemo bis vexare debet* – forbids a person to be vexed twice over.

Conditions precedent for estoppel *in personam* to operate:

- i. The parties and privies against whom the judgment is tendered must be suing in the same right or same capacity as in the former proceedings.
- ii. The matter in dispute must be the same in both proceedings.

The judge decides on the question of identity of issues and the test is whether the same evidence would support both actions.

What this means is that an action in tort will not estoppe an action in contract arising from the same faults. The duty of care owed by one driver to another differs from duty of care owed the passengers by the driver.

Estoppel also applies in Administration Actions. Consequently, a party who has acquiesced in the distribution of funds is stopped from a subsequent application to revoke the letters of administration. However, the fact of a conviction is admissible in civil proceedings.

#### 3.4.5 Foreign Judgment

A party who obtains a foreign judgment in his favour is at liberty to sue again in the domestic courts. However, there are occasions when a foreign judgment may estoppe a party against whom judgment has been given. It is ineffectual against a party in whose favour the foreign judgment was given. The foreign judgment acts as an estoppel, it is conclusive against the defendant and the domestic courts will not go into its merits or sit over it as an appellate court. But it is impeachable on the ground of:

- Fraud, collusion, or forgery

- Want of jurisdiction in the foreign court
- That it is not a final judgment decided on the merits of the case
- That it is contrary to natural justice
- That it is contrary to the rules of Private International Law.

#### **3.4.6 Judgment in *rem* and judgment in *personam*.**

The distinction between judgments *in rem* and *in personam* is explained in *Dike v Nzeke* (1986) where the Court said:

A judgment is said to be *in rem* when it is an adjudication pronounced upon the status of some particular thing or subject matter by a tribunal having the jurisdiction and competence to pronounce on that status. Such a judgment is usually and invariably founded in proceedings instituted against something or subject matter whose status or conditions is to be determined. It is thus a solemn declaration on the status of some persons or things. It is therefore binding on all persons in so far as their interests in the status of the person or thing are concerned. That is why a judgment *in rem* is binding on the whole world – parties as well as non-parties.

A judgment *in personam*, on the other hand, is a judgment against a particular person as distinguished from a judgment declaring the status of a particular person or thing. A judgment *in personam* is a judgment inter parties. It creates a personal obligation as it determines the rights of parties *inter se* to or in the subject – matter in dispute whether it is land or other corporeal property damaged, but does not affect the status of either of the parties to the dispute or the thing in dispute.

#### **3.5 Estoppel by Deed**

Estoppel by deed prevents a party to a deed from denying anything recited in that deed if the party has induced another to accept or act under the deed. Indeed, every recital and description in the deed which is unambiguous, material and unseeded to be binding, binds both parties to the deed and anyone claiming through them, but only in an action on the deed.

Hence, parties to a deed and those claiming under them cannot deny the statements of fact contained in the deeds in an action between the actual parties to it and in an action on the deed. The particular statements of facts must be material and intended to be binding on the parties. This type of estoppels may be challenged on the ground that:

- i. The deed itself is tainted by fraud or illegality
- ii. It was executed under duress
- iii. It was executed under a mistake

A recital in a deed acknowledging that one of the parties received some money is merely an evidence of payment, does not create an estoppel.

### **Self Assessment Exercise**

What is the effect of the deed so far as estoppel is concerned?

### **3.6 Estoppel by Conduct**

When one person has either by virtue of an existing court judgment, deed or agreement or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true or to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or said person's representative in interest, to deny the truth of that thing. Except for the additional phrase "either by virtue of an existing court judgment, deed or agreement or" estoppel means essentially the same as it was prior to 2011.

Whereas Section 151 Evidence act 2004 refers to "declarations, act or omission" section 169 of Evidence Act 2011 has expanded this to include court judgement, deed or agreement.

Estoppel by conduct implies that when a person, by his or her conduct induces another to alter his position upon some representation made, the law precludes him or her from denying the fact which he does represent to exist.

Estoppel by conduct arises in a contractual relationship between parties e. g. between a mortgagee and mortgagor, lessor and lessee, bailor and bailee, licensor and licensee. Where this relationship exists, estoppel would operate in situation where:

- A mortgagee allows a mortgagor of property to remain in possession and sell in execution to satisfy mortgagor's judgment debt with knowledge of seizure and intention to sell.
- Lessee or bailee denies title of licensor or bailor respectively.

Estoppels *in pais* operates under the following conditions:

- These must be a representation by words (spoken or written) or conduct of some existing fact. In this context, conduct includes silence when there is a duty to speak. A statement or promise as to the statement of law, or of intention in future is ineffectual : *Kelsen V Imperial , Tobacco Co (1957)*, *Jorden v Money (1854)*
- The representation must be clear, precise, and unqualified. *Territorial and Auxiliary Forces v. Nicholas (1949)*, *Canadian and Dominion Sugar Co v Canadian West Indies Steamships Ltd (1947)* (*lower v. Combank Ltd (1960)*).
- It must be a representation of fact not Law *Territorial and Auxiliary forces V. Nicholas (1949)*, *Leslie v Shiell (1914)*.
- The representation must be such that a reasonable man would believe it and act upon it. *Freeman v Cooke (1848)* \_However, a “reasonable man” is not credited with the knowledge of the intricacies of modern hire purchase finance (*Lowe V Lambank Ltd. 1960*). It suffices that the representation meant the statement to be acted upon or at least have so conducted himself that a reasonable man in the position of the representee would take the representation to be true and believe that it was meant that he should act upon it.
- The representation must have been made with intent that the other party shall act on it. Mere negligent statement in an atmosphere where there is no duty of care is not sufficient: *Seton V Lafone (1887)*, *Henderson V Williams (1895)*.
- The party to whom the representation was made must have acted on it to his or her detriment *Caroline Morayo V Okiode and others (1942)*; *Conpaye Ado V Musa (1938)*.
- He or she must also have suffered damages, and the representation must have been proximate cause of such damage.

### 3.7 Estoppel and Bills of Exchange

Estoppel operates on favour of a holder in due course and those who claim through him or her. Consequently:

- The drawer is stopped from denying the existence of the payee of a negotiable instrument and his capacity to endorse.

- The acceptor of a bill of exchange is stopped from denying the existence of the drawer, the genuineness of the drawer's signature, and his capacity and authority to draw the bill.
- The endorser is stopped from denying the genuineness of the drawer's signature, and any previous endorsements.

### 3.8 Standing By

*Amancio Santis v Ikosi Industries Ltd & Anor (1942)*  
*Merbill v Akiwei (1952)*

The conduct of 'standing by' is omission to take actions, which ought to have been taken. It arises, for instance, where there is a pending action in Court and a person who has the same interest in the subject matter of litigation as one of the parties, stands by, sees his battle fought by somebody else in the same interest, (and fails, omits or neglects to apply to be made a party in addition to that party), In a situation of such , the person is bound by the result and would not be allowed to reopen the case.

The doctrine would not apply to:

1. A decision against a person in his/her personal capacity and the person to be stopped is not privy or cannot be held to be a party.
2. A person, who during the pendency of an action, brought his own action before judgement in the earlier or pending action

### 3.9 Innocent Misrepresentation

Generally, no damage is recoverable for an innocent or negligent mis-statement of fact;

*(Derry v Peck, (1889)* Negligence creates estoppels where the person alleged to be estopped owes a duty of care to the person setting up the estoppel. *(Campbell Viscount Co v Gold (1961)*).

Under the Companies and Allied Matters Act, 1990-2004, directors may be liable for mis-statement in the prospectus of a company unless they had reasonable grounds for believing their statements to be true.

Damages may be recovered from a breach of contract or breach of warranty in which there has been an innocent misrepresentation of fact.

This is based on “a principle of universal application that if a person makes a false representation to another and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he or she said was false and to assert the real truth in place of the falsehood which has so misled the other” – Per Lord McNaughton.

Misrepresentation is a cause of action, but the doctrine of Estoppels is not. Rather it is a rule of evidence. On how estoppel operates in relation to misinterpretation, read the following cases:

*Balkie Consolidated Co Ltd V Tomkinson (1893)*  
*Burrowes V Lock (1805)*  
*Robertson V Minister of Pension (1949)*  
*Combe V Combe (1951)*

NOTE: There must be an independent cause of action for estoppels to operate in favour of the plaintiff seeking damages, estoppels being part of his or her evidence.

You own a car or other articles; you allow another to treat the car or goods as his or her own; you do not object, whereby a third person is induced to buy the car *bona fide*: By your laches and acquiescence, you are stopped from claiming the ownership to the car.

### **3.10 Equitable Estoppel or Promissory Estoppel.**

This is a defensive doctrine, which prevents one party from taking an unfair advantage of another, when, through a false language, or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way. The doctrine is founded on the principle of fraud.

It is also called quasi estoppels or promissory estoppels. It is a shield, not a sword; a defence, not a cause of action. The principle of equitable estoppels was expressed by Lord Cairns in the important case of *Hughes V Metropolitan Railway Co (1877)* as follows.

“If parties, who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of a negotiation, which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to



enforce them, where it would be inequitable, having regard to the dealings which have thus taken place between the parties.”

In the case, a tenant failed to comply with his landlord’s notice to repair the premises, because he was negotiating for the purchase of these premises. When the negotiation failed, the landlord ought to forfeit the lease because of the tenant’s failure to comply with the notice. The House of Lords held that there is an implied promise that the notice would not be enforced as long as the negotiations continued. The tenant was therefore entitled to a reasonable time after their termination to comply with the notice.

The principle was re affirmed by Denning in *Central London Property Trust Ltd V High Trees House Ltd (1947)* and *Combe V Combe (1951)* where Denning L.J explained that:

“The principle stated in the *High Trees Case* does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal right, when it would be unjust to allow him or her to enforce them, having regard to the dealing which have taken place between the parties. The principle is that:

Where one party has, by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted upon accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promises or assurance had been made by him, but he must accept their legal relations, subject to the qualification, which he himself has so introduced, even though it is not supported on points of law by any consideration but only by his (or her) word.

Equitable estoppel is not limited to representation of fact. It extends to:

- Representation of Intention (oral or written)
- Representation by Conduct
- Representation by legal relations

Equitable Estoppel does not bind promisor ad infinitum; it endures only until such time as the promisee should have been restored to the position he or she was immediately before the representation.

If estoppel is based on conduct, the other would have acted to his detriment.

(See Lord Denning: 15 M.L.R. pages 1-10).

## 4.0 CONCLUSION

If a man by his words or conduct willfully endeavours to cause another to believe in a certain state of things which the first knows to be false and the second believes in such state of things and acts upon the belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things does not exist at the time. Again if a man either in express terms or by conduct makes representation to another of the existence of a state of facts, which he intends to be acted upon in a certain 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 that state of facts. Thirdly, if a man 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 such way to his damage, the first is estopped from denying the facts of representation (See the case of *Joe Iga and others v. Ezekiel Amakiri and others* (1976)11S.C.1) especially pages 12 – 13).

Thus an Estoppel is a rule of evidence which precludes a person from denying the truth of some statement formerly made by him or her or the existence of facts upon which a judgment against him or her is based. Estoppel is a shield, not a sword, a defence; not a cause of action. A party who wishes to avail such estoppels, whilst there cannot be cause of action stopped as between a criminal and a civil action, there can be issue estoppels.. Estoppel is based on the rule of public policy that there should be an end to all litigations and no one should be sued twice on the same ground(s).

## 5.0 SUMMARY

In the unit, you learnt about Estoppels in the law of Evidence – its definition, nature, classes and effects. You made reference to the Evidence Act, 2011, section 62-64, 169-174 and to the 1999 Constitution, section 36(9). Each class was explained in some detail and illustrated with examples. Its pitfalls were also indicated. Even where there is none, the judge may, in the interest of public policy demand proof of facts in issue. Specifically, you learnt Estoppel *per rem judicata*, estoppel *in personam* and estoppels by conduct among other estoppels. You would have noted that the doctrine of stand by applies (with certain exceptions) in estoppels such that if a person is content to stand by and see his battle fought by someone else in the same interest, he is bound by the result and should not be allowed to reopen the case.

## **6.0 TUTOR MARKED ASSIGNMENT**

1.
  - (a) In what circumstances can an estoppels by conduct arise?
  - (b) What do you understand by the term: “Equitable Estoppel?
  - (c) Give examples of Estoppel by agreement

## **7.0 REFERENCES/FURTHER READING**

Aguda T, (2007) The Law of Evidence, Spectrum Law Series, Ibadan.  
Aguda T. (1998) Law and Practice relating to Evidence in Nigeria, 2<sup>nd</sup> ed, MIJ Professional Publishers, Lagos  
Afe B (2001) Law and Practice of Evidence in Nigeria, Intec Printers, Ibadan  
FGN: Evidence Act, 2011.  
Nwadialo, F Modern Nigerian Law of Evidence, second edition, University of Lagos Press.

## **MODULE 4; Unit 2.**

### **PRIVILEGE**

#### **Contents**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.4 Privilege
  - 3.5 State Privilege
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

#### **1.0 INTRODUCTION:**

The duty of a court is to decide between the parties on the basis of the evidence that has been demonstrated, canvassed and argued in court. In order to secure a fair trial, all relevant oral, real and documentary evidence in respect of the matter before it should be made available for consideration of the court without let or hindrance whatsoever.

However, such an ideal situation is hardly attainable as a witness, though competent and compellable, may under certain circumstances, claim privilege from answering certain questions or from tendering certain documents. The justification is borne out of public policy and to secure some important benefits such as protecting the society good and security. In this Unit, you shall learn about privilege in Law of Evidence.

#### **2.0 OBJECTIVES**

When you have studied this Unit, you should be able to:

- Define the term ‘Privilege’
- Explain and distinguish:
  - Absolute or state privilege
  - Private privilege

- Explain , with illustrations, the rule: ‘Once a privilege, always a privilege’
- Critique ‘Privilege’ in the Law of Evidence

### **3.0 MAIN CONTENT**

#### **Definition of the Term ‘Privilege’**

Black Law’s Dictionary defines ‘Privilege’ as a special legal right, exemptions, or immunity granted to a person or class of persons, an exception to a duty. It is that right which is given by the law to a person and which allows him to refuse to testify about a particular matter or to withhold a particular document.

Privilege is of two types:

1. Absolute or state Privilege
2. Private privilege or just privilege

#### **3.1 Private Privilege (or Privilege)**

There are varieties of privileges. Some of them are

- Privilege against self incrimination Section 183, Evidence Act, 2011
- Communication between spouses during marriage (i.e. marital privilege) Evidence Act Sections 182 (3), and 187.
- Privilege from answering questions, which tend to show that a spouse is guilty of adultery Evidence Act 2011, Section 186.
- Judicial communication. Evidence Act,2011, Section 188
- Communication made without prejudice Section 196
- Communication relating to the deeds and other documents
- Other confidential communications, Evidence Act, 2011, Section 189, 191, 192

##### **3.1.1 Professional Confidence – Section 195**

Issues of professional confidence may arise in a client and legal adviser relationship.

An oral or written communication between a client and his or her legal adviser is privileged and neither of them can be compelled to disclose it. It is immaterial that the client is or is not a party or that the legal adviser is a barrister, solicitor, or clerk or intermediate agent of either.

There are conditions precedents to a valid claim of privilege, namely:

- The legal adviser must have been consulted in his professional capacity
- The communication must have been made during the existence of the client-legal adviser relationship.
- Such communication must be made for the purpose of obtaining or giving legal advice and assistance, although it need not relate to actual, pending or contemplated suit.
- The privilege belongs to the client and the legal adviser can only disclose upon his or her consent.

The communications made between a legal adviser and his clients or any person representing his client(s) are privileged provided the dominant purpose is related to pending or contemplated suit and are made not only after litigation is anticipated or commenced but also made with a view to such litigation. This extends to answers to inquires by the party at the request or suggestion of the legal prosecution or without any request for the purpose of obtaining a legal advice or of enabling him to prosecute or defend an action or prepare a brief. Certainly a legal professional privilege is non-existent in relation to communications which protect or facilitate crime or fraud.

The object of the communication is connected with one of the following:

- advice as to litigation – pending or contemplated
- advice as to the questions to be given
- advice as to information, that may lead to required evidence.
- An in-house legal practitioner's advice to his employers.
- Items enclosed with or referred to in communications falling into the above categories in circumstances where the items came into existence in the process of giving or receiving legal advice, provided the original would have been privileged.

In *Calorific V Guest (1898) Lindley*, MR said:

The principle of the rule of privilege is designed to enable a legal advice to be obtained safely and sufficiently. It does not protect confidential communication made to priests, friends or servants. "Once a privilege, always a privilege" it does not end with the termination of the original client-legal adviser relations.

But see also the following explanation by Jessel, MR:

“The principle protecting confidential communication is of a very limited character. It does not protect all confidential communications, which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which necessarily must be made, in order to enable the medical man to advise or prescribe for the patient are not protected”. “See *Wheeler v Le Marchant* (1881).

### **Self Assessment Exercise**

How are professional confidences privileged?

#### **3.1.2 Title Deed**

A party to a criminal proceeding may claim privilege for documents which relate to his or her Title or relate solely to his own case and does not prove or support the title of the other party.

#### **3.1.3 Marital Privilege**

Spouses under the Marriage Act are privileged from:

- Giving evidence of marital intercourse during any period.
- Disclosing the communication between spouses during marriage.

The rule is inapplicable to nor protect:

- (i). Pre-marital communications
- (ii) Communications made after the dissolution of marriage by death or divorce of the spouses,
- (iii). Communications made by spouse's witness to her.

The privilege is not limited to communications of a confidential nature. Every witness may claim the privilege whether or not he or she is a party to the action. The privilege belongs to the spouse witness who is at liberty to waive and disclose it regardless of the witness of the other spouse. However, the communication can be proved by calling third party witness who overheard it or by producing a privileged letter between the spouses which had been intercepted. A witness in any proceeding instituted in consequence of

adultery may not be compelled to answer any question which tends to show that he is guilty of adultery.

### **3.2 Incriminating Questions or other Confidential Communications**

Generally, a witness cannot be compelled to answer any question or produce any or his or her spouse to a criminal charge, penalty or forfeiture.

The privilege belongs to a witness, not a co-defendant, who also may waive it. The privilege is exercised by the witness on oath, at the point the question is asked. The claim is not absolute, as the court needs to be satisfied that there is a reasonable ground to apprehend danger to the witness. If the court finds the ground of objection reasonable, the privilege subsists. Otherwise the witness must answer the question or face committal for contempt, should he or she decline to answer. The privilege does not extend to co-defendants.

An accused is a competent witness and may give evidence in his own defence. In the process, he is not privileged from answering questions put to him, which tend to implicate him in the crime with which he is charged. Conversely, he is subject to statutory exceptions from answering questions tending to show that he is guilty of other offences.

It is not settled whether a spiritual leader can avoid disclosing confidential secrets on the ground that doing so would expose him or her to ecclesiastical penalties.

A journalist is not privileged against disclosing the name of his or her informant (*AG. V. Mulholland and Foster* (1963)).

Note also that a Magistrate or a Police Officer cannot be compelled to disclose the source of information as to the commission of an offence on ground of public policy. Thus a witness, if he is a third person cannot be asked questions as will disclose the informant; nor will he be asked if he himself is the informant.

See Evidence Act, Section 183 and 189.

### **3.3 Activity**

Read the Freedom of Information Act, 2011.

To what extent if at all does the Act affect the assertion that journalists lack privilege against disclosing their informants?



### **3.4 Privilege against self-incrimination**

A person who is arrested or detained has the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his choice. He is protected from being compelled to give evidence at the trial.

Note the following 1999 Constitutional safeguards:

- Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice (section 35(2)).
- In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. Sec 36 (1).

Read (i) Evidence Act Section 190, 191 and 192

(ii) The 1999 Constitution, Section 36 (1)

### **3.4 Evidence as to affairs of State**

“Subject to any direction of the President in any particular case, or of the Governor of a State where the records are in the custody of a state, no one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived from such record except with the permission of the officer at the head of the Ministry, Department or Agency concerned who shall give or withhold such permission as he thinks fit.

Provided that:

The head of the Ministry, Department or Agency concerned shall, on the order of the court, produce to the judge the official record in question or as the case may be, permit evidence derived from it to be given to the judge alone in Chambers, and if the judge after careful consideration shall decide that the record or the oral evidence, as the case may be, should be received as evidence in the proceeding, he shall order this to be done in private as provided in Section 36(4) of the Constitution: Section 190, Evidence Act, 2011.

The Evidence as to the affairs of State is otherwise known as State privilege and it refers to the power that the Court has to exclude evidence on the ground that the disclosure of information would injure the general good. It is a rule of law that requires the withholding of documents on the ground that it would be harmful to public interest to disclose it.

### **3.6 Justification of the Rule**

A State privilege is based on the public policy that a person should not be allowed to do anything at large. It may demand that a certain relevant document or matter be excluded on the ground that its admission would be contrary to public policy. This is especially the case where such admissibility is likely to affect the security of the State or the good administration of public affairs or justice. The State Privilege cannot be waived: It relates to relevant facts which need not be proved by reason of public policy or State privilege and cannot be given in evidence.

When an original document is excluded on the ground of State privilege, a copy of such a document or a secondary oral communication or oral testimony of it is inadmissible in evidence - once a privilege, always a privilege.

Let us consider three classes of cases to explain how the principle of state privilege operates:

#### *3.6.1 Affairs of state – Section 190*

Evidence pertaining to the affairs of state is excluded from evidence if the disclosure would be detrimental to the interest. The protection also encourages freedom of communication among officials and between officials and the public at large.

Examples of such important state of affairs are:

The construction of a submarine

The Report of a Court Martial to the Commander – in –Chief.

The company's balance sheet in the possession of the income tax authorities

The Report of a Prison director or of the Police as to the mental state of a prisoner

Written or oral communication among appointing bodies or authorities on the suitability of a candidate for magistracy or justice of the peace.

#### *3.6.2 Scope:*

State privilege is not confined to documents although usually, it applies to it. It is not also confined to public documents. It protects also the following:

- Documents in the possession of a government department or official
- Private documents whose production could be prejudicial to the state.

State Privilege does not extend to documents relating to the affairs of local authorities. It does apply to exclude oral evidence which, if given would jeopardize the interests of the community.

The Minister of the Government Department concerned may give consent to produce the documents in issue. He can object to its production also. He does so:

- On discovery
- In an objection before trial by affidavit, or
- At the trial

It is important that an official or State Counsel, in obedience to the subpoena, must have the document in Court at the trial.

### *3.6.3 Objection*

Claim of state privilege must be made by the minister himself, having seen, and considered the contents and satisfied himself that it ought not to be produced on grounds of public interest because, for example, disclosure would injure national defence or good diplomatic relations or because the practice of keeping the class of documents secret is necessary for the proper functioning of the public service.

The objection to the production if sustained by the court is final; and the judge would call for the production of the document.

Some judicial opinions have tried to draw a dichotomy between

- (a) a particular document and
- (b) a certain class of documents

The protagonists also advocate that the Minister should, by affidavit specify:

- That a particular document should not be discussed
- The class to which the document belongs is with sufficient clarity to enable this judge to form his opinion

In *Spigelmann v Hocker* (1933) it was held that the principle of state privilege did not apply to claims relating to certain classes of documents as opposed to a particular document or documents.

See also *Re Grosvenor Hotel (No 2)* (1964). In this case, the Court of Appeal held that in relation to documents of a particular class, the courts in England had a residuary power to override the executives' veto where the privilege is unreasonably claimed. The House of Lord has endorsed this reasoning in the important case of *Conway V Rimmer* (1968)

### 3.7 Activity

Read the following cases:

- *Duncan v Cammel Laurd & Co. Ltd. (1942)* this case is civil but its principle applies to criminal proceedings.
- *Conway v Rimmer (1968)*
- *Maya (Jnr) & Sons Ltd. UAC of Nigeria Ltd (1971)*
- *Attorney-General of Western Nigeria v The African Press & Another (1965)*

Also refresh your memory by reading over Evidence Act Section 190, 191 and 192 as well as the 1999 Constitution, section 36.

1. What did *Duncan's case* decide and by which court and in what year? Does it apply in Nigeria?
2. What did *Conway's case* decide? By which Court? What year? Does it apply in Nigeria?
3. Who does each of both cases say has the final decision as to whether or not a document is state privileged -the relevant state functionary or the Judge?
4. Which view does the Evidence Act support?
5. Do you see any conflict between section 36 (1) of the 1999 Constitution and Evidence Act, 2011 provision?

It would appear that the Evidence Act makes the state functionary the final arbiter in the matter of exclusion of evidence on the ground of state privilege. See the Constitution, 1999, Section 36(4) and the proviso in Evidence Act 2011 Section 190.

Maya's case is of the view that it is still open to the court to consider whether public interest outweighs the accused's right to fair hearing. The position of the law is probably, as stated in *AG (WN) v The African Press & Anor* where the Supreme Court said:

"It remains the duty of the Court to uphold the right to a fair trial, and if, in a criminal case, there are reasonable grounds for supposing that the exclusion of evidence by such a certificate might have prejudiced the accused in making his defence, the court is bound to say that the prosecution has not proved its case beyond reasonable doubt. In the course of argument we called the attention of the Director of Public Prosecutions to proviso (b) to section 22 (3) of the Constitution of the Federation, under which the court may take evidence in private if the Minister certifies that it would not be in the public interest for it to be publicly disclosed. Anyone improperly disclosing such evidence subsequently would be punishable for contempt of court and we trust that whenever possible Ministers will adopt this middle course rather than that of excluding relevant evidence from the consideration of the court. The Minister is made the judge of what the public interest requires, but he must weigh one consideration against another, and he should be reminded that it is always contrary to one facet of the public interest if relevant evidence is excluded.

The relevance of evidence is for the court, not the Minister, to decide and where ad subpoena is applied for on frivolous grounds it may be set aside by the court on a motion brought for that purpose as was done in *R v Agwuna* (1949) 12 WACA 456; the same applies to a subpoena which is bad for vagueness.

### **3.8 Judicial Privilege: Compellability of Justices etc or the persons before whom the proceedings is held.**

By Sections 188-189 Evidence Act, 2011, No Justice, Judge, Grand Kadi or President of a Customary Court of Appeal and, except upon the special order of the High Court of the State, Federal Capital Tertiary, Abuja or Federal High court, no magistrate or other persons before whom a proceeding is being held shall be compelled to answer any questions as to his own conduct in court in any of the capacities specified in this section, or as to anything which came to his knowledge in court in such capacity but he may be examined as to other matters, which occurred in his presence whilst he was so sitting (Section 188)

Restriction on disclosure as to source of information in respect of commission of offences:

No magistrate, police officer or any other public officer authorized to investigate or prosecute offences under any written law shall be compelled to disclose the source of any information as to the commission of an offence which he is so authorized to investigate or prosecute and no public officer employed in or about the business of any branch of the public revenue, shall be compelled to disclose the source of any information as to the commission of any offence against the public revenue. (Section 189, Evidence Act, 2011)

By this provision, a statement in any document marked “Without Prejudice” made in the course of negotiation for a settlement of a dispute out of court, shall not be given in evidence in any civil proceeding in proof of the matter stated in it (Evidence Act, 2011, Section 196).

Judge of a superior Court of record enjoys a state privilege not to give evidence as to matters arising before him in his judicial capacity. This privilege does not extend to matters of incidental nature, such as a riot in the Court.

A legal practitioner cannot be compelled to disclose matters stated by him in the course of conducting a case. Similarly an Arbitrator is protected from giving evidence of what took place before him. But he cannot be heard to claim privilege from disclosure of the reason for his award or the meaning intended to be given to it.

Similarly a witness is protected from disclosing the sources of information leading to the detection of a Crime except to prove the innocence of the accused.

### **3.9 Statements in documents marked: “Without Prejudice” –section 196**

Communications made “without prejudice” either in writing or orally are protected from subsequent disclosure, unless both parties are willing to dispense with this protection.

This is to discourage litigation and to encourage parties to settle matters amicably without recourse to litigation. It is also to encourage parties to shift grounds and avoid embarrassment, which would have ensued but for the protection. The immunity extends to admissions by words or conduct and to communications forming part of the same chain of communications made without prejudice.

Statement made “without prejudice” may be express. It may also be inferred, where not expressly made “without prejudice.” It all depends on the relationship of the parties, the

circumstances in which the statement is made, the contents of the statements or other relevant facts.

Examples are statements made by estranged spouses to conciliators or a probation officer. But statements or acts that are without proper connections or which are not reasonably incidental to the negotiations are not protected.

### **3.10 Self Assessment**

How valid is the rule: “Once privilege, always privilege”

### **3.11 Members of the National or State Houses of Assembly**

This eminent class of people is immune from giving evidence in a Court of law as to what was said in the floor of the National or State House of Assembly.

The foundation of the rule is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for non production. The general interest of the public is paramount to the interest of the plaintiff . (*Asiatic Petroleum Co Ltd v Eady L.J Oil Coy Ltd (1916) per Swinfer –Eady L.J*)

### **3.12 Sample Cases**

At this juncture, let us review more cases.

#### **3.12.1 Duncan V Cammell Laird & Coy Ltd (1944).**

This action is one of negligence for damages arising from the construction of a submarine. Appellants asked for an order for the production of a submarine. The first Lord of the Admiralty deposed to an affidavit that such production would be contrary to the public interest. Upholding the objection, the Court said:

- (i) That documents, otherwise relevant and liable to production, need not be produced, if owing to their actual interest requires that they should be withheld.
- (ii) That an objection to the production of documents duly taken by the head of a government department should be treated by the court as conclusive.

Viscount Simon LC put the matter plainly thus:

“The essential matter is that the decision to object should be taken by the minister, who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interests, they ought not to be produced, either because of their actual contents or because of the class of documents – e.g., departmental minutes – to which they belong. Instances may arise where it is not convenient or practicable for the political minister to act (e.g. he may be out of reach, or ill, or the department may be one where the effective head is a permanent official), and in such cases it would be reasonable for the objection to be taken, as it has often been taken in the past, by the permanent head. If the question arises before trial, the objection would ordinarily be taken by affidavit, and a good example is provided by the affidavit of the First Lord of the Admiralty in the present case. If the question arises on subpoena at the hearing, it is not uncommon in modern practice for the minister’s objection to be conveyed to the court, at any rate in the first instance, by an official of the department who produces a certificate which the minister has signed, stating what is necessary. I see no harm in the procedure, provided it is understood that this is only for convenience and that, if the court is not satisfied by this method, it can request the minister’s personal attendance.”

### 3.12.2 :Conway V Rimmer (1968)

*In Conway V Rimmer* (1968), Lord Reid explained the rule further:

It is universally recognized that there are two kinds of public interests which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of Justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private can be allowed to prevail over it.

## 4.0 CONCLUSION

A witness may claim privilege and be protected from answering certain questions or from tendering certain documents. A privilege relating to a document extends to its secondary evidence where it relates to the affairs of states, judge and magistrate. There is the controversy whether the view of the official or of the head of the Department (e.g. a Minister) that public interests would suffer from the disclosure in court is absolute or whether it can be heard *in camera*. See *Duncan’s*



*case (1942) and Conway V Rimmer (1968)*. A witness is privileged from answering incriminating questions (*Boyle V Wiseman*) A statement made without prejudice does not apply to collateral facts that may be discovered during “without prejudice” negotiation.

## 5.0 SUMMARY

Official and privileged communications exist among judges and magistrates as to their conduct in their courts and among jurors as to their conduct in the jury room. Privilege protects communications between legal practitioners and their clients, spouses, and among persons in fiduciary relationship. Documents relating to the affairs of state are, in the interest of the security and the welfare of state privileged (section 190-191), *Asiatic Petroleum Co Ltd V Anglo Persian Oil Co Ltd (1916)*, *Ali v Jonathan Cape Ltd (1976)*. You may notice that a statement without prejudices is privileged only if it relates to negotiations towards the settlement of an issue. A client (whether a party or not cannot be compelled to disclose communications (oral or written) between him and his legal advisor. Clients and patent agents or party and non-professional agents have limited privilege. Matrimonial Causes Act protects spouses against disclose of evidence of marital intercourse as well as communication between them during marriage.

No witness is compellable to answer questions tending to expose him or her, or his spouse to a criminal charge, penalty or forfeiture. No privilege extends to communications between priest and penitent; doctor and patient, or a journalist against disclosing the name of his informant.

## 6.0 TUTOR MARKED ASSIGNMENT

1. Distinguish between state privilege and private privilege
2. What is the duty of the Court where evidence is objected to on the ground that its admission would be contrary to public interest?

## 7.0 FURTHER READINGS/REFERENCES

Afe, B (2001) Law and Practice in Nigeria  
Nwadiolo, F (1999) 2<sup>nd</sup> Ed. Modern Nigerian Law of Evidence,  
Lagos University Press, Lagos FGN – Evidence Act 2011.

## **MODULE 5 UNIT DOCUMENTARY EVIDENCE.**

### **CONTENTS**

- 1. 0. **INTRODUCTION**
- 2. 0 **OBJECTIVES**
- 3. 0 **MAIN CONTENTS**
  - 3.1 Statutory Provision
  - 3.2 Proof of Execution of Documents
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### **1.0 INTRODUCTION**

In Part I of Law of Evidence you learnt what a document is and about its different kinds. In this unit, we shall be dealing with documentary evidence. Documentary evidence is evidence supplied by writing, which must be authenticated before the evidence is admissible (*Blacks Law Dictionary*). In this context, writing includes books, maps, plans, drawings, photographs, matters expressed or described upon any substance by means of letters, papers or marks or by more than one of these means intended to be used or which may be used for that purpose of recording matter.

Evidence Act Section 258 (1) extensively interprets the terms: ‘copy of a document’, ‘computer’ and ‘document’ because of their importance in litigation today and Section 84 deals with the admissibility of statements in documents produced by computers. You may find it interesting to reconsider all the case law on admissibility. Essentially, a document is a statement made in a document which is offered to the Court in proof of any fact in issue (Aguda). In this unit, you shall learn how the statutory provisions on documentary evidence have been interpreted and applied, and rules and principles that have now emerged.

## **2.0 OBJECTIVES**

When you have studied this Unit, you should be able to:

- Grasp a working definition of documentary evidence.
- Give examples of circumstances when documentary evidence would or would not be excluded in law of Evidence.
- Describe the conditions precedent for admissibility of Secondary document evidence.
- Describe the general discretions to exclude documentary evidence.

## **3.0 MAIN CONTENT**

### **3.1 Statutory Provision**

It is important that you understand the principles and rules relating to documentary evidence. To start with, you need a brief survey of the provisions of the Evidence Act relating to the subject:

Read section 85 – 92 to refresh your memory on the definition, classification and admissibility of documentary evidence.

Then Read section 83 - 84 relating to admissibility of documentary evidence.

The differences between Public and Private Documents are explained in section 102 – 106, while the circumstances of exclusion of oral documentary evidence are contained in sections 128 – 130.

You may gain an added advantage by reading in passing Sections 107 – 120 which deal with the contents and validity of Affidavit.

### **3.2 Proof of Execution of Documents – section 93-98**

Any document which is tendered as a proof of its content is a hearsay evidence. It is inadmissible in evidence unless it falls within one of the exceptions, e.g. dying declaration, a confession, or if it is a public document. On the other hand, it is not hearsay if the same document were tendered to prove its existence or the fact that it was made

Some documents like the Acts of the National or State Assembly are judicially noticed and are admissible without any form of authentication. There are other documents which may necessarily be authenticated or classified, stamped, sealed or signed by designated

public officials as the case may be. The validity of a document determines its admissibility or the secondary evidence of the document.

### **3.2.1 Ancient documents**

Some reference had been made to presumptions as to hand-writing on what needs to be added is that if a document is proved or purported to be 20 years old and is produced from the proper custody and otherwise free from suspicions, the court will presume the document's validity but not its veracity. The Court presumes that:

- The signature on the document is genuine
- The handwriting is that of the person who is supposed to have written it.
- The document was duly executed these prescriptions arising by reason of the document are rebuttable.

In this context, proper custody implies the deposit of the document in a place, and under the care of persons, whose and with whom it might naturally and reasonable be expected to be found, if authentic, even though those may be some other custody more strictly proper. Generally, if a document is alleged to be 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 (Section (93)).

### **3.2.2 Proof of Signature and handwriting and Electronic Signature**

Evidence that a document exists having the same name, address, business or occupation as the maker of a document purports to have, is admissible to show that such document was written or signed by that person.

Evidence that a document exists to which the document, the making of what is in issue purports to be a reply, together with evidence of the making and delivery to a person of such earlier document, is admissible to show the identity of the maker of the disputed document with the person to whom the earlier document was delivered (Evidence Act 2011, Section 93 and 94)

### **3.3 Handwriting**

Evidence of handwriting may be required if a document other than an ancient document which a person is alleged to have signed or written. The evidence of hand writing may be given in the following ways:

- By comparing the disputed signature or handwriting with a sample which is either admitted or proved to have been written by the person named (i.e. the writer or signatory).
- By calling the alleged writer or signatory as a witness and inviting him to write any words or figures so that the Court can compare with the disputed document.
- By calling the alleged writer and signatory or person named as a witness to identify his or her own signature or writing.
- By calling any person who saw the writer or signatory write (where he or she is not available) to give a direct evidence of that fact.
- By calling a person who is familiar with the writing or who regularly receives or did receive documents signed or written by the signatory or writer of the disputed document to be called to make a comparison.
- By the opinion of hand writing expert witness.

The Evidence Act 2011 introduced for the first time the element electronic signature. In Section 93(2) (1) (3), it states:

- (2) Where a rule of evidence requires a signature, or provided for certain consequences if a document is not signed; an electronic signature satisfies that rule of law or avoids those consequences.
- (3) An electronic signature may be proved in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person.

### 3.4 ATTESTATION

Some documents require attestation. Example is a Will or other testamentary disposition or other document required by law to be attested.

To prove due attestation, you need to call the attesting witnesses if they are alive or resort to proof of handwriting if the attesting witnesses are dead.

Ancient document is presumed to be valid. Accordingly the Court presumes that the signature is genuine; that the handwriting is that of the writer or signature and that the document is duly executed. In other words, these facts or matters need no proof in Court; they are presumed to exist.

Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, statutes, and statutory declarations of at least 20 years old are presumed to be correct.

Where the holder of a bill of exchange has a lien on it, by contract or in law, he is deemed to be holder for value to the extent of his lien.

Where value has at any time been given for a bill of exchange, the holder is *prima facie* deemed or presumed to be holder for value.

Alterations to deeds are presumed to have been made before or at the time of execution. The effect of material alterations made after execution of a deed without concurrence of the party to be charged is to render the whole deed void.

Alterations to Wills are presumed to have been made after the execution. Alterations to a Will made after executions are of no effect unless they amount to partial revocations.

A document which is required by law to be stamped is presumed to have been duly stamped if it is lost, or not provided upon notice.

These presumptions are examples only. They are not exhaustible.

### **3.5 Proof of the Contents of documents**

#### **3.5.1 See sections 85 – 89 Evidence Act, 2011.**

The contents of a document may be proved by primary or secondary evidence, depending on the requirement of the law and the nature of the document – whether it is public or private document. The contents of any document must be proved by primary evidence subject to certain exceptions.

Primary evidence is the production of the original document for the inspection of the Court. Where a document is executed in several parts, each part is primary evidence. Similarly, if in counterparts, each counterpart, or a copy of identical documents produced in a uniform process by means of printing, lithography, photograph, like the copy of any Newspaper of a particular date is original. Each of these documents is a primary evidence of the contents of a pertinent edition.

The original document sought to be produced must be identified on oath being what it purports to be, unless it has already been admitted or it is a public document admissible on production.

If the original document is in the hands of an opponent or a stranger, the following notices to produce must first be served:

- Notice to produce. –Here production is optional, commonly used in Criminal proceedings
- *Subpoena duces tecum* –Here, production is compulsory

In the case of banker's books, the judge's prior order is necessary

An Admission (oral, written or by conduct) of the contents of a document by a party is a primary evidence against him or her, who admits. Similarly a copy of document acknowledged as correct by an opposite party is regarded as an original document.

### **3.5.2 Copies of an Original Document**

Sometimes, a copy of an original document made under a public authority is admissible as primary evidence. For example, Probate of a Will is a primary evidence of the words of the Will. A document which is sealed and certified by the Director of National Archives is treated as primary evidence (Public Archives Act. Section 7 and Evidence Act section 88); so also is a certified copy of entry in the Register of Marriage (Marriage Act).

### **3.6 Secondary Evidence:**

See section 87, Evidence Act, 2011.

Secondary evidence of the contents of a document is any admissible evidence other than the primary evidence. The general rule is that the Secondary evidence of the contents of a document can *never* be admitted unless the original document itself would be admissible in evidence. It is of utmost importance that:

First, you lay a foundation for admissibility of the original document, giving account of the original document e.g. that it is a public or judicial document. Next is to lay the foundation for the admissibility of the secondary evidence of those documents.

#### **3.6.1 Forms of Secondary Evidence**

Secondary evidence may take any form; but where statute prescribes a particular type of secondary evidence, no substitute may be permissible admissible.

Examples of these forms of Secondary evidence are:

1. Office copies of judicial documents bearing official seal, and made by an officer of the Court having custody of the original document.
2. Examined Copies of documents produced by a writer who, has compared them with the originals or by oral evidence by a witness who has read the original document.
3. Photostat or certified copy of the original copy  
Oral testimony of private documents may be given by the testimony of the conduct of a person, acting in pursuance of the assumed terms of a document.

A public or judicial document and quasi-public document may be proved by oral or secondary evidence, depending on convenience. They may be proved in the following ways:

- By an examined copy
- Sealed and certified copy of records (public record or letters patent)
- Certificates or certified copies of public documents, proceedings of corporations or entries in Register.
- As statute may prescribe
- A copy of extracts of books, documents of public nature.

### **3.6.2 Private Documents**

Private documents must be proved by primary evidence, except in those special circumstances in which the law allows secondary evidence of their contents.

### **3.7 Cases in Which Secondary Evidence of Private documents is admissible**

See Section 89. Evidence Act, 2011.

A secondary evidence of the document may be admitted in the following cases:

- Where the original document is lost or destroyed
  - Where undue delay or expense would be involved in providing the original
  - Where the original is in the hands of a stranger
  - Where the original is in the hand of an opponent
  - Where it is inconvenient or physically impossible to provide the original.
- See for other cases, sub sections (a)-(h)



### 3.7.1 Bankers Book

An entry in the ordinary books of the Bank may be proved by secondary evidence provided that:

- The book in which the entry is made is at the time one of the ordinary books of the Bank, irrespective of whether it is used daily or occasionally.
- The entry is made in the usual and ordinary course of businesses.
- The book is in the custody and control of the Bank, which proof may be given orally or by affidavit by a partner or officer of the bank.
- The copy has been examined with the original entry and found to be correct, (not necessarily verbatim or precise language) but in substance. A Ledger card is not admissible (*Yesufu v ACB (1976)*; *Fadah Allah v Arewa Texile Ltd (1997)*).

### 3.7.2 Secondary evidence of previous conviction

There are several ways of proving a conviction. Examples are:

- By a certified copy of the record
- By a certificate signed by a clerk or deputy clerk of the Court of trial
- By a copy of the summary conviction signed by a Justice of the Peace
- By a certified extract from the Court Register
- By a certificate signed by or on behalf of the Inspector General of Police giving particulars of the conviction, and certifying that the finger print exhibited to the certificate are those of the person convicted and
- a certificate signed by the person in authority certifying to the same effect.

A document which is admissible as evidence of conviction is admissible in any civil proceedings to prove the facts on which the conviction is based. The information, complaint, indictment in the charge – sheet may be used for this purpose

3.7.3 In sum, secondary evidence of the contents of the following documents may be given provided the originals themselves would be admissible.

- Public or judicial documents or a private one required to be registered or enrolled.
- Document that has been lost or destroyed provided that the existence and search (if lost) has first been proved.
- Document in the possession of a stranger or adversary who requires to produce document of which production is physically impossible or highly inconvenient.
- In interlocutory proceedings

## 3.8 EXTRINSIC EVIDENCE OF DOCUMENTS

Extrinsic evidence means evidence relating to a contract but not appearing on the face of the contract. It comes from other sources such as statements between the parties or the circumstances surrounding the agreement. It is an extraneous evidence.

The general rule is that extrinsic evidence is inadmissible to add to, subtract from, vary, alter or contradict a written document that is not ambiguous.

A written document is deemed fit to be a complete and conclusive record of the transaction. No evidence therefore may be given to prove the terms of the transaction, except the document itself or where the laws direct otherwise.

Suppose A advertises his parcel of land for sale. The land comprises Blackacre, Greenacre and Whiteacre. A and B enter into an agreement in writing for the sale of whiteacre and Greenacre in Gariki Abuja, B cannot be heard later to complain that there was complementary verbal agreement that Blackacre was included in the original agreement that is in writing.

Where a judgment, contract, disposition of property or other transaction is in writing, such document or series of documents represents what was intended. An extraneous oral evidence to prove the contents is inadmissible.

Exceptions:

Extrinsic Evidence of a written instrument or documents may be admissible in the following cases.

- To impeach the document for want or failure of consideration, incapacity of the parties, illegality, mistake, fraud, and innocent misrepresentation, undue influences, forgery etc.  
The ultimate purpose is to show that there is no valid transaction or any such matter as would entitle a party to the document to a judgment or order relating to it.
- To show that a deed appearing to be a sale is, in fact, a mortgage.
- To show that the written record has been wrongly dated
- To show that the writing was not meant to be the record of the transaction, or the complete record of it.
- To prove a condition precedent to any delegation under a contract or disposition of property
- To add supplemental or collateral terms contained in separate agreement.

- To incorporate local or trade custom
- To show a subsequent oral agreement, varying or rescinding the written instrument
- To connect two or more written documents, which refer to each other in relation to the transaction.
- To prove a legal relation created by a document when only the existence of such relationship is involved and not the terms of the document.
- To show that a document was executed with an intent, which is contrary to the presumption raised by the equitable doctrine of satisfaction. *See Re-Tussand (1878)*,
- To prove a contract where proof of part performances is accepted in place of a statutory memorandum
- To translate the document (e.g. a document in foreign language, signs, abbreviations, nicknames, illegible characters).
- To explain the terms now obsolete but used in an ancient document
- To explain scientific or technical terms
- To explain common words (e.g. where parties use words in a particular sense with secondary meaning.
- To explain where the words used have a special meaning (e.g. trade usages or not being contradictory to the document.
- To show the circumstances of the parties or one of them.
- To identify parties ,persons and things
- To explain ambiguity – latent, patent or equivocation.

### **3.8.1 Rescission or variation of a written instrument:**

An obligation under seal can only be varied or rescinded by a deed. The doctrine of equity holds a contrary view. See the case of *Berry v Berry* (1929)

Since equity prevails, a contract in writing or evidence in writing may be varied by a later oral agreement.

However, if the law declares that “writing or a memorandum in writing” is a condition precedent to an agreement or contract, it can only be varied by a subsequent contract, which is itself in writing. For example, the Statute of Frauds states that a contract concerning land must be evidenced in writing. If then P agrees in writing to sell an acre of land to D, any subsequent oral contract between P and D would not suffice to confer on D any good title to any of the plots as such oral agreement would be offensive to the Statute and therefore inadmissible.

But then, specific performance of the contract as varied orally is permissible in three situations, namely

- Where the absence of writing, is not specially pleaded
- When, through the defendants fraud, no memorandum was signed
- When the plaintiff proves acts of part performance or verbal variation which unequivocally refers to it.

In regard to rescission of a written instrument, a prior written contract can always be rescinded expressly by a subsequent oral agreement. But notice: that the subsequent contract itself cannot be sued upon by reason of want of writing or written evidence.

In an old case of *Morris v Baron & Co* (1918), an action for \$800 was settled by oral agreement which both rescinded the original written contract and contained a new arrangement. At the time, the Sale of Goods Act 1893 had provided that a contract for the sale of goods of \$10 and upwards had to be evidenced in writing. The House of Lords held that oral agreement was valid to rescind the former written agreement, but unenforceable as to the new arrangements made.

### **3.8.2 Extrinsic evidence inadmissible**

Extrinsic evidence will not be admissible:

- Of a party's direct declaration of intention
- Where there is no ambiguity in the language or merely grammatical ambiguity
- Where the language is so vague or imperfect that no extrinsic evidence would be mutually equivalent to making a new document.
- Where the interpretation sought to be given would conflict with some rule of law or construction.

## **3.9 Interpretation of Written Document**

Only a summary of this topic is required here. Words used are taken in their "ordinary popular meaning" and as modified to produce sense and consistency, except where it is apparent that the words have been used in some other sense.

### **When extrinsic evidence is not admissible**

The Court is concerned with the document itself. What the parties have expressly stated in the document is what they really intended. Hence, extrinsic evidence is not admissible if the words of a document are clear and unambiguous. A party cannot be heard therefore,

to say that although the parties have expressed certain things in words, they really intended something different.

However, the Court may depart from the words used and receive extrinsic evidence in :

- Expressions which are contradictory, or
- Single expression, which is against the general term or of the document.

When this situation arises, what does the Court do?

- It considers the document as a whole
- It construes the meaning of terms from what has gone before and what follows (i.e. *ex antecedentibus et consequentibus*).

Remember that the court is always anxious to uphold a document, if possible, rather than that it should fail for uncertainty (i.e *ut res magis valeat quam pereat*: let it rather be valid than perish). Hence, whatever the intention of the parties which the Court so construes prevails over the words so expressed.

For that reason also, where a deed may be read in two ways – one reading of which makes its object unlawful and the other lawful, the latter is to be given effect. An example is the cy-pres doctrine which applies to charitable trusts.

Extrinsic evidence in aid of interpretation may also be admissible to prove the following:

- knowledge and circumstances of this writer – his or her identify
  - the extent of the objects referred to in a document;
  - The particular sense in which certain words are used.
  - Whether those words were not used in their primary or ordinary sense; the surrounding circumstances in which used – trade and habits of speech.
  - Situation: *falsa demonstratio non nocet*; i.e where words (are used correctly in one part and incorrectly in another part, or (apply partly to one subject matter and partly to another, or (have both ordinary and local or particular meaning, extrinsic evidence is admissible to show that which was intended.
- 
- To resolve ambiguity or an equivocation. Equivocation refers to a situation where words used fit two persons or things, or where it fits one person accurately and another popularly or both equally and subject to common inaccuracy.
  - To explain technical, local or foreign terms by references to dictionaries and expert evidence

Any ambiguity which does not answer the above description may be incurably bad for uncertainty. See the case of *The Union Bank of Nigeria Ltd v Professor Alvert Ojo Ozigi* (1994), where Adio JSC expressed the following guiding principles:

1. The general rule is that where the parties have embodied the terms of their contract on a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument.

See also section 131, Evidence Act, 2011; *Olaoye v Balogun* (1990), *Eke v Odolofin* (1961), *Macaulay v Nal Merchant Bank* (1990), *Colonial Development Board v Kassisi* (1955), *Molade v Molade* (1958).

2. The operation of the parol evidence rule is not limited to oral evidence. It extends to extrinsic evidence in writing, such as drafts of agreement, preliminary agreements and letters relating to previous negotiations.

3. Extrinsic evidence is not admissible as to what passed between the parties before the execution of a written agreement or during its preparation. For example, the court may refuse a document as inadmissible because it constitutes extrinsic evidence intended to be used to contradict a mortgage deed.

4. Where a document is clear, the operative words in it should be given their simple and ordinary grammatical meaning.

5. Where the words of any instrument are free from ambiguity in themselves and where the circumstances of the case have not created any doubt or difficulty as to the proper application of the words to claimants under the instrument or the subject matter to which the instrument relates, such an instrument is, as a general rule, always to be construed according to the strict, plain and common meaning of the words themselves. It is wrong to import into Mortgage deeds extraneous matters, such as the requirement that the party should obtain the prior consent or give prior notice of increase in the rate of interests on the loan to the other.

This doctrine has been applied and followed by the Apex Court in Nigeria.

### **3.10 Refreshing Memory from a Document.**

Subject to certain conditions, a witness may refresh his memory from a written document while giving evidence. This type of evidence is oral, not documentary.

The written record must have been made:

- i. By the witness or on his or her direction from his treaties e.g expert witness.

- ii. Upon matters within his own knowledge
- iii. Within such a time after the transaction as to still be fresh in his memory or read through while the matter was still fresh in case of records made at his direction.
- iv. Before any controversy in the matter arose.

A witness, with the permission of Court, may validly refresh his memory from the document. The practice has the merit of:

- The writing reviving the witness's recollection of facts;
- Creating in his mind, a belief that when the writing was made, he knew it to be correct
- The witness being satisfied that it would not have been made if it was not true;

Examples of documents, which courts have permitted to be used to refresh oneself include:

- Entries made by a tradesman in the book of orders actually made
- Entries in a diary
- Tape recorder being replayed in court

#### 4.0 CONCLUSION

Any document which is tendered as a proof of its contents is hearsay evidence and it is as a general rule inadmissible. However extrinsic evidence may be admitted to:

- a. Vary, or contradict a public document, not being a judicial record e.g the Register of slips.
- b. Vary, or contradict a private document – informal or *inter aliois* e.g a receipt.
- c. Modify or rescind at any time before breach and by oral agreement any written transactions which statute requires to be in writing show that the document or transaction is invalid.

Extrinsic evidence may be adduced to supplement, but not to contradict the terms of a private formal document for the purpose of proving terms that are omitted, proving collateral agreement or warranty or proving that the contract was subject to a custom (not inconsistent with its terms). Where a statutory Memorandum is required, any modification or rescission must be written. If the purpose is to rescind the contract as a whole, oral evidence suffices.

Extrinsic evidence is receivable to show that the document in question is not a valid record of a transaction (i.e. A forgery) or that the transaction as recorded is itself invalid, want of consideration, or by reason of fraud, mistake or illegality. On the other hand, extrinsic evidence may be admissible to prove the true nature of a transaction and relation of the parties such as evidence showing that a conveyance is in fact a mortgage or that an agency relationship exists between parties.

## **5.0 SUMMARY**

The Evidence Act defines document in section 258 and provides for documentary evidence in parts v and vi and more particularly in section 85-107, and 108-130. You learnt of circumstances when documentary evidence may or may not be admitted and the conditions precedent to admissibility where applicable. The contents of a document may be proved by primary or secondary evidence, depending on the requirement of the law and the nature of document (section 85-89, Evidence Act). As a general rule, extrinsic evidence is inadmissible. You should be able to enumerate exceptions to the rule. The Unit ended with a brief resume of how to interpret a document.

## **6.0 TUTOR MARKED ASSIGNMENT**

1. In what circumstances is extrinsic evidence of a document admissible?
2. Respond to the argument that extrinsic evidence can never be used to contradict or vary the terms of a document.
3. What is a latent ambiguity? How is it different from a patent ambiguity?
4. Discuss the rules relating to the admissibility of extrinsic evidence in and of the interpretation of documents.

## **7.0 REFERENCES/RURTHER READINGS**

1. FGN. The Evidence Act, LJW 2011
2. Nwadialo. F, (1999) Modern Nigerian Law of Evidence. University of Lagos Press, Lagos.
3. Aguda T. (2007) the Law of Evidence, Spectrum Law Series, Ibadan
4. Afe, B . (2001) Law and Practice of Evidence in Nigeria Intec Printers, Ibadan
5. Glanville Williams: The Criminal Law Review, Sweet and Maxwell, London. March 1973, P 139 – 152. The New Proposals in Relation to Double Hearsay.



## **MODULE 6: UNIT 1**

### **COMPETENCY AND COMPELLABILITY**

#### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Preamble
  - 3.2 Competency and compellability of Witnesses
  - 3.3 Compelling and Compellability of Spouses of parties
  - 3.4 Compellability
  - 3.5 Compelling of persons charged
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Reading

#### **1.0 INTRODUCTION**

In this unit, you shall learn about the competency and compellability of witnesses. Competency is the mental ability to understand problems and make decisions, the capacity to understand proceedings – whether or not a witness may legally give evidence in a court proceeding. Compellability deals on issues as to whether a witness is obligated to give evidence at proceedings even against the wish of the witness. In the discourse you shall learn the rules concerning competency and compellability; particularly as they relate to parties, their spouses, children, and persons of unsound mind. An attempt will be made to distinguish those who are competent or both competent and compellable, identify those who are not and the effects.

You will learn about the sharp distinction between civil and criminal proceedings in relation to competency and compellability of witnesses.

## 2.0 OBJECTIVES

When you have studied this unit, you should be able to:

- Identify persons who are Competent and Compellable
- Identify person who may or may not be competent and compellable witnesses
- Explain the circumstances in which the accused, his spouse and children or persons of defective intellect are both competent and compellable in criminal and civil proceedings, if at all.

## 3.0 MAIN CONTENT

### 3.1 Preamble

The main issue of concern is whether a witness may legally give evidence in a judicial proceeding. It is not about the question of reliability. There are legal disabilities forbidding certain witnesses from testifying. A ready example is a child who by reason of his age, cannot understand the question that are put to him or her or give answers that can be understood.

### 3.2 The General Rule

Read generally Chapter XI Evidence Act, 2011.

The general rule is that every person is competent to give evidence except the following:

- Persons of unsound mind and drunken persons who are incapable of giving rational testimony.
- A child in civil cases, too young to understand the nature of the oath.
- Persons who will neither take the oath, nor affirm.

All evidence must, as a general rule, be given on oath or affirmation. Oath is by swearing with the Holy Bible by Christians, the Holy Qu'ran by the Muslim and 'iron' by the traditionalists.

A witness affirms if he has no religious belief, or if the taking of an oath is contrary to his religious belief or if his religion permits him to take an oath but

compliance with the requirement of this religion would cause undue inconveniences or delay.

The following witnesses do not need to swear or affirm:

- Children of tender years, who do not understand the nature of an oath, but who understand the duty of speaking the truth.
- A witness, who is merely producing a document.
- A Counsel or a judge explaining cases in which he is previously engaged.
- An accused unsworn statement without cross examination either in lieu of or in addition to, his sworn statement.
- The Head of State, (not being foreign sovereign)

Any person, who understands an oath or is capable of affirming, is competent to give evidence. A witness is lawfully sworn if he or she subscribes to an oath or affirmation. Both in law and practice, any conviction based on the evidence of a witness who has not been lawfully sworn is bad and must be quashed

A competent witness may also be a compellable witness with certain exceptions; As you shall see later, spouses are not compellable witnesses for each other in a criminal proceeding.

### **3.2.1 Competency of Children**

The competency of a child to give evidence is determined by a test of intellect. A child who lacks the requisite intellect and does not understand the nature of an oath is incompetent to give evidence. However, the Children and Young Persons Act permits a young child, who does not understand the nature of an oath to give unsworn testimony if the judge is satisfied that he or she understands the duty of speaking the truth. Such an unsworn evidence of a child is not to be admitted or acted upon unless it is corroborated. Indeed, no person can be convicted upon an uncorroborated and unsworn evidence of a child.

In this context, the age of the child is not material, but the child must:

- (i) possess the intellect
- (ii) fall within the definition of a child, being person under the age of 14 years.

In order to determine whether a child understands the nature of an oath (and therefore be competent to give evidence), the judge must examine the child in the open court.

### **3.2.2 Competency and Compellability of witnesses**

#### **(a) Witness for the Prosecution**

The following are not competent as witnesses for the prosecution:

- the accused person
- the spouse of the accused with certain exceptions
- persons jointly indicted or jointly tried with the accused
- spouses of persons jointly charged or jointly tried with the accused

#### **(b) Witness for the Defence:**

The following are competent witnesses for the defence

- The accused person whether charged solely or jointly.
- The spouse of the accused person

### **3.3 Rights of the accused person: The rule as to competence and compellability:**

He is a competent witness for him or herself. His or her failure to give evidence is not subject to comments by the Prosecution.

He or she may not be called as a witness, except upon his or her own application.

If called, he or she may be asked any question in cross-examination, notwithstanding that it incriminates him as to the offence charged.

He may 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 charged with, any other offence, or is of bad character unless:

- proof of the commission or a conviction for that other offence is admissible to prove the present offence as in evidence system.

- He or she personally or by his or her counsel asked questions of witnesses for the prosecution with a view to establishing his own good character or has given evidence of his good character.
- The nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the prosecution's witnesses.

Please note the following:

1. By putting his or her character in issue, an accused person puts the whole of his or her character in issue and may, as a general rule, be cross-examined with regards to previous charge for which he or she was convicted; to bring up evidence as to statements made at that trial, which tend to conflict with the evidence in the court trial.
2. It is not all the imputation made on the character of witnesses for the prosecution that may or may not put the character of the accused in issue. For example:

It does not in the following cases where

- (a) The attacks are directed at persons who are not parties e.g..
  - The presiding magistrate
  - the police officer (or a police officer, who does not give evidence)
  - the deceased
- (b) If defence merely denies the prosecution's evidence however, vehemently. For instance, to say "The Police witness is a liar" is nothing more than "pleading not guilty with emphasis".

A cross examination of a prosecution in the case of rape or indecent assault to the effect that the prosecutrix consented is not an imputation on her character.

In the important case of *Selvery v. DPP* (1968) the House of Lord firmly established the following procedure:

- i. The words of the statute must be given their ordinary material meaning.
- ii. It is permissible to cross examine the accused as to character both when imputations on the character of the prosecutor and his witnesses are cast to show their unreliability as witness independently of the evidence given by

them and also when the casting of such imputations is necessary to enable the accused to establish his defence.

- iii. In rape cases, the accused can allege consent, and the loose character of prosecutrix, thus seemingly placing himself in peril of such cross examination. But the issue can be said to be one raised by the prosecution and if what is said amounts in reality to no more than a denial of the charge expressed, however emphatic the language, it should not be regarded as an imputation on character.

By giving evidence against any other person, charged with the same offence (i.e. an accused giving evidence of damning character against a co-accused charged with the same offence). In this case, the judge has no discretion to exclude such evidence even though its prejudicial effect far outweighs its probative value.

The view has been strongly expressed that there is no general rule that evidence of the bad character of the accused cannot be introduced where the defence necessarily involves imputations against the character of the prosecution or its witness. The trial judge has an unfettered discretion to allow or refuse to permit cross examination of the accused in the particular circumstances.

### **3.2.1. Spouses of Parties**

#### **(a) Position of Accused's Spouses:**

Following a decree of divorce or nullity, spouses are cured of incompetency. They become competent witnesses for the prosecution, in matters occurring '*after*' the decree. They remain incompetent in respect of matters occurring during their covertures. A decree of judicial separation is ineffectual; the spouse remains incompetent witness. Parties to a marriage that is void *ab initio*, are not affected by incompetency rule as there was never a marriage.

The rules relating to the competency and compellability of a spouse of an accused person to give evidence apply in three categories of cases, namely:

- i. Cases in which a spouse is competent only upon the application of the accused.
- ii. Cases in which the spouse is competent without the consent of the Accused

- iii. Cases in which a spouse is both competent and compellable for the prosecution or the defence.

**(b)** *Cases in which the spouse is competent*

A spouse is competent to give evidence upon the application of the accused in cases other than those cases in which he or she is competent without the consent of the Accused as well and those in which he or she is both competent and compellable for the Prosecution or the defence. In these cases both spouses must give their consent.

© *Cases in which the spouses is competent without the consent of the Accused.*

The following cases are examples in which a spouse is not competent to give evidence for the Prosecution or the defence, without the consent of the Accused.

- Neglect to maintain or desertion of wife or family
- Offence relating to children
- Child destruction
- Bigamy
- Sexual offences other than buggary, indecent assault on a man, and assault with intent to commit buggery.

d. *Cases in which a spouse in both competent and compellable.*

These are:

- Offences against the spouse's property
- Offences of violence against the spouse
- Cases brought for the purpose of enforcing civil rights (e.g. public nuisance)

The spouse is competent to give evidence against the other spouse in cases where the health, liberty, or person is involved. Thus a spouse is a compellable witness where the other is charged with attempting to strangle his or her, intent to murder him or her, causing him or her grievous bodily harm, maliciously inflicting grievous bodily harm or attempting to poison him or her with intent to murder.

Cases in which the spouse is competent and/or compellable include attempt to commit such cases.

These rules which apply to spouses, are applicable during the subsistence of the marriage between the spouses and after the termination of such marriage . They apply with equal tone to:

- Spouses during the subsistence of marriage
- Ex-spouses (i.e. erstwhile husband or wife who have divorced) for offences committed during the subsistence of the marriage.
- Persons whose voidable marriage has been annulled.

In this context, void marriage is no marriage and parties to it are not spouses

Conversely a marriage still subsists even after a decree of judicial separation. Thus a spouse's incompetence to give evidence against the other spouse is not brought to an end by a decree of judicial separation.

The sum total is that in civil court, both parties and their spouses are compellable witness. The accused is never a compellable witness in criminal cases. His spouse in neither competent nor compellable for the persecution. For the defence, she is competent on the application by the accused but not compellable.

### **3.3.2. Defendant**

An accused is a competent, but not compellable witness in his or her own case or in defence of a co-accused. He is not also a competent witness for the prosecution.

The following are competent witness for the defence:

1. The accused person, whether charged solely or jointly
2. The spouse of the accused person.

Suppose after investigation, Police finds X and Z liable for conspiracy and X and Z were jointly charged X is competent to testify at the instance of Z and vice versa. Neither of them can be compelled. Neither also can testify for the prosecution.

Suppose instead of charging X and Z jointly, they are charged separately. They cease to be co-accused and can be used one against the other.

If a defendant fails to give evidence in his/her own defence (if when giving evidence, refuses without good cause to answer any question), the court in



determining whether he/she is guilty of the offence charged, may draw such inferences from that failure as appear proper.

An accused's spouse is a competent witness for the prosecution, the defendant and for a co-defendant. Where he/she is not charged, he/she is a compellable witness for the defendant. In relation to some spouse's offences, a defendant's spouse is compellable witness for the prosecution or for the defendant,

### **3.5 Securing Attendance**

The following forms or processes are available for securing the attendance of witness:

#### **(a) The Magistrate's Courts**

Witness Summons:

In the Magistrate's Courts, a witness summons may be issued to compel a witness attendance. The witness is entitled to be paid money or travelling expenses.

#### **(b) High Court**

Attendance of witness may be enforced by

- (a) *Subpoena ad testificandum* – This requires the witness to attend and give oral evidence.
- (b) *Subpoena duces tecum* – This orders the witness to bring and produce a document.
- (c) *Habeas corpus ad testificandum* – This orders the custodian of a person imprisoned in consequence of a civil process to produce the prisoner to give evidence.
- (d) Judges Order – This is used where is in prison awaiting trial or under sentence.

### **3.5. Children and Persons of Unsound Mind**

In criminal trials a child who understands the question asked or able to give a rational answer is competent.

### **3.5.1. Witness**

Persons of unsound mind, by reason of the defect in their intellect, cannot be a competent witness.

## **4.0 CONCLUSION**

A witness is competent if he or she possesses the mental ability to understand the proceedings and make a decision. He or she is compellable if there is an allegation to give evidence. Spouses and children occupy special positions, the law of evidence has specified cases where they are competent, but not compellable or where they are both competent and compellable.

## **5.0 SUMMARY**

Every person charged with an offence, shall be competent witness for the defence Provided:

- (a) he elects upon his own application
- (b) Failure to give an evidence shall not be subject to comments
- (c) He may be asked any question in cross examination notwithstanding that it would tend to criminate him as to the offence charged.
- (d). he shall not be asked and if asked, shall not be required to answer, any Question tending to show that he or she committed or been convicted of or been charged with any offence other than that wherewith he is then charged or is of bad character.

Unless

- It is to show that he is guilty of the offence charged.
- He asks questions with a view to establish his own good character.
- He has given evidence of his good character
- Nature of conduct of defence involves imputation on the character of the prosecutor or his witness.

See section 180, Evidence Act, and 429 and 250 of the Criminal Codes.

## **6.0 TUTOR MARKED ASSIGNMENT**

In what circumstances may a person give evidence without taking the oath?

#### 7.0 **REFERENCES/FURTHER READING**

Aguda, T. (2007) *The Law of Evidence*, Spectrum Law Series, Ibadan

Nwadio. F. (1999) *Modern Nigerian Law of Evidence*, University of Lagos Press, Lagos.

Afe, B. (2001) *Law and Practice of Evidence in Nigeria* Intec Printers, Ibadan FGN, Evidence Act, 2011.

## **MODULE 6**

### **UNIT 2**

#### **CORROBORATION CONTENTS**

1. Introduction
2. Objectives
3. Main Contents
  - 3.1 What is Corroboration?
  - 3.2 No Self Corroboration
  - 3.3 When Corroboration is required
  - 3.4 Forms of Corroboration
  - 3.5 Corroboration of Evidence of young children
  - 3.6 Evidence of Accomplice
  - 3.7 Nature of Warning
4. Conclusion
5. Summary
6. Tutor Marked Assignment
7. Reference/Further Reading

#### **1.0 Introduction**

It is not obligatory that parties in a civil or criminal proceeding should call every witness and put in all documents in the case before the court. What is of essence is not the quantum of evidence but the quality and weight. Hence a court can convict upon the testimony of a single witness. An example is a positive, direct, voluntary and dogmatic confession. However, there are certain cases where the law demands a specified number of witnesses to sustain a conviction. This additional evidence in support is “corroboration” and it is the subject matter of this unit. You will learn to explain its meaning, its form, where it is required in Law or as a matter of practice and its application.

#### **2.0. Objective**

When you have studied this unit, you should be able to:

1. Explain the term “Corroboration”
2. Gain an awareness of when corroboration is required in Law.

3. Distinguish when corroboration may be required as a matter of practice.
4. Illustrate with reference to decided cases what constitutes corroboration or how it operates in Law of Evidence.
5. Critique the rigidity and complexity of the Law as regards corroboration, if at all.

### **3.0. Main Content**

#### **3.1 What is Corroboration?**

- Confirmation or support by additional evidence (*Black's Law Dictionary 7th edition*)
- Confirmation, ratification, verification, or validity of an existing evidence in some material particular from another independent witness or witnesses implicating the accused.
- Evidence that differs from but strengthens or reinforces other evidence; especially that which needs support.
- Confirmatory or supporting proof of a matter on which evidence of the same fact has already been or will be given.

Functionally, corroboration is essentially a confirmatory or supportive evidence in the sense that it proves:

1. That a crime has been committed
2. That the accused is implicated in it

Corroboration shows that the evidence of the witness is probably true and that it is reasonably safe to convict on it. Evidence in corroboration must be independent testimony, which affects the accused by connecting or tending to connect him with the crime: *R.v. Baskerville*, 1916.

It is not necessary that the independent witness should confirm everything that the accomplice has said or done. All that is required is some independent evidence connecting the accused with the crime.

#### **3.1.1 No self Corroboration**

A witness cannot corroborate him or herself; otherwise, it would suffice for one to repeat one's story a hundred times in order to get a hundred corroboration of it. (*R.v. Whitehead* (1929)). In essence, the corroboration must be extraneous and independent of the testifying witness, and must connect the accused to the crime.

### **3.1.2. A complaint is no corroboration**

The testimony of a witness as to a complaint made to him or her does not amount to a corroboration of the complaint. *R. V. Christie, 1914*. The evidence must corroborate the remainder of the evidence in some material particular.

### **3.1.3 When Corroboration is required**

Generally, Corroboration is not of essence so long as the parties are able to adduce enough evidence to warrant a verdict.

However, the statute creating certain offences have demanded corroborative evidence as a precondition for a conviction. In some cases also, the court, as a matter of practice, makes corroboration necessary.

### **3.1.4 Corroboration as a matter of Law**

The following are examples of instances where corroboration is required by Law:

1. Unsworn evidence of a child. Evidence Act Section 208 and 209
2. Treason; Criminal Code Section 37
3. Concealment of Treason. Section 40, Criminal Code and Evidence Act Section 200.
4. Treasonable felonies Section. 41. Criminal Code, and Evidence Act, section 200
5. Promoting: Inter-communal war Section 42, Criminal Code and Evidence Act Section 200
6. Perjury Evidence Act, Section 198
7. Traffic Offence of Exceeding Speed limit: Evidence Act Section 201
8. Sedition: Evidence Act Section 204, Criminal Code Section 51 (1)(b)
9. Action for Breach of promise for marriage: Section 197 Evidence Act

It should be noted that under the Evidence Act of 2004 Sexual offences were among instances where corroboration is required by law, however, Sexual Offences were omitted from the 2011 Evidence Act

### **3.1.5. Where corroboration may be required in practice**

Although corroboration may not be a requirement of the law, the court may in exceptional cases, demand some corroborative evidence as a matter of practice.

Such instances include:

1. Evidence of an accomplice
2. Sworn evidence of a young child
3. Matrimonial causes
4. Claimants' evidence relating to a deceased person.

### 3.1.6. Forms of corroboration

Corroboration may take any of the following forms:

- (a) Confession or admission by an accused
- (b) Evidence of a witness
- (c) Scientific evidence
- (d) Destruction of material evidence or exhibit
- (e) The position of the complainant coupled with the nature of complaint as in sexual offences.
- (f) Independent evidence or an earlier similar offence by the accused on the same person.

Corroborative evidence may be oral, written or documentary, real, behavior or conduct or other. It may be direct or as in most cases circumstantial. It may also take the form of a confession, or a lie about a matter or an informal admission. It does not amount to corroboration that the party or witness gave false names or failed, refused, or neglected to give evidence. Unreliable evidence requires no corroboration.

In practice, the judge is required to:

- Examine the whole of the evidence, to see whether there is any corroboration from the witness of the prosecution.
- State what he finds to be corroboration
- Expressly caution himself and exercise extreme care in determining whether or not to act on the suspect's evidence where there is no corroborative evidence.

The test is whether there is an independent testimony which affects the accused by

connecting or tending to connect him or her with the crime *Odhoere v state* (1996).

In *R. v. Christie* (1914), the accused was charged with indecently assaulting a child. The evidence was that after the act, the child went home and told the mother what happened. The mother took the child to the Police and the three of them went to Christie. On meeting Christie, the child pointed to him and said: "this is the man". He repeated the assault story.

Christie was silent. At the trial, it fell for determination whether the story of the child was corroborated by that of the mother.

The House of Lords held as follows:

1. That the mother's evidence being a repetition of the children's story does not amount to corroboration in law.
2. The statement made by the child in the presence of the police and the accused could not be admitted as part of *res gestae* because there was a sufficient time lag between the act and the word.
3. The silence of the accused did not amount to an admission and *a fortiori* to corroboration.
4. However, the statement was admitted as evidence of complaint in that it showed lack of consent on the part of the complainant and consistency between the evidence he gave outside the court and in the witness box.

In *Credland v Knowler* (1951), the accused was charged with indecent assault on a girl aged 10 years. The investigating police officer, gave evidence that when the parties met, the accused first denied and later admitted association with the girl. The girl and another girl aged 9 gave unsworn evidence of indecency. The prosecution claimed and the defence denied that the lies told by the accused amounted to corroboration of the girls' story. The court held that the fact that the accused told a lie may be but is not necessarily a corroboration. If a man tells a lie when he is spoken to about a certain offence, the fact that he told a lie at once throws grave doubt upon his evidence. If he afterwards gives evidence, it may be a good ground for rejecting the evidence.

However, the court found other strong corroborative statement including that of the accused which corroborated virtually all the children's evidence except the indecency. On this the court said it was not necessary to corroborate the whole of the evidence but only some material particular.



### 3.4 Corroboration of evidence of young children

One of the thorny issues in law relating to corroboration is the evidence of young children.

A conviction based on the uncorroborated unsworn evidence of a child is bad. The question is whether or not an unsworn evidence of a child can be corroborated by another evidence of another child, sworn or unsworn.

It has been argued that evidence which requires corroboration cannot itself corroborate (*R. v Manser, (1934)*). This argument was overruled in *R v Hester* which held that an unsworn statement can only be corroborated by a sworn statement. In essence the unsworn statement of a child may be corroborated by a sworn statement of another child.

Consistently with this trend of thought, the House of Lord also decided that a sworn evidence of a child can corroborate another sworn evidence of another child (*DPP v Kilbourne*).

See *R. v Campbell*, where the court dealt with the issue of sworn evidence of children and more specifically whether the evidence of children who were assaulted would be corroboration for the evidence of other children that were assaulted. As explained by Lord Goddard, CJ.

“The unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children, the judge must stop the case. It makes no difference whether the child’s evidence relates to an assault on himself or herself or to any other charges. An example, would be where an unsworn child says that he saw the accused person steal an article.

“The sworn evidence of a child need not, as a matter of law, be corroborated, but a jury should be warned (and where there is no jury the judge should warn himself) not that the jury (or the judge) must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls, though the jury (or the judge) may do so if convinced that the witness is telling the truth, and this warning should also be given, where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn or of an adult”.

### 3.5Activity

Subscribe to the argument whether or not the unsworn evidence of one child can corroborate the sworn evidence of another

- See the views expressed in:  
*E v E (1964)*  
*R v Manser (1934)*
- What does the Evidence Act provide?
- Note the views in *R v Campbell (1956)* that:  
“the evidence of an unsworn child can amount to corroboration of sworn evidence though a particularly careful warning should in this case be given”

### 3.6Evidence of an accomplice

An accomplice is a person who has been connected in the commission of a crime; a person who, on the evidence, may be convicted of the offence with which an accused is charged. He is involved in the crime but he is not charged; rather he is turned a prosecution witness. He is a *principis criminis*, neither a co-accused nor an agent *provocateur*.

#### 3.6.1 An accomplice includes:

- A Participant in the actual crime charged
- A Receiver of property for which the accused is charged with stealing
- A Participant in other crimes alleged to have been committed by the accused, where evidence of such other crimes is admissible to prove system or intent or to negative accident.

The following persons may be directly or remotely connected with a crime but are not accomplices:

- An accused, who testifies on his own behalf in a joint trial, and who incriminates a co-accused: *Ukut and others v the state (1968)*.
- A Bribe giver who meets the monetary demand of bribe taker: *R v Usman Pategi (1957)*, *Okeke v the Police (1948)*; *Osidola v COP. (1968)*.

- A person, who takes no part in a crime but is merely an eye witness: *Queen v Ukut* (1960).

*See Enahoro v the Queen* (1965)

O. was charged with conspiracy with others to commit treason. O was assigned a responsibility. He subscribed to the oath, but declined his role. He did not report to the police. O was a prosecution witness and it was contended that he was an accomplice. The Supreme Court held that O might have been guilty of an offence under a different section of the code for failure to reveal the plot, but this offence is a separate and distinct offence from the conspiracy charged. Accordingly O is not an accomplice.

### **3.6.2. The Evidence Act Provision.**

The Evidence Act, Section 198 provides that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Provided that in cases tried by a jury when the only proof against a person charged with a criminal offence is the evidence of an accomplice uncorroborated in any material particular implicating the accused, the judge shall warn the jury that it is unsafe to convict any person upon such evidence though they have a legal right to do so and in all other cases, the court shall direct itself.

The judge must warn himself of the danger of convicting on the uncorroborated evidence of an accomplice who testifies for the prosecution. Having warned himself the judge may convict upon uncorroborated testimony if he believes the evidence adduced by the accomplice.

Compare *Odojin Bello v State* (1967) and *Malayi v State*.

In *Odojin Bello v the State*, the Supreme court on the requirement that the judge must warn himself said:

“The judge must ask himself whether or not he believed the evidence of the accomplice and if he believed it, he must warn himself that it was unsafe to convict on it. He must then look for additional statement or evidence not that of an accomplice rendering it probable, that the story of the accomplice is true and that it is reasonably safe to act on it”.

In *Malayi v State*, the Supreme Court overruled itself and said that warning without more was sufficient.

In *R. v Omisade*, the Supreme court decided that as regards an overt act, it is not necessary that each witness should give evidence as to each overt act. It is sufficient that a number of witnesses are able to give evidence of “snipers,” which all taken together will amount to an overt act.

### 3.6 Nature of Warning

Where in practice, corroboration is required, the court must exercise extreme caution and must warn itself. The presence or absence of that warning is a determining factor.

If there is corroboration but no warning, the prosecution must fail.

If there is no corroboration but there is a warning, the prosecution succeeds all else being equal. There is no magic formula regarding the warning; and although it is required in practice, it has the force of law. The case of *Davis v DPP (1954)* gives you a guide as to the nature of warning. In the case, the House of Lords explained that the rule that where a person who was an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury (or himself in the absence of the jury) that, although they (or the judge) may convict on the evidence of the accomplice, it is dangerous to do so unless such evidence is corroborated.

This rule, although a rule of practice, has the force of law. Where the judge fails to warn in accordance with this rule, then, even though there is ample corroboration of the accomplice’s evidence, the conviction will be quashed *unless* the appellate court is satisfied that no substantial miscarriage of justice has been caused by a breach of the rules.

The warning must be direct and precise. For this reason the court quashed the conviction

in *R v Price (1968)*. The warning to the jury in that case was:

“When they (the jury) have to take the evidence of an accomplice, they ought to view it with particular care and they ought to look to see whether there is other evidence separate from that of the accomplice which implicates the accused in a material particular.....having had that warning they may accept the evidence of the accomplice and even without corroboration if they think it right”

### 3.7 Self assessment example:

“if there is corroboration but no warning, the prosecution fails”. Justify this assertion and its impact on miscarriage of justice.

## 4.0 CONCLUSION

Evidence does not constitute corroboration unless it clearly links the accused with the crime charged and also confirms the evidence of the accomplice as to the material circumstances of the crime. The prosecution must fail where the law requires corroboration and the court finds none or where the corroboration offered is irrelevant to the issue. The kind of corroboration required is not confirmation by independent evidence of everything the accomplice relates but some independent testimony which affects the accused. The uncorroborated evidence of an accomplice is admissible but where he is a prosecution witness, the judge must warn himself that although he may convict on his evidence, it is dangerous to do so unless it is corroborated. There is no magic formula for warning. Warning may advance justice but the effect of failure to warn appears to tilt to the contrary and therefore calls for a review of the law relating to corroboration.

## 5.0 SUMMARY

Corroboration is evidence that differs from but strengthens or reinforces other evidence (especially that which needs support). It is a confirmatory or supporting proof of a matter on which evidence of the same fact has already been or will be given.

It may be required in law or in practice. Admission and confession among others are forms of corroboration, but lying may not be. You should be careful to dichotomise between “lying” or “mistaking” and whether the lie or mistake pertains to participation in the crime charged or his presence at the scene of crime. Read some of the cases referred to in the text.

## 6.0. TUTOR MARKED ASSIGNMENT

1. When is corroboration required in law and in practice?
2. What is the nature and effect of warning?

## REFERENCES/FURTHER READING

Comment [DU1]: No references

## **MODULE 6**

### **UNIT 3**

#### **EVIDENCE OF CHARACTER**

##### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Contents
  - 3.1 Definition of Terms
  - 3.2 Character of Witness
  - 3.3 What Constitutes Evidence of Bad Character
  - 3.4 When Character Evidence Becomes Relevant
  - 3.5 Character Evidence in Civil Proceedings
  - 3.6 Character Evidence in Criminal Proceedings
- 5.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 References/Further Readings

##### **1.0 INTRODUCTION**

The evidence of good character of an accused person or of a witness is admissible in evidence. It points to the direction that the allegation against him is less likely to be true. Conversely, the evidence of bad character or of bad reputation is inadmissible in both civil and criminal proceedings, except where a statute specifically allows it. In this unit, you shall learn about character evidence generally, what character evidence is and the exceptional circumstances when it becomes relevant and admissible.

##### **2.0 OBJECTIVES**

When you have studied this unit, you should be able to

- define or explain the term “Character Evidence”
- identify when it is likely to be admitted or rejected in evidence
- Explain how:
  - (a) Evidence of good character can be relevant
  - (b) Evidence of bad character can be relevant.
- critique the principle of character evidence

### **3.0 MAIN CONTENT**

#### **3.1 Definition of Terms**

Literally, ‘character’ signifies a reputation and a disposition.

In sections 78-82 of the Evidence Act, the word “Character” means “reputation” as distinguished from “disposition”.-Section 77

(b) Character evidence connotes evidence regarding someone’s personality traits; evidence of a person’s moral standing in a community based on reputation or opinion. It refers to one’s reputation – the esteem or otherwise, in which a person is held; the conviction based upon the person’s behaviour.

##### **3.1.2 Character Distinguished**

###### **(a) Reputation and Disposition**

A reputation must be distinguished from a disposition

(i) Disposition is a natural way of behaviour towards others. One may be of an evil disposition and yet be of good reputation. The converse is equally true.

###### **(b) Character and Conduct**

You need also to distinguish character evidence from evidence of conduct or of behaviour.

Character evidence will be admissible for example evidence of previous convictions which are related in substance to the offence charged Section 82 (4) (5 ) . It applies in both civil and criminal proceedings (Evidence Act Sections 78-82).

###### **(c) Character evidence and similar facts**

Similar facts evidence is defined in section 12 of the Evidence Act. It has two connotations.

##### **3.1.3 Facts having general resemblance.**

###### **(a) Illustration: Fact situation one**

A Stole, B murdered, C burgled. There is a general resemblance; each is a criminal; they are bad men or women.

###### **b) Facts having particular resemblance**

Fact situation two

‘C’ is charged with stealing; three years earlier, he committed house breaking. Here is a similar fact evidence showing in each case that A is a criminal.

(c) Fact situation three

X is charged with obtaining N100,000 from Z by false pretence, that the ring is made of gold; some six months earlier, he had obtained N50,000 from Y by the same misrepresentation. Here also is a similar facts evidence showing that X is a bad man and a criminal whose particular modus operandi is obtaining money by false pretence.

Facts situations one and two show general resemblance. They are irrelevant, not admissible in evidence, against A or C.

Fact situation three is of a particular resemblance – distinctive modus operandi – and is admissible against X.

It may be surmised that evidence of general resemblance or general evidence system is admissible only if apart from general resemblance, the Evidence Act allows it. But those showing particular resemblance such that they fix the accused as the actor in each fact situation is relevant and admissible.

The purpose of this type of evidence system (evidence of similar fact) is to show that the accused is to be guilty of the offence currently charged by simply showing that he or she had been guilty of other misconduct than the one primarily charged.

You would have observed by now that similar facts evidence and an accused's bad character reinforce each other or support the allegation made against the accused. Hence, evidence of bad character, which falls within the scope of similar facts evidence is relevant and admissible. Whenever evidence of bad character is relevant, evidence of previous conviction is also relevant. However, the general principle remains that:

1. The evidence of character of either party to a judicial proceeding is irrelevant and inadmissible and in a criminal proceeding the evidence of bad character (reputation) of the accused, or his previous conviction or previous acquittal is also irrelevant and inadmissible unless the Evidence Act or other statute so permits.

In this regard admissibility of evidence system in a criminal trial would be determined by asking, in each case whether the probative value of each evidence outweighs the prejudicial effect: *DPP V P (1991)*.

In civil proceedings, such evidence is admissible wherever it is relevant to determine the matter in issue provided it would not be oppressive or unfair to the other side to do so. *Mood Music Publishing Co Ltd v De Wolfe Publishing Ltd (1976)*.



### 3.2 Character of the Witnesses

The character of a witness is always relevant to his or her credit to show that he or she is a person of bad character and unworthy to be believed. The evidence of a witness's character becomes relevant if he or she:

- denies his or her previous conviction
- has made inconsistent statements
- denies bias in favour of one party
- where the reliability or credibility of a previous witness (e.g. medical evidence of abnormality of mind) may affect reliability of the witness's testimony.

The character of a prosecutrix may be impeached in sexual offences, thus in a charge of Rape and similar offences, a party may adduce evidence of her reputation to show that she is a common prostitute.

The prosecutrix may be cross-examined as to acts of immorality with men, other than the accused, for purpose of impeaching her credit in such a case. But her denial is final and may not be contradicted any further.

- Evidence of previous sexual relation with the accused during cross-examination may be received if "consent" is in issue.

However, such cross examination for purpose of establishing consent is not to be regarded as an imputation on her character as to put in issue the character of the accused.

The prosecution may attack the character of a defence witness and such attack may go beyond contracting the evidence of his or her good character which the witness has given.

### 3.3 What Constitutes Evidence of Bad Character

The Evidence Act, section 82, provides instances where bad character e.g. of previous Conviction will be admissible. You may ask, what is the meaning of previous conviction in this context?

Look at the following cases.

*Stirland v DPP (1944)*, the court expressed the view that the word "charged" in the sense it bears in the statute means "previously being brought before a criminal Court" not just being suspected or questioned.

*R v Shrimpton*

S was charged with larceny (theft), His character became an issue, Prosecution gave evidence of previous conviction. The court said that if the previous conviction had been for rape, it would not have been admissible because it would have been prejudicial.

*R v Winifield (1939)*

W. was charge with indecent assault. The court admitted evidence of previous conviction for dishonesty. The court added that there is no such thing as putting half a prisoner's character in issue and leaving the other one out.

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### **3.4 When a Character Evidence becomes Relevant Sections**

What matters is not an individual opinion of the person; It is the opinion of the community.

X, a school teacher is accused of sexual harassment. Police investigates and charges him with indecent assault. The defence testifies as to the teacher's good behaviour. The prosecution calls a witness in rebuttal in an answer to the accused's moral standard, saying:

"I know nothing of the neighbourhood's opinion because I was only a boy at school when I know him but my own opinion and that of my brothers who were his principals is that his character is that of a man capable of the grossest indecency and the most flagrant immorality". *R v Rowton (1865)*

A witness can only speak of the accused's reputation, not of rumour, or suspicions which cannot be proved.

In a situation where a rumour affects a person's reputation, Admissibility or non admissibility may well depend on party's pleadings.

#### **3.4.1 Where Character Evidence is Relevant**

Evidence of character may be admitted in the following circumstances.

- a) where the question of character becomes relevant
- b) as evidence of similar facts to show system or design
- c) to negative a plea of accident
- d) to know motive or intention
- e) if an accused has adduced evidence of his or her own good character
- f) where statute specifically allows evidence of accused's bad character or previous conviction(s).

Some of these situations apply to civil proceedings while others apply to criminal matters. Some of them also apply in both cases.

### SELF ASSESSMENT EXERCISE

Explain what is meant by bad character

### 3.5 Evidence of Character in Civil Proceedings

In civil cases, evidence of the character of a party is irrelevant. It becomes admissible if it is otherwise relevant, as in the following examples

a) Where the character of the claimant/Plaintiff is a fact in issue. It is in issue in

- ☐ an action for libel, or slander, seduction, illegitimacy proceedings, etc
- ☐ an action for breach of promise of marriage, where the claimant/Plaintiff adduces character evidence in defence
- ☐ an action where evidence of bad character is an ingredient of the fact in issue. See *Ingram v Ingram (1956)*. This was a case of divorce based on adultery. The husband, who was a senior military officer was allowed to give evidence of treason against his spouse in proof of the fact that his spouse was guilty of weighty misconduct which is a constituent of cruelty.

b) Where the character of the Plaintiff is relevant in assessing the quantum of damages e.g.

- i) Proceeding for breach of promise of marriage
- ii) Petition for divorce founded on adultery with his or her spouse
- iii) In mitigation of damages in action of defamation Evidence of conviction is conclusive proof that the subject committed the offence in an action for libel or slander in which the question whether a person did or did not commit a criminal offence is relevant
- iv) Evidence of bad character (i.e. general Reputation) of the Plaintiff is relevant in an action for defamation in which justification is pleaded and also to mitigate damages. In this regard the defence must first deliver particulars of the proposed evidence seven days before the trial or with leave of the judge.

c) In cross examination of witness as to credit.

Evidence of previous conviction or of bad character of a party may be relevant where the party testifies on oath at the witness box and is being cross-examined as to credit. (see Evidence Act section 210-213, 179, 224 and 228).

### 3.6 Character of the Defendant

Normally, the fact that a defendant in a civil action is an ex-convict would not be admissible for the Plaintiff/Complainant. (*Hollington V Hawthorn and Co Ltd (1943)*)

However, the moral character of the defendant is relevant, for example:

- i) to allegations of adultery in divorce proceedings
- ii) in an action for breach of promise of marriage

*Dim v African Newspaper Ltd (1990)* was a case of libel and evidence of bad character was held admissible since the parties have, in pleadings joined issues on the good character of the Plaintiff.

### 3.7 Character Evidence in Criminal Cases

The accused occupies dual positions: He is a party (the accused). He is a competent witness for the defence. Both roles have different bearing on character evidence.

#### 3.7.1 Accused's Good Character

Common law and the Law of Evidence allow an accused to give evidence of his or her good character. This may be elicited either in evidence on grounds of humanity, in examination –in-chief of a character witness or by the accused himself or in cross-examination of the witness by the prosecution. Evidence of opinions of specific person or evidence of specific acts by the accused is outside the scope of character evidence (Evidence Act, section 81).

Evidence of good character may be admissible if:

- i) it is relevant to the offence charged
- ii) it refers to a date proximate to the charge
- iii) it is general, not relating to specific instances.

In *Stirland v DPP (1944)* Accused was charged for forgery, he gave evidence of good character and official record and called a witness to depose that he had never been charged before. In rebuttal, the prosecutor sought to cross examine as to whether the employer had suspected or questioned the accused about a suspected forgery. Held, inadmissible.

In *Haruna and others v Police (1967)*, the applicant was charged with abetment of robbery. He called as a witness, a bank manager who said:

“I know the accused's financial background. He is financially sound. Since I

have known the accused I don't remember him getting involved in any trouble"

Held admissible as evidence of good character.

The character evidence must be of the specific type impeached. Thus if the offence involves dishonesty, or immorality, the question in issue becomes his or her character as to honesty or morality; character in other respects are immaterial.

Evidence of good character is a double edged weapon as it entitles the prosecution also to advance evidence of bad character, if any.

It has two important limbs

- 1) Its relevance to credibility
- 2) Its relevance to the question whether the accused/defendant was likely to have behaved as alleged by the prosecution.

Where an accused faces multiple charges, pleads guilty to some and not guilty to others, he ceases to be of good character any longer.

#### **4.7.2 Evidence of bad character**

Evidence of bad character is irrelevant (Evidence Act, Section 81). It cannot be adduced for the following reasons:

- a) It is irrelevant
- b) It may unduly harass the party
- c) It is prejudicial
- d) It tends to rake up the whole of one's career which one would not be prepared to defend without sufficient notice

There are, however, the following exceptions to the general rule that evidence of bad character, convictions and acquittals of the accused are inadmissible:

- a) Where the accused puts his or her character in issue by:
  - i) Introducing evidence of his or her good character or
  - ii) Attacking the character of the prosecutor or his witness.

For this purpose evidence of previous conviction is evidence of general reputation. Such imputation may be by personal testimony, or through a witness or advocate.

- b) Where statute permits, examples are:
  - i) Evidence Act, section 180
  - ii) Criminal code 249-50 and 427 and,
  - iii) Penal Code section 40. Some statutes have provisions for evidence of

bad character e.g. official secret Act.

c) Similar facts such as conduct in previous transactions. The purpose should be

- (i) to negate a plea of accident,
- (ii) to show evidence system
- (iii) to show motive.

d) Certain crimes, as defined in the statute creating them, allow character evidence. Example is loitering with intent to commit a felony.

e) Character evidence in form of previous conviction may be allowed:

- (i) to establish knowledge in case of receiving stolen property (evidence of Scierter).
- (ii) when the penalty is to be enhanced for subsequent offences as in the case of persistent offenders.

f) Upon a plea of autrefois convict or autrefois acquit.

g) After verdict and in response to “Alloquitus” for purpose of determining appropriate sanction.

Note that an emphatic denial however strong, is not a character impeachment and would not justify a rebuttal based on bad character or previous conviction. If the accused impeaches the character of the prosecution or his or her witness from the dock, he is protected. But when the accused makes such imputations and elects to go and goes into the witness box, he exposes him or herself to cross examination with regard to his or her bad character or previous conviction.

The judge has a discretion to disallow a cross-examination as to accused’s bad character or his or her previous conviction, where the prejudicial effect outweighs the probative value.

Where an accused has given evidence of his or her own good character, it is always open to the prosecution to give evidence in rebuttal but Lord Hershell’s dictum is instructive. He states:

“it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from the criminal conduct or character to have committed the offence for which he is being tried.

“On the other hand, the mere fact that the evidence adduced tends to show the

commission of other crime does not render it inadmissible, if it be relevant to an issue before the (court) and it may be so relevant if it bears upon the question whether the act alleged to constitute the crime charged in the indictment was **designed** or **accidental** or to **rebut** a defence, which would otherwise be open to the defence” (*Makin v. Attorney-General for War Saurth Wales* (1894)).

Evidence of bad reputation or a bad disposition is to be excluded only if it shows nothing more.

Look at the case of *R V Sims* (1946)

Accused was charged with 10 counts for sodomy and gross indecency with A, C, H and E and with three boys and tried together. Considering sodomy as a crime of special category, a repetition of the acts with a specific feature connecting the accused with the crime and the interest of justice, the court held that the evidence of such acts was admissible in each case to show the nature of the act done by the accused.

Series of facts with self same characteristics is unlikely to be produced by accident or inadvertence. After all, human nature has a propensity to repetition and as series of acts are likely to bear the same characteristics, while therefore one witness as to one act might be mistaken in identifying the accused, it is unlikely that a number of witnesses identifying the same person in relation to a series of acts with the self-same characteristics would all be mistaken.

In *Harris v. DPP* (1952). Appellant was at all material times on duty as a police constable in a market. He was indicted on 8 counts each of which alleged a breaking into the same office in the market and stealing between May and July. The evidence showed that most of the gates of the market were closed and on each occasion the thief had entered the office by the same method and stolen part of the money, the whole of which he could have stolen. Apart from the evidence of opportunity, there was no evidence to connect the appellant with 7 of the counts. With regard to the 8<sup>th</sup> count, the evidence shows that a burglar alarm had been planted on the premises unknown to the appellant, who was as usual, on duty in the market at the time. Immediately after the alarm had sounded, some detectives, who had been lying in wait ran to the market and saw the appellant standing near the office. Although he was acquainted with the detectives, he nevertheless disappeared from sight for a short period long enough for him to hide the money, where it was later found.

The trial court acquitted him of the first 7 counts but convicted him on the last, which conviction was upheld by the court of criminal appeal. On further appeal, the House of Lords quashed the conviction on the ground that irrelevant evidence in the nature of the evidence of the earlier theft was wrongly admitted.

In *Boardmen v. DPP* (1974) the House of Lord held that in exceptional cases, evidence that an accused had been guilty of other offences will be admissible, if it

shows that those other offences have with the offence in hand, common features of such an unusual nature and striking similarity that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence.

The approach by Lord Goddard, CJ deserves mention. He said, (*R v Sims 1946*)

“If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused. But if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence and we think is the correct view.

The Judicial Committee of the Privy Council criticized this approach saying that the judge ought to consider whether such evidence proposed to be adduced:

Is sufficient and substantial having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice that it should be admitted.

In so far as the purpose is concerned, it can, in the circumstance of the case, have only trifling weight, the judge will be right to reject it; ... but cases may occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge (per Lord dy Parque).

The judge has a discretion to admit the type of evidence if he is satisfied that:

- 1) Its probative force in relation to an issues in the trial outweighs its prejudicial effect and
- 2) There was no possibility of collaboration between the witnesses.

### **3.8 SELF ASSESSMENT EXERCISE**

What is the principle of evidence enunciated in Makin's case

## **4.0 CONCLUSION**

Literarily, character refers to disposition and reputation. In Law, it signifies reputation, not particular facts or opinion.



In Civil cases, evidence of character of either party to a judicial proceeding is generally inadmissible (Evidence Act, sections 78 and 81). The reason is that it is not only irrelevant but also would unduly harass and prejudice the party. It has the effect of raking up the whole of his/her career. The character of the complainant/Plaintiff in a civil suit is irrelevant and inadmissible except where his/her character is in issue or where it is relevant to assessing damages. (*Butterworth v Butterworth (1920)*) or in cases of rape and indecent assault (evidence Act section 233), (*Selvey v DPP (1968)*). A defendant's character is hardly in issue, except perhaps in divorce proceedings (*Ingram v Ingram, 1956*) or in an action for breach of promise of marriage (*Hollington v Hairthorn & co Ltd (1943)*). In relation to an accused, evidence of good character can, on grounds of humanity, be given in person, or by the prosecution/defence witness. Evidence of bad character cannot be adduced before verdict. To this general rule there are exceptions. Examples are: where the accused puts his/her character in issue, evidence system, in proof of previous conviction or where statute so provides. See Evidence Act, Section 8, 81, 180, 228, Criminal Code sections 249-250, 427, Penal Code section 405. An accused's character is adduced in cross-examination when he goes to the witness box. Character evidence may be given after verdict or in a plea of *autrefois verdict or acquit*. The character of witnesses is impeachable as to his/her credit in cross-examination (*Rv Rowton, Scott v Sampson (1882)*). In criminal proceedings the general rule is that evidence of bad character (reputation) previous conviction or acquittals of the accused is irrelevant and inadmissible.

## 5.0 SUMMARY

In this unit, you learnt about character evidence and examined sections 77-82 and 180 of the Evidence Act. The expression was defined or explained with illustrations. You also learnt of the circumstances under which good or bad character evidence of the parties and witnesses (as the case may be) may be relevant and admissible and when not. What constitutes evidence of bad character was examined. It is not individual opinion, it is the opinion of the community. Character evidence in criminal and civil proceedings were dealt with separately. In civil matters, evidence of character is admissible if it is relevant in order to determine the matter in issue provided it is not oppressive or unfair to the other party. In criminal trials, the judge has a discretion to weigh its probative worth with its improper prejudicial effect. The important principle enunciated in *Makin's case* cannot be sufficiently stressed. The type of bad character evidence to admit or disallow is at the discretion of the judge.

## 6.0 TUTOR MARKED ASSIGNMENT

Okoro is charged with the offence of Rape. He has previously been convicted of unlawful possession of Marijuana, but that was his only conviction.

Okoro has approached you to defend him. Summarize the application about his character that you should make to the judge

## **7.0 REFERENCES/FURTHER READINGS**

Nwadialo, F (1999) 2<sup>nd</sup> ed. Modern Nigerian Law of Evidence, University of Lagos Press. Lagos

FGP. (2011) Evidence Act.

Aguda T. (2007) the Law of Evidence, Spectrum Law Series, Ibadan.

## MODULE 7

### UNIT 1

## **BURDEN AND STANDARD OF PROOF**

### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Definitions
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### **1.0 INTRODUCTION**

The theme of this unit is the burden and standard of proof, both of which jointly enhance the proof of cases in the court. They form the subject matter of Part IX of the Evidence Act and can be found also in several other legislations like the Matrimonial Causes Act, the Magistrates Act, the Criminal Code and Penal Code as well as the Constitution of Federal Republic of Nigeria, 1999. The basic principle is that the party on whom lies the burden of proof must persuade the court, in the best traditions of advocacy of the veracity of the facts in issue. In this discourse therefore, you should be critical about two questions: (1) Who has the burden of proving the fact or facts in issue? (2) What test can be applied to determine whether sufficiently weighty evidence has been adduced to discharge that burden?

### **7.1 OBJECTIVES**

When you have studied this unit, you should be able to:

- Determine who has the burden of proving a fact in issue
- Explain the test to be applied in determining the weight of evidence to be adduced

- Contribute to the question: whether or not the burden of proof can be placed on the defence or whether or not a law may impliedly place such a burden on the defence or accused
- Distinguish between legal evidential burden and the different standards of proof
- State the principle in *Woolmington v DPP* as enunciated by Viscount Sankey.
- critique the nature of the legal burden of proof.

### 3.0 MAIN CONTENT

#### 3.1 Definition

##### 3.1.1 Proof

“Proof” is the establishment of a fact by proper legal means to the satisfaction of the court and in this sense includes “disproof”.

A fact is proved when the court is satisfied as to its truth and the evidence by which that result is produced is called “proof” See Evidence Act, section 121

##### 3.1.2 Burden

Burden signifies a duty or responsibility

##### 3.1.3 Burden of Proof

A party’s duty to prove a disputed assertion or charge.

This expression connotes the carrying of the risk of non persuasion in the sense that a party who has the burden stands to lose if his or her evidence fails to convince the judge. The burden of proof is sometimes referred to as *onus probandi* or loosely as a burden of persuasion. It includes:

- Burden of persuasion
- Burden of production

##### 3.1.4 Statutory provision

###### a) The constitution, 1999

It is a constitutional as well as a fundamental human right that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. (Section 36 (5).

**b) Evidence Act**

Part IX of the Evidence Act, 2011 provides for production and effect of evidence, and for burden of proof as follows:

Burden of Proof - Section 131

On whom burden of Proof lies - Section 132

Burden of Proof in civil case - Section 133

Burden of Proof beyond reasonable doubt -Section 139

Burden of Proof as to particular fact - Section 136

Burden of proving fact to be proved to make evidence admissible-138

Burden of proof in criminal cases - Section 139

proof of facts especially within knowledge - Section 140

exception need not be proved by prosecution -Section 141

c) Some legal writers have used the term “burden of proof” in two senses, namely:

1) The burden of proof on the pleadings (i.e. the burden of persuasion, or legal burden (also called persuasive burden).

2) The evidential burden of proof (i.e. the provisional burden or a burden of production)

**d) Put differently the two senses are:**

1) Particular duty of him who has the risk of any given proposition on which parties are at issue – who will lose the case if he does not make this proposition out, when all has been said and done.

2) The duty of going forward in producing evidence whether at the beginning of a case or at any later moment, throughout the trial or discussion.

e) Different writers have used different nomenclature to describe the burden of proof: they mean essentially the same thing. For example, the burden of proof as a matter of law and pleadings is similar in content with:

legal burden or burden of proof simpliciter (Professor Cross)

legal burden (Lord Denning)

persuasive burden (Glanville William) or

Burden of persuasion (Henry Black)

What is important is to distinguish two categories of burdens: (1) Legal burden of Proof (2) Evidential burden of Proof.

The first category – the legal burden of proof – is an obligation that rests on a party in relation to a particular fact in issue. The burden of such proof rests on only one party. It implies a party's duty to prove, by weight of evidence, the totality of the truth of

some preposition of fact which is vital to the case and which is also in issue. Failure to discharge this burden certainly results in the failure of the whole or some part of the allegation or prosecution's case.

Conversely the second category – evidential burden of proof denotes an obligation on a party to adduce sufficient evidence on a particular fact so as to warrant a finding on that fact in favour of the party under the obligation. A failure to discharge this burden does not lead to the certainty of failure of entire or part of the case. That risk, however, is present; the immediate effect of a successful discharge of the burden is to shift the evidential burden to the opponent.

In both categories, the standard of proof is different.

In *Elemo and others v. Omolade and others* (1968) the Supreme Court explained that the burden of proof has two common meanings:

- a) The burden of proof as a matter of law and pleadings; This burden is one of establishing a case whether by preponderance of evidence or beyond reasonable doubt, and
- b) The Evidence Act, Sections 131-132.

As a general rule of evidence, the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When the party adduces evidence, which is sufficient to raise a presumption that he or she asserts the truth, his or her allegation is presumed to be true unless the opponent adduces evidence to rebut the presumption

All facts in issue are to be established by the party who, in law, has the burden of proving those facts. In essence, the claimant (Plaintiff) in a civil case must prove the facts of his claim in order to establish his or her claim if the defendant does not admit them expressly or by implication. In the same way the prosecution, in a criminal case, must prove his facts in order to secure a conviction.

In practical terms: suppose there is a suit where a party claims a right, alleges a breach and claims damages or where a prisoner at the dock is charged with a crime; The parties are in court; The case is called. Both parties and witnesses keep mute. No one gives evidence, the question you should now answer is what should be the court's verdict? Which party wins or loses; By reason of the constitutional provision and presumption of innocence the defendant or the accused wins, the claimant (Plaintiff) or the prosecution loses. If no evidence is given, the party who stands to lose has the right to begin. He bears the light burden, the burden of persuasion or burden of proof.

### **3.1.5 Scope of Proof**

The burden of proof refers to the party's duty to prove, by weight of evidence the totality of the truth or some proportion of fact, which is vital to the case and which is

also in issue.

Thus in a tort of malicious prosecution, the substantive law demands that the claimant/Plaintiff must not only allege but also prove the following:

- 1) An unsuccessful prosecution instigated by the defendant
- 2) Absence of reasonable and probable cause
- 3) Damage

If Kodjo is charged with receiving stolen property, the prosecution bears the burden of proving his guilt by showing that:

- 1) The accused had the stolen article in his possession
- 2) At the time of receiving it, he knew the article was stolen
- 3) Kodjo had been convicted of an offence involving fraud or dishonesty within the five years preceding the date of the offence charged (and seven days notice in writing has been given to him)
- 4) Other property stolen within twelve months preceding the date of the offence charged was found in the accused's possession.

If the complainant/Plaintiff or the prosecutions in these two cases default in proving any of the elements as prescribed in the substantive law, the totality of the case or claim crumbles. See Evidence Act, Sections 132 and 135

In some cases however, the burden is shared; such that one party bears the burden of proof on some issues and another party on others. Examples of such cases are:

- 1) Action for negligence
- 2) Criminal trials where the accused acted under[ provocation: (*Mancini v DPP* (1942), [self defence: *R v Lobell* (1957); [duress: *R v Gill* (1963), or [a state of automatism: *Bratty v A-G for Northern Ireland* (1996)

Strictly speaking the type of burden in these cases is evidential burden, not burden of proof. The failure of a party to discharge this burden of proof may not lead to the loss of the entire case. See Evidence Act, Section 132.

If the accused succeeds at discharging the burden, the prosecution must, in the discharge of his legal burden negative it. This burden of proof denotes the duty placed on the prosecution not only to prove the elements of the offence charged but also to disprove the defences. However, the standard of proof required in each case is different. A legal burden must be discharged beyond all reasonable doubt whereas evidential burden is discharged upon a reasonable satisfaction or upon a balance of probabilities.

The statute, sometimes, imposes a burden of proving certain facts on the accused. See for example: Custom and Exercise Management Act, section 166(2) (b). But the constitutionality of this provision is being questioned. See the Constitution, 1999 section 36(5).

### 3.2 Civil Proceedings

The burden of proof operates in both civil and criminal proceedings, but it operates differently and each has its own rules. In either case, the burden of proof largely determines the right to begin also, that is to say that the burden of proof rests on:

- the Plaintiff or claimant

- the Claimant/Plaintiff who has the right to begin the proceeding

- the party that seeks to obtain judgment on the pleadings on which his or her legal rights and the other party's liability depend.

- "The party other than the party that would be successful if no evidence at all were given" see Evidence Act, section 133.

Pleadings are important; they determine the incidence of burden of proof in civil cases. It affords parties to state their case, support their claims, admit or deny each other's allegations.

Where parties deny the allegations, the burden is on the plaintiff. If the defendant admits the main allegation, no issues are joined in the dispute, the burden of proof is displaced and the court merely considers the quantum of damages. Even at that, where there are special circumstances which may affect the damage, the Plaintiff still has to prove (*Hadley V Baxendale* (1854)).

If the defendant admits to the main issues but sets up fresh facts by way of avoidance, he must prove those facts and sometimes this may constitute the whole of the general burden. The effect of a Traverse of allegations made in the statement of claim is to cast upon the Plaintiff the burden of proving the allegation denied (*M v K Ltd v Lamidi Apena* (1969)).

Issues are often distributed in a civil proceeding. This arises, as often the case, where parties admit some allegation, and deny others. In the circumstance, the general burden of proof lies on the plaintiff while the burden of proving each individual allegation is on the party making it.

In a civil proceeding, the burden of proof is discharged when the party carrying the burden has proved every material fact on which he or she bases his or her claim with the exception of those which require no proof (e.g. presumptions).

The doctrine of *res ipsa loquitur* ("the thing speaks for itself") also relieves the party



of the burden of proving all material facts. This applies in circumstances where it may be impossible to prove the facts because they are not known. But upon proof of the happening of a particular event, it can with truth be said that the thing speaks for itself” *Moore v R; Fox and Sons Ltd (1956)*.

Lord Maughan enunciated the rule in *Constantine line v Imperial Smelting Corporation (1942)* where the Learned Law Lord said.

“The burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule which applies is *Ei qui affirmat non ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reason.

This basic principle represents the law in Nigeria.

See also *Osawaru v Ezeiruka (1978)*. Where the court said that the burden of proof is on the Plaintiff (Complainant) to prove his claim and not on the defendant to prove otherwise.

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In *R v Eka (1945)* the West African Court of Appeal said”

“It is fundamental that in a criminal trial, the onus is upon the prosecution to prove the elements which make up the offence charged. If it fails to prove any of them, the accused is entitled to an acquittal and if inspite of that he is convicted, he is entitled to have the conviction quashed on appeal.

Bairamian SPJ (as he then was) confirmed this in *Kannami v Bauchi NA (1951)*, saying:

“It is not the duty of the accused to prove his innocence, it is the duty of the prosecution to prove his guilt”

See also *Ibeziako v COP (1963)*

Read the following:

- The Constitution, 1999, Section 36(5)
- The Criminal Procedure Code (CPC) section 156-7, 160-161, 170, 172, 187-

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### Activity

How much are these provisions consistent or inconsistent with each other.

Critique the following cases from the point of view of Law of Evidence.

*Ibeziako v COP (1963)*  
*S'adu Mohammed v COP (1967)*  
*Wambai and Another v Kano NA (1965)*  
*Lafia v COP (1971)*

3. Consider the extent to which these decisions conform with or depart from the rule in *Woolmington v DPP*.

### 3.3 SELF ASSESSMENT EXAMINATION

It appears that the “golden thread of the Nigerian Criminal Justice, that it is for the prosecution to prove its case and not for the accused to prove his innocence, has been completely broken by the CPC, particularly in section 156 and 157”. Comment critically.

Exception to the golden thread

If you read *Woolmington v DPP (1935)* which you must, you would have observed that Viscount Sankey highlighted certain exceptions to the rule in *Woolmington v DPP*. You need to note these exceptions in particular.

### 3.4 Criminal Proceeding

First read the Evidence Act Section 132-141

In Criminal matters, the prosecution bears the burden of proof. This burden is clearly stated in the case of *Woolmington v DPP (1935)* where Viscount Sankey said:

“Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the defence that the prisoner killed the deceased with a malicious intention, the prosecution has not made out his case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained”.

Also see the following cases:

- *Mancini v DPP (1942)* on the defence of provocation
- *R v Hodges (1962)* on defence of accident

- *Chan Ray v R* (1955) on defence of self defence
- *R. v Budd* (1962) on defence of automatism

The burden of proof placed on the prosecution includes the burden of negating the defences raised.

Also See Evidence Act Section 135, 139 and 140 which have relieved the prosecution of the burden of proof in certain cases.

Once you as a party, begin your case, you must call in all your evidence. You are not entitled to call prima facie evidence, hear your opponent's evidence and then call further evidence to confirm your prima facie evidence. However, in the following circumstance, you may call rebuttal evidence in order to nullify or qualify your opponents' evidence, but not to confirm your own case:

- As the party who begins a case, you may call witnesses to say that they would not believe certain of the opponents witnesses on oath and to contradict the answers of the opponents witnesses during cross-examination as to credit.
- You may call evidence, with leave of the judge, in answer to that adduced by the opponent in support of an issue, the proof of which lay on the latter.
- When you are taken by surprise e.g. as the result of an inadequate cross-examination.

If the defence raises alibi, which the prosecution could not have anticipated or could not foresee, the judge has a discretion to allow the prosecutor's evidence in reply.

### **3.5 Scope of Burden of Proof**

The general burden rests on the prosecution or complainant. Lord Denning describes it as a "legal burden" (61 LQR 379) and failure to discharge this burden inevitably leads to failure of the whole or some of its limits. This burden never shifts.

The substantive law prescribes the facts which are vital to the allegation of crime and which are also in issue. It also determines which particular burden shall form the essential part of the general burden.

For example, the substantive law requires that in a charge of murder (Criminal Code Section 316-319) or (culpable Homicide punishable with death, Penal Code sec 211) the prosecution must allege the following:

- That the death of a human being has actually occurred
- That such death was caused by the act or omission of the accused
- That the act or omission was done with the intention of causing death or

grievous bodily harm

- That the accused knew that death would be the probable consequence of his act, (see *Michael v the state* (2008), compare), *Ochemaje v the state* (2008) compare *Kada v the State* (2008).

### 3.5.1 The evidential Burden of Proof or Particular Burden

Sometimes, the statute may relieve the prosecution or complainant of the burden to adduce sufficient evidence on a particular fact. What has shifted is evidential burden of proof which Lord Denning has described as “a provisional burden”. When discharged, the evidential burden shifts again to the opposite party.

For example, it is open to the defence to plead diminished responsibility or insanity. As you already know, it is a presumption that every man or woman is sane. Accordingly, the defence must not only allege the insanity or diminished responsibility but also must prove it. (*M’Naghten’s case*, (1843).

The prosecution is not required to prove negative averments. (Evidence Act, Section 141

### 3.5.2 The Rule in *R v Turner* (1956)

If the accused is charged with possessing a firearm “without lawful excuse”, it is for defence and not the prosecution to prove ‘lawful excuse’ this is what is referred to as the Rule in *R. v Turner* (1956) read up the full-Report on the case.

### 3.5.3 Licensing Cases

Where the law makes a general proscription of an act and then provides for an exception in favour of those who obtain licences to perform the act, it is prima facie an offence to do that act. To convict the offender, the prosecution only needs to prove that the accused did the act. It is not for him to prove that at the time of the act, the accused had no licence. The burden of proving that he or she had a licence is on the accused. (*John v. Humphreys*, 1955); and *A.G. Eastern Nigeria v Asiala* (1964).

It is the same rule in driving licence cases or selling controlled essential commodities without licence. Thus when the statute makes it an offence for any person to do something unless that person is qualified, authorised, or licenced, all the prosecutor or complainant (plaintiff) needs to do is to adduce evidence in support of the proscribed act only. Neither of them is under any burden of adducing evidence to show that the accused had no prescribed qualification, authorization or licence.

### 3.5.4 Receiving Stolen Property

In receiving stolen property and the like, the possession of goods recently stolen calls for an explanation and if none is given, or one is given which is untrue, that entitles the court to convict.

Sometimes, statutes may impose on the accused or the defence a duty to prove certain facts. For example, where the accused relies, for his or her defence, on any exception, exemption, proviso, excuse or qualification whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification lies on the defence. This is notwithstanding that the information or complaint contains an allegation negating the exception, exemption, proviso, excuse or qualification": (See Evidence Act S. 16) in these situations: However, this evidential burden merely mitigates the general burden which still lies on the prosecution. Thus, if the accused does not discharge his or her burden and the prosecution also fails to discharge his or her .

### 3.5.5 Defence of Alibi

Where a defence of alibi is raised, the burden of proving it lies on the defence. The leave of court is required to adduce evidence in support of an alibi. The defence must also give notice of the particulars of the alibi within a prescribed period.

### 3.5.6 Shifting the Burden

Be careful not to confuse "shifting the burden" with "Burden of proving"  
"The burden of proof never changes. It remains to the end of the case with the party who has it" at the outset. When the Plaintiff has introduced enough evidence to make out a *prima facie* case, the defendant, unless he would see the verdict, introduce evidence to controvert or weaken the effect of that which the Plaintiff has introduced – This is the burden of going forward with the evidence, or the "burden of proceeding" as it may be called in order to distinguish it from the "burden of proof". It is therefore, the burden of proceeding which shifts from one party to another but not the burden of proof".

### 3.7 Standard of Proof

### 3.7.1 Read the Evidence Act, Section 134 and 135

The standard of proof is a matter of weight of evidence. It varies as between civil and criminal cases.

### 3.7.2 Civil actions other than matrimonial cases

The general rule in civil actions (other than matrimonial causes) is that a party, who bears the legal burden of proof is entitled to a verdict if his or her evidence establishes in his or her favour, a “balance of probabilities”, or a “preponderance of evidence”. That should be the case, where at the end of the case, one can say the Plaintiff (Complainant’s) case is more likely to be true than untrue.

Note Lord Denning’s caveat in *Hornal v Neuberger Products Ltd* (1956) that:

“The more serious an allegation, the higher the degree of probability that is required”. This is suggestive that the standard is not absolute.

The preponderance of evidence or balance of probabilities means that the evidence adduced by the Plaintiff/Complainant should be put on one side of an imaginary scale and the evidence adduced by the defendant put on the other side of that scale and weighed together to see which side preponderates. See *Mogagi v Odofin* (1978), *Alhaji Balogun v Alhaji Labiran* (1988).

### 3.7.3 Criminal Proceedings

In a criminal proceeding, the prosecution must prove the totality of his/her case or the Accused’s guilt, “beyond all reasonable doubt”.

There is some contention that the standard should be proportionate to the gravity of crime, that “as the crime is enormous so ought the proof to be clear”.

However, where the fact in issue is to be proved by the defence as in a defence of insanity, the standard is a balance of probability as in a civil case.

The proof “beyond all reasonable doubt” does not mean that the judge must be absolutely certain of the accused’s guilt. A reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow to influence you one way or the other.

The term “beyond all reasonable doubt” stands out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace this presumption, the evidence of the prosecution must prove beyond reasonable doubt,

(not beyond all shadow of any doubt), that the person accused is guilty of the offence charged.

As Oputa JSC said in *Bakare v the State*, (1987):

Proof beyond reasonable doubt connotes such proof as precludes every reasonable hypothesis except that which it tends to support. It is a proof to a moral certainty, such that it satisfied the judgement and conscience of a judge as a reasonable man applying his reason to the evidence placed before him that the crime charged has been committed by the accused and so satisfied him as to leave no other reasonable conclusion possible.

### **3.7.4 Allegation of Crime in Civil Matters**

The position of the law is not quite clear when crime is alleged in a civil proceeding. In *Lek v Matthews* (1927) and *Hornel v Neuberger Products Ltd* (1956) the court applied a civil standard.

Conversely, a criminal standard was applied in *Issaias v Marine Insurance Co Ltd* (1923)

The uncertainty of the situation is more complex where the criminal conduct alleged cannot be severed from the civil cause itself to which it is not merely incidental. See *Omoboriowo v Ajasin* (1984) and *Nwobodo v Onoh* (1984).

By reason of Evidence Act, Section 135, if the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted to the accused to adduce or produce evidence of other facts. *Okogbue v COP* (1965). Where the prosecution fails to make at least a prima facie case against the accused at close of his case, the accused is entitled to a discharge without being called upon to enter any defence. The accused has no corresponding duty to establish his innocence: *Oteki v A.G (BDS)* (1986).

### **3.7.5 What Proof beyond reasonable doubt is not:**

A proof beyond reasonable doubt does not:

- admit of plausible and fanciful possibilities
- fanciful doubts, imaginary doubts, speculative doubt or facts not borne out by the facts and surrounding circumstances of the case.
- Extend to a proof beyond all possible.

### 3.7.6 Matrimonial Causes

Where the Matrimonial Causes Act requires the court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient if the court is “reasonably satisfied” of the existence of that ground or fact or as to that other matter. (MCA. S. 82). Cases have shown that the court has not been consistent in interpreting the standard of “reasonable satisfaction,” See examples:

- 1) Lord Damond applied a standard applicable in a criminal matter – one beyond reasonable doubt.
- 2) In *Blyth v Blyth* (1966): Lord Denning rejected such a strict standard and applied a standard of proof on a balance of probabilities. (ie. The civil case standard)
- 3) *Bastable v Bastable* (1968), the standard applied was not as high as “beyond reasonable doubt” but higher than the civil requirement of proof on “the balance of probabilities.

In other words, proof that may satisfy the court in a civil matter may be insufficient for a matrimonial cause. The more serious the matrimonial offence, the clearer the proof required.

The standard probably lies between “proof beyond reasonable doubt” and a “preponderance of probabilities” – one of “reasonable satisfaction”.

## 4.0 CONCLUSION

Burden of proof lies on the party that stands to lose in a civil matter. The standard is a balance between probability and improbability. Verdict is upon a preponderance of evidence or preponderance of probability. In matrimonial causes, the standard is one of “reasonable satisfaction”. In a criminal case, the burden is on the prosecution. It does not shift and, unless otherwise directed by statute, the presumption of innocence casts on the prosecution the burden of proving every ingredient of the offence. If at the end of the evidence given by either party the prosecution has not made out the case, the prisoner is entitled to an acquittal. it has to be remembered that it is an essential principle of law that a criminal act has to be established by the prosecution beyond reasonable doubt.

## 5.0 SUMMARY

In this unit you learnt the burden and standard of proof. In doing so, we defined the terms used, and the senses in which they have been used. References have been made to the Constitution (1999), the Evidence Act Part IX and several other statutes as



well as decided cases. The basic principle and gold thread was discussed. So also were the exceptions. The differences between burden of proof in both civil and criminal proceedings were highlighted. You noted the uncertainty of the standard of proof of allegations of crime in the course of civil proceedings. You also learnt how burdens of proofs are shared or distributed in some cases. You should now be conversant with the Rule in *R v Turner* and the difference between legal burden, evidential burdens and standards of proofs in criminal and civil proceedings (other than matrimonial causes) and in a matrimonial cause.

## **6.0 TUTOR MARKED ASSIGNMENT**

What does it mean to say that a party has an evidential burden and how does this differ from a legal burden in relation to particular issues?

## **7.0 REFERENCES/FURTHER READINGS**

Nwadialo, F. (1999) Modern Nigerian Law of Evidence 2<sup>nd</sup> Ed. University of Lagos Press, Lagos. Chapter 12

Tobi Niki 'Burden and Standard of Proof' in Babalola, Afe: (2001) Law and Practice of Evidence in Nigeria, Intec Printers Ltd, Ibadan, Chapter 13

LFN - The Evidence Act

- The Constitution, 1999
- The Penal and Criminal Procedure Code

## **MODULE 7**

### **UNIT 2**

#### **EXAMINATION**

##### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main content
  - 3.1 Examinations
  - 3.2 Hostile Witness
  - 3.3 Cross Examination
  - 3.4 Re- Examination
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-marked assignment
- 7.0 References/Further Reading

##### **1.0 INTRODUCTION**

The provisions concerning the examination of witnesses can be found in Part XII of the Evidence Act. The Act as well as the law and practice in operation for the time being combine to regulate the order in which witnesses are produced and examined in a judicial proceeding. In this unit, you shall learn the order in which a witness is examined in the course of trial and the rules guiding the conduct of the different examinations.

##### **Objectives:**

When you have studied this unit, you should be able to

- Differentiate between Examination –in-chief, Cross-Examination and Re-Examination.

- Narrate the order of examinations
- Formulate what questions may be asked
- Distinguish what questions may not be asked?
- Give examples of circumstances when a party may discredit its own witness

### **3.0 MAIN CONTENT**

#### **3.1 EXAMINATIONS**

You are now about to learn the questioning of a witness under oaths or affirmation, the order in which witnesses are called and examined the rules

Procedure

To commence a criminal proceeding, a charge or information must have been filed and a copy served on the accused. At the trial date, the court is set, the accused is called into the dock; he is asked if he understands English language or language of the court and of the charge. If not, an interpreter is provided. The charge or information is read aloud to the accused and explained.

When the accused admits that he has understood the charge, he elects trial, (in appropriate case) and pleads, where he or she submits to court's jurisdiction, guilty or not guilty. He may keep mute to malice, and the court enters a plea of not guilty.

##### **3.1.1 Examination in Chief:**

The court is cleared out of sight and hearing of all the witnesses in the case-S212. The Prosecution opens his case; he may or may not make any opening address. He calls his first witness. The initial examination of a witness by the party who calls him is called "Examination – in – chief". Evidence Act 2011, Section 214.

The witness takes the oath by the Holy Bible, The Qur'an, or Iron or affirms as the case may be Ss 205-208 The Prosecutor examines the witness in chief, eliciting from the witness all such facts as tend to prove his case and which are within the personal knowledge of the witness; he guides the witness against irrelevancies or facts which are inadmissible.

### 3.1.2 Leading Questions

Leading questions are questions which suggest their own answers or assume the existence of disputed facts which have not yet been proved in evidence. They are not generally allowed in examination-in-chief. (Section 221, Evidence Act) Thus you do not ask:

- Was the Accused at Ibadan on the day in question?
- Was the Accused driving on the right side of the road?  
Rather, you ask: By which side of the road was the accused driving?
- You may ask where was the Accused on the day in question?.

Questions which require answers “Yes” or “No” are most likely to be leading question.

This is not to say that every leading question is bad. A Leading question may be permissible if:

- It relates merely to introductory matters or identification
- It is a fact which is not in dispute
- It is a fact/ which in the court’s opinion, had already been proved or put in evidence by the other.
- It is necessary,
- If the witness is forgetful or hostile, the court may allow him to refresh his memory of the subject matter on which he is about to testify or give evidence by allowing him to look at a document made by the witness himself or by someone to the knowledge of the witness and while the matters recorded were fresh in the recollection of the witness (say within the week/ or two of the events).
- It is necessary to lead the mind of the witness to the subject matter on which he is called to give evidence. See section 220 (3)

### 3.1.3 Object of Examination- in-Chief

The object of Examination –in-chief is to adduce all the material facts as far as the witness can remember and in his own words to establish the party’s case – not necessarily all that the witness knows.

## 3.2 Self Assessment Exercise

What is a leading question? When is it permissible in a judicial proceeding, if at all?

### **3.2 A Hostile Witness**

A party who calls a witness holds out that the witness he calls or intends to call is a person to be believed on oath or affirmation. It is thus contradictory in terms to adduce evidence to impeach or discredit a party's own witness, and hence give evidence of bad character. See Evidence Act section 230.

A situation may however arise, where the witness has been bought over or afflicted with malice or annoyance and in the judge's opinion shows animus against the party that called him. Accordingly, he may be induced to withhold facts, which are favourable to his party, give contradictory evidence of the party or show a reluctance to tell the truth. One who does this becomes a "hostile witness" If this behaviour becomes apparent, the party that called him may ask for and the judge may grant leave to treat him as a hostile witness. The judge will refuse leave to treat the witness as hostile unless he is convinced that the witness is biased or poised to damage the party who called him or her. The party producing the witness may thereby be entitled to discredit or contradict the witness. To this end, the witness may be asked if he has made any statement at other times - a statement inconsistent with his present testimony. Before doing so, the party would have established the circumstances or occasion when the statement was made.

The witness must be asked whether or not he made such statement and if he denies, it may be proved that he did. The hostile witness may also be cross examined as to his previous statement in writing or give a contradictory proof. The judge may request the production of the statement for his inspection and use as he may think fit.

The evidence so adduced is not a proof of the facts contained in it. Its purpose is merely to discount the hostile witness.

### **3.4 Self Assessment Exercise**

1. What do you understand by the term 'hostile witness'?
2. State the rules governing the examination of such witness.

3. Distinguish between a “hostile witness” from the witness, who is merely “unfavorable”.

### **3.5 Cross Examination- Sections 216, 217, 219, 232, etc**

On completion of the examination – in – chief, the witness is cross-examined by the other side. The examination of a witness, by a party other than the party who calls him is called: ‘cross-examination’. The objectives of cross examinations are:

- To test the accuracy of the evidence-in-chief.
- To weaken or destroy examination-in-chief, if possible.
- To obtain evidence that will assist the party’s own case by the testimony of the opponent’s witness.
- To show that the witness is unreliable and for that purpose may attack his testimony or credibility.
- To obtain necessary facts that may be favourable to a party’s case or to weaken or dilute the strength of evidence –in-chief.

The scope of cross-examination is wider than that of examination-in- chief. Cross examination is not limited to questions raised in examination-in-chief; leading questions are allowed as are questions designed to discredit the character of the witness. One may be cross examined as to previous statement one has made relative to the subject matter

*Who may be cross examined? By whom?*

The witness who may be examined includes

- The witness who has been examined-in-chief
- A sworn witness, whether or not examined in chief
- Witness as to character
- Witness called by co-accused
- The accused where he testifies

Some witnesses may or may not be cross examined. Examples are witnesses who are:

- called by a genuine mistake

- unable to give any evidence material to the case.

The normal procedure is for the adverse party to cross-examine the witness called by the other party. Where there is more than one plaintiff, defendant or accused, each must be given opportunity to cross examine.

Each of the accused persons is allowed to cross-examine any witness called by co-accused. Where an accused gives evidence in chief, every co-accused has right to cross-examine him.

The witness under cross examination may be asked question to:

- Test his accuracy or veracity
- Discount his identify and position in life
- Test his qualification or any special ability which he claims in the case of witness
- Injure his credit as a truthful witness.

Where a question during cross examination is directed at a witness's credit; whatever answer the witness gives is final. No evidence in rebuttal is admissible. These are the following exceptions to this general rule, when rebuttable evidence may be allowed.

- (a) Where a witness denies bias or partiality
- (b) If the witness denies a previous inconsistent statement
- (c) If the witness denies a previous conviction
- (d) If the witness denies that he is a notorious liar or has such a generally bad reputation for veracity that he is not to be believed on oath

### 3.6 ACTIVITY

React to the Prosecution's proposal to call Adams to testify as to the charge before the court and the Accused's objection and intention to call witnesses to prove that Adam's statement on Oath is not to be believed.

In introducing Adams as a witness the prosecution represents to the Court that Adams is a witness to be believed on oaths or affirmation. According to Lord Goddard, CJ,:

“(The fact) that witnesses can be called to say that they would not believe a particular witness called by the other side, whether for the prosecution in a criminal case or for a party in a civil case, is in the opinion of the court, undoubted. “

That credit of the witness may be impeached by the opposite side, by the evidence of persons who swear that they, from that knowledge of the witness, believe him to be unworthy of credit upon his or her oath.

Such persons may not upon their examination –in-chief give reason for their belief but they may be asked that reason in cross examination and their answers cannot be contradicted”

#### *Limitation on the scope of Cross-Examination*

Cross examination is not a channel for:

- (1) Questions which are intended to insult or annoy either the witness or any other person
- (2) Questions put forward only to impugn the witness's character
- (3) Affirmative evidence to contradict answers given in cross examination to questions directed only to credit.
- (4) Questions which affect the credibility of a witness by attacking his character, but which are not otherwise relevant to the actual inquiry unless the imputation conveyed by the question is well founded or true.
- (5) Questions relating to matters so remote in time or of such a character that they would not materially affect the credibility of the witness.

#### **Re- Examination**

When the cross examination is completed, the party who called the witness has the right to re-examine him. Where a witness has been cross-examined and is



then examined by the party who called him, such examination is called ‘re-examination’: Evidence Act, Section 214 (3).

A re-examination follows a cross-examination. The latter follows the examination-in-chief. Re-examination is the right of the party that called the witness and it exists once there has been cross examination.

A re-examination is confined only to matters arising in cross-examination. New evidence may not be introduced without the leave of court. Leading questions are not also allowed.

The object of re-examination is to repair, as much as practicable, the damage done during cross examination and to clear up any misunderstandings of ambiguities that may have arisen during cross examination.

#### **4.0 CONCLUSION**

Part XII of the Evidence Act makes provision for examination of witness. There are three types of examination: Examination-in-chief, cross – examination and re-examination. You should remember the order in which they are called, their objectives and limitations.

#### **5.0 SUMMARY**

In this unit, you learnt about examination of witnesses in proceedings, who a hostile witness is and the process of treating him as such. Certain questions may not be asked during examination in chief and if asked, need not be answered. No such restriction applies in cross examination. A re-examination is confined to issues arising from the cross-examination that precedes it. If new matters are introduced, the leave of court must first be obtained and the other party must be granted opportunity to cross examine on it.

#### **6.0 TUTOR MARKED ASSIGNMENT**

In certain circumstances, the answer which a witness gives during cross examination must be regarded as final. What are these circumstances?

#### **7.0 REFERENCES/FURTHER READING**

FGN Evidence Act, 2011

Nwadialo, F (1999) Modern Nigeria Law of Evidence, University of Lagos Press

Aguda T (2007) The Law of Evidence, Spectrum Law Series, Ibadan

Afe, B (2001) Law and Practice of Evidence in Nigeria, Intect Printers, Ibadan