

UNIVERSITY OF PORT HARCOURT  
FACULTY OF LAW

LAW OF EVIDENCE & PROCEDURE I

MODULE I:- DEFINITION, SCOPE, CLASSIFICATION AND SOURCES  
OF NIGERIAN LAW OF EVIDENCE

**Definition & Scope**

In a simple pedestrian sense, evidence could be said to signify that which makes apparent the truth of a matter in question. Evidence, however enjoys a wider and more elaborate meaning in a legal or judicial sense. According to the learned legal writer PHIPSON, evidence means the testimony whether oral, documentary or real, which may be legally received in order to prove or disprove some facts in dispute. To Professor Cross, evidence is 'the testimony, hearsay, documents, things and facts which a court will accept as evidence of the facts in issue in a given case'. There is also the definition of Professor Best that evidence is any matter of fact, the effect, tendency or design of which is, to produce in the mind, a persuasion, affirmative or disaffirmative, of the existence of some other matter of facts. He specifically described judicial evidence as evidence received by courts of justice in proof or disproof of facts the existence of which comes in question before them.

In Onya v. Ogbuji (2011) All FWLR (Pt. 556) 493 at 517, the Court of Appeal defined evidence as follows: 'The term evidence has been aptly described as any specie of proof, or probative matter legally presented at the trial of any issue, by the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc, for the purpose of inducing belief in the mind of the court or jury as to their contentions'. In another case, Kolo v. Lawan (2011) All Fwlr (Pt. 597) 725, evidence was defined as any type of proof or probative matter legally presented at the trial of an issue, by the act of the parties, and through the medium of witnesses, records, documents, exhibits, concrete objects, etc for the purpose of inducing belief in the mind of the court or jury as to their contentions. It is with all these in mind that a learned legal writer summarized the law of evidence as follows:- 'The law of evidence encompasses rather broader functions. It includes rules regulating the means and by which facts may be proved to the satisfaction method of the court; it allocates burdens of proof as between the parties, and it prescribes the standard of proof which a court must require before it can make a finding on a given issue. The law of evidence also includes within its broader compass

rules prescribing the relative functions of judge and jury in respect of the receipt and evaluation of evidence'.

It should be noted that evidence is a virtually indispensable tool in the determination of any matter or dispute. This is especially so because judges and jurors are not magicians or necromancers who can resolve a dispute merely by looking at the faces of the parties, rather, they rely and depend on the evidence presented or adduced before them by the parties. This is why the Supreme Court in Neka B.B.B. Manufacturing Co. Ltd v. A.C.B. Ltd (2004) All FWLR (Pt. 199) 1175 at 1191 held that neither pleadings nor the most forensic eloquence of a brilliant lawyer can be a substitute for evidence which in point of fact remains the fountainhead of the law.

Judicial evidence consists of the testimony, hearsay, documents, things and facts which a court will accept as evidence of the fact in issue in a given case. By Section 258 of the Evidence Act, 2011, a "Fact" includes:

- (a) Anything, state of things or relation of things capable of being perceived by the senses; and
- (b) Any mental condition of which any person is conscious.

In other words, a fact is anything which is subject of perception or consciousness.

A "fact in issue" by the aforesaid Section includes any fact from which either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows. It is the proof of a fact in issue to the satisfaction of the court that entitles a party to judgment.

Evidence is generally different from law, opinion and legal arguments.

### Sources of Nigerian Law of Evidence

The Evidence Act is the primary and most basic source of the law of evidence. Prior to 1945, Nigerian courts were applying the received English law which was made up of the common law, the English doctrines of equity and the statutes of general application in force in England as at 1<sup>st</sup> January, 1900. This received law invariably includes the English law of evidence. In 1943 however, the Evidence Ordinance was promulgated, but was made to come into force on 1<sup>st</sup> June, 1945. In 1958, the Evidence Ordinance was re-enacted as the Evidence Act and was made Cap. 112 of the 1990 Laws of the Federation of Nigeria. This Act was in force in the country until 3<sup>rd</sup> June, 2011 when it was repealed and replaced with the Evidence Act, 2011.

\*The repealed Evidence Act, Cap 112 was adapted from the Digest of the law of Evidence by Sir. James Fitzgerald Stephen which in itself was an attempt

to codify the English common law rules of evidence. The interesting thing about the repealed Evidence Act was that during its promulgation, Nigeria was a federation of regions with powers to separately legislate on evidence. This continued even under the 1960 independence constitution and the 1963 Republican constitution. But from the 1979 constitution up till, the present 1999 constitution as amended, evidence has been made a subject in the exclusive list with the effect that only the National assembly can legislate on evidence. The effect of this is that any state legislation which however dabbles into the realm of evidence is pro tanto ultra vires and therefore null and void.

Apart from the Evidence Act, other statutes in force both within and outside the country can be said to be sources of the law of evidence. Note however that unlike the repealed Evidence Act which permitted the courts to rely on other statutes, rules of court and other principles of law of evidence, either from the common law or from other jurisdictions, Section 3 of the Evidence Act, 2011 has completely outlawed that practice. In other words, Section 3 of the Evidence Act, 2011 has limited the admissibility of evidence in or by Nigerian courts to "evidence that is made admissible by any other legislation validly in force in Nigeria". What this in effect means is that all previous decisions which have held that foreign statutes and principles on evidence are applicable in Nigeria are no longer good authorities.

It must be noted that the Evidence Act, 2011 has equally added another source to the Nigerian law of evidence which is could be found in Section 255 of the Act. According to the said section, *'the minister charged with responsibility for justice may, from time to time, make regulations generally prescribing further conditions with respect to admissibility of any class of evidence that may be relevant under this Act'*.

In conclusion, the sources of Nigerian law of evidence include the following:

- 1) The Evidence Act.
- 2) Other local or Nigerian statutes or rules of courts.
- 3) Judicial opinions especially of judges and justices of superior courts of record in Nigeria.
- 4) Judicial opinions of courts of foreign jurisdiction, where applicable and persuasive enough.
- 5) The English common law or principles of countries with identical or similar provisions with our Act which are accepted in Nigeria through judicial decisions; and
- 6) Regulations, practice or reference directions made by the Attorney-General of the Federation.

## Courts bound by the Evidence Act

The relevant provisions of the Evidence Act 2011 on this sub-head are those of Section 256(1) thereof. The said Section provides as follows:

'256. (1) The Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria, but it shall not apply to

- a) Proceedings before an arbitrator; or
- b) A field general court martial; or
- c) Judicial proceedings in any civil cause or matter in or before any sharia court of appeal, customary court of appeal, area court or customary court unless any authority empowered to do so under the Constitution, by order published in the gazette confers upon any or all sharia courts of appeal, customary courts of appeal, area courts or customary courts in the Federal capital territory Abuja or a State as the case may be, power to enforce any or all the provisions of this Act.

(2) In judicial proceedings in any criminal cause or matter in or before an Area court, the court shall be guided by the provisions of the Criminal procedure Code Law.

(3) Notwithstanding anything in this Section, an Area court shall, in judicial proceedings in any criminal cause or matter, be bound by the provisions of sections 138-140'

Note that Customary courts have also been held bound by the provisions of Sections 138-140 of the Evidence Act. Even where a court is not bound by the provisions of the Evidence Act, to ensure fairness and impartiality, it must allow itself to be guided by it. See *Kanumbu v. Bunu* (2006) All FWLR (Pt. 300) 1709.

## Classification of Evidence

1. **Primary Evidence**:- This is the best or highest kind of evidence which the law regards as affording the greatest certainty to a fact in issue. It is used more as a sub-classification of documentary evidence and refers to a document itself or its original been produced before the court for inspection. It is this type of evidence which gave birth to the best evidence rule which stipulates that the best evidence of the contents of a document is the document itself been laid bare before a court.
2. **Secondary Evidence**:- This is any evidence given in respect of a document other than its primary evidence. Examples of primary

evidence includes photocopy of a document oral account of the contents of such a document.

3. **Direct Evidence**:- Direct evidence is the evidence of a witness who saw and watched an act in issue. This type of evidence, as opposed to circumstantial evidence, is evidence which if believed, proves a fact in issue without the court resorting to inference or presumption. Another name for this type of evidence is positive evidence.
4. **Circumstantial Evidence**:- This is the direct opposite of direct evidence. It refers to evidence of relevant facts from which the existence or non-existence of facts in issue may be inferred. As was held in *Igabale v. State* (2005) All FWLR (Pt. 285) 568, circumstantial evidence is evidence which does not directly prove the existence of a fact or happening, but rather gives rise to a logical inference that such a fact exists or that the happening occurred. Further to the above, circumstantial evidence could also mean a combination of facts creating a network from which there is no other escape. For instance, if in a charge of murder, the deceased was alone with the accused in a room where she was later found dead and during their stay in the room, the deceased was heard groaning in pain, before the accused was seen bolting away with a blood-stained matchete, all these would constitute circumstantial evidence from which the guilt of the accused could be inferred.
5. **Hearsay Evidence**:- This is a species of indirect evidence which is given by somebody based on an information which he got from another person who is not himself called as a witness. According to Section 37 of the Evidence Act, 2011, hearsay means a statement—
  - (a) Oral or written made otherwise than by a witness in a proceeding; or
  - (b) Contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.

As a general rule, hearsay evidence is inadmissible. This rule however admits of some exceptions.
6. **Real Evidence**:- This is also known as objective or demonstrative evidence. It refers to material objects, things and monuments other than documents produced for the inspection of the court. It could be

a place, a person, animal or thing. A document may also qualify as a real evidence if it is produced in evidence as an object and not for the purpose of reading its contents. In other words, where a document is tendered as the item stolen by the accused person in a charge of stealing, it is a perfect example of real evidence. Note that real evidence, especially when immovable, are more often than not admitted during a visit to the locus in quo by the court.

7. **Oral Evidence**:- Another name for this type of evidence is VIVA VOCE Evidence. It basically refers to the verbal testimony of a witness which is usually given on oath from the witness box. It includes, in appropriate cases, signs or body language demonstrated by an incapacitated person while in the witness box. See Section 176 of the Evidence Act, 2011.
8. **Documentary Evidence**:- This is evidence tendered through or by the use of documents. The word 'document' is defined in Section 258(1) of the Evidence Act 2011 in a wide and all-embracing manner and even includes books, maps, plans, graphs, drawings, photographs, discs, tapes, sound track and other sound devices, films, etc.

### **TUTORIAL QUESTIONS**

1. Discuss the meaning and scope of the law of Evidence.
2. Discuss the applicability of the Evidence Act to the various courts in Nigeria.
3. Examine in details the sources of the law of evidence in Nigeria.
4. Write short notes on:
  - 1) Direct and indirect evidence
  - 2) Oral and documentary evidence
  - 3) Primary and secondary evidence.

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## UNIVERSITY OF PORT HARCOURT FACULTY OF LAW

### LAW OF EVIDENCE

#### MODULE 5 :- THE RULE AGAINST HEARSAY

##### THE RULE AGAINST HEARSAY

Section 126(a-d) of the Evidence Act, 2011 provides among others that "oral evidence must, in all cases whatever be direct". In other words, this provision makes hearsay evidence generally inadmissible. What then is hearsay evidence? Simply put, it refers to an evidence given by a witness concerning a statement made to him by another person who is not himself called as a witness. It has variously been described as an unoriginal piece of evidence or an evidence based on mere rumour. But note that hearsay evidence was clearly defined in section 37 of the Evidence Act, 2011 as follows:

*Hearsay means a statement –*

- (a) Oral or written made otherwise than by a witness in a proceeding ; or*
- (b) Contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.*

What the above reveals is that we have both oral hearsay evidence and documentary hearsay evidence. It is documentary hearsay when it is contained in a document where the maker of such document is not called as a witness to answer questions on the said document. It is simply oral hearsay where it is adduced verbally and is based on an information received from another person who is himself not called as a witness.

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The judicial definition of hearsay is contained in the locus classicus case of Subramanian v. Public Prosecutor (1956) 1 WLR 969 where the Privy Council declared as follows:

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

In Judicial Service Commission v. Omo (1990) 6 NWLR (Pt. 157) 407 at 468, the Court of Appeal described hearsay evidence in the following terms:

*What is hearsay evidence? When a third party relates a story as proof of the contents of a statement such story is hearsay...Hearsay evidence is all evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part, on the veracity and competence of some other person.*

NB: The rule against hearsay evidence in Nigeria is codified in section 38 of the Evidence Act. According to the section, 'hearsay evidence is not admissible except as provided in this part or by or under any other provision of this or any other Act.' What this means in effect is that as a general rule, hearsay evidence is excluded from and rendered inadmissible in all judicial proceedings.

A case that aptly illustrates the application of the hearsay rule in Nigeria is Vivian Odogwu v. State (2013) 14 NWLR (Pt. 1373) 74 at 80-83 ratios 3-10.

In this case, the accused was charged with the murder of her boyfriend who was a law lecturer at the Rivers State University of science and technology.<sup>①</sup> The prosecution alleged that the accused person arranged for the killing of the deceased because the deceased ended their love relationship and asked her to leave.<sup>②</sup> It was held by the Supreme Court that the bulk of witnesses called by the prosecution were police officers who testified of what they were informed by persons who were themselves not called as witnesses.<sup>③</sup> The court therefore regarded these testimonies as hearsay and discharged the accused person. According to the Supreme Court:

*Evidence of a statement made by a witness by a person who is not himself called a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to prove the truth of the facts asserted by 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. In this case, the oral evidence of the prosecution witnesses consisted mainly of what they were told, and the purpose of the evidence was for the trial Court to draw the inference that the appellant killed the deceased. In the circumstance, the oral evidence of the prosecution witnesses was hearsay evidence, which the trial court should have expunged if it had properly evaluated the evidence presented by the prosecution witnesses.*

## Rationale for the Rule

What are the justification for the rule against hearsay? Some of them are set out hereunder:

- (1) The unreliability of the original maker of the statement who is not in court and was never cross-examined on it.
- (2) The statement of the original maker was hardly made under oath.
- (3) The depreciation of truth arising from repetition.
- (4) Hearsay evidence is prone to fraud and open to concoction.
- (5) The tendency of such evidence to lead to prolonged inquiries.
- (6) The admission of hearsay evidence tends to encourage the substitution of weaker for stronger evidence.
- (7) It leads to prolonged inquiry.  
*\* (Collect from Minisom)*

While commenting on the rationale for the rule, Cross & Tapper remarked as follows:

*It is largely because of the increased dangers of impaired perception, bad memory, ambiguity and insincerity, coupled with the decreased effectiveness of conventional safeguards, that hearsay is regarded as so particularly vulnerable as to require a special exclusionary rule.*

On his part, Cross Wilkins maintained as follows:

*The essence of the matter is that B's statement may not be narrated by A as evidence of its truth, because B cannot be cross-examined and the court has no opportunity of considering his demeanour. Furthermore, B, will usually not have been on oath. In many instances there will be no chance of checking the accuracy with which A has repeated B's words.*

## Exceptions to the Hearsay Rule

The hearsay rule, like other rules of law, is subject to a plethora of exceptions. Some of them are as follows:

- 1) **RES GESTAE:** This is provided for in section 4 of the Evidence Act, 2011. For detail explanation of the meaning of Res Gestae, please see your note on module No. 2.

- 2) **DYING DECLARATION:** The oral or written declaration of a deceased person is admissible evidence of the cause of his death at a trial for his murder or manslaughter. Thus, section 40(1)(a) of the Evidence Act provides thus:

*A statement made by a person as to the cause of his death or as to any of the circumstances of the events which resulted in his death, in cases in which the cause of that person's death comes into question, is admissible where the person who made it believed himself to be in danger of approaching death, although he may have entertained at the time of making it, hopes of recovery.*

Section 40(2) provides that a statement referred to in subsection (1) of the section shall be admissible whatever may be the nature of the proceeding in which the cause of death comes into question.

**N.B** The rationale for dying declaration was stated to be that a person would be unlikely to choose to die with a lie on his lips. Note that the absence of an accused where or when a dying declaration was made will not affect the admissibility of such statement. See R. v. Bebetebé (1938) 4 WACA 67. Note that the conditions for the admissibility of dying declaration are as follows:

- (a) The statement which may be written or oral, must be of relevant facts.
- (b) The declaration or statement must relate to the cause of death of the deceased or declarant or any of the circumstances of the transaction which resulted in his death.
- (c) The cause of death must be in issue in the trial or proceedings in which the statement is intended to be used.
- (d) At the time of making the statement or declaration, the declarant must have believed himself to be in danger of approaching death, although he may have entertained some hopes of recovery.

\* Note that there are two important differences between the conditions of admissibility of dying declaration under the Nigerian Evidence Act and under the English common law. First, under the common law, the declarant must have been at the time of making the declaration, "in a settled hopeless expectation of death" and not merely believed himself to be in danger of approaching death as is simply required under Nigerian law. Secondly, in England, the court is allowed to infer from the

nature of the wounds sustained by the deceased that he was in "fear of death" when he made the dying declaration, but in Nigeria, there must be positive evidence that the deceased was in this fear. See Okokor v. State (1967) NMLR 189.

¶ Note that a dying declaration can also be part of res gestae and a statement which is not admissible as a dying declaration may be admissible as part of res gestae and vice versa.

3) **STATEMENT MADE IN COURSE OF BUSINESS:** By section 41(1) of the Evidence Act, statements made in the course of business by a person are admissible, provided that the maker made the statement contemporaneously with the transaction recorded or so soon thereafter that the court considers it likely that the transaction was at that time still fresh in his memory. Thus, in R v. Lawani (1959) LLR 97, entries made in a police accident report book by a police officer who was already dead at the time of the trial were held admissible under this provision. Note that for a statement to be admissible under this section, the following conditions must be satisfied:

- (a) The statement which may be verbal or written, must be of relevant facts and must have been made by one of the persons mentioned in section 39 of the Evidence Act.
- (b) The statement must have been made in the course of business or in the discharge of professional duty. In other words, the person must have had a duty to act and record the said statement. Thus, in Price v. Torrington (1703) 1 Salk, 285, the defendant was sued for the price of beer sold and delivered. Entries which a deceased drayman who had been employed by the plaintiff, made in the plaintiff's books were received as evidence of the delivery of the beer as it was his duty to deliver and record the amount delivered.
- (c) The statement must relate to acts which must have been performed, either by the declarant in person or a third party, provided the performance of the acts is within his knowledge. See R v. Lawani (supra).
- (d) The statement must be reasonably contemporaneous with the transaction involved.

4) **STATEMENT AGAINST INTEREST OF MAKER WITH SPECIAL KNOWLEDGE:** By section 42 of the Evidence Act, 2011, an oral or

written statement of relevant facts made by a person who is dead is admissible when the statement is against the pecuniary or proprietary interests of the person making it and he had peculiar means of knowing the matter and had no interest to misrepresent it. For a statement to be admissible under this section, the following conditions must be satisfied:

- (a) The statement which may be written or verbal, must be of relevant facts and the maker must be anyone of those mentioned in section 39 of the Act.
- (b) The statement must be against the pecuniary or proprietary interests of the maker. Examples of such statements include admitting indebtedness to someone or that debt owed to one has fully been paid.
- (c) The maker must have had peculiar means of knowing the subject upon which he made the statement. In other words, the subject upon which the declaration against interest is made "must have been within the direct personal knowledge of the person making the declaration.
- (d) The maker must have had no interest to misrepresent the matter upon which he has made the statement. Where it is however shown that the maker has obvious motive to misrepresent the matter, such a statement will be inadmissible under this exception to the hearsay rule.

A case that aptly illustrates the application of this exception is Obawole v. Williams (1996) 12 SCNJ 415. In this case, the plaintiff claimed a declaration of right of occupancy over a given piece of land. The defendant in turn maintained that it was their ancestor who owned the land and granted a portion thereof to the plaintiff's ancestor as his customary tenant. The defendant tendered the evidence of the plaintiff in an earlier suit involving another party where the plaintiff admitted that their family paid rents to the defendant's family for the said land. It was held by the Supreme Court that this evidence was admissible under this exception to the hearsay rule.

- 5) **STATEMENT AS TO PUBLIC RIGHT OR CUSTOM AND MATTERS OF GENERAL INTEREST:** By section 43(1) of the Evidence Act, 2011, a statement, written or verbal of relevant facts is relevant and admissible when the statement gives the opinion of any such person as to the existence of any such right or custom or matter of public or general interest, the existence of which, if it existed he would have been likely to be aware, and when such statement was made before any controversy

as to such right, custom or matter had arisen. The conditions for the admissibility of statements under this sub-head are as follows:

- (a) The statement must be of relevant fact.
- (b) The statement must relate to the existence of a public right or custom or matter of public or general interest, otherwise it will be inadmissible under this exception. See R v. Bliss (1837) 7 and E 550.
- (c) The maker must be a person likely to be aware of such a public right, custom or matter of public or general interest, if it existed. In other words, the statement of a person who has no such knowledge will clearly be inadmissible. See Mercer v. Denne (1905) Ch. 538.
- (d) The statement must have been made before any controversy as to the right, custom or matter had arisen. See also section 83(3) of the Evidence Act.

6) **STATEMENTS RELATING TO EXISTENCE OF RELATIONSHIP:**

Section 44 provides for the admissibility of statements which relate to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by bloody marriage or adoption the person making the statement has special means or knowledge. Under this exception such matters as death, birth, residence of persons, age, childlessness, marriage or such similar matters may be established. The conditions for admissibility of statements under his exception are as follows:

- (a) Such a statement is deemed to be relevant only in cases in which the pedigree to which it relates is in issue.
- (b) The statement must be made by a maker shown to be related by blood to the person to whom it relates, or by the husband or wife of such a person. In other words, it is only the statement of a family member that is admissible under this exception. Thus, in Johnson v. Lawson (1824) Bing 86, the evidence of a deceased woman who had lived with the family as a housekeeper for 24 years was rejected.
- (c) The statement must have been made before the question in relation to which it is to be proved had arisen.

7) **DECLARATION BY TESTATOR:** By section 45(1) of the Evidence Act, the declaration of a deceased testator as to his testamentary intention and as to the contents of his will and codicils are relevant and are ipso facto, admissible in the following circumstances:

- (i) When his will has been lost and when there is a question as to what were its contents; or
- (ii) When the question is whether any existing will is genuine or was improperly obtained; or
- (iii) When the question is whether any and which of more existing documents than one constitute his will.

A case that clearly illustrate this exception is Sagden v. Lord St. Leonards (1876) 1 PD 154. In this case, it was discovered that the will of a testator a famous lawyer and Judge was missing. The daughter was well conversant with the contents of the will most of which she could recite from memory. The daughter and some other witnesses testified as to statements made by the deceased before and after the execution of the will as to its contents. It was held that the statements made by the deceased after he had executed the will were admissible.

#### 8) EVIDENCE OF FAMILY OR COMMUNAL TRADITION IN LAND CASES:

Where title to land or communal land holding is in dispute, oral evidence of family or communal tradition concerning title to such land is relevant. Accounts of how the land was founded by the original founder and how it devolved over the years are admissible. See The Commissioner of Lands v. Kadiri Adagun 3 WACA 206. See also section 66 of the Evidence Act.

#### 9) AFFIDAVIT EVIDENCE:

Affidavits are employed in judicial proceedings to establish facts in support of a matter. The Evidence Act allows hearsay evidence to be deposited in affidavits provided the deponent states the names of his informant and the place, date and time he was obliged with the said information. See section 115 (3) & (4) of the Evidence Act...

### TUTORIAL QUESTIONS

1. What is hearsay evidence? What are the justification for the hearsay rule.
2. Discuss four exceptions to the hearsay rule.
3. Compare and contrast dying declaration with res gestae. \*

LAW OF EVIDENCE

MODULE 7:- CHARACTER EVIDENCE

**Introduction**

Character evidence or evidence of character has been defined as evidence regarding someone's personality traits or evidence of a person's moral standing in a community based on reputation or opinion. Thus, the character of a person is therefore his general reputation as opposed to evidence of particular acts done by him. See Section 77 of the Evidence Act. See also the case of R v. Rowton (1865) Le & Ca 520 at 530 where Cockburn, C.J. explained that the only way the law allows one getting at the disposition and tendency of another person's mind is by evidence as to his general character founded upon the knowledge of those who know anything about him and his general conduct. His Lordship concluded that evidence of character must relate to general reputation and not the individual opinion of the witness.

As a general rule, character evidence is irrelevant in judicial proceedings except in circumstances permitted by the provisions of the Evidence Act. Note that this is applicable to the parties in their capacity as parties. Where however a party also seeks to testify as a witness, his character is relevant to his credit and evidence of his character could be admitted for the purpose of attacking his credibility or to show that he is not a witness worthy of belief. Thus, Section 223 of the Evidence Act provides as follows:

When a witness is cross-examined, he may, in addition to the question referred to in the preceding sections of this part, be asked any question which tend to –

- (a) Test his accuracy, veracity or credibility; or
- (b) Discover who he is and what is his position in life; or
- (c) Shake his credit by injuring his character;

Provided that a person charged with a criminal offence and being a witness may be cross-examined to the effect, and under the circumstances, described in paragraph (c) of the proviso to section 180 of this Act.

In **Emoga v. The State** (1997) 7 SCNJ 518, the Supreme Court held that the proper procedure for drawing a court's attention to the credibility of a witness is to cross-examine him as to credit and this includes delving into his past and drawing out such dirt as could be found thereat. See also **Dogo v. The State** (2001) SCNJ 315 at 336 where the Supreme Court held that a man who is capable of uttering deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath.

Note that the reasons why character evidence are generally excluded in judicial proceedings include the following:

- (1) They are highly prejudicial.
- (2) They are assumptive or speculative in nature.
- (3) They often lead to erroneous judgment/decision.
- (4) They substantially raise suspicion which does not amount to legal proof.
- (5) They may lead to a hasty conclusion in a matter.

### **Character Evidence in Civil Cases**

By section 78 of the Evidence Act, character evidence is generally not relevant except in so far as such character appears from facts otherwise relevant. This section therefore contains two limbs namely, the first limb which declares character evidence inadmissible and the second limb which otherwise allows character evidence in certain circumstances. What the above simply reveals is that the general rule which renders character evidence inadmissible in civil proceedings clearly admits of some exceptions which otherwise allows the reception of such evidence. Examples of such instances are as follows:

1. In a case of defamation where the defendant sets up the defence of justification, character evidence may be permitted to be adduced. This is especially so because by the defence of justification, the defendant has put the claimant's character in issue and evidence of his bad character will freely be adduced in order to establish the said defence of justification. See Din v. African Newspapers Ltd (1990) 3 NWLR 392. In this case, the plaintiff sued for libel who on his part pleaded justification. Evidence of the bad reputation of the plaintiff was allowed to be adduced in order to make out the defendant's plea of justification. See also **Goddy v. Odhams Press Ltd** (1968) 3 WLR 400.

2. Character evidence is also admissible in a case of breach of promise of marriage. Evidence of the plaintiff's bad character may constitute a defence for the repudiation of the promise by the defendant or may be relevant for the mitigation of damages.
3. Character evidence are generally admissible in divorce cases. For instance, where a petitioner is relying on such misconduct as adultery, cruelty and intolerable conduct to secure dissolution, the evidence of bad character of the respondent will be allowed to be adduced in order to make out the claim. See *Akinbuwa v. Akinbuwa* (1998) 7 NWLR (Pt. 559) 661; *Anyaso v. Anyaso* (1998) 9 NWLR (Pt. 564) 150.
4. By Section 79 of the Evidence Act, the fact that the character of any person is such as to affect the amount of damages which he ought to receive in an action is relevant.
5. Where a party testifies in person, his character becomes relevant as it affects his credit. To his end, he may be asked questions in cross-examination touching on his character with a view to impeaching his credit.

## Character Evidence in Criminal Trials

Note that in criminal trials, a clear distinction is made between evidence of good character and evidence of bad character and different principles apply to each of them.

### Evidence of Good Character

By Section 81 of the Evidence Act, evidence of good character of the accused person is relevant and admissible. Such evidence may be given by the accused himself or by other witnesses called by the defence, or may be elicited from the prosecution witnesses through cross-examination. See *Haruna v. Police* (1967) NMLR 145 where the evidence of god character of the accused given by the bank manager was admitted by the court.

*Haruna v. Police*  
S81 EA  
Two limitations

Note that the usefulness of evidence of good character is limited for two reasons. First, for an evidence of good character to have any probative value, it must relate to the offence charged. Thus, where a person is charged with an offence involving dishonesty, the relevant evidence of

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good character will be one showing that he is an honest person. It will be futile to establish that the accused is peaceful and level-headed where he is charged with stealing funds from his employers. Secondly, evidence of good character can only exculpate the accused where the prosecution has not fully made out their case. But where the prosecution's case is well made out, no amount of evidence of good character can exculpate the accused. This point was more graphically captured by the learned legal author NOKES who stated as follows:

If an alarm of theft is raised at a charity bazaar and the thief slips a stolen purse into the pocket of a Bishop, the episcopal character of the Bishop may allay suspicion; but if a Bishop should be caught in the act of 'shoplifting', the Episcopal character would merely appear to be unmerited.

Finally note that the accused evidence of good character is a double-edged sword which may help in saving the accused and may also sink him as it allows the prosecution to adduce evidence of his bad character, if any.

## Evidence of Bad Character

Section 82 of the Evidence Act regulates the reception or otherwise of evidence of bad character in criminal proceedings.

Under subsection (1) of the said Section 82, evidence of bad character is generally inadmissible in criminal proceedings. Subsections (2) and (3) of that section however went on to state that evidence of bad character is admissible in the following situations:

- (1) When the bad character of the accused or defendant is a fact in issue.
- (2) When the defendant has given evidence of his good character.
- (3) A defendant may be asked questions to show that he is of bad character in the circumstances mentioned in paragraph (C) of the provisos to Section 180 of the Evidence Act or to impeach his credit as a witness..

Note that aside from the above three exceptions, evidence of bad character remains inadmissible in criminal proceedings. Note also that

wherever the evidence of bad character is admissible, evidence of previous conviction is also admissible. See Section 82(4) of the Evidence Act. Under subsection (5) of Section 82, for evidence of previous conviction is to be admitted, it shall be related in substance to the offence charged. We shall hereunder examine the above exceptions in greater details.

### **(1) When the Bad Character of an Accused is in Issue**

This involves cases where the bad character of the accused is an ingredient of the offence charged. For instance, an ingredient of the offence of being a rogue and vagabond under Section 250(1) of the Criminal Code is previous conviction for the offence of being an idle and disorderly person under section 249 of the Criminal Code. Similarly, for the purpose of proving guilty knowledge in a charge of receiving stolen property under section 247 of the Criminal Code, the fact that within the five years preceding the date of that charge the accused was convicted of any offence involving fraud or dishonesty may be proved.

### **(2) Where the Accused has Given Evidence of his Good Character**

Whenever an accused gives evidence of his good character, whether by himself or through any witness called by him, he is said to have put his character in issue and the prosecution accordingly becomes entitled to lead evidence in its rebuttal by showing evidence of the accused bad character. The purpose of the rebuttal evidence is to ensure that all evidence material to the character of the accused are laid bare before the court since he in the first place had put his character in issue. Note however that such evidence of bad character given in rebuttal cannot be at large, but must be related to the specific claims made by the accused person.

### **(3) Evidence of Bad Character under Section 180 and to Impeach credit**

This third exception relates to the position of the accused as a witness. In other words, where an accused elects not to testify, this third exception will hardly be applicable against him. The proviso to section 180 permits questions tending to show the bad character of an accused to be put to him when:

(a) The proof that he has committed or been convicted of a criminal offence is admissible evidence to show that he is guilty of the offence charged.

(b) When the accused whether in person or through his counsel, has put his character in issue by leading evidence of his good character.

(c) When the accused has given evidence against any other person charged with the same offence.

As pointed out earlier, Section 223 of the Evidence Act allows an accused person who is a witness to be asked any question which tends to:

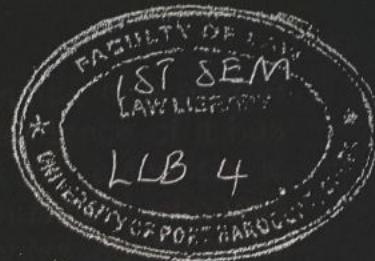
- i) Test his accuracy, veracity or credibility; or
- ii) Discover who he is and what is his position in life;  
or
- iii) Shake his credit by injuring his character;

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LAW OF EVIDENCE

MODULE 9:- PRIVILEGE



By Proviso (b) to Section 1 of the Evidence Act, 2011, a fact may be relevant to a matter but would otherwise be excluded if some other provisions of the Act disallows such evidence to be given in judicial proceedings. Privilege and Estoppel provide perfect examples of such scenario.

### PRIVILEGE

Generally, every person is competent to give evidence before a court and may be compellable, but under certain circumstances, a person may be able to claim privilege from answering certain questions or from adducing certain pieces of evidence or even from producing a relevant document. Privilege is therefore a rule of exclusion which prevents certain classes of evidence to be adduced by reason of statutory privilege. A witness may claim the privilege or his counsel may do so on his behalf. Sometimes, the Judge may direct a witness not to answer a particular question. The rationale behind the rule of privilege is to protect state security or the sanctity of marriage or the privacy of an individual. Another reason for the existence of this rule is the protection of public policy and morality.

There is paucity of reported cases on this area of the law and this is attributable to the fact that most claims for privileges are usually by way of interlocutory applications which do not metamorphose into appellate grounds of challenge of such decisions.

The Evidence Act in various sections clearly provide for the exclusion of privileged pieces of evidence. Basically, the law has categorized Privilege into two broad classes namely, State Privilege and Private Privilege. State privilege relates to affairs of state, judicial and other official information as well as information leading to the detection of crimes. The justification for excluding evidence on these matters is to protect the security of the state and the good administration of public affairs and justice. On the other hand, Private privilege is the privilege which protects from disclosure matters which affect a person in his private capacity. Such a person may be the witness in person or a person testifying on his behalf.

There are two important distinctions between a State privilege and Private privilege. The first is that private privilege may be waived by the person to whom it belongs or with his consent by his agent. When so waived, the protected fact may be disclosed in evidence and no adverse presumption shall be drawn from non-waiver of such privilege. But on the other hand, a State privilege is hardly waived in the interest of public security or policy. The

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second difference between them is that when the subject-matter of a private privilege is a document and that document or secondary evidence of it has been obtained independently by the opposite party, such evidence is admissible. Thus, in Rumpling v. DPP (1964) AC. 814, a husband who was charged with murder wrote a letter to his wife in which he confessed the crime to her. This letter was intercepted on the way and it eventually got into the hands of the prosecution. It was held by the House of Lords that it could be received in evidence as part of the prosecution's case, even though it was a privileged communication between spouses. The above is not the case with State privilege as a privileged document remains inadmissible for all purposes even if it gets into the hands of the adverse party. See Gain v. Gain (1961) 1 WLR 1469.

### State Privilege

Under the Evidence Act, 2011, there are three instances of State privilege which would be discussed hereunder.

- (a) **Affairs of State:** The first provision under this head will be found in Section 190 of the Evidence Act. It provides that subject to any direction of the President or the Governor of a State where the records are in the custody of a State, no one shall be permitted to produce any unpublished official records relating to the affairs of State, or to give any evidence derived from such record except with the permission of the officer at the head of the Ministry or Agency concerned who shall give or withhold such permission as he thinks fit. The best a Judge can do is to examine such document alone in chambers. The second provision under this head is contained in Section 191 of the Act. According to it, no public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure. Thus, in Moronu v. Benson (1966) NMLR 66, it was held that this section precludes the court from compelling a public officer to disclose communications made to him in official confidence. The final provision under this head is Section 243 of the Evidence Act, 2011 which is similar to Section 220 of the repealed Evidence Act. According subsection (1) of section 243, a Minister, or in respect of matters to which the executive authority of a State extends, the Governor or any person nominated by him, may in any proceedings object to the production of documents or request the exclusion of oral evidence when after consideration he is satisfied that the production of such document or the giving of such oral evidence is against public interest. Under subsection (2) thereof, the objection mentioned above shall if taken before trial, be by affidavit, or if at the hearing, it shall be by certificate produced by a public officer. In Section 220(2) of the repealed Evidence Act, it was provided that an objection so taken under the section shall be conclusive and the court has no power to do otherwise than to close its eyes to the document or evidence objected against. Note that the Supreme Court of Nigeria in A.G. Western

Nigeria v. The African Press & Anor. (1965) NSCC 10 held that this provision is in conflict with Section 22 of the 1963 Constitution which was repeated in Section 33 of the 1979 Constitution and is currently contained in Section 36(4) of the 1999 Constitution as amended on the right to fair hearing. See also Maja (Jnr) & Sons Ltd v. United African Co. of Nig. Ltd (1971) 1 NMLR 157; Apampa v. Balogun (unreported). It is heart-warming that subsection (3) of Section 243 of the Evidence Act, 2011 has fully taken the above judicial decisions into consideration when it provides as follows: '*The Court shall have a discretion whether or not to uphold any such objection and may in determining how to exercise its discretion, inspect such documents or be informed as to the nature of the oral evidence to which the objection relates*'.

\*Note generally that the above provisions on State Privilege may just be in conflict with the provisions of the recently enacted Freedom of information Act.

(b) **Judicial disclosures:** By Section 188 of the Evidence Act, 2011, no justice, judge or presiding officer of a superior court of law shall be compelled to answer any question as to his own conduct in court or as to anything which came to his knowledge in court in his capacity as a judge. There is a similar privilege for magistrates or other judicial officers before whom a proceeding is being held, but in their case, they could be compelled upon a special order of the High Court. Note that this privilege of judicial officers does not extend to other matters which occurred in their presence whilst acting in their official judicial capacities.

(c) **Information as to the commission of offences:** According to Section 189 of the Evidence Act, 2011, no Magistrate, police officer or any other public officer authorized to investigate or prosecute offences under any written law shall be compelled to disclose the source of any information as to the commission of an offence. In the same vein, officers employed in or about the business of any branch of the public revenue cannot be compelled to disclose the source of any information as to the commission of any offence against the public revenue. In R v. Hardy (1794) 24 How. St. Tr 808, it was held that by virtue of this provision, the name of an informant or the person to whom the information was given, or the nature of the information or any other question as to the channel of its communication are protected from disclosure in evidence. Note that the production of the source of information may be allowed if required to establish innocence in a criminal trial or if otherwise authorized by the Freedom of Information Act.

- (a) **Communications between spouses:** Sections 182(3) and 187 of the Evidence Act, 2011 clearly provides that both husband and wife cannot be compelled to disclose any communication made during the subsistence of their marriage except there is prior consent by the person who made it or by that person's representative in interest.
- (b) **Production of title Deeds and other documents:** A witness who is not a party in a suit cannot be compelled to produce his title deeds to any property nor can he be compelled to produce any document by virtue of which he holds any property on pledge or on mortgage or any document the production of which might tend to incriminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims. See Section 184 of the Evidence Act, 2011. By Section 185 of the Evidence Act, 2011, this privilege extends also to a person who is in possession of another person's documents where the said other person is entitled to privilege, unless he secures the consent of that other person. For instance, if A is holding the Deeds of B who is entitled to privilege not to produce them in court, A cannot be compelled to produce those deeds of B in his possession without the consent of B.
- (c) **The privilege against self-incrimination:** Section 183 of the Evidence Act, 2011 provides that no one is bound to answer any question if the answer thereto would in the opinion of the court have the tendency to expose the witness or the wife or husband of the witness to any criminal charge or any penalty or forfeiture. It is always the court which will decide whether the answer to a question asked is capable of exposing the witness or his spouse to a criminal charge, forfeiture or penalty. Note that this privilege does not prevent a witness from entering the witness box to be sworn and then commence his testimony. It is only applicable to elicited answers which are capable of incriminating the witness. Note however that this privilege is subject to the following exceptions:

- i) Where the witness is an accused standing trial in the matter, he may be asked and is bound to answer any question in cross-examination notwithstanding that it would tend to incriminate him.
  - ii) No one is excused from answering any question only because the answer may establish or tend to establish that he owes a debt or is otherwise liable to any civil suit either at the instance of the Federal, State or Local Government or any other person.
  - iii) In an inquiry, witnesses are required by the direction of the Attorney-General to answer all questions put to them.
- (d) **Legal Professional communications:** A legal practitioner is not allowed to disclose any communication made to him in the course and for the purpose of his employment as a lawyer by or on behalf of a client, unless with the express consent of the client. See Section 192 of the Evidence Act, 2011. In the same vein, a legal practitioner is not permitted to disclose the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment. He must not disclose any professional advice he has given to his client in the course of such employment. This privilege is so fundamental that it even applies to interpreters and clerks of legal practitioners. What is more, the privilege subsists even after the lawyer had ceased to be a lawyer to the client.

Note that the principle upon which this privilege is based was stated by Holden, J. in Horn v. Rickard (1963) 2 All NLR 40 at 41 thus: 'Every client is entitled to feel safe when making disclosures to his solicitor or counsel, and there are cases where the establishing firmly that counsel cannot be called to give any evidence which would infringe the client's privilege of secrecy'.

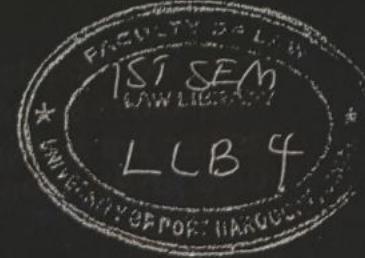
This privilege is for the client and only he can waive it, and not for the counsel. The privilege is subject to two main exceptions namely, (1) any communication made in furtherance of any illegal purpose is not privileged. (2) any fact observed by a

legal practitioner in course of his employment showing that any crime or fraud has been committed since the commencement of his employment.

- (e) **Doctor and Patient:** There is no provision in the Evidence Act as to privilege in respect of communications made between a doctor and his patient. In other words, even though medical ethics refrain doctors from disclosing information obtained from patients to third parties, such ethics do not amount to legal privilege. What this means is that a doctor could be asked to disclose information he obtained in secret from his patients and he is legally obliged to disclose it.
- (f) **Priest and Penitent:** There is also no provision in the Evidence Act protecting communications between a priest and a penitent and such communications are therefore not privileged. The predominant view is that even though in strict law the privilege does not exist, a priest should not be required to give evidence as to confessions made to him. The trial Judge should be able to exercise his discretion on whether or not to allow the disclosure of such confession whenever such occasion arises.
- (g) **Statements made without prejudice:** This privilege mainly applies in civil cases. It is a common practice for parties to resort to alternative dispute resolution methods to settle their disagreements and in course of such meetings or negotiations, parties are free to make admissions and concessions which are not expected to haunt them subsequently should the process break down and the matter finds its way to the court. This privilege, therefore prevents parties from using admissions and statements earlier made in the making such settlement process against the maker. Such statements may be oral or in writing and may be marked 'without Evidence' or 'without prejudice'. Section 196 of the Evidence Act codifies this privilege. Statements made without prejudice can only be tendered with the consent of both parties. See Fawehinmi v. NBA (No. 2) (1989) 2 NSCC 43. Note that the mere marking of a document 'without prejudice' does not confer this privilege on

such a document unless it is shown that it was made in course of a settlement or negotiation between the parties. Thus, in Omisade v. Martins (unreported) it was held that a contract headed 'without prejudice' does not make the document privileged. Conversely, the failure to mark a document 'without prejudice' will not deny it the privilege if it is shown that it was made in course of settlement or negotiation between the parties.

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MODULE 10.: ESTOPPEL



Estoppel is a rule which bars a party to a suit from asserting or denying a particular fact. It is a rule of exclusion thus making the evidence of a relevant fact inadmissible. Put differently, where a person is stopped from giving a certain piece of evidence, such an evidence in effect becomes inadmissible. Note that the word estoppel was not defined in the Evidence Act, even though it was mentioned in sections 169-174 of the Evidence Act. Suffice it to say that the Supreme Court in Oyerogba v. Olaopa (1998) 13 NWLR (Pt. 583) 508 at 518 defined estoppel as follows:

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

See also Cave v. Mills (1862) H & N 913 where it was held thus:

"A man shall not be allowed to blow hot and cold, to affirm at one time and deny at another – making a claim on those whom he has deluded to their disadvantage, founding that claim on the very matters of the delusions. Such a principle has its basis on common sense and common justice, and whether it is called "estoppel" or by any other name, it is one which courts of law have in modern times most usefully adopted".

Is Estoppel a rule of pleadings, evidence, substantive law or merely an irrebuttable presumption?

Estoppel can be seen as a rule of evidence in that it is one of those rules that render relevant evidence inadmissible. A party seeking to rely on the doctrine must specifically plead it or give the facts to be relied upon. Generally, estoppel has no place in the statement of claim, but can be a whole defence in the statement of defence. Estoppel is similar to an irrebuttable presumption of law, but the difference between them is that while estoppel can be waived, an irrebuttable presumption cannot be waived. We can therefore say that while estoppel has a bearing on all the above, it is a rule that is rooted in justice and fairness. See Ibesim v. Ndule (1992) 1 NWLR (Pt. 216) 153 where the court held inter-alia: 'The doctrine of estoppel whether as a rule of evidence or rule of substantive law, is founded on the principle of justice'.

Oyerogba v. Olaopa  
Oyerogba v. Olaopa

## Types of Estoppel

There is a difference between estoppel simpliciter and estoppel per rem judicata. While estoppel simpliciter operates against the parties, as in estoppel by conduct, estoppel per rem judicata operates not only against the parties but also against the court's jurisdiction. See Coker v. Sanyaolu (1976) 9-10 SC. 203 at 221.

In Balogun v. Adejoke (1995) 2 NWLR 131, it was held that estoppel can be classified into four, namely:

- (a) Estoppel by record
- (b) Estoppel by conduct
- (c) Estoppel by agreement
- (d) Estoppel by deed.

### (a) Estoppel by Record

This type of estoppel is divided into two, namely:

#### i) Cause of action estoppel

This is usually referred to as estoppel per rem judicata. What it means in essence is that where a cause of action which was the subject of an earlier litigation between the same parties and had been adjudicated upon by a court of competent jurisdiction, is brought again in a subsequent action between the same parties, the subsequent plaintiff or claimant will be barred or precluded from bringing up the same cause of action again. In such a case, the earlier judgment is res judicata i.e. a matter adjudged or a thing judicially acted upon or decided or a thing or matter settled by judgment. This specie of estoppel is also called "Estoppel by Judgment" because it arises from the judgment of a court.

#### ii) Issue estoppel

In a cause of action, many issues may arise and it may not be all that would conclusively be determined. Issue estoppel is to the effect that where a fact in issue in the first cause of action has been decided by the court and that same fact crops up subsequently in a suit between the parties, none of them will be allowed to dispute or deny the decision of the court in the previous proceedings. See Hill v. Hill (1954) P.D. 291. Note that in the case of continuing trespass or damage, successive actions can be brought from time to time as issue estoppel will not arise. See Adepoju v. Oke (1999) 3SCNJ 46 at 55-56.

## Rationale behind the doctrine

Estoppel by Record is predicated on the rule of public policy that it is for the common good that there should be an end to litigation. Also that no one should be sued twice on the ground. See Omokhage v. Esekhanne (1993) 8 NWLR 58.

Omokhage v. Esekhanne

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Omokhage v. Esekhanne

## Conditions for the invocation of Estoppel by Record

Section 173 of the Evidence Act provides as follows:

*"Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case actually decided by the court and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved".*

For the plea of estoppel by record to be upheld in a matter, the following four conditions must be established. Note that the failure to establish any one of them will defeat the plea for estoppel. The conditions are as follows:

(1) **Parties must be the same:** Parties in the two cases must be the same.

Parties include not only the parties named in the writ but privies to such parties. Privies are in three (3) categories:

- i)      privies in blood e.g. ancestors and heirs;
- ii)     privies in estate e.g. lessors, lessees, assignees, etc;
- iii)    privies in law e.g. testator and executor

See Coker v. Sanyaolu (supra).

Parties also include those who had an opportunity to attend the proceedings and those who ought to have joined as parties thereto. See Onisango v. Akinkumi & Ors (1955/56) WRNLR 39. Any judgment against a person in his personal capacity cannot generally operate as res judicata against that person in a representative capacity.

(2) **Issues and subject-matter must be the same:** Another condition is that the issues and subject-matter in the two cases must be the same.

Estoppel will not operate if the issues and subject-matter are different.

See Ibiyemi & Anor. V. Olusoji & Anor. (1957) WRNLR 25. In Hoystead v. Commissioner of Taxation (1926) A.C. 155, the court held as follows:

*"everything that was in controversy in the second suit as foundation of action for relief was also in controversy or open to controversy in the first suit".*

A party will not be allowed to split a cause of action into two or more and litigate them in parts or piecemeal. See Gadai v. U.A.C. (1961) ALL NLR 785.

Hoystead v. Commissioner of Taxation

*(3) Requirement / condition  
AQ Riv v. Dr Akwa Ibom  
Must be intentional*

(3) **Court of competent jurisdiction:** A third condition is that the court that heard the first suit must be a court of competent jurisdiction. See Ekpe v. Atai (1944) 1 All NLR 587 at 594.

(4) **Previous decision must finally decide the issues between the parties:** Even if the above three conditions are met, estoppel will not operate where there is a valid and subsisting judgment that has not finally decided the issues in dispute between the parties. Thus, an interim or interlocutory injunction will not generally constitute estoppel per rem judicata in respect of the matter or controversy in the main action. See Owoade v. Adeyemi III (1975) 1 WSCA 74. The fact that a judgment was obtained by default does not prevent it from operating as an estoppel. See Odu v. John Holt & Co. Ltd (1950) 19 NLR 127. Even if a judgment is to be appealed against, it will operate as estoppel until it is overturned on appeal. The mere fact that a judgment was wrongly decided will not prevent it from operating as estoppel until upset by a higher court. See Larinde v. Ajiko (1940) 6 WACA 108. But where such a judgment is a nullity, or was given per incuriam, it will not operate as estoppel. See Ngwo v. Monye (1970) 1 All NLR 91. Where there are conflicting judgments by courts of competent jurisdiction between the same parties, the last judgment in time creates estoppel. See Seriki v. Solaru (1963) 1 All NLR 383.

(b) **Estoppel by conduct:** This is provided for in section 169 of the Evidence Act, 2011. It is to the effect that when there is an intentional representation that had been acted on by the other party, the first party will be estopped from denying the existence of the state of affairs. See Iga v. Amakiri (1976) 11 S.C. 1 at 12-13 where the Supreme Court explained it as follows:

*"If a man by his words or conduct willfully endeavours to cause another to believe in a certain state of things which the first knows to be false and if the second believes such state of things and acts upon his belief; he who knowingly made the false statement is estopped from averring afterwards that such a state of things does not exist at the time; again, if a man either in express terms or by conduct, makes a representation to another of the existence of a state of facts which he intends to be acted upon in a certain way in the belief of the existence of such a state of facts, as to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of affairs. Thirdly, if a man whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain"*

- ① There must have been a rep by word / conduct<sup>4</sup>*  
*② The other party must have acted on*

*representation of facts and that it is a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief act in that way to his damage, the first is estopped from denying the facts as represented".*

Note that whatever a man's real intention may be, he is deemed to act willfully if he conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it and did act on it as true. The party who made the representation would be precluded from contesting its truth. See A-G Rivers State v. A-G Akwa Ibom State (2011) All FWLR (Pt. 579) 1023 at 1055 where the Supreme Court described estoppel by conduct thus: '*The doctrine forbids a person from leading his opponent from believing in and acting upon a state of affairs, only for the former to turn around and disclaim his act or omission...*'

Note that for this estoppel to arise, the representation, act or omission must have been made intentionally. See Bank of the North Ltd v. Na'Bature (1994) 1 NWLR 235.

(c) **Estoppel by Deed:** This is not provided for in the Evidence Act but is a common law rule. It is to the effect that where a party or his privy has executed a deed or an instrument under seal, he will be estopped by a court from asserting that the facts stated therein are untrue. This estoppel applies only to litigations arising on the deed and operates only between the parties to the deed. See Greer v. Kettle (1938) A.C. 156.

(d) **Estoppel in Criminal Cases:** In criminal cases, the doctrine of res judicata operates in another form referred to as autre fois acquit or autre fois convict. The origin of this estoppel is section 36(9) and (10) of the Constitution of the Federal Republic of Nigeria 1999 as amended. This specie of estoppel covers the same grounds as cause of action estoppel in civil cases. The thrust of this estoppel is that no person shall be tried twice for one offence for which he had earlier been tried by a court of competent jurisdiction and has either been acquitted or convicted, "nor" can he be tried for an offence having the same ingredients. See Eda v. Police (1952) 14 WACA 163.

## TUTORIAL QUESTIONS

1. Discuss with the aid of decided cases the essential conditions for the application of estoppel by record.
2. What do you understand by estoppel? Outline its types and reasons for its existence.
3. Discuss the place of estoppel in criminal cases.
4. What is privilege? What are the differences between state privilege and private privilege.
5. Critically discuss the various species of state privilege under the Evidence Act, 2011.
6. Examine the various types of private privilege under the Evidence Act.
7. The categories of private privilege under the Evidence Act, 2011 still needs to be enlarged. Do you agree? Give reasons for your answer.

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COURSE TITLE:  
LAW OF EVIDENCE  
SIMILAR FACTS EVIDENCE



### INTRODUCTION

A fact in issue in any proceedings civil or criminal, is resolved by the court from evidence adduced by the parties thereto.

A similar fact in the present context means a fact similar to the fact in issue. Similar fact evidence arises where the question answered by inference from a similar fact which has happened before. For example that a man once burgled a neighbours house and was convicted for that offence may be a well established known fact. The fact in issue in a court before which the same man is being prosecuted for a later offence of burglary is whether he burgled the house of another neighbour this time.

A similar fact, thus refers to a fact similar generally to a fact in issue. The earlier fact is similar to the fact in issue as both deal with the same person and the offences proved and alleged respectively against him are identical.

### SIMILAR FACTS EVIDENCE IN LAW THE GENERAL RULE

The General Rule is that Evidence of Similar Facts is generally irrelevant and inadmissible. There are however, exceptions in this case where this type of Evidence is admissible and the study of Similar Facts Evidence is in essence a study of the exceptions.

The Rule regarding evidence of a previous conviction or commission by an accused person of another offence only shows at worst that he is disposed to commission of crime and consequently prejudicial against him.

vision of similar fact evidence is of Common Law origin. Indeed, no express provision in our Evidence Act excluding Similar Facts. However the rule of exclusion of similar facts evidence forms part of Evidence.<sup>2</sup>

is not so common in our courts, this account for death of cases on set in Nigeria. Accordingly most of the illustrative cases will be cases.

ssed earlier the General Rule excludes this type of evidence from wing in court proceedings for criminal trial this general rule excluding evidence in court proceedings was stated by per Lord Herschell, L.C. King V. The Attorney General of New South Wales<sup>3</sup> "It is, edly not competent for the prosecution to adduce evidence tending that the accused has been guilty of criminal acts other than those by the indictment, for the purpose of leading to the conclusion that the person likely, from his criminal conduct or character, to have ed the offence for which he is being tried. On the other hand, the fact evidence adduced tends to show the commission of other crimes to render it inadmissible if it is relevant to an issue before the jury and be so relevant if it bears upon the question whether the acts alleged stitute the crime charged in the indictment were designed or al or to rebut a defence which would otherwise be open to the ed.

eneral rule and each of the ones that excludes evidence of Hearsay, and character respectively constitute the four rules of exclusion in of Evidence it has to be borne in mind that the principles are mainly from the Common Law. Infact the Evidence Act contains no provision cally embodying the general rule and it is only one of the main on that is expressly enacted in the Act.<sup>4</sup>

This principle was applied in the case of **R.V. Thomas**.<sup>5</sup> The Appellant was convicted in the High Court for forgery of a letter of application for endorsement of Import Licence. At the trial the prosecution gave evidence of a series of other similar transactions involving imported Licences by him. On appeal the conviction was quashed since the evidence was not relevant to the charge before the court but merely was prejudicial to the appellant by showing him as a dishonest man. For the operation of the principle in a civil action see the case of **HODINGHAM v. HEAD**.

This was an action in contract, the issue in it was whether the contract between the plaintiff and the Defendant was subject to certain terms.

Evidence that similar contracts made by the plaintiff with other parties were also subject to the same very special terms was held inadmissible.

Rationalizing the decision, it was stated that the fact that a man has once or more in his life acted in a particular way does not make it probable that he so acted on a given occasion.

In the case of **R v. WHITEHEAD**<sup>6</sup>

The issue was whether the defendant performed a surgical operation negligently. Evidence of past careless or skillful operation by him was held inadmissible.

In the case of **John Makin & Ors v. New South Wales (1984) A.C. 57**

The accused were convicted for the willful murder of an infant child of which the Evidence showed that they had received from its mother on the representation of their willingness to adopt him and the mother paid a premium.

The body of the child was buried in the garden of a house occupied by them. There was also evidence that several other infant children have been received by the accused on similar representation and that the bodies of

infant had been found buried in similar manner in gardens of several houses occupied by them.

evidence that the accused have been guilty of Criminal Acts other than the charge is not admissible unless the issue is whether the acts charged against the accused were designed or accidental or unless to rebut a defence.

### MIR MOH'D v. R (1949) A.C. 182

Appellant was charged with the death of a woman living with him as his wife by poisoning. Evidence was admitted to show that 2 years before the incident another woman married to the accused died in a similar circumstance.

ld:

The evidence is inadmissible in that it tended to show that the accused had been guilty of a criminal charge. Also the evidence is not relevant to any issue in the case. In THOMAS v. C.O.P (1949) 12 WACA 490

Appellant was issued with bundles of tickets for sale at a race meeting. It was proved that he had removed a few tickets from the bottom of each of one of the bundles instead of removing from the top to the down ward gradually. Evidence was also admitted to the effect that on some occasions before, the accused had done same.

ld:

Evidence of the previous Act similar to the one charged is admissible, for the purpose of proving guilty knowledge, or intention or that the act was intentional and not accidental, or to rebut the defence that the missing tickets might have been taken by the manager servant.

HASSAN V. C.O.P (1944) WACA 238

The Appellant was convicted for corruption by accepting bribe from some  
bouters. Evidence was tendered to show that he had previously extorted  
bribes from some other persons.

held:

The fact of the previous act had no specific connection with the charge in  
issue and hence the evidence was inadmissible.

It is previously noted, the principle of exclusion of similar facts is not absolute  
<sup>envisaged</sup> ~~sanrosanct~~. In the case of Makin Vs Attorney General of New South  
Wales, where the principle was enunciated, exception to the general rule  
are recognized and provided when the court stated.

On the other hand, the mere fact that the evidence adduced tends to show  
the commission of other offences does not render it inadmissible if it be  
relevant to an issue before the Jury. It may be so relevant if it bears upon

the case of HOLCOMBE v. HEWTON<sup>7</sup>. The fact in issue was whether the  
beer supplied by the publican was bad, evidence that the beer the same  
beer supplied to other publican was good was held inadmissible.

#### EXCEPTIONS TO THE RULE EXCLUDING SIMILAR FACTS EVIDENCE STATUTORY EXCEPTION TO THE GENERAL RULE

The main ground of excluding similar facts evidence is the absence of  
a special link between such evidence and the fact in issue. The evidence is  
therefore irrelevant to such fact. A fact is relevant and admissible a fact that  
is irrelevant is inadmissible.

Sometimes however a special link may exist between similar fact and the  
fact in issue as to make the former relevant to the later and thus admissible.

In the case of *Cole & Anor v. Akinyele*<sup>14</sup> or Ors. Reliance was placed on a single and solitary decision. In *Alake v. Pratt*<sup>15</sup> establishing a Yoruba Custom that if the paternity of children is acknowledged by a man during his life time, they are to be regarded as legitimate and entitled to share his estate with his children born of a marriage contracted under the Marriage Act.

On the other hand Native Law and custom- It was held in *Giwa Abiodun v. Erimilokun* that "Native Law and custom is a matter of Evidence to be decided on facts presented before the courts in each particular case unless it is of such notoriety and has been so frequently followed by the courts that Judicial Notice would be taken of it without evidence being required to establish it.

#### **In *Rabiu v. Abasi*<sup>16</sup>**

The Supreme Court held that a customary law can be judicially noticed on the basis of a single decision of a court of superior jurisdiction.

#### **4.0 FACTS OF COMMON KNOWLEDGE NEED NOT BE PROVED**

Section 124(1) of the Act provides that proof shall be required of a fact the knowledge of which is not reasonably open to question and which is:

- a) Common knowledge in the locality in which the proceeding is being held or generally.
- b) Capable of verification by reference to a document the authority of which cannot be reasonably questioned like Books.

Where the Supreme Court the Highest Court in the Land has upheld a particular custom every other court in the country is bound to recognize that custom. See *Rabiu v. Abasi*<sup>17</sup>

<sup>14</sup> (1960) 5 F.S.C. 84

<sup>15</sup> (1955) 15 W.A.C.A. 30

<sup>16</sup> (1919) 7 S.C. NJ. 53 at 56

<sup>17</sup> Supra

This principle has been applied in a number of Nigerian cases see the case of Iola v. The State.<sup>10</sup> The accused was charged with murder. He raised the defence of alibi and improper or insufficient identification by the prosecution witnesses. The trial judge admitted evidence of the witnesses on previous occasions where they assaulted them and the accused stabbed the deceased near the eyebrow. He was convicted. The accused appealed against the conviction on the ground that the trial Judge erred in admitting similar facts evidence. The Supreme Court affirmed his conviction and held that in view of the defence raised by the Appellant, the evidence was admissible.

In the earlier case of Akerele v. The King,<sup>11</sup> The Appellant a medical practitioner was tried and convicted for manslaughter in that he administered a poisoned injection to a child who was suffering from yaws causing his death. The prosecution said poisoning resulted from overdose of the drug. The accused said the deceased child had a particular peculiarity which would not kill a normal child. The prosecution was allowed to bring evidence to show that other children injected with similar drugs died. Thus affirming the conviction, the court held that the evidence of similar fact was admissible.

It must be noted that similar facts evidence is also applicable to civil cases in ALLES v. KERR.<sup>12</sup> A barber was sued for negligence in that he used an unsterilized razor resulting in infecting of the plaintiff with ringworm.

Evidence that other persons shaved by the defendant barber had contacted the same infection was held admissible.

Was held relevant and admissible.

Other 4 provisions of the Evidence Act which create exceptions to the general rule of inadmissibility of similar facts Evidence are:

## 1 SECTION 9(B)

The full text of the provisions are necessary. Section 9.(b) makes relevant and admissible similar fact evidence by permitting evidence which by themselves or in

ng stolen property, in order to prove guilty knowledge, similar fact Evidence  
tant and admissible.

#### SECTION 66 – PROOF OF TITLE BY ORAL EVIDENCE OF TRADITION

statutory exception, to the exclusion of similar facts is captured in section  
which a person is permitted to lead oral evidence of tradition to prove title to  
or communal land..

#### SIMILAR FACT EVIDENCE IS ADMISSIBLE UNDER THE COMMON ORIGIN

fact Evidence is admissible where the facts relate to subject matters which  
common origin.

ed by a learned author<sup>15</sup> in cases falling under this heading there is a  
nexus between the facts similar and the fact in issue, the reason is that  
have a Common Origin.

case of Manchester Brewery Vs Coombs<sup>16</sup> The question which arose for  
nation was whether a brewer sold good beer to a publican, it was held that  
e of the fact that the brewer had sold good or bad beer to other publicans  
missible if all the supplies were from the same brewing.

Person vs. Clark<sup>17</sup> The question was whether the quality of milk delivered to  
her by a dairy-man was good. Evidence of other delivery made to another  
er was held admissible once the two deliveries were extracted from the  
ows and at the same milking.

No cases can be contrasted with the case of Holcomber vs. Hewton<sup>18</sup>  
brewer claimed damages for breach of a publican's covenant to buy bear

ence was that the plaintiff had supplied bad beer. Evidence to the effect  
had supplied other publicans with good beer was held inadmissible  
It was also held that the brewer might deal well with one and not with the

the two were from the same source (Common Origin) similar fact would have been admissible.

### SHOW SYSTEM

of exclusion of similar fact evidence, may be given which shows the of a system of operation or systematic course of conduct is usually in criminal cases. Partly to identify the accused person with the crime and to demonstrate a discernable pattern of conduct as the cases of Attorney General of New South Wales<sup>19</sup> and R vs Smith<sup>20</sup>.

ised was on trial for the murder of his wife. She was found dead in her that was shortly after he had insured the wife's life in his favour. ly two former wives of the deceased had also died in similar ances, i.e. in their baths and after he had insured the life of each in his was the contention of the accused that the wife died of epilepsy.

that the death was part of a system devised by the accused with the claiming insurance benefits after killing the wives. The prosecution was d to give evidence of the two previous circumstances. The other case Attorney General of New South Wales.<sup>21</sup> This was a case of murder in e accused, a woman and a man were charged with killing a child whom earlier adopted on payment of small premium by the child's mother.

ly of the child was found buried in the garden of the accused and was in condition that the cause of death could not be ascertained. Evidence that used had received other infants from their mothers on similar terms who onwards disappeared and that the bodies of unidentified infants were found in the garden of other houses occupied by the accused was admitted to system.

Another case showing system is the case of *Hales vs Kerr*<sup>22</sup> where a barber was sued for causing a customer to contract ringworm by using unsterilized razor to shave the customer. In order to show that the system used in the barber's saloon was dangerous, evidence that other customers were similarly afflicted after being shaved by the barber was admitted.

*R v Mortimer*<sup>23</sup> The Accused was charged with murder after he knocked down a woman cyclist by deliberately driving his car on her. Evidence was admitted to show that shortly before this incidence he had knocked down two other women, and assaulted them in similar way and assaulted them.

*Id.*

Evidence was rightly admitted as being relevant to establish guilty intention to kill or cause grievous bodily harm.

#### PROOF OF IDENTITY

Similar fact evidence can be given to prove the identity of the accused as the person who committed the offence charged.

*R vs. Straffen*<sup>24</sup> The accused was charged with the murder of a little girl. She had been strangled to death for no reason and her body left near a road, where it could easily be seen. The deceased had not been sexually interfered with. At the trial the issue was whether the accused person was responsible for the killing of the little girl. The accused had previously confessed to the murder by implication of two other little girls.

The accused was convicted of the murder charge and his appeal to the court of Appeal was dismissed.

In the case of *Twomey v. R*<sup>25</sup> the accused was charged with murder. The evidence of the victim showed that he had been a victim of vicious homosexual

ns and had been violently attacked. Evidence showing that the accused who proved to have been near the place of the murder at the material time was admissible, as the accused was given to homosexual acts accompanied by necessary and grave violence.

### ACTION FOR DAMAGES AS A RESULT OF INJURY CAUSED BY DOMESTIC ANIMALS

If an action is instituted by a plaintiff claiming damages for injury, caused by a domestic animal which is by nature not vicious or dangerous, evidence of injury or damage caused by the animal to the knowledge of the keeper is relevant and admissible.<sup>26</sup>

### JUDICIAL DISCRETION TO EXCLUDE PRE JUDICIAL EVIDENCE

Similar fact evidence though admissible in a number of instances nevertheless, a Judge in a criminal case has the discretion to exclude similar facts evidence on the ground that though legally admissible, its probative value is out weighted by its prejudicial propensity.

In the case of *Noor Mohammed v. R.*<sup>27</sup>

The Appellant was charged with the death of a woman living with him as his wife by poisoning. Evidence was admitted to show that 2 years before the accident another woman living with him died in similar circumstance.

d

Evidence was inadmissible in that it tended to show that the accused had been guilty of a criminal charge. Also the evidence is not relevant to any issue in the case.

### CONCLUSION

In nearly every case of similar fact evidence considered deals with the adduction of such evidence in order to prove the charge against the accused on to rebut

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LAW OF EVIDENCE

TOPIC:

ADMISSIONS AND CONFESSIONS

## 1.0 INTRODUCTION

An admission is an express or implied concession by a person of the truth of an alleged fact.<sup>1</sup>

Section 20 of the Evidence Act 2011 defines an admission as a statement, oral or documentary, or conduct which suggests any inference as to any fact in issue or relevant fact and which is made by any of the persons and in the circumstances mentioned in the Act.

The reason for this is that it may be presumed that no man would declare anything against himself unless it were true. The rationale for admission, is to dispense with the necessity of proving the fact admitted which in effect shortens the length of a case.

Admissions are used generally in civil proceedings. The courts always tend to accept the admissions where the statement is against the makers interest.

## 2.0 TYPE OF ADMISSIONS

Admissions are either formal or informal

## 2.1 FORMAL ADMISSION

A formal admission is usually contained in a pleading pending litigation. The fact so admitted in a pleading may be taken as established without proof. By section 7 of the Evidence Act a fact is proved in any civil proceedings which the parties therefore or their agents agree to admit by writing under their hands or which by any rule or pleadings of facts at the time, they are deemed to have been admitted by their pleading provided that the court may

<sup>1</sup> See Nokes An Introduction to evidence 4th Edition p. 287.

in its discretion require the facts admitted to be proved otherwise than by such admissions.

This situation may arise for instance where a trial Judge has reasons to believe that the admission was based on erroneous understanding by the party making it or where the court considers *suo motu* that it is in the interest of Justice to do so. See the case of **BELLO v. EWEKA**<sup>2</sup>. In an action for declaration of title, the plaintiff by his statement of claim averred that he derived his title from the vendor who conveyed the land to him. The defendant in his statement of defence admitted the fact.

**HELD:** There was no need to call the vendor to testify in proof of a fact which has already been admitted.

See also the case of **OKESUJI v. LAWAL**<sup>3</sup>. In an action relating to land and succession to the estate of the deceased, the plaintiff who commenced the action in representative capacity made several allegations of fraud. In his statement of defence he failed to deny the allegations.

The Court held that failure to deny the allegation amounts to an admission and hence requires no further proof.

### **INFORMAL ADMISSIONS**

Informal admissions are relevant facts and therefore admissible as evidence which maybe explained away or contradicted by other evidence, they are not confined to any particular litigation and are usually regarded as exceptions to the Hearsay rule.

### **INFORMAL ADMISSIONS**

Informal admission is a statement, oral or documentary which suggests any inference as to any fact in issue or relevant fact made by any person and in any of the circumstances contained in sections 21-23.

Section 19 defines informal admission in the Evidence Act. Informal admissions are relevant fact and therefore admissible as evidence which

<sup>1</sup>I.S.C. 101 at 103

<sup>2</sup>2 NWLR (pt.222) at 322

may be explained away or contradicted by other evidence, they are not confined to any particular litigation and are usually regarded as exceptions to the Hearsay rule.

Informal admissions, are not conclusive proof of the matters admitted although they may operate as estoppels consequently they may be contradicted they are relevant facts and therefore admissible in evidence but, generally against and not in favour of the party making them.

See the case of **SAVANNAH BANK OF NIGERIA PLC v. OPANUBI**<sup>4</sup>

### ADMISSION BY CONDUCT

Though the Evidence Act does not say anything about admission by conduct, the courts have nevertheless held in many cases that there could be admission by conduct.

Nigerian Courts have in this admission by conduct followed the common law position In **AKINBIYI v. ANIKE**<sup>5</sup>

It was held that failure of a plaintiff suspected of committing a crime by a police officer to say anything would not constitute an admission or corroboration. See the case of **R.v. WHITEHEAD**<sup>6</sup>

Besides this judicial authority, it is also a Fundamental Human Right of any person arrested or detained to remain silent. Section 35(2) of the 1999 Constitution Provides: "Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his choice.

But in **UTTEH v. THE STATE**<sup>7</sup> The Supreme Court said that it is the Law when a direct accusation is made against a person in circumstances which would elicit instant refutation from the person accused, and the person does not

<sup>4</sup> 13 NWLR Pt 634 at 203

<sup>5</sup> 1 NWLR 16

<sup>6</sup> 1 K.E. 99 at 102

<sup>7</sup> 2 NWLR (Pt.223) 257 at 274 EF

Confession is admission made by a person charged with a crime stating or suggesting the inference that he committed the crime

refute it, evidence of such conduct could be given against him as admission by conduct.

Statements made by parties to a suit either or being suing sued in a representative character are not admissions unless they were made while the party making them held that character. The Court of Appeal in INKOTARIAH v. GOODHEAD<sup>8</sup> in interpreting this subsection held that a statement made by a person before he assumed representative capacity cannot bind the group after he assumed that capacity except he later adopted it.

In AKINBIYI v. ANIKE<sup>9</sup>

It was held that failure of a plaintiff to cross-examine the defendant on his counter-claim was held as admission of the items claimed by the defendant.

## PERSONS WHO CAN MAKE ADMISSIONS

### PARTY TO THE PROCEEDING.

By virtue of section 24 such admission are relevant and admissible against the person making them but not in his favour. See INSURANCE BROKERS OF NIGERIA V. ATLANTIC TEXTILES MANUFACTURING CO. LTD.<sup>10</sup>

### AN AGENT OF A PARTY TO A PROCEEDING

The Evidence Act recognizes that an agent may under certain circumstance make admission which will bind his principal; for this to apply, the Agent must be a person whom the court regards in the circumstances of the case, as expressly or impliedly authorized by the principal to make such statement, such admission must also have been made by the agent while the agency subsists. See section 21 (1) of the Evidence A.

### A PERSON SUING OR SUED IN REPRESENTATIVE CAPACITY.

This category of admissions will be valid if it was made by him at the time he was acting that character see section 21 (2)

**A PERSON HAVING PROPRIETARY OR PECUNIARY INTEREST.**  
provided the admission was made in the character of a person having such  
an interest.

### **PREDECESSOR IN TITLE**

Section 21 (3) (b) states statements made by persons-  
From whom the parties to the suit have derived the interest in the subject-  
matter of the suit are admissions if they are made during the continuance of  
the interest of the person making the statement.

Where however an admission is not based on personal knowledge of the  
maker of the facts admitted such admission can hardly be of any value".

### **In CHUKWUDOZIE ANYABUNS V EMMANUEL UGUNZE**

The two witnesses from the appellants family testified against him in a land  
suit to the effect that it was the respondents family that made the grant in  
respect of the land in dispute as against the Appellants own story that he  
allocated the same piece of land. In affirming the judgment of the High Court  
and that of the Court of Appeal, the Supreme Court held that the testimonies  
of the Appellants own kith and kin constituted admission against them.

### **ADMISSIONS BY A PERSON WHOSE POSITION MUST BE PROVED, AS AGAINST A PARTY TO A SUIT.**

Section 22- where it is necessary to show the position or liability of x against  
A in a suit between A and another any statement made by x may amount to  
an admission if such a statement would be relevant as against x had a suit  
been brought against him; provided he made the statement at the time he  
occupied such position or was subject to such liability.

### **ADMISSION BY A PERSON EXPRESSLY REFERRED TO BY A PARTY TO A SUIT.**

This is provided for by Section 23 of the Evidence Act. Under this section,  
any statement made by a person to whom a party to a suit has expressly  
referred to for information in reference to a matter in dispute, is an admission

although a legal practitioner can make a formal admission on behalf of his client he cannot do so in the case of an informal admission

### ADMISSION BY A WIFE AGAINST HER HUSBAND

An admission by a wife cannot bind her husband and vice-versa unless the relationship between them comes within one of those disclosed above.

Aside from the foregoing exceptions an admission is admissible in evidence only against the person making it and not in his favour or against a third party see **ATANZA v. ATTAAH**<sup>11</sup>

## CONFESION

### DEFINITION

A "confession" is by virtue of section 28 of the Evidence Act 2011 an admission made at anytime by a person charged with a crime stating or suggesting the inference that he committed that crime" 1  
See the case of **IKEMSON v. THE STATE**<sup>12</sup> (1999) 3 NWLR pt 110 at 455

in the case of **ANTHONY EJINIMA v. THE STATE**<sup>13</sup>

The Appellant was charged with the murder of his three children. He made a statement to the police in which he admitted killing the 3 children with his cutlass.

At the trial the Appellant denied telling the police that he killed the kids and said the kids were killed by armed robbers.

The Supreme Court upheld the admissibility of the confessional statement and dismissed the Appellants appeal.

In the Ejinima's case, the Supreme Court adopted the test laid down in **R.V. SKYES**<sup>14</sup> where a confession is retracted at trial, in other words where a person who made the confession is now denying it. The six tests are as follows:

(1999) 3 NWLR Pt. 596 at 647  
(1989) 3 NWLR Pt 110 at 455.  
(1997) 3 NWLR

1. Is there anything outside to show it was true?
2. Is it corroborated?
3. Are the statements made in it in fact true as far as they can be tested.
4. Was the prisoner the person who had the opportunity of committing the murder?
5. Is his confession possible?
6. Is it consistent with other facts which have been ascertained and which have been proved?

In that case the court concluded that a confession does not become inadmissible merely because an accused person denies having made it but that it is desirable that, before a conviction can properly be based on such a retracted confession, there should be some corroborative evidence outside the confession which would make it probable that the confession was true.

Confessional statements are usually some of the ways by which criminal cases are established.

There must however be no controversy of any sort as to whether or not it was voluntarily made.

It will be admissible against the persons who made it only- section 29 (2) of the Evidence Act States the condition when confession will be relevant and be admissible in Evidence.

Section 29(1) in any proceeding a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section; see section 29(2)

One fundamental ingredient of a confession is that it must be voluntary. Otherwise, it is deemed to be irrelevant and inadmissible.

In the case of **Yusufu v. The State**<sup>15</sup> It was held that it was desirable to have outside a defendant's confession to the police, some evidence, be it

slight of the circumstances which makes it probable that the confession was true.

### In IGBINOVIA v. THE STATE<sup>16</sup>

The Supreme Court said 'a confession is relevant where it proves the fact that constitutes one of or all the elements of the crime to be proved and or identifies the person who committed the offence".

Confession alone if direct and positive and the court is satisfied that the confession is voluntary can convict an accused person. However the practice of confirming confession before a Senior Police Officer in accordance with the Judges Rule is not a rule of Law but only a commendable precaution for ensuring that an enthusiastic junior Police Officer does not endeavour to be tempted to obtain confession to secure conviction<sup>17</sup>.

For a confessional statement to be admissible it must be voluntarily made by the accused person. Therefore where a confessional statement is challenged by the accused as not voluntarily made by him when it is tendered by the prosecution the court must conduct a trial within trial to ascertain, if it was voluntarily made or otherwise of the truth of the assertion of the accused, that it was not voluntarily made by him.

A confession made in court before the Judge or Magistrate is described as **FORMAL OR JUDICIAL CONFESSION**.

Instances of this are where an accused pleads guilty to a charge or where he admits his guilt in a preliminary inquiry.

### EXTRA JUDICIAL CONFESSION

It is extra judicial or informal when made out of court; this later type is what we are dealing with.

<sup>16</sup> 2 S.C. 5 at pp 17-18h.

<sup>17</sup> Obuguy, The State (1994) 9 NWLR (pt.366) 1 at pp. 34-35 H E (SC)

A confession is generally made in writing to a police officer or other law enforcement agent (usually the IPO-IPO means Investigating Police Officer) during the investigation it could also be made orally.

One made orally carries a lot of weight. It is as strong as a written confession if the testimony of the witness to whom it was made was accepted by the court.<sup>18</sup>

A confession must be direct and positive as far as the charges are concerned. To constitute a confession a statement must admit or acknowledge that the maker thereof committed the offences for which he is charged and must in doing so be clear, precise and unequivocal.<sup>19</sup>

A confession to be admitted, must be direct, positive and unequivocal even if it was retracted by the maker **OZAKI vs. THE STATE.**

### In **AFOLABI v. THE COMMISSIONER OF POLICE<sup>20</sup>**

The accused was the store keeper to the company- in Ibadan when a shortage was discovered in his store and was brought to his notice by the manager of the company. He confessed to the manager that he has taken some of the items from the store and sold them to assist in defraying some of the cost of the election expenses but did not indicate how much he sold. The court held that as the alleged confession was neither direct nor positive as to the items contained in the charges it was not admissible 33 items were stolen the Accused admitted only 12.

The charge did not specify or identify the exact 12 items – it was now said that it was neither direct nor positive (is the law not an ass)

Section 28(1) speaks of "an admission made at any time by a person charged.

Uafe & ons V. The State (1968) NMLR 251

Sadomas v. The State (1992 11/12 SCNJ (pt 2) 268 at 276.

561) A.N.L.R. 654

Can this provision be interpreted to mean that a confession if it is to be admitted must have been made subsequent to the accused being charged.

It has been held that a statement may amount to a confession even if made before the accused was charged with the offence but not before the commission of the offence.

The fact that an accused has denied making a confessional statement does not necessarily make it inadmissible.

But when an accused retracts his earlier confessional statement, it is desirable to have some evidence outside the confessional statement.

### VOLUNTARY CONFESSION

Unlike the repealed Evidence Act, the New Act gave conditions that make confessions relevant under section 29(2) a-b but voluntariness of confession was evaded.

The onus of proving affirmatively beyond reasonable doubt that a confession is voluntary rests on the prosecution see **GBADAMOSI v. THE STATE**<sup>21</sup>

It is submitted that any confession that does not come within any of these conditions listed in S. 29 (2) will be relevant and admitted under Section 29(2) as being voluntary.

A cursory look at s.29 (a & b) shows a number of points that must be given detailed examinations

### OPPRESSION

An inducement need not be aimed at making the accused speak the truth in a case, suffice it if he is intimidated to make a statement at all by persons in authority according to section 29 (5) "Oppression" includes torture, inhuman or degrading treatment and the use of threat of violence whether or not amounting to torture. A confession elicited from an accused person as a result of physical violence inflicted on him or of threat of such violence is

involuntary and therefore inadmissible. In **R V BODOM**<sup>22</sup> the accused persons were tied and beaten by their fellow villagers and told to confess by a man in authority in the village. It was held that the confessions they made subsequently, even after caution by the police was wrongly admitted.

### THREATS

Any confessional statement obtained consequent upon the use or the threat of the use of actual violence to the body of the accused will be deemed to be vitiated.

Some policemen are known to have inflicted injuries on accused persons.

### TRIAL WITHIN TRIAL

If in the course of a trial an accused person objects through his Counsel to the admission of a confessional statement on the ground that it was extracted from him by force, the trial Judge will at once be obliged to stop the main trial and conduct a trial within trial to ascertain the voluntariness or otherwise of the said statement.

See **OBIDIOZO v. THE STATE**<sup>23</sup>.

### DISTINCTION BETWEEN A CASE IN WHICH THE ACCUSED DENIES MAKING A STATEMENT ON GROUNDS OF VOLUNTARINESS AND TOTAL DENIAL OF NOT MAKING THE STATEMENT

A distinction is usually drawn between a case in which the accused person objects to the admission of the statement on the ground simpliciter that it was not voluntarily made and the other ground where the accused denies ever making the statement. See the case of **MADAKI v. THE STATE**<sup>24</sup>

On issues relating generally to admissibility weight, or probative value of confessional statements - See **IGBINOVIA v. THE STATE**<sup>25</sup>

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<sup>22</sup>. (1985) 2 WACA 390

<sup>23</sup>. (1987) 4 NWLR Pt.66 at 68

<sup>24</sup>. (1996) 2 NWLR pt 429 at 171

<sup>25</sup>. (1981) 2 S.C. 17 - See Also Modern Law of Evidence by Fidele Nwadiago

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LAW OF EVIDENCE  
RELEVANCY AND ADMISSIBILITY

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INTRODUCTION

The legal body saddled with the administration of Justice in Nigeria is the Judiciary and they operate through the instrumentality of the Courts. Cases are presented in the Court being presided over by either the Judge or the Magistrate.

Cases of the litigants are presented before an official Court through a process of laid down procedure known as the Law of Evidence.

This topic is limited to a consideration of the general principle of admissibility of evidence, which in itself is largely based on the issue of relevancy.

Such relevancy could either be based on reason or logic, or on specific provisions of the Evidence Act 2011 or some other Nigerian Act or even on the Common Law<sup>1</sup>.

The Nigerian Law Reform Commission Stated with regard to the importance of Admissibility in the law of Evidence thus;

"The basic function of the law of Evidence is to ensure that justice is done and the truth is as far as practicable ascertained. The adversary system we operate confines a Judge to the evidence before him adduced by the parties, and he is not allowed to take an active part in fact finding through interrogation of the accused or examination of documents and in the inquisitorial system. It is therefore paramount that there should be an effective system of discerning which evidence is admitted or rejected in proof of a matter."<sup>2</sup>

The Rules relating to Relevancy and admissibility as laid down in the Evidence act are designed to achieve this purpose.

<sup>1</sup>. Afe Babalola, law and practice of evidence in Nigeria (2001) Silon books

<sup>2</sup>. Workshop paper on reform of the Evidence Act

The general principle governing the Law of Evidence is that with some specific exceptions all evidence which is sufficiently relevant to an issue before the court is admissible and all evidence that is not relevant is inadmissible.

### 1.1 WHAT IS ADMISSIBILITY

The fact is clearly defined by section 7 of the Evidence Act 2011. It states the basic rule of Admissibility thus:

"Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and no others"

Section 7 stipulates the facts on which evidence may be given. In other words, the relevance of such facts is prescribed by the law.<sup>3</sup>

Relevancy under the Act arise either because, it is therein stated to exist between particular set of facts, or because of the logical connection between facts generally. As Nsofor J.C.A. rightly declared in

**OGUONZEE v. STATE**<sup>4</sup>

"Relevancy, Admissibility and proof are distinct concepts and departments of the Law of Evidence, to be admissible in Evidence because they may be remotely relevant."

The requirement of anything sought to be admitted in evidence is that of sufficient relevance. What is relevant i.e. what goes to the proof or disproof of a fact in issue will be decided by logic and human experience. In the case of **ELIAS v. DISU**,<sup>5</sup>

In determining whether a particular piece of evidence is admissible "It is the relevancy of the evidence that is important and not how the evidence was obtained"

A particularly vivid illustration of what is not relevant, and therefore inadmissible occurred in **Candide - JOHN v. EDIGIN**<sup>6</sup>

In that case, the Appellant was appearing for an accused person before the respondent who was the trial magistrate at a certain stage, there was an

3. See SS. 4-7 of 2011 Evidence Act Cap. E. 14.

4. 1997 8 NWLR (Pt.518) 566 at 588

5. 1962 1 All NLR 214

6. 1950 1 NWLR (Pt.129) 659 at P.672

exchange of words between the appellant and the respondent. The respondent asked the appellant when he left the law school and the appellant replied "I will refuse to answer that question in the rudest manner" whereupon the respondent ordered the appellant to be detained for some minutes.

It was against this detention for alleged contempt that the appellant brought this action for a breach of his fundamental rights.

In declaring that the detention was illegal and that there was no contempt the court of Appeal considered the issue of relevance and admissibility.

..... It is trite that relevance of facts is of paramount importance in our law. A court has a duty to disallow a question which is not relevant to the proceedings but a relevant question can freely be put to a witness and must be answered although the weight attached to the answer is an entirely different matter and admissibility are closely knit together while the question of weight pertains to the province of evaluation.

It may well be asked was the question when the appellant left Nigeria Law School relevant and necessary for the proper determination of the motion earlier moved by the appellant and adjourned to a date for ruling?

The answer is No. It can thus be stated that as we shall see later in this course except where this is excluded by law or practice logic is the determining factor of relevancy and therefore of admissibility.

It should be noted that if deliberately or through some inadvertence or oversight evidence of a fact not pleaded, is let into proceedings, then it is the duty of the court when it comes to giving judgment to treat the inadmissible evidence as if it had never been admitted.

#### In the case of OKEREKE v. STATE<sup>7</sup>

The Court said:-

"Where evidence legally inadmissible was wrongly admitted, whether objection was taken or not against its admissibility that evidence remains inadmissible and must be excluded either by the trial Judge or the appellate court."

Admissibility in the Law of Evidence refers to evidence which is legally relevant whether it is logically probative or not. In general admissible evidence is that which is relevant and which is not excluded by rules of law or practice.

## 2.0 WHAT IS RELEVANCY OR THE MEANING OF RELEVANCY

Stephen defined the term relevant as:-

"Any two facts to which it is applied are so related to each other that according to the common course of events either one taken by itself or in connection with other facts proves or renders probable the past present or future existence or non-existence of the other".

For example if goods are found in the possession of an accused person shortly after they were stolen and he is unable or unwilling to explain or give adequate explanation of the manner in which they came into his possession that would be a "relevant" fact in a charge of stealing.

Again when stolen goods are found in the possession of an accused person or a suspect, the presumption is that you are either the thief or you bought them knowing them to be stolen. It can be a rebuttable presumption.

As the learned AUTHOR NWADIALO<sup>8</sup> rightly stated, the importance of relevancy in the law of evidence is such that when either party proposes to give evidence, of any fact, the court may ask the party in what manner the alleged fact if proved would be relevant and not otherwise.

### 2.1 FACTS IN ISSUE AND FACTS

The Evidence Act does not define the term "Relevance" but it is clear from the definition of "fact in issue" in section 258 that there is a close connection between relevancy and facts in issue. Thus by section 258 of the Evidence Act 2011 "fact in issue" includes "any fact from which either by itself or in connection with other facts, the existence non-existence, nature or extent of any right liability or disability asserted or denied in any suit or proceedings necessarily follows"

Fact is defined in the Nigerian Evidence act as including:-

<sup>8</sup> Plaintiff of the Law of Evidence 12th Edition Article II

<sup>9</sup> McLean Law of Evidence P.30

- a) Anything, state of things or relation of things, capable of being perceived by the senses; and
- b) Any mental condition of which any person is conscious

A "fact in issue" by the same section 258 of the Evidence Act includes any fact from which either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows.

A fact is said to be "proved" when after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought in the circumstances of the particular case, to act upon the supposition that it does exist.

But when after considering such matters, "the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought in the circumstance of the particular case, to act upon the supposition that it does not exist in that case the fact is said to be "disproved". It is "not proved"

A fact must be distinguished from law. The courts are presumed to know they have to be established in the same way as a fact. A rule of law may be shown to exist by reference to the statute which enacts it or the decision of the court that embodies it or to relevant authoritative legal text books. Opinions also differ from facts opinions are views formed by individual person on facts.

Generally the opinion of a person is not allowed to be given in evidence. It is the function of the court to form its opinion as to the effect of facts it would therefore appear that all facts in issue are relevant per se and therefore admissible facts.

According to Aguda

Facts in issue are all such facts that a plaintiff in a civil case must prove in order to establish his claim if they are not admitted expressly or by implication by the defendant and also such facts as the prosecutor in a criminal case must prove in order to secure a conviction. Facts in issue

also include what a defendant must prove in order to establish his defence"<sup>10</sup>  
Facts in issue are therefore those facts necessary for the plaintiff in a civil case to establish his claim and those the defendant must prove to make out a defence.

A fact in issue is a disputed question of fact and arises where the fact is mentioned by one party and it is controverted by the opposite party in the pleading<sup>11</sup>

When parties to an action have arrived at some material point on matter of fact, affirmed on one side and denied on the other, the parties are said to be at issue, they have joined issues and the question thus raised is called an "issue".

If a fact is not in issue it will either be redundant or unnecessary to tender evidence in proof of it.

Facts in issue are thus determined by substantive law on the subject matter and in civil proceedings also by pleadings.

Thus in a criminal case the facts in issue are those which must be proved by the prosecution in order to establish the charge e.g. in a charge of murder, any fact necessary to establish the fact that the accused committed the act, is a fact in issue. This would be for example section 316 CC

1. Unlawful killing of the victim;
2. The accused intended to cause the death of the deceased or the death of some other person;
3. If the accused intended to do the person killed or some other person grievous bodily harm;
4. If the death was caused by means of an act done in the prosecution of an unlawful purpose of such a nature as likely to endanger human life e.t.c

All the above are facts in issue and are therefore relevant<sup>12</sup>

10. The Law of Evidence 3rd Ed. P. 23.

11. Olale v. Ekwelendu (1989) NWLR p. 326

12. Nwankwo, Modern Nigerian Law of Evidence, Pp 28-9

With regard to civil actions, a good illustration of what constitutes the facts in issue, say in an action for trespass to land are:

i. Possession of the land by the plaintiff

ii. Wrongful entry thereon by the defendant

In a Negligence action for example the facts in issue would include the ingredients:

a) The existence of the duty of care towards the plaintiff by the defendant

b) The breach of that duty of care towards the plaintiff by the defendant

c) A quantum of damages.

If the charge in a criminal case is for example, stealing then the facts in issue are that the accused fraudulently took something capable of being stolen or fraudulently converted such thing to his own use or that of another person for those are the ingredients of that offence.

Another example is if the issue is whether it was the accused who personally burgled a house in a particular village, on a particular date the fact that throughout that day he was away from the village becomes a fact in issue and also becomes relevant and may be proved by evidence.

Relevant facts also constitute circumstantial evidence.

Relevancy and Admissibility are two closely related terms but with certain distinctions while relevance is based on ordinary logic, Admissibility depends on law i.e. the court applies the law see *Miller v. State*<sup>13</sup>. Justice Coker (JSC) said "Admissible evidence under the Evidence Act is evidence which is relevant. The Supreme Court stated in *AGUNBIADE v. ASEGBON*<sup>14</sup> "Admissible evidence under the Evidence Act is evidence which is relevant and it should be borne in mind that what is not relevant is not admissible."

### 3.0 EXCEPTION TO THE GENERAL RULE

Admissibility is a rule of evidence and it is based on relevancy. It connotes relevancy and absence of any legal rule of exclusion.

An admissible fact must be a relevant fact and must not be prohibited from being proved by any rule of law "According to S. 20 (Evidence Act, 2011)

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

1. Evidence must be relevant for it to be admissible but it could be relevant without being admissible usually, the court would admit any evidence if it thinks that the fact is proved it would be relevant and not otherwise.
2. It must be noted that no fact can be regarded as inadmissible unless the Evidence Act provides it to be so. See R.V. AGWUNA<sup>15</sup>
3. In certain circumstances, evidence of previous conviction is admissible under the Act to show Bad character of the accused especially where the bad character of the accused is a fact in issue. S. 248 (E.A. 2011) or where evidence is being given to impeach his impartiality.

The act permits such evidence to be given even though it has no bearing with facts in issue or relevant facts to the facts in issue.

In Land cases previous proceedings and judgment may be admissible to show acts of possession in respect of a particular parcel of land in dispute

#### 4. FACTS RELEVANT ON SOME SPECIAL GROUNDS

Some facts which would otherwise not be relevant may become relevant on some special grounds judging by the circumstances of the particular situation.

- Section 66 of the Evidence Act States that where the title to or interest in family or communal land is in issue oral evidence of family or communal traditions concerning such title or interest is relevant.

· In the case of Commissioner of Land V. K. Adagun<sup>16</sup>

The West African Court of Appeal Stated that literacy among the people of this country does not date back very far and therefore, oral tradition which is generally the only evidence available as to the ownership of land earlier

than the memory of any living witness undoubtedly a practice in this country"<sup>17</sup>. Another example of facts which become relevant on special grounds may be seen in the tendering of secondary evidence of a private document. However it must be shown to the court that the original is lost or cannot be found or has been destroyed.

## 6. FACTS WHICH AFFECT THE CREDIBILITY OF A WITNESS

Such evidence may be given in court and is admissible even though they do not relate to the facts in issue or facts relevant to the fact in issue.

Such evidence usually arise in the course of cross-examination S. 223 makes it possible in the course of cross-examination:

- a) To test the accuracy or veracity or credibility; or
- b) To discover who he is, and his position in life; or
- c) To shake his credit by injuring his character.

## 7. EVIDENCE OF A PREVIOUS CONVICTION OF A WITNESS IS ALSO RELEVANT

Evidence of a previous conviction of a witness for any crime as well as evidence to impeach his impartiality may be given.

According to S. 229 of the Evidence Act when a witness has been asked and has answered any question which is relevant to the inquiry only so far as it tend to shake his credit by injuring his character, no evidence shall be given to contradict him, but if he answers falsely, he may after wards be charged with an offence under section 191 of the Criminal Code and on conviction shall be dealt with accordingly.

Provided that if a witness is asked

- a. Whether he has been previously convicted of any crime and denies it evidence may be given of his previous conviction; or
- b. Any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

<sup>17</sup> See also the case of Sadua and Another v. State (1968) 1 All N.L.R. 125

## FACTS FORMING PART OF THE SAME TRANSACTION

Section 7 of the Act Makes provision for another category of admissible facts, these are facts which though not in issue are so connected with a fact in issue as to form part of the same transactions whether they occur at the same time or at different times and place.

The issue of admissibility of facts occurring at different times and places on the ground of their forming part of the same transaction arose in the case of **ISHOLA V THE STATE<sup>18</sup>**.

In this case the Appellant shot the deceased on a moonlit night in company of 4 other Accomplices, ran into the bush and thereafter crossed into a Road on which his car was parked and drove off with the other accomplices.

The wife of the deceased gave evidence that although he was running away, she recognized the appellant who was holding a gun, from the back and also from the dress he was wearing. Another witness said he was the accused and the others getting into a car which he recognized as the accused's although it was in the night, and admittedly a moonlit night, and although he did not read the number of the plate.

The question that arose was whether under those circumstances the evidence identifying the Appellant was admissible.

In his argument against the admissibility of the evidence of identity, Appellant Counsel argued that the evidence of the prosecution witnesses that they saw the appellant in the vicinity of the murder at about 8p.m on the night of the murder was one of mistaken identity. Even if there was moonlight that made little difference since the witnesses had only a fleeting glance of the suspect and in any case, the deceased's wife only saw the person's back.

In rejecting counsel's argument and upholding the evidence of the appellant's identity, the trial judge considered the following:-

- i) That over a year or two immediately preceding the murder of the deceased, there had been violent disagreements between the appellant and the villagers in the course of which it was alleged

- that the appellant and his workmen or "thugs" attacked the villagers.
- ii) That the Appellant on one occasion took some of the villagers to the police station at Agege for attacking and injuring a road workman;
  - iii) That on another occasion the appellant had ordered one of his men to hold the deceased at gun point while the appellant went to bring a number of police men who on his instructions took the deceased and some other villagers away to Agege Police Station for an alleged offence.

At the end of this review of the evidence, the trial Judge observed "I infer from those details of unhappy contacts between the (Appellant) and the villagers at Alimosho that the (Appellant) must be a very well known person to the villagers and especially to the deceased and members of the Household"

In reviewing this part of the judgment of the trial court, the Supreme Court referred to the so called contact between the appellant and the villagers, and the evidence of those who identified him on the night of the murder and stated as follows:

"Surely the general rule in Criminal Law as well as in civil cases that the evidence must be confined to the point in issue cannot be applied where the facts which constituted distinct offences are the same time part of the transaction which is the subject of the charge. Evidence is necessarily admissible as to acts which are closely and inextricably mixed up with the history of the Criminal Act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentation of the case without the evidence of being thereby rendered unintelligible".

Thus in cases of murder, evidence is admissible to show prior assaults by the accused upon the murdered person, or menaces uttered to him by the accused or to show conversely, the irritating behaviour by the deceased to the accused.

Again the relations of the murdered man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the person

charged with the crime can be admitted to prove an integral part of the history of the alleged crime for which the accused is on trial.

#### 9. CONSPIRATORS COMMON INTENTION ETC.

Section 8(1) of the Evidence Act provides that where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong was, done, or written by any one of such persons in execution or furtherance of their common intention, after the time which such intention was first entertained by one of them, is a relevant fact as against each of the persons believed to be so conspiring for the purpose of proving the existence of conspiracy as well as for the purpose of showing that any such person was party to it.

According to the Supreme Court under S. 8 of the Evidence Act once there are reasonable grounds for believing in the existence of conspiracy evidence of acts done by the conspirators would be used against each of the persons believed to be conspiring as well as for the purpose of showing that any such person was a party to it. In **BALOGUN V. POLICE**,<sup>19</sup> Three persons A, B, and C were charged with conspiracy to steal some bags of cement and with stealing the bags of cement. B and C had made statements to the police in the absence of A incriminating him in the conspiracy. The accused were all convicted and A appealed on the ground that he was not present when B & C made the statements and this could therefore not be admissible against him.

It was held that although the statements could not be used against A in proof of the conspiracy but other acts of B and C done in execution or in furtherance of the conspiracy could be used.

If armed robbers who plan to rob said there should be no shooting and one of them shoots, and the deceased dies they will all be charged with the offence – because they had a common intention.

It should be noted that a *prima facie* case must first be established before S. 8 can be invoked. The statement of an accused cannot be admissible against another accused, in the absence of *prima facie* grounds for believing in the existence of the conspiracy to which the statement relates.

## 10. MOTIVE

"Motive" is usually the reason for an act or omission, that is what, impels one to act, for example, ambition love Hatred, fear, jealousy envy greed, revenge, etc.<sup>20</sup>

Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.<sup>21</sup>

Thus motive is a relevant fact although not a fact in issue. It is relevant because it discloses the reason why the accused committed the crime. Thus although a man can be convicted without proof of his motive evidence of motive definitely facilitates proof and its absence will make the work of the prosecution doubly difficult.

In **JIMOH ISHOLA V. THE STATE**<sup>22</sup> The Supreme Court held that although proof of motive on the part of the accused on a charge of murder is not a *sine qua non* to his conviction for the offence, yet if evidence of motive is available, it is not only a relevant fact, but also admissible under section 4 of the Evidence Act.

Thus in the case of **OGUNTOLU VS THE STATE**<sup>23</sup> The accused was charged with the murder of the deceased and then proceeded to inflict machet cuts on him, however, the prosecution did not advance any proof of motive and the accused's conviction for murder by the trial court was challenged in the Court for this reason among others.

Dismissing the appeal the Court of Appeal Stated that where the conviction for an offence is sufficiently supported and proved by the evidence as whole it is no answer or defence to say that no motive was shown.

## 11. ILLEGALLY OBTAINED EVIDENCE

It should be noted that evidence is admissible even when it is illegally obtained.

20. See section 6 of the Evidence Act

21. See Musdataphar J.C.A. In Oguntolu v. State (1987) 1 NWLR (pt.50) 404 at 470

22. Jimoh Ishola v. The State (1978) 2 LRN 111

23. 1987 (NWLR pt.50) 404 at 470

This principle is illustrated by the decision in *Musa Sadau & Anor v. The State*<sup>24</sup> Hero an accused, who was convicted of forgery appealed on the grounds inter-alia that in as much as the provisions of S.78 (1) of the Criminal Procedure Act were not complied with during the searching of the appellants house as no neighbours were present, the search was illegal and the properties removed there from should not have been received in evidence.

Ruling on the issue of relevancy and admissibility of evidence obtained as a result of the illegal search, Coker JSC Stated that:

"Admissibility is a rule of evidence and it is based on relevancy the Evidence Act provides for the admission in evidence of the variety of facts and other matters described therein in the circumstances under which they are admissible in evidence. It was submitted by the learned Director of Public Prosecutions that admissibility in evidence is based on relevancy and it has not been argued before us that where a fact is relevant it could be excluded at law except by virtue of a specific statutory provision of rule of law; so, a confessional statement, oral or written, will not be admitted unless it is shown to have been obtained in compliance with the law.

There is a general rule of law in civil as well as in criminal cases that evidence which is relevant is not excluded merely by the way in which it has been obtained. This is subject in criminal cases to the discretion of a trial judge "to set the essential of justice above the technical rule if the strict application of the latter would operate unfairly against the accused". (See per Viscount Simon in *Harris v. Director of Public Prosecutions*<sup>25</sup>). This means that the judge can, where the interests of justice demands it, exclude evidence which otherwise would be relevant considering the circumstances of its discovery and production.

Similarly, in *Igbinovia v. The State*<sup>26</sup> the Supreme Court approved the principle that the trial court should not be concerned with the manner of

which admissible evidence has been obtained. Esq JSC however added a caveat that the trial court in a criminal trial ought to exercise its discretion to refuse to admit evidence if it is of the view that the prejudicial effect of the evidence outweighs its probative value. His Lordship then warned against indiscriminate use of police traps as a means of obtaining evidence for the persecution of a case<sup>27</sup>.

## 12. CONCLUSION

There can be no doubt however, that the right to private and family life guaranteed by Section 37 of the 1999 Constitution is designed to protect persons against bodily searches by airport officials, unlawful entry by police into private premises for the purpose of arrest or investigation, government confiscation of mails or identity documents and tapping of telephone lines. The case of *Musa Sadau* earlier referred to would in our opinion not constitute any authorization to the law enforcement agencies to devise unconstitutional means of obtaining evidence. It seems that in exercising their discretion to admit or reject evidence, the court may in exceptional cases in the interest of security and public safety allow the police to use evidence obtained in contravention of a citizen's right to privacy<sup>28</sup>.

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<sup>27</sup> In the case at hand, the prosecution tendered in evidence certain confessional statements made by the accused to a police detective allegedly planted in the same cell with the accused. Upon conviction for murder, the appellant unsuccessfully challenged the admissibility of the statement. *Malone v. U.S.* (1928) 277 U.S. 438; *Malone v. Metropolitan Police Commissioner* (1979) 2 WLR 700.