EVIDENCE

LAW

FOR

PLC PART 1 STUDENTS

@

GHANA SCHOOL OF LAW

RJK Agala

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Compiled By:

RJK Agala

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GENERAL INFORMATION

This pamphlet contains the briefs and necessary portions of some of the cases stated in the study guides. It also has the necessary Articles of the Constitution and Sections of other relevant legislations.

THIS CANNOT BE SAID TO CONTAIN EVERYTHING THAT IS NEEDED FOR THE COURSES, because, the lecturers may add certain important materials and it is always necessary to look up references given in the notes.

ATTENDANCE AT LECTURES IS ALSO VERY IMPORTANT IN ORDER TO HAVE A GOOD UNDERSTANDING OF THIS COURSE.

This reading material, being the writer's personal notes, **IS NOT INTENDED TO BE PUBLISHED / REPRODUCED WITHOUT THE EXPRESS CONSENT OF THE AUTHOR.**

LESSON ONE:

GENERAL INTRODUCTION TO THE LAW OF EVIDENCE

INTRODUCTION:

The law of evidence refers to the legal rules and principles that govern the presentation of evidence or the proof of facts in a legal proceeding. It determines what evidence must or must not be considered by the trier of fact (a judge in bench trials, or the jury in any cases involving a jury) in reaching its decision. Also, it guides the trier of fact to be fair to both parties, disallowing the raising of allegations without a basis in provable fact.

The law of evidence is concerned with the quantum, quality, and type of proof needed to prevail in litigation. The rules of evidence vary depending upon whether the forum is a criminal court, civil court, or family court, and they vary by jurisdiction. The quantum of evidence is the amount of evidence needed; the quality of proof is how reliable such evidence should be considered.

The law of evidence can be described as the heart of the law due to two main reasons. First is that, certain parts of other substantive laws feature predominantly in the law of evidence and have to be studied almost to the same extent as they are studied in those subjects. Second is that, the law of evidence features predominantly in the resolution of many issues which arise in other areas of the law.

The study of the law of evidence therefore cuts across almost all other areas of the law. It therefore requires knowledge of the law in other areas in order to master the law of evidence.

To finalize it, the law of evidence in the major legal systems/ i.e., in the common law, civil law or in countries that have a mixed legal system) is the body of legal rules developed or enacted to govern:

1. What facts need to be proved and produced to the court;
2. Which of the parties have the burden of proof;
3. The required standards of proof to win the case;
4. The admissibility, creditability, and weight of evidence and other procedural matters as to how the evidence shall be produced before the court of law.

In real life, it is impossible to give a legitimate legal advice on a legal issue if one is not sure of the defense to be made or the evidence in support of the claim or against the claim. Thus, no practicing lawyer or judge can make a decision on the merits or demerits of a case when he or she is not certain of the evidence in support of or against that decision.

In practical terms, the law of evidence limits the nature and extent of abuse in making claims, defenses or accusations in court. Put differently, the law of evidence effectively enables the court to prevent resort to rumors, gossip, defamations, slanders, insults, witch-hunt, and outright lies in making one's case.

DEFINITION AND SCOPE OF EVIDENCE IN LAW

The word **"evidence"** originated from the Latin term **"evidentia"** which means ***'to show clearly, to make clear to the sight, to ascertain or to prove'***. This implies that, evidence is something, which serves to prove or disprove the existence or non-existence of an alleged fact. The party who alleges the existence of a certain fact has to prove its existence and the party, who denies it has to disprove its existence or prove its non-existence.

Unfortunately, it is not all the facts traditionally considered as evidence which may be considered as evidence in the eyes of Evidence Law. Rather, ***"evidence is something presented before the court for the purpose of proving or disproving an issue under question. In other words, evidence is the means of satisfying the court with the truth or the untruth of a disputed fact between the parties to a suit in their pleadings."***

In an ordinary parlance, evidence may be construed as ***"any information or material offered to the court to prove or disprove an issue in a case."***

The **BLACK'S LAW DICTIONARY, 7TH EDITION, AT PAGE 576** defines evidence as ***"something including testimony, documents and tangible objects that tends to prove or disprove the existence of an alleged fact."***

PHIPSON ON EVIDENCE also observed that, ***"in a real sense, evidence is that which may be placed before the Court in order that, it may decide the issues of fact".***

In Ghana, the most authoritative definition of the word Evidence is found in **Section 179 of the Evidence Act, 1975 (NRCD 323).**

Section 179 (1) of the Evidence Act, 1975 (NRCD 323) defines evidence as ***"testimony, writings, material objects, or any other things presented to the senses that are offered to prove the existence or non-existence of a fact".***

The above definitions simply imply that, evidence is made up of the information, facts or materials put before the court to prove or disprove an issue. It is for this reason that, the law of evidence comprises the rules and principles that govern the proof of facts presented to the court to convince it of the merits of one's case.

Strictly considered, evidence has two sides. On the one hand, it is **partly law** and on the other hand, it is **partly factual or matter of fact**. It is the cumulative considerations of the law and the facts that result in the outcome of the case.

We learned that, the court is made up of the judge and the jury. In **jury trials,** all matters of law are to be decided by the judge and this is supported by **Section 1 (1) of NRCD 323.** It states that, ***"All matters of law, including but not limited to the admissibility of evidence and the construction of the Decree, are to be decided by the court".***

On the other hand, all matters of fact are determined by the jurors and this is supported by **Section 2 (1) of NRCD 323.** It provides that, ***"Except as otherwise provided in this or any other enactment, in a jury trial, all questions of fact are to be decided by the jury".***

If the court sits without a jury as it is the practice in most criminal trials and in almost all civil trials in Ghana, it is the judge who decides the facts as well as the law. This is supported by **Section 1 (1) of NRCD 323, when read together with Section 2 (3) of the Decree. Section 2 (3)** states that, ***"Where there is no jury, all questions of fact shall be decided by the court".***

From the foregoing, evidence legally covers the burden of proof, admissibility, relevance, weight and sufficiency of what should be admitted into the record of a legal proceeding. Evidence, crucial in both civil and criminal proceedings, may include blood or hair samples, video surveillance recordings, or witness testimony. If evidence is procured illegally, such as during an unlawful police search, then that evidence (and any other evidence it leads to may not be used at trial. Evidence that is deemed irrelevant or prejudicial to a case also may be deemed inadmissible. Additionally, evidence may be thrown out if the integrity of its handling (**"chain of custody"**) is in doubt.

TYPES OF EVIDENCE

There are four main types of evidence, even though a fifth one (scientific evidence) may be considered.

1. PAROL / ORAL EVIDENCE

Parol evidence is oral testimony. It comprises information given in Court verbally (**viva voce**) by a party (either the accused person or a witness) to prove the truth of the matter asserted. It may or may not be on oath. Oral or testimonial evidence can therefore be said to include all statements which the Court permits or requires to be made before it by witnesses in relation to the matters of fact under inquiry. Evidence given by video conferencing or video / television link is classified under this category of evidence.

A witness who cannot speak may communicate his knowledge of the facts to the Court by signs or by writing and in either case, it will be regarded as oral or testimonial evidence. Thus, in a case where the witness (a woman) was unable to speak because her throat was cut and she suggested the name of her assailant by the signs of her hand, it was held to be an oral statement relevant as a dying declaration.

As a general rule, oral evidence must be direct. This means that, a witness can tell the Court of only a fact of which he has personal knowledge in the sense that, he perceived the fact by any of the five senses. That is to say that, if the evidence refers to a fact which could be seen, it must be

from a person who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says she perceived it by that sense or in that manner; if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

This is supported by **Section 60 of the Evidence Act, 1975 (NRCD 323).** The ***only exception to the rule*** is where an expert witness testifies to matters calling for expertise (**Section 112 of NRCD 323).** In that case, the rule under **Section 60 (1) of NRCD 323** shall not apply. This is because, portions of the testimony of an expert may be derived from textbooks or what he has learnt from other people. Point must be noted that, the party against whom parol or testimonial evidence is given has a right to cross-examine the witness.

At Contract law, there is a rule known as ***Parol Evidence Rule.*** It prevents the introduction of evidence to prove oral agreements that were not put into the written agreement. Once the parties have reduced their intents into writing, the written document is, **prima facie**, taken to be the whole contract. The terms of such a written contract are therefore said to be limited to the contents of the written document and nothing more. The rule provides that ***"extrinsic evidence is inadmissible to vary a written contract".*** At Evidence law, the parol evidence rule is codified in **Section 177 and Section 25 (1) of the Evidence Act, 1975 (NRCD 323).**

2. REAL EVIDENCE

This is physical evidence which plays a direct part in the incident in question. In other words, real evidence is evidence whose characteristics are directly material to the issue to be determined. This type of evidence is usually involved in the actual production or making of the evidence in issue. Real Evidence therefore takes the form of material objects or physical things produced as exhibits for the court to see or smell or feel or hear. If the condition of a material object is among the facts in issue, for example, that, the accused was found in possession of blood-stained cutlass, the object (cutlass) may be produced to the court to enable the court form an opinion or take a decision on

the matter. In **R. AMETEWE** (***assassination attempt on Dr. Nkrumah***), the real evidence was the gun used in the assassination attempt since only one gun was shot and the deceased died of gunshot wounds.

As a general rule, real evidence or material objects must be presented in the presence of parties so as to make the necessary submissions. Failure to produce such an object may be the subject of observation by the judge and if its value is in issue, a presumption adverse against the party who fails to produce the object may be made. In exceptional cases, the court will accept secondary evidence of real objects rather than requiring their physical production.

3. DEMONSTRATIVE EVIDENCE

This is physical evidence which one can see and inspect. It is made up of information in the nature of illustration, such as pictures, maps, busts, building plans, site plans, etc.

4. DOCUMENTARY EVIDENCE

Documentary Evidence covers any information in the form of writing on paper, such as affidavit, wills, indenture, written contract. It is usually tangible. Such a statement can, as a rule be proved only by the production of the original document itself and this is supported by ***Section 165 of the Evidence Act, 1975 (NRCD 323),*** which provides that, ***"Except as otherwise provided by this DECREE or any other enactment, no evidence other than an original writing is admissible to prove the content of a writing".***

5. SCIENTIFIC / DIGITAL / ELECTRONIC EVIDENCE

This is also known as Digital or Electronic Evidence. This is defined in ***Black's Law Dictionary,*** **7th ed. at page 580** as: **"Testimony or opinion that draws on technical or specialized knowledge and relies on scientific method for its evidentiary value."** It includes ***digital evidence*** which is any information stored or transmitted in an electronic form for use in court proceedings. It is sometimes described as electronic evidence. Examples are tape recording, CD

ROM, video recording. The SC of Ghana has restated the law on the admissibility of scientific evidence in the cases of **RAPHAEL CUBAGEE v. ASARE AND OTHERS (2017/2018)-*Article 18 (2) Case*** where **PWAMANG JSC** held as follows: ***"In conclusion therefore, we answer the question referred to us as follows; the secret recording of John Felix Yeboah, the Superintendent Minister and representative of the 3rd defendant by the plaintiff amounted to a violation of the privacy rights of the said John Felix Yeboah. In all the circumstances of this case the secret recording ought to be excluded from the evidence in the case. However, since the Magistrate of the District Court "A" Sunyani has already listened to the recording we direct that the case be transferred to the nearest District Court for determination."***

ADJUNCT TYPES OF EVIDENCE

1. **CIRCUMSTANTIAL EVIDENCE**

This is Evidence that tends to prove a factual matter by proving other events or circumstances from which the occurrence of the matter can be reasonably inferred.

2. **HEARSAY EVIDENCE**

This is a declaration, statement or utterance made out of Court and offered as a substitute for the truth of what is alleged t have been said or uttered. It is ***evidence of a statement***, other than a ***statement made by a witness while testifying in the action at the trial***, offered to prove the truth of the matter stated. See **Section 116 (c) of the Evidence Act, 1975 (NRCD 323).** Hearsay Evidence is not admissible (**Section 117 of NRCD 323**) except as otherwise provided by the

a) ***Evidence Act, 1975 (NRCD 323), example-Section 124 of NRCD 323 permits admission of res gestae; or***
b) ***Any other enactment, example-Section 31 (1) of the Chieftaincy Act, 2008 (Act 759); or***
c) ***Agreement of the parties.***

3. TRADITIONAL EVIDENCE

This is evidence that is made up of the history of events which happened sometime in the past concerning a person's pedigree, origin, migration, land amongst others.

SOURCES OF THE LAW OF EVIDENCE

1. CONSTITUTIONAL LAW

This includes all the past Constitutions of Ghana, i.e. the recent 1979, 1969, 1960 and 1957 Constitutions because, the 1992 Constitution is based on repeat provisions and interpretations of past provisions, i.e. doctrine of stare decisis applies. The main relationship between the law of evidence and constitutional law lies in the fact that, there are many evidentiary rules which are traceable or directly referable to the current 1992 Constitution.

First is the rule on **Presumption of Innocence of the Accused.** This rule is well settled in the law of evidence and can be traced to **Article 19 (2) (c)** of the 1992 Constitution. This provision reads that, ***"A person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty".***

Second is the rule on the **Right to Silence** which is deduced from the right to testify or not to testify under **Article 19 (10) of the 1992 Constitution.** This provision reads that, ***"No person who is tried for criminal offence shall be compelled to give evidence at the trial".***

Third is the evidentiary rules on **Autrefois acquit and Autrefois Convict** which are neatly summed up in **Article 19 (7) of the 1992 Constitution.** This provision reads that, ***"No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for the offence, except on the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal".***

2. STATUTES / STATUTORY LAW

The competent body for statutory law is Parliament of Ghana. The number of statutes covered by the law of evidence is legion. However, the most important is obviously the **Evidence Act, 1975**

(NRCD 323), which came along with a commentary and per the Interpretation Act, 1960 (CA 4), it serves as an aid to construction.

Other statutes which are of special significance in the study and application of the law of evidence are the laws relating to Civil Procedure such as:

- ***Supreme Court Rules, 1996 (CI 16)***
- ***Court of Appeal Rules, 1997 (CI 19)***
- ***High Court (Civil Procedure) Rules, 2004 (CI 47)***
- ***District Court Rules, 2009 (CI 59)-regulate the procedure process at the district court.***
- ***Chieftaincy (National and Regional Houses of Chiefs) Procedure Rules, 1972 (CI 27)***
- ***Chieftaincy (Proceedings and Functions) (Traditional Councils) Regulations, 1972 (LI 798)***
- ***Courts Act, 1993 (Act 459)***
- ***Criminal and Other Offences (Procedure) Act, 1960 (Act 30)***
- ***Children's Act, 1998 (Act 560)***
- ***Juvenile Justices Act, 2004 (Act 653)***
- ***Road Traffic Act, 2004 (Act 683)***
- ***Criminal Offences Act, 1960 (Act 29)***
- ***The Wills Act ,1971 (Act 360)***
- ***The Intestate Succession Law, 1985 (PNDCL 111).***

3. JUDICIAL PRECEDENTS

These are decisions of the courts explaining or enunciating various aspects of the law of evidence. The decisions which are of binding effect are those of the Supreme Court, Court of Appeal and High Court.

The Supreme Court, Court of Appeal and the High Court **together form the Superior Courts of Judicature.** The Circuit Court, District Courts and other Tribunals constitutes the **Lower Courts / Inferior Courts.** The Lower Courts will always accept decisions of Higher Courts as binding and authoritative.

The Supreme Court doubles as the final appellate Court and Constitutional Court in Ghana. It has original jurisdiction in all matters relating to the interpretation of the constitution and appellate

jurisdiction. The High Courts have original jurisdictions in all matters except Chieftaincy matters (enstoolment and destoolment of a Chief). Court of Appeal has no original jurisdiction.

4. CUSTOMARY LAW

These are laws regulating the cultures, tradition and customs of the people of Ghana. Many of the customary laws are in fact substantive laws. However, they contain provisions which may be described as procedural to the extent that, they set out the processes for doing certain things and provide the evidence required to prove or disprove certain facts relating to customs or culture. The evidence so provided constitutes part of the law of evidence.

5. COMMON LAW

Historically, the Common Law originated from England. It was developed from the common customs of the English people. It was derived from judicial decisions and was administered by the Common Law Courts. As a result of colonization, the common law became part of the laws of Ghana when the colonialists imposed their culture and laws on the people of the Gold Coast and later Ghana. Thus, the Common Law is the received law from our colonial masters. In Ghana, we now have the common law of Ghana being part of the laws of Ghana by virtue of **Article 11 (1) of the 1992 Constitution**. By the definition of Common Law under **Article 11 (1) of the 1992 Constitution**, Common Law in Ghana includes the rules of law known as the common law, the rules of equity known as the doctrines of equity, the rules of customary law and Judicial Precedents.

6. TEXTBOOK LAWS

Some important views ad interpretations placed on some aspects of the law of evidence may only be found in textbooks. Those relating to the law of evidence are considered when issues of evidence are being determined by the courts. In Ghana, the most authoritative laws on interpretation and application of some aspects of the Law of Evidence are as follows:

-Criminal Procedure in Ghana, by A.N.E. Amissah, 1982

-The Ghana Law of Evidence, by J. Ofori-Boateng, 2nd ed.

-Law of Evidence in Ghana, by Maxwell Opoku-Agyeman

-Annotated Criminal Procedure Code of Ghana, 1992, by Henrietta J.A.N. Menah-Bonsu.

-The Law of Interpretation in Ghana, by Dr. S.Y. Bimpong-Buta.

-The Law of Chieftaincy in Ghana, by S.A. Bobbey, 2008

7. FOREIGN LAWS

There are certain laws in foreign countries which are often considered and used as guides when deciding on issues relating to the law of evidence. Laws in this context refer to both judicial precedents and statutory laws. They are mainly laws from countries where the prevailing law is common law and they include countries like England, the USA, Australia, Nigeria, and India.

This view or application of the common law is supported by **Article 11 (1) (e) of the 1992 Constitution** of Ghana which provides that, the common law forms part of the laws of Ghana. **Section 178 (3) of the NRCD 323** also supports this view. They are most useful when there are no Ghanaian authorities on the issues.

Point must however be noted that, the interpretations and decisions from foreign countries are considered with much caution, since most of them are based on social, economic, cultural or political circumstances which may not be applicable or relevant to Ghana.

LESSON TWO

PROOF

DEFINITION AND SCOPE OF PROOF

In litigation, the entire subject of the law of evidence is aimed at the ascertainment of truth by the medium of proof.

Section 179 (1) of the Evidence Act, 1975 (NRCD 323) defines **proof** as ***'the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.'***

In MAJOLAGBE v. LARBI & OTHERS (1959) GLR 190, **proof in law** was defined as ***"the establishment of facts by the proper legal means."***

DIFFERENCE BETWEEN EVIDENCE AND PROOF

A comparison of the concept of evidence and the concept of proof will facilitate the understanding of the word 'proof". Sometimes, **proof** is used to mean evidence or testimony or documents. However, in law, there is a difference between evidence and proof.

1. ***In law, evidence is the method or the means by which an information is put across to the court to prove or disprove the existence of a fact in issue whilst proof is the effect the evidence has on the mind of the court, judge or trier of facts and his conclusions from the evidence adduced before him.***

2. ***Whilst evidence may be an object or a material, proof is the convincing or the persuading aspect of the evidence.***

3. ***Whilst evidence is determined at the beginning of the trial, i.e. it has to be adduced at the beginning of the trial, proof is assessed at the end of the testimony, i.e. after hearing the entire case.***

4. ***Evidence is factual or tangible whilst proof is more of a mental exercise or intangible.***

GENERAL RULES UNDER PART 1 OF THE NRCD 323

Evidence has two side; i.e. it is partly law and partly factual. It is the cumulative considerations of the law and the facts that result in the outcome of the case. The Court is made up of the judge and the jury and in a typical courtroom scenario, there can be questions of law and at the same time questions of fact so the ***Evidence Act, 1975 (NRCD 323)*** determines who answers such questions.

In Ghana, a trial by jury is used only in a criminal cases, i.e. where the trial is on indictment. Jury trials are covered by the **1992 Constitution, NRCD 323 and ACT 30.** The general rule is that, all questions of law must be determined by the judge while questions of fact are to be determined by the jury. The Court or Jury may also have to decide preliminary facts and preliminary facts in issue as and when they arise. The general rules and exceptions relating to these facts are as follows:

1) QUESTIONS OF LAW: SECTION 1 OF NRCD 323

Questions of law are decided by the court and this is supported by **Section 1 of NRCD 323.**

a) The **NRCD 323** provides under **Section 1 (1)** as follows:

"All questions of law, including but not limited to the admissibility of evidence and the construction of this Decree, are to be decided by the court."

Comment (s):

A **"question of law"** is also known as **"point of law".** Questions of law are questions that must be answered by the application of relevant legal principles to the interpretation of the law. They are matters or issues which can be decided on plain law or statutes. The determination of the questions of law is a series of process from the commencement of the trial to the end. It is not a judgment of the case, it is usually made up of objections and rulings during the trial. At times, you need to adduce evidence in order to establish what is the law, especially where the law is not written but by convention and practice. By virtue of **Section 1 (1) of the NRCD 323**, the determination of a question of law is mandatorily to be determined by the judge, even in a jury trial. The **NRCD 323** defines **"Court"** in **Section 179 (1)** to include the Superior Courts of Judicature and all other Courts of Ghana which constitute the Judiciary. From **Sections 1 and 2**, it can be concluded that, the word "Court" refers to the judge as contrasted with a jury. Judge also

refers to a Magistrate. During the course of the trial, if any question of law comes up, for example, a witness is called and an objection is raised challenging his qualification as a witness, this being a question of law, the judge will rule on it. The qualification of a witness is a question of law because the Evidence Act provides for the qualifications.

b) The **NRCD 323** also provides under **Section 1 (2)** as follows:

"The determination of the law of an Organization of states to the extent that such law is not part of the law of Ghana, or of the law of a foreign state or sub-division of a foreign state, is a question of fact, but it shall be determined by the court."

Comment (s)

Section 1 (2) envisages two situations: The ***first situation*** arises on the determination of the extent to which international laws are binding on Ghana or another state. If in any litigation, the issue as to the extent to which the whole or part of any convention to which Ghana or any other Country is a signatory is binding on Ghana or that State, it is a question of fact but is to be determined by the judge. Also where a person wants to show that, terms of a convention to which Ghana or another State in an International Organization is part of the laws of Ghana or that State, the issue is treated as a question of fact but determined by the judge. The ***second situation*** refers to the applicability of the laws of other countries in Ghana. **Section 40 of NRCD 323** provides that, ***"the Law of a foreign Country is presumed to be the same as the Law of Ghana"***. If you want to show it is not the same, you first have to prove the foreign law is different and once you do that, it is applied by the judge as a question of law. Put differently, **Section 1 (2)** simply means that, the court will receive evidence from witnesses on oath from the parties and eventually make a decision as to the law of that state. For example a stranger who came to reside in Ghana from an ethnic group in Namibia dies intestate (without making a will). The intestate law provides that part of the property should be distributed according to the custom of the deceased. The issue in such a situation will be what is the customary law? The court will take evidence after which it will give judgment to state the law applicable to the deceased person's custom. Thus, as could be seen, **Section 1 (2)** clearly indicates that, ***"the rule that all questions of facts are to be determined by the trier of facts is not absolute."***

c) The **NRCD 323** also provides under **Section 1 (3)** as follows:

"The determination whether a party has met the burden of producing evidence on a particular issue is a question of law to be determined by the court."

Comment (s):

The burden of proof simply means the obligation of a party to establish or prove the existence or otherwise of a claim. It entails two concepts; burden of persuasion and burden of producing evidence (we will treat these as we go along, from Sections 10-17). A party to a case in court must lead evidence to satisfy the requisite legal standard. The determination as to whether the evidence produced met the standard is a question of law for the court because, the standard is set by law and is an issue of law. The determination of whether a party has met the burden of producing evidence on a particular issue according to **Section 1 (3)** is a question of law to be determined by the court. Thus, whether there is sufficient evidence is a question of law for the judge to determine. If the party has adduced enough evidence to justify, for instance, a favorable finding by the jury, the judge leaves it to the jury to decide whether or not the issue has been proved. If the evidence is insufficient in the opinion of the judge, he must withdraw the issue from the jury , whatever their view of the matter, directing them either to return a finding on that issue in favor of the other party or , in appropriate circumstances, to return a verdict on the whole case in favor of the other party. Please note that, any time they refer to evidence, it means fact. Facts are used as evidence. If you are told to lead evidence, it means come and state the facts in support of your case. So often the two words are used interchangeably. Also, the prosecution must first discharge its burden of proving its case against the accused before the accused is called upon to lead evidence to raise a doubt. So before the accused is called upon to explain, it means the prosecution has established a prima facie case against the accused. Therefore, if the prosecution fails to adduce sufficient evidence in relation to an essential element of the offence, they not only fail on that issue, but also in the whole case and the judge will direct the jury to acquit the accused. The judge, even at the close of the prosecution case may consider if there is a case at all for the accused to answer or to acquit the accused. Thus, the issue of whether the accused has a case to answer after the prosecution's case is a question of law to be determined by the judge and the power of the judge to decide on that is provided for in **Section 271 of Act 30**. The said Section of **Act 30** states that,

"The Justice may consider at the conclusion of the case for the prosecution whether there is a

case for submission to the jury, and if of the opinion that a case has not been made that the accused has committed an offence of which the accused could be lawfully convicted on the indictment on which the accused is being tried, the Justice shall direct the jury to enter a verdict of not guilty and shall acquit the accused."

In **TSINOWOPE v. THE REPUBLIC (1989/90) 1 GLR 114 C.A.**, at the end of the trial of the appellant for murder, the medical evidence was uncertain as to the cause of death. Although the appellant slapped the deceased once, the injury was consistent with other events that had occurred that day. The judge directed the jury on murder and manslaughter and invited them to consider whether the appellant's slap was intended to kill. The appellant was consequently convicted of manslaughter and he appealed. The Court of Appeal held that, the judge should have withdrawn the charge of murder and the accused should not have been called upon to enter a defense. The Court was of the opinion that, the question of whether the prosecution has made out its case was one of law for the trial judge to decide and not one of fact for the jury. Therefore, that issue should have been so decided.

Similarly in **C.O.P v. AKOTO (1963) GLR 231**, the trial judge, in a trial for murder ruled that, there was a case for the accused to answer because, (1) there was evidence of hostile intentions on the part of the accused towards the deceased; (2) the deceased was found dead the same night after a quarrel with the accused; and (3) the clothes and palms of the accused were stained with blood. On appeal, it was held that, the trial judge failed to discharge his duty under **Section 271 of Act 30** because; (a) there was no satisfactory proof of the accused's alleged expression of intention to kill the deceased; (b) on the evidence, it is extremely difficult to say the accused alone had the opportunity of lying in wait to inflict harm on the deceased and whereby murder him; (c) where the prosecution rely on human blood found on the clothes of the accused, they must also be able to prove that the blood is that of the deceased. Otherwise, there was no nexus between the accused and the killing. It is therefore dangerous in jury cases to leave to the jury evidence which amounts to suspicion only as there is the fear that they may put a multitude of suspicions together and make a proof of them.

d) The **NRCD 323** also provides under **Section 1 (4)** as follows:

"Where the court determines that a party has not met the burden of producing evidence on a particular issue the court shall as a matter of law determine that issue against that party."

Comment (s):

If the court in **Section 1 (3)** above comes to the conclusion that, a party was not able to lead evidence to satisfy the requisite legal standard, then the case shall be decided against the party. It can be likened to a student who fails to attain the pass mark in an exams and declared as having failed. See T**TSINOWOPE v. THE REPUBLIC (1989/90) 1 GLR 114 C.A.** and **C.O.P v. AKOTO (1963) GLR 231.**

2) **QUESTIONS OF FACT: SECTION 2 OF NRCD 323**

All questions of fact are to be decided by the jury except otherwise provided for by the **NRCD 323** or any other enactment and this is supported by **Section 2 of NRCD 323.**

a) **The NRCD 323 provides under Section 2 (1) as follows:**

"Except as otherwise provided in this or any other enactment in a jury trial all questions of fact are to be decided by the jury."

Comment (s):

As a general principle, all questions of law must be determined by the judge while questions of fact are to be determined by the jury. The jury do this by considering the whole evidence (facts) and giving a verdict as to whether the accused is guilty or otherwise. A jury trial is often used in the serious criminal offences such as murder. ***The jury are a group of seven (7) lay persons from the community each aged between 25 and 60.*** The singular is juror and the plural is jury. At the end of the trial, the jury determines the verdict after consideration of the evidence. The verdict is whether the accused is guilty of the offence charged or not. The judge does not play any role in deciding whether or not the accused is guilty. The role of a judge in a trial with a jury is to explain the provisions of the relevant laws to the jury to apply. Should there be any issue whether a law

has been complied with, such an issue being a legal one or question of law shall be determined by the judge. In brief, the jury determines all questions of fact in a jury trial.

b) **The NRCD 323 provides under Section 2 (2) as follows:**

"Nothing in this section shall preclude the court from summing up the evidence to the jury or from commenting on the weight or credibility of the evidence so long as the court makes it clear to the jury that they are to determine the weight and credibility of the evidence themselves and are not bound by the court's summary or comments."

Comment (s):

In a jury trial, the judge can express his opinion on a fact but his opinion is not binding on the jury. Should the judge express his opinion on a question of fact, he should do well to inform the jury that, his opinion is not binding on them and that, they should come to their own independent opinion on the said fact. If a judge imposes his determination of facts on the jury, it will be fatal. If the case goes on appeal, his decision will be quashed. See **APETORGBOR AND OTHERS v. THE REPUBLIC (1974):** ***"The determination of whether a witness was an accomplice or not was a question of fact for the jury to decide and not a matter of law for the judge to determine. Although a judge was entitled to direct a jury on questions of fact as well as on law, he must, however, in his directions on questions of fact indicate to the jury that his own opinion on the facts was not binding on them and that they should make up their own minds on the issue of facts, having regard to the evidence before them. In directing the jury to regard the first prosecution witness as an accomplice, the trial judge had usurped the function of the jury. Dicta of van Lare J.A. in R. v. Ahenkora and Badu [1960]"***

c) **The NRCD 323 provides under Section 2 (3) as follows:**

"Where there is no jury, all questions of fact shall be decided by the court."

Comment (s):

If a judge is sitting alone, we say that, the judge is sitting in a ***composite position*** and in that case, the judge decides both questions of law and facts.

3) **PRELIMINARY FACTS: SECTION 3 OF NRCD 323**

Preliminary facts are matters which have to be proved before the main evidence may be admitted and this is provided for under **Section 3 of the NRCD 323.**

a) **The NRCD 323 provides under Section 3 (1) as follows:**

"For the purposes of this section and section 4, a "preliminary fact" is any fact upon which depends the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or non-existence of a privilege."

Comment (s):

Usually, before a judge decides whether or not a fact should be admitted in evidence, he has to decide on the existence or non-existence of some preliminary fact. A preliminary fact is whether a particular situation exists to form the foundation or basis for the application of the relevant law. For example, where the law says only a particular type of evidence is admissible, the preliminary fact will be whether or not the evidence about to be offered qualifies under the law. At times, the preliminary fact will not be in issue (no arguments as to their existence or non-existence). At times, it becomes a bone of contention between the parties and if such is the situation, we say the **preliminary fact is in issue** and the court must make a determination on it. The court makes a determination after legal arguments by the parties or after taking evidence and legal arguments.

The NRCD 323 however limits the definition in **Section 3 (1)** to ***Sections 3 & 4***. It states thus, ***"for the purposes of this Section and Section 4, a preliminary fact is a fact on which depends: a) the admissibility of evidence b) the qualification or disqualification of a person to be a witness c) the existence or non-existence of a privilege.***

Put differently, as could be seen from **Section 3 (1),** preliminary facts may be grouped into three:

1. **Preliminary facts to determine whether a person is qualified or disqualified to be a witness.**
2. **If so qualified, whether the evidence is admissible, for example, is it a voluntary or involuntary confession or is it a hearsay? Is there a rule of estoppel applicable?**
3. **If the person is qualified, and the evidence is normally admissible, whether or not there exists some facts which establish some privileges which do not make the**

evidence admissible. The privilege may attach to the witness personally or to some document to be tendered. We will treat privileges later.

For example, Section 59 of NRCD 323 sets down those who are disqualified from testifying as a witness to include a person incapable of coherent expression so as to be understood, directly or through interpretation by another person who can understand that person. Enyonam is of unsound mind and witnessed the WILL of her late uncle which is being contested as not being valid because Enyonam cannot understand the document that she signed. The matter goes before a court challenging her capacity to sign the WILL.

At the court, when it was her turn to testify, the other party raised the point that, she was not qualified to testify as a witness because, she is not capable of coherently expressing herself to be understood directly or through an interpreter. Thus the qualification of Enyonam as a witness becomes a PRELIMINARY FACT. The preliminary facts being her ability to coherently express herself to be understood directly or through an interpreter.

In jury trials, the court or judge decides the preliminary facts on which admissibility is based but the jurors decide on the facts in issue on the base of which a decision or outcome of the case is based. Where the judge sits alone, he decides both the preliminary facts and the facts in issue.

Normally, during a jury trial all these preliminary findings of fact are determined in the presence of the Jury. However there are some situations where the judge may have to make a specific finding or may have to hear evidence in the absence of the jury and those situations include the following:

a) **Where the evidence is admitted conditionally, without proof of preliminary fact.**
b) **Determination of privilege**
c) **Determination of admissibility of confession statement**

b) **The NRCD 323 provides under Section 3 (2) that,**

"The court shall determine the existence or non-existence of all preliminary facts."

Comment (s):

The duty to determine the existence or non-existence of a preliminary fact is vested in the court.

c) **The NRCD 323 provides under Section 3 (3) as follows:**

"A ruling on the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or non-existence of a privilege implies whatever finding of fact is prerequisite to it, and unless otherwise provided by any enactment no separate formal finding of fact is necessary."

Comment (s):

Once a ruling is made by the court to determine a preliminary fact, no evidence shall be taken to determine that same preliminary issue. That is to say that, should the court give a ruling on the existence or non-existence of a preliminary fact in issue without the taking of evidence, the issue will not be determined again despite the fact that, no evidence was taken before its determination.

d) **The NRCD 323 states under Section 3 (4) as follows:**

"Any party, and as to a claim of privilege the person claiming the privilege, is entitled to present evidence and arguments relevant to a determination under subsection (2)."

Comment (s)

Any party claiming a privilege MAY present evidence and arguments to assist the court determine the existence of the said privilege. Thus, by virtue of **Section 3 (3),** it is not always that the preliminary fact has to be established by evidence. However, if the preliminary fact is contested, evidence may have to be led in proof of it before the admissibility is determined and this is supported by **Section 3 (4).**

e) **The NRCD 323 provides under Section 3 (5) as follows:**

"In making a determination under subsection (2), the court may hear the evidence and arguments and announce its determination in the absence of the jury, and shall hear the evidence and arguments and announce its determination in the absence of the jury if the determination concerns any matter admissible only under section 120 relating to confessions."

Comment (s):

The court in the process of the determination of the existence or non-existence of a preliminary fact **MAY** do so in the absence of the jury. However if the determination relates to the admissibility of a confession statement of an accused admitting an offence, the hearing **SHALL** be held in the absence of the jury.

f) **The NRCD 323 states under Section 3 (6) as follows:**

"Unless otherwise provided by this Decree, the court may admit evidence which requires proof of preliminary facts without prior proof of the preliminary facts on the condition that the preliminary facts will be proved later in the course of the trial; but such conditionally admitted evidence shall be disregarded if the court determines that the preliminary facts were not proved."

Comment (s):

The court may irrespective of the need to determine the existence or non-existence of a preliminary fact, go ahead to take and admit evidence on condition that, the said determination would be done later. Should the later determination of the preliminary fact lead to the inadmissibility of the evidence or disqualification of the witness, the evidence so admitted shall be ***expunged*** from the record.

4) **Preliminary Facts-In-Issue / Facts-In-Issue**

A preliminary fact in issue occurs when a preliminary fact becomes a fact in issue for determination in the substantive matter. ***What is a fact in issue?***

Facts in issue are the main controversies to be decided by the court. It is the central issue based on which evidence will be led. In civil cases, summons for direction is taken for the parties to agree on the triable issues. The triable issues are the facts in issue. Thus, the triable issue in the example of the case under (1) is whether or not being a person of unsound mind she had the capacity to witness the WILL of his late uncle.

In civil trials, facts in issue are deducible from the pleadings. Again, in a civil case, any fact is in issue if, having regard to the statement of case and the substantive law, it is a fact necessary to the success of any claim or defense at issue. The number of facts in issue will depend entirely on the nature of the case. In a typical action for negligence, the facts in issue are that that defendant owed a duty of care to the claimant, that the defendant was in breach of that duty of care and that such breach caused the claimant loss or damage for which he is entitled in law to recover; together with any further facts raised by an affirmative defense, which goes beyond a mere denial of those pleaded by the claimant, for example facts as may establish contributory negligence, volenti non fit injuria or act of God.

In criminal trials, the facts in issue are ascertained by reference to the essential elements of the offence as charged in the indictment or summons. The position here is rendered somewhat simpler by the fact that, ***a plea of not guilty puts in issue all the facts necessary to establish the commission by the accused of the offence charged, and the prosecution bear the legal burden of proving every such element of the offence.***

a) The NRCD 323 provides under Section 4 (1) as follows:

"When a preliminary fact is also a fact in issue in the action:

> ***(a) the court or jury, as the tribunal of fact, shall not be bound by the court's determination of the existence or non-existence of the preliminary fact, and***
>
> ***(b) a determination by the tribunal of fact that differs from the court's determination of the existence or non-existence of the preliminary fact shall not require the tribunal of fact to disregard any admitted evidence or affect any ruling admitting or excluding evidence."***

b) The NRCD 323 provides under Section 4 (2) as follows:

"Nothing in this section shall be construed to preclude the introduction of evidence relevant to the weight or credibility of admitted evidence or to preclude the tribunal of fact from considering such evidence."

Comment (s):

At times the preliminary facts in controversy will be the same as the controversy to be determined in the main trial. In such a situation we say the preliminary fact is in issue.

For example Kwame Berko is charged with the offence of rape for having carnal knowledge of Ama Asimi without her consent. Ama Asimi according to the facts of the prosecution is a person of unsound mind who cannot coherently express himself to be understood and as such could not be said to have given consent to the sexual act with Kwame Berko. The explanation of the accused, Kwame Berko, is that Ama Asimi is a very sound person and capable of coherently expressing herself to be understood and as such gave a valid consent to the sexual act.

When it was the turn of Ama Asimi to testify at the trial as the rape victim, the court first decided to ascertain if Ama Asimi is competent to testify as a witness since she is alleged to be of unsound mind and cannot coherently express herself to be understood directly or through an interpreter. It is clear from the above that the same triable issue in the Criminal case before the court has become the preliminary fact to determine whether Ama Asimi is qualified to testify as a witness. In such a situation we say the preliminary fact is in issue.

Section 4 (1) (a) says that, the determination of the preliminary fact is not binding on the court in the substantive matter. Thus, despite the decision by the court on the preliminary fact, when the substantive matter comes to be determined, an independent determination must be done again devoid of the fact that, the same issue was determined earlier at the preliminary fact stage.

Section 4 (2) says that, no decision taken by the court on the preliminary fact can prevent the attack on the credibility of a witness in the main action. For example, if the preliminary fact was on whether a witness is competent to be a witness because of his propensity to tell lies, (See **Section 59 (1) (b)),** this determination of the preliminary fact in favor of the witness will not prevent his

credibility as a witness being attacked in the main trial on the same ground that, he is not a truthful person.

BURDEN OF PROOF

INTRODUCTION

In a party's quest to lead admissible evidence to establish a case in Court, the law requires the evidence led by the party to attain a certain degree of acceptance. This topic (Burden of Proof) is about the level or standard of the evidence that the law requires various parties in a case to attain. In other words, what is the legally acceptable level of evidence that a party should adduce? For the purpose of the legal level of evidence to be attained by a party, Court cases are divided into two broad categories namely:

1) **CRIMINAL CASES:** the situation where a person commits an offence sanctioned by punishment and the person is prosecuted only by the state.

2) CIVIL CASES: All other matters that are not criminal matters are civil matters.

The legal level of evidence required in each of the above two cases is entirely different from each other. In other words, the legal level or measurement of evidence in a CRIMINAL CASE is entirely different from that of a CIVIL CASE. Thus, a court cannot use the legal burden of proof for a civil case to determine a criminal case and vice versa. If a court knowingly or unknowingly does that, it will render the whole proceedings null and void and of no legal effect.

In actual courtroom practice, one often hears of the phrases **"Onus of proof on the plaintiff", "Onus of proof on the defendant", "Onus of proof on the prosecutor", "Onus of proof on the accused".** The phrase **"onus of proof"** is rendered in Latin as **"onus probandi".** It simply means the burden on a party to establish from the evidence led, the requisite degree of belief in the mind of the trier of fact.

However, in Ghana, the Evidence Act, 1975 (NRCD 323) avoids the use of **"onus of proof".** It rather uses the phrases **"BURDEN OF PRODUCING EVIDENCE" AND BURDEN OF PERSUASION".** That is to say that, the **"burden of proof"** under NRCD 323 connotes: the **"burden of producing evidence and the burden of persuasion".** The combination of both phrases sums up the burden on a party who has to establish his case in court.

From the foregoing, one must take note that, at one time, the phrase, **"burden of proof"** has been used to mean the **"burden of producing evidence"** ***which is the obligation of a party to produce sufficient evidence to avoid a ruling against him on the issue and implies the risk that, if no further evidence is adduced, the Court will rule adversely on the issue.*** At other times, the phrase **"burden of proof"** has been used in Ghanaian Courtrooms to mean the **'burden of persuasion"** which is ***proving a fact to the requisite degree of certainty in the mind of the tribunal of fact and implies the risk of losing the issue if the tribunal of fact is not sufficiently persuaded.*** In some other common law jurisdictions, the phrase in use is **Standard of Proof** but they are all the same.

To this end, the key takeaways from the above are that, at Ghana Law of Evidence, the burden of proof contains two (2) elements:

a) The **PERSUASIVE BURDEN**- also known as the ***LEGAL BURDEN*** or the ***ULTIMATE BURDEN, RISK OF NON-PERSUASION***-See **Section 10** of the NRCD 323.

b) The **EVIDENTIAL BURDEN**- also known as the ***BURDEN OF GOING FORWARD, BURDEN OF PRESENTAION, RISK OF NON-PRODUCTION***-See **Section 11** of the Evidence Act.

A combination of the two (Persuasive Burden and Evidential Burden) would give us the burden of proof at Ghana Law of Evidence.

THE PERSUASIVE BURDEN / LEGAL BURDEN: SECTION 10 OF NRCD 323

The word **Persuasion** is defined by Google to include the process of coaxing someone to do or to believe something. In litigation, it is not enough for the party desirous of winning his case to lead evidence. The evidence led should be such as will coax or convince the court or trier of fact that, the existence of a fact is more probable than its non-existence. That is, he will be required to lead evidence that will coax or convince the court that, his case has more merits than that of his opponent. It is when he so convinces the court that he will have a ruling in his favor. This is referred to as **burden of persuasion** at Ghana law).

The **Burden of Persuasion** is therefore an obligation of a party to establish a requisite degree of belief in the mind of a tribunal of fact. ***Section 10 of the NRCD 323 deals with burden of persuasion and it is the most important burden that all litigants bear.*** **Section 10** of the NRCD 323 states as follows:

(1) "For the purpose of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

(2) "The burden of persuasion may require a party to raise reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of fact by a preponderance of the probabilities or by proof beyond reasonable doubt."

COMMENT (S) ON SECTION 10 OF NRCD 323

Under the Evidence Act, 1975 (NRCD 323), where a person bears the burden of persuasion, that person has the obligation to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court. This may be done by:

1. *Raising a reasonable doubt concerning the existence or non-existence of a fact (accused in criminal case)*
2. *By proof beyond reasonable doubt (prosecution in criminal cases)*
3. *By establishing the existence or non-existence of a fact by a preponderance of the probabilities (civil cases).*

Take note of the following:

a) *The burden of persuasion has been properly described as the convincing aspect of the evidence before the court.*
b) *It is the obligation of a party to prove the existence or non-existence of a fact in issue to the requisite standard or requisite degree of belief in the mind of the jury or judge, or to the extent that will satisfy the jury or the trier of fact.*
c) *It is determined at the end of a trial after all the evidence has been adduced in court. This implies that, the issue of the burden of persuasion will arise only after the full*

evidence of the plaintiff and that of the defendant have been put before the court. It is then that the court will set out to evaluate the evidence to determine whether the quality of the evidence led is such as to convince the court to decide the case in favor of the evidence which has more or better merits.

d) *The Supreme Court referred to the Burden of Persuasion as the "Legal Burden"* in SUMAILA BIELBIEL (NO 3) v. ADAMU DRAMANI & AG [2012] SCGLR 370.

e) *The burden of persuasion does not require proof by eliminating all possible doubts. The standard of proof necessary to discharge the burden of proof relates to the legal burden but not evidential burden. In other words, the party who bears the legal burden on any issue will lose on that issue if the tribunal of fact decides that, the required standard of proof has not been reached.*

f) *How is it determined that the burden of persuasion has been met? Brobbey suggests that, one test which may be adopted is the American test which is described as the REASONABLE PERSON TEST. By this is meant that, sufficient admissible evidence must be submitted to the court to allow a reasonable person to find that, a fact exists or that, the burden has been met.*

THE EVIDENTIAL BURDEN: SECTION 11 OF NRCD 323

The real meanings of *"Evidential Burden or Burden of Producing Evidence"* are provided in **Section 11 of the Evidence Act, 1975 (NRCD 323).**

1. **THE NRCD 323 PROVIDES IN SECTION 11 (1) AS FOLLOWS:**

"For the purpose of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue"

Comment (s):

When a party to a case is called upon to lead evidence, he must give the court sufficient cogent evidence to prevent the court from deciding the case against him.

2. **The NRCD 323 provides in Section 11 (2) as follows:**

"In a criminal action, when the burden of producing evidence is on the prosecution as to any fact essential to guilt, the prosecution must provide sufficient evidence so that, on all the evidence, a reasonable mind could find the existence of the fact beyond reasonable doubt."

Comment (s)

This is when the burden to adduce evidence in a criminal case is on the prosecution. When it is an accused person that is being prosecuted in a criminal matter and there is the need for the prosecution to establish a particular fact to satisfy the court, the level of evidence that the prosecution will come out with should be of such a quality that, any ordinary person will be satisfied without entertaining any doubt that, the fact has been proved against the accused. Please note very carefully that, **Section 11 (2)** is talking about FACT which is essential to guilt. It is not talking about the guilt itself. In effect, **Section 11 (2)** is on the various ingredients of the offence. For example, in a stealing case, the prosecution must prove the following facts which are essential to guilt: a) **the existence of a thing, the appropriation of the thing, b) the appropriation of the thing must be dishonest, c) the accused is not the owner of the thing, and d) the accused is the person responsible for the said appropriation and no one else.** The various essential facts put together will establish the guilt of the accused. So **Section 11 (2)** is demanding that, each of them should be proved by the prosecution by way of leading evidence to such an extent that, an ordinary person will be left with no doubt that, the accused is actually guilty.

3. **The NRCD 323 provides in Section 11 (3) as follows:**

"In a criminal action, when the burden of producing evidence is on the accused as to any fact the converse of which is essential to guilt, he is only required to produce sufficient evidence such that, on all the evidence, a reasonable mind could have a reasonable doubt as to guilt."

Comment (s):

This is when the burden to adduce evidence in a criminal case is on the accused. The legal level of persuasion on the accused is merely to lead evidence to make the court think that, what he is saying is likely to be true. In effect, the reasonable person should **NOT** be totally convinced that, the story

or explanation of the accused is true. He should just believe that, **IT MAY BE TRUE OR MAY NOT BE TRUE.** We say there is a reasonable doubt. So in effect, the burden of proof on the accused is **NOT** to convince you without leaving any doubt in your mind whatsoever. The moment you listen to the story or explanation of the accused and you draw the conclusion like **"I DO NOT BELIEVE THE EXPLANATION OF THE ACCUSED, HOWEVER, HIS EXPLANATION CAN BE TRUE"**, that is to say you have a doubt as to whether his explanation is true. This is the legal burden on the accused-***the burden of creating a reasonable doubt in your mind as to the existence of a fact which is essential to guilt or to produce sufficient evidence so that on the totality of the evidence, a reasonable mind could have a reasonable doubt as to guilty.*

4. **The NRCD 323 provides in Section 11 (4) as follows:**

"In other circumstances, the burden of producing evidence requires a party to produce sufficient evidence so that, on all the evidence, a reasonable mind could conclude that, the existence of the fact was more probable than its non-existence"

Comment (s):

"IN OTHER CIRCUMSTANCES" is used in **Section 11 (4)** to refer to **CIVIL MATTERS** even though civil matters is not specifically mentioned in the provision. That is to say minus criminal matters, all other matters are **CIVIL MATTERS**. ***Unlike criminal matters where the prosecution is given a higher level of persuasion than that of the accused person, in civil matters, both the Plaintiff and the Defendant have the same level of producing evidence.*** It is a level playing field. The two parties must produce the same level of evidence in order to avoid the case being decided against any of them. It is to depict this level that the symbol of the scale of justice was created. That is to say, the two sides will be placed on the same scale and weighed to determine the party that will adduce more convincing evidence. The party must convince the Court that, the **"EXISTENCE OF THE FACT WAS MORE PROBABLE THAN ITS NON-EXISTENCE".**

From the foregoing, ***the burden of producing evidence is the duty that lies on a party to adduce sufficient evidence to support his case regarding the issue at stake in order to avoid a ruling of the court being given against him. Put differently, the evidential burden is the obligation of a party to show sufficient evidence to raise an issue as to the existence or non-existence of a fact***

in issue, with due consideration of the standard of proof demanded of the party under the obligation.

Thus, whenever a party relies upon a fact or an issue, there arises the obligation on that party to produce sufficient evidence on that fact or issue so that the court would be justified thereby to find that, the fact has been proved by him.

Unlike the burden of persuasion, which is determined at the end of a trial, the burden to produce evidence is determined at the beginning of the trial. This explains why a case may have to be dismissed or withdrawn from the jury if the party to whom the obligation lies refuses or fails to lead any evidence.

Point must be noted that, some textbooks describe the burden of producing evidence as evidential burden, the burden of going forward or the risk of non-production.

The Supreme Court of Ghana, **per Date-Bah JSC @ 371,** seemed to have endorsed the use of the term **"evidential burden"** in the recent case of **SUMAILA BIELBIEL (No. 3) v. ADAMU DRAMANI AND ATTORNEY GENERAL (2012) SCGLR 370.**

LESSON THREE

PROOF IN CIVIL AND CRIMINAL PROCEEDINGS

PROOF IN CIVIL PROCEEDINGS:

As noted above, at Ghana law of Evidence, the burden of proof connotes the burden of persuasion and the burden of producing evidence.

1. THE BURDEN OF PERSUASION

In **Civil Proceedings**, the Burden of Persuasion is on each party to litigation. Each party carries his own burden of persuasion as required by the nature of the claim or defense he makes in court and the law applicable to the case.

The test to arrive at the burden of persuasion is known as the **REASONABLE PERSON TEST** i.e. what a reasonable person placed in the shoes of the Judge. See Section 10 (2) of NRCD 323. The use of Reasonable Man's Test was applied in **ACKAH v. PERGAH TRANSPORT LIMITED (2010) SCGLR 728.**

The **NRCD 323** defines the **Burden of Persuasion in Section 10 (1) as** ***"the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court"***. This means that, ***the Burden of Persuasion is the burden on a party to convince the court that, the existence of a fact is more probable than its non-existence.*** This is the reason why the Burden of Persuasion has been properly described as" ***the convincing aspect of the evidence before the court."***

BURDEN OF PERSUASION was also defined in **DUA v. YORKWA (1993-1994) 1 GLR 217@223** as ***"THE QUANTITY, THE QUANTUM, AMOUNT, DEGREE OR EXTENT OF EVIDENCE...WHICH A LITIGANT SHOULD SATISFY IN ORDER TO PROVE A FACT".***

The **NRCD 323** provides in **Section 10 (2)** that, the **Burden of Persuasion** may require a party to do the following:

a) ***Raise a reasonable doubt concerning the existence or non-existence of a fact; or***

b) ***Establish the existence or non-existence of a fact by a preponderance of probabilities; or***

c) ***Establish the existence or non-existence of a fact by proof beyond reasonable doubt.***

Importantly, the Burden of Persuasion IS ***DETERMINED AT THE END OF PROCEEDINGS, I.E. AFTER ALL THE EVIDENCE HAS BEEN ADDUCED IN COURT-***TAKORADI FLOUR MILLS v. SAMIR FARIS (Holding 5). This implies that, the issue of the burden of persuasion will arise only after the full evidence of the plaintiff and that of the defendant have been put before the court. It is then that the court will set out to evaluate the evidence to determine whether the weight or quality of the evidence led is such as to convince the court to decide the case in favor of the evidence which has more or better merits. In short, the evidence must be led before it can be weighed so unlike the burden of producing evidence, all the evidence must be before the court before there can be consideration for the burden of persuasion.

This is the reason why the burden of persuasion is determined at the end of the trial after all the evidence has been adduced in the court. This has been explained in the ***COMMENTARY TO THE EVIDENCE ACT, 1975 (NRCD 323)*** as follows: ***"Only after all the evidence has been presented and it has been determined that, there is sufficient evidence to meet the burden of producing evidence on each issue can the evidence be weighed. It is only on those issues where the evidence must be weighed that, the burden of persuasion must be fixed".***

It is an established law that, ***A PARTY IS NOT OBLIGED TO TESTIFY IF HE DOES NOT WISH TO***. By implication, the party on whom the burden of persuasion lies can rely on the evidence of his opponent to make his case without necessarily leading evidence, if he desires to end the case at the conclusion of his opponent. This may be described as the basis for making a submission of no case in both civil and criminal cases.

For the submission of no case in both civil and criminal cases, see the following cases which were considered in **SUMAILA BIELBIEL (NO. 4) v. ATTORNEY-GENERAL (NO. 4) (2012) SCGLR 374:**

1. **BOYCE v. WYATT ENGINEERING (2001) EWCA 692**
2. **BENHAM v. KYTHIRA INVESTMENTS (2003) EWCA 1794**

It must be noted that, **Section 10 (1) of NRCD 323** and the ***Burden of Persuasion*** were applied in the case of **PATRICK BARKERS-WOODE v. NANA FITZ (2007-2008) SCGLR 879 (Holding 2).**

ALLOCATION OF THE BURDEN OF PERSUASION:

SECTION 14 OF NRCD 323 states as follows: ***"Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defense he is asserting"***

Comment (s):

Section 14 simply says that, he who asserts must prove. That is if you go to Court making any allegation, the burden of persuasion will be on you. So the decision or allocation of who is to prove is on the person who is asserting. If the party asserting thinks that, adducing evidence to support his claim will enable him persuade the Court, he can do so.

Section **14 of NRCD 323** was applied in **DZAISU & OTHERS v. GHANA BREWERIES LIMITED (2007-2008) SCGLR 539.** The Supreme Court held that, the plaintiffs failed under **Section 14 of NRCD 323** to discharge the onus of proof on them (***failed to adduce evidence to support their averment captured in their pleadings***). The Court noted that, the failure of the defendant to cross-examine the plaintiffs on their assertion relating to the employment of two streams of workers did not absolve the plaintiffs of the duty to have led evidence in proof of that assertion.

The decision of the Supreme Court in **DZAISU & OTHERS v. GHANA BREWERIES LIMITED (2007-2008) SCGLR 539** has established the principle that, ***"WHERE THE BURDEN OF PROOF LIES ON A PARTY, THAT BURDEN IS NOT DISCHARGED BY THE FAILURE OF THE OPPONENT TO CROSS-EXAMINE HIM WHEN THE PARTY MAKES NO MORE THAN A BARE ASSERTION WITHOUT ADDUCING EVIDENCE IN SUPPORT OF THE ASSERTION."***

BURDEN OF PERSUASION IN PARTICULAR CASES: SECTION 15 OF NRCD 323

(1) Unless and until it is shifted, the party claiming that a person is guilty of crime or wrongdoing has the burden of persuasion on that issue.

(2) Unless and until it is shifted, the party claiming that a person did not exercise a requisite degree of care has the burden of persuasion on that issue.

(3) Unless and until it is shifted, the party claiming that any person, including himself, is or was insane or of unsound mind has the burden of persuasion on that issue.

Comment (s):

Burden of persuasion in criminal trials is adequately covered in **NRCD 323, SECTION 15 (1).**

Section 15 (1): If you allege a crime you must prove it.

Section 15 (2): If you claim a person was careless, you must adduce evidence to prove it.

Section 15 (3): If you claim a person is insane or of unsound mind, you must prove it.

NB: Note that the burden of persuasion can shift depending on the pleadings and the applicable law.

INSTRUCTION ON BURDEN OF PERSUASION: SECTION 16 OF NRCD 323

"The court on all proper occasions shall instruct the jury as to which party bears the burden of persuasion on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or non-existence of a fact or that he establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt"

Comment (s)

The jury in a criminal trial are laypersons and as such, it is the duty of the Court to inform them as to which of the parties bears the burden of producing evidence. The Court must also explain to them the various levels that the evidence to be produced must attain.

2) PROOF IN CRIMINAL PROCEEDINGS

Proof in criminal trials is different from proof in civil trials in significant ways. We learned that, Burden of Proof connotes **Burden of Persuasion (Section 10 of NRCD 323) and Burden of Producing Evidence (Section 11 of NRCD 323).** We have also learned the real meanings of Burden of Persuasion and Evidential Burden.

Criminal prosecutions are predicated on three principles:

1. **Presumption of innocence of the accused-Article 19 (2) (c)**
2. **The right to silence of the accused-Article 19 (10)**
3. **The burden of proof on the Prosecutions**

In criminal trials, the burden of proof (Legal and Evidential Burden) has been specified in the 1992 Constitution of Ghana, **Article 19 (2) (c).** The statement in **Article 19 (2) of the 1992 Constitution** relates to the principles on human rights. It is at the same time a provision on the principle of the presumption of innocence in favor of any person who has been charged with an offence

The clause connotes two principles:

1. ***That, the accused is not guilty of the crime charged with, right from the time of his arrest including the time when he is arraigned before the court. It is only after he himself has pleaded guilty that, he may be pronounced guilty.***
2. ***That, the accused has to be proved guilty by his accusers if he has pleaded not guilty to the charge.***

Article 19 (2) (c) of the 1992 Constitution of Ghana therefore places the onus of proving the guilt of the accused on the prosecution. The onus is placed on the prosecution because, it is the party which initiates prosecution in court on the premise that, the accused has committed an offence. That is more or less an assertion. The basic elementary principle of law that, ***"he who asserts assumes the onus of proof"*** therefore applies in all its forms.

i) **THE BURDEN OF PERSUASION IN CRIMINAL PROCEEDINGS: SECTION 13**

In a criminal matter, the **Burden of Persuasion** is divided into two. The **Burden of Persuasion** on the **PROSECUTION** is entirely different from the **Burden of Persuasion** on the **ACCUSED**. The legal level of persuasion is different. The prosecution is tasked with a higher burden than the accused. The Burden of Persuasion on the **PROSECUTION** is what we discussed in **Section 11 (2)** and that is ***the burden of producing sufficient evidence to prove an essential fact as to guilt of the accused beyond reasonable doubt.***

The Burden of Persuasion on the **ACCUSED** is only to ***raise a reasonable doubt as to guilt.*** The burden on accused is what we discussed in **Section 11 (3)** and that is ***the burden to lead evidence to raise a reasonable doubt as to his guilt.***

SECTION 13 actually deals with the Burden of Persuasion in criminal trials. **The NRCD 323 provides in Section 13 (1) and (2) as follows:**

Section 13 (1): ***"In an action whether Civil or Criminal, if you want to prove that a person has committed a crime, same must be proved beyond a reasonable doubt."***

Section 13 (2): ***"In a criminal action, the Burden of Persuasion when it is on the accused as to any fact the converse of which is essential to guilt, the accused is only to raise a reasonable doubt as to guilt."***

Comment (s)

Section 13 states that, any time you are to prove a crime whether in a criminal or civil matter, the level of evidence is ***beyond a reasonable doubt.*** The question then arises as to why ***"beyond a reasonable doubt"*** in a civil matter? The answer is that, at times, you make a claim in civil matter based on a crime allegedly committed against you. Punishment is for the state but you can sue personally for compensation. For example, if you are defrauded of the sum of GHC1 Million, and you sue in a civil action for the money, you will need to prove in the civil action that, the man actually committed the crime of Defrauding by False Pretenses against you. The standard of persuasion will be beyond a reasonable doubt to prove the commission of the said crime.

However, other parts of the same civil case not connected with crime will be proved based on the level of persuasion in civil cases and that is ***"preponderance of probabilities"***.

The Defendant in the civil matter when it comes to adducing evidence in defense of the criminal matter within the civil trial will need to produce evidence to raise a reasonable doubt as to his guilt. So in effect, whenever there is a need to prove crime whether in an entirely criminal matter or as a part of a claim in a civil matter requires a proof beyond a reasonable doubt.

ii) **THE EVIDENTIAL BURDEN IN CRIMINAL PROCEEDINGS: SECTIONS 11, 15 AND 17 OF NRCD 323**

In criminal trials, the burden of producing evidence is the obligation on the prosecution to produce sufficient evidence in support of a charge to induce the judge not to withdraw the charge from consideration by the Jury (jury trial) or convince the Judge, where he sits alone (***SITS IN A COMPOSITE POSITION***), not to dismiss the charge summarily.

The necessity of the prosecution to start adducing evidence in criminal trials is based on the principle that, ***"HE WHO ASSERTS ASSUMES THE BURDEN OF PROOF".*** The principle that, the prosecution has the burden of proving the guilt of the accused is further codified in several sections of **NRCD 323**, including **Sections 11, 15 and 17 of NRCD 323.**

The **combined effects of Sections 11 (2) and 15 (1) and Article 19 (2) (c)** of the 1992 Constitution of Ghana are that, at the beginning of the trial, the burden of producing evidence on the crime charged lies on the prosecution. The wording of **Sections 11 (1) and 17 of NRCD 323** also echo the same effect just that, **Section 11 (1)** talks about general facts whilst **Section 17** talks about a particular fact.

The established rule therefore is that, ***THE PERSON TO START LEADING EVIDENCE IS THE ONE AGAINST WHOM A RULING WILL BE GIVEN IF NO EVIDENCE IS LED.*** The same argument will apply, mutatis mutandis, where the writ is for interpretation or for a declaratory order.

Other terminologies including **EVIDENTIAL BURDEN, BURDEN OF GOING FORWARD, RISK OF NON-PRODUCTION**, may be found in **SUMAILA BIELBIEL (No. 3) v. ADAMU DRAMANI AND ANOTHER (2012) SCGLR 370.**

Take note that, ***"unlike the burden of persuasion, the burden of producing evidence is determined at the beginning of the trial".*** This explains why the case may have to be dismissed or withdrawn from the jury if the party on whom the obligation lies refuses or fails to lead any evidence.

The principle on the burden of producing evidence was applied in **FAIBI v. STATE HOTELS CORPORATION (1968) GLR 471** and **TOTAL GHANA LIMITED v. THOMPSON (2011) SCGLR 458.**

In **FAIBI v. STATE HOTELS CORPORATION (1968) GLR 471,** the court held (In Holding 1 through OLLENNU J.A.) as follows (***Please check this case up for the facts***): ***"Onus in law lay upon the party who would lose if no evidence was led in the case; and where some evidence had been led it lays on the party who would lose if no further evidence was led. In the instant case since the plaintiff's contention was that his dismissal was wrongful whilst that of the defendants was that the dismissal was not wrongful, the party who would lose if no evidence was led would be the plaintiff. The onus was therefore on the plaintiff to prove that, he was wrongfully dismissed. The plaintiff must prove that, he did not contravene the orders of his employers, or if he did, that the orders were unlawful and unreasonable, and on the evidence he failed to do so."*** In the same case, **Ollennu J.A.** observed that, ***"If evidence is peculiarly within the knowledge of a party and that party would not produce it, the inference of law is that, the evidence is against him".***

In **TOTAL GHANA LIMITED v. THOMPSON (2011) SCGLR 458,** the Court held that, ***since Total Ghana Limited had written the suspension letter, the burden of producing evidence lay on it to prove the allegation on which the suspension was true.*** The Court held (In Holding 1) as follows: ***"In the peculiar context of the case, there was an obligation of the defendant company to provide credible evidence to the trial Court that would render the allegation on which its suspension of the plaintiff was based, more probable than the version of a denial by the plaintiff"***

From the foregoing, it is evident that, the burden of producing evidence depends on a number of factors:

1. The nature of the evidence
2. The type of case

3. The position of the defendant
4. The consequence of inaction.

The type and nature of the evidence to be adduced to prove a point in a case was set out in **ACKAH v. PERGAH TRANSPORT LIMITED** where it was held that, ***"the method of producing evidence is varied and it includes the testimonies of the parties and material witnesses".*** To these may be added demonstrative evidence, documentary evidence and others discussed under types of evidence.

THE POSITION OF THE DEFENDANT (ACCUSED): WHAT HAPPENS TO THE CASE OF THE DEFENDANT (ACCUSED)?

It can be deduced from the foregoing that, if the plaintiff or the prosecutor is able to perform his side of the exercise in Court by adducing evidence to prove his claim, the defendant may then be called upon to put his defense across. The defendant does that by adducing evidence that he believes will provide adequate answer to or rebut the claims of the plaintiff or prosecutor. In short, if the plaintiff is able to prove his claim and there is no counterclaim, the defendant will lose.

The position of the defendant was summarized by the Supreme Court in the case of **BARIMA GYAMFI v. AMA BADU (1963) 2 GLR 596 (In Holding 1)** as follows (Judgment of Ollennu JSC): ***"In a claim made by a plaintiff, there is no onus on the defendant to disprove the claim so that, however unsatisfactory or conflicting the defendant's evidence may be, it cannot avail the plaintiff. The evidence of the defense only becomes important if it can upset the balance of probabilities which the plaintiff's evidence might have created in the plaintiff's favor or if it tends to corroborate the plaintiff's evidence or tends to show that, evidence led on behalf of the plaintiff was true".***

The applicable principles deduced from the judgment in **BARIMA GYAMFI v. AMA BADU (1963) 2 GLR 596 (In Holding 1)** are as follows:

1. There is no onus on the defendant (accused) to disprove the claim of the plaintiff (prosecution).

2. The defendant need not lead evidence to disprove the claim of the plaintiff. See also **IN RE ASHALLEY BOTWE LANDS (2003-2004) SCGLR 420.** .
3. Evidence of the defendant is **ONLY REQUIRED** to tilt the balance away from the plaintiff to the defendant or if the defendant's evidence tends to corroborate plaintiff's case.

DOES THE ONUS SHIFT TO THE DEFENDANT?

In **FOSUA AND ADU POKU v. DUFIE (DECEASED) AND ADU POKU MENSAH (2009) SCGLR 310**, the Court held that, ***"if the plaintiff is able to lead sufficient evidence to prove his case, the onus will shift to the defendant to lead evidence that will tilt the balance of probabilities in his favor"***

In that case, if the defendant fails to lead evidence, judgment may be given on the case as made by the plaintiff. If the plaintiff's case (without the defendant's evidence) is sufficient to be granted his relief, the Court will proceed to enter judgment in his favor. If the plaintiff's case is not sufficiently proved to the satisfaction of the Court (and the defendant fails or refuses to give his evidence), the Court may dismiss the claim. In the latter event, the Court may enter judgment for the defendant. The judgment for the defendant (even if he has not filed a counterclaim) will amount to an empty pronouncement of judgment in favor of the defendant and no more. In the past, the rule was to enter **"JUDGMENT IS FOR THE DEFENDANT"** simpliciter.

It appears that, this aspect of the law in Ghana has now been altered by the decision in **HANNA ASSI (NO. 2) v. GIHOC REFRIGERATION AND HOUSEHOLD PRODUCTS LIMITED (NO. 2) (2007-2008) SCGLR 16** by which the Court may proceed to grant the defendant judgment on his counterclaim even if it did not expressly apply for it. The reasons for this change in the law have been articulated in that judgment, including: ***To avoid multiplicity or proliferation of suits or to do substantial justice.***

COUNTERCLAIMS:

Where the defendant files a counterclaim, he assumes the same onus of proving the counterclaim as that placed on the plaintiff because, the counterclaim is always considered to be of the same

status as the claim of the plaintiff. See **MALM v. LUTTERODT (1963) 1 GLR 1, SC**, which was cited in **APEA v. ASMOAH (2003-2004) 1 SCGLR 226, @246.**

THE PHILOSOPHY UNDERLYING THE PRINCIPLE ON PROOF

The principle that, ***"HE WHO AFFIRMS OR ASSERTS ASSUMES THE ONUS OF PROOF"*** has been stated in Latin by classical writers as ***"SEMPER NECESSITAS PROBANDI INCUMBIT EI QUI AGIT".*** This expression means that, ***"THE NECESSITY OF PROOF ALWAYS LIES WITH THE PERSON WHO LAYS CHARGES".***

The Latin rendition of the above principle has also been captured in ***Black's Law Dictionary, 6th Edition, at page 516*** which reads as follows: ***"EI INCUMBIT PROBATIO QUI DICIT NON QUI NEGAT: THE BURDEN OF PROOF LIES UPON HIM WHO AFFIRMS NOT HE WHO DENIES".*** See **TAKORADI FLOUR MILLS v. SAMIR FARIS (2005-2006) SCGLR 882 and NORTEY (NO. 2) v. AIJC (NO. 2) (2013-2014) SCGLR 703 (holding 1).**

In **TAKORADI FLOUR MILLS v. SAMIR FARIS (2005-2006) SCGLR 882**, the Court held that, ***"IT IS THE DUTY OF THE PARTY WHO ASSERTS THE AFFIRMATIVE TO PROVE THE POINT IN ISSUE".***

In **NORTEY (NO. 2) v. AIJC (NO. 2) (2013-2014) SCGLR 703,** the Court held (in holding 1) that, ***"WHERE THE ISSUES ARE JOINED, THE PLAINTIFF ASSUMES THE OBLIGATION TO ESTABLISH THE REQUISITE DEGREE OF BELIEF CONCERNING HIS CLAIM IN THE MIND OF THE COURT AS PROVED IN SECTION 10 (1) OF NRCD 323"***

EXCEPTION (S) TO THE PRINCIPLE THAT, "HE WHO AFFIRMS OR ASSERTS ASSUMES THE ONUS OF PROOF:

In Ghana, there are statutory exceptions to the principle that, ***"he who affirms or asserts assumes the onus of proof"*** and one of such exceptions is found in **Moneylending Transactions**:

By **SECTION 3 OF THE MONEYLENDERS ACT, 1941 (CAP 176)**, if a person proves that, the other party has lent money at interest, or it is established that, the lender took interest or it is established that, the lender took interest for the money lent, the lender will be presumed to be a moneylender. That means that, the former does not have to lead evidence to prove that, the lender was a money lender. Once it is established that, the lender lent money with interest and was therefore a moneylender, the onus will then shift to the lender to prove that, he is either not a moneylender or has license to lend money. There are two cases which applied the statutory exception under **Section 1 of Cap 176** and these are **DUA v. AFRIYIE AND OTHERS (1971) 1 GLR 260 CA** and **AHENFIE CLOTH SELLERS ASSOCIATION v. PHILOMENA MENSAH AND OTHERS (2010) SCGLR 680.**

In **DUA v. AFRIYIE AND OTHERS (1971) 1 GLR 260 CA,** the plaintiff lent money to the defendant by a written agreement which stated that, the loan was free of interest. The trial court accepted extrinsic evidence which showed that, the plaintiff lent 400 pounds but exacted interest of 200 pounds. The Court of Appeal ruled that, the law in Ghana differed from the law in England in that, by the **Moneylenders Act, 1951 (Cap 176), Section 3**, a person who lends money even on one occasion with interest was presumed to be a moneylender and the onus shifted on him to show that, he had license to lend money.

NB: **Cap 176 was repealed in 2008 by the Non-Bank Financial Institutions Act, 2008 (Act 774), s. 47 (1)** ***but was applied since Act 774 cannot take a retrospective effect.***

In **AHENFIE CLOTH SELLERS ASSOCIATION v. PHILOMENA MENSAH AND OTHERS (2010) SCGLR 680**, the Appellant / Defendant Association was presumed to be a moneylender when it was established that, it lent money to the Respondent / Plaintiff members of

the Association with an interest. The onus was therefore on the Appellant / Defendant Association to have proved that, it did not lend money with interest or that, it had license to lend money.

LESSON FOUR

STANDARDS OF PROOF

INTRODUCTION:

There are three standards of proof in Ghana and these are as follows:

1. **Proof on a balance of probabilities or proof by a preponderance of probabilities**
2. **Proof beyond reasonable doubt**
3. **Proof by reasonable doubt.**

The standard of proof applied by the Court will depend on the nature or type of the legal action before the Court and that is, whether it is a Civil or Criminal Action.

Each type of legal action (Civil or Criminal) has its own standard of proof that must be reached before it can be said that, a particular case has been proved up to the required standard.

STANDARD OF PROOF REQUIRED IN CIVIL CASES:

In civil matters, proof is established by the principle of ***THE PREPONDERANCE OF PROBABILITIES or BALANCE OF PROBABILITIES.*** The standard of proof in civil matters has been set out in **Section 10 (2) and Section 12 of NRCD 323.**

As provided in **Section 12 (1) of NRCD 323), *preponderance of probabilities*** means ***"the degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that, the existence of a fact is more probable than its non-existence."*** Thus, ***preponderance of probabilities*** means that, the existence of a fact is more probable than its non-existence or a fact is more likely to be true than to be untrue.

The ***balance of probabilities*** means that, considered in the light of all the facts, one party had established the truth with more than 50% of the evidence. Thus, evidence adduced must tilt the balance more to one side in order to discharge the burden. Where more than 50% of the evidence is established, the standard of proof is achieved.

By the balance of probabilities, the plaintiff has the duty to lead the quality, quantum or quantity of evidence that will **TILT THE SCALE OF JUSTICE** in his favor or his action will fail. **TILTING THE SCALE OF JUSTICE IN HIS FAVOR** implies that, **"IF THE WEIGHT OF THE EVIDENCE ON THE SCALE IS BALANCED, THE PLAINTIFF'S ACTION HAS FAILED."**

In **ADWUMENG v. DOMFEH (1996-1997) SCGLR 66 (Holding 3),** the Court held that, ***"THE STANDARD OF PROOF IN ALL CIVIL CASES IS PROOF BY PREPONDERANCE OF PROBABILITIES AND SO ALL CASES WHICH HAVE HELD THAT, SOME CIVIL MATTERS (TITLE LAND) SHOULD BE PROVED BEYOND REASONABLE DOUBT ARE NO LONGER GOOD LAW".***

In **SERWAH v. KESSIE (1960) GLR 227,** proof on a balance of probabilities was applied.

EXCEPTION TO PROOF IN CIVIL TRIALS (THE CIVIL RULE):

There are exceptions to the civil rule. In Ghana, one exception made to the rule that, ***A CIVIL CASE MUST BE PROVED BY PREPONDERANCE OF PROBABILITIES*** is contained in **SECTION 13 (1) OF NRCD 323** and this is to the effect that, ***"WHERE A CRIMINAL ALLEGATION IS MADE IN A CIVIL PROCEEDING, PROVIDED THAT ALLEGATION IS IN ISSUE, THE STANDARD OF PROOF IS BEYOND REASONABLE DOUBT".*** This implies that, notwithstanding that, the case is a civil one, the allegation of crime in the trial should be proved beyond reasonable doubt, which is the highest of the three standards of proof.

The ***COMMENTARY ON THE EVIDENCE ACT, 1975 (NRCD 323)*** provides the rationale for the exception to the civil rule as follows: ***"TO IMPUTE CRIME TO A PERSON IS QUITE SERIOUS AND THEREFORE PROOF OF THAT IMPUTATION SHOULD NOT LIGHTLY BE ESTABLISHED. IT SHOULD RATHER CARRY A HIGH DEGREE OF PROOF TO PORTRAY THE SERIOUSNESS OF THE IMPUTATION"***

Point must be noted that, for **Section 13 (1) of NRCD 323** to apply, the allegation of crime should form one of the issues for determination in the given case. A mere reference to a crime which is not part of the facts in issues will not justify the invocation of the Section.

A typical instance will be found in the ***TRIAL OF A DIVORCE CASE*** in which one party alleges bigamy. Bigamy is a crime. He who alleges it should prove it beyond reasonable doubt even though divorce is obviously part of civil proceedings.

More commonly, the issue arises in ***CASES INVOLVING FRAUD AND FORGERY. Example:*** In **SASU BAMFO v. SINTIM (2012) 1 SCGLR 136 (in holding 3),** it was alleged that, some lands had been acquired by the use of forged documents. On the facts of the case, the Court ruled that, the forgery allegation was prove beyond reasonable doubt, even though it was a civil case. The Supreme Court held as follows: ***"THE LAW REGARDING FORGERY OR ANY ALLEGATION OF A CRIMINAL ACT IN CIVIL TRIAL WAS GOVERNED BY SECTION 13 (1) OF NRCD 323; THAT SECTION PROVIDED THAT, THE BURDEN OF PERSUASION REQUIRED WAS PROOF BEYOND REASONABLE DOUBT."***

FENUKU v. JOHN TEYE (2001-2002) SCGLR 985 was another civil case involving the allegation of forgery of a document. The trial judge examined the evidence and came to his own conclusion on the allegation of forgery. He did not however aver his mind to the standard of proof required under Section 13 (1) of NRCD 323 to prove forgery. The Court held (In Holding 5) as follows: ***"THE SUPREME COURT, BY WAY OF REHEARING, LOOKING AT THE EVIDENCE ADDUCED WAS NOT SATISFIED THAT, FORGERY HAD BEEN ESTABLISHED BEYOND REASONABLE DOUBT"***

STANDARD OF PROOF IN CRIMINAL PROCEEDINGS:

There are three standards of proof in criminal proceedings and these are as follows:

1. Proof beyond reasonable doubt
2. Proof by reasonable doubt
3. Proof on the balance of probabilities or proof by the preponderance of probabilities.

PROOF BEYOND REASONABLE DOUBT

The established principle is that, ***"the presumption of innocence places on the prosecution the onus to prove its case beyond reasonable e doubt."***

Proof beyond reasonable doubt is the highest standard of proof required under the 1992 Constitution and other statutes which regulate criminal trials in the country.

The rationale for the high standard of proof is that, such criminal prosecutions may result in the accused losing his property or losing his liberty by being incarcerated or losing his life altogether if sentenced to death. It appears that, the philosophy behind the principle was encapsulated many years ago when it was held in a British case of R v. HOBSON (1823) 1 Lew CC 261 per HOLROYD J. that: ***"IT IS A MAXIM OF ENGLISH LAW THAT, TEN GUILTY MEN SHOULD ESCAPE RATHER THAN ONE INNOCENT MAN SHOULD SUFFER".***

Proof beyond reasonable doubt has been codified by NRCD 323, in at least three Sections. These are Sections 11 (2), 13 (1) and 22 of NRCD 323. Proof beyond reasonable doubt does not mean that, there should be no doubt whatsoever in the case presented by the prosecution.

PROOF BEYOND REASONABLE DOUBT MEANS:

a) ***Appropriate evidence should be led to establish facts and circumstances essential to prove elements of the charge***
b) ***Evidence led should be sufficient to convince the Court that, the offence has been committed and***
c) ***That, it was the accused (and no one else) who committed the offence***
d) ***Proof must reach a high degree of probability but not on a balance of probability***
e) ***No need to reach certainty.***

The effect of the burden on the prosecution has been explained in several local cases including the following:

1. REPUBLIC v. ADAMU (1960) GLR 91@p. 95

The Court held that, where the evidence of the prosecution is so inconsistent as to ***'contain the seeds of its own destruction'***, the accused cannot be convicted. This case was decided before the promulgation of the NRCD 323.

2. **MALI v. THE STATE (1965) GLR 710**

The Court held that, if at the end of the case, the Court requires further evidence in order to decide on issues raised in the case for the prosecution, the inference is that, the prosecution has not made out a case and the accused should be discharged.

3. **REPUBLIC v. DJOMOH (1960) GLR 193**

The Court held that, ***"a finding that, the accused had told lies in his defense does not absolve the prosecution from the duty of affirmatively proving the prisoner's guilt beyond reasonable doubt."***

In Ghanaian criminal jurisprudence, the expression connotes that, at the start of the trial, the prosecution assumes the burden of persuasion or the legal burden as well as the evidential burden. The legal burden is to prove every element of the charge and the evidential burden is to adduce evidence that will suffice to establish every element of the charge.

The case of **WOOLMINGTON v. D.P.P (1935) AC 462** illustrates these two requirements on the prosecution. In that case, the accused was charged with the murder of his wife. He gave evidence that, he had shot her accidentally. The trial judge directed the jury that, once it was proved that, the accused shot his wife, he bore the burden of disproving malice aforethought. The House of Lords held this to be misdirection. **Lord Sankey** made a memorable statement on the duties of the prosecution as follows: ***"THROUGHOUT THE WEB OF THE ENGLISH CRIMINAL LAW, ONE GOLDEN THREAD IS ALWAYS TO BE SEEN THAT, IT IS THE DUTY OF THE PROSECUTION TO PROBE THE PRISONER'S GUILT...NO MATTER WHAT THE CHARGE OR WHERE THE TRIAL, THE PRINCIPLE THAT THE PROSECUTION MUST PROVE THE GUILT OF THE PRISONER IS PART OF THE COMMON LAW OF ENGLAND AND NO ATTEMPT TO WHITTLE IT DOWN CAN BE ENTERTAINED."***

The expression made by ***Lord Sankey*** in **WOOLMINGTON v. D.P.P (1935) AC 462** connotes the notion that, it is incumbent on the prosecution to prove the guilt of the accused beyond reasonable doubt and that, at the end of the trial, no reasonable explanation on the facts should be possible than that, the offence was committed and that, the accused was the one who committed it. If there is a reasonable explanation on the facts, then that may amount to reasonable doubt and

that will mean that, the prosecution has failed to prove its case "beyond reasonable doubt" and the burden of persuasion would have failed. On the other hand, if the prosecution succeeds in eliminating want of reasonable doubt, it will displace the presumption of innocence in favor of the accused.

The point is that, ***proof beyond reasonable doubt*** is far above ***proof on the balance of probabilities or proof by the preponderance of probabilities.*** However, if there is doubt, the doubt must be reasonable and not fanciful. See **MILLER v. MINISTER OF PENSIONS (1947) 2 ALL ER 372@373** and **OTENG v. THE STATE (1966) GLR 352@354-355**

In **MILLER v. MINISTER OF PENSIONS (1947) 2 ALL ER 372@373,** the statement made by ***DENNING J. (as he then was)*** sheds light on the standard of proof required to be met in a criminal case before an accused person may be found guilty: ***"It need not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond all reasonable doubt but nothing short of that would suffice."***

In **OTENG v. THE STATE (1966) GLR 352@354-355,** the Supreme Court of Ghana made the following observation regarding proof beyond reasonable doubt as the highest standard of proof amongst the three: ***"One significant respect in which our criminal law differs from our civil law is that, whi le in civil law, a plaintiff may win on a balance of probabilities; in a criminal case, the prosecution cannot obtain a conviction upon mere probabilities. The citizen too is entitled to protection against the State and that, our law is that, a person accused of a crime is presumed to be innocent until his guilt is proved beyond reasonable doubt as distinct from fanciful doubt".***

AT WHAT POINT SHOULD THE COURT ASSESS PROOF BEYOND REASONABLE DOUBT?

There are two schools of thought on this: ***The first school of thought is of the view that, proof beyond reasonable doubt should be assessed by the Court at the close of the prosecution's case. The second school of thought is of the view that, proof beyond reasonable doubt should be assessed by the Court at the end of the entire trial.***

The position of the second school of thought is the correct position of the law in Ghana as held in the case of **TSATSU TSIKATA v. THE REPUBLIC (2003-2005) 2 GLR 292 (Holding 5).** In that case, Professor Ocran JSC posed the following question which summed up the Ghana position: ***"Indeed, if the submission of no case is made at the close of the prosecution's case and cross-examination of its witnesses, how could one seriously speak of proof beyond reasonable doubt when the defense has not had a full chance of punching holes in the prosecution's case to possibly raise doubt in the minds of the trier of facts, by calling its own witness and presenting counsel's address? It seems to me we have to look for a lower proof at this preliminary stage in the criminal proceedings".***

The position of the law regarding the time to assess reasonable doubt as held in **TSATSU TSIKATA v. TE REPUBLIC (2003-2005) 2 GLR 292 (Holding 5)-*PROOF BEYOND REASONABLE DOUBT CAN ONLY BE ASSESSED AFTER THE ENTIRE TRIAL HAS BEEN CONSIDERED*-**is no different from the position taken years ago by the same Supreme Court in **THE STATE v. SOWAH AND ESSEL (1961) GLR 743.**

In **THE STATE v. SOWAH AND ESSEL (1961) GLR 743,** the appellants were charged with unlawful entry and stealing. They were both convicted by the trial Court and they appealed to the Supreme Court. The trial judge stated in his judgment as follows: ***"I am satisfied beyond reasonable doubt that, the accused entered the room of PW1 by breaking open the lock and stole the items specified in the second count despite the fact that, none of these articles were found. I was so satisfied before the accused gave evidence".*** In allowing the appeal, the Supreme Court held inter alia, as follows: ***"It is wrong therefore to presume the guilt of an accused merely from the facts proved by the prosecution. The case for the prosecution provides prima facie evidence***

from which the guilt of he accused may be presumed, and which therefore calls for an explanation by the accused".

A) PROOF BY REASONABLE DOUBT

Proof by reasonable doubt is the proof which lies on the accused whenever the law requires that, he makes his defense. The burden of proof on the accused has been set in **Section 11 (3) and Section 13 (2) of the NRCD 323.**

Per **Section 11 (3),** when the burden of producing evidence is on the accused in a criminal trial, all he has to do is to lead evidence which will raise a reasonable doubt as to his guilt.

Per **Section 13 (2),** if there is any burden of proof on the accused during a criminal trial, that proof will be discharged if he is able to raise only a reasonable doubt.

The combined effect of **Section 11 (3) and Section 13 (2)** is that, the accused person only needs to adduce evidence which will result in raising **REASONABLE DOUBT AS TO WHETHER OR NOT HE IS GUILTY.** Since proof by the prosecution should be beyond reasonable doubt, any reasonable doubt found in the case of the prosecution should be resolved in favor of he accused person.

The burden of proof on the accused in criminal trials was elaborated by the Supreme Court in the earlier case of **COP v. ANTWI (1961) GLR 408**. In that case, the appellant was convicted of stealing. He appealed to the Supreme Court and argued ten grounds of appeal which raised two main issues, namely that, the trial judge had misdirected himself on the nature of the burden of proof of guilt and on the facts proved in evidence. The Court allowing the appeal held that: ***"The fundamental principles underlying the rule of law are that, the burden of proof remains throughout on the prosecution and the evidential burden shifts to the accused only if at the end of the case for the prosecution, an explanation of circumstances peculiarly within the knowledge of the accused is called for. THE ACCUSED IS NOT REQUIRED TO PROVE ANYTHING; IF HE CAN MERELY RAISE A REASONABLE DOUBT AS TO HIS GUILT, HE MUST BE ACQUITTED."***

NB: The effect of the statement that, ***"THE ACCUSED NEED NOT PROVE ANYTHING"*** *was considered in;* ***IN RE ASHALLEY BOTWE LANDS (2003-2004) SCGLR 420 (H-5) (CIVIL CASE)***

It will be observed therefore that, while the prosecution is required to prove its case beyond reasonable doubt, the accused is not required to prove his defense beyond reasonable doubt. The general rule is that, unless otherwise provided by statute, the law does not require the accused to prove his defense or establish his innocence.

EXCEPTIONS TO THE GENERAL RULE ON PROOF BY REASONABLE DOUBT:

There are two main exceptions to the general rule on proof by reasonable doubt.

1. **Statutory Law, Section 14 of NRCD 323:** This section restates the general rule which is to the effect that, a party against whom a ruling would be given has the burden to make his case. Thus, where the prosecution has established a prima facie case against the accused, a ruling would be given against the latter if he fails to make his defense to the prima facie case.
2. **Proof of insanity (Cases of Diminished Responsibility):** Where the accused person relies on the defense of insanity, the burden shifts to the accused. This is provide in **Sections 27 and 28 of Act 29.** See also **Section 137 of Act 30.** This statutory exception was developed from the common law rule that, every person is presumed to be sane and to know the natural and probable consequences of his actions as was decided in the **M'NAGHTEN'S CASE (1843) 10 CH & FIN 200.** The legal position in Ghana is that, where proof of insanity is in issue, the principle to be applied has been codified in **NRCD 323, Section 15 (3)** (*check it up*). The standard of proof required for the accused to prove his insanity is however **proof by preponderance probabilities,** which is lighter than the standard of proof on the prosecution. See the following cases:

i) **ASARE v. THE REPUBLIC (1978) GLR 193, CA**

ii) **DABLA v. THE STATE (1963) 2 GLR 14, SC.**

iii) **DOGO DAGARTI v. THE STATE (1964) GLR 653 (Automatism and hysterical amnesia)**

iv) **COLLINS ALIAS DERBY v. THE REPUBLIC (1987-1988) 2 GLR 521, CA. (Mentally deranged-Statement to the police indicated that, he was Jesus persecuted by the Jews)**

v) **KETSIAWAH v. THE STATE (1965) GLR 483, SC (alcoholism)**

B) PROOF BY PREPONDERANCE OF PROBABILITIES / PROOF ON THE BALANCE OF PROBABILITIES

We have already learned what this means. The point is that, in criminal trials, the standard of proof for all cases of diminished responsibility is proof by the preponderance of probabilities or proof on the balance of probabilities. See the following cases:

a) **ASARE v. THE REPUBLIC (1978) GLR 193, CA.**

b) **DABLA v. THE STATE (1963) 2 GLR 14, SC.**

c) **DOGO DAGARTI v. THE STATE (1964).**

d) **COLLINS ALIAS DERBY v. THE REPUBLIC (1987-1988);**

e) **KETSIAWAH v. THE STATE (1965).**

TUTORIAL QUESTIONS ON LESSONS ONE – THREE

PROOF / STANDARD OF PROOF / BURDEN OF PROOF

QUESTION ONE

In an action brought by the plaintiff against the defendant for declaration of title to the Ampabame lands, the trial High Court Judge made the following observations;

(i) The legal burden of proof is borne by the plaintiff

(ii) The burden of proof is discharged if the plaintiff proves his title beyond reasonable doubt. This degree or standard of proof is required in a civil action where title to land is in issue.

COMMENT ON EACH STATEMENT.

QUESTION TWO

In a criminal action, the burden of proof always lies and remains on the prosecution to prove the guilt of the accused. No burden is ever placed on the accused. I cannot conceive any exception to that time tested rule.

COMMENT ON THE STATEMENT OF THE TRIAL JUDGE.

QUESTION THREE

The plaintiff, Opanin Kwaku Manu, brought an action against the defendant, Rev. Dr. Tomtom, claiming declaration of title to a piece of land. The main issues set down for determination was whether or not the defendant's lease had been procured by fraud. In his judgment, the trial Judge stated as follows:

"The defendant is a Reverend Minister and a PhD. Holder in Divinity and Theology. He should have been very concerned to dislodge the allegation of fraud levelled against him, yet, he took the view that, the plaintiff bore the burden of persuasion and the burden of producing evidence. I disagree with him. The defendant also asserted that, there was a high burden imposed on the plaintiff in this regard. I further disagree. The law as I understand is that, in a civil case, even where an allegation that a crime has been committed is directly in issue, the burden of persuasion is still the civil standard; proof by a preponderance of probabilities. I find that, the plaintiff has discharged the burden and is therefore entitled to the relief he seeks".

COMMENT ON THIS JUDGMENT.

QUESTION FOUR

Mr. Akoto hired a haulage company, Risk and Company Limited, to transport the contents of his house at East Legon, Accra to his newly built mansion at Adukrom-Akuapim in the Eastern Region of the Republic of Ghana. The removal van and all its contents were destroyed in a lay by just outside Aburi, about some 25 kilometers from Adukrom-Akuapim. Some time after the loss, Mr. Akoto was told by an employee of the Risk and Company Limited that, the van had been deliberately set on fire so that, Risk and Company Limited could claim from their insurers for its loss.

Mr. Akoto is suing Risk and Company Limited for the value of his destroyed property, which he estimates at Twenty-five thousand Ghana cedis (GHC 25, 000). He claims first in their deliberate destruction by the defendants; alternatively, he alleges that, they were destroyed by reason of the defendants' negligence.

By their defense, Risk and Company Limited deny deliberately setting fire to the van and plead that, their contract with Mr. Akoto had an exclusion clause, which said that, they would not be liable for loss by fire provided that, their servants were not negligent. They also plead that, it was

a term of the contract that, they would not be liable for any loss in excess and that, Risk and Company Limited are liable for the full loss.

DISCUSS IN THE LIGHT OF EVIDENCE DECREE, 1975 (NRCD 323), THE BURDEN AND STANDARD OF PROOF IN RELATION TO THE ISSUES THAT ARISE.

LESSON FIVE

MATTERS NOT REQUIRING PROOF

GENERAL INTRODUCTION

As a general rule, all facts in issue or facts relevant to the issue in any given case must be proved. This is the assertion that, ***"he who avers must prove"*** and proof of a matter is done by the adduction of evidence through the tools or means of proof such as witnesses, documents or objects.

However, when making a case in Court, it is not every fact which has to be proved by the adduction of evidence. Certain types of evidence are such that, they are taken as established without the necessity to adduce facts in proof of them. In such situations, the Court is entitled to consider or treat them as if they were admitted in evidence.

The phrase ***"matters not requiring proof"*** therefore means that, contrary to the general rule stated supra, evidence does not need to be adduced to prove certain matters or facts in Court. It also means that, the matter or fact is taken by the Court as proved. The reasons for a Court to consider certain matters as proved without the need for a party to adduce evidence to prove them are as follows:

1. ***That, proof has been dispensed with by Statute.***
2. ***That, the truth of the fact is within the knowledge of the Court or Judge***
3. ***That, it has been conceded or admitted or confessed by the opponent.***

The matters which are exempted from proof are four in number and are as follows:

1. ***Matters exempted by statute (also known as statutory exemptions).***
2. ***Judicial Notice***
3. ***Admissions (Formal Admissions)***
4. ***Confessions***

1. MATTERS EXEMPTED BY STATUTE / STATUTORY EXEMPTIONS

There are some types of evidence which the law requires no proof of and it is because, statute dispenses with the requirement of proof. They include the following:

a) **Depositions Signed By a Party:**

By **ORDER 38 RULE 8 (2) OF CI 47,** a deposition purporting to be signed by the person from whom it was taken shall be received in evidence without proof of the signature of that person.

b) **Official Documents in Evidence (Documents under Seal):**

By **ORDER 38 RULE 9 OF CI 47**, every document purporting to be sealed with the seal of any office or department shall be received in evidence without further proof unless the contrary is shown.

c) By **SECTION 269 (1) OF ACT 30**, a statutory statement of an accused person which has been signed by a Magistrate shall be received in evidence without proof.

2. JUDICIAL NOTICE: SECTION 9 OF NRCD 323

Judicial Notice is the second exemption from proof and it is governed by **SECTION 9 OF THE EVIDENCE DECREE, 1975, NRCD 323.**

By way of definition, Judicial notice means **"the acceptance by a judicial tribunal of the truth of a fact or situation without proof because the latter is within the tribunal's own knowledge, i.e. the court takes judicial notice of that fact"**

The concept of judicial notice relates to situations in which adjudicative facts are accepted or noticed by the court or judicial tribunal without proof on the ground that, it is within the courts or the judicial tribunal's own knowledge.

Differently stated, judicial notice is the doctrine of law (especially, law of evidence) which empowers a court to declare that, it finds certain facts to exist without a need for any evidence to be given as to the existence of the said facts.

It has been said that, the rationale for the doctrine of judicial notice is that, it promotes efficiency; and consistency. Again, where a fact is well known or its existence is so easily determinable from unimpeachable sources, it will not be good sense to require formal proof. It therefore follows that, a working understanding of **Section 9 (2) (a) and (b) of Ghana's Evidence Decree, 1975 (NRCD**

323) which just re-enacted the common law position of **NOTORIOUS FACTS AND REFERENCE TO UNIMPEACHABLE SOURCES** as test for judicial notice.

It is simply a labor saving device in that, the policy of law is **de minimis non curat lex (which literally means that, the law does not concern itself with trivialities).** It is a system by which the courts are saved the bother of having to waste time considering unimportant, obvious, uncontested or mundane matters when its time is required to be used for matters with opposite characteristics.

A typical example will be when a party sets out to prove that, the sun rises from the east and sets in the west. That is a fact which is obvious and is known to everyone. The judge in such a situation declares that, he takes judicial notice of that fact or directs the jury to take judicial notice of same, although a party offers no formal proof.

Section 9 (1) says that, instead of leading evidence, the court will accept the fact as true without calling evidence in proof of same. For example, the fact that there is a University College in Accra known as Wisconsin is so notorious that the court will not call on a party to adduce evidence to establish this fact. We say the court has taken judicial notice of that fact.

Section 9 (2) lists the matters that qualify to be accorded judicial notice and include:

(a) ***FACTS THAT ARE GENERALLY KNOWN WITHIN THE TERRITORIAL JURISDICTION OF THE COURT.*** For example, it is generally known in Ghana that, public secondary schools now run shifts system namely of yellow and green. The implication is that, where a decision is based on a fact not shared within the jurisdiction of the Court, then Section 9 (2) (a) is not applicable. See REPUBLIC v. IGOMBE (1964).

(b) ***FACTS THAT CAN EASILY BE ASCERTAINED FROM SOURCES WHOSE ACCURACY CANNOT BE DOUBTED.*** For example, the fact that, public secondary schools in Ghana run the shift system can be accurately determined from many credible sources such as Government of Ghana, Universities and all churches. The said facts cannot be disputed. For example if the court takes judicial notice of the fact that the capital city of Ghana has a sea coast cannot be disputed.

Section 9 (3) says that, the court can ***suo moto (on its own)*** take judicial notice of a fact without same being requested by a party in the matter. This is the holding of the Court in **HLODJIE v. GEORGE [2005-2006] SCGLR 974.**

Section 9 (4) explains that, a party in a case can make an application to the court to take judicial notice of a matter provided that, the party requesting same gives notice to all other parties (adverse parties) and gives the sources for verification of the fact to the court. See also **Section 9 (5) of NRCD 323.**

Section 9 (6) says that, judicial notice may be taken at any stage of the action.

Section 9 (7) says that, in a jury trial, the Court may on its own or upon a timely request shall, instruct the jury to accept as conclusive any facts which have been judicially noticed.

In **NYARKO v. THE REPUBLIC [1974] 1 GLR 206,** the court added another condition to the effect that, ***WHERE A FACT WAS SO NOTORIOUS THAT, JUDICIAL NOTICE COULD BE TAKEN OF IT, EVIDENCE TO THE CONTRARY COULD BE TREATED AS PALPABLY FALSE.*** That case involved judicial notice of the fact that, ***"Rothmans cigarettes were not manufactured in Ghana at a time when it was commonly known that, that cigarette was a foreign commodity."***

Additionally, judicial notice of the ***COMMON LAW, CUSTOMARY LAW AND STATUTORY PROVISIONS MAY BE TAKEN BY THE COURT IN MOST CASES WITHOUT ANY ARGUMENT.*** These are habitually brought to the notice of the court by counsel in the proceedings. The judge in such a situation is required to take judicial notice of the laws of the land. **Article 11 of the 1992 Constitution** provides the sources of law in Ghana, and these include existing laws consistent with the provisions of the Constitution. The case of **SERAPHIM v. AMUA-SEKYI [1971] 2 GLR 132** is an authority for the proposition that, ***"THE JUDGE WHO IS SUPPOSED TO KNOW THE LAW HAS THE RIGHT TO APPLY IT. THIS IS SO, EVEN IF THE LAW IS UNKNOWN TO THE PARTIES OR THEY MISCONCEIVE IT."***

Note must however be taken that, ***JUDICIAL NOTICE MAY NOT BE TAKEN OF THE LAWS OF A FOREIGN COUNTRY. A PARTY WHO PLEADS A FOREIGN LAW MUST LEAD EVIDENCE TO ESTABLISH THAT FACT.***

In **DAVIES v. RANDALL AND ANOTHER (1964)**, the court held that, ***"the party who pleaded the law of Sierra Leone could have proved it as a fact as judicial notice could not be taken of the law of that country."***

Foreign law is ***"presumed to be the same as the laws of Ghana"***: see **Section 40 of the Decree.** That is only a presumption which is rebuttable.

To decide on proof of foreign law, the relevant statutory provision is **Section 1 (2)** of **NRCD 323** which provides that: ***"The determination of the law of an organization of states to the extent that such law is not part of the law of Ghana, or of the law of a foreign state or sub-division of a foreign state is a question of fact, but shall be determined by the court".*** The **Commentary on the Evidence Decree explains** this **Section 1 (2)** to mean that, foreign law has to be proved in Court by the person relying on it.

The Court can take judicial notice of authenticated administrative circulars and gazette notices. Where circulars and gazette notices conflict with the terms of a statute or the Constitution, the latter shall prevail. Where the statute provides that, the Court has to take into account some documentary evidence, such document may be taken judicial notice of but not necessarily its contents.

Issues sometimes arise between knowledge of facts which are private and personal to the judge and those that are general enough to be regarded as known to members of the society who care to know. ***IN DECIDING A CASE, TO WHAT EXTENT MAY A JUDGE RELY ON HIS PERSONAL KNOWLEDGE OR FACTS OF A LOCAL SITUATION KNOWN TO HIM PERSONALLY?***

The general rule is that, a judge is not permitted to rely on personal knowledge of facts even if they are known to him. This is the position particularly in criminal cases. See **GIBSON v. VON GLAHN HOTEL (1920) 185 NYS 154**.

In **GIBSON v. VON GLAHN HOTEL (1920)**, the issue was the absolute liability of an innkeeper. This touched on the question whether the establishment was a hotel. The trial judge volunteered, ***"I know Glahn Hotel as well as the witness does himself. I will give a ruling now, it is a hotel."*** It was held on appeal that, the trial judge gave a ruling which he does not share in common with average members of the community. See also: **REPUBLIC v. IGOMBE (1964)**

In **REPUBLIC v. IGOMBE (1964)**, the applicant was convicted of using threatening and abusive words in a public place. The presiding Magistrate in the trial took judicial notice of the fact that, part of the HERALD NEWSPAPER's OFFICE where the words were spoken was opened daily as a reading room and that, the public had access to it. In reversing the conviction on appeal, the Court said that, ***"the Magistrate was not entitled to take judicial notice of that fact, because, it was not a fact which NOTORIOUSLY established that, evidence of its existence is not necessary."*** See *also* **EX PARTE WHITE**.

Moreover, the fact that a judge has today convicted a person of one crime cannot be used by the judge in a second trial on the next day involving the same accused person, especially in order to arrive at the conclusion that, because of the first offence, the accused may be taken to be the one who probably committed the second offence. The facts of each case should be critically examined to determine facts which are available to the judge as a result of his personal inquiries which cannot be said to be of public notoriety and those of which the public may be presumed to know or can easily be verified by reasonable enquiry. The later may form the basis of judicial enquiry and not the former.

In Ghana, the locus classicus on the use of personal knowledge and criteria for determining judicial notice is **JH MENSAH AND OTHERS v. THE REPUBLIC [1979] GLR 523**. In that case, the trial Court took judicial notice of world economic factors as being responsible for the problems of Ghana. However, the decision of the trial Court was reversed on appeal by Cecilia Koranteng-Addow, JA. The Court observed as follows: ***"Judicial notice refers to facts, which a Judge could be called upon to receive and act upon either from his general knowledge of them or from inquiries to be made by himself for his own information from sources which it was proper for him to refer. To take judicial notice of a fact however, the Judge had to be convinced that, the matter was so notorious as not to be the subject of dispute among reasonable men, or that, the matter was capable of immediate accurate demonstration by readily accessible sources of***

indisputable accuracy. The facts which the trial judge took judicial notice of in the instant case could not be classified under this definition. Although world inflation was a matter of public notoriety, the extent to which world inflation affected each country was not a matter of which judicial notice could be taken...Furthermore, a Court was not the proper forum for the evaluation of economic factor, which contributed to inflation".

AN EXCEPTION to the rule against the use of personal knowledge may arise where judges are appointed based on their expertise **(LIKE A TAX SPECIALIST APPOINTED A JUDGE HANDLING A CASE ON TAX ISSUES).** In such situations, the strict application of the rule that, judges should not rely on their personal knowledge may defeat the purpose of their appointment. In such cases, their personal knowledge may be valuable. It seems however that, personal knowledge may be professional knowledge rather than purely private knowledge.

From the foregoing, the subject-matters of judicial notice include the following:

1. **MATTERS OF PERSONAL KNOWLEDGE**
2. **TRADE OR PROFESSIONAL PRACTICES**
3. **LAW, STATUTES, CIRCULARS AND GAZETTE NOTICES:** ***SERAPHIM v. AMUA SAKYI*** **[1971] 2 GLR 132**
4. **UNDISPUTED HISTORICAL FACTS AND DOCUMENTS**
5. **POLITICAL AND ADMINSTRATIVE ARRANGEMENTS**

Examples of facts judicial notice may be taken of are as follows:

a. **Legitimacy of children**. See **Section 32 of NRCD 323 (presumption of legitimacy**. See also **REPUBLIC v. LUFFE (1867)**. In that case, the question arose as to the legitimacy of a child where the husband was away and returned only a fortnight before the birth of the child. It was held that, the Court could take judicial notice of the fact that, the husband could not have been the father since it is impossible in the course of nature to

occasion and produce a birth within those limits of time. See also **Section 33 of NRCD 323** for presumption of death.

b. Fact that, cats are kept for domestic purposes (**NYE v. NIBLET-1908**). Is that the case today?

c. Fact that, men and women sharing a bed are likely to have sexual intercourse (**WOOLF v. WOOLF-1931**). Is that the case today?

3. ADMISSIONS

Admission is a voluntary acceptance or acknowledgment of evidence relevant or beneficial to an adversary's case.

The principle of admission is based on the concept of adversarial system: no one will ordinarily want to aid his adversary to fight him. If facts helpful to an opponent are accepted, they can be presumed to be true.

The implication is that, the facts in dispute, by reason of being admitted, have been conceded and therefore are no longer in contention or in issue. Thus, if they are no longer in issue, they do not require to be proved. Hence, "admissions" being part of matters not requiring proof.

Admissions come about by two methods:

a) **BY DIRECT ACCEPTANCE OR ACKNOWLEDGMENT OF FACTS OR OMISSIONS WHICH FAVOUR THE OPPONENT. This is also known as Formal Admissions.**

b) **BY INDIRECT DEDUCTIONS FROM CONDUCT OR ATTITUDE TOWARDS A CASE. This is also known as informal admissions.**

Formal admissions are made during the trial in Court or in correspondence or pleadings or statement given by the party.

Informal admissions on the other hand are based on deductions or implications from conduct or attitude towards information or accusations or as disclosed in defense.

TYPES OF ADMISSIONS:

1. **FORMAL ADMISSION (CONCLUSIVE ADMISSION)**
2. **INFORMAL ADMISSION- (REBUTTABLE, INCIDENTAL, IMPLIED, ADOPTIVE ADMISSION).**
3. **ADMISSIONS IN CIVIL PROCEEDINGS**
4. **ADMISSIONS IN CRIMINAL PROCEEDINGS**

FORMAL ADMISSION

This is a voluntary acknowledgement of the existence of a fact relevant to an adversary's case in Court. Formal admission is made through five (5) processes:

1. **Statement of case**
2. **Pleadings**
3. **Through notice to admit facts or produce documents**
4. **By implication through representative-Section 119 (a) of NRCD 323.**
5. **By a party through correspondence or proceedings leading to litigation if not without prejudice.**

Formal admissions are usually conclusive and for that matter do not require proof. They are usually binding on the party who makes them or on whose behalf they are made.

A formal admission may however be amended or withdrawn with the leave of the Court- **ORDER 23 RULE 5 OF CI 47.**

INFORMAL ADMISSIONS

They may take the form of implied, incidental or adoptive admissions. The person may not have admitted it but the admission may be implied from conduct. See **BESSELA v STERN (1877).** In that case, ***a man was told in the face that, he had reneged on his promise to marry a woman.***

Instead of answering the accusation, he offered the woman money to go away. The Court held that, his conduct was an admission that, he had made the promise and had also broken it.

INSTANCES OF INFORMAL ADMISSIONS

- ***FORI v. AYIREBI*** **[1966]GLR 627, 647**- AVERMENT WHICH IS NOT DENIED –NO ISSUE JOINED – NO NEED TO LEAD EVIDENCE
- ***TAKORADI FLOUR MILLS v. FARIS*** **[2005-2006] SCGLR 882 (H-1)** WHERE EVIDENCE IS NOT CHALLENGED BY XXN AND NO OBJECT TENDERED IN OPPOSITION, FACTS IN THE EVIDENCE ARE DEEMED TO HAVE BEEN ADMITTED AND MUST BE ACCEPTED: LOCUS CLASSICUS IS ***KUSI & KUSI V BONSU*** **[2010] SCGLR 80**, APLIED IN ***TAGOE V ACCRA BREWERY LTD*** **[2017-2020]SCGLR....**
- ***QUAGRAINE V ADAMS*** **[1981] GLR 599** FAILURE TO XXN A PARTY ON AN AVERMENT MEANS THE AVERMENT IS ADMITTED SUB SILENTIO (SUBJECT TO SOME EXCEPTIONS)
- SEE ALSO ***TOTAL GHANA LTD V THOMPSON*** **[2011] 1 SCGLR 458**

STATUTORY PROVISIONS ON ADMISSIONS

- CI 47, ORDER 23 – ADMISSIONS IN CIVIL PROCEEDINGS
- NRCD 323, SECTION 119- ADMISSIONS IN BOTH CIVIL AND CRIMINAL PROCEEDINGS
- ADMISSIONS ARE HEARSAY IN SO FAR THAT THEY ARE MADE OUTSIDE THE COURT ROOM. BEING HEARSAY, THEY ARE INADMISSIBLE UNDER SECTION 117 OF NRCD 323.
- HOWEVER, ADMISSONS ARE MADE ONE OF THE EXCEPTIONS TO THE INADMISSIBILITY OF HEARSAY RULES UNDER SECTION 119 OF NRCD 323.

CONDITIONS FOR ACCEPTING ADMISSIONS AS EVIDENCE AGAINST THE OPPONENT UNDER SECTION 119 OF NRCD 323

SECTION 119 COVERS BOTH CIVIL AND CRIMINAL PROCEEDINGS

For Avernment To Be Accepted As Admission, The Ff. Conditions Must Be Satisfied:

- **It Must Be Against A Party In The Case (Since No One Will Give Evidence Against Himself)**
- **The Party Should Have Adopted (Or Accepted Or Believed In Or Taken Advantage Of) The Admitted Fact**
- **If The Admission Was Made On A Party's Behalf, That Party Must Have Permitted Or Sanctioned The Making Of The Statement**
- **The Statement Must Have Been Made By An Employee Or Agent During The Subsistence Of The Employment Or Agency.**
- **The Statement Must Have Been Made By The Declarant Or Party While Participating In A Crime Or Civil Wrong Or Conspiracy Thereof.**

ADMISSIONS IN CIVIL CASES

Admission in civil cases come about through the 5 processes stated above and the conditions for admissions are set out in **Section 119 of NRCD 323.**

ORDER 23 OF CI 47 has further rules on admissions in civil cases

1. Admission may be made voluntarily by a party
2. A party may apply to an opponent to make an admission
3. Where a party is served with notice to admit facts and he does not react within 14 days after service, he shall be presumed to have admitted it-**IFC v. SHANGRI-LA (2003-2004) 2 GLR 59.**
4. Admission must be specifically denied otherwise, a party will be deemed to have accepted it.

5. Where admission is made unconditionally, it operates to prevent or bar the application of the Limitation Decree (NRCD 54)-**ARCTON v. ACC (1977) 2 GLR 43.**

ADMISSIONS IN CRIMINAL PROCEEDINGS:

In criminal proceedings, admissions may be made in Court or outside the Court. Where admission is made in Court, it is by PLEA OF GUILT by the accused and this becomes a formal admission. Where the admission is made outside the Court, it becomes a Confession. The point is that, Confession constitutes a criminal aspect of admissions.

4. CONFESSIONS

Confession is the fourth and final exemption from proof in Ghana Law of Evidence and applicable to only criminal cases. It is defined as the admission of an offence or commission or participation in the commission of the offence by an accused person.

A ***Confession Statement*** is a statement made by a suspect which when taken together with other facts and circumstances constitutes an admission of the commission or participation in the commission of an offence.

A ***Confession Statement*** is classified as ***Hearsay Evidence*** in so far as it takes place outside the courtroom. Being hearsay, a confession statement is generally not admissible by virtue of **Section 117 of the NRCD 323.** However, **Section 120 of the NRCD 323** makes a confession statement admissible in evidence as an exception to the hearsay rules, provided certain conditions are satisfied.

The point is that, when a suspect is arrested by the police, there are two statements the police have to take, apart from the usual oral interrogation. The first of such statements is known as **INVESTIGATION CAUTION STATEMENT,** which assists the police to know the side of the suspect's story and to, with an open mindedness, independently investigate same as well. The second of such statement is known as the **CHARGE CAUTION STATEMENT,** which is taken by the police after the completion of investigations and they think there is sufficient evidence to support a charge against the suspect. These statements are taken at the Police Station. Occasionally, some suspects admit committing the offence in the one or both of the statements. Usually the

admission is common in the **INVESTIGATION CAUTION STATEMENT.** These statements are tendered as exhibits during the trial of the accused. If the accused confessed committing the offence and it is tendered without any objection, then it presupposes that, the accused is admitting the commission of the offence before the Court.

It is worth noting that, both the **INVESTIGATION CAUTION STATEMENT** and the **CHARGE CAUTION STATEMENT** are hearsay statements since they are taken by the police out of Court. Usually, the prosecutor through his witness in the box will inform the Court what the accused told him at the police station. So the accused is the **DECLARANT.** The witness who is usually the investigator will be reporting to the Court what he was told by the accused (**HEARSAY**). Although hearsay is as a general rule not admissible, the **Evidence Decree, 1975 (NRCD 323)** allows hearsay statement to be admissible in evidence if the declarant is a party in the matter. In criminal trials, the accused is always a party in the case.

At Ghana law of Evidence, ***"Confessions or Admissibility of a Confession Statement of an Accused" is governed by Section 120 of the Evidence Decree, 1975 (NRCD 323).*** The **cardinal condition for the admissibility of a Confession Statement** is **VOLUNTARINESS.**

By virtue of **Section 120 (2) of the NRCD 323**, any statement made by an accused whilst arrested, restricted or detained by the State will not be admitted in evidence before a court unless the said statement was made in the presence of an **INDEPENDENT WITNESS.**

An **INDEPENDENT WITNESS** is any person who was present at the time the police took the **INVESTIGATION CAUTION STATEMENT** from the accused. The presence of the Independent Witness must be for a purpose and that is to make sure that, the accused person made the confession statement out of his own free will and that, the police did not beat him or threaten him in order to make him confess in his statement that, he committed the offence. After observing the taking of the statement, the **Independent Witness** is required to sign the statement certifying that, indeed the accused made the said confession statement voluntarily. Where the accused is blind or illiterate, the Independent Witness shall carefully read over and explain to him the contents of the statement before it is signed or marked by the accused, and shall certify in writing on the statement that, he had so read over and explained its contents to the accused and that, the accused appeared perfectly to understand it before it was signed or marked (**The Jurat**). It therefore follows

that, **Section 120 (1) of the NRCD 323** provides that, if such a statement is made voluntarily, it is admissible against the accused and by implication, if it is not made voluntarily, it is not admissible in evidence.

In the case of **DUA v. THE REPUBLIC (1987-88) 1 GLR 343**, the court held that, ***"The principle was that, once the prosecution had been able to establish that, the statement was made voluntarily by the accused, in the sense that, it was not obtained from him by the influence of fear or hope of advantage, exercised by or held out by a person in authority, it was admissible in evidence against him."***

In **IBRAHIM v. REPUBLIC (1914) AC 599 @ 609**, **Lord Sumner** said that, ***"No statement of an accused person is admissible against him unless it is shown by the prosecution to have been a Voluntary Statement."***

In **REPUBLIC v. THOMPSON**, the court stated that, ***"No statement of an accused person is admissible evidence against an accused unless it is proved affirmatively that the confession was free and voluntary."***

The rationale for the requirement of voluntariness is that such, statements are likely to be untrue if not made voluntarily. Therefore, in **REPUBLIC v. BALDRY,** Pollock said at page 441-442 that: ***"The ground for not receiving such evidence is that, it would not be safe to receive a statement made under any influence or fear."*** It was also stated by **Williams J** in **REPUBLIC v. MANSFIELD (1881)** that, ***"It is not because the law is afraid of having truth elicited that these confessions are excluded, but it is because, the law is jealous of not having the truth."***

TYPES OF CONFESSIONS

There are two main types of confessions.

1. **JUDICIAL CONFESSIONS.** These are also known as **CONFESSIONS IN FACIE CURIAE.**
2. **NON-JUDICIAL CONFESSIONS**. These are also known as **CONFESSIONS EX FACIE CURIAE.**

JUDICIAL CONFESSIONS / CONFESSIONS IN FACIE CURIAE

Judicial confessions are made inside the Courtroom during trials. Judicial confession connotes two concepts:

1. Where the accused pleads guilty
2. Where the confession is made during committal proceedings.

Therefore, in facie confessions are of two types – **plea of guilty and statutory statement.**

First type of judicial confession is **plea of guilty** to criminal charge inside the courtroom and such confession amounts to admission of guilt. The admission of guilt is capable of forming the basis for conviction if genuinely made with full understanding of the implications of the plea. See **AGYIRI ALIAS OTABIL v. THE REP [1987-88] 1 GLR 58.**

Second type of judicial confession is **statutory statement**. It is a statement made by the accused during his committal to stand trial for indictable offence. It is admissible without proof if signed by the magistrate. Thus, admissibility of confession made inside the Court depends on the signature of the magistrate. The Magistrate's signature is prima facie evidence of the statutory statement. This makes such admissions admissible into evidence without proof – hence inclusion of **"admissions"** as part of the matters not requiring proof.

The conditions on admissibility of statutory statement were set out in **STATE v. BANFUL [1965] GLR 433, SC.** In that case, a school boy aged 19 was alleged to have murdered the bursar of his school by gunshot wound. None of the 24 prosecution witnesses gave material evidence which connected the accused to the death of the bursar. The prosecution sought to tender a statement which the accused had made to the investigating officer confessing to the crime. This was held to be inadmissible on the ground that, it was not made voluntarily because, a promise that, he would be released if he made the statement was operating on his mind at the time of making the confession. The prosecution also sought to tender a statutory statement which the accused made to the magistrate at his committal. This was also held to be inadmissible for the same reason. The prosecution then pressed for a case to be stated for the consideration of the Supreme Court but the trial judge refused that application. At the close of the prosecution's case, the judge ruled that, there was no case to go to the jury. He accordingly directed the jury to return verdict of NOT

GUILTY, which the jury did. Prosecution appealed and the Supreme Court held inter alia, dismissing the appeal that:

1. A statutory statement made by an accused person is not admissible automatically in trials of indictment. Its admissibility is governed by the same principles which govern the admissibility of any other statement, judicial or extra-judicial. The only difference is that, by virtue of SECTION 269 (1) of ACT 30, a statutory statement whether signed by the defendant or not, may be admitted in evidence without further proof by the prosecution, unless it is proved that, the committing magistrate purporting to sign it did not in fact sign it, while the admissibility of any other statement depends upon proof.
2. Where the prosecution intend to rely on a confession statement, it is their duty to prove affirmatively that, the admissions therein were voluntarily made and not induced by any promise of favor or advantage or by use of fear or threats or pressure by a person in authority.
3. In a case where an earlier statement has been rendered inadmissible because, it is not voluntary, a subsequent statement can only be admitted, if it is proved to have been made voluntarily and the inducement held out in respect of the earlier statement had dissipated.

NON-JUDICIAL CONFESSIONS / CONFESSIONS EX FACIE CURIAE

- CONFESSIONS EX FACIE CURIAE ARE USUALLY MADE OUTSIDE THE COURT ROOM.
- BECAUSE THEY ARE MADE OUTSIDE THE COURT ROOM, THEY CONSTITUTE HEARSAY AND ARE THEREFORE INADMISSIBLE. THIS IS THE GENERAL RULE.
- BY **SECTION 120**, EX FACIE CONFESSIONS CONSTITUTE EXCEPTIONS TO INADMISSIBILITY OF HEARSAY EVIDENCE. WHY? WE WILL GET TO KNOW AS WE GO FORWARD.

HOW CONFESSIONS MADE EX FACIE CURIAE ARE PROCURED?

- Procured Usually During Investigation Of Criminal Cases By Police Or Other Investigators
- By Express Admission Of Offence Or
- By Implication Or From Conduct Of Suspect: Eg
- Inducng A Person To Live In A Brothel: Act 29, S 107(1)(D)
- Receiving Stolen Property Knowing Well That It Has Been Stolen
- Bigamy In Divorce Proceedings: **Genfi Ii V. Genfi Ii [1964] Glr 548**
- By Conduct- Whether Standing By Amounts To Confession: **Otsiba V The Republic [1978] Glr 290**
- Standing By But Accompanied By Words Or Jestures Or Signs
- Confession By Accused Person Is Binding Only On Himself Unless Adopted Or Acknowledged By Co-Conspirators: *Francis Yirenkyi V The Republic*, Sc, 17/2/16 (Cr App No. J 3/17/2015)
- Emerging From A Room, Sweating "We Were Enjoying Ourselves" (With A 14-Year Old Girl)
- Sexual Harrassment
- What Constitute Investigating Statement?-
- Statement Usually Procured In The Course Of Police Or Investigator's Probe Into Commision Of Crimes
- 3 Criteria For Labelling Statement "Investigating": S 120
- Form Or Make Up The Offence Are:
- A. Must Be Essential Aspect Of The Offence
- B. Must Be Taken With Other Facts Which Form Bases Of Offence

WHY CONFESSION IS INCLUDED IN EVIDENCE REQUIRING NO PROOF

- ONCE ESTABLISHED- NO NEED TO PROVE ITS CONTENTS
- THIS IS THE REASON FOR ITS INCLUSION IN THE LAW ON MATTERS NOT REQUIRING PROOF.

INFLUENCE OF FOREIGN LAW ON GHANA LAW OF CONFESSION

- THE LAW ON CONFESSION IN GHANA IS LARGELY INFLUENCED BY FOREIGN LAWS, PARTICULARY THE LAWS ON CONFESSION IN ENGLAND.
- IN PARTICULAR, THE ENGLISH STATUTE OF PACE, THE POLICE AND CRIMINAL EVIDENCE ACT, 1984, S. 76 CONTAINS USEFUL PROVISIONS WHICH SHED LIGHT ON THE LAWS ON CONFESSIONS IN GHANA USEFUL
- IT HAS TO BE NOTED THAT, ALL THOSE LAWS AND DISCUSSIONS ARE NOT BINDING ON GHANA COURTS. THEY ARE OF PERSUASIVE EFFECTS ONLY

GENERAL RULE:

- THE GENERAL RULE IS THAT, ***"STATEMENT MADE OUTSIDE THE COURT OR CONFESSION EX FACIE CURIAE IS INADMISSIBLE FOR BEING HEARSAY"***
- However, **Section 120** Makes Such Admission An Exception To Inadmissibiilty By Words In **Section 120 (1)** Which States: "***Unless The Statement Was Made Voluntarily***"
- Exception Makes The Statement Admissible If It Was Voluntarily Given.
- For Admission Ex Facie Curiae To Be Admissible, It Must Be Made ***Voluntarily*** By The Accused At The Time He Was Arrested, Restricted Or Detained By The State.
- ***How Is Voluntariness Determined?*** If The Accused Made The Statement While Arrested, Detained Or Restricted, That Statement Would Be Voluntary If It Was

Witnessed By An Indpendent Person Or Made In The Presence Of An Independent Witness Who Attested That, He Made It Voluntarily.

- In Other Words, While He Was Under Arrest, Detention Or Restriction, The Statement He Made Is Admissible If It Was Witnessed By An ***Independent Witnesss.***

WHO IS AN INDEPENDENT WITNESS?

There Are 5 Main Criteria For Deciding Who Is An Independent Witness By Virtue Of **Section 120 (3) Of The Nrcd 323.** He Must Be Someone Who:

- 1. ***Can Understand The Language Spoken By The Accused.***
- ***2. Can Read And Write.***
- ***3. Can Write or Certify in Writing That, The Statement Was Voluntarily Made In His (Witness's) Presence.***
- ***4. Where The Accused Is Blind Or Illiterate, That, He Had Carefully Read Over And Explained The Contents Of The Statement To The Accused.***
- ***5. Certify In Writing On The Statement That, Upon Reading And Explaining The Contents Of The Statement To The Accused, The Accused Appeared To Have Understood It Before Signing Or Making His Mark.***

DISQUALIFICATION AS INDEPENDENT WITNESSES: THE CASE OF THE *"UNIFORMED PERSONNEL"*

- in the past, ***"uniformed personnel"*** were disqualified as independent witnesses.
- what is implied by ***"uniformed personnel"?***
- persons engaged in the ***army, police, air force, navy, immigration, customs, EOCO, etc.***
- issue: ***whether or not uniformed personnel can be independent witness.***

- the law is now amended by ***evidence and criminal procedure amendment decree, 1979 (smcd 237)*** which allows uniformed personnel to be independent witnesses.
- **FRIMPONG ALIAS IBO MAN v. THE REPUBLIC [2012] SCGLR 279**
- ***where statute conflicts with decision of the court, statute prevails***

CURRENT LAW ON ADMISSIBILITY OF CONFESSIONS

ARTICLE 14 (2), SECTION 120 OF NRCD 323 AND DUAH v. THE REPUBLIC.

For The Statement To Be Voluntary, Certain Constitutional Requirements Must Additionally Be Satisfied, Aside Those Under **SECTION 120 OF NRCD 323.**

Where Accused Is Under Arrest, Restriction Or Detention- 3 Conditions To Be Satisfied By Virtue Of Article 14 (2) Are:

- **Accused Must Be Informed In A Language He Understands**
- **Of The Reasons For His Arrest**
- **And His Right To A Lawyer Of His Choice: Murray V. Uk**

FULL REQUIREMENTS FOR DETERMINING AN INDEPENDENT WITNESS

- With The Six Requirements And The Three Constitutional Requirements, Nine Requirements Have To Exist For A Person To Qualify As Independent Witness.
- Note That, Not All Nine Have To Exist Before A Person Will Quailify As Independent Witness. Each Facts May Demand Different Requirements.
- Where Accused Is Under No Arrest – Court Has To Determine Voluntariness Of The Confession From The Facts
- IN ***DUA v. THE REPUBLIC*** [1987-88] 1 GLR 343, CA, The Court Held That, Where The Person Is Not Under Arrest, Detention Or Restriction, If The Confession Is Found Voluntary, It Will Be Admissible.

INSTANCES OF INVOLUNTARY CONFESSIONS

- STATEMENT MADE UNDER PHYSICAL AND MENTAL STRESS (SECTION 125 (A)): ***STATE v. BANFUL*** **[1965] GLR 433, SC**
- INDUCED BY PHYSICAL SUFFERING OR INHUMAN CONDITIONS: ***REPUBLIC v. AGYIRI ALIAS OTABIL*** **[1982-83] GLR 251**(handcuffed, beaten, made to thumbprint what police wrote for him, no witness)
- BY THREAT OF PROMISE: ***COP v. SEM*** **1962 2 GLR 77**, SC (signing the confession statement as the only condition by which the employer will withdraw the case from the police- inducement)

RIGHT TO SILENCE AND CHARGES TO PROSECUTE THE ACCUSED

- RIGHT TO SILENCE IN **ARTICLE 19 (10)** IS NOT INCONSISTENT WITH THE PREFERMENT OF CHARGES.
- THE SAME CONSTITUTION WHICH PROVIDES FOR THE RIGHT TO SILENCE IN **ARTICLE 19 (10)** ALLOWS THE ACCUSEDTO BE PROVED GUILTY IN **ARTICLE 19 (2) (C).**
- TO PROVE HIM GUILTY HE HAS TO BE CHARGED. IF HE IS CHARGED, HE MAY CHOOSE TO REMAIN SILENT
- REASON IS THAT, THE COURT HAS POWER TO SUBPOENA A PERSON TO COURT BY THE CHARGE.
- ONCE IN COURT, THE COURT HAS NO POWER TO COMPEL HIM TO TALK
- HE WILL ONLY TALK IF HE WANTS TO TALK.

PRESUMPTION OF INNOCENCE AND CHARGES TO PROSECUTE THE ACCUSED

- The First Part of **Article 19 (2) (C)** Provides Presumption of Innocence. That Part Is Not Inconsistent With Charges Preferred Against The Accused Because, That Article Demands

That, Charges Should Be Laid For The Accused To Have The Chance To Exercise His Right To Remain Silent

- The Same Clause Demands That, The Accused May Be Proved Guilty.
- To Prove Accused Guilty, Charges Have To Be Laid, I.E. He Has To Be Prosecuted. This Presupposes That, The Clause Expects Charges To Be Preferred Before That Requirement Of Proof Of Guilty Will Be Satisfied. Unless The Charges Are Laid, The Accused Cannot Be Proved Guilty.
- Therefore Laying Charges To Prove The Accused Guilty Is A Demand Of The Clause In The Constitution And Cannot Be Said To Be Inconsistent With The Constitution.

VOIRE DIRE

- VOIRE DIRE IS A FRENCH EXPRESSION WHICH LITERALLY MEANS ***"TO SPEAK THE TRUTH".***
- IN COURT, IT IS ***"THE PROCEDURE CONDUCTED TO DETERMINE THE VOLUNTARINESS OR OTHERWISE OF THE CONFESSION STATEMENT GIVEN BY A SUSPECT CHARGED WITH A CRIMINAL OFFENCE."***
- THE PROCEDURE IS ALSO DESCRIBED AS MINI TRIAL OR TRIAL WITHIN A TRIAL.
- OBJECTIVE OF VOIRE DIRE IS – ***TO DETERMINE THE VOLUNTARINESS OR OTHERWISE OF THE CONFESSION.***
- IT IS PART OF THE PROCEDURE IN JURY TRIALS
- THE PROCEDURE AND ITS CONSEQUENCES ARE MATTERS FOR CRIMINAL PROCEDURE AND SO WILL ONLY BRIEFLY BE DISCUSSED.

OBJECTIVES OF VOIRE DIRE

- The Objective Of Voire Dire Is To Determine The Voluntariness Or Otherwise Of Confession Statement Given By A Suspect Who Has Been Charged With A Criminal Offence.

- The Main Issue Is Under What Circumstances Will Voire Dire Have To Be Conducted?
- Situations Which May Call For Conduct Of Voire Dire Include:
- 1. Where The Statement Is Denied Or Objected To Or Repudiated; Or
- 2. Where The Statement Has Been Extracted By Torture, Deceit, Inhuman Treatment; Or
- 3. Where Statement Has Been Written By Another Person And Accused Ordered To Sign It If It Contains Contents Different From What He Signed; Or
- 4. Where Statement Breached Any Of The Conditions On Voluntariness Of Confessions As Discussed Above And
- 5. Occasionally, Where The Statement Is Admitted But Contents Challenged On Grounds Of Inaccuracy.– No Voire Dire - Fine Line- ***ASARE ALIAS FANTI v. THE STATE*** **[1964] GLR 70.**

TUTORIAL QUESTIONS ON JUDICIAL NOTICE

QUESTION ONE

A) Identify and explain the exception to the general rule that, "he who avers must prove".
B) Explain Judicial Notice and the statutory conditions for it to be taken.
C) Explain the extent to which the personal knowledge of the judge may be relied upon in taking judicial notice.
D) Identify certain matters of which judicial notice may be taken as sanctioned by law.
E) Explain the legal consequences of Formal Admissions (Admissions in civil matters and confessions in criminal matters).

QUESTION TWO:

In an action for general and special damages for personal injuries the facts are that the Plaintiff had been knocked down by the Defendant whilst riding a bicycle between Banda Kuma and Fufulso in the Upper West Region. The action is pending at the District Court, Osu Accra, where the Defendant resides.

Whereas the Defendant contends that the accident had occurred in a sharp curve or bend in the road and that he had not seen the Plaintiff in time because of the nature of the curve and the fact that it was a pitch black right, the Plaintiff contends that there was a full moon that night, that visibility was thus good and that the road was straight. He contends the Defendant should have seen him in time to avoid knocking him down if he kept a good lookout.

Whether or not there was a full moon that night and whether or not the accident occurred in a sharp curve or bend in the road are among the issues set down for determination at the trial. On the day that hearing commenced the Presiding Magistrate had this to say

> ***"One of the issue in contention in this case is whether or not there was a full moon on the 18th of February, 2011, the night the accident occurred. I have conducted my own investigation into this fact by reference to records kept by the National Geographic Society of Britain and also that of the National Space and Aeronautics Agency (NASA) of the USA regarding the Phases of the moon. Both of these institutions confirm that there was a full moon on the 18th of February, 2011. I there take the judicial notice of that fact. There is therefore no need to call evidence of that fact".***

Later on in the trial, when a witness for the Defendant was about to give evidence on the nature of the road between Banda and Fufulso, the Presiding Magistrate interrupted and said

> ***"I come from Bunpugu which is two kilometers from Fufulso, I travel that road between Banda Kuma and Fufulso at least twice a month. I know that stretch of the road as well as the witness herself. It is as straight as a ruler. Justice does not require that I profess ignorance when I know this is a fact. I will therefore take judicial notice of the fact that there is no sharp curve or bend in the road between Banda Kuma and Fufulso".***

Discuss the merits of these two rulings by the Magistrate in the light of the principles regulating the instances when judicial notice may be taken of facts in issue.

LESSON SIX

TRIAL BY A JUDGE AND THE JURY

INTRODUCTION:

There are two modes of trial and these are summary trial and trial on indictment. A trial by both a judge and a jury is a trial on indictment.

In Ghana, where the trial is on indictment, then both judge and jury are involved and it is known as jury trial. Jury trials are covered by the 1992 Constitution, NRCD 323 and ACT 30.

GENERAL RULES

1. All questions of law, including but not limited to the admissibility of evidence, are to be decided by the Court or Judge-**SECTION 1 (1) OF NRCD 323.**
2. In a jury trial, all questions of fact are to be determined by the jury, except otherwise provided by an enactment-**SECTION 2 (1) OF NRCD 323.**

FUNCTIONS OF THE JUDGE OR COURT

The Evidence Decree, 1975 (NRCD 323) defines ***"Court"*** in **Section 179 (1)** to include the Superior Courts of Judicature and all other Courts of Ghana which constitute the judiciary.

From the wording **Sections 1 and 2** of **NRCD 323**, it can be concluded that, the word Court refers to the judge as contrasted with a jury. Judge also refers to a magistrate.

- Decide on all Questions of law
- The right to adduce evidence first
- Provide directions to jurors on conclusion of the jury
- Decide on admissibility of evidence
- Decide on the meaning, and construction or interpretation of documents
- Foreign Law
- Discharge of Evidential Burden

1. QUESTIONS OF LAW:

By Section 1 (1) of the EVIDENCE DECREE, 1975 (NRCD 323), in a trial on indictment, especially in a jury trial, it is the duty of the presiding judge to decide all questions of law arising in the course of the trial. The questions of law are the legal issues and include questions as to the relevancy of facts and the admissibility of evidence. The judge has the discretion to prevent the production of admissible evidence whether objected to or not by a party

Section 1 (2) of the NRCD 323 provides that, the determination of the law of an organization of states to the extent that the law is not part of the law of Ghana, or of the law of a foreign state or sub-division of a foreign state, is a question of fact which shall be determined by the court.

Section 40 of NRCD 323 provides that, the law of a foreign Country is presumed to be the same as the Law of Ghana. If you want to prove that, it is not the same, you first have to prove that, the foreign law is different and once you do that, it is applied by the judge as a question of law.

As could be seen, **Section 1 (2)** clearly indicates that, the rule that all questions of facts are to be determined by the trier of facts is not absolute.

The discharge of a burden of proof requires a party to prove the "existence or non-existence of a fact", the determination whether a party has met the burden of producing evidence on a particular issue according to **Section 1 (3)** is a question of law to be determined by the court. Thus, whether there is sufficient evidence is a question of law for the judge to determine. If the party has adduced enough evidence to justify, for instance, a favorable finding by the jury, the judge leaves it to them to decide whether or not the issue has been proved. If the evidence is insufficient, in the opinion of the judge, he withdraws the issue from the jury , whatever their view of the matter, directing them either to return a finding on that issue in favor of the other party or , in appropriate circumstances, to return a verdict on the whole case in favor of the other party.

THE RIGHT TO BEGIN AND TO ADDUCE EVIDENCE FIRST

There is advantage to be gained by having chance to open a case and adduce evidence first. In a criminal trial, it is usually the prosecution that begins but there are a few instances such as where

the defense of **autre fois** is pleaded when the accused has the right to begin. Any decision on who has the right to begin depends on substantive law and must therefore be decided by the Court. .

ADMISSIBILITY OF EVIDENCE

Admissibility of Evidence is a question of law for the judge. Often before a judge decides whether or not a fact should be admitted in evidence, he has to decide on the existence or non-existence of some preliminary fact. The determination as to whether the facts exist or not is a function of the judge as provided by **Section 3 (2) of the Evidence Decree.**

THE MEANING AND CONSTRUCTION OR INTERPRETATION OF DOCUMENTS

Meaning to be ascribed to documents which have been admitted in evidence will have to be determined by the judge, although meaning of technical or local terms may however be treated as questions of fact and left to the jury.

DIRECTIONS TO THE JURY

Even though the general rule as stated above is that, the jury is omnipotent when it comes to the issue of facts, there are ways in which the judge controls the exercise of that power. Judicial control over the Jury is exercised in four main ways:

(a) withdrawal of an issue from the Jury
(b) excluding otherwise admissible evidence
(c) Summing up the evidence
(d) Setting aside verdicts on appeal

WITHDRAWAL OF ISSUE FROM THE JURY

Before an issue can be submitted to a jury, it is incumbent upon the judge to be satisfied that, there is sufficient evidence in support of the contention by a party for the jury's consideration. If in the considered view of the judge the evidence is insufficient, he must decide the issue in favor of the opponent. **Section 1 (4) of the Evidence Decree** provides that, where the Court makes a

determination that, a party has not met the burden of producing evidence on a particular issue, the Court shall as a matter of law determine the issue against the party. See **Metropolitan Railway Co v Jackson** (1871) AC 193 @ 196

R v. JOHNSON (2001) EWCA provides that, in determining whether or not to withdraw an issue from the Jury, the test to be applied is for the judge to inquire whether there is evidence, which if untainted and un-contradicted would justify men of ordinary reason and fairness in affirming the proposition which the proponent is bound to maintain, having regard to the degree of proof demanded by the law with regard to the particular issue.

This exercise is normally done after a submission of no case to answer by the accused. The Judge must rule in favor of the submission if there is insufficient evidence to prove an essential element of the prosecutor's case. See **Ali Kasena v The State.**

EXCLUSION OF ADMISSIBLE EVIDENCE

The court may in its discretion exclude otherwise admissible evidence under **Section 52** and prevent the Jury from considering the same. Section 52 provides that "the court in its discretion may exclude relevant evidence if the probative value of the evidence is substantially outweighed by

a. considerations of undue delay, waste of time, or needless presentation of cumulative evidence; or
b. the risk that the admission of the evidence will create substantial danger of unfair prejudice or substantial danger of confusing the issues; or
c. the risk, in a civil action, where a stay is not possible or appropriate, that the admission of the evidence will unfairly surprise a party who has not had reasonable grounds to anticipate that the evidence would be offered.".

FUNCTIONS OF THE JURY

Even though the Evidence Decree does not define 'jury', its definition of ***'tribunal of fact'*** considers the jury. It states that, a ***"tribunal of fact"*** means trier of fact and includes (a) the jury and (b) the Court when the court is trying an issue of fact other than one relating to the admissibility of evidence.

A jury can be said , in the language of the **Black's Law Dictionary 8th Edition 2004 , *" to be a group of persons selected or empaneled according to law and given the power to decide questions of fact and return a verdict in the case submitted to them".***

Generally as already stated, in all jury trials, all questions of fact are to be decided by the jury- Section 2 (1) of NRCD 323. As stated already, nothing in the NRCD 323 shall preclude the Court (judge) from summing-up the evidence to the jury or from commenting on the weight or credibility of the evidence so long as the court (judge) makes it clear to the jury that they are to determine the weight and credibility of the evidence themselves and are not bound by the court's (judge's) summary or commencements- **Section 2 (2).**

However, in a trial by jury, it is the duty of the jury to:

1. Decide on all questions of fact-Section 2 (1) of NRCD 323. NB: Where there is no jury, the judge shall determine the questions of fact-Section 2 (3) of NRCD 323.
2. To listen to testimony and evaluate evidence adduced.
3. To assess the weight to be given to evidence in relation to standard of proof
4. To determine whether or not a fact in issue exists or not, i.e. whether a relevant fact has been proved or not
5. To arrive at the verdict. Not the special verdict of guilty but insane.
6. To construe the ordinary meaning of terms and words in a statue.

In REPUBLIC v. AHENKORAH [1960] GLR 160, CA, judges were warned to refrain from encroaching on the provinces of the jury in determining facts. In this case, three persons, namely the first appellant, the deceased and one Mensah went to a cemetery for the second appellant to invoke juju for them to increase their business prosperity. A gun for the purpose was borrowed by the first appellant. During the ritual, the second appellant fired the gun, and Mensah, the only prosecution witness, testified that the deceased fell on the ground and died later. In his summing-up, the judge directed the jury that no question of accident arose from the evidence. They were therefore convicted of murder. On appeal, the Court of Appeal held among others that it is the duty of counsel to bring to the consideration of the jury every possible matter and even the remotest inferences from the facts which may assist an accused person. The learned judge's withdrawal of such matters from the consideration of the jury was fatal, for the judge's finding that the deceased

did not meet his death as a result of an accident was a serious encroachment on the province of the jury.

BENIAKO v. THE REPUBLIC (1995-1996) sets out 3 functions of the jury:

1. ***Determines credibility of witnesses.***
2. ***Evaluates all evidence adduced in Court.***
3. ***Decide the guilt or innocence of the accused.***

See also: **STATE v. AMUAH (1961)**

See also: **YANKEY v. THE STATE (1968)**

See also: **ZUTA KWABENA ALIAS DONKOR v. THE STATE (1963)**

Take note that, the sum total of the decisions in the cases is that, ***"judges should refrain from encroaching the province of the jury: which is the determination of facts."***

SUMMING-UP

An offence is triable by a judge and a jury when the offence is tried on indictment or the offence is punishable by death or life imprisonment.

See **Article 19 (2).** It states as follows: ***"A person charged with an offence shall- in the case of an offence other than high treason or treason, the punishment for which is death or imprisonment for life, be tried by a judge and jury."***

See also **Section 2 (2) of ACT 30.** It states as follows: ***""An offence shall be tried on indictment if (a) it is punishable by death or it is an offence declared by an enactment to be first degree felony; or (b) the enactment creating the offence provides that the mode of trial is on indictment."***

The implication is that, **OFFENCEs PUNISHABLE BY DEATH OR LIFE IMPRISONMENT ONLY e.g. MURDER, MANSLAUGHTER, etc.** are **TRIABLE BY JUDGE AND JURY (made up of 7 men and women)-ARTICLE 19 (2).** Jury trial always commences by **COMMITTAL PROCEEDINGS-Section 44 of ACT 30 AND *ADDAI v. THE REPUBLIC* [1973] 1 GLR 312, CA.**

Every indictable trial with jurors end by summing-up which is the summary of the case in simple terms to enable jury determine the facts and return verdict.

Summing-up is mandated by statute-**Section 277 of Act 30.** It states as follows: ***"when in a trial before a jury, the case on both sides is closed, the justice shall, if necessary, sum up the law and the evidence in the case."*** Despite the wording of Section 277 of Act 30, the duty to sum-up is mandatory and not discretionary.

By way of definition, Summing-up is explained in **Section 277** of the Criminal and other Offences (Procedure) Act, 1960 (Act 30). It is ***"the duty of a judge after the close of parties' case in a jury trial to summarize the law and evidence to assist the jury in their deliberation."***

Whether or not the duty is discretionary or mandatory: See Practice Direction given by the Supreme Court in **STATE v KWAME AMOH [1961] 2 GLR 637, SC.** It states as follows: ***"The trial judge has the duty to give directions to the jury despite the wording of Section 277 of Act 30 which seems to give the impression that, there is no need to give directions".***

In **ASARE v. THE REPUBLIC (1978),** the Courts stated as follows: ***"There is the need for the judge to actually direct the jury as to what to do."***

In ***STATE v. YAW AMUAH (1961),*** practice direction given by the Supreme Court pointed out the content of summing-up as follows:

1. It should cover the ingredients of the offence.
2. It should cover the things that are required to prove each ingredient.
3. It should cover the principles of law applicable to each ingredient of the offence.
4. It should cover a summary of the evidence adduced by both the prosecution and the defense.
5. Expand or expound to the jury the defense put forward by the prisoner. Whatever the defense of the prisoner may be, however weak or improbable, he is entitled to have it put adequately to the jury.

In brief, summing-up begins with a reference to the charge preferred against the accused and it is clearly the duty of the trial judge to explain to the jury what the ingredients of the offence are and what evidence is required to prove each ingredient and also the principles of law applicable.

You should remember that though there is no formula or exact words to be used in summing up, summing-up should not be used to pre-empt the jury's verdict or seek the ratification of judge's

verdict by the jury. Summing up must be fair and balanced and not a biased rehearsal of a one-sided and unfair comment.

Refer to ***LORD SIMON*** in **DPP v. STONEHOUSE [1978] AC 55@80** where he admonished judges not to direct the jury to accept his view of disputed facts but to merely direct and remind them that they have the final say in the determination of the facts before them. You must be aware that nothing prevents a judge from commenting robustly on the evidence in a summing-up but should always leave the verdict to be made by the jury.

LEGAL PRINCIPLES ON SUMMING-UP

1. No particular format is required for summing-up

AGYEMAN v. THE STATE (1964)

ODURO v. THE STATE (1967)

2. The most important issue is the effect of the summing-up on the mind of the jury.

KLUVIA v. THE STATE (1965).

3. Summing-up must be fully done orally and not by mere notes.

BERKO v. THE REPUBLIC (1982-1983)

4. Section 277 of NRCD 323 imposes a compelling duty on the judge to sum-up in an indictable hearing although the law appears to be discretionary.

BERKO v. THE REPUBLIC (1982-1983)

5. Summing-up should be recorded.

NANKANI v. THE REPUBLIC.

6. In jury trials, judgment is not written, it is why summing-up is required because, the judge only gives directions.

STATE v. AMOH (1961)

SUMMING-UP COMPRISES:

1. **DIRECTIONS TO JURORS ON THE FACTS RELEVANT TO THE CASE**

Care should always be taken to direct jurors that, if the judge makes statement or findings of fact in the course of the directions, the jurors are at liberty to ignore his views on the facts and form their own views on the facts since they are always the judges of facts.

2. **DIRECTIONS TO THE JURORS ON THE LAWS RELEVANT TO THE CASE**

Care should be taken to direct jurors that the views of the judge on the law are binding on the jurors and have to be complied with.

3. **DIRECTIONS TO JURORS ON THE VERDICT TO BE CONSIDERED BY JURORS, INCLUDNG DIRECTION ON ALTERNATIVE VERDICTS WHERE APPLICABLE**

Directions should explain that, the verdict may be unanimous or by majority and that, it is always unanimous in murder cases. That, it is the duty of the judge after announcement of verdict by foreman of jury, to accept the verdict and announce it - exception where verdict is incomplete, ambiguous, illegal, in which case further directions may be given for jurors to retire again to reconsider the verdict. Thereafter, if verdict is appropriate, appropriate sentence must be imposed.

SAMPLE FORMAT FOR SUMMING-UP

1. The charge: Explain the ingredients of the offence to the jury and what is required to prove each ingredient.
2. The evidence adduced: Summary of salient and material facts-**KAMBE AND OTHERS v. THE REPUBLIC (1989-90).**
3. Burden of proof: The prosecution has the burden of proof-**AGYEMAN v. THE STATE (1964).**
4. State the case of the defense: Defense accused person is entitled to on the facts even if he does not raise that defense. Explain the defense to the jurors in detail, explain the evidence adduced by the accused and extent to which the evidence establishes the defense the

accused is putting across to the Court. State that, ***there is no onus on the defense to prove the accused person's innocence-REPUBLIC v. MURTAGH AND KENNEDY (1955).***

5. The verdict: It is binding on the judge except it is incomplete, vague or illegal. It must be stated that, in murder cases, the verdict must be unanimous otherwise there will be a mistrial-**MOSHIE v. REPUBLIC (1977).**

CRITICISM AGAINST SUMMING-UP: MISDIRECTION

Misdirection occurs where wrong instructions which affect the final outcome of the case are given to the jurors.

The fundamental rule on criticism of the summing-up based on misdirection was stated in **APALOO v. THE REPULIC (1975)** as follows: "***...the ground of complaint must allege not only whether the misdirection was one of law or fact but also its nature***".

There are three main types of misdirection:

1. Misdirection on the facts and on the law: The judge giving wrong instructions on the facts and on the law.
2. Misdirection by non-direction or misdirection by omission-Failure of the judge to give instructions on an essential aspect of the facts or the law.
3. Miscarriage of justice: Misdirection or non-direction always leads to miscarriage of justice otherwise it will not affect the outcome of the case.

PRECEDENTS ON MISDIRECTED SUMMING-UP

On the fatality of a misdirected summing-up, let's look at the following important cases:

1) **REGINA v. OJOJO (1959)**

In a lengthy summing-up to the Jury, the trial-Judge said as to the case for the Crown:

"I have to direct you therefore that on the evidence of the prosecution, if you accept or believe the whole evidence, you would be entitled to come to the conclusion that it was the accused who

set upon the deceased and inflicted the injuries from which he died - and that therefore he is Guilty of Murder i.e., intentionally causing the death of another by unlawful harm. But at that stage there was still room for doubt," The trial-Judge proceeded to read to the Jury the unsworn statement made by the accused from the dock, and concluded his summing-up with the following direction to the Jury: "Well now, Gentlemen, I regret to say the above is nothing short of a clear confession of Murder pure and simple. Accepting his narration, even if it is true that the deceased tried or actually used his (the deceased's) cutlass on him, he himself says – "I was quicker and knocked away his cutlass from his hands" – that is to say disarmed him. Having disarmed him, the law does not allow him to cut him up in the manner described by the doctor. "It is therefore my very painful but bounden duty to direct you that on the Accused's own statement from the dock which amounts to a clear confession, he intentionally caused the death of the deceased Kwame Brehun by unlawful harm, the awful cutlass injuries inflicted on him which the doctor described in his evidence, and that your verdict must be guilty of Murder. Will you now retire to consider your verdict."

The accused was convicted of murder, and appealed to the Court of Appeal (Criminal Appeal No. 161/58).

Held:

(1) that the accused's statement did not amount to a confession of murder. It admitted killing, but clearly raised the alternative defenses of provocation and of self-defense;

(2) that these defenses raised questions of fact which should have been left to the jury, and the direction to the jury that their "verdict must be guilty of murder" was a usurpation of the jury's functions;

(3) that it was the judge's duty to direct the attention of the jury to the two defenses, but he failed to do so, or to consider them himself;

(4) that where the judge has failed to direct a jury adequately on the defense, and where the facts have been found by him instead of by them, there has been a substantial miscarriage of justice, and the Court will not apply the proviso to sec. 10 (1) of the Court of Appeal Act, 1957.

2) **KETSIAWAH v. THE STATE (1965)**

At the trial the closing sentence of the judge's summing-up notes said: "If you believe that accused was so drunk that he did not know what he was doing or that he was highly provoked then say he is guilty of manslaughter. If you are not sure, or if you think his explanation might reasonably be true, then return a verdict of guilty of manslaughter."

HELD: Dismissing the appeal

The trial judge's direction to the jury that if they believed the accused was so drunk that he did not know what he was doing then they should return a verdict of guilty of manslaughter was a misdirection since it did not explain to the jury that if they formed the opinion that the accused did not know what he was doing, then, in law, he was insane and they should return the special verdict of guilty but insane, as provided in section 28 (3) of the Criminal Code, 1960. But this misdirection had not occasioned a miscarriage of justice since, by returning the verdict of guilty of murder, the jury showed that they did not believe that the accused was intoxicated to the extent that he did not know the nature of his act.

3) **BARKAH v. THE STATE (1966)**

The trial judge directed the jury, inter alia, as follows:

"If however you are not so satisfied, but feel that because of some sure and reasonable doubts, the guilt of the defendant cannot be said to have been proved with certainty, then you must find the defendant not guilty."

He was convicted and, on appeal, his counsel submitted that, the summing-up by the trial judge shifted the burden of proof onto the defense and that the use of the phrase ***"some sure and reasonable doubts"*** by the trial judge confused the minds of the jury.

Held: Dismissing the Appeal:

The phrase "some sure and reasonable doubts" used by the trial judge in his summing-up was an unfortunate expression but in this particular context it did not create the wrong impression on the jury. The trial judge's charge to the jury on the burden of proof when critically examined as a

whole, showed that he directed them adequately on the burden of proof. The jury heard all the evidence of the prosecution and defense on the fight that ensued between Amadu Wangara and the appellant, and the issues in the case were in substance put to them. Failure on the part of the trial judge to direct them on something which was already on record was therefore not fatal.

4) **AKORFUL v. THE REPUBLIC (1963)**

The appellant heard someone trying to force open his window at about 1.00 a.m. He got up, took his gun and went out to investigate. He did not see anybody. A few moments later he saw someone walking in the dark. He shouted at the person, but there was no answer. Thinking that the person was a thief he fired his gun towards the direction where the person was coming from in order to scare him away. His shots hit and killed one Kofi Buabeng. The appellant was charged with murder. He was the sole witness to the incident. In his summing-up the judge said to the jury: "Intention as far as the courts are concerned is inferred from one's conduct. [For example] ... if A. takes a gun which is loaded and shoots towards B. the reasonable man standing will infer that A. intends to shoot at B. and it does not matter what B. says or thinks if the ordinary reasonable thinking man will infer from A.'s conduct the intention to shoot." He also said to the jury that, "In this case therefore there are the constituent elements which amount to murder, but the law says even though all the ingredients of the offence are there, there are some circumstances in which the offence is reduced to manslaughter." The appellant was convicted of murder and on appeal, **Held:**

(1) the proposition that a jury in a murder trial need not consider what an accused person in fact contemplated as the probable result of his act once they are satisfied that the act was unlawful and voluntary, and that any reasonable man in the position of the accused would appreciate the consequences of his act is not applicable to the law of murder in this country. In this case the learned judge in directing the jury to apply an objective test in determining the intention of the appellant had seriously misdirected the jury on this issue. Before an accused person can be convicted of murder it must be proved that he had a real or wicked intention to kill or that the circumstances were such that he was aware that the result of his act would be death.

(2) Nowhere in the summing-up did the learned trial judge refer to the evidence of the appellant's intention of firing his gun in order to scare away a thief, and his failure to do so taken together with his direction that the elements of the charge of murder had been proved amounted to a substantial miscarriage of justice, for he clearly prevented the jury from considering the real issues affecting the guilt or innocence of the appellant and thereby deprived him of a fair chance of acquittal.

(3) In a murder trial it is necessary to explain to the jury the fundamental distinction between murder and manslaughter in order to enable them to understand the verdicts that they are entitled to return. The failure to draw such a distinction may occasion a possible miscarriage of justice. In this case though the learned trial judge directed the jury to return a verdict of manslaughter if they thought there were circumstances which reduced the offence to manslaughter yet he did not explain the difference between murder and manslaughter.

5) **SARBAH v. THE REPUBLIC (2009).**

The trial judge failed to direct the jury on the defenses, self-defense and provocation, available to the appellant.

6. **APETORGBOR AND OTHERS v. THE REPUBLIC (1974)**

"The determination of whether a witness was an accomplice or not was a question of fact for the jury to decide and not a matter of law for the judge to determine. Although a judge was entitled to direct a jury on questions of fact as well as on law, he must, however, in his directions on questions of fact indicate to the jury that his own opinion on the facts was not binding on them and that they should make up their own minds on the issue of facts, having regard to the evidence before them. In directing the jury to regard the first prosecution witness as an accomplice, the trial judge had usurped the function of the jury. Dicta of van Lare J.A. in R. v. Ahenkora and Badu [1960]"

TUTORIAL QUESTION ON SUMMING-UP

The accused slashed his mother to death on a broad Sunday when the mother returned from Church. When asked to give a statement to the Police, he stated that his mother was a witch who had prevented him from prospering in his life.

During the trial, the following were the answers he gave to questions by the Prosecution:

> ***"Q. Where do you live?***
> ***A. I live on the Odum trees with Jesus Christ and Osama Bin Laden.***
>
> ***Q. What are you doing there?***
>
> ***A. We are waiting for the end of the world to come so that we the Faithfuls will rescue devils and infidels like you and pave way for you to enter the Promised Land, if only you can repent and atone for half of your grievous sins on earth."***

In his summing up, the trial judge directed the jurors as follows:

> ***"Members of the jury you all saw the demeanor and utterances of the accused. A person who can remember people like Osama Bin Laden, that there is a place like Promised Land etc. cannot convince anybody that he was insane as the defense counsel contends. He was not insane.***
>
> ***You are to retire and proceed to convict him so that I order him to be hanged for killing his own mother". The jurors returned with a verdict of "guilty"***

COMMENT ON THE SUMMING UP.

LESSON SEVEN

WITNESSES

WHO IS A WITNESS?

GENERAL MEANING: Generally, a witness includes all persons from whose lips testimony is extracted to be used in any judicial proceeding and for this reason includes the following:

1. DEPONENTS: A deponent is a person making a deposition under oath or giving written testimony to be used in Court.
2. AFFIANTS: An affiant is a trusted person, one you have faith in.
3. All persons delivering testimony before a Court or jury.

LEGAL MEANING: In its strict sense, a witness is a person who gives evidence in a cause before a Court. It includes those who give oral testimony before the Court as well as those witnesses whose sworn affidavits and statements are used, even though they do not appear in Court.

Witnesses are used by parties in civil actions and criminal cases to establish the facts upon which the parties rely to proof their cases. Whether the witness is competent to give evidence and the procedure to be followed in extracting the evidence from him (i.e. rules relating to examination in Court) must be well known.

Given the importance attached to oral testimony, the law is greatly concerned with the qualifications to testify (competency of a witness) and those who may or may not be compelled by a court to testify (compellability of a witness).

TYPES OF WITNESSES

1. ADVERSE WITNESS: SECT 72 OF NRCD 323

The Evidence Act under **Section 72** describes persons who may be ruled to be **"adverse witnesses."** They include ***witnesses who willingly agree with suggestions put to them by counsel for the opponent.*** Among the category of **"adverse witnesses"** under **Section 72** includes people with **IDENTICAL INTEREST** to the opposing party and so are likely to testify to aid that

interest, such as a **spouse, director, an employee or agent of a company** where that spouse or company is a party to the case.

The entire section, whose marginal note describes the section as referring to "Adverse witness," reads as follows:

"72 (1) Subject to the discretion of the court, in a civil action , a party, or a person whose relationship to a party makes his interest substantially the same as a party, may be called by any adverse party and examined as if on cross-examination at any time during the presentation of evidence by the party calling the witness.

72 (2) When such a witness is cross-examined by his own lawyer or by a party who is not adverse to the party with whom the witness is related that examination is to be treated as if it were re-examination."

This section implies that, where a party intends to call a person as a witness and the party believes that, the witness will not speak the truth or support his case, then that party is entitled to apply to the Court to treat the witness as an **adverse witness.**

In this context, the word **"adverse"** should be given its ordinary dictionary meaning which is **"that which is contrary to the expectations or aspirations"** of the party calling the witness.

The section may be applied by a party or a person with identical interest with the party such as the wife, an employee or agent of the party. If a party desires to call the wife, agent, employee or child of the opponent as a witness, it is reasonable if the party anticipates that, the witness may or may not testify in such a way as to support his case against the husband, employer or principal.

The witness who testifies against the case of the party who called him can properly be described as **unfavorable or hostile witness,** depending on the behavior that he exhibits in Court. For instance, if he turns out to be obstructive of the proceedings or remains mute, he will be described as a **hostile witness**. If he struggles to speak the truth, then he may be described as **unfavorable witness**. In the terms of NRCD 323, the term **"adverse witness"** may cover either **hostile witness** or **unfavorable witness.**

Now, where the only witness available to you is a close person to your opponent, such as wife, son or best friend, such a witness can be described as an adverse witness. Under such condition, you will not lead him in **evidence-in-chief** but you conduct the **evidence-in-chief** as if you are **cross-examining him.** For example if I am to call my opponent's son as the only available witness for me, despite the fact that I called him as a witness to testify on my behalf and should have been led in evidence-in-chief by my lawyer, he will rather be subjected to **cross-examination.** In Court room practice, an application has to be made to the Court for leave to treat the witness as hostile, unfavorable or adverse witness. The Court will have to rule on the application before the witness can be treated as a hostile, unfavorable or adverse witness.

2) **UNFAVORABLE WITNESSES**

An **"UNFAVORABLE WITNESS"** is a witness who although displays no hostility towards the party who calls him, but nonetheless, fails to give evidence favorable to the cause of that party. Such a witness strives to speak the truth but what he says in the witness box turns out not to be useful to the side that called him.

In **ABADOO v. AWOTWE (1973) 1 GLR 393**, the Court held that, ***"A party is under no obligation to call a witness…whose interest is at variance with his".***

In **GYAMFI v. BADU (1963),** the Court held that, ***"It will be nothing but madness for a party to rely on his opponent for evidence".***

A witness may be unfavorable but that does not necessarily mean or imply that, he is hostile. See **LANQUAYE v. THE REPUBLIC [1976] 1GLR 1.**

At common law, a party faced with an unfavorable witness cannot cross examine him. At the time the party called him, he gave the impression to the Court and the whole world that, he was reliable; he cannot turn round to attempt to impeach his character by cross-examination aimed at showing that, he was no longer reliable. That is the basis of the principle that, an unfavorable witness cannot be cross-examined by the party who called him.

Even though a party is not allowed under common law to impeach the credit of an unfavorable witness, he is however allowed to call other witnesses to give evidence of those matters in relation

to which the unfavorable witness failed to give evidence in proof. See **EWER v. AMBROSE (1825),**

In **EWER v. AMBROSE (1825),** the defendant called a witness to prove an existence of a partnership but gave a contrary testimony. It was held that, while the defendant could not adduce general evidence to show that, the witness was not to be believed on his oath, he was entitled to contradict him by calling other witnesses. As stated by **Holroyd J:** ***"If a witness proves a case against the party calling him, the latter may show the truth by other witnesses. But it is undoubtedly true, that if a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to show that the witness was not to be believed on his oath, but he may show by other evidence that he is mistaken as to the fact which he is called to prove".***

3) **HOSTILE WITNESSES**

On the other hand, a ***HOSTILE WITNESS*** is one who refuses to tell the truth, who stands mute only in the Courtroom or who turns out to be obstructive inside the Courtroom. He is a witness who, in the opinion of a judge, shows no desire to tell the truth at the instance of the party calling him and also displays hostility towards him. Here too, his previously known conduct, inconsistent statement or prior admissions will provide pointers to whether the witness is to be treated as an unfavorable or hostile witness. See **EGBETORWOKPOR v. THE REPUBLIC [1975] and RE OKINE (DECEASED); DODOO AND ANTOHER v. OKINE & OTHERS [2003-2004] SCGLR 582.**

In **EGBETORWOKPOR v. THE REPUBLIC [1975],** a witness who had given written statement to the police incriminating his father retracted it in Court and claimed that, his father was innocent. He was treated as a hostile witness.

In **RE OKINE (DECEASED); DODOO AND ANTOHER v. OKINE & OTHERS [2003-2004] SCGLR 582, Prof. Kludze JSC** observed that, **"...a witness is a hostile witness if it can be shown that, he knows the truth but deliberately persists in lying to the court..."**

At common law, **unlike an unfavorable witness**, a judge may allow cross-examination of a hostile witness by the party calling him. An application to treat a witness as hostile may be made at any stage during the witness' evidence, even at the late stage of re-examination.

CROSS EXAMINATION OF WITNESSES:

The general rule at common law is that, a party is not allowed to impeach the credit of a witness he calls. Thus, a party may neither question his own witness' character, nor call evidence concerning his character, convictions, prior inconsistent statements or bias. What this means is that, if the witness gives adverse testimony, the party may not turn round and cross-examine his own witness as if he were a witness for his opponent. In a nutshell, he takes his witness as he finds him.

Certainly, it would be repugnant to principle to enable a party having called a witness on the basis that, he is at least in general going to tell the truth to question him or call other evidence designed to show that, he is a liar. It is therefore incumbent upon parties and their counsel to do their homework well in deciding the witnesses they call.

GHANAIAN LAW POSITION:

In Ghana, the law is different as you can find in **NRCD 323 SECTION 81 (1)** which allows a party to cross-examine his own witness if the witness turns out to be an unfavorable witness.

The party may also call other witnesses to put in other evidence which the unfavorable witness was **UNABLE** or **UNWILLING** to establish and thus **REBUT** the unfavorable impression that his testimony has created.

COMPETENCY AND COMPELLABILITY OF WITNESSES

A witness is said to be competent if he may be called to give evidence and compellable if, being competent, he may be compelled by the Court to do so. Put differently, competence relates to the

ability of the person to testify on the topic before the Court for which he has been called as a witness.

The question that may be asked is this: Will this particular witness be able to testify on the subject before the Court? The answer to the question will depend on whether or not the witness has the knowledge of the topic to be able to inform the court of what happened or what the topic is about.

Generally, competence relates to the reliability of the testimony of the witness based on his knowledge of the facts, his ability to recall events, etc.

On the other hand, a witness is compellable if he may lawfully be obliged or forced to testify in Court. ***AS A GENERAL RULE, ALL COMPETENT WITNESSES ARE COMPELLABLE.*** This appears to be the rationale for the rule in the **Courts Act, 1993 (Act 459), Section 61.** ***That section makes it an offence for anyone properly summoned to refuse to attend the court, or after being properly summoned and present in court, to depart from the Court without reasonable excuse or permission from the court.*** The general rule is however subject to persons immune by way of PRIVILEGE (see **SECTION 88 of the NRCD 323**)

COMPETENCE OF A WITNESS AT GHANAIAN LAW

At Ghana Law, **Sections 58-60 of the Evidence Act** regulate the competence of a witness.

Section 58 states that, **"Except as otherwise provided by this Act, a person is competent to be a witness and a person is not disqualified from testifying to a matter."**

Paragraph 13 of the Memorandum to the Evidence Decree, 1975 (NRCD 323) explains the meaning of **Section 58 of the NRCD 323**. It explains that, **Section 58 of the NRCD 323** abolishes all pre-existing common law disqualifications for witnesses and provides that, in Ghana, every person is a competent witness and no person is disqualified as a witness except as provided in the NRCD 323 or any other enactment

It therefore follows that, as a general rule and by virtue of **Section 58** of the Evidence Decree, 1975 (NRCD 323), **"every person is competent to be a witness at Ghanaian law."**

However, **Section 59** tells us that, despite the fact that every person is competent to be a witness, any person who wants to testify as a witness should be able to express himself very well to be understood directly or through interpretation by another person who can understand him and also must understand the duty of a witness to tell the truth. **Section 59** therefore sets out the grounds upon which a person may be disqualified to be a witness.

Section 59 (1) provides that, **"A person is not qualified to be a witness if that person is**

(a) incapable of coherent expression so as to be understood, directly or through interpretation by another person who can understand that person;
(b) incapable of understanding the duty of a witness to tell the truth.

Section 59 (2) provides that, **"A child or a person of unsound mind is competent to be a witness unless the child or that person is disqualified by subsection (1).**

CASE ON SECTION 59:

R v. HILL

Facts: A patient of a lunatic asylum laboring under the delusion that he had a number of spirits about him which were continually talking to him but with a clear understanding of the obligation of the oath

Held: That he was competent to give evidence for the Crown on a charge of manslaughter. However, if the evidence of such a person is so tainted with insanity as to be unworthy of credit, the jury may properly disregard it.

The combined effect of **Sections 58 and 59** may be summarized as follows:

- Every person is **potentially** competent to be a witness and no person is disqualified from testifying to any matter except as otherwise stipulated in the Evidence Decree, 1975 (NRCD 323).
- In order to qualify to be a competent witness, a person must have :
  - the ability to express himself or herself so as to be understood, either directly or through interpretation by one who can understand him;
  - the capability of understanding the duty of a witness to tell the truth.

In other words, whenever a witness is presented to the Court, the witness will be a competent witness once they pass the **"intelligible communication"** or **"comprehension of duty to speak truthfully"** tests.

- Children or persons of unsound mind (mad persons), once they pass any of the two tests are as competent as any other category of witnesses. Put differently, a child or a mad person is competent to be a witness in so far as they can express themselves and understand the duty to tell the truth.
- It may be useful here to remember that, **Section 7 of the Act** no longer requires that, the evidence of a child must be corroborated.

In addition to the requirements set out in **Section 59 of the Evidence Act**, the requirement of personal knowledge under **Section 60** of the same Act is worth noting. **Section 60** is about having personal knowledge of what you intend to testify on. As a general principle, the matter on which you are going to court to testify on should be within your personal knowledge. The general rule therefore forbids a witness from telling the court what a friend told him or her. A witness is under an obligation to testify on what he or she has personally observed or within his or her personal knowledge and not what he or she heard from others. If a matter is not within the witness' personal knowledge, it is termed as **"hearsay (a major topic under Sections 116-138 to be treated later)".** Consequently, **Section 60** may be applied to disqualify and or limit the scope of a witness' testimony to matters of which he has firsthand information. Let's take a look at the wording f **Section 60** of the Evidence Act (NRCD 323)

Section 60 (1) provides that, **"A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that, the witness has personal knowledge of the matter"**

Section 60 (2) provides that, **"Evidence to prove personal knowledge may, but need not consist of the testimony of the witness personally."**

Section 60 (3) provides that, **"A witness may testify to a matter without proof of personal knowledge if an objection is not raised by a party".**

The implication of this Section is that, if a witness in the witness box says something that is not within his personal knowledge, the opponent must object to it at that point. The opponent must not wait for the opposing witness to testify on hearsay evidence and later raise an objection to it. The opponent must object timeously and prevent the opposing witness from giving evidence based on hearsay. Note that, some lawyers will intentionally make their witness (es) attempt to lead hearsay evidence and if you the lawyer for the other side is not vigilant to object and it goes in, you cannot later complain. So a serious lawyer should be ready to object to any such evidence timeously. This is one of the areas that you hear lawyers in court shouting "**Objection My Lord**"

Section 60 (4) provides that, **"This section is subject to section 112 relating to opinion testimony by expert witnesses."** This is to the effect that, the general rule under Section 60 is subject to some exceptions including Section 112 relating to opinion testimony by expert witnesses.

To this end, a person may have passed the **"intelligible communication"** or **"comprehension of duty to speak the truth"** tests but be disqualified from testifying to a matter unless he has personal knowledge of the matter just as stipulated in Section 60 (1) of the Decree. This section however does not render the person an incompetent witness, it only limits the scope of his testimony to matters of which he has firsthand information.

COMPETENCE AND COMPELLABILITY OF ACCUSED PERSONS

On the competence and compellability of accused, see Section 63 (1) of the NRCD 323. Even though an accused is a competent witness, he enjoys the right to remain silent and enjoys privilege against self-incrimination (this will be dealt with under Privileges).

SUMMARY: COMPETENCE OF WITNESSES IN GHANA

In Ghana, there is no longer categorization of competent witnesses: every person is competent except where the person is disqualified by virtue of **SECTION 59 (1) OF THE NRCD 323.**

Take note that, **Section 59 (2)** of the NRCD 323 specifically and for the avoidance of doubt, makes a child and a person of unsound mind competent witnesses in Ghana so long as:

a) ***They can express themselves so as to be understood, either directly or through interpretation by one who can understand them or***
b) ***They are capable of understanding the duty of a witness to tell the truth.***

These are the two considerations for determining the competence or otherwise of a witness. However, you should also know the general requirement that, a witness may not testify to a matter unless sufficient evidence is introduced to show that, he has personal knowledge of the matter – SECTION 60 (1) (DIRECT EVIDENCE; not applicable to indirect evidence such as hearsay or expert evidence SEE SECTION 112)

For competence of a child refer to **MORIKAWA v. STATE [2001]**

For competence of persons of unsound mind refer to **R v. HILL (1851) and R v. BELLAMY (1985).**

TESTS IN DETERMINING THE WEIGHT TO BE ATTACHED TO A TESTIMONY OF A PERSON OF UNSOUND MIND

There are three main tests in determining the weight to be attached to a testimony of a person of unsound mind and these tests were laid down in the case of **R v. HILL** namely:

1) If in the opinion of the judge a proposed witness, by reason of defective intellect does not understand the nature and sanction of the oath, he is incompetent to testify;
2) A person of defective intellect who does not understand the nature of the oath may give evidence and it will be left to the jury to attach such weight to his testimony as they see fit;
3) If his evidence is so tainted with insanity as to be unworthy of credit, the jury may properly disregard it.

The point is that, even though under Ghana Law, a person of unsound mind is qualified to be a witness provided he or she satisfies Section 59, the principles in R v. Hill may still be relevant in determining the weight to be attached. Thus, even if the witness (a person with unsound mind) satisfies Section 59 in the opinion of the judge or jury, but the evidence is so tainted with insanity, no credit or weight may be attached to it since competence to testify is different from the weight to be attached to the testimony.

COMPETENT BUT NON-COMPELLABLE WITNESSES / SPECIAL CATEGORIES OF WITNESSES

Even though generally the law treats all persons as competent witnesses, there have been various devises to cater for special categories of witnesses, such as Court witnesses, Sovereign and Diplomats, Judges and Jurors, persons of unsound mind, children , and accused persons.

1. COURT WITNESS

A witness is said to be the most common vehicle for proving a cause in any proceedings. It is therefore incumbent on a party to present witnesses, if any, to prove or disprove a matter, as the case may be. Although generally parties are expected to call witnesses, it must be said that the court has a discretion **suo motu** to call or recall any witness.

Section 58 of the Courts Act, 1993 (Act 459) provides that, "in any proceedings, and at any stage of the proceedings, a court either on its own motion or on the application of any party, may summon any person to attend to give evidence, or to produce any document in his possession or excerpts from it subject to any enactment or rule of law."

A similar provision is found in **Section 68 (1) of the Evidence Act** which also provides that, **" the court may, on its own motion or at the request of a party, call or recall witnesses"**. Such witnesses include bystanders as provided in **Section 63 of Act 459.**

Thus: "A person present in court, whether a party or not in the proceedings before the court may be compelled by the court to give evidence, or to produce any document in his possession or under his control, in the same manner and subject to the same rules as if he had been summoned to attend to give evidence, or to produce the document, and may be punished in the same manner for refusal to obey the order of the court".

It must be stated that, a witness called by a court in **suo motu** is subject to the requirements of competency and compellability and shall be subject to cross examination by parties in the proceedings.

Notwithstanding the unambiguous provisions in both the Courts Act and the Evidence Act on the discretion of the court to call witnesses on its own motion, there have been questions as to whether in all instances, the court should exercise that discretion with the consent of the parties.

In the Court of Appeal case of **Addai v. Donkor [1972] 1 GLR 209,** the trial judge **suo motu** called a witness who was present in court and was mentioned in evidence. It was held that, as neither party objected, the witness was properly called. The language of the decision seems to suggest that, if any of the parties had objected, the court could not have exercised its discretion as provided in the Courts Act and the Evidence Act.

In **Kombat v Lambim (1989 – 90) 1 GLR 324,** the court held that, the power of the court to call witnesses should be subject to the consent of all parties, and that the confusion or doubt which the witness will be called to clarify should be made known to all the parties before, or at the time the witness was called.

2. THE SOVEREIGN AND DIPLOMAT

The Sovereign and heads of other sovereign states are competent but not compellable to give evidence. In Ghana, the Diplomatic Immunities Act (192) Act 148 incorporates Article 31 of the Vienna Convention and provides that:

"A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in case of:

a) **a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purpose of the mission;**
b) **an action relating to succession in which the diplomatic agent is involved as executor, heir or legatee as a private person and not on behalf of the sending state;**
c) **an action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions**

2) A diplomatic agent is not obliged to give evidence as a witness".

However, it must be stated that a Diplomatic agent and other persons enjoying immunity from jurisdiction of the courts may wave such immunities and such waivers must always be expressed in writing-see Article 32. A diplomatic agent who initiates proceedings in a court in the receiving state shall be precluded from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim-Article 32 (3).

The issue as to what privileges diplomatic agents enjoy in a country and how their immunity from the domestic jurisdiction of Ghanaian courts is proved, was determined in the case of **Amon v. Katz [1976] 2 GLR 115.**

3. JUDGES AND JURORS:

The Evidence Act on the issue of the competence of a presiding judge as a witness provides under **Section 65** that, **"a judge siting at the trial may not testify as a witness in that trial".** As the word 'may' is used in the provision, it may be argued that, presiding judges are not absolutely incompetent in testifying as witnesses in cases which they preside.

Notwithstanding the statement above, it can be said that, in practice, it would be awkward if not preposterous for a judge to mount the witness box in a case which he presides.

In the case of jurors, **Section 66 (1)** states that "a member of the jury may not testify as a witness in the trial of the action in which he is sitting". Unlike the provision relating to presiding judges, **Section 66 (2) of the Act** provides for situations in which a juror may testify as follows: "Upon an issue of the validity of a verdict, a juror who participated in rendering that verdict may testify as any other witness except that, he may not testify concerning the effect of any matter upon the determination of the verdict concerning the mental processes by which the verdict was reached".

4. PERSONS OF UNOUND MIND:

A person of an unsound mind is a competent witness unless he is incapable of expressing himself so as to be understood either directly or through interpretation by one who can understand him, or incapable of understanding the duty of a witness to tell the truth.

In **R v. Bellamy (1985),** the trial judge had in a case of a woman aged 33 with a mental age of ten unnecessarily embarked upon an enquiry into the extent of her belief in and knowledge of God. The court was of the view that, the proper test of the competence of a mentally handicapped person is whether that person has a sufficient appreciation of the seriousness of the occasion and a realization that, taking the oath involves something more than the duty to tell the truth in ordinary day to day life.

The competency of an unsound mind to testify as a witness was also illustrated in the case of **R v. Hill (1851).** In this case, a patient of a lunatic asylum, laboring under a delusion that, he had a number of spirits about him which were continually talking to him, but with a clear understanding of the obligation of the oath, was held to be a competent witness to give evidence for the prosecution on a charge of manslaughter.

In **R v. Hill,** the English Court laid down three principles by which we ascertain the competency of a lunatic. These are:

a) If in the opinion of the judge a proposed witness, by reason of defective intellect, does not understand the nature and sanction of the oath, he is incompetent to testify;

b) A person of defective intellect who does understand the nature of the oath may give evidence and it will be left to the jury to attach such weight to his testimony and they see fit;

c) If his evidence is so tainted with insanity as to be unworthy of credit, the jury may properly disregard it.

5. ACCUSED PERSONS:

As stated already, **Section 59 of the Evidence Act** generally, makes every person a competent witness as no person is disqualified from testifying to any subject matter subject to exceptions.

Notwithstanding the general provision, **Section 96 (1) of the Act** provides that, **"the accused in a criminal action shall not be called as a witness and shall not be compelled to testify except on his own application."** This provision has been given a constitutional blessing under Article 19 (10) as follows: **"no person who is tried for a criminal offence shall be compelled to give evidence at the trial".**

This provision thus sustains the competency of the accused to testify as a witness but is however not compellable unless he decides to waive that privilege. Where the accused waives the privilege as to non-compellability and testifies on his own behalf, he shall be subject to examination in the same manner as any other witness **(Section 96 (2)).**

In the same vein, **Section 174 (1) of Act 30** provides also that "at the close of the evidence in support of the charge, if it appears to the Court that, a case is made out against the accused sufficiently to require him to make a defense, the Court shall call upon him to enter his defense and shall remind him of the charge and inform him that, if he so desires, he may give evidence himself on oath or may make a statement. The Court shall then hear the accused if he desires to be heard and any evidence he may adduce in his defense."

6. CHILDREN:

It must be said that, competent children are in principle, compellable witnesses. As provided in **Section 59 (2) of the Evidence Act, "a child or a person of unsound mind is competent to be**

a witness unless he is disqualified by subsection (1) of this section". Thus, for child to be a competent witness he must be:

a. **capable of expressing himself so as to be understood , either directly or through an interpreter who can understand him; or**
b. **capable of understanding the duty of a witness to tell the truth.**

By this provision, the testimony of a child is admissible without corroboration. **Section 7 of the Evidence Act** no longer makes corroboration a necessity for the admission for a child. These cases have therefore been rendered bad law: **MOSHIE v. THE REPUBLIC [1976], R v. BUSANGA AND LARTI v. THE STATE [1965].**

LESSON EIGHT

QUESTIONING OF WITNESSES

THE THREE STAGES OF QUESTIONING WITNESSES

1. Examination In Chief
2. Cross-Examination
3. Re-Examination

1. EXAMINATION IN CHIEF

When a witness appears in Court, he is sworn on oath and asked to mount the witness box. The witness is allowed to tell his full story without any interference whatsoever. The only interference may be objections from Counsel of the opposing party to parts of his evidence on stated grounds. This evidence given by the witness whereby he tells the Court what he knows about the case is known as **EVIDENCE IN CHIEF.** The essence of Examination in Chief is to ***obtain or elicit testimony in support a party's claim from his or her own witness.***

Take note that, there is no limitation to the number of witnesses a party can call at the Examination in Chief stage unless the Court is of the opinion that, it is satisfied with the witnesses a party has already called.

Take note also that, in both civil actions and criminal cases, a party is not obliged to call witnesses in a particular order or there is no formula for doing so. However, if it is a trial on indictment, the parties must call their witnesses according to the ***"summary of witnesses".***

It is important to add that, even though the prosecution has unfettered discretion to call as many witnesses as he deems appropriate in criminal cases, he must do so **to further the interest of justice.** See: **TETEH v. REPUBLIC (2001-2002).** In that case, the Court held inter alia that, ***"As a general rule, the prosecution has the discretion to present such witnesses as it elects to call in support of its case. But the discretion must be exercised in a manner that would further the interests of justice and ensure fairness to the accused so that he does not suffer any disadvantage.'***

WHAT HAPPENS IF THE WITNESSES A PARTY CAN RELY ON ARE HIS OPPONENTS? See **GYAMFI v. BADU (1963)**. In **GYAMFI v. BADU (1963),** the Court held that, ***"in a case where the only witnesses who can give oral evidence in support of a party's case are his opponents, the court should not regard his failure to call such persons as failing to adduce available evidence to prove his case, but the court should rather look at other available and material evidence on the record, and if those are sufficient to establish the averment, uphold it."***

IS A COURT OR JUDGE OR MAGISTRATE ALLOWED BY LAW TO CALL WITNESSES FOR PARTIES? See **HAUSA AND ANOTHER v. DAUDA (1961).** In **HAUSA AND ANOTHER v. DAWUDA (1961),** the Court held that, ***"it was wrong for the local court magistrate to invite the adjoining landowner to give evidence as to the ownership of the land in dispute. It is for the parties to know which witnesses are likely to help them and to call them. It is not for a court to go out of its way to look for witnesses for one party or the other."***

ARE LEADING QUESTIONS ALLOWED DURING EXAMINATION IN CHIEF? See **SECTION 70 (1) OF NRCD 323.** A **LEDING QUESTION** is simply a question that suggest the answer. **SECTION 70 (1) OF THE NRCD 323** defines a **LEADING QUESTION** as a question that suggests directly or indirectly the answer that the examining party expects or desires. As a general rule and by virtue of **SECTION 70 (3),** leading questions are not allowed in Evidence in Chief or Re-Examination. There is however an exception to this general rule and this is found in **Sections 70 (2) and 70 (4) of the NRCD 323**. Subject to the discretion of the Court, leading questions may be asked as to ***MATTERS WHICH ARE INTRODUCTORY OR UNDISPUTED OR WHICH HAVE BEEN SUFFICIENTLY PROVED IN THE OPINION OF THE COURT.***

IS REFRESHING MEMORY ALLOWED DURING EXAMINATION IN CHIEF? The answer is YES! During **EXAMINATION IN CHIEF**, a witness may be allowed to refresh his memory; that is, he may refer to a document or previous writing in order to refresh his memory or a person is allowed to refer to documents before stating the facts orally. See **SECTION 77 (1) OF THE NRCD 323** for provision on **REFRESHING MEMORY.**

2. CROSS-EXAMINATION

Cross-Examination is the questioning of a witness after evidence in chief. After the examination-in-chief, the court will call on the opponent to ask the witness questions.

The questions asked by the opposing party or lawyer of the opposing party is known as **CROSS-EXAMINATION.** It is important to note that, whilst leading questions are generally not allowed during Evidence in Chief, it is allowed in cross-examination.

Take note that, Cross-Examination is governed by **SECTION 62 OF THE EVIDENCE DECREE, 1975 (NRCD 323).**

As a **general rule and by virtue of Section 62 (1) of the NRCD 323,** all witnesses are bound to be cross-examined by virtue of **Section 62 of the Evidence Decree, 1975 (NRCD 323).** Thus, the right to cross-examine witnesses is a very important and central part of the adversarial system.

By **Section 62 (2) of the NRCD 323,** if a witness gives Evidence-In-Chief but unavailable for cross-examination, the evidence may become irrelevant or be expunged from the records of the Court. See **MENSAH v. NIMO (1961) and ATUAHENE v. COMMISSIONER OF POLICE (1963).**

In **MENSAH v. NIMO (1961),** an appeal was filed against the decision of the New Juaben Local Court and the appellant was of the view that, after the first defendant and the second co-defendant had spoken in chief, the local Court did not invite them to be cross-examined. The Court relied on their evidence and gave judgment for the plaintiff. The Court held that, ***"the evidence of the first defendant and the second co-defendant not having been subjected to cross-examination are 'improper evidences'. Judgments based on improper evidences cannot stand."***

In **ATUAHENE v. COMMISSIONER OF POLICE (1963),** the Court held that, ***"where a witness gives evidence for the prosecution but is not available for cross-examination by the defense, the trial court should either expunge his testimony from the record or insist upon his appearance in court. The court is not entitled to act upon his evidence."*** In the same case, the Court further held that, ***"Witnesses used at the inspection of the locus should be put into the***

witness-box to afford the defense or the prosecution the opportunity to cross-examine them. If this is not done the evidence is inadmissible."

EXCEPTION TO THE GENERAL RULE IN SECTION 62 OF THE NRCD 323:

However, a major exception to the rule in **Section 62 (2) of the NRCD 323** is found in **Section 63 of the NRCD 323** which relates to certain statements of an accused in a criminal trial which may be admitted into evidence without cross-examination. **EXAMPLE:** In a criminal trial, when it is time for the accused to open his defense, the law allows him to make an election either to move into the witness box to testify on oath and be cross-examined or to remain in the dock (the dock is where accused persons stand where their case is going on) and will not swear oath and tell his story. If the accused remains in the dock and tells his story without taking an oath, it is termed or labeled as **UNSWORN STATEMENT OF THE ACCUSED PERSON**. By law, he is not cross-examined. Such an unsworn statement is admissible as if it has been given on oath but the weight and credibility attached to it is negligible. It is not even called evidence or testimony but just a statement. This is the position of **SECTION 63 OF THE NRCD 323.**

LIMITATION TO THE RIGHT TO CROSS-EXAMINE AND OBJECT OOF CROSS-EXAMINATION

Though cross-examination is fundamental, it may be controlled by the Court by virtue of **SECTION 69 OF THE NRCD 323.** The Courts control the mode of questioning to avoid over aggressive cross-examination or prevent improper questioning. However, the Courts must do so only to further the interest of justice and not to frustrate the cross-examination process. See **ADZAKU v. GALENKU (1974).**

In **ADZAKU v. GALENKU (1974).**, the Court held (in Holding 2) that, ***"The part which a trial judge or magistrate ought to take whilst witnesses gave evidence, must rest with his discretion. However, a judge must not so conduct himself as to cause inconvenience to counsel by his undue participation in the examination of witnesses. Examination of the record of proceedings in the instant case did not indicate that the trial magistrate took sides nor pressed any witnesses in a way which could be considered undesirable."***

The right to cross examine, the form it takes and its length is however not unlimited. The permitted form of questioning in cross examination is most conveniently considered by reference to the objects of cross examination. These are two-fold. The cross examiner will seek:

(a) To elicit evidence which supports his version of the facts in issue-CROSS-EXAMINATION AS TO FACT IN ISSUE

(b) To cast doubts upon the witness' evidence-CROSS-EXAMINATION AS TO CREDIT.

Note that, a witness under cross examination may be asked **leading questions,** even if he appears more favorable to the cross-examiner than to the party who called him and whether the questions are directed to either the first or second object of cross examination.

Note also that, every cross examination is subject to an important general constraint which applies whether the question to be put to the witness goes to the matters in issue or to credit only. It is the discretion of the judge to prevent any questions which in his opinion are **unnecessary, improper or oppressive.** Thus, counsel will be restrained from embarking on lengthy cross examination on matters that are not really in issue and from framing his questions in such a way as to invite argument rather than elicit evidence on the facts in issue. See **R v. OSLIN and R v. FANJOY**.

EFFECT OF FAILURE TO CROSS-EXAMINE:

For a testimony to be accepted by the Court as cogent, it must pass the cross-examination test. A testimony that is not subject to cross-examination is not credible and the weight to be placed on it is not great. Evidence not cross-examined attracts little weight. However, if the opportunity is given to the opponent and he fails to cross-examine the witness, then he is deemed to have admitted **sub-silentio** all matters of substance of the **evidence-in-chief.** Put differently, a party who has failed to cross-examine a witness on a particular matter that contradicts his evidence-in chief or impeach his credit, will not be permitted to invite the jury or tribunal of fact to disbelieve the witness's evidence on that matter. See **WIAFE v. KOM [1973];** See also **FORI v. AYIREBI (1966).**

In **WIAFE v. KOM [1973],** the Court held that, ***"where a witness testified on oath on certain vital matters and the opposing side was silent in his cross examination on those matters, he***

would be taken to have admitted those matters. The strict application of this law however could appropriately be tempered in the case of illiterate litigants who were generally not versed in the art and intricacies of cross examination. It was not uncommon to meet an illiterate litigant whose attitude of mind was to let the other party state his case to the court and bother less with cross examination, so that when his time came he would also state his case and leave the court to choose which side to believe. EDUN v.. KOLEDOYE (1954) applied."

Also, in **FORI v. AYIREBI (1966),** the Court held (in Holding 6) that, ***"When a party had made an averment and that averment was not denied, no issue was joined and no evidence need be led on that averment. Similarly, when a party had given evidence of a material fact and was not cross-examined upon, he need not call further evidence of that fact. These principles applied also to assertions made or claims made to farms, villages and ancient relics on the land during the survey. The plan coupled with the evidence of the surveyor which was not challenged showed that more undisputed claims were made by the plaintiffs to farms, villages and relics on the disputed land other than were claimed by any other of the two stools. The learned judge thus misdirected himself in accepting evidence on behalf of the Banka stool which was at complete variance with their pleadings and evidence."***

A cross examiner who wishes to suggest to the jury that, the witness is not speaking the truth on a particular matter must lay a proper foundation by putting that matter to the witness so that, he has an opportunity of giving any explanation which is open to him. The rule however is not absolute or inflexible. Thus, if it is proposed to invite the jury to disbelieve a witness on a matter, it is not always necessary to put to him explicitly that, he is lying, provided that, the overall purpose of the cross examination is designed to show that, his account is incapable of belief. See **R v. LOVELOCK (1997)**. See also **MANTE v. BOTWE (1989/90).**

COLLATERAL QUESTIONS AND FINALITY

What is the effect of answers to COLLATERAL QUESTIONS?

A party eliciting evidence from a witness under cross examination unfavorable to his case, may understandably seek to adduce evidence in rebuttal. To allow the party to adduce such evidence without restriction, however, would lead to a multiplicity of issues, some of which might be of minimal relevance to the facts in issue in the case and thereby prolong the trial unnecessarily.

As a general rule therefore, the answer given by a witness under cross examination to questions concerning collateral matters (matters that are irrelevant to the issue in the proceedings) must be treated as final. Finality for this purpose does not mean that, the tribunal of fact is obliged to accept the answers as true, but simply that, the cross-examining party is not permitted to call further evidence with a view to contradict the witness. Whether a question is collateral or not is not always easy to decide.

In **AG v. HITCHCOOK (1847),** a person was charged with using a cistern in breach of certain regulatory requirements. A prosecution witness gave evidence that, the cistern had indeed been used. He was cross-examined to the effect that, he had told a man called Cook that, he had been offered a bribe to give evidence that, the cistern was used. He denied the allegation. Counsel for the defense then sought to call Cook to come and give evidence to rebut the denial of the offer of the bribe. The Court held that, it was not permitted to call Cook since the question was collateral to the issue and the answer therefore was therefore deemed to be final.

NORMALLY THE ISSUE AS TO THE DISTINCTION BETWEEN CROSS EXAMINATION AS TO CREDIT AND CROSS EXAMINATION AS TO MATTERS IN ISSUE MOSTLY OCCUR IN RAPE AND OTHER SEXUAL OFFENCES CASES.

In **R v. HOLME**, the Court held that, in cases of rape, attempted rape and assault with intent to commit rape where consent was not in issue, although the complainant may be cross examined about acts of intercourse with men other than the accused, they are collateral facts and therefore if she denies them, evidence may not be called to contradict her.

In **R v. RILEY,** it was held that, evidence is admissible to contradict a complainant who denies previous acts of sexual intercourse with the accused, the matter being relevant to the issue of consent.

In **R v. BASHIR & MANZER,** the complainant in a prosecution for rape was cross examined on whether she had accosted men and offered them sexual intercourse in return for money. It was held that, evidence that, she was a prostitute, being relevant to the issue of consent was admissible to contradict her.

3. RE-EXAMINATION

After the cross-examination, the witness may be re-examined. **Re-examination** is done by the lawyer for the party who called the witness to come and testify on their behalf. During cross-examination, if any of the answers given by the witness contradicts his own evidence-in-chief, we say there is **an ambiguity** and that, he must be **re-examined** to give him the chance to **clarify** the **ambiguity**. That is, his own lawyer will ask him questions to explain why in his **evidence-in-chief** he said something and during **cross-examination** he said the opposite. See **OKUDZETO v. COMMISSIONER OF PLOICE (1964).**

In **OKUDZETO v. COMMISSIONER OF PLOICE (1964),** the Court held (in Holding 2) that, ***"where a witness's evidence under cross-examination is subsequently contradicted by him in re-examination, the whole evidence of the witness should be discredited by the trial court. The object of re-examination is to explain evidence given under cross-examination; re-examination is never to be used to get a witness to deny or cancel evidence already given under cross-examination."***

FACTORS USED BY THE COURT TO TEST THE CREDIBILITY OF A WITNESS: SECTION 80 OF NRCD 323.

Credibility at common law is tested by examining the witness' opportunities for observation and powers of observation as well as his ability to state and explain accurately what he remembers. On the other hand, **Credit** at common law may be tested by questioning the witness on his past records, his character, his associates, consistency and impartiality.

It should however be pointed out that, under the Evidence Decree, 1975 (NRCD 323), credibility connotes credit and this can be **Seen from the wording of SECTION 80.**

By virtue of **Section 80 (2) of the NRCD 323,** matters which may be relevant to the determination of the credibility of the witness include, but are not limited to the following:

(a) the demeanor of the witness;

(b) the substance of the testimony;

(c) the existence or non-existence of any fact testified to by the witness;

(d) the capacity and opportunity of the witness to perceive, recollect or relate any matter about which he testifies;

(e) the existence or non-existence of bias, interest or other motive;

(f) the character of the witness as to traits of honesty or truthfulness or their opposites;

(g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;

(h) the statement of the witness admitting untruthfulness or asserting truthfulness.

It is therefore the duty of the court to determine whether the witness who is testifying before it is a person who can be relied on to tell the truth. In law, we say whether the witness is a credible witness. The aforementioned factors are some of the main yardsticks to be used by the court in assessing whether the witness can be said to be a truthful person for the court to rely on his evidence. For want of sticking to the study manual, let's take a look at the following factors:

a) **THE DEMEANOR OF THE WITNESS.**

Demeanor here includes the way the witness is dressed, the way he speaks, the manner in which he answers questions put to him and all other characteristics that are used in assessing the character of a person. All of these are considered by the Court whilst the witness is in the witness box giving evidence.

b) **PREVIOUS CONSISTENT AND INCONSISTENT STATEMENT OR TESTIMONY.**

If the witness in the witness box says as part of the testimony that, on the day of the alleged event, the other side insulted and slapped him but he did not say anything. Then during cross-examination, it was suggested to him by counsel on the other side that, his evidence before the Court is a fabrication and all of a sudden he starts shouting and insulting the lawyer. You will agree with me that, his conduct of shouting and insulting the lawyer will be inconsistent with his testimony that, he was very patient when he was slapped by his opponent. Simply put, the conduct that you put up can be used to assess whether what you are testifying to is true or otherwise.

c) **EXHIBITION OF BIAS**

If a witness is known to have an interest in a matter, it will count towards the determination of his credibility. For example, if Sammy Gyamfi, Esq. is to testify on a matter against NPP, the chances are that, the judge will bear in mind his likelihood of the existence of bias on his part against NPP to determine whether his evidence will be credible.

LESSON NINE

OATH / AFFIRMATION AND CALLING OF WITNESSES

INTRODUCTION:

In law, an **OATH** refers to a solemn (formal and dignified) declaration made before a competent tribunal to tell the truth. It is the act of a person, who has been lawfully required to give testimony in Court, takes God to witness tat, what he says is the truth, nothing but the truth. It is a religious act by which the party invokes God not only to witness the truth and sincerity of his promise but also to avenge his imposture or violated faith, or in other words to punish his perjury if he is guilty of it.

In order for an **OATH** to be legally effective, it must be administered by a public official. The law creating each public office and describing the duties of the official ordinarily indicates who is authorized to administer the oath of office. A spoken oath is generally sufficient; however, a written and signed oath can be required by law.

The main purpose for **OATHS** in modern times is not as in the past to ensure that, a witness actually tells the truth (for fear of God) but now to punish him severely if he lies-for **CRIME OF PERJURY.** Accordingly, there is in fact no need for the oath for that purpose and the main reason why secular and mixed societies allow evidence and statements to be given by way of **AFFIRMATION.**

An **AFFIRMATION** is also a solemn (formal and dignified) declaration that, a statement is true. However, an **AFFIRMATION** does not make reference to God so it can be made by someone who does not believe in God or it can be made by someone who has conscientious objections against swearing to God. It is for this reason that, state statutes and or Constitutions ordinarily allow **AFFIRMATIONS** to be made as alternatives to **OATHS.**

It therefore follows that, an **AFFIRMATION** is a solemn declaration allowed to those who conscientiously object to taking an **OATH**. An **AFFIRMATION** has exactly the same legal effect as an oath but is usually taken to avoid the religious implications of an oath; it is thus legally binding but not considered a religious oath. Some religious minorities hold beliefs that allow them

to make legally binding promises but forbid them to swear an oath before a deity. Additionally, many decline to make a religious oath because, they feel that, to do so would be valueless or inappropriate, especially in secular Courts.

In some jurisdictions, an **AFFIRMATION** may be given only if such a reason is provided. One who makes an affirmation or a positive declaration about something to be true is called an **AFFIRMANT**. For example, witnesses usually make affirmations about their testimony. If an **AFFIRMANT** willfully violates his **AFFIRMATION**, then the **AFFIRMANT** will be held liable for **PERJURY**.

Before a competent witness will be allowed to give evidence either in Court or at an enquiry, he will either have to swear an oath, or to affirm that, he will speak the truth. Under certain circumstances however, he will be permitted to affirm or make an unsworn statement.

The law on **OATH, AFFIRMATION OR ON SWORN STATEMENTS** may all be found in the Evidence Decree, 1975 (NRCD 323) and the Courts Act, 1993 (Act 459) which complement each other.

SECTION 61 OF NRCD 323 states that, every witness before testifying shall take an oath or make an affirmation that, he will testify truthfully, subject to any enactment or rule of law to the contrary and any statement made by a witness without such an oath or affirmation shall not be considered as evidence.

In Ghana, Christians usually swear on the holy bible or the cross (SOC) whilst Moslems swear on the holy Koran or Quran (SOK) and persons who believe in their own traditional gods, swear in accordance with their beliefs.

People who by their special religious teachings cannot swear oath or for other reasons do not desire to swear oath will have to affirm that, they will tell the truth.

A witness who should be sworn but to whom it is not reasonably possible to administer the **OATH** in the manner appropriate to his religious belief, because the necessary sacred book is not available, may **AFFIRM.**

A witness who declares his believe in God or that he has a belief in some power according to his religious beliefs but which does not prohibit him swearing to tell the truth and yet refuses to take

an oath will not be permitted to affirm. He will have to be sworn or else be treated like an incompetent witness.

When a person refuses to tell the form of oath binding on him, he would be treated as an incompetent witness and will not be allowed to affirm. See NASH v. ALI KHAN 1892 TLR 287.

Jurors (criminal) or assessors (civils) and interpreters are also sworn or made to affirm, promising to do their duties truthfully.

The oath of the interpreters particularly assures the court or those witnesses or parties who may not understand English that, the sworn interpreter will translate truthfully from and into English and other languages to the court and to the witness whatever the court will say and vice versa.

Persons such as probation officers or policemen or other persons called upon to give evidence on character or on previous conviction before convicted persons are given sentence, take an oath known as **VOIR DIRE.**

VOIR DIRE is a legal phrase for a variety of procedures connected with jury trials. It originally referred to an oath taken by jurors to tell the truth; i.e., to say what is true, what is objectively accurate or subjectively honest, or both.

A juror also has to be sworn so that he may be examined by the judge to ascertain the reasonableness of the objection. He also takes the oath of **voir dire.** The form of the **voir dire** is as follows: **"I swear by the Almighty God that, I will truly answer and such questions as the court shall demand on me"**

Voir dire is a preliminary examination of a witness by a judge hence its usage **"trial within trial"** and examination of jurors and probation officers is also called **voir dire.**

Under the Decree, Act 459, and other statutes, when a witness refuses to take an oath or affirm without a good cause, he commits an offence which may be punishable for contempt and will have to purge himself of the contempt. Also if he swears either by affidavit or in the dock or witness to speak the truth but does not, he may be convicted of **perjury.**

CALLING OF WITNESSES

INTRODUCTION

As a general rule, oral examination of witnesses (viva voce evidence) is preferred to the use of witness statements. However, in civil matters, CI 87 has introduced the use of witness statements in lieu of viva voce evidence. CI 87 has therefore amended order 38 rule 1 of ci 47 which sets the general rule to cover a witness proving a fact by oral evidence given in Court.

Take note that, there is no limitation as to the number of witnesses a party can call unless the Court is of the opinion that, it is satisfied with the witnesses you have already called.

In Civil Matters, a party is not obliged to call witnesses in a particular order.

In **Criminal Cases or trials on indictment on the other hand,** the parties must call their witnesses according to the ***"summary of witnesses".*** When it comes to criminal case, the prosecution has unfettered discretion to call witnesses but **must be done in the interest of justice. See TETEH v. REPUBLIC (2001-2002).**

In **TETEH v. REPUBLIC (2001-2002),** the appellant was charged and convicted on the offences of (1) striking a superior officer, (2) use of violence against a superior officer and (3) conduct prejudicial to good order and discipline before a disciplinary court-marshal of the Ghana army. He contested the decision of the court marshal and one of his grounds was that, the prosecution failed to call ***MATERIAL WITNESSES*** and therefore failed to establish a case against the appellant. The Court held that, the argument of the appellant will be correct if indeed there were material witnesses which the prosecution did not call in support of the case against the appellant, for the law is settled that, the failure means that, the case against the appellant was not proved beyond reasonable doubt. ***As a general rule, the prosecution has the discretion to present such witnesses as it elects to call in support of its case. But the discretion must be exercised in a manner that would further the interests of justice and ensure fairness to the accused so that he does not suffer any disadvantage.***

A **MATERIAL WITNESS** is a person with information alleged to be **material** concerning a criminal proceeding. In other words, a material witness is

a person who apparently has information about the subject matter of a lawsuit or criminal proced ding which is significant enough to affect the outcome of the case or trial.

Generally, the information the material witness possesses has strong **probative value** and few, if any, other witnesses possess the same information. Because of the importance of a material witnesses' testimony, **judges** usually make every reasonable effort to have such witnesses made available to **testify**. For example, a **continuance** (***delay in a trial***) may be granted in the event that, a material witness is late to Court or temporarily unavailable.

SECTION 69 OF THE NRCD 323 provides that, ***"The Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence with a view to making the interrogation and presentation as rapid, and distinct and readily understandable as may be."***

By this provision therefore, the Court may interfere with a party's right to call his witnesses and the order they might have preferred to call them for the stated reasons.

CALLING OF WITNESSES IN CIVIL TRIALS

The party in civil proceedings who wishes to give evidence on his own behalf will naturally attend court voluntarily. He may also be able to get other witnesses to attend court voluntarily to give evidence for him. However, as a precautionary measure, a Court may issue a **WITNESS SUMMONS** in the form of either:

1. **SUBPOENA AD TESTIFICANDUM** (subpoena for giving evidence) or
2. **SUBPOENA DUCES TECUM** (subpoena for producing document)

A failure by witness summoned by these processes to attend court may suffer a penalty. A party in civil proceedings is under no obligation to call particular witnesses. The party can call witnesses to support his case as he deems fit, and can call them in the order of his choice subject to the power of control given to the Court under **Section 69 of the Evidence Act.**. In **ABADOO v. AWOTWI (1973)1 GLR 393**, the Court held that, ***"there was no law which enjoins a plaintiff in an action to call all material witnesses if he knows that, the interest of such witnesses is at variance with his and that, they are not likely to testify on his behalf."*** See also **GYAMFI V. BADU (1963)2**

GLR 596 where the Court held that, ***"In a case where the only witnesses who can give oral evidence in support of a party's case are his opponents, the court should not regard his failure to call such persons as failing to adduce available evidence to prove his case, but the court should rather look at other available and material evidence on the record, and if those are sufficient to establish the averment, uphold it."***

CALLING OF WITNESSES IN CRIMINAL TRIALS

In the case of criminal trial, the attendance of the accused person for his own trial, whether he is on bail or in custody, is a must.

However, in minor offences such as technical assault and minor traffic offences, an accused may plead guilty by a letter or through his own counsel and not appear in court at all. See **SECTION 166 (2) OF ACT 30.**

When an accused is in custody, the prison authority will have to produce him. If he is on bail, he will be warned by the police of the day he is to attend court, and the surety of his bail bond will be a guarantee against any attempt to be absent.

The prosecution and defense witnesses may be warned to attend court to give evidence. But as a precautionary measure, a formal subpoena may be issued compelling them to attend on pain of being arrested on a bench warrant and taken to court in custody and a possible fine imposed.

Sometimes, a person in custody pending trial or a prisoner serving sentence may be needed as a witness in a criminal or civil trial. In such a case, the party calling for such a witness will have to apply to a judge, magistrate or chairman of a tribunal for a warrant to produce the witness.

On the receipt of the warrant, the director of prisons or other person who has custody of the prisoner shall produce him to the courts. See **SECTION 64 OF THE COURTS ACT, 1993 (ACT 459).**

As a general rule, the prosecution had discretion to present such witnesses as it elected to call in support of its case. But the discretion had to be exercised in a manner that would further the interests of justice and ensure fairness to the accused. The rule that, the prosecution had to call

material witnesses was an important qualification on the discretion of the prosecution. **See R v. ANSERE (1958).**

Whether or not a witness was a material witness depends on the quality and content of the evidence he is expected to offer in relation to the case on trial. He would be deemed to be material if the evidence expected from him was deemed to be so vital as to be capable of clearly resolving one way or the other, an important and decisive issue of fact in controversy. The evidence has to appear likely to have a profound impact on the facts of the case to the extent that, if it was accepted as true, it would compel the Court to come to a conclusion that was different from the decision given.

See: **ANNIN v. THE REPUBLIC (1972),** the Court held that, ***"in a criminal proceeding, a prosecutor is relieved from calling a material witness if he has a reasonable belief that, the witness will not speak the truth."***

POWER OF THE COURT TO CALL AND EXAMINE WITNESSES

Section 68 gives the Court power, on its own motion or at the request of a party, to call or recall a witness. However, it seems that in practice, this power should be exercised sparingly and with the consent of the parties.

See KOMBAT v. LAMBIM (1989 – 90) 1 GLR 324, which held that, ***"the power of the Court to call witnesses should be subject to the consent of all parties, and that the confusion or doubt which the witness will be called to clarify should be made known to all the parties before, or at the time the witness was called."***

See also **HAUSA v. DAWUDA (1961) 2 GLR 550**. In that case, the issue in question related to the ownership of a particular parcel of land. The presiding magistrate suo muto called an adjoining land over to give evidence as to the ownership of the land in dispute. It was held that, ***"it was not for a Court to go out of its way to look for witnesses for one party or the other".***

See also **QUARTEY ALIAS KUUKUA v. THE REPUBLIC (1999-2000) 2 GLR 201** which holds that, ***"although a Court has wide discretion under Sections 68 and 69 of the Act to call witnesses not called by the parties, the power should not be exercised in a manner prejudicial or oppressive to the interest of any party.***

LESSON TEN

RELEVANCY AND ADMISSIBILITY OF EVIDENCE

WHAT IS RELEVANT EVIDENCE?

1. SECTION 179 OF THE EVIDENCE DECREE, 1975 (NRCD 323)

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

2. FEDERAL RULES OF EVIDENCE (USA)

RELEVANT EVIDENCE means ***"evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without it"***

3. DPP v. KILBOURN (1973) per LORD SIMON

RELEVANT EVIDENCE means ***"Evidence is relevant if it is logical, probative or disprobative or evidence which make the matter which requires proof more probable or less probable"***

BASIC RULES ON RELEVANT EVIDENCE

1. Evidence is relevant if it has a material connection with a fact in issue and has a probative value.
2. Relevant evidence does not mean a conclusive evidence.
3. Admitting evidence does not mean the evidence is true.

ADMISSIBILITY OF RELEVANT EVIDENCE

ADMISSIBILITY is the acceptance of evidence as part of the record of Court proceedings. It is the duty of the judge to decide which evidence is to be accepted and which is not to be accepted

to form part of the record of the Court proceedings. Counsel in the case bears a similar responsibility and it is that responsibility that raises the question of admissibility.

In Ghana, principles regulating admissibility have been codified in **SECTION 51 of the EVIDENCE DECREE, 1975 (NRCD 323).**

SECTION 51 (1) OF NRCD 323 says that, ***"Relevant evidence IS ADMISSIBLE except as otherwise provided by an enactment"*** and **SECTION 51 (2) of the NRCD 323 says that,** ***"Evidence IS NOT ADMISSIBLE except relevant evidence"***

The implication of **SECTIN 51 OF THE NRCD 323** is that, ***"only relevant evidence or evidence that is closely connected to the facts in issue or triable issues are admissible. If a law provides that, a particular evidence despite being relevant should not be admitted, same cannot be admitted."***

An example of a law which prohibits the admission of relevant evidence is the law on *CONCLUSIVE PRESUMPTION. See* **Section 24 of the NRCD 323** which says that, **"evidence contrary to the conclusively presumed fact may not be considered by the tribunal of fact".** It is important to add that, ***CONCLUSIVE PRESUMPTIONS*** include, but not limited to those provided in **Sections 25-29 of the NRCD 323.**

In summary, **Section 51 of the NRCD 323** implies that, ***IF THE EVIDENCE IS RELEVANT TO THE EXTENT THAT IT REFERS TO OR CONCERNS THE MATTER IN ISSUE, IT IS ADMISSIBLE.*** This refers to the connection or relation of the evidence to the issue for determination before the court. The section also implies that, the evidence must ***MATTER IN DECIDING THE ISSUE PENDING BEFORE THE COURT. THAT IMPLIES THAT THE EVIDENCE MUST AID THE PROOF OR DISPROOF OF THE ISSUE TO BE DETERMINED BY THE COURT OR THE EVIDENCE MUST BE OF PROBATIVE VALUE TO THE ISSUE TO BE DETERMINED BY THE COURT.***

Take note that, aside cases of conclusive presumption, the Court has been given the discretionary power to exclude relevant evidence. Let's look at that briefly.

JUDICIAL DISCRETION TO EXCLUDE RELEVANT EVIDENCE: SECTION 52 OF NRCD 323

The power of the Court to exclude relevant evidence from the records of Court proceedings is governed by **Section 52 of the NRCD 323.**

SECTION 52 (a)-(c) of NRCD 323 provides that, *"The Court in its discretion may exclude relevant evidence if the probative value of the evidence is substantially outweighed by:*

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

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

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

IMPLICATION OF SECTION 52 OF THE NRCD 323

Let's start with **Section 51 of the NRCD 323** which suggests that, the law at times allows relevant evidence to be excluded like in the case of conclusive presumptions.

Section 52 of the NRCD 323 then provides a further ground under which relevant evidence may be excluded by the Court and it says that, if the ***PROBATIVE VALUE OF THE EVIDENCE IS NOT WEIGHTY ENOUGH,*** the Court has the discretion to exclude it from the record of proceedings. The question then arises as to what is the ***PROBATIVE VALUE OF EVIDENCE?***

PROBATIVE VALUE OF EVIDENCE

This is the logical connection between the piece of evidence and the proposition it is offered to prove. In other words, it is the thing which makes us decide that, one piece of evidence makes a consequential fact more probable or less probable.

How do we assess whether one piece of evidence is more probable or less probable? This is based on Logic, Common Sense, and the general experience of the world.

As such, the value of the evidence should be of substance in order to have an effect on the case. A particular piece of evidence ***MAY BE OF A PROBATIVE VALUE*** in a case but the same evidence ***MAY NOT BE OF A PROBATIVE VALUE*** in another case ***IF THE TRIABLE ISSUES DIFFER***. An example is a murder case where a witness wants to testify that, he saw the accused at the scene of murder with the deceased at the material time period of the event but did not observe any other thing. In this case, if the triable issue is the defense of the plea of alibi, the evidence that, the witness saw him will be of great probative value. However, if the defense of the witness is anchored on the plea of self-defense, that is, the accused is not denying being at the scene of the event or denying being responsible for the death of the deceased but saying that, he was present at the scene and killed the accused in order to prevent the accused from killing him. In such a case, the fact of the witness seeing the accused is of less probative value because, it will have no sufficient weight in the determination of the issue whether the accused acted in self-defense.

GROUNDS UPON WHCH THE COURT MAY EXERCISE DISCRETION TO EXCLUDE RELEVANT EVIDENCE UNDER SECTION 52 (a)-(c) OF THE EVIDENCE DECREE, 1975 (NRCD 323)

a) If the admission of the relevant evidence will ***CAUSE UNDUE DELAY OF THE CASE, OR AMOUNT TO WASTE OF TIME OR NEEDLESS PRESENTATION OF CUMMULATIVE EVIDENCE,*** the evidence will be excluded despite being relevant. For example, if a party in a case informs the Court that, his witness has traveled and will be back in two years' time. The Court may decide to exclude the evidence of that witness regardless of the relevancy of his expected testimony. Another area is where many witnesses are being called to testify on the same fact-cumulative evidence.

b) If the admission of the relevant evidence will pose the ***RISK OR SUBSTANTIAL DANGER OF UNFAIR PREJUDICE*** or ***SUBSTANTIAL DNAGER OF CONFUSING THE ISSUES***. If for example, the evidence though relevant but its nitty gritty will make another ethnic group rise up against the other, it will not be admitted. Also if the evidence will end up confusing the issues.

c) If in a civil case, the admission of the relevant evidence will be ***ENTIRELY UNEXPECTED, OR WILL UNFAIRLY SURPRISE A PARTY WHO HAS NOT HAD A REASONABLE GROUND TO ANTICIPATE THAT SUCH EVIDENCE WOULD BE OFFERED***, the Court will not receive the evidence but adjourn the case for the needed pre-information to be given to the other party.

ERRONEUOS ADMISSION OR EXCLUSION OF EVIDENCE

The effect of the erroneous admission or exclusion of evidence is provided in **SECTION 5 (1) OF THE NRCD 323.** It states that, in the event a finding, verdict, judgment or decision is reached following an erroneous admission or exclusion of evidence, that finding, verdict, judgment or decision shall not be set aside, altered or reversed on appeal or review because of the erroneous admission of evidence ***UNLESS THE ERRONEOUS ADMISSION OF EVIDENCE RESULTED IN SUBSTANTIAL MISCARRIAGE OF JUSTICE.*** See **SECTIN 5 (2)** for factors the Court will consider to determine whether erroneous admission of evidence resulted in substantial miscarriage of justice. See **THE STATE v. BROBBEY AND NIPAH (1962).**

In the case of **THE STATE v. BROBBEY AND NIPAH (1962)**, ***the Supreme Court reversed the decision of the trial Court because, in the view of the Court, the erroneous admission led to a substantial miscarriage of justice.*** The Court observed as follows: ***"If exhibit M had been excluded from consideration by the jury, it would have been impossible for them to have returned the verdict which they did return".***

RIGHT TO OBJECT TO EVIDENCE IN AN ACTION

As admissibility of evidence is important in any trial, a party has a right to object to evidence in every action, and at every stage at the time the evidence is offered. Such a preliminary objection

must be recorded and ruled upon by the Court as a matter of course. This is the position of **SECTION 6 OF THE NRCD 323.**

POWER OF THE COURT TO SUO MOTU EXCLUDE INADMISSIBLE EVIDENCE

The power of the Court to exclude inadmissible evidence on its own motion is provided in **SECTION 8 OF THE NRCD 323**. It states that, ***"Evidence that would be inadmissible if objected to by a party may be excluded by the Court on its motion".***

PRECEDENTS ON INADMISSIBLE EVIDENCE

1. **TORMEKPEY v. AHIABLE (1975).** The Court held that, ***"if inadmissible evidence had been received (whether with or without objection) it was the duty of the trial judge to reject it when giving judgment; if he had not done so, it would be rejected on appeal since it was the duty of courts to arrive at their decisions upon legal evidence only"***
2. **AMOAH v. ARTHUR (1987-1988),** the CA cited with approval the decision in TORMEKPE v. AHIABLE (1975) that, ***"It was the duty of the trial judge to reject inadmissible evidence which had been received, with or without objection, during the trial when he came to consider his judgment; and if he failed to do so that evidence would be rejected on appeal, because it was the duty of the courts to arrive at decisions based on legal evidence only."***
3. **BONSU ALIAS BENJILO v. THE REPUBLIC (1999-2000),** per Bamford-Addo. The Court held that, "***Normally all relevant evidence was admissible. However, as provided by Section 52 of the Evidence Act, the Court could exclude evidence, however relevant if it was prejudicial against an accused.***"
4. **ASANTE-APPIAH v. AMPONSAH (2008),** per Brobbey JSC. The Court held that, ***"The Evidence Act, 1975 (NRCD 323), Section 8 empowers the Appellate Court to reject evidence which ought to have been rejected at the trial Court."***

LESSON ELEVEN

CORROBORATION

DEFINITION (s) AND SCOPE

Generally, CORROBORATION is "***the information which connects, affirms, or makes more certain the relevant portions of previous or future evidence in such ways that, it enables the Court to believe that, the corroborative evidence confirms the previous evidence and that confirmation makes the previous evidence true.***"

There is a clearer definition which has been applied in a number of cases. This definition was laid down in the case of **R v. BASKERVILLE [1916]** by **Lord Reading, CJ**.

In **R v. BASKERVILLE [1916]**, **LORD READING, CJ,** has this to say about corroboration: ***"...evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is which confirms in some material particular not only that, the crime has been committed, but also that, the prisoner committed it."***

This case law definition given by ***LORD READING, CJ*** in **R v. BASKERVILLE (1916)** seems to suggest that corroborative evidence tends, in some material particulars to: substantiate, validate, verify, confirm, affirm or support all or some relevant aspects of previous or future evidence.

The principle in **REPUBLIC v. BASKERVILLE (1916)** has been applied in the following Ghanaian cases:

3. **COMMODORE ALIAS KAYAA v. THE REPUBLIC (1976) 2 GLR 471 @486-487**
4. **OBENG v. THE REPUBLIC (1972) 2 GLR 107 @125 CA**
5. **APETORGBOR AND OTHERS v. THE REPUBLIC (1974) 1 GLR 347 CA**
6. **DJAN v. THE REPUBLIC (1954) 14 WACA 558**

Corroboration is for ascertainment of truth. Being concerned with an aspect of ascertainment of truth, corroboration is one of the collateral issues relating to proof.

FORM / CHARATERISTICS OF CORROBORATION

CORROBORATION may take the **FORM** of a **DOCUMENTARY EVIDENCE** or **ORAL TESTIMONY** of a deceased, parties or witnesses in Court.

The **RULES OF COMPETENCY** are applicable when a witness is called to corroborate another's evidence-**ATADI v. LADZEKPO [1981],**

Corroboration may also take the form of a documentary evidence or oral testimony of a relative. See **ATADI v. LADZEKPO (1981).**

In **ATADI v. LADZEKPO [1981],** it was held that, **"Whilst there was the need for caution in accepting the corroborative evidence of a relation, especially when his evidence was being offered against a stranger to the family, it was not justifiable to reject same without laying a foundation for such a course especially when on the evidence, such a witness was the only person known to have personal knowledge of the events at issue."**

STATUTORY DEFINITION OF CORROBORATION: SECTION 7 OF NRCD 323

Corroboration is governed by **SECTION 7 of the NRCD 323.**

SECTION 7 (1) provides that, ***"CORROBORATION CONSISTS OF EVIDENCE FROM WHICH A REASONABLE INFERENCE CAN BE DRAWN WHICH CONFIRMS IN SOME MATERIAL PARTICULAR THE EVIDENCE TO BE CORROBORATED AND CONNECTS THE RELEVANT PERSON WITH THE CRIME, CLAIM OR DEFENSE."***

Corroborative evidence therefore tends to ***substantiate, validate, verify, confirm, affirm or support some relevant aspects of previous or future evidence.*** This is the exact implication of the definition of corroboration given by Lord Reading, CJ in **REPUBLIC v. BASKERVILLE (1916)**

By way of explanation, the definition of ***corroboration*** under **Section 7 (1) of NRCD 323** connotes three concepts:

1. **Firstly,** for the evidence to amount to ***corroboration, IT MUST HAVE SOME CONNECTION OR RELATIONSHIP WITH THE PREVIOUS EVIDENCE.***

2. **Secondly,** that connection should amount to ***AFFIRMATION OR DENIAL OF SOME RELEVANT PART OF THE PREVIOUS EVIDENCE.***
3. **Thirdly,** the connection and affirmation should directly be referable or attributable to the person or fact in so far as the crime, claim or defense is concerned. If these three conditions exist, the court may conclude that, the second evidence (corroborative evidence) confirms, supports or "corroborates" the first evidence.

It follows that, by the statutory definition of corroboration under **Section 7 (1) of NRCD 323**, if the above three (3) concepts exist, the Court may conclude that, the corroborative evidence (second evidence) confirms, supports or corroborates the earlier or first evidence.

GHANAIAN LAW POSITION ON CORROBORATION

The law on the application of corroboration in Ghana is found in **SECTION 7 (3) OF NRCD 323,** which provides that, ***"CORROBORATION IS NOT NECESSARY TO PROVE A FACT UNLESS EXPRESSLY REQUIRED BY STATUTE."***

Section 7 (3) of the NRCD 323 states that, ***"UNLESS OTHERWISE PROVIDED BY THIS OR ANY OTHER ENACTMENT, CORROBORATION OF ADMITTED EVIDENCE IS NOT NECESSARY TO SUSTAIN ANY FINDING OF FACT OR ANY VERDICT."***

SECTION 7 (3) OF NRCD 323 simply means that, **CORROBORATION IS NOT A REQUIREMENT IN GHANA LAW.**

THE EFFECT OF SECTION 7 (3) OF NRCD 323:

The **EFFECT** of **Section 7 (3) of NRCD323** is that, ***ANY RULE ON CORROBORATION WHICH HAS BEEN ENUNCIATED BY THE COMMON LAW, IS LITERALLY INAPPLICABLE IN GHANA. IT MAY BE CONSIDERED THAT, AN EXCEPTION SHOULD BE MADE WHERE THE RULE IS APPLIED IN CONFORMITY WITH THE PRINCIPLE OF STARE DECISIS.***

SIMPLY PUT, SECTION 7 (3) OF NRCD 323 MAKES INAPPLICABLE TO GHANA ALL COMMON LAW RULES ON CORROBORATION.

THE TURNBULL GUIDELINES: EXCEPTION TO THE GHANAIAN POSITION ON CORROBORATION:

The only exception to the rule under **SECTION 7 (3)** is the **TURNBULL GUIDELINES.**

The **TURNBULL GUIDELINES** require a trial judge to warn himself of the following:

1. The danger of acting on uncorroborated evidence in certain cases including sexual offences and
2. The danger of commenting on statements on identification of accused person standing trial.

This is said to have been repeated in **NRCD 323, SECTION 7 (5).**

NRCD 323, SECTION 7 (5) SAYS THAT, "NOTHING IN THIS SECTION SHALL PRECLUDE THE COURT OR ANY PARTY FROM COMMENTING ON THE DANGER OF ACTING ON THE UNCORROBORATED EVIDENCE OR COMMENTING ON THE WEIGHT AND CREDIBILITY OF ADMITTED EVIDENCE OR PRECLUDE THE TRIBUNAL OF FACT FROM CONSIDERING THE WEIGHT AND CREDIBILITY OF ADMITTED EVIDENCE."

COMMENT (S)

1. **CORROBORATION IS NOT A REQUIREMENT IN GHANA LAW-SECTION 7 (3) OF NRCD 323.**

SECTION 7 (3) OF NRCD 323 actually belittles, lessens, denigrates (criticize unfairly) or disparages **CORROBORATION.**

However, **JUSTICE OFORI BOATENG** says it has some **SIGNIFICANCE** or **USEFULNESS** after all.

In his book "THE LAW OF EVIDENCE IN GHANA", 2ND EDITION, PAGE 48-52, Justice Ofori Boateng argued that, corroboration is REQUIRED in the following cases:-

i. **Affiliation Proceedings (Paternity search/test proceedings)**

ii. **Breach of promise of Marriage Proceedings**

iii. **Evidence of Accomplices and Evidence of co-accused.**

COMMENTS/ CRITIQUES TO OFORI BOATENG.

Is Corroboration as important as Ofori Boateng is saying? If so, what is the POSITION OF THE LAW IN GHANA?

I. THE POSITION OF THE LAW:

A case can be decided on the evidence of one witness. (If a case can be decided on one witness then much is not needed by corroboration)

i. **COP v. AMEYAW (1962) 2 GLR 162-165**

ii. **LOGS AND LUMBER LIMITED v. OPPONG (1977) 2 GLR 263**

In **COP v. AMEYAW (1962) 2 GLR 162-165**, the Court said that, ***"...if any of these cases is established by the testimony of only one witness whom the court believes, the court will be entitled to give judgment on the evidence of that single witness".***

The implication of the principle in **COP v. AMEYAW (1962)** is that, the outcome of the case will depend **MORE** on the **CREDIBILITY** given to that **EVIDENCE** by the court than the **NECESSITY** for **CORROBORATION** (i.e. "whom the court believes").

ONE WITNESS/SINGLE WITNESS TESTIMONY (EVIDENCE)

The Court can rely on a single witness to give judgment. In **COP v. AMEYAW (1962),** the Court said that, ***"In the instant case, even if it was ONLY by Lawyer Amarteifio who testified on the***

bequest, his character and the circumstances of his evidence were such that the court could rely on his evidence to give judgment on the issue."

The locus classicus on this principle is the case of **LOGS AND LUMBER LIMITED v. OPPONG (1977) 2 GLR 263.**

In **LOGS AND LUMBER LIMITED v. OPPONG (1977) 2 GLR 263,** the Court said that, ***"A Court could act on the testimony of a single witness where the single witness on whose evidence reliance was placed, was (a) an honest witness, (b) there was nothing in his background to cast doubt on his veracity, (c) he had no motive to misrepresent facts or be biased and (d) his evidence was in no way tainted, i.e. he was not an accomplice"***

CONDITIONS UNDER LOGS AND LUMBER LIMITED v. OPPONG (1977) 2 GLR 263.

If the single witness is:

1. **An honest witness**
2. **There was nothing in his background to cast doubt on his veracity (truthfulness)**
3. **He had no motive to misrepresent facts or be biased**
4. **His evidence was in no way tainted (i.e. he was not an accomplice)**

TYPES OF CASES WHERE CAUTION FOR CORROBORATION ARE DEMANDED

1. JUDGE (when he is sitting alone) and /on
2. JURORS (as the Judge is giving **DIRECTIONS** to the Jurors)

In practice, Ghana law demands caution in the following cases:

1. **SUSPECT EVIDENCE**
2. **TRIAL OF SEXUAL OFFENSES (e.g. rape, defilement of female)**
3. **EVIDENCE OF ACCOMPLICES**
4. **EVIDENCE AGAINST DEAD PERSONS**

5. SOME EVIDENCE OF RELATIVES OR SOURCES.

Take note that, it is not the rule that corroboration should be provided in these cases (topics). What is required is the caution before acting on the evidence (uncorroborated evidence).

WHAT THEN CONSTITUTE CAUTION

The Caution Has Been Interpreted To Mean That, The Evidence Ought To Be Considered Critically And With Great Care, Weighing Or Sifting It Thoroughly To Ensure That. There Are No Loopholes Or That The Charge Or Claim Does Not Suffer From Any Absurdities Or The Like.

TURNBULL GUIDELINES – R v. Turnbull (1977) QB 224

- NRCD 323 sec 7 (5) seems to have endorsed the common law rule of practice which is referred to as the Turnbull Guidelines. These guidelines originated from the English case of R v TURNBULL (1977) QB 224
- They are usually relevant during summing-up in Jury trials
- Justice Ofori-Boateng in "The Law of Evidence in Ghana"- sees the adherence to the Guidelines as beneficial, especially in evaluating evidence on the identification of suspects in criminal trials.

TURNBULL GUIDELINES – REPUBLIC v. TURNBULL (1977) QB 224

- In R v Turnbull, the court of Appeal laid down important Guidelines for the judges in trials where identification evidence was disputed.
- Warnings that have been given to juries in identification cases

i. Amount of time the suspect was under observation

ii. Distance between suspect and witness

iii. Visibility at the time the witness saw the suspect

iv. Obstructions between suspect and witness

v. Does he know the suspect or has seen the suspect before

vi. Any particular reason for the witness to remember suspect

vii. Time lapse since witness saw suspect

viii. Or could there be an error or discrepancy in the description given by witness.

TURNBULL RULES (WHAT TO CONSIDER)

1. The Turnbull Guidelines should always be followed by Judges where the possible Mistaken IDENTIFICATION of an accused is an issue.
2. Even where an accused has admitted being present at the scene of an offence, there will still be occasions where a judge should give such direction as required by the Guidelines - R. v Thornton(1995)

Where voice identification is an issue, the Turnbull Guideline should be used to direct the jury to the ***"quality of the evidence"***-**REPUBLIC v. HERSEY (1998)**

CORROBORATION AND COURTROOM PRACTICE

Impliedly, **SECTION 7 (5) OF NRCD 323** states that, corroboration will surely be beneficial to be adduced if available.

In actual courtroom practice, corroboration will be required in the following situations when considering evidence of parties or witnesses:

1. In cases of **BREACH OF PROMISE OF MARRIAGE:** The Court will hardly accept mere allegation of the promise of marriage unsupported by some evidence of the promise like a ring or a gift or even witnesses.
2. In **PATERNITY PROCEEDINGS:** A statement that, a man is the father of a child will hardly be believed by the Court unless some corroborative evidence is adduced such as

the relationship of the woman with the man or some acts of sexual intercourse around the time of the pregnancy.

3. In cases pertaining to **A DEAD PERSON:** Evidence against a dead person is admissible but it has to be carefully scrutinized-See **MOSES v. ANANE (1989-90) 2 GLR 694 CA**. The scrutiny is regarded as corroborative evidence in support of the statement against the dead person.

MOSES v. ANANE has roots in the case of **IN RE GARNETT; GANDY v. MACAULAY (1885) 31 CHD. 1 @ 9.** ***BRETT M.R*** said: ***"The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted and the mind of any judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine (of corroboration) becomes absurd"***

Note carefully that, ***"a claim against a deceased's estate must be viewed with suspicion. Proof must be strict and utterly convincing, as one of the protagonists is dead and cannot assert his claim."***

See also **KUSI & KUSI v. BONSU (2010) SCGLR 60 @ 82** *per* ***GEORGINA WOOD CJ: "A Judge In Receipt Of Uncorroborated Evidence Consisting In The Main Of Charges Against A Deceased Person Does Not Swallow The Story Lock, Stock And Barrel, But First Views It From A Suspicious Standpoint. If The Story As Presented Is Neither Incongruous, Preposterous, Unreasonable, Illogical, Nor Incredible, Then The Judge May Proceed To Give It The Weight It Deserves."***

The most current authority is **KUSI AND KUSI v. BONSU (2010) SCGLR 60**, in holding 5 which reads as follows:

"There is no intractable rule of law that charges or claims against a dead person could not succeed without corroboration. To the contrary, the discernible principle was that a court could proceed on the uncorroborated evidence if satisfied about its truthfulness. The only rider or caution was that the court must examine the evidence critically, to ensure that there

were no loopholes or that the charge or the claim did not suffer from any absurdities or the like. A judge in receipt of uncorroborated evidence consisting in the main of charges against a deceased person would not swallow the story lock, stock and barrel, but would first view it from a suspicious standpoint. If the story presented was neither incongruous, preposterous, unreasonable, illogical nor incredible, then the judge might proceed to give it the weight it deserved. The exercise would relate to the cogency or the weight to be attached to the evidence given. In that regard, the question of the credibility of a witness was critical to a determination of the cogency issue. And the criteria for determining the obviously difficult question of credibility, had been provided for under Section 80 of the Evidence Act, 1975, (NRCD 323). A Court would be justified, in addition to using other relevant matters, to take some of the matters set out in Section 80 of the NRCD 323 into consideration to determine the vexed question of whether or not to accept claims against the deceased. And the required corroboration, which had been defined in Section 7 (1) of the Evidence Act 1975 was independent evidence, oral or documentary that would confirm the truth of the assertions made..."

REPUBLIC v. TURNBULL (1977)

In the R v. Turnbull (1977) QB 244, the Court of Appeal laid down some important Guidelines for judges in trials where **IDENTIFICATION EVIDENCE** was **DISPUTED.** Warning that has been given to the juries in identification cases:

1. **Amount of time the suspect was under observation by the witness.**
2. **Distance between the suspect and the witness.**
3. **Visibility at the time the witness saw the suspect.**
4. **Obstructions between suspect and witness.**
5. **Knows suspect or has seen him/her before.**
6. **Any particular reason for the witness to remember him suspect.**
7. **Time lapse since witness saw suspect.**

8. Error or material discrepancy in the description given by witness

The Turnbull guidelines should always be followed by judges where the possible mistaken identification of an accused is an issue.

Even where an accused has admitted being present at the scene of an offence, there will still be occasions where a judge should give such direction as required by the guidelines. See **Republic v. Thornton (1995)**

Where voice identification is an issue, the Turnbull should be used to direct the jury to the ***'quality'*** of the evidence. (R v. Hersey 1998).

LESSON TWELVE

CIRCUMSTANTIAL EVIDENCE

CIRCUMSTANTIAL EVIDENCE is very essential in proving many criminal cases. The importance of this evidence is the fact that, in most cases, crimes are committed outside the view of witnesses. Thus, parties resort to circumstantial evidence where there are no eye-witnesses.

By way of definition, ***CIRCUMSTANTIAL EVIDENCE*** is defined as ***"any fact from which a judge may infer, presume or deduce the existence, non-existence or proof of a fact in issue."***

CIRCUMSTANTIAL EVIDENCE is an evidence that tends to prove a factual matter by proving other events or circumstances from which the occurrence of the matter can be reasonably inferred. Circumstantial evidence is based on reasonable deductions from narrated circumstances. A typical instance is afforded by a statement of a witness at a murder trial that, he saw the accused carrying a blood-stained knife at the door of the house of the victim. With this evidence, the prosecutor invites the jury or the Court to assume that, the witness is speaking the truth, and second, to infer that, the accused inflicted the fatal wound on the deceased with the blood-stained knife.

The danger of mere speculations, suspicions and rumors is not lost on the Court in the use of circumstantial evidence in proving the guilt of an accused. You should therefore be able to distinguish between a reliable circumstantial evidence from mere speculations and rumors. This calls for reading of the most important cases on the topic such as:

1. **R. v. TAYLOR (1928):** Circumstantial Evidence is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a preposition with the accuracy of mathematics.
2. **DUAH v. THE REPUBLIC (1987-1988):** ***"In the nature of things, many crimes are hardly committed in the full glare of the public. "Circumstantial evidence is utilized where direct evidence is not available or where direct or positive evidence is not easy to obtain."***
3. **VALENTINO GLIGAH v. REPUBLIC (2010):** ***"There are pieces of evidence which if put together make a very strong case against the accused persons. It is like series of small threads and when put together, make a very strong rope.***

The same with circumstantial evidence. It is generally accepted that when direct evidence is unavailable, but there are bits and pieces of circumstantial evidence available, and when these are put together they make stronger, corroborative and convincing evidence than direct evidence."

4. FRIMPONG ALIAS IBOMAN v. THE REPUBLIC (2012) SCGLR 297: ***"Circumstantial evidence was evidence that could indirectly link the accused to the crime. Some forms of evidence which could be termed circumstantial and accepted by the Courts would include (i) forensic examinations; (ii) DNA results; (iii) mobile phone conversations or SMS messages; (iv) e-mail messages; (v) crime scene investigations and others"***
5. STATE v. ALI KASSENA [1962]: ***"Where the evidence is circumstantial, the law requires a particularly high standard of proof…It is dangerous in jury cases to leave to the jury evidence which amounts to suspicion only as there is the fear that, they may 'put a multitude of suspicions together and make proof out of it"***
6. STATE v. BROBBEY AND NIPAH [1962]: Appeal allowed, decision of trial judge reversed due to reliance on inadmissible circumstantial evidence.
7. In the case of REPUBLIC v. ONUFREJCZYK (1955) per Goddard C.J. adopted the statement of law made in REPUBLIC v. HORRY that, on a charge of murder, ***"the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and that the accused has made no confession of any participation in the crime. Before he [the accused] can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."***

THE TEST FOR RELYING ON CIRCUMSTANTIAL EVIDENCE TO CONVICT

A presumption from circumstantial evidence should be drawn against the appellant only when the presumption follows irresistibly from the circumstances proved in evidence; and in order to justify the inference of guilt, the exculpatory facts must be incompatible with the innocence of the

appellant, and incapable of explanation upon any other reasonable hypothesis than that of guilt. See **THE STATE v. ANANI FIADZO (1961).**

In **THE STATE v. ANANI FIADZO (1961),** the conviction of the appellant for the murder of his son was based solely upon circumstantial evidence. Held: ***"Presumptive or circumstantial evidence is quite usual as it is rare to prove an offence by evidence of eye-witnesses and inference from the facts may prove the guilt of appellant. A presumption from circumstantial evidence should be drawn against the appellant only when that presumption follows irresistibly from the circumstances proved in evidence; and in order to justify the inference of guilt the exculpatory facts must be incompatible with the innocence of the appellant, and incapable of explanation upon any other reasonable hypothesis other than guilt. A conviction must not be based on probabilities or mere suspicion".*** **R. v. ONUFREJCZYK [1955]** cited.

PROOF OF ADULTERY WITH CIRCUMSTANTIAL EVIDENCE IN MATRIMONIAL CASES

The importance of circumstantial evidence in adultery cases is borne out of the statement in Halsbury's Law Report quoted with approval in **ADJETEY AND ANOTHER v. ADJETEY (1973)** as follows:

FACTS:

The wife petitioned for a dissolution of her marriage with her husband in August 1972, but failed to prosecute her case and the petition was dismissed. The husband cross petitioned and alleged that the wife had deserted him and had also committed adultery with two persons and that by reason of the said desertion and adultery the marriage had broken down beyond reconciliation and prayed that it be dissolved. The husband in his cross-petition claimed damages against the co-respondent.

HELD (HOLDING 1): ***"Adultery must be proved to the satisfaction of the court and even though the evidence need not reach certainty as required in criminal proceedings it must carry a high degree of probability. Direct evidence of adultery was rare. In nearly every case the fact of adultery was inferred from circumstances which by fair and necessary inference would lead to that conclusion. There must be proof of disposition and opportunity for committing adultery,***

but the conjunction of strong inclination with evidence of opportunity would not lead to an irrebuttable presumption that adultery had been committed, and likewise the court was not bound to infer adultery from evidence of opportunity alone."

PRINCIPLES ON THE USE OF CIRCUMSTANTIAL EVIDENCE

1. For circumstantial evidence to lead to the conviction of the accused, it must lead to irresistible conclusion that, the crime has been committed and that, guilt is the only inference that can be drawn from the circumstances-**AMETEWEE v. THE STATE (1964).**
2. For circumstantial evidence to support a conviction, it must lead to the irresistible conclusion that, the crime was committed by no other person than the accused; in other words, the facts must exclude the probability that, the crime could have been committed by another person-**DUAH v. THE REPUBLIC (1987-1988).**
3. For circumstantial evidence to support a conviction, it must be inconsistent with the innocence of the accused-**STATE v. ANANI FIADZO (1961).**
4. Where the circumstantial evidence relied on is more consistent with the innocence of the accused than with his guilt, the conviction cannot be sustained-**LOGAN AND ANOTHER v. THE REPUBLIC (2007-2008).**
5. Since the whole evidence against the appellant was circumstantial, the Court should not have convicted the appellant unless the evidence pointed to guilt and nothing else. Since the circumstantial evidence was consistent with guilt as well as with innocence, the Court should have acquitted the appellant-**DOMENA v. COMMISSIONER OF POLICE (1964).**
6. The evidence against the accused being entirely circumstantial, the law required a particularly high standard of proof-**ABBEY v. THE STATE (1964).**
7. Even where there is no direct evidence of the death or trace of the dead body, circumstantial evidence can provide proof of death on condition that, the jury are warned that, circumstantial evidence should lead to one and only one conclusion that, the person is dead and the accused was responsible for the death-**BOSSO v. THE REPUBLIC (2009).**

LESSON THIRTEEN

CHARACTER EVIDENCE: SECTION 53 OF THE NRCD 323

INTRODUCTION

The reason why Courts are wary of admitting character evidence is the ***INHERENT DANGER OF PREJUDICE IT CAN CAUSE***; that is, while the evidence of identity of the criminal factor may be weak, the disclosure that, the accused had committed an unrelated similar offence may have the tendency to distract the Court from the main issue in the trial. Character Evidence is governed by **Section 53 of the NRCD 323.**

GENERAL PRINCIPLE ON ADMISSIBILITY OF CHARACTER EVIDENCE

As a general principle of law, ***EVIDENCE OF CHARACTER NOT ADMISSIBLE TO PROVE CONDUCT-SECTION 53 OF NRCD 323.***

The opening clause of **Section 53** states the general law on the admissibility or otherwise of evidence on a person's character or a trait of his character. It states that, "***EVIDENCE OF A PERSON'S CHARACTER OR A TRAIT OF HIS CHARACTER IS NOT ADMISSIBLE TO PROVE HIS CONDUCT IN CONFORMITY WITH THAT CHARACTER OR TRAIT ON A SPECIFIC OCCASION".***

The **GENERAL PRINCIPLE** therefore is that, "***THE COURT WILL NOT ACCEPT AS EVIDENCE, A STATEMENT ON A PERSON'S GENERAL CHARACTER, GOOD OR BAD, WHETHER THE STATEMENT IS ON A PERSON'S GENERAL DISPOSITION TO PROVE THAT, HE WAS RESPONSIBLE FOR ANY ACT WHICH IS IN CONFORMITY WITH HIS KNOWN DISPOSITION OR SPECIFIC CONDUCT."***

Thus evidence which shows mere propensity is inadmissible for reasons of public policy because, evidence showing a person's bad character is prejudicial. The prejudicial effect is that, a verdict is reached, not as a valid conclusion from a logical line of reasoning, either by giving too much weight to the evidence of Bad Character (Reasoning Prejudice) or by convicting otherwise than on the evidence.

It was noted in MAKINS v. AG OF NEW SOUTH WALES that, **"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."**

If for example a person is being tried for the offence of stealing, the law will not allow you to testify on his ***PREVIOUS CONVICTIONS*** for stealing as a basis to prove the instant offence. That will amount to using character evidence to testify against him and not the facts of the instant case.

The point is that, SECTION 53 which makes ***CHARACTER EVIDENCE GENERALLY INADMISSIBLE UNLESS IT COMES UNDER (a) – (d)*** is an amplification of the discretion given to the Court in Section 52 which seeks to prevent prejudice.

THE GENERAL EXCLUSION OF CHARACTER EVIDENCE AND THE THRESHOLD A PARTY NEEDS TO CROSS IN IMPUTING THE CHARACTER OF A WITNESS.

The general rule is that, if the accused attacks the character of a witness of the prosecution or if he adduces evidence of his good character, then the other party can rebut with evidence of his character. See AVEGAVI & OTHERS v. THE REPUBLIC [1971].

In AVEGAVI & OTHERS V. THE REPUBLIC [1971], SIRIBOE JA observed that, ***"Under our law, cross-examination as to the PREVIOUS CONVICTIONS AND BAD CHARACTER OF THE ACCUSED is PERMISSIBLE ONLY WHEN THE NATURE OR CONDUCT OF THE DEFENCE IS SUCH AS TO INVOLVE IMPUTATIONS AGAINST THE CHARACTER OF THE PROSECUTOR OR THE WITNESSES FOR THE PROSECUTION WHICH ARE NOT REASONABLY NECESSARY FOR THE CONDUCT OF THE DEFENCE..."***

Thus, if what is said by the defense or accused amounts in reality to no more than a denial of the charge, albeit in an emphatic manner, it should not be regarded as crossing the threshold as to statements not reasonably necessary for the conduct of the defense.

GROUNDS FOR THE ADMISSIBILITY OF CHARACTER EVIDENCE UDER SECTION 53 OF THE NRCD 323

1. WHERE THE ACCUSED OFFERS GOOD CHARACTER AS A DEFENSE

SECTION 53 (a) states that, if in a criminal case, the accused on his own offers his good character as a defense, then the prosecution will be permitted to adduce character evidence of the accused. Sometimes, it becomes necessary that, an accused person has to offer his character as evidence to prove his innocence. In such a case by the provisions of Sections 53 (a) and 54 (1), such evidence will be admissible only if it is in the ***FORM OF REPUTATION (SOCIETAL OPINION) OR IN THE FORM OF AN OPINION (PERSONAL OPINION)***. But once such personal opinion or reputation evidence has been adduced by or for an accused, the prosecution is also allowed to adduce evidence by way of personal opinion or reputation on the character of the accused in rebuttal.

2. WHERE THE ACCUSED IMPUGNS THE CHARACTER OF THE VICTIM

SECTION 53 (b) says that, in a criminal case, if the accused impugns the character of the victim, then the prosecution will also be allowed to adduce character evidence against the accused. For example, if the accused in a rape case says the lady is found of entrapping men to have sex with them and thereafter demand huge monies in lieu of lodging a complaint of rape with the police against them. Such an evidence will allow the prosecution to call witnesses, if any, to testify to the bad character of the accused.

3. WHERE THE ACCUSED USES CHARACTER EVIDENCE TO SUPPORT OR ATTACK THE CREDIBILITY OF A HEARSAY WITNESS OR HEARSAY DECLARANT

SECTION 53 (c) says that, where a witness testifies on something that is not within his personal knowledge but was told by another person (that person who told the witness may be dead or for some good legal reason not available to testify as a witness. The law gives an exception for the admission of such evidence. Thus, the person who is dead or unavailable is known in law as the **"DECLARANT")**. If a hearsay witness testifies, the opposing party can attack the character of the declarant as a person who goes about gossiping on facts that he cannot prove. Since the

declarant cannot be trusted, the hearsay evidence emanating from his source is not credible. The law allows such character evidence to be adduced to attack the credibility of a declarant.

4. WHERE CHARACTER OR TRAIT OF CHARACTER IS AN ESSENTIAL ELEMENT OF A CHARGE, CLAIM OR DEFENSE.

SECTION 53 (d) says that, character evidence may be led and same admitted into evidence if it is an essential element of the matter. For example, if you are sued for defamation based on the fact that, you told people that, the plaintiff is a notorious gossiper. Your defense is likely to be that, you told the truth about the plaintiff. In such a case, the central triable issue is character. The law though against the use of character evidence, will allow such evidence to be adduced, as it is at the heart of the triable issue.

METHODS OF PROVING CHARACTER EVIDENCE: SECTION 54 OF THE NRCD 323

SECTION 54 (1) says that, one is allowed to adduce evidence in the form of a personal opinion or reputation. So as could be seen, evidence under **Section 54 (1)** will be admissible only if it is in the form of reputation or personal opinion. The prosecution is also entitled to present rebuttal evidence.

In **A-G v. RADLOFF** **"In criminal cases, evidence of the good character of the accused is most properly and with good reason admissible in evidence because there is a fair and just presumption that, a person of good character would not commit a crime."**

Section 54 (2) says that, the general character traits of the person can be used without leading evidence of the specific facts. For example, you call testify that, the person has a reputation of being a thief without the need to adduce evidence to support the fact that, he stole something on a particular occasion. You will only prove the facts if only it is essential to guilt.

In **ROWTON (1865)**, the accused called a character witness who spoke of his good reputation. The Prosecution called in rebuttal a witness who admitted he knew nothing of his reputation but knew of a specific instance in school when the accused had committed the kind of indecent act charged. It was held on appeal that, rebuttal evidence in the form of specific instance of conduct cannot be allowed.

Section 54 (3) says that, even though Section 53 (2) excludes the adducing of evidence of specific instances, it will be allowed if it is to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident which are facts difficult to prove by direct evidence. For examples of reliance on **MOTIVE, PREPARATION AND CONDUCT** to prove character you should read **R v. PALMER (1856)**. In this case, the accused was financially distressed and to overcome his difficulties borrowed huge sums of money from his friend. Palmer and the friend used to go to races together. One night after attending the races, his friend came back to his hotel and died soon after midnight under circumstances which raised a suspicion that he had been poisoned. The fact that the accused had a strong motive to eliminate his creditor was held to be relevant.

LESSON FOURTEEN

SCIENTIFIC / DIGITAL / ELECTRONIC EVIDENCE

DEFINITION AND SCOPE

Electronic information is one of the means by which evidence may be obtained for trial purposes. This is because, **SECTION 179 OF NRCD 323** identifies electronic recording as one of the means of writing in Ghana law. Electronic information may be described in other words as digital evidence or scientific information.

By way of definition, ***SCIENTIFIC / DIGITAL / ELECTRONIC EVIDENCE*** is defined as ***"ANY PROBATIVE INFORMATION STORED OR TRANSMITTED DIGITALLY AND WHICH A PARTY TO A JUDICIAL DISPUTE MAY USE IN THE TRIAL".***

Put differently, ***DIGITAL EVIDENCE*** is ***"ANY FORM OF INFORMATION RECORDED AND STORED IN AN ELECTRONIC FORM WHICH MAY BE USED IN COURT PROCEEDINGS."***

Modern communication relies heavily on electronic forms. The result is that in the law of tort for instance, it is not uncommon to have, as the basis for actions in defamation, communication obtained by electronic means.

Unfortunately, the Courts are careful in admitting electronic or digital evidence during Court proceedings due to the challenges associated with the methods employed by many to obtain it.

The skepticism was expressed in the American case **CLAIR v. JOHNNY'S OYSTER & SHRIMP INCORPORATION (1999)**. The Court observed in that case as follows:

"WHILE SOME LOOK TO THE INTERNET AS AN INNOVATIVE VEHICLE FOR COMMUNICATION, THE COURT CONTINUES TO WARILY AND WEARILY VIEW IT LARGELY AS ONE LARGE CATALYST FOR RUMOUR, INNUENDO AND MISINFORMATION. SO AS NOT TO MINCE WORDS, THE COURT REITERATES THAT THIS SO-CALLED WEB PROVIDES NO WAY OF VERIFYING THE AUTHENTICITY OF THE ALLEGED CONTENTIONS..."

Therefore, from the above, the main hurdle of a proponent of digital evidence is ***AUTHENTICATION*** of same. You must however understand that, ***THE MERE POSSIBILITY OF ALTERATION DOES NOT AND CANNOT BE THE BASIS FOR EXCLUDING EMAILS OR DIGITAL EVIDENCE AS UNIDENTIFIED OR UNAUTHENTICATED AS THE TRADITIONAL SOURCES OF EVIDENCE LIKE PAPER DOCUMENTS ALSO SUFFER SAME INFIRMITIES.***

ELECTRONIC MEANS OF COMMUNICATION

The electronic means of obtaining information may cover any of the following:

1. **FACE BOOK**
2. **SKYPE**
3. **INSTAGRAM**
4. **WHATSAPP**
5. **TWITTER**
6. **SNACHART**
7. **YOUTUBE**
8. **E-MAIL/inter net**
9. **TELEGRAM**
10. **SMS**
11. **ZOOM**
12. **IMO**
13. **TIKTOK**
14. **RECORDED EVIDENCE - by tape recorder, by telephone or by camera**

Any of these can form the basis of electronic transaction or Court action (for damages for defamation or breach of fundamental human rights.)

LEGAL STATUS OF ELECTRONIC EVIDENCE: THE ELECTORNIC TRANSACTION ACT, 2008 (ACT 772)

Electronic evidence is ***HEARSAY EVIDENCE*** so far as it is always procured outside the Courtroom.

Under **SECTION 117 OF NRCD 323**, such hearsay evidence is inadmissible except as otherwise provided by enactment.

In Ghana, the **ELECTRONIC TRANSACTION ACT, 2008 (ACT 772)** authorizes the use of electronic evidence in various transactions. **ACT 772** therefore makes electronic evidence admissible as an exception to **SECTION 117 OF NRCD 323.**

ILLEGALITY OF ELECTRONIC EVIDENCE

The use of electronic evidence may be ***IMPROPER AND ILLEGAL IF THAT USE AMOUNTS TO NON-COMPLIANCE WITH THE CONSTITUTION, STATUTE OR NATURAL JUSTICE*** in such ways as to affect ***JURISDICTION***. See **GAISIE, ZWENNES, HUGES AND COMPANY v. LODERS CROCKLAAN BV [2012] 1 SCGLR 363.**

For instance, secretly recording a conversation with any person without the consent of that person amounts to breach of the latter's right to privacy which is breach of his fundamental human rights contrary to the 1992 constitution, Article 18 (2) and to the extent that, the conversation breaches the law (i.e. the 1992 constitution), it is illegal as defined from the start of this discussion.

Take notice therefore that, in an examination setting, what is being discussed here may be described as: **AREA OF LAW: ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE.**

ILLGALLY OBTAINED EVIDENCE OR IMPROPERLY OBTAINED EVIDENCE IN GHANA LAW

Discussions here cover illegally obtained evidence, improperly obtained evidence and electronic or digital evidence.

Take notice that, NRCD 323 does not cover illegally obtained or improperly obtained evidence so all the discussions here are based on common law principles.

COMMON LAW PRINCIPLES ON ILLEGALLY OBTAINED EVIDENCE

Common law principles still influence the laws in Ghana considerably.

Relevant to the discussions on illegally obtained evidence are some of the provisions in pace (Police and Criminal Evidence Act, 1984, esp. SECTION 78 which contains provisions on the exercise of Court discretion to exclude or include ill-gotten evidence). Bear in mind that those discussions are only of persuasive effect on Ghana Courts.

AREA OF LAW:

ADMSSIBILITY OR INADMISSIBILITY OF ELECTRONIC EVIDENCE

ISSUE

THE ISSUE IS WHETHER OR NOT TO ADMIT INTO EVIDENCE ELECTRONIC MATERIAL OR DIGITAL INFORMATION.

THERE ARE TWO OPPOSING PRINCIPLES UNDER CONSIDERATION HERE

1. **THE EXCLUSIONARY VIEW / PRINCIPLE**

The exclusionary view is premised on the mode of acquiring or obtaining the evidence. The premise is that, some electronic evidence such as unauthorized tape recorded evidence are considered on the same level as evidence obtained by unlawful search, evidence extracted by torture, duress, impersonation, entrapment or cell confessions. These are considered as ***IMPROPERLY OR ILLEGALLY ACQUIRED*** because, they are obtained from sources or methods which breach the constitutional rights of citizens under the 1992 constitution and for this breach, they are inadmissible into evidence. See **THE FRUIT OF THE POISONED TREE PRINCIPLE**.

The reason for the inadmissibility is that, the mode of acquiring the evidence taints the evidence from its source or from its roots. Once the evidence is tainted at source, it follows that, the entire evidence is tainted from its roots to its fruits and that is expressed in the statement that, THE EVIDENCE IS "THE FRUIT OF THE POISONED TREE". This is sometimes described as the common law view. In reality, what else can come out of poison?

If the evidence is poisoned, it is of no use and cannot be relied on to administer justice. **THE FRUIT OF THE POISONED TREE PRINCIPLE** is considered as supporting the ***exclusionary view*** in that, it allows evidence to be taken out or rejected or not admitted into record or excluded from the record of evidence.

BIBLICAL SUPPORT OF THE FRUIT OF POISONED TREE: MATTHEW 7 v. 17-20

"Even so every good tree bringeth forth good fruit, but a corrupt tree bringeth forth evil fruit. A good tree cannot bring forth evil fruit, neither can a corrupt tree bring forth good fruit. Every tree that bringeth forth bad fruit is hewn down and cast into fire. Wherefore by their fruits ye shall know them."

APPLICATION OF THE EXCLUSIONARY PRINCIPLE IN GHANA

1. **AMOSI (NO 1) v. KORBOE (NO1) (2016 UNREPORTED)**

Ansah, JSC, appears to have applied the principle in the case of **AMOSI (NO 1) V. KORBOE (NO1) (2016 UNREPORTED)** where he ruled that,

A lawyer whose license has expired is not qualified to sign, issue a writ or perform any judicial act."

The judge stated further that:

"Practicing without a valid license is not only criminalized. Any process borne out therefrom is equally tainted. It is the fruit of the forbidden tree. It ought not to be touched, put in the mouth or swallowed. It is poison and must be spewed out of the mouth."

APPLICATION OF THE EXCLUSIONARY PRINCIPLE IN CIVIL LAW – BY IMPLICATION

1. **AWUKU v. TETTEH [2011]**

The principle may be said to have been applied to civil cases. One instance is **AWUKU v. TETTEH [2011]** which concerned derivative title. It was held that, where the original title is void- the title held from that original title is equally void- **EX NIHILO NIHILI FIT** (nothing comes out of nothing).

In **AWUKU v. TETTEH [2011],** the Supreme Court stated the principle thus at page. 376:

"...WHERE AN APPELLANT'S TITLE IS DERIVATIVE, HE OUGHT TO DEMONSTRATE THAT, THE PREDECESSOR IN TITLE HELD A VALID TITLE WHICH HE COULD PASS TO HIS GRANTEE, FOR IF THE FOUNDATION WAS TAINTED, THE SUPERSTRUCTURE WAS EQUALLY TAINTED..."

On the facts, the appellant based his title on a grant by a caretaker who claimed to have acted as agent but his agency was invalidated by the Supreme Court.

RATIONALE FOR THE EXCLUSIONARY VIEW

Some of the rationales for not admitting such electronic evidence on the basis of the principle of the fruit of the poisoned tree are:

1. ***The protection of the individual is paramount under 1992 Constitution***
2. ***The guarantee of personal liberty under art 14 (1) of the 1992 Constitution of Ghana.***
3. ***The prohibition against torture or degrading treatment: Article 15(2) of the 1992 Constitution of Ghana.***
4. ***Prohibition against bugging: Article 18 (2)***
5. ***Prohibition against entrapment-Article 18 (2)***
6. ***Policy of the law not to encourage unlawful activities of investigators.***
7. ***Policy of the law not to allow people to profit from or to take advantage of their wrongful acts***

2) THE INCLUSIONARY VIEW OR PRINCIPLE

This second principle is said to support inclusive or inclusionary position in that, it enables the evidence to be admitted or included in the record before it can be evaluated. This is the obverse of the first principle.

It is to the effect that, ***"judges are to decide cases by evidence that will ensure justice, not to probe police or investigator's methods of operation or allow technicalities to deflect the course of justice or to let criminals off the hook even where there is glaring evidence in support of the crime charged."***

This is why the principle is described in some text books as supporting inclusive view i.e. to ***"INCLUDE OR TAKE INTO"*** the evidence.

Proponents of this view hold that: ***"EVIDENCE IS ADMISSIBLE EVEN IF STOLEN"*** – **R. v. LEATHAM (PER CROMPTON J).**

Thus, by the INCLUSIONARY POSITION, ***"even if the evidence is obtained by theft or other improper means, it will still be acceptable and admissible provided that they conduce to rendering justice in cases on trial."*** In effect, how the evidence was obtained does not matter, what matters is the fact that, the evidence is before the Court.

GROUNDS OR BASES FOR THE INCLUSIONARY VIEW

The inclusive view is said to function on two bases.

1. **The first base is to accept the evidence because, *IT IS CONNECTED TO THE ISSUE BEFORE THE COURT.***
2. **The second base is to accept the evidence because, *IT IS OF PROBATIVE OR DISPROBATIVE VALUE TO THE ISSUE BEFORE THE COURT***

CASES OR PRECEDENTS ON INCLUSIONARY VIEW

The second principle that, the source of the evidence does not matter, even if the evidence is stolen, is supported by the following cases:

1. **R. v. LEATHAM [1861]**

Evidence is admissible even if stolen.

2. **FOX v. CHIEF CONSTABLE OF GWENT [1985]**

The role of the Court is not to investigate investigator's methods of operation but to examine evidence adduced in support of charges and administer justice- not to punish police investigators. At best such evidence may be used in mitigation of sentence

3. **R. v. APICELLA [1985]**

Blood sample taken from accused for purely therapeutic purpose showed accused suffered from peculiar gonorrhea which he infected victims he had raped. His conviction on that evidence upheld by the Court of Appeal.

SUMMARY OF INCLUSIONARY VIEW

Inclusionary view conveys two aspects:

1. The first aspect is that, even if evidence is obtained by entrapment, impersonation, by tricks or by guile, it will still be admissible because ***IT IS CONNECTED TO THE ISSUE TO BE DECIDED BY THE COURT.*** In effect, this principle emphasizes that, how the evidence was obtained does not matter. What matters is that, the evidence is relevant or connected to the issue to be decided and at the same time, it is available before the Court to be considered.
2. Evidence may be admitted based on ***ITS PROBATIVE VALUE OR ITS RELEVANCE.*** Once the probative value can be established, the evidence may be admitted: ***"IT MATTERS NOT HOW YOU GET IT, IF YOU STEAL IT EVEN, IT WOULD BE ADMISSIBLE IN EVIDENCE."***-R. v. LEATHAM [1861]. This principle emphasizes

that, the duty of the Court is to look for evidence and examine it but not to probe investigators or to punish them for adopting unacceptable methods.

THE INCLUSIONARY VIEW SUPPORTED BY SECTION 51 (2) OF NRCD 323

SECTION 51 (2) OF THE NRCD 323 says that, "evidence is not admissible except relevant evidence". *Now, if relevant evidence connotes both "connection" and "probative value", then the evidence which is stolen but which is of probative value will be relevant and admissible*

DOES SECTION 51(2) THEREFORE SUPPORT THE ANAS PRINCIPLE?-i.e. even if he stole the evidence or obtained it by guile, entrapment or impersonation, if the evidence is of probative value, it is admissible?

HOW IS THIS DIFFERENTT FROM THE MICHEAVELLIAN PRINCIPLE OF "THE END JUSTIFIES THE MEANS?"

GHANA'S POSITION ON THE EXCLUSIONARY POSITION

1. At Ghana law, the Constitution is the supreme law of the land and for this reason, acts or omissions inconsistent with the constitution are void, to the extent of the inconsistency-**ARTICLE 1 (2) OF THE 1992 CONSTITUTION OF GHANA**
2. Generally, breach of a constitutional provision ***"carries with it not only illegality but impropriety, arbitrariness and dictatorship and amounts to breach of the fundamental law of the land"***-**OKORIE ALIAS OZUZU v. THE REPUBLIC [1974]** per ***TAYLOR J***. In that case, evidence was rejected because accused was not told of his right to counsel in breach of his constitutional right.
3. See also **RAPHAEL CUBAGEE v. ASARE (2017-2018)** and **ACKAH v. ADB (2017-2018).** We will focus on these two cases later.

JUDICIAL DISCRETION TO INCLUDE OR EXCLUDE RELEVANT EVIDENCE UNDER SECTION 52 OF NRCD 323

In spite of the principles above, Ghanaian Courts can exercise discretion under Section 52 and admit or exclude ill-gotten evidence.

For the conditions under Section 52 to exclude or include evidence to apply, read Section 52 in detail.

In addition to the two (2) land mark cases, proviso to **Article 18 (2), Article 12, and Article 13** will allow Ghana Courts to exercise discretion to include or exclude evidence if facts grant exemptions or where provisos or other constitutional provisions apply.

These cases seem to support discretionary Ghana position on admissibility of such evidence:

1. **KURUMA v. THE REPUBLIC** (search without warrant- conviction on it upheld by the Privy Council)
2. **JEFFREY v. BLACK** (sandwiches and drugs case)
3. **R v. SANG** (evidence obtained by entrapment upheld by the court of appeal)

ARTICLE 18 (2)

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

See **RAPHAEL CUBAGEE v. ASARE (2017-2018) and ACKAH v. AGRICULTURAL DEVELOPMENT BANK (ADB) (2017-2018).** Both cases held that, ***"recording evidence without the knowledge of the person being recorded amounts to breach of the fundamental rights of the person recorded as contained in Article 18 (2) of the 1992 constitution and are therefore inadmissible."***

It has been held that, generally, the breach of a constitutional provision ***"carries with it not only illegality but impropriety, arbitrariness and dictatorship and amounts to breach of the fundamental law of the land"***-**OKORIE ALIAS OZUZU v. THE REPUBLIC [1974]**.

The point is that, that kind of secret recording amounts to evidence obtained by illegal or improper means.

EFFECT OF PUBLIC POLICY ON ADMISSIBILITY OF IMPROPERLY / ILLEGALLY OBTAINED EVIDENCE

- **Both cases held that, evidence obtained by improper or illegal means is inadmissible unless the evidence was obtained to prevent the commission of a crime or it was in the interest of the public to do so.**
- **This raises public policy issues which will be determinable on the basis of the facts of each case.**

This is consistent with the proviso in Article 18 (2) and Article 12. Example: "*...except in accordance with the law and as may be necessary in a free and democratic society for the public safety or the economic well-being of the country, for the protection of health or morals for the prevention of disorder or crime or for the protection of the rights or freedoms of others.*"

PUBLIC POLICY AND JUDICIAL DISCRETION

Both cases set out the principles to be followed in deciding whether or not to admit or reject such recording in evidence and how to evaluate such evidence In considering to admit or reject such ill-gotten evidence, public policy must be considered as enjoined by the two cases The public policy matters that may be considered include the following:

The Court has to consider whether admission or inadmissibility

1. **will bring the administration of justice into disrepute**
2. **will be unfair to the other party**
3. **The nature of the right violated**
4. **The manner of the violation (deliberate or innocuous),**
5. **The severity of the crime**
6. **The nature of the commission of the crime**
7. **The severity of the sentence, etc.**

8. **The impact that the exclusion of the evidence may have on the outcome of the case.**

RAPHAEL CUBAGEE v. MICHAEL YEBOAH ASARE (2017-2018)

"In determining whether impugned evidence could bring the administration of justice into disrepute or make proceedings unfair, the court must consider all the circumstances of the case; paying attention to the nature of the right that has been violated and the manner and degree of the violation, either deliberate or innocuous; the gravity of the crime being tried and the manner the accused committed the offence as well as the severity of the sentence the offence attracts. The impact that exclusion of the evidence may have on the outcome of the case, particularly in civil cases where establishment of actual facts is of high premium. These factors to be considered in determining whether to exclude or admit evidence obtained in breach of human rights are not exhaustive but are only guides to courts"

ABENA POKUAA ACKAH v. ADB (2017-2018)

"Under the circumstances, we hold that, the delivery of the secret recorded conversation between the applicant and the respondent amounted to a breach of the applicant's right to privacy as provided for in Article 18 (2)."

CONSTITUTIONAL PROVISIONS

In determining the admissibility of such evidence some articles in the constitution may have to be considered carefully considered; for instance:

Fundamental human rights have limits: no fundamental rights are absolute, two of which are these:

Article 13 (1) allows right to life to be curtailed if ordered by the Court: See ***"...except in the execution of a sentence of a Court in respect of a criminal offence under the laws of Ghana of which he has been convicted."***

Article 12 emphasizes that, all human rights are ***"subject to respect for the rights of others and for the public interest."***

If the **"rights of others"** or **"public interest"** demand that, the rights be curtailed, evidence to curtail those rights may be admissible.

Article 18 (2) contains several exceptions which may justify the admissibility of the illegally obtained evidence.

Are these justifications for the application of the Leatham principle, or the Anas cases?

CONSTITUTIONAL PROHIBITIONS

ARTICLE 1 (2): ***"This constitution shall be the supreme law of Ghana and any other law found inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void."***

SIMILAR PROVISION WAS INTERPRETED TO MEAN THAT ***"no person can make lawful what the Constitution says is unlawful. No person can make unlawful what the Constitution says is lawful. The conduct must conform to due process of law as laid down in the fundamental law of the land or it is unlawful and invalid."***-**TUFFOUR v. ATTORNEY-GENERAL [1980].**

LESSON FIFTEEN

OPINION EVIDENCE: SECTION 111-115 OF NRCD 323

1. THE COMMON LAW POSITION ON OPINION EVIDENCE

The **GENERAL RULE AT COMMON LAW** is that, ***WITNESSES MAY ONLY GIVE EVIDENCE OF FACTS OF WHICH THEY HAVE PERSONAL KNOWLEDGE.*** In other words, ***WITNESSES MAY TESTIFY ONLY TO WHAT THEY THEMSELVES DID, SAID, HEARD, OR WITNESSED.***

This cardinal common law rule provides the foundation not only for the hearsay rule, but also for a further common law rule that prohibits witnesses from expressing their opinions about what happened or may have happened.

The **RULE AGAINST EVIDENCE OF OPINION IS BASED ON THREE MAIN RATIONALES:**

a) The first is that, generally speaking, witnesses' opinions are unnecessary and superfluous. The Court is as well-equipped as the witness to draw inferences from the fact to which the witness testifies and to reach conclusions about the application of the law to the facts. The reception of opinion evidence from witnesses would thus ***PRODUCE DELAY AND EXPENSE*** that could be avoided.

b) The second rationale argues that, the ***RECEPTION OF OPINIONS MIGHT RAISE COLLATERAL ISSUES*** that would distract or confuse the factfinder. These include such issues as the qualifications of the witness to give an opinion, the basis for the opinion, how far it is consistent with other opinions, and so on.

c) The third rationale is related to the first. It is the function of the factfinder in adjudicative proceedings to draw inferences from the facts and to reach decisions about the application of the law to the facts. The danger of admitting evidence of opinion is that, the witness may usurp this function; the danger is thought to be particularly apparent in jury trials in criminal cases where the witness is a person to whose opinion the jury may give great weight.

EXCEPTIONS TO THE GENERAL COMMON LAW POSITION ON OPINION EVIDENCE

As a general rule, the common law has erected a general ban on the admissibility of opinion evidence. However, the ban is subject to two types of exception:

a) Where evidence of a witness's opinion is either inevitable or desirable. It is inevitable where it is not reasonably practicable for the witness to separate the observed facts from the inferences that the witness draws from the facts. In such cases the courts take the view that it is better to have the evidence in the form of an opinion than not to have it at all.
b) Opinion evidence is desirable where it consists of inferences to be drawn in relation to some matter involving special skill or knowledge that is outside the normal experience and competence of the tribunal of fact. In such cases, a Court needs expert help in order for the Court to discharge its duty of fair and accurate fact-finding. These exceptions thus allow for the admission in certain cases of non-expert opinion evidence and expert evidence respectively

2. THE GHANAIAN LAW POSITION ON OPINION EVIDENCE: SECTION 111-115 OF NRCD 323.

INTRODUCTION

Opinion evidence is *A TESTIMONY GIVEN BY A PERSON WHO, INSTEAD OF TESTIFYING ON FACTS, BASES HIS TESTIMONY ON HIS VIEWS, AND OBSERVATIONS OR HIS THINKING OF THE FACTS.* Sometimes, that kind of evidence may be borne out of inferences, deductions or conclusions of the person testifying.

WHERE OPINION EVIDENCE IS GIVEN BY A PERSON WHO HAS NO SPECIAL TRAINING, SKILL, KNOWLEDGE, LEARNING OR LONG EXPERIENCE ON THE TOPIC IN RESPECT OF WHICH HE TESTIFIES, HIS TESTIMONY IS DESCRIBED AS LAY OPINION EVIDENCE. The witness is described as **LAY WITNESS** in contradistinction to **EXPERT WITNESS.**

GENERAL RULES ON WHAT WITNESSES MAY TESTIFY TO: SECTION 60

Opinion evidence is when a witness testifies on a matter which is not within his personal knowledge but based on his personal observations or his views. The rule in the Law of Evidence is that, a witness should testify on matters within his personal knowledge.

The general rule at Evidence Law therefore is that, ***OPINION EVIDENCE IS INADMISSIBLE BECAUSE, A WITNESS IS SUPPOSED TO SPEAK OF FACTS WHICH HE PERSONALLY PERCEIVED, NOT OF INFERENCES DRAWN FROM THOSE FACTS.***

This implies that, the witness is to testify on matters he has seen, observed or perceived by himself, not on matters he has heard or learned from others through narrations, stories, reading or learning. This is even more so with lay witnesses because, to do so would lead to usurpation of the functions of a trier of fact. See **Section 2 (1) of the NRCD 323.**

It has been observed in the **CROSS ON EVIDENCE, 6th EDITION@437** that, **"This is because litigants are entitled to have their dispute settled by a judge with or without a jury and not by the statement of witnesses. If witnesses are too readily allowed to give their opinion concerning an ultimate issue, there is a serious danger that the jury would be unduly influenced".**

It therefore follows that, opinion evidence is excluded on the grounds that, it is for the tribunal of fact, and not witnesses, to draw inferences. Where an **Ultimate Issue** falls to be decided, the decision, similarly, must emanate from the tribunal of fact. Another reason for the exclusion of lay opinion is where its reception will not assist and might even mislead the court or where the evidence is irrelevant.

This view is regulated by NRCD 323, **Section 60** which reads as follows:

> **(1) "A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that he has personal knowledge of the matter.**
>
> **(2) Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.**
>
> **(3) A witness may testify to a matter without proof of personal knowledge if no objection is raised by any party**

(4) The section is subject to section 112 relating to opinion testimony by expert witnesses."

Section 60 (1) generally conditions the nature of the evidence to be given by a witness before the court. It emphasizes the fact that, the witness is to testify on matters in respect of which he has personal knowledge.

Personal knowledge may be based on personal observation. Section 60 (2) permits a witness in proving personal knowledge to rely on what he himself has observed or seen. Under Section 60 (2), the court can allow a witness to proceed on the basis of what he himself had seen or observed.

Section 60 (3) makes provision for testimonies on mundane matters like the name, age, place of birth , etc. to be testified upon if the opponent does not raise any objection to them. That is what actually happens during trials when witnesses are led in their **Evidence-In-Chief.** Nobody saw the day he was born or witnessed where he was born. Nevertheless, testimonies on such matters are admissible. The wording of the Section however permits a party to object to such evidence if he has grounds to challenge the accuracy or veracity of the testimony.

EXCEPTIONS TO SECTION 60 ARE THE BASES FOR OPINION EVIDENCE

However, to the general rule (supra), there are two main exceptions namely:

a) **A LAYPERSON OR A NON-EXPERT WITNESS may state his opinion on a matter not calling for any particular expertise as a way of conveying the facts which he personally perceived.**

b) **An appropriately qualified expert or an EXPERT WITNESS may state his opinion on a matter calling for his expertise.**

LAY (NON-EXPERT) OPINION: SECTION 111

Section 111 of the Evidence Act reads as follows:

"(1) A witness not testifying as an expert may give testimony in the form of an opinion or inference only if

(a) The opinion or inference concerns matters perceived by the witness; and

(b) Testimony in the form of an opinion or inference is helpful to the witness in giving a clear statement or is helpful to the court or tribunal of fat in determining any issue.

(2) The matter on which the witness bases his opinion or inference need not be disclosed before the witness states his opinion or inference, unless the court in its discretion determines otherwise, but he may be examined by any party concerning the basis for his opinion or inference and he shall then disclose that basis."

COMMENTS:

Section 111 allows a witness to testify by giving evidence in the form of an opinion or inference.

Section 111 (1) states **three conditions** which must be satisfied before lay opinion may be admitted in evidence. They are

1. **That, the opinion should be based on what the witness perceived, saw, experienced or made etc. by himself.**
2. **That, the opinion evidence should assist the witness in clarifying the account or description of his testimony in court; or**
3. **That, it should assist the court in deciding on the issue for trial before the court.**

Section 111 (2) says that, there is no obligation on the witness to disclose the source of his lay opinion, unless the court in its discretion otherwise directs.

EXPERT OPINION: SECTION 112

As already shown supra, as a general rule of evidence, opinion evidence is inadmissible; as a witness is supposed to speak of facts which he personally perceived, not of inferences drawn from those facts. However, to this general rule, there are two main exceptions namely, **(a) an appropriately qualified expert may state his opinion on a matter calling for the expertise**

which he possesses and (b) a non-expert witness may state his opinion on a matter not calling for any particular expertise as a way of conveying the facts which he personally perceived.

The courts deal with several diverse issues, some of which are highly technical and therefore require the assistance of specially trained persons or persons with special knowledge to dispose of them. Such persons are described as experts.

NB: Before we continue with Section 113, let's look at who an expert is and qualifications.

WHO IS AN EXPERT?

An expert or expert witness is a person skilled in the subject to which his testimony relates. An expert witness gives evidence in the form of an opinion or inference where the subject matter of the testimony is beyond common experience. The common experts one meets in the courts are handwriting experts, forensic experts, surveyors, economists, doctors, engineers, bankers, forensic experts, scientists, etc. In criminal practice, **Section 121**of **Act 30** has a provision covering the following experts**: medical practitioners, analysts, chemical examiners, geologists, engineers, assayers and mineralogists.**

QUALIFICATIONS OF AN EXPERT: SECTION 67

The qualifications of an expert is provided for under **Section 67.**

(1) **"A person is qualified to testify as an expert if he satisfies the Court that he is an expert on the subject to which his testimony relates by reason of his special skill, experience or training**

(2) **Evidence to prove expertise may, but need not; consist of the testimony of the witness himself."**

Whether or not a person qualifies as an expert is to be determined by the Court i.e. the judge. It is for the judge to determine whether the witness has undergone such a course of special study or experience as would render him expert in a particular subject and it is not necessary for the expertise to have been acquired professionally. A person may thus acquire academic qualification

as an expert by training or by learning. The training may be formal or informal. He may also acquire qualification by experience gained through years of practice. Therefore as already alluded to, the fact that a person has not had formal training on the subject may not disqualify him from testifying as an expert.

In **R v. SILVERLOCK (1894) 2 QB 766,** the prosecution's solicitor was held to have been rightly permitted to give evidence as a handwriting "expert", on the basis of the considerable study and attention, as he put it, that he had given to handwriting over the past 10 years, quite apart from his professional work. **Lord Russel** said:

"There is no decision which requires that the evidence of a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business."

Similarly, in **OSEI v. THE REPUBLIC [1976] 2 GLR 383, CA**, per **Francois JA** (as he then was) ***"a handwriting expert was one who had adequate knowledge and skill as to handwriting whether acquired in the way of his business or not. Consequently any person whose business had been the detection of forgeries could be used to prove attempts to dissemble handwriting. In this case a witness called by the prosecution, having devoted a considerable number of years to the examination of and undergone a course in disputed handwriting, eminently qualified as an expert."***

In **TACKIE v. THE STATE [1964] GLR 262, SC**, handwriting was proved by evidence of witnesses familiar with the handwriting of the writer in question and who were found to be credible witnesses by the Court.

Thus, a police officer's experience in investigating motor traffic accidents may make him an expert for the purpose of reconstructing a particular motor accident. See **R v. OAKLEY (1979) RTR 417**

In highly technical areas where a professionally trained person is required to testify on an issue relating to that profession, an untrained person may be ruled as not qualified to be an expert. For instance, in **R v. INCH (1989) 91 CR APP R 377** where the cause of an injury was in issue, it was held that, a medical orderly was not qualified as an expert capable of giving evidence that, the injury was caused by a blow from an instrument and not the result of the collision of heads.

A practitioner or former practitioner may be an expert in foreign law. It must be remembered that foreign law is a question of FACT but is decided by the judge. Foreign law is usually proved by expert evidence. The expert is entitled to refer to foreign statutes, decisions and textbook. See **R v. OFORI [1993] 99 CAR 223**

Where issues relating to gold, fisheries, cocoa or wood are concerned, will any of these qualify to be expert in gold, fishing, cocoa or wood: a galamsey operator, a Chorkor fisherman, Bogoso cocoa farmer or Anloga carpenter with no less than thirty years' experience in galamsey, fishing, cocoa farming or carpentry? The answer depends on the issue at stake to be determined by the Court. For instance, where gold properties and their carats are in issue, a galamsey operator whose only tools of trade are his bare hands, legs and body cannot qualify as an expert irrespective of the number of years he has worked as a galamsey operator. The competence of an expert affects the weight to be attached to the evidence given by the expert but may not affect the admissibility of his testimony.

SUBJECT-MATTER OF EXPERT EVIDENCE: SECTION 112 OF NRCD 323

By **Section 112**, where a person is able to establish that, he is an expert, his evidence will be admissible if the subject-matter he will testify upon satisfies these three conditions:

1. **THAT, THE SUBJECT-MATTER MUST BE BEYOND COMMON EXPERIENCE.**
2. **HIS EXPERTISE MUST RELATE TO THE SUBJECT IN ISSUE BEFORE THE COURT**
3. **HIS EXPERT OPINION SHOULD BE HELPFUL TO THE COURT**

The first condition implies that, the evidence of the expert should be beyond the normal competence of the court. If the evidence is on matters within the competence of the court, the court should be able to decide on the issue without any assistance form the expert.

The second condition deals with relevance of the testimony to the issue for determination before the court. The evidence should ordinarily have **probative value** in respect of the issues for determination before the court.

The **COMMENTARY ON THE EVIDENCE DECREE, AT PAGE 85** explains the third condition to cover two situations, namely,

> **"Where the expert can supply general technical background information which might be useful in understanding evidence introduced in the action...and secondly, the expert might usefully give his opinion based on facts of the case."**

BASIS OF EXPERT OPINION: SECTION 113

(1) A witness testifying as an expert may base his opinions or inferences on matters perceived by him or known to him because of his expertise or on matters assumed by him to be true for the purpose of giving his opinion or inference.

(2) The matters on which a witness testifying as an expert bases his opinion or inference need not be admissible in evidence.

(3) The matters on which a witness testifying as an expert bases his opinion or inference need not be disclosed before the witness states his opinion or inference, unless the Court in its discretion determines otherwise, but he may be examined by any party concerning the basis for his opinion or inference and he shall then disclose that basis.

COMMENTS:

The principles for determining the basis of the opinion of the expert are provided in Section 113 of NRCD 323, which reads:

> **"(1) A witness testifying as an expert may base his opinion or inference on matters perceived by him or known to him because of his expertise or on matters assumed by him to be true for the purpose of giving his opinion or inference.**
>
> **(2) The matters on which a witness testifying as an expert bases his opinion or inference need not be admissible in evidence**
>
> **(3) The matter on which a witness testifying as an expert bases his opinion or inference need not be disclosed before the witness states his opinion n or inference, unless the**

court in its discretion determines otherwise, but the may be examined by any party concerning the basis for his opinion o inference and he shall then disclose that basis."

According to Brobbey, generally, there are two broad bases for opinion evidence of experts, these are:

1. **Opinion based on the perception or knowledge of the expert. This is what the expert personally obtained or experienced or encountered; and**
2. **Opinion based on information obtained by the expert through interviews or discussions with investigators, police officers, doctors, lawyers and other technocrats.** This means that the opinion may be based on facts not known by him but obtained from others or documents. Obviously, this second basis will be hearsay but the expert is entitled to assume the accuracy of what he obtains from those sources. His opinion will be admissible in court, notwithstanding their hearsay connection.

By **Section 113 (2),** the matter on which the witness bases his evidence does not need to be admissible. This provision seems to pave the way for the admissibility of hearsay as the basis for expert evidence. The expert is not expected to disclose the source or basis of his information and yet, his opinion will be admissible in evidence.

Section 113 (3) however says that, the expert MAY be cross-examined on his testimony and on the basis of his opinion. He MAY further be ordered by the court to disclose the source of his opinion if the court in its discretion so directs.

COURT EXPERTS: SECTION 114

(1) In any action at any time the court in its discretion may, on its own motion or at the request of any party, appoint a court expert to inquire into and report upon any matter on which an expert opinion or inference would be admissible under section 112.

(2) Unless otherwise ordered by the court, the report of the court expert shall be made to the court in writing together with such number of copies as the court may require and the court shall make one copy of the report available to each party.

(3) The report of the court expert shall be admissible to the same extent as the testimony of any other expert witness and shall to that extent be deemed to be in evidence without formal introduction by the court or any party.

(4) Whether called as a witness by the court or a party, the court expert may be cross-examined by any party, including the party calling the court expert.

(5) The court expert shall if possible be a person agreed between the parties, and failing agreement shall be nominated by the court.

(6) The matters to be submitted to the court expert shall if possible be agreed between the parties and the court, and failing agreement shall be settled by the court.

(7) The court expert may conduct such experiments and tests as he deems appropriate and he may communicate with the parties to arrange for the attendance of any person or the provision of samples or information or any similar matter; and failing agreement between the parties and court expert as to any of these matters, they shall be determined by the court.

(8) The court expert appointed under this section is entitled to reasonable remuneration as determined by the court.

(9) The remuneration of the court expert shall be taxed as costs to the parties.

(10) If it is necessary or appropriate to pay the court expert any or all of his remuneration before costs are taxed, without prejudice to the ultimate taxation of costs and unless otherwise ordered by the court, in a civil action each party shall contribute a pro rata share of such remuneration and shall be jointly and severally liable for the whole remuneration, and in a criminal action the prosecution shall contribute the whole remuneration.

COMMENTS

Section 114 of NRCD 323 allows the court to appoint its own expert. The section makes provision for the parties to object to the appointment. It also permits parties to cross examine the court-appointed expert.

By **Section 114 (1), Court Experts** are witnesses invited by the court itself to enquire into any matter and present a report on the matter to the court. For example, in a land litigations, the courts usually invite land surveyors to go to the land and do the needed enquiry and report back to the court.

Section 114 (2) says that, the report of the court expert must be in writing, unless otherwise decided by the court. It must be signed by the expert and together with the appropriate copies required by the court submitted to the court. The court upon receipt of the report will give copies to the parties.

It goes further under Section 114 (3) that, the report of the COURT EXPERT is admissible and carries the same weight just like any other expert witness and is taken to be in evidence without it being introduced by the court or any of the parties.

Section 114 (4) says that, Just like any other witness, the COURT EXPERT is subject to cross-examination by the court and the parties in the case.

Section 114 (5) says that, the parties to the litigation may agree on the person to be appointed as the court expert. If the parties do not agree, the court shall use its discretion to appoint one. In Accra, Kumasi, Takoradi and Tamale, the agreement by the parties on the appointment of a surveyor as a COURT EXPERT is never a problem as the lawyers know all the efficient and experienced surveyors.

Section 114 (6) says that, the parties in the case are given the opportunity to agree on the areas in controversy that the COURT EXPERT should identify and enquire into. In land litigation, the area of controversy that is the matter of enquiry for the surveyor is usually the boundaries. Most often, agreements on the subject matter by parties is never a problem. However, in the unlikely event that, the parties do not agree, the court will set out the matters for the COURT EXPERT.

Section 114 (7) says that, the COURT EXPERT will inform the parties of anything that he may require from them to enable him carry out the exercise and their attendance to answer questions and give the needed directions, if any. Should the COURT EXPERT encounter any problem in soliciting the support of the parties or any of them, he may defer to the court to assist. In land litigation, the needed information from the parties is for them to identify their respective borders and give their site plans to the COURT EXPERT.

Section 114 (8) and (9) says that, the remuneration of the COURT EXPERT is paid by the parties. In land matters, the surveyors collect their remuneration before they commence the enquiry. In land cases, the parties easily agree on the amount to pay because, the standard range is known to the lawyers. The remuneration of the court expert is later taxed as costs to the parties.

(10) If it is necessary or appropriate to pay the court expert any or all of his remuneration before costs are taxed, without prejudice to the ultimate taxation of costs and unless otherwise ordered by the court, in a civil action each party shall contribute a pro rata share of such remuneration and shall be jointly and severally liable for the whole remuneration, and in a criminal action the prosecution shall contribute the whole remuneration.

THE ULTIMATE ISSUE RULE: SECTION 115

BY SECTION 115 OF NRCD 323, TESTIMONY IN THE FORM OF AN OPINION OR INFERENCE ADMISSIBLE UNDER SECTION 111 OR 112 SHALL NOT BE INADMISSIBLE BECAUSE THE OPINION OR INFERENCE CONCERNS AN ULTIMATE ISSUE TO BE DECIDED BY THE TRIBUNAL OF FACT.

COMMENTS

The **"ultimate issue"** refers to the very question that the Court has to determine in the trial. It is the court to determine the ultimate or main issue and not the expert. The evidence of the expert is just prima facie evidence. However, notwithstanding the fact that, it is the duty of the court to decide the ultimate issue, the court cannot reject the evidence of an expert because it touches on the main issue. Section 115 which deals with ultimate issue states:

"Testimony in the form of an opinion or inference admissible under section 111 or 112 shall not be inadmissible because the opinion or inference concerns an ultimate issue to be decided by the tribunal of fact."

Thus, unlike other common law jurisdictions where opinion evidence which determines an ultimate issue may be considered inadmissible, in Ghana, it is not sufficient to reject such evidence merely on that basis.

EFFECT OF EXPERT EVIDENCE

The established rule is that, ***EXPERTS GIVE EVIDENCE AND DO NOT DECIDE CASES.*** The evidence given by the expert is only a prima facie case and should not be considered as deciding the issue for the Court. That evidence is not binding on the judge. It is to be considered as guides which are to assist the judge in deciding on the issues before him. It is treated almost in the same way as the treatment of the opinions of assessors in trials with the aid of assessors.

It is also well settled law that, in handwriting issues, the Court is entitled to examine documents and reach its own conclusions upon such examinations. This was the position of the court in **STATE v. LAWMAN [1961] GLR (PT II) 6698, SC**.

Also, in **FENEKU v. JOHN TEYE [2001-2002] SCGR 985,** it was held (In holding 6) that:

"The principle of law regarding expert evidence was that, the judge need not accept any of the evidence offered. The judge was only to be assisted by such expert evidence to arrive at a conclusion of his own after examining the whole of the evidence before him. The expert evidence was only a guide to arrive at the conclusions."

A similar decision was reached in **IN RE AGYEKUM (DECEASED) [2005-2006] SCGLR 851 (HOLDING 2).**

See also **SASU v. WHITE CROSS INSURANCE COMPANY LIMITED (1960) GLR 4,** the Court held that, ***"expert evidence is to be received with reserve, and does not absolve a judge from forming his own opinion on the evidence as a whole."***

LESSON SIXTEEN

HEARSAY EVIDENCE: SECTION 116-135 OF NRCD 323

INTRODUCTION

HEARSAY is evidence made up of what a speaker or presenter heard from another person but not what he personally observed or personally knows. In common parlance, it is similar to rumor or gossip or tale bearing which borders on questions such as **who said it? To whom? When? Why? For what?**

THE BASES FOR DISBELIEVING RUMOUR ALMOST THE SAME AS THOSE FOR DISBELIEVING HEARSAY. IN COURTROOM SITUATION, THESE CONSTITUTE THE SAME RATIONALES FOR NOT ADMITTING HEARSAY AS EVIDENCE.

Other reasons are that, "Any Statement Not Given on Oath in a Court Trial Is Not to Be Considered as Evidence"-SECTION 63 (1) OF NRCD 323.

Again, the SPEAKER OF THAT STATEMENT CANNOT BE HELD LIABLE TO PERJURY because, he is not known to have given the statement on oath-SECTION 211 OF ACT 29.

Hearsay evidence is therefore the evidence of those who relate not to what they know themselves, but what they have heard from others. For example your mother tells you that he is ill (she is saying it as the **"originator".** In law the originator is called the **DECLARANT**). After hearing this from your mother, you go and inform your elder brother that your mother (declarant) says she is ill (hearsay).

Brobbey uses a hypothetical scenario to explain hearsay evidence in the law of evidence:

"A made a statement. A is not in Court. B is in court. B claims to have heard or seen A writing or making the statement. B is testifying about the statement which A made. The testimony of B on that statement is hearsay. That testimony is inadmissible. The reason is that, A is not in Court for his veracity or the veracity of the statement he gave to be tested. On these facts, A is described as the declarant or the maker of the pretrial statement. B may be a witness, a party or the accused."

As a general rule in law, this type of evidence is inadmissible as evidence in Court because, it is not within your personal knowledge. Our ordinary local parlance version is that ***"they say, they say, is not tolerated in Court."***

However, despite the general principle that, hearsay evidence is inadmissible, the law makes a number of exceptions where hearsay evidence is made admissible.

This study basically examines the various circumstances under which HEARSAY EVIDENCE will be admissible.

LEGAL DEFINITION OF HEARSAY: SECTION 116

For the purpose of this Part

(a) a "statement" is an oral or written expression, or conduct of a person intended by him as a substitute for oral or written expression;

(b) a "declarant" is a person who makes a statement;

(c) ***"HEARSAY EVIDENCE" IS EVIDENCE OF A STATEMENT, OTHER THAN A STATEMENT MADE BY A WITNESS WHILE TESTIFYING IN THE ACTION AT THE TRIAL, OFFERED TO PROVE THE TRUTH OF THE MATTER STATED;***

(d) a "hearsay statement" is a statement evidence of which is hearsay evidence;

(e) "unavailable as a witness" means that the declarant is:

(i) exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant; or

(ii) disqualified as a witness from testifying to the matter; or

(iii) dead or unable to attend or testify at the trial because of a then existing physical or mental condition; or

(iv) absent from the trial and the court is unable to compel his attendance by its process; or

(v) absent from the trial and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process; or,

(vi) in such a position that he cannot reasonably be expected in the circumstances (including the lapse of time since the statement was made) to have any, recollection of matters relevant to determining the accuracy of the statement in question.

(f) "available as a witness" means that the declarant is not unavailable as a witness.

COMMENTS:

In Ghana, the Evidence Decree, 1975 (NRCD 323) defines **"hearsay evidence"** as **"EVIDENCE OF A STATEMENT, OTHER THAN A STATEMENT MADE BY A WITNESS WHILE TESTIFYING IN THE ACTION AT THE TRIAL, OFFERED TO PROVE THE TRUTH OF THE MATTER STATED."**

A breakdown of the statutory definition has it that, **FOR A STATEMENT TO QUAIFY AS HEARSAY UNDER SECTION 116, THE FOLLOWING CONDITIONS MUST BE SATISFIED: THEY CONSTITUTE CHARACTERISTICS OF HEARSAY IN SECTION 116:**

1. **HEARSAY IS A STATEMENT GIVEN OUT OF COURT:** To understand this, imagine two situations. One is the current or present situation in which a witness or a party testifies in court. The other one is a past situation made earlier in a different setting from what is happening now in the current trial. Hearsay refers to the latter situation.
2. **THE STATEMENT MUST BE AN ORAL OR WRITTEN EXPRESSION OR CONDUCT INTENDED AS SUBSTITUTE FOR ORAL OR WRITTEN EXPRESSION**
3. **THE STATEMENT MUST HAVE BEEN GIVEN BY A PERSON WHO IS DESCRIBED AS A DECLARANT**
4. **THE DECLARANT MUST HAVE GIVEN THE STATEMENT IN THE PAST**

5. **THE STATEMENT MUST HAVE BEEN GIVEN BY A DECLARANT NOT PRESENT IN COURT i.e. THE STATEMENT MUST HAVE BEEN GIVEN AT A TIME WHEN THE DECLARANT WAS UNAVAILABLE AS A WITNESS OR A PARTY IN THE CURRENT COURT TRIAL**
6. **THE STATEMENT MUST BE NARRATED (or repeated) BY A PERSON PRESENT IN COURT WHO TESTIFIES IN THE CURRENT TRIAL AS A WITNESS OR A PARTY**
7. **THE WITNESS OR PARTY in court MUST HAVE GIVEN THE STATEMENT IN THE COURT IN ORDER TO ESTABLISH THE TRUTH OF THE HEARSAY STATEMENT.**
8. **THE WITNESS OR PARTY IN COURT SHOULD NOT HAVE GIVEN THE STATEMENT MERELY TO SHOW THE MAKING OF THE STATEMENT OR OCCURRENCE OF AN EVENT**

Section 116 (a) defines **a statement** as ***"ANY ORAL OR WRITTEN EXPRESSION OR CONDUCT INTENDED BY THAT PERSON AS A SUBSTITUTE FOR THE ORAL OR WRITTEN CONDUCT."*** It means that, despite the use of the verb "say", other things such as writings on objects and conducts will all qualify as hearsay. Thus, the hearsay rule applies to all out-of-Court statements whether oral, written or otherwise. This does not mean that, all out-of-Court statements are hearsay. This is not the case. An out of Court statement may or may not be hearsay depending on the purpose for which it is offered. If it is offered to prove the truth of what it asserts, it becomes hearsay. If it is offered for any other purpose, the statement is not hearsay. The question then arises as to what other purposes could an out-of-Court statement be admitted? The answer is to show consistency, to rebut allegations of recent fabrication, to negative consent etc.

Section 116 (b) defines a declarant as a person who is the originator of the statement. In other words, the person who first said what is being reported.

Section 116 (c) gives the legal definition of **"HEARSAY EVIDENCE".** It defines it as **EVIDENCE OF A STATEMENT** other than that made by a witness who is testifying in court. It means that, the said **EVIDENCE OF A STATEMENT** was not made by the witness and that, the witness is just restating what another person said to support the truth of his testimony. In other

words, any statement on oath that can only be proved by **hearsay evidence** is a **hearsay statement.** For example, as a witness, I make a statement in court but I am not the declarant and I am asked to lead evidence in support of the said statement. The evidence I have to support the said statement is called **HEARSAY EVIDENCE**, then the statement that I made is called **HEARSAY STATEMENT.** We say **"A HEARSAY STATEMENT IS SUPPORTED BY A HEARSAY EVIDENCE".**

Section 116 (e) defines the phrase **"UNAVAILABLE AS A WITNESS"**. This phrase **"THE DECLARANT UNAVAILABLE AS A WITNESS"** permeates most of the provisions on the topic "HEARSAY", hence the need to define it for a better appreciation of the provisions. Any time the phrase **"unavailable as a witness"** is used, it means that, the maker of the original statement known in law as the **declarant** is in one of the following situations:

(i) **Exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant;** (for example, the foreign diplomatic corps)

(ii) Disqualified as a witness to testify in the matter. For example a person of unsound mind who is not capable of coherently expressing himself to be understood.

(iii) Is dead /unable to attend court due to a physical or mental condition/unable to testify in court due to a physical or mental condition.

(iv) Absent from the trial and cannot be compelled by the court to attend.

(v) Cannot be found to attend and testify despite diligent efforts to trace him.

(vi) Made the statement long ago and cannot be expected to be capable of recollecting relevant matters relating to the statement.

Section 116 (f) simply defines **"AVAILABLE AS A WITNESS"** to mean that, the declarant of the statement is available as a witness. That is, he is there and can be called upon to testify.

GENERAL RULE ON HEARSAY EVIDENCE: HEARSAY NOT ADMISSIBLE: SECTION 117

Hearsay evidence is NOT ADMISSIBLE except as otherwise provided by this Decree or any other enactment or by the agreement of the parties.

COMMENTS:

Section 117 of NRCD 323 lays down the exclusionary rule of hearsay as evidence. As stated early on, the general rule is that, hearsay evidence is inadmissible in Court. The only time (s) that hearsay can be admitted are:

a) when the Evidence Act provides that it should be admitted as evidence.

b) when any other law provides that it should be admitted.

c) when parties in the matter before the Court agree that it should be admitted.

Thus, by **SECTION 117 OF NRCD 323** and as a general rule, hearsay cannot be admitted in court trials as evidence unless any of the following three conditions have been satisfied:

1. **THE PARTIES HAVE AGREED THAT, HEARSAY SHOULD BE ADMITTED (as it happens in arbitration proceedings) OR**
2. **AN ENACTMENT PERMITS PARTICULAR HEARSAY EVIDENCE TO BE ADMITTED IN COURT TRIALS.**
3. **THE ADMISSIBILITY IS PERMITTED BY THE PROVISIONS OF "THIS DECREE" WHICH REFERS TO ONLY "NRCD 323."**

EXCEPTIONS TO THE GENERAL HEARSAY RULE

1. **FIRST HAND HEARSAY ADMISSIBLE: SECTION 118**

By SECTION 118 OF NRCD 323, evidence of a hearsay statement is not made inadmissible by section 117 if—

(a) the statement made by the declarant would be admissible had it been made while testifying in the action and would not itself be hearsay evidence, and

(b) the declarant is:

(i) unavailable as a witness, or

(ii) a witness, or will be a witness, subject to cross-examination concerning the hearsay statement; or

(iii) available as a witness and the party offering the evidence, has given reasonable notice to the court and every other party of his intention to offer the hearsay statement at the trial and that notice gave sufficient particulars (including the contents of the statement, to whom it was made, and, if known, when and where) to afford a reasonable opportunity to estimate the value of the statement in the action.

(2) In a criminal action where the prosecution offers evidence under clause (b) (iii) of subsection (1) of this section, the evidence shall not be admissible if an accused has given reasonable notice to the court and the prosecution that he objects to its admission.

(3) Nothing in this section shall preclude the prosecution from offering such evidence under any other clause of subsection (1) of this section or under any other provision of this Decree.

(4) In a criminal action evidence of a hearsay statement made by an accused shall not be admissible under subsection (1) of this section when offered by the accused unless the accused is or will be a witness subject to cross-examination concerning the hearsay statement.

(5) Evidence of a hearsay statement offered under clause (b) (i) of subsection (1) of this section shall not be admissible if the declarant is unavailable as a witness because the exemption, preclusion, disqualification, death, inability, absence or failure of recollection of the declarant was brought about by the wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.

COMMENTS:

Section 118 (1) stipulates that, hearsay evidence may be admissible provided the following conditions are satisfied.

1. The first condition is that, the hearsay evidence should be such that, if it had been offered by the declarant during the trial, it would not itself have been hearsay evidence. This implies that, the statement from the declarant should come from his personal knowledge. He should not have come by that statement from or through another person or source.
2. The second is that, the declarant should not be available to be called as a witness, or where he is available, his position should not be such that, he cannot possibly or legally be cross-examined if he desires. If the declarant is likely, for instance, to claim privilege and therefore may not be compelled to come to court to testify, that hearsay evidence from that declarant will not be admissible. The principle was applied in **PIETERSE v. AMANKRAH [1982-83] 1 GLR 785**. In that civil case, the witness was not allowed to testify on the explanation which the accused gave in a criminal trial regarding his charge of careless driving. The reason given for disallowing the testimony was that, the witness was a declarant within the meaning of Section 118 of NRCD 323 in that, he was an official in a foreign bank who could not be compelled to testify. Similar reasoning of unavailability under Section 116 was applied in **REPUBLIC v. CIRCUIT COURT; EX PARTE APPIAH [1982-83] GLR 276.**
3. The third condition for admitting first hand hearsay evidence is in Section 118 (1) (b) (iii) where the party offering the current statement has given reasonable notice to the Court that, he intends to rely on hearsay evidence at the trial.
4. The fourth condition is applicable in criminal trials. In such trials, hearsay evidence will not be admissible if the accused objects to it. Also, where the statement is offered by the accused, it will not be admissible unless the accused is subject to cross-examination. For instance, hearsay evidence offered by an accused person, who testifies from the dock and will therefore not be subject to cross-examination, will be inadmissible.

By Section 118 (5), if the unavailability of the declarant was caused by the party seeking to rely on the hearsay statement, then same will not be admissible. For example, if I intentionally kill the

declarant to prevent him from giving evidence and I come as a witness to testify to the court as to what the deceased declarant told me.

From the foregoing the criteria for admitting First Hand Hearsay are as follows:

a) **STATEMENT FROM DECLARANT MUST COME FROM HIS PERSONAL KNOWLEDGE (Section 118 (a), i.e. from his physical or ocular observation). See also Section 60 of NRCD 323.**

b) **DECLARANT NOT AVAILABLE AS A WITNESS (Section 118 (a) (i) (the one who made the statement cannot be called to testify because he is dead or has travelled out of the Court's jurisdiction.**

c) **IF DECLARANT IS AVAILABLE AS A WITNESS, HE SHOULD BE CAPABLE OF BEING CROSS-EXAMINED (Section 118 (b) (ii)–i.e., he must not be likely to claim privilege or testify under Section 63 (1)).**

d) **IF AVAILABLE AS A WITNESS, THE PARTY OFFERING IT MUST HAVE GIVEN REASONABLE NOTICE TO THE COURT OF HIS INTENTION TO USE THE HEARSAY EVIDENCE AS PART OF HIS CASE (Section 118 (b) (iii) rationale of the notice- to prepare to cross-examine the witness or party.**

2. **ADMISSIONS: SECTION 119**

The second exception to the inadmissibility of hearsay evidence which is provided in Section 117 relates to admissions. **Section 119** reads as follows:

Evidence of a hearsay statement is not made inadmissible by section 117 if the statement is offered against a party, and—

(a) the declarant is a party to the action either in his individual or representative capacity, or

(b) the party against whom it is offered has manifested his adoption of, or his belief in the truth of, the statement, or

(c) the party against whom it is offered had authorised the declarant to make a statement concerning the subject matter of the statement, or

(d) the declarant was an agent or employee of the party against whom it is offered and the statement concerns a matter within the scope of the declarant's agency or employment and was made before the termination of the agency or employment, or

(e) the declarant made the statement while participating in a conspiracy to commit a crime or civil wrong and in furtherance of that conspiracy.

COMMENTS:

Section 119 says that, Evidence of a hearsay statement is not affected by Section 117 or is admissible:

(a) If the declarant is also a party to the case. For example in a criminal case of Defrauding by False Pretenses, if the accused is alleged to have made some false statements based on which the complainant parted with his money to him, the complainant whilst testifying as a witness will be allowed to tell the court all that was told him by the accused. Accused will be the declarant of the said statement but it will be admissible because the accused is a party to the matter.

(b) If the party against whom the witness is testifying based on hearsay believes in the truth of the said hearsay. For example if you testify that, when the dispute arose, I reported the matter to the defendant's pastor who invited us and told us as follows...The 'as follows' is a hearsay, however, if the opposing party believes in what you are telling the court about what the pastor told the two of you, then it will be admissible although a hearsay statement.

(c) If the party against whom it is offered gave the witness the go ahead to use the hearsay testimony.

(d) If the declarant was or is an employee of the party against whom it is offered and the issue was within the witness' scheme of work. For example a former employee who is suing for wrongful termination can testify thus, "when I complained about my low wages you told me that...What he was told is definitely a hearsay statement but admissible under the provisions of this sub-section.

(e) The declarant made the statement as an accomplice whilst planning to go and commit a crime. For example when we were planning to overthrow the government, you told me as follows:

3. CONFESSIONS: SECTION 120

This topic touches on statements made by suspects when arrested by the police. When the police arrest you, apart from interrogating you, which is usually oral and you do not sign anything, there are two statements that you give them.

The first one is the **INVESTIGATION CAUTION STATEMENT** - **This statement assists the police to know your side of the story and investigate it as well.** The police in the discharge of their investigative duties are like the court, they are neither on the side of the complainant nor the suspect. They do their job with open minds. By the dictates of their rules, they are to independently investigate the case without any premeditated decision. In doing this, they diligently collect the versions of both sides of the case and investigate. If you are a suspect and refuse to give a statement, then you miss the opportunity of allowing the police to investigate your story as well and thereby giving an undue advantage to the complainant.

The second statement taken by the police is the **CHARGE CAUTION STATEMENT-This is the statement collected by the police after the completion of investigations and they think there is sufficient evidence to support a charge against you.**

These statements are taken at the Police Station. Occasionally, some suspects admit committing the offence in the one or both of the statements. Usually the admission is common in the **INVESTIGATION CAUTION STATEMENT**, which is the first to be taken.

These statements are tendered as exhibits during the trial of the accused. If the accused confessed committing the offence and it is tendered without any objection, then it presupposes that, the accused is admitting committing the offence before the court.

When it comes to the point of tendering the statements in court during the course of a criminal trial, the accused through his lawyer will often object to it on the grounds that, the said statement was not made voluntarily. The often allegation is that, the police brutalized them into signing what

the police themselves wrote down for them to sign. In other words the accused will deny making any such confession statement.

OUR study of Section 120 of the Evidence Decree, 1975 (NRCD 323) is based on the admissibility of the **CONFESSION STATEMENTS** by the court.

To start with, the **INVESTIGATION CAUTION STATEMENT** and the **CHARGE CAUTION STATEMENT** are all hearsay statements. The prosecutor through his witness in the box is telling the court what the accused told him at the police station. So the accused is the declarant. The witness who is usually the investigator will be reporting to the court what he was told by the accused (hearsay). Although hearsay is as a general rule not admissible, the Evidence Act allows hearsay statement admissible if the declarant is a party in the matter. In criminal trials, the accused is always a party in the case.

Any statement made by an accused whilst arrested, restricted or detained by the State will NOT be admitted in evidence before a court unless the said statement was made in the presence of an **INDEPENDENT WITNESS.**

WHO then is an **INDEPENDENT WITNESS?** An **INDEPENDENT WITNESS,** is any person who is present when the **INVESTIGATION CAUTION STATEMENT** or **CHARGE CAUTION STATEMENT** was being collected from the accused at the police station. He is present to make sure that the accused person made the confession statement out of his own free will and that the police did not beat him or threaten him in order to make him confess in his statement that he committed the offence. After observing the taking of the statement, the **INDEPENDENT WITNESS** will sign the statement certifying that, indeed the accused made the said confession statement voluntarily.

The word **"witness"** in the phrase **"INDEPENDENT WITNESS"** is not the word witness as testifying before a court. For example," I saw them making the statement" which is the same as "I witnessed them making the statement". So in effect, it means the Independent person who witnessed or saw the making of the investigation caution statement.

Where the accused is blind or illiterate, the independent witness shall carefully read over and explain to him the contents of the statement before it is signed or marked by the accused, and shall

certify in writing on the statement that he had so read over and explained its contents to the accused and that the accused appeared perfectly to understand it before it was signed or marked.

For the purpose of this section a statement that was not made voluntarily includes, but is not limited to, a statement made by the accused if—

(a) the accused when making the statement was not capable, because of a physical or mental condition, of understanding what he said or did; or

(b) the accused was induced to make statement by being subjected to cruel or inhuman conditions, or by the infliction of physical suffering upon him by a public official, or by a person who has a direct interest in the outcome of the action, or by a person acting at the request or direction of a public official or such interested person; or

(c) the accused was induced to make the statement by a threat or promise which was likely to cause him to make such a statement falsely, and the person making the threat or promise was a public official, or a person who has a direct interest in the outcome of the action, or a person acting at the request or direction of public official or such an interested person.

In a criminal action tried by a jury, a party may not, in the presence of the jury, offer to prove a hearsay statement under this section.

When a party offers to prove a hearsay statement under this section the court shall, in the absence of the jury, determine the admissibility of the statement as provided in section 3.

A determination by the court under subsection (7) that a statement is admissible shall not preclude the jury from determining that the statement is not to be believed.

4. **FORMER TESTIMONY: SECTION 121**

Evidence of a hearsay statement is not made inadmissible by section 117 if it consists of testimony given by the declarant as a witness in an action or in a deposition taken according to law for use

in an action, and when the testimony was given or the deposition was taken the declarant was examined by a party with interests and motives identical with, or similar to, the party against whom the evidence is offered in the present action.

COMMENTS

If the declarant (original maker of the statement) made the statement on oath whilst giving evidence in a court proceeding and was cross-examined. It is admissible because, court records of proceedings are officially certified public records and the content is a correct reflection of the evidence of the maker.

5. PAST RECOLLECTION RECORDED: SECTION 122

Evidence of a hearsay statement is not made inadmissible by section 117 if—

(a) the statement is contained in a writing and constitutes a record of what was perceived by a witness who is present and subject to cross-examination; and

(b) the statement would have been admissible if made by the witness while testifying; and

(c) at a time when the matter recorded was recently perceived and clear in his memory, the witness recognised the written statement as an accurate record of what he had perceived or the witness stated what he perceived and the written statement, by whomever or however made, correctly sets forth what the witness stated.

COMMENTS

If the witness himself recorded something and has forgotten but is reading to the court what he himself wrote down. For example, I may be the one writing down the minutes of meetings as the secretary of a particular organization and about 15 years' time, there is a dispute and I am called to testify, the law allows the contents of the said minutes that I am relying on to be admitted.

6. STATE OF MIND: SECTION 123

Evidence of a hearsay statement is not made inadmissible by section 117 if the statement states the declarant's existing state of mind, emotion or physical sensation and is not a statement of the declarant's memory or belief of a fact offered to prove the truth of the fact remembered or believed.

COMMENTS

Anything said by a declarant relating to his own state of mind is admissible. These are things said relating to the condition of his mind, emotion and sensations. For example, if the declarant said he is anxious about a particular occasion or that he is feeling frightened.

7. RES GESTAE (THINGS DONE): SECTION 124

Evidence of a hearsay statement is not made inadmissible by section 117 if the statement was made—

(a) while the declarant was perceiving the event or condition which the statement narrates or describes or explains or immediately thereafter; or

(b) while the declarant was under the stress caused by his perception of the event or condition which the statement narrates or describes or explains.

COMMENTS

"Res gestae" is a Latin expression which literally means **"things done". Res gestae** is a reference to facts, which though not in issue are so connected with a fact in issue as to form part of the same transaction, whether they occurred at the same time and place or at different times and places. It is made up of remarks, observations and recollection of a fact. All these words or conduct relates to an existing fact and its antecedents. By way of illustration, if Kwame is accused of the murder of Kwasi by beating him, whatever was said or done by Kwame or Kwasi or the by-standers at the beating or so shortly before or after it, is a relevant fact.

Thus, whenever a **'transaction'** such as a contract or a crime, is a fact in issue, then evidence can be given of every fact which forms part of the same transaction. The facts which surround the happening of an event are its **res gestae.** In other words, every act, omission or statement which throws some light upon the nature of the transaction or reveals its true quality or character is held as part of the transaction and the evidence of it should be admitted.

RATIONALE

The rationale for this hearsay exception is that, such statements may have great probative value in establishing or understanding events in question, and that, the emotional involvement of the speaker in the event provides a guarantee of sincerity.

There are four conditions which must be satisfied before the statement can be said to form part of the **res gestae.** They are:

a) CONTEMPORANEITY OR SPONTANEITY OF THE STATEMENT:

The first condition for applying **res gestae** is that the statement should have been made while the event under investigation was actually taking place. By this it is meant that the statement should have been made contemporaneously or spontaneously with the event. "Contemporaneous" implies that the statement must have been made at the same time that the event was taking place. On this basis, evidence of tape recordings video and CCTV recordings of relevant past events are held admissible in evidence during court trials.

Even though the statement was rejected as part of the **res gestae**, the Court of Appeal admitted it as amounting to a confession statement by stating that:

"The mere denial by the appellant of the facts contained in the statement 'I have killed Aggie' did not render it inadmissible in law, provided it was made freely and voluntarily. The principle was that once the prosecution had been able to establish that the statement was made voluntarily by the accused, in the sense that it was not obtained from him by the influence of fear or hope of advantage, exercised or held out by a person in authority, it was admissible in evidence against him. On the evidence, the statement was made by the appellant to a trusted relation, at a time nobody knew a crime had been committed and his relative was not in any authority. The

confession was free and voluntary and proceeded for remorse and a desire to make reparation for the crime. Since the confession was admissible in law and was material evidence implicating the accused, the jury properly took it into consideration."

b) **"IMMEDIATELY AFTER" THE OCCURRENCE:**

The second condition is that, if the statement was not made at the same time that the event occurred, it must have been made "immediately after "the occurrence of the event. According to Brobbey, the idea connoted by "immediately" seems to have been elaborated upon in the privy council case of **TEPPER v. R [1952] AC** 480 in which it was stated that the event must have been "so closely associated with (the statement) in time, place and circumstances that they are part of the thing being done." This condition emphasizes the time element. The event must necessarily be connected with the matter under investigation in such closeness of time that there should be no room for the declarant to have reflected on what to say or do or what not to say or do.

c) **STRESS OF THE EVENT:**

The third condition is that the statement must have been made while the stress of the event or the statement was still dominating the mind of the declarant. A classic illustration of this occurred in **RATTEN v. REPUBLIC.** In that case, that evidence was held admissible because at the time of the telephone call the event was operating on her mind to constitute the *res gestae*. **Exception to stressed declarant: State of mind explanation**

In real life, it is possible for the statement not always referable to emotional or stressful state of mind and yet may be admitted in evidence. In other words, even where there is no evidence of stress, a statement which explains why the declarant acted under the way he did may be admissible. For instance in **R v. GILFOYLE [1996] 1 CRAPP R** 302 the accused who was charged with the murder of his wife put up the defense that, she had committed suicide and produced suicide notes allegedly prepared by her to buttress his defense. Evidence from the wife's friends that she had told them that she was helping her husband to prepare suicide notes as part of work related project was admissible in evidence because they tended to show that when she wrote the note, she was not of suicidal frame of mind.

8. **BUSINESS RECORDS: SECTION 125**

Evidence of a hearsay statement contained in a writing made as a record of an act, event, condition, opinion or diagnosis is not made inadmissible by section 117 if—

(a) the writing was made in the regular course of a business;

(b) the writing was made at or near the time the act or event occurred, the condition existed, the opinion was formed, or the diagnosis was made; and

(c) the sources of the information and the method and time of preparation were such as to indicate that the statement contained in the writing is reasonably trustworthy.

(2) Evidence of the absence from records of a business of a record of an alleged act, event or condition is not made inadmissible by section 117 when offered to prove the non-occurrence of the act or event, or the non-existence of the condition, if—

(a) it was the regular course of that business to make records of all such acts, events or conditions at or near the time the act or event occurred or the condition existed and to preserve those records; and

(b) the sources of information and method and time of preparation of the records of that business were such that the absence of a record is a reasonably trustworthy indication that the act or event did not occur or that the condition did not exist.

(3) For the purpose of this section a "business" includes every type of regularly conducted activity, business, profession, occupation, governmental activity, or operation of an institution, whether carried on for profit or not.

(4) A hearsay statement admissible in evidence under this section is not made inadmissible by the fact that it is not based on the personal knowledge of the declarant.

9. **OFFICIAL RECORDS: 126**

The following though "hearsay statements" are admissible:

(1) if made in WRITING and

(a) made within the scope of duty of a public officer

That is to say any official record is admissible as evidence. There is a rebuttable a presumption of official duty regularly performed. See **Section 37 of the Evidence Act.**

(b) the writing was made at the same time or immediately after the event

(c) the source of information and the time the writing was prepared makes it authentic.

(2) means for example if a public officer in charge of records declares in writing that the file of an official record cannot be traced after diligent search, then it will be admissible will be admissible as that event not having taken place.

(3) means that the preparation of the official record need not be done by the person who had knowledge of the fact. For example if a registrar at a public university make a record that a particular lecturer taught (lectured) at a specific date and time, the said declaration by the registrar will be admissible despite the fact that he did not see or observe the registrar in the act of lecturing(he had no personal knowledge of the event).

10. **JUDGMENTS: SECTION 127**

Judgments are given outside the current trial and therefore are hearsay. Being hearsay, they are inadmissible under **Section 117** which makes judgments admissible as one of the exceptions to the hearsay rule.

JUDGMENTS IN CRIMINAL CASES: SECTION 127 (1): ***"Evidence of a final judgment of a court in Ghana adjudging a person guilty of a crime is not made inadmissible by section 117 when offered to prove any fact essential to the judgment."***

Criminal cases are based on past proceedings and so are hearsay, such evidence being hearsay always raise issues of admissibility.

Unlike common law, in Ghana, proceedings from previous criminal cases (resulting in judgment) where accused was convicted are admissible in civil proceedings as exception to hearsay under **Section 127 (1):** applied in **PIETERSE v. AMANKWAH [1982-] 1 GLR 785**. Hence, the principle that, previous criminal convictions are admissible in civil cases.

At ***Common Law***, **HOLLINGTON v. HEWTHORN** held that, criminal proceedings are not admissible in civil action. However, in Ghana, **PIETERSE v. AMANKWA (1982)** ruled that, **Section 127 (1)** has reversed the **HOLLINGTON v. HEWTHORN** rule in Ghana. It therefore follows **HOLLINGTON v. HEWTHORNE** is therefore not applicable in Ghana.

Simply put, the position in Ghana is that, by virtue of **Section 127 (1) and (4) of the Evidence Act, 1975** the judgment of a criminal case in which the accused was convicted is admissible in evidence in a civil trial to prove the contents of the judgment that are essential to the issue on trial.

11. FAMILY HISTORY: SECTION 128

(1) Family history concerning tracing of family ancestry and affiliations admissible as evidence, though a hearsay and the declarant did not acquire a firsthand personal knowledge of the facts stated by him. For example if your grandfather narrates the history of your ancestors to you, you can testify on it in court although your grandmother who narrated it to you did not himself personally saw or observe what he narrated to you. Meaning your grandfather (declarant) himself came by the facts by means of hearsay. The condition is that the said grandfather should have made the declaration prior before the dispute leading to the court action.

(2) a history declared by a person not directly of the family lineage of a witness is admissible as evidence provided that the declarant :

(a) was related to the witness by blood, marriage or adoption.

In Ghanaian Akan custom, a wife is not considered as belonging to the ancestral family of the spouse and vice versa. However, a wife can be a declarant to the family history of her spouse and vice versa. The same goes with an adopted member of a family like a child aged 3 years of a single mother and the mother marries and takes her along to her new marital home. The child grows up or is brought up by the mother's household of the mother's husband. Such an adopted child tends

to know a lot about that family even more than his biological father's family because that is the family in which he was natured and lived and lived as an adult. The only condition is that he should have declared the history before the controversy leading to the litigation in court.

(b) the declarant though not a family or related in any way was just close to the family for such a long period of time that those who do not know that the declarant is just a close contact of the family will easily assume such a person to be a family member. For example, it is common to have your sister's friend or brother's friend or better still your mother's friend who is always with the person and they "share everything" together. Such friends are not related to your family but by their close association with your family for so many years are more than a family member.

(3) Documented records of a family is also admissible.

Please, note that when preparing funeral brochures and posters, only facts should be stated. If a person is not a child, that person should not be stated as a child for convenience sake. It creates problems. For example my father died in 1983 (about close 40 years ago) and copies of his funeral brochure and posters are still in possession of family members. If some facts were misrepresented, it can be used as true facts in any court litigation. So please, always advise your family members to be very wary of what is put in funeral brochures relating to the relationship of individuals to the deceased.

(4) evidence of reputation among family members offered to prove the truth of the matter reputed.

A person is known best by his family members. So although reputation as evidence is inadmissible, same is made admissible if offered by the person's own family to prove a dispute relating to that reputation.

For example a family member is reputed as very generous and there is a dispute in court where the issue is as to whether he acted generously on that occasion. Evidence of his family members relating to his reputation as a generous person will be admissible as evidence.

COMMENTS:

In giving traditional testimony, example, about family history etc., the person narrating such evidence has no personal knowledge about the matters to which he is testifying. The same usually

applies to the person who also told the person testifying. Traditional evidence can therefore be said to be strictly hearsay but Section 128 of the Evidence Act serves as an exception to the rule against hearsay evidence.

Thus by virtue of **SECTION 128 (1)** of the NRCD 323, evidence of a hearsay statement by a declarant concerning his own birth, marriage, divorce, relationship by blood, marriage or adoption, ancestry or other similar fact of his family history is admissible in evidence as an exception to the hearsay rule under Section 117 of the same Act, whether or not the declarant has personal knowledge of what he declared.

Again, by virtue of **Section 128 (2)** of the NRCD 323, evidence of a hearsay statement concerning the birth, death, marriage, divorce, relationship by blood, marriage or adoption, ancestry or other similar fact of the family history of a person other than the declarant is admissible in evidence as an exception to the hearsay rule under Section 117 of the same Act if the statement was made before controversy arose concerning the fact of family history, and the declarant was related to the other person by blood, marriage or adoption; or the declarant was otherwise so intimately associated with the other person's family as to be likely to have had accurate information concerning the matter declared.

More so, by virtue of **Section 128 (3)** of the NRCD 323, evidence of entries in family bibles or other family books, family portraits, and inscriptions on buildings, tombstones and the like is admissible in evidence as an exception to the hearsay rule under Section 117 of the same Act, when offered to prove the birth, death, marriage, divorce, relationship by blood, marriage or adoption, ancestry or other similar fact of family history of a member of the family by blood, marriage or adoption.

Moreover, by virtue of **Section 128 (4)** of the NRCD 323, evidence of reputation among members of a family is admissible in evidence as an exception to the hearsay rule under Section 117 of the same Act, when offered to prove the truth of the matter reputed if the reputation concerns the birth, death, marriage, divorce, relationship by blood, marriage or divorce, ancestry or other similar fact of the family history of a member of the family by blood, marriage or adoption.

12. HEARSAY EVIDENCE OF BOUNDARIES AND COMMUNITY HISTORY: SECTION 129

Evidence of a witness who personally knows of a reputation is admissible

(a) If the reputation concerns boundaries, customs, land in a community and said reputation was in existence prior to the event leading to the litigation in court.

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

For example on the Thursday morning preceding an annual celebration of the festival of a village the whole community will gather in a part of the forest to pour libation. That part of the forest is no man's land but belongs to the village as a whole. The land area is suddenly being claimed by a single individual as his family land. The court will admit evidence of the reputation relating to the use and ownership of the said land.

13. DEEDS AND ANCIENT WRITINGS: SECTION 130

Evidence of a will, assignment, or any document giving out property to another person is admissible as evidence before a court although it is a hearsay statement.

(a) If the statement in the document i.e. will, deed of assignment or deed of transfer or any other such documents relates to the issue of the litigation in court.

(b) if the statement in the document i.e. will, deed of assignment or deed of transfer or any other such documents relates to a person's claim of interest in the property mentioned in the said document.

(c) if the handling of the property mentioned in the will, deed of assignment or deed of transfer or any other such document is as stated in the document. For example Agbemenu makes a will and gives out his property to the community to be used as a nursery school and is actually since his death being used as such. Such a use is consistent with the statement in the will.

(2) if the document i.e. will, deed of assignment or deed of gift is more than 20 years old and the use of the property has been in accordance with the statement in the document.

14. REPUTATION CONCERNING CHARACTER: SECTION 131

Reputation is hearsay evidence and not admissible. However, a character or a trait that became common knowledge within a group that a person lived is admissible to prove the reputation of the said character.

For example if during your studies at Wisconsin you are reputed by your colleagues to be quarrelsome, evidence of the said reputation will be admitted to prove an issue in court as to whether you are quarrelsome or not.

15. REFERENCE WORKS: SECTION 132

A published book like, history, science, pamphlets etc. are all admissible despite being hearsay evidence provided the court takes judicial notice of its existence like the Daily Graphic. The court will take the statement therein as being prima facie true (rebuttable).

An expert witness can also testify to the knowledge of the declarant in the area of work on which he wrote the article or book.

(2) A compilation of a statement generally used and relied upon as accurate in a regular course of business is admissible.

For example if an institution relies on any document as its true source of information, then it becomes admissible in any matter involving that institution.

16. CREDIBILITY OF THE DECLARANT: SECTION 133

After the admission of hearsay evidence;

(b) if the conduct of the declarant turns out to be inconsistent with the declarant's hearsay statement, then the said inconsistent conduct will be admitted to attack his credibility. For example the declarant wrote an article saying that a land area in his hometown belongs to the community. Later the same claimant is heard claiming the land belongs to his girlfriend's family. This conduct

will be totally inconsistent with his earlier declaration and maybe used to discredit him by attacking his credibility.

(b) Any attack on the credibility of the declarant is admissible if same would have been admitted against him if he were to be testifying as a witness in the matter.

CROSS-EXAMINATION OF DECLARANT: SECTION 134

(1) The declarant whose statement is being used as hearsay if available may be summoned to Court and cross-examined on his statement.

(2) However, the declarant will not be called to be cross-examined if the following situations exist:

(a) if the declarant already appeared before the court and testified and was cross-examined, he shall not be called to be cross-examined.

(b) if he is one of the parties in the case contesting the matter.

(c) having identical interest with a party in the matter before the court.

(3) The declarant will not be cross-examined if he falls under any of the conditions mentioned in Sections 119, 120, 121 and 127 (read those sections immediately and refer to the corresponding notes)

(4)if there is any provision making a hearsay statement admissible without being subjected to cross-examination, then this section may not apply.

DISCRETIONARY EXCLUSION IF DECLARANT AVAILABLE: SECTION 135

Gives the court the power to decide not to admit a statement against the accused if there is any good reason to suggest that the Statement sought to be relied on to prosecute accused cannot be fully trusted or is somehow a little doubtful.(read all the relevant sections).

You should remember that article 19 of the Constitution protects the accused to ensure a fair trial. As such any evidence that cannot be believed beyond reasonable doubt will not be admitted.

DYING DECLARATIONS

These are statements or utterances made by the declarant while on the throes of death but relevant and closely connected to the event under investigation.

The admissibility of dying declarations as an exception to the hearsay evidence rule is not expressly provided for in the Evidence Act. However, prior to the promulgation of the Evidence Act, a dying declaration was admissible in evidence in criminal matters as provided under Section 270 of the Criminal Procedure Code, 1960 (Act 30). This section, however, has been repealed by section 5 of the Criminal Procedure Code (Amendment Decree No. 2) .NRCD 324. Paragraph 11 of het Memorandum to NRCD 324 providing the reason for the repeal of section 270 of the Criminal Procedure Code provides:

"Lastly, section 270 of Act 30 is also repealed. This provided for the giving in evidence of dying declarations will now be admissible under section 118 (b) (1) of the Evidence Decree, for the reason that the declarant is unavailable as a witness".

THE RULE:

At a trial for murder or manslaughter, an oral or written statement by the victim as to the cause of his injuries is admissible as evidence of the truth of its contents, provided that at the time it was made the victim was ***UNDER A SETTLED HOPELESS EXPECTATION OF DEATH*** and would have been competent as a witness. Therefore for such statement to be admissible, the declarant should be on the point of death or should have given up any hope of living when he made the statement. The test is not whether the declarant expected immediate death but whether he has abandoned all hope of life so that to him death was impending or imminent.

The Court pronounced in **REPUBLIC v. WOOD COCK** as follows: The principle on which this species of evidence is admitted is that they are declarations made in the extremity when the party is at the point of death and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Law."

In **REPUBLIC v. JENKINS (1869) LR 1 CCR 187**, a death-bed statement was taken from the victim but it was read over to her and before she signed it she desired that a passage to the effect that it was made ***'with no hope of my recovery' be amended so as to read 'with no hope at present of my recovery'***. The statement was held inadmissible on the grounds that it was capable of bearing the interpretation that presently she had no hope of recovery but she hoped still that ultimately a change might come and then she might recover.

In contrast, a statement by a victim that, **'Oh Gert, I shall go. But keep this a secret, let the worst come to the worst"** was held to be admissible-**REPUBLIC v. PERRY (1909) 21 CB 697**

In the Nigerian case of **AKINFE v. THE STATE (1988) 3 NWLR 729,** the Supreme Court of Nigeria held that for a dying declaration to be admissible it must satisfy the following requirements:

1. It must deal with the case of the maker's death or any of the circumstances of the transaction which resulted to it.
2. The cause of death must be an issue in the trial in which the statement is to be proved
3. The trial must be for the murder or manslaughter of the deceased
4. At the time of making it, the deceased must have believed himself to be in danger of approving death.

LESSON SEVENTEEN

TRADITIONAL EVIDENCE

GENERAL INTRODUCTION

TRADITIONAL EVIDENCE refers to the testimony or testimonies given in Court on a matter or matters relating to the following:

1. **Family History**
2. **A person's pedigree, origin, migration.**
3. **Chieftaincy (Stools and Skins)**
4. **Ownership of Lands**
5. **Ownership (rightful occupants) of Stools**
6. **Family, Clan, Tribe or Community Rights and Attributes**

The testimonies given in Court on a matter relating to the aforementioned are most often than not conflicting. This is because of the following reasons:

1. **Those with living memories of these accounts or events would usually be dead by the time the evidence will be given in Court (during litigation); and**
2. **The dead would have passed on memories of the accounts, events and /or information orally from generation to generations (oral tradition).**
3. **These narrations are given by people who have no personal knowledge of the events because, the events they narrate had occurred long before they were born.**

The above reasons essentially make traditional evidence hearsay evidence.

TRADITIONAL EVIDENCE AS HEARSAY

The view of the law many years ago prior to the promulgation of the NRCD 323 was that, ***"TRADITIONAL EVIDENCE IS A HEARSAY EVIDENCE".***

Due to this assertion, the common law did not seem to place much premium on traditional evidence in deciding cases. This is evidence in the case of **EBU v. ABABIO (1956) 2 WALR 55**. In that case, the Court (in dismissing the appeal) held that, ***"Although traditional evidence has a part to***

play in actions for the declaration of title of land, favorable finding on this evidence is not necessarily essential to the case of the party seeking the declaration."

At Ghana law, the assertion that, ***"traditional evidence is a hearsay evidence"*** was first laid down in the case of "**IN RE ASERE STOOL: NIKOI OLAI AMONTIA IV (SUBSTITUTED BY TAFO AMON II) v. AKOTIA OWORSIKA III (SUBSTITUTED BY LARYEA AYIKU II) (2005-2006) SCGLR 637**. That case defines traditional evidence as follows:

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

PROMULGATION OF THE EVIDENCE DECREE, 1975 (NRCD 323)

However, with the promulgation of the Evidence Decree, 1975 (NRCD 323), ***SECTIONS 128 AND 129*** PROVIDE EXCEPTIONS TO THE ASSERTION THAT, ***"TRADITIONAL EVIDENCE IS A HEARSAY EVIDENCE".***

BY VIRTUE OF SECTION 128 OF NRCD 323, "TRADITIONAL EVIDENCE OVER FAMILY HISTORY PER SE IS A HEARSAY EVIDENCE BUT IT BECOMES ADMISSIBLE WHEN GIVEN BY A DECLARANT CONCERNING HIS OWN BIRTH, MARRIAGE, DIVORCE, RELATIONSHIP BY BLOOD OR ADOPTION, ANCESTRY OR OTHER SIMILAR FACTS OF HIS FAMILY HISTORY, WHETHER THE DECLARANT HAS PERSONAL KNOWLEDGE OF THE MATTER DECLARED OR NOT IF THE STATEMENT WAS MADE BEFORE CONTROVERSY AROSE OVER THE FACT OF FAMILY HISTORY"

ON THE OTHER HAND, SECTION 129 OF NRCD 323 CONTAINS "RULES ON THE ADMISSIBILITY OF TRADITIONAL EVIDENCE RELATING TO BOUNDARIES AND COMMUNITY HISTORY." SECTION 129 THEREFORE ALLOWS SUCH EVIDENCE ON THE COMMUNITY BOUNDARIES OR CUSTOMS AFFECTING LAND IN THE COMMUNITY TO BE ADMISSIBLE IF GIVEN BY A PERSON WITH PERSONAL KNOWLEDGE OF THE HISTORY AND BEFORE CONTROVERSY BEFORE THE BOUNDARY OR CUSTOM AROSE.

SECTIONS 128 AND 129 OF NRCD 323 therefore allow the admissibility of hearsay evidence at Ghana law of Evidence. These sections of NRCD 323 read as follows:

1. SECTION 128 OF NRCD 323

SECTION 128 (1): ***"Evidence of a hearsay statement by a declarant concerning his own birth, marriage, divorce, relationship by blood, marriage or adoption, ancestry or other similar fact of his family history is not made inadmissible by Section 117 and will not be made inadmissible by the fact that, the declarant had no means of acquiring personal knowledge of the matter declared if the statement was made before controversy arose over the fact of family history."*** **SECTION 128 (1) OF NRCD 323** is simply saying that, no one has personal knowledge of his own date or place of birth. Such information is always obtained by way of narration from others and is essentially hearsay. For instance, in Ghana, births, deaths, marriages, and divorces are often not recorded in official records, where events of family history have occupied long in the past hearsay is likely to be the only form in which evidence exists.

SECTON 128 (2): ***"Evidence of hearsay statement concerning the birth, death, marriage, divorce, relationship by blood, marriage or adoption, ancestry or other similar fact of the family history of a person other than the declarant is not made inadmissible by Section 117 if the statement was made before controversy arose concerning the fact of family history and (a) the declarant was related to the other person by blood, marriage or adoption; or (b) the declarant was otherwise so intimately associated with the other person's family as to be likely to have had accurate information concerning the matter declared".***

SECTION 128 (3): "Evidence of entries in family bibles or other family books, family portraits, and inscriptions on buildings, tombstones and the like is not made inadmissible by Section 117 when offered to prove the birth, death, marriage, divorce, relationship by blood, marriage or adoption, ancestry or other similar fact of family history of a member of the family by blood, marriage or adoption". **SECTION 128 (3)** is simply saying that, information from a person's family Bibles or other family books, tombstone, relics and similar objects are admissible into evidence even if they are relayed by people who have no personal knowledge of them.

SECTION 128 (4): says that, admissibility of similar information is allowed if given by people in the community where the person or the family may be found. In BRUCE v. ATTORNEY GENERAL (1967) 1 GLR 107, the Court held that, ***"Evidence of deceased relatives given ante litem motam is admissible (as an exception to the hearsay rule) to prove family pedigree."***

2. SECTION 129 OF NRCD 323

SECTION 129 says that, ***"Evidence of boundaries or community history may constitute exception to hearsay rule".*** SECTION 129 is to the effect that, evidence given by a member of the community or someone with specialized knowledge of the history of the community may be admitted in evidence. This is done under these conditions:

1. ***The evidence should relate to the community or land boundaries (relate to that particular community or particular boundary of land).***
2. ***The statement given should affect the general history of the community which is of much importance to the community.***
3. ***It must apply to the principle of "ANTE LITEM MOTAM"-"Before litigation was contemplated."***
4. ***Subject to SECTION 52 OF NRCD 323 as not being of sufficient probative value.***

A case that relates to boundaries of land and community history with regard to traditional evidence is RICKETTS v. ADDO AND RICKETS v. BORBOR (CONSOLIDATED) [1975] 2 GLR 158, CA. In that case, the Court held that, ***"TRADITIONAL EVIDENCE IN CAUSES RELATING TO PEDIGREE, INHERITANCE, BOUNDARIES OF LAND AND FAMILY LAND TRANSACTIONS, ETC. WAS ADMISSIBLE AS AN EXCEPTION TO THE HEARSAY RULE. THE RELATOR OF SUCH EVIDENCE IS ENTITLED TO TESTIFY NOT ONLY ON MATTERS OCCURRING BEFORE HIS BIRTH BUT ALSO TO MATTERS WHICH HAD HAPPENED DURING HIS TIME."***

SECTION 48 OF THE NRCD 323 cites possession and ownership as valid means of evaluating traditional evidence. It states as follows:

SECTION 48 (1): ***"THE THINGS WHICH A PERSON POSSESSES ARE PRESUMED TO BE OWNED BY HIM."***

SECTION 48 (2): ***"A PERSON WHO EXERCISES ACTS OF OWNERSHIP OVER PROPERTY IS PRESUMED TO BE THE OWNER OF IT."*** This Section raises the presumption of ownership in favor of a person in occupation or in possession of property or one who manifests ownership over it. **SECTION 48** OF NRCD 323 was applied in the case of **HLODJIE v. GEORGE (2005-2006) SCGLR 974.** This appeared to be an elaboration of what constitutes traditional evidence, the **SUPREME COURT** stated in (holding 1) as follows:

"Therefore, findings and decisions of Courts of competent jurisdiction may appropriately qualify as evidence of facts in living memory. But evidently, in land litigation, proven UNINTERRUPTED AND UNCHALLENGED ACTS OF POSSESSION, in the absence of some cogent evidence on record to the contrary as for example, an unreserved acceptance of crucial parts of the other sides oral history, cannot be ignored or denied the deserved weight, given that in the first place, by the clear provision of section 48 of the Evidence Decree, 1975 (NRCD 323), such acts raise a presumption of ownership."

DEFINITION AND SCOPE

TRADITIONAL EVIDENCE *is "Evidence of the history of events which happened some time past, concerning a person's pedigree, origin, migration, land, family, stool, etc. passed on generally by oral tradition from generation to generation."* Thus, by its nature, *TRADITIONAL EVIDENCE IS HEARSAY EVIDENCE.* See the case of **IN RE ASERE STOOL: NIKOI OLAI AMONTIA IV (SUBSTITUTED BY TAFO AMON II) v. AKOTIA OWORSIKA III (SUBSTITUTED BY LARYEA AYIKU II) [2005-2006] SCGLR 637.**

NATURE OR CHARACTERISTICS OF TRADITIONAL EVIDENCE

1. *IT IS MOSTLY VERBAL*: Traditional Evidence is not often supported by written records (but very rarely, parties can rely on written historical reports). See of **BROWN v. QUASHIGAH [2003-2004] 2 SCGLR 930 (Holding 2)**.

In the case of ***BROWN v. OUASHIGAH*** **[2003-2004] 2 SCGLR 930(h-2), the Court held that,** ***"CUSTOMARY LAW KNEW NO WRITING AND TRANSACTIONS BASED ON ORAL EVIDENCE ARE VALID".***

In that case, a customary law transaction of 1961 was held valid even though only evidence in support was oral. Therefore Traditional Evidence is still valid even if it was created verbally.

2. ***IT IS ALWAYS HISTORICAL***: Traditional Evidence is always handed down from generation to generation) and therefore essentially hearsay.
3. ***IT IS HEARSAY AND GENERALLY INADMISSIBLE UNDER SECTION 117 OF NRCD 323.***
4. ***IT IS HOWEVER AN EXCEPTION TO THE COMMON LAW RULES ON INADMISSIBILITY OF HEARSAY EVIDENCE BY VIRTUE OF SECTIONS 128 AND 129 OF NRCD 323.*** See **RICKETTS v. ADDO (CONSOLIDATED) [1975] 2 GLR 158, CA**

In **RICKETTS v. ADDO AND RICKETS v. BORBOR (CONSOLIDATED) [1975] 2 GLR 158, CA,** the Court held that, ***"TRADITIONAL EVIDENCE IN CAUSES RELATING TO PEDIGREE, INHERITANCE, BOUNDARIES OF LAND AND FAMILY LAND TRANSACTIONS, ETC. WAS ADMISSIBLE AS AN EXCEPTION TO THE HEARSAY RULE. THE RELATOR OF SUCH EVIDENCE IS ENTITLED TO TESTIFY NOT ONLY ON MATTERS OCCURRING BEFORE HIS BIRTH BUT ALSO TO MATTERS WHICH HAD HAPPENED DURING HIS TIME."***

5. ***IT RAISES PRESUMPTIONS ONLY***: Traditional Evidence creates a necessary implication which is rebuttable. Often, the presumptions relate to possession, ownership or occupation of property. See **HLODJIE v. GEORGE [2005-2006] SCGLR 974.**

In **HLODJIE v. GEORGE [2005-2006] SCGLR 974,** ***THE SUPREME COURT EXPLAINED TRADITONAL EVIDENCE IN HOLDING 1 AS FOLLOWS:***

"THEREFORE, FINDINGS AND DECISIONS OF COURTS OF COMPETENT JURISDICTION, MAY APPROPRIATELY QUALIFY AS EVIDENCE OF FACTS IN LIVING MEMORY. BUT EVIDENTLY IN LAND LITIGATION, PROVEN

UNINTERRUPTED AND UNCHALLENGED ACTS OF POSSESSION, IN THE ABSENCE OF SOME COGENT EVIDENCE ON RECORD TO THE CONTRARY, AS, FOR EXAMPLE, AN UNRESERVED ACCEPTANCE OF CRUCIAL PARTS OF THE OTHER SIDE'S ORAL HISTORY, CANNOT BE IGNORED OR DENIED THE DESERVED WEIGHT, GIVEN THAT, IN THE FIRST PLACE, BY THE CLEAR PROVISION OF SECTION 48 OF THE EVIDENCE DECREE, 1975 (NRCD 323), SUCH ACTS RAISE A PRESUMPTION OF OWNERSHIP."

WHAT MAY CONSTITUTE FACTS OF LIVING MEMORY?

From the case of **HILODJIE v. GEORGE (2005-2006),**

1. **FINDINGS AND DECISIONS OF COURTS QUALIFY AS FACTS OF LIVING MEMORY.**
2. **UNINTERRUPTED AND UNCHALLENGED ACTS OF POSSESSION PROVED DURING LITIGATION QUALIFY AS FACTS OF LIVING MEMORY.**

See also **SECTION 48 (1) OF NRCD 323** which states that, ***"the things which a person possesses are presumed to be owned by him."***

WHAT IS THE MEANING OF "POSSESSION?"

To possess means to be in physical (or theoretical?) control of the object.

Take note that, in the terms of **NRCD 323, POSSESSION MAY GIVE GROUNDS TO OWNERSHIP.** See **SECTION 48 (2) OF NRCD 323.**

By SECTION 48 (2) OF NRCD 323, *"A PERSON WHO EXERCISES ACTS OF OWNERSHIP OVER PROPERTY IS PRESUMED TO BE THE OWNER OF IT."* Ownership in this context means holder of title or right to the property

EVALUATION OF TRADITIONAL EVIDENCE / METHODS OF TESTING TRADITIONAL EVIDENCE

A question that begs for a legal answer is, ***SINCE TRADITIONAL EVIDENCE IS ALWAYS IN CONFLICT WITH ONE ANOTHER, HOW DOES ONE EVALUATE VARIOUS PIECES OF TRADITIONAL EVIDENCE?***

THE ADJEIBI-KOJO v. BONSIE (1957) PRINCIPLE

The answer to the above question rests with the case of **ADJEIBI-KOJO v. BONSIE [1957] 3 WALR 257, PC.** This case is the ***LOCUS CLASSICUS THAT LAID DOWN THE METHOD OF TESTING OR EVALUATING TRADITIONAL EVIDENCE IN GHANA.***

In **ADJEIBI-KOJO v. BONSIE [1957],** the Court held that, ***"THE MOST SATISFACTORY METHOD OF TESTING THE TRADITIONAL HISTORY IS BY EXAMINING IT IN THE LIGHT OF SUCH MORE RECENT FACTS AS CAN BE ESTABLISHED BY EVIDENCE IN ORDER TO ESTABLISH WHICH OF TWO CONFLICTING STATEMENTS OF TRADITION IS MORE PROBABLY CORRECT."***

The case of **ADJEIBI-KOJO v. BONSIE [1957]** placed emphasis on ***MORE RECENT FACTS OR FACTS OF RECENT MEMORY.***

INSTANCES OF RECENT FACTS RAISING PRESUMPTION OF ACTS OF OWNERSHIP

1. Payment Of Compensation
2. Court Actions Resulting In Judgment
3. Revenue From Use As ***FOOTBALL PARK, KVIP, COMMUNITY CENTRE, PERMISION TO BUILD PUBLIC SCHOOL***
4. Collection of Market Tolls.
5. Findings Of Courts Of Competent Jurisdiction

6. ***PROVEN UNINTERRUPTED AND UNCHALLENGED ACTS OF POSSESSION*** (E.g. Recent Or Current Farming On Disputed Land)

7. Acknowledgment of Ownership By Boundary Owners: **KWESI YAW v. KWAW ATTA.**

In **KWESI YAW v. KWAW ATTA [1961] GLR 513,** the Court held that, ***"WHERE THERE IS A CONFLICT OF TRADITIONAL HISTORY THE BEST WAY TO FIND OUT WHICH SIDE IS PROBABLY RIGHT IS BY REFERENCE TO RECENT ACTS IN RELATION TO THE LAND. IN THE INSTANT CASE, THE FACT THAT THE PLAINTIFF IS IN POSSESSION OF THE LAND, AND IS ACKNOWLEDGED BY HIS BOUNDARY OWNERS TO BE THE OWNER IS ENOUGH TO PROVE THAT HIS EVIDENCE OF TRADITION IS PROBABLY RIGHT."***

APPLICATION OF THE ADJEIBI-KOJO v. BONSIE (1957) PRINCIPLE

1. The principle applies only where the **COURT IS IN DOUBT** ***NOT WHERE ONE SIDE HAS BEEN TAKEN***- See **IN RE TAAHYEN & ASAAGO STOOLS; KUMANIN LL v. ANIN [1988-89] SCGLR 399,**

2. See also **KWESI YAW v. KWAW ATTA [1961] GLR 513:** ***"WHERE THERE IS A CONFLICT OF TRADITIONAL HISTORY, THE BEST WAY TO FIND OUT WHICH SIDE IS PROBABLY RIGHT IS BY REFERENCE TO RECENT ACTS IN RELATION TO THE LAND. IN THE INSTANT CASE, THE FACT THAT THE PLAINTIFF IS IN POSSESSION OF THE LAND, AND IS ACKNOWLEDGED BY HIS BOUNDARY OWNERS TO BE THE OWNER IS ENOUGH TO PROVE THAT HIS EVIDENCE OF TRADITION IS PROBABLY RIGHT".***

3. The principle applies where there is ***PROVEN UNINTERRUPTED AND UNCHALLENGED ACTS OF POSSESSION***- **HILODJIE v. GEORGE (2005-2006).**

ANOTHER METHOD OF EVALUATING TRADITIONAL EVIDENCE ASIDE THE ADJEI-KOJO v. BONSIE (1957) METHOD: See also the case of **ACHORO v. AKANFELA [1996-97] SCGLR 209.**

In ACHORO v. AKANFELA [1996-97] SCGLR 209, the Court held that, "***The best way of evaluating traditional evidence was to test the authenticity of the rival versions against the background of POSITIVE AND RECENT ACTS.***"

The question posed by the **ACHORO v. AKANFELA [1996-97) method in evaluating Traditional Evidence** is in the light of evidence of positive and recent acts, which of rival versions is more authentic?. Take note that, emphasis is on recent acts.

DISPUTE ON THE FIRST TO SETTLE ON LAND

In the event that, there is a dispute regarding who first settled on a disputed land, refer to the case of **ADWUBENG v. DOMFEH [1996-97] SCGLR 660.**

In **ADWUBENG v. DOMFEH [1996-97] SCGLR 660**, the Court held that, ***"WHERE (AS IN THE INSTANT CASE) IT WAS DIFFICULT, ON THE BASIS OF TRADITIONAL EVIDENCE, FOR THE TRIAL COURT TO MAKE A FINDING AS TO WHICH OF THE ANCESTORS OF THE PARTIES WAS THE FIRST TO SETTLE ON DISPUTED LAND, THE RECOMMENDED APROACH WAS TO HAVE RECOURSE TO FACTS IN RECENT YEARS AS ESTABLISHED BY THE EVIDENCE. AND A PARTY, SUCH AS IN THE INSTANT CASE, COULD STILL SUCCEED IN AN ACTION FOR DECLARATION OF TITLE, EVEN IF HIS TRADITIONAL EVIDENCE HAD BEEN REJECTED."***

The principle established by **ADWUBENG v. DOMFEH [1996-97] SCGLR 660** is that, where there is a dispute as to which family first settled on the disputed land, the recommended approach is to evaluate the facts by recourse to ***FACTS IN RECENT YEARS AS ESTABLISHED BY THE EVIDENCE*** and that, even if traditional evidence fails, it is possible to succeed by relying on the facts in recent years as established by the evidence.

CONFLICT BETWEEN FACTS OF LIVING MEMORY AND TRADITIONAL EVIDENCE

1. ***"FACTS ESTABLISHED BY MATTERS AND EVENTS WITHIN LIVING MEMORY ESPECIALLY EVIDENCE OF ACTS OF OWNERSHIP AND POSSESSION MUST***

TAKE PRECEDENCE OVER MERE TRADITIONAL EVIDENCE."-ADJEI v. ACQUAH [1991] 1 GLR 13

2. A Possible Rationale For This Principle is ESTOPPEL BY CONDUCT

RECENT EVENTS SUPPORTING TRADITIONAL EVIDENCE

"Since the parties had proffered conflicting traditional evidence in support of their respective claims, the law required that, recent events supporting the claim of either party should sway the determination of the dispute. Thus, the evidence of traditional history tested against recent events, relied on by both the Kumasi traditional council and the National House of Chiefs in preferring the defendant's version of the founding of the Krobo Stool, was amply supported by the totality of the evidence on record."-IN RE KROBO STOOL; (NO 1); NYAMEKYE (NO 1) v. OPOKU [2000] SCGLR 347.

GRANT OF LAND TO STRANGERS AND TRADITIONAL EVIDENCE

"IT WAS NOT DISPUTED THAT THE ROOTS OF TITLE OF THE PARTIES WAS FOUNDED ON TRADITIONAL HISTORY, EVENTS DATING AS FAR BACK AS A CONQUEST IN 1690 BY THE LABADIS...OR SETTLEMENT UNDER AN OGBOJO TREE IN 1730 OR THEREABOUTS...THE EVIDENCE OF THE DEFENDANTS WAS BUOYED BY ACTS OF OWNERSHIP LIKE GRANTS OF LANDS TO STRANGERS COVERED BY EXHIBITS...WHILE THESE PER SE WOULD NOT CONFER OWNERSHIP OR TITLE ON THE GRANTORS, THEY WOULD GO A LONG WAY TO BUTTRESS A CLAIM OF TITLE TO THE LAND GRANTED. EVIDENCE OF RECENT ACTS OF OWNERSHIP BY THE PLAINTIFF WAS NIL, OR IF ANY AT ALL, INSIGNIFICANT AND NOT OF ANY WEIGHT..."-AGO SAI AND OTHERS v. NII KPOBI TETTEH TSURU LLL [2010] SCGLR 763.

DEMEANOUR AND IMPRESSIONS IN TESTIMONY AND TRADITIONAL EVIDENCE

Impressions and Demeanor should not be the sole ground for determining issues of traditional evidence-**IN RE TAHYEN & ASSAGO STOOLS; KUMANIN 11(SUBSTITUTED BY) OPPON v. ANIN [1998-99] SCGLR 399.**

CONFLICT BETWEEN TRADITIONAL EVIDENCE AND OCCUPATION

The solution is to weigh both sides to determine which outweighs the other as supported by the evidence on record. See **IN RE KODIE STOOL; ADOWAA v. OSEI [1998-99] SCGLR 23**

In **IN RE KODIE STOOL; ADOWAA v. OSEI [1998-99] SCGLR 23**, the Court held that, conflict between Traditional Evidence and occupation may be resolved ***"BY SIFTING AND WEIGHING THE RESPECTIVE TESTIMONIES TO SEE WHICH OUTWEIGHS THE FEW CLEARLY ESTABLISHED FACTS".***

LONG AND UNDISTURBED POSSESSION

Where the admission of one party established that, the other party had been in long undisturbed possession and occupation of the disputed property, the party making the admission assumed the onus to prove that, such possession was inconsistent with ownership.

The principle is that, such a person in possession and occupation is entitled to the protection of the law against the whole world except the true owner or someone who could prove a better title.

This appears to be the basis for the presumption in **SECTION 48 OF NRCD 323 (PRESUMPTION OF POSSESSION AND OWNERSHIP)** which reads as follows:

"(1) THE THINGS WHICH A PERSON POSSESSES ARE PRESUMED TO BE OWNED BY HIM. (2) A PERSON WHO EXERCISES ACTS OF OWNERSHIP OVER PROPERTY IS PRESUMED TO BE THE OWNER OF IT."

FAILURE OF TRADITIONAL EVIDENCE AND SECTION 48 OF NRCD 323 (PRESUMPTION OF POSSESSION AND OWNERSHIP)

In the event that, a traditional evidence is offered but rejected and the defense of possession and ownership fails, what happens to the plaintiff's case" The answer to this question has is found in **ADWUBENG v. DOMFEH:**

In **ADWUBENG v. DOMFEH**, the Court observed as follows: ***"...AND A PARTY, SUCH AS IN THE INSTANT CASE, COULD STILL SUCCEED IN AN ACTION FOR DECLARATION OF TITLE, EVEN IF HIS TRADITIONAL EVIDENCE HAD BEEN REJECTED."***

PRESUMPTION OF PROBABILITY, BUT REBUTTABLE

"The party whose traditional evidence such as established acts and events support or render more probable must succeed unless there exists, on the record of proceedings, a very cogent reason to the contrary. And the presumption of title raised by acts of possession and ownership appears now as section 48 of the Evidence Decree, 1975 (NRCD 323). It follows from that provision that, a party can succeed in his claim even if his traditional evidence is rejected."- **IN RE TAHYEN & ASSAGO STOOLS; KUMANIN 11 (SUBSTITUTED BY OPPON) v. ANIN [1998-99] SCGLR 399.**

NB:

IN RE ADJANCOTE ACQUISITION; KLU v. AGYEMANG II [1982-83] GLR 852:

Please take note that, the above case contains a summary of most of the principles discussed so far under Traditional Evidence.

THE MOST CURRENT AUTHORITY ON THE EVALUATION OF TRADITIONAL EVIDENCE IN GHANA

CASE:

NENE NARH MATTI & TWO OTHERS; OYORTEY v. TEYE [2017-2018] 1 SCLRG 746

FACTS:

The plaintiff claimed that, the disputed land formed part of their ancestral family heritage. The defendant on the other hand claimed that, the disputed land belonged to his family and that, it was acquired from time immemorial. The defendant relied on reports including **JACKSON REPORT** and two judgments. The Supreme Court found that, none of the plaintiffs and their ancestors was a party to the suits.

HELD:

The Supreme Court held as follows:

"(1) A PARTY WHO RELIES ON ESTOPPEL PER REM JUDICATTAM, MUST PROVE THAT, THE IDENTITY OF THE LAND IN THE PREVIOUS SUIT IN RESPECT OF WHICH JUDGMENT WAS GIVEN IN HIS FAVOUR, IS THE SAME AS (the identity of the land) IN THE SUBSEQUENT SUIT UNDER CONSIDERATION."

"(2) WHERE BOTH PARTIES IN A LAND SUIT RELY ON HISTORICAL EVIDENCE AND THERE IS A CONFLICT IN THE RIVAL CLAIMS, THE BEST WAY TO RESOLVE THE CONFLICT IS TO TEST THE TRADITIONAL EVIDENCE BY REFERENCE TO FACTS IN RECENT YEARS AS ESTABLISHED BY EVIDENCE. THAT IS THE ONLY WAY BY WHICH IT COULD BE ESTABLISHED, WHICH OF THE TWO CONFLICTING PIECES OF EVIDENCE IS MOST PROBABLE."

APPLICATION OF ADJEIBI-KOJO v. BONSIE PRINCIPLE:

This principle has been applied in the following cases:

-IN RE TAAHYEN & ASAAGO STOOLS: KUMAN II v. ANIM

-KWESI YAW v. KWAW ATTA (1961) GLR 513

-ADJEI v. ACQUAH AND ORS.

-DUA III v. TANDOH

-IN RE KODIE STOOL: ADOWAA v. OSEI (1998-99)

-ACHORO & ONOR v. AKANFELA. (1896-97) SCGLR 209

- HLODJIE v.. GEORGE
- IN RE KROBO STOOL; (NO1); NYAMEKYE v.. OPOKU.
- AGO SAI AND OTHERS v. KPOBU TETTEH TSUM III
- NYAMEKYE v. OPOKU(2000) SCGLR 347
- ADWUBENG v. DOMFE (1996-97) SCGLR 66

SAMPLE TUTORIAL QUESTIONS ON TRADITINAL EVIDENCE

QUESTION ONE

In the judgment of Apakye J. on a land case in the High Court, He stated that; "Since the parties have submitted reports on the ownership and possession of the disputed land, I am at the liberty to decide on which version appeals to me. I find the plaintiff's account more convincing. I therefore give judgment in favour of the plaintiff".

Comment on the judgment in the light of the rules on evaluating traditional evidence.

QUESTION TWO

In application for a declaration of title to land, the plaintiff, Nii Kpobi II pleaded that all Ogbojo lands are part of the La Stool lands. To support his claim, the plaintiff recounted how the La ancestors who sojourned from Israel through Benin spiritually entered the land from the sea and chased out and conquered lands, including the disputed Ogbojo lands. On this part, the defendant Nii Sia, who describes himself as Chief of Ogbojo lands, disputed the plaintiff claim and contended that the Ogbojo lands belong to the Anahor and Dzirase Families of Ogbojo and that the lands were founded in 1730 by settlements by his ancestors. The High Court after weighing the evidence by both parties made inter alia the following findings: (a) the Ogbojo village was established by the ancestors of the defendants; (b) that the ancestors of the defendants had over the years exercised

acts of ownership over Ogbojo lands without any obligation by the plaintiff; and (c) that the defendant has granted leases without any objection from the plaintiff or his predecessors. On appeal by the plaintiff, the Court of Appeal reversed and set aside the judgment on the grounds, inter alia that the plaintiff was not stopped by conduct from laying claim to the disputed land and that traditional evidence of conquest as adduced by the plaintiff as roots of title is far superior to that settlement and that in any event 1730 is subsequent to 1690. The defendant has appealed to the Supreme Court.

As a Research Assistant at the Supreme Court, prepare an informed opinion on the guiding principles for evaluating traditional and conflicting evidence.

QUESTION THREE

In an action for declaration of title to land both the plaintiff and Defendant largely supported their respective claims with traditional evidence. At the end of the trial the learned trial delivered a judgment as follows:

"From the evidence on record, both the Plaintiff and the Defendant relied on traditional evidence in proof of their case. Whilst the plaintiff insisted that his ancestors were granted then land as a result of their exploits in a war of conquest, the Defendant insists that the land was discovered by their ancestors who was a renowned hunter on one of his hunting expeditions. I am left in a dilemma as to which of the rival versions of traditional evidence to prefer. I must say that I am most impressed with the manner with which the plaintiff's and their witness related their version and how coherent they were.

The Plaintiff's representatives and their witnesses were very eloquent. Their testimonies were clear and concise. Contracted with this the defendant's representative's testimony was full of inconsistencies, contradictions and weaknesses. He himself admitted that his grand uncle and his uncle in rendering the traditional story to him years before this litigation could not agree whether the hunter who discovered the land was called Kojo Tenten or Kojo Ware. Based on the above I have no choice but to prefer the traditional evidence of the Plaintiff and to reject the version of the Defendants. I am unable to grant their counter-claim for a declaration of title to the land. This is in spite of the clear evidence of ownership and acts of possession in favour of the Defendants. A

part whose traditional evidence is rejected is not entitled to a declaration of title. I must hasten to add that the only documentary evidence which was a pamphlet published by an unknown author but titled "A recording of the folktales of the people of the lower Denkyira" contains stories which support the plaintiff's case. Judgment is therefore given in favour of the plaintiff".

Comment on this judgment in the light of the principles for evaluation of conflicting traditional evidence.

QUESTION **FOUR**

A dispute has arisen between the family of Ntow and Bater over ownership of a 500 acre land in the village of Abe-ase, The Ntow family sued. It is the evidence of Mr. Nkansah, head of family of the Ntow family, that their ancestors migrated from Brong-Ahafo and founded this 500-acre land, about 300 acres of which they have reduced their possession. They have other settler farmers on this land who have been paying yearly tolls to them in recognition of their ownership of this disputed land. The head of the Bater family did not testify but evidence was given by Osafo, who appeared to be in his late nineties for the Bater family. His evidence was that they purchased the disputed land from the ancestors of the Ntow family and have been on this land since the purchase, some 100 years back. He gave evidence of large settlements on this land by other families who had their grant from them. He mentioned schools, a clinic, community centre, all built on land granted by his family in recent times. The next witness for the Bater family, uncle Attah corroborated the evidence of Osafo in every material particular. His cross examination began and the trial was adjourned for continuation the following day. Uncle Attah on the following day came to court alright but refused to be cross examined because the wife who was from Ntow family has threatened to divorce him if he did not dissociate himself from the trial. In the judgment of the trial court, the judge said: "I have examined the evidence of Uncle Attah, and I am of the view his evidence is full of lies. Corroboration is a legal requirement in a case like this and Uncle Attah's evidence cannot be corroborative of Osafo's evidence which, in any case, I find incredible. Worse still for the Bater people, their head of family did not testify? From the foregoing I give judgment to the Ntow family declaring them owners of the 500 acres land. **Discuss the evidential issues in this cases viz-a-viz the judgment of the Court.**

LESSON EIGHTEEN

DOCUMENTARY EVIDENCE

DEFINITION AND SCOPE

In Evidence Law, the term **"DOCUMENT"** connotes writing on paper or its equivalent.

Generally, the term **"DOCUMENT"** imports a paper or set of papers containing an information but can also be extended to information found on other objects like tombstone, barks of tree, rocks, metal objects, etc.

DOCUMENTARY EVIDENCE covers any information in the form of writing on paper, such as affidavit, wills, indenture, written contract.

DOCUMENTARY EVIDENCE is a type of evidence which covers any information in the form of a document, presented to prove or disprove certain allegations at a trial. Thus, any evidence that is, or can be, introduced at a trial in the form of documents, as distinguished from oral testimony, constitutes **DOCUMENTARY EVIDENCE.**

An information in a form of a document can be from a vast number of sources. It can be from diaries, affidavits, wills, indentures, letters, written contracts, newspapers, and any other type of document that one can think about.

The key takeaway is that, **DOCUMENTARY EVIDENCE** is most widely understood to refer to writings on paper (such as an invoice, a contract or a will), but the term can also apply to any media by which information can be preserved, such as photographs; a medium that needs a mechanical device to be viewed, such as a tape recording or film; and a printed form of digital evidence, such as emails or spreadsheets as well as information found on other objects like tombstone, barks of tree, rocks, metal objects etc.

Normally, before **DOCUMENTARY EVIDENCE** is **ADMISSIBLE** as evidence, it must be proved by other evidence from a witness that the document is genuine, called **"LAYING A FOUNDATION".**

DOCUMENTARY EVIDENCE VRS. PHYSICAL EVIDENCE

A piece of evidence is *not* documentary evidence if it is presented for some purpose other than the examination of the contents of the document. For example, if a blood-spattered letter is introduced solely to show that the defendant stabbed the author of the letter from behind as it was being written, then the evidence is physical evidence, not documentary evidence.

However, a film of the murder taking place *would* be documentary evidence (just as a written description of the event from an eyewitness). If the content of that same letter is then introduced to show the motive for the murder, then the evidence would be both physical and documentary.

AUTHENTICATION AND ADMISSIBILITY

There are restrictions and qualifications for using documents at a trial as there is a need to make sure they are authentic and trustworthy.

DOCUMENTARY EVIDENCE is therefore subject to specific forms of **AUTHENTICATION**, usually through the **TESTIMONY** of an **EYE WITNESS** to the execution of the document, or to the testimony of a witness able to identify the **HANDWRITING** of the purported author. Documentary evidence is also subject to the **BEST EVIDENCE RULE**, which requires that, the original document be produced unless there is a good reason not to do so.

THE BEST EVIDENCE RULE AT COMMON LAW

At Common Law, the **Best Evidence Rule** is also described as the **Primary Evidence Rule.** The main objects of this rule or principle are to avoid the risks of fraud, mistake or inaccuracy when interpreting documents or when finding the imports of documents.

The **BEST EVIDENCE RULE** holds that, "***A PARTY RELYING ON THE CONTENTS OF A DOCUMENT SHOULD PRODUCE THE ORIGINAL IF IT IS AVAILABLE.***"

The **BEST EVIDENCE RULE** can also be put as follows:

1. ***A party relying on the contents of a document should adduce primary evidence of that document if it is available.***

2. ***A party relying on the contents of a document is not allowed to tender a copy or duplicate of that document where the original is available.***
3. ***No party before a Court of competent jurisdiction is allowed to rely on the copy of a document where the original is available.***
4. ***To prove the contents of a document, the proponent must produce the original document.***

THE BEST EVIDENCE RULE AT GHANA LAW: SECTION 165 OF NRCD 323

At Ghana law, the **BEST EVIDENCE RULE** has been codified in **SECTION 165** of the **EVIDENCE DECREE, 1975 (NRCD 323).** It states as follows:

"EXCEPT AS OTHERWISE PROVIDED BY THIS DECREE OR ANY OTHER ENACTMENT, NO EVIDENCE OTHER THAN AN ORIGINAL WRITING IS ADMISSIBLE TO PROVE THE CONTENT OF A WRITING".

It therefore follows that, at Ghana law, **DOCUMENTARY EVIDENCE** can, as a general rule, be proved only by the production of the original document itself by virtue of **SECTION 165 of NRCD 323**.

However, there are **SEVERAL EXCEPTIONS** to the **BEST EVIDENCE RULE** under **SECTIONS 166-174** of the same **NRCD 323.**

CATEGORIES OF BEST EVIDENCE OR PRIMARY EVIDENCE AT GHANA LAW

At Ghana Law of Evidence, there are two main categories of what constitutes Best Evidence or Primary Evidence:

1. ***The original.***
2. ***Certain copies or duplicates codified as having the same effect as the original and therefore are as admissible as the original.***

WRITING, AN ORIGINAL WRITING AND DUPLICATE OF A WRITING AT GHANA EVIDENCE LAW

1. WRITING: SECTION 179 OF NRCD 323

WRITING is defined under **Section 179 of NRCD 323** to mean a ***"handwriting, typewriting, photostatting, mechanical or electrical recording, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols or combination thereof."***

2. ORIGINAL WRITING: SECTION 163 OF NRCD 323

The word **"ORIGINAL"** literally means the first product out of which copies or duplicates are made or derived or formulated. **SECTION 163 OF NRCD 323** defines an **ORIGINAL WRITING** as follows:

(1) An **"ORIGINAL"** of a writing is the writing itself or any copy intended to have the same effect by the person or persons executing or issuing it.

(2) An **"ORIGINAL"** of a writing which is a photograph includes the photographic film (including a positive, negative or photographic plate) or any print made therefrom.

(3) If information contained in a writing is stored in a manner not readable by sight, as in a computer or on magnetic tape, any transcription readable by sight and proved to the satisfaction of the Court to accurately reflect the stored information, is an **"ORIGINAL"** of that writing.

3. DUPLICATE OF A WRITING: SECTION 164 OF NRCD 323

A **"DUPLICATE"** of a writing is a copy produced by a technique that ensures an accurate reproduction of the original, and includes a copy produced by the same impression, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, but does not include a copy reproduced after the original by manual handwriting or typing.

EXCEPTIONS TO THE BEST / PRIMARY EVIDENCE RULE: SECTIONS 166-174 OF NRCD 323

Exceptions to best or primary evidence provide alternative principles when deciding on what may constitute best or primary evidence for the purpose of admissibility of original documents. A few exceptions under **SECTION 166-176 OF NRCD 323** are as follows:

1. A duplicate of a writing is admissible to the same extent as an original of that writing, unless-(a) a genuine question is raised as to the authenticity of the original or the duplicate; or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original-**SECTION 166.**
2. Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing if all originals are lost or have been destroyed, unless the loss or destruction resulted from the fraudulent act of the proponent of the evidence-**SECTION 167.**
3. Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing if no original can be obtained by any available judicial procedure or if all persons having control of an original after receiving judicial process compelling production do not produce it-**SECTION 168.**
4. Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing if at a time when an original was under the control of the opponent of the evidence, the opponent was given express or implied notice, by the pleadings or otherwise that, the content of the writing would be a subject of proof at the hearing, and on request at the hearing, he does not produce it. The caveat is under **Section 169 (2):** Though a writing requested by one party is produced by another and is inspected by the party calling for it, the party calling for the writing is not obliged to introduce it as evidence in the action-**SECTION 169.**
5. Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing if the content of the writing is not closely related to a controlling issue in the action-**SECTION 170**.

6. Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing if the originals consist of numerous accounts of other writings which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole. 2) The court may in its discretion require that such accounts or other writings be produced in court or be produced for inspection or copying by any adverse party- **SECTION 171.**
7. Evidence other than an original writing is admissible to the same extent as an original to prove the content of a writing if the original is of such a nature as not to be easily moved- **SECTION 172.**
8. Evidence other than an original of a writing is admissible to the same extent as an original to prove the content of a writing if the contents of the writing have been admitted by the opponent of the evidence in writing or by testimony in the action-**SECTION 173.**
9. A copy of a writing is admissible to the same extent as an original to prove the content of a writing if an original and the copy have been produced at or before the hearing and made available for inspection and comparison by the court, and all adverse parties-**SECTION 174**.
10. **A copy of a writing which is an official copy of the writing and certified as correct and genuine is admissible to the same extent as an original to prove the content of a writing (e.g. Birth certificate, official documents, etc.)-SECTION 175.** See **ORDER 38 RULE 9 OF CI 47** which says that, also ***OFFICIAL DOCUMENTS UNDER SEAL ARE ADMISSIBLE AS ORIGINALS.***
11. **Copies of BANKERS BOOKS and COMPANY LEDGERS are admissible like the originals but must have been made in the course of the regular business and must be certified as correct by relevant official-SECTION 176.**

THE EXTRINSIC OR PAROLE EVIDENCE RULE

The **Parole or Extrinsic Rule** is that, ***"a party to a written document is not permitted to adduce evidence to vary or contradict the terms of that document."***

Extrinsic or Parole Evidence entails adduction of external evidence to influence or change the contents of a document.

It is one of the exclusionary rules by which the court will refuse to admit evidence intended to affect the contents of a document where the parties have duly signed the document.

At Ghana law of evidence, the **EXTRINSIC OR PAROLE EVIDENCE RULE** has been codified in **SECTION 177 (1) OF NRCD 323**. It states as follows:

"Except as otherwise provided by the rules of equity, terms set forth in a writing intended by the party or parties to the writing as a final expression of intention or agreement with respect to such terms as are included in the writing may not be contradicted by evidence of any prior declaration of intention, of any prior agreement or of a contemporaneous oral agreement or declaration of intention, but may be explained or supplemented-

(a) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the intention or agreement, provided that a will and a registered writing conveying immovable property shall be deemed to be a complete and exclusive statement of the terms of the intention or agreement; and

(b) By a course of dealing or usage of trade or by course of performance."

SECTION 177 (3) OF NRCD 323 says that, for the purpose of this section:

(a) "a course of dealing" means a sequence of previous conduct between parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct;

(b) "a usage of trade" means any practice or method of dealing in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question;

(c) "course of performance" means, in respect only of a contract which involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any manner of performance accepted or acquiesced in without objection.

BREAKDOWN / ELEMENTS OF SECTION 177 (1) OF NRCD 323

1. There must be an agreement with terms set forth in writing
2. The terms of the agreement must be intended by the parties as final expression of their intentions.
3. The terms of the agreement cannot be contracted by evidence of prior intention, prior agreement or contemporaneous oral agreement or declaration of intention.

PAROLE EVIDENCE RULE (SECTION 177) VRS. ESTOPPEL BY DEED (SECTION 25 (1))

Section 177 is close in its implication to **Section 25 (1)** which **DEALS WITH ESTOPPEL BY DEED.**

SECTION 25 reads as follows:

(1) *Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the instrument, or their successors in interest.*

(2) *This section does not apply to the recital of consideration.*

FACTS IN DOCUMENTARY EVIDENCE: SECTION 25:

"Except otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the instrument, or their successors in interest."

COMMENTS:

By Section 25, evidence cannot be admitted to contradict the terms of a document (let's say a contract) which parties have agreed to embody in that document. Any fact that is stated in a document especially an agreement (contract of any type) is **CONCLUSIVELY** presumed to be true as between the parties. It means you should be careful in signing agreements, especially those prepared by people sitting by the roadside and under trees. You must study the contents very well before you sign. If you do not have time let a trusted person do it for you. Documents are presumed to be conclusive **"AS BETWEEN THE PARTIES"**. That is, if you are not a signatory to the document, then the conclusive presumption will not adversely affect you. The principle is akin to **estoppel by deed.**

In **AFRICAN DISTRIBUTORS COMPANY LIMITED v. CEPS [2011] 2 SCGLR 955, the Supreme Court per WOOD (MRS), CJ** applied Section 25 (1) by its ruling that, the plaintiff company was bound by the contents of a written agreement which had raised conclusive presumption against it.

PAROLE EVIDENCE VRS. ESTOPPEL BY DEED

1. Parole evidence has more or less same meaning as estoppel by deed.
2. The implication of both sections is this: a party who signs a document is conclusively bound by its contents.

EXCEPTIONS TO SECTION 177 (1) OF NRCD 323

There are five exceptions which must be observed in the application of parole evidence rule (and by implication the rule on estoppel by deed). They are:

1. **Where the agreement is partly oral and partly written or one containing nebulous or ambiguous terms or expressions**
2. **Ex post facto agreements, (especially one which results in annulling the original contract or replaces it).**

3. **Where there are consistent additional terms necessary to convey full import of the agreement**
4. **Where parole evidence is admissible to explain trade usages or trade practices existing between the parties.**
5. **Where the agreement was entered into by fraud, undue influence or duress, evidence allowing application of equitable principles to rectify the situation may be admissible.**

ILLITERACY AND PROOF OF DOCUMENTS

When illiterates execute documents, the issue which arises is whether or not they sufficiently understand and appreciate the meaning and import of their contents for them to be bound by it.

Take note that, ***ILLITRATES USUALLY EXECUTE DOCUMENTS BY THUMB PRINTING OR BY SIGNING THEM.***

Generally and at Common Law, the rule is that, ***"a party of full age and understanding is normally bound by his signature to a document, whether he reads the document or not."***

This was the position of the Court in the case of **L'ESTRANGE v. GRAUCOB LIMITED [1934] 2 KB 394, CA.** In that case, a general rule was established that, ***"where a document containing contractual terms is signed, in the absence of fraud or misrepresentation, the party signing it is bound by its terms and it is wholly immaterial whether he read the document or not."***

However, the Ghanaian law position has taken a different footing and given legislative backing in **SECTION 4** of the **ILLITERATES' PROTECTION ORDINANCE (CAP 262).**

SECTION 4 OF CAP 262 makes it compulsory for anyone who prepares any document for an illiterate person to sign;

1. ***Read the content of the document to the illiterate person***
2. ***Explain the content to him,***
3. ***Interpret it to him in a language that he understands***
4. ***Make sure he understands it.***

The person who has prepared the document must do all these things before the illiterate person signs the document. Failure to do all these things means the illiterate person can **plead non est factum** to absolve himself from liability. To prove that, one has complied with all these, you must place the **JURAT** at the end of the document.

DEFENCES

Defenses often raised by illiterates are:

1. **NON EST FACTUM:**

REQUIREMENTS FOR THE DEFENSE OF NON EST FACTUM TO APPLY

a)Where a party's signature has been procured by the fraud of another party.

b) Where the other party's fraud was such that, it induced the other party to believe that, the nature and content of the document were fundamentally and radically different from what they actual were or the document signed is fundamentally and radically different from the document he thought he was signing.

c) Where the party who has signed the document is not guilty of negligence or carelessness in signing the document.

See **SAUNDERS v. ANGLIA BUILDING SOCIETY (a.k.a. GALLIE v. LEE)** ***[1970] AC 1004-***

See also **MOUGANIE v. YEMOH (1977)**

2. **NEMO CONTRA FACTUM SUUM PROPRIO VENIRE POTEST**

NB: In the case of **S.A.T. TRADING COMPANY v. ARYEE**, the Court held that, ***"Illiteracy per se is no defence".***

PRINCIPLE ON ILLITERATE EXECUTION OF DOCUMENTS

1. The principle for resolving issues raised by illiterate's execution of documents was laid down in **WAYA v. BYROUTHY (1958) 3 W.A.L.R. 413**. In that case, the Court held

that, ***"Where an illiterate thumb prints or signs a document, the person who seeks to bind the illiterate to the document has to lead evidence to show that, the document. was explained and interpreted to him in the language he understands before he signed or thumb printed it."***

2. See also **ZABRAMA v. SEGBEDZI (1991) 2 GLR 221 (CA):**

CORAM: AMPIAH JA, KPEGAH JA, ADJABENG JA

FACTS:

The plaintiff, an illiterate, brought an action against the defendant to redeem a house he alleged he had pledged to the defendant nine years earlier for the sum of ¢200. The defendant however denied that claim. His defence was that the plaintiff sold the house to him for the stated amount. In support of his case, he tendered exhibit A, the document they had executed to evidence the sale. The defendant's evidence was corroborated by the letter-writer who wrote exhibit A for the parties. He testified that he interpreted the document in the Twi language to the plaintiff before the parties executed it. The odikro of the town also testified that when the parties, in accordance with the practice in their traditional area, sought his consent to their transaction he had the document interpreted to them and their witnesses and it was only after the plaintiff had affirmed the sale to him and his elders that he gave his consent to the transaction.

The trial judge accordingly dismissed the plaintiff's action. Aggrieved by that decision, the plaintiff appealed on the grounds, inter alia, that "the judge misdirected himself and gave an erroneous decision." Furthermore, he failed to consider the fact that since exhibit A contained no interpretation clause showing that the contents were read over and interpreted to him in a language he understood and he appreciated what was read before he made his mark on it, the document offended the Illiterates' Protection Ordinance, Cap. 262 (1951 Rev.).

HELD (DISMISSING THE APPEAL):

(1) to state in a notice of appeal, as did the appellant's counsel, that ***"the trial judge misdirected himself and gave an erroneous decision"*** without specifying how he misdirected himself, was against the rules and rendered such a ground of appeal inadmissible. The implications of rule 8 (2) and (4) of the Court of Appeal Rules, 1962 (L.I. 218) was that, an appellant after specifying the part of a judgment or order complained of, must state what he alleged ought to have been found

by the trial judge, or what error he had made in point of law. It did not meet the requirement of those rules to simply allege "misdirection" on the part of the trial judge. The requirement was that the ground stated in the notice of appeal must clearly and concisely indicate in what manner the trial judge misdirected himself either on the law or on the facts. The rationale was that, a person who was brought to an appellate forum to maintain or defend a verdict or decision which he had got in his favor should understand on what ground it was being impugned. Therefore, as the ground of appeal alleging the misdirection failed to meet the required standard, it was clearly inadmissible.

(2) The principle was firmly established by a stream of decided cases that where an illiterate executed a document which compromised his interest and that document was being cited against him by a party to it or his privy, there was no presumption in favour of the proponent of the document, and against the illiterate person, that the latter appreciated and had an intelligent knowledge of the contents of the document. The party seeking to rely on the document must lead evidence in proof that the document was actually read and interpreted to the illiterate who understood it before signing same. Being a question of fact, the presence or otherwise of an interpretation clause on a document was one of the factors a court should take into account in determining whether the document in question was fully understood by the illiterate. The presence of an interpretation clause in a document was not conclusive of that fact, neither was it a sine qua non. It was still possible for an illiterate to lead evidence outside the document to show that despite the said interpretation clause, he was not made fully aware of the contents of the document to which he made his mark. If a court, after assessing all the available evidence was satisfied, upon the preponderance of the evidence, that the document was read and interpreted to the illiterate person, then the burden of proof would have been discharged by the person relying on the document. That was because just as it was bad to hold an illiterate to a bargain he would otherwise not have entered into if he fully appreciated it, so also was it equally bad to permit a person to avoid a bargain properly and voluntarily entered into by him under the guise of illiteracy. In the instant case, although there was no interpretation clause on exhibit A, there was sufficient evidence on record to justify a finding of fact that the document was read over and dutifully interpreted to the plaintiff before he made his mark. **STATE v. BOAHENE [1963] G:L.R. 554** applied.

ILLITERATE PROTECTION ORDINANCE (CAP 262), SECTION 4

Seeks to offer maximum protection for the illiterate who executes a document by these terms:

1. **"Every person writing a letter or other document for or at the request of an illiterate person, whether gratuitously or for reward, shall clearly and correctly read over and explain such letter or document or cause the same to be read over and explained to the illiterate person; cause the illiterate person to write his signature or make his mark at the foot of the letter or other document.**
2. **Clearly write his full name and address on the letter or other document as the writer thereof; and**
3. **State on the letter or other document the nature and amount of the reward, if any, charged or taken or to be charged or taken by him for writing the letter or other document and shall give receipt."**

REQUISITES FOR APPLICATION OF SECTION 4 OF CAP 262

The writer of the document (pro bono or for a fee) must

1. **Read over and explain to the illiterate or cause the document to be read over and explained to him.**
2. **Cause the illiterate person to write or make his mark at the foot of the document.**
3. **Clearly write a JURAT on the document.**
4. **State the charge for writing the document**
5. **JURAT-statement on the face of a document testifying that the content of the document has been read and interpreted to the illiterate in the language he understands and he appeared to perfectly understand the contents of the document.**

AIDS TO INTERPRETATION

Two of the exceptions clearly affect the interpretation to be given to documents. These are

1. Where the document is nebulous, unclear or ambiguous and therefore need to be interpreted. The evidence to aid the interpretation will surely be extrinsic to the original document; and
2. 2. Where evidence is required to explain trade usage or trade practice, the evidence to be led in aid of that interpretation will be extrinsic evidence or evidence extraneous to the original evidence.

REGISTRATION OF DOCUMENT

1. Sometimes the validity of a document will be dependent on whether or not the document has been registered.
2. In such situations, the admissibility based on relevance (under **Section 51**) should be considered differently from the validity of the document (which may raise issues of **Evaluation**)

PAROLE EVIDENCE

Where the parties have formally recorded the whole of their agreement in writing, the written document is prima facie taken to be the whole contract. The terms are therefore limited to the contents of the written document and nothing more. Extrinsic evidence will not be admitted to add to, vary or contradict the terms of the written agreement by **evidence of prior intention, or prior agreement or contemporaneous oral agreement or declaration of intention.**

EXCEPTIONS TO PAROLE EVIDENCE

1. It may be admissible to establish or prove the existence of a collateral contract
2. It may be admissible to establish the existence of a vitiating factor example mistake, duress, undue influence, fraud.
3. It may be admissible to establish the plea of non est factum (this is not my deed).

4. It may be admissible to prove the existence of a custom or trade usage, which should apply to the contract.

5. It may also be admissible to show that the operation of the entire contract had been suspended until the occurrence of some event.

LESSON NINETEEN

ESTOPPEL: INFERRED FROM SECTION 24 (2) OF NRCD 323

DEFINITION AND SCOPE

PHIPSON defines estoppel as ***"The rule whereby a party is precluded from denying the existence of some state of facts which he had formerly or earlier asserted"***

Estoppel is a common law rule by which a person is prevented or "estopped" from denying what he has previously accepted or assented to.

The law of equity, or fairness, has developed several estoppel doctrines to deal with situations people find themselves in when one person relies upon another person's conduct or words. The doctrines are estoppel by conduct or representation, estoppel by deed, promissory estoppel, and proprietary estoppel

There are many different types of estoppel which can arise, but the common thread between them is that, a person is restrained from asserting a particular position in law where it would be inequitable to do so. By way of illustration:

a) If a landlord promises the tenant that he will not exercise his right to terminate a lease, and relying upon that promise the tenant spends money improving the premises, the doctrine of ***promissory estoppel*** may prevent the landlord from exercising a right to terminate, even though his promise might not otherwise have been legally binding as a contract. The landlord is precluded from asserting a specific *right*.

b) If a person brings legal proceedings in one country claiming that a second person negligently injured them and the courts of that country determine that there was no negligence, then under the doctrine of ***issue estoppel*** the first person will not normally be able to argue before the courts of another country that the second person was negligent (whether in respect of the same claim or a related claim). The first person is precluded from asserting a specific ***claim***.

Estoppel is an equitable doctrine. Accordingly, any person wishing to assert an estoppel must normally come to the court with."**clean hands**".

SOURCE (S) OF ESTOPPEL

Estoppel is not one of the main Sections in the Evidence Decree, 1975 (NRCD 323). This implies that, estoppel is not covered as one of the main topics like presumptions or privileges in the NRCD 323. It is however inferred from **SECTION 24 (2) OF NRCD 323** which says that, the NRCD 323 provides instances of conclusive presumption in **SECTIONS 25 TO 29**.

RATIONALE (S) FOR ESTOPPEL

There are two main rationales for the rules of estoppel and these are as follows:

1. **RULE OF FAIRNESS**: It is not right or fair for a person to be made to endure twice for the same action or omission.
2. **MATTER OF PUBLIC POLICY**: This comes up in two senses, namely
    a) That, a person should be made to stand by his or her word or conduct; and
    b) That, in the interest of society as a whole, litigation must come to an end as expressed in the Latin maxim of: "**INTEREST REIPUBLICAE UT SIT FINIS LITIUM".**

THE BASIS OF ESTOPELL IN COURT PROCEEDINGS

1. In Court proceedings, Estoppel is rationalized on the principle that, ***"WHERE A MATTER HAS BEEN DISPOSED OF BY A COURT OF COMPETENT JURISDICTION, THE SAME MATTER SHOULD NOT BE ALLOWED TO BE OPENED UP AND RE-LITIGATED."*** The objects of this principle are as follows: (a) ***To avoid waste of time; (b) To save resources (of the Court / society).***
2. Also, in Court proceedings, estoppel is further rationalized on the basis of the public policy that, ***"NO ONE SHOULD BE SUED OR PUNISHED TWICE FOR THE SAME CAUSE OR MATTER AS EXPRESSED IN THE LATIN MAXIM OF NEMO DEBET BIS VEXARI PRO EODEM CAUSA."*** This public policy has the same objectives of the necessity: ***(a) To save time and (b) To save resources (of the Court / Society).***

ESTOPPEL VRS. SUBSTANTIVE LAW

Estoppel and Substantive Law are similar but not the same. The differences are as follows:

1. Estoppel as a shield, not a sword. See **QUIST v. GEORGE.**
2. Estoppel cannot defeat substantive law or statute: **TUFFOUR v. ATTORNEY GENERAL [1980] GLR 637.**
3. Substantive Law is not pleaded, but estoppel has to be pleaded: See also **SIISI v. BOATENG AND ANOTHER (2014)**: ***"It was settled rule of pleading that the defence of* estoppel per rem judicatam *should be specifically pleaded where there were pleadings; and where there were no pleadings, it must be raised by word of mouth at the earliest possible stage of the proceedings."*** See also **SASU v. AMUA SAKYI.**
4. Estoppel operates only in two topics in Criminal Law (Substantive Law): **AUTREFOIS CONVICT AND AUTREFOIS ACQUIT** but estoppel is wide in civil proceedings.

STATUTORY PROVISIONS ON ESTOPPEL

1. 1992 Constitution.
2. The Evidence Decree 1975 (NRCD 323).

- **Section 24 (2):** ***"Conclusive Presumptions include but are not limited to those provided in Sections 25 to 29".***
- **Section 25:** ***"Deals With Estoppel On Written Documents"***
- **Section 26:** ***"Deals With Estoppel By Own Statement Or Conduct"***
- **Section 27:** ***"Deals With Estoppel Of A Tenant Denying Title Of The Landlord"***
- **Section 28:** ***"Estoppel Of Licencee Denying Title Of Licensor"***
- **Section 29:** ***"Estoppel Of Bailee And Agent And Authority Of The Bailor Or Bailor"***

3. The Criminal and Other Offences, 1960 (Act 29)

TYPES OF ESTOPPEL

1. ESTOPPEL PER REM JUDICATAM / RES JUDICATA
2. ESTOPPEL BY CONDUCT
3. ESTOPPEL BY DEED
4. SUBSIDIARIES:
   - PROMISSORY ESTOPPEL
   - ESTOPPEL IN PAIS
   - EQUITABLE ESTOPPEL
   - RESULTING TRUST
   - ESTOPPEL BY ELECTION
   - PRINCIPLE OF **HENDERSON v. HENDERSON (1843):** ***A party may not raise any claim in subsequent litigation which they ought properly to have raised in a previous action.***

ESTOPPEL PER REM JUDICATAM / RES JUDICATA

Estoppel per rem judicatam / Res Judicata Estoppel operates on the principle that, ***"A final adjudication of a legal dispute is conclusive as between the parties to the litigation and their privies as to the matters necessarily determined, and the conclusions cannot be challenged in subsequent litigation between them."***

Estoppel per rem judicatam (and by conduct) prevents a person from reopening questions that are *res judicata* (i.e. that have been adjudicated upon by a Court of competent jurisdiction).

As a plea, estoppel per rem judicatam operates as a bar to a subsequent litigation and as evidence; it is conclusive between the parties to it. The plea applies where a Court has given a final decision on the matter like deciding that, it has no jurisdiction to entertain a matter and there is no appeal against it over the suit.

The application of the doctrine of ***"estoppel per rem judicatam"*** is based on the four conditions which must exist cumulatively for the plea to be successful. The conditions are as follows:

1. **The parties must be the same in the earlier action as in the second action;**
2. **The issue or subject-matter must be the same in the earlier action as in the second action;**
3. **The judgment or decision in the earlier action must be a final one; and**
4. **The Court which adjudicated upon the earlier suit must possess the requisite jurisdiction over the suit.**

For basic understanding of **RES JUDICATA**, refer to **AMISSAH JA** in **FOLI v. AGYA ATTA (1976) 1 GLR 194, CA:** HELD (dismissing the appeal) as follows:

(1) it was a rule of law that a person could not bring an action where the cause of his claim or the issue which he sought to have determined had as between the parties or their privies already been disposed of by a competent court. This rule covered not only matters which were actually dealt with in the previous judgment but those as well which ought to have been brought up then but which were not. Dicta of Wigram V.-C. in Henderson v. Henderson (1843) cited.

(2) An unconditional withdrawal of an action without liberty to bring a fresh suit raised an estoppel. Discontinuing an action either without leave or with leave but unconditionally where the rules required that leave be sought and conditions obtained might be construed as tantamount to an admission that the case brought was without foundation. A discontinuance was the voluntary act of the plaintiff or prosecutor and his act had to be judged within the context of the rules prevailing. It was not necessarily the case where the action was dismissed for want of prosecution or even after hearing.

(3) A dismissal of a suit for mere want of prosecution could not found res judicata. Thus in actions which were dismissed by the court instead of being voluntarily withdrawn, the point of time at which the dismissal occurred did not itself determine the question of estoppel. With regard to actions dismissed after a hearing or trial, the legal position was whether anything could be said to have been decided, so as to conclude the parties, beyond the actual fact of the dismissal. If the dismissal necessarily involved a determination of any particular issue or question of fact or law, then the dismissal would be an adjudication on that question or issue; if otherwise, the dismissal

would decide nothing, except that the party had been refused the relief which he sought. In the circumstances of the instant case, the dismissal of the reliefs claimed was a mere refusal of reliefs and was by no means intended to conclude any matter giving rise to those reliefs. Consequently the plaintiff was not precluded per rem judicatam from bringing the present action. In any case after the 1957 decision, upon the invitation to attorn tenant and the refusal of the defendants to do so, the plaintiff acquired a cause of action by which he could ask for the present reliefs. Pople v. Evans [1968] 2 All E.R. 743 applied.

TYPES OF ESTOPPEL PER REM JUDICATAM / RES JUDICATA

There are two types of Estoppel per rem judicatam and these are (a) **CAUSE OF ACTION ESTOPPEL** AND (b) **ISSUE ESTOPPEL**

The distinction was spelt out in the case of **IN RE ASERE STOOL 2005-2006] SCGLR 637 (HOLDING 3) as follows:**

"Estoppel per rem judicatam is a generic term which in modern law, includes two species. The first species is called "cause of action estoppel", which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, ie. Judgment given on it, it is said to be merged in the judgment, the Latin phrase being transit in rem judicatam. If it was determined not to exist, the unsuccessful party can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of public policy expressed in the Latin maxim nemo debet bis vexari pro uno et eadem causa, meaning literally, that no man ought to be twice put to trouble, if it appears to the court that it is for one and the same cause. The second specie is called "issue estoppel" which is an extension of the same rule of public policy. This will arise where apart from cases in which the same cause of action or the same plea in defense is raised, there may be cases in which a party may be held to be estopped from raising particular issues, if those issues are precisely the same as the issues which have been previously raised and have been the subject of adjudication."

A classic authority on judgment **per rem judcatam** is **IN RE SEKYEDUMASE STOOL AFFAIRS; NYAME V KESSE ALIAS KONTO 1998-99] SCGLR 476**. That case expanded the concept of the pela of **res judicata** by this statement (in holding 1):

"Furthermore, the plea of res judicata encompasses three types of estoppel: cause of action estoppel, issue estoppel in the strict sense and issue estoppel in the wider sense. Cause of action estoppel should properly be confined to cases where the cause of action and the parties (or their privies) are the same in both current and previous proceedings. In contrast, issue estoppel arises where such a defense is not available because the causes of action are not the same in both proceedings. Instead they operate where issues, whether factual or legal , have either already been determined in previous proceedings between the parties (issue estoppel in the strict sense) or where issues should have been litigated in previous proceedings but owing to negligence, inadvertence or even accident, they weren't brought before the court (issue estoppel in the wider sense)."

POLICY FRAMEWORKS UNDER WHICH ESTOPPEL PER REM JUDICATAM / RES JUDICATA OPERATES

The policy frameworks under which estoppel per rem judicatam / res judicata operates were considered in the case of **CONCA ENGINEERING v. MOSES [1984-86] 2 GLR 319 (HOLDING 1)**

(1) ***"The plea of res judicata was based on two policy grounds, first, that it was in the public interest that there should be an end to litigation and secondly, that nobody should be vexed twice on the same matter. In view of the repetitive and sometimes harassing nature of litigation in Ghana, a rule of law which sought to avoid that, was one of abiding value. But in a sense, the principle of estoppel conferred mixed blessings. It has been described as odious because it prevented a suitor from relating the truth. It was thus a rule of exclusion making evidence in proof or disproof of a relevant fact inadmissible."***

See also **ABABIO v. KANGAH (1932) 1 WACA 253** applied in **BLEWUDZI v. DOTSI [1979] GLR A73 AT P 176**

CAUSE OF ACTION ESTOPPEL

This is a specie of res judicata and is related to estoppel by record. This arises where the orders or judgments made in previous legal proceedings prevent the parties from relitigating the same issues or causes of action. It affects the subject matter like tort or contract.

The principle is that, ***no one may sue twice for the same cause of action***.

For instance, in **POKU v. FRIMPONG [1972] GLR 230, CA**, the original judgments relied on were described as creating cause of action estoppel because they both related to land (in contradistinction to say tort). In this type of estoppel, the parties and the cause of action in both the current and previous suits should be the same or identical.

See **IN RE SEKYEDUMASI STOOL [1998-99] SCG: R 476. IN COBBLAH V OKRAKU [1961] GLR (PT 11) 679**, it was held that, estoppel **per rem judicatam** could not be pleaded because the land in the present suit was not identical with the land in the previous suit. If the claim in the previous suit is not same as the claim in the present suit, no estoppel arises.

In **EX PARTE NII AMAR [1975] 2 GLR 122**, it was held (in holding 3) that the Nii Koi Lai family was neither a party nor privy to the parties in the previous dispute and therefore the judgment in that dispute could not be used as estoppel against that family.

Cause of action estoppel is binding on the parties and their privies. The privies may be determined by blood such as ancestor and heir, by title such has between vendor and purchaser, or in an action concerning trust property, between the trustee and beneficiary.

ISSUE ESTOPPEL

Issue estoppel is a species of res judicata. It applies where an **issue** in a cause of action was decided in a previous action. Issue estoppel affects the issue or question to be decided in the case (both legal and factual). Within one cause of action, there may be several issues to be decided.

This refers to estoppel raised by the question decided by the court. Where the subject matters in the current and previous cases and the parties are the same but the issues to be tried in the current suit differ from those tried in the previous suit, there can be no estoppel.

Three conditions for invoking issue estoppel are that:

1. **The same issue must have been decided in the earlier case;**
2. **The judicial decision in the earlier case must have been final; and**

3.The parties in the current case must be the same parties in the earlier case or their privies.

In issue estoppel, ***causes of action need not be the same in both suits. However, the issue must be the same in both suits and must have already been decided (limited sense) or ought to have been decided (broad sense) but were not decided due to inadvertence, forgetfulness,*** etc. See **REPUBLIC v. HIGH COURT ACCRA; EX PARTE HESSE [2007-8] SCGLR 1230 (HOLDING 5)**. Also, in issue estoppel, the parties must be the same.

There must be a finding that is fundamental to the outcome of the decision, so fundamental that if a different conclusion had been reached on the **issue**, the outcome would have been different.

In **R v. HOGAN,** Justice Hogan offered this concise statement of law pertaining to the legal definition of issue estoppel: ***"ISSUE ESTOPPEL CAN BE SAID TO EXIST WHEN THERE IS A JUDICIAL ESTABLISHMENT OF A PROPOSITION OF LAW OR FACT BETWEEN PARTIES TO EARLIER LITIGATION AND WHEN THE SAME QUESTION ARISES IN LATER LITIGATION BETWEEN THE SAME PARTIES. IN THE LATER LITIGATION THE ESTABLISHED PROPOSITION IS TREATED AS CONCLUSIVE BETWEEN THOSE SAME PARTIES."***

The underlying notion of issue estoppel is to prohibit one party to previous litigation from putting a concluded issue, finally determined therein, into contention again in newly instituted proceedings taken against the same opponent before the same, or another, tribunal having jurisdiction to adjudicate and determine that issue anew.

In **DS v. SILOUND**, ***Diplock J.*** observed that, "In English law, when a plaintiff, who, basing his claim on a particular set of facts, has already sued the defendant to final judgment in a foreign court of competent jurisdiction and lost, then seeks to enforce a cause of action in an English court against the same defendant based on the same set of facts, the defendant's remedy against such double jeopardy is provided by the doctrine of issue estoppel.

For principles underlying cause of action estoppel; and issue estoppel, see the following cases:

1. **EASTERN ALLOYS COMPANY LIMITED v. SILVER STAR AUTO COMPANY LIMITED (H-2)**
2. **SASU v. AMUA SAKYI [2003-2004] 2 SCGLR742, 769.**

ESTOPPEL BY RECORD

This is another specie of res judicata and has to do with previous proceedings.

The principle is that, ***"A final adjudication of a legal dispute is conclusive as between the parties to the litigation and their privies as to the matters necessarily determined, and the conclusions cannot be challenged in subsequent litigation between them."***

There are two (2) underlying bases for Estoppel by Record:

a) **INTEREST REI PUBLICAE UT SIT LITIUM:** ***"In The Interest Of Society As A Whole, Litigation Must Come To An End."***

b) **NEMO DEBET BIS VEXARI PRO EADEM CAUSA**: ***"No One Should Be Sued Or Punished Twice For The Same Cause Or Matter."***

See **CONCA ENGINEERING v. MOSES [1984-86] 2 GLR 319 (HOLDINGS 1 AND 2)**

(1) ***"The plea of res judicata was based on two policy grounds, first, that it was in the public interest that there should be an end to litigation and secondly, that nobody should be vexed twice on the same matter. In view of the repetitive and sometimes harassing nature of litigation in Ghana, a rule of law which sought to avoid that, was one of abiding value. But in a sense, the principle of estoppel conferred mixed blessings. It has been described as odious because it prevented a suitor from relating the truth. It was thus a rule of exclusion making evidence in proof or disproof of a relevant fact inadmissible."***

(2) ***"Ordinarily the plea of res judicata or estoppel by record was available only after the issue had been determined in a contested action in which both parties had been heard. But it had been held to apply even in cases where the decision had been reached in default of pleading or appearance by either of the parties..."***

ESTOPPEL BY CONDUCT

Section 26 of NRCD 323 enacts the common law rule of estoppel by conduct. The rule is that, ***"where by your conduct you permit a person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successor in interest and such relying person or his successors in interest."***

Estoppel by conduct (or *in pais*) arises when the party estopped has made a statement or has led the other party to believe in a certain fact.

The locus classicus for the meaning of Estoppel by Conduct can be found in **PICKARD v. SEARS (1837)** and **SSB v. AGYARKWA [1992].**

CONSIDERATIONS FOR ESTOPPEL BY CONDUCT AT COMMON LAW AND UNDER NRCD 323

The applicability of Estoppel by Conduct is based on the principle of equity and there are three considerations:

1. **BY AGREEMENT**

Where parties bind themselves to the contents of agreement – they are bound by that agreement- or are estopped from denying the contents of the agreement. This creates **ESTOPPEL BY DEED**: under **SECTION 25 OF NRCD 323** which states that, ***"facts recited in a written document are conclusively presumed to be true as between the parties to the instrument or their successors in interest".*** Examples are landlord / tenant (**SECTION 27**); licensor / licensee (**SECTION 28**) (right to possession); Bailor / bailee (SECTION 29); (agent / principal) etc. The presumptions here are all subject to claims of a person with better title to possession or ownership. The fallout from the principle is **LACHES**

2. **BY REPRESENTATION (WORDS, ACTIONS OR OMISSIONS)**

Inducing a person to believe in a situation or fact by reason of the representation made by a person through his words, actions or omissions, and subject to the victim believing and acting on the belief. The fallout from this principle is **ACQUIESCENCE.**

3. BY NEGLIGENCE

Where a person by his deliberate negligence induces another to believe in a state of facts and act on that belief to his detriment, that person will be estopped from denying the deduction from his conduct which formed the bases of that belief.

The point is that, the three conditions apply to present facts, not future representation. **Secondly** the person must owe duty of care to the promise. **Thirdly**, the representation must yield legal results.

At Ghana law, all three conditions of agreement, representation and negligence are said to be subsumed under **SECTION 26 OF NRCD 323.** The applicability of Estoppel by Conduct in Ghana is therefore based on **SECTION 26 OF THE EVIDENCE DECREE, 1975 (NRCD 323)**. It states as follows:

"EXCEPT AS OTHERWISE PROVIDED BY LAW, INCLUDING A RULE OF EQUITY, WHEN A PARTY HAS, BY THAT PARTY'S OWN STATEMENT, ACT OR OMISSION INTENTIONALLY AND DELIBERATELY CAUSED ANOTHER PERSON TO BELIEVE A THING TO BE TRUE AND TO ACT ON THAT BVELIEF, THE TRUTH OF THAT THING SHALL BE CONCLUSIVELY PRESUMED AGAINST THAT PARTY OR HIS SUCCESSORS IN INTEREST IN ANY PROCEEDINGS BETWEEN THAT PARTY OR SUCCESSORS IN INTEREST AND SUCH RELYING PERSON OR SUCCESSORS IN INTEREST."

Estoppel by Conduct was applied in the following cases:

a) **DUPAUL WOOD PROCESSING TREATMENT (GH) LIMITED v. WINDWORTH HOLDINGS (PROPERTY)**

b) **EASTERN ALLOYS COMPANY LIMITED v. SILVER STAR AUTO LIMITED**

c) **AFFUAH & ANOTHER v. GENERAL DEVELOPMENTS COMPANY LIMITED [2017-2018] 1 SCLRG 619**

d) **REPUBLIC v. ADAMAH-THOMPSON; EX PARTE AHINAKWA II [2013-2014] SCGLR 1396**

e) **KANKAM v. BUACHIE III:** Predecessors in title of both parties had a boundary dispute. They had the boundary inspected and fixed and signified their acceptance. Their successors in title were held to be estopped from challenging the boundary.

f) **ASIA v. AYEDUVOR [1987-88] 1 GLR 175**: A person who sold house as owner not allowed to give evidence that, the house belonged to his son.

g) **ELLIOT v. KING:** A testator was in possession of property in her life time. He devised these to the plaintiff and defendants. The defendants took possession of the property devised to them. Later they sought to interfere with the plaintiff's enjoyment of that devised to him on grounds that same was family property. It was held that by their conduct, they had accepted that the testator had power to devise.

Estoppel by conduct is usually more conveniently discussed under some sub-headings such as ***LACHES, ACQUIESCENCE, ESTOPPEL BY REPRESENTATION, ESTOPPEL BY AGREEMENT (DEED), AND ESTOPPEL BY NEGLIGENCE.***

LACHES

This is a long and unreasonable neglect in asserting ones right. See **BOATENG v. NTIM (1961) 2 GLR 671 @674:**

In **BOATENG v. NTIM (1961),** the Court held, for estoppel by laches to apply, the following three (3) conditions must be proved,

a. ***That, the party pleading or relying upon it bona fide believed that, he had good title to the land when in fact he had none;***

b. ***That, the person sought to be estopped had knowledge of the error on the part of the person pleading the estoppel;***

c. ***That, the party pleading it had fraudulently been led by the silence or active encouragement of the person sought to be estopped, to spend money to improve the property or in respect of the property.***

All these elements must be present before a party will succeed. What is your take on **KWAKU v. SERWAH [1993-94] GLR 429**?

ACQUIESCENCE

It is also a variant of estoppel by conduct. It arises where property is being alienated or developed but real owner does nothing or stands by and later turns round to assert claim to it.

The conditions for the application of estoppel by acquiescence were set out in **NII BOI v. ADU [1964] GLR 410, SC. (HOLDING 2) PER OLLENNU JSC.** The Court held in Holding 2 as follows:

"To establish acquiescence under equity and customary law, five conditions must be satisfied: (1) the person who enters upon another's land must have done so in honest but erroneous belief that he has the right to do so; (2) he should have spent money in developing the land; (3) the actual owner must be aware of this person's entry upon the land and (4) his mistaken belief which is inconsistent with his ownership; and 54) finally he should have fraudulently encouraged his development of the land by not calling his attention to the error. In this case, the defendant was warned when he was fencing the land in question. Moreover there was no evidence of capital having been expended to develop the disputed land. The learned judge was therefore wrong in coming to a conclusion on acquiescence."

The five conditions for estoppel by acquiescence according to **OLLENNU** JSC. in **NII BOI v. ADU [1964]** are summarized as bellow:

- **ENTRY ON LAND**
- **ERRONEOUS BELIEF**
- **SPENT MONEY IN DEVELOPING IT**
- **ACTUAL OWNER AWARE OF ENTRY**
- **OWNER'S INACTION.** See **LARTEY v. HAUSA [1961]** ***(conduct must be fraudulent)***

REPRESENTATION

Where a party makes a representation of existing fact by word or conduct with the intention, actual or presumed of inducing another to act on the faith of that representation and alter his or her position to his or her detriment, the representor is estopped from denying the facts as represented.

AGREEMENT / DEED

Situations where rules of evidence prevent a litigant from denying the truth of what was said or done. Estoppel by deed prevents a person who has executed a deed from saying that the facts stated in the deed are not true.

OTHER IMPORTANT CNCEPTS

1. **JUDGMENT ESTOPPEL**

The importance of the doctrine of res judicata to the proper administration of justice is well established. This is because, it enables a judgment to terminate not only the suit in progress but also the dispute which gave rise to the suit. Again, it frees the arties from the fear, burden and expense of repetitious litigation. Almost alone, it distinguishes judicial decisions from mere advisory opinions and endows them with the respect and significance which they command.

For judgment estoppel to be called into action, it should satisfy the following conditions:

a) **The judgment should be delivered by a Court of competent jurisdiction.**

b) **It should be conclusive or final and not pending conclusion.** See **REPUBLIC v. HIGH COURT, ACCRA (COMMERCIAL DIVISION); EX PARTE HESSE [2007-2008] SCGLR 1230.** See also **AGBESHIE v. AMORKOR [2009] SCGLR 594.**

c) **Parties in the current case should be the same as parties in the previous case or should be the privies of the present case.**

d) **Judgment in a criminal case in which the accused was convicted is admissible in Court proceedings.** See **SECTION 127 OF NRCD 323.**

The following may not form basis of judgment estoppel:

a) **Judgment of Lower Courts?**
b) **Default Judgment**
c) **Withdrawn Judgment**
d) **Judgment struck out**
e) **Judgment obtained by deceit, fraud or collusion.**

QUESTION: (Examinable)

WILL A DEFAULT JUDGMENT SUFFICE AS A VALID GROUND FOR ESTOPPEL?

a) **LARYEA v. OFORIWAH (1984-1986) 2 GLR 410:** ***"There was no doubt that a default judgment was capable of giving rise to an estoppel but it should always be critically examined and scrutinized with extreme particularity for the purpose of ascertaining the bare essence of what it must necessarily have decided."*** per **ABBAN JA.**

b) **NEW BRUNSWICK RAILWAY COMPANY v. BROITISH AND FRECN TRUST CORPORATION LIMITED (1939):** ***"An estoppel based on a default judgment must be very carefully limited" per*** **LORD MAUGHAM**

c) **KOK HOONG v. LEON CHEONG KWENG MINES LIMITED (1964):** ***"...a judgment by default speaks of nothing but the fact that, a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious and indeed grave danger in permitting such a judgment to preclude the arties from ever re-opening before the Court on another occasion". Per*** **LORD RADCLIFFE**

d) **CONCA ENGINEERING (GHANA) LIMITED v. MOSES (1984-1986) 2 GLR 319.** Per **APALOO CJ.**

HELD, allowing the Appeal (HOLDINGS 1 AND 2)

(1) The plea of res judicata was based on two policy grounds, first, that it was in the public interest that there should be an end to litigation and secondly, that nobody should be vexed twice on the same matter. In view of the repetitive and sometimes harassing nature of litigation in Ghana, a rule of law which sought to avoid that, was one of abiding value. But in a sense, the principle of estoppel conferred mixed blessings. It has been described as

odious because it prevented a suitor from relating the truth. It was thus a rule of exclusion making evidence in proof or disproof of a relevant fact inadmissible.

(2) Ordinarily the plea of res judicata or estoppel by record was available only after the issue had been determined in a contested action in which both parties had been heard. But it had been held to apply even in cases where the decision had been reached in default of pleading or appearance by either of the parties. However, in recent times judges had sought to limit the binding efficacy of estoppel in default judgments. Thus in the New Brunswick case ([1939] A.C. 1, H.L.) it was stated that an estoppel based on default judgment must be carefully limited. The true principle in such a case would seem to be that the defendant was estopped from setting up in a subsequent action a defence which was necessarily and with complete precision decided in the previous judgment. Again in the **KOK HOONG CASE ([1964]** 1 All E.R. 300, P.C.) the court held of a defaulting judgment as speaking of nothing but that a defendant for unascertained reasons, negligence, ignorance or indifference, had suffered judgment to go against him in the particular suit in question. There was obvious danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion whatever issues could be discerned as having been involved in the judgment so obtained by default. **NEW BRUNSWICK RAILWAY CO. v. BRITISH & FRENCH TRUST CORP. LTD. [1939]** A.C. 1 at 21, H.L. and **KOK HOONG v. LEONG CHEONG KWENG MINES LTD. [1964]** 1 All E.R. 300 at 305, P.C. applied. Fosu v. Kramo [1965] G.L.R. 629 cited.

2. EQUITABLE PRINCIPLE OF ADVANCEMENT

The equitable principle of **ADVANCEMENT** is a presumption in trust, contract and family law, which suggests that, property transferred from a parent to a child or a spouse to a spouse is a gift and would defeat any presumption of resulting trust. Historically, the presumption of advancement has been applied in two situations: A) **Where the transferor is a husband and the transferee is a wife. B) Where the transferor is a father and the transferee is a child.**

The presumption of advancement is based on the concept that, where a property is transferred to a person to whom the transferor has an obligation to support, it is presumed to be an

ADVANCEMENT of the interest the dependent might reasonably expect to receive on the death of the transferor. The presumption of advancement can therefore be rebutted by **EVIDENCE** that, no gift was intended.

Usually, this is between husband and wife, father and child or a person to whom the purchaser stands in **LOCO PARENTIS** **(a person stands in loco parentis to a child if that person has assumed the duty of providing for the child in life-it is a question of fact though). The presumption of advancement does not arise when a wife buys a property and puts it in the name of the husband, in such a case, the husband holds it as a trustee for the wife. Also, it cannot be raised in favor of a woman with whom a man is cohabitating without any marriage at all (mistress).**

CASES:

a) **BENNET v. BENNET.** The court held that, where a father buys a property in the name of his child, prima facie, it is a gift to the child and the presumption of advancement arises.

b) **CRABB v. CRABB (1834):** HELD: it is well-established law that there is a presumption of advancement in the case of a voluntary conveyance by a parent to a child which presumption however is rebuttable

c) **QUIST v. GEORGE (1974):** In 1959, the plaintiff, the then legal owner of a piece of land, conveyed by a deed of gift the legal and beneficial interests in the land to her daughter, the lawful wife of the defendant, a private medical practitioner. The defendant later built on the land that belongs to the wife. The court held that, the house does not belong to him. **HELD: The deed of gift executed by the plaintiff in favor of the daughter could not be construed as a trust deed made in favor of the defendant because it clearly transferred both the legal estate and beneficial interest in the land to the daughter and the fact that the defendant later built thereon could not raise a presumption of resulting trust or advancement in his favor**

d) **ASANTEWAA v. ANSONG (1992):** The law is settled that, where a father acquired property in the name of a child, it creates a presumption of advancement in favor of the child. That presumption is however rebuttable by evidence showing either that there was no present intention to benefit the child. Since the deceased had made a gift of the house

to the defendant, he lacked the legal capacity to devise the property in his last will, and consequently, the devise was null and void.

3) **PRINCIPLE OF HEDERSON v. HENDERSON (1843)-ABUSE OF JUDICIAL PROCESS**

The principle of abuse of judicial process is also referred to as the principle in **HENDERSON v. HENDERSON (1843).**

a) **The principle is based on the fact that, parties should present their cases in full at first instance.**
b) **Parties should not be allowed to litigate piecemeal.**
c) **The principle also require that, issues obvious from the facts should be raised to be adjudicated upon.**
d) **It is based in the same principle of rei publicae ut sit finis litium.**
e) **The principle may not apply where new facts, hidden facts, fraud or impersonation are raised and successfully proved as defence to the principle.**

The principle is based on the principle that, the facts known to parties should be laid fully before the trial Court and issues arising from known facts should be raised in the first litigation so as to give the Court the chance to fully adjudicate on the facts and the issues.

Where issues are apparent from the facts, it is incumbent on the parties to raise the issues so that, they will be determined once and for all a party who fails to raise such issue will be estopped in subsequent suit by the principle. See **EASTERN ALLOYS COMPANY LIMITED v. SILVER STAR AUTO LIMITED [2017-2018] 1 SCLRG 329.**

In **EASTERN ALLOYS COMPANY LIMITED v. SILVER STAR AUTO LIMITED [2017-2018]**, the Court held (In Holding 1) as follows: ***"Where a matter was the subject of litigation in a court of competent jurisdiction the parties were required to put forward any arguments, claims, or defences which they could have put forward for a decision on the first occasion, so that all aspects of the dispute might be finally decided once and for all."***

FACTS:

Case settled by consent judgment at pretrial stage. Respondent subsequently filed a counterclaim which could have been raised at the time of the litigation resulting in the consent judgment. The SC held that the filing of the counterclaim amounted to abuse of process. SC held further that, the consent judgment entered by the Court at the pretrial stage had the same binding effect as if it was a judgment after a full trial.

ESTOPPEL IN CRIMINAL TRIALS

Applies in only two situations.

1. **DOUBLE JEOPARDY; 1992 CONSTITUTION**

ARTICLE 19 (7): ***"No person who shows that he had been tried by a competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for the offence, except on the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."***

2. **AUTREFOIS ACQUIT / AUTREFOIS CONVICT**

Applicable where party tried and convicted or tried and acquitted. Offence to be the same or substantially the same.

PRINCIPLE OF FEEDING THE ESTOPPEL

Originates from the principle of **NEMO DAT QUOD NON HABET**. The grantor granting land in which he has no title. Thus, automatically, grantee acquires no title. However, if later title is acquired, benefit of acquisition enures automatically to grantee, not grantor. Founded in English case of **CUBERTSON v. IRVIN (1859)**, applied in cases like **RAJAPASKE v. FERNANDO [1920]** and **SERWAH v. ADJEN II [1992] 1 GLR 296, CA**

EQUITABLE DOCTRINE OF PROMISSORY ESTOPPEL

The Equitable Doctrine of Promissory Estoppel holds that, ***"whenever there is a legal relationship or a contractual relationship between two or more parties and one party clearly indicates either by words or conduct that, he or she does not intend to insist on his strict legal rights under that legal relationship and the other party relies on that representation and thereby changes his or her position, then the party whose words or conduct has been relied upon will not be permitted to change his or her mind if it will be unfair on the other party to permit the change of mind".***

Thus, equity will sometimes enforce a promise even in the absence of consideration to support the promise especially when the doctrine of promissory estoppel applies. **To this end and as a matter of legal principle, consideration is not required at all where the equitable doctrine of promissory estoppel applies to an existing agreement or contract.**

APPLICATION OF THE DOCTRINE:

The Equitable Doctrine of Promissory Estoppel was initially developed to deal with variation or modification agreements in the case of leases and was first applied in 1877. One of the earliest cases in which the principle was applied is the case of **HUGHES v. METROPOLITAN RAILWAY COMPANY (1877).** The principle was further applied in a number of cases involving leases and was ultimately confirmed in the renowned case of **CENTRAL LONDON PROPERTY TRUST v. HIGH TREES HOUSE LIMITED ((1947)-THE HIGH TREES CASE.**

THE ELEMENTS OF THE DOCTRINE:

1. ***There must be an existing contractual relationship between the parties.***

CASES:

a) **THE HIGH TREES CASE (1947),**
b) **TOOL METAL MANUFACTURING COMPANY v. TUNGSTEN ELECTRIC COMPANY (1955)**
c) **COMBE v. COMBE (1961),**
d) **DJAYI v. R.T. BRISCOE (NIGERIA LIMITED**

2. ***There must be a clear and unambiguous promise by one party (the promisor) not to insist on enforcing his strict legal rights.***

CASES:

a) **HUGHES v. METROPOLITAN RAILWAY COMPANY (1877)**

b) **WOODHOUSE v. NEGERIAN PRODUCT COMPANY LIMITED (1972)**

3. ***There must be an intention that, the promise made by one party (promisor) should be relied upon by the other party (promisee).***

CASES

a) **HUGHES v. METROPOLITAN RAILWAY COMPANY (1877).**

b) **IBM WORLD TRADE CORPORATION v. HASNEM ENTERPRISE LIMITED**

c) **W. J. ALAN & COMPANY LIMITED v. EL NASR EXPORT AND IMPORT COMPANY (1972).**

4. **There must be unfairness if the promisor is permitted to change his promise.**

CASE:

In **D & C BUILDERS v. REES (1966),** it was held for the claimants. Mrs. Rees could not rely on estoppel to pay less as there was no existing agreement to accept less.

EFFECTS / QUALIFICATIONS OF THE DOCTRINE:

1. ***It operates only to suspend and not to wholly extinguish the promisee's obligations or the promisor's legal rights.***

The case of **HUGHES v. METROPOLITAN RAILWAY COMPANY (1877)** suggests that, the contractual right was only suspended for the duration of the war only.

In **TOOL METAL MANUFACTURING COMPANY v. TUNGSTEN ELECTRIC COMPANY (1955),** the House of Lords held that, TMM could not enforce the compensation payments during the war years but could enforce them on termination of the war.

2. ***It only operates if it would be inequitable for the promisor to go back on his promise and insist on his strict legal rights under the contract.***

In **D & C BUILDERS v. REES (1966), it was held for the claimants.** Mrs. Rees could not rely on estoppel to pay less as there was no existing agreement to accept less.

3. ***The doctrine does not create entirely new rights where none existed before, there must be an existing contractual relationship.***

See **COMBE v. COMBE (1961).** In that case, Lord Denning noted *that, "the principle in the High Trees Case does not create a new cause of action where none existed before, stating further that, the principle of promissory estoppel could be used as a shield and not as a sword."*

NB: The Ghanaian courts have taken a bold step further in **TSEDE and OTHERS v. NUBUASA and ANOTHER** than Lord Denning was prepared to go in **COMBE v. COMBE**. In **TSEDE and OTHERS v. NUBUASA and ANOTHER,** one C.N. was in the employment of the plaintiffs. He owed a debt in the course of his employment. When he was asked to settle the debt, he took the plaintiff to his relatives (the defendants). The defendants promised to pay the debt on behalf of their relative C.N. within one week. They caused a note, exhibit B to be prepared in favor of the plaintiffs to that effect. They were unable to settle the full amount (debt). The plaintiffs sued for the balance. It was considered on their behalf that, there was no consideration for their promise to pay the debt and therefore the contract was not enforceable. The court per **PREMPEH J.** however held that, even though on the face of Exhibit B, there was no consideration for the promise to pay, consideration need not always be express; it could be implied from the circumstances of a particular case. The court held further that, an agreement to forbear from instituting legal proceedings to enforce a legal or equitable right is sufficient consideration for a promise to pay a debt already incurred. Such an agreement to forbear could be implied from the facts of the case and the plaintiffs were therefore entitled to succeed.

According to **DATE-BAH S.K. (1969) TSEDE v. NUBUASA: A WELCOME INROAD INTO THE DOCTRINE OF CONSIDERATION VOL. VI NO. 1 UGLJ 60-63,** the decision in **TSEDE v. NUBUASA brings the Ghanaian law near to making the principle of promissory estoppel a "SWORD and not a MERE SHIELD".**

LESSON TWENTY

PRESUMPTIONS: SECTIONS 18-50 OF NRCD 323

DEFINITION OF PRESUMPTION

SECTION 18 (1): **"A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action."**

COMMENTS:

In ordinary words, we may say that, a presumption is a legal assumption that, a fact exists based on the fact that, some other fact or group of facts are known or are proven to exist. A presumption thus defined has two clear ingredients:

(a) **A fact or group of facts ought to be proved, admitted or otherwise established by the Court (Basic / Primary Fact)**

(b) **This fact or group of facts should be among those selected by law to be capable of precipitating a presumption.**

Once these ingredients have, in law, been established, mandatorily, the Court ought to presume that, certain consequential facts, although unproven have been established (either **conclusively or rebuttably**). This is the **"PRESUMED FACT".** What you are assuming may not be true but the law says you should assume legally that, it is true.

Presumptions are devices that the Courts use to make pronouncements on an issue (s) notwithstanding the fact that, there is no evidence or sufficient evidence on the issue (s).

For example, if a person cannot be traced or heard of for a period of **seven (7) years,** it is legally assumed that, the said person is dead. For example, no one can legally assume that, the musician called Castro is dead until **seven (7)** years after his disappearance. In the above example, the group of facts that will be made available to the Court are:

a) ***A man called Castro visited Ada about seven (7) years ago (7 years for the purposes of our studies).***
b) ***He got missing whilst riding in a boat close to the estuary.***
c) ***Searches were made throughout the years.***

d) It is over seven (7) years since he got missing.

From the above group of facts, the Court will make a presumption of death. You will agree with me that, no one saw Castro drowning. No one saw or can tell what actually happened. No dead body was seen. The law says under **SECTION 33 OF NRCD 323** that, after **seven (7)** years, if a missing person is not heard of or traced, it should be assumed that, he is dead.

We have several presumptions. In some jurisdictions, if a man and woman sleeps in a room overnight, the presumption is that, they had sex. The basic or primary facts that will be needed here are that,

a) There was a man and a woman and

b) They slept in the same room overnight.

DEFINITION OF INFERENCE

SECTION 18 (2): "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."

COMMENTS:

An inference is a deduction of fact that may be logically and reasonably drawn from another fact or group of facts. Please, bear in mind that, the fact or group of facts from which the presumption is being assumed and the inference is being made must all be facts adduced before the court as evidence. It is from these pieces of facts adduced as evidence that presumption and inference are made. Whilst presumption is a legal assumption (or based on law), inference is based on logic.

TYPES / CLASSIFICATIONS OF PRESUMPTIONS: SECTION 18 (3) OF NRCD 323

Traditionally, the common law classified presumptions into two:

1. ***PRESUMPTIONS OF FACT; and***
2. ***PRESUMPTIONS OF LAW.***

Presumptions of law were further subdivided into two:

1. ***REBUTTABLE PRESUMPTIONS; and***
2. ***IRREBUTTABLE (CONCLUSIVE) PRESUMPTIONS.***

The **Evidence Decree, 1975 (NRCD 323)** attempts to avoid the common law classification of presumptions into presumptions of fact and presumptions of law. It just classifies them into two;

1) ***CONCLUSIVE PRESUMPTIONS; and***
2) ***REBUTTABLE PRESUMPTIONS.***

This is provided for under **SECTION 18 (3) OF THE NRCD 323** which simply states that, ***"A PRESUMPTION IS EITHER CONCLUSIVE OR REBUTTABLE."***

APPLICATION OF PRESUMPTION IN CRIMINAL CASES: SECTION 22 OF NRCD 323

SECTION 22: "In a criminal action, a presumption operates against the accused as to a fact which is essential to guilt only if the existence of the basic facts that give rise to the presumption are found or otherwise established beyond a reasonable doubt, and thereupon, in the case of a rebuttable presumption, the accused need only raise a reasonable doubt as to the existence of the presumed fact."

COMMENTS:

In a criminal matter, the standard to examine the existence of the basic facts before declaring it to be a presumption against the accused person is **BEYOND REASONABLE DOUBT** unlike **SECTION 21 (d)** which talks about **BALANCE OF PROBABILITIES.** Using our Castro example, the Court looking at all the listed existing facts like:

(a) ***Castro visited Ada more than 7 years ago***
(b) ***He got missing whilst riding in a boat near the estuary (the estuary is where the river actually enters the sea and is very rough and turbulent underneath)***
(c) ***Throughout the over 7 years, diligent efforts have been made to trace him without success.***
(d) ***It is a notorious fact that, people occasionally get drowned near the estuary and sometimes never seen again;***

The Court will consider the above group of facts and be sure of the existence of death before declaring it as a presumption.

In a criminal matter, the Court should be sure ***BEYOND REASONABLE DOUBT*** that, the listed basic facts point to death before declaring it as a presumption. However under **SECTION 21 (d)** and in all other cases, the Court can declare the presumption based on the balance of probabilities.

THE PROCEDURE FOR THE APPLICATION OF PRESUMPTIONS IN CRIMINAL CASES TRIED BY THE JURY: SECTION 23

In a criminal action tried by a jury:

(a) the Court shall not direct the jury to find a presumed fact against the accused if that fact is essential to guilt, unless on all the evidence, a reasonable mind could have no reasonable doubt either as to the existence of the basic facts that give rise to the presumption or as to the existence of the presumed fact;

(b) when the presumed fact is essential to guilt, the Court may submit the question of the existence of the presumed fact to the jury, if, but only if, on all the evidence, a reasonable mind could find both the existence of the basic facts that give rise to the presumption and the existence of the presumed fact beyond a reasonable doubt;

(c) when the presumed fact is not essential to guilt, the question of the existence of the presumed fact may be submitted to the jury if the basic facts that give rise to the presumption are established or otherwise supported by evidence sufficient to meet the burden of producing evidence;

(d) whenever the jury is asked to determine the existence of a presumed fact against the accused if that fact is essential to guilt, the Court shall instruct the jury that, they shall find against the existence of the presumed fact unless they find both the existence of the basic facts that give rise to the presumption and the existence of the presumed fact beyond a reasonable doubt.

COMMENTS:

In a jury trial, all questions of law are decided by the judge. So the judge will look at the basic facts and direct the jury. For example, in the Castro example, the judge after considering all the basic facts may direct the jury that, the law assumes that, the man Castro is dead. The jury will have to follow this legal determination by the judge.

SECTION 23 (a) says that, if a reasonable mind will agree that, the presumption is doubtful, the judge in a jury trial shall not direct the jury to find the existence of the fact against the accused where the fact is essential to guilt. Some facts are not essential to guilt. Facts that are essential to guilt are facts which can contribute to the establishment of an element of the offence. That is to say that, if the presumed fact is doubtful, the judge shall not direct the jury to believe that fact. In the Castro example, if there are doubts that, he is dead, the judge shall direct the jury not to accept that he is dead.

SECTION 23 (b) says that, if the presumed fact points to the existence of the presumption beyond reasonable doubt, the judge shall direct the jury to believe in its existence. That is, if the fact is essential to the determination of guilt. In the Castro example, if the basic facts point to the fact that, he is dead beyond reasonable doubt, the judge shall direct the jury to believe that, he is dead.

SECTION 23 (c) says that, if the presumed fact is ***NOT ESSENTIAL TO GUILT*** and the basic facts are sufficient to meet the burden of producing evidence, the existence of the presumed fact MAY be submitted to the jury. That is, if it is not an essential fact, the judge has a discretion to submit or not to submit the existence of the presumed fact to the jury.

SECTION 23 (d) says that, where the presumed fact is ***ESSENTIAL TO GUILT*** and the basic facts leading to the existence of the presumption is not beyond reasonable doubt, the judge shall not direct the jury to find against the accused.

EXPLANATION IN DETAIL OF CLASSIFICATIONS OF PRESUMPTION

Please take note that, we will treat conclusive resumptions first before rebuttable presumptions even though in NRCD 323, Sections for rebuttable comes ahead of conclusive.

1. CONCLUSIVE PRESUMPTIONS: SECTION 24 OF NRCD 323

Conclusive Presumptions are also known as ***Irrebuttable Presumptions***. A **Conclusive Presumption** is one that cannot be contradicted and no evidence in rebuttal can be admitted by the trial Court.

Here, once the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, no evidence contrary to the conclusively presumed fact may be considered by the tribunal of fact. Put differently, once the law presumes the fact to exist, it is conclusive and cannot be proved otherwise. Even in the face of available evidence to the contrary, you cannot change the presumption. Examples include: ***facts in a documentary evidence (Section 25), estoppel by own statement or by conduct (Section 26), estoppel of licensee / tenant to deny the title of licensor / landlord (Section 27 and 28), estoppel of bailee, agent etc.***

These are common law rules that have been codified in **NRCD 323, SECTION 24 (1)** as follows: ***"Where the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, no evidence contrary to the conclusively presumed fact may be considered by the tribunal of fact..."***

REQUIREMENT FOR THE APPLICATION CONCLUSIVE PRESUMPTION / SECTION 24 (1) OF THE NRCD 323

The **BASIC CONDITION** for the **APPLICATION OF SECTION 24 (1)** is that, the Court must find the presumed fact to exist before it will prevent the adduction of evidence in rebuttal of the presumed fact. See **IN RE SUHYEN STOOL; WIREDU & OBENWAA v. AGYEI & OTHERS (2005-2006) SCGLR 424**

In **IN RE SUHYEN STOOL; WIREDU & OBENWAA v. AGYEI & OTHERS (2005-2006) SCGLR 424 (IN HOLDING 4),** this principle was re-stated as follows: **"The predicate condition stipulated in the first part of Section 24 (1) of NRCD 323, *namely the basic facts that had arguably given rise to a conclusive presumption must first be found or otherwise***

established before the application of the legal effect or consequences of conclusive presumption, i.e. the disallowance of contrary evidence."

INSTANCES OF CONCLUSIVE PRESUMPTIONS: SECTIONS 25-29 OF NRCD 323

SECTION 24 (2) says that, the NRCD 323 provides instances of conclusive presumption in **SECTIONS 25-29 OF THE DECREE**. The list is not exhaustive. Prima facie, the Sections refer to basic rules of Estoppel:

> *(a)* **FACTS IN DOCUMENTARY EVIDENCE: SECTION 25:** ***"Except otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the instrument, or their successors in interest."***
>
> **COMMENTS:**

By **SECTION 25**, evidence cannot be admitted to contradict the terms of a document (let's say a contract) which parties have agreed to embody in that document. Any fact that is stated in a document especially an agreement (contract of any type) is ***CONCLUSIVELY PRESUMED TO BE TRUE AS BETWEEN THE PARTIES***. It means you should be careful in signing agreements, especially those prepared by people sitting by the roadside and under trees. You must study the contents very well before you sign. If you do not have time let a trusted person do it for you. Documents are presumed to be conclusive **"AS BETWEEN THE PARTIES".** That is, if you are not a signatory to the document, then the conclusive presumption will not adversely affect you. The principle is akin or similar to **ESTOPPEL BY DEED.**

In **AFRICAN DISTRIBUTORS COMPANY LIMITED v. CEPS [2011] 2 SCGLR 955,** the Supreme Court per **WOOD (MRS), CJ** applied **SECTION 25 (1)** by its ruling that, ***"the plaintiff company was bound by the contents of a written agreement which had raised conclusive presumption against it."***

> *(b)* **ESTOPPEL BY OWN STATEMENT OR BY CONDUCT: SECTION 26**: ***"Where a party has by his own statement, act or omission, intentionally and deliberately caused***

or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest"

COMMENTS

If you say or do anything to give the impression to others to believe the existence of a fact to be true and they take steps to act on the fact or impression that you made them to believe, your statement will be conclusively presumed against you. Simply put, do not make or do things to make people act on those things, the law will hold you accountable for your own words and or actions. Be very cautious when saying or doing an act that will convey a message to people to act on same. It will be conclusively presumed against you.

(c) **ESTOPPEL OF LICENSEE OR TENANT TO DENY TITLE OF LICENSOR OR LANDLORD – SECTIONS 27 & 28:** The two Sections deal with the common law rule that, a licensee or a tenant who challenges the title of his licensor or his landlord forfeits his interest in the property which is the subject matter of the dispute, including his right to occupation of the property.

COMMENTS:

A licensee is a person allowed to stay on a property free of charge and can be asked to vacate the premises at any time. The person who gives the property out to the licensee is the licensor. At times, the licensee may not be given the property but he goes to occupy it on his own, especially uncompleted properties in Ghana.

If you agree that, a person is your landlord (usually in a tenancy agreement), then you are conclusively presumed to have admitted that fact that, he is the owner of the land. For example, if your parents leave you property and one of your siblings should request you to sign a document as if you are a tenant and you sign knowingly, the fact that you are not a co-owner will be conclusively presumed against you. The moment you acknowledge a person as your landlord, you cannot challenge his ownership of the property as between the two of you. A typical example in Ghana is where you rent a room and after living in the house for some time, you tend to recognize another

person as the better landlord. Let say the tenancy agreement is between you and the wife's husband and after a while, there is a marital controversy between the man and wife. You the tenant take sides with the woman and henceforth want to acknowledge the wife as your landlady instead of the man that you signed the tenancy agreement with. The conclusive presumption is that, you ***cannot deny the title of your landlord.*** The moment you challenge the title of your landlord, you forfeit your tenancy interest in the property.

There are some tenants, especially those who have absentee landlords, after being in possession of the property as tenants for a long period of time, they tend to take steps to assume ownership of the land in a bid to deny their landlord's title to the land. Many children of absentee cocoa farmers face this situation that, after the death of their father, the caretakers will attempt to manipulate the vacuum to take ownership of the land.

The meaning and exact connotation of **SECTIONS 27 AND 28 OF NRCD 323** were stated in **ANTIE & ADJUWAH v. OGBO [2005-2006] SCGLR 494** as follows (in holding 6):

> ***"The common law rule as to forfeiture by a licensee or tenant who challenges the title of his licensor or landlord has received statutory recognition under Sections 27 and 28 of NRCD 323. The law is that, a licensee or tenant who denies the title of his licensor or landlord, either by claiming that title to the subject matter is vested in himself or herself or someone else forfeits his or her interest."***

As stated by Brobbey, the rationale for the two rules is that, the relationships of licensor-licensee or landlord and tenant raise presumption of ownership in favor of the licensor against the licensee or in favor of the landlord against the tenant. In that case, it was held that, in view of the plaintiff's direct challenge to the defendant's lawful claim to ownership, he forfeited his right to remain in the disputed premises.

(d)**ESTOPPEL OF BAILEE, AGENT OR LICENSEE: SECTION 29:** Bailee, agent or licensee usually act on behalf of the landlord (principal). Just like the situations in 27 and 28 above, they occasionally want to use their position and long dealings as well as familiarity with the property to assume ownership.

COMMENTS:

The principles stated under **SECTIONS 27 AND 28** apply to property held by a bailee, agent or licensor. The title of the bailor, principal or licensee is conclusively presumed. If the bailee, agent or licensee denies the title of the bailor, principal or licensor, he forfeits his right to the property, unless the bailee, agent or licensee can prove that he wa s compelled to deliver the property to a person who is better entitled to it than the bailor, principal or licensor.

2. REBUTTABLE / INCONCLUSIVE PRESUMPTION: SECTIONS 19 AND

A ***Rebuttable Presumption*** is also known as ***Inconclusive Presumption.*** ***This is a presumption that is based on the principle that, the conclusion from a set of facts can be made unless evidence is led to the contrary. The implication is that, the presumption can be replaced by evidence.***

A ***Rebuttable Presumption*** is therefore an inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence. Here, you can lead evidence to prove the contrary. The presumption in this case is therefore said to be a **prima facie presumption** of the existence of the presumed fact. See **SECTION 19 OF NRCD 323** for the meaning of **PRIMA FACIE EVIDENCE.**

PRIMA FACIE EVIDENCE: SECTION 19 OF NRCD 323

"An enactment providing that a fact or group of facts is prima facie evidence of another fact creates a rebuttable presumption."

COMMENTS:

Prima facie means **"on the face of it".** If the law says the presumed facts are prima facie, then it means the presumed facts can be rebutted. The party against whom it operates must adduce evidence to prove its non-existence. Put differently, if the presumption operates against you adversely, then you can lead evidence to show otherwise (rebut it).

EXAMPLE: ***"A host who feeds 100 guests with sausages may be believed if he claims that, he had access to a lot of pork – sausages can be made from pork but if evidence is led to show that,***

some of the sausages in question were made of meat, the assumed fact may be proved false. That is why the statement is said to be prima facie true – because, it can be rebutted by evidence."

EFFECT OF REBUTTABLE PRESUMPTIONS: SECTION 20

"A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact."
See **GPHA v. NOVA COMPLEX LIMITED [2007-2008] 2 SCGLR 806.**

COMMENTS:

A rebuttable presumption places a dual burden on the party against whom it operates, i.e. the ***burden of producing evidence*** as well as ***the burden of persuading the tribunal*** of the non-existence of the presumption.

Rebuttable presumptions may therefore be categorized into two:

a) ***Evidential Presumptions or***
b) ***Persuasive Presumptions.***

Evidential Presumptions are a subdivision of rebuttable presumptions. They denote a conclusion that must be drawn by the fact finder on proof of the basic fact of the presumption in the absence of any evidence to the contrary.

Persuasive Presumptions denote a conclusion that must be drawn by the fact finder on proof of the basic fact of the presumption unless and until the conclusion is disproved by the party it operates against.

These presumptions accordingly operate to place a legal, as opposed to an evidential burden on the party challenging the presumed fact.

If the factfinder is left in doubt at the conclusion of all the evidence, this legal burden will be decisive. E.g. Presumption of legitimacy.

In the case of **GPHA v. NOVA COMPLEX LIMITED [2007-2008] 2 SCGLR 806.**, the Court describes rebuttable presumptions as "***conditional, inconclusive and disputable presumptions***". That case ruled further that: ***"The presumption has prima facie effect only and the presumed***

facts may therefore be replaced by evidence. A rebuttable presumption, in the language of section 20 of NRCD 323 'imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact'."

PROCEDURE IN APPLYING REBUTTABLE PRESUMPTIONS: SECTION 21 OF NRCD 323

In the application of rebuttable presumptions, the **standard of proof** is the preponderance of probabilities. That is to say that, if evidence is led to challenge a rebuttable presumption, the standard of proof is that, both sides will be weighed equally.

As stated in **Section 20**, in cases of rebuttable presumption, the burden of persuasion shall be on the party against whom the presumption operates to produce evidence of its non-existence. Once the law presumes the existence of a fact, for example, that Castro is dead after the **seven (7)** years, the burden of persuasion is on the person challenging that, he is not dead to lead evidence to rebut the said presumption. See **SECTION 21 OF NRCD 323**.

SECTION 21 (a) OF NRCD 323:

In an action where proof by a preponderance of the probabilities is required:

(a): "A rebuttable presumption requires the tribunal of fact to assume the existence of the presumed fact unless and until the party against whom the presumption operates proves that the non-existence of the presumed fact is more probable than its existence".

COMMENTS:

SECTION 21 (a) says that, the tribunal of fact or the Court will hold the belief that, the presumed fact exists and as such the truth, until the party who is challenging it adduces evidence to prove its non-existence. For example, death after seven (7) years is a rebuttable presumption. So if the group of basic facts leads to the presumption that, the person is dead, the Court shall hold that belief till such time that, evidence is adduced to rebut the assumption that, the person is dead. We say it is proved that, the non-existence of the presumed fact is more probable than its existence.

SECTION 21 (b) OF NRCD 323

(b): "when no evidence is introduced contrary to the existence of the presumed fact, the question of the existence of the presumed fact depends upon the existence of the basic facts that give rise to the presumption and is determined as follows:

(i) if reasonable minds would necessarily agree that, the evidence renders the existence of the basic facts more probable than not, the court shall find, or direct the jury to find, in favor of the existence of the presumed fact

(ii) if reasonable minds would necessarily agree that the evidence does not render the existence of the basic facts more probable than not, the court shall find, or direct the jury to find, against the existence of the presumed fact, or

(iii) if reasonable minds would not necessarily agree as to whether the evidence renders the existence of the basic facts more probable than not, the court shall find, or submit the matter to the jury with an instruction that it shall find, in favour of the existence of the presumed fact if it finds from the evidence that the existence of the basic facts is more probable than not, but otherwise, it shall find against the existence of the presumed fact."

COMMENTS

SECTION 21 (b) says that, the law says that, if no evidence is adduced to counter the presumed fact, the Court will look at the basic facts that led to the presumption. For example in the Castro case, if after seven years, he is presumed dead and no one leads evidence to rebut the existence of the said presumption, the Court will on its own take a critical examination of the following basic facts that gave rise to the presumption:

(a) Castro visited Ada

(b) Got missing whilst riding in a boat close to the estuary

(c) Continuous searches were made

(d) No trace of him whatsoever

(e) It is of judicial notice that, several people get drowned near the water close to the estuary and they are never found.

All the above basic facts giving rise to the presumption will be analyzed by the Court. The method of the analysis shall be as follows:

(i) If reasonable minds after considering the basic facts would agree and conclude that, its existence is more probable than its non-existence, then the Court shall find in favor of the existence of the presumed facts. With the example, if reasonable minds looking at all the circumstances of Castro's case would agree that, the fact that he is dead is more probable than that he is not dead, then the Court will conclude that, he is dead.

(ii) If reasonable minds would agree that, the basic facts do not render the existence of the presumption more probable, then the Court shall draw the conclusion that, the presumption does not exist. In our Castro's example, if reasonable minds considering the circumstances would agree that, he is not dead, then the Court shall rule that, the presumption that, he is dead does not exist.

(iii) If reasonable minds considering the basic facts would agree that, the existence of the facts is on the same level with its non-existence, then the Court shall draw the conclusion that, it does not exist. In our Castro's example, if reasonable minds considering the basic facts will consider that, the probability is balanced and cannot conclude if he is dead or not, then the Court shall draw the conclusion that, he is not dead.

SECTION 21 (c) OF NRCD 323:

"Where evidence is introduced contrary to the existence of the presumed fact, when reasonable minds would necessarily agree that the evidence renders the existence of the basic facts that give rise to the presumption more probable than not, the question of the existence of the presumed fact is determined as follows:

(i) if reasonable minds would necessarily agree that the evidence renders the non-existence of the presumed fact more probable than not, the court shall find, or direct the jury to find, against the existence of the presumed fact, or

(ii) if reasonable minds would necessarily agree that the evidence does not render the non-existence of the presumed fact more probable than not, the court shall find, or shall direct the jury to find in favor of the presumed fact, or

(iii) **if reasonable minds would not necessarily agree as to whether the evidence renders the non-existence of the presumed fact more probable than not, the court shall find, or submit the matter to the jury with an instruction that it shall find, in favor of the existence of the presumed fact unless it finds from the evidence that the non-existence of the presumed fact is more probable than its existence, in which case it shall find against the existence of the presumed fact."**

COMMENTS:

SECTION 21 (c) talks about a situation where the person against whom the presumption operates produces evidence to challenge or rebut it. In law, we say the party adduces evidence to rebut the presumption. If that happens, the question of the existence or non-existence of the presumed fact is determined as follows:

Section 21 (c) (i): If the evidence led to rebut the presumption is such that, reasonable minds would agree that, the presumption is non-existence, then the court shall conclude that, the presumption does not exist. In the Castro example, if the presumption that, he is dead is countered with evidence and reasonable minds would agree that, he is not dead, then the court shall find that, the presumption that he is dead does not exist or is non-existence.

Section 21 (c) (ii): If the evidence led to counter the presumption is such that, reasonable minds would agree that, the existence of the presumed fact is more probable than its non-existence, then the court shall conclude that, the presumption exists. In our Castro example, if evidence is produced to the effect that, he is not dead but reasonable minds would agree despite the evidence adduced that, he is dead, then the court will conclude that, he is dead. The court will decide in favor of the existence of the presumption.

Section 21 (c) (iii): If the evidence led to counter the existence of the presumption is such that, it only made reasonable minds to agree that, it may exist or may not exist, then the court shall draw the conclusion that, the presumption that, it does not exist. In our Castro example, if the presumption that, he is dead is challenged by evidence and the evidence led would make reasonable minds agree that, he may be dead or not dead, then the court shall conclude that, he is not dead or in legal terms, the presumed fact is non-existent.

SECTION 21 (d) OF NRCD 323:

"When evidence as to the existence of the basic facts that give rise to the presumption is such that, reasonable minds would not necessarily agree whether their existence is more probable than not and evidence as to the non-existence of the presumed fact is such that they would not necessarily agree that its non-existence is more probable than not, the court shall find, or submit the matter to the jury with an instruction that, it shall find in favor of the existence of the presumed fact if it finds from the evidence that the existence of the basic facts is more probable than not and it does not find the non-existence of the presumed fact more probable than not, but otherwise it shall find against the existence of the presumed fact."

COMMENTS:

This is a situation where the court looks at only the basic facts and is not able to tell whether it should accept its existence or non-existence. Note that, this is NOT the situation where evidence is led to counter it. There is no evidence from the party adversely affected by it and the court is just looking at the basic facts. This is the situation where the court is yet to arrive at the presumption. It is only when the court considers the basic facts and is convinced that it will declare it as a presumption. Simply put, the court should examine the existing basic facts very well and be convinced before arriving at the conclusion that, the presumption exist. If it is not convinced, it should not declare it in the first place as a presumption. Note carefully that, you can only rebut it if it is declared as a presumption.

In the Castro example, the existence of the listed basic facts should not make the court to declare a presumption but must weigh the basic facts very well and be convinced before declaring it to be a presumption.

INSTANCES OF REBUTTABLE (INCONCLUSIVE) PRESUMPTIONS: SECTIONS 30-50 AND 151-162 OF NRCD 323

Literally considered, a rebuttable presumption is one that the Court must make unless evidence is adduced to the contrary. Rebuttable presumption is where the Court after making a presumption gives any party who is adversely affected by the presumption, the opportunity, if he so wishes, to

adduce evidence to show otherwise. In effect, the existence of the said fact is open to challenge. If it is not challenged, then the Court will take it to be the true fact. See **GPHA v. NOVA COMPLEX LIMITED [2007-2008] 2 SCGLR 806**, where the Court describes rebuttable presumptions as "***conditional, inconclusive and disputable presumptions***".

In rebuttable presumptions, when the basic fact is proved, the presumed fact must be accepted as proved as well, until evidence is led in rebuttal. One of the differences between rebuttable and irrebutable presumption is that, in the latter, no evidence can be led in rebuttal; but in the former, evidence will be allowed in rebuttal.

SECTIONS 31 TO 49 AND 151 TO 162 provide instances of rebuttable presumptions. They are however not exhaustive of all that can be considered under rebuttable presumptions. They are as follows: Presumption of:

a) ***Validity of Marriage***
b) ***Legitimacy of Children***
c) ***Death after seven (7) years***
d) ***Simultaneous death***
e) ***Owner of Legal Title is owner of beneficial title***
f) ***Regularity of official duty performed..***

VALIDITY OF MARRIAGE: SECTION 31:

Section 31 provides that:

(1) A marriage which has been celebrated before witnesses is presumed to be valid

(2) This section applies whether or not the witnesses to the marriage are called as witnesses in the action.

(3) This section applies to both monogamous and polygamous marriages."

COMMENTS

According to **LORD PENZANCE** in **HYDE v. HYDE (1866) LR 1 PD 130**, concerning the validity of a Mormon marriage, marriage may be defined as ***"the voluntary union for life of one man and one woman to the exclusion of all others"***

Marriages in Ghana are presumed to be valid only on proof of two conditions, namely, ***the celebration of the marriage and in the presence of witnesses.*** The presumption raised in **SECTION 31** can be displaced where there is evidence that, there was no witness to the marriage or that, the person who celebrated the monogamous marriage was not licensed.

According to Brobbey, the decided Ghanaian cases which validate common law marriages brought about by co-habitation or reputation are in clear conflict with the statute and to that extent were decided per incuriam and more so when there is a conflict between the common law and statute, statute ought to prevail. When statute prescribes the procedure same must be complied with (**BOYEFIO v. NTHC PROPERTIES LIMITED**). Again, estoppel does not affect statutory or constitutional dictates (**AG v. FAROE ATLANTIC, TUFFOUR v. AG**).

PRECEDENTS OF PRESUMPTION OF LEGITIMARY OF MARRIAGE

(i) **RAMIA v. RAMIA [1981] GLR 275, CA**

(ii) **MAHADERVAN v. MAHADERVAN (1962)**

(iii) **BADRI PRASAD v. DEPUTY DIRECTOR OF CONSOLIDATION AND OTHERS (1978)-INDIAN CASE!**

In **RAMIA v. RAMIA (1981).** The Court held (In Holding 2) as follows:

"The marriage certificate showed conclusively that the marriage of H to W was registered on the same day the marriage was celebrated. The certificate therefore satisfied the presumption of validity and the presumption of legality. The presumption of the legality of a marriage was so strong that it could only be rebutted by proof beyond reasonable doubt. In the instant case, nothing had been advanced to establish the contrary. Consequently, Cap. 129 had not been breached and the presumption of advancement could not be defeated on that score. **MAHADERVAN V. MAHADERVAN [1962]** and **TAYLOR, IN RE; TAYLOR V. TAYLOR [1961]** C.A. cited."

In MAHADERVAN v. MAHADERVAN (1962), parties got married in a foreign country, they got married in a home. However, husband goes to England and tries to get re-married. HELD: The Court held that, ***"Technicalities won't invalidate the presumption of marriage, if there is a ceremony followed by Cohabitation and you hold yourself as married; you are."***

In BADRI PRASAD v. DEPUTY DIRECTOR OF CONSOLIDATION AND OTHERS (1978), the Court held that, ***"A strong presumption arises in favor of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favor of legitimacy and frowns upon bastardy...If men and women who live as husband and wife in society are compelled to prove, half a century later, by eyewitness evidence that, they were validly married, few will succeed."***

LEGITIMACY OF CHILDREN: SECTION 32:

Section 32 provides:

(1) A child born during the marriage of the mother is presumed to be the child of the person who is the husband of that mother at the time of the birth.

(2) A child of a woman who has been married, born within 300 days after the end of the marriage is presumed to be a child of that marriage."

COMMENTS

SECTION 32 (1) presumes that, a child born within the subsistence of a marriage is the child of the husband of the married woman. The principle is based on the assumption that, when a married couple lives together, there will be sexual intercourse between them. The presumption applies where the child is conceived and born during the subsistence of the marriage. If the marriage should be dissolved by the time the child is born, the application of rules of **decree nisi or decree absolute** are eliminated.

SECTION 32 (2) says that, ***"a child of a woman who has been married, born within 300 days after the end of the marriage is presumed to be a child of that marriage."*** The 300 days referred to in Section 32 (2) has been interpreted in the Commentary to the Evidence Decree to mean

ten (10) months. Evidence can be led to displace the presumption. If it can be proved that, the husband was impotent, or was out of the country where the woman was resident at the time of the conception or no intercourse took place, the presumption will be displaced.

PRECEDENTS

1. **KNOWLES v. KNOWLES (1962) 1 ALL ER 659** (Look this case up)
2. **DAABOA DAGARTI v. DORNIPEA [1982-83] GLR 594**: HELD (Dismissing the Appeal): (1) the Evidence Decree, 1975 (N.R.C.D. 323), s. 32 (1) provided that, ***"a child born during the subsistence of marriage was presumed to be the child of the husband of the mother of the child."***

PRESUMPTION OF DEATH: SECTION 33:

The section provides:

(1) Where a person has not been heard of for seven years despite diligent effort (whether or not within that period) to find him, he is presumed to be dead.

(2) There is no presumption as to the particular time when he died.

COMMENTS

In this presumption of death, the legal burden remains on the party in whose favor the presumption operates. The evidential burden is on the party against whom the presumption operates. At common law, there are three conditions for applying this presumption. They were summarized in **CHARD v. CHARD [1956] P259** as follows:

> **"Where as regards 'AB' there is no acceptable affirmative evidence that he was alive at some time during a continuous period of seven years or more, then if it can be proved first, that there are persons who would be likely to have heard of him over that period, secondly, that those persons have not heard of him, and thirdly, that all due inquiries have been made appropriate to the circumstances, 'AB' will be presumed to have died at sometime within that period."**

In that case, the woman was married to A in 1909. A was frequently in prison and was not heard of from 1917 to 1933. In 1933, she married W. W later filed petition for divorce on the ground that, A was still alive at the time he married the woman. The presumption of death was not applied because, there was no one shown to have been likely to have seen him from 1917 to 1933.

The three conditions for presumption of death specified in that English case are subsumed by the provisions of Section 33. A person applying to rely on the presumption of death in Ghana must establish those three conditions before the application will succeed. Thus, if a person is not heard of for seven (7) years despite diligent efforts, he is presumed to be dead.
The law allows the presumption to be rebutted.

SIMULTANEOUS DEATH: SECTION 34:

This section provides that, where two people die simultaneously, the younger person is presumed to have outlived the older one. The section is subject to an enactment relating to succession to property.

OWNERSHIP OF LEGAL TITLE AND BENEFICIAL TITLE: SECTION 35:

This common law principle is to the effect that, whoever owns the legal title is presumed to own the beneficial title. The presumption is similar to resulting trust. Evidence can, however, be led to show otherwise.

TRANSFER BY TRUSTEES: SECTION 36

Transfers effected by a duly appointed trustee are presumed to have been properly made unless the contrary is proved by evidence.

When property is given to a person to keep in trust for another person, he is presumed to have conveyed it to the person he is holding it in trust for.
For example a man died with all the children been minors. The property of the deceased is given to the brother of the deceased to keep in trust for the children till attain the age of 25. The moment

the last child attains 25, he is deemed to have transferred the property to them. Since it is a rebuttable presumption, evidence can be led to show otherwise.

REGULARITY OF OFFICIAL DUTIES: SECTION 37

Section 37 states that,

(1) It is presumed that, official duty has been regularly performed

(2) This presumption does not apply to an issue as to the lawfulness of an arrest if it is found or otherwise established that, the arrest was made without warrant."

COMMENTS

It is always presumed that, all government duties were performed correctly. For example, a nurse at a government hospital is presumed to have observed all the safety protocols of the workplace. It is an inconclusive presumption, so evidence can be led to rebut same. This is a very common excuse that government officials use to defend themselves. You cannot accuse a government official for not doing his work well even in the face of a poor result. The excuse is always that, in the absence of any cogent evidence that due care was not taken, it should be assumed that, the work was done as expected.

This section re-states the common law rule rendered in Latin as **OMINIA PRAESUMUNTUR RITE ESSE ACTA** which literally means that, **"THERE IS A PRESUMPTION THAT, OFFICIALS PERFORM THEIR DUTIES REGULARLY."** The principle was applied in **GPHA v. NOVA COMPLEX LTD.** In this case, it was held that:

"It follows (from sections 20 and 37 (1) that, whenever the maxim is applied, the person against whom it is invoked and who is entitled to lead evidence to refute the presumption, is at liberty to prove that, there was in fact no due regularity or performance of the official or statutory duty in question. Evidence may be led to show also, for example that, the person is not a public officer or is not duly authorized so to act, or that, the person acted outside the limits of his or her discretion."

That case held further that, the section applies to official, judicial or governmental acts. By this presumption, if a person is required to act in an official capacity, it will be presumed that, he had

properly been appointed to act unless the contrary is proved. The presumption applies to people acting in a public capacity to give out licenses which are issued in order to enable activities accessible by the public to be carried on, such as permit issued by City Council authorities to operate a shop. See also **SEIDU MOHAMMED v. SAANBAYE KANGBERE (2012) 2 SCGLR 1068.**

In **SEIDU MOHAMMED v. SAANBAYE KANGBERE (2012),** the Supreme Court said that, ***"The presumption of regularity in law had been given statutory recognition in SECTION 37 of the Evidence Act. That meant that, institutions of state like the Lands Commission, Survey Department and the Land Registry were presumed to conduct their affairs with a certain degree of regularity in line with the statutes that had established them."***

The presumption of regularity of official duty is reinforced by the equity maxim that, "**EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE."** See **BERRYMAN v. WISE (1791).**

In BERRYMAN v. WISE (1791), the Court held that, ***"A person who acted as a solicitor was presumed to have been properly qualified as a solicitor".*** See also **R v. ROBERTS (1878).**

In **R v. ROBERTS (1878),** the Court held that, ***"A person who sat as a Deputy County Court Judge was both properly qualified for the job and properly appointed."***

EXCEPTION: The point is that, the presumption cannot be relied upon to prove or stablish an ingredient of an offence if the regularity of the act is in question. See **SECTION 37 (2) OF NRCD 323 (*This presumption does not apply to an issue as to the lawfulness of an arrest if it is found or otherwise established that, the arrest was made without warrant.)***

ORDINARY CONSEQUENCES OF VOLUNTARY ACT: SECTION 38

In life, we always expect results from our actions. Each person is presumed to have expected ordinarily results from a particular action. You will, however, be surprised that, human beings knowing very well that, a particular result will ordinarily take place, will take the action but think that, the result will not occur. A typical example is a young man and woman having unprotected sex and pregnancy results. The reaction is we did not expect the pregnancy. Especially, the men

will start behaving as if their whole world is shattered. Of course, the ordinary consequences of unprotected sex is pregnancy, so the presumption is that, you intended to impregnate the woman. At times, an elderly married woman will get pregnant and will claim it occurred by mistake. However, since it is the ordinary consequence of the act of unprotected sex, it is presumed that, she intended to get pregnant.

JUDICIAL JURISDICTION: SECTION 39

A judge is deemed to have acted within the powers conferred on him. It is a rebuttable presumption. Evidence can be led to establish that, he acted outside his jurisdiction.

FOREIGN LAW: SECTION 40

A foreign law is presumed to be the same as the law of Ghana. Laws differ from country to country but whenever you are doing anything in contemplation of a law of another country, the presumption is that, it is the same law. For example, I do not know the law governing marriage in Vermont, I can presume that, it is the same as Ghana.

CONTINUATION: SECTION 41:

The presumption is that, if a thing is yet to reach its normal life span, it is presumed to be still continuing. For example, if a woman got pregnant about five (5) months ago, it is presumed that, the pregnancy is still continuing. This is so because, the five months is a period shorter than that within which a pregnancy usually ceases to exist.

A PERSON IS PRESUMED TO BE OF FULL AGE AND SOUND BODY: SECTION 42

Anytime reference is made to a person, the presumption is that, he is an adult and of full age. Evidence can, however, be led to show that, the person is a minor or a person of unsound mind.

THINGS DELIVERED: SECTION 43

If you deliver a thing to another person, the person to whom it is delivered is presumed to be the owner of the thing that is why it was delivered to him. Being a rebuttable presumption, evidence can be adduced to rebut the presumption. It could be that, the person to whom it was delivered was to keep it in trust for another person.

OBLIGATION DELIVERED: SECTION 44

If a debtor is given documents proving that, he has honored his debt, the presumption is that, he paid the debt. It is a rebuttable presumption and evidence can be led to rebut same.

POSSESSION OF ORDER TO PAY OR DELIVER: SECTION 45

It is presumed that, once you are in possession of an order for payment of money, you are presumed to have paid the money or delivered the thing. The possession of the order is prima facie evidence of payment. However, like all other rebuttable presumptions, evidence can be led to prove the non-existence of the presumed payment.

POSSESSION OF OBLIGATION BY CREDITOR: SECTION 46

An obligation possessed by the creditor is deemed not to have been paid. The basic facts are that, if it were to be paid, it would have been given to the debtor as proof of his payment. The presumption can be rebutted by evidence.

PRIOR PAYMENT OF RENT: SECTION 47

The payment of earlier rent (rent advance) or instalments is presumed from the date for the later rent or instalments. The date on the receipts issued for current to a tenant will form the basic facts that he had paid all past rents. For example if we are in the year 2020 and I am in debt of my January, February, March and April rents, any money I pay currently (if I give out one month

payment in May 2020), the receipt to be issued to me under normal circumstances will be used for the payment of the arears for the January unpaid rent. However, if despite the non-payments, the receipt for the one month's rent money that I am paying in May reflects that, it is for the payment of May 2020 rent, the presumption will be that, I have already paid rent for the months of January, February, March and April.

OWNERSHIP: SECTION 48

The things which a person possesses are presumed to be owned by that person. Normally if you possess a thing, let say a car, the presumption is that, you are the owner. Evidence can, however, be led to rebut same by showing that, you are the driver or mechanic of the owner. If you exercise ownership rights over a property, it is presumed that you are the owner. It is this belief that makes tenants, agents and caretakers after enjoying the false status as owners want to occasionally claim ownership to perpetuate their fame of ownership. It is a rebuttable presumption and evidence can be led to show that, despite the exercise of the ownership rights, the person is in fact not the owner.

PARTNERS, LANDLORD AND TENANT, PRINCIPAL AND AGENT STAND IN THAT RELATIONSHIP TO EACH OTHER: SECTION 49

The presumption is that, you maintain that status throughout. In effect if a tenant should genuinely buy the property from the landlord without public knowledge, it will still be presumed to be landlord and tenant relationship. The tenant turned owner of the property would have to lead evidence to establish that, he is the new owner and that, the landlord-tenant relationship between him and the landlord no longer exists.

DISTINCTION BETWEEN ESTOPPEL AND PRESUMPTIONS

Estoppel is distinguishable from presumption by three (3) main ways.

1. ***The first is procedural. Estoppel has to be pleaded before it can be relied upon. Presumption does not have to be pleaded.*** See **IN RE SUHYIEN STOOL; WIREDU & OBENWAA v. AGYEI [2005-2006] SCGLR 424**
2. ***The second is evidential. Evidence has to be led in order to establish estoppel, especially in estoppel by conduct. Evidence does not have to be adduced before a presumption may be taken up.*** See **IN RE SUHYIEN STOOL; WIREDU & OBENWAA v. AGYEI [2005-2006] SCGLR 424**

The distinction was clarified in **IN RE SUHYIEN STOOL; WIREDU & OBENWAA v. AGYEI [2005-2006] SCGLR 424**. In distinguishing **estoppels** from **conclusive presumptions**, the Supreme Court per **PROFESSOR MODIBO OCRAN JSC** quoted with approval the argument of **OFORI –BOATENG** in his book "**THE GHANA LAW OF EVIDENCE**" that,

"Even though all the examples of conclusive presumptions given in sections 25-29 of the Evidence Act seem to be instances of estoppels, an estoppel and conclusive presumptions functionally often bring about the same legal effect, an estoppel; is not synonym for a conclusive presumption. The learned author in support of his argument cited Nokes, Introduction to Evidence, 4th ed. P124 as follows: ***"...Estoppel has two characteristics of evidence to distinguish it from presumption, which is a rule of substantive law. The first difference is procedural. Estoppel usually must be pleaded before the evidence to establish it will be allowed, but a presumption is not to be pleaded. The second difference becomes particularly clear in cases of estoppels by conduct. The party pleading this type of estoppels has to adduce evidence to establish the estoppels. Under such circumstances, the existence or non-existence of the estoppel would be impossible to tell until the end of the trial, after the other side would have supplied evidence in rebuttal. But the essence of conclusive presumption is to stop the other party in the first place from adducing evidence to the contrary".***

3) ***The third is that, apart from pleas of autrefois convict and autrefois acquit, estoppel does not apply to criminal cases.***

LESSON TWENTY-ONE

PRIVILEGES (SECTION 18-50)

INTRODUCTION

Generally, a privilege refers to a special right, advantage, exemption or immunity given or granted to a special person or group of people.

At Evidence Law, a privilege is an exceptional or special right, immunity or exemption by which a person may refuse to give evidence or disclose a fact or prevent others from doing so in court proceedings or administrative enquiries.

Just like the discussions on relevance and admissibility, under privileges, relevant evidence is excluded not because it is unreliable or irrelevant to the facts in issue, but because of extrinsic considerations which are held to outweigh the value that the evidence would have in the trial.

The rationale for the application of privileges in the law of evidence is the protection of public policy, the sustenance of the inviolability of the individual's human rights, the protection of the sanctity of certain socially valued confidential communication and the maintenance of justice in society. The disadvantages of privileges are that:

A) They hinder searches for truth in that, they prevent the use of competence and relevance in the admissibility of evidence. They preclude the admissibility of evidence that may be relevant and reliable.
B) They negate the principle that, every citizen has obligation to give evidence in judicial proceedings. The use of privilege obstructs the producing of relevant evidence essential to the adjudication of issues before the court.

Privileges in the Evidence Act starts from **SECTION 87 TO 110.**

APPLICATION OF THIS PART: PART SIX: SECTION 87

(1) The provisions of this Part shall apply in all proceedings.

(2) The provisions of any enactment or rule of law which make rules of evidence inapplicable or of limited application in particular proceedings shall not make this Part inapplicable to such proceedings.

(3) For the purpose of this Part a "proceeding" means any action, investigation, inquiry, hearing, arbitration or fact-finding procedure, whether judicial, administrative, executive, legislative or not before a government body, formal or informal, public or private.

(4) For the purpose of this Part a "presiding officer" means the court or the person authorised in the proceeding to rule on a claim of privilege.

COMMENTS

Section 87 says that, the law on the claim of privilege applies not only to proceedings in Court but to all formal and informal proceedings of findings of fact like disciplinary committee sittings, police investigation processes.

For example, there is an enquiry going on and a person is summoned to appear before the sitting and testify on a subject. If the information is privileged, the person will communicate to the committee that, the information they seek from him is a privilege one and as such, same cannot be divulged.

PRIVILEGE RECOGNISED ONLY AS PROVIDED: SECTION 88

(1) Except as otherwise provided in this Part or in any other enactment, no person has a privilege to:

(a) refuse when duly subpoenaed to be a witness: or

(b) refuse as a witness to disclose any matter; or

(c) refuse as a witness to produce any object or writing.

(2) Except as otherwise provided in this Part or in any other enactment, no person may prevent another person from being a witness, from disclosing any matter, or from producing any object or writing.

COMMENTS:

Section 88 says that, apart from the categories of privileges specifically mentioned in the Evidence Act or any other law, it is an offence to refuse to disclose the needed information to the court. The Right to Information Law excludes the specific privileges listed under law.

WAIVER OF PRIVILEGES: SECTION 89

(1) Except as otherwise provided in this section, a person who would otherwise have privilege to refuse to disclose or to prevent any other person from disclosing a particular matter has no such privilege if he or any other person while the holder of the privilege has voluntarily disclosed or consented to the disclosure of a significant part of that matter.

(2) A disclosure of a privileged matter where the disclosure itself is a privileged communication does not affect the right of any person to claim the privilege.

(3) A waiver of a joint privilege to refuse to disclose or to prevent any other person from disclosing a particular matter by any holder of the joint privilege does not affect the right of any other holder to claim the privilege.

COMMENTS:

Privilege is personal to the holder. It may therefore be waived by the person entitled to it. The privilege will be deemed to have been waived if the one entitled to it does anything that may be interpreted to mean that, he does not intend to insist on the privilege. The wavier may come about intentionally or unintentionally where the party consents to the disclosure or where a witness starts

voluntarily to disclose what would otherwise have been prevented from being disclosed or where he deliberately waives the privilege. The waiver of state secrets and identity of informants are matters for the court to decide.

Waiver in respect of the right to avoid self-incrimination shall be determined purely on the facts of each case. Should a person who confesses to a crime be allowed to claim privilege on the grounds of the right to self-incrimination?

Where a person makes a disclosure of a privileged matter to, for example, a professional lawyer or a priest, that cannot be the subject matter of waiver. The exceptions to waiver are where the privilege is jointly held by two or more people.

Where privilege exists, the one entitled to claim it may be deemed to have waived it if he does not claim it. He will be taken to have waived it if he discloses some or part of the privilege material or information.

Section 89 (1) says that, if the holder of the privileged information discloses it, then it ceases to be a privilege and as such cannot be claimed by any other person. For example, if I go to my medical officer and after a routine medical examination test positive for AIDS, it is a confidential information between Doctor and myself. However, if, on my own volition, voluntarily make it public, then if the Doctor should be summoned by any court to disclose the results, he cannot claim immunity because, I being the holder of that privilege had already disclosed it.

Section 89 (2) says that, it is not all disclosures under sub-section (1) that will take away the right of privilege. At times, the disclosure itself is a privilege. For example, taking the AIDS scenario, if I inform my pastor about it to pray for me, the communication between the pastor and myself is in law a privilege communication. As such, the fact it was disclosed by me to my pastor will not be a basis for my Doctor to disclose same. That is, should my Doctor be requested to disclose the said information, he can still claim the privilege.

Section 89 (3) says that, there are some circumstances that, the privilege communication will be a joint one, if one of the joint holders should disclose it, same will not affect the right of the others to the claim of the privilege. For example, if for any reason based on urgency two of us (husband and wife tested positive for the AIDS test), it becomes a joint privilege. If my wife should disclose it to the public, it will not affect my claim to the said privilege.

Privilege must however be distinguished from public interest immunity. If the primary source of the evidence is privileged, one can resort to secondary evidence available. On the other hand, if a claim to public immunity succeeds, it will not be possible to prove the excluded facts by any other means.

Privilege can also be distinguished from the questions of competence and compellability of witnesses. Privilege only entitles witnesses to refuse to give evidence on particular matters. However, a witness who is competent but not compellable can choose whether to give evidence at all. But if he chooses to give evidence, for example, an accused person, must answer all questions properly put to him, and may be liable for contempt if he refuses, except those in respect of which he is entitled to claim privilege.

COMMENT AND INFERENCES AS TO EXERCISE OF PRIVILEGE: SECTION 90

If a privilege to refuse to disclose, or a privilege to prevent another from disclosing, a matter is claimed and allowed, the presiding officer, counsel or the parties may comment thereon and the tribunal of fact may draw all reasonable inferences therefrom.

COMMENTS:

After the claim of privilege is allowed, the court or any of the parties may comment on it and the court may draw an inference from it. For example, a party may comment that, the refusal for the information to be disclosed will make difficult to discharge the burden of persuasion on him. The court may draw an inference from it and may use same in his final decision.

DETERMINATION AND ENFORCEMENT OF PRIVILEGE: SECTION 91

(1) The presiding officer shall determine a claim of privilege in the manner provided in Part I of this Decree.

(2) No person shall be punished for failure to disclose or produce any matter claimed to be privileged unless he has failed to comply with an order of court that he disclose or produce the matter or unless the presiding officer, by law, has the power to punish for contempt.

COMMENTS:

Section 91 is also known as the burden of proving privilege.

The proponent of the privilege assumes the onus of proving that, the privilege he claims is confidential. On the other hand, certain communications are presumed to be confidential.

In those cases, when the privilege has been raised, the onus shifts onto the one opposing it to prove that, the object or communication is not confidential. On the face of the principle, it may appear that, this is one of the few occasions when a party is required to prove the negative. Such privilege includes doctor-patient relationship, spousal privileges, lawyer-client privileges, clergy and penitent privileges, privileges against self-incrimination, privileges on state secrets, privileges on the right to vote and privilege to protect trade secrets.

Section 91 (1) says that, the decision by the court to allow a claim of privilege will follow the process as stated in PART ONE on the determination of preliminary facts. (**Please go back and read Section 3 of the Evidence Act on the process used in the determination of the existence or non-existence of a privilege**)

Section 91 (2) says that, a person refusing to disclose an information and claiming a privilege formally before the court cannot be sanctioned for doing so.

DISCLOSURE OF PRIVILEGED INFORMATION: SECTION 92

(1) Subject to subsection (2), the presiding officer may not require disclosure of information claimed to be privileged in order to rule on the claim of privilege.

(2) When a court is ruling on a claim of privilege under section 105, 106 or 107 relating to state secrets, informants, and trade secrets and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is

sought or a person authorised to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorised to claim the privilege and such other person as the person authorised to claim the privilege is willing to have present.

(3) If the judge determines that the information is privileged, neither he nor any other person shall ever disclose, without consent of a person authorised to permit disclosure, what was disclosed in the course of the proceedings in chambers.

COMMENTS

Section 92 (1) says that, in taking evidence as to whether the information is a privilege, the content of the privilege information MAY not be disclosed to the court. It should be noted that, the word "MAY" is used. For example, in the AIDS example, the court may not be told the results of the test to enable it rule on the existence or non-existence of the claimed privilege.

Section 92 (2) says that, where it becomes necessary to know the contents of the privileged information and the information relates to State secrets, state informants, and trade secrets, it may be done in the chambers (in camera)

Section 92 (3) says that, all information made available in chambers of the judge shall not be disclosed by the judge or any other person privy to it.

COMMUNICATIONS PRESUMED CONFIDENTIAL: SECTION 93

Whenever a privilege is claimed to refuse to disclose or to prevent any other person from disclosing a confidential communication protected from disclosure under this Part, the communication is presumed to have been made in confidence and the opponent of the claim has the burden of persuasion to establish that the communication was not confidential.

COMMENTS

This is a rebuttable presumption of confidentiality. So if a person claims that, a piece of information is confidential, the court will presume it to be so. The person or party adversely affected by the said claim will have the burden of persuasion to discharge by leading evidence to show that, it is not a privileged information as being claimed.

ERROR IN ALLOWING PRIVILEGE: SECTION 94

A party may, on appeal or review, allege error on a ruling disallowing a claim of privilege only if he is the holder of the privilege.

COMMENTS

The only person who can appeal against the decision of a court to the effect that, a matter is not a privilege and as such should be disclosed is the holder of that privilege. For example, in the AIDS case, it is only the patient who tested positive and as such the holder of the privilege who can appeal against the ruling to disclose the results. The Doctor who is ordered by the court cannot appeal against the decision because he is not the holder of the privilege.

EFFECT OF ERROR IN DISALLOWING PRIVILEGE: SECTION 95

Evidence of a statement or other disclosure of privileged matter that was compelled to be disclosed in any proceeding by an erroneous ruling disallowing a claim of privilege is inadmissible against a holder of the privilege in any later proceeding or in any re-hearing of the original proceeding.

COMMENTS

If a court rules that, an information is not a privileged one and is disclosed but an appeal against the ruling succeeds, the said information so erroneously disclosed shall be expunged from the record of the court that received the evidence. The said information shall be treated as privileged as if it was never disclosed to the court or any other person.

PRIVILEGE OF AN ACCUSED NOT TO BE COMPELLED TO TESTIFY: SECTION 96

(1) The accused in a criminal action shall not be called as a witness and shall not be compelled to testify except on his own application.

(2) Except as otherwise provided in this Decree, if the accused in a criminal action testifies on his own behalf he shall be subject to examination in the same manner as any other witness.

(3) An accused in a criminal action has no privilege to refuse to submit his body to examination by the court or the tribunal of fact or to refuse to do any act in their presence for the purpose of identification other than to testify.

(4) If an accused in a criminal action does not testify on his own behalf, the court, the prosecution and the defence may comment upon the accused's failure to testify, and the tribunal of fact may draw all reasonable inferences therefrom.

COMMENTS

Section 96 (1) says that, an accused person cannot testify against himself unless he himself applies to the Court so to do. This privilege is also guaranteed by Article 19 (10) of the Constitution, which provides that, ***"No person who is tried for a criminal offence shall be compelled to give evidence at the trial".***

Section 96 (2) says that, an accused who testifies (on his own application) in a criminal trial will be cross-examined.

Section 96 (3) says that, an accused cannot claim a privilege if he testifies and the Court wants to examine his body or asked to do any act to assist in identifying him.

Section 96 (4) says that, in a criminal action, if the accused when called upon to open his defense refuses to testify on oath to enable him to be cross-examined, his refusal to testify shall be taken into consideration by the Court in arriving at its decision.

Article 19 (10) and Section 96 (1) of NRCD 323 are collectively referred to as THE RIGHT TO SILENCE OF THE ACCUSED PERSON DURING A CRIMINAL TRIAL. This rule is

however subject to the exception by which the accused may be ordered by the court to subject himself, for instance, to be examined for the purpose of identification.

GENERAL CATEGORIES OF PRIVILEGES: SECTIONS 97-110

Besides privileges provided in the 1992 Constitution and other statutes, privileges covered by NRCD 323 include the following:

- **Privilege against self-incrimination (SECTION 97)**
- **Lawyer-client privilege (SECTION 100, *EXCEPTIONS SECTION 101, WORK PRODUCED BY A LAWYER-SECTION 102*)**
- **Privilege on mental treatment (SECTION 103)**
- **Privilege on religious advice (SECTION 104)**
- **Privilege concerning compromise (SECTION 105)**
- **Privilege on state secrets (SECTION 106)**
- **Privilege on Government informants (SECTION 107)**
- **Privilege on trade secrets (SECTION 108)**
- **Privilege on political voting (SECTION 109)**
- **Privilege on marital communication (SECTION 110)**

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- **Privilege against self-incrimination (SECTIONS 97-99)**
- **Lawyer-client privilege (SECTIONS 100-102)**
- **Mental Treatment Privilege (SECTION 103)**
- **Religious Advice Privilege (SECTION 104)**
- **Privilege against Disclosure of Compromise (SECTION 105)**
- **Privilege on Government informants (SECTION 107)**
- **Marital Communication Privilege (SECTION 110)**

PRIVILEGE AGAINST SELF INCRIMNATION: SECTION 97

(1) In any proceeding a person has a privilege to refuse to disclose any matter or to produce any object or writing that will incriminate him.

(2) No person has a privilege under subsection (1), where the court thinks that it is necessary to the determination of an issue, to refuse:

(a) to submit his body to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition; or

(b) to furnish or permit the taking of samples of body fluids or substances for analysis; or

(c) to speak, write, assume a posture, make a gesture, or do any other act for the purpose of identification.

(3) An accused in a criminal action who voluntarily testifies on his own behalf in the action has no privilege under subsection (1) to refuse to disclose any matter or produce any object or writing that is relevant to any issue in the criminal action.

(4) A matter, object or writing will incriminate a person within the meaning of this Decree if it:

(a) constitutes a violation of the criminal laws of Ghana; or

(b) forms an essential part of a violation of the criminal laws of Ghana, or

(c) is taken in connection with other matters already disclosed is a basis for a reasonable inference of a violation of the criminal laws of Ghana.

(5) Notwithstanding subsection (4), a matter, object or writing that would otherwise incriminate a person will not incriminate him if he has for any reason become permanently

immune from punishment for a violation of the criminal laws of Ghana which may reasonably be inferred from that matter, object or writing.

COMMENTS:

Section 97 (1) is based on the traditional reluctance to compel anyone, on pain of punishment, to give incriminating evidence against himself. The privilege operates to permit a witness, in a legal proceeding, to refuse to answer questions the answers to which may tend to incriminate him by exposing him to subsequent criminal proceedings. This privilege thus discourages the extraction of suspicious confessions, especially during police interrogations and the ill-treatment of suspects, again in the course of police interrogation. The principle is codified under **NRCD 323, Section 97.**

However, as provided for under **Section 97 (2)**, no person has a privilege under **Section 97 (1)** when the court thinks that, **refusal of the person to**:

(a) submit his body to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition; or
(b) furnish or permit the taking of samples of body fluids or substances for analysis; or
(c) speak , write, assume posture , making a gesture o, or do any other act for the purpose of identification; **will affect the determination of the case**.

Although an accused person cannot be compelled to testify during his trial, an accused person who voluntarily testifies on his own behalf in the action has no privilege to refuse to disclose any matter or produce any object or writing that is relevant to any issue in the criminal action-see **Section 97 (3).**

The rule is that, no-one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose him to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for.

WHAT CONSTITUTES INCRIMINATING EVIDENCE?

Section 97 (4) defines incrimination as where the matter, object or writing will:

a. **Constitute a violation of the criminal laws of Ghana or**
b. **Form an essential part of a violation of the criminal laws of Ghana, or**
c. **Taken in connection with other matters already disclosed is a basis for a reasonable inference of a violation of the criminal laws of Ghana"**

By this definition, the English / Common law definition including a matter which has the **tendency of exposing the accused to penalty or forfeiture is not applicable in Ghana.**

In considering whether a matter has the tendency to expose a person to a criminal charge or which may lead to reasonable inference of violation of the criminal laws, and which may entitle a party to claim the privilege of silence, ***"the Court must see from the circumstances of the case and the nature of the evidence which the witness is called to give that, there is reasonable ground to apprehend danger to the witness from his being called to answer...The danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things; not an imaginary and unsubstantial character..."***

In **SASU BAMFO v. SINTIM [2012] SCGLR 136**, one of the grounds of appeal was whether the first plaintiff witness had committed perjury through his self-incriminating evidence during cross-examination. In this case, the plaintiff claimed to have obtained in 1990 from the Okumo Aryikwei Family, acting by the Head of Family, Nuumo Kpanie Mensah, a ninety-nine (99) year lease of the disputed land situate at Taifa in Accra. He sued at the High Court for among others, a declaration of title to land. The defendant resisted the plaintiff's claim. He contended that, the lease agreement, **Exhibit A,** tendered in evidence by the plaintiff, was a forged and fraudulent document. The defendant counterclaimed for the same land, contending that, he had obtained a ninety-nine (99) year lease of the land in 2005 from the same family. He claimed that, he went into possession of the land which was then vacant.

The evidence of the first plaintiff witness at the hearing was that, he was present when on, 7 August 1996, the head of family, Nuumo Kpanie Mensah, executed the oath of proof of the lease agreement. He identified the thumbprint appearing on the oath of proof as that of the head of family and his own signature as a witness. However, the same witness admitted under cross –examination that, the head of family, Nuumo Kpanie Mensah, had died on 8 January 1993. Counsel for the defendant impugned the **authenticity of exhibit A** and called upon the Court to subject the

document to forensic examination but the trial Court rejected counsel's application without giving any reason.

The trial Court rejected the allegation that, **Exhibit A** was a forged document; the Court rather accepted it as passing good title to the plaintiff. The defendant appealed to the Court of Appeal, which allowed the appeal and set aside the judgment entered by the trial Court in favor of the plaintiff. The Court of Appeal also upheld the defendant's counterclaim and found that, Exhibit A was a forgery and that, the plaintiff's first witness had committed perjury.

The plaintiff in turn appealed to the Supreme Court on grounds that, the Court of Appeal erred in holding that, exhibit A was a forgery and that, the plaintiff's witness had committed perjury.

In committing the first plaintiff witness for perjury, the Court of Appeal referred to the lies he peddled under oath while testifying and stated thus:

> **"The within named lessor' in exhibit A is no other person than Nuumo Mensah had died on 8 January 1993, did he resurrect to the present to execute exhibit A and for exhibit A to be read and explained to him by the first plaintiff witness on 7 August 1996 and to be seen physically, like Jesus Christ was seen by the apostles after His resurrection by the first plaintiff witness-Mr Addy?...It is sufficiently established and we so find and hold that the first plaintiff witness committed intentionally and deliberately perjury when he sower to the oath of proof of the execution of exhibit A in August 1996. The first plaintiff witness did not purge himself of that obvious, intentional and deliberate perjury in court insisting that exhibit A is the deed of Nuumo Mensah, deceased".**

The Supreme Court per Rose Owusu reversing the judgment of the CA tersely said:

> ***"On the face of exhibit A, the first plaintiff witness never signed nor thumb printed the oath of proof as a deponent even though the Chief Registrar has signed as the oath having been sworn before him. The finding of the Court of Appeal that the first plaintiff witness perjured himself is not supportable on the evidence and therefore the CA erred when it so held".***

By this privilege, a person facing interrogation by the police or people in authority (including departmental inquiries) may refuse to answer questions when he believes the answer will incriminate him.

In both civil and criminal proceedings, a person may refuse to answer questions that are likely to result in another prosecution.

DISCLOSURE OF THINGS OWNED BY ANOTHER: SECTION 98

No person has a privilege under section 97 to refuse to obey an order made by a Court to produce an object or writing under his control constituting, containing or disclosing matter which will incriminate him if by law some other person has a superior right to the object or writing ordered to be produced.

COMMENTS

If a thing is in your possession which is owned by another person and that object or thing may incriminate that other person, you cannot refuse to disclose it by claiming self-incrimination on behalf of that person. **Self-incrimination should be claimed personally by whoever wants to rely on it.**

REQUIRED REPORTS: SECTION 99

(1) A person making a record, report or disclosure required by law has no privilege to refuse to disclose or to prevent any other person from disclosing the contents of the record, report or disclosure except as otherwise specifically provided by any enactment.

(2) A **public official or public entity** to whom a record, report or disclosure is required by law to be made has a privilege to refuse to disclose the contents of the record, report or disclosure if the law requiring it to be made prevents its disclosure for the purpose in question.

LAWYER-CLIENT PRIVILEGE: SECTION 100

(1) For the purpose of this section and sections 93, 101 and 102—

(a) A "client" is a person, including a public entity, association or body corporate, who directly or through an authorized representative seeks professional legal services from a lawyer;

(b) a "representative of the client" is a person having authority from the client to make to, or receive from, a lawyer confidential communications relating to professional legal services sought by the client;

(c) a "representative of the lawyer" is a person having authority from the lawyer to assist the lawyer in rendering professional legal services sought by the client;

(d) a communication is "confidential" if not intended to be disclosed, and made in a manner reasonably calculated not to disclose its contents, to third persons other than those to whom disclosure is in furtherance of the client's interest in seeking professional legal services or those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication, reasonably related to professional legal services sought by the client, made between the client or a representative of the client and the lawyer or a representative of the lawyer, or between the lawyer and a representative of the lawyer, or between the lawyer or a representative of the lawyer and a lawyer representing another person in a matter of common interest with the client or a representative of such lawyer.

The client's privilege under subsection (2) may be claimed by—

(a) the client; or

(b) the client's guardian or committee; or

COMMENTS

No claim to privilege under **Section 100** above if any of the following exists:

(a) If the lawyer-client communication was to promote a crime or an intentional tort.

(b) if two or more parties are claiming interest in the property of the same deceased person

(c) if the communication relates to the issue of breach of duty as a lawyer

(d) if it relates to the signing of a document such as a will or title deed

(e) the communication relates to a subject in which more than one client has an interest and is being used in proceedings involving the same interest holders.

WORK PRODUCED BY A LAWYER FOR A CLIENT: SECTION 102

(1) A client has a privilege to refuse to disclose and to prevent any other person from disclosing information obtained or work produced by his lawyer or a representative of the lawyer in rendering professional legal services sought by the client.

(2) The client's privilege under subsection (1) may be claimed by:

(a) the client; or

(b) the client's guardian or committee; or

(c) the personal representative of a deceased client; or

(d) the successor in interest of a client who was an artificial person; or

(e) the lawyer who himself or through his representative obtained the information or produced work, or the representative of such lawyer, but such lawyer or his representative may not claim the privilege if there is no other person in existence who is authorized by paragraph (a), (b), (c) or (d) of this subsection to claim the privilege or if he is otherwise directed to permit disclosure by a person so authorized.

(c) the personal representative of a deceased client; or

(d) the successor in interest of a client who was an artificial person; or

(e) the person who was the client's lawyer at the time of the communication, or the representative of such lawyer, but such person may not claim the privilege if there is no other person in existence who is authorised by paragraph (a), (b), (c) or (d) of this subsection to claim the privilege or if he is otherwise instructed to permit disclosure by a person so authorized.

EXCEPTIONS TO LAWYER-CLIENT PRIVILEGE: SECTION 101

No person has a privilege under Section 100:

(a) if, apart from the communication, sufficient evidence has been introduced to support a finding of fact that the services of the lawyer were sought or obtained to enable or aid any person to commit or plan to commit a crime or intentional tort;

(b) as to a communication relevant to an issue between parties who claim an interest in property through the same deceased client of the lawyer;

(c) as to a communication relevant to an issue of breach of duty by a lawyer to his client or a client to his lawyer;

(d) as to a communication relevant to the formalities of the execution of a writing by a client where the lawyer or a representative of the lawyer is an attesting witness to the execution of the writing;

(e) as to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer sought by them in common, when offered in any proceeding between any of the clients.

(3) A court, in its discretion, may disallow a claim of privilege under subsection (1) if the information sought is not reasonably available from another source and the value of the information substantially outweighs the disadvantages caused by its disclosure.

MENTAL TREATMENT: SECTION 103

(1) *A person has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication between himself and a physician or psychologist or any other persons who are participating in the diagnosis or treatment under the direction of the physician or psychologist if the communication was made for the purpose of diagnosis or treatment of a mental or emotional condition.*

(2) For the purpose of this section, *a communication is confidential if it is not intended to be disclosed to third persons other than those reasonably necessary for the transmission of the communication or persons who are participating in the diagnosis or treatment under the direction of a physician or psychologist.*

(3) The privilege under subsection (1) may be claimed by—

(a) the person himself; or

(b) the person's guardian or committee; or

(c) the person's personal representative if the person is deceased; or

(d) the person who was the physician or psychologist or any other person who participated in the diagnosis or treatment under the direction of the physician or psychologist, unless he is otherwise instructed to permit disclosure by a person authorised to claim the privilege by paragraph (a), (b), (c) or (d) of this subsection.

(4) A court, in its discretion, may disallow a claim of privilege under subsection (1) if—

(a) in a proceeding to commit the person who was the patient, the information sought is relevant to the determination of whether the person should be committed, or

(b) in a criminal or civil proceeding the person claiming the privilege raises any matter relating to his mental or emotional condition, or

(c) a Court has ordered the person who was the patient to submit to an examination of his mental or emotional condition by a physician or psychologist.

RELIGIOUS ADVICE: SECTION 104

(1) A person has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication by the person to **a professional minister of religion who is prevented from disclosing such communication by the code of his religion and has been consulted in his professional role as a spiritual adviser.**

(2) For the purpose of this section, a communication is confidential if made privately and not intended for further disclosure.

(3) The privilege under subsection (1) may be claimed by—

(a) the person himself; or

(b) the person's guardian or committee; or

(c) the person's personal representative if the person is deceased; or

(d) the professional minister of religion to whom subsection (1) applies.

PRIVILEGE AGAINST DISCLOSURE OF COMPROMISE: SECTION 105

(1) A person has a privilege to refuse to disclose and to prevent any other person from disclosing to the tribunal of fact information concerning the furnishing, offering or accepting by such person or his authorized representative of valuable consideration in compromising a claim which was disputed either as to validity or amount and information concerning conduct or statements made as an integral part of such compromise negotiations.

(2) A person has no privilege under this section if his, or his authorized representative's conduct or statements relating to the compromise were made with the **intention that, they would not be privileged from disclosure to a tribunal of fact.**

PRIVILEGES ON INFORMANTS: SECTION 107

(1) The Government has a privilege to refuse to disclose and to prevent any other person from disclosing the identity of a person who has supplied to the Government information purporting to reveal the commission of a crime or a plan to commit a crime.

(2) The Government does not under this section have privilege to refuse to disclose a communication from such a person **except to the extent necessary to protect the identity of the person from disclosure.**

(3) The Government's privilege under this section may be claimed by any person authorized by the Government to claim the privilege.

(4) The Government has no privilege under this section if the identity of the informant has been disclosed to the public by the Government or the informant or if the informant appears as a witness in Court in an action to which his communication relates.

(5) If the Government claims its privilege under this section and the circumstances indicate a reasonable probability that the informant can give testimony necessary to a fair determination of

guilt or innocence, in a criminal action the Court may on its own motion and shall on the motion of the accused, dismiss the action.

MARITAL COMMUNICATION PRIVILEGE: SECTION 110

(1) A person has a privilege to refuse to disclose and to prevent any other person from disclosing a ***confidential communication made between himself and his spouse during their marriage.***

(2) A ***communication is confidential if not intended to be disclosed, and made in a manner reasonably calculated not to disclose its contents, to any third person.***

(3) This section applies to both ***monogamous and polygamous marriages.***

COMMENTS

Under **SECTION 110 OF NRCD 323**, spouses have the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between themselves ***during the subsistence of the marriage***. There are policy reasons for this principle.

1. It is said that, in law, the husband and wife are one. That implies that, the husband and wife have ***identity of interests***. If that position is accepted, then it follows that, no one will be expected to give evidence against him or herself.
2. There is the public policy that, the ***confidences of conjugal relations should be preserved.*** That is necessary in order to ***maintain marital harmony***. If spouses were to be compelled to testify against each other, it would result in ***undermining marital relations.***

The marital privilege applies to ***COMMUNICATION ISSUED WHILE THE MARRIAGE WAS SUBSISTING***. ***IT WILL NOT APPLY TO SITUATIONS WHICH EXIST BEFORE MARRIAGE***.

AFTER DIVORCE OR THE DEATH OF ONE SPOUSE, CAN THE OTHER SPOUSE DISCLOSE COMMUNICATION WHICH TOOK PLACE DURING MARRIAGE?

The Section forbids same. The principle is rationalized in the **Commentary on the Evidence Decree** to be that, the mischief (by which the rule guards against disclosure of marital communication) is for the protection of the public revulsion at the indignity of having to disclose marital secrets and marital communication. Therefore, once the communication is proved to have been made during marriage, the fact will still stand than to allow a disclosure which will defeat the very revulsion which it seeks to avoid.

In Ghana, the principle applies where the couples are properly married. Hence, they need to have gone through any of the three known marriages under our law:

a) ***Marriages Under The Ordinance,***
b) ***Traditional Marriages And***
c) ***Moslem Marriages.***

IT IS NOT EVERY CONVERSATION OR COMMUNICATION THAT TAKES PLACE BETWEEN MARRIED COUPLES THAT WILL JUSTIFY THE INVOCATION OF THE PRIVILEGE. The requirement is that, the **conversation should be intended by the parties to be confidential.** What will amount to **confidential information** will depend on the facts of every case.

CAN A WIFE TESTIFY AGAINST HER HUSBAND IN A CRIMINAL TRIAL?

In the case of **R v. ALGAR 1954] 1 QB 279,** the accused husband was charged with forging his wife's checks (cheques) during the period of their marriage. The marriage was later dissolved as voidable on account of the husband's impotence. She testified for the prosecution and he was convicted. On appeal, the conviction was quashed for the reason inter alia that, her evidence was inadmissible. There is however no express provision in NRCD 323 as to whether or not the principle in the Algar case can be applied in Ghana.

Again, where the spouse claims the privileges, it is possible for the Court to allow other evidence or alternative evidence on the subject to be tendered or admitted provided there is legal justification

for the admissibility: This principle was illustrated in the English case of RL [2008] 2CR. APP R 18 where a wife had declined to testify against her husband on the charge of multiple rape of his daughter. A statement she had earlier made to the police undermining the defense of the husband was nevertheless admitted in evidence.