INTRODUCTION

The law of evidence requires a rigorous examination and understanding of the vast array of rules and exceptions in both criminal and civil law of evidence.[1] The proper application of the law of evidence requires the student and the practitioner to have a command of substantive law, that is, criminal law, land law, law of contract and commerce among many others. Trials in Ghana are an adversarial contest, and therefore, the parties will seek to present their case in the most persuasive manner that they can – this involves selecting the evidence that they will present.[2]

WHAT IS EVIDENCE?

Evidence means anything by which any alleged matter of fact is either established or disproved.[3] In simple terms, evidence is a fact that tends to prove a person's submission. Justice Brobbey states that evidence is information or material offered to the court to prove or disprove an issue in the case.[4]

Evidence is thus that branch of the law that regulates how issues may be proved in court. It establishes the sources and methods which a court may use in order to find that facts have – or have not – been proven, and thereby decide cases.[5] In Ghana, the Evidence Act NRCD 323 at Section 179 has defined **Evidence** as follows:

> "**Evidence** - means testimony, writings, material objects, or any other things presented to the senses that are offered to prove the existence or non-existence of a fact

Ultimately, the definitions of what is evidence indicate that evidence is any information, facts or materials presented to the court for the purpose of proving or disproving a matter of controversy before the court. The law of evidence lays down the guiding principles based on which a court can receive, apply, or reject the information, facts or materials presented in proof of a party's case. In **Ram Jas v Surrendra Nath [1980] A.I.R 385** at 388 Hari Swaroop J states as follows:

> *"The law of evidence does not affect substantive rights of parties but only lays down the law facilitating the course of justice. The Evidence Act lays down the rules of evidence for the purposes of the guidance of the courts. It is procedural law which provides, inter alia, how a fact is to be proved"*

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[1] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge
[2] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge
[3] Maxwell Opoku Agyemang, Law of Evidence in Ghana 2nd Ed Admax Law Series 2015.
[4] Justice S A Brobbey, Essentials of the Ghana Law of Evidence Darto Publications 2014
[5] Stable URL: https://www.jstor.org/stable/10.3366/j.ctv1c29r6b.5

There are three important things that you must remember that the law of evidence governs:
(a) How facts are proven in court;

(b) The rules on how evidence should be put to and presented in court; and

(c) That these go along with the rules on which evidence should be excluded from the court altogether.[6]

One must appreciate that the parties to any action, whether it be a civil action or a criminal one, are not given blanket permission to put before the court all the evidence that may assist their case. The parties are only permitted to put before the court the evidence that is:

(a) Relevant to a fact in issue in the case and

(b) Admissible; and even then, the trial judge may decide to exclude it.[7]

According to Justice Brobbey, the law of evidence effectively enables the court to prevent rumours and gossip from being resorted to.[8] A person is required to prove what he claims or asserts.

THE APPLICATION OF THE LAW OF EVIDENCE

In a dispute, one often hears the question, where is your evidence? Or what is your evidence? This is in line with the oft cited legal principle "He who alleges must prove." In the celebrated case of **Majolagbe vs Larbi 1959 GLR 190** at Page 192 relying on **Khoury vs Ritcher** the court stated:

> *"Where a party makes an averment capable of proof in some positive way e.g. by producing documents, description of things, reference to other facts, instances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances from which the Court can be satisfied that what he avers is true."*

According to Maxwel Opoku Agyemang "*the practical reality is that the truth or merits of a case are worthless unless they can be proved to the acceptance of the judge and thereby enable him to act on them accordingly. The function of the law of evidence is to lay down rules according to which the facts of a case can be proved or disproved before*

[6] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge
[7] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge
[8] Justice S A Brobbey, Essentials of the Ghana Law of Evidence Darto Publications 2014

a court of law. The means which can be used to prove a fact are all controlled by the rules and principles laid down by the law of evidence."

EVIDENCE AND SUBSTANTIVE LAW

Substantive law is concerned with the respective elements that must be proven in order for a criminal offence or civil wrong to have been committed. Adjectival law or Procedural law is concerned with the rules and regulations used to determine how the substantive law is to be proven.

Evidence goes hand in hand with substantive law. Substantive law always defines the conduct, which may be the subject of litigation or trial. For instance, contract law, land law, criminal law, family law etc. The substantive law concerns matters such as the elements of a criminal offence or a tort or the circumstances leading to the discharge of a contract, and the adjectival law relates to practice and procedure. The law of evidence concerns the use of materials to prove the existence or non-existence of any elements of the substantive law.[9]

An illustration can be the crime of Murder. Pursuant to section 47 of the Criminal Offences Act, Act 29 provides: "*A person who intentionally causes the death of another person by an unlawful harm commits murder unless the murder is reduced to manslaughter by reason of an extreme provocation or any other matter of partial excuse,..."*

Therefore, the ingredients provided by the substantive law, which must be proved by the prosecutor, are namely;

a. Somebody is dead;
b. That the person died through unlawful harm;
c. That the accused person caused the unlawful harm; and
d. That the accused intended that death should result.

The process by which the prosecutor can prove a particular ingredient or issue is determined by the rules of evidence. For example, in a murder case, the jury will often have to decide whether the defendant intended to kill or to cause serious bodily harm. These aspects of the trial relate to the elements of the offence, and fall within the remit of the substantive criminal law.

However, a number of evidential rules will regulate how the case is prosecuted in court. They will dictate where the burden and standard of proof lies, what material may be used by the parties, the form of questioning that can be adopted by the advocates, and the manner in which the jury should assess the evidence. It is, therefore, unsurprising that,

[9] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 2

in practice, knowledge of the operation of evidential rules is essential to a complete understanding of the legal process as a whole. No matter how well-versed a lawyer may be in substantive law, they will be unable to provide advice to a client or to prosecute a case without a firm grasp of the law of evidence.[10]

One can thus say that the substantive law deals with rights and obligations, but to be able to prove or disprove a right or an obligation, a party must submit to the court the fact on which he relies and by which the court or tribunal can determine that the issue before it is or is not as claimed by the party, and this process is what evidence is about.

SOURCES OF LAW OF EVIDENCE

The sources of law in Ghana are provided under Article 11 of the 1992 Constitution and comprise: --

A. the Constitution[11]
B. enactments made by or under the authority of the Parliament established by the Constitution;
C. any Orders, Rules and Regulations made by any person or authority under a power conferred by the Constitution;
D. the existing law; and
E. the common law.

A. The Constitution

The 1992 Constitution of Ghana is the supreme law in Ghana. There are specific provisions that deal specifically with the law of evidence. For example: Article 19 and Article 135.

The main provisions of the 1992 Constitution, which bears upon the law of evidence, can be found in Article 19 (2) (c), (e) and (g), Article 19(10) of the Constitution, which deals with fair criminal prosecution.

These provisions ensure that a person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court. This principle of 'fair hearing' can be said to be fundamental in the administration of justice. It also forms part of the concept of natural justice, which requires that an accused person and his witnesses in any criminal trial be heard before the case against him is determined.[12]

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[10] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 2
[11] The 1992 Fourth Republican Constitution which came into effect on the 7th of January 1993
[12] Maxwell Opoku Agyemang, Law of Evidence in Ghana 2nd Ed Admax Law Series 2015.

B. Acts of Parliament

There are several acts of parliament that seek to regulate the law of evidence. The primary legislation is the Evidence Act, 1975 NRCD 323. Some relevant provisions in statutes have been highlighted below:

I. Evidence Act

Section 178(1) of the Evidence Act provides that

"178. Application

(1) This Act applies in an action, whether civil or criminal, and to privileges as provided in section 87.

(2) In applying this Act, and in particular in determining whether and to what extent to exercise its power under section 8, the Court shall have special regard to the fair application of this Act in respect of a party not represented by a lawyer.

(3) A rule of law which provides that acts in derogation of the common law shall be narrowly construed does not apply to this Act.

(4) This Act shall be interpreted and applied so as to achieve a consistent law of evidence and the most just, expeditious and least costly administration of the law."

II. Courts Act, 1993 Act 459

Sections 58 – 67 on witnesses.

Section 58. Summoning witnesses

"In proceedings, and at any stage of the proceedings, a Court, either on its own motion or on the application of a party, may summon a person to attend to give evidence, or to produce a document in the possession of that person or excerpts from the document, subject to the applicable enactment or the relevant rule of law."

III. Stamp Duty Act, 2005, Act 689

Section 32

"(6) Except as expressly provided in this section, an instrument

(a) executed in Ghana, or

(b) executed outside Ghana but relating to property situate or to any matter or thing done or to be done in Ghana,

shall except in criminal proceedings, not be given in evidence or be available for any purpose unless it is stamped in accordance with the law in force at the time when it was first executed."

C. Orders, Rules and Regulations

High Court Civil Procedure Rules 2004 C.I 47 Order 38 as Amended by C.I 87 (2014)

Order 38 rule 1 General Rule

"Subject to the Constitution, the Evidence Act, 1975 (NRCD 323), these Rules and any other enactment to the contrary, a fact to be proved at the trial of an action by the evidence of the witnesses shall be proved by a trial of their oral evidence given in court"

Order 38 rule 3 *Evidence of particular facts*

"(1) Without prejudice to rule 2, the Court may at or before the trial of an action, order that evidence of any particular fact shall be given at the trial in such manner as may be specified by the order.

(2) The power conferred by subrule (1) extends in particular to ordering that evidence of any particular fact may be given at the trial

(a) by statement on oath of information or belief; or

(b) by the production of documents or entries in books; or

(c) by copies of documents or entries in books; or

(d) in the case of a fact which is or was a matter of common knowledge either generally or in a particular district, by the production of any publication of general circulation which contains a statement of that fact."

D. Judicial decisions on evidential rules

Several judicial decisions have shaped the law of evidence. In recent times some notable cases are

Case: **Republic v Eugene Baffoe-Bonnie and 4 others, Reference No J1/06/2018 dated 7th June 2018.**

Background: This case interprets specific provisions in Article 19 of the 1992 Constitution and indicates that accused persons are entitled to a fair trial. One way of ensuring this is if the prosecution makes a full disclosure of evidence gathered in the course of investigations.

Held: *On a proper and true interpretation of article 19 (2) (e) and (g), we hold that it is inherent in the right to a fair trial, of an accused person's right to be given adequate time and facilities for the preparation of his defence as well as facilities to examine in person or by his lawyer, the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses on the same condition as those applicable to witnesses called by the prosecution.*

Consequently, we hold that *to give meaning to this right to a fair trial, the accused person in a summary trial is entitled to be given or have access to copies of witnesses' statements, copies of documents and exhibits in the possession of the prosecution, including materials they do not intend to tender before a trial court.*

The duty to disclose is to be made before the commencement of the trial or within a reasonable time in the course of the trial, before they are tendered as evidence in court by the prosecution.

The duty to disclose is not absolute; the prosecution has the discretion to withhold material on the grounds of relevance and privilege. The need to preserve the information must outweigh the need for disclosure in the interest of justice. This discretion is subject to review by the trial judge or magistrate and in the appropriate case by the Supreme Court in accordance with Article 135. The duty to disclose is a continuing one and disclosure must be completed when additional information or material comes into the possession of the prosecution.

Failure to disclose a material before tendering it in evidence does not render the material inadmissible, but should result in an adjournment to enable the accused to study the evidence or material before it can be used by the prosecution.

Failure to disclose does not automatically nullify a trial. When the issue is raised on appeal, the court must consider whether such failure impaired the right of the accused to make a defence, which in turn depends on the nature of the information withheld and whether it might have affected the outcome or the failure has occasioned a miscarriage of justice under ***section 31 of the Courts Act, 1993 (Act 459)***

Case: **The Republic v High Court, Commercial Division Ex parte Kwabena Duffour Civil Motion No. J5/05/2021 dated 10th February 2021.**

Background: This case deals with when an objection can be raised as to the admissibility of evidence. This case arose because of the practice of trial courts rejecting evidence at the Case Management Conference stage in the trial.

Held: *Thirdly, there is a clear internal inconsistency in the direction stated in Part 4(3)(g) of the Practice Direction that objections to any matter disclosed by the Prosecution shall be made, as directed in terms of section 6 of NRCD 323 at the Case Management Conference stage. This inconsistency lies in the fact that the direction flies in the face of the very section 6 of NCRD 323 which the direction clearly defers to. Section 6(1) of the NRCD 323 expressly regulates objections to evidence and it is clearly so headed. In its terms, it provides as follows:-*

> ***"6. Objections to evidence;***
>
> ***(1) In an action, and at every stage of the action, an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered."***

The statutory provisions on objections to evidence says in very certain terms and with clarity that in ***"an action"****(regardless of whether it is a civil or criminal)****"and at every stage of the action [including case management] an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered".** *This without fear of contradiction whatsoever means that the only time when an objection can be taken to the admissibility of evidence is* ***at the time*** *(not before, or after, or in between)* ***"when the evidence is being offered".***

The discussion so far exposes the fact that the High Court's decision that the practice in civil cases where all objections intended to be made are made at the case management conference stage with the effect that if any document annexed to the witness statement was objected to and was upheld by the court that document is marked ***"Rejected"*** *and "****cannot be used in the trial"*** *by either side or the court itself, flies in the face of the clear provisions of Section 6(1) of the Evidence Act 1975 (NRCD 323). It is a palpable error committed by the High Court.*

The timing of such objections whether in civil or criminal proceedings must be at the time when the evidence is offered. This is confirmed by the Practice Direction and also the rules of civil procedure. The contrary practice adopted by the High Court in civil and criminal trials is at variance with the Practice Direction and the rules.

BASIC CONCEPTS AND TERMINOLOGIES

1. Evidence must be relevant for it to be admitted.
2. Evidence must be admissible. All relevant evidence is admissible except otherwise provided; all irrelevant evidence is inadmissible.
3. Judges exercise exclusionary discretion in admitting relevant evidence.
4. Judges have no discretion in admitting irrelevant evidence.
5. Parties produce evidence and court determines the weight of evidence at the end of trial.

JUDICIAL ENQUIRY

In any judicial enquiry, there would have to a determination of both questions of fact and law. The Evidence Act provides that in a judicial enquiry, all questions of law, including but not limited to the admissibility of evidence and the construction of the Act, are to be decided by the court.

A. Questions of Law

Generally, questions of law will relate to the definition of an offence, elements of an offence and rules of evidence, i.e. admissibility and existence of sufficient evidence to allow the jury to consider an issue.

Section 1 Evidence Act NRCD 323

> ***"Questions of law***
>
> *(1) A question of law including but not limited to the admissibility of evidence and the construction of this Act, shall be decided by the Court.*
>
> *(2) The determination of the law of an organisation of states to the extent that the law is not part of the law of Ghana, or of the law of a foreign state or sub-division of a foreign State, is a question of fact which shall be determined by the Court.*
>
> *(3) The determination whether a party has met the burden of producing evidence on a particular issue is a question of law which shall be determined by the Court.*
>
> *(4) Where the Court determines that a party has not met the burden of producing evidence on a particular issue the Court shall, as a matter of law determine the issue against that party."*

Section 2 Evidence Act NRCD 323

> ***"Questions of fact***
>
> *(1) Except as otherwise provided in this or any other enactment in a jury trial a question of fact shall be decided by the jury.*
>
> *(2) Subsection (1) does not preclude the Court from summing up the evidence to the jury, or from commenting on the weight or credibility of the evidence but the Court shall make it clear to the jury that they are to determine the weight and credibility of the evidence themselves and are not bound by the Court's summary or comments.*
>
> *(3) In a trial without a jury, a question of fact shall be decided by the Court."*

What is a Fact?

A fact can be said to mean anything, state of things, or relation of things capable of being perceived by the senses, or any mental condition of which any person is conscious. Facts can be described as events. A fact may, therefore, be physical or mental.

Evidence must be confined to the facts of the case. Facts extraneous to the case need not bother the parties or the court to waste precious time over such facts. Even with reference to the facts of the case, it must be limited to areas where the parties are in dispute. Evidence becomes necessary only in reference to facts which are in controversy between the parties.

Facts in Issue

Facts which are in dispute are facts in issue. A fact in issue is sometimes referred to as the 'principal fact' or factum probandum. There are two principal types of facts in issue. These are, those, which are in issue as a matter of substantive law, and those, which are in issue as a matter of the law of evidence itself. The facts in issue; which are as a matter of the substantive law, may be described as the 'restricted meaning' and the facts in issue as deduced from the law of evidence can be referred to as 'extended meaning".[13]

The main facts in issue, or the primary facts in issue are all those issues which the claimant in a civil action or the prosecution in a criminal proceedings must prove in order to succeed. The facts in issue also include the further facts that the defendant or accused must prove in order to establish a defence. In a civil matter, the facts in issue are usually

[13] Maxwell Opoku Agyemang, Law of Evidence in Ghana 2nd Ed Admax Law Series 2015.

identifiable by reference to the pleadings, which help in ascertaining the factual issues on which the parties agreed or disagreed to enable the Court know in advance what matters are left in dispute and what facts will have to be proved or disproved at the trial.[14]

For instance in a case of defamation, the plaintiff must prove the elements as provided in the law of torts, which are that there was a publication, that the publication was about the plaintiff, that it was defamatory as it was tended to expose the plaintiff to ridicule or contempt. On the part of the defendant, he may be required to deny the publication or that even if it was published, it was not published of the plaintiff or that it was not defamatory or that it was justified.

The facts in issue are the facts that are being contested by the parties. In some cases, an accused may plead not guilty and simply deny any knowledge of the offence. In such a case, all the elements of the offence effectively become facts in issue since they are contested by both parties. Here the prosecution must prove all elements of the offence.[15]

Facts in issue: civil cases

In civil cases it is possible to ascertain which facts are in issue from a document known as the Statement of Case. This document contains a statement of material facts upon which the party claiming has based their claim. In short, the facts that are in issue in civil cases are *those facts that the claimant must establish in order to succeed* in their claim *and to disprove any defence* raised by the defendant.

The facts in issue are usually identifiable by reference to the pleadings, which help in ascertaining the factual issues on which the parties agreed or disagreed to enable the Court know in advance what matters are left in dispute and what facts will have to be proved or disproved at the trial

As stated earlier, the substantive law in any cause of action provides the elements, which must be proved in order to sustain claims or counterclaims. The main facts in issue, or the primary facts in issue are all those issues which the claimant in a civil action or the prosecution in a criminal proceedings must prove in order to succeed.

Simply put, it can be said to include any fact from which either by itself or in connection with other facts, the existence or nonexistence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding necessarily follows.

Facts in issue: criminal cases

[14] Maxwell Opoku Agyemang, Law of Evidence in Ghana 2nd Ed Admax Law Series 2015.
[15] Jonathan Doak, Claire McGourley and Mark Thomas “Evidence Law and Context” 5th Ed Pg 2

The facts that are in issue in criminal cases mainly tend to be the facts that the prosecution must prove to establish a defendant's guilt, i.e. the elements of an offence, but they also include those facts that constitute a defence raised by the defendant. Therefore, the prosecution will also have to adduce evidence in order to disprove any defence that the defendant has raised.

In criminal cases, it has been said "whenever there is a plea of not guilty, everything is in issue, and the prosecution has to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary state of mind. Apart from the primary facts in issue, collateral or subordinate facts in issue which may be affecting the competence or credibility of a witness, or the relevance or admissibility of evidence may be in issue in a particular case on the account of the law of evidence itself, and not on account of the substantive law.

Preliminary Facts/Collateral Facts

Preliminary or collateral facts, are sometimes also referred to as subordinate facts. Those facts that are not directly relevant to the facts in issue are known as 'collateral facts'. Collateral facts are usually only relevant to the court insofar as they go to the credit of the witness, or to the credibility of primary evidence – such as the admissibility of a confession. Thus, counsel may carry out cross-examination purely designed to undermine the credibility of the witness in the eyes of the jury and persuade them to give less weight to the evidence of the particular witness or a particular piece of evidence.[16] These are facts upon which depends the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or nonexistence of a privilege.

It is also important that you understand what collateral facts are and what effect they have. Collateral facts are those facts that affect the admissibility of evidence. For example, the police obtain a confession from Yaw Owusu through oppressive means; in this instance, the existence of oppression is a collateral fact because it will affect whether or not the court will allow the prosecution to adduce this evidence. Collateral facts also include those facts that affect the credibility of a witness or the weight that is given to a piece of evidence. Procedurally, collateral facts are normally put to the court before the evidence is presented; for example the defence may, in a voir dire (a trial within a trial), apply to have excluded a confession such as that discussed earlier.[17]

The existence or non-existence of all preliminary facts is a question of law which shall be decided by the court.

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[16] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 4
[17] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge

Section 3 Evidence Act NRCD 323

"*Preliminary facts*

*(1) For the purposes of this section and of section 4 a **"preliminary fact"** is a fact on which depends*

(a) the admissibility of evidence,

(b) or the inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or

(c) the existence or non-existence of a privilege.

(2) The Court shall determine the existence or non-existence of a preliminary fact.

(3) A ruling on the admissibility or the inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or non-existence of a privilege implies a finding of fact which is prerequisite to it and unless otherwise provided by an enactment a separate formal finding of fact is not necessary.

(4) A party, and as regards a claim of privilege, the person claiming the privilege, may present evidence and arguments relevant to a determination under subsection (2)."

TRADITIONAL CLASSIFICATION OF RULES OF EVIDENCE TESTIMONIAL EVIDENCE

Direct Evidence and Indirect Evidence

Direct evidence is evidence of the fact in issue itself. Indirect evidence is that which, although not evidence of the thing itself, might lead – or help lead – us to the conclusion that the fact has or has not been proven.

Most commonly, evidence will take the form of direct oral testimony. This means that the witness will be called on to testify under oath in open court, and everything they say will be tendered as evidence of the truth of the facts asserted. Witnesses can only give evidence of matters that they have themselves perceived with one of their five senses – usually a witness will speak of what they saw or heard. Such testimony is always admissible, providing it is relevant and the witness is competent to testify.[18]

[18] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 12

A. Oral Evidence/Testimonial evidence

This is the oral statement given by a witness in court (given in the witness box). It is offered as the evidence of the truth of that which is stated. Most of the rules of evidence, as regards oath, the competence of the witness and his cross-examination, are designed to ensure that testimonial evidence shall be as reliable as possible.

The general rule is that a witness can give evidence only of facts of which he has personal knowledge of, something, which he has perceived with one of his five senses.

This means that oral evidence must be direct. This means that a witness can tell the court of only a fact of which he has first-hand personal knowledge in the sense that he perceived the fact by any of the five senses.

The only exception to the rule is the expert witness testifying to matters calling for expertise. Parts of the testimony of an expert may be derived from textbooks or on what he has learned from other people. The party against whom testimonial evidence is given has a right to cross-examine the witness.

Hearsay

This is simply said to be a statement of a person who is not available in court. Instead, another person who has no personal knowledge of the event is the one in court seeking to give evidence on the matter, as the truth of the matter stated. Hearsay rules apply to what people wrote as well as to what they were heard to say, and to what the witness himself said out of court as well as to what he proves to have been said by others whether they are or are not called as witnesses.

The Evidence Act defines hearsay evidence as ‘evidence of a statement, other than a statement made by a witness while testifying in the action at the trial offered to prove the truth of the matter stated. Therefore, one can say that an evidence or statement given in the same circumstance as hearsay evidence but not offered to prove the truth of the matter stated is not hearsay evidence.

B. Documentary Evidence

Not all evidence, however, needs to be received in oral form. Documentary evidence will also be admissible, and comprises not only written or typed papers, but also maps, plans, graphs, drawings, photographs, tapes (audio and visual), films, negatives and disks, CDs or DVDs, and digital recordings. In short, ‘documentary evidence’ is used to refer to every means of communicating information other than the direct spoken word. The purpose of producing a document varies according to the document and the particular case.[19]

[19] Jonathan Doak, Claire McGourley and Mark Thomas “Evidence Law and Context” 5th Ed Pg 12

The contents of a document may be incorporated in the evidence of a witness. A document may be put in evidence as a chattel, a substance, such as a paper bearing an inscription or else as a statement, that is, the inscription on the paper. When treated as a chattel, the document would constitute part of the real evidence. For instance, if a will is stolen, it can be produced in court to show that it bore the fingerprints of the accused. When treated as a statement however, a document may form part of the testimonial evidence of the witness or as part of circumstantial evidence. When used as circumstantial evidence, although it is produced and identified by the witness, the document is not incorporated into the testimony as having been written or read by him, neither are its contents as proof of anything they may assert.

Where documentary evidence is used, not as a chattel but, for the probative value of its content, or writing, there are various rules regarding its admissibility or otherwise, in the Evidence Act.

C. Digital/electronic evidence

This is a new area in the law of evidence in Ghana. There are few judicial decisions on the topic in Ghana. However, the intrusion of electronic evidence has increased exponentially in many jurisdictions. You may assess how the following affect your private life and think about how the law should deal with them: emails, digital photographs, word processing documents, instant message histories, internet browser histories, databases etc

In understanding the use of digital evidence, we always situate scenarios within the existing non-digital rules and then determine how to resolve issues. Consider a scenario where K accuse A of stealing his 5 Cedis. K alleges that he gave his mobile phone to A who manipulated the phone and managed to transfer that amount of credit from his phone to her phone. K is relying on the message of that transaction sent to him via text message from the provider.

The main issue when it comes to digital or e-evidence would be how authentic or reliable is this form of evidence and also whether the text message or internet messages should be admissible.

D. Real evidence

In addition to documentary evidence, the court may also receive ‘real evidence’. This term is usually taken to mean some material object, known as an exhibit, that is produced to the court for inspection so that the court may draw its own inference from observation of the particular object. Although real evidence will frequently feature in the cases of either the prosecution or defence, it is usually of little intrinsic value without some accompanying testimony.

Thus, a knife may be produced in a murder case as a form of real evidence. However, unless other evidence is available to show that it was the murder weapon and that it is linked to the accused (e.g. it was found in their car and has the victim's blood on it), it proves nothing.

Real evidence may also be an original document, a visit to the scene of the alleged crime(s) by the judge and jury, a tape-recording, photograph or video image of the defendant.

Real evidence will usually constitute an exception to the hearsay rule. For example, in **R v Robson, Mitchell and Richards [1991] Crim LR 362** the defendants were convicted of armed robbery. The prosecution linked the second defendant with the crime by means of a computer printout of telephone calls made by the second defendant to the phone of the first defendant. It was held that the printout was not hearsay but real evidence since the printout was produced by a computer that operated automatically and independently without human intervention.[20]

E. Circumstantial evidence

Circumstantial evidence is evidence of relevant facts from which the existence, or nonexistence, of the facts in issue may be inferred. Such evidence may include any of the above forms of evidence except, of course, direct testimony relating to the facts in issue.[21]

Example

Sarah is charged with the murder of Julia by stabbing her in an alleyway behind a club they both frequented. On the night of Julia's death, Sarah and Julia had an argument in the club, which resulted in Julia being thrown out at around 9.30 pm. Around 30 minutes later, Sarah was seen leaving the club in an agitated state through the back door, which led into the alleyway where Julia's body was later found. At about 10.15 pm, a woman fitting Sarah's description was seen running away from the alleyway, a few minutes after witnesses heard loud voices followed by a scream. Sarah's jacket was stained with lime wash, which was identical to that used on a wall in the alley where Julia's body was found, and a button from Sarah's jacket was found at the scene of the murder. The murder weapon, a carving knife, was of the same brand as those contained in a knife block in Sarah's kitchen. One knife is missing from the block.

[20] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 13
[21] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 13.

In the above example, while no witnesses may have seen Sarah stab Julia, there is plenty of circumstantial evidence to suggest she was involved. When we tie the various strands of it together, there appears to be a very strong case against the accused.[22]

UNDERSTANDING OF KEY TERMINOLOGIES:

I. The 'facts in issue' are those matters that are being contested or disputed by the parties.

II. Facts in issue: criminal cases – these are facts that the prosecution must prove to establish a defendant's guilt or disprove a defence.

III. Facts in issue: civil cases – these are facts that the claimant must establish in order to succeed in their claim and to disprove any defence raised. They arise based on the pleadings, that is, Statement of Claim and Statement of Defence.

IV. Collateral facts – these are facts that affect the admissibility of evidence, the credibility of a witness or the weight given to a piece of evidence. They are extraneous to the facts in issue.

V. Relevant facts – facts in issue are proven or disproven by what are known as relevant facts; that is, 'relevant, i.e. logically probative or disprobative, evidence is evidence which makes the matter which requires proof more or less probable.

VI. All evidence adduced at the trial must be relevant; the determination of relevancy is a matter for the trial judge.

VII. Evidence can be categorised into a number of types or forms, including direct evidence, documentary evidence, real evidence and circumstantial evidence.

- *"oral" evidence* – that given orally by a witness in court;

- *"real" evidence* – a thing or an item, lodged as a "production" in court. It is normally necessary for a witness to "speak to" (that is, refer to) the item in oral evidence for the real evidence itself to become evidence that the court can take into account;

[22] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 14

- *"documentary" evidence* – documents which are lodged in court as productions. Like real evidence, they should normally be spoken to by a witness to become evidence themselves.[23]

VIII. Weight - Once it has been determined what facts in issue the evidence may prove or disprove (which means that it is relevant and that it is admissible), it is then down to the court or tribunal of fact (jury) to decide what weight to attach to it.

For some, the weight of evidence can seem like an abstract notion; in the law of evidence, the weight simply refers to the extent to which the evidence presented aids in proving or disproving a fact.

The weight that the jury gives a particular piece of evidence will be subjective, drawing on both logic and common sense when they determine what they do, or do not, believe. There are two possible outcomes to this: the evidence may be given no weight and therefore disregarded completely or it may be given weight, thereby influencing the jury's decision concerning the extent to which they perceive its reliability, strength and truthfulness.[24]

[23] James Chalmers "Scottish Evidence Law Essentials" Edinburgh Unversity Press (2021) p 5.
[24] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge

CIRCUMSTANTIAL EVIDENCE

INTRODUCTION

Circumstantial evidence forms one of the means of proof that includes documentary evidence, oral evidence and others. Circumstantial evidence is the fact from which a trier of fact may infer, presume or deduce, the existence, non-existence or proof of another fact. In **FRIMPONG@ IBOMAN V THE REPUBLIC** the Supreme Court stated:

> *"What must be noted is that, a crime is always investigated after the act had been committed. However, during the investigation, the Police are able to put together strings of activities and draw the necessary inferences and conclusions. Some of the evidence might be direct and therefore quite conclusive, but others might be indirect, and referred to as circumstantial."*

Circumstantial evidence is not proof of the fact itself. Circumstantial evidence is utilized where direct evidence is not available or where direct evidence is not easy to obtain. Circumstantial evidence is very essential in proving criminal cases. This is because most crimes are committed outside the view of witnesses. Thus, parties resort to circumstantial evidence where there are no eye witnesses. In **DUAH v. THE REPUBLIC [1987-88] 1 GLR 343-360** it was held that:

> *" In criminal cases, it was sometimes not possible to prove the crime charged by direct or positive evidence of persons present at the time the crime was committed. So where the testimony of eye-witnesses was not available, the jury was entitled and indeed permitted to infer from those facts which the prosecution had proved other facts necessary either to complete the elements of guilt or establish innocence."*

By definition, Circumstantial evidence is the fact from which the fact in issue may be deduced, inferred or concluded. A judge is permitted under section 18(2) of the Evidence Act NRCD 323 to make an inference from given facts. Section 18(2) of the Evidence Act, NRCD 323 provides as follows:

> "(2) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."

HOW THE COURT HAVE DEFINED CIRCUMSTANTIAL EVIDENCE

Pollock CB in **R V EXALL** said :

> "*It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for the, if any one link break, the chain would fail. <u>It is more like the case of a rope comprised of</u>*

several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. But the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of".

Also Lord Hewart LCJ described circumstantial evidence in **R V TAYLOR** as follows :

"it is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics."

It was stated in the celebrated case of **R V ONUFREJCZYK** in further explanation of the importance of circumstantial evidence:

"it is often the best evidence. It is evidence of surrounding circumstances, which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial".

Circumstantial evidence is to be assessed cumulatively

In applying circumstantial evidence, the court cannot look at one evidence in isolation from the other pieces of evidence before the court. The nature of circumstantial evidence is that its effect is cumulative, and the existence of a successful case based on circumstantial evidence is that the whole is stronger than the individual parts.

In **GLIGAH & ATISO V THE REPUBLIC,** Dotse JSC stated as follows:

"…There are pieces of evidence which if put together make a very strong case against the accused persons. It is like series of small threads and when put together, make a very strong rope. The same with circumstantial evidence. It is generally accepted that when direct evidence is unavailable, there are bits and pieces of circumstantial evidence available, and when these are put together, they may make stronger, corroborative and convincing evidence than direct evidence. In the instant case, the following pieces of evidence helped in making very strong circumstantial evidence against the accused persons:

(i) The detailed and correct description given by the first prosecution witness of the operation room.

(ii) The presence of the earring stopper of the first prosecution witness on the foam mattress.

(iii) The identification of the first prosecution witness by the fifth prosecution witness as being present in front of the room on the date in question.

(iv) Denial by the fourth prosecution witness that the first accused ever came to the Station View Hotel, Tudu, with the first prosecution witness to have sex.

(v) Confirmation by the second prosecution witness that the first prosecution witness had been carnally known by an erect male organ."

WHAT MAY CONSTITUTE CIRCUMSTANTIAL EVIDENCE

In the case of **Frimpong alias Iboman v The Republic [2012] 1 SCGLR 297** it was held as follows:

"As at now, so far as the evidence on record is concerned, there are bits and pieces of evidence connecting the appellant to his deep involvement in the commissioning of the offences with which he was charged. In this instance, we will venture to state that, the inferences that have logically been made in this case appear so strong, cogent, credible and reasonable that assuming the confession statement is even disregarded, they constitute the best evidence against the appellant and upon which the court must convict.

Other forms of evidence which can be termed circumstantial and accepted by the law courts are some of the following:

i. Forensic examinations etc.

ii. DNA

iii. Mobile phone conversations or SMS messages

iv. Email messages where these are available and relevant

v. Crime scene investigations, and others.

Principles for the evaluation of Circumstantial Evidence

In criminal cases, the principles applied in evaluating and applying circumstantial evidence have been settled in many decisions by the Supreme Court. Three broad principles appear to have been enunciated from the decided cases.

A. Inferences that support the conclusion that the offence has been committed

CASE: AMETEWEE VS THE STATE

Facts: This case involved the a police officer who fired three shots at the President. One of the shots hit and killed the body-guard of the President. A pathologist's report confirmed that the deceased died from bullet wounds. The appellant admitted firing three shots at the material time but he denied that it was any of his shots which killed the deceased.

Held: The preponderance of evidence showed that only three shots were fired, and the pathologist's report also established that the deceased died as a result of an injury he

received from a bullet. The chain of circumstantial evidence therefore pointed to the one and only one irresistible conclusion that the appellant was the person who killed the deceased.

B. Inferences that it was the accused and no one else who committed the crime charged

In ***Duah v. The Republic 1987-88 1 GLR 343***

Facts: Accused person was alleged to have killed his wife. He claimed she committed suicide. Evidence showed that he confessed to the crime " I have killed Agnes".

Held: "*Thus circumstantial evidence ought to be closely examined and should be acted upon only when the circumstances are such that the guilt of the accused must of necessity be inferred and that the facts lead to no other conclusion…"*

Note: Start from "This evidence was in direct conflict"

In ***State v Anani Faidzo***

Facts: Accused was charged with the murder of one son and the attempted murder of the other. The son who survived escaped from the beating him with a hoe stick.

Held

"Presumptive or circumstantial evidence is quite usual, as it is rare to prove an offence by evidence of eye-witnesses, and inferences from the facts proved may prove the guilt of the appellant. A presumption from circumstantial evidence should be drawn against the appellant only when that presumption follows irresistibly from the circumstances proved in evidence; and in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the appellant, and incapable of explanation upon any other reasonable hypothesis than that of guilt. A conviction must not be based on probabilities or mere suspicion. Although there was no direct evidence, there was nevertheless a mass of circumstantial evidence from which the fact could be inferred that the appellant killed the deceased; the facts in this case point to that conclusion only."

C. Inferences that guilt is the only rational hypothesis.

In **THE STATE v. BROBBEY AND NIPAH** [1962] 2 GLR 101-105 the court stated

Facts: Appellants were charged with the murder of a man. Police had earlier arrested another accused person one Yaw Buakyi in connection with the crime. Charges against Yaw Buaki were withdrawn and he later became a prosecution witness. The evidence tying the accused to the crime Exhibit M was held to be inadmissible.

Held: " In a case where the evidence is purely circumstantial and establishes nothing more than suspicion, the judge must draw attention to the necessity of some piece of evidence that is more than mere suspicion and which would lead to one conclusion and one conclusion only, that is, to the guilt of the prisoner. One cannot put a multiple of suspicions together and make proof of it. For circumstantial evidence to support a conviction it must be inconsistent with the innocence of the accused, and must lead to the irresistible conclusion not only that the crime charged has been committed, but that it was in fact committed by the person or persons charged and by no other person; in other words the evidence on the whole must exclude the probability that the alleged crime could have been committed by some person or persons other than the person or persons before the court."

The court continued and stated thus:

> *"We also have in this case a piece of evidence of a circumstantial nature, that is evidence of cumulative surroundings wholly unconnected with the prisoners charged, with circumstances pointing to a probability that the deceased met his death at the hand of some other, one Yaw Buakyi, the thirteenth prosecution witness. So strong was the nature of such evidence, suspicion it might well be called, that the said Yaw Buakyi was arrested, charged with this same offence and put before the court; it was after several weeks that the prosecution discontinued against him. It is beyond question that the said Yaw Buakyi is not an accomplice of the prisoners in the commission of the offence preferred. This shows that the evidence tendered against the prisoners does not exclude the probability that the alleged crime could have been committed by some person other than the persons charged."*

The key point that must be noted from the above authority is that a multiple of suspicions or rumors as to the commission of a crime cannot be the basis for a conviction.

In State v Ali Kassena it was held that

> *"At the close of the case for the prosecution there was no evidence that the blood found on the clothes and palm of the appellant was that of the deceased, and therefore no definite inculpatory fact was proved against the appellant. The accumulation of facts proved amounts to no more than mere suspicion, and however strong suspicion may be, it cannot form the basis for continuing trial after a submission of no case… We are in agreement with these views of Delvin, J. (as he then was), and we think it is dangerous in jury cases to leave to the jury evidence which amounts to suspicion only as there is the fear that they may "put a multitude of suspicions together and make proof out of it".*

Also in **STATE v. OTCHERE AND OTHERS [1963] 2 GLR 463-531**

Held *"Evidence of rumours of the commission of a crime do not constitute evidence of the commission of a crime, and evidence of the rumours circulating in the country about the complicity of the accused persons of the assassination attempt on the President was no proof that they were responsible for the attempt on the life of the President."*

Key Case: **Asante vs The Republic [2017-2020] 1 SCGLR 132**

Facts: The Appellant, aged 26 years, was an Agricultural Science teacher at JSS in Tamale. He was accused of carnally knowing a 14-year-old girl. He was charged with Defilement and sentenced to 15 years IHL. After completing his 15 years IHL sentence he was acquitted.

The Circumstantial Evidence used to convict:

1. On 12 Nov 2003, the victim complained of body and head pains. Her uncle asked her to attend the hospital.
2. The next day, the victim was caught writing a love letter to Mr Eric. In the letter the victim stated that she met the Mr. Eric the previous day and gave him what he wanted. She thanked him for the money he gave her. She expressed her love for him and explained that she could not visit him that day as planned because she was unwell.
3. When confronted she said Mr Eric was her teacher and boyfriend.
4. Victim said that on the first day she had sex with the Appellant she left her books with a friend. But this friend was never called as a witness.
5. On 14th Nov 2023 the matter was reported to the police and upon examination by a doctor the victim was found to be 23 weeks pregnant.
6. She attributed the pregnancy to the Appellant.

Evidence of the Appellant:

1. None of the witnesses called by the Prosecution saw the sexual intercourse.
2. None of the witnesses saw the victim enter appellant's room on 12/11/2003 or on any other day for that matter
3. The victim accused the Appellant of having sex with her on 12 Nov 2003 but the Medical Officer that examined her on 14th Nov 2003 did not examine her to determine this fact
4. There was evidence on record that the victim had told a friend that her auntie's husband was sexually abusing her.
5. There were two teachers in the school with their first name as Eric.
6. He asked for a DNA test in his final appeal to the Supreme Court. The results showed he was not the father.

Held: Reason for overturning conviction

- As pointed out above, the trial court and the Court of Appeal in their judgments considered the pregnancy as corroboration of the victim's testimony of sexual intercourse with the Appellant. The import of the DNA evidence is that the victim was not truthful when she testified on oath that it was appellant who had sexual intercourse with her leading to the pregnancy and that has legal implications including her credibility as a witness.

- In this case the victim met the medical doctor within 48 hours of the alleged intercourse but no effort was made to examine her vagina for possible medical evidence of penetration. The evidence of the victim is that on the 12/11/2003 the appellant requested her to take books to his house after close of classes. It is inconceivable that no pupil in the class saw the victim take the books to the house of the teacher. The victim herself mentioned a friend whom she left her books with on the day she allegedly went to appellant's house for the first time and they had sexual intercourse. Why did the prosecution not produce this friend of the victim to confirm her story of visiting him in his house.

- In view of the evidence before us the question we ask ourselves is; if the trial judge knew what we now know namely; that the testimony of the victim to the effect that it was appellant who impregnated her was deliberate falsehood, whether he would still describe her as a witness of truth? If she chose to lie on oath about the pregnancy what else did she lie about in her testimony? In our judgment the DNA evidence does tremendous damage to the credibility of the victim and her disposition to speak the truth in this case is put in serious doubt….Why did the victim fabricate a false story and repeat it on oath that her pregnancy was caused by the Appellant? Did she really have any sexual intercourse at all on 12/11/2003? The totality of the evidence leaves a reasonable doubt in the mind of the court as to whether on or about 12/11/2003 the victim engaged in sexual intercourse at all and with the appellant in particular and we are bound by law to resolve that doubt in favour of the appellant.

CIRCUMSTANTIAL EVIDENCE USED TO ESTABLISH THE IDENTITY OF ACCUSED

In most cases, there will be no eyewitness who saw the accused committing the crime. In such circumstance, the court is permitted to infer from surrounding circumstances that it was the accused who committed the crime charged and no one else. Circumstantial evidence of identity often takes the form of expert testimony that the fingerprints of the accused30 or samples taken from his body match those discovered on or taken from

some material object at the scene of the crime or the victim of the offence in Question. It can also take the form of evidence that a tracking dog tracked the accused by scent from the scene of the crime. Identity may also be established by evidence that both the accused and the criminal share the same name, the same physical idiosyncrasy, for example left-handedness, the same style of handwriting, or the same particular manner of expression in speech or writing.

In the case of Dogbe v The Republic 1975 1 GLR 118-126, which involved the stealing of ten cassette tapes contained in a parcel where the accused argued that there was no evidence connecting him to the offence, the court held as follows:

> *"in criminal trials, the identity of the accused as the person who committed the crime might be proved either by direct testimony or by circumstantial evidence of other relevant facts from which it might be inferred by the court. Thus opportunity on the part of the accused to do the act and his knowledge of circumstances enabling it to be done were admissible to prove identity."*

The above case is used as the authority for using circumstantial evidence to prove the identity of an accused person.

CIRCUMSTANTIAL EVIDENCE USED TO ESTABLISH INTENTION OR KNOWLEDGE

It is often said that not even the devil knows what is truly in a man's mind. As a result, it can be challenging to ascertain a person's knowledge or intentions when it comes to committing a crime. Typically, these aspects are inferred from the surrounding circumstances, events, or occurrences, which can collectively amount to circumstantial evidence. Circumstantial evidence is thus admissible to prove intention or knowledge.

In the case of **Nyameneba v The State [1965] GLR ,** The appellants, who were members of a religious sect, had been growing "herbs of life" for four years or more. They used the herbs publicly for invocation, at their worship, for food and medicine. Upon report being made to the police against the sect, the police investigated and found the herbs to be Indian hemp. The appellants were tried and convicted under section 49 of the Pharmacy and Drugs Act, 1961 (Act 64). At the trial a chemist certified that the herbs were Indian hemp but the prosecution failed to call the chemist to be cross-examined on his report even after the court had so directed

In using the surrounding circumstances the Supreme Court found as follows:

> *" In a case like this where the appellants consistently maintained that the herbs they grow and which they have been offering to the public of Princess Town for the past four or more years are herbs of life, and that it was because of religious jealousy that the chief of Princess Town, his elders and some of the other citizens*

are alleging that the herbs are Indian hemp and not herbs of life, it is important that the prosecution should have carried out the directions given by the circuit court and called the chemist….

However, in our view the refusal by the prosecution to call the chemist, and the failure of the circuit court to call him, have not resulted in any miscarriage of justice in this particular case. Having regard to the facts in the case, the evidence of the chemist cannot affect the defence one way or another, at its best all the oral evidence of the chemist could have done is to convince the appellants at a stage in the trial, that the thing they had honestly believed all these years to be a herb of life, is after all not a herb of life at all but a dangerous thing called Indian hemp. But such knowledge acquired by the appellants at that stage cannot relate back, and therefore cannot form the basis of the decision in the case.

And that takes us to the real issue in the case. As earlier pointed out, the charges against the appellants are that they cultivated, possessed and smoked Indian hemp. The appellants admit cultivating, possessing and smoking the stuff produced in court. In fact it was they themselves who voluntarily showed this stuff to the public of Princess Town, and later voluntarily showed and handed the stuff to the police. There is no question at all upon the evidence that the appellants honestly though erroneously, believed that the stuff is herbs of life and nothing else. The learned circuit judgment himself impliedly found as a fact that the appellants honestly believed the stuff to be herbs or tree of life, but that the government chemist's report calls the same thing Indian hemp."

Based on all the evidence available it was clear that the accused persons lacked the knowledge of the substance they had.

However, in the case of **Kamil v The Republic [2011] 1 SCGLR 300** the accused persons were charged with importation and possession of narcotic drugs without lawful authority.

Police had monitored the accused persons for some time and on the day in question they had imported fish into the country. The fish was transported to the residence of the 1st Accused. A combined team of personnel from the Narcotic Control Board and the Drug Enforcement Unit of the Ghana Police Service raided the residence of the 1st accused and discovered 'bails' and parcels of whitish substances suspected to be cocaine concealed in specially recently constructed compartments in a wall covered by a large dressing mirror. When confronted with the substance the first accused said it was 'cocaine' brought to the house by one Yakuba for safekeeping for a fee of $50,000.00. All the accused persons who were in the house were arrested and sent to the Narcotic control board offices and later charged with the offences.

The Appellant who was in the house was convicted and he appealed. It was his case that he went to the 1st Accused Kevin Gorman, his brother-in-law, in his house on 31-12-03 in the morning to see him and one Aisha; he denied going there to offload boxes. He denied the offences leveled against him, and the evidence by the Prosecution witnesses, particularly that he hired and paid some of them to offload the boxes in which the cocaine was found.

Evidence led by the prosecution showed that he had arranged for the transportation of the fish and the packing of the boxes of fish.

The Court held as follows:

> *" Thus, a judge is permitted to infer from the proven facts, other facts necessary to complete the elements of guilt or to establish innocence. It is not permissible to castigate a judgment simply because it was founded on circumstantial evidence as was done by the counsel for the appellant. A close study of the evidence revealed that there was more than sufficient evidence to support the findings of fact by the trial court so that the first appellate court was perfectly right in affirming them.The evidence showed the role played by the appellant in the saga which may easily win laurels in any annual best film award contest as recounted above (by which he first drove the vehicle that transported the boxes from the beach with he himself carrying some of the boxes, hiring and paying others to assist him in so carrying the boxes upstairs for hiding and hiding them in that compartment in the wall), were acts suggestive of one fact, namely that he knew he was handling an obnoxious substance, and as it turned out to be, cocaine. The appellant before us played a pivotal role in the affair."*

In considering the two cases, Nyameneba and Kamil, it is clear that based on circumstantial evidence, a court can safely determine the state of mind of an accused person.

USE OF CIRCUMSTANTIAL EVIDENCE WHERE THERE IS NO PROOF OF CAUSE OF DEATH OR THE BODY OF THE VICTIM IS NOT FOUND

Even where there is no direct evidence of the death or trace of the dead body, circumstantial evidence can provide proof of death on condition that the jury are warned that the circumstantial evidence should lead to one and only conclusion that the person is dead and that the accused was responsible for death. That was the decision

In ***Gabriel Bosso v. The Republic.*** In that case, the deceased was last seen alive entering the room of the accused. She disappeared thereafter. The accused denied killing her. No one saw the accused killing the deceased. He initially told inconsistent stories about the whereabouts of the deceased. Several months after the deceased had died, the accused subsequently led the police to retrieve the body of the deceased which he

had dismembered into 150 pieces, wrapped in polythene bags and dumped into his own septic tank. He appealed against his conviction for manslaughter. The conviction was affirmed by the Supreme Court which increased his sentence of fifteen years imposed by the lower courts to twenty years imprisonment.

Held:

> " *We are in complete agreement with the decision of the court. On a critical examination of the evidence of the prosecution and the defence there is no doubt that the evidence leading to the death of Debora was clearly circumstantial. Also, two possible verdicts were open to the court and the learned justices are to be commended for examining these two alternative possibilities carefully.*
>
> *From the evidence led, it is not disputed that the Appellant caused the death of the deceased.*
>
> a. *The accused admits that he injected the deceased with two class "A" drugs. He also admitted that these are very potent and dangerous drugs and when given an overdose, could kill.*
> b. *The Appellant further admits that he chopped up the body of the deceased and flushed it down a septic tank.*
> c. *The internal organs which were essential to ascertaining the actual cause of death of the deceased could not be found and were never retrieved.*
>
> *The clear legal principle established in the case of* ***R v. Onufrejczyk [1955] 1 Q.B. 388*** *is that in a trial for murder, the fact of death can be proved by circumstantial evidence provided that the jury were warned that the evidence must lead to one conclusion only, and the cause of death may be proved by such circumstances as render the commission of the crime certain and leave no degree of doubt, even though there is no body or trace of the body or any direct evidence as to the manner of death of the victim.*
>
> *Clearly, the principle discernible in this case applies with equal force to charges of manslaughter. In a trial for manslaughter, the fact of death is provable by circumstantial evidence, the only caveat being that the evidence must irresistibly lead to only that one conclusion. The death may be proved by such circumstantial evidence even though there is no trace of the body or as happened in this instant case vital organs needed to help establish the specific cause of death cannot be traced. Provided the circumstantial evidence leaves no room for doubt and does safely lead to that one conclusion, a guilty person ought not to be set free on the sole ground that the exact cause of death has not been established by medical experts."*

CIRCUMSTANTIAL EVIDENCE USED IN ADULTERY CASES

Case: ADJETEY AND ANOTHER v. ADJETEY [1973] 1 GLR 216

Held: “Adultery must be proved to the satisfaction of the court and even though the evidence need not reach certainty as required in criminal proceedings it must carry a high degree of probability.

“Direct evidence of adultery is rare. In nearly every case the fact of adultery is inferred from circumstances which by fair and necessary inference lead to that conclusion. There must be proof of disposition and opportunity for committing adultery; but the conjunction of strong inclination with evidence of opportunity does not lead to an irrebuttable presumption that adultery has been committed; and likewise the Court is not bound to infer adultery from evidence of opportunity alone.”

TRADITIONAL EVIDENCE

WHAT IS TRADITIONAL EVIDENCE

Traditional evidence is very crucial in cases such as ownership of land, the occupant of a stool or ownership of stool land. In such instances, proof may be by means of conflicting traditional stories, myths, folklore by rival families, etc. In these cases, the persons with personal knowledge of these matters would have usually been dead by the time evidence was given in court.[1] They would have, however, passed on memories of the events and information orally from generation to generation.

A useful definition of traditional evidence will be found in ***In re Asere Stool : Nikoi Olai Amontia IV (substituted by Tafo Amon II) v. Akotia Oworsia III (substituted by Laryea Ayiku II)*** [2005-2006] SCGLR 637. That case defines traditional evidence as follows :

> "By its nature, traditional evidence is hearsay evidence. It is evidence of the history of events which happened some time past, concerning a person's pedigree, origin, migration, land, family, stool, etc passed on generally by oral tradition from generation to generation."

Traditional evidence is derived from tradition or statements of deceased persons with regard to questions of pedigree, ancient boundaries and the like, when no living witnesses are available to testify about such matters. In such testimonies, the person who is himself narrating such evidence has no personal knowledge about the matters to which he is testifying. The same usually applies to the person who also told the person testifying. This makes traditional evidence hearsay evidence.

TRADITIONAL EVIDENCE AND HEARSAY

Traditional evidence can therefore be said to be strictly hearsay but for the provisions of sections 128 and 129 of the Evidence Act which made it an exception to the hearsay rule it would be inadmissible. In the case of **RICKETTS AND ANOTHER V. ADDO AND OTHERS AND RICKETTS V. BORBOR AND OTHERS (CONSOLIDATED) [1975] 2 GLR 158-169** it was held as follows

> *"traditional evidence in causes relating to pedigree, inheritance, boundaries of land and family land transactions, etc. was admissible as an exception to the hearsay rule. The relator of such traditional evidence was entitled to testify not only to matters occurring before his birth but also to matters which had happened*

[1] Justice S A Brobbey, Essentials of the Ghana Law of Evidence Darto Publications 2014 Page 456

during his lifetime. In the instant case, the defendant, as a customary successor, could have given traditional evidence of his family's land transactions."

SECTIONS 128 AND 129 OF THE EVIDENCE ACT NRCD 323

128. Family history

(1) Evidence of a hearsay statement by a declarant concerning the birth, marriage, divorce, relationship by blood, marriage or adoption, ancestry or any other similar fact of the family history of the declarant is not made inadmissible by section 117, and will not be made inadmissible by the fact that the declarant did not have any means of acquiring personal knowledge of the matter declared if the statement was made before the controversy arose over the fact of family history.

(2) Evidence of a hearsay statement concerning the birth, death, marriage, divorce, relationship by blood, marriage or adoption, ancestry or any other similar fact of the family history of a person other than the declarant is not made inadmissible by section 117 if the statement was made before the controversy arose concerning the fact of family history and

(a) the declarant was related to the other person by blood, marriage or adoption; or

(b) the declarant was otherwise so intimately associated with the other person's family as to be likely to have had accurate information concerning the matter declared.

(3) Evidence of entries in a family bible or other family book, family portrait, and inscriptions on a building, a tombstone and the like is not made inadmissible by section 117 when offered to prove the birth, death, marriage, divorce, relationship by blood, marriage or adoption, ancestry or any other similar fact of family history of a member of the family by blood, marriage or adoption.

(4) Evidence of reputation among members of a family is not made inadmissible by section 117 when offered to prove the truth of the matter reputed if the reputation concerns the birth, death, marriage, divorce, relationship by blood, marriage or divorce, ancestry or any other similar fact of the family history of a member of the family by blood, marriage or adoption.

129. Boundaries and community history

Evidence of reputation in a community given by a person with personal knowledge of the reputation is not made inadmissible by section 117 if

(a) the reputation concerns boundaries of, or customs affecting, land in the community and the reputation arose before the controversy concerning the boundary or custom; or

(b) the reputation concerns an event of the general history of the community and the event was of importance to the community.

HOW IS TRADITIONAL EVIDENCE TESTED?

The problem with traditional evidence is that it is mostly carried down through the generations by oral tradition. It is therefore possible for the stories to get distorted as it is passed down from generation to generation.

The question we are interested in is that when faced with two conflicting traditional accounts which different parties base their case, what test should the court adopt in selecting the more probable of the conflicting traditional evidence or establishing which one is preferable? The leading authority in this area is the case of **Adjeibi-Kojo v Bonsie** [1957] 3 WALR 257, PC.

The test to be adopted when evaluating traditional evidence was stated by the Privy Council through Lord Denning in that case as follows :

> "The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard it must be recognised that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatever.
>
> ***The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the most probable. That is how both the Native Courts approached the matter and their Lordships think they were right in so doing*.**"

The applicable principle therefore as stated by Brobbey is that in evaluating which of conflicting traditional evidence to accept as more probable, "the courts should weigh the traditional evidence alongside facts of recent ownership or possession concerning the contested subject matter: Those facts should not be in dispute and they should be facts which have recently occurred or facts of recent memory."

Application of Adjeibi Kojo v Bonsie Principle

One of the cases that applied this principle was the case of **Adjei v Acquah [1991] 1 GLR 13.**

Held: The Supreme Court per Aikins JSC (as he then was) held that the law was that although traditional evidence had a part to play in action for declaration of title, a

favourable finding on its evidence was not necessarily essential to the case of the party seeking the declaration.

What the authorities require is that such stories must be weighed along with recent facts as acts of exercise of rights of ownership to see which of the two rival stories appears more probable. Facts established by matters and events within living memory , especially evidence of acts of exercise of ownership and possession, must take precedence over mere traditional evidence. "

There was a misconception created in the Adjei v Acquah case which the Supreme Court sought to correct in ***In Re Kodie Stool; Adowaa v Osei*** where the court stated thus

> *"I think counsel for the plaintiff has misunderstood the application perhaps if I may say so, the simplification- of the Adjeibi-Kojo principle.*
>
> *The dictum of Edward Wiredu JSC in Adjei v Acquah does not mean that rival traditional evidence may be resolved 'solely' by recent acts of events without reference to the traditional evidence on record.*
>
> *Edward Wiredu JSC in that dictum requires two steps to be taken in assessing the probability of the correctness of rival traditional 'stories'.*
>
> *First the rival stories must be weighed along the recent facts to ascertain which story appears the more probable; and*
>
> *second, facts established by matters and events within living memory must necessarily take precedence over mere traditional evidence."*

In ***Achoro v Akanfela*** [1996-97] SCGLR 209, a chieftaincy dispute where the parties gave conflicting accounts of the proper person to be enskinned a chief for Kanjara, the Supreme Court held that :

> "***The best way of evaluating traditional evidence was to test the authenticity of the rival versions against the background of positive and recent acts***."

In re ***Tahyen & Assago Stools; Kumanin II (Substitued by) Oppon v Anin [1998-99] SCGLR 399***

> "the best way of assessing rival traditional evidence was to find out which of the rival versions was authenticated by acts and events within living memory, especially where such acts and events were acts of possession and ownership by a party claiming ownership and title to the subject-matter of the claim; in which case they raise a presumption of ownership in favour of the party. The presumption of title raised by acts of possession and ownership was presently

captured as section 48 of the Evidence Decree, 1975 (NRCD 323). And the party whose traditional evidence such acts and events supported or rendered more probable had to succeed, unless there existed on the record of proceedings a very cogent reason to the contrary. Besides, facts established by acts and events within living memory, especially acts of ownership and possession, took precedence over traditional history. Accordingly, a party could still succeed in his claim even if his traditional evidence was rejected."

What may form part of acts within living memory was laid out in the case of **HILODJIE & ANOR V GEORGE [2005-2006] SCGLR 974**. In that case, the Supreme Court stated that:

> *"The clearly discernible principle is that in cases of this nature, the most satisfactory contemporary facts that a court should look out for are **undisturbed overt acts of ownership or possession exercised over the subject matter**. That is not to say that other concrete acts do or may not qualify as acts in living or recent memory. Indeed, what may constitute a fact or an event in recent memory in one case, may not pass the test in another. Each case must therefore be dealt with on its own peculiar facts. Therefore, **findings and decisions of courts of competent jurisdiction**, may, appropriately qualify as evidence of facts in living or recent memory. But evidently, in land litigation, proven uninterrupted and unchallenged acts of possession, in the absence of some cogent evidence on the record to the contrary, as for example an unreserved acceptance of crucial parts of the other side's oral history, cannot be ignored or denied the deserved weight, given that in the first place, by the clear provisions of S.48 of the Evidence Decree NRCD 323, such acts raise a presumption of ownership."*

<u>Guiding principles for applying and accessing traditional evidence</u>

The guiding principles for applying and accessing traditional evidence was laid down in the case of **IN RE ADJANCOTE ACQUISITION; KLU v. AGYEMANG II [1982-83] GLR 852-863** and was affirmed and restated by the Dotse JSC in the case of **DZOKUI II V ADZAMLI (DECEASED) SUBSTITUTED BY ADZAMLI & OTHERS [2017-2020] 1 SCGLR 663 AT 674.**

The guiding principle on which the courts have treated and accepted traditional evidence as sufficient to establish title to land was that:

1. Oral evidence of tradition was admissible and might be relied upon to discharge the onus of proof if it was supported by the evidence of living people of facts within their own knowledge. Commissioner of Lands v. Adagun (1937) 3 W.A.C.A. 206 cited;

2. Where it appeared that the evidence as to title was mainly traditional in character on each side and there was little to choose between the rival conflicting stories the person on whom the onus of proof rested must fail in the decree being sought for. Kodilinye v. Odu (1935) 2 W.A.C.A. 336, and Abakam Effiana Family v. Mbibado Effiana Family [1959] G.L.R. 326 C.A. cited;

3. Where there was a conflict of traditional history the best way to find out which side was probably right was by reference to recent acts in relation to the land. Yaw v. Atta [1961] G.L.R. 513 cited;

4. Where claims of parties to an action were based upon traditional history which conflicted with each other, the best way of resolving the conflict was by paying due regard to the accepted facts in the case which were not in dispute, and the traditional evidence supported by the accepted facts was the most probable. Beng v. Poku [1965] G.L.R. 167 cited;

5. Where the whole evidence in a case was based on oral tradition not within living memory, it was unsafe to rely on the demeanour of the witnesses to resolve conflicts in the case. Adjeibi-Kojo v. Bonsie (1957) 3 W.A.L.R. 257, P.C.;

6. Where the admission of one party established that the other party had been in long undisturbed possession and occupation of the disputed land, the party making the admission assumed the onus to prove that such possession was inconsistent with ownership. The law was that such a person in possession and occupation was entitled to the protection of the law against the whole world except the true owner or someone who could prove a better title; and

7. In a claim for title to land where none was able to show title because of want of evidence, or that the evidence was confusing and conflicting, the safest guide to determining the rights of the parties was by reference to possession. Dictum of Van Lare J.S.C. in Summey v. Yohuno [1962] 1 G.L.R. 160 at 167. S.C. cited.

APPLICATION OF THE TEST IN AGO SAI v KPOBI TETTEH TSURU [2010] SCGLR 762

Facts: The Respondent, who described himself as the occupant of the La Stool commenced this suit in the High Court, Accra against the Appellants for a declaration of title to all Ogbojo lands. The respondent relied on traditional evidence and contended that Ogbojo lands were part of La Stool Rural Lands which it laid claim to by conquest of the

Nunguas in 1690 and these lands stretched from the foot of the Akwapim hills to the place where the La township was situated. It was their case that subjects of the La Stool settled on these lands but owed allegiance to the stool who had always been the allodial owner and that these La rural villages which the La citizens were allowed to found numbered about thirty three, Ogbojo inclusive. The respondent further averred that there were copious number of judgments which supported their claim to the allodial ownership of all La rural lands. According to the respondent, in recent times, the appellant who was an 'Onukpa'or 'Headman' of the village of Ogbojo has been asserting a claim to Ogbojo lands as belonging to him and his family absolutely and has refused to recognise the allodial title of the La Stool to Ogbojo lands.

The appellant strongly resisted the respondent's claims. They admitted they were subjects of the La Stool and also relied on traditional history which traced their claim and acquisition to their hunter, herbalist and farmer forebears who founded the settlement under an Ogbojo tree. The appellant contended that the head and lawful representative of the families and their predecessors had consistently made absolute grants of Ogbojo lands without reference to the La Stool and some of which had been registered for over twenty years without any hindrance from the La Stool.

The trial judge who made concrete findings of fact on the basis of the evidence adduced before her dismissed the case of the respondent and said that she was inclined to believe that the La Stool was now putting up the claim of ownership of Ogbojo lands because of the commercial value those lands had acquired in recent times. Dissatisfied with the decision, the respondent appealed from it to the Court of Appeal on several grounds. The Court of Appeal allowed the appeal and set aside the judgment of the trial High Court. The appellant then appealed to the Supreme Court.

The Supreme Court held allowing the appeal:

> *"it was a worn out principle that where in a land suit the evidence as to title to land was traditional and conflicting, the surest guide was to test such evidence in the light of recent acts to see which was preferable. In the instant case, the appellants tendered exhibits to support their claim of ownership and these documents testified to grants of portions of Ogbojo lands by the Anahor and Dzirase families and the La Mantse was neither a party nor a signatory. They also tendered arbitration proceedings which arbitration published an award that the lands were for the Ogbojo chief and his people. Furthermore, Nii Anyetei Kwakwranya II, the immediate past chief of Labadi acknowledged the appellants as the owners of Ogbojo. The evidence of the appellants was buoyed by acts of ownership like grants of lands to strangers covered by exhibits whereas evidence of recent acts of ownership by the respondent was nil.*

Per Atuguba JSC:

> ***"****The appellant's case has been clearly supported by documentary evidence, open and physical acts of ownership with regard to the land and some independent witnesses such as the second respondent witness. . . the chief of Ashalley Botwe who shares a boundary with Ogbojo village. All these in law strengthen the appellant's case against that of the respondent."*

<u>Impressions and Demeanour on Evaluating Traditional Evidence</u>

Generally, pursuant to Section 80 of the Evidence Act NRCD 323, the court is permitted to look at the demeanour of a witness in assessing credibility. Regarding traditional evidence, the established rule is that the impressive delivery and presentation of a case by parties and witnesses should not be allowed to be used as the sole basis for deciding which traditional evidence to accept.

This principle was highlighted in ***Adjeibi-Kojo v Bonsie [1957] 3 WALR 257*** when the court stated thus

> "*Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their beliefs. In such a case demeanour is little guide to the truth*."

This point was further discussed in ***In re Tahyen & Assago Stools; Kumanin II (Substitued by) Oppon v Anin*** [1998-99] SCGLR 399. It was held in that case that :

> "*In assessing rival traditional evidence, the court must not allow itself to be carried away solely by the impressive manner in which one party narrated his version, and how coherent that version is; it must rather examine the events and acts within living memory established by the evidence, paying particular attention to the undisputed acts of ownership and possession on the record; and then see which version of the traditional evidence, coherent or incoherent, is rendered more probable by the established facts and events. The party whose traditional evidence such established acts and events support or render more probable must succeed unless there exists on the record of proceedings a very cogent reason to the contrary. And the presumption of title raised by acts of possession and ownership appears now a s section 48 of the evidence decree, 1975 (NRCD 323). It follows from that provision that a party can succeed in his claim even if his traditional evidence is rejected*."

Failure of Traditional Evidence

In some instances, the two traditional stories may be quite unreliable. When this happens, a party whose traditional evidence is dismissed might still succeed in their claim if there is other evidence, such as possession. In *Adwubeng v Domfeh [1996-97] SCGLR 660* the Supreme Court held as follows:

> Although each party denied that the other's ancestor was the first to settle at Duasi, neither denied the ancestry of the other. In the circumstances, the resolution of the traditional evidence did not depend on the acceptance or rejection of the entire history of a party as done by the trial judge, but on the determination of which of the ancestors was first to settle at Duasi*. In such a situation where it was difficult to make such a finding, the recommended approach was to have recourse to facts in recent years as established by the evidence. Thus a party could still succeed in an action for declaration of title even if his traditional evidence was rejected..*"

This passage emphasizes that where the court is faced with conflicting evidence, traditional evidence does not have to be used as the sole basis for the decision of the court. Other evidence before the court will be relevant in making a decision on the case. That may result in a party winning his case even if his traditional evidence fails, provided there is other evidence which the court can safely use as the basis of its decision.

The presumption of ownership raised under section 48 of the Evidence Act can aid a person to win his case even where his traditional evidence fails. When section 48 was applied in ***In re Tahyen & Assago Stools*** *,* it was held that :

> "The party whose traditional evidence such established acts and events support or render more probable must succeed unless there exists, on the record of proceedings , a very cogent reason to the contrary. And the presumption of title raised by acts of possession and ownership appears now as section 48 of the evidence Decree , 1975 (NRCD 323). It follows from that provision that a party can succeed in his claim even if his traditional evidence is rejected."

THE ROLE OF BOOKS, SONGS AND LITERATURE IN TRADITIONAL EVIDENCE

Section 130 of NRCD 323

130. Deeds and ancient writings

(2) Evidence of a hearsay statement is not made inadmissible by section 117 if the statement is contained in a writing more than twenty years old and the statement has since been acted upon as true by persons having an interest in the matter.

In ***Hilodjie & Anor v George*** [2005-2006] SCGLR 974

Facts: On the 19th of May 1999, the Plaintiff/Respondent/Respondent obtained judgment for a declaration of title to a 34.6 acres piece of land lying at Okwenya in the Manya Traditional area. He maintained that he was compelled to institute these proceedings when the Defendant/Appellant/Appellant allegedly trespassed on to a portion (1.72 acres) of this land which he claimed to have obtained by way of a gift in 1975, from the Manya -Aklomasu family, owners of all Okwenya lands, and which said transaction he alleged was evidenced by the registered deed of gift tendered at the trial as the Exhibit A.

Both the 1st Appellant as well as the Respondent each claimed title to the same piece of land, each party's grantor relied on traditional evidence in proof of their original title. Both the High Court and Court of Appeal placed weight on N.A. Azu's history of the Krobos as referred to in the Jackson report and gave judgment to the Respondent. The Supreme Court overturned the decision of the two lower Courts and held as regards the effect of the Jackson report as follows:

> "*Jackson's enquiry which was to ascertain inter alia, the boundaries between Osudoku and Manya Krobo necessarily involved a determination of the extent of Akuse lands. The Konor of Manya Krobo was present and gave evidence and so was the 2nd Appellant family.*
>
> *In any event, while those accounts may have served the purposes of his commission well, the same cannot be said of this judicial exercise in which the principal argument is that quite apart from other material evidence on the record,* ***the substantial evidence of acts of possession on the record, must take precedence over these unreliable text book accounts****.*
>
> *In my opinion, in cases of this nature, historical accounts from other sources, text book accounts included, which are nothing more than a repeat of the disputed or inconclusive traditional evidence already adduced at the trial, ought to attract very minimal weight. I do not think such matters ought to be preferred to proven acts of effective ownership. In short, the report does not, in the context of this case, qualify as a fact in recent memory, let alone vital one.".*

The Court also held:

> "Also, the trial judge's reliance on the lyrics of a song, in the light of the very text of the song as translated by the learned trial judge, where two people are laying claim to the Krobo Mountain, cannot be justified."

THE LAW ON DIGITAL/ELECTRONIC EVIDENCE IN GHANA

Presently, electronic devices have supplanted the more traditional modes of communication like letters and telegraphs, hence the need for the law and its interpretations to move in a similar direction. Electronic or Digital evidence has, therefore, become necessary to keep up with the needs of the present time. According to Justice Brobbey, digital or electronic evidence refers to evidence in any form of information stored, transmitted or reproduced in an electronic form for use in court proceedings. Digital evidence or electronic evidence also refers to any probative information stored or transmitted in digital form that a party to a court case may use at trial.[1] Examples of electronic evidence include ATM transactions, video recordings, audio recordings, internet browser histories, emails etc.

Under the Evidence Act NRCD 323, "writing" as defined under Section 179 seeks to capture some major forms of electronic evidence. Section 179 states as follows:

> "**writing**" includes handwriting, typewriting, printing, photostating, photographing, mechanical or electronic recording, and any other means of recording upon a tangible thing, a form of communication or representation, including letters, words, pictures, sounds or symbols, or combinations of those things."

As such, the provisions in the Evidence Act, that regulate writing are applicable to all other forms of digital recordings. This was stated in **SELORMEY V THE REPUBLIC [2001-2002] 1 GLR 144** where it was held that

> "Information from a computer as an electronic recording, was a writing or document under section 179 of NRCD 323. Their admissibility was therefore governed by the provisions on documents in NRCD 323 regarding identification, authentication or relevance."

USE OF DIGITAL/ELECTRONIC EVIDENCE IN COURT

Due to the vast technological advancements made in today's modern age, courts in Ghana, as well as practitioners, must be aware of the rules that govern digital/ electronic evidence. The need for the courts to welcome such evidence was highlighted by Amegatcher JSC in ***Atuguba & Associates v Scipion Capital (UK) Ltd & Another [2017-2020] 2 SCGLR.*** In this instance case, terms of service and payment were agreed upon via email. There was no question in the court's mind that this was a valid agreement. The learned justice stated:

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[1] (Digital Evidence and Computer Crime, second edition (2004) by Eoghan Casey)

> “In an age of dynamism of knowledge in society, businesses and virtually almost everything around us; this court will … not gloss over an offer made and accepted in an email or other electronic means of communication…”

Despite the advantages of electronic evidence, there are significant concerns about its reliability due to the ease with which one could tamper with such material. In the age of "deep fakes," which are videos that digitally alter a person's face or body to make them appear as someone else, this issue is particularly pressing. These deepfakes are often used maliciously or to spread false information.

KEY STATUTES REGULATING ELECTRONIC EVIDENCE

The Act that specifically deal with electronic evidence are:

1. The Evidence Act, 1975 NRCD 323.
2. Electronic Transactions Act, 2008 (Act 772).
3. The Electronic Communications Act (Act 775).
4. The Cybersecurity Act, 2020 (Act 1038).

There are other laws that deal with electronic evidence, but for the purpose of our discussion, we will focus on these four.

ADMISSIBILITY OF ELECTRONIC EVIDENCE

The Electronic Transactions Act 2008(Act 772) in section 144 states that **electronic records include data generated, sent, received or stored by electronic means as a voice, where voice is used in automated transactions and as a stored record**.

It is worth noting that, the general rules on admitting evidence are not replaced by the rules on admitting electronic evidence. In regards to the admissibility and evidential weight of electronic record, Section 7 of the Electronic Transactions Act, 2008 (Act 772) provide as follows:

> *“(1) The admissibility of an electronic record shall not be denied as evidence in legal proceedings except as provided in this Act.*
>
> *(2) In assessing the evidential weight of an electronic record the Court shall have regard to*
>
> *(a) the reliability of the manner in which the electronic record was generated, displayed, stored or communicated,*
>
> *(b) the reliability of the manner in which the integrity of the information was maintained,*

(c) the manner in which its originator was identified, and

(d) any other facts that the Court may consider relevant."

The courts in Ghana based on the above principles have admitted into evidence several forms of electronic evidence such as emails, audio tapes and video evidence. In the case of **International Rom Ltd (No.1) v Vodafone Ghana Ltd & Fidelity Bank Ltd (No.1) [2015-2016] 2 SCGLR 1389** the supreme Court admitted into evidence email records. It was held at holding 2 as follows:

> *"Exhibit 21, the email, which was received from the Chief Compliance Officer of Mauritius was intended to be an official record to be admitted in evidence as proof of the liquidation of International Rom, Mauritius. The email which if it were an ordinary writing would be covered under section 126 (1) of Evidence Act, 1975 NRCD 323, by virtue of sections 5, 6 and 10 of the Electronic Transaction Act, (2008) Act 772 satisfied the requirement of the section 126 (1) of NRCD 323 as an electronic record. The High Court and the Court of Appeal were therefore right, albeit for different reasons, in accepting the email in evidence on the basis of its relevance to the determination of the issue sought to be proved."*

The court was, however, quick to caution on the reliance of such evidence. Holding 3 states:

> *"While the email satisfied the requirement for admitting an electronic record in evidence that satisfaction alone did not decide what probative value or weight to be attached to it. It did not at that stage determine whether or not the party on whose behalf the email was tendered has met the requisite burden of proof required of him on the issue sought to be proved. The probative value or weight to attach could only be determined upon considering all the evidence on the issue in contention because admissibility was one thing, and the weight to be attached or accorded the admitted evidence was another."*

ACCESS TO DIGITAL EVIDENCE

In the case of **ANAS A. ANAS V KENNEDY AGYEPONG SUIT NO GT/892/2018 DATED 15TH MARCH 2023**, Eric Baah JA sitting as an additional High Court Judge stated as regards electronic evidence contained on a pendrive. He stated:

> *"As obiter dicta, I have to state that where counsel conducts a case where electronic evidence on a device such as a pen drive is tendered, it is not sufficient to fasten the device to a document and go home to sleep. You must answer the following questions:*

(a) Is my electronic evidence in the form that the judge can readily access, interpret, or apply?

(b) If the evidence was not played out in court, when, where and how is the judge to access and apply the evidence from the device?

(c) Can the judge access electronic evidence not played out in court or translated and transcribed outside court sitting and in the absence of the parties?

(d) How convenient will it be to expect the judge outside court hours to plug the device to an electronic system anytime he wants to make a reference to its contents?

(e) If the relevant evidence is only a fraction of a bulky content, how reasonable is it to expect a judge after court hours to spend precious time viewing or listening to the entire content to be able to extract the relevant evidence?

(f) If the evidence is not in English, what if the judge does not understand the language? And

(g) Even where he understands it, is it permissible for the judge to turn himself into an interpreter behind the backs of the parties when he writes his ruling or judgment, which is usually at his home?

It is of necessity and desirability that the party tendering the electronic evidence apply to the court for it to be viewed in court. Most counsel do that, but a few forget to do so. Where the evidence is a bulky material, only the relevant or essential parts should be played. Where the relevant parts of the material are bulky or where it is not in the English language, the party tendering it must cause it to be translated and transcribed for convenience of reference by the parties and the court. Where the material is bulky, no pretension should be made that the judge can store the information in his memory, to be used during ruling or judgment. No one acquires such extra space in his brain on becoming a judge."

The above serves as a useful guide as to how electronic evidence can be adduced in court.

However, in the cause of an investigation, law enforcement officers are permitted to seize devices containing electronic evidence, order access, store content and then adduce that evidence in court. The legal backing can be found under Section 69 of the Cyber Security Act 2020 (Act 1038) which provides

"**Application for production order of subscriber information**

69. (1) An investigative officer may apply ex-parte to the High Court, for a production order to collect subscriber information.

(2) An investigative officer who makes an application under subsection (1) shall demonstrate to the satisfaction of the Court that there are reasonable grounds to believe that the subscriber information associated with a specified communication and related to or connected with a person under investigation is reasonably required for the purposes of a specific criminal investigation.

(3) Where an investigative officer makes an application under subsection (1), that investigative officer shall

(a) explain why the investigative officer believes the subscriber information sought, will be available to the person in control of the computer or computer system;

(b) identify and explain with specificity the type of subscriber information suspected to be found on the computer or computer system;

(c) identify and explain with specificity the subscribers, users or unique identifier that may be found on a computer or computer system that is the subject of an investigation or prosecution;

(d) identify and explain with specificity the offences in respect of which the production order is sought; and

(e) indicate what measures shall be taken to ensure that the subscriber information will be procured

(i) whilst maintaining the privacy of other users, customers and third parties, and

(ii) without the disclosure of the subscriber information of any party not part of the investigation."

After the grant of this order or in another other case the police may seize an electronic device containing electronic evidence. Section 98 of the Electronic transactions Act provides:

"**Powers of law enforcement officers**

98. (1) This provision is in addition to the powers of arrest, search and seizure of a law enforcement agency provided by law.

(2) A law enforcement agent may seize any computer, electronic record, program, information, document, or thing in executing a warrant under this

Act if the law enforcement officer has reasonable grounds to believe that an offence under this Act has been or is about to be committed"

After seizure, section 99 of the Electronic Transactions Act permits the police to have access to the content.

There is a presumption that the contents of a computer belong to the owner Section 139 of Act 772 provides

"**Ownership of programme or electronic record**

139. A programme or electronic record held in a computer is deemed to be property of the owner of the computer."

OBJECTIONS TO THE ADMISSIBILITY OF ELECTRONIC EVIDENCE

I. OBJECTIONS BASED ON HEARSAY

If the person who created the electronic evidence is different from the one trying to present it, then the statement contained in the recording would be considered hearsay. This is because the person seeking to admit the electronic evidence is attempting to use it as proof of the truth of the matter stated.

II. OBJECTIONS BASED ON IDENTIFICATION AND AUTHENTICATION

Before electronic evidence will be admissible in court it must be found to be authentic. The Evidence Act under Section 136 provides:

"136. **Authentication**
(1) Where the relevancy of evidence depends upon its authenticity or identity, and the authentication or identification is required as a condition precedent to admission, that requirement is satisfied by evidence or any other showing which is sufficient to support a finding that the matter in question is what its proponent claims.

(2) Permissible means of authentication or identification include, but are not limited to, those provided in sections 137 to 161."

The above points to the fact that before electronic evidence can be admissible, it must satisfy one of the requirements of authentication under Sections 137 to 161.

How, therefore, can the traditional forms of authentication be used when it comes to authenticating modern communications that occur over email, text, and social media? The same kinds of authentication issues that arise when letters or testimony about telephone calls are offered at trial also arise when a party seeks to offer electronic forms of evidence.

For example, a defendant is charged criminally for making a threat via e-mail. It will not be sufficient for the prosecution to offer a printout of the e-mail bearing the e-mail address of the defendant in the "send" line of the e-mail. Just as someone could write a letter and falsely sign another's name, someone could use the e-mail address of another person to make a threat.

So how would the prosecutor authenticate the e-mail?

As with other evidence, there is no one required method. The prosecutor would have to adduce sufficient foundational evidence for the jury to be able to find by a preponderance of the evidence that the defendant sent the e-mail. A witness testifying that she saw the defendant send the e-mail would be sufficient, as would a witness testifying that the defendant admitted sending the e-mail.

In Ghana, Section 137 of the Evidence Act deals with authentication by admission. The section provides:

> *"137. Authentication by admission*
>
> *Authentication may be by evidence that the party against whom it is offered has at any time admitted its authenticity or identify or acted upon it as authentic."*

AUTHENTICATION OVER THE INTERNET

Many criminal acts are committed online. Although evidence of these acts may be easy to obtain, proving the identity of the accused person as the perpetrator can be challenging. The anonymity available on the Internet makes authentication of some postings difficult but not impossible to deal with. Some creative investigation is often required.

For instance, in the case of **UNITED STATES V. BYNUM 604 F.3D 161 (4TH CIR. 2010).**

FACTS:

An FBI Special agent was working undercover and using an informant's password to enter a child pornography online chat group administered by Yahoo. He observed on two occasions that someone using the name "**markie_zkidluv6**" had uploaded to the group's website a dozen photos depicting children engaged in sexual acts. Through the following steps, the accused person was arrested:

1. A subpoena to Yahoo to obtain subscriber information on "Markie" and IP addresses associated with the uploads; use of a free public website that directed him to the Internet Service Provider associated with those addresses;

2. A subpoena to the provider which indicated that "markie" had used a phone-based dial-up service to access the internet; and

3. Another subpoena to the phone and internet companies providing the service.

4. The agent obtained Bynum's name and address (which was his parent's home).

5. The agent returned to the online chat group, saw a new posting of a video by "Markie," and by accessing "Markie's" profile information, he found a photo of Bynum, and a statement that Bynum, a 24-year-old single male living in North Carolina want[s] to chat with any cute girls that live close by that's up for a little fun."

6. The FBI obtained a search warrant and, on a laptop computer, found 5,074 photos and 154 videos of child pornography.

It is hardly surprising that Bynum did not challenge authentication. The government's investigation tied the computer and the images to him, and his posting of his photo along with a statement as to his age and gender. Bynum did argue that there was insufficient evidence to prove beyond a reasonable doubt that he, rather than another occupant, resident or friend was the person responsible for the images. The court of appeals found substantial evidence to support the jury's verdict of guilty.

NOTE: Discussion on the case of **EDMUND ADDO V THE REPUBLIC** as case currently pending in the High Court involving the sharing of intimate images. The facts are as follows:

The victim then a Senior High School student, telephoned her mother to inform her that she had seen her nude pictures on social media. Her mother, the complainant, verified this information on Facebook which led her to a website where indeed she found pictures of her daughter in various anal and oral sex activities including pictures that showed the genitals of the victim.

A complaint was lodged at the Police Station and subsequent investigations indicated that the Appellant met the victim at a party when she was fourteen years old. Some months later, the Appellant invited the victim to watch a film at the West Hills Mall, Accra, on 14th February 2015 after which he proposed love to her. In the first week of March 2015, after the Appellant had taken the victim to a Guest House and demanded to have sex with her and having informed him that she had never had sex, he taught her how to perform oral sex after which he demanded to have anal sex with her but she refused. Thereafter, the Appellant sent pornographic videos depicting anal sex to her. Two weeks later, the Appellant invited the victim to his house where he had anal and oral sex with her in his music studio. He took her on other occasions to a Guest House and Hostel where he had both anal and oral sex with her. All the sexual activities were recorded or photographed by the Appellant under the pretext that they were meant for memories of their time together even though she protested.

The Appellant on different occasions instructed the victim to photograph and video record herself showing her fondling her genitals which she did. After a while, the victim refused to visit the Appellant and to send her nude pictures to him when he demanded them. In January 2016, the Appellant began to threaten her via whatsapp messages that if she did not continue with the sending of her nude pictures to him, he would publish her nude photographs on social media. On 25th May 2016, she saw her photographs depicting sexual activities with the Appellant on social media with her face showing clearly while the Appellant's face was hidden. By 28th May 2016, the pictures had attracted 360,000 views.

Upon these facts, the Appellant was arraigned before the High Court, Accra on four counts namely; Defilement contrary to Section 101 (2) of the Criminal Offences Act 1960 (Act 29); Child Pornography contrary to Section 136(b) of

the Electronic Transactions Act, 2008 (Act 772); Child Pornography contrary to Section 136(b) of the Electronic Transactions Act, 2008 (Act 772); Child Pornography contrary to Section 136(c) of the Electronic Transactions Act, 2008 (Act 772).

HOW CAN ELECTRONIC EVIDENCE BE USED?

III. BREACH OF THE RULES OF PRIVACY UNDER ARTICLE 18(2) OF THE CONSTITUTION.

Article 18(2) of the 1992 constitution of Ghana provides

> "18. Protection of privacy of home and other property
> (2) No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic wellbeing of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."

Cases to Consider: Raphael Cubagee v Michael Yeboah Asare; Abena Pokuaa Ackah v Agricultural Development Bank.

(This will be discussed in detail under illegally obtained evidence)

WITNESS STATEMENTS

Prior to 5th March 2015, all witnesses who sought to testify at any trial in Ghana were required to do so orally and in open court. This was the position as spelt out in Order 38 Rule 1 of the High Court Civil Procedure Rules C.I 47. The provision stated as follows:

> *"1. Subject to the Constitution, the Evidence Decree, 1975 (N.R.C.D. 323), these Rules and any other enactment, any fact required to be proved at the trial of an action by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court."*

This position changed as regards Civil trials upon the coming into force of the High Court Civil Procedure (Amendment) Rules 2014, C.I 87. Regarding criminal trials, the position changed based on the practice direction from the case of **REPUBLIC V BAFFOE-BONNIE AND 4 OTHERS SUIT NO J1/06/2018 DATED 6TH JUNE 2018** which came into force on 1st November 2018.

These changes ensured that all trials were conducted in an expeditious and least costly manner. This is in line with Section 178 (4) of the Evidence Act NRCD 323, which provides that

> *"(4) This Act shall be interpreted and applied so as to achieve a consistent law of evidence and the most just, expeditious and least costly administration of the law."*

Also, the High Court (Civil Procedure) Rules, C.I. 47 (2004) was enacted to promote speedy and effective justice by disposing of matters effectively, completely and finally as between the parties and at the same time avoid delays, unnecessary expenses and multiplicity of suits. **See: Order 1 of C.I 47**

Witness Statement

Witness statement is, therefore, a new means of proof intended to substitute viva voce evidence in chief. Ghana, following countries such as the United Kingdom , Canada and India had introduced witness statements to curtail the delays occasioned when a party was under examination-in-chief.

A witness statement is a statement in writing by a person and signed by that person containing the evidence the person would be permitted to give orally at the trial. A witness statement is subject to all the rules of evidence regarding personal knowledge and thus shall not contain anything that the person who signed it would not be permitted to give orally as evidence at the trial.

A witness statement shall remain a statement until it is adopted by the Court at the trial after it has passed the admissibility test. The Court has the power to reject a witness statement or part of it as inadmissible when the person who made it and wishes to rely on it as that person's evidence-in-chief has been sworn by the Court and seeks the conversion of the witness statement from a statement to evidence in-chief.

Any objection to a witness statement or any exhibits attached must be made at the time it is been tendered. This is provided for under Section 6 of the Evidence Act and was discussed in

the case of **The Republic v High Court, Commercial Division Ex parte Kwabena Duffour Civil Motion No. J5/05/2021 dated 10th February 2021.**

Background: This case deals with when an objection can be raised as to the admissibility of evidence. This case arose because of the practice of trial courts rejecting evidence at the Case Management Conference stage in the trial.

> **Held**: *Thirdly, there is a clear internal inconsistency in the direction stated in Part 4(3)(g) of the Practice Direction that objections to any matter disclosed by the Prosecution shall be made, as directed in terms of section 6 of NRCD 323 at the Case Management Conference stage. This inconsistency lies in the fact that the direction flies in the face of the very section 6 of NCRD 323 which the direction clearly defers to. Section 6(1) of the NRCD 323 expressly regulates objections to evidence and it is clearly so headed. In its terms, it provides as follows:-*
>
> ***"6. Objections to evidence;***
>
> ***(1) In an action, and at every stage of the action, an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered."***
>
> *The statutory provisions on objections to evidence says in very certain terms and with clarity that in* ***"an action"****(regardless of whether it is a civil or criminal)****"and at every stage of the action [including case management] an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered".*** *This without fear of contradiction whatsoever means that the only time when an objection can be taken to the admissibility of evidence is* ***at the time*** *(not before, or after, or in between)* ***"when the evidence is being offered".***
>
> *The discussion so far exposes the fact that the High Court's decision that the practice in civil cases where all objections intended to be made are made at the case management conference stage with the effect that if any document annexed to the witness statement was objected to and was upheld by the court that document is marked* ***"Rejected"*** *and "****cannot be used in the trial"*** *by either side or the court itself, flies in the face of the clear provisions of Section 6(1) of the Evidence Act 1975 (NRCD 323). It is a palpable error committed by the High Court.*
>
> *The timing of such objections whether in civil or criminal proceedings must be at the time when the evidence is offered. This is confirmed by the Practice Direction and also the rules of civil procedure. The contrary practice adopted by the High Court in civil and criminal trials is at variance with the Practice Direction and the rules."*

After objections to the admissibility of a person's witness statement have been determined by the Court, the admissible part shall stand as the evidence-in- chief of that person.

<u>When to file witness statements</u>

In a Civil trial, after the application for directions stage, the trial Court will give orders for the filing of witness statements. In a criminal trial, however, it should be at least two clear days before the case management conference.

In a civil trial the witness statements may be filed by the parties simultaneously or at different times as the court may determine in the interest of justice, depending on the nature of the case. In a criminal trial, the prosecution first and after the close of the prosecution's case, the accused person may file.

Criminal trial witness statement

Republic v. Eugene Baffoe-Bonnie (SC dated 7/6/2018)(available on ghalii.org). 2017-2020] SCGLR 327) Practice Direction (Disclosures and Case Management in Criminal Proceedings) (2018) [2017-2020] SCGLR 362)

The practice direction introduced disclosures. What are disclosures? Disclosure refers to releasing information to the accused person in the custody of the prosecution.

In the R v Eugene Baffoe-Bonnie the court held

> *"From the foregoing we hold that, in order to meet the requirements of fair trial in criminal matters, it is the duty of the prosecution in both indictment and summary trials, to disclose to the defence, statements made to the police by persons who will or may not be called to testify as witnesses for the prosecution, as well as copies of exhibits and documents which are to be offered in evidence for the prosecution."*

Things to note:

The witness statement is usually prepared by the prosecutor /lawyer from the statement of the witness given to the police and after the witness conference (may be written by the witness himself);

It shall be a detailed statement of the witness covering all the essential parts of the witness' statement and it must state all documents to be identified or tendered in evidence by the witness;

The witness statement must be dated, signed or thumb printed by the witness. it shall have the Statement of Truth as the final clause: "I verify that this statement is true to the best of my knowledge and belief".

The Witness statement may be used in evidence by the prosecution or the accused. If Witness Statement is used as evidence-in-chief in a criminal matter, it must be read in court before Cross-Examination

Amending the witness statement:

There seems to be a debate as to whether or not a witness statement can be amended? Order 16 of CI 47, which deals with amendments, has not been repealed. A witness statement filed in

the Registry of the Court remains a document in the proceedings until it is adopted by the Court as evidence during the trial. It is submitted that being a document in the proceedings, a witness statement so filed may be amended before its adoption as evidence. A party can however file a supplementary witness statement.

Whether or not a party can choose not to give evidence even after filing a Witness Statement

In the recent case of John Mahama v Electoral Commission and Nana Akufo-Addo the court discussed this point in the ruling delivered on 11th February 2021.

FACTS:

At the close of the Petitioner's case, Counsel for 1st Respondent announced to the court that the 1st Respondent does not intend to adduce any evidence in the case and, therefore, wanted its case closed. Counsel for the 2nd Respondent associated himself with the position taken by the 1st Respondent and reiterated that the 2nd Respondent would also close his case because he was not adducing any evidence.

Petitioner opposed the position taken by the Respondents and argued that the Respondents, especially the 1st Respondent, cannot refuse to adduce evidence in the case. The grounds upon which Counsel for the Petitioner opposed the Respondents' decision not to adduce evidence are that they have both elected to adduce evidence, in that they have filed and served Witness statements, as ordered by the Court.

Held:

> *"We are of the considered opinion that it would be wrong in law to hold that a party is deemed to have elected to adduce evidence as soon as that party files and serves a Witness statement in compliance with a Court order. To hold so would mean that once a party files and serves a Witness statement that party mandatorily has to mount the witness box and adduce evidence at the trial. This position is not borne out of the rules. Indeed Order 38 r 3E (5), clearly provides otherwise as follows:-*
>
> *''(5) If a party who has served a Witness statement does not call the witness to give evidence at the trial or put the Witness statement in as hearsay evidence, any other party may put the Witness statement in as hearsay evidence.''*
>
> *The above rule implies that when a witness statement is filed and served the party who filed same may choose not to give evidence at the trial. The principle is the same in viva voce evidence where a party or witness who mounts the witness box, testifies in chief and fails to turn up for cross-examination. Such a witness cannot be compelled by the court to appear for cross-examination. He suffers the penalty of the evidence being expunged from the record….*
>
> *...The above rule also points to the fact that a witness statement filed and served does not constitute evidence in law till the author of the statement mounts the witness box,*

takes the oath and prays that the witness statement be adopted as evidence in chief pursuant to Order 38 r 3E(2), which provides thus:

"(2) Where a witness is called to give oral evidence under subrule (1), the witness statement of that witness shall stand as the evidence in chief of that witness unless the Court otherwise orders."

RELEVANCE, ADMISSIBILITY AND WEIGHT OF EVIDENCE

Much of the law of evidence is concerned with the kind of evidence which can legitimately be put before a court and taken into account in decision-making. If evidence is to be admissible, two things are required. First, it must be relevant. Secondly, its use must not be prohibited by an exclusionary rule.

WHAT IS RELEVANCE?

A fact is said to be relevant to another if by itself, or in connection with other facts it renders the existence of a fact in issue either probable or improbable. "In very general terms relevant evidence may be said to be evidence which is logically connected with those matters in dispute between the parties"[1]

Relevancy, thus implies relationship and such relationship with the fact in issue convinces or has the tendency to convince a judge as to the existence or otherwise of fact in issue. It refers to the evidence having any tendency to make the existence of any fact that is of consequences to the determination of the action more probable or less probable than it would be without the evidence.

In contrast, evidence can be said to be irrelevant when it does not tend to establish or create a belief as to the existence or non-existence of material facts which are in issue. The main rule governing the entire subject is that all evidence, which is sufficiently relevant to an issue before the court is admissible, and all that is irrelevant or insufficiently relevant should be excluded.

CASE LAW DEFINITION OF RELEVANCE

DPP V KILBOURNE where Lord Simon said

> "Evidence is relevant if it is logical, probative or disprobative or evidence which makes the matter which requires proof more or less probable"

In the case of **INTERNATIONAL ROM LTD (NO.1) V VODAFONE GHANA LTD & FIDELITY BANK LTD (NO.1) [2015-2016] 2 SCGLR 1389** the Supreme Court stated:

> *"Evidence is said to be relevant if it renders a fact in issue in a case more likely or less likely as the case may be or if it affects an issue that goes to the credibility of the witness. (See Evidence Law and Practice 2nd Edition by Eric Cowsill and John Clegg, page 72). This however did not bring the issue to a close because admissibility is one thing and the weight to be attached or accorded the admitted evidence is another."*

---

[1] (Walkers on Evidence (5th edn, 2020)

Considering the definitions, one realizes that two things must co-exist in determining the relevance of evidence, namely, materiality and the probative value of the evidence. Two key features can be derived

1. Materiality
2. Probative value.

Materiality

A material connection is where the evidence has a bearing on or relates to the fact in issue. Material evidence is evidence which has a material connection that links the accused with the offence committed, that is, the evidence that relates to the subject matter in issue.

The materiality is established where there is some logical connection between the evidence offered and the issue to be determined.

Probative value

Probative value means the evidence tends to prove or disprove a fact in issue. Probative value also means the evidence has the tendency to establish the major proposition that is required to be proved.

It must be stated that requiring that evidence should be relevant does not mean it should be conclusive. The question should always be whether the evidence is relevant and not whether it conclusively deals with the matter in issue.

RELEVANCE OF EVIDENCE, THE EVIDENCE ACT, NRCD 323

Section 179

"relevant evidence" means evidence including evidence relevant to the credibility of a witness or hearsay declarant, which makes the existence of a fact which is of consequence to the determination of the action more or less probable than it would be without the evidence;

Section 51- Relevant Evidence Admissible

1. Relevant evidence is admissible except as otherwise provided by an enactment.

2. Evidence is not admissible except relevant evidence.

In Ghana, based on section 51 of NRCD 323, all relevant evidence is admissible. Even if evidence is relevant, it may still be inadmissible, on the basis that it falls foul of one of the exclusionary rules of the law of evidence.

However, Irrelevant evidence or evidence that is insufficiently relevant to a fact in issue will be rejected by the court and it is inadmissible. In the case of **R v Sandhu [1997] Crim LR 288** The Court of Appeal held that evidence that illustrated the defendant's state of mind at the time of committing a strict liability offence was irrelevant to prove the issue of the defendant's guilt.

The reason for this is simple: cast your mind back to your studies of criminal law and the fact that strict liability is imposed regardless of mental intention. Thus, the mental intent of the defendant is not a fact in issue and therefore evidence proving or disproving a guilty intention is irrelevant. Example: leading evidence to prove consent in a defilement case is irrelevant to the fact in issue.

JUDICIAL DISCRETION AND ADMISSIBILITY OF EVIDENCE

Although relevance is a prerequisite to evidence being admissible, it is not the sole requirement that needs to be satisfied before evidence can be put before the court. If the evidence is relevant because it proves or disproves a fact in issue, the admission of the evidence will then depend on whether or not it falls foul of any of the exclusionary rules in evidence.

The exercise of judicial discretion in the admissibility of evidence may be considered in both its inclusionary and exclusionary point of view.

I. The Inclusionary Discretion means the discretion of a judge in admitting evidence even if it is regarded as legally inadmissible. This is not applicable in Ghana.

II. Exclusionary Discretion deals with whether a judge can exclude legally admissible evidence in any proceedings.

Section 52- Exclusion of Relevant Evidence

52. Exclusion of relevant evidence

The Court may exclude relevant evidence if the probative value of the evidence is substantially outweighed by

(*a*) considerations of undue delay, waste of time, or needless presentation of cumulative evidence; or

(*b*) the risk that the admission of the evidence will create substantial danger of unfair prejudice or substantial danger of confusing the issues; or

(*c*) the risk, in a civil action, where a stay is not possible or appropriate, that the admission of the evidence will unfairly surprise a party who has not had reasonable grounds to anticipate that the evidence would be offered.

EXCLUSION OF EVIDENCE

The Court has the power to exclude evidence that is legally inadmissible. **Section 8** of the Evidence Act provides as follows:

> **Section 8 Exclusion of evidence.**
>
> *"Evidence that would be inadmissible if objected to by a party may be excluded by the Court on its own motion."*

This is the power of the Court on its own to exclude evidence that may be inadmissible. A distinction is made between evidence that is inadmissible per and evidence that is not. In the case of **AMOAH VRS. ARTHUR [1987-88] 2 GLR 87**, the court held:

> ***"It was the duty of the trial judge to reject inadmissible evidence which had been received, with or without objection, during the trial when it comes to consider his judgment, and if he failed to do so that evidence would be rejected on appeal because it is the duty of the courts to arrive at decisions based on legal evidence only".***

In **EDWARD NASSER V MCVROOM [1996-97] SCGLR 468** the plaintiff sued his employer for negligence because a house allocated to him by the employer had caught fire, resulting in the destruction of his property. He alleged that the fire was caused by faulty electrical wiring. There was nothing in the pleadings alleging an absence of a building permit, the age of the building or the nature of the construction. However, evidence was led by the plaintiff's witnesses concerning building permits, certificate of occupancy, construction and age of the building, without objection from the defendant. On appeal, it was argued for the defendant that the trial court erred in considering such evidence when those facts had not been pleaded. Writing for the unanimous Supreme Court, Acquah JSC (as he then was), examined the state of the authorities. He then said at 477:

> "*The correct answer, in the light of the Evidence Decree, 1975 ... is that where evidence in respect of an unpleaded fact had been led without objection, unless*

that evidence is inadmissible per se, the court is bound to consider that evidence in the overall assessment of the merits of the case. And an appeal or review against the judgment may succeed only where it is established that the admission has occasioned a substantial miscarriage of justice."

Based on the above, evidence of an unpleaded fact is admissible. This is the principle in **ABOWABA V ADESHINA (1946) 12 WACA 18** where it was stated that

"where evidence, which could have been ruled out as inadmissible to prove a material fact which was not pleaded, has nevertheless been adduced without objection and is before the judge… the trial judge was bound to take it into consideration…"

WHAT KIND OF EVIDENCE IS IN ADMISSIBLE PER SE

However, there are some pieces of evidence that are inadmissible per se. This means the court can exclude them whether an objection is raised or not. In the case of **IN RE OKINE (DECD); DODOO AND ANOTHER v OKINE AND OTHERS [2003-2005] 1 GLR 630** it was held as follows:

Held:

"Evidence is inadmissible per se when a statute or law makes it inadmissible and its inadmissibility is not founded upon the fact that the matter to be proved by that evidence had not been pleaded. As was explained in Abowaba v Adeshina (1946) 12 WACA 18, ***the types of evidence inadmissible per se include hearsay, unstamped documents and unregistered documents****. It is the law itself which makes them inadmissible, and they are inadmissible even if the opposing party does not object."*

Based on the above, evidence is inadmissible per se if it is provided by a statute or law that such evidence is inadmissible per se. From the above authority, evidence that can be considered inadmissible per se includes:

1. Hearsay
2. Unstamped documents
3. Unregistered document

<u>HEARSAY</u>

As regards hearsay, the law is clear, as provided for under Section 117 of the Evidence Act, that Hearsay evidence is not admissible except as it falls under one of the exceptions stated in the Evidence Act or any other enactment or by the agreement of the parties.

<u>UNSTAMPED DOCUMENTS</u>

As regards unstamped documents, one must make reference to Section 32(6) of the Stamp Duty Act, which makes unstamped instruments legally inadmissible. The Stamp Duty Act, 2005, Act 689 provides as follows:

> ***Section 32***
>
> *"(6) Except as expressly provided in this section, an instrument*
>
> *(a) executed in Ghana, or*
>
> *(b) executed outside Ghana but relating to property situate or to any matter or thing done or to be done in Ghana,*
>
> *shall except in criminal proceedings,* ***not be given in evidence or be available for any purpose unless it is stamped in accordance with the law in force*** *at the time when it was first executed."*

The law regarding unstamped instruments presented as evidence has recently seen some revision by the Supreme Court in the case of **Nii Aflah vs Benjamin Kwaku Boateng Civil Appeal No J4/80/2022 dated 22nd March 2023 (unreported)**.

The Supreme Court speaking per Kulendi JSC undertook an exposition on the law on stamping and referred to all the relevant authorities on the subject. See:

I. **Amonoo & Ors v. Dee [1975] 1 GLR 305;**
II. **Antie & Adjuwuah vrs, Ogbo [2005-2006] SCGLR 494 at page 506;**
III. **Lizori Ltd. v. Boye & School of Domestic Science and Catering (2013-14) 2 SCGLR 889;**
IV. **Mary Tsotsoo Laryea vrs Amarkai Laryea Civil Appeal No. J4/36/2016 dated 7th June 2018 (unreported)**
V. **Woodhouse Ltd. vrs. Airtel Ghana Ltd [2017-2018] SCLRG 615.**

The learned Supreme Court judge highlighted that over the years there have been some inconsistencies with the rulings on the subject of admissibility of unstamped instruments. The learned judge stated that whereas in the cases of **Amonoo v. Dee, Auntie v. Ogbo** and **Mary Tsotsoo** on the one hand, the Supreme Court essentially decreed a discretion in trial Courts to admit unstamped documents and instruments subject to the party later stamping the document. The Supreme Court in the cases of **Lizori** and **Woodhouse** on the other hand, was emphatic and unequivocal that stamping is a precondition for the admissibility of documents and instruments liable to stamping and trial courts have no discretion to admit such documents subject to stamping.

The learned judge proceeded to state that there was a need to bring some finality to the discussion and bring the debate to an end. Kulendi JSC proceeded to consider the

relevant statutory provisions that is the Stamp Act 1965 (Act 311) as well as the Stamp Duty Act, 2005 (Act 689). For ease of reference, I will reproduce the relevant provisions in this opinion.

Section 14 of the Act 311 provides as follows:

"(1) Where an instrument chargeable with a duty is produced as evidence in a Court in a civil matter, or before an arbitration or referee, the judge, arbitrator or referee, as the case may be, shall take notice of any omission or insufficiency of the stamp on the instrument.

(2) If the instrument is one which may legally be stamped after its execution, it may, on payment to the registrar of the Court or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping that instrument, be received in evidence, saving all just exception on other grounds:

Provided that any instrument which is sufficiently stamped under the provisions of this Act shall be receivable in evidence although such instrument may be unstamped or is insufficiently stamped according to the law in force in the place where such instrument was executed.

(3) The registrar, arbitrator or referee receiving the duty and any penalty shall give a receipt for it, and make an entry in a book kept for that purpose of the payment and of the amount thereto, and shall communicate to the commissioner the name or title of the proceeding in which, and of the party from whom, he received the duty and penalty and the date and description of the instrument, and shall pay over to the central revenue department the money received by him for the duty and penalty.

(4) Upon production to the Commissioner of any instrument in respect of which any duty or penalty has been paid under this section, together with the receipt of the registrar, arbitrator or referee, as the case may be, the payment of such duty shall be denoted on the instrument by an impressed stamp or stamps, and the payment of such penalty shall thereon by a certificate under the hand of the Commissioner and his seal.

(5) Save as otherwise expressly provided in this section, any instrument executed in any part of Ghana or relating, wheresoever executed to any property situate, or to any matter or thing done or to be done, in any part of Ghana, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time where it was first executed."

Secondly, **section 32 of Act 689** provides:

> *"(1) Where an instrument chargeable with a duty is produced as evidence*
>
> *(a) in a Court in a civil matter, or*
>
> *(b) before an arbitration or referee,*
>
> *the judge, arbitrator or referee, shall take notice of an omission or insufficiency of the stamp on the instrument.*
>
> *(2)* ***If the instrument is one which may legally be stamped after its execution, it may, on payment of the amount of the unpaid duty to the registrar of the Court or to the arbitrator or referee, and the penalty payable on stamping that instrument, be received in evidence subject to just exception on other grounds.***
>
> ***(3) An instrument which is sufficiently stamped under this Act shall be receivable in evidence although that instrument may not have been stamped or is insufficiently stamped according to the law in force in the place where that instrument was executed.***
>
> *(4) The registrar, arbitrator or referee shall*
>
> *(a) give a receipt for moneys paid as duty or penalty; …*
>
> *(6) Except as expressly provided in this section, an instrument*
>
> *(a) executed in Ghana, or*
>
> *(b)* ***executed outside Ghana but relating to property situate or to any matter or thing done or to be done in Ghana, shall except in criminal proceedings, not be given in evidence or be available for any purpose unless it is stamped in accordance with the law in force at the time when it was first executed."***

After a careful consideration of the relevant statutory provisions the learned judge stated that the provisions do not give a court the discretion whether to admit or reject an unstamped document. The court further stated that to the extent that the case of **Antie vrs. Ogbo** granted such a discretion which was not borne out from the relevant statute the decision is *per incuriam* to the extent that it seeks to propound a general rule of practice on the admissibility of unstamped documents or instruments.

The settled position of the law is that stamping and or the payment of the penalty is a precondition or condition precedent to admission in evidence of any document or instrument liable to stamping. The learned judge therefore laid down the following guidelines for dealing with unstamped documents:

> *"The clarity of the legislative intent and effect may be better inferred from a reading of the entire section 32. The said section 32 read as a whole, imposes the following procedural practice regime in respect of situations where a document or instrument chargeable with stamp duty is sought to be tendered in evidence in a civil court or before an arbitration or referee:*
>
> *i. The judge, arbitrator or referee, is obligated to* ***take notice of an omission of stamping or insufficiency of the stamp*** *on the instrument in issue.*
>
> *ii. The party who produces such an instrument must* ***be given the option*** *by the Court to pay the amount of unpaid duty and any applicable penalties to the registrar of the court or to the arbitrator or referee.*
>
> *iii. Prior to the grant of this option, the document or instrument is* ***neither received by the Court in evidence and marked as an exhibit nor rejected by the Court and marked as such.***
>
> *iv.* ***After the payment*** *of the amount of unpaid duty and any penalties,* ***the document can then be tendered and received in evidence*** *by the Court.*
>
> *v. After the payment of the applicable stamp duty and/or penalty and at the point of tendering or reception in evidence, the instrument or document may be subject to any just exception or objections on other grounds that may arise. This is to say, there may well be other justifiable exceptions and/or grounds to exclude a duly stamped document from being received in evidence or having been received in evidence, from being given negligible or substantial weight in the process of evaluation even though admitted evidence during a trial."*

What the above exposition, therefore, means is that once the indenture was not stamped, it was legally inadmissible. However, if before it is admitted into evidence, the court notices that it is not stamped, the party must be given the option by the court to pay the amount of unpaid duty and any applicable penalties to the registrar of the court or to the arbitrator or referee. This option is only available prior to the court admitting the evidence and marking it as an exhibit or rejected by the court and marked as such.

UNREGISTERED DOCUMENTS

Under Section 24(1) of the Land Registry Act, 1962 (Act 122) (now repealed), the non-registration of an instrument rendered it no effective. Section 24 (1) of the Land Registry Act, 1962 (Act 122) says:

> "24. (1) Subject to subsection (2), of this section, an instrument other than, (a) a will, or (b) a judge's certificate, first executed after the commencement of this Act shall be of no effect until it is registered."

And "Instrument" is defined under section 36 of Act 122 as "any writing affecting land situate in Ghana, including a judge's certificate and memorandum of deposit of title deeds."

The courts in Ghana interpretated “no effect” to mean that an unregistered document was void and thus inadmissible. This position was stated by the Supreme Court in **ANTIE & ADJUWUAH v OGBO [2005-2006] SCGLR** where the court stated per Wood JSC (as she then was) as follows:

> *“All the issues discussed so far have been resolved in favour of the appellants, ie the defendants. But there is one final legal conclusion which cannot, however, be faulted. The defendants have complained that the Court of Appeal erred in rejecting exhibit R2 in evidence on the basis also that it had not been registered. This criticism is unjustified.* ***The court properly excluded the document, given that the well-established principle is that the explicit provision in section 24[sic] of the Land Registry Act, 1962 (Act 122), render the unregistered document ineffective and wholly inadmissible****.”*

This position as to the inadmissibility of unregistered documents as stated in **ABOWABA V ADESHINA (1946) 12 WACA 18**, **IN RE OKINE (DECD); DODOO AND ANOTHER v OKINE AND OTHERS [2003-2005] 1 GLR** and **ANTIE & ADJUWUAH v OGBO [2005-2006] SCGLR** is no longer the position of the law.

The current position of the law was spelt in **MARY TSOTSO LARYEA AND 4 OTHERS VRS AMARKAI LARYEA** Civil Appeal No. J4/36/2016 dated 7th June 2018 where the Supreme Court speaking per Pwamang JSC stated as follows:

> *“The trial judge clearly erred in rejecting that document and excluding it from the evidence because non-registration of an instrument relating to an interest in land does not make the document inadmissible in evidence.* ***By the provisions of Section 24 of the Land Registry Act, 1962 (Act 122) non-registration makes a document relating to an interest in land invalid and that means that it does serve to create enforceable interests in land. However, such a document is admissible in evidence and its contents can be used as estoppel against persons who signed it****. See Donkor v Alhassan [1987-88] 2 GLR 253, and*

MaClean II & Anor v Akwei II [1991] 1 GLR 54. As that document was wrongly excluded from the evidence we set aside the trial judge's ruling rejecting 2nd plaintiff's lease dated 1st January, 1990."

STATEMENT OF A CO ACCUSED USED AGAINST AN ACCUSED PERSON

It should be noted that evidence can be admissible for some purposes and inadmissible for others. For example, if Kweku and Yaw rob a bank and Yaw later confesses to the commission of the crime, his confession will be both relevant and admissible as evidence against him in court; however, it cannot be used as evidence against Kweku. In these instances, it is likely that the defendants will be tried separately because of the risk that the co-defendant will be prejudiced.

In criminal matters, statements given by co-accused serve as evidence against the accused alone and not co-accused persons. In the case of **STATE V. BROBBEY AND NIPA, t**he appellants were jointly charged with two other persons with the offence of murder. The appellants were convicted; the other persons were acquitted. All the evidence adduced at the trial was circumstantial. However, X one of acquitted persons, had made a statement to the police, exhibit M, in which he confessed that he and the accused were in the vicinity of the murder on the fatal night. This statement was made in the absence of the appellants, and at the trial, X denied that he had ever made such a statement.

Although the trial judge warned that exhibit M was not evidence against the rest of the accused, the Supreme Court found that he "in the same breath particularised the material parts of the very same statement and emphasised them as evidence which the jury were entitled to act upon."

Held:

"A careful scrutiny of the proceedings on the whole shows that not one of the material facts referred to by the trial judge is evidence against the appellant as the only source from which such facts come is the statement exhibit M. In fact the prisoner who made it denied ever making such a statement but even if the jury had believed that he in fact made such a statement, ***it could only be used against the prisoner concerned and not against any of the others.*** *Thus in one breath the learned trial judge told the jury "this statement (exhibit M) is not, repeat, not evidence against the rest of the accused," yet he, in the same breath, particularised the material parts of the very same statement and emphasised them as evidence which the jury were entitled to act upon. The only effect such a direction could have is to cause confusion in the mind of the jury and we are convinced that the summing-up did produce such effect. The fact that the jury convicted the appellants*

*and acquitted the two other prisoners shows that they acted upon exhibit M and following the summing-up must have believed that it was the second appellant who fired the gun that killed Nsonamoah and that he did so at the instance of the first appellant, and also that the two others, although present at the scene of the crime were there on a joy-ride only, and not concerned with the commission of the crime**. If exhibit M had been excluded from consideration by the jury it would have been impossible for them to have returned the verdict which they did return. The learned Director of Public Prosecutions has conceded this aspect of the matter, and we are satisfied that there has been a fatal misdirection by direction on inadmissible evidence and in the circumstances it is impossible in law to permit the convictions to stand.**"*

Additionally in the case of **BONSU ALIAS BENJILLO V THE REPUBLIC** it was held that

"An unsworn statement by an accused person unless repeated by him on oath at the trial and he had been cross-examined on it, would be admissible evidence against only the maker and not a co-accused. Since in the instant case, the first accused had been unavailable for trial, his prejudicial unsworn caution statement incriminating the appellant and which he had made in the absence of the appellant, had been wrongly admitted in evidence by the trial tribunal. Accordingly, it should not have been used against the appellant. Lawson v The Republic [1977]1 GLR 63 cited."

Erroneous admission or exclusion of evidence

Where a court erroneously admits or excludes evidence, the decision of that court may be overturned on appeal if the admission or exclusion caused a substantial miscarriage of justice. This is provided for under section 5 of the Evidence Act NRCD 323

"Section 5. Erroneous admission or exclusion of evidence

(1) A finding, verdict, judgment or decision shall not be set aside, altered or reversed on appeal or review because of the erroneous admission of evidence unless the erroneous admission of evidence resulted in a substantial miscarriage of justice.

(2) In determining whether an erroneous admission of evidence resulted in a substantial miscarriage of justice, the Court shall consider

(a) whether the trial court relied on that inadmissible evidence, and

(b) whether an objection to, or a motion to exclude or to strike out, the evidence could and should have been made at an earlier stage in the action, and

(c) whether the objection or motion could and should have been so stated as to make clear the ground or grounds of the objection or motion, and

(d) whether the admitted evidence should have been excluded on one of the grounds stated in connection with the objection or motion, and

(e) whether the decision would have been otherwise but for the erroneous admission of evidence.

(3) A finding verdict, judgment or decision shall not be set aside altered or reversed on appeal or review because of the erroneous exclusion of evidence unless,

(a) the substance of the excluded evidence was made known to the Court by the questions asked, by an offer of proof, or by any other means, and

(b) the Court which decides on the effect of the error also determines that the excluded evidence should have been admitted and that the erroneous exclusion of the evidence resulted in a substantial miscarriage of justice."

OBJECTING TO ADMISSIBILITY OF EVIDENCE

Section 6. Objections to evidence

(1) In an action, and at every stage of the action, an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered.

(2) An objection to the admissibility of evidence shall be recorded and ruled upon by the Court as a matter of course.

(3) Where a document is produced and tendered in evidence and rejected by the Court, it shall be marked by the Court as having been tendered and rejected.

Case: Ex parte Kwabena Duffour

Held: *The statutory provisions on objections to evidence says in very certain terms and with clarity that in "an action" (regardless of whether it is a civil or criminal) "and at every stage of the action [including case management] an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered". This without fear of contradiction whatsoever means that the only time when an objection can be taken to the admissibility of evidence is at the time (not before, or after, or in between) "when the evidence is being offered".*

IN RE OKINE (DECD); DODOO AND ANOTHER v OKINE AND OTHERS [2003-2005] 1 GLR 630

Held:

"Since the promulgation of NRCD 323 it is now beyond dispute that evidence let in without objection must be considered by the court even if the facts to be proved had not been pleaded. Section 6(1) of NRCD 323 now provides that: "In every action, and at every stage thereof, any objection to the admissibility of evidence by a party affected thereby shall be made at the time the evidence is offered." In Atta v Adu [1987-88] 1 GLR 233 at 238, SC Francois JSC, speaking for a unanimous Supreme Court, interpreted this to mean that where evidence is not pleaded but is let in at the trial, the court is obliged to consider the matter so let in. Earlier than that, in Quashie v Boahema [1987-88] 1 GLR 727 at 733, CA, actually decided in 1985 by the erstwhile Court of Appeal as the court of final resort, it was again unanimously held that where evidence is let in without objection or drawn from a party in cross-examination, the trial court, in the light of section 6 of NRCD 323, is bound to consider the evidence. For, in that case, it was evidence that properly became part of the case of the party that led the otherwise inadmissible evidence….

An exception is made for only evidence which is inadmissible per se. Evidence is inadmissible per se when a statute or law makes it inadmissible and its inadmissibility is not founded upon the fact that the matter to be proved by that evidence had not been pleaded. As was explained in Abowaba v Adeshina (1946) 12 WACA 18, the types of evidence inadmissible per se include hearsay, unstamped documents and unregistered documents. It is the law itself which makes them inadmissible, and they are inadmissible even if the opposing party does not object."

EVIDENCE AS REGARDS CHARACTER

The evidence of an accused person's character or his dispositions to wrong doing may be thought to be relevant in a trial because it makes it more likely that he committed the offence charged. Generally, such disreputable evidence is excluded because of the inherent danger to create prejudice.

Therefore, while the evidence of the identity of the criminal factor may be weak, the disclosure that the accused had committed an unrelated similar offence may be reason of its tendency to distract the jury from the main issue in the trial. It may lead the jury to ignore the central element of the case and this justifies the exclusion of such evidence.

Character evidence is generally inadmissible for two reasons:

1. Because of its prejudicial effect
2. Because it may be considered as irrelevant for proving the offence currently charged

A person's character can generally be said to refer to a person's general disposition or propensity or tendency to do or refrain from doing an act. It relates to how he will act in certain circumstances or behave in certain ways such as his tendency for violence, lying etc

Character has been defined at Section 179 of NRCD 323 as ""character" means a person's generalised disposition made up of the aggregate of the traits, including traits of honesty, peacefulness, temperance, skill or care of that person and their opposites;"

A persons aggregate traits as generally known among people with whom he lives or associates is called reputation.

Evidence of a person's character is generally inadmissible except as provided in the Evidence Act NRCD 323 or under Act 30

The Provision that deals with character Evidence is Section 53 of NRCD 323. The section provides as follows:

Section 53. Evidence of character not admissible to prove conduct

> *Evidence of a person's character or a trait of the character of that person is not admissible to prove conduct in conformity with that character or trait of character on a specific occasion, except*
>
> *(a) in a criminal action, evidence of the character or trait of the character of the accused when offered by the accused to prove the innocence of the accused, or by the prosecution to rebut the evidence previously introduced by the accused; or*

(b) in a criminal action, evidence of the character or trait of the character of the victim of the alleged crime when offered by the accused to prove the conduct of the victim in connection with the alleged crime, or by the prosecution for the same purpose; or

(c) evidence of the character or a trait of the character of a witness or hearsay declarant when offered to support or attack the credibility of the witness or declarant;

(d) where character or a trait of character is an essential element of a charge, claim or defence.

EXPLANATION

The opening statement in Section 53 generally makes character evidence inadmissible. It states that

"Evidence of a person's character or a trait of the character of that person is not admissible to prove conduct in conformity with that character or trait of character on a specific occasion"

This opening statement is followed with the word **"except"** which then introduces the various exceptions:

(A) IN A CRIMINAL ACTION, EVIDENCE OF THE CHARACTER OR TRAIT OF THE CHARACTER OF THE ACCUSED WHEN OFFERED BY THE ACCUSED TO PROVE THE INNOCENCE OF THE ACCUSED, OR BY THE PROSECUTION TO REBUT THE EVIDENCE PREVIOUSLY INTRODUCED BY THE ACCUSED; or

In some instances, it may become necessary for an accused person to lead evidence as to his good character to prove his innocence. Once this is done, the prosecution is then permitted to adduce evidence of the character of the accused in rebuttal.

Example: A priest who adduces evidence of his good character in a charge of indecent assault against young boys, opens the gate for the prosecution to adduce evidence of his previous charges or accusations of indecent assault on other boys.

(B) IN A CRIMINAL ACTION, EVIDENCE OF THE CHARACTER OR TRAIT OF THE CHARACTER OF THE VICTIM OF THE ALLEGED CRIME WHEN OFFERED BY THE ACCUSED TO PROVE THE CONDUCT OF THE VICTIM IN CONNECTION WITH THE ALLEGED CRIME, OR BY THE PROSECUTION FOR THE SAME PURPOSE; OR

As a defence the accused person may offer evidence on the reputation of a victim of an offence with which he has been charges.

Example: In a charge of rape, the accused person can lead evidence of the character of the victim showing that she is a prostitute, thus creating a doubt on the question of consent.

The prosecution may also do the same by calling evidence of the good character of the victim, that she was of good character and thus would not have consented.

(C) EVIDENCE OF THE CHARACTER OR A TRAIT OF THE CHARACTER OF A WITNESS OR HEARSAY DECLARANT WHEN OFFERED TO SUPPORT OR ATTACK THE CREDIBILITY OF THE WITNESS OR DECLARANT;

Evidence of the general character of a witness, or his specific conduct may be relevant directly or indirectly to the fact in issue, for the purpose of determining credibility, for the worthiness of a statement on oath or affirmation of any witness has a close relevance to whether that evidence can be considered as worth believing or not.

A person of good character as a witness is usually deemed more likely to tell the truth than a dishonest person. Thus evidence to establish or to discredit the good or bad character of a witness is relevant and so admissible to establish or destroy the credibility of that witness.

In adducing evidence of character evidence to attack credibility a distinction is made in criminal and civil cases. In criminal cases an accused can first lead evidence of his good character but in civil cases a person's character must first be impugned before he can lead evidence as to his good character.

Section 83 (1) and (2)

> ***"83. Character traits affecting credibility***
>
> ***(1) Subject to subsection (2), evidence of good character to support the credibility of a witness is not admissible unless evidence which impugns the good character of the witness has been admitted for the purpose of attacking the credibility of the witness.***
>
> ***(2) An accused in a criminal action may introduce evidence of good character to support the credibility of the accused, and unless the accused first introduces that evidence, the prosecution may not attack the credibility of the accused by introducing evidence, including evidence of a previous conviction, to impugn the good character of the accused."***

However, it is not every bad character that can be used to attack credibility. Evidence that a person has a road traffic conviction, or assault and battery is not evidence admissible to attack credibility.

Section 85 NRDC 323

“ 85. Previous convictions affecting credibility

(1) For the purpose of attacking the credibility of a witness, a party may lead evidence by the examination of the witness or by record of the judgment that the witness has been convicted of a <u>crime involving dishonesty or false statement, but shall not lead evidence as to a conviction for any other crime.</u>

(2) Evidence as to a conviction shall not be led under subsection (1) if a period of more than ten years has elapsed since the date of conviction or the termination of the sentence imposed by the Court for that conviction, whichever last occurs for that conviction.

(3) The pendency of an appeal against a conviction does not prevent the leading of evidence as to the conviction.

(4) Where evidence of a conviction is led, the pendency of an appeal against that conviction may also be led.”

(D) WHERE CHARACTER OR A TRAIT OF CHARACTER IS AN ESSENTIAL ELEMENT OF A CHARGE, CLAIM OR DEFENCE.

The admissibility of specific conduct as evidence to establish an essential element in a charge, claim or defence, presupposes the existence of some nexus between that specific conduct and the essential element in the charge, claim or defence to be established.

<u>Previous Conviction Section 129 of Act 30</u>

129. Evidence of witnesses

(1) A person charged and called as a witness under this Act shall not be asked, and if asked shall not be required to answer, a question tending to show that the witness has committed, or has been convicted of, or has been charged with, an offence other than that with which the witness is then charged, or that the witness is of bad character, unless,

(*a*) the proof of the witness having committed or having been convicted of the other offence is admissible evidence to prove the offence then charged; or

(*b*) the witness has personally or by counsel asked questions of a witness for the prosecution with a view to establishing the witness’s own good character or has given or called evidence of the accused’s own good character.

(2) Paragraph (*b*) of subsection (1) does not authorise the accused to be asked or to require the accused to answer a question tending to show that the accused has committed or has been convicted of or been charged with an offence other than that with which the accused is charged or an offence involving dishonesty or false statement.

(3) A person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give evidence from the witness box or any other place from which the other witnesses give their evidence.

Case: AVEGAVI AND OTHERS v. THE REPUBLIC [1971] 1 GLR 428-438

facts

The three appellants were unrepresented by counsel during the trial at which they were all charged with robbery. When the trial judge ruled that there was a prima facie case for the appellants to answer they elected to give evidence on their own behalf. Each one of the appellants vehemently denied the charges and denied ever having made the confession attributed to him. During the cross-examination the third appellant stated inter alia: "I do not know if Sgt. Hanu concocted the statement [which he] says I made. I never begged Sgt. Hanu or anyone saying I had done wrong. I say Sgt. Hanu has lied to the court in what he has said about me . . ." At this point and in the presence of the jury, counsel for the prosecution applied for leave to cross-examine the first and third appellants as to their previous convictions because the third appellant had attacked the character of Sgt. Hanu, a prosecution witness. Leave was granted forthwith to prove the previous convictions not only of the third appellant but also the first appellant. Following an adjournment, previous convictions for stealing were duly proved. On appeal it was submitted that there was no justification for the court to have permitted the cross-examinations for the first and third appellants as to their previous convictions and for the proven convictions to have been revealed to the jury.

Held, allowing the appeal:

> *- "In Ghana, as in England, the rule is that the prosecution are generally not allowed to give evidence of the accused's bad character or previous convictions in order to help establish that he committed the crime in question. Such evidence can, in general, be given only after the conviction [p.433] in order to determine punishment. The main reason for this rule is obvious; for if it were otherwise, an accused person in a jury trial would, more likely than not, be condemned, not on evidence adduced at his trial, but on prejudice stemming from his previous convictions and general bad character. Another reason is that evidence of general evil propensity widens the issues for the trial so immensely as to be unfair to the accused."*

(1) according to section 129 (5) of Act 30 an accused person cannot be cross-examined as to his previous convictions and bad character if and when the conduct of his defence reasonably requires the making of injurious reflections or imputations on the prosecutor or the witnesses for the prosecution. Whether or not imputations have been made becomes a question of fact and degree.

(2) It was the prosecuting counsel who trapped the third appellant into confirming that Sgt. Hanu had lied to the court. This did not mean that the character of a prosecution witness was impugned, rather it was no more than an emphatic mode of denial which was consistent with a plea of not guilty. Furthermore, answers to questions put in cross-examination do not form part of the "nature or conduct of the defence" within section 129 (5) (c) of Act 30. R. v. Jones (1909) 3 Cr.App.R. 64, C.C.A. applied. R. v. Rouse [1904] 1 K.B. 184, C.C.R.; Selvey v. Director of Public Prosecutions (1968) 52 Cr.App.R. 443, H.L. and R. v. Clark [1955] 3 All E.R. 29 at p. 34, C.C.A. considered.

(3) Even if the third appellant had attacked the character of a prosecution witness it was wrong and indefensible for the court to have granted the prosecution's application to prove the previous convictions of the first appellant who had already completed his evidence which did not contain any attack on the character of a prosecution witness. The protection from cross-examination as to previous convictions or bad character as set out in section 129 (5) of Act 30 is a vested right which is not taken away from an accused if a co-accused loses his own shield by any act or step which falls within any of the four exceptions set out in paragraphs (a), (b), (c) and (d) of section 129 (5) of Act 30.

ADMISSIBILITY OF PREVIOUS PLEA OF GUILTY

Section 57 of NRCD 323 provides

“57. Offers to plead guilty, withdrawn pleas of guilty

Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or any other crime is not admissible in a civil or criminal action involving the person who made the plea or offer.”

THE ‘SIMILAR FACT’ RULE

The main exception to the rule excluding bad character evidence was known (somewhat misleadingly) as the ‘similar fact’ rule. It was laid down in ***MAKIN V ATTORNEY-GENERAL FOR NEW SOUTH WALES*****,** in which a husband and wife were convicted of murdering a foster child, whose body was found buried in their garden. During their trial, the Crown had introduced evidence of 12 further bodies of babies and young children that had been discovered at their previous residences.

The question for the Privy Council was whether this evidence had been rightly admitted. In the words of Lord Herschell:

> *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 his criminal conduct or character to have committed the offence for which he was being tried. On the other hand, the mere fact that the evidence tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.*

The first paragraph of this excerpt sets out the general rule that evidence of previous criminal conduct cannot be adduced in order to show that the defendant is a person likely from their criminal conduct or character to have committed the offence charged. In the second paragraph, Lord Herschell explains the exception to that rule, in stating that such evidence is admissible if it is relevant to an issue in the case, such as rebutting a defence of accident, or any other defence open to the accused. Over the years, the rule was refined so that the basis of the admissibility of evidence of bad character was that it had to be not merely relevant to an issue in the case, but *so* relevant that its probative value outweighed any prejudice that might arise. One of the most straightforward ways of establishing relevance was to show a similarity between the manner and circumstances in which the previous offences were committed and the manner and circumstances in which the offence charged had been committed. It was this comparative exercise that led to the description of such evidence as ‘similar fact evidence’.

Perhaps the most infamous example of its application came in ***R V SMITH***, popularly known as the Brides in the Bath case, in which the defendant was accused of drowning his wife in the bath. Having run the defence of death by accident, the prosecution adduced evidence that two previous wives had arrived at an unfortunate end in a remarkably similar fashion. In all three cases, the accused stood to gain financially from their deaths, and all three women had drowned in the bath shortly after having wed him.

Essential Element of the crime charged: Character evidence can be lead to prove the identity of the accused or that he had the requisite intent. Use Makin v AG as an example as intent.

EVIDENCE OBTAINED BY ILLEGAL, IMPROPER OR UNFAIR MEANS

INTRODUCTION

Evidence may be obtained illegally, for example by a crime, tort, or breach of contract, or in contravention of statutory or other provisions governing the powers and duties of the police or others involved in investigating crime. Evidence may also be obtained improperly or unfairly, for example by trickery, deception, bribes, threats, or inducements.

There is a general principle that no one should be allowed to benefit from his illegal act and there is a view that this should be applicable to the admissibility of evidence illegally obtained. Views however differ in the common law on the desirability or otherwise of admitting evidence which has been obtained illegally

One school of thought is that relevant and otherwise admissible evidence should not be excluded because of the means by which it was obtained, as in their view, excluding it would, in some cases, result in injustice including the acquittal of the guilty. To this school of thought therefore, all evidence which is necessary to enable justice to be done should be admitted and that those responsible for the illegality or impropriety may be variously prosecuted or disciplined.

On the other extreme is a school of thought which is of the view that illegally or improperly obtained evidence should always be excluded. In the view of this school, to admit it might encourage the obtaining of evidence by such means. Therefore, all such evidence, it is argued, should be excluded even if it sometimes results in injustice, including the guilty going free, so that those responsible for the illegality or impropriety are in future compelled to respect and deterred from invading the ordinary civil liberties of the citizen.

COMMON LAW POSITION

The common law position on the admissibility or otherwise of illegally obtained evidence was stated by Crompton J in **R v Leatham (1861) 8 Cox CC 498 (DC)** at p. 501 that *"it matters not how you get it; if you steal it even, it would be admissible in evidence".*

The admissibility of unlawfully obtained evidence was also addressed by the Privy Council in the original leading case of **Kuruma v. R [1955] 2 WLR 223**.

FACTS

K had been searched by Kenyan police officers and, it was alleged, found to be in unlawful possession of two rounds of ammunition, a capital offence under the Emergency Regulations then in force. The law provided that only an officer of or above the rank of assistant inspector could lawfully search persons suspected of being in possession of ammunition, yet neither officer involved was of such rank. Consequently, the evidence

purportedly found on K had been obtained unlawfully, and he appealed against his conviction on the ground that it should not have been admitted. Dismissing the appeal Lord Goddard CJ said (at pp. 226±7):

> *"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained . . . There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused . . . If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."*

There are a number of cases where unlawful conduct was held to be insufficient to justify the exclusion of relevant evidence. One notable case is:

In **R v Sang [1979] 3 WLR 263**, the court stated that there is no discretion at common law to refuse to admit relevant admissible evidence on the grounds that it was obtained by improper or unfair means. As Lord Diplock famously surmised:

> *"Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offence, [the judge] has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how the evidence was obtained"*

Also Lord Fraser in Fox v Chef Constable of Gwent said that "*the duty of the court is to decide whether the appellant has committed the offence with which he is charged and not to discipline the police for exceeding their powers*".

IT MATTERS HOW YOU GET IT

In Canada, improperly obtained evidence can be inadmissible if it violates the accused's Charter rights. This can happen if the police violate an accused's rights during a criminal investigation.

In **R. v. Harrison (B.) (2009), 253 O.A.C. 358 (SCC)** McLachlin, C.J.C., Binnie, LeBel, Deschamps, Fish, Abella and Charron, JJ.

Harrison and his friend were driving a rented SUV from Vancouver to Toronto. In Ontario, a police officer on highway patrol noticed that the vehicle had no front licence plate. Only

after activating his roof lights to pull it over did he realize that, because it was registered in Alberta, the vehicle did not require a front licence plate.

Even though he had no grounds to believe that any offence was being committed, the officer testified at trial that abandoning the detention might have affected the integrity of the police in the eyes of observers. He arrested the accused after discovering that his driver's licence had been suspended. The officer then proceeded to search the vehicle and found two cardboard boxes containing 35kg of cocaine.

The trial judge held that the initial detention of the accused was premised on a mere hunch or suspicion rather than reasonable grounds and therefore constituted an arbitrary detention, contrary to s.9 of the Charter. He further held that the warrantless search of the vehicle was unreasonable within the meaning of s.8.

In the s.24(2) analysis, the trial judge found that the violations were serious and that the officer's explanations for stopping the vehicle defied credibility. However, in view of the seriousness of the offence charged and the importance of the evidence to the Crown's case, he admitted the cocaine into evidence on the grounds that the repute of the administration of justice would suffer more from its exclusion than from its admission. The Court of Appeal upheld the trial judge's decision to admit the evidence and affirmed the accused's conviction. Cronk, J.A dissenting

On appeal to the SCC, the issue was should the cocaine have been admitted under Section 24 (2) of the Charter?

Reasons

McLachlin, CJ, writing for the majority, applied the test set out in *Grant*. She held that the conduct of the police that led to the *Charter* breaches represented a blatant disregard for *Charter* rights, which was further aggravated by the officer's misleading testimony at trial. The deprivation of liberty and privacy represented by the unconstitutional detention and search was significant, although not egregious, intrusion on the accused's *Charter*-protected interests. On the other hand, the drugs seized constituted highly reliable evidence tendered on a very serious charge.

On balance, however, she held that the seriousness of the offence and the reliability of the evidence did not outweigh the factors pointing to exclusion; for the courts to appear to condone wilful and flagrant *Charter* breaches undermines the long-term repute of the administration of justice. The trial judge's reasoning transformed the s.24(2) analysis into a contest between the degree of the police misconduct and the seriousness of the offence, placing undue emphasis on the third section. Because the evidence in question was essential to the Crown's case, Harrison was acquitted. She noted that:

"We expect police to adhere to higher standards than alleged criminals . . . . the price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining Charter standards.

GHANAIAN POSITION

In Ghana, Section 51 of the Evidence Act provides that: "Relevant evidence is admissible **except as otherwise provided by an enactment."**

The above means that even though evidence may be relevant, it may be excluded if an enactment provides that such evidence is inadmissible. One example is a confession statement obtained from an accused person. Section 120 of the Evidence Act lays out the procedure for obtaining such a confession statement and failure to comply will mean that the confession statement will be inadmissible.

Section 120 of the Evidence Act, requires that such evidence must be obtained voluntarily and in the presence of an independent witness. The Supreme Court in the case of **Frimpong alias Iboman v. The Republic [2012] 1 SCGLR 297** stated as follows:

" *From a careful reading of section 120 of the Evidence Act, 1975, NRCD 323, the following procedure must be complied with to give validity to a confession statement and make it admissible in law.*

1. *If the declarant of the statement made the statement while arrested, restricted or is detained by the State then the statement is admissible only if:*

i. it was made in the presence of an independent witness, who

ii. understands the language in which the declarant spoke i.e. accused therein, herein appellant.

iii. can also read and understand the language in which the statement is made.

iv. *whenever the statement is in written form, the independent witness* ***shall certify in writing on the statement as follows:***

"that the statement was voluntarily made in his presence and that the contents were fully understood by the accused."

v. *where the declarant is illiterate or blind, there are further provisions to protect the declarant by ensuring that the state does not take advantage of his disability by ensuring that*

vi. *the independent* ***witness shall carefully read over and explain to the declarant the exact contents of the statement before it is marked or signed.***

vii. ***the independent witness shall certify on the statement in writing that he had so read over*** *and explained the contents of the statement to the declarant and that* ***he appeared perfectly to understand it before making his mark or signature.***

However, there may be situations where evidence is obtained in violation of a statutory provision or the Constitution. In such instances, the evidence would be deemed to have been improperly obtained.

SEARCHES BY THE POLICE.

The police, pursuant to section 8 of Act 30, are empowered to search a person who has been arrested. However, Section 88 of Act 30 provides that where the police reasonably suspect that a crime has been committed or is about to be committed, they may apply to a District Court for a warrant to search the place.

Section 8 of Act 30 provides as follows;

"8. Search of arrested person

(1) When a person is arrested by a police officer or any other person, the police officer making the arrest or to whom the other person, makes over the person arrested**, may search the person arrested, and place in safe custody the articles, other than necessary wearing apparel, found on the arrested person.**

(2) Where the person arrested can be legally admitted to bail and bail is furnished, the person arrested **shall not be searched unless there are reasonable grounds to believe that the person arrested has in possession**

(a) a stolen article, or

(b) an instrument of violence, or

(c) tools connected with the kind of offence the person arrested is alleged to have committed, or

(d) articles which may incriminate the person arrested in respect of the offence alleged to have been committed.

(3) The search shall be made with strict decency and where a woman is to be searched, the search shall be made by another woman."

Search by warrant

Section 88 of Act 30

88. Issue search warrant and procedure

> *(1) Where a District Magistrate is satisfied, by evidence on oath, that there is reasonable ground for believing that there is in a building, vessel, carriage, box, receptacle, or place … the Magistrate may at any time personally issue a warrant authorising a constable to search the building, vessel, carriage, box, receptacle, or place for that thing, and to seize and carry it before the Magistrate issuing the warrant or any other Magistrate to be dealt with according to law.*

In the case of **Edmund Addo v The Attorney-General And Inspector General of Police** HIGH COURT (HUMAN RIGHTS DIVISION 2), ACCRA SUIT NO.HR/0080/2017 DATE: 30 MARCH, 2017

This was an application for the enforcement of human rights by an accused person. Edmund Addo had been arrested on the charge of defilement and child pornography. The Applicant couched his reliefs as follows:

"a. Adjudge and declare that the Applicant's rights to privacy, property, fair trial and education have been, are being or are likely to be violated by the Respondent;

b. Make an order:

i. Restraining the Respondents from further interfering with or violating the above-mentioned rights of the Applicant; and,

ii. For the immediate return of the said laptop and mobile phone to the Applicant or in the alternative for the deposit of the same with the trial court;

The Applicant was seeking to prevent the police from accessing mobile phone and laptop as they believed it contained relevant evidence. According to the Applicant and as can be gathered from his affidavit in support, the police have been uncompromisingly making the effort to "access the content of the said laptop and mobile phone" and had on several occasions "taken the Applicant together with the said laptop and mobile phones to a number of so-called IT experts in many places in Accra and elsewhere to have them help the Police access the content of the said laptop and mobile phone." It is, therefore, the view of the Applicant that the seizure of the items has adversely affected not only his rights to his property and privacy.

The trial judge ANTHONY K. YEBOAH J after referring to section 88 of Act 30 held

> *"This section provides in effect that, where, as in the present case, a person, who is suspected of having committed or being about to commit an offense, has in his possession or under his control any item of property that is believed to be associated with the alleged or suspected commission of the offense, the person or the item may be searched by the police with a warrant that is issued under the hand of a magistrate. Thus, the right to privacy of the person is legally or lawfully limited or restricted by the issuance of a warrant by a magistrate."*

The learned judge then stated:

> *"It is, therefore, my considered view, and I hold accordingly, that the police may only search the seized mobile phone and laptop with a warrant duly procured under section 88 of Act 30 1960, that is, under the hand of a magistrate, and that a search in any other manner or form, given the facts of the present case, will amount to a breach of the Applicant's right to privacy."*

The trial judge then made the following orders

"IT IS HEREBY DECLARED that the Applicant's rights to privacy and fair trial are under threat of being infringed by the 2nd Respondent's attempt to access the Applicant's laptop and mobile phone without a search warrant under the hand of a magistrate.

IT IS ACCORDINGLY HEREBY ORDERED that the Inspector General of Police (2nd Respondent) acting through the police officer charged with the criminal investigation and the prosecutor do deposit the laptop and the mobile phone with the Registrar of the trial court until the conclusion of the ongoing criminal trial, (unless the trial judge orders otherwise), if within fourteen (14) days from the date of service of this order on the prosecutor the 2nd Respondent (acting through the police investigator and the prosecutor) fails to comply with section 88 of Act 30/1960."

BREACH OF PRIVACY

The right to privacy is a Constitutional right provided for under Article 18(2) of the Constitution. Article 18 (2) of the 1992 Constitution of Ghana provides as follows:

"18 (2)

No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."

Below are the relevant cases that have discussed the admissibility of evidence obtained in breach of the right to privacy.

1. **Ackah v Agricultural Development Bank [2017-2020] 1 SCGLR**

FACTS

On Monday, 8th August 2011, the appellant was invited to the office of the Human Resources Department to discuss her current debt profile. After waiting for well over 5 hours, she was informed to go to the board room where to her utter consternation and dismay, the chairman of the Respondent bank played an edited version of a secretly recorded telephone conversation, which the appellant had engaged in some months before with another person (Nana Yaw Yeboah).

After this on the 10th of August, 2011 she was summarily suspended from her duties indefinitely with immediate effect and a further penalty of withholding of half of her salary during the suspension period.

In December 2011, the appellant was invited to appear before the disciplinary committee, where the full version of the tape was played to her. She objected to the use of the tape. The Chairman of the disciplinary committee, Mr. Agbeddoh intimated to her that they could not give a ruling on the objection at that moment but would give it later.

To the Appellant's absolute shock, on the 16th day of February, 2012 she received a letter dated 13th of February, 2012 communicating the respondent's decision to terminate her employment pursuant to the proceedings before the disciplinary committee.

The Appellant then instituted an action in the High Court claiming a breach of her right to privacy. She lost at the High Court and Court of Appeal but succeeded at the Supreme Court.

The Supreme Court had to determine the balance between Section 51 of the Evidence Act which stipulates that all relevant evidence is admissible as against the right to privacy under Article 18(2) of the 1992 Constitution. The court found section 51 is subject to the constitutional provisions of Article 18 of the 1992 constitution.

The court held at holding 1 as follows:

> " Though by Section 51(1) of NRCD 323 all relevant evidence was admissible except as otherwise provided by an enactment, the delivery of the secretly recorded conversation between the applicant and the respondent in the instant case amounted to a breach of the applicant's right to privacy as provided for in Article 18(2) of the 1992 Constitution:"

2. **Raphael Cubagee v Michael Yeboah Asare [2017-2020] SCGLR**

The Supreme Court in the recent case of Raphael Cubagee v Michael Yeboah Asare [2017-2020] SCGLR stated the general position as relates to secret recordings done in violation of Article 18(2) of the Constitution. The court held that to record a person without their consent would be a breach of their privacy and that before recording someone or allowing third parties to listen to what he says on telephone, his consent must be sought or he must be informed such that he can decide to end the call if he does not want to be recorded or heard by third parties.

The Supreme Court in the case of Raphael Cubagee v Michael Yeboah Asare provided further clarity on the Ghanaian position on illegally obtained evidence. The court stated that in Ghana a court in considering all the circumstances of the case has a discretion to exclude illegally obtained evidence. The court stated as follows:

> *" It therefore seems to us that the frame work of our Constitution anticipates that where evidence obtained in violation of human rights is sought to be tendered in proceedings, whether criminal or civil, and objection is taken, the court has to exercise a discretion as to whether on the facts of the case the evidence ought to be excluded or admitted. We therefore adopt for Ghana the discretionary rule for the exclusion of evidence obtained in violation of human rights guaranteed under the 1992 Constitution."*

The court further provided guidelines as to the factors that must be considered in determining whether to admit evidence or exclude it. The court stated that where the admission of such evidence could bring the administration of justice into disrepute or affect the fairness of the proceedings, then it ought to exclude it. In determining whether the evidence could bring the administration of justice into disrepute or make proceedings unfair, the court must consider:

1. All the circumstances of the case
2. the nature of the right that has been violated and the manner and degree of the violation, either deliberate or innocuous;

3. the gravity of the crime being tried and the manner the accused committed the offence as well as the severity of the sentence the offence attracts.

4. The impact that exclusion of the evidence may have on the outcome of the case, particularly in civil cases where establishment of the actual facts is of high premium.

MATTERS NOT REQUIRING PROOF

The general rule is that all facts in the issue or relevant to the issue in a given case must be proved; in other words, he who avers must prove. This may be done through testimonial evidence, hearsay statements, documentary evidence, or production of real evidence. Failure to lead evidence may lead to you losing the case. There are however a number of exceptions to the general rule stated above. These include:

1. The judge or jury may take JUDICIAL NOTICE of the existence of certain facts.
2. A party may make a formal ADMISSION of a relevant matter.
3. CONFESSIONS
4. STATUTORY EXEMPTIONS

JUDICIAL NOTICE

A court may judicially notice a fact whenever it "is so generally known that every ordinary person may be reasonably presumed to be aware of it". The law takes the position that there are certain facts that are beyond serious dispute, so notorious or of such common knowledge that they require no proof and are open to no evidence in rebuttal.

Where a fact is well known or its existence is so easily determinable from unimpeachable sources, it will not be good sense to require formal proof. The judge, in such a situation, declares that he takes judicial notice of a fact or directs the jury to take judicial notice, although a party offers no formal proof. It is a system by which the courts are saved the bother of having to waste time considering unimportant or uncontested matters when its time is required to be used for matters that are in contest.

The point is quite simple: there are some facts that are so well known that requiring a party to prove them would be an affront to common sense and would only result in a waste of precious (and overstretched) court time.[1]

WHAT IS JUDICIAL NOTICE?

It simply means recognition without proof of something existing or being true. Lord Sumner in Commonwealth Shipping Representative v P & 0 Branch Services [1923] AC 191 at 212 stated that

"judicial notice refers to facts which a judge can be called upon to receive and act upon either from his general knowledge of them or from enquiries to be made by himself or from his own information, from sources to which it is proper for him to refer".

---

[1] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge

Any attempt at a compilation of the numerous facts of which judicial notice has been taken would be pointless. It will suffice to refer to the following examples:

i. 25th December is Christmas day.
ii. The President of Ghana,
iii. The world is round,
iv. Ghana is in West Africa.

Thus, in R v Luffe (1867) 8 East 193 17 the question arose as to a child's legitimacy. The evidence was that the husband did not see the wife until a fortnight before the birth, and the court took judicial notice of the fact that he could not have been the father of the child. Lord Ellenborough CJ remarked:

> *"Here . . . in nature the fact may certainly be known that the husband, who had no access until within a fortnight of his wife's delivery, could not be the actual father of the child. Where the thing cannot certainly be known, we must call in aid such probable evidence as can be resorted to, and the intervention of a jury must, in all cases in which it is practicable, be had to decide thereupon; but where the question arises as it does here, and where it may certainly be known from the invariable course of nature, as in this case it may, that no birth could be occasioned and produced within those limits of time, we may venture to lay down the rule plainly and broadly, without any danger arising from the precedent . . ."*

No one needs to lead evidence to prove these facts as they are well known and uncontested. From these examples, it becomes obvious what types of facts are judicially noticed. The test is whether the facts are so notorious that it would be an affront to the common sense of judges and the dignity of the court to require proof.

JUDICIAL NOTICE UNDER THE EVIDENCE ACT

Section 9 of the Evidence Act, NRCD 323 provides

9. Judicial notice

(1) This section governs the taking of judicial notice of facts in issue or facts which are relevant to facts in issue.

(2) Judicial notice can be taken only of facts which are

(*a*) so generally known within the territorial jurisdiction of the Court, or

(*b*) so capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,

that the facts are not subject to reasonable dispute.

From the above Judicial Notice can be taken when:

1. The fact is relevant to facts in issue
2. So generally known within the territorial jurisdiction of the court or
3. Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned; and
4. Facts which are not subject to reasonable challenge, question or contest.

According to Justice Brobbey in his book Essentials of the Ghana Law of Evidence at Page 106, he refers to the case of **Nyarko v The Republic [1974] 1 GLR 206** and states that in cases where a fact was so notorious that judicial notice could be taken of it, evidence to the contrary could be treated as perjury or palpably false.

In the case of **Nyarko v The Republic [1974] 1 GLR 206**, the appellant was convicted by a circuit court of smuggling Rothmans cigarettes into Ghana contrary to section 49 (1) (a) and (e) of the Customs and Excise Decree, 1972 (N.R.C.D. 114), and was sentenced to five years' imprisonment with hard labour.

Held:

> *"…. the second prosecution witness who was recalled at the instance of the defence counsel stated that he understood the accused to be saying that he had bought the cigarettes in Accra. That brand of cigarette is not manufactured in Ghana and I think a Court is entitled to take judicial notice of this notorious fact and to treat the evidence of the first defence witness to the effect that Rothmans Kingsize cigarettes are manufactured by the Pioneer Tobacco Company, Accra, as perjury or as palpably false."*

Territorial jurisdiction; Section 9(2) (a) of the Evidence Act

The limitation to 'territorial jurisdiction' as provided in the Act is recognition of the existence of a fact, which may differ from one region or district or area to the other. Thus, for example, a fact so notoriously or commonly known in the Greater Accra region may not be so known in Ashanti Region. Therefore, a Magistrate sitting in Accra can take judicial notice of the fact that the major occupation of the residents of James Town is fishing. That fact may not be of common knowledge in the streets of Kumasi so as to qualify for judicial notice by a Kumasi magistrate.

This therefore means that before a judge can take judicial notice of fact, that fact should be commonly, generally or universally acknowledged in the community.

JUDICIAL NOTICE AND PERSONAL KNOWLEDGE OF THE JUDGE

The concept of notoriety is the hallmark for judicial notice. A court may depart from the need for evidence to prove facts that are general knowledge. It must not, however, do so from subjective, personal knowledge, i.e. something that the trial judge has personal knowledge of.

The general rule is that a judge is not permitted to rely on personal knowledge of facts even if they are known to him.

Maxwell Opoku Agyemang in his book “Law of Evidence in Ghana” at page 109 to 110 referred to two cases where the judges took judicial notice of matters within their personal knowledge:

In the Southern Rhodesian (Zimbabwe) case of *R V IGOMBE (1964) 3 P 816*, the applicant was convicted of using threatening and abusive words in a public place. The presiding Magistrate in the trial took judicial notice of the fact that the part of the Herald newspaper’s office where the words were spoken was opened daily as a reading room and that the public had access to it. In reversing the conviction on appeal, the court said that “the Magistrate was not entitled to take judicial notice of that fact, because it was not a fact notoriously established that evidence of its existence is not necessary.”

In the American case of *CUBSON V BON GALAHN HOTEL* 185 NYS P 154 SCthe issue was the absolute liability of an innkeeper. This touched on the question whether the establishment was a hotel. The trial judge volunteered, “I know Galahn Hotel as well as the witness does himself I will give a ruling now, it is a hotel” . It was held on appeal that the judge gave a ruling, which he does not share in common with average members of the community.

In Ghana the case of **Mensah and others v The Republic [1979] GLR 523-551** deals with judicial notice.

Facts- JH Mensah wrote a document couched in very strong and rude language dealing with matters of public affairs in which he criticized, among others, the economic policies of the then Acheampong’s government, charged it with misadministration and mismanagement, maligned the Head of State and some of his Commissioners and charged the Head of State with incompetence and corruption. He was charged with sedition

The trial judge took judicial notice of the fact that the economic ills of the country were due to world inflation, held that the document was seditious and held that the clandestine manner in which the document was disseminated imputed malice to J H Mensah and sentenced appellants to various terms of imprisonment.

In allowing the appeal, the High Court per Cecilia Koranteng-Addow J stated among others:

> *"Judicial notice referred to facts, which a judge could be called upon to receive and act upon either from his general knowledge of them or from inquiries to be made by himself for his own information from sources to which it was proper for him to refer. To take judicial notice of a fact, however, the judge had to be convinced that the matter was so notorious as not to be the subject of dispute among reasonable men, or that the matter was capable of immediate accurate demonstration by readily accessible sources of indisputable accuracy. The facts, which the trial judge took judicial notice of in the instant case, could not be classified under this definition. Although world inflation was a matter of public notoriety the extent to which word inflation affected each country was not a matter of which judicial notice could be taken. Again one could also not make a sweeping statement about world inflation being due to the oil crisis and the extent to which this country has been affected without basing such observation on any evidence. Furthermore, a court was not the proper forum for the evaluation of economic factors, which contributed to inflation. Consequently to the extent that the judge did not base his verdict on admissible evidence he was wrong."*

JUDICIAL NOTICE UPON ENQUIRY OR RESORT TO INDISPUTABLE SOURCES-SECTION 9(2)(B) OF THE EVIDENCE ACT

Facts, which are neither notorious nor common knowledge, may nevertheless be taken judicial notice of after due judicial enquiry. This is done by reference to accurate and reliable sources.

In *McQuaker v Goddard* [1940] 1 KB 687 a camel bit the claimant while he was visiting the defendant's zoo. The question in issue was whether camels are '*ferae naturae'* (naturally fierce) or '*mansuetae naturae'* (naturally tame) for the purpose of the law relating to liability to animals. The judge ruled that he would take judicial notice of the issue and listened to five expert witnesses who gave evidence on the subject. The trial judge reached the conclusion that it was domesticated after consulting books about camels and hearing witnesses. This decision was confirmed in the Court of Appeal where Clauson L.J. said that the trial judge was entitled to examine the books and hear witnesses, not as evidence, but for the purpose of "forming his view as to what the ordinary course of nature in this regard in fact is, a matter of which he is supposed to have complete knowledge."

Held

"The judge takes judicial notice of the ordinary course of nature, and in this particular case of the ordinary course of nature in regard to the position of camels among other

animals. The reason why the evidence was given was for the assistance of the judge in forming his view as to what the ordinary course of nature in this regard in fact is, a matter of which he is supposed to have complete knowledge. The point is best explained by reading a few lines from that great work, the late Mr. Justice Stephen's, "Digest of the Law of Evidence." In the 12th edition, Article 62 is as follows: **"No evidence of any fact of which the Court will take judicial notice need be given by the party alleging its existence; but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference."** From that statement it appears that the document or book of reference only enshrines the knowledge of those who are acquainted with the particular branch of natural phenomena; and in the present case, owing to some extent to the fact that there appears to be a serious flaw in a statement in a well known book of reference on the matter here in question, the learned judge permitted, and properly permitted, oral evidence to be given before him by persons who had, or professed to have, special knowledge with regard to this particular branch of natural history. When that evidence was given and weighed up with the statements in the books of reference which were referred to, the facts became perfectly plain; and the learned judge was able without any difficulty whatever to give a correct statement of the natural phenomena material to the matter in question, of which he was bound to take judicial notice."

SOME THINGS THAT COURTS CAN TAKE JUDICIAL NOTICE OF:

1. Political Matters

Judicial notice is taken of matters concerning governments and the governed, that is, their relationships with other states, the existence or otherwise of war, recognition of governments and diplomatic ties.

2. Historical Facts

In the case of ***Hilodjie & Anor v George*** [2005-2006] SCGLR 974 as regards what can be a source and whether the court could take judicial notice of the Jackson report Supreme Court held as follows:

> *"The issue which arises for our consideration is whether in the case that they were met with, the Appellate 'court was right in using the history book accounts as a matter of judicial notice. Differently stated, do the book accounts qualify as accurate or reliable sources from which facts may be drawn? As a matter of law, a trial court has power suo moto to take judicial notice of unpleaded facts, as for example historical facts which have neither been pleaded nor tendered at the*

trial. It is true that those historical facts may be taken from any source, but it is equally plain that the source must be credible. That discretionary authority is derived from SS9 (2) and (3) of NRCD 323, which provide that:

> *"Judicial notice can be taken only of facts which are either:*
>
> *(a) So generally known within the territorial jurisdiction of the court' or*
>
> *(b) So capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,*
>
> *That the fact is not subject to any reasonable dispute.*
>
> *(3) Judicial notice may be taken whether requested or not."*

As already demonstrated, the rule under SS 9 (2) (b) is rather limited in scope, it being restricted to sources (from which the facts are drawn) whose accuracy cannot reasonably be questioned, and understandably, thereby not open to reasonable dispute, for the obvious reason that the court would be entitled to take judicial notice of those facts, that is treat the facts drawn from these sources as proven evidence. Unfortunately, the law is silent on what constitutes "sources". In typical common law fashion, I would not attempt a closed definition of the term. I would nevertheless identify some of the "sources" which a court could resort to under this provision. I should think that archival records, the arts (by definition the creative and performing arts e.g. music, poetry, painting and dance), literary works, findings and decisions of courts of competent jurisdiction, text-books, history books not excluded, would all qualify.

The question therefore is whether the judicial notice principle under (2) (b) was rightly applied in the particular circumstances of this case. I do not think it was. The historical accounts the court resorted to, for an accurate and ready determination of the facts in issue-who first acquired the disputed land by settlement, were the text book accounts or records of Azu and Field which were tendered at the Jackson Commission. But, we are told that those records were challenged at the enquiry, by no mean a person than Nene Azu- Mate Korle, Konor of Manya Krobo i.e. the respondent's own paramount chief. Counsel's further unchallenged submission is that the historical accounts by the two authors have in any event been discounted or contradicted by another eminent Krobo writer, S.S. Odonkor in his book "The Rise of the Krobos" (Vide Ghana Gazette of 27th November 1959 (page 1590 refers). Since the accuracy of these texts-book accounts have been questioned, they are of doubtful authority. Once the law limits the application of the principle to facts which are not open to reasonable dispute, these text books are so unreliable they cannot qualify as

sources in respect of which the judicial notice principle can validly be applied under ss. 9(2) and (3) of N.R.C.D. 323."

3. Judicial Notice of the Law

Judicial notice of the common law, customary law and statutory provisions may be taken by the court in most cases without any argument. These are habitually brought to the notice of the court by counsel in the proceedings. The judge in such a situation is required to take judicial notice of the laws of the land. Article 11 of the 1992 provides the sources of law in Ghana, and these include existing laws consistent with the provisions of the Constitution

The binding nature of judicial findings

An interesting question arises: what happens to judicial findings on issues that have been previously litigated, i.e. where a judge has already decided on an issue? In that instance, because of the need for consistency and to prevent the continuous resurgence of issues, the English law of evidence sometimes requires such findings to be taken as binding by a subsequent court of the same or lower jurisdiction.

This was the case in **ROWLAND KOFI DWAMENA VRS RICHARD NARTEY OTOO AND THE REGIONAL LANDS OFFICER CIVIL APPEAL NO. J4/47/2018 dated 12th June 2019** the Supreme Court per PWAMANG, JSC:

HELD:

"It is trite learning that the doctrine of judicial notice is one of the exceptions to formal proof of facts before a court or tribunal, which is by adduction of evidence. Judicial notice may be taken only of facts which are notoriously true or are capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned. ***Courts frequently take judicial notice of geographic information, scientific data and statutes that are passed by the legislature or under its authority. Where a fact is subject to dispute on reasonable grounds, a court ought not to accede to an invitation to take judicial notice of it. Courts may take Judicial notice of court records, including final judgments, in other cases either by the court itself or other courts. By Section 127 of NRCD 323, final judgments of courts in Ghana are admissible evidence in proceedings."***

The Learned Judge went on to state:

"There are circumstances, such as we have in this case, where the need to take judicial notice of adjudicated facts from another case may arise for the first time in appellate proceedings. This may occur where final judgment in that other case was given after the trial of the case on appeal so it could not have been taken into account or where the existence of that final judgment was unknown to the parties and the trial court, or where it was deliberately concealed from the trial court as in this case. Section 9(6) of NRCD 323 provides that judicial notice may be taken at any stage of the proceedings, and this includes appeal proceedings, so it is competent for a court to take judicial notice of a fact in the course of determining an appeal. See also the case of; In re Indian Palms Association Ltd 61 F.3d 197, 205-06.

Generally, the main purpose of the doctrine of judicial notice is to bring about judicial economy by saving time and resources proving what is already known. But when judicial notice is taken of adjudicated facts, the doctrine has the additional advantage of ensuring consistency in courts judgments which engenders confidence in the overall administration of justice. However, these laudable objectives of the doctrine have to be matched against avoiding prejudice to the case of the party against whom the doctrine is invoked. Therefore, it is only in exceptional cases, where there are compelling reasons, that a court may take judicial notice of adjudicated facts. Where an adjudicated fact is to be judicially noticed, it must be in a final judgment that binds the party against whom it is being raised. See Kilory v State of California (2004) 119 Cal App 4th 140. If the determination is open to challenge by the party affected, then it does not satisfy the statutory criteria of being beyond reasonable disputation. Furthermore, the adjudication must conclusively undermine the basis of the claim or defence of the party against whom it is applied."

SPECIAL KNOWLEDGE

The general rule in common law is that neither a judge nor juror may act on his personal knowledge of facts. It should not be forgotten that some judges, like those in Tax Courts, are selected because of their technical expertise and therefore may take notice of a wide range of matters. In such cases, it can be said that the distinction between general knowledge tends to break down, and that it should be drawn between the specialist knowledge reasonably to be expected of someone selected for his expertise, and that which is not.

But how far may an adjudicator use his specialist, non-legal knowledge in the judicial process? For example, can a judge or magistrate, who is also a medical doctor, use their medical knowledge in adjudicating on a related issue? The answer is that the

tribunal (judge or lay magistrate) is never entitled to substitute his specialized experience for evidence.

WHEN AND HOW CAN A COURT TAKE JUDICIAL NOTICE

As a general rule, Judicial Notice can be taken by a court at any time in the proceedings and even on appeal. This has been spelt out in Section 9(3) to (7) of the Evidence Act:

> *"(3) Judicial notice may be taken whether requested or not.*
>
> *(4) Judicial notice shall be taken if requested by a party and the requesting party*
>
> *(a) gives each adverse party fair notice of the request through the pleadings or otherwise, and*
>
> *(b) supplies the necessary sources and information to the Court.*
>
> *(5) A party is entitled, on timely request, to an opportunity to present to the Court information relevant to the propriety of taking judicial notice and the meaning of the fact to be noticed.*
>
> *(6) Judicial notice may be taken at any stage of the action.*
>
> *(7) In an action tried by jury the Court may, and upon a timely request shall, instruct the jury to accept as conclusive the facts which have been judicially noticed."*

ADMISSIONS

An admission is a voluntary acknowledgement of the existence of facts relevant to an adversary's case. An admission simply implies that the fact or issue has been conceded and is no longer in contention.

Types of admissions

1. Formal admissions
2. Informal admissions

Formal admissions are binding on the party by whom or on whose behalf they were made. Formal admissions are considered conclusive against the person who made them. A formal admission is an agreement between the parties indicating that the subject matter of the admission does not require proof. An interesting question arises: what if a fact in issue, for example the existence of a duty of care, is formally admitted? The position is straightforward: the fact is no longer a fact in issue. In that instance the

party who has the burden of proving the fact in issue will not have to adduce any evidence to prove it and the court will not hear such evidence. The logic behind this is simple: there is no requirement to prove something that can be accepted as having been proven by a formal admission. To hear the evidence of this regardless would not only be an affront to common sense, but also a waste of time and court resources.

Maxwell Opoku Agyeman in his book law of evidence 2nd edition at page 123 states as follows

> *"Formal admissions cannot be contradicted by the person who makes them and are binding only for the purposes of the particular case in which they are made. Formal admissions should be distinguished from informal admissions, which are evidence tendered at the trial, which may or may not be admitted by the court or which if admitted may be rebutted by the other party."*

On the other hand, **informal admissions** are said to be rebuttable. Informal admissions include implied admissions. An implied admission is an admission reasonably inferable from a party's conduct, actions or statement or a party's failure to react against the admission. They may be rebutted, contradicted or explained away by evidence.[2]

In the case of **Bessela v. Stern(**1877) 2 CPD 265 a woman accused a man to his face that he had reneged on his promise to marry her daughter. He gave no answer but rather offered the woman money for her to go away. By his silence to the accusation and his offer of the money, the court deduced that the allegation was true. if a denial is what one would naturally expect, it is strong evidence of an admission.

In criminal cases, silence is not an admission. In, **Moro v. The Republic [1979] GLR 256-262** it was held that the refusal by an accused person to make a statement, when cautioned by the police, must not be construed as evidence of guilt. However, in exceptional circumstances, where the facts of the case were such that the accused, in the ordinary course of events, ought to say something in answer to the charge, and he refused to make any statement, the court would be entitled to comment adversely on his failure to make a statement when the opportunity was offered.

FORMAL ADMISSIONS IN CIVIL CASE

A formal admission in civil proceedings is a concession made by a party to the proceedings that a certain fact or issue is not in dispute. Formal admissions' made for the purpose of dispensing with proof at trial are conclusive as to the matters admitted.

A formal admission may be made:

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[2] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge

(1) by a statement in the pleadings or by failure to deliver pleadings;

(2) by an agreed statement of facts filed at the trial;

(3) by an oral statement made by counsel at trial,' or even counsel's silence in the face of statements made to the trial judge by the opposing counsel with the intention that the statements be relied on by the judge;

(4) by a letter written by a party's solicitor prior to trial; or

(5) by a reply or failure to reply to a request to admit facts.

In the case of **In Re Asere Stool; Nikoi Olai Amontia IV (Substituted by Tafo Amon II) V Akotia Oworsika III (Substituted by) Laryea Ayiku III [2005-2006] SCGLR 637** the Supreme Court held that:

> *"Where your adversary has admitted a fact advantageous to your cause, what better evidence do you need to establish that fact than by relying on his own admission…..".*

Also in the case of **Opoku & Others (No.2) V Axes Col. Ltd (No.2) [2012] 2 SCGLR 1214** the Supreme Court observed as follows:

> *"Once there has been such an unequivocal admission before a court in respect of a claim or part thereof as was done in the case before us and not withdrawn there cannot in principle be any objection to a decision based thereon."*

In civil trials formal admissions are made in the pleadings or after a request to admit filed pursuant to Order 23 of C.I 47.

Under Order 23 of C.I 47 A party may request the other in writing to admit certain facts upon which the claim is based. The other party may admit accordingly. Where the party on whom the request to admit is served fails to respond, the party shall be deemed, for the purposes of the cause or the matter only, to admit the truth of the facts or the authenticity of the documents mentioned in the request to admit.

FORMAL ADMISSIONS IN CRIMINAL CASES

Guilty Pleas

Formal admissions can also be made in the context of a criminal proceeding. A guilty plea, for example, constitutes an admission of all of the essential elements of the offence charged in the indictment and to be proved by the Republic. Such a plea is the acceptance of guilt in respect of the offence charged.

"Section 239 of Act 30 . Plea of "guilty"

(1) A plea of guilty, when recorded, constitutes a conviction."

The plea may be made during the trial for any offence which is not punishable by death. In Section 199(5) of Act 30

(5) The Court shall not accept a plea of guilty in the case of an offence punishable by death.

STATUTORY EXEMPTIONS ON REQUIREMENT FOR PROOF

Some statutes mandate that certain facts have to be accepted by the courts and admitted in evidence without the necessity for proof of them, provided some stipulated conditions are satisfied:

1. Official documents produced under seal
2. Deposition offered as evidence
3. Statutory Statement

Statutory Statements

In the case of State v Banful [1965] GLR 433-444 the court stated as regards a statutory statement as follows

> *"a statutory statement made by an accused person is not admissible automatically in trials on indictment. Its admissibility is governed by the same principles which govern the admissibility of any other statement, judicial or extra-judicial. The only difference is that by virtue of section 269 (1) of the Criminal Procedure Code, 1960, a statutory statement whether signed by the defendant or not, may be admitted in evidence without further proof by the prosecution, unless it is proved that the committing magistrate purporting to sign it did not in fact sign it, while the admissibility of any other statement depends upon proof."*

Section 269 of Act 30

269. Proof of statement of accused in lower Court

(1) The statement of the accused duly recorded by or before the committing Court, and whether signed by the accused or not, may be given in evidence **without further proof of the statement** by the prosecution, unless it is proved that the Magistrate purporting to sign it did not in fact sign it.

FOREIGN LAW

Section 1(2) of the Evidence Act provides that “the determination of the law of an organization of States to the extent that such law is not part of the law of Ghana, or of the law of a foreign State or sub-division of a foreign state, is a question of fact, but it shall be determined by the court”.

On its part, section 40 of the Act also provides that “the law of a foreign state is presumed to be the same as the law of Ghana’.

Thus, when a question of applicability of foreign law is raised before a court, the onus lies on the party who asserts that that foreign law is different from that of Ghana to prove it. The provisions in sections 1(2) and 40 of the Evidence Act can be said to deal with the extent to which public international law is binding in Ghana.

It must be stated that judicial notice may not be taken of the laws of a foreign country. A party who pleads a foreign law must lead evidence to establish that fact as provided for at section 1(2) of the Evidence Act.

BURDEN OF PROOF

A party who makes a claim, be it in a civil or criminal action, generally assumes the burden of proving such a claim. It is said that such a party must prove his case to the satisfaction of the court by the adduction of admissible evidence. This requirement of proof is the effect that evidence has on the mind of the trier of fact and his conclusions from the evidence adduced before him. In other words, a fact is said to be proved when, after considering the matters before a court, the court either believes it to exist or considers its existence so probable that a prudent man under the circumstance of the particular case to act upon the supposition that it exists. This obligation on parties to prove their case is generally referred to as the **burden of Proof**. In the case of **Okudzeto Ablakwa (No. 2) vs. Attorney General & Another [2012] 2 SCGLR 845 at 867** the court explained the law governing proof when it stated that:

> *"If a person goes to court to make an allegation, the onus is on him to lead evidence to prove that allegation, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in court if the case is based on an allegation which he fails to prove or establish."*

Key Terms

- Proof: In Majolagbe v. Larbi [1959] GLR 190-195, Ollennu J (as he then was) stated as follows:

  > *"Proof, in law, is the establishment of fact by proper legal means; in other words, the establishment of an averment by admissible evidence. Where a party makes an averment, and his averment is denied, he is unlikely to be held by the Court to have sufficiently proved that averment by his merely going into the witness-box, and repeating the averment on oath, if he does not adduce that corroborative evidence which (if his averment be true) is certain to exist"*
  >
  > The Evidence Act NRCD 323, Section 179 provides that "**Proof**" means the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court;

- The burden of proof: where a fact is in dispute in a case, which of the parties is required to prove it?

- The *standard* of proof: where a party bears the burden of proof, to what "standard" must they discharge that burden? Must they prove their case "beyond reasonable doubt", or simply "on the balance of probabilities"?[1]

[1] James Chalmers "Scottish Evidence Law Essentials" Edinburgh Unversity Press (2021) p 4.

BURDEN OF PROOF

The term 'burden of proof' describes an obligation on a particular party to prove a fact or facts. The general obligation for proof will lie on the party that asserts the existence of particular facts. The burden of proof is significant in three main ways:

1. The burden of proof determines the eventual outcome of a case; it helps in determining who should lose if no evidence was led or if no sufficient evidence was produced.
2. It helps to determine which party has the right or duty to begin adducing evidence in the court
3. It helps the judge in a trial with judge and jury to know how to direct the jury.

TERMS

The term burden of proof indicates two burdens:

1. Burden Persuasion or the Legal Burden – This is the burden of persuading the trial judge or the trier of facts that the alleged fact is true or not.

2. Burden of Producing evidence or the Evidential Burden- This is the burden of producing evidence which is satisfactory enough to determine a particular issue.

THE BURDEN OF PRODUCING EVIDENCE

When parties appear in court in a typical courtroom setting, one party has to start the process with his testimony. The rules governing the obligation to start are based on common sense. They can be illustrated thus: The plaintiff goes to court and drags the defendant with him. The plaintiff goes to court because he maintains that he has something to claim from the defendant. In other words, the reason why the plaintiff goes to court is to demand something from the defendant. Until the plaintiff goes to court, the defendant has no business appearing in the court.

Simply logic therefore demands that the plaintiff should be the one to start the proceeding by giving his testimony. That testimony will show what he wants from the defendant and why he wants the court to order the defendant to give it to him. If the plaintiff leads no evidence of what he wants, common sense alone dictates that he cannot get the court to order the defendant to give him what he wants. The court will rule against him on the claim he has made in the court by dismissing it.

The established rule is, therefore, that the person to start leading evidence is the one against whom a ruling will be given if no evidence is led. This position has been stated in the case of **Faibi v. State Hotels Corporation [1968] GLR 471** where Ollennu JA held as follows:

" onus in law lay upon the party who would lose if no evidence was led in the case; and where some evidence had been led it lay on the party who would lose if no further evidence was led."

Additionally, the Court of Appeal in the case of **Duah v Yorkwa [1993-94] 1 GLR 217—241** stated as follows:

"In our jurisprudence, if two parties go to court to seek redress to a dispute, it is the plaintiff who initiates the litigation and literally drags the defendant into court. If both parties decide to lead no evidence, the order which will be given will necessarily go against the plaintiff. Therefore it is the plaintiff who will lose first, who has the duty or obligation to lead evidence in order to forestall a ruling being made against him. This is clearly amplified in section 11 (1) of NRCD 323"

This particular requirement of the law has been stated in Section 11 of NRCD 323.

Section 11- Burden of Producing Evidence Defined.

11. Burden of producing evidence defined

(1) For the purposes of this Act, the burden of producing evidence means the obligation of **a party to introduce sufficient evidence to avoid a ruling on the issue against that party.**

(2) In a criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt.

(3) In a criminal action, the burden of producing evidence, when it is on the accused as to a fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.

The party who bears the burden of producing evidence or the allocation of the burden of producing evidence has been provided for under section 17 of NRCD 323. The Provision states as follows:

"17. Allocation of burden of producing evidence

Except as otherwise provided by law,

(a) the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof;

(b) the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact."

The general principle discernable from the above provisions is that the necessity of adducing evidence always lies with the person who lays the charges. This party usually also has the burden of persuasion as to that fact. This person must, therefore, discharge this burden of producing evidence before his opponent would be called upon to lead evidence. In **Ababio vs. Akwasi III [1994-1995] GBR 774** the court pointed out that:

> *"A party whose pleading raised an issue essential to the success of the case assumed the burden of proving such issue. The burden only shifted to the [other party] when [such a party] had adduced evidence to establish the claim"*

HOW TO DISCHARGE THE BURDEN OF PRODUCING EVIDENCE

The burden of producing evidence is discharged by producing admissible evidence like documents, oral testimonies, real evidence etc. In the case of **Ackah v Pergah Transport Ltd [2010] SCGLR 728** the court re-stated the point that:

> "*It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence. This is a requirement of the law on evidence under sections 10(1) and (2) and (11(2) and (4) of the Evidence Act, 1975, (NRCD 323).*"

CAN A DEFENDANT BE ASKED TO START A CASE?

Ordinarily, it is a Plaintiff who has commenced the action that is required to start the adduction of evidence. This is because it is the plaintiff who will lose if no evidence is led. However, in some cases where the Defendant has admitted the plaintiff's case, it would appear from the reading of Sections 11 and 17 that the burden will then fall on the

defendant to start the adduction of evidence since if no evidence is led at that point it is the Defendant who will lose.

In the case of **Sumaila Bielbiel v. Adamu Dramani and AG (No.3) [2012] 1 SCGLR 370** the Supreme Court invited the defendant to start the adduction of evidence but this was resisted by the counsel for the defendant. The Supreme Court eventually withdrew the invitation and asked the Plaintiff to start.

Facts- In this case, the court had to determine a preliminary issue as to which of the parties, that is, plaintiff or the first defendant should open their case by adduction of evidence. The court had at an earlier instance invited the first defendant to begin the adduction of evidence as to whether he holds or has revoked his British citizenship prior to contesting the election as a parliamentary candidate. The invitation was strenuously rejected by the first defendant counsel.

In his ruling on the objection by counsel, Dr Date- Baah JSC stated:

> "*There are two kinds of burden of proof recognized by the common law and which are preserved in Ghanaian law by the evidence Act, NRCD 323. In the common law, some cases and text writers have made distinction between the legal burden of proof and the evidential burden of proof. The distinction is mirrored in the Evidence Act by the distinction between the burden of persuasion and the burden of producing evidence.*
>
> *The burden of persuasion is defined in Section 10(1) as the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.*
>
> *The burden of producing evidence is defined Section 11(1) as the obligation of a party to introduce sufficient evidence to avoid a ruling on an issue against that party*
>
> *The distinction between the two burdens of proof is important because the incidence of the burden of producing evidence can lead to a defendant acquiring the right to begin leading evidence on a trial, even though the burden of persuasion remains on the plaintiff.*
>
> *Ordinarily the burden of persuasion lies on the same party as bears the burden of producing evidence. However, depending upon the pleadings or what facts are admitted, the evidential burden can move on to a defendant. The cumulation on the defendant of the evidential burden on the issues to be tried in a case result in the right to open the case shifting to the defendant.*

For instance, where the burden of producing evidence on every issue in a case lies on the defendant, he or she will have the right to open the case even if the burden of persuasion remains on the plaintiff."

Court's reason for the invitation

"On the fact of the present case, this court indicated to counsel that it was inclined to invite the first defendant to begin the process of adduction of evidence, since it would appear that the burden of producing evidence on the issue of whether he had renounced his British citizenship was on him, while on the affidavit evidence, the fact that the first defendant had been issued with a British passport was admitted. The issue in contention is whether on the dates of the election in 2008 and his subsequent swearing into office as MP, the first defendant was still the holder of a British passport.

The offer by this court of the right to begin oral testimony to the first defendant was meant to be without prejudice to the burden of persuasion remaining on the plaintiff with regard to the facts necessary for the plaintiff to succeed in his suit."

The Supreme Court concluded as follows:

*"Counsel for the first defendant has strenuously resisted the offer to begin the adduction of evidence. In our view, it is not necessary to examine the minutiae of counsel's objection since what is being extended to the first defendant is a right or, as we referred to in court earlier, a **privilege** and not an obligation. Accordingly, if he is opposed to it, it should be withdrawn. For the reasons canvassed above, we unanimously invite the plaintiff to open his case"*

The above case thus provides a possible scenario where a defendant in a matter may be called upon to start the process of producing evidence. It must, however, be noted that this is without prejudice to the burden on the plaintiff to discharge the burden of persuasion.

DOES A DEFENDANT IN A CIVIL CASE HAVE A DUTY TO LEAD EVIDENCE

The legal position is that a Defendant who has not made any claim before the court is not mandated to lead any evidence at the trial. However, in a civil case where a plaintiff has discharged his burden of producing evidence, the defendant who decides not to lead evidence will likely lose on the issue before the court. This legal position has been stated by the Supreme Court in the case of **In re Ashalley Botwe Lands: Adjetey Agbosu and others v Kotey and Others [2003-2004] SCGLR 420** per Brobbey JSC as follows:

" The hackneyed common law principle has always been that a defendant in a civil case assumes no onus of proof and, indeed, is said to be under no obligation to

prove his defence. Serious inroads have however been created in this principle by two sections in NRCD 323. The first is section 11 and [sic] the second is section 14… These sections of NRCD 323 clearly require a defendant who wishes to win his case to lead evidence on issues he desires to be ruled in his favour. The effect of sections 11(1) and 14 and similar sections in NRCD 323 may be described as follows: A litigant who is a defendant in a civil case does not need to prove anything; the plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time, if the court has to make a determination of a fact or of an issue, and that determination depends on evaluation of facts and evidence, the defendant must realise that the determination cannot be made on nothing. If the defendant desires the determination to be made in his favour, then he has the duty to help his own cause or case by adducing before the court such facts or evidence that will induce the determination to be made in his favour. The logical sequel to this is that if he leads no such facts or evidence, the court will be left with no choice but to evaluate the entire case on the basis of the evidence before the court, which may turn out to be only the evidence of the plaintiff. If the court chooses to believe the only evidence on the record, the plaintiff may win and the defendant may lose. Such loss may be brought about by default on the part of the defendant. In the light of the statutory provisions, literally relying on the common law principle that the defendant does not need to prove any defence and therefore does not need to lead any evidence may not always serve the best interest of the litigants, even if he is a defendant."

PROOF OF A POSITIVE AVERMENT AND NOT A NEGATIVE AVERMENT

Proof lies upon him who affirms, not with him who denies, since by the nature of things, he who denies a fact cannot produce proof. Where a party makes a positive averment capable of proof, it is his duty to lead evidence to establish the positive averment and not the duty of the opponent to establish the negative. In Powell's Principles and Practice of the Law of Evidence (10th ed.) at p. 135-136 the learned author in discussing the burden of proof, inter alia, states:

"As a rule, the onus of proof lies upon the party who has in his pleading maintained the affirmative of the issue; for a negative is usually incapable of proof. The affirmative is generally, but not necessarily, maintained by the party who first raises the issue.."

See: **BANK OF WEST AFRICA LTD. v. ACKUN [1963] 1 GLR 176-182**

THE BURDEN OF PERSUASION

Some decided cases and textbook writers describe the burden of persuasion as the legal burden or the persuasive burden. The "persuasive" or "legal" burden rests on the party

who must satisfy the court on a particular issue in order for the relevant fact (or facts) to be found proven.

The legal burden of proof is thus the obligation the law imposes on a party to prove a fact in issue. It requires one to lead evidence that will convince the court that his case has more merits than that of his opponent. It is the obligation on a party to prove the existence or non-existence of a fact in issue to the requisite standard or requisite degree of belief in the mind of the jury or judge or the extent that will satisfy the jury or the trier of the fact. It is when he so convinces the court that it will rule in his favour.

Depending on the case, it is possible for different parties to bear persuasive burdens with respect to different issues. For example, where an accused pleads insanity, the prosecution bears the persuasive burden in respect of proving that he has committed the crime, but the accused bears the persuasive burden in respect of proving his plea of insanity.[2].

Section 10 of the Evidence Act NRCD 323 provides as follows:

> ***"Section 10- Burden of Persuasion Defined****.*
>
> *10. Burden of persuasion defined*
>
> *(1) For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.*
>
> *(2) The burden of persuasion may require a party*
>
> *(a) to raise a reasonable doubt concerning the existence or non-existence of a fact, or*
>
> *(b) to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt."*

What constitutes the burden of persuasion was discussed in the case of **Duah v Yorkwa [1993-94] 1 GLR 217—241** where the court stated as follows:

> *"Considering the wording of section 10 (1) of NRCD 323 in the light of the Commentary on the Evidence Decree at pp 14-16,* ***I am of the view that the expression "burden of persuasion" should be interpreted to mean the quantity, quantum, amount, degree or extent of evidence which a litigant is obligated to adduce in order to satisfy the requirement of proving a situation or a fact.*** *"*

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[2]James Chalmers "Scottish Evidence Law Essentials" Edinburgh Unversity Press (2021) p 7.

Simply put, it is the burden or responsibility of convincing the judge to the requisite degree by adducing evidence in support of your claim. It is the burden of establishing your case.

Writing on the subject **"Incidence of the legal burden",** the learned authors of **Halsbury's Laws of England,** Volume 17 on Evidence at paragraph 14 of page 11 state as follows: *"**The legal burden of proof normally rests upon the party desiring the court to take action, thus a claimant must satisfy the tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom the substantiation of that particular allegation is an essential of his case."***

In **Barkers-Wood v Nana Fitz [2007-2008] SCGLR 879** Dr. Date Baah discussed the burden of persuasion in light of Section 10 and made the following observation.

> *Since the defendant claimed that the admitted oral contract between him and the plaintiff had been rescinded by mutual agreement, the persuasive burden was clearly on him to prove that assertion. The burden of persuasion remains on the defendant, even if the evidential burden shifts as a result of any assertion made by the plaintiff in response to his claim.* ***The common law has always followed the common sense approach that the burden of persuasion in proving all facts essential to any claim lies on whoever is making the claim*****.**

The above exposition on the law is in line with Section 14 of the Evidence Act NRCD 323, which provides that:

> **"Section 14- Allocation of Burden of Persuasion**
>
> *Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defense that party is asserting."*

The principle, therefore, is that where the plaintiff makes a positive assertion at the start of the trial, he bears the legal burden to adduce evidence to convince the court. Put differently, he who asserts must prove. In the case of **Takoradi Flour Mills v Samir Faris [2005-2006] SCGLR 882** the Supreme Court held as follows:

> *"… the burden of proof. Or the onus probandi, by which it is the duty of the party who asserts the affirmative to prove the point in issue. This was expressed in the classical terms* ***ei incumbit probation qui dicit, non qi negat****. As it was the Plaintiff who made a claim and asserted the positive, he had to adduce evidence sufficient to establish a prima facie case, as required by section 14 of the Evidence Decree 1975 because in law where a fact is essential to a claim, the party who*

asserts the claim has the burden to persuade the court of the existence of that fact."

If a claimant is unable to discharge the legal burden he bears on any fact in issue in relation to his case, the whole of that case will collapse. For this reason, it is sometimes said that he bears a specific legal burden on each of the facts in issue he is obliged to prove and an `ultimate burden' to prove his case as a whole.

By contrast, if the defendant bears the legal burden on an issue, for example, because he has responded to the claimant's allegation of negligence with his own counter-allegation of contributory negligence, his failure to discharge that burden will not necessarily mean he will lose his case. He may fail to prove contributory negligence, but if the claimant fails to prove any of the facts in issue which comprise his allegation of negligence it is the claimant who will ultimately lose, for the defendant will not be found liable to any extent.

The keywords in Section 10 are to establish "*a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court."*

Ordinarily, the evidence must be led before it can be weighed. Unlike the burden to produce evidence, all the evidence must be before the court before there can be consideration for the burden of persuasion. In effect, the burden of persuasion is determined at the end of the trial after all the evidence has been adduced in the court.

Put differently, whether the legal burden has been discharged, in respect of any fact in issue, is determined by the tribunal of fact at the end of the trial in the light of all the evidence adduced by both parties.

Summary

In their book entitled ***Mc Cormick on Evidence*, 2nd Edition** published in 1972 at page 783, the learned authors writing on the subject**:** *"The Burden of Proof: The Burden of Producing Evidence and the Burden of Persuasion*" state as follows:

> *"……...The term encompasses two separate burdens of proof. One burden is that of producing evidence satisfactory to the judge, of a particular fact in issue. The second is the burden of persuading the trier of fact that the alleged fact is true.*
>
> *The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced. It is usually cast first upon the party who has pleaded the existence of the fact, but as we shall see, the burden may shift to the adversary when the pleader has discharged his initial duty……..*

The burden of persuasion becomes a crucial factor only if the parties have sustained their burdens of producing evidence and only when all the evidence has been introduced……..”

Standard of Proof

In Ghana there are three (3) standards of proof.

1. Proof on a balance of probabilities or proof by the preponderance of probabilities- Section 12
2. Proof beyond reasonable doubt- Section 13(1), (on the prosecution)
3. Proof by raising a reasonable doubt- section 13(2), (on the accused)

PROOF ON A BALANCE OF PROBABILITIES

In a civil matter the standard of proof is on Proof on a balance of probabilities or proof by the preponderance of probabilities. What constitutes proof by a preponderance of probabilities has been provided for under Section 12 of NRCD 323.

> **“12. Proof by a preponderance of the probabilities**
>
> **(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.**
>
> **(2) “Preponderance of the probabilities” means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence.”**

What is meant by Proof by a preponderance of probabilities was defined in the case of **Sagoe & others v SSNIT[2012] 2 SCGLR 1093** where the court stated:

> *“By the rules of evidence, at the close of pleadings in the matter herein, based on the allocation of the burden of proof, the plaintiffs were required to lead evidence before the trial court on the respective areas claimed to belong to each of them for the purpose of persuading the trier of fact that the facts asserted in support of their case were more probable to have existed than their non-existence. “**Proof by a preponderance of probabilities”** within the context of the burden of proof simply means weightier or superior evidence.”*

This has been explained further in the case of **BISI AND OTHERS v. TABIRI ALIAS ASARE [1987-88] 1 GLR 360-413** court held

“The standard of proof required of a plaintiff in a civil action is to lead such evidence as will tilt in his favour the balance of probabilities on the particular issue. The rampant encounter with the pleader's demand for strict proof has never been taken to call for an inflexible proof either beyond reasonable doubt or with mathematical exactitude or with such precision as would fit a jig-saw puzzle. With the definition supplied, preponderance of evidence, in short, becomes the trier's belief in the preponderance of probability. An American decision Norton v. Futrell, 149 Cal App. 2d 586 (1957) has explained that:

"The term 'probability' denotes an element of doubt or uncertainty and recognizes that where there are two choices, it is not necessary that the jury be absolutely certain or doubtless, but that it is sufficient if the choice selected is more probable than the choice rejected."

PROOF IN CRIMINAL PROCEEDINGS

Proof in criminal trials is different from proof in civil trials in significant ways. In criminal trials, the accused is presumed to be innocent. The 1992 constitution of Ghana at Article 19(2) (c) provides that:

“A person charged with a criminal offence shall (c) be presumed to be innocent until he is proved or he is pleaded guilty.”

This is the presumption of innocence. This places the onus of proving the guilt of the accused on the prosecution. The onus is placed on the prosecution because it is the party which initiates prosecution in court on the premise that the accused has committed an offence.

The importance attached to this principle is reinforced by the very high standard of proof the prosecution must attain to secure a conviction, but the desirability of acquitting the innocent is not the only justification for the presumption of innocence. Other considerations, such as losing his property, losing his liberty by being incarcerated, losing his life altogether if sentenced to death, the dignity of the individual, and the individual's right to privacy, which may be violated as a result of any decision to prosecute, demand that prosecutions should be commenced and continued only when there is cogent evidence to justify such course of action. The point was eloquently made in the Supreme Court of Canada in **R v. Oakes [1986] 1 SCR 103 (at pp. 119 - 20):**

“The presumption of innocence is a hallowed principle lying at the very heart of criminal law. . . . [It] protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with

a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt he or she is innocent. This is essential in a society committed to fairness and social justice."

Thus, in criminal proceedings, the prosecution generally has to prove each of the elements of the offence charged (that is, that the accused committed the actus reus of the offence with the requisite mens rea) and also disprove any affirmative defence raised by the accused. In the case of **R v Sims [1946] KB 531**, at 539 (Lord Goddard CJ) Lord Goddard CJ's observed that when a defendant pleads not guilty, '*everything is in issue and the prosecution has to prove the whole of its case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent'*

A central feature of most common law jurisdictions is that the prosecution has the burden of proving the guilt of the accused person beyond reasonable doubt. It appears that the philosophy behind the principle was encapsulated many years ago in the case of Hebron (1823) William Blackstone's often quoted statement that

"Better than ten guilty persons escape than one innocent suffer"

This was quoted and relied upon in the unanimous decision of **Republic vrs Acquaye alias Abor Yamoah II, ex-parte Essel and others [2009] SCGLR 749 at 750**

Section 11(2) and (3) of NRCD 323 states the standard of proof that the prosecution must meet in the discharge of their evidential burden.

(2) In a criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt.

(3) In a criminal action, the burden of producing evidence when it is on the accused as to a fact the converse of which is essential to guilt requires the accused to produce sufficient evidence so that on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt.

The `Golden Thread'

The starting point for any discussion on the incidence of the legal burden of proof in criminal proceedings is the landmark case of **Woolmington v. DPP [1935] AC 462 (HL)**.

In Woolmington v DPP, the House of Lords held that it was for the prosecution to prove all of the elements of the crime, including the mental element (i.e. the mens rea). In Woolmington, the accused was charged with murdering his estranged wife. He admitted shooting her, but claimed that he had shot her by accident. The trial judge directed the jury that, once it was established that the victim had died as a result of the accused's act, the defence bore the burden of proving that it was an accident rather than an intentional killing.

Full Facts

Reginald Woolmington's wife, Violet, left him to live with her mother just a couple of months after their marriage and on 10 December 1934 he cycled round to their house in an attempt to induce her to return to him. The next-door neighbour, a Mrs Smith, heard the sound of a gun at about 9.30 a.m. and, upon looking out of her front window, saw Woolmington mount his bicycle and ride away. Mrs Smith entered her neighbour's home to find Violet lying on the floor. She had been shot through the heart and was dead. A note was later found in Woolmington's coat pocket which suggested that he had intended to kill his wife and then himself. At his trial for murder, Woolmington admitted that he had cycled round to Violet's house armed with a loaded sawn-off shotgun but said that he had merely intended to frighten her into returning with him by threatening suicide and that the gun had gone off accidentally. The trial judge directed the jury, in accordance with the law as it was generally understood to be, that once it had been proved by the prosecution that Woolmington had killed his wife a presumption of murder arose and it was for him to prove that he had not intended to kill her. Woolmington was convicted of murder and appealed unsuccessfully to the Court of Criminal Appeal, and then finally to the House of Lords. The House of Lords quashed his conviction, and in a speech with which all their Lordships concurred Viscount Sankey LC said (at pp. 481 -2):

> *" While the prosecution must prove the guilt of the prisoner, there is no . . . burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt. Throughout the web of 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 the defence of insanity and subject also to any statutory exception . . . 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 Wales) and no attempt to whittle it down can be entertained."*[3]

The consequence is that, as a general rule, the prosecution are obliged:

(i) to prove that the accused committed the actus reus of the offence with the requisite mens rea and

[3] Woolmington v DPP [1935] AC 462.

(ii) to disprove any defence (in respect of which the accused has discharged a mere evidential burden).

Viscount Sankey referred to the common-law defence of insanity and certain statutory exceptions, demonstrating that while the presumption of innocence is fundamental, it is not an absolute right immune from derogation; but such exceptions aside, the burden rests with the prosecution to disprove any defence which the judge has allowed the jury to consider, and the judge must make this clear in his summing-up. As Lord Bingham CJ stated in **R v. Bentley (Deceased) [2001] 1 Cr App R 307 (CA) (at p. 326):**

> *`The jury must be clearly and unambiguously instructed that the burden of proving the guilt of the accused lies and lies only on the Crown, that (subject to exceptions not here relevant) there is no burden on the accused to prove anything and that if, on reviewing all the evidence, the jury are unsure of or are left in any reasonable doubt as to the guilt of the accused that doubt must be resolved in favour of the accused.'*

In practice, the evidential burden is of most importance in criminal cases. Proof beyond a reasonable doubt does not mean that there should be no doubt whatsoever in the case presented by the prosecution. It means that by the end of the trial, the prosecution must prove every element of the offence or the charge and show that the defence is not reasonable. In **FRIMPONG @ IBOMAN V REPUBLIC** the Supreme Court stated

> *"The prosecution have a duty to prove the essential ingredients of the offence with which the appellant and the others have been charged beyond any reasonable doubt. The burden of proof remains on the prosecution throughout and it is only after a prima facie case has been established i.e. a story sufficient enough to link the appellant and the others to the commissioning of the offences charged that the appellant, therein accused is called upon to give his side of the story."*

WHAT IS BEYOND REASONABLE DOUBT

Where the prosecution bears the legal or persuasive burden, they must establish a defendant's guilt beyond reasonable doubt. Many judicial attempts have been made to define what is, or is not, reasonable doubt. For the most part, these efforts have generally shed little light on the term. One of the better definitions, however, was that given by Lord Denning in **MILLER V MINISTER OF PENSIONS 1947] 2 All ER 372:**[4]

> *"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted of fanciful possibilities to*

[4] [1947] 2 All ER 372.

deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt but nothing short of that will suffice"[5]

Proof beyond reasonable doubt is far above proof on the balance of probabilities. In **OTENG V THE STATE** [1966] GLR 352 at 354 the Supreme Court took the view that:

> **One significant respect in which our criminal law differs from our civil law is that while in civil law a plaintiff may win on a balance of probabilities; in a criminal case the prosecution cannot obtain a conviction upon mere probabilities.**

Reasonable doubt certainly does not include fanciful doubts. In the same **Oteng v The State** at page 355, the Supreme Court ruled that:

> **The citizen too is entitled to protection against the State and that ours is that a person accused of a crime is presumed innocent until his guilt is proved beyond reasonable doubt as distant from fanciful doubt.**

Based on the above, suppose there is a reasonable doubt created by the evidence adduced either by the prosecution or the defence, then, the prosecution has not made out their case and the defendant must be acquitted.

<u>Reasonable doubt</u>

The law is that the prosecution must prove the guilt of the accused person; but whenever the law requires a defendant to prove something, he does not have to make you sure of it. He has to show that it is probable, which means it is more likely than not, that [e.g. he had reasonable excuse etc. for doing it]. If you decide that probably he did [e.g. have a reasonable excuse etc. for doing it], you must find him 'Not Guilty'. If you decide that he did not, then provided that the prosecution has made you sure of what it has to prove, you must find him 'Guilty.' **In Lutterodt vrs Commissioner of Police [1963] 2 GLR 429 holding 3** which sets out three stages that a court must use to examine the case of the defence in criminal cases. These are:

> **(3)"In all criminal cases where the determination of a case depends upon facts and the court forms the opinion that a prima facie case has been made, the court should proceed to examine the case for the defence in three stages**
>
> **a. if the explanation of the defence is acceptable, then the accused should be acquitted;**

[5] Miller v Minister of Pensions

b. <u>if the explanation is not acceptable, but is reasonably probable, the accused should be acquitted;</u>

c. if quite apart from the defence's explanation, the court is satisfied on a consideration of the whole evidence that the accused is guilty, it must convict."

<u>When there is any doubt</u>

The Law provides that where there is any doubt, same must be resolved in favour of the accused. *In* ***<u>Faisal Mohammed Akilu vs The Republic CRIMINAL APPEAL NO. J3/8/2013 dated 5TH JULY, 2017 (unreported)</u>*** the Supreme Court stated as follows:

> *"We want to lay emphasis on the principle in criminal trials that; all reasonable doubts that make the mind of the court uncertain about the guilt of the accused are always resolved in favour of the accused. By reasonable doubt is not meant mere shadow of doubt. Where, from the totality of the evidence before a trial court, a soliloquy of; 'should I convict', or 'should I acquit' takes control of the mind of the court, then a reasonable doubt has been raised about the guilt of the accused. The appropriate thing to do, in such a situation, is to acquit, as required by law."*

<u>Criminal trials: proof on the balance of probabilities</u>

In all cases where the accused bears the legal burden of proof on an issue, the standard that has to be met is proof on the `balance of probabilities'. An obligation to prove a defence also entails an obligation to discharge an evidential burden in relation to it. On those relatively rare occasions on which the defence bears the legal burden on an issue at trial (e.g. where insanity or diminished responsibility is pleaded, or where an express or implied statutory exception applies), the relevant standard is the balance of probabilities.

ALLEGATIONS OF CRIME IN CIVIL TRIALS.

In Ghana, where there is an allegation of a crime in a civil case the one alleging must prove the criminal act beyond a reasonable doubt and not on preponderance of probabilities. This means if someone alleges fraud or forgery in a civil case, the standard of proof required to establish the fraud or forgery is beyond a reasonable doubt. This is contained in Section 13(1) NRCD 323 as follows:

> "S.13 (1) In a **civil** or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond reasonable doubt."

In Ghana, it is thus clear that the standard required in a civil case where a criminal matter arises in such cases is proof beyond reasonable doubt. This was discussed in two cases namely:

a. Fenuku v. John Teye 2001-2002 SCGLR 985
b. Sasu Bamfo v. Sintim [2012] 1 SCGLR 136

In Fenuku v. John Teye, the SC held:

> **"The law regarding proof of forgery or any allegation of a criminal act in a civil trial was governed by Section 13(1) of the Evidence Act, which provided that the burden of persuasion required proof beyond reasonable doubt. The SC by way of rehearing looking at the evidence adduced was not satisfied that forgery had been established beyond reasonable doubt."**

In Sasu Bamfo v. Sintim:

The Supreme Court affirmed its decision on the issue of proof of crime in a civil matter when it's said in holding 3 as ff:

> "The law regarding proof of forgery or any allegation as a criminal act in a civil trial was governed by Section 13(1) of the Evidence Act. That Section provided that the burden of persuasion required was proof beyond reasonable doubt."

SUBMISSION OF NO CASE IN A CRIMINAL CASE

The determination of whether a party has discharged the burden of producing evidence is a question of law. This is provided for under section 1(3) and 1(4) of the Evidence Act.

Section 1(3) The determination whether a party has met the burden of producing evidence on a particular issue is a question of law which shall be determined by the Court.

(4) Where the Court determines that a party has not met the burden of producing evidence on a particular issue the Court shall, as a matter of law determine the issue against that party.

There is a need to distinguish the burden of persuasion which is eventually determined by the standard of proof from the burden of producing evidence.

This is because even though in a trial with judge and jury it is the duty of the jury to determine whether the prosecution has proved his case beyond a reasonable doubt, this question will not arise if the Judge is of the opinion that the prosecution was not discharged the burden of producing evidence at the end of the Prosecution's case.

This is why we have a submission of no case to answer. A submission of no case to answer is determined by the Judge and not the jury. The judge will direct the jury to enter a verdict of not guilty.

"Section 271 of Act 30 Consideration of case to answer

> *The Justice may consider at the conclusion of the case for the prosecution whether there is a case for submission to the jury, and if of the opinion that a case has not been made that the accused has committed an offence of which the accused could be lawfully convicted on the indictment on which the accused is being tried, the Justice shall direct the jury to enter a verdict of not guilty and shall acquit the accused."*

This points to the fact that the burden of producing evidence is a question of law.

Pursuant to Section 173 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) which provides as follows:

> *"**Acquittal of accused when no case to answer***
>
> *"Where at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require him to make a defence, the Court shall, as to that particular charge, acquit him"*

However, where the Court finds that a prima facie case has been made against the accused person, then the Court must call upon the accused person to open his defence. This is provided for at Section 174(1) of Act 30 which states thus:

> *"(1) At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused sufficiently to require the accused to make a defence, the Court shall call on the accused to make the defence and shall remind him the accused of the charge and inform the accused of the right of the accused to give evidence personally on oath or to make a statement.*"

ESTABLISHING A PRIMA FACIE CASE AT THE CLOSE OF PROSECUTION'S CASE

A "prima facie case" is a party producing enough evidence to allow the fact finder to infer the fact in issue and rule in the party's favour. In criminal cases at the close of the prosecution's case they must have established a prima facie case against the accused. In ***Tsatsu Tsikata v The Republic*** **[2003-2005] SCGLR 1068** Prof Ocran JSC posed the following question which summed up the Ghana position on the establishing of a prima facie case in criminal cases as follows:

> *"Indeed, if the submission of no case is made just at the close of the prosecution's case and cross-examination of its witnesses, how could one seriously speak of*

proof beyond reasonable doubt when the defence has not had a full chance of punching holes in the prosecution's case to possibly raise doubt in the mind of the trier of facts by calling its own witnesses and presenting counsel's address? It seems as if we have to look for a lower standard of proof at this preliminary stage in the criminal proceedings."

However, In the case of **Republic vs. Eugene Baffoe-Bonnie & 4 Others [2020] DLCA8745**, the court stated that the evidence at the close of the prosecution's case must be such that if the accused did not respond, then it was capable of grounding a conviction. The court stated thus:

"*It is true that at the close of the case for the prosecution, the guilt of the accused is not supposed to have been proved beyond reasonable doubt. As the authorities however show, and having regard to the provisions of section 11(2) of the Evidence Decree 1975, NRCD 323, the evidence led at this stage should however be such that it should be capable of convicting the accused if he/ she offers no explanation."*

REFUSAL TO TESTIFY IN COURT

The effect of the case of the prosecution is usually to establish a prima facie case against the accused. When that happens, the burden of proof may shift from the prosecution to the accused or the defence.

If the accused refuses to testify after the prima facie case has been made, the court may rule on the basis of the evidence before it. If the evidence is such as will warrant conviction, the court may convict the accused on the evidence. This implies that if the accused does not want a ruling made against him, he will do well to testify where prima facie case has been made against him. The ruling of the court in such an eventuality will be justified by NRCD 323, s 17(1) which provides that:

"Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the part against whom a finding on the fact would be required in the absence of further proof."

SHIFTING OF BURDEN OF PROOF

When it is said that the burden of proof shifts, what is meant is that after one party has adduced sufficient evidence to prove his point, the burden will move to the opposing party to adduce more cogent evidence which will disprove the opponent's case and induce the court to believe him and rule in his favour.

The shifting of the burden applies only to the burden to produce evidence. This is the position in civil trials. The burden will not shift in respect of burden of persuasion in civil trials.

The criminal proceeding in Section 15 begins by placing on the prosecution the burden of proof of the guilt of the accused. The burden never shifts to the accused. The accused has a different burden of persuasion which requires him to establish his defense by reasonable doubt.

In the commentary to the Evidence Act this point is explained as ff:

Thus, while the burden of producing evidence may shift from one party to another and back again in the course of a trial, the burden of persuasion will not shift back and forth, it may shift from the pleadings but it will be determined to have done so only after all the evidence has been presented.

It is essential to note that the legal burden sometimes refers to the burden placed on parties by law, such as the presumption of innocence which implies, For instance, the onus of proof in criminal cases is always on the prosecution. Such legal burden never shifts from one on whom it is placed.

Exceptions to Burden of Proof

In Ghana, there are exceptions to the principle that he who affirms or asserts assumes the onus of proof.

EXCEPTIONS:

(a) Statutory exceptions

(c) Insanity (read M'NAGHTEN'S case and see Section 15 (3) of the Evidence Act)

EXCEPTIONS TO THE GENERAL RULES

In practice there are certain circumstances which demand that the accused person literally has to prove his innocence or defence. These apply in two situations, namely, where statute provides that the accused prove his defence like insanity cases or where the law places the onus of proof on the accused.

a. ***First exception: By statutory law***

The situations when statute places on the accused person the onus to establish his innocence were originally provided in the common law. They were later codified in some

statutes. They obviously constitute exceptions to the general rule. The first part of the exception is covered by NRCD 323, Section 14 which provides that:

> *"Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting."*

The above provision must be considered in two parts. The first consideration is to look at the positive averment in the section which reads:

> *"…a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting."*

The first consideration re-states the general rule, which is to the effect that a party against whom a ruling would be given has the onus to make his case. Where the prosecution has established a prima facie case against the accused, a ruling would be given against the later if he fails to make his defence to the prima facie case.

The second consideration is the first part of the section which is in the form of a clause as follows:

> *"Except otherwise provided by law, unless and until it is shifted…."*

The clause in the second section implies that the law can provide situations otherwise than the general rule. That is another way of stating that the law can provide exceptions to the general rule on the shifting of the onus of proof. The law may be statutory law or case law. The statutory law or case law may be stated as containing exemptions, provisos, exceptions, excuses, justifications or qualifications.

Those exemptions, etc, may be couched in words such as:

I. "*proof of which shall lie on the accused*"
II. "unless otherwise justified by the accused",

The exceptions may be provided expressly or by necessary implication. Where the statute contains these exemptions, etc, the onus of proof is taken away from the prosecution and placed on the defence, before it may possibly shift back to the prosecution.

This means that after the prosecution has introduced the charge and has adduced the supporting facts or evidence from prosecution witnesses which amount to the establishment of prima facie case, the accused has the evidential burden to lead evidence in support of his defence to justify the defence being considered before the jury or the trier of facts, before the prosecution assumes the legal burden of disproving the defence of the accused.

Since the provisions are considered in statutes, the court has the initial duty to interpret the statute to determine whether the statute creates the exception, which will entail shifting the onus from the prosecution to the defence and back to the prosecution.

Examples of the exemptions are as the following charges:

Act 29, section 148(1) – Having possession of stolen property

Act 29 Section 244 – Acceptance of bribe by public officer

Act 29, s 165- whoever without lawful excuse the proof of which shall lie on him has his possession any instrument or thing specially contrived or adapted for the purpose of forgery shall be guilty of a misdemeanor.

Act 29, s 206- A person who, without lawful authority the proof of which lies on that person, has in a public place an offensive weapon commits a misdemeanor.

Act 29, s 169(b) - A person commits a criminal offence and is liable to a fine not exceeding fifty penalty units who

b. Without lawful excuse, the proof of which lies on that person, makes or has knowingly in possession a die or an instrument capable of making the impression of that stamp.

For academic purposes, it appears that the validity of the statutes which place on the accused the onus of proving his innocence may be doubtful. The reason is that the 1992 Constitution is the fundamental law of the land. By article 1(2), any law found to be inconsistent with it is void, to the extent of the inconsistency. In so far as the Constitution, by article 19(2), categorically emphasizes on the presumption of innocence in favour of the accused, the law which places on the accused the onus is obviously inconsistent with the Constitution. It is arguable whether such law is not void to the extent of the inconsistency.

On the other hand, it would appear that the issue has been taken care of by the article 19(16) (a) which provides that:

a. Paragraph (c) of clause (2) of this article, to the extent that the law in question imposes upon a person charged with a criminal offence, the burden of proving particular facts.

FACTS PECULIARLY WITHIN THE KNOWLEDGE OF THE ACCUSED

The courts have recognised that, where an explanation for otherwise suspicious conduct lies peculiarly within the knowledge of the accused, a provisional burden may fall upon him to explain his conduct. Also, when an accused person seeks to rely on an exception

or an exemption provided in a statute, it imposes on the accused the burden of proving the existence of that exemption.

Where the knowledge of a fact is peculiarly within the knowledge of the accused person, a negative averment is not required to be proved by the prosecution but on the contrary the affirmative must be proved by the accused as a matter of defence.

That was the holding in **SALIFU V THE REPUBLIC [1974]2 GLR 291 (HOLDING 2)**. In that case, the accused procured a document which he claimed to be genuine. He relied on it for his defence but the prosecution maintained that it was not genuine. It was held that the accused who claimed that the document was genuine assumed the onus to prove the genuineness of the document. It was not the duty of the prosecution to prove that the document was not genuine. The court stated as follows:

> *"Where knowledge of a fact was peculiarly within the knowledge of an accused person a negative averment was not to be proved by the prosecution but on the contrary the affirmative must be proved by the accused as a matter of defence. Whether exhibit B was genuine or false was peculiarly within the knowledge of S. who relied on it for his defence; it was not therefore the duty of the prosecution to prove the genuineness of exhibit B"*

In an earlier decision in **COP V ANTWI [1961] GLR 408**, it was held by Supreme Court 9in holding 1) that:

> *" The fundamental principles underlying the rule of law are that the burden of proof remains throughout on the prosecution and the evidential burden shifts to the accused only if at the end of the case for the prosecution an explanation of circumstance peculiarly within the knowledge of the accused is called for. The accused is not required to prove anything; if he can merely raise a reasonable doubt as to his guilt, he must be acquitted."*

Self-defence is just one example of a defence that will impose an evidential burden on the accused. Others include non-insane automatism, intoxication, duress, diminished responsibility and loss of self-control.

b. *Second exception: Cases of diminished responsibility*

The second part of the exceptions relates to proof of insanity. By section 137(1) of Act 30, a person charged with an offence may plead insanity as his defence.

At the trial of such a person, if there is evidence which shows that he is so insane as not to be responsible for his actions in the terms of Act 29, ss 27 and 28, the accused may be pronounced guilty but insane.

Where the accused contends that he is not guilty because at the time of commission of offence he was suffering from insanity or mental disease which prevented him from knowing the nature and consequences of his actions, he assumes the legal burden of proving his insanity. That is another statutory exception which places the burden of proof on the accused instead of on the prosecution.

The statutory exception was developed from the common law rule that every person is presumed to be sane and to know the natural and probable consequences of his actions as was decided in the M'Naghten's case (1843) 10 Cl & Fin 200 also Section 42 of NRCD 323 provides

"Full age and sound body

A person is presumed to be of full age and of sound body."

The legal position in Ghana is that where proof of insanity is in issue, the principle to be applied has been codified in NRCD 323,s 15(3) which read as follows:

> Unless it is shifted, the party claiming that a person including himself is or was insane or of unsound mind has the burden of persuasion on that issue.

By this section, when a person claims that at the time of the commission of the offence he was insane and therefore could not remember what happened to be held answerable for the consequences of his actions, he assumes the legal burden of proving that insanity.

The law requires that he proves that insanity by leading evidence showing the state of his mind at the time of the commission of the offence.

The standard of proof required for the accused to establish insanity is proof by preponderance of possibilities. It is lighter than the standard of proof on the prosecution.

This principle was enunciated in the English case of Sodeman v R[1936] 2 AII ER 1138 at 1140 but has been applied in Ghana in **ASARE V THE REPUBLIC [1978]GLR 193** where it happened as follows

During the night of 16 April 1973, after the appellant had retired to bed with his wife and two children, their neighbours heard a gunshot followed by a cry from the appellant's wife in the locked room. Several attempts made by the neighbours together with the father and brother of the appellant to get the appellant to open the door of the room proved futile. Eventually the appellant opened the door and rushed into the bush where he hid for four days. On his return to the village, the appellant was arrested and charged with the murder

of his wife. At the trial, the defence did not dispute the facts adduced, but relied on the defence of insanity since evidence had been given of the accused's previous history of mental derangement. The prosecuting state attorney, in his final address to the jury submitted that "since the defence are relying on this insanity it is their duty to satisfy you beyond all reasonable doubt that he in fact was insane at the time this offence was committed." The trial judge in his summing-up gave a succinct direction to the jury on the law of insanity and insane delusion but failed to direct the jury on the issue of the burden of proof required of the prosecution in a criminal trial. The appellant was convicted and sentenced to death. On appeal,

Held, allowing the appeal:

(1) a judge in a criminal trial with jury was in duty bound to sum up the law and the evidence in the case when the case on both sides was closed. The judge was also required to cover in his summing-up the issue of the burden of proof.

(2) As a general rule, there was no burden on the accused to establish his innocence, rather it was the prosecution that was required to prove the guilt of the accused beyond all reasonable doubt. In some exceptional cases however the law required that the burden of proving some defence like insanity and insane delusion should be on the defence. In such exceptional cases like the present case where a plea of insanity was made by the accused, it was mandatory for the trial judge to direct the jury clearly [p.194] on the standard of proof needed to establish the particular defence relied upon.

(3) Where the onus of proof was on the accused, the burden on him was lighter than that on the prosecutor. In the circumstances of the present case, the trial judge should have invited the jury to consider whether on the totality of the evidence, and on the balance of probabilities the appellant was, at the time of the killing of his wife, probably suffering from mental illness and was therefore totally disabled from knowing the nature or consequences of his act. An examination of the evidence as a whole showed that the appellant was insane at the time of killing his wife so as not to be legally responsible for his actions.

PRESUMPTION

A “Presumption”, is a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts. As stated by William P Richardson in his book Law of Evidence 3Ed

> *“A presumption may be defined to be an inference as to the existence of one fact from the existence of some other fact founded upon a previous experience of their connection”.*

Presumptions, properly so-called, involve certain inferences being drawn from other facts which have been proved or admitted. They involve what may be referred to as a *basic fact* (or facts) and a *presumed fact* (or facts). The existence of the presumed fact is inferred from the proof or admission of the basic fact.[1]

WHY PRESUMPTIONS ARE USED?

- It is a device which the court can use to pronounce on an issue notwithstanding the fact that there is no evidence or sufficient evidence about an issue.

- Presumption, as a device helps by allocating a burden of proof in relation to an issue to a party irrespective of which party bears the general burden of proof. The court will presume the existence of the fact in his favour and may act on it unless the contrary is shown, if it is a rebuttable presumption.

PRESUMPTIONS UNDER THE ACT

Traditionally, there was a distinction between presumptions of law and presumptions of fact.

Presumptions of law are arbitrary consequences expressly annexed by law to particular facts; and may be either *conclusive*, as that a child under a certain age is incapable of committing any crime; or *rebuttable*, as that a person not heard of for seven years is dead.

The term “presumption of fact” however is misleading. Its only use is to describe inferences which the mind naturally and logically draws from given facts, irrespective of their legal effect. Not only are they always rebuttable, but the trier of fact may refuse to make the usual or natural inference, notwithstanding that there is no rebutting evidence. Where a presumption of fact exists, the court may presume one fact on the basis of another. In many respects, this is more akin to drawing a conclusion based on circumstantial evidence.

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[1] James Chalmers “Scottish Evidence Law Essentials” Edinburgh Unversity Press (2021) p 17.

Under the Evidence Act, NRCD 323 presumptions of law are simply as **presumptions** and presumptions of fact as **inference**.

The Evidence Act NRCD 323, in **Section 18** makes a distinction between **'presumption'**, and an **'inference'**.

The Act defines **'presumption'** as "an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action".

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action. Inferences usually exist as an example of circumstantial evidence.

In the memorandum to the Evidence Act the distinction between a presumption and an inference is stated as follows:

> *"The Act distinguishes presumptions (defined as a mandatory connection between basic and assumed facts) from mere inferences (permissible but not mandatory connections between basic and assumed facts)."*

TYPES OF PRESUMPTIONS

Section 18(3) provides that "A presumption is either conclusive or rebuttable."

Conclusive (Irrebuttable) Presumptions

Conclusive presumptions, sometimes called irrebuttable presumptions of law, are really rules of law.

Thus, under the Section 24 of the Evidence Act, *"where the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, no evidence contrary to the conclusively presumed fact may be considered by the tribunal of fact*".

A conclusive presumption can thus be said to be a presumption which once admitted cannot be challenged or controverted by any evidence from an aggrieved party. The effect of the presumption is that it concludes the matter as inferred by the court or tribunal.

Presumptions of this nature cannot be rebutted by contradictory evidence of any sort. Once the basic fact is admitted or proved, proof of the presumed fact necessarily follows. An example of such a presumption is the statutory rule found at Section 26 of Act 29 that "*For the purposes of the criminal law a person under twelve years of age is incapable of committing a criminal offence*"[2]

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[2] James Chalmers "Scottish Evidence Law Essentials" Edinburgh University Press (2021) p 17.

The basic condition for the application of section 24(1) of the Evidence Act is that the court must find the presumed fact to exist before it will prevent the adduction of evidence in rebuttal of the presumed fact. This principle was stated in the case of **RE: SUHYEN STOOL; WIREDU & OBENWAA V AGYEI & ORS [2005-2006] SCGLR 424** where it was held that

> *"The predicate condition stipulated in the first part of section 24(1) of NRCD 323, namely the basic facts that had arguably given rise to a conclusive presumption must first be found or otherwise established before the application of the legal effect or consequence of conclusive presumption ie the disallowance of contrary evidence."*

Under the Evidence Act NRCD 323, examples of conclusive presumptions are stated from section 25 to 29.

Section 25. Facts recited in written instrument

(1) Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the document, or their successors in interest.

(2) Subsection (1) does not apply to the recital of consideration.

26. Estoppel by own statement or conduct

Except as otherwise provided by law, including a rule of equity, when a party has, by that party's own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon that belief, the truth of the thing shall be conclusively presumed against that party or the successors in interest of that party in proceedings between

(*a*) that party or the successors in interest of that party, and

(*b*) the relying person or successors in interest of that person.

27. Estoppel of tenant to deny title of landlord

Except as otherwise provided by law, including a rule of equity, against a claim by a tenant, the title of a landlord at the time of the commencement of their relation is conclusively presumed to be valid.

28. Estoppel of licensee to deny title of licensor

Except as otherwise provided by law, including a rule of equity, against a claim by a licensee of immovable property, the licensor is conclusively presumed to have a valid right to possession of the immovable property.

29. Estoppel of bailee, agent or licensee

(1) Except as otherwise provided by law, including a rule of equity, against a claim by a bailee, agent or licensee to whom movable property has been entrusted, the bailor, principal or licensor is conclusively presumed to have been entitled to the movable property at the time it was entrusted.

(2) For the purposes of subsection (1), the bailee, agent or licensee may show

(*a*) that the bailee, agent or licensee was compelled to deliver up the movable property to another person who had a right to it as against the bailor, principal or licensor, or

(*b*) that the bailor, principal or licensor wrongfully and without notice to the bailee obtained the movable property from a third person who has claimed it from the licensee, bailor or licensor.

Notwithstanding the fact that these presumptions are termed conclusive, they are all subject to other existing statutes, including the rules of equity. It, therefore, means that a conclusive presumption may become a rebuttable presumption if otherwise provided by law, including a rule of equity.

Rebuttable Presumptions

A rebuttable presumption is an inference drawn from certain facts that establish a prima facie case, which may be overcome by introducing contrary evidence.

Section 19 of NRCD 323

> *"19. **Prima facie evidence***
>
> *An enactment providing that a fact or group of facts is prima facie evidence of another fact creates a rebuttable presumption."*

An example of the above can be found at Article 63(9) of the 1992 Constitution of Ghana:

> ***"An instrument which –***
>
> ***(a) is executed under the hand of the Chairman of the Electoral Commission and under the seal of the Commission; and***

(b) states that the person named in the instrument was declared elected as the President of Ghana at the election of the President, shall be prima facie evidence that the person named was so elected."

As regards rebuttable presumptions, once the basic facts are established and the presumption is made, it imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact. This is provided for under Section 20 of NRCD 323 as follows:

"Section 20 NRCD 323

20. ***Effect of rebuttable presumptions***

A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact."

In **GHANA PORTS & HARBOURS AUTHORITY (GPHA) & ANOR VRS NOVA COMPLEX (2007-2008)2 SCGLR 806** in discussing the presumption of regularity in section 37 of NRCD 323 the court stated as follows:

"***It is trite learning that presumptions of this kind, have a prima facie effect only and the presumed facts may therefore be displaced by evidence****. Section 30 provides that: "Rebuttable presumptions include but are not limited to those provided in sections 31 to 49 and 151 to 162."*

A rebuttable presumption, in the language of section 20 of the Evidence Act, 1975, "imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact." It follows that whenever the maxim is applied, the person against whom it is invoked and who is entitled to lead evidence to refute the presumption, is at liberty to prove that there was in fact no due regularity or performance of the official or statutory duty in question."

As can be seen above, the party whom a rebuttable presumption operates against has the dual burden of producing evidence as well as persuading the tribunal of the non-existence of the presumption. It is said that if, after the proof of the basic fact, the

presumed fact must be taken to be established in the absence of evidence to the contrary, then an evidential burden has been cast upon the opponent of the presumed fact.

The Act's provisions clearly show that the test in applying rebuttable presumptions is objective, and the standard required to rebut a presumption is the preponderance of probabilities.

APPLICATION OF REBUTTABLE PRESUMPTIONS

Section 21 of NRCD 323

> ***"21. Applying rebuttable presumptions***
> *In an action where proof by a preponderance of the probabilities is required,*
>
> *(a) a rebuttable presumption requires the tribunal of fact to assume the existence of the presumed fact, unless the party against whom the presumption operates proves that the non-existence of the presumed fact is more probable than its existence;*
>
> *(b) when evidence is not introduced contrary to the existence of the presumed fact, the question of the existence of the presumed fact depends upon the existence of the basic facts that give rise to the presumption and is determined as follows:*
>
> *(i) if reasonable minds would necessarily agree that the evidence renders the existence of the basic facts more probable than not, the Court shall find, or direct the jury to find, in favour of the existence of the presumed fact; or*
>
> *(ii) if reasonable minds would necessarily agree that the evidence does not render the existence of the basic facts more probable than not, the Court shall find, or direct the jury to find, against the existence of the presumed fact;*
>
> *(iii) if reasonable minds would not necessarily agree as to whether the evidence renders the existence of the basic facts more probable than not, the Court shall find, or submit the matter to the jury with an instruction that it shall find, in favour of the existence of the presumed fact if it finds from the evidence that the existence of the basic facts is more probable than not, but otherwise, it shall find against the existence of the presumed fact;"*

"Section 22 of NRCD 323. Effect of certain presumptions in criminal actions

> *"In a criminal action, a presumption operates against the accused as to a fact which is essential to guilt only if the existence of the basic facts that give rise to the presumption are found or otherwise established beyond a reasonable doubt, and, in the case of a rebuttable presumption, the accused need only raise a reasonable doubt as to the existence of the presumed fact."*

REBUTTABLE PRESUMPTIONS UNDER THE ACT

Section 30. Rebuttable presumptions

Rebuttable presumptions include, but are not limited to, those provided in sections 31 to 49 and 151 to 162.

DISCUSSION ON THE REBUTTABLE PRESUMPTIONS

Section 31. Marriage

(1) A marriage which has been celebrated before witnesses is presumed to be valid.

(2) Subsection (1) applies whether or not the witnesses to the marriage are called as witnesses in the action.

(3) This section applies both to monogamous and polygamous marriages.

Note: For a valid ordinance marriage one must comply with Section 74 of the Marriages Act 1884-1985

Section 32. Children of a marriage

(1) A child born during the marriage of the mother is presumed to be the child of the person who is the husband of the mother at the time of the birth.

(2) A child of a woman who has been married, born within three hundred days after the end of the marriage, is presumed to be a child of that marriage.

(3) This section applies both to monogamous and polygamous marriages.

CASE: In Re Overbury, Sheppard v. Matthezlss and Others [1954] 3 W.L.R. 644

The mother gave birth two months after she married for a second time, her first husband having died six months before her marriage.

Facts

The mother had married her first husband on July 4, 1868. Approximately six months later, on January 26, 1869, her first husband died as a result of an accident. The mother remarried on July 27, 1869, and a child was born on September 24, 1869, i.e., approximately eight months after the death of the first husband. The mother registered the birth and she named her second husband as father of the child.

On the question of the legitimacy of the child and the father of the child, the Chancery Division per Harman J held that because the child was conceived approximately nine months before birth, the presumption which was to be applied was that the father of the

child was the man, if any, that the mother was married to at the time of conception, namely her first husband.

Also, in the case of **DAABOA DAGARTI v. DORNIPEA [1982-83] GLR 594-601,** it was held at holding 1 as follows:

> *"The Evidence Decree, 1975 (N.R.C.D. 323), s. 32(1) provided that a child born during the subsistence of marriage was presumed to be the child of the husband of the mother of the child. There was therefore the need in the instant case, for the trial judge to have determined which marriage was subsisting legally at the time of delivery by the child's mother since that would have made the application of the provisions of N.R.C.D. 323, s. 32(1) easier."*

33. Death after seven years absence

(1) Where a person has not been heard of for seven years despite diligent effort whether or not within that period, to find that person, that person is presumed to be dead.

(2) There is no presumption as to the particular time when that person died.

34. Simultaneous death

Subject to an enactment relating to succession to property, where two or more persons have died in circumstances in which it is uncertain which survived the other, the older is presumed to have predeceased the younger.

Note: This presumption is also known as the commorientes rule. Similar provisions can be in Section 15 PNDC Law 111 and Section 7(7) of the Wills Act, Act 360.

35. Owner of legal title is owner of beneficial title

The owner of the legal title to property is presumed to be the owner of the full beneficial title.

36. Transfer by trustee

A trustee or any other person whose duty it was to convey immovable property to a particular person, is presumed to have actually conveyed to that particular person when the presumption is necessary to perfect the title of the person or the successor in interest of that person.

37. Official duty regularly performed

(1) It is presumed that an official duty has been regularly performed.

(2) Subsection (1) does not apply to an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.

Note: Expatiating on the scope of the application of section 37 (1) of the Evidence Act, Aikins, JSC delivering the judgment of this court in the case of ***Brobbey and Others v Kwaku (1995-96) 1 GLR 125*** observed thus

‘’This states the common law presumption of Omnia Praesumuntur rite esse acta and the Commentary on the Evidence Decree confirms at page 31 that it is generally applied to judicial and governmental acts but may also be applied to duties required to be performed by law’’.

CASE: SEIDU MOHAMMED V. SAANBAYE KANGBEREE [2012] 2 SCGLR 1182

Facts: The Plaintiff Saanbaye Kangberee sued in the High Court Accra for the declaration of title to a parcel of land situate at South Ofankor. He had a land Title Certificate issued by the land Title Registry. The Defendant claimed the land Title Certificate was fraudulent. The court in discussing the issue stated as follows:

Held:

> “*Even though the defendant made an attempt to challenge the plaintiff by alleging that his Land Title Certificate was procured fraudulently, the said attempt was a lame one since no particulars of the said fraud were particularised. In any case no evidence whatsoever was given which either directly or indirectly gave an inkling of any allegation of fraud in the procuration of the plaintiff’s Land Title Certificate.*
>
> *It is trite learning that for anyone to succeed with a serious allegation like fraud which has the tendency to vitiate acts done regularly, the particulars, which must be pleaded, must also be proven. In the instant case, not only were the allegations of fraud not particularised, but they were also not proven.*
>
> ***There is a presumption of regularity in law and this has been given statutory recognition in section 37 of the Evidence Act which provides “It is presumed that an official duty has been regularly performed” This means that, institutions of state like the Lands Commission, Survey Department and the Land Title Registry are presumed to conduct their affairs with a certain degree of regularity in line with the statutes that established them. Thus, unless there is strong evidence to the contrary, such a presumption should not be wished away***.”

NOTES

The presumption is reinforced by the equity maxim that equity looks on that as done which ought to be done.

Case: **GHANA PORTS & HARBOURS AUTHORITY (GPHA) & ANOR VRS NOVA COMPLEX (2007-2008)2 SCGLR 806** in discussing the presumption of regularity in section 37 of NRCD 323 the court stated as follows:

> " *At law, the maxim, which has gained statutory recognition in our jurisdiction, applies not only to official, judicial, and governmental acts, but also to duties required to be performed by law. The relevant section, ie section 37(1) of the Evidence Act, 1975 (NRCD 323) provides: "It is presumed that an official duty has been regularly performed."*
>
> *The Commentary on this statutory provision, which serves as an undoubted aid to its interpretation, reiterates the common law position that the rule as is "generally applied to judicial and governmental acts," may also be applied to "duties required to be performed by law." Even more important, section 30 of NRCD 323, stipulates clearly that, section 37(1) which was invoked at the defendants' behest, by law, falls in the class of presumptions which by virtue of the fact that they permit contrary evidence to be led, are described as rebuttable, conditional, inconclusive or disputable presumptions. It is trite learning that presumptions of this kind, have a prima facie effect only and the presumed facts may therefore be displaced by evidence. Section 30 provides that: "Rebuttable presumptions include but are not limited to those provided in sections 31 to 49 and 151 to 162."*
>
> *A rebuttable presumption, in the language of section 20 of the Evidence Act, 1975, "imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact." It follows that whenever the maxim is applied, the person against whom it is invoked and who is entitled to lead evidence to refute the presumption, is at liberty to prove that there was in fact no due regularity or performance of the official or statutory duty in question. Evidence may be led to show also, for example, that the person is not a public officer or is not duly authorised so to act, or that the person acted outside the limits of his or her authority, or that they acted in bad faith or that theirs was an improper exercise of discretion. The learned authors of Halsbury's Laws of England (3rd ed), Vol 15 para 620, in setting out the scope of rebuttable legal presumptions stated:*
>
> *"The nature of a presumption of law is that the court treats as established some fact of which no evidence has been given, and when rebuttable, it can have no weight capable of being put in the balance against opposing evidence which is believed. It does not follow that such a presumption may be rebutted in every case*

by any evidence however slight. The rebutting evidence must be considered on its merits: its credibility is neither increased nor diminished by the existence of the presumption; but if it is believed the presumption is displaced.""

38. Ordinary consequences of voluntary act

(1) A person is presumed to intend the ordinary consequences of the voluntary act of that person.

(2) Subsection (1) is not applicable in a criminal action to establish specific intent where specific intent is an element of the crime charged.

39. Judicial jurisdiction

(1) A Court of Ghana, or a court of general jurisdiction in any other country or sub-division of a country, or a judge of that court, acting as a judge is presumed to have acted in the lawful exercise of its jurisdiction.

(2) Subsection (1) applies only where the jurisdiction of the court or the judge is not directly in issue.

40. Foreign law

The law of a foreign country is presumed to be the same as the law of Ghana.

41. Continuation

A thing or state of things which has been shown to be in existence within a period shorter than that within which that thing or state usually ceases to exist is presumed to be still in existence.

42. Full age and sound body

A person is presumed to be of full age and of sound body.

Okyere v Nkansah [1992 – 1993] 3 G B R 1124 – 1140 C.A

Facts: The deceased died at the age of 125 years leaving a will disposing of his properties. The will was challenged partly on the basis that he was blind.

Held:

"Section 42 of the Evidence Decree 1975 (NRCD 323) provides that "a person is presumed to be of full age and sound body." This is a rebuttable presumption. Under this section, a person of full age is presumed not to be blind. He is presumed to have good eyesight as a part of the sound body. The learned trial judge is

therefore not under the compulsion of any law to presume a person blind, simply because he is of full age, and well over one hundred and twenty years of age. The burden of rebutting this presumption of sound body including good eyesight should therefore be on the appellant. In my opinion this rebuttal was poorly done. Most of the witnesses for the appellant merely described the testator as having a frail body and weak eyesight. But does weak eyesight mean blindness? The ordinary meaning of blindness is lack of sense of sight. There is a great difference between a person who does not see clearly but could do so with the aid of spectacles, that is, a man with weak eyesight, and a person who cannot see at all.

The appellant whose evidence has been quoted above is the strongest witness on record, regarding the seriousness of the testator's eye defects. To rebut the presumption under s 42 of the Wills Act, the rebuttal evidence should go further to establish whether the hospitals and the clinics which the testator was alleged to have attended treated such serious eye problems as blindness. No such evidence was available. The testator was also alleged to have suffered from cataract. Did the cataract merely impair his eyesight or did it make him blind? Here again none of the doctors whom the testator was alleged to have consulted was called to testify whether the testator ever had cataract, and the extent to which it impaired the eyesight that is, whether it made him blind or merely made him see poorly. Without such clear evidence of blindness, the trial judge had no basis to apply s 2(6) of the Wills Act, which was applicable only in case of blindness; and without such evidence, a presumption that the deceased was of a healthy body could not be rebutted to invalidate the will which, on the face of it, was properly made under the Wills Act. For the above reasons, I am unable to accept counsel's argument that the trial judge should have applied s 2(6) of Act 360, and I accordingly reject it."

43. Thing delivered

(1) A thing delivered by a person to another person is presumed to have belonged to the person to whom it was delivered.

(2) In subsection (1), "thing" includes money.

44. Obligation delivered

An obligation delivered up to the debtor is presumed to have been paid.

45. Possession of order to pay or deliver

A person in possession of an order on that person for the payment of money, or the delivery of a thing, is presumed to have paid the money or delivered the thing accordingly.

46. Possession of obligation by creditor

An obligation possessed by the creditor is presumed not to have been paid.

47. Prior payment of rent

The payment of earlier rent or instalments is presumed from the receipt for the later rent or instalments.

48. Ownership

(1) The things which a person possesses are presumed to be owned by that person.

(2) A person who exercises acts of ownership over property is presumed to be the owner of it.

49. Partners, landlord and tenant, principal and agent

Persons acting as partners, landlord and tenant, or principal and agent are presumed to stand in that relationship to one another.

50. Inconclusive judgments

A judgment, when not conclusive, is presumed to determine or set forth the rights of the parties correctly, but there is no presumption that the facts essential to the judgment have been correctly decided.

151. Public publications

Books, pamphlets, gazettes or other publications purporting to be printed or published by a public entity are presumed to be authentic.

152. Law reports and treatises

Printed and published books of statutes or reports of the decisions of the Courts of a country, and books proved to be commonly admitted in those Courts as evidence of the law of that country are presumed to be authentic.

153. Maps and charts

The maps or charts made under the authority of a public entity, and not made for the purpose of litigated question, are presumed to be authentic and correct.

154. The *Gazette*

The Proclamations, acts of State, whether legislative or executive, nominations, appointments, and other official communications appearing in the *Gazette* are prima facie evidence of a fact of a public nature which they are intended to notify

155. Reference books

A reference book, text or treatise which is produced for inspection by the Court if in the condition which does not create a suspicion concerning its authenticity is presumed to be written and published at the time and place it purports to have been.

156. Newspapers and periodicals

Printed materials purporting to be newspapers or periodicals are presumed to be authentic.

157. Signs and labels

Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin are presumed to be authentic.

158. Acknowledged writings

Writings accompanied by a certificate of acknowledgment bearing the signature and seal of a notary public in Ghana or other officer in Ghana authorised by law to take acknowledgments are presumed to be authentic.

159. Seals

A seal is presumed to be genuine and its use authorised if it purports to be the seal of

(*a*) Ghana, or of a Ministry, Department, officer or agency of Ghana;

(*b*) a public entity in Ghana or a Department, officer or agency of a public entity;

(*c*) a State recognised by Ghana or a Ministry, Department officer or agency of that State;

(*d*) a public entity in a State recognised by Ghana or a Department, officer or agency of that public entity;

(*e*) a Court in Ghana or a Court in a State recognised by Ghana;

(*f*) an international public entity or a department, officer or agency of that public entity;

(*g*) a notary public or a commissioner for oaths in Ghana.

160. Domestic official signatures

A signature is presumed to be genuine and authorised if it purports to be the signature, affixed in the

official capacity, of

(*a*) a public officer of Ghana;

(*b*) a public officer of a public entity in Ghana;

(*c*) a notary public or a commissioner for oaths in Ghana.

161. Foreign official signatures

(1) A signature is presumed to be genuine and authorised if it purports to be the signature, affixed in an official capacity, of an official of an international public entity or a State or a public entity in a State recognised by Ghana and the writing to which the signature is affixed is accompanied by a certification of the genuineness of the signature and official position of the person who executed the writing.

(2) The certification must be signed and sealed by a diplomatic agent of Ghana or of a Commonwealth country who is assigned or accredited to that country.

(3) If reasonable opportunity is given to the parties to investigate the authenticity of a foreign official signature, the Court may, for good cause shown, order that it be treated as presumptively authentic without a certification.

162. Copies of writings in official custody

A copy of a writing is presumed to be genuine if it purports to be a copy of a writing which is authorised by law to be recorded or filed, and has in fact been recorded or filed in an office of a public entity or which is a public record, report statement or data compilation if

(*a*) an original or an original record is in an office of a public entity where items of that nature are regularly kept, and

(*b*) the copy is certified to be correct by the custodian or other person authorised to make the certification where

LEGAL PRESUMPTIONS FROM JUDICIAL DECISIONS

Based on the foregoing, a presumption is a rule of law, statutory or judicial, which leads to a decision on a particular issue in favour of the party who establishes it or relies upon

it, unless it is rebutted. In Halsbury's Law of England, fourth edition Re-issue Volume 11(2) at paragraphs 1008-1009 page 883 which deal with rebuttal presumptions of law, the authors lucidly state the presumption thus:

> *"A rebuttable presumption of law is one which leads to a decision on a particular issue in favour of a party who establishes it or relies upon it, unless it is rebutted.* ***Rebuttable presumptions of law may be created by statute or may exist at common law****, and may cast either a legal or an evidential burden on the party seeking to rebut the presumption."*

Not all rebuttable presumptions are listed under the Evidence Act. Some rebuttable presumptions exist under common law and can be found in judicial decisions. Below are some examples:

1. It is presumed that where a person buys property in the name of another, that other person would be deemed to hold the property in trust for the true purchaser.

In the case of **In re Koranteng (dec'd), Addo v Koranteng and others** [2007-2008] SCGLR 1039 it was held as follows:

> *"In essence, a resulting trust was a legal presumption made by the law to the effect that where a person had bought property in the name of another, that other person would be deemed to hold the property in trust for the true purchaser. It was a trust implied by equity in favour of the true purchaser or his estate upon death. The trust was regarded as arising from the unexpressed or implied intention of the true purchaser. Thus for a resulting trust to be established there had to be proof that the purchase money for the disputed property had been advanced by the beneficiary of the resulting trust."*

2. Presumption of Advancement from Father to Children and Husband to Wife – It is presumed that when a father purchases property for a child, he intends to gift the property to the child. Also when a husband buys property for his wife he intended to gift the property to her.

In the case of **Re Sasu-Twum (Deceased); Sasu-Twum v Twum (1976) 1 GLR 23**,

The facts

The deceased was survived by a wife and four sons who were all infants at the time of the action. The deceased acquired six houses in his lifetime, two of which were acquired

in the name of his eldest son. Faced with challenges in the distribution of the properties of the deceased, the administrators of the estate applied to the court by originating summons for a declaration, among others, that the two houses acquired in the name of the eldest son were held in trust for the said son. Counsel for the defendant argued that since the deceased had three other children, it was unreasonable for the deceased father to make provision for only one child and leaving out the other three. Counsel invited the court to construe the conduct of the deceased as to include all the four children to benefit from the two houses.

Held:

> *"A father was under an obligation to support or make provision for his child. So where the father took conveyance of property in the name of his child, as in the present case, there would be a presumption of advancement in favour of the child. In other words, there would be a presumption that the father intended to part with both his legal and beneficial interest in the property to the child and that the property was intended to be a gift to the child."*

It was further held that:

> *"The burden of rebutting the presumption of advancement in favour of a child was on the party disputing the advancement. Evidence in rebuttal of presumption must be strong, such as a contemporaneous, not subsequent, declaration or act of the father manifesting a clear intention that the child was to hold as a trustee; so that even if the subsequent acts of the deceased were admissible, they would be of no value, and would have no weight sufficient to offset the presumption, especially because they could not be a guide to his intentions. In this case there was no evidence to rebut the presumption of advancement."*

See also: Juliana Richards v Jimmy Nkrumah 2013-2014 SCGLR 1577 where it was held that

> *"The law is settled that when a father obtains a conveyance in the name of his child, the presumption is that of advancement in favour of such child. (See **Twum v Sasu Twum (1976) GLR 23; Sidmouth v. Sidmouth, [Rolls Court (Lord Langdale, M.R), April 27, 28, 1840] 2 Beav. 447; 48 E.R. 1254.***
>
> *In this appeal, the relationship between the respondents and the deceased is one of 'child to father' which creates the results aptly stated **in Halsbury's Laws of***

England 3rd Edition Vol. 21 at page 201, Pt 2 Sect 1 item 447 *on the subject of Presumption of advancement as follows:*

> *"Where a father, or a person who has put himself in loco parentis, purchases either real or personal estate in the name of a child alone or in the joint names of the child and himself or a stranger, the father or other person is presumed to have intended to make a gift to the child. The presumption does not exist where the purchase is made by a mother, but slighter evidence is sufficient to prove an intention on her part to advance the child than would be required in case of a purchase by a stranger. The presumption of advancement may be rebutted by evidence of a contrary intention collected from the acts or declarations of the parties before or at time of the transaction, subsequent acts and events being only admissible as evidence against the party who did or made them and not in his favour. The presumption may exist even though the parent has actually received the income during his life and made leases of the property."*

… *As a consequence of the authorities cited supra and the evidence clearly manifest in the record of appeal, more particularly exhibit A the respondents succeeded in establishing that the property in dispute was an advancement made to them, the children therein named. By the provisions of section* ***25 (1) of NRCD 323*** *the facts recited in a written document such as exhibit A are conclusively presumed to be true as between the parties to the instrument, or their successors in interest. The recital to exhibit A identifies the respondents herein as the beneficiaries of the advancement."*

ESTOPPEL

Estoppel is the rule by which a person is prevented from asserting or denying the existence of facts because he has previously asserted or denied the opposite.

Estoppel, as was observed by Coke CJ "is an excellent and curious kind of learning. It is called estoppel because a man's own act or acceptance stopeth or closeth up his mouth to allege or plead the thing".

Estoppel may arise in several ways such as the person's own statement or conduct or act may estop him from denying same.

In Ghana, estoppel, is treated under the provisions on conclusive presumptions, it is in the nature of conclusive or irrebuttable presumption. This character or nature of estoppel is evidenced by the fact that under the Evidence Act, it is treated under Section 24(2) which provides that:

"Conclusive presumptions include, but are not limited to those provisions in sections 25 — 29."

Distinguishing Estoppels from Presumptions

The Supreme Court has distinguished Estoppels from presumptions in **RE: SUHYEN STOOL; WIREDU & OBENWAA V AGYEI & ORS [2005-2006] SCGLR 424**. The court stated as follows:

Held

> "*Estoppel has two characteristics to distinguish it from presumption, which is a rule of substantive law. The first difference is procedural. Estoppel usually must be pleaded before the evidence to establish it will be allowed but a presumption is not to be pleaded. The second difference becomes particularly clear in cases of estoppels by conduct. The party pleading this type of estoppel has to adduce evidence to establish the estoppel. Under such circumstance, the existence or non-existence of the estoppel would be impossible to tell until the end of the trial, after the other side would have supplied evidence in rebuttal. But the essence of conclusive presumption is to stop the other party in the first place from adducing evidence to the contrary*."

It must be emphasized however that the provisions in sections 25 —29 do not exhaust the heads of estoppel. The implication is that there are other matters which may be treated as estoppel and in respect of which no evidence is admitted to rebut or controvert.

TYPES OF ESTOPPEL

1. Estoppel per rem judicatam
2. Estoppel by conduct
3. Estoppel by deed

Some other Estoppels as highlighted by Brobbey are:

1. Estoppel in pais
2. Promissory Estoppel
3. Equitable doctrine of unjust enrichment
4. Resulting trust
5. Abuse of Judicial process;
6. Estoppel by election

ESTOPPEL PER REM JUDICATAM (Estoppel by records)

Estoppel per rem judicatam is estoppel that arises from previous judicial proceedings. It is also known as estoppel by record, the record being normally a judgment of the court. That is, where a court of competent jurisdiction has adjudicated on a matter, the same matter cannot subsequently be re-litigated by the parties or their privies.

The rationale underlying estoppel by record is: For the common good THAT THERE SHOULD BE AN END TO LITIGATION and The other maxim of equal importance is 'nemo debet bis vexari pro eadem causa'- that is, NO ONE SHOULD BE SUED TWICE ON THE SAME GROUND.

The rationale has been stated in **CONCA ENGINEERING (GHANA) LTD. v. MOSES [1984-86] 2 GLR 319-334**

"the plea of res judicata was based on two policy grounds, first, that it was in the public interest that there should be an end to litigation and secondly, that nobody should be vexed twice on the same matter. In view of the repetitive and sometimes harassing nature of litigation in Ghana, a rule of law which sought to avoid that, was one of abiding value. But in a sense, the principle of estoppel conferred mixed blessings. It has been described as odious because it prevented a suitor from relating the truth. It was thus a rule of exclusion making evidence in proof or disproof of a relevant fact inadmissible."

In summary it means that the order of a court of competent jurisdiction on a matter is conclusive.

RES JUDICATA

Estoppel Res judicata is the same as Estoppel per rem judicatam. Res judicata literally means that the matter has already been determined or adjudicated upon.

Res Judicata has been explained in the case of **RE SEKYEDUMASE STOOL; NYAME V KESE ALIAS KONTO** where the court speaking through Acquah JSC stated:

> "...the pleas of res judicata is never a technical plea. It is part of our received law by which a final judgment rendered by a judicial tribunal of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action". -

Wigam VC in **HENDERSON V HENDERSON** stated as follows:

> "I believe I state the rule of the court correctly, when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

The plea of *res judicata* in civil cases is generally described as having five elements (see *Walkers on Evidence* (5th edn, 2020), para 11.5.1; Raitt, *Evidence* (3rd edn, 2018), para 15.25). These are as follows:

(1) an earlier determination by a competent court or arbiter;

(2) that determination must have been on its merits without fraud or collusion;

(3) the prior determination must have concerned the same subject-matter;

(4) the grounds of action (*media concludendi*) must have been the same;

(5) the action must be between the same parties.[1]

TYPES OF ESTOPPEL RES JUDICATAM

Estoppel per rem judicatam is of two kinds, namely, cause of action estoppel and legal issue estoppel.

In the case of **POKU VS FRIMPONG 1972 GLR** the court held that there are two kinds of Estoppel and a judge must first determine the type of estoppel that a case concerns. The court in Poku vs Frimpong stated as follows:

> *"estoppel deriving from a judgment is of two kinds, namely, cause of action estoppel and issue estoppel. Where a plea of estoppel per rem judicatam is pleaded it is necessary for a trial judge, in order to avoid confusion, to decide first the nature of the estoppel raised"*

CAUSE OF ACTION ESTOPPEL

In a cause of action estoppel, once it appears that the same cause of action was held to lie or not to lie in a final judgment between the same parties or their privies, litigating in the same capacity, there must be an end to the matter as such the parties would be estopped.

As stated by Lord Denning MR in **Fidelitas Shipping Co ltd v V/O Exportchled [1966]** 1 QB 630

> *" If one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause."*

In **POKU v FRIMPONG [1972] GLR** the court held that the cause of action was the same as it related to land. The court laid down how to prove cause of action estoppel.

Held:

> *"The estoppel pleaded in the instant case was cause of action estoppel. Where a party relies on such estoppel, the onus of establishing the identity of the subject-matter of the previous suit with that of the second suit lies on him.* ***The onus is discharged by first producing in evidence the record of the pleadings and judgment in the earlier suit. If by comparing the earlier pleadings and judgment with the pleadings before the trial court, he satisfies the trial court of the possibility of the two causes of action being identical, he will then proceed to give positive evidence of identity. "***

[1] James Chalmers "Scottish Evidence Law Essentials" Edinburgh Unversity Press (2021) p 115.

It must be emphasized though that this estoppel applies only to litigation arising out of the same facts. Therefore, if the facts change, then a judgment arising out of the earlier facts raises no estoppel.

In explaining Cause of Action estoppel the case of AMPAH v PRAH [1995-96] 1 GLR 201 provides some clarity.

In the case of AMPAH v PRAH [1995-96] 1 GLR 201 the facts were as follows:

After the death intestate of one EA, the respondent, his head of family, on behalf of their family brought an action against the appellant, EA's widow, for, inter alia, a declaration that the couple's matrimonial home was family property. The decision of the High Court that the house in dispute was the self-acquired property of EA was affirmed on appeal. The respondent then brought another action against the appellant for a declaration that the family was entitled to one-third of the intestate estate by virtue of section 48 of the Marriage Ordinance, Cap 127 (1951 Rev) and an order for the appellant to take steps to vest the one-third share of the estate in the respondent as the head of family. After entering a conditional appearance, the appellant brought a motion to dismiss the action on the ground, inter alia, that the respondent's family were estopped per rem judicatam by the judgments in the earlier litigation which were in her favour. The application was dismissed by the High Court: see Prah v Ampah [1992] 1 GLR 34. Aggrieved by that decision the appellant appealed from it to the Court of Appeal.

The Court held as follows:

> *"Where there were distinct and separate causes of action, a plaintiff could not be prevented from litigating piecemeal in respect of the different causes of action. It was only where there was only one cause of action open to a party but with different reliefs that, if the party opted for only one relief and a judicial decision was given on that relief, he could not go and claim another relief in respect of the same cause of action even though he could have claimed both reliefs in the earlier proceedings. In the instant case, the first litigation between the parties was to determine whether the house in dispute was Family property or the self-acquired property of the deceased. Since the court held that the house was the self-acquired property of the deceased, it formed part of the intestate estate to be enjoyed by whoever was entitled to it. Accordingly, since the plaintiff was claiming on behalf of the family, a share in the deceased's estate, including the house, the causes of action as well as the issues were not the same and besides, the plaintiff was not claiming in the same right. Furthermore, since title was in issue in the first litigation, the plaintiff could not have asked for distribution, for that would have been contradictory of the family's claim. Accordingly, the plaintiff's action was competent."*

LEGAL ISSUE ESTOPPEL

The second kind of res judicata is legal issue estoppel. As explained by Lord Denning MR *"within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then as a general rule, neither party can be allowed to fight that issue again".*

In order to raise issue estoppel rem judicatam, there are three requirements to be met, as propounded by Lord Brandon thus:

1. that the judgment in the earlier action relied on must be that of a court of competent jurisdiction; that the judgment was final and conclusive; and, that the judgment was on the merits of the case

2. that the parties in the earlier action relied on as creating an estoppel and those in the latter action in which that estoppel is raised as a bar must be the same; and

3. that the issue in the latter action in which the estoppel is raised as a bar must be the same issue as that decided by the judgment in the earlier action.

In ***Re Sekyedumase Stool Affairs; Nyame v Kesse alias Konto [1998-99]SCGLR*** 476, where Acquah, JSC (as he then was) discussed the types of Estoppels as follows:

"The plea of res judicata really encompasses three types of estoppel: cause of action estoppel, issue estoppel in the strict sense and issue estoppel in the wider sense. In summary, cause of action estoppel should properly be confined to cases where the cause of action and the parties (or their privies) are the same in both current and previous proceedings. In contrast, issue estoppel arises where such a defence is not available because the causes of action are not the same in both proceedings. Instead it operates where issues, whether factual or legal, have either already been determined in previous proceedings between the parties (issue estoppel in the strict sense) or ***where issues should have been litigated in previous proceedings but, owing to "negligence, inadvertence, or even accident," they were not brought before the court (issue estoppel in the wider sense), otherwise known as the principle in Henderson v Henderson (1843) 3 Hare 100; See also In re Yendi Skin Affairs; Andani v Abudulai [1981] GLR 866. CA. The rationale underlying this last estoppel is to encourage parties to bring forward their whole case so as to avoid a succession of related actions"***

JUDGMENTS IN REM AND JUDGMENT IN PERSONAM

JUDGMENT IN REM has been defined in LAZARUS-BARLOW V REGENT ESTATES CO LTD:

"A judgment of a court of competent jurisdiction determined the status of a person or thing, or the disposition of a thing"

A judgment in rem is a conclusive judgment against all persons of the existence of the state of things which it actually affects when the existence or otherwise of that state is in issue or relevant to the issue. A judgment in rem is "a judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to the litigation).

It is conclusive against all parties. Eg judgments dissolving or affirming a marriage, judgment revoking a patent, a judgment affirming the validity of a will.

On the other hand, **A JUDGMENT IN PERSONAM** deals with rights or interests of parties in a person or thing. The rights or interest determined or declared are those existing between only specific parties to the case and their privies. They do not affect third parties. For instance: judgment to recover land.

Difference between Judgment In rem and Judgment in personam

The difference between judgment in rem and judgment in personam is that judgment in rem are binding on the whole world and third parties once the status or title has been determined and declared while judgment in personam binds only parties to the case giving rise to the judgment or their privies.

WHAT TYPE OF JUDGMENTS CAN GROUND A PLEA OF ESTOPPEL

Judgment on the merits from:

I. the Superior Courts, that is: Supreme Court, Court of Appeal, High Court and the Regional Tribunal.
II. Lower courts
III. Arbitration Awards
IV. Judicial Committee of the various house of Chiefs

Can a suit struck out for want of prosecution ground estoppel. To answer this question one must refer to the case of **FOLI AND OTHERS v. AGYA-ATTA AND OTHERS (CONSOLIDATED) [1976] 1 GLR 194-203**

Facts

In a previous action in 1957 before the High Court between the Nkonya stool (represented by the plaintiff) and the Alavanyo stool (represented by the defendants as the subjects of the stool) the boundary between the two stools, i.e. the Grunner boundary, as propounded

by the plaintiff, was upheld by the trial court and the plaintiff was therefore adjudged owner of the land lying on the Nkonya side of the boundary. In the 1957 action, the plaintiff's other reliefs, i.e. recovery of possession, damages for trespass and perpetual injunction were dismissed by the trial judge as not having been pressed by the plaintiff. Subsequently, the defendants, who had previously made farms as tenants on the land adjudged to belong to the plaintiff, continued to make new farms on the land and refused to attorn tenant to the plaintiff as the adjudged owner of the land. The plaintiff therefore by the present action sued for the same reliefs which had been dismissed for want of prosecution in the 1957 action.

Held, dismissing the appeal:

"(1) it was a rule of law that a person could not bring an action where the cause of his claim or the issue which he sought to have determined had as between the parties or their privies already been disposed of by a competent court. This rule covered not only matters which were actually dealt with in the previous judgment but those as well which ought to have been brought up then but which were not. Dicta of Wigram V.-C. in Henderson v. Henderson (1843) 3 Hare 100 at pp. 114-115 cited.

(2) An unconditional withdrawal of an action without liberty to bring a fresh suit raised an estoppel. Discontinuing an action either without leave or with leave but unconditionally where the rules required that leave be sought and conditions obtained might be construed as tantamount to an admission that the case brought was without foundation. A discontinuance was the voluntary act of the plaintiff or prosecutor and his act had to be judged within the context of the rules prevailing. It was not necessarily the case where the action was dismissed for want of prosecution or even after hearing. Dictum of Chitty L.J. in Fox v. Star Newspaper Co., Ltd. [1898] 1 Q.B. 636 at p. 639, C.A.; Hendersons (Manchester) Ltd. v. Awortwi (1926) F.C. '26-'29, 139 and Ahenkora II v. Kumah [1963] 1 G.L.R. 77 applied.

(3) A dismissal of a suit for mere want of prosecution could not found res judicata. Thus in actions which were dismissed by the court instead of being voluntarily withdrawn, the point of time at which the dismissal occurred did not itself determine the question of estoppel. With regard to actions dismissed after a hearing or trial, ***the legal position was whether anything could be said to have been decided, so as to conclude the***

parties, beyond the actual fact of the dismissal. *If the dismissal necessarily involved a determination of any particular issue or question of fact or law, then the dismissal would be an adjudication on that question or issue; if otherwise, the dismissal would decide nothing, except that the party had been refused the relief which he sought. In the circumstances of the instant case,* ***the dismissal of the reliefs claimed was a mere refusal of reliefs and was by no means intended to conclude any matter giving rise to those reliefs.*** *Consequently the plaintiff was not precluded per rem judicatam from bringing the present action. In any case after the 1957 decision, upon the invitation to attorn tenant and the refusal of the defendants to do so, the plaintiff acquired a cause of action by which he could ask for the present reliefs. Pople v. Evans [1968] 2 All E.R. 743 applied"*

The case of Foli v Agya Atta (supra) establishes the principle that a suit dismissed for want of prosecution will not give rise to an estoppel. The court that the matter must have been determined to a conclusion on its merit. If a matter was terminated *on some technical grounds, for instance, dismissal for want of prosecution or default judgment or procedural omission, it may not suffice to ground estoppel in rem judicatem*.

From the above there is an indication that a default judgment does not give rise to an estoppel. However, this is not always the case.

DEFAULT JUDGMENT

On the issue of default judgment and res judicata the position of the law is that a party is estopped by res judicata of judgment by default where identical issues arising in the second action has been directly decided in the first action between the same parties. The rule therefore applies even to interlocutory matters. Therefore for estoppel to apply in interlocutory matters, the issue or question involved ought to have been conclusively determined in one way or the other between the parties in the first action.

In the case of **CONCA ENGINEERING (GHANA) LTD. v. MOSES [1984-86] 2 GLR 319-334** it was held as follows:

> "Ordinarily the plea of res judicata or estoppel by record was available only after the issue had been determined in a contested action in which both parties had been heard. But it had been held to apply even in cases where the decision had been reached in default of pleading or appearance by either of the parties.

However, in recent times judges had sought to limit the binding efficacy of estoppel in default judgments"

Also, in the case of **FOSU V KRAMO [1965] GLR 629** where it was held that:

> *"A default judgment is capable of giving rise to an estoppel per rem judicata, but it must be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what it necessarily decided. While from one point of view it can be looked at as a form of judgment by consent, from another a judgment by default speaks of nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in a particular suit in question. There is obvious and indeed grave danger in permitting such a judgment to preclude the parties from ever re-opening before the court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default. However, even though the default judgment could be re-opened, its evidential value against the plaintiff was nil."*

From the above, it can be gleaned that generally a default judgment will not give rise to an estoppel unless it is found that a matter or issue was actually determined in the matter. This question has finally been settled by the Supreme Court.

In the case of **In re Mensah (Decd) Mensah & Sey v Intercontinental Bank (Gh) LTD** 2010 SCGLR 118 the Supreme Court answered the question whether a default judgment can give rise to an estoppel.

In this case the Plaintiff obtained judgment in default of defence against the Defendant bank for all the reliefs endorsed on the writ, particularly an order for the Defendant bank to reconcile the accounts to reflect the true amount required to be in the account. The Plaintiff sough to levy execution by attaching the properties of the Defendant. The execution was set aside on the basis that the judgment was only for the Defendant bank to reconcile account. The court ordered the Defendant to reconcile the account, which was later complied with by the Defendant bank. The Plaintiff's disputed the reconciliation done by the bank and filed an application for the court to appoint a court expert to conduct the reconciliation. This application was refused. The plaintiff thus instituted another suit this time claiming the disputed amount plus interest. The defendant raised the defence of res judicata. The case travelled all the way to the supreme court. It is stated at holding 3 as follows:

"The default judgment given in the first suit was interlocutory, but it became final judgment when the defendant bank lodged the reconciliation report, exhibit M, in the court registry."

The court reasoned as follows:

"The main ground which had been hotly contested throughout this case rested on whether the plaintiffs' cause of action was caught by estoppel by res judicata. This well established rule of estoppel by judgment, is based on two policy grounds, namely that it is in the public interest that there be an end to litigation and that nobody should be vexed twice on the same matter. The plea of res judicata has been explained in Spencer- Bower and Turner's book, Res Judicata (2nd edition) paragraph 9 at page 9, as:

> *" The rule of estoppel by res judicata… is a rule of evidence and may thus be stated: where a final decision has been pronounced by a...judicial tribunal of competent jurisdiction over the parties to, and the subject matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto… is estopped in any subsequent litigation from disputing or questioning such decision on the merits whether it be used as the foundation of an action or relied upon as a bar to any claim." .*

The judgment relied on by the defendant before us is a default judgment so we need to examine the scope of the rule of estoppel in respect of judgment by default. The scope of the rule of estoppel in this regard was fully expounded by Apaloo C.J. in delivering the judgment of the ***Court in Conca Engineering v. Moses [1984-86]2GLR 319****, we will therefore quote extensively from there. The eminent Chief Justice …*

However the binding force of a default judgment is extremely limited. Courts in all jurisdictions sought to limit the application of estoppel by res judicata of judgment by default. The learned Chief Justice Apalloo accordingly said:

> *"That a default judgment has the same potency as estoppel as a judgment after a contested hearing, was the beaten track of the eighteenth and nineteenth century decisions. In recent times, judges have sought to limit the binding efficacy of estoppel in default judgments.*
>
> *Thus in New Brunswick Railway Co. v. British & French Trust Corporation Ltd. [1939] A.C. 1, H.L. the House of Lords refused to sustain a plea of estoppel by a previous default judgment obtained against the*

respondents. In that case, Lord Maugham who delivered the leading speech said at 21:

> *"…an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment."*

The court held that the previous judgment which was set up as precluding the defendant company was not so decided. This decision was given in 1938. More recently, the Privy Council in the Malaysian case of Kok Hoong v. Leong Cheong Kweng Mines Ltd. [1964] 1 All E.R. 300, P.C., decided in 1964, followed the limiting effect of default judgment articulated by the House of Lords. Lord Radcliffe, who spoke for the board on this subject said at 305:

> *"…a judgment by default speaks of nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious and, indeed, grave danger in permitting such a judgment to preclude the parties from ever re-opening before the court on another occasion ... whatever issues can be discerned as having been involved in the judgment so obtained by default."*

In further expatiation of the scope of the rule, the learned Chief Justice Apaloo observed that:

> *"In Spencer-Bower and Turner on Res Judicata (2nd ed.) at p. 48, para. 53 the learned authors extracted the principle from the modern decisions on default judgment. They put it in these words:*
>
> > *"8. It seems clear from the judgments . . . that while a default judgment will certainly estop the defendant from denying that the plaintiff is not entitled to the relief which it has awarded to him, it cannot be invoked to estop him by way of issue estoppel as to any question which is not eadem questio . . . But if the identical question arising in the second action actually arose in the first, and has been or must necessarily be deemed to have been decided with complete precision one way or the other as the foundation of the default*

judgment signed by the plaintiff, then, at least while that judgment stands, that question is concluded between the parties."(e.s)

He thus concluded:

"That, as a general statement of the modern judicial approach to default judgment, makes good sense and is broadly accepted."

It is therefore settled law that a party is estopped by res judicata of judgment by default where identical issues arising in the second action has been directly decided in the first action between the same parties. The rule therefore applies even to interlocutory matters. *See dictum of the learned Chief Justice Georgina Wood in the case of Republic v. High Court, Accra (Commercial Division); Ex parte Hesse (Investcom Consortium Holdings SA & Scancom Limited, Interested parties) [2007-2008] SCGLR 1230.* ***We are however of the view that for estoppel to apply in interlocutory matters, the issue or question involved ought to have been conclusively determined in one way or the other between the parties in the first action.*** *The above principles on estoppel per res judicata have been followed by this court in cases such as Oforiwah v. Laryea [1984-86] 2GLR 410, In re Sekyeredumase Stool; Nyamev. Kesse alias Konto [1998-99] SCGLR 476, Dahabieh v. S.A. Turqui & Bros [2001-2002]SCGLR 498, In re Kwabeng Stool; Karikari v. Ababio II [2001-2002] SCGLR 15;"*

As to how far interlocutory judgments can give rise to a successful plea of res judicata, one has to distinguish between judgments by defaults, either of appearance or defence and summary judgment under Order 14 of CI 47. Thus, Lord Maugham delivering the leading speech in the House of Lords case of **NEWS BRUNSWICK RAILWAY CO V BRITISH & FRENCH TRUST CORPORATION LTD** said:

"*an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment".*

On his part, Lord Radcliffe in Kok bong v Leong Cheong Kweng Mines Ltd340, on this subject said:

"...a judgment by default speaks of nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered

judgment to go against him in the particular suit in question. There is obviously and indeed grave danger in permitting such a judgment to preclude the parties from ever re-opening before the court on another occasion... whatever issues can be discerned as having been involved in the judgment so obtained by default'.

CAN A PARTY RAISE RES JUDICATA WHEN A COURT RULES THAT IT LACKS JURISDICTION?

In the case of **Kwadwo Dankwa & 3 ors v Anglogold Ashanti Ltd Civil Appeal No J4/22/2018 dated 14th February 2019**

"In the Eighth Edition of Black's Law Dictionary, Res Judicata has been defined as a doctrine barring the same parties from litigating a second suit on the same transaction or any other claim arising from the same transaction or series of transactions or that could have been raised but was not raised in the first suit. For the proper invocation of the doctrine, these elements must exist:

1) There must be an earlier decision on the issue;

2) A final judgment on the merits; and

3) The involvement of the same parties or parties in privity with the original parties.

In Speedline Stevedoring Co Ltd; Rep v High Court, Accra; Ex-parte Brenya (2001-2002) SCGLR 775 and Rep. v Adama-Thompson; Ex-parte Ahinakwa (2013-2014) SC GLR 1395, this Court reiterated that for a judgment to operate as res judicata, it must be valid and subsisting. It must be a final judgment delivered by a court of competent jurisdiction on the merits; i.e. the issue must have been raised and pronounced upon. Therefore, a dismissal of a suit or an action by a competent court or tribunal on grounds of lack of jurisdiction does not and cannot operate as res judicata.

At pages 52-53 of the Second Edition of their book "ResJudicata", Spencer Bower and Turner, the learned text writers stated; "where an action has been dismissed on the sole ground that the particular court had no jurisdiction, there is no decision of the question in controversy, such as to estop the plaintiff from suing again in any court which has jurisdiction to entertain the suit; but such a dismissal, while it will allow the disappointed party to prosecute his claim in a court having jurisdiction, will preclude him from reviving his claim before the tribunal which has formerly refused jurisdiction."

In Pinnock Bros v Lewis or Peat Ltd (1923) IKB 690, it was held that the award of an arbitrator dismissing a claim on grounds that he had no jurisdiction did not operate as estoppel in a fresh action. Again, in Hines v Birkberk College 1992 Ch. 33 also reported in (1991) 4 AIL ER 450, the plaintiff, a professor, sued for wrongful dismissal. The Court dismissed his action on grounds that it lacked jurisdiction to entertain the claim against the respondent. When jurisdiction was subsequently conferred on the court and the plaintiff issued a new writ for the same cause of action, it was held that the plaintiff was not estopped from commencing the new action.

In the instant case before us, when the application went before Mahamadu J, he essentially declined jurisdiction on grounds that being a court of co-ordinate jurisdiction, he was not vested with authority to determine the application. The application, as a result, was not determined on the merits. It is therefore obvious that the decision cannot operate as res judicata, the principle being that a dismissal by a court or a competent tribunal on grounds of want of jurisdiction is not binding on the grounds of res judicata. Having regard to the fact that Mahamadu J only dismissed the application for want of jurisdiction; the decision did not operate to estop the defendant from filing the application before Azumah J who rightly, in our view assumed jurisdiction."

ELEMENTS OF RES JUDICATA

The first test is that the court whose judgment is in issue to establish the estoppel must be a court of competent jurisdiction. Secondly, it must be shown that the court acted within that jurisdiction.

JUDGMENT OF COMPETENT COURT

For a judgment to give rise to estoppel, it must have been delivered by a competent court. This means that the court had jurisdiction to determine the issues before the court.

In the case of Re Kwabeng Stool: Karikari and Another v Ababio II and Others[2001-2002] SCGLR it was held that :

> *"…in order that estoppel by record might arise out of a judgment, the court which pronounced the judgment must have had jurisdiction to do so…"*

The issue whether a decision of a fact finding tribunal or body, such as the judicial committee of the various chieftaincy tribunals could be relied on pleading res judicata was raised **IN RE SEKYEDUMASE STOOL**. In this case, among the grounds of appeal was that the plea of res judicata was confined to the decisions of normal courts and therefore not available to decisions of fact-finding tribunals.

It was held that : *"the plea of res judicata could be invoked in respect of any final judgment of a judicial tribunal of competent jurisdiction. Accordingly, since the chieftaincy tribunals of the various traditional councils and houses of chiefs were by statute invested with jurisdiction to determine chieftaincy disputes as defined in the relevant statutes, the final decisions of those chieftaincy tribunals operated as res judicata to prevent those bound by those decisions from seeking to reopen them. Accordingly, a chieftaincy tribunal before which a plea of res judicata had been raised, was duty bound to determine whether the plea had indeed been made out; and if it was satisfied that the plea had been established, decline jurisdiction and dismiss the action because the court would then lack jurisdiction to inquire into the matter."*

FRAUD IN A JUDGMENT

Estoppel will also fail if the judgment relied on is proved to have been obtained by fraud, deceit or collusion. As stated by Lord Langdale in **PERRY V MEDDOWCROFT**:

"If a sentence, decree or judgment of any court can be shown to have been obtained by fraud or collusion, it is not to be used in any court as evidence against the right of the party who might be precluded by a sentence properly obtained…A sentence may be refused the respect of which would otherwise be due to it, if it can be shown that the sentence was obtained by fraud or collusion".

However,

"in all cases where fraud has been set up as an answer to a plea of res judicata, as well as others in which fraud is set up as a defence, the Courts have made it clear that the rules of pleading as regards fraud must be strictly adhered to. The allegation must be clear and definite. .. otherwise the Court should disregard it, and not permit any evidence to be led in proof thereof'.

PRIVITY, IDENTITY AND CAPACITIES OF PARTIES

Judgment of a court is considered conclusive against privies, that is, agents, assigns, descendants, etc.

SEY v. CROMWELL AND ANOTHER [1973] 2 GLR 412 -420 this case raised the question whether the administrator of the estate of the deceased was estopped from relitigating a matter involving property and rent because the deceased was not successful in joining the earlier suit as a third party.

Held:

"inasmuch as the third party was not given the liberty to defend the action, and the third party proceedings were set aside, no action subsisted between them, that is to say, between the third party and the plaintiff before the circuit court. Since no action subsisted between them, neither of them could be said to be estopped by a judgment to which they were not parties."

Also in **ROBERTSON v. REINDORF [1971] 2 GLR 289-307** involved a question where litigation involving a smaller family served as an estoppel to the wider family

Held:

> *"For a judgment to operate as an estoppel against a person, he or those he represents must have been a party or privy to a party in the case. Although the family involved in the earlier suit of Reindorf v. Amadu was [p.290] a smaller section of the larger family involved in the present suit, the co-defendant in that earlier case was not only head of the smaller family but also head of the larger family. Even if the parties were not identical, they were at least privy to one another."*

The principle underlying estoppel of parties to a suit was espoused by Lord Penzance in **WYTHCHERLEY V ANDREWS** quoted with approval by the Judicial Committee of the Privy Council in **NANA OFORI ATTAH II V NANA ABU BONSRA** thus:

> *"if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result,*

and not be allowed to reopen the case, was not limited to wills and representative actions, and while it might have been found appropriate in England only in special condition, there was no reason why in West Africa it should not be applied to conditions which were found appropriate for it there. The principle was, in the absence of technical legal reasons to the contrary, applicable in the present case, and accordingly the appellant stool, having knowingly stood by while its subordinate fought the question of title in the same interest, was estopped from litigating the matter afresh".

THE SUBJECT MATTER OF ACTION

Parties and their privies are estopped by previous judgments in which they were parties or had identical interest. But to be so bound, the issue or the subject matter in dispute in the earlier case, must be identical with the issue in the latter proceedings, though it is not necessary that it should be the only point in issue in either case or that the cause of action will be the same.

In the case of POKU V FRIMPONG 1972 GLR it was held that

"A part of a subject-matter is identical with the whole and where a person's claim to a portion of land is dismissed by a court of competent jurisdiction, he is estopped from asserting in future proceedings a claim to a part of the larger whole in respect of which his claim failed."

In ROBERTSON v. REINDORF [1971] 2 GLR 289-307 the court had to decide whether a judgment declaring ownership of a smaller portion of land could serve as an estoppel for a case involving the larger portion of the same land.

Held: *"if in an action in respect of a portion of land title to a wider area covering that portion is put in issue, a judgment given in that action operates as estoppel against any subsequent suit involving a portion of the larger area. The decision in the earlier suit on the quarry site was arrived at after the court had pronounced that the larger area in which the quarry was situate belonged to the respondent's family. The estoppel raised by that decision should not therefore be limited to the quarry site only."*

ESTOPPEL BY CONDUCT

Estoppel by conduct arises where a person puts up behaviour or makes a statement on the basis of which he knows the other party will act, and when that other party acts on it to his detriment, that person will be prevented from asserting the opposite of what his behaviour has led the other party to believe in that person will be prevented or estopped from denying his behaviour or statement or consequences of his behaviour or statement.

The underlining basis for estoppel by conduct was stated in **SOCIAL SECURITY BANK LTD. v. AGYAKWA [1991] 2 GLR 192-206** where the court stated that:

> *"the principle of estoppel by conduct was applicable only in those circumstances where it was just to invoke it, namely in those circumstances in which it would be unjust, inequitable or unconscionable to permit a party against whom a plea of estoppel by conduct was raised to go back on his word or conduct. Consequently, in invoking a plea of estoppel by conduct, one had to have regard to the circumstances surrounding the particular conduct which was the subject of the plea. Invariably, each case had to be decided or its own peculiar facts."*

Section 26 of the Evidence Act enacts the common law rule of estoppel by conduct by providing thus:

26. Estoppel by own statement or conduct

"Except as otherwise provided by law, including a rule of equity, when a party has, by that party's own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon that belief, the truth of the thing shall be conclusively presumed against that party or the successors in interest of that party in proceedings between

(a) that party or the successors in interest of that party, and

(b) the relying person or successors in interest of that person."

The importance of that type of estoppel is that a person who by his words or conduct wilfully or negligently causes another to believe in the existence of certain state of things and induces him thereby to act on that belief or to alter his position is estopped from asserting against the other person that a different state of things existed at that time or none at all.

The estoppel by conduct will arise despite the actual intention of that person if he so conducted himself that **a reasonable man** would have taken his representation, either express or otherwise to be true and believe that it was intended that he should act upon it.

In the old English case of **PICKARD VS. SEARS (1837) 6 AD & EL. 469** the principle of estoppel by conduct was explained as follows:

"Where one by his word or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on the belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

See also **OBENG & OTHERS VS. ASSEMBLIES OF GOD CHURCH, GHANA [2010] SCGLR 300**

Held*: Having adverted our minds to all the exhibits referred to supra in which the logo and name of the plaintiffs church, (Assemblies of God) had been manifestly used by the defendants coupled with the express acts of conduct and or omission of the defendants, we think it is correct to conclude on the basis of the provisions of Section 26 of the Evidence Act 1975 NRCD 323 that the defendants are estopped from denying that the CCC was not an Assemblies of God Church. Section 26 of the Evidence Act, 1975, NRCD 323 provides thus:-*

"Except as otherwise provided by law. Including the rule of equity, when a party has by his own statement, act or omission intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest"

ESTOPPEL RELATING TO WRITTEN INSTRUMENTS

Section 25(1) of the Evidence Decree provides as follows:

"Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the instrument or their successors in interest".

A written document is not defined in the Decree except that it may be said to carry the same meaning as a written instrument. Written instruments may be defined as a formal legal writing, for example, record, deed of transfer, letter, cheque, telegram or even an envelope with a postmark on it. Therefore, where parties prepare a written instrument, they are said to be bound and are estopped from denying the facts therein381.

In a dictum in the case of **STROUGHILL V BUCK**, Patterson J said:

“When a recital is intended to be a statement which all parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be a statement of one party only, the estoppel is confined to that party and the intention is to be gathered from construing the document”.

ESTOPPEL IN CRIMINAL CASES

The principle of estoppel in criminal cases is the rule against double jeopardy. As was explained by Lord Pearce in Connelly v DPP:

“Just as in civil cases the court has constantly had to guard against attempts to relitigate decided matters, so too, the courts’ criminal procedure needed a similar protection against the repetition of charges after an acquittal or even after a conviction which was not followed by a punishment severe enough to satisfy the prosecutor. It was no doubt, to meet those two abuses of criminal procedure that the court from its inherent power evolved the pleas of autrofois acquit and autrefois convict. For obvious convenience these were pleas in bar and as such fell to be decided before the evidence in the second case was known. . .It is clear from several cases that the court in its criminal jurisdiction retained a power to prevent a repetition of prosecutions even when it did not fall within the exact limits of the pleas in bar”.

This principle finds expression in the maxim autrefois acquit and autrfois convict. In i traditional applications, the rule of autrefoit connotes finality, that is, it debars the prosecution from prosecuting the accused. A simple plea of autrefoi, t on a criminal charge bars or estopps prosecution, whether the result, being referred to, was an acquittaL or conviction. The new trial is barred if the offence charged in the instant case is the same or substantially similar.

As was stated in R v Baron:

“The law does not permit a man to be twice in peril of being convicted of the same offence. if therefore, he has been acquitted... by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the first indictment, but to any offence which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaughter”.

The issue of autrefois convict was extensively discussed by the Court of Appeal in the case of Republic v General Court Martial; Ex parte Mensah

<u>The principle of double jeopardy</u>

AUTREFOIS ACQUIT AND AUTREFOIS CONVICT

This defence simply means that no one is to be punished twice for the same offence.

A person who has been tried by a court of competent jurisdiction for a criminal offence and has been acquitted shall not be tried for that offence or any other offence that the person could have been tried for.

This defence does not apply to appeals, supervisory or review jurisdiction of the Court.

CONSTITUTIONAL PROVISIONS

Article 19 (7) and (8) of the 1992 Constitution

(7) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for the offence, except on the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(8) Notwithstanding clause (7) of this article, an acquittal of a person on a trial for high treason or treason shall not be a bar to the institution of proceedings for any other offence against that person.

(Also look at Article 139 for the composition of the High Court in Treason cases 3 judges must sit)

Article 19(16) (b)

(b) clause (7) of this article, to the extent that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of the force, except that any court which tries that member and convicts him shall, in sentencing him to any punishment, take into account any punishment imposed on him under that disciplinary law.

Provisions in Act 30

113. Retrial

In accordance with clause (7) of article 19 of the Constitution, a person who has been once tried by a court of competent jurisdiction for an offence, and convicted or acquitted of the offence, shall not be tried again on the same facts for the same offence or any other offence of which that person could have lawfully been convicted at the first trial unless a retrial is ordered by a Court having power to do so.

115. Consequences supervening or not known at time of former trial

A person convicted or acquitted of an act causing consequences which together with the act constitute a different offence from that for which that person was convicted or acquitted, may be afterwards be tried for that last-mentioned offence, if the consequences had not happened at the time when that person was acquitted or convicted.

EXPLANATION: Kofi punches Yaw in the face and Yaw is serious injured. Kofi is arrested, tried and convicted for the offence of causing harm contrary to Section 69 of Act 29. However after Kofi's conviction Yaw dies in the hospital because the punch to the face seriously affected his spine. Kofi can be tried again for murder or manslaughter because at the time of the first conviction the death of Yaw had not occurred.

116. Original Court not competent to try subsequent charge

A person convicted or acquitted of an offence may be subsequently charged with and tried for any other offence constituted by the same acts which that person may have committed, if the Court by which that person was first tried was not competent to try the offence subsequently charged.

EXPLANATION: Kofi breaks into Akua's house to steal. He is arrested and placed before the District Court and he is convicted. Later police find out that Kofi, when he went to Akua's house also raped Akua. Kofi can be tried at the High Court for rape since rape is an indictable offence(see the case of **Richard Banousin v the Republic**) and the District Court lacks the jurisdiction to try the offence of rape.

TRIAL WITH JUDGE AND JURY- SUMMING UP

Criminal trials in Ghana are tried either summarily or on indictment. Section 2 of the **Criminal and Other Offences (Procedure) Act, 1960, Act 30** spells out the criminal jurisdiction of the court as follows:

> **"Section 2 - Mode of trial**
>
> (1) An offence shall be tried summarily if
>
> (a) the enactment creating the offence provides that it is punishable on summary conviction, and does not provide for any other mode of trial; or
>
> (b) the enactment creating the offence does not make a provision for the mode of trial and the maximum penalty for the offence on first conviction is a term of imprisonment not exceeding six months, whether with or without a fine.
>
> (2) An offence shall be tried on indictment if
>
> (a) it is punishable by death or it is an offence declared by an enactment to be a first degree felony; or
>
> (b) the enactment creating the offence provides that the mode of trial is on indictment.
>
> (3) Any other offence is triable on indictment or summarily.
>
> (4) Subject to the limitations on the jurisdiction of the Court,
>
> **(a) the High Court or a Circuit Court is the venue for a trial on indictment;**
>
> (b) the High Court, a Circuit Court or a court of summary jurisdiction, is the venue for a summary trial."

As regards trials on indictment, although section 2 of Act 30 gives the High Court and the Circuit Court concurrent jurisdiction in trials on indictment, only the High Court has jurisdiction in trials on indictment. This is so because Section 43 of the Courts Act, 1993 Act 459 takes away the circuit court jurisdiction in indictable offences. Section 43 provides as follows:

> *"A Circuit Court has original jurisdiction in criminal matters* ***other than treason, offences triable on indictment and offences punishable by death****."*

Additionally, trial on indictment encompasses both trials with judge and jury and trials with the aid of assessors. Section 204 of Act 30 provides as follows:

> *"**Section 204. Jury or assessors***
>
> *Trials on indictment shall be by a jury or with the aid of assessors in accordance with this Act."*

However, our focus is on trials conducted with a judge and jury.

Summing up

After the conclusion of the case of both the prosecution and the accused person, it is the duty of the trial judge to sum up the law and the evidence to the Jury.

The legal basis for summing up can be found in Section 277 of Act 30, which states that

> "*when, in a trial before a jury, the case on both sides is closed, the justice shall, **if necessary**, sum up the law and evidence in the case*".

Even though this provision in **Act 30** does not seem to make summing up a mandatory duty, with the use of the words "if necessary", this has been considered in the case of State v Amoh [1961] G.L.R 637.

In the practice direction that follows the case ***State v Amoh,*** it was stated that the duty of the trial judge to sum up the law and the evidence is not less imperative by reference to the exercise of discretion, and that the duty to sum up, especially in a trial for a capital crime is **as obligatory as it would have been if the words "if necessary" had been omitted from the section**.

In the case of ***Berko v The Republic*** [1982-83] GLR 23 -33 the court held that although ***Section 277*** appeared to confer discretion on the judge as to summing up of the law and evidence, it was a mandatory duty. Therefore, even where only notes were made as opposed to a full "summing up" sufficient indication of the legal principles relating to the charge was to be given. It is stated at holding 3 of the report as follows:

> *" Although section 277 of the Criminal Procedure Code, 1960 (Act 30). appeared to be discretionary, it had been interpreted by the Supreme Court in its Practice Note in State v. Amoh [1961] G.L.R. (Pt. II) 637 to impose a compelling duty on a judge in a trial for a capital crime…A summing-up of the law as required by Act 30, s. 277, therefore should bring to the attention of the jury the definitions by way of explanation of the various sections. The notes of the summing-up in the present case were very short - a page and a half of typed script. However, since on the evidence it took more than one hour, it was conceivable, as experience showed, that the actual summing-up covered more ground than what appeared in the script.*

The court would therefore assume that the judge would not have omitted the definition or explanation of the relevant provisions."

There have never been precisely formulated rules or a laid down format for summing up. The summing up of the judge must be viewed as a whole. However, from case law some elements must always be present in a summing up. In the case of **Richmond Kwabla Dzangmatey vs The Republic Criminal Appeal Suit No. J3/7/2017 30th October 2019** His Lordship Amegatcher JSC stated as follows:

" In our view, the requirements of section 277 of the Criminal Procedure Act, 1960 (Act 30) is for the judge to carefully direct the jury in simple language on the law and evidence relevant to the matters place before him at the trial. One clear example is the law on the burden of proof which rests on the prosecution to prove its case against the accused beyond all reasonable doubt. This burden never shifts unto the accused person who may even choose to remain silent or raise reasonable doubts in the prosecution's case. ***It must be noted that there are no templates showing the form in which the direction should be made to the jury. What is important is the substance of the summing-up based on the peculiarity of the evidence led in the particular case. In sum, the summing-up must be looked at as a whole and not in piecemeal.****"*

Additionally, in the case of **Awedam v The Republic [1982-83] GLR 902** the court stated that ***"We are of opinion that a summing-up should be looked at as a whole. Any tendency to pick up solitary phrases or clauses or sentences often tend to distort the true meaning."***

Based on case law and other authorities, the points outlined below indicate some necessary considerations that must be in a summing up.

1. The judge must instruct the jury on the duty of the judge and on the duty of the jury. The duties of the judge and judge have been set out in Section 278(1) and 279 of Act 30 as follows:

Section 278. Duty of Justice

" (1) For the purposes of this Act, the Justice

(a) shall decide the questions of law arising in the course of trial, and especially the questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and, may prevent the production of inadmissible evidence whether or not it is not objected to by the parties;

(b) shall decide on the meaning and construction of the documents given in evidence at the trial;

(c) shall decide on the matters of fact which it may be necessary to prove in order to enable evidence of particular matter to be given;

(d) shall decide whether a question which arises is for the Justice personally or for the jury, and on this point the Justice's decision binds the jurors.

(2) The Justice may, in the course of summing up, express to the jury a personal opinion on a question of fact or on a question of mixed law and fact relevant to the proceedings."

Section 279. Duty of jury

" It is duty of the jury

(a) to decide which view of the facts is true and then to return the verdict which, under that view, ought, according to the direction of the Justice, to be returned;

(b) to determine the meaning of the technical terms other than terms of law and words used in an unusual sense, which it may be necessary to determine, whether the words occur in documents or not;

(c) to decide the questions which according to law, are to be deemed questions of fact;

(d) to decide whether general indefinite expressions do or do not apply to particular cases, unless the expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of which cases it is the duty of the Justice to decide their meaning."

Section 1(1) of NRCD 323 provides that all questions of law are to be decided by the judge and Section 2(1) of NRCD 323 then adds that in a jury trial a question of fact shall be decided by the jury.

2. The judge must inform the jury of the charges against the accused person and the elements that need to be proved. The judge here must direct the jury on the

ingredients of the offence and the need for the prosecution to prove each of them by cogent admissible evidence. In the practice direction in **State v Amoh** it was stated as follows:

" It is clearly the duty of the trial judge to explain to the jury what the ingredients of the offence are and what evidence is required to prove each one of them and also the principles of law applicable to each"

3. The judge must direct the jury on the evidence presented by both the prosecution and the accused which must be fair and even-handed as possible. The judge is to sum up the facts as presented by both parties. In the practice direction dated 10th April 1961 in the case of **State v Yaw Amuah [1961] GLR 195-196** where it was stated:

"It is the duty of the trial judge to place the prisoner's case adequately before the jury, that is to say, he should remind the jury of the general nature of the defence, but not that he may present a different case no matter how favourable that may be to the prisoner. It is of the greatest importance that the jury should be directed in an impartial way on the facts, and not in such a way as to indicate what they should find; it is also imperative that the judge should point out the considerations for the jury to bear in mind in deciding whether or not they should find the prisoner guilty. Although a judge is not disbarred from expressing his own opinion on the facts, it is his duty at the same time to warn the jury that they are not obliged to accept the opinion expressed by him on the facts."

4. The judge must direct the jury on the standard of proof on the prosecution and the accused. The onus of proof on the prosecution is dictated by ***Section 11(2)*** of ***NRCD 323,*** which requires the prosecution to prove the guilt of the accused beyond a reasonable doubt. The judge must explain to the understanding of the jury the term "*beyond reasonable doubt*". The judge must also direct the jury on when the burden shifts to the accused as dictated by ***Section 11(3)*** of ***NRCD 323*** and the fact that the accused person need only raise a reasonable doubt. The duty of the judge in this regard has been stated at Section 16 of NRCD 323 as follows:

"Section 16. Instructions on burden of persuasion

The Court shall, on a proper occasion, instruct the jury as to which party bears the burden of persuasion on each issue and as to whether that burden requires a party

(a) to raise a reasonable doubt concerning the existence or non-existence of a fact, or

(b) to establish the existence or non-existence of a fact by a preponderance of the probabilities, or by proof beyond a reasonable doubt."

In ***Asare v The Republic*** **[1978] GLR 193** it was held that *"a judge in a criminal trial with jury was in duty bound to sum up the law and the evidence in the case when the case on both sides was closed. The judge was also required to cover in his summing-up the issue of the burden of proof."*

In ***The State v Afenuvor [1961] GLR 655*** the appellant was convicted of murder. On appeal to the Supreme Court against conviction it was argued that the trial judge "*gave conflicting directions on the burden of proof resting upon the prosecution and that this amounts to misdirection*". Exception was taken by counsel to the use of the phrase "to prove and substantiate the charge to your satisfaction" because he contends that the direction in those terms does not adequately or sufficiently enough instruct the jury as to the high standard of proof which is now established to be required of the prosecution in its effort to discharge the burden of proof in a criminal prosecution. It was held as follows:

"From the authorities therefore it appears sufficiently clear that it is in respect of a standard of proof whereby they are not merely "satisfied" but either "satisfied beyond reasonable doubt" or "completely and entirely satisfied" or "satisfied as to be quite sure", of the prisoner's guilt, that the jury have to be directed or instructed in or by the summing-up. Learned counsel's arguments to that effect therefore are obviously well-founded.

… ***In a commendably detailed, and seemingly instructive summing-up by the learned judge, counsel is compelled to pick only on the phrase to which we have already made reference, namely, "To prove and substantiate the charge against the prisoner to your satisfaction". But it does not seem to us, in the first place, that the phrase can be divorced or dissociated from the final phrase in that paragraph, "by means of the clearest possible and convincing evidence". … It is impossible for anyone reading the two parts together to have any misapprehension whatsoever about the instruction intended to be given to the jury. What is vital in a summing-up is not the use of a particular formula of words but the effect of a summing-up as a whole in giving guidance as to the right approach.***

In ***Barkah v The State [1966] GLR 590*** the trial judge in a summing-up said

*“if however you are not so satisfied, but feel that because of **some sure and reasonable doubts**, the guilt of the defendant cannot be said to have been proved with certainty, then you must find the defendant not guilty”.*

The defence appealed against the summing-up arguing that it shifted the burden of proof onto the defence. The Supreme Court held as follows:

“ In our view, the phrase "some sure and reasonable doubts" used by the trial judge was an unfortunate expression, but in this particular context, it did not give a wrong impression to the jury; because, at a later stage when the trial judge was instructing them on the essential aspects of the burden of proof, he directed them as follows:

"(a) The burden of proof never shifts on to the defence. It is always upon the prosecution to establish by clear, convincing and satisfactory evidence, the guilt of the defendant. This is subject to certain exceptions that do not affect us in this present matter.

(b) It is never enough for the prosecution to prove merely a prima facie case against the defendant. Jurors must never feel satisfied with a prima facie case. Even if they are satisfied with a prima facie case, jurors will be bound to go further to consider the defence and thus take and examine and consider the case as a whole.

(c) However stupid or improbable the defence may seem, or its explanations, jurymen must give due and careful attention and consideration to that defence and the explanations canvassed by the defendant.

(d) There is no duty upon the defendant to prove his innocence, or to disprove his guilt. Whether or not there be explanations, or whether or not a defence is put up by the defendant, the burden of proving the defendant's guilt is always upon the prosecution."

***A summing-up should always be looked at as a whole. In the instant case, the trial judge's charge to the jury on the question of burden of proof, when critically examined as a whole, conveyed the one and only meaning that where a prima facie case is made out by the prosecution and the appellant, by his defence, offers an explanation, the burden of proof that the offence charged has been committed is still on the prosecution and, if upon a review of the evidence on both sides, they are in doubt they ought to acquit. In our view the learned judge did not shift the burden of proof on to the defence**.”*

5. A judge should always put the defenses raised by the evidence to the jury even if not put forward as a defence by the accused, and summing-up should not be a rehearsal of a one-sided and unfair comment,

   Despite the fact that the accused did not rely on a particular defence, in the event that such a defence was apparent on the face of the record, the judge is duty-bound to direct the jury on it. In a criminal case, the overriding duty of the judge is to put the defence fairly and adequately to the jury, which in almost every case will involve a summing-up, explaining the constituents of the offences charged and the relevance of them to the evidence which has been adduced. Even where potentially prejudicial evidence has been admitted, the judge must direct the jury on its potentially probative value, which is then for the jury to determine.

   In the practice direction in **State v Amoh** it was stated as follows

   > *" It is the duty of the learned trial judge to expand or expound to the jury the defence put forward by the prisoner. Whatever the defence of a prisoner may be, however weak or improbable, he is entitled to have it put adequately to the jury."*

6. The judge should direct the jury on the principle of the evaluation of the explanation by the accused as enunciated in the Supreme Court in the case of ***LUTTERODT v. COMMISSIONER OF POLICE [1963] 2 GLR 429***

   > *"Where the determination of a case depends upon facts and the court forms the opinion that a prima facie case has been made, the court should proceed to examine the case for the defence in three stages:*
   >
   > *(1) Firstly it should consider whether the explanation of the defence is acceptable, if it is, that provides complete answer, and the court should acquit the defendant;*
   >
   > *(2) If the court should find itself unable to accept, or if it should consider the explanation to be not true, it should then proceed to consider whether the explanation is nevertheless reasonably probable, if it should find it to be, the court should acquit the defendant; and*
   >
   > *(3) Finally quite apart from the defendant's explanation or the defence taken by itself, the court should consider the defence such as it is together with the whole case, i.e., prosecution and defence together, and be satisfied of the guilt of the*

defendant beyond reasonable doubt before it should convict, if not, it should acquit."

7. The judge must direct the jury on the issue for determination or in contention. The judge will direct the jury on the main issue or ingredient in contention. This direction is vital as it helps the jury know what is at stake and the crucial facts to be evaluated.

8. The judge must direct the jury on the application of some presumptions. ***Section 23*** of ***NRCD 323*** enjoins the judge to direct the jury not to make a finding of fact against the accused person unless the conditions for doing so exist. When the presumed facts exist beyond a reasonable doubt, the court may submit the question to the jury.

9. The judge must direct the jury on some specific uncorroborated evidence and warn them on the dangers of accepting uncorroborated evidence relating to sexual offences; the unsworn evidence of a child, evidence of a co-accused/accomplice or evidence of any person having exceptional interest directly or indirectly in the outcome of the case.

10. The judge must direct the jury on the effect of the contents of an admitted statement after a mini-trial. Where the court rules after a mini trial that a confession statement is admissible, the judge in his summing up must inform the jury to determine on their own whether the statement is to be believed or not.

11. A judge, in summing up may comment robustly on the evidence, but must not direct the jury to accept it. He must direct the jury in a balanced way and cannot content himself by simply reiterating the incantation that it is for the jury to decide the facts. Summing up should thus be full and fair. ***Section 278(2)*** of ***Act 30*** entitles a judge in the course of summing up to express to the jury a personal opinion on a question of fact. A judge in so doing must not give the impression that he is usurping the functions of the jury. He must direct the jury that despite his opinion, it was still left to them to form their own opinion since they are not bound by his opinion. In ***(R v Ojojo)*** it was held that a judge must leave matters of fact to the jury to decide and must not impose, nor request a jury to return a verdict unfavourable to the accused. In **Duah v The Republic [1987-88] 1 GLR 343-360** held:

> *"A judge was entitled to comment on the evidence adduced by both the prosecution and the defence, and when doing so, it was not wrong for him even to give a confident opinion on certain questions of fact when summing up to the jury provided that he did not create the impression that he was usurping their functions as judges of fact. In the instant case, although the comments by the trial judge in the summing up to the effect that the*

behaviour of the appellant was suggestive of an attempt on his part to conceal the crime was justified, yet before he left the case to the jury, he directed them to rid their minds of any comments he had made in the process of summing up. It could not therefore be said that he had either prejudiced the case for the appellant or invited the jury to convict."

Additionally, In the case of **Richmond Kwabla Dzangmatey vs The Republic Criminal Appeal Suit No. J3/7/2017 30th October 2019** His Lordship Amegatcher JSC stated as follows:

"The trial judge went ahead to direct the jury on the defences available to the appellant i.e., self-defence and provocation. The judge also at page 68 of the record made it clear to the jury that the law allows him to express his own views on pieces of evidence, but the jury is not bound to accept or agree with any such view or opinion. In effect the jury may ignore the judge's opinion and form their own since they are the judges of fact while he is the judge of law."

12. The judge must direct on all possible verdicts which should be consistent with the evidence on record. This is more so, especially in a case where there were two or more alternative verdicts open to them.

    In ***Abam v The Republic*** [1967] GLR 699 the learned trial judge concluded his summing-up as follows:

    "If you are satisfied the prisoner did not know the gun was loaded then he cannot be convicted of murder and the question would be one of manslaughter. If a man takes a gun, not knowing whether it be loaded or unloaded and using no means to so ascertain and fires it in the direction of another person and who died eventually he is guilty of manslaughter."

    It was held as follows:

    " With respect to the learned trial judge we think that the directions in the final passage of the summing-up contained a new theory of his own, for that was the case neither for the prosecution nor for the defence. It is dangerous and inadvisable for a judge for the first time in his summing-up to advance a theory of his own…The learned judge did not tell the jury how far the theory could be applied to the facts in this case. Besides, though the passage contains the only reference to manslaughter in the whole summing-up, yet the learned trial judge omitted to explain to the jury the distinction between murder and manslaughter as enacted in sections 47 and 51 of the Criminal Code, 1960 (Act 29)…. ***A jury should not be left to make guesses, and it is the duty of the trial judge to explain to them all matters to which they have to***

apply their minds. <u>Therefore, having for the first time in his final charge told the jury that it was open to them to return a verdict of manslaughter, it became the imperative duty of the trial judge to direct them that their verdict would be either guilty of murder or guilty of manslaughter or complete acquittal. But he failed to tell them about the three possible verdicts, which on his direction they could return.</u>

In our view, the misdirections in the final passage of the summing-up must have confused and misled the jury, for having rejected the prosecution's view of the case, they were left only with the case of the appellant, which stood uncontradicted. In those circumstances the only verdict which the jury could have legitimately returned was one of complete acquittal. We are satisfied that the misdirections in the final passage of the summing-up have occasioned a substantial miscarriage of justice in this case, for they deprived the appellant of a fair chance of acquittal."

13. <u>The judge must direct the jury to be unanimous in the return of their verdict</u>. If it is a capital offence, the judge is duty-bound to direct the jury that their verdict should be unanimous. However if it is not a capital offence, the judge must direct them that a verdict of not less than 5 to 2 shall be held to be received by the court as the verdict of the whole jury. Section 285 of Act 30 provides as follows:

"**Section 285. Action on verdict**
(1) When the jury are unanimous in their opinion, the Justice shall give judgment in accordance with that verdict.

(2) Where the accused is found not guilty, the Justice shall record a judgment of acquittal.

(3) Where the accused is found guilty, the Justice shall pass sentence on the accused according to law.

(4) Where the jury are not unanimous in their opinion, the Justice shall, after the lapse of a time that the Justice considers reasonable, discharge the jury, but a verdict of a majority of not less than five to two shall, in respect of an offence which is not punishable by death, be held, taken to be, and received by the Court as the verdict of the whole jury."

14. <u>The judge must direct the jury that they should return for further direction if they retire and do not reach a unanimous verdict</u>

MUST READ CASE REGINA V OJOJO

The legal requirements for summing up are discernable from the case of **Regina v Ojojo [1959] GLR 207-213**. The relevant facts are as follows:

FACTS

The accused (Daniel Ojojo) was charged with the murder of Kwame Brehun. There was no eye-witness of the killing, but that he had killed deceased was admitted by the accused.

The son of deceased, a boy about ten years of age, had accompanied his father to a sugar-cane farm on the morning of the incident. After the deceased had cut down about two dozen sticks of sugar-cane he sent this boy to another farm, situate about 300 yards away, to bring along a hook stick for cutting grass or bush. While at the latter farm, the boy heard shouts, which he recognised as those of his father, calling him back. He hurried back to the farm where he had left his father, but found him lying on the ground, with cutlass wounds on him and unable to speak. Near him on the ground were two cutlasses; one belonged to the deceased, the other was identified as that of the accused.

The boy ran home and reported to the Chief. A witness had seen the accused with a cutlass earlier that morning going to a farm in the same neighbourhood. Upon the villagers gathering, the absence of the accused raised a suspicion and they began to look for him. He was later seen and arrested. He made a statement to the Police, and was eventually charged with the murder of the deceased.

At the trial, the learned Judge (Adumua-Bossman J.) rejected as inadmissible the statement which the accused had made to the Police, on the ground that it was obtained without due caution. At the close of the evidence for the prosecution, however, the accused made an unsworn statement from the dock. He called no witnesses in his defence. The accused's statement from the dock opened by alleging taunts by deceased that he had committed adultery with accused's wife, and had got her with child:-

"I brought a wife from Nigeria and a certain man from Toboasi is keeping her as his own house-wife. When she conceived I sent her to Nigeria. Since her departure to Nigeria that fellow is always coming to me and telling me that he was the one who conceived my wife. Then I was annoyed at hearing that from the fellow - and I went to the Chief of the town and he later told me that it was not that fellow who had come to me who was chancing my wife I replied to the Chief you say it was not this fellow who came and spoke to me, but that fellow was always coming to my window and boasting to me to the following effect "Your wife I'm the one who conceived her"- five months after she had left to Nigeria, this

fellow was always laughing at me when ever he sees me that my 'prick die', i.e. my genital organ was not capable of acting."

The accused's statement went on to allege that he had complained repeatedly to the Chief about deceased's conduct:

"All this I used to report to the Chief and I told the Chief to enquire from the fellow why the fellow kept on worrying me, and I told him the Chief that if he failed to call the fellow to enquire of him I would report to the Police - The Chief said I must stop - As I heard this from the Chief I considered it myself that as my wife had gone to Nigeria it is good for me to leave the matter so I did not go to report to the police - The fellow however still continued his conduct - saying that my wife's conception was not by myself."

Next, in what the trial-Judge described as "perhaps the crucial and most important part" of the statement, the accused described the killing:

—So one Sunday I went to my Cassava farm and was in the farm when the fellow came by the footpath near the Cassava and taunted me saying "This fellow still here who cannot have connection with a woman." He further told me that when my wife was going those children who accompanied belonged to local people and if I didn't see that those children were brought back I myself would be lost in the farm. I told him "Will you prove to me those who are the fathers of the children whom I have sent to Nigeria" - I further told him that when my wife was here that was how he used to behave in the same way by telling me that her pregnancy was not by me. When I said this the fellow tried to fight me - He had a cutlass and tried to use the cutlass on me, but I was quicker to knock away his cutlass from his hands and I then killed him with my cutlass. That's all I have to say except that when this matter happened and I was taken in custody by the police I asked them to send for my wife from Nigeria but I don't know whether they have sent for her or not. That's all I have to say."

In a lengthy summing-up to the Jury, the trial-Judge said as to the case for the Crown:

"I have to direct you therefore that on the evidence of the prosecution, if you accept or believe the whole evidence, you would be entitled to come to the conclusion that it was the accused who set upon the deceased and inflicted [p.209] the injuries from which he died - and that therefore he is Guilty of Murder i.e., intentionally causing the death of another by unlawful harm. But at that stage there was still room for doubt,"

The trial-Judge proceeded to read to the Jury the unsworn statement made by the accused from the dock, and concluded his summing-up with the following direction to the Jury:

"Well now, Gentlemen, I regret to say the above is nothing short of a clear confession of Murder pure and simple. Accepting his narration, even if it is true that the deceased tried or actually used his (the deceased's) cutlass on him, he himself says – —I was quicker and knocked away his cutlass from his hands – that is to say disarmed him. Having disarmed him, the law does not allow him to cut him up in the manner described by the doctor.

—It is therefore my very painful but bounden duty to direct you that on the Accused's own statement from the dock which amounts to a clear confession, he intentionally caused the death of the deceased Kwame Brehun by unlawful harm, the awful cutlass injuries inflicted on him which the doctor described in his evidence, and that your verdict must be guilty of Murder. Will you now retire to consider your verdict."

The accused was convicted of murder, and appealed to the Court of Appeal

HELD

- ***The notes of the Judge's summing-up attracted our attention, and we granted leave to appeal. When the appeal came on for hearing we asked learned Crown Counsel for the respondent whether he could be of any assistance to the Court even before hearing counsel for the appellant. He readily agreed, and conceded (properly, in our view) that the Judge's summing-up fell so far short of what the law required that he could not support the conviction. We are of the opinion that although the learned Judge took meticulous care in his summing-up in explaining the law of murder to the jury, and also in recapitulating the evidence for the prosecution, he unfortunately misdirected himself, both by actual misdirection and by non-direction, as to the requirements of the law in regard to the defence. We considered that the passages in the summing-up to which reference will be made in this judgment were so gravely at fault as to amount to a substantial misdirection on a point of law, which made allowing the appeal inevitable.***

- ***The summing-up should have left these questions to the jury; but instead, unfortunately, after the learned Judge had directed that the prisoner's statement amounted to a confession of murder… The authorities are clear that a Judge must leave the facts for the jury to decide, and should not impose, nor request a jury to return, a verdict unfavourable to the prisoner. A Judge is, however, entitled to indicate his own views to the jury, provided he leaves it to them to make up their own mind. We may put it this way: that unless in favour of the accused, it would be exceptional for a Judge to direct***

a jury as to the verdict which they should return. He is permitted, of course, to express his opinion freely and strongly, provided he is fair, and provided he makes it clear that the jury is free to give his opinion what weight it chooses. But that was not the kind of direction which the Judge gave in this case.

SETTING ASIDE VERDICTS ON APPEAL

When the verdict is given by the jury it is final. The judge has no option to alter the verdict of the jury. Even on appeal, the appellate court is not to put itself in the position of the jury or have the case re-tried. In the case of **Richmond Kwabla Dzangmatey vs The Republic Criminal Appeal Suit No. J3/7/2017 30th October 2019** His Lordship Amegatcher JSC stated as follows:

> " Our duty as an appellate court in such appeals is not to put ourselves in the position of the jury or have the case re-tried. Our duty is to review the record and satisfy ourselves whether firstly the jury was directed properly on the law and secondly whether the evidence supported the conviction. In the Supreme Court's case of Yirenkyi v The State [1963]1 GLR 66 at 77, Akufo-Addo JSC (as he then was) in addressing a similar attack on the trial judge in a summing-up expounded the legal position as follows
>
> > *"To borrow the words of Lord Goddard C.J. in R. v. Whybrow, we do not for a moment seek to put ourselves into the position of a jury. We take the verdict of the jury, which is one of guilty, and which means that the jury were satisfied that the appellant did do a criminal act. We then have to see how far the case is affected by the wrong direction given by the trial judge, and in doing so we take the whole of the facts into account and regard the whole of the circumstances."*

This was also stated in **Moshie v The Republic [1977] 1 GLR 287**

> *" It was the duty of the trial judge simply to accept the verdict without any question where the jury returned a unanimous verdict of guilty or not guilty. It was only in a case where the jury were not unanimous that the judge might require them, after further direction on matters of law or fact, whenever necessary, to retire for further consideration; but he could not do so after the delivery of the actual verdict. Unless contrary to law, a judge was bound to accept the unanimous verdict of the jury. It was only when the verdict was incomplete, vague or ambiguous or inconsistent that a judge might be justified in putting questions to the jury in order to ascertain what the verdict really was. In this case, the jury delivered a clear unambiguous verdict after the summing-up and "after critically deciding the issues" before them. Consequently the learned trial judge was, by virtue of section 285 (1) and (2) of*

Act 30, bound to accept it. The conviction and sentence founded on the second verdict were therefore utterly illegal."

What can be challenged is the summing up on Appeal. There are two board grounds usually described as misdirection or variants of them. These are:

1. Misdirection
2. Misdirection by non-direction

Both these grounds must lead to a substantial miscarriage of justice. Section 31 of the Court Act, Act 456 provides as follows:

"31. Appeal allowed on substantial miscarriage of justice

(1) Subject to subsection (2), an appellate court on hearing an appeal in a criminal case shall allow the appeal if the appellate court considers

(a) that the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or

(b) that the judgment in question ought to be set aside as a wrong decision on a question of law or fact, or

(c) that there was a miscarriage of justice,

and in any other case shall dismiss the appeal.

(2) The appellate court shall dismiss the appeal if it considers that a substantial miscarriage of justice has not actually occurred or that the point raised in the appeal consists of a technicality or procedural error or a defect in the charge or indictment but that there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the accused could have been convicted on that charge or indictment."

<u>MISDIRECTION</u>

This refers to erroneous instructions given to the jurors by the Judge. A misdirection may either be a misdirection on the law or a misdirection on the facts.

Misdirection as to facts normally depends on the nature of the evidence adduced by the prosecution and by the defence.

Misdirection as to the law is determined by the type and nature of the law applicable to the evidence adduced in the case or the burden of proof.

MISDIRECTION BY OMISSION OR MISDIRECTION BY NON-DIRECTION

When the trial judge failed to direct the jurors on the facts or the relevant law applicable to the facts. In the case of **Akorful v The Republic [1963] 2 GLR 371** – In the case, the judge failed to direct the jurors on the distinction between murder and manslaughter.

Held:

> *"Nowhere in the summing-up did the learned trial judge refer to the evidence of the appellant's intention of firing his gun in order to scare away a thief, and his failure to do so taken together with his direction that the elements of the charge of murder had been proved amounted to a substantial miscarriage of justice, for he clearly prevented the jury from considering the real issues affecting the guilt or innocence of the appellant and thereby deprived him of a fair chance of acquittal…. In a murder trial it is necessary to explain to the jury the fundamental distinction between murder and manslaughter in order to enable them to understand the verdicts that they are entitled to return. The failure to draw such a distinction may occasion a possible miscarriage of justice. In this case though the learned trial judge directed the jury to return a verdict of manslaughter if they thought there were circumstances which reduced the offence to manslaughter yet he did not explain the difference between murder and manslaughter."*

MISCARRIAGE OF JUSTICE

The misdirection or misdirection by non-direction should lead to a miscarriage of justice. If it does not, the criticism will be incapable of altering the verdict. In the case of **YIRENKYI v. THE STATE [1963] 1 GLR 66-77**

Held: Whatever the nature of the misdirection complained of (whether it be an omission by the judge to put the defence adequately to the jury, or a misdirection on a point of law), if it can be predicted that properly directed the jury must have returned the same verdict, then, there being no substantial miscarriage of justice, the appeal fails.

TESTIMONIAL OR ORAL EVIDENCE

The giving of evidence by witnesses in court is the most common means of proof. Oral evidence thus comprises information given in court verbally (viva voce) by a party, the accused person or a witness. Oral or testimonial evidence can therefore be said to include all statements which the court permits or requires to be made before it by witnesses in relation to the matters of fact under inquiry.

Evidence given by video conferencing or video link is classified under this category of evidence. The giving of oral evidence in court by a witness in Ghana has been slightly affected by the enactment of C.I 87 that introduced the witness statement to replace oral evidence in Chief.

WITNESS TO GIVE EVIDENCE AS TO PERSONAL KNOWLEDGE

The general rule is that a witness can give evidence only of facts of which he has personal knowledge of, that is, something which he has perceived with one of his five senses. That is to say that if the evidence refers to a fact which could be seen, it must be from a person who says he saw it; if it refers to a fact which could be heard , it must be the evidence of a witness who says he heard it; if it refers 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 she perceived it by that sense or in that manner.

In other words, oral evidence must be direct. This means that a witness can tell the court of only a fact of which he has the first hand personal knowledge in the sense that he perceived the fact by any of the five senses. As was stated by Grose J in n ***R v Eriswell (Inhabitant)*** (1870) 3 RR 707; 106 ER 815

“ No one ever conceived that an agreement could be proved by a witness swearing that he heard another say that such an agreement was made”

SECTION 60 OF EVIDENCE ACT NRCD 323

60. Personal knowledge required

(1) A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter.

WITNESSES

A witness is said to be the most common vehicle for proving a cause in any proceedings. The law on witnesses, it must be emphasized, is mainly concerned with their qualification

to testify (competency) and those who may or may not be compelled by a court to testify (compellability).

A witness is said to be competent if he may be called to give evidence and compellable if, being competent, he may be compelled by the court to do so. A compellable witness who refuses to testify is in contempt of court and faces the penalty of imprisonment. However, a witness, although compellable, may be entitled, on grounds of public policy and privilege, to refuse to answer some or all of the questions put to him.

A person is competent if the law recognises him or her as having the capacity to give admissible evidence as a witness In general, all persons are both competent and compellable. Competence, however, is to be distinguished from compellability. In some circumstances a person who is competent to give admissible evidence as a witness will nonetheless not be compelled by the court to do so. Moreover, even a person who is generally competent and compellable as a witness may not be compelled to give evidence as to particular matters.

EVIDENCE ACT NRCD 323 ON WITNESSES

For a person to qualify as a witness in Ghana he or she must be both competent and Compellable.

The term ‘competency’ is concerned with who may lawfully testify as a witness, whereas the term ‘compellability’ is concerned with who may be lawfully obliged to testify. Both are matters of law to be resolved by the trial judge prior to the witness giving evidence.[1]

COMPETENCE

Competence relates to the ability of the person to testify on the topic before the court for which he has been called as a witness.

Section 58. Competent persons

Except as otherwise provided by this Act, a person is competent to be a witness and a person is not disqualified from testifying to a matter.

Section 59. Disqualification of witnesses

(1) A person is not qualified to be a witness if that person is

(a) incapable of coherent expression so as to be understood, directly or through interpretation by another person who can understand that person; or

[1] Jonathan Doak, Claire McGourley and Mark Thomas “Evidence Law and Context” 5th Ed Pg 79.

(b) incapable of understanding the duty of a witness to tell the truth.

(2) A child or a person of unsound mind is competent to be a witness unless the child or that person is disqualified by subsection (1).

COMPELLABLE

At every stage in criminal proceedings all persons are (whatever their age) presumed competent to give evidence. It is well established that all competent witnesses are compellable. In other words, all witnesses are under a legal obligation to give evidence if called upon to do so and may be subject to a legal penalty for failure to carry out that duty. A competent witness can be compelled to give evidence by the threat of being held in contempt (punishable by imprisonment) for failing to do so.[2]

Courts Act, Act 459

Section 58. Summoning witnesses

In proceedings, and at any stage of the proceedings, a Court, either on its own motion or on the application of a party, may summon a person to attend to give evidence, or to produce a document in the possession of that person or excerpts from the document, subject to the applicable enactment or the relevant rule of law.

Section 59. Warrant in criminal cases

In a criminal case where the Court is satisfied by evidence on oath that a person can give material evidence and will not attend court unless compelled to do so, the Court may immediately issue a warrant for the arrest and production of the witness before the Court at a time and place specified in the warrant.

Section 61. Penalty for non-attendance by witness

(1) A person summoned as a witness who

(a) without reasonable excuse fails to attend court as required by the summons after having had reasonable notice of the time and place as required by the summons, or

(b) having attended court departs without reasonable excuse and without having obtained the permission of the Court, or

(c) fails without reasonable excuse to attend after adjournment of the Court after being ordered to attend,

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[2] Jonathan Doak, Claire McGourley and Mark Thomas “Evidence Law and Context” 5th Ed Pg 85.

may be proceeded against by warrant to compel the attendance of that person, and commits an offence and may be dealt with summarily by the Court for contempt of court and sentenced immediately to a fine not exceeding fifty penalty units or to a term of imprisonment not exceeding six months or to both the fine and the imprisonment.

Section 62(4)

(4) Where a person appears in court to give evidence and

(a) refuses to be sworn, or

(b) having been sworn, refuses without lawful excuse to answer a question put to that person, or

(c) refuses or neglects to produce a document or thing which that person is required to produce, or

(d) when lawfully required to do so refuses to sign that person's deposition, without offering a lawful or a sufficient excuse for the refusal or neglect,

that person commits, independently of any other liability, the offence of contempt of court, and the Court before which the contempt is committed may deal summarily with, and sentence, that person as if that person had been convicted of a misdemeanour.

Add in Civil cases the possibility of issuing a subpoena.

Although it is usually the case that competence will automatically give rise to compellability, there are three major exceptions to this rule that apply in criminal cases.

First, the spouse of an accused is now a competent witness. However, as we shall see below, they may be only compellable for the prosecution against the accused, or a co-accused in very limited circumstances.

Second, the accused was made a competent witness in their defence but is not a compellable witness for the prosecution in any proceedings so long as they remain charged with an offence in the proceedings.

An accused person is not compellable, but, as noted, if they choose to give evidence, there is no privilege against self-incrimination in respect of the offences with which they are charged.

Lastly, diplomats, foreign heads of state and the sovereign are competent, but are not usually compellable witnesses.

PERSONS NOT COMPELLABLE

The Spouses of the Parties

At common law a spouse of a party to either civil or criminal proceedings was incompetent to testify for or against him whether the evidence in question related to events which occurred before or during the marriage.

The spouse of the accused

The common law rules relating to the competence and compellability of the accused's spouse were complex and confused. The wife or husband of a person charged in the proceedings was generally considered to be incompetent, except in respect of a small number of serious offences. The House of Lords' decision in *Hoskyn v Metropolitan Police Commissioner*[3] changed this view, and thereafter the common law rule was that the wife or husband of a defendant could not give evidence for the prosecution no matter how serious the charge.

The issue was considered by the Criminal Law Revision Committee in 1972. The Committee accepted that a wife ought not to be compelled to testify against her husband on the grounds that such a move could disrupt marital harmony by placing one partner in the invidious position of having to incriminate the other.[4]

Former spouses, future spouses and polygamous 'spouses'

Under section 80(5) of the PACE 1984, former spouses are competent and compellable to give evidence as if that person and the accused had never been married. Only those who have had the divorce decree made absolute are compellable.[5]

The position regarding future spouses was considered in R (Crown Prosecution Service) v Registrar-General of Births, Deaths and Marriages,[6]in which the accused, charged with murder and held on remand, sought permission to marry his long-term partner.

Since she was a witness for the prosecution, and would by virtue of section 80 of the 1984 Act cease to be a compellable witness at his trial, the CPS attempted to persuade the Registrar-General and the director of the prison not to allow the marriage to take place until after the trial. When both declined to do so, their decision was challenged by way of judicial review. The Court of Appeal held that there was no power to prevent, on the grounds of public policy, the marriage between a prisoner on remand and his long-term partner, despite the fact that the marriage would make her a non-compellable witness at his forthcoming trial for murder. It was accepted that the duty of the Registrar-General

[3] [1979]AC 474.
[4] Criminal Law Revision Committee, Eleventh Report, Evidence (General), Cmnd 4991 (HMSO, 1972).
[5] R v Cruttenden [1991] Crim LR 537.
[6] [2003] 1 QB 1222.

under section 31 of the Marriage Act 1949 was absolute. There were, however, circumstances in which that absolute duty would be subject to implied limitations on public policy grounds. Authorities were cited to show that no person should profit from their own serious crime, and that statutes should be interpreted to prevent a grave crime being committed or the course of justice perverted. Despite the consequences that followed from the provisions of section 80 of the 1984 Act, entering into a lawful marriage did not amount to perverting the course of justice.

Under the Evidence Act of 1898, the accused's spouse was made competent as a witness for the accused and for any other person jointly charged with the accused subject to the consent of the accused. Even though competent, the spouse of an accused was however not compellable as a witness for either the accused or co-accused.

POSITION IN GHANA

A spouse of an accused person can testify on his behalf. However, some courts have place very like weight on such evidence due to the likelihood of the testimony being embellished to suit the interest of the spouse.

In ***HANSON v. THE REPUBLIC [1978] GLR 477–490***Archer JA (as he then was), admonished judges not to treat evidence of spouses contemptuously on the flimsy ground that 'she was the appellant's wife who was prepared to tell lies to secure her husband's acquittal.

The facts of the case is that the appellant, a major in the Army, appealed from his conviction by General Court Martial at Tamale for conduct prejudicial to good order and discipline contrary to the Armed Forces Act, 1962 (Act 105), s. 54 (1). The complainant, the wife of a private, alleged that on the pretext of giving her a lift, the appellant had driven her out of the barracks, had intercourse with her against her will, and had driven her back to barracks. There were no eye-witnesses and the prosecution witnesses could only reiterate what had been told to them by the complainant. Of this, the judge advocate in his summing-up said, "Such evidence . . . merely establishes the consistency of [the complaint's evidence. It does not amount to corroboration of [her] evidence." The complainant further testified that she did not know the appellant before the incident but had established his identity by describing him and his car to a sentry on duty at the barracks gate. She also said that whilst she was at the gate, weeping, the appellant had approached her and twice asked her why she was crying. At this point she told her companion, "This is the man who drove me to the bush and had sexual intercourse with me." She had made no previous mention of this complaint to her companion.The appellant pleaded alibi and gave evidence that at the time of the alleged offence he was in a store drinking beer with his wife and the store manager, both of whom corroborated this. Soldiers at the barracks gate gave evidence that the appellant had been seen driving

his car in and out, but none could identify his companion as either his wife or the complainant. The two major grounds of appeal argued were that the judge advocate failed to deal adequately with the issue of corroboration and that he misdirected the panel on the crucial issue of identity.

It was held as follows concerning the testimony of his wife:

> *“"The accused in his defence denied the charges. His defence is alibi. He said that at 6.30 p.m. on 20 December 1974 he drove his wife to a shop called the Sarboa Enterprises and bought two bottles of schnapps. The defendant's first witness was the shopkeeper who sold the two bottles of schnapps to him. After purchasing the schnapps, the managing director of the Sarboa Enterprises served them with four bottles of beer and they drank in the shop. They were in the said shop for an hour. They left the shop at about 8.15 p.m. and got home about 8.30 p.m. Barely about ten minutes after they had got home one Mrs. Acheampong and her sister visited them . . .”*
>
> *As already pointed out, the evidence of the wife of the appellant was to demonstrate that when the appellant went to town that evening she accompanied him and when he returned she was in the car with him. As Lord Widgery pointed out in the Turnbull case (supra) when dealing with the appeal of Roberts at p. 457:*
>
> > *"This is a situation which not infrequently arises. In such circumstances it will almost certainly be present in the jury's mind that the witness is the defendant's wife and they will no doubt make what they think is the proper allowance for this fact. They should, however, be warned in most, if not all, similar cases that the they should not necessarily regard the fact that the witness is the defendant's wife as derogating from the worth of her evidence when the nature and content of the defence is such that anyone would expect her to be called as a witness in any event."*
>
> *In this appeal, the evidence of the appellant’s wife was crucial and the learned judge advocate should have directed the panel to consider her evidence seriously and not to reject it on the flimsy ground that she was the appellant’s wife who was prepared to tell lies to secure her husband's acquittal. In other words, her evidence was to the effect that if some of the guardsmen said that they saw the appellant with another [p.488] person in the small white car that evening driving through the gates, she was the one in the car and nobody else. This was to negative any inference that the complainant was the one in the car. The guardsmen could not say that it was the complainant who was in the car with the appellant and as such that issue was in the air.”*

In Ghana, a spouse is competent but may not be compellable if the testimony relates to martial communication.

PRIVILEGE IN MARITAL COMMUNICATION

110. Marital communications

(1) A person has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made between that person and the spouse of that person during their marriage.

(2) A communication is confidential if it is not intended to be disclosed, and made in a manner reasonably calculated not to disclose its contents, to a third person.

(3) This section applies to both monogamous and polygamous marriages.

SPOUSE TESTIFYING FOR ACCUSED/CO-ACCUSED

Generally, under the common law, the accused's spouse was considered competent but not compellable as a witness for the accused.

Even though a spouse of accused is considered competent to give evidence for a co accused, there is a difficulty when it comes to the issue of compellability. In considering this issue, one may have to look at the interest of justice which may require that the co-accused should be able to compel the spouse if he or she is able to give relevant evidence in his defence.

The other side of the equation which must also be looked at is that if the spouse is compelled to testify in such cases, the prosecution, in cross-examination of the spouse may well elicit evidence incriminating the accused, a result which may be inconsistent with the general common rule that the prosecution may not compel a spouse to testify for them.

In resolving this puzzle, the Committee recommended that the spouse should be compellable on behalf of a co-accused in any case where he or she would be compellable on behalf of the prosecution.

THE ACCUSED

At common law generally, the accused, whether charged solely or jointly with any other person is incompetent as a witness for the prosecution. Thus, in cases where the prosecution wishes to call a co-accused for instance, to give evidence for them, they may only do so if he has ceased to be a co-accused.

The accused is also a competent witness for a co-accused[7] but is not compellable.[8] However, a defendant is not competent to testify for the prosecution so long as they are a 'person charged' in the proceedings, who is named in the indictment, whether alone or with others.

Section 53(5) of the YJCEA 1999 provides that 'a person charged in criminal proceedings does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason)'.

This may happen either because:

a. he has pleaded guilty;

b. he has been acquitted, for example, where no evidence is offered against him or he makes a successful submission of no case; or

c. an application to sever the indictment has been successful so that he is not tried with the other accused; or

d. the Attorney-General has entered a nolle prosequi thereby putting an end to the proceedings against him

In any of the above situations, a former co-accused under the common law becomes both a competent and a compellable witness for the prosecution. R v Pitt [1983] QB 25.

However, it must be stated that where a former co-accused has pleaded and proposes to give evidence for the prosecution, as a general rule, he should be sentenced after the trial of the other accused.

Under the Evidence Act, "an accused in a criminal action may make a statement in his own defence without first taking an oath or affirmation that he will testify truthfully and without being subject to the examination of the parties to the action"

PRIVILEGE FOR ACCUSED IN GHANA

Section 96. Privilege of an accused

(1) The accused in a criminal action shall not be called as a witness and shall not be compelled to testify except on the application of the accused.

(2) Except as otherwise provided in this Act, an accused who testifies in a criminal action testifies on behalf of the accused, and is subject to examination in the same manner as any other witness.

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[7] Youth Justice and Criminal Evidence Act 1999, s 53(1).
[8] Criminal Evidence Act 1898, s 1(1)

(3) An accused in a criminal action does not have a privilege to refuse to submit to physical examination by the Court, or the tribunal of fact, or to refuse to do an act in the presence of the Court or tribunal for the purpose of identification other than to testify.

(4) Where an accused in a criminal action does not testify on behalf of the accused, the Court, the prosecution and the defence may comment upon the accused's failure to testify, and the tribunal of fact may draw a reasonable inference from the failure to testify.

See: Article 19(10) of the 1992 Constitution of Ghana.

The Sovereign and Diplomats

The Sovereign and heads of other sovereign states are competent but not compellable to give evidence. In Ghana, the Diplomatic Immunities Act incorporates Article 31 of the Vienna Convention and provides that:

"A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in case of:

(a) a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purpose of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, heir or legatee as a private person and not on behalf of the sending state;

(c) an action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.

(2) A diplomatic agent is not obliged to give evidence as a witness".

Judges and Jurors

Section 65 of NRCD 323. Presiding justice disqualified as a witness

A justice sitting at the trial may not testify as a witness in that trial.

In the case of **THE REPUBLIC VRS THE HIGH COURT, ACCRA EX PARTE: CONCORD MEDIA LTD ALFRED OGBAMEY GHANA PORTS & HARBOURS AUTHORITY BEN OWUSU MENSAH** CIVIL MOTION NO.J5/17/2010 16TH FEBRUARY,2011

Facts

The Applicant invoked the supervisory jurisdiction of the Supreme Court to prohibit the High Court Accra and in particular Benson J from hearing the case entitled **Ghana Ports & Harbours Authority & Another v Concord Media & Another** as well as two motions in the cause that are pending before him for contempt of court. In the supporting affidavit, the deponent accused the presiding judge of having in the course of deliberations before him referred to a previous petition that he had authored to Her Ladyship the chief Justice seeking a transfer of the matter from the said judge as " a bogus petition''. The said deposition also alleged of and concerning the judge that he had described the witness as "a cantankerous person". Based on the said allegations, the applicants were apprehensive that the learned judge had lost his impartiality as the words on which the application was based were prejudicial to a fair consideration of the matters before him as an adjudicator. The application was opposed by the interested party who is the plaintiff in the action at the High Court in which the second applicant and the Concord Media Limited have been sued for damages for defamation and other ancillary reliefs. On the 30/04/2010, the learned judge himself swore to an affidavit in which he stoutly denied all the damning allegations of judicial impropriety leveled against him in the affidavit in support.

On the question of the trial judge filing an affidavit the court held as follows:

Held:

Anin Yeboah JSC (as he then was) stated:

" We are of this view in that if in course of hearing an application for judicial review and the court exercising its supervisory jurisdiction grants leave to parties to cross-examine on the affidavits, a judge whose affidavit is on record may also have to be cross-examined. This practice should be deprecated to avoid any attack against the judge."

Gbadegbe JSC concurring:

" It is observed that in the course of the proceedings before us we directed that the affidavit of the learned judge be struck out as it offended against section 65 of the Evidence Act, NRCD 323 that seeks to protect the common law right of privilege attaching to judges and adjudicators. In making the said order regarding the deposition of the learned judge we were applying a long established rule of the common law that precludes superior court judges from testifying about matters that occurred in the course of the exercise of their judicial functions. See: Florence v Lawson (1851) 17 LT 260. Having had the said deposition that was sworn to in error by the learned trial judge struck out, I think that it is no longer a competent process that could be relied on by the applicant to sustain his application and for this reason also reject his argument regarding its effect on the matter before us for determination."

66. Competency of jurors

(1) A juror may not testify as a witness in the trial of the action in which that juror is sitting as a juror.

SPECIAL CATEGORY OF WITNESSES

Even though generally the law treats all persons as competent witnesses, there have been various devises to cater for special categories of witnesses, such as children, or persons of unsound mind and accused persons.

Accused and Accomplices

Section 59 of the Evidence Act generally, makes every person a competent witness as no person is disqualified from testifying to any subject matter subject to exceptions. Notwithstanding the general provision,

Section 96(1) of the Act provides that "the accused in a criminal action shall not be called as a witness and shall not be compelled to testify except on his own application"

This provision thus sustains the competency of the accused to testify as a witness but is however not compellable unless he decides to waive that privilege.

Competence and Compellability of Children

In the 18th Century in the case of R v Brasier (1779) East 433 it was discussed that children who were deemed capable of distinguishing between good and evil were expected to take the oath and give evidence orally from the witness box in open court.[9]

In R v MacPherson,[10] the appellant was charged with having committed indecent assault upon a 4-year-old girl. The trial judge, having watched the video-recorded interview, rejected the defence's contention that the witness was incompetent, and allowed her evidence. The appellant was convicted, and appealed on the grounds that the judge erred in determining S's competence on the basis of her video testimony alone, that he had no or insufficient regard to the requirement that he assess the child's ability to understand and answer questions within the forensic forum as a witness as required by section 53 of the Act, and that, in reaching his decision, he had no or insufficient regard to the girl's ability to participate meaningfully in cross-examination. These arguments were, however, dismissed by the Court of Appeal. It was held that the judge had properly assessed the

[9] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 79
[10] [2006] Cr App R 459.

child's ability to 'understand questions put to her as a witness and give answers to them which could be understood'.

In particular, the court noted that the words 'put to him as a witness' within section 53(3)(a) meant the equivalent of 'being asked of him in court', so that a child who could only communicate in baby-language with his mother would not ordinarily be competent, but a young child like the girl in the instant case, who could speak and understand basic English with strangers, would be competent. Moreover, the Act laid down no requirement that the child should be aware of their status as a witness: questions of credibility and reliability were matters for the jury and were not relevant to the issue of competence.[11]

It must be said that competent children are in principle, compellable witnesses. As provided in section 59(2) of the Evidence Decree, "a child or a person of unsound mind is competent to be a witness unless he is disqualified by subsection (1) of this section".

Thus, for child to be a competent witness, he must be:

a. capable of expressing himself so as to be understood, either directly or through an interpreter who can understand him; or

b. capable of understanding the duty of a witness to tell the truth.

Persons of Unsound Mind

At common law, 'persons of unsound mind' who were not capable of understanding the nature of the oath and of giving rational evidence were not competent witnesses.

Historically, the applicable test was whether the witness understood the nature of the oath and the divine sanction. Thus, in R v Hill,[12]the witness was an inmate of a lunatic asylum who suffered from the delusion that he was possessed by spirits who talked to him. Medical evidence was given that the witness was capable of giving an account of any transaction that he witnessed. The Court of Appeal held that the judge had correctly ruled that the witness was competent. In any such case, it was for the trial judge to examine the witness and determine, on the basis of the responses to his questions, whether the witness understands the nature of the oath.[13]

A person of an unsound mind is a competent witness unless he is incapable of expressing himself so as to be understood, either directly or through interpretation by one who can understand him, or incapable of understanding the duty of a witness to tell the truth.

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[11] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 81
[12] (1851) 2 Den 254.
[13] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 83.

Under the Evidence Act, a person of unsound mind is generally a competent witness unless he is not capable of expressing himself so as to be understood, either directly or through interpretation by one who can understand him or not capable of understanding the duty of a witness to tell the truth.

COMPETENT AND COMPELLABLE WITNESSES IN GHANA

Paragraph 13 of the Memorandum to the Evidence Act provides as follows:

“Part V of the Decree deals with witnesses. Section 58 abolishes all pre-existing common law disqualifications for witnesses and provides that, subject to the exceptions provided in the Decree, every person is competent to be a witness and no person is disqualified from testifying to any matter. Section 59 identifies the circumstances in which a person is not qualified to be a witness...”.

Notwithstanding the purported abolishment of the common law rules on competence, one can generally reduce the rules of competence and compellability into two broad terms namely:

a. any person is a competent witness in any proceedings, and

b. all competent witnesses are compellable.

COURT WITNESS

Section 58 of the Courts Act 459 provides that “in any proceedings, and at any stage of the proceedings, a court either on its own motion or on the application of any party, may summon any person to attend to give evidence, or to produce any document in his possession or excerpts from it subject to any enactment or rule of law.

A similar provision is found in section 68(1) of the Evidence Act which also provides that “the court may, on its own motion or at the request of a party, call or recall witnesses”.

It must be stated that a witness called by a court in suo motu is subject to the requirements of competency and compellability and shall be subject to cross-examination by parties in the proceedings.

Notwithstanding the unambiguous provisions in both the Courts Act and the Evidence Act on the discretion of the court to call witnesses on its own motion, there have been questions as to whether in all instances the court should exercise that discretion with the consent of the parties.

In the Court of Appeal case of **Addai v Donkor**, the trial judge suo motu called a witness who was present in court and was mentioned in evidence. It was held that as neither party objected, the witness was properly called. The language of the decision seems to suggest that if any of the parties have objected, the court could not have exercised its discretion as provided in the Courts Act and the Evidence Act.

In **Kombat v Lambim** the judgment of Benin J also suggests that a court must first obtain the consent of the parties before calling a witness. Benin J said:

"...Rather after the defendant had closed his case.the trial magistrate suo mont called Suuk as witness. She testified that she knew all the five women or wives involved. I would have left the matter at that but for the fact that the trial magistrate accepted Suuk's evidence as confirming that of the defendant and upon that gave judgment for the defendant.

Suuk was called by the court itself as a court witness but the record is clear that she was not allowed to be cross- examined by either party. In this respect the court erred...

Secondly, it seems to me that at the stage the trial magistrate purported to call the witness he could not do so without the consent of the parties... I am of the view that the fact that the parties did not challenge the court's unilateral decision to call Suuk does not amount to acquiescence on their part. I am sure that section 68(1) of the Evidence Decree permits a court to call or recall witnesses, but I think this is subject to the general rule of evidence which I quoted above since the NRCD 323 itself is silent as to when this discretion may be exercised."

OATH OR AFFIRMATION

At one time, the principle of orality required that all witnesses testify under oath on the Bible. The courts appeared to regard it as a form of acknowledgement by the witness of a belief that, if they did not keep to it, the consequence would be to suffer 'some kind of divine punishment, although it need not be as bad as hell-fire'[14]

It must be noted that in times past the requirement of swearing an oath meant that non Christians and atheists were excluded from giving testimony.

In Ghana the OATHS ACT, 1972 N.R.C.D. 6 provides as follows:

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[14] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 79; Spencer, J. and Flin, R., The Evidence of Children (Blackstone, 1993), p 51, citing Brett MR in Attorney General v Bradlaugh (1885) 14 QBD
667.

Section 5. Manner of taking oath

The oath shall be taken

(a) by the person who is to take the oath holding in the uplifted hand a copy of the Bible, New Testament or Old Testament, as is appropriate to that person, and saying or repeating after the person administering the oath the words prescribed by law or by the practice of the Court; but if that person is physically incapable of so taking the oath, the copy may be held before the person taking the oath by the person administering the oath, or

(b) in any other manner which is lawful according to law, customary or otherwise, in force in the Republic.

Section 6. Place and date of oath

A commissioner for oaths or a notary public before whom an oath or affidavit is taken or made shall state truly in the jurat or attestation at what place and on what date it is taken or made.

Section 7. Absence of religious belief

Where an oath is duly administered and taken, the fact that the person taking it does not have a religious belief at that time does not for any purpose affect the validity of the oath.

Section 8. Affirmation

(1) A person who objects to taking an oath and wishes to make an affirmation in lieu of the oath may do so without being questioned as to the grounds for wishing to affirm.

(2) Where a person declining or objecting to take an oath is, in the opinion of the Court or officer before whom the oath is to be taken, competent to make an affirmation, that person shall, on the Court or officer so directing make an affirmation. (3) Where an affirmation is to be made, the form prescribed for the oath shall be varied,

(a) by substituting for the words of swearing the words “I solemnly, sincerely and truly declare and affirm that…”, and

(b) by omitting the words “So help me God,” if those words appear; and any other consequential variations of form that is necessary shall be made

In Ghana the law on taking oaths is as follows:

Section 61 of NRCD 323. Oath or affirmation required

Subject to an enactment or a rule of law to the contrary, a witness before testifying shall take an oath or affirmation that the witness will testify truthfully and a statement made by a witness without the oath or affirmation shall not be considered as evidence.

Section 63 of NRCD 323. Statement of accused

(1) An accused in a criminal action may make a personal statement in defence of the charge without first taking an oath or affirmation that the accused will testify truthfully and without being subject to the examination of the parties to the action.

(2) The statement by an accused is admissible to the same extent as if it had been made under oath or affirmation and subject to examination in accordance with sections 61 and 62.

(3) The fact that the evidence was given without oath or affirmation, or that there was no possibility of examination, may be considered in ascertaining the weight and credibility of the statement, and may be the subject of comment by the Court, the prosecution or the defence.

Section 62 Courts Act

62. Examination of witnesses

(1) Subject to the applicable enactment or the relevant rule of law to the contrary, a Court shall require a witness to be examined on oath.

(2) The Court may [at any time if it thinks it just and expedient] for reasons to be recorded in the proceedings, take without oath the evidence of a person who declares that the taking of an oath is unlawful according to the religious belief of that person, or who by reason of immature age or want of religious belief ought not in the opinion of the Court to be admitted to give evidence on oath.

(3) The fact that the evidence has been taken without oath shall be recorded in the proceedings, and the evidence taken shall be treated as if it had been taken on oath.

There are different types of witnesses which include

1. Unfavourable Witness
2. Hostile Witness
3. Adverse Witness
4. Expert Witness

A case is not won on the plurality of witnesses. It is not the number of witnesses which decide whether or not a person has to win his case. It is the quality of the evidence they will give.

ABADOO v. AWOTWI [1973] 1 GLR 393-416 Held: There was no law which enjoined a plaintiff to an action such as the instant case to call all material witnesses if she knew that the interest of such witnesses was at variance with hers and that they were not likely to testify on her behalf.

In a criminal trial, the prosecution has a duty to call all material witnesses. However, in the case of **AGYEMAN AND ANOTHER v. THE STATE [1964] GLR 681-695** it was held the prosecution is relieved from calling a witness whose name is listed on the indictment if they have a reasonable belief that the witness will not speak the truth.

DIFFERENCE BETWEEN A HOSTILE OR ADVERSE WITNESS AND AN UNFAVOURABLE WITNESS

The party calling the witness is not entitled to conduct a cross-examination of his witness. In attempting to prove his case he assumes that the witness would testify on issues relevant to the facts in issue and in his favour. The witness may disappoint the party in that he fails to prove the relevant issue or proves an issue prejudicial to the party calling him.

AN UNFAVOURABLE WITNESS is a person who strives to speak the truth but what he says in the witness box turns out not to be useful to the side that called him. He does not exhibit any hostility to the party who called him. The witness may not have shown any animosity towards the party calling him but simply that the proof expected from him might have been exaggerated or overstated or the facts were not adequately perceived by him. Thus, an unfavourable witness is one who does not display any hostility to the party calling him but disappoints him in failing to prove the relevant issue. An unfavourable witness cannot be cross –examined.

A HOSTILE WITNESS is one who refuses to tell the truth, who stands mute only in court room or who turns out to be obstructive inside the court room. A ‘hostile’ witness is one who shows animosity towards the party calling the witness. He is not desirous of speaking the truth or he sets out to sabotage the case of the party calling him. The judge in his discretion is required to make a ruling as to whether the witness is hostile or not.

This decision is required to be determined in the presence of the jury, so that they can hear and see the answers given by the potentially hostile witness. Once the judge has made the ruling that the witness is hostile, then at common law, in both civil and criminal cases, the party calling the witness is entitled, subject to the discretion of the judge, to conduct a limited form of cross-examination of the witness. Such a party is entitled to ask

leading questions and to reduce the impact of the witness's testimony by questioning him with regard to his memory, means of knowledge, etc. The purpose of the line of questioning is twofold:

(a) to persuade the witness to return to the details contained in his witness statement;

(b) to highlight inconsistencies between the witness's versions of events.

IN RE OKINE (DECD); DODOO AND ANOTHER v OKINE AND OTHERS [2003-2005] 1 GLR 630 a hostile witness was described as follows:

> *"A witness was however a hostile witness if it could be shown that she knew the truth but deliberately persisted in lying to the court. Although the clearest and easiest way to make that determination was if he had made a previous contradictory statement, there might be different ways of arriving at that decision. The law was however clear that when a witness was declared a hostile witness, his evidence was nugatory."*

In **R v Thompson** (1976) 64 Cr App R 96, the defendant was charged and convicted with incest with his daughter (aged sixteen at the time of the trial). She had made a statement to the police implicating her father. At the trial, after being sworn in, she was asked by counsel for the prosecution about the merits of the case and said, 'I am not saying nothing, I am not going to give evidence.' The judge retorted, 'Oh yes you are.' The witness said, 'I'm not.' The judge said, 'Do you want to spend time in prison yourself?' The witness said, 'No.' The judge continued, 'You wouldn't like it in Holloway, I assure you. You answer these questions and behave yourself, otherwise you will be in serious trouble. Do you understand that?' The witness replied, 'Yes.' She then refused to answer the questions put to her. The judge then gave permission to treat the witness as hostile and she was cross-examined by the prosecution counsel and the accused was convicted and appealed. The Court of Appeal dismissed the appeal because the judge had correctly exercised his discretion to treat the witness as hostile.

AN ADVERSE WITNESS are people with identical interest to the interest of the opposing party and so are likely to testify to aid that interest, such as a spouse, director, an employee or agent of a company where that spouse or company is a party to the case.

Section 72 of NRCD 323

72. Adverse witness in a civil action

(1) Subject to the discretion of the Court, in a civil action, a party, or a person whose relationship to a party makes the interest of that person substantially the same as a party,

may be called by an adverse party and examined as if on cross-examination at any time during the presentation of evidence by the party calling the witness.

Case: In Re Okine; Dodoo and Anor v Okine

“The fact that a witness called by a party gives an adverse or contradictory testimony does not lead to the irresistible conclusion that the adverse witness is an untruthful witness. The witness may be an adverse witness precisely because he insists on telling the truth rather than commit perjury in support of the fabricated story of the party who called him.”

The court further stated

“I am not prepared to indorse the view that there cannot exist a proper basis for declaring a witness to be a hostile witness unless there is a contradictory statement previously made by that witness. I agree that it is clearest and easiest to make that determination if there is a previous statement by the witness; but that is not the only means of ascertaining if a witness is a hostile witness. In my view, a witness is a hostile witness if it can be shown that he knows the truth but deliberately persists in lying to the court.”

QUESTION: OCTOBER 2020 Q.4

OPINION EVIDENCE

Opinion evidence is testimony given by a person who, instead of testifying on facts, bases his testimony on his views, observations or his thinking of the facts. Sometimes that kind of evidence may be borne out of inferences, deductions or conclusions of the person testifying. Where opinion evidence is given by a person who has no special training, skill, knowledge, learning or long experience on the topic in respect of which he testifies, his testimony is described as lay opinion evidence. The witness is described as a lay witness in contradistinction from expert witness.

As a general rule, witnesses should only give evidence of facts, since it will be the opinion of the judge or the jury, and not the witnesses, that will determine the end result. However, it is not possible to draw a neat dividing line between fact and opinion, and, therefore, the law of evidence has developed two different sets of rules for experts and lay witnesses.

GENERAL RULES AS TO WHAT WITNESSES ARE TO TESTIFY : SECTION 60

As a general rule of evidence, opinion evidence is inadmissible; as a witness is supposed to speak of facts which he personally perceived, not of inferences drawn from those facts.

This implies that the witness is to testify on matters he has seen, observed or perceived by himself, not on matters he has heard or learned from others through narrations, stories, reading or learning. This is even more so with lay witnesses because to do so would lead to usurpation of the functions of a trier of fact. See Section 2(1) of the NRCD 323.

Therefore, in so far as it is possible for them to do so, the courts set themselves against receiving evidence from any witness in every matter which the judge or jury are to decide.

The general rule is that opinion evidence is excluded on the grounds that it is for the tribunal of fact, and not witnesses, to draw inferences. However, to the general rule there are two main exceptions namely

(a) an appropriately qualified expert may state his opinion on a matter calling for the expertise which he possesses and

(b) a non-expert witness may state his opinion on a matter not calling for any particular expertise as a way of conveying the facts which he personally perceived.

ADMISSIBILITY OF LAY (NON-EXPERT) OPINION EVIDENCE: SECTION 111

Section 111 lays down the conditions under which lay opinion evidence may be given or admitted. It reads as follows :

"**Section 111 of NRCD 323**

> *(1) A witness not testifying as an expert may give testimony in the form of an opinion or inference only if*
>
> *(a) The opinion or inference concerns matters perceived by the witness; and*
>
> *(b) Testimony in the form of an opinion or inference is helpful to the witness in giving a clear statement or is helpful to the court or tribunal of fact in determining any issue.*
>
> *(2) The matter on which the witness bases his opinion or inference need not be disclosed before the witness states his opinion or inference, unless the court in its discretion determines otherwise, but he may be examined by any party concerning the basis for his opinion or inference and he shall then disclose that basis."*

Section 111(1) states three conditions which must be satisfied before lay opinion may be admitted in evidence. They are

1. That the opinion should be based on what the witness perceived, saw, experienced or made etc by himself.

2. That the opinion evidence should assist the witness in clarifying the account or description of his testimony in court; or

3. That it should assist the court in deciding on the issue for trial before the court.

There is no obligation on the witness to disclose the source of his lay opinion (section 111(2)), unless the court in its discretion otherwise directs.

In **R V BECKETT** for instance, the issue was about the value of a plate glass window. The English Court of Appeal held that the value of the window had been established by the evidence of the lay witness that in his opinion the window was worth more than five pounds. Notwithstanding the decision in Beckett, it must be emphasized that non-expert opinion evidence of value is only admissible in respect of commonplace objects as opposed to works of art, antiques and other objects the valuation of which would obviously require specialized skill or knowledge.

On occasions, witnesses may also give opinions *about* those matters that they have directly perceived. In **R V DAVIES**, the accused was tried for driving while unfit. Here, the witness's opinion that the defendant was drunk was held to be admissible since the witness had spoken to the accused moments after he had collided with a stationary vehicle. However, it would have been wrong for him to proceed to give evidence that the accused was unfit to drive, simply because he was a driver himself.

Similarly, in **R V TAGG** passenger on board an aircraft was permitted to give evidence that the defendant appeared to have consumed excess alcohol. However, it should be underlined that witnesses in both of these cases would have been expected to substantiate *why* they believed the defendants to be drunk. They may, for example, have referred to the defendants' unstable stance, slurred speech, smelly breath, etc.

EXPERT EVIDENCE

As a general rule of evidence, opinion evidence is inadmissible; as a witness is supposed to speak of facts which he personally perceived, not of inferences drawn from those facts.

The courts deal with several diverse issues, some of which are highly technical and therefore require the assistance of specially trained persons or persons with special knowledge to dispose of them. Such persons are described as experts.

Admissibility of Expert Opinion

In the case of **R V MOHAN** the court established the four-tier criteria for admitting expert evidence

- Relevance
- Necessity in assisting the trier of fact
- The absence of any exclusionary rule
- A properly qualified expert

WHO IS AN EXPERT?

An expert witness is a person skilled in the subject to which his testimony relates. An expert witness gives evidence in the form of an opinion or inference where the subject matter of the testimony is beyond common experience.

The common experts one meets in the courts are hand writing experts, forensic experts, surveyors, economists, doctors, engineers, bankers, forensic experts, scientists, etc.

QUALIFICATIONS OF AN EXPERT:

SECTION 67 of NRCD 323

The qualifications of an expert is provided for under section 67.

> *(1) A person is qualified to testify as an expert if he satisfies the court that he is an expert on the subject to which his testimony relates by reason of his special skill, experience or training*
>
> *(2) Evidence to prove expertise may, but need not; consistent of the testimony of the witness himself."*

Whether or not a person qualifies as an expert is to be determined by the court i.e. the judge. It is for the judge to determine whether the witness has undergone such a course of special study or experience as would render him an expert in a particular subject and it is not necessary for the expertise to have been acquired professionally.

A person may thus acquire academic qualification as an expert by training or by learning. The training may be formal or informal. He may also acquire qualifications by experience gained through years of practice. Therefore, as already alluded to, the fact that a person has not had formal training on the subject may not disqualify him from testifying as an expert.

In **R V SILVERLOCK (1894) 2 QB 766**, the prosecution's solicitor was held to have been rightly permitted to give evidence as a handwriting "expert", on the basis of the considerable study and attention, as he put it, that he had given to handwriting over the past 10 years, quite apart from his professional work. Lord Russel said : There is no decision which requires that the evidence of a man who is skilled in comparing

handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business.

Similarly in **OSEI V THE REPUBLIC [1976] 2 GLR 383, CA**, per Francois JA (as he then was)

> *" a handwriting expert was one who had adequate knowledge and skill as to handwriting whether acquired in the way of his business or not. Consequently, any person whose business had been the detection of forgeries could be used to prove attempts to dissemble handwriting. In this case a witness called by the prosecution, having devoted a considerable number of years to the examination of and undergone a course in disputed handwriting, eminently qualified as an expert."*

R V INCH, where the cause of an injury was in issue, it was held that a medical orderly was not qualified as an expert capable of giving evidence that the injury was caused by a blow from an instrument and not the result of the collision of heads.

Thus a police officer's experience in investigating motor traffic accidents may make him an expert for the purpose of reconstructing a particular motor accident. **R V OAKLEY (1979) RTR 417**

In **MANU ALIAS KABONYA v. THE REPUBLIC [1977] 1 GLR 196-198** On the question of a cause of death after the accused had confessed to the murder the court stated:

> "The question to be answered is whether medical evidence was necessary to establish the cause of death of this little girl?....."
>
> *"as regards proof of the cause of death, medical evidence, though desirable, was not essential. Having regard to the external wounds inflicted by the appellant on the deceased, the jury was entitled to decide whether or not the wounds caused the death of the deceased without the assistance of any medical evidence"*

The case of *Manu v the Republic* highlights the principle that it is not every issue before a court that the assistance of an expert is needed to resolve.

SUBJECT MATTER OF EXPERT EVIDENCE: S 112

Under section 60 of NRCD 323, a witness may not testify to a matter unless sufficient evidence is introduced to support a finding that he has personal knowledge of that matter.

That is, generally, a witness cannot give opinion evidence. However, under section 112, a witness may give testimony in the form of an opinion or inference concerning a subject matter on which he is qualified to give expert testimony, if the subject matter is beyond common experience and the expert witness will assist in the determination of the issues before the court.

Section 112 of NRCD 323 provides :

> *"If the subject of the testimony is sufficiently beyond common experience that the opinion or inference of an expert will assist the court or tribunal of fact in understanding evidence in the action or in determining any issue a witness may give testimony in the form of an opinion or inference concerning any subject on which the witness is qualified to give expert testimony."*

In the case of Ogyeedom Obranu Kwesi Atta VI v Ghana Telecommunications Co Ltd Civil Appeal No. J8/96/2020 dated 5th June 2023. It was held as follows;

> *"The evidence of the experts is considered as expert opinion within the meaning of Section 112 of NRCD 323 where two conditions must be met. First the evidence must be beyond common experience which means that the ordinary man not acquainted with that particular subject will not be able to accurately analyze and make the necessary deductions from the fact or evidence presented. Secondly, the evidence must as of necessity assist the trier of fact. Where the evidence would rather confuse the issues, such evidence must be rejected."*

By this section, where a person is able to establish that he is an expert, his evidence will be admissible if the subject matter he will testify upon satisfies these three conditions:

- that the subject matter must be beyond common experience.
- His expertise must relate to the subject in issue before the court
- His expert opinion should be helpful to the court

The first condition implies that the evidence of the expert should be beyond the normal competence of the court. If the evidence is on matters within the competence of the court, the court should be able to decide on the issue without any assistance from the expert.

The second condition deals with the relevance of the testimony to the issue for determination before the court. The evidence should ordinarily have probative value in respect of the issues for determination before the court.

The Commentary on the Evidence Act, the third condition to cover two situations, namely,

> *"where the expert can supply general technical background information which might be useful in understanding evidence introduced in the action…and secondly, the expert might usefully give his opinion based on facts of the case."*

In the case of **CONNEY v BENTUM - WILLIAMS [1984-86] 2 GLR 301-318** it was held that:

> *"A handwriting expert is not required to state definitely that a particular writing is by a particular person. His function is to point out similarities or differences in two or more specimens of handwriting submitted to him and leave the court to draw its own conclusions…. In other words, an expert in handwriting having examined, deciphered and compared the disputed writing with any other writing, the genuineness of which is not in dispute, is only obliged to point out the similarities or otherwise in the handwriting; and it is for the court to determine whether the writing is to be assigned to a particular person. So in the case herein, the report was supposed merely to assist the court in deciding the vital issue of whether or not the conveyance, exhibit C, was a forgery and it would therefore have been an undue and unwarranted interference if it had gone further to pronounce on the very issue which the court was called upon to determine."*

-It is the duty of the court to examine the competence of an expert before admitting his testimony.

PROVING HANDWRITING BY NON-EXPECT WITNESS

Section 140 of Evidence Act

Authentication by non-expert opinion on handwriting

"To authenticate or identify handwriting, a witness who is not an expert on handwriting may state an opinion whether the handwriting is that of the alleged writer if the Court is satisfied that the witness has personal knowledge of the handwriting of the alleged writer.

In the case of **TACKIE V THE STATE [1964] GLR 262** it was held that handwriting can be proved by evidence of witnesses familiar with the handwriting of the writer in question and who were found to be credible witnesses by the court. It was held as follows:

"With regard to the first appellant's contention about the handwriting, as we have already pointed out, no less than three witnesses who were familiar with the appellant's handwriting expressed as their opinion, that the alterations appeared in his handwriting. Although the appellant vehemently disputed this in the court below, the learned circuit judge who saw these witnesses considered them worthy of credit. We ourselves are aware of no rule of law which lays it down that evidence of handwriting can only be given by handwriting experts. We think the learned circuit judge was entitled to rely on the

evidence of these non-expert witnesses whose testimony was tested before him in cross-examination."

Also in **RE SACKITEY (DECD.); SACKITEY AND ANOTHER v. DZAMIOJA [1987-88] 2 GLR 434-443** where it was held *"The signature appearing in the 1975 Will therefore called for dispassionate scrutiny. Consequently, since there was no legal requirement that evidence of handwriting could only be given by handwriting experts, the trial judge erred when he rejected the evidence of those acquainted with the deceased's signature which successfully impugned the signature in the 1975 Will simply because it was not given by a handwriting expert."*

IS A COURT BOUND BY THE OPINION OF AN EXPERT

A court is not bound by the evidence given by an expert. The established rule is that experts give evidence and do not decide cases. The evidence given by the expert is only a prima facia case and should not be considered as deciding the issue for the court. That evidence is not binding on the judge. It is to be considered as a guide which is to assist the judge in deciding on the issues before him. It is treated almost in the same way as the treatment of the opinions of assessors in trials with the aid of assessors.

It is also well settled law that in handwriting issues, the court is entitled to examine documents and reach its own conclusions upon such examinations, see State v Lawman [1961] GLR (Pt II) 6698, SC. In **FENEKU V JOHN TEYE [2001-2002] SCGLR 985** it was held (In holding 6) that :

> *"The principle of law regarding expert evidence was that the judge need not accept any of the evidence offered. The judge was only to be assisted by such expert evidence to arrive at a conclusion of his own after examining the whole of the evidence before him. The expert evidence was only a guide to arrive at the conclusions."*

A similar decision was reached in **IN RE AGYEKUM (DEC'D) [2005-2006] SCGLR 851** (Holding 2). In the case of **OFORI V APPENTENG [2017-2018] 1 SCLRG 819** it was held as that:

> *"The courts below failed to realize that they were not bound to accept the findings of the court-appointed surveyor even if his testimony was credible and reliable. They failed to realize that the surveyor, as an expert, was there to assist the court only, so his evidence was subject to all the rules pertaining to evaluation of witness testimony. The court as the trier of fact was bound to form an opinion on the facts, independent of the surveyor's testimony. This is a statutory edict captured in*

> *Section 3(2) of the Evidence Act, 1975 (N.R.C.D. 323) which states that "where there is no jury, all questions of fact shall be decided by the court." In this country, this applies to all civil trials. Thus even where expert evidence has been received, the power of decision rests solely with the trial judge in civil matters. And as stated in Phipson on Evidence, 15th edition, paragraph 37-12 at page 925, "This is so even when the decision turns on a matter on which the tribunal would be unable to understand the evidence without the assistance of experts."*
>
> *And given the fact that the surveyor was not positive and conclusive in findings he himself had put down, nothing prevented the courts from rejecting same as unreliable and forming their own opinions on the evidence adduced by the parties."*

However, before the Court decides to reject the expert opinion it must give good reasons. In the case of **Tetteh v Hayford** it was held that:

> *" It is generally understood that a court is not bound by the evidence given by an expert such as the Surveyor, in this case. See case of* ***Sasu v White Cross Insurance Co. Ltd [1960] GLR 4 and Darbah & another v Ampah [1989-90] 1 GLR 598 (CA) at 606*** *where Wuaku JA (as he then was) speaking for the court also reiterated the point that a trial Judge need not accept evidence given by an expert.*
>
> ***But the law is equally clear that a trial court must give good reasons why an expert evidence is to be rejected."***

COURTS EXPERT: SECTION 114 (read the full provision)

Section 114 of NRCD 323 allows the court to appoint its own expert. The section makes provision for the parties to object to the appointment. It also permits parties to cross-examine the court-appointed expert.

The report of the expert must be in writing.

THE ULTIMATE ISSUE RULE: SECTION 115

The "ultimate issue" refers to the very question that the court has to determine in the trial. It is the court to determine the ultimate or main issue and not the expert. the evidence of the expert is just prima facie evidence. However, notwithstanding the fact that it is the duty of the court to decide the ultimate issue, the court cannot reject the evidence of an expert because it touches on the main issue.

Section 115 which deals with ultimate issue states :

> *"Testimony in the form of an opinion or inference admissible under section 111 or 112 shall not be inadmissible because the opinion or inference concerns an ultimate issue to be decided by the tribunal of fact."*

Thus, unlike other common law jurisdictions where opinion evidence which determines an ultimate issue may be considered inadmissible, in Ghana, it is not sufficient to reject such evidence merely on that basis.

PROCEDURAL ISSUES RELATING TO WITNESSES

INTRODUCTION

A party to civil or criminal proceedings may call as many witnesses as he may consider necessary to prove his case. He is under no obligation to call a certain number of witnesses, and there are no restrictions on the order in which his witnesses may be called. In **AKROFI VRS. OTENG & ANOR. [1989-90] 2 GLR 244**, the court said:

> *"A party can rely on the quality of one witness to establish his case. It does not matter that the evidence was given by one or several witnesses; the important thing is the quality of evidence."*

However, some witnesses are considered as material witnesses. In **Tetteh** v. **The Republic** [2001-2002] SCGLR 854, the Supreme Court upheld an appeal since the evidence did not meet the required standard of proof for failure to call a material witness. Adzoe JSC, explained who a material witness is. He stated that :

> *"Whether or not a witness is a material witness depends on the quality and content of the evidence he is expected to offer in relation to the case on trial. The witness will be deemed to be material if the evidence expected from him is … so vital as to be capable of clearly resolving, one way or the other the important and decisive issue of fact that is in controversy. The evidence must appear likely to have a profound impact on the facts of the case to the extent that, if it is accepted as true, it will compel the court to come to a conclusion that is different from the decision it has taken."*

In civil and criminal proceedings, the consequences of a party's failure to call a material witness depend on the onus of proof placed on the party by the facts of the case. If a party has to establish his case and, therefore, assumes the onus of proof, he must call witnesses material to establish that case. In that event his failure to call a material witness may result in a ruling being given against him for the reason that he has failed to establish his case.

The principle of law is that when a material witness is available and their testimony could determine the outcome of a case, that witness should be summoned to testify. If the prosecution or any party neglects to do so, it may suggest that they would not be able to discharge their burden of proof. This is however dependent on the circumstances of each case.

QUESTIONING OF WITNESSES

In the common law adversarial system, the questioning of witnesses generally falls into three stages, namely:

(a) examination in chief,

(b)cross-examination; and

(c)re-examination.

EXAMINATION-IN-CHIEF

The essence of examination-in-chief is to obtain or elicit testimony in support of the claim or the version of facts in issue or relevant to the issue for which the party calling the witness contends.

As a general rule, a witness may not be asked leading questions and a witness who may have difficulties in recollecting the events to which his evidence relates, is permitted, in certain circumstances, to refresh his memory by reference to a former written statement that he has made.

A witness may give evidence unfavourable to the person who called him but he cannot be asked questions by the person who called him in order to impeach his credibility except where with the leave of the court the witness is treated as a hostile witness.

CROSS-EXAMINATION

Cross-examination is the questioning of a witness, immediately after his examination-in-chief, by the opponent of the party who called him as a witness. It can be said to be the questioning of a witness at a trial or hearing by the party opposed to the party who called the witness to testify.

Difference between cross examination and examination in chief

1. In cross-examination, leading questions are permitted but are not in examination in chief

2. In examination in chief all questions to witnesses must be relevant to an issue in the case. However, the cross-examiner is permitted to make the credibility of the witness an issue in the case.

Object of cross examination

1. To elicit evidence which supports the cross-examiners' version of the facts in issue and
2. To cast doubt upon the witness’s evidence.

“Section 62

62. Cross-examination

(1) At the trial of an action, a witness can testify only if the witness is subject to the examination of the parties to the action, if they choose to attend and examine.

(2) Where a witness who has testified is not available to be examined by the parties to the action who choose to attend and examine, and the unavailability of the witness has not been caused by a party who seeks to cross-examine the witness, the Court may exclude the entire testimony or a part of the testimony as fairness requires.

(3) This section is subject to section 63 relating to certain statements of an accused."

On the legal effect of failure to cross-examine on material facts, in the case of **HAMMOND V AMUAH & ANOTHER [1991] 1 GLR 89**, it was held that when a party had given evidence of a material fact and was not cross-examined upon same, he needed not call further evidence of that fact. Failure by the defence to cross-examine amount to an admission by the defence. The Court stated as follows:

*"The law is quite well settled that where a party makes an averment and that averment is not denied no issue is joined and no evidence need be led on that averment. Similarly when a party has given evidence of a material fact and is not cross-examined upon it, he need not call further evidence of that fact: see **FORI V. AYIREBI [1966] G.L.R. 627, S.C**. Indeed, it was also held in the case of **QUAGRAINE V. ADAMS [1981] G.L.R. 599, C.A**., that where a party makes an averment and his opponent fails to cross-examine on it, the opponent will be deemed to have acknowledged, sub silentio, that averment by failure to cross-examine."*

LEADING QUESTIONS

As a general rule, the party who calls the witness ought not to ask leading questions. A leading question is one that either assumes the existence of disputed facts or suggests the desired answer. It is also suggested that a leading question is one to which the answer is 'yes' or 'no'.

In the Canadian case of **R V ROSE (2001), 143 O.A.C. 163 (CA)**, Charron J.A summarized the law on leading questions as follows:

"A leading question is one that suggests the answer. It is trite law that the party who calls a witness is generally not permitted to ask the witness leading questions. The reasons for the rule arises from a concern that the witness, who in many instances favours the party who calls him or her, will readily agree to the suggestions put in the form of a question rather than give his or her own answers to the questions."

There are a number of situations where, exceptionally, leading questions are permitted in evidence in chief. These include formal introductory matters on undisputed issues, such as the name of the witness, occasions when it is necessary to focus the witness's attention on a specific matter and, of course, cases where the opponent has consented to leading questions.

A leading question is one which either:

(a) suggests the answer desired, or

(b) assumes the existence of disputed facts as to which the witness is to testify.

It can also be said to be "a question that suggests the answer to the person being interrogated".

The Evidence Act defines a leading question as "a question that suggests directly or indirectly the answer that the examining party expects or desires".

> **"Section 70**
>
> **70. Leading question**
>
> (1) A leading question is a question that suggests directly or indirectly the answer that the examining party expects or desires.
>
> (2) The Court may, determine to what extent, and in what circumstances a party calling a witness shall be permitted, and a party not calling the witness shall be forbidden, to ask leading questions of the witness.
>
> (3) Subject to the discretion of the Court,
>
> (a) leading questions may not, if objected to by an adverse party, be asked in examination-in-chief, or in re-examination;
>
> (b) leading questions may be asked as to matters which are introductory or undisputed, or which have, in the opinion of the Court, been already sufficiently proved;
>
> (c) leading questions may be asked in cross-examination or examination by leave of the Court"

WHY WILL A PARTY ASK A LEADING QUESTION DURING EXAMINATION IN CHIEF

A party calling a witness and desperately seeking to elicit evidence to support his case may be faced with a witness who may not be forthcoming. The person may thus be tempted to put words in the mouth of the witness and therefore try to explain what he wants the witness to say. Thus, it would be a leading question.

REFRESHING MEMORY

Much significance is given to the answers given by witnesses in court under oath or affirmation than to written statements previously made by them. However, witnesses may often experience difficulties in recollecting the events for which they are called to testify, especially due to lapse of time.

Therefore, subject to certain conditions, any such witness, in the course of giving his evidence may refer to a document or previous writing in order to refresh his memory. This means that a party is allowed to refer to documents before stating the facts orally.

Under the Evidence Act, a witness, may refresh his memory "either while or before testifying" in a case. In Ghana Section 77 of the Evidence Act provides as follows

> **"77. Writing used to refresh memory**
>
> (1) Where a witness, while or before testifying, uses a writing to refresh the memory of the witness with respect to a matter about which the witness testifies, the testimony on that matter shall be excluded if the writing is not produced at the trial unless the Court allows the testimony to stand.
>
> (2) Where the writing is produced at the trial, an adverse party may, if that party chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence those parts of it which relate to the testimony of the witness for the purpose of attacking the credibility of the witness or, if the writing is otherwise admissible, for any other purpose."

In Ghana, if a witness uses a writing to refresh his memory with respect to any matter which he testifies, the testimony on that matter shall be excluded if the writing is not produced at the trial, unless the court in its discretion allows the testimony to stand. One can therefore say that the condition for allowing a witness to refresh his memory is the preparedness of that witness to make that writing available to the court upon demand by the judge.

TESTING THE CREDIBILITY OF WITNESSES

Every witness purports to tell a court what he saw and found significant and what he finds significant depends on his preconceptions. The purpose of calling a witness by a party to litigation, most often is to obtain or elicit testimony in support of his or her claim during examination in chief.

The aim of the adverse party, however, is to punch holes in the testimony of the witness and one way of doing this may be testing the credibility of such a witness by attempting to raise issues relating to self-serving statements and previous inconsistent statements.

"Section 80. Attacking or supporting credibility

(1) Except as otherwise provided by this Act, the Court or jury may, in determining the credibility of a witness, consider a matter which is relevant to prove or disapprove the truthfulness of the testimony of the witness at the trial.

(2) Matters which may be relevant to the determination of the credibility of the witness include, but are not limited to

(a) the demeanour of the witness;

(b) the substance of the testimony;

(c) the existence or non-existence of a fact testified to by the witness;

(d) the capacity and opportunity of the witness to perceive recollect or relate a matter about which the witness testifies;

(e) the existence or non-existence of bias, interest or any other motive;

(f) the character of the witness as to traits of honesty or truthfulness or their opposites;

(g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;

(h) the statement of the witness admitting untruthfulness or asserting truthfulness."

"Section 81. A party may attack or support credibility

(1) The credibility of a witness or of a part of the testimony of a witness may be attacked or supported by the party calling the witness and any other party.

(2) Where, before a party calls the witness, that party has reasonable grounds to attack the credibility of the witness or of a part of the testimony of the witness, that party shall, out of the presence of the witness, notify the Court and every other party of the expectation, but, if the witness is a party the witness need not be notified."

"Section 82. Extrinsic evidence affecting credibility

Except as otherwise provided by this Act, to attack or support the credibility of a witness' evidence other than the testimony of the witness is admissible if relevant to prove or disprove the truthfulness of the testimony of the witness."

There are various ways of determining the credibility of a witness by the questions asked under cross-examination. Even though Counsel may ask questions to attack the credibility of a witness there are some limitations. These limitations are discussed below:

A. COLLATERAL QUESTIONS OR THE FINALITY RULE

The general notion is that a party eliciting from a witness under cross-examination evidence unfavourable to his case, may understandably seek to adduce evidence in

rebuttal. However, to allow such a party to adduce such evidence without limitations would, in most cases, lead to a multiplicity of issues, some of which might be of minimal importance or relevance to the facts in issue.

To curtail this problem therefore, **under the common law the rule is that answers given by a witness under cross-examination to questions concerning collateral matters, that is, matters which are irrelevant to the issues in the proceedings, must be treated as final.**

While counsel retains a broad leeway in the forms of questions that are put to witnesses, cross-examination is not designed to be a '**fishing expedition'**. One of the most important restrictions upon counsel is the operation of the finality rule. **The rule is a natural corollary of the concept of relevance, and states that questions that are not directly relevant to the issue(s) in the proceedings must be regarded as final.**

For example, in ***R v Burke* (1858) 8 Cox CC 44**. the cross-examiner alleged the witness, who was testifying through an interpreter in Irish, had been heard talking to two other people in the court precinct in English. The witness denied that this ever happened. It will be recalled from that matters concerning the credit of a witness or the credibility of evidence given are generally regarded as collateral matters because they do not bear directly on the issue(s) before the court. Thus, in the instant case, the court refused to allow counsel to adduce any evidence in rebuttal, since this was deemed to be a collateral matter. While neither counsel nor the jury is required to believe the answer to a collateral question, counsel is prevented from calling further evidence to demonstrate that the answer is not true.

In saying that the answers are final, it does not in anyway mean that the tribunal of fact is obliged to accept the answers as true, but simply that the cross-examining party is not permitted to call further evidence with a view to contradicting the witnesses.

The issue whether a question is collateral is not easy to determine.

However, as formulated by Pollock CB in **A-G V HITCHCOCK (1847) 1 Ex Ch 91**,

> *If the witness's answer is a matter on which the cross-examining party would be allowed to introduce evidence in chief, because of its connection with the issues in the case, then the matter is not collateral and may be rebutted. Therefore, it can be said that questions which go merely to the credit of the witness are clearly collateral.*

More accurately, it might be said that a fact constitutes a 'fact in issue' if it must be established by either party in order to discharge the burden of proof. Only in these circumstances will counsel be able to adduce rebutting evidence to disprove the answer of the witness. If the answer relates to collateral issues, and is thereby not relevant to any material issue in dispute, the finality rule applies and no rebutting evidence is admissible.

SEXUAL DISPUTES

The difficulty however is that where the issue is a sexual dispute between two persons in private, determining the difference between questions going to credit and questions going to the facts in issue is reduced to vanishing point because most often sexual intercourse, whether consensual or not, takes place in private and leaves few visible traces of having occurred, so that the evidence is often limited to that of the parties involved. Thus, in such cases, much is likely to depend upon the balance of credibility of the parties.

As already stated, the issue as to the distinction between cross-examination as to credit and cross-examination as to matters in issue occur mostly in rape and other sexual offences. It seems from the authorities however that the general rule is mostly applied in that a victim's answer to a collateral question is held final.

In **R V HOLMES (1871) L 1 CCR 334**, it was held that in cases of rape, attempted rape and assault with intent to commit rape, although the prosecutrix may be cross-examined about acts of intercourse with men other than the accused, they are collateral facts and therefore if she denies them, evidence may not be called to contradict her.

However, in **R V RILEY(1887) 18 QBD 481**, it was held evidence is admissible to contradict a complainant who denies previous acts of sexual intercourse with the accused, the matter being relevant to the issue of consent.

Similarly, in **R V BASHIR AND MANZUR [1969] 1 WLR 1303**, a prosecution for rape in which the complainant was cross-examined on whether she had accosted men and offered them sexual intercourse in return for money, it was held that evidence that she was a prostitute, being relevant to the issue of consent, was admissible to contradict her.

Likewise, in **R V KRAUS (1973) 57 Cr App R 466** where the accused alleged that a woman whom he had met for the first time in a public house agreed to sleep with him, but after intercourse, when she had asked for money which he had refused, had complained of rape, it was held that the judge had improperly prevented the defence from adducing evidence of previous similar conduct by the complainant.

The Court of Appeal in R v Kraus acknowledged that:

"In an age of changing standards of sexual morality, it may be harder to say where promiscuity ends and prostitution begins... Evidence which proves that a woman is in the habit of submitting her body to different men without discrimination, whether for pay or not, would seem to be admissible".

B. RULE AGAINST SELF-SERVING OR NARRATIVE

The general rule in the common law is that a witness may not be asked in evidence-in-chief about former oral or written statements made by him and consistent with his evidence in the proceedings.

Simply put, a witness may not be asked prior consistent statements while testifying. He could not narrate such statement, if it is oral or refer to it if it was in writing. Thus, the evidence of the earlier statement may not be given either by the witness who made it or by any other witness.

The main reason which has been given for barring previous consistent statement was the prevention of manufactured evidence. Such a sweeping statement may then debar all witnesses who are also parties to an action from testifying.

Simply, the general common law rule against manufactured evidence, applicable to both civil and criminal cases, is that where a witness called by a party has testified in chief about an assertion:

- that witness may not be asked in chief whether he had made a statement repeating the assertion to another person;

- the party calling the witness is not entitled to adduce evidence of the assertion;

- the third party recipient of the assertion may not be called to testify that the witness had narrated the assertion to him.

According to the advocates of this exclusionary rule, the reason for barring other witnesses to testify to the prior consistent statement of such witness is that a resourceful witness minded to deceive the court could with ease deliberately repeat his version of the facts to a number of persons prior to trial with a view to showing consistency with the story he tells in the witness box thereby bolstering his credibility.

On his part, Lord Radcliffe in **FOX V GENERAL MEDICAL COUNCIL [1960] 3 All ER 225** stated his reason as:

“Generally speaking, as is well known, such confirmatory evidence is not admissible, the reason presumably being that all trials, civil and criminal, must be conducted with an effort to concentrate evidence on what is capable of being cogent”.

The general rule is sometimes referred to as the rule in **CORKE V CORKE AND COOK [1958] 1 ALL ER 224**. In this case, H, a husband, who was separated from his wife, W, had petitioned for a divorce on the ground of W’s adultery with the co-respondent, Mr Cook, a lodger. At about midnight, H and an inquiry agent confronted W in Mr Cook’s bedroom and accused her of having recently committed adultery with Mr Cook. W denied this and about ten minutes later she telephoned her doctor requesting that both she and Mr Cook be examined to ascertain whether they had recently had sexual intercourse. The doctor declined because such an examination could have been inconclusive. W was refused permission to adduce evidence of the request and refusal by the doctor and, on appeal, the court decided that the evidence was correctly excluded:

> " I apprehend that the dishonest may be resourceful in giving an air of innocence to their transaction . . . Were it to be held otherwise, one wonders where ingenuity in bolstering up a witness's evidence would stop.'

In discussing this rule, one need not confuse it with the common law rule against hearsay whereby an out-of-court statement is made inadmissible as evidence of the facts contained in it. Whilst hearsay evidence is one intending to prove the truth of the content, a previous consistent or self-serving statement of a witness is excluded mainly as evidence of the witness's consistency and credibility.

EXCEPTIONS TO THE RULE AGAINST SELF-SERVING OR NARRATIVE

Notwithstanding the danger associated with the reception of self-serving statements, the following are exceptions to the rule.

1. Sexual Offences
2. Statement to rebut accusation of Recent Fabrication
3. Statement of the suspect being accused of a crime
4. Statements forming part of the Res gestae

1. COMPLAINTS IN SEXUAL CASES

It may be said that the weight of the current authority suggests that the above exception applies only in the case of complaints of rape and other sexual offences. Thus, in cases of rape and other sexual offences, the fact that the complainant made a voluntary complaint shortly after the alleged offence, together with the particulars of that complaint, is admissible by the prosecution to show the consistency of such conduct with the complainant's evidence, and in cases where consent is in issue, to negative consent.

In **R V OSBORNE [1905] 1 KB 551** The defendant was charged with indecent assault on a girl aged twelve. Evidence was given by another girl, aged eleven, to the effect that, shortly before the incident, she had left the victim with the defendant, arranging to return soon. On her way back, she met the victim running home and asked her, 'Why are you going home? Why did you not wait until I came back?' The answer from the victim incriminated the defendant. On conviction, the appeal was dismissed.

It must be emphasized though that the exception is also not confined to sexual offences against females as the Criminal Court of Appeal in England in **R V CAMELLERI [1922] 2 KB 122** held that a 15 year old boy's complaint of an offence of gross indecency committed against him was admissible under the exception.

It should be noted that it is a condition of the admissibility of a complaint in a sexual case that the complaint is made voluntarily and not in reply to questions of a suggestive, leading or intimidating character.

This condition was clearly explained by Ridley J in **R V OSBORNE [1905] 1 KB 551** thus:

".. . the mere fact that the statement is made in answer to a question in such case is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have effect. . . but a question such as this, put by the mother or other person, 'What is the matter?' or 'Why are you crying'? will not do so. These are natural questions which a person in charge will be likely to put.

On the other hand, if she were asked, 'Did so and so assault you?', 'Did he do this and that to you?' then the result would be different,. .

In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first..."

Therefore, in Osborne, the complaint, which had been made in reply to the questions, 'Why are you going home? Why did you not wait until we came back? was held to be admissible.

Finally, for complaints to be admissible, it must be made timeously. As stated by Ridley J in Osborne, a complaint is only admissible in evidence under the exception 'when it is made at the first opportunity after the offence which reasonably offers itself.

It must be noted though that whether a complaint was made as soon as was reasonably practicable after the occurrence of the offence is a question of fact and degree to be determined by the judge in each case.

R V LILLYMAN [1896] 2 QB 167 The defendant was charged with attempted rape and indecent assault. The employer of the victim (a maid) was allowed to narrate the terms of the complaint made to her shortly after the incident. Following a conviction the defendant appealed and the appeal was dismissed on the ground that the complaint was correctly admitted in court:

> *"It is not admitted as evidence of the facts complained of; those facts must therefore be established… The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box and as being consistent with her consent to that of which she complains . . . The evidence can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness box . . . we think that it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated.'*

2. STATEMENT TO REBUT ALLEGATIONS OF RECENT FABRICATION

The second exception to the rule against narrative is statements admitted to rebut allegations of recent fabrications or concoctions. This exception may surface, if for instance, in cross-examination it is suggested to a witness that his account of some incident or set of facts is a recent invention or fabrication.

At common law, the rule is that, under cross-examination, if it has been suggested that the witness has 'recently' (i.e. within a specified period) fabricated his story, the examiner in chief may rebut the suggestion under re-examination of the witness. In other words, in both civil and criminal cases, the party calling the witness is entitled to adduce evidence to rebut a suggestion made by the cross-examiner that the witness has fabricated his story.

In such a situation, evidence of prior statements made by the witness to the same effect is admissible to support his credibility. In many cases, such prior consistent statements would be put to the witness in re-examination.

In **R V OYESIKU (1971) 56 Cr APP Rep 240** the defendant was charged with assaulting an officer in the execution of his duty. The defence was self-defence. The defendant's wife testified to the effect that the police officer was the aggressor. It was put to the defendant's wife that she had prepared her evidence in collusion with her husband (the defendant). The judge had refused to allow defence counsel to adduce evidence to show that the witness had made a consistent statement to her solicitor after her husband's arrest and before she had time to see or contact him. The defendant was convicted and appealed and the appeal was allowed because the judge had ruled incorrectly:

> *'the exception is brought into play where it is suggested in cross-examination that the witness's account is a late invention or has been recently reconstructed, even though not with conscious dishonesty.'*

In determining whether the exception should be applied, a judge should consider the following three issues;

(i) that the account given by the witness is attacked on the ground of recent fabrication, invention or reconstruction or that a foundation for such attack has been laid;
(ii) that the contents of the statements are in fact to the like effect as his account given in his evidence; and
(iii) that having regard to the time and circumstances in which it was made the statement rationally tends to answer the attack.

In R. v Y. (M.A.), 2017 ONSC 2899 (CanLII), it was held that in criminal proceedings, a previous consistent statement is admissible under the exception not as evidence of the truth of its contents but to negative the suggestion of invention or reconstruction and thereby confirm the witness's credit.

3.STATEMENT OF THE SUSPECT ON BEING ACCUSED OF A CRIME

Where an accused person makes a statement on being accused of a crime, that statement may be admissible as an exception to the rule on narrative. Such statements are admitted in evidence as evidence of the reaction of the accused when confronted with the offence.

4.STATEMENTS FORMING PART OF THE RES GESTAE

The rule is that a witness's testimony may be confirmed by a repetition of the evidence by the same witness or a third party if it forms part of the same transaction or story or the res gestae.

PREVIOUS INCONSISTENT STATEMENTS

As stated above, among the matters relevant in testing the credibility of a witness is the consideration of previous consistent and inconsistent testimonies. Therefore, if a witness under cross-examination denies a previous oral or written statement made by him which is relevant to an issue in the case and inconsistent with his testimony, that statement may be proved against him.

75. Prior inconsistent statement or conduct

In examining a witness concerning a statement or other conduct by the witness which is inconsistent with a part of the testimony of the witness at the trial, it is not necessary to disclose to the witness an information concerning the statement or other conduct.

76. Extrinsic evidence of prior inconsistent statement

Unless the Court otherwise determines, extrinsic evidence of a statement made by a witness which is inconsistent with a part of the testimony of the witness at the trial shall be excluded unless,

(*a*) the witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement; or

(*b*) the witness has not been excused from giving further testimony.

Even though it is not expressly provided in section 76 of the Act, it may be said that generally that if a party wishes to contradict a witness he should

- without reading the contents aloud hand it over to the witness,

- direct his attention to the relevant part or parts of its content,

- ask him to read that part or those parts of the document to himself quietly and then ask him whether after reading those parts of his previous statements he still stands by his present evidence.

- If the witness adopts the previous statement then the statement so adopted will become part of his evidence.

RE-EXAMINATION

A witness who has been cross-examined may be re-examined by the party who called him. The object of re-examination is, in broad terms, to repair such damage as has been done by the cross-examining party in so far as he has elicited evidence from the witness supporting his version of the facts in issue and cast doubt upon the witness's evidence in chief.

The most cardinal rule in re-examination is that it must be confined to such matters as arose out of the cross-examination, and a new matter may be introduced only by the leave of the court. The rule has been justified as very sound in principle as it prevents the reception of inadmissible evidence in re-examination under the guise of dealing with points emerging from cross-examination, and any hardship that the rule may occasion may be mitigated at the discretion of the judge.

CORROBORATION

Section 7 NRCD 323 –

Corroboration

(1) Corroboration consists of evidence from which a reasonable inference can be drawn which confirms in a material particular the evidence to be corroborated and connects the relevant person with the crime, claim or defence.

(2) Evidence may, in proper circumstances, be corroborated by other independent evidence that requires corroboration.

(3) Unless otherwise provided by this or any other enactment, corroboration of admitted evidence is not necessary to sustain a finding of fact or verdict.

(4) A finding, verdict, judgment or decision shall not be set aside, altered or reversed on appeal or review on the sole ground that the Court failed to caution itself or the jury as to the danger of acting on the uncorroborated evidence unless the Appellate Court is satisfied that the failure resulted in a substantial miscarriage of justice.

(5) This section does not preclude the Court or a party from commenting on the danger of acting on the uncorroborated evidence, or commenting on the weight and credibility of admitted evidence, or preclude the tribunal of fact from considering the weight and credibility of admitted evidence.

In the case of Francis Arthur vs The Republic Criminal Appeal No J3/)2/2020 dated 8th December 2021. The Supreme Court speaking through Amegatcher JSC stated as follows

> *"What, then constitutes corroboration in cases where the confession falls short of establishing the corpus delicti? Section 7(1) of NRCD 323 defines corroboration to consist of evidence from which a reasonable inference can be drawn which confirms in some material particular the evidence to be corroborated and connects the relevant person with the crime, claim or defence. In essence, the corroborating evidence strengthens the initial evidence, which standing alone is insufficient to determine the commission of a crime. Retired Supreme Court judge and legal text writer Stephen Alan Brobbey writes in ESSENTIALS OF THE GHANA LAW OF EVIDENCE, First Ed. 2014at page 85 that this definition connotes three concepts; firstly, for the evidence to amount to corroboration, it must have some connection or relationship with the previous evidence. Secondly, that connection should amount to affirmation or denial of some relevant part of the previous evidence. Thirdly, the connection and affirmation should directly be referable or attributable to the person or fact in so far as the crime, claim or defence is concerned. If these three concepts exist, the court may conclude that the second evidence confirms, supports, or "corroborates" the first evidence."*

In **Manu v Nsiah [2005 – 2006] SCGLR 25 at 33** and **Sarkodie v FKA CoLtd [2009] SCGLR 77**, the principle was clarified that where the evidence of a party on an issue is corroborated by that of his opponent's witnesses, while his opponent's own stands uncorroborated, the court ought not to accept the uncorroborated version unless the corroborated testimony is found to be incredible, impossible or unacceptable.

PRIVILEGE

DEFINITION

Privilege is said to mean a special right, exemption, or immunity granted to a person or class of persons by which such persons may refuse to give evidence or disclose a fact or prevent others from doing so in court proceedings or administrative enquiries.

A privilege grants someone the legal freedom to do or not to do a given act. It immunizes conduct that under ordinary circumstances would subject the actor to liability.

The disadvantages of privileges are that they hinder searches for truth in that they prevent the use of competence and relevance in the admissibility of evidence: they preclude the admissibility of evidence that may be relevant and reliable.

Secondly, they negate the principle that in Ghana everyone is compellable as a witness.

USING A PRIVILEGE

As a general rule, a witness or party may be punished for contempt of court if he fails or refuses to answer questions or obey the orders of the court as provided for under section 61 and 62 of the Courts Act. Where privilege is established, a witness or party cannot be guilty of contempt of court.

Privilege is often associated with or attached to

- a party in a civil case,
- accused in a criminal case,
- a witness in either of them or to an object or a document.

The decision whether or not a person should be called to appear in court to testify or produce documents during court proceedings is controlled by statute, such as the Courts Act, 1993(Act 459), ss. 58, 59 and 62. They regulate when and how witnesses are subpoenaed to court.

As already stated, when an order is made under those provisions, failure to comply with them may result in conviction for contempt of court.

The right to raise a privilege is not limited to proceedings in court alone. Section 87(2) of NRCD 323 provides

> "proceeding" means any action, investigation, inquiry hearing, arbitration or fact-finding procedure, whether judicial, administrative, executive, legislative or not before a government body, formal or informal, public or private;

WAIVER

Privilege is personal to the holder. It may therefore be waived by the person entitled to it. The privilege will be deemed to have been waived if the one entitled to it does anything that may be interpreted to mean that he does not intend to insist on the privilege.

The waiver may come about intentionally or unintentionally where the party consents to the disclosure or where a witness starts voluntarily to disclose what would otherwise have been prevented from being disclosed or where he deliberately waives the privilege.

Section 89 of NRCD 323

> **89. Waiver**
>
> (1) Except as otherwise provided in this section, a person who would otherwise have the privilege to refuse to disclose or to prevent any other person from disclosing a particular matter does not have a privilege, if that person or any other person while the holder of the privilege has voluntarily disclosed or consented to the disclosure of a significant part of that matter.
>
> (2) A disclosure of a privileged matter where the disclosure itself is a privileged communication does not affect the right of a person to claim the privilege.
>
> (3) A waiver of a joint privilege to refuse to disclose or to prevent any other person from disclosing a particular matter by a holder of the joint privilege does not affect the right of any other holder to claim the privilege.

A client may elect to waive the legal professional privilege that is available to him. Having waived his privilege, he cannot later reassert it.

Thus litigants who deliberately produce a privileged document for inspection on discovery, cannot at trial claim privilege for that communication.

It must be noted that merely referring to the existence of a document in pleadings or affidavits will not amount to waiver, though quoting from it may do so.

LIMITATIONS ON THE LAW OF PRIVILEGES IN GHANA

In the terms of the provision of NRCD 323 Section 88, privileges in Ghana are only limited to specific heads of privileges expressly provided for in NRCD 323 or other enactments.

> *“Section 88 provides as follows:*
>
> *88.* ***Privilege recognised only as provided***

(1) Except as otherwise provided in this Part or in any other enactment, a person does not have a privilege

(a) to refuse when duly subpoenaed to be a witness; or

(b) to refuse as a witness to disclose a matter; or

(c) to refuse as a witness to produce an object or a writing.

(2) Except as otherwise provided in this Part or in any other enactment, a person may not prevent any other person from being a witness, from disclosing a matter, or from producing an object or a writing."

In view of this, Paragraph 15 of the Memorandum to the Evidence Act provides thus:

"Section 88 abolishes all existing common law privileges.

The only privileges that will now be recognized are those specified in the Act or in any other enactment. The Decree accordingly re-enacts in statutory language many of the pre-existing privileges, but some (such as the privilege to refuse to produce documents of title) are not retained. A person will now be both a competent and compellable witness for or against his spouse (although confidential marital communications are privileged from disclosure..."

CATEGORIES OF PRIVILEGES

Besides privileges provided in the 1992 Constitution and other statutes, privileges covered by the NRCD 323 include the following:

a. Privilege of accused not to be compelled to give evidence
b. Privilege from self-incrimination
c. Privilege on mental treatment
d. Privilege on religious advice
e. Privilege concerning compromise
f. Privilege on state secrets
g. Privilege on government informants
h. Privilege on state secrets
i. Privilege on political voting and
j. Privilege on marital communication.

LAWYER –CLIENT PRIVILEGE

The lawyer-client privilege is a privilege that seeks to protect client information while also ensuring that clients are free to make full disclosures to their lawyer with respect to confidential information reasonably related to the provision of professional legal services.

The core of the lawyer-client privilege is a communication passing between a lawyer and client conveying legal advice relating to the conduct of on-going litigation which need not be disclosed to a third party or given in evidence without the client's consent.

It enables a client to maintain the confidentiality of communication between him and his lawyer made:

- for the purpose of obtaining and giving legal advice,

- communications between him and his lawyer and third parties such as potential witnesses and experts,

- the dominant purpose of which was preparation for contemplated or pending litigation and items enclosed with or referred to in such communications and brought into existence for the purpose of obtaining legal advice.

RATIONALE

The rationale for this privilege is that they encourage those who know the facts to state them fully and candidly without fear of compulsory disclosure:

'a man must be able to consult his lawyer in confidence since otherwise he might hold back half the truth'. See Waugh v British Railway Board [1980] AC 521, HL at 531

The main object of this privilege is to protect communication between a client and his lawyer was stated in ***Derby Magistrate Court, ex parte B (1996) AC 487 at page 507 as follows:***

> *"The principle which runs through all these cases and many other cases which we cited is that a man must be able to consult his lawyers in confidence, since otherwise he might hold back half the truth. A client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is fundamental condition on which the administration of justice as a whole rests."*

In a broader sense the rationale has been expressed in **Re L (a minor) [1996] 2 WLR 395**, thus:

> *"But it is not for the sake of the application alone that the privilege must be upheld. It is in the wider interest of those hereafter who might otherwise be deterred from telling*

the whole truth to their solicitors. For this reason I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established."

LAWYER-CLIENT PRIVILEGE UNDER THE ACT

According to Maxwell Opoku Agyemang in his book "Law of Evidence in Ghana 2nd Edition" the lawyer-client privilege "is that of the client and not the lawyer". What this in effect means is that the privilege is meant to protect the client, and all those who claim the privilege as listed in Section 100(3) of the Evidence Act are entitled to that privilege subject to the client being entitled to the privilege. This means the client can waive the privilege and all such persons would be bound to disclose whatever information as it relates to the client.

Lawyer-client privilege is covered by NRCD 323, s 100(2) which provides that:

> A client has the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication, reasonably related to a professional legal services sought by the client and made
>
> (a) between the client or a representative of the client and the lawyer or a representative of the lawyer, or
>
> (b) between the lawyer and a representative of the lawyer, or
>
> (c) between the lawyer or a representative of the lawyer and a lawyer representing another person, in a matter of common interest with the client or a representative of the lawyer.

This privilege affects the communication between the lawyer and the client. It also affects the work produced by the lawyer and that is covered in NRCD 323, s 102(1) which provides that:

> *A client has the privilege to refuse to disclose and to prevent any other person from disclosing information obtained or work produced by his lawyer or a representation of the lawyer in rendering professional services sought by the client.*

This type of privilege will cover matters like letters, indentures and document and objects prepared by the lawyer for the client when professional services are sought.

The meanings of "client", "client representative" and "confidential communication" have been given in section 100 of NRCD 323, but not the meaning of a 'lawyer.'

Client is defined in the relation to the services rendered by the lawyer. Section 100(1)(a) defines client as:

> A person including a public entity, association, body corporate, who directly or through an authorized representative seeks professional legal services from a lawyer.

The section explains the representative of a client to mean a person authorized by the client to act on behalf of the client and that is defined in section 100(1) (b)

DEFINITION OF KEY TERMS

Section 100 of NRCD 323

100. Lawyer-client privilege

(1) For the purposes of this section and of sections 93, 101 and 102,

(a) a client is a person, including a public entity, an association or a body corporate, who or which directly or through an authorised representative seeks professional legal services from a lawyer;

(b) a representative of the client is a person having authority from the client to make to, or receive from, a lawyer confidential communications relating to professional legal services sought by the client;

(c) a representative of the lawyer is a person having authority from the lawyer to assist the lawyer in rendering professional legal services sought by the client;

(d) a communication is confidential if it is not intended to be disclosed, and is made in a manner reasonably calculated not to disclose its contents, to third persons other than those to whom disclosure is in furtherance of the client's interest in seeking professional legal services, or those reasonably necessary for the transmission of the communication.

The Lawyer

Who is a lawyer in this context? The lawyer is not defined in NRCD 323 but the "representative of the lawyer" is defined in section 100 (1) (c) as:

> A person having authority from the lawyer to assist the lawyer in rendering professional legal services sought by the client.

By this definition the typist, secretary or junior of the lawyer will be affected by the duty not to disclose communication between the lawyer and his clients.

From the legal profession Act, 1960 (Act 32), a person can properly be described as a lawyer if the following are satisfied:

i. He must have qualified to be enrolled as a lawyer under Act 32, s 3.
ii. He must have been enrolled as a lawyer under Act 32, s 6
iii. He must have obtained a solicitor's license under Act 32, s 8(1) and
iv. He must be entitled to practice as a lawyer under Act 32, s 2.

The communication

The nature of communication has been defined in section 100(1) (d) thus:

> A communication is confidential if not intended to be disclosed, and made in manner reasonably calculated not to disclose its contents to third persons other than those to whom disclosure in furtherance of the client's interest in seeking professional legal services or those reasonably necessary for the transmission of the communication.

The qualifying factor on communication is that the communication should be for the furtherance of **professional legal services** or with the object of seeking professional legal services.

The emphasis is on the fact that the client must have gone to the lawyer to seek professional legal service.

The term professional legal service is not defined in Evidence Act.

Black's Law Dictionary, 7th Ed, page 1226 defines professional as: "A person who belongs to a learned profession or whose occupation requires a high degree of training and proficiency."

NOTE

A client's privilege is to prevent any other person from disclosing a confidential communication reasonably related to professional legal advice. It is therefore possible that where a court determines that a confidential communication is not reasonably related to professional advice, it may compel its disclosure.

Thus, a lawyer may be obliged, for instance, to disclose the identity of his client. See **BURSILL V TANNER (1885) 16 QBD 1**

In **BROWN V FOSTER (1857) 7 H&N 736**, it was held that a barrister who saw a book produced at the trial of his client could testify without the client's consent, in subsequent proceedings, on the question whether it contained a particular entry when he previously saw it at the preliminary examination.

In **MINTER V PRIEST [1930] AC 558** the court indicated that the communication must have been confidential and if not actually made in the course of a relationship of lawyer and client, it must at least have been made with a view to establish such a relationship.

In this case, when a solicitor was consulted with the view to retaining his services, it was held that the communication that passed between him and the would-be client was privileged, although the solicitor was not, after all, retained.

However, the court speaking, per Lord Buckmaster, stated it is not every communication in such situations that will attract the privilege. It must be shown the communication was intended for professional legal services. The learned judge stated as follows:

> *"The relationship of solicitor and client being once established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure.* ***The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship, but outside that boundary the mere fact that a person speaking is a solicitor, and the person to whom he speaks is his client affords no protection."***

The Courts have however recognised the existence of a privilege in cases where the information communicated by the lawyer to the client must be for the purpose of tendering advice, despite the information emanating from a third party, being passed on as received , despite there being no litigation in prospect.

Intention of the parties

The use of the word "intended" in section 100(1) (d) conveys another qualification on the privilege. It implies that the communication should have been deliberately offered by or to the lawyer following the conscious effort of the client to seek professional legal advice. Information given by or to the lawyer by pure chance or accident will not be privileged.

THE PROTECTED MATERIAL – Section 102 of NRCD 323

The client may and his lawyer must, subject to the client's waiver, refuse to disclose written or oral communications between them made for the purpose of giving and receiving legal advice about any matter, whether or not litigation was contemplated at the time.

As stated above, the communication must have been confidential and if not actually made in course of a relationship of lawyer and client must at least have been made with a view to the establishment of that relationship.

Thus, when a communication is made in a professional capacity for the purposes of giving or receiving legal advice, the whole communication is privileged. This, include any parts

of it in which the solicitor conveys to the client information which he had received in a professional capacity from a third party.

The protected material can thus be said to extend to:

i. The instructions given by the client to his lawyer,

ii. Counsel's opinion written down

iii. Documents brought into existence (that is created by a party for the purpose of instructing the lawyer and obtaining his advice

iv. Copies of documents the originals of which were brought into existence for such a purpose and

v. A selection of pre-existing documents, whether obtained from the client or a third party, which are not in themselves privileged, but which have been copied or assembled by a solicitor and betray the trend of the advice which he is giving the client.

It must be emphasized though that the privilege does not extend to a lawyer's attendance notes recording what took place in chambers or in open court, in the presence of both parties to the litigation. Even though if a lawyer makes an attendance note of a meeting or telephone conversation between the lawyers for each side, would not per se be privileged, any subsequent communication by the lawyers to their respective clients informing them about the discussion will be privileged.

However, if a lawyer is instructed by two clients, communication between him and one of the clients will not be privileged against the other client in so far as they concern the matter in which they are jointly interested. But the communication, whether or not the communication is disclosed to the other client, they will be protected as against outsiders.

Communication with Third Parties

In many instances, prior to seeking proper legal advice, it will be necessary for a person to obtain statements from others, such as witnesses and experts. The question is whether these statements from third parties would also be privileged.

In **WAUGH V BRITISH RAILWAYS BOARD [1980] AC 521**, the plaintiff's husband, an employee of the defendant, was killed in a railway accident. In an action for compensation, the plaintiff sought discovery of routine internal reports prepared by the defendant regarding the accident.

The House of Lords held that, in order to attract privilege, the dominant purpose of preparation of the reports must have been that of submission to a legal adviser for use in relation to anticipated or pending litigation. In the view of the House, whilst this was

undoubtedly one of the purposes of the reports, it was not the dominant one, as there was another equally important purpose which was to inform the Board about the cause of the accident in order that steps could be taken to avoid recurrence. Accordingly, the House held that privilege could not be claimed and disclosure of the reports was ordered.

It must be emphasized that the application of the 'dominant purpose' test has never been easy and in many cases of accident investigations, the conclusion has always been that the dominant purpose was the prevention of recurrence rather than for the purpose of litigation.

Thus, in **NEILSON V LAUGHARNE [1981] QB 736**, the plaintiff's demand for compensation for alleged police misconduct prompted the police to initiate the statutory complaints procedure. Statements taken for the purpose of that procedure were clearly obtained in anticipation of litigation but it was held that the dominant purpose was that of the complaints procedure and the statements therefore were not privileged.

In **GUINNESS PEAT PROPERTIES LTD V FITZROY ROBINSON PARTNERSHIP [1987] 2 All ER 716**, it was held that the dominant purpose of a document would be ascertained by an objective view of the evidence as a whole, having regard to not only to the intention of its author, but also to the intention of the person - authority under whose direction it was procured.

In this case, the plaintiffs, building developers, had notified the defendants, engaged by them to act as architects for the construction of a building, of an alleged design fault. The defendants, in order to comply with the condition of their insurance policy, which required immediate notification of claims, thereupon wrote a letter to their insurers enclosing relevant memoranda and expressing their own views on the merits of the claim. In the course of discovery in the action which ensued, the question arose whether the letter was privileged. The defendants conceded that it was not their purpose, in writing the letter, to obtain legal advice or assistance.

The Court of Appeal held that it could look beyond that intention to the intention of the insurers who had procured its genesis. Their intention, in requiring an immediate written notice of claim, was to enable them to submit it together with other relevant documents to their lawyers for advice on whether the claim should be resisted. The letter was therefore held to be privileged.

Some relevant provisions on documents in Ghana

No person shall be obliged to disclose a record, report, writing or an object under the control and which contains matters which may incriminate him if another person has superior right to the record, writing or object (Section 98).

Where a public officer makes a report it cannot refuse to disclose it unless some enactment forbids the disclosure of the report (section 99(1).

A public office can claim privilege to disclose a report made by him if the law making the report mandatorily prevents the disclosure (s 99(2)).

Who can claim the privilege?

This is answered in section 100(3) to include:

i. The client representative;
ii. The guardian of the client;
iii. The personal representative of a deceased client;
iv. the successor in interest of a client who was an artificial person; or and
v. The lawyer of the client or his representative as defined in section 100 (1) (c).

Limitations

The limitations of the lawyer-client privileges are as follows(section 101): Privilege cannot be claimed in the following situations:

i. If there is evidence that consultation with the lawyer was to facilitate the planning or commission of a crime.
ii. Where two or more parties claim interest in the property through the same deceased client of the lawyer.
iii. Where there is allegation of breach of duty by a lawyer to his client or the client to the lawyer.
iv. Where the lawyer is a witness to the execution of a document and an issue has arisen in respect of the formalities on the execution of the document.
v. Where there was communication relevant to a matter of common interest between two or more client if the communication was alleged to have been made by any of the clients and there is a dispute in court between the two clients.

MENTAL TREATMENT PRIVILEGES: S 103

Under the Evidence Act a person has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication between himself and a physician or psychologist or any other persons who are participating in the diagnosis or treatment under the direction of the physician or psychologist if the communication was made for the purpose of diagnosis or treatment of **a mental or emotional condition.**

The privilege relating to mental or emotional treatment is described as medical privilege. It is covered by section 103. Section 103(1) reads:

> A person has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication between himself and a physician or a psychologist or any other persons who are participating in the diagnosis or treatment under the direction of the physician or psychologist if the communication was made for the purpose of diagnosis or treatment of a mental or emotional condition.

On the face of the provision, this section covers only physicians, psychologists and those assisting the doctor or psychologist, such as nurses and medical attendants. The object of this category of privilege is to ensure that communication between the doctor and his patient is kept confidentially and will not be disclosed. **For the communication to be privileged, it must relate to emotional or mental treatment. Communication in respect of other medical treatments will not be privileged.**

"Section 103(2)

> (2) For the purposes of subsection (1), a communication is confidential if it is not intended to be disclosed to third persons other than those reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis or treatment under the direction of a physician or psychologist."

Even though in common law, one may have a lot of authority on the subject of communications between doctors and their patients generally, in Ghana, it seems that **the privilege is thus limited to confidential communication on mental and emotional treatment but not general medical practice.**

Those who are entitled to claim the privilege are the patient suffering emotional or mental diseases, the patient's guardian, the personal representative of the patient if he is dead and the physician or psychologist.

Section 103(3)

> "A privilege under subsection (1) may be claimed by
>
> (a) that person personally; or
>
> (b) that person's guardian or committee; or
>
> (c) that person's personal representative if that person is deceased; or

(d) the person who was the physician or psychologist or any other person who participated in the diagnosis or treatment under the direction of the physician or psychologist, unless that person is otherwise instructed to permit disclosure by a person authorised to claim the privilege by paragraph (a), (b), (c) or (d) of this subsection."

There are four exceptions to the privilege in which the court in its discretion may not grant the privilege. Section 103(4) provides that

(4) A Court may disallow a claim of privilege under subsection (1) where

(*a*) in a proceeding to commit the person who was the patient the information sought is relevant to the determination of whether that person should be committed, or

(*b*) in a criminal or civil proceeding, the person claiming the privilege raises a matter relating to a mental or emotional condition, or

(*c*) a Court has ordered the person who was the patient to submit to an examination of the mental or emotional condition of that person by a physician or psychologist.

NOTE: The Right to Information Act 2019, Act 989 at Section 15 provides for a general privilege for doctors and patients. It provides as follows:

" (1) Information is exempt from disclosure where

(b) the disclosure of the information reveals confidential communication between a doctor and a patient or any other medical expert in connection with the medical diagnosis or treatment of the patient."

PRIVILEGES ON RELIGIOUS ADVICE

Privileges arising from spiritual advice have been covered in NRCD 323, s 104 which reads:

104(1). A person has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication by the person to **a professional minister of religion** who is prevented from disclosing such communication **by the code of his religion and has been in his professional role as a spiritual adviser**.

The preconditions for applying for this type of privilege are that there should be consultation with a professional minister of religion which is expected to be confidential

in that it should not be communicated to a third party by the code of ethics of the religion of the minister.

Who is a professional Minister of Religion?

Will that cover any of the “one-man” persons masquerading as “men of God” or “ministers of religion” or they have to include only properly ordained ministers.

Will persons in the Moslem religion calling themselves Mallams, Sheilks or Alhajis who, according to the Muhammadan religion, they qualify as professional ministers.

Then there will be the question as to what constitutes confidential communication.

Section 104(2)

(2) For the purposes of subsection (1), a communication is confidential if made privately and not intended for further disclosure.

Will the communication cover crimes or other forms of misconduct bordering on crime?

Under English common law, there is very little judicial authority on priest-penitent privilege. This may be attributed to an obiter of Best CJ in **BROAD V PITT (1828) 3 C&P 518** when he said

“I for one, will never compel a clergyman to disclose communications made to him by a prisoner, but if he chooses to disclose them I shall receive them in evidence”.

Thus, in **NORMANSHAW V NORMANSHAW AND MEASHAM (1893) 69 LT 468**, a clergyman was obliged to disclose an admission of adultery made in conversation by a friend.

<u>WHO CAN CLAIM THE PRIVILEGE</u>

Section 104 (3) A privilege under subsection (1) may be claimed by

(a) that person personally; or

(b) that person’s guardian or committee; or

(c) that person’s personal representative if that person is deceased; or

(d) the professional minister of religion to whom subsection (1) applies.

PRIVILEGE RELATING TO A COMPROMISE: S 105

This is a privilege which is attached to communication between parties which amount to a genuine attempt to reach an agreement or compromise. One of the litigating parties can prevent the disclosure of what took place during the negotiations for settlement.

However, communications between opposing parties to an action or between their counsels, are not privileged. Therefore, in the absence of any other protection, if one party, in the course of negotiations for a possible settlement were to make a concession and in the event where the negotiation fails, the other party would be able to use the concession as constituting a damaging admission. It is to remove such a situation and to encourage negotiated settlement in civil litigations that there is the rule that privilege attaches to statements made 'without prejudice', that is without prejudice to you the maker of the statement if the terms he proposes are not accepted.

For the purpose of this type of privilege, letters, and other written documents exchanged between the parties are often headed as "without prejudice." Such "without prejudice" communication is privileged from being disclosed by the parties or other third persons.

In **REPUBLIC V BONSU; EX PARTE FOLSON [1999-2000] 1 GLR 523**, it was held that:

> The general principle or rule of evidence that the contents of a statement made 'without prejudice' could not be put in evidence in a civil case without consent of the parties only applied to communications or statements made in negotiations for settlement or with a view to attempt a compromise in litigation.

Another instance of the use of compromise will be found in **COP V SEM [1962] 2 GLR 77** in which the Supreme Court held that nothing which takes place during the negotiations of parties to settle a dispute should be used by a trial court to prejudice the case of either of the negotiating parties.

Facts

The appellant, who was charged with defilement of a female between ten and fourteen years of age, was convicted of the lesser offence of indecent assault. The complainant, a maidservant aged twelve years, had delayed three weeks in reporting the incident. Medical evidence did not support her account of attempted sexual intercourse three weeks previously but showed that it "might have been attempted on her not more than five days before the examination."

The appellant, who had denied the charge, was induced to sign a confession prepared by the complainant's employer because, "he said if I wrote that statement he would remove the case from the police." Three witnesses corroborated the appellant's version of the making of the confession

Held

“This last observation of the learned judge is true enough; unfortunately however, many a person is prepared to make any sacrifice to avoid going to court, and the law itself is obliged to take cognizance of that stark reality of life by making provision for the law of blackmail to protect the class of persons who are scared to death of a court trial. It is also the clearly settled general policy of the law that nothing which might have taken place during negotiations for the settlement of a dispute between parties, should afterwards, if the negotiations fail and the dispute has to be tried and decided on its merits, be used by a trial judge to prejudice either party. So in Davies v. Kofi Kuma,3 Coussey, J. (as he then was) pointed out that:

"It is a settled principle that nothing which passes between parties in any attempt at arbitration or compromise should be allowed to effect the slightest prejudice to the merits of their [respective] cases as it eventually comes to be tried by the court."

That was said in a civil case, but the principle applies with equal force in respect of a bonafide attempt to settle a criminal matter.”

PRIVILEGE NOT TO BE COMPELLED TO TESTIFY.

Under NRCD 323, s 96(1), an accused person cannot be compelled to give evidence if he does not wish to do so. The section provides that:

“The accused in a criminal action shall not be called as a witness and shall not be compelled to testify except on the application of the accused.”

This is further confirmed in the 1992 Constitution, art 19(10) which provide that:

No person charged who is tried for a criminal offence shall be compelled to give evidence at the trial.

This is what sometimes referred to as the right to silence of the accused person during a criminal trial. The court, the prosecution or the defence have the right to comment on the failure or refusal to give evidence. This rule is subject to the expression by which the accused may be ordered by the court to subject himself, for instance, to be examined for the purpose of identification.

PRIVILEGE AGAINST SELF-INCRIMINATION

The privilege against self-incrimination means that a person cannot be legally compelled to provide the authorities with information which could reasonably lead to, or increase the likelihood of, that person’s prosecution for a criminal offence, or which might be used against that person in criminal proceedings.

The common law provided that no witness was required to answer any question or produce any document in court proceedings where the answer or the document would incriminate themselves and expose them to charges of having committed offences in contravention of the criminal law.

In Beghal v DPP [2015] UKSC 49, [2015] 3 WLR 344 [60], Lord Hughes refers to the privilege as an entitlement 'to refuse to answer questions or to yield up documents or objects if to do so would carry a real or appreciable risk of its use in the prosecution of that person or his spouse'.

The privilege is codified under NRCD 323, s 97(1) which reads that:

> In any criminal proceedings, a person has a privilege to refuse to disclose any matter or to produce any object or writing that will incriminate him.

As stated by Murphy J in **PYNEBOARD PLY LTD V TRADE PRACTICES COMMISSION [1983]152 CLR 328**:

> *"The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self- incrimination, it is society's acceptance of the inviolability of human personality"*

Section 97(2) of NRCD 323 provides

(2) A person does not have a privilege under subsection (1) where the Court thinks that it is necessary to the determination of an issue, to refuse

(a) to submit to physical examination for the purpose of discovering or recording the corporal features and other identifying characteristics, or the physical or mental condition of that person, or

(b) to furnish or to permit the taking of samples of body fluids or substances for analysis, or

(c) to speak, write, assume a posture, make a gesture, or do any other act for the purpose of identification.

(3) An accused in a criminal action who voluntarily testifies on behalf of the accused in the action does not have a privilege under subsection (1) to refuse to disclose a matter or produce an object or a writing which is relevant to an issue in the criminal action.

The rule is that no-one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose him to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for.

Section 97(4) defines incrimination as where the matter, object or writing will:

a. Constitute or
b. Form an essential part of, or
c. Taken in connection with other matters already disclosed is a basis for reasonable inferences of a violation of the criminal laws of Ghana.

Under the NRCD 323, it is the judge (described as the Presiding officer) who has to determine whether or not privilege has been established. (See Section 91 and Section 3 of NRCD 323).

For this privilege to apply, the court has to be satisfied that by the disclosure the accused will face real danger of being prosecuted for violating the criminal law in Ghana.

If he finds that in the affirmative, then the privilege has been established and therefore the accused person does not have to make the disclosure or produce what is being sought from him.

EVIDENCE INCRIMINATING STRANGERS/COMPANIES

In most cases this head of privilege is claimed by a person because he fears he would be liable to prosecution. If he chooses to waive that right, no one else can claim it on his behalf. A witness can therefore not refuse to answer questions in a trial on the ground that doing so will incriminate strangers.

Since the privilege is a privilege against self-incrimination, officeholders, employees, or agents of a company may claim the privilege themselves but cannot refuse to answer questions which would tend to incriminate the company, employer or the principal. In the same vein, a company or an employer cannot refuse to answer questions which would tend to incriminate the office-holders.

Under the Evidence Act, no person has a privilege to refuse to obey an order made by a court to produce an object or writing under his control constituting, containing or disclosing matter which will incriminate him if by law some other person has a superior right to the object or writing ordered to be produced.

Section 98 of NRCD 323

98. Disclosure of things owned by another

> "A person does not have a privilege under section 97 to refuse to obey an order made by a Court to produce an object or writing under the control of that person constituting, containing or disclosing a matter which will incriminate that person, if by law any other person has a superior right to the object or writing ordered to be produced."

Similarly, a person making a record, report or disclosure required by law has no privilege to refuse to disclose or to prevent any other person from disclosing the contents of the record, report or disclosure except as otherwise specifically provided by any enactment.

On the other hand, a public official or public entity to whom a record, report or disclosure is required by law to be made has a privilege to refuse to disclose the contents of the record, report or disclosure if the law requiring it to be made prevents its disclosure for the purpose in question.

99. Required reports

(1) A person making a record, report or disclosure required by law does not have a privilege to refuse to disclose, or to prevent any other person from disclosing, the contents of the record, report or disclosure except as otherwise specifically provided by an enactment.

(2) A public officer or public entity to whom a record, report or disclosure is required by law to be made has a privilege to refuse to disclose the contents of the record, report or disclosure, if the law requiring it to be made prevents disclosure for the purpose in question.

NOTE: Consider the right to information Act

PRIVILEGES ON INFORMANTS: S 107

This is the simple privilege granted in section 107 to only the Government not to disclose the identity of people who supply information on the commission of or the plan to commit a crime.

As a matter of principle, in criminal prosecutions, the identity of informers are not disclosed. This implies that the prosecution need not be asked and they are not bound to disclose the names of people who supply information on the commission of crimes.

NOTE: Consider WHISTLEBLOWER ACT, 2006 ACT 720. The purpose of the Act is to

"AN ACT to provide for the manner in which individuals may in the public interest disclose information that relates to unlawful or other illegal conduct or corrupt practices of others;

to provide for the protection against victimisation of persons who make these disclosures; to provide for a Fund to reward individuals who make the disclosures and to provide for related matters."

Section 107 of NRCD 323. Informants

(1) The Government has a privilege to refuse to disclose and to prevent any other person from disclosing, the identity of a person who has supplied the Government with information purporting to reveal the commission of a crime or a plan to commit a crime.

(2) The Government does not, under subsection (1), have a privilege to refuse to disclose a communication from a person except to the extent necessary to protect the identity of the person from disclosure.

(3) The Government's privilege under subsection (1) may be claimed by a person authorised by the Government to claim the privilege.

(4) The Government does not have a privilege under subsection (1) where the identity of the informant has been disclosed to the public by the Government, or the informant, or if the informant appears as a witness in Court in an action to which the communication of the informant relates.

(5) Where the Government claims its privilege under this section and the circumstances indicate a reasonable probability that the informant can give testimony necessary to a fair determination of guilt or innocence, in a criminal action the Court may on its own motion and shall on the motion of the accused dismiss the action.

Rationale

The rational of the principle is that those who supply information to the police on the commission of crimes need to be protected so that they are not met with reprisal. The policy aims at ensuring their security. It is also to ensure that people freely give information on the commission of crimes so that information leading to detection of crime does not dry up.

It will not be correct to state that the principle applies to only criminal cases because it is possible to arise in the disclosure of information in some types of civil cases which are closely connected with crimes, such as civil action for malicious prosecution. The principle applies to the disclosure of the names or identities of informants or the nature of the information given.

Application of the rule under s 107

Under s 107 of NRCD 323, the main rules applicable are as follows:

a. Only the Government can invoke the principle to avoid disclosure of the information (s 107(1)). A person authorized by the Government may equally claim the privilege including State Attorneys, State Prosecutors and Government Officials (s 107(3)).

b. The immunity cannot be claimed where the one claiming it appears as a witness in the case or where the Government has already disclosed the information elsewhere (a 107(4)).

c. The privilege applies to only the identity of the informant but not the contents of his information. (s 107(2)).

d. In the process the policy on the innocence of the suspect is not compromised. If the disclosure will affect the fair trial of the case, the court will order the disclosure to be made.(s 107(5).

PRIVILEGES AND MARITAL COMMUNICATION

Under normal circumstances, the spouse of the accused is not a compellable witness. There are however some exceptions to the rule. There are policy reasons for this principle.

Firstly, it is said that in law, the husband and wife are one. That implies that the husband and wife have identity of interest. If the position is accepted, it will follow that no one will be expected to give evidence against himself/herself.

Secondly, there is the public policy that confidences of conjugal relations should be preserved. That is necessary in order to maintain marital harmony. If spouses were to be compelled to testify against each other, it would result in undermining marital relations.

What should be the position of the law where the spouse is accused of a serious criminal offence and the other spouse happens to be the most essential witness.

A situation like that will involve two conflicting positions, namely, on the one hand, the policy that the law should not create circumstances which will give rise to marital discord likely to undermine the institution of marriage. On the other hand, there is the need to protect society against people who commit serious crimes and who should not be allowed to escape but should be duly punished.

If the spouse cannot testify against the spouse, can one spouse testify for the other spouse?

The law of Ghana has settled this issue in the affirmative. There are however certain restrictions on the use of such evidence which must be borne in mind since they affect not only the admissibility of such evidence but also the evaluation of it.

What are these restrictions?

One relates to the evaluation of evidence given by a spouse in relation to its likelihood to be exaggerated or embellished to suit the interest of the spouse.

Another restriction is statutory and is provided in NRCD 323, s 110. The section provides that:

> 110. (1) A person has the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between himself and his spouse during their marriage.
>
> (2) A communication is confidential if not intended to be disclosed, and made in a manner reasonably calculated not to disclose its contents, to any third party.
>
> (3) This section applies to both monogamous and polygamous marriages".

The section deals with mainly the disclosure of communication between spouses.

It applies to communication issued while the marriage was subsisting. It will not apply to situations which existed before marriage.

After the divorce or the death of one spouse, can the other spouse disclose communication which took place during marriage?

The section forbids the disclosure of marital communication after divorce. Once the communication is proved to have been made during marriage, the fact will still stand that to allow a disclosure will defeat the very revulsion which it seeks to avoid. In a way, it can be argued that a wife is still a wife except that she is a divorced wife. Does a divorce wife become a spinster or by reason of the divorce?

The section applies where the couples are properly married. This implies that the privilege can be claimed during marriage. It also applies after the dissolution of marriage or the death of one spouse.

In Ghana the principle applies where the couple has gone through any of the marriages known to the law. The three marriages known to the law are marriages under the Ordinance, traditional marriages and Moslem marriages.

Confidentiality of marital communication

It is not every conversation or communication that takes place between married couples that will justify the invocation of the privilege. The requirement is that the conversation should be intended by the parties to be confidential. The law is such that what will amount to confidential will depend on the facts of each case.

PRIVILEGES BASED ON DIPLOMATIC RELATIONS

The Diplomatic Relations Act, 1962 (Act 148) grants diplomatic immunities to certain categories of diplomats and consular officers.

Act 148 consolidates the Diplomatic Immunities Act, 1962(Act 148) and the Consular Relations Decree, 1967(NLCD 150) and the Consular Fees Act (Act 231).

Act 148 formally endorses the application in Ghana of the relevant provisions of the Vienna Convention as set out in the Schedule to the Act.

Questions

2015 – Q 5

Question 6 - June 2019 – Lawyer Client Privilege

HEARSAY EVIDENCE

Each witness must generally give evidence only of matters within his or her personal knowledge. Section 60 of NRCD 323 provides the "*A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter."*

Reason for Excluding Hearsay

The most important reason for excluding hearsay is that the truth of such statements cannot be tested by cross-examining the witness offering such a statement because, in most cases, all he can say is**: I don't know.** Whether what X told me is true but, but I have repeated it accurately.

Thus, a witness may testify to the court: 'I saw David strike Vida.' This is direct testimony, since the witness is speaking as an eyewitness. However, should that witness be unable to testify, a friend or family member could not be called to say that 'Ama told me that she saw David striking Vida.' That would be hearsay, since it would be tendered to prove that the defendant struck the victim.[1]

The rule against hearsay, therefore, prevents evidence of a statement made outside court being led in order to prove the truth of its contents. It does *not*, however, prevent such evidence being led if the party seeks only to prove that the statement was made, regardless of its truth. The common law rule is that a statement made other than one made by a person giving oral evidence in a proceeding was inadmissible as evidence of any fact stated.

Hearsay can therefore be defined as a statement made out of court when such evidence is offered for the purpose of proving the truth of such previous statement. It **is any statement other than one made by the witness in the course of giving their evidence in the proceedings in question, which is tendered as evidence of the truth of the facts asserted. Such evidence is inadmissible unless subject to statutory exception.**

Definition of Hearsay under the Evidence Act

In Ghana Section 116 has defined both a hearsay statement and hearsay evidence.

Section 116(d)- hearsay statement is a statement, evidence of which is hearsay evidence.

Section 116(c)-hearsay evidence is evidence of a statement other than a statement made by a witness while testifying in the action at the trial offered to prove the truth of the matter stated.

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[1] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 12

What is hearsay was explained in the case **SUBRAMANIAM V. PUBLIC PROSECUTOR [1956] 1 W.L.R 965**

Facts: the accused was charged with unlawful possession of ammunition. He stated that it was given to him by terrorists and forced to keep the weapons under threat of death from the terrorist. The trial judge excluded the evidence as hearsay.

The privy Council reversed the decision stating:

> *" 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 evidence , not the truth of the statement, but the fact that it was made."*

This case has been quoted with approval by the Court of Appeal in ***Apaloo and others v. The Republic [1975] 1 GLR 156***

Note: One of the major reasons for the exclusion of hearsay evidence is that the witness cannot be cross-examined on the truth of the statement, but merely on whether or not it was in fact said.

See also: **Nkegbe v. African Motors Division of UAC [1978] GLR 32**

HEARSAY UNDER THE EVIDENCE ACT

As a general rule, hearsay evidence is inadmissible. This is stated at section 117 of NRCD 323

> "**117. Hearsay not admissible**
>
> Hearsay evidence is not admissible except as otherwise provided **by this Act or any other enactment or by the agreement of the parties**."

For hearsay evidence to be admissible it must fall under any one of the exceptions provided for under the Evidence Act or any other enactment or based on the agreement of the parties.

Some enactments aside from the Evidence Act, that make hearsay evidence admissible are: Section 31 of the Chieftaincy Act 2008, Act 759 states as follows

> *" A judicial Committee may receive in evidence any matter including hearsay which tends to prove or disprove a fact relevant to the subject matter before the Committee."*

Also Order 38 rule 3E (5) of C.I 87, 2014 which states

" (5) If a party who has served a witness statement does not call the witness to give evidence at the trial or put the witness statement in as hearsay evidence, any other party may put the witness statement in as hearsay evidence"

Unavailable as a witness

What is the meaning of unavailable as a witness? Section **116** provides**:**

(e) unavailable as a witness means that the declarant is

(i) exempted or precluded on the ground of privilege from testifying concerning the matter to which the statement of the witness is relevant; or

(ii) disqualified as a witness from testifying to the matter; or

(iii) dead or unable to attend or to testify at the trial because of a then existing physical or mental condition; or

(iv) absent from the trial, and the Court is unable to compel the attendance of the declarant by its process; or

(v) absent from the trial and the proponent of the statement of the declarant has exercised reasonable diligence but has been unable to procure the attendance of the declarant by the court's process; or

(vi) in a position that the declarant cannot reasonably be expected in the circumstances (including the lapse of time since the statement was made) to have a recollection of matters relevant to determining the accuracy of the statement in question;

(*f*) **"available as a witness"** means that the declarant is available as a witness.

Exceptions to the General Hearsay Rules

118. First-hand hearsay

(1) For the purposes of section 117, evidence of a hearsay statement is admissible if

(a) the statement made by the declarant would be admissible had it been made while testifying in the action and would not itself be hearsay evidence, and

(b) the declarant is

(i) unavailable as a witness, or

(ii) a witness or will be a witness, subject to cross-examination concerning the hearsay statement, or

(iii) available as a witness and the party offering the evidence has given reasonable notice to the Court and to every other party of the intention to offer the hearsay statement at the trial and that notice gave sufficient particulars (including the contents of the statement to whom it was made and if known when and where) to afford a reasonable opportunity to estimate the value of the statement in the action.

(2) In a criminal action where the prosecution offers evidence under paragraph (b) (iii) of subsection (1), the evidence shall not be admissible if an accused has given reasonable notice to the Court and to the prosecution that the accused objects to its admission.

(3) This section does not preclude the prosecution from offering the evidence under any other paragraph of subsection (1) or under any other provision of this Act.

(4) In a criminal action, evidence of a hearsay statement made by an accused is not admissible under subsection (1) when offered by the accused unless the accused is, or will be, a witness subject to cross-examination concerning the hearsay statement.

"(5) Evidence of a hearsay statement offered under paragraph (b) (i) of subsection (1) is not admissible if the declarant is unavailable as a witness because the exemption, preclusion, disqualification, death, inability absence or failure of recollection of the declarant was brought about by the wrongdoing of the proponent of the statement for the purpose of preventing the declarant from attending or testifying."

In the case of **Opanin Osei Akwasi (Substituted by Badu Dankwah alias James Danquah) vrs Kwadwo Dwemoh Civil Appeal No. J4/37/2022 dated 1st March 2023,** an objection was raised to the testimony of DW 1 on the basis that the testimony was hearsay. The testimony of DW1 was as follows:

> "My full name is Haruna Musa. I live at James Kumah near Mpasaso No. 2. I live in the disputed farm. My father's name is Malam Musah a.k.a. Agya Musah. I know one Agya Osei Kwasi. My father also knows this Agya Osei Kwasi. My father has become very old and cannot do anything on his own. I know how my father got to know Opanin Osei Kwasi. My father used to trade in cola nuts and through this trade he went to stay with Opanin Osei Kwasi at Mpasaso. He was buying cola nuts and exported same to Burkina Faso. All that I am saying, I was informed by my father; so Opanin Osei Kwasi told my father that he had a parcel of virgin land so my father should search for some labourers to come and work on same. My

father speaks with difficulty. My father is 130 years old. There is nobody older than my father in the whole of James Kumah village"

The High Court found the testimony to be inadmissible. This was affirmed by the Court of Appeal but reversed by the Supreme Court. The Supreme Court speaking per Kulendi JSC stated as follows:

> *"Section 118 provides for the admission of first hand hearsay evidence subject to conditions set out in the said section…. First hand hearsay testimony is admissible if it can be demonstrated that the statement made by the declarant would have been admissible had it been made by the declarant while testifying and the said testimony would itself not have been hearsay evidence. This requirement is set out in Section 118(1)(a) of Act 323.*
>
> *In addition to the above condition, a court must further satisfy itself that any one or more of the following conditions set out in Section 118(1)(b) of Act 323 are met:*
>
> 1. *The declarant is unavailable as a witness or;*
> 2. *The declarant is a witness or will be a witness in the case and therefore would be subject to cross-examination concerning the hearsay statement or*
> 3. *The declarant is available as a witness and reasonable notice with sufficient particulars has been given to the court and to every other party of the intention to offer the hearsay evidence at trial.*
>
> *The Court of Appeal, though holding that the declarant (DW1's father) was an unavailable witness nonetheless held that the testimony of DW1 was inadmissible as hearsay evidence because the said testimony was given in breach of Section 118(1)(b)(ii)…The use of the word "OR" in the itemisation of the conditions under Section 118(1)(b) of Act 323 shows that the conditions listed therein are disjunctive and not conjunctive. Therefore, any, and not necessarily all, of the three conditions set out in Section 118(1)(b) must be present together with the conditions stated in Section 118(1)(a) to qualify the first hand hearsay to be admissible. Whilst Section 118(1)(b) uses the word "OR" to distinguish the three items of conditions from each*

other, the word "AND" is used conjunctively in Section 118(1)(a) to show the nexus the said section has with Section 118(1)(b).

Having found that the Declarant was unavailable to testify by reason of Section 116I(iii), the Court of Appeal thus erred when it held that the failure to give notice pursuant to Section 118(1)(b)(iii) made the testimony of the declarant inadmissible. This is especially so when from the record before us and from the Court of Appeal's own finding, the declarant was unavailable to testify and thus fulfilling Section 118(1)(b)(i) as follows: "the declarant is unavailable as a witness."

Also in the case of **Appiah v The Republic 1987-88 2 GLR 377** it was held that *the affidavit of the official of Barclays Bank International, London was admissible under the Evidence Decree, 1975 (N.R.C.D. 323) because as extracts of banker's books it was admissible under sections 125 and 176. It was also admissible as an exception to the hearsay rule under section 118, because it was the statement of a declarant who was unavailable and which since it had both the affidavit and seal of the Supreme Court of Judicature, England, satisfied the due authentication requirements of section 136.*

Admissions – Section 119

According to the Blacks law Dictionary an admission may be defined as " *a voluntary acknowledgment of the existence of facts relevant to an adversary's case*." Most admisssions are made outside the courtroom and therefore amount to hearsay evidence. However, by reason of Section 119, admissions are an exception to the inadmissibility of a hearsay statement.

Section 119 provides as follows:

Admissions

Evidence of a hearsay statement is not made inadmissible by section 117 if the statement is offered against a party, and

(*a*) the declarant is a party to the action either as an individual or in a representative capacity, or

ILLUSTRATION

In the case of Duah v The Republic [1987-88] 1 GLR 343-360, the court admitted the evidence of the accused person's uncle that the accused said to him "I have killed Aggie" as an admission or confession of him having killed Agnes. The learned judge in his summing up put it to the jury when he said:

> *"Dr. Francis Duah is an uncle to the accused. He appears a responsible man. Do you think he would have told the court in his evidence-in-chief that the accused said 'I have killed Aggie', if he had not heard any such thing? ... If during your consideration of the whole case you accept the prosecution's case and that of Dr. Francis Duah that the accused told him 'I have killed Aggie' that would be sufficient confession or admission by the accused and that would entitle you to bring a verdict of guilt against the accused. But I must warn you that if you make up your minds as to whether Dr. Francis Duah possibly did not hear the accused well as to whether accused said 'I killed Aggie' or 'Aggie is dead' with reference to the short conversation at Kuku Hill then I direct you to treat Dr. Francis Duah's piece of evidence on that matter as unreliable and you should attach no weight to that." (The emphasis is ours.)*

(*b*) the party against whom it is offered has manifested the adoption of, or the belief in the truth of, the statement, or

ILLUSTRATION

In an action to recover a debt of one million dollars. The defendant makes an out-of-court statement contained in a text message to a friend admitting to owing the Plaintiff a million dollars. The friend can be called as a witness and the testimony will be admissible.

(*c*) the party against whom it is offered had authorised the declarant to make a statement concerning the subject matter of the statement, or

ILLUSTRATION

A Managing Director authorizes the finance Manager to make a specific statement on a subject, and he does so, that out of court statement by the finance manager can be received as evidence of the admission of its truth against the Managing Director who authorized the statement.

(*d*) the declarant was an agent or employee of the party against whom it is offered and the statement concerns a matter within the scope of the declarant's agency or employment and was made before the termination of the agency or employment, or

ILLUSTRATION

In an action against a company, an out-of-court statement from a former managing director will be admissible against the company.

Also

A client who engages counsel to conduct litigation on his behalf is by law deemed to be the principal and the counsel his agent. Consequently, any admission of fact made by counsel, within the scope of the matter binds the client and is admissible against him.

In, ***Baiden v. Solomon*** *[1963] 1 GLR 488-499, a lawyer admitted that in negotiations, his client had admitted negligence and only contested the issue of damages. The Supreme Court held that:*

> *"The appellant was bound by the admission of his counsel and the trial judge was justified in precluding him from adducing evidence on the issue of negligence. A decision of counsel on the issue of negligence falls within the scope of his authority to conduct a case and to do everything which, in the exercise of his discretion, he may think best for the interests of his client. Counsel does not need the consent of his client for a matter which ordinarily falls within the ambit of his authority. Counsel has an implied authority to make admissions against his client during the actual progress of the case in court for the purpose of dispensing with proof on any issue in the case, and once this has been done the court will not hear any evidence."*

(*e*) the declarant made the statement while participating in a conspiracy to commit a crime or civil wrong and in furtherance of that conspiracy.

ILLUSTRATION

A and B conspire to break into a bank. They need the assistance of a driver to drive them away when it is done. Statements made to the driver by A and B as to plans to break into the bank will be admissible in evidence against A and B.

SECTION 120 - CONFESSIONS

Confession is a statement by a suspect which, when taken together with other facts and circumstances, constitutes an admission of the commission or participation in the commission of an offence. In **Ekow Russel v The Republic [2017-2020] SCGLR 467** Akamba JSC defined a confession as *"an acknowledgment in express words, by the accused in a criminal charge, of the truth of the main fact charged or of some essential part of it. By its nature, such statement if voluntarily given by an accused person himself, offers the most reliable piece of evidence upon which to convict the accused."*

Additionally, in **Frimpong@iboman v The Republic [2012] 1 SCGLR 297** the court stated "… *the appellant opened his mouth very loosely as if he was suffering from a mouth diarrhoea. This is in essence what is called a confession statement, where the statement admits of the declarant's involvement in the commissioning of the offence*."

It is classified as hearsay evidence in so far as it takes place outside the courtroom. Being hearsay evidence, confessions would generally have been inadmissible but for section 120 of NRCD 323.

> *"Section 120. Confessions*
>
> *(1) In a criminal action, evidence of a hearsay statement made by an accused admitting a matter which*
>
> *(a) constitutes, or*
>
> *(b) forms an essential part of, or*
>
> *(c) taken together with other information already disclosed by the accused is a basis for an inference of,*
>
> *the commission of a crime for which the accused is being tried in the action is not admissible against the accused unless the statement was made voluntarily."*

The key consideration from section 120(1) of the Evidence Act, is that the statement should have been made voluntarily. In **Ibrahim v. R [191] AC 599** Lord Sumner stated "*it has long been established as a positive rule of English criminal law, that no statement by an accused person is admissible evidence against him unless it is shown by the prosecution to have a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage expected or held out by a person in authority."*

In the case of **REPUBLIC v. KONKOMBA, [1979] GLR 270-284** a voluntary statement was defined as follows:

> *"In my view, in ordinary parlance "voluntary statement" means a statement offered by person on his own, freely, willingly, intentionally, knowingly and without any interference from any person or circumstance. Upon this definition if a person, whether a somnambulist or not, says something in his sleep, the statement is not offered knowingly and intentionally and it is therefore not voluntary. If a person of unsound mind makes a statement, it is not voluntary, due to the interference induced by insanity; if, short of insanity, a person makes a statement not because he wishes to make it but because of circumstances however induced, it will not be voluntary because of the interfering circumstances. If a statement is induced by*

threats or actual violence, it may be intentional, it may be made knowingly, it may even be argued that it was willingly made and some may also urge that it was freely made, but it cannot be said to have been offered by the person on his own, nor can it be said to have been made without, interference from any person, and so it is not voluntary. If a statement is induced by promises, then it is not offered by the person on his own and it is accordingly not voluntary."

Section 120(4) of NRCD 323 provides for what is meant when the section says **"Voluntary"**

"(4) For the purposes of this section, a statement that was not made voluntarily includes, but is not limited to a statement made by the accused if

(a) the accused when making the statement was not capable because of a physical or mental condition of understanding what the accused said or did; or

(b) the accused was induced to make the statement by being subjected to cruel or inhuman conditions, or by the infliction of physical suffering upon the accused by a public officer or by a person who has a direct interest in the outcome of the action, or by a person acting at the request or direction of a public officer or that interested person; or

(c) the accused was induced to make the statement by a threat or promise which was likely to cause the accused to make the statement falsely, and the person making the threat or promise was a public officer, or a person who has a direct interest in the outcome of the action, or a person acting at the request or direction of a public officer or the interested person."

Independent witness

Section 120(2) - Independent Witness

(2) Evidence of a hearsay statement is not admissible under subsection (1) if the statement was made by the declarant while arrested, restricted or detained by the State unless the statement was made in the presence of an independent witness who

(a) can understand the language spoken by the accused,

(b) can read and understand the language in which the statement is made,

and where the statement is in writing the independent witness shall certify in writing that the statement was made voluntarily in the presence of the independent witness and that the contents were fully understood by the accused.

Blind or illiterate

Section 120(3) of NRCD 32 provides for where the accused is blind or illiterate:

> *"(3) Where the accused is blind or illiterate, the independent witness*
>
> *(a) shall carefully read over and explain to the accused the contents of the statement before it is signed or marked by the accused, and*
>
> *(b) shall certify in writing on the statement that the independent witness had so read over and explained its contents to the accused and that the accused appeared perfectly to understand it before it was signed or marked. "*

In, **Republic v Animah [1989-90] 1 GLR**, The accused, an illiterate person, made a confession statement to the police. According to the second prosecution witness the independent witness did not read over and explain the contents of the statement to the accused but only signed what the investigator had written. The prosecution sought to tender that statement in court and counsel for the accused raised an objection to its admissibility on the grounds that (i) the statement did not contain what the accused said to the police; and (ii) the procedure for taking confession statements as laid down by section 120 of the Evidence Decree, 1975 (N.R.C.D. 323) was not complied with. Upholding the objection the Court held as follows:

> *"under section 120 of the Evidence Decree, 1975 (N.R.C.D. 323), a statement such as the one sought to be tendered which constituted or formed an essential part of or taken together with other information already disclosed by the accused was a basis for an inference of the commission of a crime for which the accused was being tried in the action was not admissible against him, unless, inter alia,* ***the independent witness, where the accused was blind or illiterate, carefully read over and explained to him the contents of the statement before it was signed or marked by the accused and did certify in writing on that statement that he had so read over and explained its contents to the accused and that the accused appeared perfectly to understand it before it was signed or marked. In the face of the glaring disregard of the clear and mandatory provisions of an enactment as in the instant case, it would be a travesty of justice for the court to shut its eyes to that contempt of the law and make decisions which were at large. Applying section 120 (4) the statement sought to be tendered was inadmissible and must be rejected."***

In Frimpong alias Iboman v. The Republic, the Supreme Court stated that *from a careful reading of section 120 of the Evidence Act, 1975, NRCD 323, the following procedure must be complied with to give validity to a confession statement and make it admissible in law.*

1. *If the declarant of the statement made the statement while arrested, restricted or is detained by the State then the statement is admissible only if:*

   i. ***it was made in the presence of an independent witness, who***

   ii. ***understands the language in which the declarant spoke i.e. accused therein, herein appellant.***

   iii. ***can also read and understand the language in which the statement is made.***

   iv. *whenever the statement is in written form, the independent witness* ***shall certify in writing on the statement as follows:***

   "that the statement was voluntarily made in his presence and that the contents were fully understood by the accused."

   v. *where the declarant is illiterate or blind, there are further provisions to protect the declarant by ensuring that the state does not take advantage of his disability by ensuring that*

   vi. *the independent* ***witness shall carefully read over and explain to the declarant the exact contents of the statement before it is marked or signed.***

   vii. ***the independent witness shall certify on the statement in writing that he had so read over*** *and explained the contents of the statement to the declarant and that* ***he appeared perfectly to understand it before making his mark or signature.***

The rationale for the above elaborate provisions are clear. They are to ensure that the rights of the declarant, i.e. accused who is under restriction are not trampled upon by the Police or the investigative agencies. These constitute the rights of all accused persons as has been protected in the Constitution 1992."

In ***Frimpong alias Iboman v. The Republic***, it was held, among others, that a policeman was not competent to be an independent witness, where the accused is arrested, restricted and detained. Justice Brobbey (JSC) in delivering the judgment stated:

> *"In short, an independent witness must not be someone who is so closely connected to the police as to make him more or less dependent on the police. Such a scenario will defeat the purpose for which the law was enacted.*
>
> *Secondly, the independent witness must not only understand the language in which the declarant spoke, but also understand the language in which the statement was written down if it was written by someone other than the declarant.*

Thirdly, the independent witness must also be able to read and understand the language into which the statement was written so as to enable him explain the content to the declarant."

However, it has been held that this decision was decided **Per incuriam**. The contrary position was first expressed by Sir Dennis Adjei JA, in ***Awutu Ellies Kaati and 5 others v. The Republic. Civil Appeal No f22/40/2009 dated 15th January 2014*** After quoting the words of Brobbey JSC in the Iboman case he continues:

"Under the original Evidence decree NRCD 323, a police officer or a member of the Armed Forces was prohibited from acting as independent witness. All other people serving as independent witness were to be approved by the suspect. This position was amended by the Evidence and Criminal procedure (Amendment Decree) 1972, SMCD 237. It took away or deleted the word 'other than a police officer or member of the Armed Forces approved by the accused'.

SMCD 237 has not been amended and police officers and members of the Armed Forces could act as independent witnesses. The law is now settled that police officers and members of the Armed Forces may act as independent witnesses.

We are of the opinion that by the Article 11 of the constitution 1992, the existing is law is superior to judgment and even though we are bound by the decision of the Supreme Court, we have no doubt in our minds that where a decision is given contrary to statute, we are bound by the statute.

In respect of the holding that a police officer cannot act as an independent witness we are bound by Section 120 of the Evidence Act, NRCD 323, and not the holding of Frimpong alias Iboman v. The Republic and we held that Police and Military officers can act as independent witnesses."

The Supreme Court later in the case of ***Ekow Russel v The Republic [2017-2020] SCGLR 469*** settled the current position of the law. Akamba JSC in delivering the judgment of the Supreme Court stated:

*" The present case affords us an opportunity to have another look at our decision in the **Iboman case** especially on the question as to who is an independent witness in the light of Section 120 of the Evidence Act, NRCD 323. There is no denying that Section 120(2) and (3) of the NRCD 323 is provided to ensure fairness to an accused person who volunteers to a confession while under state restriction…*

It is therefore not so much that the institution one belongs to that should determine whether a person qualified to be an independent witness as much as the level of interest and closeness one has to or in the particular case under investigation.

*I find this an opportune occasion to clarify the segment of our decision in the **Iboman case** which gives the impression that the police personnel per se are excluded from being independent witnesses when it states to the effect that "an independent witness must not be someone who is so closely connected to the police as to make him more or less dependent on the police," as not properly couched and as such not in consonance with the intendment of Section 120 of the NRCD 323 and to that extent made per in curiam.*

In order to attain the objectives of providing adequate safe guards for a suspect under investigation an independent witness as used in Section 120 of NRCD 323 may include - any person who qualifies to a competent witness and has no direct personal interest in the case in issue. Such an independent person must be a person who is disinterested in the matter under investigation.

At the official level, the independent person should not be directly be under the control and influence of the person investigating the crime nor himself be part of the investigation team."

"In summary, any person - be it a policeman, a soldier, a prison officer, other security investigating apparatus or civilian - who qualifies in terms of being disinterested in the matter under investigation, and is not under the direct control and influence of the person investigating the crime, or is not himself part of the investigation team and qualifies to be a competent witness may serve as an independent witness. The independent witness must also meet the requirements of section 120 (3) of NRCD 323. By this provision the person must:

(a)Understand the language which the accused speaks

(b)Can read and understand the language in which the statement is made

(c)Must understand read and speak English."

Where the accused is not under arrest, restriction or detention

A confession may be admissible when made while the accused is not under arrest, restriction and detention. In the case of ***Duah v. The Republic [1987-88] 1 GLR 343***, the conviction based on the confession was upheld on appeal for the main reason that it was given voluntarily, "*in the sense that it was not obtained from him by the influence of fear or hope of advantages*"

Where there is no Independent Witness to the Confession

Duah v. The Republic expresses further that the confession may be admissible even where there is no independent witness to it, provided that it was freely made by the

accused without any pressure or influence from any force or source. The voluntariness of the confession is the major criterion as specified in NRCD 323, S 120(1).

Non- Compliance with section 120 of NRCD 323

When the accused person alleges that the statement was not given voluntarily or that the statement was never made, the court shall conduct a mini–trial or voir dire to determine if the confession was voluntarily made.

However, where the accused person states that the confession statement was voluntarily made but contains inaccuracies, then the court will admit the confession in evidence. The accused will be permitted to cross-examine the witness to show the portions that are not his deed and the extent of his objection to material parts that he claims are not his. This principle was stated in **Asare alias Fanti v The State [1964] GLR 70-77** where it was held that:

> *" where an objection is raised against the tendering of a statement alleged to have been made by an accused person, evidence will be heard only when the accused alleges that no statement was made at all, or that the statement was made under duress. But when objection is raised against such a statement on the ground of inaccuracy, its admissibility becomes a question of law for the judge and the weight to be attached to it is a question of fact for the jury, and it must therefore first be admitted before it can be evaluated."*

Nevertheless, where the claim is that the statement was not made at all or not voluntarily given, then a mini-trial must be held. At the trial, the prosecution will seek to lead evidence that all the requirements of section 120 were complied with. The accused is not mandated to lead any evidence. But if he chooses to, it is the convention that he cannot testify from the dock. He must go into the witness box. This will enable the court to fully determine the credibility of the witness.

If, after the mini-trial, the judge determines that the statement was made voluntarily, it will be admitted. But if it is rejected, it will be marked as "R''. This confession statement will be kept and form part of the record of appeal so that if the case proceeds to the appellate court, it can be reevaluated if necessary.

Former Testimony- Section 121

Evidence of hearsay statement is not made inadmissible by (section 117), if it consists of testimony given by the declarant as a witness in an action or in a deposition taken according to law for use in an action and when the testimony was given or the deposition was taken and the declarant was examined by a party with interest and motives identical with or similar to the party against whom the evidence is offered in the present action.

Case: Regina v Hall (Peter Barnabas) [1972] 3 W.L.R. 974 Court of Appeal dated 20 October 1972 Karminski L.J., O'Connor and Forbes JJ.

Facts

R gave evidence for the prosecution at the trial of the defendant which ended in the disagreement of the jury. Before the retrial R died. At that trial, the defence sought to put in evidence the transcript of R's evidence at the first trial but the judge ruled the evidence to be hearsay and inadmissible. The defendant was convicted. On appeal against conviction:-

Held, allowing the appeal, that at common law the deposition of a witness who had died before trial was admissible in evidence and, since both a deposition and a transcript of evidence given at a trial recorded the sworn evidence of a witness given in the presence of the defendant and that evidence had been subject to cross-examination, there was no reason in principle to distinguish a deposition from a transcript provided the latter had been duly authenticated and, in the exercise of the judge's discretion, the transcript was admissible in evidence. Accordingly, the judge had wrongly ruled that the transcript of R's evidence was inadmissible.

Section 122. Past recollection recorded

Evidence of a hearsay statement is not made inadmissible by section 117 if

(a) the statement is contained in a writing and constitutes a record of what was perceived by a witness who is present and subject to cross-examination; and

(b) the statement would have been admissible if made by the witness while testifying; and

(c) at a time when the matter recorded was recently perceived and clear in the memory of the witness, the witness recognised the written statement as an accurate record of what the witness had perceived or the witness stated what the witness perceived and the written statement, by whomever or however made, correctly sets forth what the witness stated.

Section 123. State of mind

Evidence of a hearsay statement is not made inadmissible by section 117 if the statement states the declarant’s existing state of mind, emotion or physical sensation, and is not a statement of the declarant’s memory or belief of a fact offered to prove the truth of the fact remembered or believed.

In R v Gilfoyle [1996] 3 All ER 883 The defendant was accused of murdering his wife, and contended that she had committed suicide. In furtherance of this, he tendered as evidence a note allegedly written by her about her depressed state of mind. The

prosecution, in rebuttal of this, tendered evidence of remarks made by the wife to her friends in which she had told them how she had written the note at the request of her husband, and how she had found the whole thing highly amusing. The conversation was not hearsay evidence when tendered to show her state of mind, i.e. that she was not depressed.

RES GESTAE

Res gestae is a latin expression meaning “things done”. Hearsay statements may form part of the res gestae where they are spontaneous and where they are an integral part of the event.

A `statement forming part of the res gestae' is one which can be said to be inextricably linked in time and space with an event or state of affairs. The expression is most often used in relation to spontaneous statements (`excited utterances') made approximately contemporaneously with a dramatic incident, usually the commission of a criminal offence, the assumption being that such circumstances provide some guarantee against the risk of unreliability from fabrication by the declarant.

The Res gestae embraces not only the actual fact of the transaction and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it as to form in reality a part of the occurrence.

Section 124 of the Evidence Act provides for **Res Gestae**

Evidence of a hearsay statement is not made inadmissible by Section 117 if the statement was made;

a. While the declarant was perceiving the event or condition which the statement narrates or describes or explains or immediately after the event or condition.
b. While the declarant was under the stress caused by the perception of the declarant of the event or condition which the statement narrates or describes or explains.

Statements Forming Part of Res Gestae

<u>Statements by participants in or observers of the event.</u>

Statement made concerning an event in issue in circumstances of such spontaneity or involvement in the event that the possibility of concoction, distortion or error can be disregarded, are admissible as evidence of the truth of their contents.

In, **R v Bedingfield (1879) 14 Cox CC 341** Henry Bedingfield was charged with the murder of a woman, the facts being that she and Bedingfield had been in a house together when she suddenly came out with her throat severely cut saying, exclaimed to her Aunt 'Oh dear Aunt, see what Harry has done to me!'.

This statement was excluded because '[i]t was not part of anything done, nor something said while something was being done, but something said after something was done'. The court reasoned that the statement was inadmissible on the ground that because it had not been something said while her throat was being cut it had not formed part of the res gestae. Cockburn CJ held

> *"Although statements made while the act is being done, such as ' Don't Harry' are admissible, the victim's statement could not be received in evidence because it was something stated by her after it was all over, whatever it was, and after the act was completed."*

NOTE: This decision no longer represents the law.

The case of **Ratten v. R [1971] 3 WLR 930** overruled Rv Bedingfield

In **Ratten v R**, the defendant was convicted of murdering his wife by shooting her. His defence was that the gun had gone off accidentally while he was cleaning it. The time of death was put at between 1.12 and 1.20 pm. A telephonist was permitted to give evidence that at 1.15 pm she had received a telephone call from Ratten's house made by a sobbing and hysterical woman, who had said: 'Get me the police please.' The Privy Council held that this was correctly admitted. Holding that there was no element of hearsay, the Privy Council held that the evidence was relevant, first, to show that, contrary to Ratten's evidence denying that his wife had made the call, the call had been made, and, second, to show the state of mind of the wife as being fearful at an existing or pending emergency, which was capable of rebutting the accused's defence that the shooting was an accident. The Privy Council held that the exact words used by the wife in the call were hearsay (that the maker wanted the police) but were admitted to show that she made the call and was hysterical in doing so.

Lord Wilberforce stated:

> *The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received.*

The leading case is now ***R v Andrews [1987] AC 281*** The accused was charged with murder. Immediately after a savage knife attack, the victim staggered downstairs to the flat of a neighbour, seeking assistance. Shortly afterwards, the police arrived, and the victim made a statement identifying the accused as one of his assailants. He died some two months later from his injuries. The police officers were allowed to give evidence of what the victim told them as part of the *res gestae*. The House of Lords held that this evidence had been properly admitted as evidence of the truth of the facts asserted. Lord Ackner, with whom all of their Lordships agreed, summarised the relevant principles to be applied when admitting evidence under the *res gestae* doctrine, as follows.

1. The primary question which the judge must ask himself is: can the possibility of concoction or distortion be disregarded?

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently 'spontaneous' it must be so closely associated with the event which has excited the statement that it can fairly be stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event which provided the trigger mechanism for the statement was still operative. The fact that the statement was made in response to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied on evidence to support the contention that the deceased had a purpose of his own to fabricate or concoct, namely a malice . . . The judge must be satisfied that the circumstances were such that, having regard to the special feature of malice, there was no possibility of a concoction or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied on, this goes to the weight to be attached to and not the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess. Another example would be where the identification was made in circumstances of particular difficulty or

where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error.

Time as a factor

Thus, while approximate contemporaneity is required, the emphasis is on the reliability of the statement. The shorter the time gap between the event and the statement, and the more dramatic and unusual the event is, the less likely it will be that the court will find the statement to have been concocted or distorted. In **Andrews** itself, the relevant time gap was some **15 minutes**. It was, however, emphasised that the res gestae doctrine should not be used to avoid calling witnesses who can give direct evidence of the matter.

In ***Duah v. The Republic*** - the issue of res gestae was raised in respect of the statement *" I have killed Aggie"* it was held as follows:

> "*We think the contention that the statement 'I have killed Aggie' was not admissible as part of the res gestae is well founded because it was not made while the offense was being committed or immediately thereafter. It was said long after something had been done. This statement was so separated by time and circumstances from the actual commission of the crime. It was not as if while the offense was being committed in the room, the appellant had said something which was heard outside."*

It was however admitted as a confession, this was because it was made freely and voluntarily.

In Woledzi v. Akuffo-Addo [1982-83] GLR 421, after an accident, a police man made a sketch of the scene of the accident. The defendant wanted it as part of Res gestae. The court per Cecilia Koranteng-Addo held

> *"a contemporaneous event in law, was an event which took place at the same time as another event or immediately after the event so that the two happenings or events could be regarded as having taken place at the same time. A statement made contemporaneously with the occurrence of an event into which the court was inquiring was consequently admissible in evidence because it threw light on the fact in issue by reason of proximity in time, place or circumstances; such an item of evidence which was relevant on account of its contemporaneity with matters under investigation would be expressed as forming part of the res gestae. A contemporaneous statement must, however, also directly concern the event in issue. Consequently, on the facts of the instant case, the evidence of the police constable before the magistrate court, of an investigation which took place soon before that trial, could not be regarded as something that took place at the same*

time or contemporaneous with the event in respect of which the evidence was adduced."

Conclusion

Res gestate as an exception to hearsay rule is used to prove the contemporaneous state of mind of persons. The statement or action should be least recent and not after an interval which makes fabrication and concoction possible. Such statements should thus be exclamations forced out of witness by the emotion generated by the event rather than a subsequent narrative. The courts have however being stressing the need for close association in time, place and circumstance between the statement and the crucial event.

The four key conditions for holding the existence of Res gestae are

1. Contemporaneity or spontaneity of the statement. The spontaneity of the statement means that issues of unreliability and fabrication are mitigated. It also implies that the statement must have been made at the same time that the event was taking place.

   Consider the cases of
   a. R v. Bedingfield
   b. Duah v. The Republic
   c. Woledzi v.Akufo-Addo
   d. Ratten v. R

2. Immediately after the occurrence.

   If the statement was not made at the same time that the event occurred, it must have been made "immediately after" the occurrence of the event. In the case of *Teper* v *R* (1952) AC 480 , Lord Normand said (at 487) that "*it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so closely associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement*".

3. Stress of the event.

   The statement must have been made while the stress of the event or the statement was still dominating the mind of the declarant. Consider the telephone call in the case of **Ratten v. R**

4. Exception to stressed declarant: state of mind explanation.

It is not in all circumstances that the stress of the event will be operative but a statement which explains why the declarant acted the way he did may be admissible.

Dying Declarations

The principle on which this species of evidence is admitted is that they are declarations made in the 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 law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.

The test is not whether the declarant expected immediate death but whether he has abandoned all hope of life so that to him death was impending or imminent.

A dying declaration has been repealed but is, however, admissible as first-hand hearsay.

Section 125. Business records

(1) Evidence of a hearsay statement contained in a writing made as a record of an act, event,condition, opinion or diagnosis is not made inadmissible by section 117 if

(*a*) the writing was made in the regular course of a business;

(*b*) the writing was made at or near the time the act or event occurred, the condition existed, the opinion was formed, or the diagnosis was made; and

(*c*) the sources of the information and the method and time of preparation indicate that the statement contained in the writing is reasonably trustworthy.

(2) Evidence of the absence from records of a business of a record of an alleged act, event or condition is not made inadmissible by section 117 when offered to prove the non-occurrence of the act or event, or the non-existence of the condition, if

(*a*) it was the regular course of that business to make records of those acts, events or conditions at or near the time the act or event occurred or the condition existed and to preserve those records; and

(*b*) the sources of information and method and time of preparation of the records of that business show that the absence of a record is a reasonably trustworthy indication that the act or event did not occur or that the condition did not exist.

(3) For the purpose of this section, **"business"** includes a type of regularly conducted activity, business, profession occupation, governmental activity, or operation of an institution whether carried on for profit or not.

(4) A hearsay statement admissible in evidence under this section is not made inadmissible by the fact that it is not based on the personal knowledge of the declarant.

Section 126. Official records

(1) Evidence of a hearsay statement contained in writing made as a record of an act, event or condition is not made inadmissible by section 117 if

(*a*) the writing was made by and within the scope of duty of a public officer;

(*b*) the writing was made at or near the time the act or event occurred or the condition existed; and

(*c*) the sources of information and method and time of preparation indicate that the statement contained in the writing is reasonably trustworthy.

(2) Evidence of a hearsay statement contained in a writing made by the public officer who is the official custodian of the records in a public office reciting diligent search and failure to find a record, is not made inadmissible by section 117.

(3) A hearsay statement admissible in evidence under this section is not made inadmissible by the fact that it is not based on the personal knowledge of the declarant.

Section 127. Judgments

(1) Evidence of a final judgment in a criminal action of a Court adjudging a person guilty of a crime is not made inadmissible by section 117 when offered to prove a fact essential to the judgment.

(2) Evidence of a final judgment of a Court is not made inadmissible by section 117 when offered by a judgment debtor to prove a fact which was essential to the judgment in an action in which the judgment debtor seeks

(*a*) to recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment; or

(*b*) to enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or

(*c*) to recover damages for breach of a warranty substantially the same as the warranty determined by the judgment to have been breached.

(3) Where the liability, obligation or duty of a person other than a party is in issue in an action,evidence of a final judgment of a Court against that person is not made inadmissible by section 117 when offered to prove that liability obligation or duty.

(4) A judgment offered in evidence and admissible under this section is not made inadmissible by the fact that the judgment is an opinion or is not based on personal knowledge.

Section 128 and 129 have been discussed under traditional evidence

DOCUMENTARY EVIDENCE S.163-177

Introduction

Evidence need not always be in the form of an oral statement, it may also be in the for of a document. A document is “something on which things are written, printed or inscribed and which gives information.” Simply put, a document is any material with writing that contains information.

According to **R V DAYE [1908] 2 KB 333** a document is said to be “*any written thing capable of being evidence.., and. .. it is immaterial on what the writing may be inscribed. It might be inscribed on paper, as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before that it was on stone, marble, on clay; and it might be, and often was on metal’*

In modern times in IT language a document could even mean information on a tape, or video recordings, computer hard disk, film records, photographs. The effect of the various definitions is that the term ”document” is not restricted in meaning to only paper with writing on it. The most essential part of the definition is that the material referred to should contain information capable of being used as evidence.

However, before a document can be used as evidence, it must be relevant to the matters in issue and should have gone through authentication and identification. Questions and answers to determine the authenticity and identification of documents are, in practice, referred to as “laying the foundation” for tendering a document.

Primary/ Best Evidence Rule

The general rule is that any party seeking to present a document in court must present the original of that document (primary document) to be used in the proceedings. Stated differently, when the original of a document is available as evidence, it has to be produced unless there is reason acceptable to the court for the absence of the original. This principle is known as the **Best Evidence Rule**. Therefore a party seeking **to rely upon the content of a document** must adduce primary evidence (the original) of those contents, that is the document itself.

In **Omychund v Barker (1745) 1 Atk 21**, Lord Hardwicke stated that “ the judges and sages of the law have laid it down that *there is but one general rule of evidence, the best that the nature of the case will allow*”. One can reformulate this statement to mean that all evidence is admissible if it is the best evidence, and no evidence is allowed unless it is the best evidence.

Explanation of the best evidence rule: This rule is to the effect that where a document is offered in evidence, a copy or other secondary evidence will not be received in place

of the original document unless adequate explanation is offered for the absence of the original. **A party relying on a document must thus produce the original which is the best evidence.**

Rationale for the rule

This rule was meant to reduce the risks of fraud, mistake and inaccuracy which must result from proof either by the production of photocopies or parole evidence. The best kind of primary evidence is the original of a document in question.

Over time, this common law principle has been whittled down to the present state of the law as stated by Lord Denning in **GARTON v HUNTER [1969] 2 QB 37** where it was stated that

> *"It is plain that Scott LJ had in mind the old rule that a party must produce the best evidence that the nature of the case will allow and that any less good evidence is to be excluded. That old rule has gone by the board long ago.* ***The only remaining instances of it that I know that if an original document is available in one's hand, one must produce it. One cannot give secondary evidence by producing copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight and not to admissibility."***

In Ghana, the Evidence Act has codified the common law best evidence rule by proving at **Section 165 of NRCD 323 as follows:**

> **Evidence of Content of Writing**
>
> *Except as otherwise provided by this Act or any other enactment* ***evidence other than an original writing is not admissible to prove the content of a writing.***

Ghana's codification of the best evidence rule is not without exceptions and, most importantly, a wider meaning attached to what constitutes writing. Under the evidence act at Section 179 - "**Writing**" includes handwriting, typewriting, printing, photostating, photographing, mechanical or electronic recording, and any other means of recording upon a tangible thing, a form of communication or representation, including letters, words, pictures, sounds or symbols, or combinations of those things.

From the above, writings in Ghana include not just things written or typed on paper but include things such as photographs, videos and sound recordings. This means the principles and exceptions discussed under the Evidence Act are applicable to these things. For instance when a person seeks to tender a video recording in evidence, the provisions that deal with writings will be used to determine the admissibility of the video recording.

What is an original writing

Section 163 of the Evidence Act describes Original writings as follows:

> (1) An original of a writing **is the writing itself or a copy intended to have the same effect by the person executing or issuing it**.
>
> (2) An original of a writing which is a photograph includes the photographic film, a positive, negative or photographic plate of the film or a print made from the photographic film.
>
> (3) Where information contained in a writing is stored in a manner not readable by sight, as in a computer or a magnetic tape, a transcription readable by sight and proved to the satisfaction of the Court to accurately reflect the stored information is an original of that writing.

By reason of **section 163** on original writings and **section 165** on the content of the writing, it can safely be stated that in Ghana, where a party seeks to rely on the content of a writing, that party, as a general rule, must present the original of that document. There are, however, exceptions to this general position, and as such, there are situations in which a duplicate may be treated as an original.

What, then, is a Duplicate?

Section 164 of the Evidence Act defines a duplicate as follows:

> *Section 164. Duplicates*
>
> *A duplicate of a writing is*
>
> *(a) a copy produced by a technique which ensures an accurate reproduction of the original;*
>
> *(b) a copy produced by the same impression, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording or by chemical reproduction,* ***but does not include a copy reproduced after the original by manual handwriting or typing****.*

The condition that must be satisfied before a duplicate is treated as an original has been provided under Section 166 of the Evidence Act.

> Section 166- Duplicates treated as Original
>
> *"A duplicate of a writing is admissible to the same extent as an original of that writing, unless*

a. *A genuine question is raised as to the authenticity of the original or the duplicate or*

b. *In the circumstance, would it be unfair to admit the duplicate in place of the original."*

The above section was applied in one of the interlocutory decisions of the Supreme Court in the 2012 Election petition titled **NANA ADDO DANKWA V JOHN MAHAMA CIVIL MOTION NO: J8/44/2013 DATED 7TH FEBRUARY,2013**

On whether the Electoral Commission should be ordered to produce the original pink sheets to the Petitioners the court held per Adinyira JSC as follows

"*The Results Collation Forms and the Declaration Forms pink sheets (hereinafter documents) are public records in the official custody of the 2nd Respondent. The Petitioners as well as the 1st and 3rd Respondents like all other political parties and independent candidate that contested the presidential elections were given duplicate copies of the said documents through their representatives at the polling and collation centers and the so called strong room of the Electoral Commission in accordance with the provisions of C.I. 75.*

It is our thinking that where a party is already in possession of a copy of a document mentioned in another party's pleadings it is unnecessary to apply or for the court to make an order for inspection and making copies of the document in question. By virtue of the Evidence Act, 1975, NRCD 323, section 166, the duplicate copies of these documents are admissible to the same extent as the originals in the custody of the 2nd Respondents.

Section 166 states:

"A duplicate of a writing is admissible to the same extent as an original of that writing, unless

a) *A genuine question is raised as to the authenticity of the original or the duplicate, or*
b) *In the circumstances it would be unfair to admit the duplicate in lieu of the original."*

The Petitioners have not raised any concerns about the duplicate copies given them at the collation centers and the strong room to necessitate this application. In the absence of any genuine question raised in the affidavit of the Petitioners

about the duplicates in their possession, we find this request for production and inspection and photocopying of the originals superfluous and unnecessary.

… For, it is undisputed that the Petitioners are in possession of duplicates of the said documents handed over to them and the other Presidential candidates, by the officers and or agents of the 2nd Respondent who is the official custodian of the originals after the collation of the election results at polling and collation centers and the strong room of the Electoral Commission.

In the circumstances, we hold that the Petitioners are sufficiently and well informed about the election results which had enabled them to mount this petition on grounds of malpractices in 4,709 polling stations based on the contents of these duplicate documents in their possession. The affidavit in support of the application does not disclose any need for the inspection and making photocopies of the originals of the documents. A refusal to grant this application would therefore not infringe their right to information under the said Article 21 (1) (f). From the foregoing we hold that the Petitioners have failed to make out a case for us to exercise our discretion in their favour. The application fails and it is hereby dismissed."

Exceptions

Copies, also known as secondary evidence may be admissible under certain circumstances. The circumstances under which each type is admissible will be discussed below:

1. Original lost-Section 167 –

> *"Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing if the originals are lost or have been destroyed, unless the loss or destruction resulted from the fraudulent act of the proponent of the evidence."*

When the original of a private document is lost, and reasonable and diligent efforts have been made unsuccessfully to find it, evidence other than the original writing will be allowed to provide the contents. The extent of diligence required will not be the same in all cases. A more thorough search will be required for a valuable document rather than an apparently useless one.

In **OWUSU V THE REPUBLIC [1972] 2 GLR 262-277** the accused was charged with the offences of forgery of four duplicate bank pay-in-slips and stealing. The original pay-in-slips which would have proved the alterations on the duplicate slip in respect of payments made by the appellant were not produced by the

prosecution and the explanation given by them was that the originals could not be traced at the bank, but there was no evidence of any proper search made with a view to tracing them. It was held as follows

> *the legal principle underlying the admissibility of secondary evidence of the contents of a document is that secondary evidence of a document is admissible when the original is lost or destroyed, but it must be shown that a proper search has been made for it. What is proper search depends on the nature and value of the document. A more careful search will be required for a valuable than for a useless document. Consequently, merely stating that the original pay-in-slips could not be traced, was not sufficient evidence to ground the adduction of secondary evidence in proof of their contents.*

2. Originals unavailable by judicial means-S.168

> *"Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing, if the original can not be obtained by an available judicial procedure, or if the persons having control of an original after receiving judicial process compelling production do not produce it."*

Where a court orders a party to produce a document and the party refuses to comply, the court may receive any evidence other than the original writing from the party who wished to rely on the original, denied him by the other party.

There may be several reasons why the document cannot be produced after the service of due notice such as the claim of privilege. Or the person who has the original is out of the jurisdiction and cannot be traced and served with the appropriate court process.

Whatever the reason for the failure, whether through deliberate disobedience or inconvenience or impossibility of production through the appropriate processes, the court would, as a substitute for the original writing, receive any other evidence.

3. Original under control of the opponent- opponent does not produce it.-S. 169

> *"(1) Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing, if at a time when an original was under the control of the opponent of the evidence, the opponent was given express or implied notice by the pleadings or otherwise, that the*

content of the writing would be a subject of proof at the hearing, and on request at the hearing the opponent does not produce it.

(2) Though a writing requested by one party is produced by another and is inspected by the party calling for it, the party calling for the writing is not obliged to introduce it as evidence in the action."

In **AMOAH V ARTHUR [1987-88] 2 GLR 87** it was held that

"The common law rule that only originals of documents were admissible to prove their contents had been given statutory recognition under section 165 of the Evidence Decree, 1975 (N.R.C.D. 323). The Decree however provided for two exceptions to the rule under sections 167 and 169. Section 167 allowed for [p.89] admissions of copies of documents in proof of their contents where the originals were lost or had been destroyed, provided the loss or destruction was not due to the fraudulent act of the proponent. And under section 169 copies were admissible if the originals were in the possession of the opponent and sufficient notice had been given him by the pleadings or otherwise that the contents of the document would be the subject of proof at the hearing and yet on request the opponent did not produce the original."

4. **Collateral writings – Sec 170**

Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing if the content of the writing is not closely related to a controlling issue in the action.

Secondary evidence is allowed if it refers incidentally only to the main issue. If such evidence is meant to establish the major issue then the original will be insisted on.

For instance: In a contract dispute, a witness refers to a letter they sent years ago to the other party, simply to show that they were in contact — not to prove the terms of the contract. That letter is collateral to the core dispute (the contract terms), so the witness can testify about it without producing the original.

5. Sec 171. Voluminous writings

(1) Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing if the originals consist of numerous accounts of other writings which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole.

(2) The Court may require that the accounts or other writings be produced in Court or be produced for inspection or copying by an adverse party.

For instance: Evidence of an entry in the station diary at a police station. It is practically impossible to present the whole station diary in court.

6. **Sec 172. Immovable writings**

   Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing if the original is of a nature that it can not be easily moved.

For instance: A tombstone

7. **Sec 173. Admitted writings**

   Evidence other than an original of a writing is admissible to the same extent as an original to prove the content of a writing if the contents of the writing have been admitted by the opponent of the evidence in writing or by testimony in the action.

8. **Sec 174. Copy treated as original**

   A copy of a writing is admissible to the same extent as an original to prove the content of a writing if an original and the copy have been produced at or before the hearing and made available for inspection and comparison by the Court and the adverse parties.

9. **Sec 175. Copies of official writings**

(1) A copy of a writing which is authorised by law to be filed or recorded and has in fact been filed or recorded in an office of a public entity or which is a public record, report, statement or data compilation is admissible to the same extent as an original to prove the content of the writing if

(a) an original or an original record is in an office of a public entity where items of that nature are regularly kept; and

(b) the copy is certified to be correct by the custodian or other person authorised to make the certification, and that certificate is authenticated or the copy is testified to be a correct copy by a witness who has compared it with an original.

(2) Where a copy which complies with subsection (1) cannot be obtained by the exercise of reasonable diligence, other evidence of the content of the writing is admissible to the same extent as an original.

10. Sec176- Bankers books

(1) A copy of a record made in the ordinary course of business by a bank is admissible to the same extent as an original to prove the content of the writing if the copy is testified to be a correct copy by a witness who has compared it with an original.

(2) Evidence that the record was made in the regular course of business or that the copy is a correct copy may be given by oral testimony or affidavit by a representative of the bank.

(3) A representative of a bank in an action to which the bank is not a party shall not be compelled to produce the original records of the bank or to appear as a witness concerning them unless the Court finds that fairness requires that compulsion.

(4) The Court may, on application, order a bank to allow a party to inspect or copy any records of the bank which concern the action, provided that reasonable advance notice is given to the bank.

(5) For the purposes of this section, a bank is a business registered in Ghana as a bank

PAROLE EVIDENCE RULE

The rule against parole evidence, sometimes referred to as estoppel by deed was stated simply and clearly by Bayley J in *Baker v. Dewey (1823) 1 B&C 704* in these words: **A party who executes a deed is estopped in a court of law from saying that the facts stated in that deed are not truly stated.**

As such a party to a written document cannot introduce oral evidence or other evidence to vary or change the terms of the document. In **BANK OF AUSTRALASIA V. PALMER [1897] AC 540** , it is stated that

> *"That parole testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract in which the parties have deliberately agreed to record any part of their contract."*

In the Ghanaian case of **Mouganie v. Yemoh [1977] 1 GLR 163** where in a land dispute, the court allowed witnesses to testify to contradict the contents of the documents. Amissah JA. referring to the case of Bank of Australasia v. Palmer stated:

> *"One of the complaints of the plaintiff against the decision of the trial judge is that he, the judge, accepted oral evidence to contradict a written document in circumstances where he was not at liberty to do so. The rule on this is well known. It is usually stated in connection with contracts but it equally applies to documents such as judicial records, transactions required by law to be in writing or other documents constituting a valid and effective transaction between parties. Lord*

Morris put the point [p.166] simply in Bank of Australasia v. Palmer [1897] A.C. 540 at p, 545, P.C. when he stated the agreement of both counsel

> *"'that parol testimony cannot be received to contradict, vary, add to or substract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract."*

It was not claimed that the Abafum quarter did not make the conveyance in question. It was not claimed that the document was void for mistake or illegality or was voidable on grounds of fraudulent or innocent misrepresentation. In the circumstances it was not in my view, with all due respect, open to the learned judge to receive, much less to accept, the oral evidence of the two witnesses that the land given to the plaintiff in that transaction was different from what the document itself said."

See also: **Wilson v Brobbey [1974] 1 GLR 250**

Additionally in **Duah v Yorkwa 1993-1994 1 GLR 217** the court stated that *Whenever there was a written document and oral evidence in respect of a transaction, the court would consider both the oral and the documentary evidence and often lean favourably towards the documentary evidence, especially where the documentary evidence was found to be authentic and the oral evidence conflicting.*

See also Peters v Peters 1963 2 GLR 182-211 where is was held:

> *"In Parteriche v. Powlet,18 it was stated that:*
>
> *"To add any thing to an agreement in writing by admitting parol evidence, which would affect land, is not only contrary to the statute of frauds and perjuries, but to the rule of common law, before that statute was in being."*
>
> *The parties to a deed are confined within the four corners of their document and in my judgment any parole evidence to contradict, vary, or add to the contents of the document is per se inadmissible and objection can be taken against it at any stage during the trial or on appeal."*

The parole evidence rule has been codified under the Evidence Act NRCD 323 and provided for under Section 177 and Section 25.

Section 25. Facts recited in written instrument

(1) Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the document, or their successors in interest.

Section 177. Extrinsic evidence affecting the contents of a writing

(1) Except as otherwise provided by the rules of equity, terms set forth in a writing intended by the party or parties to the writing as a final expression of intention or agreement with respect to those terms may not be contradicted by evidence of a prior declaration of intention, of a prior agreement or of a contemporaneous oral agreement or declaration of intention, but may be explained or supplemented,

(a) by evidence of consistent additional terms unless the Court finds the writing to have been intended also as a complete and exclusive stateme+-nt of the terms of the intention or agreement, but a will and a registered writing conveying immovable property shall be deemed to be a complete and exclusive statement of the terms of the intention of agreement;

and

(b) by a course of dealing or usage of trade or by course of performance.

(2) Subsection (1) does not preclude the admission of evidence relevant to the interpretation of terms in a writing.

(3) For the purposes of subsection (1),

(a) “a course of dealing” means a sequence of previous conduct between parties to a particular transaction which can fairly be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct;

(b) “a usage of trade” means a practice or method of dealing in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question;

(c) “course of performance” means, in respect only of a contract which involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, a manner of performance accepted or acquiesced in without objection.

EXPLANATION

The general rule provided by section 177 is that subject to the rules of equity,the document that embodies the terms constituting the intention of the parties is binding on them as concluded and that extrinsic or parole evidence will not be admitted to vary or contradict those terms. This is because the terms in the document are regarded as final and conclusive of what the parties had agreed upon or was on the mind of the parties when they entered into the agreement.

However there are exceptions, such as

1. When there are consistent additional terms
2. By trade usages or course of dealing or course of performance among the parties to the contract.
3. By the application of the rules of equity. This happens where a party is induced to enter into a contract by duress, undue influence or fraud. Such a party will be entitled to apply for the equitable remedy of rectification or cancellation of the document.

As regards Section 177(1)(a) which is "**evidence of consistent additional terms**" the lawmaker envisages a situation where after an agreement has been reduced to writing, parties are free to enter into a new contract not in writing that may waive, dissolve or annul the former agreement or in any manner add to, subtract from, or vary or qualify the terms and thus make a new contract altogether. In simple terms, a subsequent agreement will be admissible to contradict a final agreement.

Additionally, evidence can be adduced for the purpose of interpretation as stated in Section 177(2) of the Evidence Act. In **PY Atta & Sons Ltd v Kingsman Enterprises Ltd 2007-08 SCGLR** the court in determining whether a document was a sublease or an assignment the court stated as follows:

> *"No one can early tell the intentions of parties. Even the devil, it is said, does not know the state of a man's mind. In conflicting situations like those in the instant case, the process of determining the intentions of the parties should be objective. "Objective approach" in this context implies the meaning that the words in the document will convey to a reasonable person seised with the facts of the case. In such exercise, the entire document, the effect it has on the parties, the conduct of the parties and the surrounding circumstances will have to be taken into account. The principles were aptly summed up as follows in Geneva v Anglo-Iranian Oil Co Ltd [1953] 1 WLR 379 or [1954] 1 WLR 496 at:*
>
> > *"The construction of written instruments is a question of mixed law and fact. The expression 'construction' as applied to a document includes two things; first, the meaning of the words and secondly their legal effect or the effect which is to be given to them."*
>
> *Where two or more clauses in a document are found to be inconsistent, effect is to be given to that which is calculated to give real effect to the intentions of the parties. This rule straightaway raises issues of extrinsic evidence. The commonest rule is that extrinsic evidence is not admissible to vary or alter the words in a document. But this rule has several exceptions, one of which is that where the*

document is conflicting on the face of it, extrinsic evidence may be admitted to resolve the conflict."

The court concluded as follows:

"The most serious factor that militated against the case of the respondent was the impression given that it was when he talked to his legal advisors that he realised that he had acquired an assignment and that he did not need the permission of the appellant to redevelop the land. When his own lawyer testified in court, he stated categorically that in his view the agreement could be interpreted to be a sublease or an assignment. That was a very damning stand to take because it showed that until the respondent took legal advice he knew that he had acquired a sublease. A sublease was what he negotiated for and that was what he took and subsequently lived by. At that time, assignment was not on his mind. That was not his intention. By his own showing, he took advantage of the use of the expression "unexpired residue" and concluded that he will benefit from an assignment and that was why he changed his position to operate as an assignee. That should not be countenanced by any court of equity."

ILLITERACY AND PROOF OF DOCUMENTS

As a general rule when a person of full age and sound body signs a document, that person would be bound by that document. In the case of **Wilson v Brobbey [1974] 1 GLR 250** the general rule was established that where parties had embodied the terms of their contract in a written document extrinsic or oral evidence would be inadmissible to add to, vary, subtract from or contradict the terms of that instrument. Thus a party of full age and understanding would normally be bound by his signature to a document, whether he read or understood it or not, and the defendant was so bound.

This principle was also stated in **INUSAH vs. DHL [1992] 1 GLR 267** HC where it was held that:

"the general rule was that when a document containing contractual terms was signed, then in the absence of fraud or misrepresentation, a party of full age and understanding was bound to the contract to which he appended his signature. In such a case it would be immaterial whether he read the document or not".

This principle was also stated in the case of **Kwamin v. Kufour (1914) P.C 74** where Lord Kinnear reading the advice of the Privy Council said:

" . . . when a person of full age signs a contract in his own language his own signature raises a presumption of liability so strong that it requires very distinct and explicit averments indeed in order to subvert it."

This general rule is subject to some exceptions; one such exception is where the contents of a document are to be proved against an illiterate person. The law governing documents to be proved against an illiterate is the Illiterates' Protection Act, 1912 CAP. 262. Section 3 of this enactment provides that:-

> *"Conditions for persons writing letters for illiterates*
>
> *A person writing a letter or any other document for or at the request of an illiterate person, whether gratuitously or for a reward, shall*
>
> *(a) clearly and correctly read over and explain the letter or document or cause it to be read over and explained to the illiterate person,*
>
> *(b) cause the illiterate person to sign or make a mark at the foot of the letter or the other document or to touch the pen with which the mark is made at the foot of the letter or the other document,*
>
> *(c) clearly write the full name and address of the writer on the letter or the other document as writer of it, and*
>
> *(d) state on the letter or the other document the nature and amount of the reward charged or taken by the writer for writing the letter or the other document, and shall give a receipt for the reward and keep a counterfoil of the receipt to be produced at the request of any of the officers named in section 5…"*

WHO IS AN ILLITERATE?

An illiterate has been described in the case of **Zabrama v. Segbedzi [1991] 2 GLR 221,** where the court referred to the case of **Brown v Ansah HC Cape Coast 10 April 1989 (unreported)** where it was stated that:

> *"It is true the Act does not define who an illiterate is.* ***But I think whether a person is to be considered as literate or illiterate in this context, it must be related to the language in which the document is prepared, that is the ability to read and write the said language. In this case it is English. A person who can perfectly read and write the Ewe or Fanti language may be an illiterate within this context if the will is written in English which he can neither read nor write. It is the ability to read and write the language in which the document is written which to me is relevant and not whether the fellow can be classified as semiliterate or demi-semi-literate.*** *The evidence is that the testator cannot read and write English. He is to me an illiterate within the context of the law."*

From the above, it is clear that it is not one's ability to read the English language that makes a person literate. Rather, one's ability to read the language in which the document is written determines their literacy. Therefore, if someone is unable to read a document because they do not understand the language it is written in, that person is considered

illiterate in relation to that document. As such, an English Professor is illiterate as relates a document written in French if he cannot read and understand the language.

PROOF OF A DOCUMENT AGAINST AN ILLITERATE

The general principle relating to a document to be proved against an illiterate is that the document must contain a jurat clause. In **Waya v. Byrouthy** (1958) 3 W.A.L.R. 413 at 417 Adumua-Bossman J. (as he then was) said of such documents:

> *"As has always been held in this court, the burden is always on the party relying on the document to prove that it was read over (and, if necessary, interpreted) to the illiterate person, and that it was apparently understood by him."*

And in **Fori v. Ayirebi [1966] G.L.R. 627 at 643**, SC Ollennu J.S.C. reading the judgment of the court, held that prima facie on failure to comply with the provisions of section 4 (1) of Cap 262, or to lead evidence that the provisions have been complied with, the illiterates who made their marks would not be bound by the documents.

Can a document that has not complied with section 3 of CAP 262 be used against an illiterate person, that is where there is no statement on the face of the document that it has been read and interpreted to the illiterate person. Failure to comply with section 3 of CAP 262 meant that the illiterate did not understand the nature and effect of the document before making his mark. In **Kwamin v. Kuffuor,** Lord Kinnear statement the law as follows:

> *" . . . there is no presumption that a native of Ashanti, who does not understand English, and cannot read or write, has appreciated the meaning and effect of an English legal instrument, because he is alleged to have set his mark to it by way of signature. That raises a question of fact, to be decided like other such questions upon evidence."*

Until recently, the Courts have disagreed on the **legal effect of non-compliance with section 3 of CAP 262**. In cases like **Kwamin v. Kuffour, Waya v. Byrouthy and Foli v. Ayirebi,** the Courts held that the provision of section 3 of CAP 262 was mandatory and that failure to provide a jurat on a document prepared for an illiterate person or blind person meant that they were not bound by them. However, the need to protect illiterate persons from being exploited by persons who prepare documents for them did not import the use of Section 3 of CAP 262 to encourage illiterate persons to escape from their responsibility under contracts without a jurat.

Where there is evidence that the illiterate person knew of the content of the document before execution, the Courts have held that the failure to comply with Section 3 of CAP 262 must not render the document void.

The case of **Zabrama v. Segbedzi** departed from the strict construction of section 3 and held that failure to provide a jurat only raised a presumption that the document was not read over and explained to the illiterate person. The Court held thus:

"*when an illiterate attest to the execution of a document as a witness by making his mark on it there is no presumption that he has any knowledge of the contents of the document. The presumption is rather the other way round, and a heavier onus rests upon any person claiming that an illiterate who has attested to a document is aware of the contents of such document to prove it"*.

However, the party seeking to enforce the document against the illiterate person may lead evidence to rebut the presumption.

As stated earlier, the Courts have not always spoken in unison with respect to the legal effect of non-compliance with section 3 of CAP 262. In the case of **In re Kodie Stool; Adowaa v. Osei [1998-99] SCGLR 23** , the Supreme Court refused to follow Zabrama and held at holding 2 as follows:

" The provisions of section 4 of the Illiterates Protection Ordinance Cap 262 were mandatory and the matters required to be complied with must have appeared on the face of the letter or document. Without strict fulfilment of the section any document such as exhibits A, B and C tendered by the plaintiff, allegedly executed by an illiterate person had no probative value and was to all intents and purposes, invalid."

However, in a subsequent case, Supreme Court in **Antie & Adjuwaah v. Ogbo [2005-2006] SCGLR**, departed from its decision in In re Kodie Stool and restated the position in Zabrama that failure to provide a jurat only raised a rebuttable presumption that the contents of the document were not read and explained to an illiterate person before execution.

However, the party seeking to enforce the document against the illiterate person may lead evidence to rebut the presumption. See Section 20 of NRCD 323.

The current position on the jurat in an agreement was stated by Wood C.J in **Duodu and others v Adomako & Adomako** [2012] 1 SCGLR 198 that the courts should not make a fetish of presence or otherwise of the presence or otherwise of a jurat, because its presence was merely a rebuttable presumption of the facts alleged in the document. As such, even in the absence of a formal jurat, it should be possible for the person seeking to enforce a document to adduce extrinsic evidence to prove that the illiterate fully understood and appreciated the contents and legal effect of the document which he/she had attested. The court also added that though CAP 262 was enacted to protect illiterates against unscrupulous opponents and their fraudulent claims, it should not be permitted to be used as a cloak by illiterates against innocent persons. Thus even where there was no formal jurat, an illiterate who fully appreciates the contents of an agreement and feigns ignorance will not obtain relief. Wood C.J. restated the position of the law as follows:

"The clear object of the Illiterates Protection Ordinance, Cap 262 (1951 Rev.) is to protect illiterates for whom a document was made against unscrupulous opponents and their fraudulent claims; those who may want to take advantage of their illiteracy

to bind them to an executed document detrimental to their interests. ***At the same time, the Ordinance cannot and must not be permitted to be used as a subterfuge or cloak by illiterates against innocent persons. Conversely, notwithstanding the absence of a jurat, the illiterate person who fully appreciates the full contents of the freely executed document, but feigns ignorance about the contents of the disputed document, so as to escape legal responsibilities flowing therefrom, will not obtain relief. As noted, the presence of a jurat at best raises a rebuttable presumption only, not an irrebuttable one****. Thus, any evidence which will demonstrate that the illiterate knew and understood the contents of the disputed document, that is the thumb printed or marked document, as the case may be, should settle the issue in favour of the opponent. In other words, in any action****, it should be possible for the one seeking to enforce the contents of the disputed document to show that despite the absence of a formal jurat, the illiterate clearly understood and appreciated fully the contents of the document he or she marked or thumb printed.****"*

Recently, the Supreme Court in **Sodzedo Akuteye and others vrs Adjoa Nyakoah** Civil Motion No J4/58/2017 23rd May 2018 stated the current position as follows

"*As is evident from the terms of this provision, there is indeed no requirement that there be a jurat clause certifying that the document was read over and explained to the illiterate person. All it does is specify certain formalities that the physical author of the document must undertake. The jurat clause simply developed as a practice to evidence that the writer of the document has indeed fulfilled his/her formal statutory obligation under the Act, towards the protection afforded by the Act.* ***That is why the presence of the interpretation clause creates only a rebuttable presumption that the document is the deed of the illiterate person. Conversely, that is also why the mere absence of a jurat clause cannot per se vitiate the deed of an illiterate person without any tangible proof that he/she did not understand the contents****. Section 3 of Cap 262, is thus a partial shield rather than a total sword."*

FRESH EVIDENCE ON APPEAL

It is the principle of the law that parties must adduce all the relevant evidence in the case during trial. This is the reflection of the rule '*interest republica pta sit finis litium* ' (it is in the public interest that litigation must come to an end).

It is not generally permissible for a party after the completion of the trial at the court of first instance to seek to adduce evidence after a case has been completed.

The law however, recognized that in certain circumstances, the courts will permit a party to adduce fresh evidence on appeal. However, a party who proposes to offer fresh evidence on appeal is required to satisfy certain conditions.

In A-G v Marshall", Lord Justice Denning stated the rule thus:

"It must be shown that:

1. the evidence could not have been obtained with reasonable diligence for the use of the trial;

2. the evidence must be such that if it was given at the trial it would probably have an important influence on the result of the case, although it need not be conclusive;

3. the evidence must be such as is presumably to be believed, or other words it must be apparently credible, though it need not be incontrovertible.

In Ghana the opportunity to adduce fresh evidence in appeals has been provided for by the rules of court and further discussed in a number of cases.

COURT RULES

Order 51 rule 13 of C.I 47

13. New evidence on appeal

It is not open as of right to any party to an appeal to adduce new evidence in support of the party's original case, but for the furtherance of justice, the Court may allow or require new evidence to be adduced, and the evidence shall be either by oral examination in court or by affidavit or by deposition taken before an examining commissioner as the Court may direct, but the new evidence shall be evidence which was not within the knowledge of the party or could not have been produced after the exercise of due diligence by the party at the time when the judgment was given or that order made.

Court of Appeal rules CI 19 Rule 26

26. New evidence on appeal

(1) It is not open as of right to a party to an appeal to adduce new evidence in support of the original case but, in the interests of justice, the Court may allow or require new evidence to be adduced.

(2) Evidence allowed under subrule (1) shall be in the form of an oral examination in Court, an affidavit or a deposition taken before an examiner or commissioner who the Court may direct.

(3) A party may, by leave of the Court, allege the facts essential to the issue that have come to the knowledge of that party after the decision of the Court below and adduce evidence in support of the allegations.

SUPREME COURT RULES C.I 16 RULE 76

Rule 76—New Evidence.

(1) A party to an appeal before the Court shall not be entitled to adduce new evidence in support of his original action unless the Court, in the interest of justice, allows or requires new evidence relevant to the issue before the Court to be adduced.

(2) No such evidence shall be allowed unless the Court is satisfied that with due diligence or enquiry the evidence could not have been and was not available to the party at the hearing of the original action to which it relates.

(3) Any such evidence may be by oral examination in Court, by an affidavit or by deposition taken before an examiner as the Court may direct

CASE LAW:

Benin JSC in ***Rev Rocher De-Graft Sefa & Anor v Bank of Ghana*** laid down the principles thus

i. The evidence was not available to the applicant at the trial;

ii. The evidence could not have been obtained by the applicant upon reasonable diligence for use at the trial;

iii. Had the evidence been adduced at the trial it would have had an important influence on the result of the case, although it need not be decisive;

iv. Such as is presumably to be believed, in other words evidence of a sort which is inherently not improbable.

This principle was also stated in ***Poku v Poku***.

Also in respect of criminal matters in the case of **MAXWELL GYASI VS THE REPUBLIC** Criminal Motion No J8A/7/2018 dated 8th April 2013 where the court stated:

"It was first laid down in the oft-quoted case of DOMBO & ORS. V. NARH [1970] CC 68 CA in which the Court of Appeal held that the principles should be strictly observed before the court must exercise its discretion in granting the application.

The Court of Appeal laid down the Basic principles as follows:-

(i). The evidence must be evidence which was not available at the trial .

(ii). It must be evidence relevant to the issue.

(iii). It must be credible evidence, ie. well capable of belief.

(iv). If the evidence is admitted, the court will, after considering it, go on to consider whether there might have been a reasonable doubt as to the guilt of the appellant if that evidence have been given together with other evidence at the trial."

In the Maxwell Gyasi case above, the applicant filed an application to adduce fresh evidence on appeal to the Supreme Court, the evidence was a birth certificate and an Admission Register of Kumasi Modern International school to prove that at the time the accused to 21 years by the High Court Kumasi he was below 18 years and for that matter could not have been tried and sentenced in the manner which completely meant for adult offenders. The court in dismissing the application stated thus:

> *"It is clear in this application that all the exhibits which learned counsel for the applicant relied on to persuade this court were indeed available at the trial. A Birth Certificate and School records obviously were all available at the time the applicant was arraigned at the trial Court. The Court of Appeal in their ruling also*

formed the view that the basic requirements for adduction of fresh evidence had not been satisfied and proceeded to dismiss the application.

I have also considered these exhibits and I have come to the same conclusion that these exhibits were available at the time of the trial. Indeed, learned counsel for the applicant himself said that he unearthed the exhibits after he had taken over the brief. This could probably be lack of due diligence on the part of applicant's earlier counsel at the trial stage. It is sad that the exhibits were not made available at the trial stage but this court is not to depart from the laid down principles to allow fresh evidence to be adduced."

In **Karikari v Wiafe**, the Court of Appeal on the issue of admissibility of fresh evidence on appeal per Jiagge JA stated thus:

"The general rule was that each party in an action before the court must produce all the relevant and material evidence in support of his cause of action. The court would not permit a party to produce his evidence piecemeal in a series of actions; litigation must have end. However, there were a few exceptions to the general rule and one such rule was where material evidence that might have altered the conduct of the trial was discovered after the trial. The court might in such a case, grant leave to adduce fresh evidence at the hearing of the appeal provided there was satisfactory proof that the failure to produce the material evidence at the trial was not due to lack of diligent search on the part of the appellant".

In this case, the applicant in his affidavit in support of his motion seeking leave to adduce fresh evidence averred that during the hearing of the original suit in the High Court, one Kwabena Pie gave evidence for the plaintiff-respondent and revealed that he had one time been sued in connection with the Aboabogye farm, one of the farms in the present dispute at the District Court.

Following Kwabena Pie's evidence, the appellant applied for copies of the proceedings before the District Court to examine the nature of the evidence given on the ownership of the farm in question. By the time the applicant received the record of proceedings, judgment had already been given against him and he appealed against the judgment. On examining the record of proceedings, the applicant discovered that the evidence given by Kwabena Pie at the District Court on the ownership of the farm was quite contrary to the evidence he gave on the same issue before the High Court.

The applicant argued that if Kwabena Pie's evidence at the District Court had been available, the trial at the High Court would have taken a different turn and therefore prayed the court to grant leave to adduce fresh evidence. The Court granted his prayer holding that there was nothing to show that his failure to make the evidence available at the High Court was due to lack of diligent search on the part of the applicant.

This case must be compared with **REPUBLIC VRS ADAMA- THOMPSON EX PARTE AHINAKWAH II**

The Applicant sought to adduce newspaper publications on appeal. The Supreme Court refused the application on the basis that the applicants had not satisfied the established criteria for the grant of leave to adduce fresh evidence.

The Supreme Court speaking through Dotse JSC stated as follows

"The Supreme Court was called upon to make such a determination in the case of **Poku v Poku [2007-2008] SCGLR 996** when it considered rule 26 (1) & (2) of the Court of Appeal Rules, 1997 (C.I. 19) which are in pari materia to rule 76 of (C. I. 16) already referred to supra.

The Supreme Court held on the core issues raised in the appeal by a majority decision of 4-1 as follows:

"On construction, the adduction of fresh or new evidence in the interest of justice" as provided in rule 26 (1) of the Court of Appeal Rules, 1997 (C.I. 19) was clearly delimited by the factors delineated in rule 26 (2). ***Consequently, in an application to lead fresh or new evidence before the Court of Appeal, the first criterion, which an applicant ought to establish, was whether the evidence sought to be adduced, was neither in the possession of the applicant nor obtainable by the exercise of reasonable diligence or human ingenuity before the impugned decision was given by the lower court. It was only when that first hurdle had been surmounted, that the court should proceed to determine the other pertinent question of whether or not the intended evidence would have a positive effect on the outcome. If the first criterion was not met, no useful purpose would be served by examining the other factors".***

What is deducible from this ***Poku v Poku*** case referred to supra, is that, the rule on adduction of new evidence exists to assist an applicant who has exhibited signs that he has made really strenuous and genuine efforts at getting this evidence but has met obstacles or that the evidence was not available to the party at the material time.

The rule on adduction of new evidence is therefore not one which is of general application to a party who desires same. The court is mandated under the rules, to be satisfied that the criteria set out above are met before it can be considered."

The Court concluded thus

"*In essence, we are of the view that, the new evidence being sought to be adducted is not in the interest of justice and will also becloud the issues before the court. That is to say, the new evidence apart from not advancing the course of justice in this case is also not relevant to the determination of the issues before this court*"

RESPONDENT PERMITTED TO GIVE FRESH EVIDENCE ON APPEAL

Under some exceptional circumstances a Respondent who may be permitted to give fresh evidence on appeal provided the Appellant has previously been granted leave to adduce fresh

evidence on appeal. This legal position was stated by the Supreme Court **in Ogyeedom Obranu Kwesi Atta VI vs Ghana Telecommunication Co Ltd and anor Civil Motion No J8/37/2021 dated 31st March 2021** where the Court speaking per Kulendi JSC stated:

> *"We are however of the view that in addition to the said criteria, if the Applicant, in an application to adduce fresh evidence on Appeal is the Respondent to the Appeal as in the instant case, then such an Applicant must demonstrate, as a pre-condition, that the Respondent to the application, has been granted leave to adduce fresh evidence and that unless the Applicant is also given an opportunity to adduce fresh evidence in rebuttal, the new evidence of the Respondent is likely to occasion new findings by this Court which may result in an overturning of a the judgement appealed.*
>
> *Generally, in applications of this kind, the Applicant, whether an Appellant or a Respondent must sufficiently state or demonstrate the nature of the fresh or new evidence sought to be adduced at the hearing of the appeal. Also the Applicant must give reasons why the evidence was not produced at the trial, namely that it was* ***not necessary, relevant or compelling*** *and that it was not obtainable despite best efforts and/or reasonable diligence. See:* ***Boasiako V Panin Ii [J6/1/2012), (Judgment delivered on 22 January 2013,), His Lordship, Date-Baah Jsc; Republic Vs. Thompson And Others (J8/92/2011) (15 February 2012) Dotse JSC, R V Gbadamosi [1940] 6 Waca 83, Rex V Oton [1946-1949] 12 Waca 212-214, Nash V Rochford Rural District Council [1917] 1 Kb 384 At 393***
>
> ***Accordingly, we are of the view that in order to motivate the exercise of our discretion in favour of an Applicant who is the Respondent to the substantive appeal, such an Applicant must satisfy the following conditions****:*
>
> 1. ***That the Appellant in the substantive appeal has been permitted to adduce fresh evidence;***
> 2. ***That the fresh evidence the Appellant has adduced or proposes to adduce, unless rebutted, is likely to occasion a reversal of the findings of the Trial Court.***
> 3. ***That the reversal of the findings of the Trial Court that will be occasioned by the fresh evidence abducted or about to be introduced by Applicant's adversary is likely to result in a reversal of the judgement of the Trial Court in favour of Applicant's opponent;***
> 4. ***That the new evidence the Applicant proposes to adduce has been made necessary, relevant and compellable by the fresh evidence that the Respondent has adduced or is about to adduce.***
> 5. ***That prior to the grant of leave to the Respondent to adduce fresh evidence, the Applicant could not reasonably have foreseen the necessity and relevance of the fresh evidence sought to be adduced;***

6. ***That it is in the interest of justice for such new evidence to be allowed.***

In contrast, if the party who applies for leave to adduce fresh evidence under Rule 76 of C.I 16, is the Appellant in the substantive appeal, the applicable criteria would be as set out in the Rev. Rocher De-Graft Sefa and Poku vrs. Poku cases (supra). These criteria which are less onerous follows that which were enunciated by Denning LJ in ***Ladd v Marshall [1954] 3 All ER 745 at page 748*** *as follows:*

"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it needs not be decisive: Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

It must therefore be noted that the criteria that an Applicant who is the Respondent to an appeal must satisfy in order to succeed on an application for the leave of this Court to adduce fresh evidence is of a higher threshold than that imposed on an Applicant who is simply the Appellant in the substantive appeal.

There is the need to ensure that Applicants who seek leave to adduce fresh evidence on appeal comply with the above principles of judicial guidance laid by the rules of court and case law so that litigation is not unduly prolonged, with needless attempts to lead fresh evidence on appeal."

QUESTION 1 – SUPPL MARCH 2021