INFORMATION

This document is not a comprehensive note for the law of Evidence. It was prepared for revision only. It does not contain all the topics in the law of evidence. It does not also contain the brief of any case. It merely simplifies the principles on some of the important topics. The reader is only to use this document for revision purposes in the manner that its preparation was intended. FOR REVISION ONLY!

I am responsible for all errors and omissions in this document. Where such errors can be corrected, it will be in your own interest to do so.

After each topic, I have listed authorities to be relied upon. This is to aid a quick revision of the authorities on each of the topics. The rationale is to make it easier to list all the authorities under the '*authorities to be relied on*' right after stating the issues in a problem question.

All the Best.

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LAW OF EVIDENCE

NB: Unless otherwise stated, all 'sections' stated herein are in reference to the Evidence Act, 1975 (NRCD 323)

PRELIMINARY MATTERS

Evidence simply means the ways by which a person proves or disproves a claim in a judicial enquiry. That is, how one establishes the basis of his allegations is what the law of evidence is concerned about.

Evidence means testimony, writings, material objects or other things presented to the senses that are offered to prove the existence or the non-existence of a fact. See: Section 178

The law of evidence is procedural and not substantive as it only lays down rules on how facts are to be established.

On sources of law of evidence, refer to Article 11.

The Evidence Act applies to all actions whether civil or criminal. See: Section 178

BASIC CONCEPTS IN EVIDENCE

a. Evidence must be relevant for it to be admitted
b. Evidence must be admissible. All relevant evidence is admissible except otherwise provided. Thus, all irrelevant evidence are inadmissible
c. Judges exercise exclusionary discretion in admitting evidence.
d. Judges have no discretion in admitting irrelevant evidence. Thus, there is no inclusionary discretion.
e. Parties produce evidence and the court determines its weight at the end of the trial.

JUDICIAL INQUIRY

Each judicial inquiry consists of two facets. That is question of facts and questions of law.

Questions of Law [section 1]:

All questions of law are determined by the court. This includes the admissibility of evidence, construction (interpretation) of the Act, whether a person has met the burden

of producing evidence on an issue and the determination of the law of states or organization of states to the extent that those are not part of the laws of Ghana. See: Section 1

NB: Where a party has not met the burden of producing evidence on a particular issue, the court shall rule against him on that issue. See: Section 1(4)

Questions of fact [section 2]:

In a jury trial, the jury is the tribunal of facts unless a law provides otherwise. However, in a trial without a jury, the court shall be the tribunal of fact and decide questions of fact.

In a jury trial, the court is not prevented from summing up the evidence to the jury and also commenting on the weight or credibility of evidence. However, when such comments are made, the court is to make it clear to the jury that they are to determine the credibility and weight of the evidence and are not bound by his comments or summary.

Preliminary fact [section 3 & 4]

A preliminary fact is a fact on which depends

a. the admissibility or otherwise of evidence
b. the qualification or otherwise of a witness
c. the existence or otherwise of a privilege

The existence of all preliminary facts are determined by the court in the absence of the jury. This includes the determination of the admissibility of a confession statement under section 120. In such determination, the parties may present evidence and arguments in respect of such determination.

A ruling on a preliminary fact implies a finding of fact which is prerequisite to it. As such, unless otherwise provided by a law, a separate formal finding of that fact is not necessary.

Unless the Act provides otherwise, 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 trial. However, that conditionally evidence shall be disregarded if the court determines that the preliminary facts are not proved.

Where a preliminary fact is in issue,

a. the tribunal of fact shall not be bound by the court's determination of the existence or otherwise of the preliminary fact, and
b. a determination by the tribunal of fact that differs from the courts ruling on the existence or otherwise of the preliminary hearing shall not affect a ruling admitting or excluding evidence or require the tribunal of fact to disregard an admitted evidence.

This does not prevent the introduction of evidence relevant to the weight or credibility of admitted evidence or preclude the tribunal of fact from considering that evidence.

MEANS OF PROOF

The means of proof to be considered are testimonial evidence, circumstantial evidence, traditional evidence, documentary evidence, real/material evidence, digital/electronic evidence.

CIRCUMSTANTIAL EVIDENCE

This form of evidence is based on deductions which the law allows us to make from surrounding circumstances. See: Section 18(2)

Before circumstantial evidence will be resorted to, usually, there is no eye witness who observed the commission of the offence such as rape, murder, etc. As such the prosecution relies on the circumstances surrounding the case in order to prove his case. See: Duah v The Republic.

Circumstantial evidence is any fact from which the existence or otherwise or proof of other facts in issue may be inferred by the court. It is not a proof of the fact itself but rather pieces of facts, considered or put together, which provides the basis for drawing conclusions of the existence or otherwise of a fact. Put differently, it is based on deductions from narrated circumstances. Circumstantial evidence is distinguished from mere speculations and rumours.

It has been described as the best evidence. It is evidence of surrounding circumstances which by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial. See: Rv Onufreycyk; R v Taylor

Circumstantial evidence is not a chain but rather more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be of quite sufficient strength. See: R v Exhall

GLIGAH & ATISO v THE REPUBLIC (this authority covers all the explanations above)

Principles:

Circumstantial evidence differs from gossip or rumours. No amount of gossip or rumour will suffice to constitute proof of the commission of an offence. See: State v Otchere

For circumstantial evidence to lead to the conviction of an accused person, it must relate to inferences

a. that supports that the offence has been committed
b. that the offence was committed by the accused person and no one else. Thus, there must not be any reasonable probability that the crime was committed by some other person other than the accused person.
c. that it is consistent with the guilt of the accused person. Thus, the only conclusion is that the accused person is guilty. Put differently the conclusion must be inconsistent with the innocence of the accused person.

Thus, in cases where the prosecution relies on circumstantial evidence, the burden of proof on him is proof beyond reasonable doubt. See: Section 10(2) and 11(2). The failure of any of the tests will mean the prosecution has not proved its case beyond reasonable doubt and the accused must be acquitted and discharged.

The law is that where the circumstantial evidence leads to an inference of guilt as well as innocence of the accused, it means the prosecution has failed to prove its case and the accused must be acquitted and discharged. See: Domena v The Commissioner of Police.

AUTHORITIES TO BE RELIED ON

1. Section 18(2)
2. Section 10 & 11
3. Duah v The Republic
4. R v Onufreycyk
5. R v Taylor
6. Gligah & Attiso v The Republic
7. State v Otchere
8. Domena v The Commissioner of Police

TRADITIONAL EVIDENCE

By its nature, traditional evidence is hearsay evidence. It is the 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.

See: In re Asere stool: Nikoi Olai Amontia IV (substituted by Tafo Amon II) v Akotia Oworsika III (substituted by Laryea Ayiku II)

This type of evidence is used in cases such as ownership of lands, stools, etc. it is derived from tradition or reputation or statements of deceased persons with regards to questions of pedigree, ancient boundaries, etc when no living witnesses are available to testify to such matters. Put differently, there is a difficulty in adducing direct evidence.

The law is that traditional evidence is mostly hearsay because they are made out of court. Hearsay evidence is inadmissible by virtue of section 117. However, section 128 and 129 have saved traditional evidence as an exception to the hearsay rules and therefore traditional evidence is admissible.

The test for resolving conflicting traditional evidence is

a. Examine or weigh the traditional evidence in light of recent facts as can be established by evidence to determine which of the conflicting statements of tradition is more probable.
b. Facts established by matters and events within living memory must take precedence over mere traditional evidence.

See: Adjeibi-Kojo v Bonsie; Adjei v Acquah

In land cases, the matters to be relied upon in establishing facts in recent memory are long uninterrupted and unchallenged acts of occupation, recent ownership. It must be noted that each case must be considered based on its peculiar facts such that what may qualify as an established fact in recent memory in one case may not necessarily apply to another case.

The law is that in evaluating traditional evidence, the court must not rely solely on the impressive manner in which the stories were given or delivered by the witnesses. It must rather resort to the test stated above. See: In re Tahhyen & Asaago Stools; Kumanin II (Substituted by) Oppon v Anin

In cases where there is conflicting traditional evidence as well as conflicting evidence of recent memory, the court has to decide the case by sifting and weighing the respective

testimonies to see which outweighs the few clearly established facts. See: In re Kodie Stool; Adowaa v Osei

NB: where the court is faced with conflicting evidence, traditional evidence does not have to be used as the sole basis of its decision. Other evidence before the court will be relevant in making a decision on the case. This may result in a party winning his case even if his traditional evidence fails, provided there are other evidence on record to prove his claim. Additionally, the presumption of title under section 48 may help a party win his case notwithstanding that his traditional evidence failed.

The law is that textbooks accounts which have been objected to cannot be relied upon in proving facts of recent memory. This is same for lyrics of a song. Such accounts must be given a minimal weight. See: Hilodjie v George.

AUTHORITIES TO BE RELIED ON

1. Section 116
2. section 117
3. section 128
4. section 129
5. section 48
6. Adjeibi-Kojo v Bonsie
7. Adjei v Acquah
8. In re Tahhyen & Asaago Stools; Kumanin II (Substituted by) Oppon v Anin
9. In re Kodie Stool; Adowaa v Osei
10. Hilodjie v George

REAL OR MATERIAL EVIDENCE

This evidence takes the form of material objects or physical things produced as exhibits for the court to see, smell, feel or listen. Material objects must be presented in the presence of the parties and failure to do so may be the subject of observation by the judge.

In exceptional cases, the court will accept secondary evidence of real objects rather than requiring their physical production example photography of a tombstone rather than the tombstone itself.

Real evidence is valueless unless accompanied by testimony identifying it as the object the qualities of which are in issue. In certain cases, the court may visit the locus in quo to examine real or physical evidence.

DOCUMENTARY EVIDENCE

A document may be used either for its content or as a chattel. When the contents of a document are relied upon, it is incorporated as part of the testimonial evidence of the witness. When it is treated as a chattel, the document constitutes part of real evidence or material objects.

For instance, if a will is stolen, it can be produced in court to show that it bore the fingerprints of the accused. When treated as a statement however, a document may form part of the testimonial evidence or as part of circumstantial evidence. When used as circumstantial evidence, although it is produced and identified by the witness, the document is not incorporated into the testimony as having been written or read by him, neither are its contents as proof of anything they may assert. It is offered to the court, for example, as a kind of document which would only have been executed by someone in possession. See: R v EMES.

WHAT IS A DOCUMENT?

A document is anything tangible which contains writings (words, symbols or marks). In R v Daye, a document was defined to cover a sealed packet. Thus, a document is any writing capable of being evidence. From this, a document need not necessarily be a paper. It can be a writing engraved on stone or parchment.

USES OF A DOCUMENT

A document may be used as the medium for proving the rights and liabilities of parties. This is seen in cases of contract where the rights and liabilities of the parties are determined with reference to the contractual document itself.

Documents may be used to prove the truth of what the hearsay document represents.

Documents may be used to establish the consistency or otherwise of a witness or party who testifies in court.

In criminal cases, documents may serve as the subject matter of the charge or bill of indictment.

ADMISSIBILITY OF DOCUMENTARY EVIDENCE

The general position of the law is that where the original of a writing or document is available, same must be tendered in evidence to prove the content of a writing unless a law otherwise provides. This is referred as the best evidence rule. See: Section 165

'Original' means the writing itself or a copy intended to have the same effect by the person executing or issuing it. See: Section 163

A duplicate of a writing according to section 164 is

a. a copy produced by a technique which ensures an accurate reproduction of the original.
b. a copy produced by the same impression, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording or by chemical reproduction, but does not include a copy reproduced after the original by manual handwriting or typing.

Thus, the best evidence rule provides that, the best that the case will allow and any less good evidence is to be excluded.

Notwithstanding the best evidence rule, there are exceptions. Where the exceptions apply, the court will admit secondary evidence in place of the original document. This will lead to the secondary evidence rule. The exceptions (where a duplicate will be admitted) include.

a. where the original is lost or destroyed. This will not apply where the loss or destruction resulted from the fraudulent act of the proponent of the evidence. See: Section 167. Here, the court must be satisfied that after due diligent search, the original cannot be found. Thus, there must be a proper search and what is a proper search depends on the nature and value of the document. See: Owusu v The Republic
b. where the original cannot be obtained by an available judicial procedure or if the persons having control of the original after receiving judicial process compelling production do not produce it. See: Section 168. This may happen for example where there is a claim of privilege.

c. where the original is under the control of the opponent and after he is notified, he fails to produce it. See: Section 169
d. where the content of a writing is not closely related to a controlling issue in the action. That is the issue in the document is only incidental to the main issue for trial. See: Section 170
e. voluminous writings. Thus, if the original consists of accounts of other writings which cannot be conveniently be examined by the court and the fact to be proved is the general result of the whole. See: Section 171
f. where the original writing is immovable or cannot easily be moved. See: Section 172
g. where the contents of the writing have been admitted by the opponent of the evidence in writing or by testimony in the action. See: Section 173
h. where the copy has been compared with the original. Where the original document is made available to the court and the parties and is compared with the copy, that copy may be tendered in evidence. The comparison should take place during the trial or before the commencement of the trial. See: Section 174
i. copies of official writings or documents. See: Section 175. The copy of a document properly described as official document is admissible in lieu of the original subject to the following conditions:
    a. the document must have been filed or kept in an office where documents of that nature are kept
    b. that the copy is certified as correct by the person who ordinarily has custody of such documents and
    c. that certification has been authenticated as to be a correct copy by a witness who has compared it with an original.
j. Sealed official documents. The copy of a document which is sealed shall be admitted without proof provided that it was issued out of an office or department of the government. See: Order 38 rule 9
k. Banker's books: Documents relating to the business of the bank may be admitted in evidence. Section 176 requires the following conditions to be satisfied. The bank's representative must show that
    a. The document was made in the regular course of the bank's business and

b. The copy has been compared with the original and found to be accurate copy of the original.

PAROLE EVIDENCE RULE

This is also described as the extrinsic evidence rule or estoppel by deed. The rule is that a party to a written document is not permitted to adduce any extrinsic or oral evidence to add to, vary, subtract from or contradict the terms of the document. See:

1. Section 177
2. Wilson v Brobbey
3. Mougaine v Yemoh

The parole evidence rule is because the terms in the document are regarded as final and conclusive of what the parties had agreed upon or was on the mind of the parties when they entered into the agreement. See: Section 25(1). By the said section 25, whenever conclusive presumption has been established by the facts of a case, parties to the transaction in that case will be estopped from adducing evidence to contradict or vary the terms of that transaction.

The rule implies that a party of full age and capacity would be bound by his signature to a document, whether he read it or not. Mere negligence in not reading a document before signing it was not a good defence so as to establish non est factum. See: Gallie v Lee

Prima facie, where the court is faced with documentary evidence and oral or parole evidence, documentary evidence should prevail over the parole evidence. This is so if the oral evidence is conflicting with the documentary evidence. See: Duah v Yorkwa.

EXCEPTIONS

The parole evidence rule will not apply in the following cases

a. where the parties agreed that the agreement should be partly oral and partly written
b. where the parties did not intend that the document should embody the full terms of the agreement or contract.
c. where evidence is required to interpret ambiguous terms of the document.

d. unless the terms of the document are found to be conclusive and exhaustive of the intentions of the parties, evidence of a consistent additional terms will be admitted to vary the document.
e. the written document may be explained or supplemented by a course of dealing or trade usage or course of performance.
f. the rules of equity applies where a party has been induced to enter into a contract by duress, undue influence or fraud. In effect parole evidence rule will be admitted to establish a vitiating factor.

ILLITERACY AND PROOF OF DOCUMENT

Who is an illiterate for the purposes of execution of a document? An illiterate is determined on case-by-case basis and it is not a person who cannot read and write alone. Depending on the circumstances, one can be an illiterate on a particular subject matter only. For example, a person who has no knowledge of a car and deals with a car dealer for the purchase of a car may be an illiterate for the purpose of the car purchase agreement only.

The first condition here is to determine whether a party to an executed document is an illiterate. The term illiteracy is determined on case-by-case basis such that a party who is an illiterate for the purposes of a car deal agreement may not be an illiterate for the purposes of a contract for the purchase of shoes.

The law is that where an illiterate party 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 that he understands before he signed or thumb printed it. See: Waya v Byrouthy; Kwamin v Kuffour; Zabrama v Segbedzi

Illiteracy per se is no reason for disclaiming liability for documents executed by an illiterate. That is, if there is evidence that the illiterate understands the terms of the document and a properly worded jurat appears on the face of the document, the fact that he is an illiterate cannot help him avoid liability under the agreement. See: Zabrama v Segbezi; Reindorf v Reindorf; Duodu & Duodu v Adomako

For an illiterate party to be bound by a document, Section 3 of the Illiterates Protection Act, 1912 (CAP 262) must be complied with strictly. It provides

A person writing a letter or any other document for or at the request of an illiterate person, whether

gratuitously or for a reward, shall

a. clearly and correctly read over and explain the letter or document or cause it to be read over and explained to the illiterate person,
b. cause the illiterate person to sign or make a mark at the foot of the letter or the other document or to touch the pen with which the mark is made at the foot of the letter or the other document,
c. clearly write the full name and address of the writer on the letter or the other document as writer of it, and
d. state on the letter or the other document the nature and amount of the reward charged or taken by the writer for writing the letter or the other document, and shall give a receipt for the reward and keep a counterfoil of the receipt to be produced at the request of any of the officers named in section 5.

The strict fulfilment of the section entails the inclusion of a jurat at the end of the document prepared on behalf of the illiterate person.

DEFENCES TO LIABILITY ARISING FROM DOCUMENTARY COMMITMENTS

a. Non est factum
b. Fraud
c. Misrepresentation
d. Mistake
e. Duress
f. Undue influence

AUTHORITIES TO BE RELIED UPON

1. Section 179 (meaning of writing)
2. Section 51 & 52 (relevance)
3. Section 165 (original/best evidence rule)

4. Section 163 (meaning of original)
5. Section 164 (meaning of duplicate)

EXCEPTIONS

6. Section 167 (lost/destroyed) ; Owusu v The Republic
7. Section 168 (judicial procedure)
8. Section 169 (control of opponent)
9. Section 170 (collateral writings)
10. Section 171 (voluminous writings)
11. Section 172 (immovable)
12. Section 173 (admitted writings)
13. Section 174 (comparison)
14. Section 175 (copies of official documents)
15. Section 176 (bankers records)
16. Order 38 rule 9 (sealed official documents)

PAROLE EVIDENCE RULE

1. Section 177
2. Section 25 (presumption against documents)
3. Wilson v Brobbey
4. Mougaine v Yemoh
5. Gallie v Lee
6. Duah v Yorkwa

ILLITERACY AND PROOF OF DOCUMENTS

1. Section 4 of the Illiterates Protection Ordinance 1912 (CAP 262)
2. Waya v Byrouthy
3. Kwamin v Kuffour
4. Zabrama v Segbedzi
5. Duodu v Adomako & Adomako

MATTERS NOT REQUIRING PROOF

The law is that generally a party who avers must prove. Thus, a party to an action is required to prove the facts upon which he relies. See: Section 14. However, there are exceptions to this rule. Where the exceptions apply, the party is not required to prove the facts he avers.

The clue is that it is not every fact which has to be proved by adducing evidence during the hearing.

The matters which a party need not prove in an action includes the following:

Judicial notice, admissions, presumptions.

JUDICIAL NOTICE

This is where the court accepts the truth or accuracy of facts in issue without any proof on the basis that it is within the tribunal's knowledge. The rationale is to save time in proving matters which everyone is deemed to know. For example, the court will dispense with proving that the sun rises from the east and sets in the west.

Judicial notice is regulated by section 9.

Judicial notice may be taken at any stage of the action whether requested by a party or the court suo motu. Where judicial notice is requested by a party to the action, he shall

a. give fair notice to the other party to the action. This can be done through the pleadings or otherwise and
b. supply the necessary sources and information to the court.

A party, on timely request, is entitled to an opportunity to present to the court information relevant to the propriety of taking judicial notice and the meaning of the fact to be noticed.

In a jury trial, the court may and upon timely request shall, instruct the jury to accept as conclusive the facts which have been judicially noticed.

The law is that for the court to take judicial notice of the facts, two main conditions must be satisfied under section 9(2). This is considered in two grounds.

GROUND ONE

The conditions to be satisfied here are that the facts

a. must be generally known within the territorial jurisdiction of the court and
b. are not subject to reasonable dispute.

Both conditions must be satisfied before judicial notice will be taken.

The facts to be judicially noticed must be notoriously known and clearly established within the community. Thus, reference is made to the knowledge of the people living in the community. The facts should be known to all or almost everyone in the community.

GROUND TWO

The conditions to be satisfied here are that the facts are

a. capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned and
b. not subject to reasonable dispute.

Where the source of the fact is disputed for example the facts in books, the court cannot take judicial notice of them. The challenge by other writers on those subject shows that the source(s) had been questioned or disputed. See: Hilodjie v George

NB: The matters which judicial notice must be taken of must be relevant to the facts in issue.

The law is that where a fact was so notorious that judicial notice could be taken of it, evidence to the contrary could be treated as perjury or palpably false. See: Nyarko v The Republic

The expression 'not subject to reasonable dispute' connotes that, that fact should not be one of which different people share different ideas or notions. It should be certain and definite.

JUDICIAL NOTICE AND PERSONAL KNOWLEDGE OF THE JUDGE

The question of whether the judge can rely on his personal knowledge of facts to take judicial notice of facts in issue is answered in the negative.

The law is that for judicial notice to be taken, the facts must be notoriously known within the territorial jurisdiction of the court, or they are capable of readily determination by resorting to sources whose accuracy cannot be reasonably questioned that the facts are not subject to any reasonable dispute. This means that the judge cannot substitute the common knowledge of the people within the territorial jurisdiction of the court with his personal knowledge.

Thus, the law is that the judge is not permitted to rely on his personal knowledge of facts even if they are known to him. See: Mensah v The Republic. However, there are situations where certain judges are appointed based on their expertise such as judges in tax courts. In such instances, 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. The law allows the judge to rely on such personal knowledge in such situations with the condition that the knowledge should be a professional knowledge rather than purely private knowledge. See: R v Field Justices; Ex parte White.

NB: Some of the topics in respect of which judicial notice may be taken are either provided by statute or case law. Regardless of this, the test under section 9(2) must be applied in each case.

AUTHORITIES TO BE RELIED ON

1. Section 14
2. Section 9
3. Mensah v The Republic
4. Otoo v Dwamena
5. Hilodjie v George
6. R v field Justices Ex Parte White
7. Nyarko v The Republic

ADMISSIONS

This is where a party voluntarily accepts facts given by the opposing party as true. Thus, it is the voluntary acknowledgement of the existence of facts relevant to an adversary's

case. Where there is an admission, the fact or issue has been conceded and it is no longer in contention. This allows the court to rely on them without any further proof of the facts constituting admissions.

The law is that where a person admits or concedes to facts which are against his interests, there is no need to proceed further to prove those facts before he would be bound by the terms of those facts.

Where an admission is made outside the court room, it amounts to hearsay. see: section 116. Generally, hearsay evidence is inadmissible under section 117. However, section 119 makes admissions an exception to the hearsay rules. The effect is that where a party admits to facts outside the court room, it will be admissible if section 119 is satisfied.

In civil actions, admissions may be made through pleadings or in response to formal request made through notice to admit facts or authenticity of documents filed in consequence of the rules of court. They may be made through correspondence or communication if the communication is not made without prejudice. They may be made by a party voluntarily or by an authorized representative.

In criminal actions, admissions may be in the form of the plea of guilty as well as confessions (under section 120). Confessions shall be dealt with under the rules on hearsay.

Either ways, admissions may be formal or informal.

The law is that formal admissions are binding on the person who made them or on whose behalf they are made. As such, they cannot be controverted or contradicted. Formal admissions are conclusive against the party who made them. That notwithstanding, formal admissions can be amended or withdrawn in accordance with Order 23 rule 5 of CI 47

The law is that informal admissions raise rebuttable presumptions. They may be rebutted, contradicted or explained away by evidence. Informal admissions include: implied admission, incidental admission or adoptive admission.

Implied admission is an admission reasonably inferred from a party's conduct, actions or statement or a party's failure to react against the admission. See: Bessela v Stern (promise

to marry daughter case). This form of admission is not really different from adoptive admission.

Adoptive admission is admission brought about by a party's conduct indicating his approval of the statement or conduct of another person and thereby showing his acceptance or belief in the statement or action.

Under section 119, admission is admissible if the statement is offered against a party in the case and

a. the declarant is a party to the action as an individual or in a representative capacity or
b. the party against whom it is offered manifested the adoption of or belief in the truth of the statement or
c. the party against whom it is offered had authorized the declarant to make the statement in respect of 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 relates to a matter within the scope of the 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.

NB: the admission must relate to facts and must be adverse to the interest of the party against whom it is offered.

The law is that where the admission is unconditional, it binds the party who made it and bars the application of statute of limitation. See: Arcton v ACC

AUTHORITIES TO BE RELIED ON

1. Section 116
2. Section 117
3. Section 119
4. Bessela v Stern
5. Order 23 rule 5 of CI 47
6. Ekow Russel v The Republic

RELEVANCE AND ADMISSIBILITY

RELEVANCY

In simple terms, relevant evidence is evidence which is directed at proving or disproving a fact in issue. See: DPP v Kilbourne.

Relevant evidence means evidence including evidence relevant to the credibility of a witness or hearsay declarant, which makes the existence of a fact which is of consequence to the determination of the action more or less probable than it would be without the evidence. See: Section 179

This definition contains two elements to be satisfied. They are

Materiality: this means that the evidence offered must be material. Put differently, the evidence offered must have a logical connection with the facts in issue to be determined by the court. This is seen from the expression 'which is of consequence to the determination of the action.' In simple terms, materiality connotes that the evidence must relate to the facts in issue before the court.

Probative value: this is the ability of the evidence to prove or disprove the facts in issue. The evidence offered must have the tendency of proving a fact or disproving a fact. This is evident from the expression 'the determination of the action more or less probable than it would be without the evidence.'

ADMISSIBILITY

In simple terms, admissibility is the acceptance of a piece of evidence by a court or tribunal of fact.

The law is that relevant evidence is admissible except an enactment provides otherwise. Evidence is not admissible except relevant evidence. See: Section 51

The effect of section 51 is that the admissibility of evidence is conditioned on its relevancy (which is satisfied by materiality and probative value). Simply put, all relevant evidence must be admissible unless a law otherwise provides. If the evidence is relevant, it is admissible. If the evidence is not relevant, it is not admissible.

EXCLUSION OF RELEVANT EVIDENCE

The law is that judges have exclusionary discretion but not inclusionary discretion.

Exclusionary discretion is the power of the judge to exclude evidence although it is relevant. See: Section 8; Section 51; section 52.

Inclusionary discretion is the power of the judge to include evidence which is inadmissible. This is not available or permissible in Ghana. The exercise of such power may lead to the decision or judgment been overturned on an appeal. See: Section 5

The law is that relevant evidence must be excluded when provided by an enactment. See: Section 51

Again, the law is that (Section 52), the judge must exclude relevant evidence if the probative value is substantially outweighed by

a. Considerations of undue delay
b. Waste of time
c. Needless presentation of cumulative evidence/ unnecessary repetition of evidence
d. The risk of the evidence creating substantial danger of unfair prejudice
e. Substantial danger of confusing the issues
f. Considerations of surprise to the other party in civil action. This is where a stay is not possible or appropriate and the other party had no reasonable grounds to anticipate that that evidence would be offered.

Any of these conditions will justify the exercise of the exclusionary power of the trial judge. The law is that in exercising discretion under section 52, the judge is required to weigh the probative value of the evidence against the prejudicial effect and decide which one substantially outweighs the other.

CHARACTER EVIDENCE.

Character means a person's generalized disposition made up of the aggregate of the traits, including traits of honesty, peacefulness, temperance, skill or care of that person and their opposites. See: Section 179

From this definition, character evidence is different from reputation evidence. Reputation is the general view that people have formed of a person. For example, that one has the reputation to speak the truth. That reputation may differ from what the person does in actual given situations.

Again, character evidence is different from evidence of habit. Habit is the consistent and repeated behaviour. Habit is more or less a routine practice under section 179 which is defined as a regular response to a repeated specific situation.

Character evidence is of probative value and assists in proving a fact in issue.

ADMISSIBILITY OF CHARACTER EVIDENCE

The law is that character evidence is applicable in both civil and criminal cases.

Generally, character evidence of person is inadmissible to prove conduct in conformity with that character or trait on a specific occasion. See: Section 53. The rational for this principle is that character evidence is prejudicial in nature and as such to be excluded in accordance with section 52. Notwithstanding this, there are four exceptions to the general rule which are:

a. In a criminal trial, character evidence is admissible when offered by the accused person to prove his innocence or by the prosecution to rebut the evidence previously introduced by the accused. See: Section 53(a); Section 83(2).

   Where the accused adduces character evidence to prove his innocence, he puts his whole character in issue. As such the prosecution can attack all aspects of his character.

   Here, The law is that the prosecution can adduce character evidence only when the accused person has first adduced same to prove his innocence. This includes evidence of previous conviction. See: Avegavi v R. Again, in order to prove character here, the evidence must be in the form of opinion (personal opinion) or reputation (societal opinion) only. See: Section 54(1)

b. In a criminal trial, character evidence is admissible when offered by the accused to prove the conduct of the victim in connection with the alleged crime or by the

prosecution to rebut same. See: Section 53(b); The Republic v Melfa. Here, the evidence must be in the form of opinion or reputation only. See: Section 54(1)

c. Character evidence is admissible when offered to attack or support the credibility of a witness or a declarant. See: Section 53(d). This is applicable in both criminal and civil trials.

   How to prove character evidence here is regulated by section 83-85. The law is that evidence of a good character to support the credibility of a witness is inadmissible unless evidence which impugns the good character of the witness has been admitted to attack the witness's credibility. In supporting or attacking the credibility of a witness, evidence of reputation is inadmissible. Thus, the law is that the evidence to be offered must be that of opinion (personal opinion). See: Section 83

   Also, specific instances of conduct is inadmissible to attack or support the credibility of a witness unless inquired into on cross examination of the witness or a witness who testifies to an opinion of the character of the witness in question. See: Section 84

   Where previous convictions are relied upon in attacking the credibility of a witness, it shall be limited to conviction of crime involving dishonesty or false statement and not any other crime. The admissible previous conviction is limited to cases where 10 years has not elapsed since the date of conviction or termination of sentence. An appeal does not prevent the leading of such evidence but where evidence of conviction is led, an appeal pending may also be led. See: Section 85

   The law is that a person may not ask question which conveys adverse imputation concerning the character of a witness unless he has reasonable grounds for believing the imputation to be true. See: Section 83

d. Character evidence is admissible where character or a trait of character is an essential element of a charge, claim or defence. See: Section 53(d). Here, to prove character evidence, it must be in the form of specific instances of the persons conduct. See: Section 54(2). The example given by Brobbey JSC in his book is in cases where the accused pleads the defence of insanity.

METHODS OF PROVING CHARACTER

The various methods of proving character are:

a. Opinion
b. Reputation
c. Instances of specific conduct of a person. Example, previous convictions.

See: Section 54

NB: Instances of specific conduct of a person is admissible to prove facts such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

ROUTINE PRACTICE

Routine practice means a regular response to a repeated specific situation. See: Section 179. Simply put, routine practice is akin to the habit of a person in a particular situation.

Routine practice is one of the instances where character evidence is admissible.

The law is that evidence of a routine practice of a person or an organization is admissible to prove conduct on a specified occasion in conformity with the routine practice. See: Section 55

This may be proved by evidence of opinion (personal opinion) or instances of specific conduct on specified occasions sufficient in number to support a finding that the practice was routine.

REMEDIAL AND PRECAUTIONARY MEASURES

Evidence is inadmissible to prove negligence or culpable conduct in respect of an event where after the event, measures taken shows that if previously taken, the likelihood of the event happening would be less. See: Section 56.

Notwithstanding this, evidence of subsequent remedial or precautionary measures may be offered for other purpose. This includes showing ownership, control or feasibility of remedial or precautionary measures.

OFFERS TO PLEAD GUILTY, WITHDRAWN PLEAS OF GUILTY

The law is that a plea of guilty which is withdrawn or an offer to plead guilty to a crime is inadmissible whether in a civil or criminal action involving the person who made the plea or offer. See: Section 57

PREVIOUS CONVICTIONS

The law is that evidence of a previous conviction is hearsay evidence and should be inadmissible. However, it is admissible as an exception to the hearsay rules. See: Section 127; section 85. There are limitations placed on the use of previous convictions. Some are:

a. Previous conviction of a person before he attained 18 years is inadmissible.
b. Previous conviction which has lasted 10 years from the date of conviction is inadmissible. See: Section 85(2).

Generally, for previous conviction to be admissible, it must be similar to the offence for which the accused stands trial. See: Amoah v The Republic.

Previous conviction must relate to the offence for which the accused has been convicted or one included in the offence for which he could have been convicted. See: Republic v General Courts Martial; Ex parte Mensah.

Previous conviction must be properly proved by the prosecutor before the court will consider it. This is done by the production of a certified true copy of the order convicting the accused or a certified true copy of the judgment in which the accused was convicted. The accused must have been convicted by a court of competent jurisdiction. A discharge on a technical ground as for want of prosecution will not amount to previous conviction. See: Kuma v The Republic.

ILLEGALLY OBTAINED EVIDENCE.

The focus here is on issues concerning investigations into crimes, police surveillance activities, undercover procedures, bugging or secret listening of conversations, tape recording evidence, entrapment, confessions and admissibility of evidence.

When evidence is said to have been illegally or improperly obtained, what is referred to is evidence which has been acquired, procured or received by means, methods or

procedures which fly in the face of the law, defies standards of morality or are contrary to the sense of decency or propriety.

The question is whether such evidence is admissible?

There are two schools of thought. The first school holds the view that the finding or outcome of illegal search should not be admissible because the tainted source or tainted procedure should be considered as tainting the outcome of the search. Put differently, if the evidence was obtained illegally, then no matter how relevant it is, it is inadmissible. The argument is based on the fruit of a poisonous tree. Thus, if the tree is poisonous, the fruit is equally poisonous. They further argue that decisions of court must be based on legal or admissible evidence and not illegal or inadmissible evidence. They further argue that, to admit illegally obtained evidence will lead to the abuse of state power. Again, they argue that to admit illegally obtained evidence will lead to the police and crime investigators trampling on the liberties of the citizens.

The second school of thought holds the view that where evidence is obtained by improper or illegal or unauthorized methods, the evidence should be admissible provided it is of proper probative value. Put differently, if evidence is obtained through improper means on the basis of which the accused person will be convicted, the evidence should be admissible. Thus, for this school, the means of procuring the evidence is immaterial. They argue that the duty of the court is to determine the guilt of the person charged and not to discipline the police for exceeding their powers. See: Fox v Chief Constable of Gwent. They argue that if the police procure evidence illegally, it is up to the relevant authorities to punish them and it is not part of the criminal process that the court should punish such police personnel. See: R v Leatham. In simple terms, they argue that 'it matters not how you get it, if you steal it even, it would be admissible in evidence.'

THE COMMON LAW POSITION

The common law position is that evidence is admissible if relevant and not how it is obtained. See: R v Leatham

In England, after the enactment of the Police and Criminal Evidence Act (PACE) 1984, the court applies section 78(1) on case-by-case basis and apply the Cost-Benefit or the

Utilitarian principle. This means that, they consider the effect of the impropriety of obtaining the evidence and its benefit to the society. Where the benefit to society outweighs the effect or impact on a person, the courts admit the evidence.

THE GHANAIAN POSITION

There is no express statutory provision on the admissibility of illegally obtained evidence. However, the laws on illegally obtained evidence in Ghana may be gleaned from provisions of the Constitution, the Evidence Act as well as judicial decisions.

In Ghana, the test for admissibility of evidence is that all relevant evidence is admissible unless an enactment otherwise provides. See: Section 51. An enactment includes the 1992 Constitution. As such, any evidence obtained contrary to the provisions of the constitution is prima facie inadmissible. This is because the constitution is the supreme law of the land and any act or omission or any law which is inconsistent with it is unconstitutional. See: Article 1(2); Tuffour v Attorney General.

Flowing from this, it is improper to say that all evidence, no matter how it is obtained, is admissible. Put differently, any argument to the extent that it provides that the test for admissibility of evidence is its relevance and as such illegally obtained evidence is admissible is not correct. Rather, such evidence is prima facie, inadmissible.

Additionally, the court has the power to exclude relevant evidence if its probative value is substantially outweighed by certain considerations in accordance with section 52.

The test of 'prima facie inadmissible' will mean that, the court has to consider the extent to which the evidence breaches the constitution before it rules it as inadmissible. This is proper considering that there are exceptions to certain constitutional provisions in the constitution itself. This is clearly seen under chapter 5 on the fundamental human rights.

Article 12(2) is to the effect that the enjoyment of fundamental human rights is subject to the respect of rights and freedoms of others and for public interest. This means that if evidence is obtained in breach of one's fundamental human rights, the court must ascertain and weigh whether the public interest outweighs the right of the accused person. If yes, such evidence will admissible.

Additionally, Article 15 provides that the dignity of all persons shall be inviolable. This means any evidence obtained through torture or other cruel, inhumane or degrading treatment is inadmissible. It is on this basis that most confession statements are inadmissible (see also: Section 120).

Also, every person has the right to own property and privacy except for the prevention of crime or protecting the rights and freedoms of others. See: Article 18 and the exceptions thereunder.

The effect is this, where evidence is obtained in breach of one's human rights, the court must ascertain if any of the exceptions on the right in question justifies the admissibility of such evidence. In accordance with this, the supreme court has held that the court should exercise exclusionary power. See: Raphael Cubagee v Michael Yeboah Asare; Mrs Abena Pokuaa Ackah v Agricultural Development Bank

AUTHORITIES TO BE RELIED ON

Generally

1. Section 179 (definition of relevance)
2. DPP v Kilbourne (also on definition)
3. Section 51
4. Section 52 (exclusionary rules)

CHARACTER EVIDENCE

1. Section 179 (definition of character)
2. Section 51
3. Section 52 (prejudicial effect)
4. Section 53 (admissibility of character evidence)
5. Section 54 (how to prove character)
6. Avegavi v R
7. The Republic v Melfa
8. Section 83-85 (supporting or attacking the credibility of a witness)
9. Amoah v The Republic (previous conviction must be similar to the offence the accused is charged)

ILLEGALLY OBTAINED EVIDENCE

1. R v Leatham
2. R v Sang
3. Fox v Chief Constable of Gwent
4. Section 78 of PACE (Police and Criminal Evidence Act)
5. Section 51
6. Article 1(2); Tuffour v AG
7. Section 52
8. Chapter 5 of 1992 Constitution
9. Article 12(2)
10. Article 15 (dignity)
11. Article 18 (privacy)
12. Raphael Cubagee v Asare
13. Mrs. Abena Pokuaa v Agricultural Development Bank

PRESUMPTIONS

Presumptions, although considered separately, is part of the matters not requiring proof as discussed above. It further helps the court in determining the allocation of burden of proof. Thus, presumptions may create legal or evidential burdens. Presumptions apply in both civil and criminal trials.

Presumptions call for certain result in a given case unless the party adversely affected overcomes it by producing sufficient evidence, provided it is rebuttable.

NB: A lot of statutes raise presumptions. However, the fundamental one is the Evidence Act.

There are two main forms of presumptions. They are presumption of fact (inference) and presumption of law.

PRESUMPTION OF LAW

A presumption of law (presumption simpliciter) 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. See: Section 18(1).

For a presumption to be made, it is a condition precedent that the basic facts are established by the party in whose favour the presumption operates. It is after this that the presumption will be made and thereby shifting the burden of proof on the other party to rebut same with evidence.

PRESUMPTION OF FACT OR INFERENCE

An inference is a deduction of fact that may logically and reasonably be made from another fact or group of facts found or otherwise established in the action. See: Section 18(2)

For an inference to be made, the basic facts must be established. An inference made from the established facts must be reasonable and logical. To further appreciate this point, refer to circumstantial evidence.

An inference is made on case-by-case basis.

NB: The difference between presumptions and inference is that, in presumptions the presumed fact is based on the primary facts whilst with inference the assumed fact is taken from the primary facts.

Additionally, a presumption is a mandatory connection between the basic and assumed facts. However, an inference is permissible but not mandatory connection between the basic and assumed facts.

PRIMA FACIE EVIDENCE

The law is that where an enactment provides that a fact or group of facts is prima facie evidence of another fact, it raises or creates a rebuttable presumption. See: Section 19.

The effect is that, unless the other party who is adversely affected adduces sufficient evidence to rebut it, he shall be bound by the presumption so established.

TYPES OF PRESUMPTIONS

Presumptions can either be conclusive or rebuttable. See: Section 18(3)

CONCLUSIVE PRESUMPTIONS

Where the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, evidence contrary to the presumed fact may not be considered by the tribunal of fact. See: Section 24

The effect is that the tribunal of fact is precluded from receiving evidence which will be contrary to the fact conclusively presumed. The condition precedent is that the tribunal must find the basic or primary facts to be established. See: In re Suhyen Stool; Wiredu & Ohemaa v Agyei & Others.

The law is that once a conclusive presumption is made, no evidence to the contrary can be admitted by the court.

Conclusive presumptions include the following (section 25-29 [estoppels])

Facts in written instrument: The law is that facts recited in a written document are conclusively presumed to be true as between the parties to the document or their

successors in interest. This does not apply where a law or a rule of equity provides otherwise. See: section 25.

Put in different words, the law presumes that what the parties have documented represents their real intentions. Thus, evidence cannot be admitted to contradict the terms of the document. This is also referred to as estoppel by deed. See: African Distributors Co Ltd v CEPS

However, recital of consideration is an exception to this principle. See: Section 25(2)

Estoppel by conduct or statement: The law is that where a party by his own statement or conduct (act or omission) intentionally and deliberately cause or permit another person to believe a thing to be true and act upon that belief, the truth of the thing shall be conclusively presumed against that party or the successors of that party in interest in any proceedings between that party or his successors and the relying person or his successors. This will not apply where a law including a rule of equity otherwise provides. See: Section 26.

For a party to successfully plead this, the following must exist

a. a clear and unequivocal statement or conduct
b. it must be offered or addressed to the other party
c. the other party must rely on the statement or conduct
d. the other party must alter his position upon such reliance.

Estoppel of tenant to deny title of landlord: The law is that against a claim by a tenant, the title of the landlord at the time of the commencement of their relation is conclusively presumed to be valid. This is inapplicable where a law including a rule of equity provides otherwise. See: Section 27

Estoppel of licensee to deny title of licensor: The law is that against a claim by a licensee of an immovable property, the licensor is conclusively presumed to have a valid right to possession of the immovable property. This is inapplicable where a law including a rule of equity provides otherwise. See: Section 28

NB: The effect of section 27 and 28 is 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. See: Antie & Adjuwah v Ogbo

Estoppel by bailee, agent or licensee: The law is that the title of a 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 was compelled to deliver the property to a person who is better entitled to it than the bailor, principal or licensor. See: Section 29

REBUTTABLE PRESUMPTIONS

A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact. See: Section 20

The effect of this is that, where the basic facts are established, a rebuttable presumption will be made in that regard or accepted to be proved. Once the presumption has been made, the party against whom the presumption is operating now bears both the legal burden and evidential burden to prove the non-existence of the presumed facts. Thus, with rebuttable presumptions, the court is allowed to admit evidence to the contrary. See: GPHA v Nova Complex Ltd.

NB: the difference between rebuttable presumption and conclusive presumption is that, in the latter, no evidence can be led in rebuttal; but in the former, evidence will be allowed to be led in rebuttal.

Rebuttable presumptions include the following [section -31-49 and 151-162]

Marriage: the law is that a marriage which has been celebrated before witnesses is presumed to be valid. The witnesses to the marriage need not be called as witnesses in the action. This applies to both monogamous and polygamous marriages. See: Section 31. For this section to apply, two conditions must be satisfied:

a. celebration of marriage and
b. the presence of witnesses.

[Check Ramia v Ramia and Cap 127 on marriage under ordinance]

In customary marriages, the place of the ceremony is not relevant to determining the validity of the marriage. In marriage under ordinance, the place of celebration and the fact that the marriage officer should be licensed (formal validity) are relevant in determining the validity of the marriage. NB: capacity to marry affect essential validity.

The presumption raised in section 31 can be displaced where there is evidence that there was no witness to the marriage or the one who celebrated the monogamous marriage was not licensed.

Legitimacy of children: there are two principles here.

a. a child born during the marriage of a mother is presumed to be the child of the person who is the husband of the mother at the time of the birth.
b. a child of a woman who has been married, born within 300 days [10 months] after the end of the marriage, is presumed to be a child of that marriage.

This applies to both monogamous and polygamous marriages. See: Section 32

The effect of these principles are that a child born at the time a marriage is in existence is the child of the husband of that marriage. Also, where the marriage has been dissolved, a child born within 10 months of such dissolution is the child of the husband of the dissolved marriage. These are rebuttable presumption and can be displaced by evidence to the contrary by the husband.

Presumption of death: where a person has not been heard of for seven years despite diligent effort whether or not within that period, to find that person, that person is presumed to be dead. There is no presumption as to the particular time when that person died. See: Section 33

Here the legal burden is on the one in whose favour the presumption operates. The evidential burden is on the party against whom the presumption operates. For the presumption to apply, three conditions must be satisfied. They are:

a. there are persons who would be likely to have heard from the dead person over that period
b. those persons have no heard from him
c. all due inquiries have been made appropriate to the circumstances.

See: Chad v Chad

Simultaneous death: where two or more persons have died in circumstances in which it is uncertain which survived the other, the older is presumed to have predeceased the younger. This is subject to a law relating to succession to property. See: Section 34

Ownership of legal title and beneficial title: the owner of the legal title to property is presumed to be the owner of the full beneficial title. See: Section 35

Transfer by trustees: a trustee or any other person whose duty was to convey immovable property to a particular person, is presumed to have actually conveyed to that particular person when the presumption is necessary to perfect the title of the person or the successor in interest of that person. See: Section 36

Regularity of official duties: it is presumed that an official duty has been regularly performed. This does not apply to issues on the lawfulness of arrest if found that the arrest was made without warrant. See: Section 37; GPHA v Nova complex Ltd. This presumption is called the omnia praesumuntur rite esse acta which means officials perform their duties regularly.

Ordinary consequences of voluntary act: a person is presumed to intend the ordinary consequences of the voluntary act of that person. This does not apply where specific intent needs to be established as an element of a crime. See: Section 38.

Judicial Jurisdiction: a court in Ghana or a court of general jurisdiction in any country or a judge of that court acting as a judge is presumed to have acted in the lawful exercise of its jurisdiction. This applies only where the jurisdiction of the court is not directly in issue. See: Section 39

Foreign Law: a foreign law is presumed to be the same as the law of Ghana. See: Section 40

Continuation: a thing or state of things which has been shown to be in existence within a period shorter than that within which that thing or state of things ceases to exist is presumed to be still in existence. See: Section 41. Illustration: A school which has been in existence for 15 years in a community which has been demolished for purposes of

reconstruction shall still be deemed to be in existence within any period lesser than the 15 years of its prior existence.

Full age and sound body: a person is presumed to be of full age and of sound body. See: Section 42. This means that there is a presumption of sanity and that a person who pleads insanity has the burden of rebutting this presumption.

Thing delivered: a thing delivered by a person to another person is presumed to have belonged to the person to whom it was delivered. 'thing' includes money. See: Section 43

Obligation delivered: an obligation delivered up to the debtor is presumed to have been paid. See: Section 44

Possession of order to pay or deliver: a person in possession of an order on that person for the payment of money, or the delivery of a thing, is presumed to have paid the money or delivered the thing accordingly. See: Section 45

Possession of obligation by creditor: an obligation possessed by the creditor is presumed not to have been paid. See: Section 46

Prior payment of rent: the payment of earlier rent or instalments is presumed from the receipt for the later rent or instalments. See: Section 47

Ownership: the things which a person possesses are presumed to be owned by that person. Also, a person who exercises acts of ownership over property is presumed to be the owner of it. See: Section 48

Partners, landlord and tenant, principal and agent: persons acting as partners, landlord and tenant, or principal and agent are presumed to stand in that relationship to one another. See: Section 49

Public publications: books, pamphlets, gazettes or other publications purporting to be printed or published by a public entity is presumed to be authentic. See: Section 151

Law reports and treatises: printed and published books of statutes or reports of decisions of the courts of a country, and books proved to be commonly admitted in those courts as evidence of the law of that country are presumed to be authentic. See: section 152

Maps and charts: the maps or chats made under the authority of a public entity, and not made for the purposes of a litigated question, are presumed to be authentic and correct. See: Section 153

The Gazette: the proclamations, acts of state, whether legislative or executive, nominations, appointments, and other official communications appearing in the gazette are prima facie evidence of a fact of a public nature which they are intended to notify. See: section 154

Reference books: a reference book, text or treatise which is produced for inspection by the court if in the condition which does not create a suspicion concerning its authenticity is presumed to be written and published at the time and place it purports to have been. See: section 155

Newspapers and periodicals: printed materials purporting to be newspapers or periodicals are presumed to be authentic. See: Section 156;

Appiah v The Republic establishes that section 156 only establishes the prima facie recognition being accorded to the existence of a newspaper but not its contents and even less the truth in it.

Signs and labels: inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin are presumed to be authentic. See: Section 157

Acknowledged writings: writings accompanied by a certificate of acknowledgement bearing the signature and seal of a notary public in Ghana or other officer in Ghana authorized by law to take acknowledgements are presumed to be authentic. See: Section 158

Seals: a seal is presumed to be genuine and its use authorized If it purports to be the seal of

a. Ghana, a ministry, department, officer or agency of Ghana
b. a public entity in Ghana or a department, officer or agency of a public entity
c. a state recognized by Ghana, a ministry, department officer or agency of that state.

d. a public entity in a state recognized by Ghana or a department, officer or agency of that public entity
e. a court in Ghana or a court in a state recognized by Ghana.
f. an international public entity or a department, officer or agency of that public entity.
g. a notary public or a commissioner of oaths in Ghana.

See: Section 159

Domestic official signatures: a signature is presumed to be genuine and authorized if it purports to be the signature, affixed in the official capacity of a

a. public officer of Ghana
b. public officer of a public entity in Ghana
c. notary public or a commissioner of oaths in Ghana.

Foreign official signatures: for it to be genuine and authentic, the following must be satisfied.

a. It must be affixed by an official in his official capacity
b. the official must be that of an international public entity or a state or a public entity in a state recognized by Ghana
c. it must be accompanied by a certification of genuineness of the signature and official position of the person who executed the writing.
d. the certification must be signed and sealed by a diplomatic agent of Ghana or a commonwealth country who is accredited to that country.

The court may however presume authenticity without certification where the parties are given the opportunity to investigate the authenticity of the official signature.

See: Section 161

Copies of writings in official custody: for it to be presumed to be genuine, the following conditions must be satisfied.

a. It must be one recorded or filed and in fact recorded or filed in the office of a public entity.

b. An original or an original record is in an office of a public entity where items of that nature are regularly kept and
c. The copy is certified to be correct by the custodian or a person authorized to make the certification where the certification must be authenticated.

See: section 162

Presumption of Innocence of accused person. See: Article 19(2)(c)

CONFLICTING PRESUMPTIONS

Where two presumptions conflict in the same case, they will cancel each other if they are of equal status. If a conclusive presumption conflicts with a rebuttable presumption, it is only logical for the conclusive presumption to prevail. See: R v Wilshire

PROOF REQUIRED BY PRESUMPTIONS

See: Section 21-23

AUTHORITIES TO BE RELIED ON

1. Section 18
2. Section 19 (prima facie evidence)
3. Section 20
4. Section 21

- Conclusive Presumptions

1. Section 24 (effect) / In re Suhyen Stool; Wiredu & Ohemaa v Agyei & Others
2. Section 25 (facts in a written instrument)
3. Section 26 (estoppel by conduct or statement)
4. Section 27 (estoppel of tenant to deny title of landlord)
5. Section 28 (estoppel of licensee to deny title of licensor) – immovable property
6. Section 29 (estoppel of bailee, agent or licensee) – movable property

- Rebuttable Presumptions

1. Section 20 (effect)/ GPHA v Nova Complex Ltd
2. Section 31 (marriage)
3. Ramia v Ramia (rebutted by proof beyond reasonable doubt)
4. Section 32 (legitimacy of children)

5. Section 33 (death)
6. Chad v Chad
7. Section 34 (simultaneous death)
8. Section 36 (transfer by trustee)
9. Section 37 (presumption of regularity)/ GPHA v Nova Complex ltd
10. Section 39 (jurisdiction)
11. Section 40 (foreign law)
12. Section 41 (continuation)
13. Section 42 (sanity)
14. Section 43 (thing delivered)
15. Section 44 (obligation delivered)
16. Section 45 (Possession of order)
17. Section 48 (ownership)

ESTOPPEL

Estoppel is the rule by which a person is prevented from asserting or denying the existence of facts because he has previously asserted or denied the opposite.

The forms of estoppel to be dealt with here are those not expressly dealt with in the Evidence Act as part of conclusive presumptions. One of the forms of estoppel to be considered here ids res judicata.

The distinction between estoppels and conclusive presumptions are that: in terms of procedure, estoppel must be pleaded before the evidence to establish it will be allowed, but a presumption is not to be pleaded. The second is seen in cases of estoppel by conduct. The party pleading this type of estoppel has to adduce evidence to establish the estoppel. Under such circumstances, the existence or non-existence of the estoppels 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. See: In Re Suhyen Stool; Wiredu and Obenwaa v Agyei.

The third is that apart of the pleas of autrefois convict and autrefois acquit, estoppel does not apply to criminal cases. Presumptions can be raised in criminal cases.

ESTOPPEL AND SUBSTANTIVE LAW

Estoppel differs from substantive law in many ways.

Estoppel can be waived by a person in whose favour it operates but substantive law cannot be waived.

Except in limited situations, estoppel operates between the parties to hthe case on the basis of mutuality. Apart from estoppel in rem, strangers cannot take advantage of estoppel and it cannot operate against strangers. Rules of law operate against all persons and parties.

Estoppel is used more as a shield than a sword except in Quist v George. It is employed more in defence and does not usually found an action.

Unlike substantive law, estoppel does not operate to defeat the effect of existing legal or statutory rules or fundamental rights. See: Tuffour v Attorney General.

Estoppel cannot be used to authorize illegality. See: Re A Bankruptcy Notice.

Substantive law is not pleaded. However, barring few exceptions, estoppel must always be pleaded. See: Duagbor v Akyea-Djamson; Sasu v Amua-Sekyi

Whilst rules of law are never considered as evidence, estoppel is sometimes regarded as rule of evidence.

If conflicting estoppels exist on an issue, no estoppel operates at all. It is however legal for two estoppels to subsist in one case as long as they do not conflict. See: Smith-Mensah v Yartel.

TYPES OF ESTOPPELS

The various types of estoppels are

a. Estoppel per rem judicatam
b. Estoppel by conduct
c. Estoppel by deed
d. Estoppel in pais
e. Promissory estoppel (refer to notes in contract law)
f. Equitable doctrine of unjust enrichment
g. Resulting trust
h. Abuse of judicial process
i. Estoppel by election

RES JUDICATA

Res judicata literally means that the matter has already been determined or adjudicated upon.

This estoppel arises from previous judicial proceedings. This is also known as estoppel by record, the record normally being a judgment of the court. Here, The law is that where a court of competent jurisdiction has adjudicated on a matter, the same matter cannot

subsequently be relitigated by the parties or their privies. See: Foli v Agya Atta ; Henderson v Henderson

There are two rationales for this principle. First, it is in the interest of the public that litigation should be brought to an end. Second, that no one should be sued or vexed twice on the same subject matter or the same cause. See: Conca Engineering v Moses.

There are two kinds of res judicata namely; cause of action (subject matter) estoppel and issue estoppel. The distinction has been made clear in In Re Sekyedumase Stool Affairs; Nyame v Kesse alias Konto. The court stated that

> *"The plea of res judicata really encompasses three types of estoppel: cause of action estoppel, issue estoppel in the strict sense, and issue estoppel in the wider sense. In summary, cause of action estoppel should properly be confined to cases where the cause of action and the parties (or their privies) are the same in both current and previous proceedings. In contrast, issue estoppel arises where such a defence is not available because the causes of action are not the same in both proceedings. Instead, it operates where issues, whether factual or legal, have either already been determined in previous proceedings between the parties (issue estoppel in the strict sense) or where issues should have been litigated in previous proceedings but, owing to "negligence, inadvertence, or even accident", they were not brought before the court (issue estoppel in the wider sense) otherwise known as the principle in Henderson v Henderson (1843) 3 Hare 100. See also Andani v Abudulai [1981] GLR 866, CA. The rationale underlying this last estoppel is to encourage parties to bring forward their whole case so as to avoid a succession of related actions."*

The principles of res judicata apply to proceedings before the judicial committees of chieftaincy institutions. See: Re Sekyedumase Stool Affairs; Nyame v Kesse alias Konto

Where a judgment is pleaded as operating as an estoppel, the court must as a preliminary point decide on the kind of estoppel in order to avoid confusion. See: Poku v Frimpong

CONDITIONS FOR PLEADING RES JUDICATA

For a party to successfully plead res judicata, he must establish that

a. the decision is final. Here, default judgement is capable of giving rise to estoppel however, it must be critically examined. See: Conca Engineering v Moses
b. the decision was given by a court of competent jurisdiction
c. the parties, assigns or privies are the same
d. the subject matter or issue is the same of that of the previous action.

See: Foli v Agya Atta.

If the claim in the previous suit is different from the instant suit, no estoppel arises. The privies may be determined by blood such as ancestor and hier, by title such as between a vendor and purchaser or, in an action concerning trust property, between the trustee and the beneficiary.

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.

The judgment must not have been obtained through fraud or one which ends on a technical ground suchas one dismissing a case for want of prosecution.

A judgment used to set up estoppel may either be in rem or in personam.

A judgment in rem is one given by a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing as distinct from a particular interest in it of a party to the litigation. See: Lazarus-Barlow v Regent Estates Co Ltd. Examples include judgement affirming or dissolving a marriage, judgment revoking a patent, judgement declaring or discharging a bankruptcy, a judgment affirming the validity of a will.

Judgment in personam is one which determine and declare the rights and interests of parties in a person or thing. The rights or interests determined or declared are those existing between only the specific parties and their privies. They do not affect the rights of third parties. Example includes judgment for recovery of possession of land or movable property.

NB: Judgment in rem bind the whole world and third parties once the status or title has been declared and determined. Judgment in personam only binds the parties to the action and their privies.

ESTOPPEL IN PAIS

This simply means estoppel based on misrepresentation of an existing fact. It does not apply to future promises. See:

1. Section 26
2. T.K Serbeh & co v Mensah

In pais literally means something done or subsumed on the spot without legal proceedings. When it is used as an estoppel, it implies a situation or a conduct that has been subsumed without taking court action.

ESTOPPEL BY ELECTION

Election is where a person wilfully makes a choice where there are options. Thus, if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge, he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose.

The principle operates where it would be inequitable to allow a person to make a choice at one time and later turn around to opt for that which he initially did not believe that he could have taken.

See: Tuffour v Attorney General which held that this principle does not negate rights conferred by the constitution.

ESTOPPEL IN CRIMINAL CASES

In criminal actions the only estoppel applicable are those relating to rule against double jeopardy. This includes the autrefois acquit and autrefois convict. See: Article 19(7) of the 1992 Consititution

For this rule to apply, the accused person must establish that

a. he has been charged with and tried for an offence
b. the present offence is the same as the one he was tried with or could have been charged and tried with
c. the trial resulted in a conviction or acquittal.

Note that there are exceptions to this rule. See: notes on criminal procedure.

PRIVILEGES

Privilege is a 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.

It is used to exclude evidence for public policy considerations. It is determined as a preliminary fact by the presiding officer in the matter.

Privileges apply in all proceedings notwithstanding the provisions of an enactment or a rule of law which makes rules of evidence inapplicable or of limited application in particular proceedings. See: Section 87. This means it applies in both criminal and civil cases.

Generally, no one has a privilege to refuse to be a witness when subpoenaed or to be a witness to disclose a matter or to produce an object or a writing. However, where a law provides otherwise, then this will not apply. Additionally, a person cannot prevent another person from being a witness unless a law provides otherwise. See: Section 88

The law is that a witness or a party may be punished for contempt of court if he fails or refuses to answer questions or obey the orders of the court. However, a person shall not be punished for failure to disclose or produce a matter claimed to be privileged. See: Section 91

Where a privilege is claimed and granted, the judge, counsel or the parties may comment on the refusal or prevention to disclose a matter and the tribunal may draw a reasonable inference from it. See: Section 90

WAIVER

Privilege is a personal right to the holder. As such, he is the only person with the right to waive it.

The law is that the holder of a privilege is deemed to have waived it if he has

a. Voluntarily disclosed or
b. Consented to the disclosure of the whole or part of that matter.

Additionally, where the person does not claim the privilege where he ought to have claimed it, he will be deemed to have waived it.

NB: Consenting to disclose a matter can be in many forms. It can be deliberate or not deliberate. It can be actual or implied. It is dependent on the facts of the case which will suggest whether indeed there has been a consent to disclose an otherwise privileged information.

NB: A disclosure of a privileged matter where the disclosure itself is a privileged communication does not affect the right of a person to claim the privilege.

The law is that where the holding of a privilege is joint, a waiver of it does not affect the right of the other joint holders to claim the privilege.

See: Section 89

BURDEN OF PROVING PRIVILEGE

The law is that the party claiming a privilege must prove the existence of it. That notwithstanding, where certain communications are presumed to be privileged, the burden of persuasion and producing evidence will shift on the other party to establish the non-existence of the privilege. See: Section 93. Those communications include those between a lawyer and a client, marriage couples, a doctor and a patient, a religious follower, and a professional minister of a religion.

ERROR IN ALLOWING PRIVILEGE

The law is that a holder of a privilege may on appeal or review allege an error on a ruling disallowing a claim of privilege. This right is only available to the holder of the privilege. See: Section 94

The effect of such an error in allowing privilege is that no evidence of the disclosed matter which is privileged is admissible against the holder of the privilege in a later proceeding or in a re-hearing of the original proceeding. See: Section 95

PRIVILEGE OF AN ACCUSED PERSON

The law is that an accused person cannot be compelled to testify except he voluntarily decides to do so. This means that he shall not be called as a witness in a criminal action. However, where an accused person decides to testify, he shall be subject to examination in the same manner as any witness.

Where an accused person does not testify on his own behalf, the court, prosecution and defence may comment on his failure to do so, and the tribunal may draw a reasonable inference from it.

For the purposes of identification only, the accused person does not have a privilege to refuse to do an act or examination to help the tribunal or court to determine his identity other than to testify.

See: Section 96

PRIVILEGE AGAINST SELF INCRIMINATION

A matter, an object or a writing will incriminate a person if it constitutes or forms an essential part of or when taken in connection with other matters already disclosed is a basis of reasonable inference of the violation of the criminal laws of Ghana.

For this privilege to apply, the court must be satisfied that by the disclosure, the accused will face a real danger of being prosecuted for violating any criminal law in Ghana.

Where a person has become permanently immune from punishment for a violation of the laws of Ghana, he cannot incriminate himself and be punished.

The law is that in any action a person has a privilege to refuse to disclose a matter or produce an object or writing which will incriminate that person. The law grants privilege to self-incrimination. This means that a third party cannot claim privilege if a matter disclosed by a person in an action incriminates him.

However, a person does not have a privilege to refuse to

a. submit to physical examination in order to discover or record the corporal features and other identifying characteristics, or the physical or mental condition of that person. [to understand this, remember lunacy of accused and the lunacy inquiry in criminal procedure]
b. furnish or permit the taking of samples of body fluids or substances for analysis
c. do any act for the purpose of identification

Where an accused voluntarily testifies in a trial, he does not have privilege to refuse to disclose a matter which is relevant to an issue in the trial.

See: Section 97

An accused person does not have privilege if the matter, object, or writing is under his control if another person has a superior right to the object or writing ordered to be produced. See: Section 98

REQUIRED REPORTS

A person making a record, report or disclosure required by law does not have a privilege to refuse or prevent another person from disclosing its contents unless an enactment provides otherwise.

A public officer or public entity to makes a record, report or disclosure as required by law has privilege to refuse to disclose its contents if the law requiring it to be made prevents disclosure for the purpose in question.

See: Section 99

LAWYER-CLIENT PRIVILEGE

The law is that a client has a privilege to refuse to disclose and prevent any other person from disclosing a confidential communication which reasonably relates to professional legal services sought by the client. By virtue of section 102, a work produced, or information obtained from a lawyer of that client in rendering professional legal services is also confidential. This communication must be made between

a. the client or his representative and the lawyer or the lawyer's representative or
b. the lawyer and his representative or
c. the lawyer or his representative and a lawyer representing another person in a matter of common interest with the client or representative of the lawyer.

A communication is confidential if it is not intended to be disclosed and is made in a manner reasonably calculated not to disclose its contents to third parties except those to whom disclosure is made in furtherance of the client's interest in seeking the professional legal services or those reasonably necessary for the transmission of the communication.

The object of this is to protect communications between a lawyer and his client so that clients will tell the whole truth to their lawyers. See: In Re L (a minor)

A client is a person whether natural or artificial who or which directly or through an authorized representative seeks professional legal services from a lawyer.

The client's representative must always act on the authority of the client. This authority may be express or implied. Also, a representative of the lawyer must have authority from the lawyer to assist the lawyer in rendering professional legal services sought by the client.

See: Section 100

The lawyer-client privilege does not apply to the following communications.

a. where the services of the lawyer are sought to aid the commission or a plan to commit a crime or an intentional tort.
b. communication relevant to an issue between parties who claim an interest in property through the same deceased client of the lawyer
c. communications relevant to an issue of breach of duty by a lawyer to the client or by the client to the lawyer.
d. Communication relevant to the formalities of the execution of a writing by the client. Here the lawyer or his representative must be an attesting witness to the execution of the writing.
e. Communication relevant to a matter of common interest between two or more client. The communication must be made by any of them to a lawyer sought by them in common, when offered in a proceeding between any of the clients.
   See: Section 101

The privilege may be claimed by the

a. Client
b. Client's guardian or committee
c. Personal representative of a deceased client
d. Successor in interest of a client who is an artificial person
e. Lawyer who personally or through a representative obtained the information or produced work or the lawyer's representative. However, the lawyer or his representative cannot claim the privilege if there is no person in existence authorized by a person in (a) (b) (c) or (d) above to claim the privilege or if the

lawyer or his representative is directed to permit disclosure by an authorized person.

The court may disallow a privilege for a work produced or information obtained by a lawyer where the information sought is reasonably not available from another source and the value of the information substantially outweighs the disadvantages caused by its disclosure.

The question is who is a lawyer?

For a person to be a lawyer, the following must be satisfied.

a. He must be qualified to be enrolled as a lawyer under section 3 of Act 32
b. He must have been enrolled as a lawyer under section 6 of Act 32
c. He must have obtained a solicitor's license under section 8 of Act 32
d. He must be entitled to practise as a lawyer in Ghana under section 2 of Act 32.

See also: Akuffo-Addo v Quarshie-Idun; Republic v High Court (Fast Track Div) Accra; Ex parte Justin Pwavra Terwajah

MEDICAL TREATMENT [DOCTOR-PATIENT PRIVILEGE]

The law is that a person has privilege to refuse and prevent any other person from disclosing a confidential communication between that person and a physician or psychologist or any other person under his direction participating in the diagnosis or treatment where the communication is made for the purpose of the treatment of a mental or an emotional condition.

From this, it means that there is no doctor-patient privilege for the treatment of any other disease or sickness other than a mental condition or an emotional condition. The rationale is that people shy away from, shun, stigmatize, or ostracize those with mental diseases but not those with other forms of diseases.

A communication is confidential if it is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication or persons who are participating in the diagnosis under the direction of the physician or psychologist.

The court may disallow this privilege where [EXCEPTIONS]

a. In a committal proceeding, the information sought is to determine whether the person should be committed to stand trial.
b. In a criminal or civil action, the person claiming the privilege raises a matter relating to a mental or emotional condition.
c. A court orders the person who was the patient to submit to an examination of the mental or emotional condition of that person by a physician or psychologist.

The privilege may be claimed by

a. the patient
b. the patient's guardian or committee
c. the patient's personal representative if he is dead
d. the physician or psychologist or any person who participated in the treatment under the direction of the physician unless that person is instructed by an authorized person under (a) (b) or (c) to permit disclosure,

See: Section 103

RELIGIOUS ADVICE

The law is that a person has a privilege to refuse and prevent any other person from disclosing a confidential communication made by that person to a professional minister of religion who is prevented from disclosing the communication by the code of that religion of that minister and has been consulted in a professional role as a spiritual adviser.

The question of whether this privilege can be claimed by a follower of any pastor is determined by satisfying the conditions of the law. The conditions to be satisfied are that

a. There must be a confidential communication
b. It must be made between the follower and a professional minister of religion.
c. There must be a code of conduct of that religion
d. The minister must be prevented from making disclosure of such communication according to the code of conduct
e. The professional minister must be consulted in his professional capacity as a spiritual leader.

NB: The word professional connotes that the minister must have attained a high level of training and be certified. This means that, it is not any person who purports to be a pastor or a religious leader can satisfy the conditions of this law.

The privilege may be claimed by

a. the person personally
b. the person's guardian or committee
c. the person's representative when he is dead
d. the professional minister of religion.

See: Section 104

COMPROMISE

This privilege is attached to communication between parties which amount to a genuine attempt to reach an agreement or compromise. One of the parties can prevent the disclosure of what took place during the negotiations for settlement. Letters and other written documents exchanged between the parties are headed as 'without prejudice' and as such privileged from disclosure. See: Republic v Bonsu; Ex parte Folson.

A person has privilege to refuse and to prevent any other person from disclosing to the tribunal of fact, information concerning the furnishing, offering or accepting by that person or his authorized representative, a valuable consideration in compromising a claim which was disputed as to validity or amount, and information concerning conduct or statements made as pat of the compromise negotiations.

However, this will not apply if the conduct or statement relating to the compromise was not with the intention that they would not be confidential.

See: Section 105

STATE SECRETS

A state secret is information considered confidential by the government, which has not been officially disclosed to the public and which would be prejudicial to the security of the state or injurious to public interest to disclose.

The Government has a privilege to refuse and prevent any other person from disclosing a state secret unless the need to preserve the confidentiality is outweighed by the need for disclosure in the interest of justice. This is known as the public interest immunity. This general rule is subject to any other enactment.

Where the government is entitled to claim this privilege, it may be claimed only by a Minister responsible for administering the subject matter to which the state secret relates or by a person authorized in writing by the Minister concerned.

The court shall act under Article 135 of the 1992 constitution when a privilege is claimed by the government in respect of a state secret.

See: Section 106

INFORMANTS

An informant is a person who provides the government with information leading to the commission of a crime or a plan to commit a crime.

The government has a privilege to refuse and prevent any other person from disclosing the identity of a person who has supplied the government with information purporting to reveal the commission of a crime or a plan to commit a crime. The communication warranting this privilege is limited to the extent necessary to protect the identity of the person from disclosure.

The government may authorize a person to claim the privilege.

The privilege does not apply where,

a. The identity of the informant has been disclosed to the public by the government or
b. The informant, if he appears as a witness in a court action to which the communication of the informant relates.

Where the government claims the privilege and the circumstances indicate a reasonable probability that the informant can give testimony necessary for a fair determination of the guilt or innocence of the accused, the court may suo motu or on application of the accused person dismiss the action.

See: Section 107

TRADE SECRETS

Generally, the owner of a trade secret or his authorized agent has a privilege to refuse and prevent any other person from disclosing the trade secret. However, he cannot claim privilege where the value of disclosure is substantially outweighs the disadvantages caused by its disclosure.

In determining the existence of this privilege, the following shall be considered.

a. Whether the trade secret is adequately protected by patent, copyright, trade-mark or any other law and
b. Whether adequate protection can be provided by disclosure of the trade secret in chambers or in any other appropriate manner.

Where disclosure of a trade secret is required, a Court on its own motion or at the request of a party, may take an appropriate action to protect the trade secret from further disclosure or unauthorised usage.

See: Section 108

POLITICAL VOTE

The law is that a person has a privilege to refuse to disclose how he voted at a public election or referendum conducted by secret ballot. However, this privilege is not available when it is established by sufficient evidence to support a finding of fact that the vote was cast illegally.

See: Section 109

MARITAL COMMUNICATIONS

This privilege applies only to spouses who are married and not any other form of relationship or association.

The law is that a person has a privilege to refuse and prevent any other person from disclosing confidential communication made between that person and his or her spouse during their marriage.

A communication is confidential if it is not intended to be disclosed and made in a manner reasonably calculated not to disclose its contents to a third person.

The privilege can be claimed whether in a monogamous marriage and polygamous marriages.

See: Section 110

AUTHORITIES TO BE RELIED UPON

PRVILEGES

1. Section 87
2. Section 88
3. Section 89 (waiver)
4. Section 90 (comment)
5. Section 93 (confidential communications)
6. Section 94 & 95 (error in allowing privilege)

LAWYER CLIENT PRIVILEGE

1. Section 100 (communication in relation to legal services sought by client)
2. Section 101 (exceptions)
3. Section 102 (work produced by lawyer)
4. Section 2, 3,6 and 8 of Legal Profession Act 1960 (Act 32)
5. Emmanuel Amoakohene v Juliana Amoakohene

Section 103 (medical privilege)

Section 104 (religious advise)

Section 105 (compromise)

Section 106 (state secret)

Section 107 (informant)

Section 108 (trade secret)

Section 109 (vote)

Law of Evidence (Selfie)

Section 110 (marital communication)

OPINION EVIDENCE

To better understand this topic, remember the principles under testimonial evidence.

Q: Once a person is qualified as a witness, the question is what can he testify to?

The law is that generally, every witness must be a witness of fact and not opinion. Put differently, a person who appears before a court is entitled to tell the court only the facts of which he has personal knowledge and not his opinion. See: Section 60. However, the exceptions to this rule are

a. expert opinion evidence and
b. non-expert or lay opinion evidence

LAY OPINION

This is regulated by section 111.

A witness who is not testifying as an expert may give testimony in the form of opinion or inference only if

a. the opinion or the inference concerns matters perceived by the witness and
b. the testimony is helpful to the witness in giving a clear statement or is helpful to the tribunal of fact in determining an issue.

The requirement of 'to perceive' means that the witness must have acquired knowledge of the opinion through his senses. See: Section 179

The matters on which the witness base the opinion or inference need not be disclosed before the witness states the opinion or inference unless the court determines otherwise. However, the witness may be examined by a party concerning the basis for the opinion or inference and the witness shall then disclose that basis.

EXPERT OPINION

An expert witness is a person skilled in the subject to which his testimony relates. He gives evidence in the form of an opinion or inference where the subject matter is beyond common experience. For example, handwriting experts, forensic experts, bankers, engineers, doctors, economists, etc.

QUALIFICATION OF AN EXPERT

A person is qualified to testify as an expert if the court is satisfied that, that person is an expert on the subject matter to which his testimony relates by reason of a special skill, experience, or training of that person.

In establishing this, evidence to prove expertise may, but need not consist of the personal testimony of the witness. See: Section 67

A person may 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.

The fact that a person has not had formal training on the subject may not disqualify him from testifying as an expert. See: R v Silverlock (solicitor held to be an expert in handwriting through years of experience gained by studying on his own and during his practice as a solicitor)

A person who has spent a considerable number of years examining handwritings and had undergone a course on handwriting was qualified as an expert witness on handwriting. See: Osei v The Republic; Tackie v The State.

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. See: R v Inch

NB: whether a person qualifies to be an expert witness is determined on a case-by-case basis and decided by the judge.

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 AN EXPERT OPINION

Where the subject of the testimony is sufficiently beyond common experience that the opinion or inference of an expert will assist the court or tribunal of fact in understanding evidence in the action or in determining an issue, a witness may give testimony in the form

of an opinion or inference concerning a subject on which the witness is qualified to give expert testimony. See: Section 112

Thus, an expert will testify if three conditions are satisfied for his evidence to be admissible.

a. the subject matter must be beyond common experience. Put differently, the evidence of the expert should be beyond the normal competence of the court.
b. his expertise must relate to the subject in issue before the court [relevancy] and
c. his expert opinion should be helpful to the court.

See: Section 112

BASIS OF EXPERT OPINION

An expert witness may base his opinion or inference on

a. matters perceived by or known to him because of his expertise or
b. matters assumed by him to be true for the purpose of giving the opinion or inference.

The matters on which he bases an opinion, or an inference need not be admissible in evidence.

The matters on which the expert witness bases the opinion or inference need not be disclosed before he states the opinion or inference unless the court determines otherwise. However, the expert may be examined by a party concerning the basis for the opinion or inference and the witness shall then disclose that basis.

See: Section 113

APPOINTMENT OF COURT EXPERTS

In an action the court may suo motu or at the request of a party, appoint a court expert to inquire into and report on a matter on which an expert opinion is needed. The court expert shall if possible be a person agreed between the parties to the suit and failing agreement shall be nominated by the court.

The matters to be submitted to the expert shall if possible be agreed between the parties and failing agreement, settled by the court.

Generally, the report of the expert must be in writing unless the court otherwise directs. The court may give the number of copies needed and a copy shall be made available to each of the parties. The report is admissible to the same extent as the testimony of any other expert witness and shall be deemed to be evidence without formal introduction by the court or party.

The expert may conduct the experiments and test that he considers appropriate and may communicate with the parties to arrange for the attendance of a person or the provision of samples or information or any similar matter. Failing agreement, they shall be determined by the court.

The expert witness may be cross-examined by the parties to the action.

The expert appointed is entitled to remuneration as determined by the court. The remuneration shall be taxed as costs to the parties. Ordinarily, in a civil action, each party shall contribute a proportionate share of it, and they are jointly and severally liable for the whole remuneration. In a criminal action, the prosecution shall contribute to the whole remuneration.

See: Section 114

THE ULTIMATE ISSUE RULE

The ultimate issue is the actual issue before the court.

The law is that the expert's opinion shall not be inadmissible merely because it concerns an ultimate issue to be decided by the court. Put differently, an expert's opinion shall not be inadmissible merely because the expert commented on the actual issue before the court. See: Section 115

EFFECT OF EXPERT EVIDENCE

The law is that experts give evidence and not to decide cases. As such their evidence is only a prima facie case and not considered as deciding the issue for the court. That

evidence is not binding on the judge. It is considered as a guide which assists the court or judge in deciding on the issues before him. See: Fenuku v John Teye.

The principle of law regarding expert evidence was that the judge need not accept any 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 evidence before him. The expert evidence was only a guide to arrive at the conclusions. See: Fenuku v John Teye.

In effect, expert evidence is treated the same way as the opinion of assessors in trial with aid of assessors.

ROLE OF AN EXPERT

A handwriting expert was not required to state definitely that a particular writing was by a particular person. His function was to point out similarities or differences in two or more specimens of handwriting submitted to him and leave the court to draw its own conclusions. In other words, an expert in handwriting having examined, deciphered, and compared the disputed writing with any other writing, the genuineness of which was not in dispute, was only obliged to point out the similarities or otherwise in the handwriting; and it was for the court to determine whether the writing was to be assigned to a particular person. In the instant case, the report was supposed merely to assist the court in deciding the vital issue of whether or not the conveyance, exhibit C, was a forgery. And the trial judge was right in treating the evidence of the expert as a guide to arrive at his conclusion. See: Conney v Bentum-Williams

NB: The law is that expert witness is desirable in some cases. However, it is not always essential. See: Manu v The State

AUTHORITIES TO BE RELIED ON

1. Section 60
2. Section 111 (lay opinion)
3. Section 67 (qualification of an expert)
4. Section 112 (subject matter of expert opinion)
5. Section 113 (basis of opinion)
6. Section 114 (court appointed witness)

7. Section 115 (ultimate issue)
8. Fenuku v John Teye
9. Manu v The State
10. Tetteh v Hayford
11. Osei v The Republic
12. R v Silverlock

BURDEN OF PROOF

Proof is the establishment of facts with legally admissible evidence. See: Majolagbe v Larbi

Hence, burden of proof is the obligation on a party to establish his claim through legally admissible evidence.

NB: the failure to prove may lead to a party losing on that issue. See:

1. Section 1(4)
2. National Democratic Congress v Electoral Commission.

There are two components of burden of proof. They are the burden of persuasion and burden of producing evidence.

BURDEN OF PERSUASION

To persuade means to convince. See: Bakers-Wood v Nana Fitz.

This is the obligation on a party to establish the requisite degree of belief in the mind of a tribunal concerning a fact to the required standard. See: Section 10

Who bears the persuasive burden?

The law is that generally, he who avers must prove. Thus, 'except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting.' See: Section 14

The effect of this is that, generally

a. In criminal actions, the prosecution bears the burden of persuasion. See: Section 15(a)
b. In civil matters, the plaintiff bears the persuasive burden.
c. The burden of persuasion shifts unto the defendant where he makes a positive assertion in establishing his defence.

NB: In criminal trials, the burden of persuasion is always on the prosecution. It does not shift to the accused. This is because of the presumption of innocence. See:

1. Article 19 (2) (c)
2. Section 20
3. Section 15(a)

The EXCEPTIONS to the persuasive burden are:

a. Express statutory provisions (onus reversal provisions)
b. Implied statutory provisions
c. Defence of insanity. See: Section 15 (d)

See: Woolmington v DPP

NB: Where the exceptions apply, the accused person or the defendant is required to discharge the burden of persuasion on a particular issue.

NB: Where the onus reversal provision operates, the prosecution must first establish the basic ingredients of the offence before the burden of persuasion shifts on the accused. Also, the onus reversal provisions only place the burden of persuasion on **a particular issue** on the accused person.

NB: the accused person or the defendant shall bear the burden of persuasion if he relies on the defence of insanity because there is a presumption of sanity. See:

1. Section 42
2. Section 20

NB: With the exceptions, the accused person shall discharge same on the balance of probabilities. See: Section 12. This is because the effect of raising a reasonable doubt is the same as establishing a fact on the balance of probabilities.

STANDARD OF PROOF

The standard of proof relates to the burden of persuasion. The standards of proof are

a. Proof by reasonable doubt (on accused person in criminal trials)
b. Proof beyond reasonable doubt (on prosecution in criminal trials)
c. Proof on balance of probabilities. (In any other case)

NB: Proof on balance of probabilities means that the evidence from which a reasonable man may conclude that upon the whole, it is more likely that what is alleged happened than it did not. See: Section 12

NB: Proof beyond reasonable doubt means the prosecution must satisfy all the ingredients of the charge. It needs not reach certainty. It does not mean proof beyond a shadow of a doubt. See:

1. Section 13
2. Miller v Minister of Pensions

EVIDENTIAL BURDEN

This is the obligation on a party to introduce sufficient evidence to avoid a ruling on the issue against him. See: Section 11

The duty to determine whether sufficient evidence has been adduced is on the judge. See: Section 1(3)

Failure to meet this burden will lead to a ruling against the person. See: Section 1(4).

NB: evidence must be introduced to meet the required standard of proof. Thus, in a criminal trial, the prosecution must introduce sufficient evidence so that on the totality of all the evidence produced, a reasonable mind will be satisfied that he has proved that fact (essential to the guilt of the accused) beyond reasonable doubt. The same analogy is on accused and in civil cases. See: Section 11

Who bears the burden of producing evidence?

Except as provided by law,

a. The evidential burden is on the party against whom a finding on that fact would be required in the absence of further proof.
b. It is initially on the party with the burden of persuasion.

See: Section 17

DEFENCES AND BURDEN OF PROOF

The defences under discussion here are general defences such as self-defence, etc.

It has been established already that in criminal trials, the prosecution bears the burden of producing evidence and the burden of persuasion due to the presumption of innocence. See:

1. Article 19(2) (c)
2. Section 19
3. Section 20

Where the accused raises any defence other than insanity, he bears the burden of producing evidence in establishing that defence. As such, the prosecution bears the burden of persuasion in disproving such defence. See: COP v Antwi

The accused person discharges this burden on the balance of probabilities. This is because the effect of his defence is to raise a reasonable doubt in the case of the prosecution which is of the same effect as establishing it on the balance of probabilities. See: Section 12

NB: When it comes to the defence of insanity, the accused bears both persuasive burden and evidential burden to prove same on the balance of probabilities. When this is proved, it shifts to the prosecution to persuade the court to disbelieve same. See:

1. Section 15(c)
2. Section 19
3. Section 20
4. Section 42

PROOF OF CRIME IN CRIMINAL CASES

In any civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt. See:

1. Section 13 (1)
2. Fenuku v John Teye

AUTHORITIES TO BE RELIED ON

1. Article 19 (2) (c)
2. Bakers-Wood v Nana Fitz (to persuade)
3. Majolagbe v Larbi

4. Miller v Minister of penstions
5. Section 1(3) (duty of judge to determine sufficiency of evidence)
6. Section 1 (4); NDC v EC
7. Section 10 (burden of persuasion)
8. Section 11 (burden of producing evidence)
9. Section 12 (balance of probabilities)
10. Section 13 (proof beyond reasonable doubt)
11. Section 14 (allocation of burden of persuasion)
12. Section 15 (burden of proof in particular cases)
13. Section 16 (direction of jury)
14. Section 17 (allocation of burden of producing evidence)
15. Section 20
16. Section 42
17. COP v Antwi
18. Fenuku v John Teye
19. Woolmington v DPP

TRIAL BY JUDGE AND JURY

After the close of both the prosecution and the accused person's case, the judge is duty bound to sum up the law, evidence, and facts to the jury. This is mandatory. See:

1. Section 2
2. Section 277 of Act 30
3. Practice Direction in State v Kwame Amoh

THE ROLE OF THE JUDGE AND JURY

- JUDGE

Decides on

a. Questions of law. See: Section 1
b. Relevance of evidence
c. Admissibility of evidence
d. Propriety of questions asked
e. Construction of documents
f. Conviction in case the jury returns a guilty verdict or acquittal where a verdict of not guilty is returned
g. Sentencing accused if convicted
h. Gives opinion on facts. See: Section 2; R v Ojojo
i. Gives further directions. See: Beniako v The Republic

- JURY

From Beniako v The Republic, the jury

a. Determines the credibility of witness
b. Evaluate all evidence adduced in the trial
c. Decide on the guilt or innocent of accused
d. Tribunal of facts. Thus, decides all questions of fact. See: Section 2. For example, whether or not a killing was accidental or intentional is a question of fact to be decided y the jury.

FORMAT & ESSENCE OF SUMMING UP

There is no particular format but certain factors must be evident. See: Agyemang v The Republic

The factors are:

All directions must be fair and impartial so as to meet the ends of justice. It should be in such a way as not to direct the jury on what to find. See: Practice Note (State v Amoh)

1. Duty and functions of judge and jury. See: Section 1 & 2
2. The charge
    i. Elements of the charge
    ii. Evidence required to prove each of them
    iii. The law applicable to the case
3. The evidence adduced
4. The burden of proof. (Meaning and who bears it) see: Section 16
5. Burden of proof on prosecution. (Beyond reasonable doubt)
6. Burden of proof on accused. See: COP v Antwi
7. Case of the prosecution and defence. It must be fairly made
8. Defences available to accused person even if not pleaded but evident from the facts. See: R v Ojojo
9. In insanity cases, the judge should not draw his own conclusions from the facts and use them to direct the jury to conclude whether or not there was insanity. See: Derby v The Republic
10. Comment. If the judge comments, he must add that the jury is not bound by it and they must form their own opinion. See: Section 2
11. Standard of proof required. See: State v Afenuvor
12. The verdict. In a trial punishable by death, the duty of the jury is to return a unanimous verdict. Where they do not announce their unanimity but simply states that the appellant is guilty, they are deemed to be unanimous. See: Agyemang v The Republic.

Also note that; where the accused is charged of murder, the jury can return a verdict of manslaughter. See: Beniako v The Republic.

13. Further directions. The judge should indicate to the jury that they can return for further directions.

GROUNDS FOR ATTACKING SUMMING UP ON APPEAL

- Misdirection
- Misdirection by non-direction

The effect is that, on appeal, conviction is likely to be quashed if there is a substantial miscarriage of justice. See: R v Ojojo

AUTHORITIES TO BE RELIED ON

1. Section 1
2. Section 2
3. Section 16
4. R v Ojojo
5. Practice Direction in State v Kwame Amoh
6. COP v Antwi
7. Beniako v The Republic
8. Agyemang v The Republic
9. State v Afenuvor
10. Derby v The Republic