COURSE GUIDE

PUL446
LAW OF EVIDENCE II

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INTRODUCTION

Evidence is central to the practice of law. This is because it is only through the means of Evidence that facts can be made known to the courts for adjudication of disputes. It is through the process of adjudication that disputes are resolved and justice and good order is maintained in the society. It is for this reason that Law of Evidence is made a compulsory course in the course of study of law. Accordingly, a student of law ought to understand the rules and principles of evidence in order to be grounded as a law student as well as a practicing lawyer upon graduation.

Law of Evidence 1, is the first part of the course Law of Evidence while Law of Evidence 11 is the second part. Law of Evidence 11 builds on the foundation laid by Law of Evidence 1. Law of Evidence 11 is therefore a natural follow-up to Law of Evidence 1 and it is advised that students ought to complete their study of Law of Evidence 1 before studying this course. The central aim and objectives of the course are to broaden your knowledge on law of Evidence. Law of Evidence 11 covers such important topics such as analysis of character Evidence, opinion Evidence, similar fact Evidence, confession, competence and compellability, documentary Evidence etc.

This course consists of 4 Modules which are subdivided into 15 Study Units. In Module 1 you will be introduced to concepts such as character Evidence, similar fact Evidence, opinion Evidence. In Module 2 you will be taught the Law of Evidence relating to hearsay while in Module 3 deals with competence and compellability, corroboration, privilege and estoppel. Module 4 introduces you to the issues of burden of proof and standard of proof, confession, examination of witnesses and documentary Evidence.

COURSE LEARNING OUTCOMES

By the end of the study, you should be able to:

1) analyse character Evidence, opinion Evidence and similar fact Evidence;
2) explain the meaning of hearsay Evidence and its exceptions;
3) examine the nature of competence and compellability, corroboration, privilege and estoppel and
4) analyse burden of proof and standard of proof, confession, examination of witnesses and documentary Evidence.

WORKING THROUGH THIS COURSE

To complete this course, you are advised to read the study units, recommended books, relevant cases and other materials provided by NOUN. Each unit contains a Self-Assessment Exercise, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course there is a final examination. The course should take you about 11 weeks to complete. You will find all the components of the course listed below. You need to makeout time for each unit in order to complete the course successfully and on time.

COURSE MATERIALS

The major components of the course are.

a) Course guide.
b) Study Units.
c) Textbooks
d) Self-Assessment Exercises
e) Presentation schedule.

STUDY UNITS

The discussion in this course is broken down to 15 (fifteen) study units that are broadly dividedinto FOUR Modules as follows –

Module 1

Unit 1 Evidence of Character
Unit 2 Opinion Evidence
Unit 3 Similar Fact Evidence

Module 2

Unit 1 Hearsay
Unit 2 Exceptions to the Rule against Hearsay I
Unit 3 Exceptions to the Rule against Hearsay Rule II

Module 3

Unit 1 Estoppels
Unit 2 Competency and Compellability
Unit 3 Privilege
Unit 4 Corroboration

Module 4

Unit 1	Burden and Standard of Proof
Unit 2	Documentary Evidence
Unit 3	Confessions
Unit 4	Judges Rule
Unit 5	Examination of witness

All these Units are demanding. They also deal with basic principles and values, which merit your attention and thought. Tackle them in separate study periods. You may require several hours for each.

We suggest that the Modules be studied one after the other, since they are linked by a common theme. You will gain more from them if you read them with the cases and Evidence Act, 2011. You will then have a clearer picture into which to paint these topics. Subsequent units are written on the assumption that you have completed previous units.

Each study unit consists of one week's work and includes specific Learning Outcomes, directions for study, reading materials and Self-Assessment Exercises *(SAE)*. Together, these exercises will assist you in achieving the stated Learning Outcomes of the individual units andof the course.

REFERENCES / FURTHER READING

Certain books have been recommended in the course. You should read them where so directed before attempting the exercises.

ASSESSMENT

There are two aspects of the assessment of this course, the Tutor Marked Assignments and a written examination. In doing these assignments you are expected to apply knowledge acquired during the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the Assignment file. The work that you submit to your tutor for assessment will count for 30% of your total score.

SELF-ASSESSMENT EXERCISES

There is a self-assessment exercise at the end for every unit. You are required to attempt all the assignments. You will be assessed on all of them, but the best three performances will be used for assessment. The assignments carry 10% each. Extensions will not be granted after the duedate unless under exceptional circumstances.

FINAL EXAMINATION AND GRADING

The duration of the final examination for this course is three hours and will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self- assessment exercises and the tutor marked problems you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit and taking the examination to revise the entire course. You may find it useful to review yourself assessment exercises and tutor marked assignments before the examination.

HOW TO GET THE MOST FROM THIS COURSE

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercises, your study units provide exercises for you to do at appropriate times. Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning outcomes which will let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self-Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self-Assessment Exercise as you come to it in the study unit. Examples are given in the study units. Work through these when you have come to them.

ONLINE FACILITATION

There will be about 8 hours of online facilitation provided in support of this course. You will be notified of the dates, times and location of the facilitations, together with the name and phone number of your facilitator, as soon as you are allocated a facilitator who will take you through the course. He will keep a close watch on your progress and on any difficulties you might encounter. Your facilitator may help and provide assistance to you during the course.

Please do not hesitate to contact your facilitator by telephone or e-mail if:

- You do not understand any part of the study units or the assigned readings.
- You have difficulty with the self-assessment exercises.
- You have a question or a problem with an assignment, with your facilitator's comments on an assignment or with the grading of an assignment.

You should try your best to attend the online facilitation classes. This is the only chance to have face to face contact with your facilitator and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from the facilitations, prepare a question list before attending them. You will gain a lot from participating actively.

MAIN COURSE

CONTENTS

MODULE I

UNIT 1 EVIDENCE OF CHARACTER

Unit structure

1.1 Introduction

According to the Black's Law Dictionary 5th edition, Character is the aggregate of the moral qualities which belong to and distinguish an individual; the general result of the one's distinguishing attributes. It describes it as that moral predisposition or habit, or aggregate of ethical qualities, which is believed to attach to a person, on the strength of the common opinion and report concerning him. Blacks assert that ''Character'' as the moral qualities of a person is the qualities the person possessed as against ''reputation'' which is what others believe one to possess. The former is personal and real while the latter is external and based on other people's knowledge and assessment. More often time when ''character'' is used in relation to the law of evidence, it might be signifying ''reputation'' which is what the people tends to know about the person. Character in relation to giving evidence could either be bad or good.

The evidence of good character of an accused person or of a witness is admissible in evidence. It points to the direction that the allegation against him is less likely to be true. Conversely, the evidence of bad

character or of bad reputation is inadmissible in both civil and criminal proceedings, except where a statute specifically allows it. In this unit, you shall learn about character evidence generally, what character evidence is and the exceptional circumstances when it becomes relevant and admissible.

1.2 Learning Outcomes

This unit is to project to the student a full and proper understanding of the term "Character Evidence". It will also aid the students to identify when it is likely to be admitted or rejected in evidence. It further examines the Evidence of good and bad character and how such can be relevant.

1.3 Evidence of Character

1.3.1 Definition of Terms

Literally, 'character' signifies a reputation and a disposition. Section 77 of the Evidence Act 2011 has defined the concept of the word "Character" in relation to the Law of Evidence. It is defines it as "reputation" as distinguished from "disposition".-

(Character evidence connotes evidence regarding someone's personality traits; evidence of a person's moral standing in a community based on reputation or opinion. It refers to one's reputation – the esteem or otherwise, in which a person is held; the conviction based upon the person's behaviour.

1.3.1.1Character Evidence

According to the Black's Law Dictionary, character evidence refers to the evidence of a person's moral standing in community based on reputation. The admissibility of Character evidence in Nigeria Legal practise is set out under the sections 77-82 of the Evidence Act, 2011.

1.3.1.2 Character Distinguished

(a) Reputation and Disposition: A reputation must be distinguished from a disposition. Disposition according to Oxford Advanced Learner's Dictionary, is a person's natural qualities of mind and character. It is the natural way of behaviour towards others. The Black's Law Dictionary, 5th Edition in consideration of it with respect to mental state defines it as an attitude, prevailing tendency, or inclination. One may be of an evil disposition and yet be of good reputation. The converse is equally true.

(b) Character and Conduct

You need also to distinguish character evidence from evidence of conduct or of behaviour. Conduct can be defined in relation to one's action. According to Black's Law Dictionary 5th edition, it means an action or omission and its accompanying state of mind, or where relevant a series of acts and omission. Thus, in relation to character, conduct will be the action or inaction of an individual before the present fact.

Character evidence will be admissible for example evidence of previous convictions which are related in substance to the offence charged- Section 82 (4) (5). It applies in both civil and criminal proceedings (Evidence Act 2011, Sections 78-82).

(c) Character evidence and similar facts

Similar facts evidence is defined in section 12 of the Evidence Act, which provides as follows:

When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention or to rebut any defence that may otherwise be open to the defendant, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant. It has two connotations. (a) Facts having general resemblance and (b) Facts having particular resemblance

Self-Assessment Exercise 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. What do you understand by character Evidence?
2. Explain what is meant by bad character

1.3.1.3 Facts having general resemblance.

Illustration:

- Fact situation one: A Stole, B murdered, C burgled. There is a general resemblance; each is a criminal; they are bad men or women.

- Fact situation two: 'C' is charged with stealing; three years earlier, he committed house breaking. Here is a similar fact evidence showing in each case that A is a criminal.

1.3.1.4 Facts having particular resemblance

Illustration:
Fact situation three: X is charged with obtaining N100,000 from Z by false pretence, that the ring is made of gold; some six months earlier, he had obtained N50,000 from Y by the same misrepresentation. Here also is a similar facts evidence showing that X is a bad man and a criminal whose particular modus operandi is obtaining money by false pretence.

Facts situations one and two show general resemblance. They are irrelevant, not admissible in evidence, against A or C. Fact situation three is of a particular resemblance – distinctive modus operandi – and is admissible against X.

It may be submitted that evidence of general resemblance or general evidence system is admissible only if apart from general resemblance, the Evidence Act allows it. But those evidence which shows particular resemblance such that they fix the accused as the actor in each fact situation is relevant and admissible.

The purpose of this type of evidence system (evidence of similar fact) is to show that the accused is to be guilty of the offence currently charged by simply showing that he or she had been guilty of other misconduct than the one primarily charged.

You would have observed by now that similar facts evidence and an accused's bad character reinforce each other or support the allegation made against the accused. Hence, evidence of bad character, which falls within the scope of similar facts evidence is relevant and admissible. Whenever evidence of bad character is relevant, evidence of previous conviction is also relevant. However, the general principle remains that:
The evidence of character of either party to a judicial proceeding is irrelevant and inadmissible and in a criminal proceeding the evidence of bad character (reputation) of the accused, or his previous conviction or previous acquittal is also irrelevant and inadmissible unless the Evidence Act or other statute so permits.

In this regard admissibility of evidence system in a criminal trial would be determined by asking, in each case whether the probative value of each evidence outweighs the prejudicial effect: DPP V P (1991).

In civil proceedings, such evidence is admissible wherever it is relevant to determine the matter in issue provided it would not be oppressive or unfair to the other side to do so. See **Mood Music Publishing Co Ltd v De Walfe Publishing Ltd (1976).**

1.3.2 Character of the Witnesses

The character of a witness is always relevant to his or her credit to show that he or she is a person of good character and worthy to be believed. The evidence of a witness's character becomes relevant if he or she:

- denies his or her previous conviction
- has made inconsistent statements
- denies bias in favour of one party
- Where the reliability or credibility of a previous witness (e.g. medical evidence of abnormality of mind) may affect reliability of the witness's testimony.

The character of a prosecutrix may be impeached in sexual offences, thus in a charge of Rape and similar offences, a party may adduce evidence of her reputation to show that she is a common prostitute.

The prosecutrix may be cross-examined as to acts of immorality with men, other than the accused, for purpose of impeaching her credit in such a case. But her denial is final and may not be contradicted any further.

Evidence of previous sexual relation with the accused during cross-examination may be received if "consent" is in issue.

However, such cross examination for purpose of establishing consent is not to be regarded as an imputation on her character as to put in issue the character of the accused.

The prosecution may attack the character of a defence witness and such attack may go beyond contracting the evidence of his or her good character which the witness has given.

1.3.3 What Constitutes Evidence of Bad Character

The Evidence Act, section 82, provides instances where bad character e.g. of previous Conviction will be admissible. You may ask, what is the meaning of previous conviction in this context?

Look at the following cases.

a. **Stirland v DPP (1944) AC 315** : Here the court expressed the view that the word "charged" in the sense it bears in the statute means "previously being brought before a criminal Court" not just being suspected or questioned.

b. **R v Shrimptom**: S was charged with larceny (theft), His character became an issue, Prosecution gave evidence of previous conviction. The court said that if the previous conviction had been for rape, it would not have been admissible because it would have been prejudicial.

c. **R v Winifield** (1939): W was charged with indecent assault. The court admitted evidence of previous conviction for dishonesty. The court added that there is no such thing as putting half a prisoner's character in issue and leaving the other one out.

1.3.4 When a Character Evidence becomes Relevant

What matters is not an individual opinion of the person; It is the opinion of the community.

X, a school teacher is accused of sexual harassment. Police investigates and charges him with indecent assault. The defence testifies as to the teacher's good behaviour. The prosecution calls a witness in rebuttal in an answer to the accused's moral standard, saying:

"I know nothing of the neighbourhood's opinion because I was only a boy at school when I know him but my own opinion and that of my brothers who were his principals is that his character is that of a man capable of the grossest indecency and the most flagrant immorality". R v Rowton (1865)

A witness can only speak of the accused's reputation, not of rumour, or suspicions which cannot be proved.

In a situation where a rumour affects a person's reputation, Admissibility or nonadmissibility may well depend on party's pleadings.

1.3.4.1 Grounds for relevancy of Character Evidence

Evidence of character may be admitted in the following circumstances:

i) where the question of character becomes relevant
ii) as evidence of similar facts to show system or design
iii) to negative a plea of accident
iv) to know motive or intention
v) if an accused has adduced evidence of his or her own good character
vi) Where statute specifically allows evidence of accused's bad character or previous conviction(s).

Some of these situations apply to civil proceedings while others apply to criminal matters. Some of them also apply in both cases.

1.3.5 Evidence of Character in Civil Proceedings

In civil cases, evidence of the character of a party is irrelevant. It becomes admissible if it is otherwise relevant, as in the following examples

a) Where the character of the claimant/Plaintiff is a fact in issue: See Ingram v Ingram (1956). This was a case of divorce based on adultery. The husband, who was a senior military officer was allowed to give evidence of treason against his spouse in proof of the fact that his spouse was guilty of weighty misconduct which is a constituent of cruelty.

b) Where the character of the Plaintiff is relevant in assessing the quantum of damages e.g.
   i) Proceeding for breach of promise of marriage
   ii) Petition for divorce founded on adultery with his or her spouse
   iii) In mitigation of damages in action of defamation Evidence of conviction is conclusive proof that the subject committed the offence in an action for libel or slander in which the question whether a person did or did not commit a criminal offence is relevant
   iv) Evidence of bad character (i.e. general Reputation) of the Plaintiff is relevant in an action for defamation in which justification is pleaded and also to mitigate damages. In this regard the defence must first deliver particulars of the proposed evidence seven days before the trial or with leave of the judge.

c) In cross examination of witness as to credit: Evidence of previous conviction or of bad character of a party may be relevant where the party testifies on oath at the witness box and is being cross-examined as to credit. (See Evidence Act 2011 Sections 210213,179, 224 and 228).

1.3.3.4 Character of the Defendant

Normally, the fact that a defendant in a civil action is an ex-convict would not be admissible for the Plaintiff/Complainant. [See the case of **HOLLINGTON V HEWTHORN AND CO LTD (1943) KB 587**].

However, the moral character of the defendant is relevant, for example:
i) to allegations of adultery in divorce proceedings
ii) in an action for breach of promise of marriage

See the case of **Din v African Newspaper Ltd (1990) 3 NWLR 392 .** This was a case of libel and evidence of bad character was held admissible since the parties have, in pleadings joined issues on the good character of the Plaintiff.

3.7 Character Evidence in Criminal Cases

The accused occupies dual positions: He is a party (the accused). He is a competent witness for the defence. Both roles have different bearing on character evidence.

3.7.1 Accused's Good Character

Common law and the Law of Evidence allow an accused to give evidence of his or her good character. This may be elicited either in evidence on grounds of humanity, in examination –in-chief of a character witness or by the accused himself or in cross-examination of the witness by the prosecution. Evidence of opinions of specific person or evidence of specific acts by the accused is outside the scope of character evidence (Section 8, Evidence Act, 2011).

When the evidence of good character may be admissible?
Evidence of good character may be admissible if:
i) it is relevant to the offence charged
ii) it refers to a date proximate to the charge
iii) it is general, not relating to specific instances.

In **Stirland v DPP (1944)** Accused was charged for forgery, he gave evidence of good character and official record and called a witness to depose that he had never been charged before. In rebuttal, the prosecutor sought to cross examine as to whether the employer had suspected or questioned the accused about a suspected forgery. It was Held inadmissible.

In **Haruna and others v Police (1967) NRNLR 37**, the applicant was charged with abatement of robbery. He called as a witness, a bank manager who said:

"I know the accused's financial background. He is financially sound. Since I have known the accused I don't remember him getting involved in any trouble"

This was Held admissible as evidence of good character.
The character evidence must be of the specific type impeached. Thus if the offence involves dishonesty, or immorality, the question in issue becomes his or her character as to honesty or morality; character in other respects are immaterial.

Evidence of good character is a double edged weapon as it entitles the prosecution also to advance evidence of bad character, if any.

It has two important limbs

1) Its relevance to credibility
2) Its relevance to the question whether the accused/defendant was likely to have behaved as alleged by the prosecution.

Where an accused faces multiple charges, pleads guilty to some and not guilty to others, he ceases to be of good character any longer.

3.7.2 Evidence of bad character

Evidence of bad character is irrelevant. See Section 81, Evidence Act, 2011). Such evidence cannot be adduced for the following reasons:

a. It is irrelevant.
b. It may unduly harass the party.
c. c) It is prejudicial.
d. It tends to rake up the whole of one's career which one would not be prepared to defend without sufficient notice

There are, however, the following exceptions to the general rule that evidence of bad character, convictions and acquittals of the accused are inadmissible:

a) Where the accused puts his or her character in issue by:
    i) Introducing evidence of his or her good character or
    ii) Attacking the character of the prosecutor or his witness.

    For this purpose evidence of previous conviction is evidence of general reputation. Such imputation may be by personal testimony, or through a witness or advocate.
b) Where statute permits, examples are:
    i) Evidence Act, section 180
    ii) Criminal code 249-50 and 427 and,
    iii) Penal Code section 40. Some statutes have provisions for evidence of bad character e.g. official secret Act.

c) Similar facts such as conduct in previous transactions. The purpose should be
   i) to negate a plea of accident,
   ii) to show evidence system
   iii) to show motive.

d) Certain crimes, as defined in the statute creating them, allow character evidence. Example is loitering with intent to commit a felony.

e) Character evidence in form of previous conviction may be allowed:
   (i) to establish knowledge in case of receiving stolen property (evidence of Scienter).
   (ii) when the penalty is to be enhanced for subsequent offences as in the case of persistent offenders.
   (iii) Upon a plea of autrefois convict or autrefois acquit.

f) After verdict and in response to "Alloquitus" for purpose of determining appropriate sanction.

Note that an emphatic denial however strong is not a character impeachment and would not justify a rebuttal based on bad character or previous conviction. If the accused impeaches the character of the prosecution or his or her witness from the dock, he is protected. But when the accused makes such imputations and elects to go and goes into the witness box, he exposes him or herself to cross examination with regard to his or her bad character or previous conviction.

The judge has the discretion to disallow a cross-examination as to accused's bad character or his or her previous conviction, where the prejudicial effect outweighs the probative value.

Where an accused has given evidence of his or her own good character, it is always open to the prosecution to give evidence in rebuttal but Lord Hershell's dictum is instructive. He states:

"it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from the criminal conduct or character to have committed the offence for which he is being tried.

"On the other hand, the mere fact than the evidence adduced tends to show the commission of other crime does not render it inadmissible, if it be relevant to an issue before the (court) and it may be so relevant if it bears upon the question whether the act alleged to constitute the crime

charged in the indictment was designed or accidental or to rebut a defence, which would otherwise be open to the defence" (**MAKIN V. ATTORNEYGENERAL FOR WAR SOUTH WALES (1894) AC 59 PC**).

Evidence of bad reputation or a bad disposition is to be excluded only if it shows nothing more.

See the case of **R V SIMS (1946) 1 KB 531**. Here the Accused was charged with 10 counts for sodomy and gross indecency with A, C, H and E and with three boys and tried together. Considering sodomy as a crime of special category, a repetition of the acts with a specific feature connecting the accused with the crime and the interest of justice, the court held that the evidence of such acts was admissible in each case to show the nature of the act done by the accused.

Series of facts with same characteristics are unlikely to be produced by accident or inadvertence. After all, human nature has a propensity to repetition and as series of acts are likely to bear the same characteristics, while therefore one witness as to one act might be mistaken in identifying the accused, it is unlikely that a number of witnesses identifying the same person in relation to a series of acts with the self-same characteristics would all be mistaken.

In **HARRIS v DPP (1952) AC 694**. Here the Appellant was at all material times on duty as a police constable in a market. He was indicted on 8 counts each of which alleged a breaking into the same office in the market and stealing between May and July. The evidence showed that most of the gates of the market were closed and on each occasion the thief had entered the office by the same method and stolen part of the money, the whole of which he could have stolen. Apart from the evidence of opportunity, there was no evidence to connect the appellant with 7 of the counts. With regard to the 8th count, the evidence shows that a burglar alarm had been planted on the premises unknown to the appellant, who was as usual, on duty in the market at the time.

Immediately after the alarm had sounded, some detectives, who had been lying in wait ran to the market and saw the appellant standing near the office. Although he was acquainted with the detectives, he nevertheless disappeared from sight for a short period long enough for him to hide the money, where it was later found.

The trial court acquitted him of the first 7 counts but convicted him on the last, which conviction was upheld by the court of criminal appeal.

On further appeal, the House of Lords quashed the conviction on the ground that irrelevant evidence in the nature of the evidence of the earlier theft was wrongly admitted.

In **BOARDMEN v DPP (1974) 3 ALL E R 887**, the House of Lord held that in exceptional cases, evidence that an accused had been guilty of other offences will be admissible, if it shows that those other offences have with the offence in hand, common features of such an unusual nature and striking similarity that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence.

The approach by Lord Goddard, CJ deserves mention. He said, (**R v SIMS 1946** as above) "If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused. But if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence and we think is the correct view''.

The Judicial Committee of the Privy Council criticized this approach saying that the judge ought to consider whether such evidence proposed to be adduced:

Is sufficient and substantial having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice that it should be admitted.

In so far as the purpose is concerned, it can, in the circumstance of the case, have only trifling weight, the judge will be right to reject it; … but cases may occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge (per Lord Parque).

The judge has the discretion to admit the type of evidence if he is satisfied that:

1) Its probative force in relation to an issues in the trial outweighs its prejudicial effect and
2) There was no possibility of collaboration between the witnesses.

SELF ASSESSMENT EXERCISE

What is the principle of evidence enunciated in Makin's case Literarily, character refers to disposition and reputation. In Law, it signifies reputation, not particular facts or opinion.

In Civil cases, evidence of character of either party to a judicial proceeding is generally inadmissible (Sections 78 and 81 of the Evidence Act, 2011). The reason is that it is not only irrelevant but also would unduly harass and prejudice the party. It has the effect of raking up the whole of his/her career. The character of the complainant/Plaintiff in a civil suit is irrelevant and inadmissible except where his/her character is in issue or where it is relevant to assessing damages. (**BUTTERWORTH V BUTTERWORTH (1920) P 126**) or in cases of rape and indecent assault (evidence Act section 233), [**SELVEY V DPP (1968) 2 ALL ER 497**]. A defendant's' character is hardly in issue, except perhaps in divorce proceedings (Ingram v Ingram, 1956) or in an action for breach of promise of marriage [**HOLLINGTON V HEWTHORN & CO LTD (1943) KB 587**]. In relation to an accused, evidence of good character can, on grounds of humanity, be given in person, or by the prosecution/defence witness. Evidence of bad character cannot be adduced before verdict. To this general rule there are exceptions.

Examples are: where the accused puts his/her character in issue, evidence system, in proof of previous conviction or where statute so provides. See Evidence Act, Section 8, 81, 180, 228, Criminal Code sections 249- 250, 427, Penal Code section 405. An accused's character is adduced in cross examination when he goes to the witness box. Character evidence may be given after verdict or in a plea of autrefois verdict or acquit. The character of witnesses is impeachable as to his/her credit in cross-examination (**R V ROWTON [1865] LE & CA 520), SCOTT V SAMPSON (1882) 8 QBD 491**. In criminal proceedings the general rule is that evidence of bad character (reputation) previous conviction or acquittals of the accused is irrelevant and inadmissible.

1.4 Summary

In this unit, you learnt about character evidence and examined Sections 77-82 and 180 of the Evidence Act, 2011. The expression was defined or explained with illustrations. You also learnt of the circumstances under which good or bad character evidence of the parties and witnesses (as the case may be) may be relevant and admissible and when not. What constitutes evidence of bad character was examined. It is not

individual opinion; it is the opinion of the community. Character evidence in criminal and civil proceedings were dealt with separately. In civil matters, evidence of character is admissible if it is relevant in order to determine the matter in issue provided it is not oppressive or unfair to the other party. In criminal trials, the judge has a discretion to weigh its probative worth with its improper prejudicial effect. The important principle enunciated in Makin's case cannot be sufficiently stressed. The type of bad character evidence to admit or disallow is at the discretion of the judge.

1.5 References/Further Reading/Web Sources

Nwadialo, F (1999) 2nd ed. Modern Nigerian Law of Evidence, University of Lagos Press. Lagos. Evidence Act 2011.

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

1.6 Possible Answers to Self-Assessment Exercises

Character evidence means the evidence of a person's moral standing in community based on reputation.

UNIT 2 OPINION EVIDENCE

Unit structure

2.1 Introduction

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

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

2.2 Learning Outcomes

At the end of the study in this unit, the students should be able to understand what is meant by Opinion Evidence and identify the circumstances in which opinion evidence is generally admissible. Students should also be able to rationalize the basis on which opinion evidence has been given and admitted or rejected and what is meant by expert witnesses.

2.3 Opinion Evidence

2.3.1 Definition of Opinion Evidence

Opinion Evidence or Testimony as the Black's Law Dictionary 5th Edition put it means the evidence of what the witness thinks, believes, or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves.

It has been asserted that generally, the rules of evidence ordinarily do not permit a witness to testify as to opinions or conclusions except in certain circumstances and these are the exceptions to the general rule. One of such situation is the calling of ''Expert Witness''.

Expert witnesses are those who by virtue of their education and experience have become knowledgeable [expert] and authority in their area of profession, calling or vocation whether it is in the field of art, humanities or science.

2.3.2 Fundamental Principle of Witness Evidence

The purpose of calling a witness is to elicit from him or her evidence of facts which he or she has perceived by means of his or her senses. That is to say; What he or she saw with the eyes; What he or she tasted with the tongue.; How he or she felt; What he or she heard with the ears and What he or she smelt with the nose.

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

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

An expert opinion may be received, therefore in evidence if it relates to a technical or scientific matter in which the competency to form an opinion cannot be acquired except by a course of special study or experience. Arts, science, trade, handwriting, banking or foreign law confers such competence through a special course of study. Should any question of competency in any of these fields arise, an expert testimony

expressing his or her reasoned opinion is admissible. Otherwise such evidence is inadmissible. The reasons for exclusion of opinion evidence are that, it is:

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

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

SELF ASSESSMENT EXERCISE

Compare the prejudicial and the probative values of opinion evidence.

2.3.3 Expert Opinion

An expert may be required to give evidence of:

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

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

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

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. In what circumstances will the court receive expert evidence?
2. Explain who may qualify as an expert

2.3.3.1 The test of admissibility of expert evidence of opinion:

The admissibility of expert opinion depends on the following:

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

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

i) That the non-expert witness might state his opinion, whether the accused had taken liquor or not , but must give the facts upon which he relied in forming his opinion,

ii) Not being an expert, he was not entitled to say whether the accused was fit or unfit to drive the vehicle. That was a matter for the trial court to decide, not the opinion of nonexperts or ordinary witness.

iii) The opinion of person other than experts may be admissible in regard to the state or condition of a person or thing, other than his/her mental condition. Examples are:-

   a. Where a fact in issue is the opinion of a person e.g. opinion of another of libel, who pleads fair comment or the opinion of a witness to whom a false pretence was addressed or the opinion of a person defrauded that what the fraudster said was true.

   b. Personal opinion or belief about facts in issue which is based on grounds of experience. Such evidence has been admissible to prove identity, handwriting, age, insanity, intoxication etc. It has even been used to prove the speed of a vehicle, the value of articles and the affection between persons, where more direct and positive evidence are not available.

   c. In interlocutory proceedings, a deponent may state his opinion and the ground of its foundation.

2.3.3.2 Competency of an expert or specialist

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

An expert is a person especially skilled in the field of foreign law, native law and Custom, of science or art, handwriting and finger print analysis. His or her competency is for the judge to decide. Whether or not he or she acquired knowledge professionally goes to weight not admissibility. The test of an experts' relevance is whether he is specially skilled on the particular field in question.
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When called as an expert witness, you must first state your qualification, experience, training, nature and duty or your office relative to your field so as to satisfy the court that you are an expert on the subject in which you are about to testify as well as justify the reception of your evidence as relevant evidence.

It has to be noted, however that not only the general nature but also the precise character of the question upon which the expert evidence is required, have to be taken into account when deciding whether the qualifications of a person entitles him to be regarded as a competent expert: Ajani v the Comptroller of Customs (1954).

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

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

2.3.4 Statutory Provisions

2.3.4.1 The Evidence Act 2011.

Section 68

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

law or custom, or science or art or in questions as to identify of handwriting or finger impressions are admissible.=

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

Section 67

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

2.3.4.2 Exceptions

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

1. Facts which themselves require to be proved by admissible evidence.
2. Opinion based on the facts of the particular case.
   Before giving opinion evidence in a trial proceeding, the expert must first lay a foundation. The foundation refers to the ground or reasoning upon which the opinion is founded.

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

3. Experts may refer to information relating to their field of expertise that has come to them as a second hand (this rule is an exception to the hearsay rule)
4. When giving evidence as an expert, you may refer to articles, journals, and other materials (published or unpublished) in support of your opinion.

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

(a) Foreign law
AJANI V THE CONTROLLER OF CUSTOMS (1952) 14 WACA 39, the Judicial Committee of the Privy Council (JCPC) held that a banker was "specially skilled" to give opinions as to foreign law based on his experiences, position or status and duties relative to the subject matter.

BAILEY V RHODESIA CONSOLIDATED LTD (1910), a Reader in Roman – Dutch law of the Council of Legal Education was held to be an expert in Roman Dutch law.

(b). Native law and Customs

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

It is settled law that except where a rule of customary law has received judicial recognition, such rule is treated for purposes of proof as a matter of fact **ADEGBOYEGA V. IGBINOSU (1969) I ALL NLR 1**. Where the customary law is not judicially noticed, it may be proved by testimony, in court, of a witness acquainted with the particular law. Thus "in deciding questions of native law and custom, the opinions of native chiefs or other persons having special knowledge of the native law and custom and any book or manuscript recognised by the natives as a legal authority are relevant. Examples of such books, which judges have consulted, are:

- Ajisafe: Laws and Customs of the Yoruba people.
- Folarin: The Laws and Customs of Egba Land (See **ADESEYE & ORS. V TAIWO (1956) 14 WACA 84)**
- Ward Price: Memorandun of Land Tenure in Yoruba Province (**ADEDIBU V ADEWOYIN & ANOR. (1951) 13 WACA 191)**

  Part of these books were written by persons of Yoruba origin and received in support of the existence of certain Yoruba customs by the Supreme court in **ADESEYE V. TAIWO AND SUBERU V. SUNMONU**

The Evidence Act section 68 is not exhaustive of areas where an expert opinion may be sought. In **SEISMOGRAPH SERVICES LTD V. OGBENI (1976)4 SC 85**. P sued for nuisance and damage to his house from D's exploration exercise. P called for an expert to testify that the damage was caused by the vibration from seismic operation. The trial Judge rejected it, saying the court was capable of making the relevant inference without resort to experts. On appeal, the Supreme Court said.
"We are unable to agree with the learned trial judge that the evidence of an expert is not absolutely necessary to prove damage alleged to be caused by the vibration radiating from seismic operations taking place within a reasonable distance from the property damaged. These are

phenomena beyond the knowledge of the unscientific and untrained in seismology and civil engineering", (Per Obaseki, JSC).

2.3.4.3 Other Instances of Opinion Evidence

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

i) Evidence as to identity
ii) Handwriting
iii) Other cases

2.3.4.4 Evidence of Identification

Evidence as to the identification of a person or a thing is an expression of opinion. Examples are evidence of:

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

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

Handwriting

Handwriting includes type-writing. When hand writing or type-writing is in dispute, a handwriting expert may compare a document proved to have been written by the person whose handwriting it is sought with the document in dispute. After carrying out such a comparison, the hand-writing expert may be called to give his or her opinion.

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

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

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

- is skilled or has given consideration attention and study to the subject. The courts have received opinion or expert evidences of handwriting from:
- Police officer **R.V. ONITIRI (1946) 12 WACA 58**.
- (Solicitor who studied finger print for 10years **R. V. SILVERLOCK (1894) 2 QB 766.**
- Handwriting analysts who are trained specialists in the field.
- Persons who are skilled in finger print impression analyses.

3.4.3 Others

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

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

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

The reasons may be that:

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

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

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

3.4.5. Illustration

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

The question for determination is who is or who are entitled to inherit.
There is no evidence that Jonah and Rebecca ever married. No marriage certificate, either. But they had four children while they lived together

and their birth certificates showed that their parents – Jonah and Rebecca – were husband and wife.

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

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

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

- charge of Bigamy
- case of matrimonial proceedings e.g. divorce

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

3.5 Expert Opinion

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

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

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

3.6 New Dimensions of Matters of Science and Art

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

3.6.1 Psychiatrists and Psychologists

Persons so especially skilled are experts Sec 68(2) Evidence Act 2011.
The English courts have shown a readiness to receive psychiatrist or psychologist expert as to:

a. reliability of a confession (Ragship and others, (1991); Walker (1998) and O.Brian (2000)these are foreign matters the Nigerian courts are unlikely to hold under Evidence Act 2011
b. the defect or abnormalities of mind to impeach the credibility of the witness or witnesses or show that the patient is incapable of giving reliable evidence.

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

1. Mens rea – its existence or non-existence **RV TURNER (1975) Q B 834. COMPARE LOWERY V QUEEN (1974)**
2. Truthfulness of a witness or evidence **MACKNANNEY V PINFIELD (1981), BROWNING (1995)**
3. Ultimate Issue: ultimate issue is for the judge to decide and pronounce a verdict and expert opinion is irrelevant. Sometimes the judge allows it. Theodosi (1993); Stockwell (1993). These decisions are guides only and for purpose of argument bearing in mind the doctrine of judicial precedent.

3.6.2 Foreign Law

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

3.6.3 Customary law and Custom

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

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

3.6.4 Facts bearing on Expert Opinion

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

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

3.6.5 Opinion of non-experts Section 72

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

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

(b) Existence of general custom or right, including customs or rights common to any considerable class of persons.(section 73)
The Court would receive the opinion of non-expert who would be likely to know of the existed if it existed.

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

3.6.6 Non-expert opinion

It must be shown that the witness has special means of knowledge to the satisfaction of the court on the matter specified in (c) (i-iii) above.
Relationship of one person to another: Section 75

A member of the family or other person who has special means of knowledge on the subject may volunteer opinion expressed by conduct.
A non-expert opinion is irrelevant as to marriage in cases of

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

Conclusion

It is a fundamental principle of witness evidence that a witness should testify as to facts and not as to their opinions from facts. Opinions may be products of secondary evidencehearsay. Opinion evidence, generally, is excluded from evidence. But where some thing has arisen, which is outside the experience of the court, opinion evidence becomes relevant and admissible. Thus expert opinion is receivable to prove foreign law and customary law and custom.

Similarly non expert opinion may be relevant and admissible to prove on handwriting, general custom or right, usages and tenets, constitution and government of a religious or charitable foundation, meaning of words or terms used in particular locality or circumstance, and special relationship between one person and another. Facts not otherwise relevant are relevant if they support or are inconsistent with an expert opinion and when the opinion of a living person is admissible, the ground on which such opinion is based are also admissible.

2.4 Summary

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

2.5 References/Further Reading/Web Sources

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

Nwandialo F. (1999) 2nd Ed. Modern Nigerian Law of Evidence, Lagos University Press. Lagos. Evidence Act 2011.

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

2.6 Possible Answers to Self-Assessment Exercises

The circumstances for the receipt of expert evidence is if the evidence relates to a technical or scientific matter in which the competency to form an opinion cannot be acquired except by a course of special study or experience.

UNIT 3 SIMILAR FACT EVIDENCE

Unit Structure

3.1 Introduction

Evidence of Similar Facts is the evidence that tend to establish the fact in issue by proving the previous similar acts or omissions of the accused person. Evidence of general resemblance or general similar facts is inadmissible. They are admissible if they show not only a general resemblance but also such a particular resemblance as to fix the accused as the actor on the particular case.

3.2 Learning Outcomes

The objective of this unit is to be able to make the students to understand the concept of ‘’Similar Facts”, its provision under the Evidence Act, its application to a case and the possible effect. At the end of this unit the student should be able to demonstrate a perfect understanding of the similar facts Evidence.

3.3 Similar Fact Evidence

3.3.1 Similar Fact Evidence and Common Law

The Prior to the 19 Century, similar fact evidence was excluded unless it had a particular function. In the 19th Century, the reverse situation prevailed and similar fact evidence becomes, prima facie, admissible unless it showed only propensity. In 1894, exclusionary rule was restored and fact was confirmed by the Privy Council in the case *of*

Makin v Attorney General of New South Wales (1894) A C 59 at 65. This is a case in which a husband and his wife were charged for murdering a baby and during investigation the remains of the baby and that of three other babies were found buried in the garden at the back of the house of the Makins. Further investigation revealed the remains of seven other babies were found in the yard of the house where the Makins once lived. Considering all these evidence, the Privy Council accepted them as evidence on the ground that they showed that the accused persons had deliberately killed the baby in question. In his judgement, Lord Herschel stated the common law rule on similar fact as follows:

It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purposes of leading to the conclusion that the accused is a person likely from his criminal conduct or character, to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crime does not render it inadmissible if it be relevant to an issue before the jury: and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be opened to the accused

The position above stated was also upheld in the case of *R. v Sims (1946)1 K B 531.* This case involves a charge of the offence of sodomy and gross indecency of the accused with four men. The Court held that the evidence of each accuser was admissible.

But it is worthy of note that the position in the criminal case of *R. v Sims (1946)1 K B 531* was reverted three years later in the case of *Noor Mohammed v R (1949) AC 182* where the Privy Council held that evidence of previous similar acts were wrongly admitted in evidence and the conviction of the accused person was quashed.

Notwithstanding the position held in the case of ***Noor Mohammed v R (1949) AC 182*** above, the principle laid down by Lord Herschel in Makin's case was later affirmed by the House of Lords in the case of **Harris v DPP (1952) AC 694** though the appeal of the appellant was successful.

Noteworthy is the case of **Boardman v Director of Public Prosecutions [1974] 3 All E. R. 887**, where the House of Lords held that evidence of similar offence will be admissible in an exceptional situation where it shows that those other offences share with the offence charged common features of such an unusual nature and striking

similarity that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence. The case stated that in admitting such evidence the judge should exercise his discretion to admit the evidence only on the satisfaction of the following:

1) That its probative force in relation to an issue in the trial outweighs the prejudicial effect, and
2) That there was no possibility of collaboration between the witnesses.

3.3.2 Common Law Rule of Similar Fact Evidence in Nigeria

Prior to the advent of the Evidence Act in Nigeria, the common law rule of similar evidence as upheld in the case of Makin were made applicable in some Nigerian cases, prominent among which is the case of **R v Adeniji [1937] 3 WACA 185**. In this case the appellant was charged with the offence of being in possession of moulds for minting coins under the Criminal Code. The Court held that the evidence of previous uttering of counterfeit coins by him was admissible in order to establish guilty knowledge.

Also in the case of **Akerele v R [1943] A.C. 255**, a similar position as in the above case was maintained. In this case the appellant a Medical Practitioner gave injections of mixtures to a number of children among who is the deceased who died as a result of the injection given by the appellant. At the trial the court held that the evidence of the fact that other children died as a result of the injection given to them by the accused at the same time and from the same mixture was held admissible.

It is noteworthy that such decisions as above would have been reached even after the advent of the Evidence Act because, it tends to look like the position in the case of Makin as examined above, has become adopted in our Evidence Act, particularly in Section 17 of the Evidence Act 1990 which is now Section 12 of the Evidence Act 2011 and it provides as follows:

When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention or to rebut any defence that may otherwise be open to the defendant, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

The material content of the above provision has a very close resemblance to the Common Law principle on Similar Evidence as given by Lord Herschel. This position stipulates that similar fact evidence will only be admissible if it is relevant to the issue whether the acts alleged to constitute the offence charged were designed or accidental.

Take note that notwithstanding the admissibility of similar fact evidence under section 12 of the Evidence Act 2011, this provision is not applicable automatically, as the Court has power to exclude or jettison such evidence if it is considered evidence prejudicial to the fair trial of the accused.

The provisions of Section 12 of the Evidence Act 2011 has been subjected to several argument as regards its concept implication which is believed to be devoid of the real principle contained in the MAKIN's case which allows the evidence of similar facts ''to rebut a defence which would otherwise be open to an accused person''. It has been confirmed in response to the argument that there are no reported authorities to the contrary in Nigeria. It has also been asserted that notwithstanding the fact that Section 12 of the Evidence Act 2011 is devoid of the direct provision of the common law rule which allows the evidence of similar facts ''to rebut a defence which would otherwise be open to an accused person'', such provisions can be read into when considered along with the provision of Section 5 of the Evidence Act 1990 which allows the admissibility of evidence which apart from the Act would be admissible.

A closer look at the Evidence Act 2011 tends to show a technical content departure from the above position as the provision of Section 5 of the Evidence 1990 is no longer retained in its entirety in the Evidence Act 2011 which has altered the position that nothing will prejudice the admissibility of any evidence which apart from the provision of the Act be admissible. The Evidence Act 2011 now subjects the admissibility of any evidence other than the one provided in the Act only to those contained in any other legislation in Nigeria. See Section 3 Evidence Act 2011, it provides thus;

Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria.

It is noteworthy, that by the application of the principle of Stare Decisis, any case in which our courts have made pronouncements using the MAKIN's case as a bench mark will make the same position as applied under Section 5 of the Evidence Act 1990 to be applicable under Section

3 of the Evidence Act 2011, because judges decisions are also part of the Nigerian Legislation.

On Similar Facts evidence, it is very important for you to know that for an evidence of previous act to be given to sustain a charge, the defence of the accused must not be an outright denial of the offence charged and such evidence must be very connected to the acts of the accused. See the case of **Al-Hassan v Commissioner of Police [1944] 10 WACA 238**. Here the Court held that the evidence of previous extortion of bribes from other persons is inadmissible on the ground that the evidence has no bearing with the present charge.

Similar Facts evidence is applicable to both civil and criminal cases alike. Evidence of similar facts can be adduced in civil cases. See the case of **Hales v Ker [1908] 2 KB 601**. Here the Plaintiff sued the Defendant who is a barber for negligence in shaving him with an unsterilized razor thereby infecting him with ringworm. Evidence that the other persons shaved by the Defendant had contacted the same infection was held admissible.

In an action for negligence for performing a surgical operation carelessly evidence that in other such operation, he had been negligent or skilful is inadmissible.

See also the case of *Hollingham v Head* (1858). Here the issue was whether plaintiff contracted with the defendant subject to special terms. Evidence sought to be adduced was the fact of similar contracts with other persons, subject to these special terms. This was held inadmissible; the fact that a man (or a woman) has once or more in his life acted in a particular way does not make it probable that he or she so acted on a given occasion.

Suppose P made the same contract D, Y, Z. The claim would probably have succeeded.

3.3.3 The General Rule

The general rule specifies the facts of which evidence may be given and it has its root in the Common law rule as examined and explained above. The Evidence Act stipulates that evidence may be given facts in issue and relevant facts and "of no others".

The court, in exercise of its discretion may exclude an otherwise relevant fact, if it considers;

(i) That the prejudicial tendency outweighs its probative value
(ii) Evidence is obtained illegally or by some tricks
(iii) Strict rules of admissibility would operate unfairly against an accused

General evidence of similar facts is NOT admissible to prove the facts in issue. This assertion can be understood from illustrations as follows:

1. Koyo, a brewer supplies beer. He supplied beer to Haruna and there was no complaint. It was good beer. He supplied beer to Dogo who complained that the beer which Kodgo supplied was bad. Kodjo denies and seek to put in evidence that the beer he supplied are good beer and had supplied good beer to Haruna.

2. Ado obtained N50,000.00 by false pretence (4-1-9-) from Folashade in 2009. Ado also obtained N20,000.00 by false pretence from Chukwu in 2010. Again he has been arrested for obtaining N150,000.00 from Fatima by false pretence. He is charged to court. Ado denies the charge. The prosecution seeks to calFolashade and Chukwu to testify to previous fraud or to tender evidence of previous conviction for obtaining by false pretence.

What the brewer and Ado seek to do is to give evidence of facts similar to a fact in issue. Had both of them adduced evidence as regards the same line of transaction as with the case at hand, the evidences would have been admissible.

The general rule of Similar Facts evidence is established in the expression of Lord Herschell.

He stated the general rule when he said as follows:
"it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment; for the purpose of leading to the conclusion that the accused is a person likely form his criminal conduct or character to have committed the offence for which he is being tried."
See the case of ***Makins v Attorney General for*** **New South Wales [1894] AC 59**

But it must be noted that a contrary view to the above was maintained by Lord Goddard when he argued as follows:

"if one starts with the assumption that all evidence tending to show a disposition towards a particular issue must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the adduced; but if one starts with the

general proposition that all evidence that is logically probative is admissible unless excluded, when evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence and this we think is the correct view".

Lord Goddard's position was overruled by The Privy Council when it confirmed the position as presented by Lord Herschel.
Similar Facts Evidence may be admissible if there is a special connection (i.e. a nexus), between the facts in issue and the similar facts. Such special connection or nexus may arise from the following:

1. Modus operandi, or system
2. Common origin
3. Abnormal propensities

Thus, from one of the illustrations given above, if Kodjo had sought to adduce evidence that the beer he supplied to Haruna and Dogo were brewed together, it would be evidence of common source or origin and thus, will be admissible. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible. If it be relevant to the crime before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

3.3.4 Similar Facts under the Law of Evidence

a. Section 1 Evidence Act 2011: Evidence may be given of facts in issue and relevant facts.
The Act provides as follows:
Evidence may be given in any suit or proceeding of the existence or nonexistence of every fact in issue and of such other facts as declared to be relevant and of no others.

b. Section 12 Evidence Act 2011: Facts bearing on questions whether act was accidental or intentional. The Act provides as follows:
When there is a question whether an act was accidental or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences in each of which the person doing he act was concerned, is relevant.

c. Section 35 Evidence Act 2011: Acts of Possession and Enjoyment of Land. The Act provides as follows:

Acts of possession and enjoyment of land may be evidence of ownership or of a right or occupancy not only of the particular piece or quantity of land with reference to which such acts are done, but also of other land so situated or connected with it by locality or similarly that what is true as to the one piece of land is likely to be true of the other piece of land.

See the case **of Okechukwu and Others v Okafor and Others [1961] All NLR 685**. Here the court held that the acts of possession and enjoyment of lands adjoining the disputed one was enough to support their claim of title to that one by virtue of the section

d. Section 36(1) Evidence Act 2011. Evidence of Scienter for receiving stolen property The Act provides as follows:

Whenever any person is being proceeded against for receiving any property, knowing it to have been stolen or for having in his possession stolen property, for the purpose of proving guilty knowledge, there may be given in evidence at any stage of the proceeding-

(a) the fact that other property stolen within the period of 12 months preceding the date of the offence charged was found or had been in his possession: and

(b) the fact that within the 5 years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty.

The Law here allows the giving of evidence to be given at any stage of the proceeding of establishing the guilty knowledge of a person charged or being tried for the offence of receiving stolen property or being in possession of stolen property, knowing it to have been stolen. Take note that the only ground for which such evidence is made admissible is for the purpose of proving the guilty knowledge of the accused, and this therefore implies the facts of receiving the goods to which the charge relates must be proved. Thus, it must be proved that the accused received the goods the subject of the charge before introducing evidence of other instances when the accused had received stolen goods within the last twelve months or conviction for fraud or dishonesty in the past five years.

Before the evidence as above mentioned can be admissible, the accused person must be on trial not for stealing or other offence but for receiving or being in possession of stolen property. see the case of **Odutade v Police [1952] 20 NLR 81**, in this case, the appellant was charged with others with stealing and receiving stolen property, but by himself being with being a rogue and a vagabond. Evidence of convictions over ten

years old was given against him. He was acquitted on the vagrancy charge but convicted of receiving. On appeal, it was argued that the previous convictions were put in for the vagrancy charge and not for receiving within Section 46(b) of the Act [which is 47(2) of 1990 EA]. It was held that Section 46 (1) (b) was inapplicable and that the appellant did not have a fair trial.

It is also worthy of note that there are conditions for proving SCIENTER and such conditions include:

(i) Giving of seven days' notice in writing to the Defendant that proof of previous conviction is intended to be given and

(ii) A proof by evidence that the property which is the subject of the matter of which the accused is being tried was found in his possession or has been in his possession.

Whenever any person is being proceeded against for receiving any property, knowing I to have been stolen or for having in his possession stolen property for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings:

a). The fact that other property stolen within the period of twelve months proceedings the date of the offence charged was found or had been in his possession.

b). the fact that within the five years preceding the date of the offence charged, he was convicted of any offence involving fraud or dishonesty

1) Section 82 (2) Evidence Act 2011: Evidence of character of the accused in criminal proceedings. The Act provides as follows:

2.) The fact that an accused person is of bad character is relevant:-

a.) When the bad character of the accused person is a fact in issue.

b.) When the accused person has given evidence of his good character

3.) An accused person may be asked questions to show that he is of bad character in the circumstances mentioned in section 159 (d)

4.) Whenever evidence of bad character is relevant evidence of a previous conviction is also relevant.

Section 94 Evidence Act, 2011: Evidence of identity of name and handwriting may be admissible also to prove execution of a document. The Act provide as follows:

(1) Evidence that a person exists having the same name, address, business or occupation as the maker of a document purports to have, is admissible to show that such document was written or signed by that person.

(2) Evidence that a document exists to which the document the making of which is in issue purports to be a reply, together with evidence of the making and delivery to a person of such earlier document, is admissible to show the identity of the maker of the disputed document with the person to whom the earlier document was delivered.

Section 180 Evidence Act 2011: Competency of Accused person to give evidence. The Act provides as follows:

Every person charged with an offence shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided that-
(g) A person charged and called as a witness in pursuance of this section shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or is of bad character unless.

1) The proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
2) He has personally or by his legal practitioner asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character, if the nature or conduct of the defence in such as to involve imputation on the character of the prosecutor or the witnesses for the prosecution or
3) He has given evidence against any other person charged with the same offered

Section 211 of the Evidence Act 1990:- Prosecution for Rape:
Under this provision, when a man is charged with an offence of rape, the evidence of the fact that the woman who alleges the offence is a woman known to be generally of immoral character. Such a woman may be asked if she had connections with other men or the Defendant on some

other occasion. It should be noted that her answers as regards whether she had connections with other men cannot be contradicted. It is only the question as to whether she ever had connection with the Defendant that may be contradicted if denied. See the case of **R v Krang, {1973} 57 CR. App. Rep. 466**. It was held in this case that on a charge of rape, a witness called by the Defence to prove that the prosecutrix was a prostitute was entitled to give his reasons for saying that she was a prostitute beyond the mere fact of having himself had sexual intercourse with her.

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. What is the condition for the receipt of similar fact Evidence?

Take note that the above position of Section 211 of the Evidence Act 1990 is no longer the position under the Evidence Act 2011 because the new Act did alter the material content of the Section 211 of the 1990 Evidence Act.

Section 234 Evidence Act 2011 provides as follows:
Where a person is prosecuted for rape or attempt to commit rape or for indecent assault, except with the leave of the court no evidence shall be adduced, and, except with the like leave, no question in crossexamination shall be asked by or on behalf of the defendant, about any sexual experience of the complainant with any person other than the defendant.

A vivid look at the Section 234 of the Evidence Act 2011, shows that adducing evidence of the immoral life style of the Complainant or sexual experience with any other person or cross examination in that regard as allowed under Section 211 Evidence Act 1990 is not allowed under Section 234 of the Evidence Act 2011 except with the leave of court.

3.3.5 Other Similar Facts Evidence which are Relevant and Admissible

Evidence of similar facts are generally irrelevant and inadmissible but there are exceptions, which may be subject to the discretion of the judge

to reject it where its judicial effect outweigh its relevance similar facts evidence. Such Similar fact is relevant to:-

1. Evidence which tends to rebut a defence of accident or mistake were the fact in issue is alleged crime or tort involving guilty knowledge or intention. In **R v Geering (1849)**, G was charged with murder of her husband by administering arsenic poison. The prosecution was to call evidence showing that:

   - G cover for him and gave him his food. Her two sons who lived with her had died of arsenic poisoning
   - Her third son had taken ill from the same arsenic substance

   The defence substance objected but the court overruled. Admitting the evidence, the court explained that it tended to show that the death of accused's husband had not occurred by mere accident but by deliberate design.

   Illustrations
   Zakari advertises falsely that he carries on trade as a dairyman and famer and obtains eggs on credit from Aremu. Subsequently by the same devices, Zakari also defrauds Kuku; and Danjuma on different occasions. The three different incidents are evidence of similar facts, and are admission to prove intention.

2. Evidence which tend to prove the main fact in issue. Eg. When the similar facts are intermixed with the fact in issue as to form one transaction – when the similar facts and the fact in issue form a series of acts done in pursuance of someone design, constituting a continuous course of action.

   Illustration: Usman is charged with stealing gas from PHCN in February 2011. There was evidence that he had taken the Gas from the Gas Main, by means of a pipe, for use in his own factory. The evidence that Usman has been doing so over a number of years is evidence of similar facts admissible on the ground that it tends to show one continuous transaction.

3. Evidence which tend to establish Identity
   Facts which establish the identity of any person or thing in issue. Fact which fix the time and place connecting fact in issue to relevant fact or a party with some transaction.

   Evidence of similarity of characteristics, age, photographs, handwriting, opportunity, finger prints possession of stolen goods, special knowledge or skill etc.

Illustration : Kunle is indicted for murder of Mr. Rich. Evidence of Kunle's pecuniary embarrassment is relevant to show that his motive was to obtain deceased's property.

4. Evidence which tends to show that a conduct, which may be lawful or unlawful, depending on the intent with which it was done was, in fact, unlawful.
5. Evidence which tends to show that the material found in possession of the accused was possessed for an unlawful rather than a lawful purpose.
6. Evidence which tends to show a design, or systematic conduct
7. Evidence which tends to prove knowledge
8. Evidence which tends to corroborate the evidence of a prosecution witness

3.3.6 The Exclusionary Aspect of Similar Facts

There are several acts that may ordinarily qualify to be similar facts but which the court has no power to receive because such facts are statutorily excluded from been accepted or admissible. Such provisions include:-

1. Section 1 Evidence Act, 2011: Evidence may be given of facts in issue and relevant facts

   Evidence may be given in any suit or proceeding of the existence or nonexistence of every fact in issue and of such other facts as declared to be relevant and of no others. Provided that

   a) The court may exclude evidence of facts which through relevant or deemed to be relevant to the issue, appears to it to be too remote to be maternal in all the circumstances of the case: and

   b) This section shall n o t enable any person to give evidence of a fact, which he is disentitled to prove by the provision of the law for the time being in force.

2. Section 82 Evidence Act 2011: Evidence of character of the accused in criminal proceedings

1.) Except as provided in this section, the fact that an accused person is of bad character is irrelevant in criminal proceedings

2.) The fact that an accused person is of bad character is relevant:-
   a.) When the bad character of the accused person is a fact in issue.
   b.) When the accused person has given evidence of his good character

3.) An accused person may be asked questions to show that he is of bad character in the circumstances mentioned in section 159 (d)
4.) Whenever evidence of bad character is relevant evidence of a previous conviction is also relevant.

3. Section 180 Evidence Act, 2011: Competency of Accused person to give evidence. Every person charged with a defence shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.

A person charged and called as a witness shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or is of bad character unless.

1) The proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

2) He has personally or by his legal practitioner asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character, it the nature or conduct of the defence in such as to involve imputation on the character of the prosecutor or the witnesses for the prosecution or
3) He has given evidence .against any other person charged with the same offence
4. Section 36 (1): Evidence of Scienter

Whenever any person is being proceeded against for receiving any property, knowing it to have been stolen or for having in his possession stolen property for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings:

The fact that other property stolen within the period of twelve months proceedings the date of the offence charged was found or had been in his possession.

a. The fact that within the five years proceeding the date of the offence charged, he was convicted of any offence involving fraud or dishonesty

The last mentioned fact may not be proved unless:-

i). seven days' notice in writing has been given to the offenders that proof of such previous conviction is intended to be given, and

ii) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession.

Activity : Write a brief note on what you understand by Similar Facts Evidence

3.5 Summary

Similar fact evidence is that which is admissible because it is closely connected to the fact in issue. The principle has been formulated by the Common Law Rule in Makin's case.

3.4 References/Further Reading/Web Sources

C.C. Nweze: Contentious issues & Responses in Contemporary Evidence Law In Nigeria. [Institute for Development Studies: University of Enugu] 2003.

G. Eche Adah: The Nigerian Law of Evidence [Maltlhouse Press Limited: Lagos] 2000.

Hon. Justice P.A. Onamade: Documentary Evidence- Cases and Materials [Philade Co. Ltd: Lagos] 2002.

The Evidence Act 1990 and The Evidence Act, 2011.

The Black's Law Dictionary, 5th Edition.

3.5 Possible Answers to Self-Assessment Exercises

Similar fact evidence is receivable in exceptional situation where it shows that those other offences share with the offence charged common features of such an unusual nature and striking similarity that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence.

MODULE 2

UNT 1- HEARSAY

Unit Structure

1.1 Introduction

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

If you are consulting English books on evidence, you should pay attention to the age. The hearsay rule in criminal trials has undergone enormous revision in the U.K. it is no longer limited except and in the interest of justice by agreement, statute or common law unlike Nigeria. The U.K recognizes first hand, second hand or multiple hearsay. The hearsay rule has been abolished in the English Civil proceedings. In Nigeria, the exclusionary mile is still a fundamental part of the Law of Evidence in both civil and criminal proceedings. In this unit you shall learn in some detail “This great hearsay Rule”, and its basic principles.

You will be empowered to justify, with sound reasoning or otherwise, the desirability of hearsay rule in the Nigeria Law of Evidence.

1.2 Learning Outcomes

Under this unit, we have been able to define the term "Hearsay", Identify the circumstances when hearsay evidence rule applies and the application in the real sense of Legal Practice.

1.3 Hearsay

1.3.1 Definition of the Rule against Hearsay

Literarily, hearsay is, what a witness has heard from another person of what the accused or defendant has said, not in the presence or to the hearing of the accused or defendant. Traditionally, a testimony that is given by a witness who relays, not what he or she knows personally, but what others have said and is therefore dependent on the credibility of someone other than the witness.

According to Black's Law Dictionary, 5th edition, hearsay evidence is the evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. It has also been explained to mean the testimony in a court of a statement made out of the court, the statement being offered as an assertion to show the truth of matters asserted therein and thus resting for its value upon the credibility of the out-of-court asserter

According to Aguda, hearsay generally means a statement, written or oral, made by a person, who is not called as a witness. An oral or a written statement by a person who is not called as a witness; Evidence of what someone else has said is known as ''hearsay evidence''.

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

Statutory definition of hearsay:
By **Section 37 Evidence Act 2011**, Hearsay Evidence has been defined as follows:

Hearsay means a statement-

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

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

1.3.1.1 Examples of Hearsay statements Scenario:

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

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

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

Self-Assessment Exercise 4

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. What is hearsay evidence?

<u>Hearsay includes oral or written statement or conduct</u>:

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

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

(Adeola hears what Nike has said. Ope puts on her rain-cape

Foluke, Adeola: "The rain is heavy O!"

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

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

Ope: To say it rained that day and she had to put on her rain cap
Adeola: To say it rained that day because he heard Nike say to Ope "Let's go, it has begun to rain".

Foluke. To say it might have rained at the time because he remembered vividly saying to

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

Ope's conduct (putting on her rain cap) is also direct and admissible.
Adeola repeated what someone else (Ope) has said outside the court. It is direct evidence of what Ope has said and to that extent, direct and admissible. But it is hearsay if the object of tendering the evidence is to prove the fact that it rained.

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

1.3.1.2 Validity of the reasons for excluding hearsay evidence.

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

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

The Evidence Act makes provision for admission of evidence of certain hearsay statement of relevancies under specified conditions and these include:

1. Statements of relevant facts by person who cannot be called as witness (Section 39).
2. Statements relating to cause of death (Section 40)
3. Statements made in the course of business (Section 41)

4. Statement against the interest of its maker (Section 42)
5. Statements by opinions as to public rights, customs and matters of general interest (Section 43).
6. Statement relating to the existence of a relationship (Section 44)
7. Declarations by testators (Section 45)
8. Statements of facts made in a prior judicial proceedings as proof in a subsequent judicial proceeding (Section 46)
9. statement made under any criminal procedure legislation (Section 47)
10. Depositions at preliminary investigations or coroner's inquest (Section 48)
11. Written statements of the investigating Police officers (Section 49)
12. ENTRIES in Gazettes, Books, Maps, Acts/Laws, Certificates, Judgments of Courts convictions etc. (Section 50-65)

All these above mentioned are the exceptions to the hearsay rule which shall be fully discussed in the next units.

1.3.2 Scope

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

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

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

A statement may be made for the following purposes:

a) To establish the truth of what it states, if the evidence is adduced for the purpose of establishing or deconstructing the truth or falsity of the averment, (the truth or falsity of what was stated). It is hearsay and must be excluded: **R v Sparks (1969), R v Turner (1975) Q B 834**.

b) Some other reasons: If the evidence is adduced to prove or emphasize the fact that such averment was made at all, it is not hearsay but a direct and an original evidence; **Subramanian v**

Public Prosecutor (1956) I WLR 965: Mawaz Khan v The Queen (1967).

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

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

1.3.3 The Rule against Hearsay.

The Evidence Act, 2011 Section 38: Hearsay rule stipulates expressly that "hearsay evidence is not admissible except as provided for in the Evidence Act 2011 itself or by any other provisions of this or any other Act.

According to Section 126 (a-d) Evidence Act 2011, the general rule is that oral evidence must be direct; and except the content of documents, all facts may be proved by oral evidence. It provides as follows:

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

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

The rule against hearsay consists in truth of two separate rules:

(a) The rule requiring evidence to be first hand: This rule demands that evidence must be given by the percipient, because of the risk

of the evidence being altered as it passes from one witness or potential witness to another.

(b) The rule requiring evidence to be given orally in court: This presupposes that evidence must be given in the witness box, because of the importance attached to the Oath and to giving the opposing party or parties the opportunity to cross examine.

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

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

In **Utteh v State (1992) 2 S C N J (Pt. I) 183**, the Supreme Court of Nigerian quoted with approval the judgment of this Judicial Committee of the Privy Council in Subramanian V Public Prosecutor, where the rule was expressed thus;

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

3.3.4 Assumption

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

What is a statement? – A statement is an assertion. What is an assertion? For the purpose of evidence, does a statement or assertion include?

- Any representation of fact or opinion made by a person by whatever means (including statement, non-statement, assertive, non-assertive etc)?
- Statement only: i.e. representation by words?

- Non-statement: representation made in a sketch, photo fix or other pictorial form - Assertive statement: Intelligible and complete statement?
- Non-assertive: i.e. incomplete statement, non-statement like a pictorial form of statement, sketches, photo-fix, or greetings, commands or questions, which tend to have implied assertions?

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

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

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

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

1.4 Summary

In this unit, you learnt about the type of evidence, known as the hearsay evidence; and what the rule is. Section 37, Evidence Act, 2011 defines it as a statement; oral or written made otherwise than by a witness in a proceeding or contained or recorded in a book, document or any record whatever, proof of which is not admissible under the provisions of the Acts, which is tendered in evidence for the purpose of proving the truth of the matter stated in it. You need to be careful about: False assumptions and be critical about language and terminologies. You are encouraged to make a practice of making your own examples of statements that would be caught by the hearsay rule. In the subsequent

unit, you shall learn the exceptions to the general rule, which have either been developed by the courts or created by statutes.

Activity
Read the following cases:
(a) Subramanian v Public Prosecutor (**1956),** WLR. 965
(b) R v Turners (1975) 60 Cr App R.80

1.5 References/Further Reading/Web Sources

Allen C and Guest S (2004) Evidence, University of London.

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

Phipsons on Evidence 12th Ed

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

1.6 Possible Answers to Self-Assessment Exercises

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

UNIT 2 EXCEPTIONS TO THE RULE AGAINST HEARSAY I

Unit structure

2.1 Introduction

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

2.2 Learning Outcomes

This Unit is set out to enumerate instances where statements made by deceased persons would be regarded as an exception to the hearsay rule and all other allied matters.

2.3 Exceptions to the Rule Against Hearsay I

As earlier stated, "Hearsay Evidence" is an oral or written statement, made by a person, not called as witness or a statement contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of the Evidence Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it. (See Section 37 of the Evidence Act2011). Generally hearsay evidence is excluded and held inadmissible from evidence except as otherwise provided for or permitted in the Evidence Act or any other legislation (See Section 38 Evidence Act 2011).

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

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

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

I. Dying declaration Section 40 Evidence Act 2011
II. Statement made by a deceased person in the ordinary course of business Section 41 Evidence Act 2011
III. Statement by a deceased person against his pecuniary (financial) interest Section 42 Evidence Act 2011
IV. Statement as to pedigree by a deceased person Section 44 Evidence Act 2011 V. Facts showing the existence of a state of mind or bodily feeling.
VI. Admission and confession Part III, Evidence Act 2011.
VII. Depositions taken at the preliminary investigation under certain circumstances.
VIII. Statements contained in Public documents Section 52 Evidence Act 2011
IX. Statements accompanying and explaining an act forming part of res gestae. Applicable by Section 4 Evidence Act 2011
X. Statements of affidavits especially in an originating summons or interlocutory proceedings.
XI. Other matters eg. Status, complaints in sexual offences.

We shall discuss some of these exceptions in greater detail.

2.3.1 Statements made by Persons who have since died. See Section 39

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

- Person who has since died. Section 39
- Person who is beyond the sea
- Person who is unfit as witness (i.e. incapable of giving evidence
- Person who is kept out of the way by the adverse party
- Person who cannot be identified or found.
- Person who cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement.

- Person whose presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable.

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

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

2.3.2 Statements made in the Ordinary Course of business.

A verbal or written statement made in the ordinary cause of business by a person, who has since died is admissible in proof of facts which was the person's duty to state on record. The Evidence Act, 2011, Section 41 states:

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

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

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

1. The statement is written or verbal according to the course of business in question and it is relevant fact.
2. The maker of statement died before the evidence of the statement became necessary.
3. The statement relates only to the acts of the person making it and to no one else's.
4. It must have been made in the course of his or her duty.

5. If the statement is not made contemporaneously, it must have been made within a reasonably short time of the performance of the acts. (The court has rejected a record of collision which was made two days after the collision. Conversely, the admitted a drayman's record of delivery of beer made in the evening whereas the delivery was in the morning).
6. There must be a duty to act and to report or record such act.
7. The duty must be owed to a third party and the action recorded must have been performed by the maker him or herself.
8. The statement is only admissible as to the matters covered by the maker's duty.

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

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

In **R v TAORIDI LAWANI (1959)**, The Prosecutor sought to tender in evidence a Police Report Book" in which entry was made by a Police officer who has since died. The book was not "a public or other book." The deceased Police Officer did not personally perform the acts he had recorded. The statement was held admissible. The grounds for allowing the entry was that the deceased Police officer made it in the cause of his business and that the entry relates to matters within his personal knowledge.

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

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

Admissibility of a statement of the category in discourse is of limited purpose. The statement is not accepted as proof of the whole contents.

They are evidence only of these facts, which are within the maker's duty to record or report.

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. Mention three exceptions to the hearsay rule

2.3.3 Statement Against Person's Own Interest

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

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

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

Such statement as will be admissible under this section includes:

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

2.3.4 Illustration

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

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

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

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

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

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

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

There is a high authority for the views that the maker must have personal knowledge of the facts stated, as there are judicial decisions to the contrary. See **SUSSEX PEERAGE CASE (1844) 11 CL. & F. 85**; In that case, a clergyman who has since died made a statement exposing him to the risk of a criminal prosecution for irregular celebration of marriage. The House of Lords held that the statement did not come within the exception because the interest of the clergyman thus affected was neither pecuniary nor proprietary. See also **CREASE v BARRATT (1835) 1 CR. M. & R. 919**.

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

1. **Taylor v Williams (1876)**. In this case, the deceased made entries in his day book stating that he made a loan to X and admitting also the repayment of interest and repayment of the

loan to him, leaving some balances outstanding. The court admitted all these entries on the ground that the acknowledgement of receipts of interest and repayment of the loan to him were declarations against deceased pecuniary interest.

2. **Higham v Ridgeway (1808) 10 East 109**. The deceased was a male mid-wife. He made entry in his dairy acknowledging payment for the birth of a child on a peculiar day. This entry was admitted being a declaration against the deceased pecuniary interest.

   Examples of a declaration of proprietary interest are illustrated in **Sly v Sly (1877)** [as cited in Nwadialo] and **Obawale v Williams (1996) 12 KLR (Pt. 46) 2123**.

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

The latter case of **Obawale V Williams (1996) 12 KLR (Pt. 46) 2123** was a land dispute. The Supreme Court in that case, admitted the evidence of payment of rent to the ancestors of the defendants as a declaration against the proprietary interest of the Plaintiff's progenitor through whom they claimed title.

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

2.4 Summary

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

2.5 References/Further Reading/Web Sources

Nwadialo. F. (1999) 2nd Ed. Modern Nigerian Law of Evidence, University of Lagos Press, Lagos.

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

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

2.6 Possible Answers to Self-Assessment Exercises

i Dying declaration Section 40 Evidence Act 2011
ii Statement made by a deceased person in the ordinary course of business Section 41 Evidence Act 2011
iii Statement by a deceased person against his pecuniary (financial) interest Section 42 Evidence Act 2011

UNIT 3 EXCEPTIONS TO THE RULE AGAINST HEARSAY EVIDENCE II.

Unit structure

3.1 Introduction

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

3.2 Learning Outcomes

This unit will consider a whole lot of issues which includes: the examination of the statements as to pedigree, public and general rights and statements by a testator. It will also consider the Definition and explanation of the terms: dying declaration, deposition, recent complaints.

3.3 Exceptions to the Rule against Hearsay Evidence II

Pedigree according to the Black's Law Dictionary, 5th edition means lineage, descent, and succession of families, line of ancestors from which a person descends genealogy. It is an account or register of a line of ancestors. Simply put, it means family relationship. Section 44 Evidence Act 2011 relates to statements relating to the existence of a relationship. It states:

(1) Subject to subsection (2) of this section, a statement is admissible when it relates to the existence of relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge

(2) A statement referred to in subsection (1) of this section shall be admissible under the following conditions:

(a) that it is deemed to be relevant only in a case in which the pedigree to which it relates is in issue, and not to a case in which it is only relevant to the issue; and

(b) that it must be made by a declarant shown to be related by blood to the person to whom it relates, or by the husband or wife of such a person provided that;

(i) a declarant by a deceased parent, that he or she did not marry the other parent until after the birth of the child is relevant to the question of the paternity of such child upon any question arising as to the right of the child to inherit real or personal property under any legislation; and

(ii) in proceeding for the determination of the paternity of any person, a declaration made by a person who, if an order were granted, would stand towards the petitioner in any of the relationships mentioned in paragraph (b) of this subsection, is deemed relevant to the question of the identity of the parents of the petitioner; and

(c) that the statement must be made before the question in relation to which it is to be proved had arisen, but it does not cease to be admissible because it was made for the purpose of preventing the dispute from arising.

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

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

on evidence and judicial decision based on it or other source of law which do not form part of Nigerian law have become ineffectual.

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. What is the meaning of pedigree?

3.1.2 Requisites for admissibility

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

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

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

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

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

Such statement must be one in which:

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

See the case of **HAINES v GUTHRIE (1884) 13 QBD 818**. H took out an action for the price of goods sold to which the defence of infancy was pleaded; the date of birth being thus in question. A statement by the defendant's deceased father as to this date made in an affidavit in a previous action between different parties, was held inadmissible, this action, not being a pedigree case. As explained by Brett, M.R , the questions of family, whose son the defendant was, whether a legitimate or a natural son, the oldest or youngest or what position he occupied with regard to the rest of the family are all immaterial. The only question is "What was the date of the birth of the defendant". The statement by the defendant's deceased father in the present case is prima facie hearsay evidence and the general rule of law is that hearsay evidence is not admissible and this case does not fall within the recognized exceptions to the general rule.

3.3.2 Statement of opinion as to Public and General Rights or Custom and Matters of General Interest. These include:

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

Before the statement is received in evidence, the following conditions must be satisfied: I. It is admissible only after the maker's death to prove the rights in question.

II. The right must be a public right or a general right. A public right is one enjoyed by the public at large (e.g. the right to use the high way). A general right is one affecting a defined class of the population. Example is the right of common, which affects only the inhabitants of a village such as their boundary lines.

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

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

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

3.3 Declarations by Testators. This is provided for under Section 45 (1&2) as follows:

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

a. his will has been lost, and when there is question as to what were its contents; or

b. the question as to whether an existing will is genuine or was improperly obtained; or

c. the question as to which of more existing documents than one constitute his will

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

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

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

Thus, Section 45 allows in evidence, statements of persons who have since died if they relate to declarations by testators. The origin of this rule is traceable to the old case of **SUDGEN v LORD ST LEONARDS (1876) 1 PD**. In this case, the Will of Lord St Leonard, a Lawyer and a famous judge was missing at his death and the question before the court was the content of the Will. His daughter knew most of the contents of the Will. She was able to quote most of it from her memory. She and some other witnesses were able to testify as to statements made by the deceased before and after the execution of the Will concerning its contents. The Court of Appeal held that the statements made by the deceased before or after he had executed the Will were admissible as exceptions to the hearsay rule.

This decision has been re-affirmed in the case of **MCGILLIVARY, RE (1946) 2 ALL E.R. 301** and also represents the law applicable in Nigeria.

3.3.3 Statements relating to cause of death. This is known as Dying Declaration

Dying Declaration has been defined by the Black's Law Dictionary 5th Edition to mean statements made by a person who is lying at the point of death, and is conscious of his approaching death, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them.

This is also defined in Section 40, Evidence Act, 2011 as:

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

(2) A statement referred to in subsection (1) of this section shall be admissible whatever may be the nature of the proceeding in which the cause of death comes into question.

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

It is a statement made by the person, who is dead as to the cause of his or her death or as to the circumstances of the transactions which resulted in his death in the case where the cause of his or her death is an issue. Such a statement is relevant and admissible, subject to the following conditions:
The declaration may be written or verbal and of relevant facts. Requisites of relevance are as follows:

I. Declarant must have died before the evidence of the declaration.
II. It is admissible only in trials for murder (homicide not punishable with death) or manslaughter (homicide not punishable with death), where the accused is alleged to have caused the death of the deceased/declarant.
III. The statement must be made by the victim of the alleged crime (i.e. the deceased) and must relate to the cause of his or her own death.

IV. The statement must contain some expression of hope of recovery or doubt as to his death. That is, the deceased-declarant, at the time of making this declaration, must have believed himself or herself to be in danger of approaching death, although he may have entertained hopes of recovery. The trial judge is required to make a specific finding that the deceased did in fact believe in the danger of approaching death when making the declaration.

V. The declarant must have been a competent witness if he or she were alive. The declaration must not be or include hearsay; it may include an opinion.

VI. The declaration can be oral, or written or by signs.

VII. Where the declaration is admitted, it must be complete. It is not competent to shift the parts that are favourable from those that are not.

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

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

Who may record a dying declaration? Any of the following may:

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

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

Eyre, C.B explained the rationale of this rule as follows:
"The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful, is considered by the law as creating an obligation equal to that

when is imposed by a positive oath administered in a Court of Justice" (**SEE R v WOODCOCK (1789)1 LEACH 500 OR (1789) 168 ER 353**)

Activity
From the above teaching, briefly discuss the conditions that could make dying declaration admissible in evidence.

3.3.4 Deposition: What is a Deposition?

A deposition may be defined as

I. A witness's out-of-court testimony that is recorded in writing, usually by a Magistrate for later use in court or for discovery purpose.
II. A written record of the sworn evidence given by a witness, a deponent, before a Magistrate or other authorized person.
III. A statement made on oath before a magistrate in the presence and to the hearing of the accused taken down in writing and signed by the person making it and the Magistrate.

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

3.3.4.1 Deposition of witness unable to attend proceeding.

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

The Magistrate taking the deposition shall put all parties on reasonable notice of intention to take the deposition, time, and place. Parties present shall have opportunity to cross examine the witness. The deposition is recorded, read over to and signed by the deponent and the Magistrate.

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

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

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

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

On the other hand, States that have retained Preliminary Inquiry argued in its support that:

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

3.3.4.2 Value and purpose of deposition:

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

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

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

3.4 Summary

In this unit, you learnt more of the exceptions to the rule against hearsay as enumerated on section 39-40 of the Evidence Act, 2011. In

appropriate cases you looked at the statute and case law. There are conditions which must be satisfied before you can invoke or take advantage of the exceptions. These have been set out before you.

3.5 References/Further Reading/Web Sources

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

Nwadialo F. (1999) Modern Nigeria Law of Evidence, University of Lagos Press Evidence Act, LFN 2011.

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

3.6 Possible Answers to Self-Assessment Exercise

Pedigree means lineage, descent, and succession of families, line of ancestors from which a person descends genealogy.

MODULE 3

UNIT 1 ESTOPPELS

Unit structure

1.1 Introduction

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

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

1.2 Learning Outcomes

At the end of this unit, the students should be able to have a full grasp of the concept of ‘’Estoppel’’ which they should be able to demonstrate on application to the law of evidence.

1.3 Estoppels

1.3.1 Doctrine of Estoppels.

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

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

Estoppel may be defined or explained in various ways as:

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

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

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

1.3.2 Statutory Provision

(a) The Constitution 1999.
No person, who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for a criminal offence, having the same ingredients as that offence save upon the order of a superior court. Section 36 (9).
(b) Evidence Act, 2011
(i) Section 173
Every judgment is conclusive proof, as against parties and privies, of facts directly on issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based;
(ii) Section 174
(1) If a judgment is not pleaded by way of estoppel, it is as between parties and privies deemed to be a relevant fact, whenever any matter, which was , or might have been, decided in the action in which it was given, is in issue, or is deemed to be relevant to the issue, in any subsequent proceeding.
(2) Such judgment is conclusive proof of the facts which it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel.
(iii) Section 65

When any action is brought against any person for anything done by him in a judicial capacity, the judgment delivered, and the proceedings antecedent to it, are conclusive proof of the facts stated in such judgment, whether they are or are not necessary to

give the defendant jurisdiction, if assuming them to be true, they show that he had jurisdiction.

(iv) Section 169

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

(c) Matrimonial Causes Act, 2004. See Section 26 which deals with Condonation and Connivance.

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

(d) Rules of Court

Most High Court Rules contains provisions to the effect that:

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

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

Each of the species may have its own peculiarity and what you find in one may not be in the other. For example estoppel by record or by deed does not bind the statement, but estoppel by conduct does. Your consolation is several folds:

i. The varieties are all under one proof: "Someone is estopped from saying something or other; or doing something or other, continuing or other". The rationale is that when a person, by words or conduct, has led another to believe in a particular state of affairs, that person will not be allowed to go back on it when it would be unjust or inequitable for him or her to do so.

ii. The doctrine, whether as a rule of evidence or a rule of substantive law or in whatever form of estoppel, is rooted on the principle of justice and equity that no man should be allowed to profit from his own act or omission, which the other side has relied upon to his detriment or be allowed to raise a second time, a matter decided in a previous case.

The notion of estoppel is a combination of several elements such as:

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

1.3.3 Nature of Estoppel

1.3.3.1 Estoppel and Rule

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

In **LADEGA v DUROSIMI (1978)** Eso, JSC (as he then was) confirmed that Estoppel "is essentially a rule of evidence; any relevant evidence excluded by the doctrine of estoppels is inadmissible.

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

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

1.3.3.2Estoppel and Substantive Law:

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

Brett JSC in **IJALE v AG LEVENTIS (1961) ALL NLR 752** said that "Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law. See also **HOYSTEAD v COMMISSIONER OF TAXATION (1926) AC 155**.

1.3.3.3Estoppels and Pleadings

Estoppel, as well as the relevant and specific facts on which it relies, are required to be pleaded. Estoppel then is (though not entirely) a matter of pleading. Estoppel looks like a rule because it set up by statute and also exclusionary, but unlike a rule, an estoppel is pleaded.

1.3.4 Classification of Estoppels

Estoppel may be classified as follows:

(a). Estoppel in pais
Estoppel in writing
Estoppel by record
Per Lord Denning: West Midlands Police Force & Anor (1980)

(b). Estoppel by Representation
Promissory estoppels
Estoppel by deed
Estoppel per rem Judicata
(Iyaji v Eyigebe (1987) 3 NWLR (Pt. 61) 533

(c). Estoppel by record
Estoppel by deed
Estoppel by conduct
Equitable estoppel

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

1.3.4.1 Estoppel by Record

Estoppel by record includes:

1. Judgments of the Courts of Record
   (i). Cause of action estoppels
   This is where a cause of action which has been litigated upon between the parties and finally determined by a court of record, having jurisdiction in the matter is brought again in a subsequent proceeding between the same parties
   (ii). Issue estoppels:

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

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

i. it is for the common good that there should be an end to litigation and

ii. no one should be sued twice on the same ground.

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

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

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

A judgment in rem is adjudication as to the status or condition of some particular subject matter of a Tribunal, having competent authority for that purpose. Such judgment is in rem juidicata e.g a divorce, declaration of legitimacy, condemnation of a prize court, or adjudications in bankruptcy. The estoppel that arises in subsequent proceeding on the same subject is estoppel per rem judicatum – a rule of evidence whereby a party (or his privy) is precluded from disputing in any subsequent proceedings, matters which have been adjudicated upon previously by a competent court between him and his opponent.

A judgment is a conclusion for or against all persons, of whatever matter it settles, as to the status of persons or property, the rights or title to property or whatever disposition of property or proceeds of sale it makes or other matters actually decided. The reason is that public policy demands that questions of status and the like should not be left in doubt. For example, A decree of dissolution or nullity of marriage on the ground that the marriage has broken down irretrievably, alters the status of the erstwhile spouses, and the ground of divorce binds the parties and privies but not strangers. Thus in **Hill v Hill (1954) PD 291** W petitioned for divorce on grounds of cruelty, alleging several acts of violence against H. Dismissing the petition, the court held that the acts as were complained about did not amount to cruelty. H later petitioned for divorce on the ground of W's desertion. W pleaded

justification based on acts of violence she had alleged on the previous proceedings. Held W is estopped. Also in **EZENWANI v ONWORDI (1987)** the Supreme Court held that since the issue of traditional history has been decided in an earlier case between parties on the same land in dispute, it has become issue estoppel and inadmissible in a subsequent suit between the same parties.

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

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. What is the meaning of estoppel?

1.3.4.2 Parties

The term 'Party' means not only a person named as such but also one, who, being cognizant of the proceedings and of the facts that a party thereto is professing to act in his interest, allows his battle to be fought by that party intending to take the benefit of the championship in the success. 4.3 Privies

In this context, Privy means Privity in blood: (e.g. ancestors and heirs), privy in Law (e.g. Bankrupt and trustee in bankruptcy), privy in Estate (e.g. Lessor and Lessee). For Privies to bind the party, the party or privies must sue or defend in the same right and character. An action in a personal capacity cannot create estoppels in a subsequent action in a representative capacity or as an administrator.

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

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

B. Judgments are admissible to prove facts and can be used to corroborate other evidence even though the judgment does not amount to an estoppel. Examples can be found in cases of:
   - Bankruptcy (Ex.Parte Anderson, re Tollemache (1885)
   - Divorce (Parrington V Parrington and Atkinson (1925).

The following judgment would not constitute estoppels:
- Judgments obtained by consent;
- Judgment in default of appearance to the writ;
- Judgment of dismissal for want of persecution, not being dismissal on the merit;
- Consent orders, though obtained by fraud, do estoppel the parties until it is set aside;

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

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

1.3.4.3 Judgment in Personam

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

Conditions precedent for estoppel in personam to operate:

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

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

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

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

1.3.4.4 Foreign Judgment

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

But it is impeachable on the ground of:

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

1.3.4.5 Judgment in rem and judgment in personam.

The distinction between judgments in rem and in personam is explained in **DIKE v NZEKA (1986) 4 NWLR 144.** Here the Court said:
A judgment is said to be in rem when it is an adjudication pronounced upon the status of some particular thing or subject matter by a tribunal having the jurisdiction and competence to pronounce on that status. Such a judgment is usually and invariably founded in proceedings instituted against something or subject matter whose status or conditions is to be determined. It is thus a solemn declaration on the status of some persons or things. It is therefore binding on all persons in

so far as their interests in the status of the person or thing are concerned. That is why a judgment in rem is binding on the whole world – parties as well as non-parties.

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

1.3.4 Estoppel by Deed

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

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

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

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

Self-Assessment Exercise

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

1.3.5 Estoppel by Conduct

When one person has either by virtue of an existing court judgment, deed or agreement or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true or to act upon such belief, neither he nor his representative in interest shall be

allowed, in any proceedings between himself and such person or said person's representative in interest, to deny the truth of that thing. Except for the additional phrase "either by virtue of an existing court judgment, deed or agreement or" estoppel means essentially the same as it was prior to 2011.

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

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

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

- A mortgagee allows a mortgagor of property to remain in possession and sell in execution to satisfy mortgagor's judgment debt with knowledge of seizure and intention to sell.
- Lessee or bailee denies title of licensor or bailor respectively.
- Estoppels in pais operates under the following conditions:
- These must be a representation by words (spoken or written) or conduct of some existing fact. In this context, conduct includes silence when there is a duty to speak. A statement or promise as to the statement of law, or of intention in future is ineffectual : Kelsen v Imperial Tobacco Co (1957), Jorden v Money (1854)
- The representation must be clear, precise, and unqualified. Territorial and Auxiliary Forces v. Nicholas (1949), Canadian and Dominon Sugar Co v Canadian West Indies Steamships Ltd (1947) (Lower v. Combank Ltd (1960).
- It must be a representation of fact not Law. Territorial and Auxiliary forces V. Nicholas (1949), Leslie v Shiell (1914).
- The representation must be such that a reasonable man would believe it and act upon it. Freeman v Cooke (1848) However, a "reasonable man" is not credited with the knowledge of the intricacies of modern hire purchase finance (Lowe v Lambank Ltd. 1960). It suffices that the representation meant the statement to be acted upon or at least have so conducted himself that a reasonable man in the position of the representee would take the representation to be true and believe that it was meant that he should act upon it.

- ❖ The representation must have been made with intent that the other party shall act on it. Mere negligent statement in an atmosphere where there is no duty of care is not sufficient: Seton v Lafone (1887), Henderson v Williams (1895).
- ❖ The party to whom the representation was made must have acted on it to his or her detriment Caroline Morayo V Okiode and others (1942); Conpaye Ado V Musa (1938).
- ❖ He or she must also have suffered damages, and the representation must have been proximate cause of such damage.

1.3.6 Estoppel and Bills of Exchange

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

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

1.3.7 Standing By

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

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

The doctrine would not apply to:

I A decision against a person in his/her personal capacity and the person to be stopped is not privy or cannot be held to be a party.

2. A person, who during the pendency of an action brought his own action before judgement in the earlier or pending action.

1.3.8 Innocent Misrepresentation

Generally, no damage is recoverable for an innocent or negligent mis-statement of fact; (**DERRY v PECK, (1889**) Negligence creates estoppels where the person alleged to be estopped owes a duty of care to the person setting up the estoppel. (**CAMPBELL VISCOUNT CO v GOLD (1961**).

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

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

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

Misrepresentation is a cause of action, but the doctrine of Estoppels is not. Rather it is a rule of evidence. On how estoppel operates in relation to misinterpretation, read the following cases: Balkie Consolidated Co Ltd v Tomkinson (1893) Burrowes v Lock (1805); Robertson v Minister of Pension (1949); Combe v Combe (1951) 2 KB 215.

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

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

3.10 Equitable Estoppel or Promissory Estoppel.

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

It is also called quasi estoppels or promissory estoppels. It is a shield, not a sword; a defence, not a cause of action. The principle of equitable estoppel was expressed by Lord Cairns in the important case of **HUGHES v METROPOLITAN RAILWAY CO (1877)** as follows.

"If parties, who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of a negotiation, which has the affect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance , the person who otherwise might have enforced those rights will not be allowed to enforce them, where it would be inequitable, having regard to the dealings which have thus taken place between the parties."

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

The principle was re-affirmed by Denning in **CENTRAL LONDON PROPERTY TRUST LTD v HIGH TREES HOUSE LTD (1947) KB 130** and **COMBE v COMBE (1951) 2 KB 215 OR [1951] ALL ER 767** where Denning L.J explained that:

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

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

not supported on points of law by any consideration but only by his (or her) word.

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

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

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

If estoppel is based on conduct, the other would have acted to his detriment. (See Lord Denning: 15 M.L.R. pages 1-10).

If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false and the second believes in such state of things and acts upon the belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things does not exist at the time. Again if a man either in express terms or by conduct makes representation to another of the existence of a state of facts, which he intends to be acted upon in a certain way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of that state of facts. Thirdly, if a man whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation and that the latter was intended to act upon it in a particular way, and he with such belief, does act in such way to his damage, the first is estopped from denying the facts of representation (See the case of **JOE IGA AND OTHERS v EZEKIEL AMAKIRI AND OTHERS (1976)11S.C.1**) especially pages 12 – 13).

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

1.4 Summary

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

1.5 References/Further Reading/Web Sources

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1.6 Possible Answers to Self-Assessment Exercises

Estoppel is a legal result or conclusion arising from an admission which has either been actually made, or which the law presumes to have been made, and which is binding on all persons whom it affects.

UNIT 2 COMPETENCY AND COMPELLABILITY

Unit structure

2.1 Introduction

In this unit, you shall learn about the competency and compellability of witnesses. Competency is the mental ability to understand problems and make decisions, the capacity to understand proceedings – whether or not a witness may legally give evidence in a court proceeding. Compellability deals on issues as to whether a witness is obligated to give evidence at proceedings even against the wish of the witness. In the discourse you shall learn the rules concerning competency and compellability; particularly as they relate to parties, their spouses, children, and persons of unsound mind. An attempt will be made to distinguish those who are competent or both competent and compellable, identify those who are not and the effects.

You will learn about the sharp distinction between civil and criminal proceedings in relation to competency and compellability of witnesses.

2.2 Learning Outcomes

In this unit the students should be able to identify persons who are competent and compellable and person who may or may not be competent and compellable witnesses.

The students should also be able to explain the circumstances in which the accused, his spouse and children or persons of defective intellect are both competent and compellable in criminal and civil proceedings, if at all.

2.3 Competency and Compellability Contents

2.3.1 Preamble

The main issue of concern is whether a witness may legally give evidence in a judicial proceeding. It is not about the question of reliability. There are legal disabilities forbidding certain witnesses from testifying. A very close and ready example is a child who by reason of his age cannot understand the question that are put to him or her or give answers that can be understood.

2.3.1.1 The General Rule: Read generally Chapter XI Evidence Act, 2011

The general rule is that every person is competent to give evidence except the following:

1. Persons of unsound mind and drunken persons who are incapable of giving rational testimony.
2. A child in civil cases, too young to understand the nature of the oath.
3. Persons who will neither take the oath, nor affirm.

All evidence must, as a general rule, be given on oath or affirmation. Oath is by swearing with the Holy Bible by Christians, the Holy Qur'an by the Muslim and 'iron' by the traditionalists.

A witness affirms if he has no religious belief, or if the taking of an oath is contrary to his religious belief or if his religion permits him to take an oath but compliance with the requirement of this religion would cause undue inconveniences or delay.

The following witnesses do not need to swear or affirm:

- Children of tender years, who do not understand the nature of an oath, but who understand the duty of speaking the truth.
- A witness, who is merely producing a document.
- A Counsel or a judge explaining cases in which he is previously engaged.
- An accused unsworn statement without cross examination either in lieu of or in addition to, his sworn statement.
- The Head of State, (not being foreign sovereign)

Any person, who understands an oath or is capable of affirming, is competent to give evidence. A witness is lawfully sworn if he or she subscribes to an oath or affirmation. Both in law and practice, any

conviction based on the evidence of a witness who has not been lawfully sworn is bad and must be quashed

A competent witness may also be a compellable witness with certain exceptions; as you shall see later, spouses are not compellable witnesses for each other in a criminal proceeding.

2.3.2.2 Competency of Children

The competency of a child to give evidence is determined by a test of intellect. A child who lacks the requisite intellect and does not understand the nature of an oath is incompetent to give evidence. However, the Children and Young Persons Act permits a young child, who does not understand the nature of an oath to give unsworn testimony if the judge is satisfied that he or she understands the duty of speaking the truth. Such an unsworn evidence of a child is not to be admitted or acted upon unless it is corroborated. Indeed, no person can be convicted upon an uncorroborated and unsworn evidence of a child.

In this context, the age of the child is not material, but the child must:

(i) Possess the intellect

(ii) Fall within the definition of a child, being person under the age of 14 years.

In order to determine whether a child understands the nature of an oath (and therefore be competent to give evidence), the judge must examine the child in the open court.

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

3. How is the competence of a child determined?

2.3.2 Competency and Compellability of witnesses

(a) Witness for the Prosecution

The following are not competent as witnesses for the prosecution:

I. the accused person
II. the spouse of the accused with certain exceptions
III. persons jointly indicted or jointly tried with the accused
IV. spouses of persons jointly charged or jointly tried with the accused

(b) Witness for the Defence:
The following are competent witnesses for the defence
- The accused person whether charged solely or jointly.
- The spouse of the accused person

2.3.2.1 Rights of the accused person

The rule as to competence and compellability:
He is a competent witness for him or herself. His or her failure to give evidence is not subject to comments by the Prosecution. He or she may not be called as a witness, except upon his or her own application.
If called, he or she may be asked any question in cross-examination, notwithstanding that it incriminates him as to the offence charged.

He may not be asked and if asked shall not be required to answer any question tending to show that he has committed, or been convicted of, or charged with, any other offence, or is of bad character unless:

- Proof of the commission or a conviction for that other offence is admissible to prove the present offence as in evidence system.
- He or she personally or by his or her counsel asked questions of witnesses for the prosecution with a view to establishing his own good character or has given evidence of his good character.
- The nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the prosecution's witnesses.

Please note the following:
1. By putting his or her character in issue, an accused person puts the whole of his or her character in issue and may, as a general rule, be cross -examined with regards to previous charge for which he or she was convicted; to bring up evidence as to statements made at that trial, which tend to conflict with the evidence in the court trial.
2. It is not all the imputation made on the character of witnesses for the prosecution that may or may not put the character of the accused in issue. For example:

It does not in the following cases where
(a) The attacks are directed at persons who are not parties e.g..
- The presiding magistrate
- The police officer (or a police officer, who does not give evidence)
- The deceased

(b) If defence merely denies the prosecution's evidence however, vehemently.

For instance, to say "The Police witness is a liar" is nothing more than "pleading not guilty with emphasis".

A cross examination of a prosecution in the case of rape or indecent assault to the effect that the prosecutrix consented is not an imputation on her character.

In the important case of **SELVEY v DPP (1968) 2 ALL ER 497**, the House of Lord firmly established the following procedure:

I. The words of the statute must be given their ordinary material meaning.
II. It is permissible to cross examine the accused as to character both when imputations on the character of the prosecutor and his witnesses are cast to show their unreliability as witness independently of the evidence given by them and also when the casting of such imputations is necessary to enable the accused to establish his defence.
III. In rape cases, the accused can allege consent, and the loose character of prosecutrix, thus seemingly placing himself in peril of such cross examination. But the issue can be said to be one raised by the prosecution and if what is said amounts in reality to no more than a denial of the charge expressed, however emphatic the language, it should not be regarded as an imputation on character.

By giving evidence against any other person, charged with the same offence (i.e. an accused giving evidence of damning character against a co-accused charged with the same offence). In this case, the judge has no discretion to exclude such evidence even though its prejudicial effect far outweighs its probative value.

The view has been strongly expressed that there is no general rule that evidence of the bad character of the accused cannot be introduced where the defence necessarily involves imputations against the character of the prosecution or its witness. The trial judge has an unfettered discretion to allow or refuse to permit cross examination of the accused in the particular circumstances.

2.3.3 Spouses of Parties

(a) Position of Accused's Spouses:

Following a decree of divorce or nullity, spouses are cured of incompetency. They become competent witnesses for the prosecution, in matters occurring 'after' the decree. They remain incompetent in respect of matters occurring during their covertures. A decree of judicial separation is ineffectual; the spouse remains incompetent witness. Parties to a marriage that is void ab-initio are not affected by incompetency rule as there was never a marriage.

The rules relating to the competency and compellability of a spouse of an accused person to give evidence apply in three categories of cases, namely:

i. Cases in which a spouse is competent only upon the application of the accused.
ii. Cases in which the spouse in competent without the consent of the Accused.
iii. Cases in which a spouse is both competent and compellable for the prosecution or the defence.

(b) Cases in which the spouse is competent

A spouse is competent to give evidence upon the application of the accused in cases other than those cases in which he or she is competent without the consent of the Accused as well and those in which he or she is both competent and compellable for the Prosecution or the defence. In these cases both spouses must give their consent.

(c) Cases in which the spouses is competent without the consent of the Accused. The following cases are examples in which a spouse is not competent to give evidence for the Prosecution or the defence, without the consent of the Accused.

i. Neglect to maintain or desertion of wife or family
ii. Offence relating to children
iii. Child destruction
iv. Bigamy
v. Sexual offences other than bigamy, indecent assault on a man, and assault with intent to commit buggery.

d. Cases in which a spouse in both competent and compellable. These are:

I. Offences against the spouse's property
II. Offences of violence against the spouse

III. Cases brought for the purpose of enforcing civil rights (e.g. public nuisance)

The spouse is competent to give evidence against the other spouse in cases where the health, liberty, or person is involved. Thus a spouse is a compellable witness where the other is charged with attempting to strangle his or her, intent to murder him or her, causing him or her grievous bodily harm, maliciously inflicting grievous bodily harm or attempting to poison him or her with intent to murder.

Cases in which the spouse is competent and/or compellable include attempt to commit such cases.

These rules which apply to spouses, are applicable during the subsistence of the marriage between the spouses and after the termination of such marriage. They apply with equal tone to:

- Spouses during the subsistence of marriage
- Ex-spouses (i.e. erstwhile husband or wife who have divorced) for offences committed during the subsistence of the marriage.
- Persons whose voidable marriage has been annulled.

In this context, void marriage is no marriage and parties to it are not spouses.

Conversely a marriage still subsists even after a decree of judicial separation. Thus a spouse's incompetence to give evidence against the other spouse is not brought to an end by a decree of judicial separation.

The sum total is that in civil court, both parties and their spouses are compellable witness. The accused is never a compellable witness in criminal cases. His spouse is neither competent nor compellable for the persecution. For the defence, she is competent on the application by the accused but not compellable.

3.3.2. Defendant

An accused is a competent, but not compellable witness in his or her own case or in defence of a co-accused. He is not also a competent witness for the prosecution. The following are competent witness for the defence:

1. The accused person, whether charged solely or jointly
2. The spouse of the accused person.

Suppose after investigation, Police finds X and Z liable for conspiracy and X and Z were jointly charged X is competent to testify at the instance of Z and vice versa. Neither of them can be compelled and none can equally testify for the prosecution.

Suppose instead of charging X and Z jointly, they are charged separately. They cease to be co-accused and can be used one against the other.

If a defendant fails to give evidence in his/her own defence (if when giving evidence, refuses without good cause to answer any question), the court in determining whether he/she is guilty of the offence charged, may draw such inferences from that failure as may appear proper.

An accused's spouse is a competent witness for the prosecution, the defendant and for a codefendant. Where he/she is not charged, he/she is a compellable witness for the defendant. In relation to some spouse's offences, a defendant's spouse is compellable witness for the prosecution or for the defendant,

3.5 Securing Attendance

The following forms or processes are available for securing the attendance of witness:

(a) The Magistrate's Courts. Witness Summons:
In the Magistrate's Courts, a witness summons may be issued to compel a witness attendance. The witness is entitled to be paid money or travelling expenses.

(b) High Court. Attendance of witness may be enforced by:
   (a) Subpoena ad testificandum – This requires the witness to attend and give oral evidence.
   (b) Subpoena duces tecum – This orders the witness to bring and produce a document.
   (c) Habeas corpus ad testificandum – This orders the custodian of a person imprisoned in consequence of a civil process to produce the prisoner to give evidence.
   (d) Judges Order – This is used where the accused is in prison awaiting trial or under sentence.

3.5 Children and Persons of Unsound Mind

In criminal trials a child who understands the question asked or able to give a rational answer is competent.

3.5.1 Witness

Persons of unsound mind, by reason of the defect in their intellect, cannot be a competent witness.

A witness is competent if he or she possesses the mental ability to understand the proceedings and make a decision. He or she is compellable if there is an allegation to give evidence. Spouses and children occupy special positions, the law of evidence has specified cases where they are competent, but not compellable or where they are both competent and compellable.

2.4 Summary

Every person charged with an offence, shall be competent witness for the defence provided:

a. He elects upon his own application
b. Failure to give evidence shall not be subject to comments
c. He may be asked any question in cross examination notwithstanding that it would tend to criminate him as to the offence charged.
d. He shall not be asked and if asked, shall not be required to answer, any Question tending to show that he or she committed or been convicted of or been charged with any offence other than that wherewith he is then charged or is of bad character.

Unless

- It is to show that he is guilty of the offence charged.
- He asks questions with a view to establish his own good character.
- He has given evidence of his good character
- Nature of conduct of defence involves imputation on the character of the prosecutor or his witness.

See section 180, Evidence Act, and 429 and 250 of the Criminal Codes.

2.5 References/Further Reading/Web Sources

Aguda, T. (2007) The Law of Evidence, Spectrum Law Series, Ibadan Nwadialo. F. (1999) Modern Nigerian Law of Evidence, University of Lagos Press, Lagos.

Afe, B. (2001) Law and Practice of Evidence in Nigeria Intec Printers, Ibadan FGN, Evidence Act, 2011.

2.6 Possible Answers to Self-Assessment Exercises

The competency of a child to give evidence is determined by a test of intellect

UNIT 3 PRIVILEGE

Unit structure

3.1 Introduction

The duty of a court is to decide between the parties on the basis of the evidence that has been demonstrated, canvassed and argued in court. In order to secure a fair trial, all relevant oral, real and documentary evidence in respect of the matter before it should be made available for consideration of the court without let or hindrance whatsoever. However, such an ideal situation is hardly attainable as a witness, though competent and compellable, may under certain circumstances, claim privilege from answering certain questions or from tendering certain documents. The justification is borne out of public policy and to secure some important benefits such as protecting the society good and security. In this Unit, you shall learn about privilege in Law of Evidence.

3.2 Learning Outcomes

This unit will impart into the student a comprehensive understanding of the term 'Privilege' and its distinction from other relative terms. This

unit will also consider the definitions of the terms like "Absolute or state privilege" and ''Private privilege''

3.3 Privilege

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

Privilege is of two types and these are: Absolute or State Privilege and Private privilege or Just privilege

3.3.1 Private Privilege (or Privilege)

There are varieties of privileges. Some of them are listed as follows:

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

3.3.2 Professional Confidence – Section 195

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

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

I. The legal adviser must have been consulted in his professional capacity
II. The communication must have been made during the existence of the client-legal adviser relationship.

III. Such communication must be made for the purpose of obtaining or giving legal advice and assistance, although it need not relate to actual, pending or contemplated suit.
IV. The privilege belongs to the client and the legal adviser can only disclose upon his or her consent.

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

The object of the communication is connected with one of the following:
I. advice as to litigation – pending or contemplated
II. advice as to the questions to be given
III. Advice as to information, that may lead to required evidence.
IV. An in-house legal practitioner's advice to his employers.
V. Items enclosed with or referred to in communications falling into the above categories in circumstances where the items came into existence in the process of giving or receiving legal advice, provided the original would have been privileged.

In the case of **CALORIFIC v GUEST (1898)** Lindley, MR said:
The principle of the rule of privilege is designed to enable a legal advice to be obtained safely and sufficiently. It does not protect confidential communication made to priests, friends or servants. "Once a privilege, always a privilege" it does not end with the termination of the original client-legal adviser relations.

But see also the following explanation by Jessel, MR:
"The principle protecting confidential communication is of a very limited character. It does not protect all confidential communications, which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which

necessarily must be made, in order to enable the medical man to advise or prescribe for the patient are not protected".
"See **WHEELER v LE MARCHANT (1881).**

Self-Assessment Exercise

How are professional confidences privileged?

3.3.3 Title Deed

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

3.3.4 Marital Privilege

Spouses under the Marriage Act are privileged from:
1. Giving evidence of marital intercourse during any period.
2. Disclosing the communication between spouses during marriage.

The rule is inapplicable to nor protect:
(i). Pre-marital communications
(ii) Communications made after the dissolution of marriage by death or divorce of the spouses,
(iii). Communications made by spouse's witness to her.

The privilege is not limited to communications of a confidential nature. Every witness may claim the privilege whether or not he or she is a party to the action. The privilege belongs to the spouse witness who is at liberty to waive and disclose it regardless of the witness of the other spouse. However, the communication can be proved by calling third party witness who overheard it or by producing a privileged letter between the spouses which had been intercepted. A witness in any proceeding instituted in consequence of adultery may not be compelled to answer any question which tends to show that he is guilty of adultery.

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. What is the meaning of privilege?

3.3.5 Incriminating Questions or other Confidential Communications

Generally, a witness cannot be compelled to answer any question or produce any or his or her spouse to a criminal charge, penalty or forfeiture.

The privilege belongs to a witness, not a co-defendant, who also may waive it. The privilege is exercised by the witness on oath, at the point the question is asked. The claim is not absolute, as the court needs to be satisfied that there is a reasonable ground to apprehend danger to the witness. If the court finds the ground of objection reasonable, the privilege subsists. Otherwise the witness must answer the question or face committal for contempt, should he or she decline to answer. The privilege does not extend to co- defendants.

An accused is a competent witness and may give evidence in his own defence. In the process, he is not privileged from answering questions put to him, which tend to implicate him in the crime with which he is charged.

Conversely, he is subject to statutory exceptions from answering questions tending to show that he is guilty of other offences.

Ii is not settled whether a spiritual leader can avoid disclosing confidential secrets on the ground that doing so would expose him or her to ecclesiastical penalties.

A journalist is not privileged against disclosing the name of his or her informant (**AG. v MULHOLLAND AND FOSTER (1963) 2 QB 477**). Note also that a Magistrate or a Police Officer cannot be compelled to disclose the source of information as to the commission of an offence on ground of public policy. Thus a witness, if he is a third person cannot be asked questions as will disclose the informant; nor will he be asked if he himself is the informant. See Evidence Act, Section 183 and 189.

3.3.6 Activity

Read the Freedom of Information Act, 2011.
To what extent if at all, does the Act affect the assertion that journalists lack privilege against disclosing their informants?

3.3.7 Privilege against self-incrimination

A person who is arrested or detained has the right to remain silent or avoid answering any question until after consultation with a legal

practitioner or any other person of his choice. He is protected from being compelled to give evidence at the trial.

Note the following 1999 Constitutional safeguards:

1. Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice (section 35(2).
2. In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. Sec 36 (1).

Read (i) Evidence Act Section 190, 191 and 192 (ii) The 1999 Constitution, Section 36 (1)

3.3.8 Evidence as to affairs of State

"Subject to any direction of the President in any particular case, or of the Governor of a State where the records are in the custody of a state, no one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived from such record except with the permission of the officer at the head of the Ministry, Department or Agency concerned who shall give or withhold such permission as he thinks fit.

Provided that:
The head of the Ministry, Department or Agency concerned shall, on the order of the court, produce to the judge the official record in question or as the case may be, permit evidence derived from it to be given to the judge alone in Chambers, and if the judge after careful consideration shall decide that the record or the oral evidence, as the case may be, should be received as evidence in the proceeding, he shall order this to be done in private as provided in Section 36(4) of the Constitution: Section 190, Evidence Act, 2011.

The Evidence as to the affairs of State is otherwise known as State privilege and it refers to the power that the Court has to exclude evidence on the ground that the disclosure of information wound injure the general good. It is a rule of law that requires the withholding of documents on the ground that it would be harmful to public interest to disclose it.

3.3.9 Justification of the Rule

A State privilege is based on the public policy that a person should not be allowed to do anything at large. It may demand that a certain relevant document or matter be excluded on the ground that its admission would be contrary to public policy. This is especially the case where such admissibility is likely to affect the security of the State or the good administration of public affairs or justice. The State Privilege cannot be waived: It relates to relevant facts which need not be proved by reason of public policy or State privilege and cannot be given in evidence.

When an original document is excluded on the ground of State privilege, a copy of such a document or a secondary oral communication or oral testimony of it is inadmissible in evidence - once a privilege, always a privilege.

Let us consider three classes of cases to explain how the principle of state privilege operates:

3.3.10 Affairs of State – Section 190

Evidence pertaining to the affairs of state is excluded from evidence if the disclosure would be detrimental to the interest. The protection also encourages freedom of communication among officials and between officials and the public at large.

Examples of such important state of affairs are:

- The construction of a submarine
- The Report of a Court Martial to the Commander – in –Chief.
- The company's balance sheet in the possession of the income tax authorities
- The Report of a Prison director or of the Police as to the mental state of a prisoner
- Written or oral communication among appointing bodies or authorities on the suitability of a candidate for magistracy or justice of the peace.

3.3.11 Scope

State privilege is not confined to documents although usually, it applies to it. It is not also confined to public documents. It protects also the following:

a. Documents in the possession of a government department or official

b. Private documents whose production could be prejudicial to the state.

State Privilege does not extend to documents relating to the affairs of local authorities. It does apply to exclude oral evidence which, if given would jeopardize the interests of the community.

The Minister of the Government Department concerned may give consent to produce the documents in issue. He can object to its production also. He does so:
- On discovery
- In an objection before trail by affidavit, or
- At the trial

It is important that an official or State Counsel, in obedience to the subpoena, must have the document in Court at the trial.

3.3.12 Objection

Claim of state privilege must be made by the minister himself, having seen, and considered the contents and satisfied himself that it ought not to be produced on grounds of public interest because, for example, disclosure would injure national defence or good diplomatic relations or because the practice of keeping the class of documents secret is necessary for the proper functioning of the public service.

The objection to the production if sustained by the court is final; and the judge would call for the production of the document.

Some judicial opinions have tried to draw a dichotomy between
(a) a particular document and
(b) a certain class of documents

The protagonists also advocate that the Minister should, by affidavit specify:
- That a particular document should not be discussed
- The class to which the document belongs is with sufficient clarity to enable this judge to form his opinion

In **SPIGELMANN v HOCKER (1933)** it was held that the principle of state privilege did not apply to claims relating to certain classes of documents as opposed to a particular document or documents.

See also **RE GROSVENOR HOTEL (NO 2) (1964**). In this case, the Court of Appeal held that in relation to documents of a particular class, the courts in England had a residuary power to override the executives' veto where the privilege is unreasonably claimed. The House of Lord has endorsed this reasoning in the important case of **CONWAY v RIMMER (1968) 1 ALL ER 878.**

Activity
Read the following cases:

- Duncan v Cammel Laurd & Co. Ltd. (1942) this case is civil but its principle applies to criminal proceedings.
- Conway v Rimmer (1968)
- Maya (Jnr) & Sons Ltd. UAC of Nigeria Ltd (1971)
- Attorney-General of Western Nigeria v The African Press & Another (1965)

Also refresh your memory by reading over Evidence Act Section 190, 191 and 192 as well as the 1999 Constitution, section 36.

1. What did Duncan's case decide and by which court and in what year? Does it apply in Nigeria?
2. What did Conway's case decide? By which Court? What year? Does it apply in Nigeria?
3. Who does each of both cases say has the final decision as to whether or not a document is state privileged -the relevant state functionary or the Judge?
4. Which view does the Evidence Act support?
5. Do you see any conflict between section 36 (1) of the 1999 Constitution and Evidence Act, 2011 provision?

It would appear that the Evidence Act makes the state functionary the final arbiter in the matter of exclusion of evidence on the ground of state privilege. See the Constitution, 1999, Section 36(4) and the proviso in Evidence Act 2011 Section 190.

Maya's case is of the view that it is still open to the court to consider whether public interest outweighs the accused's right to fair hearing. The position of the law is probably, as stated in AG (WN) v The African Press & Anor where the Supreme Court said:

It remains the duty of the Court to uphold the right to a fair trial, and if, in a criminal case, there are reasonable grounds for supposing that the exclusion of evidence by such a certificate might have prejudiced the accused in making his defence, the court is bound to say that the prosecution has not proved its case beyond reasonable doubt. In the course of argument we called the attention of the Director of Public Prosecutions to proviso (b) to section 22 (3) of the Constitution of the

Federation, under which the court may take evidence in private if the Minister certifies that it would not be in the public interest for it to be publicly disclosed. Anyone improperly disclosing such evidence subsequently would be punishable for contempt of court and we trust that whenever possible Ministers will adopt this middle course rather than that of excluding relevant evidence from the consideration of the court. The Minister is made the judge of what the public interest requires, but he must weigh one consideration against another, and he should be reminded that it is always contrary to one facet of the public interest if relevant evidence is excluded.

The relevance of evidence is for the court, not the Minister, to decide and where ad subpoena is applied for on frivolous grounds it may be set aside by the court on a motion brought for that purpose as was done in **R v AGWUNA (1949) 12 WACA 456**; the same applies to a subpoena which is bad for vagueness.

3.4 Judicial Privilege

Compellability of Justices, etc or the persons before whom the proceedings is held.

By Sections 188-189 Evidence Act, 2011, no Justice, Judge, Grand Kadi or President of a Customary Court of Appeal and, except upon the special order of the High Court of the State, Federal Capital Tertiary, Abuja or Federal High court, no magistrate or other persons before whom a proceeding is being held shall be compelled to answer any questions as to his own conduct in court in any of the capacities specified in this section, or as to anything which came to his knowledge in court in such capacity but he may be examined as to other matters, which occurred in his presence whilst he was so sitting (Section 188).

Restriction on disclosure as to source of information in respect of commission of offences:

No magistrate, police officer or any other public officer authorized to investigate or prosecute offences under any written law shall be compelled to disclose the source of any information as to the commission of an offence which he is so authorized to investigate or prosecute and no public officer employed in or about the business of any branch of the public revenue, shall be compelled to disclose the source of any information as to the commission of any offence against the public revenue. (Section 189, Evidence Act, 2011).

By this provision, a statement in any document marked "Without Prejudice" made in the course of negotiation for a settlement of a dispute out of court, shall not be given in evidence in any civil proceeding in proof of the matter stated in it (Evidence Act, 2011, Section 196).

Judge of a superior Court of record enjoys a state privilege not to give evidence as to matters arising before him in his judicial capacity. This privilege does not extend to matters of incidental nature, such as a riot in the Court.

A legal practitioner cannot be compelled to disclose matters stated by him in the course of conducting a case. Similarly an Arbitrator is protected from giving evidence of what took place before him. But he cannot be heard to claim privilege from disclosure of the reason for his award or the meaning intended to be given to it.

Similarly a witness is protected from disclosing the sources of information leading to the detection of a Crime except to prove the innocence of the accused.

3.5 Statements in documents marked

"Without Prejudice" –section 196
Communications made "without prejudice" either in writing or orally are protected from subsequent disclosure, unless both parties are willing to dispense with this protection.

This is to discourage litigation and to encourage parties to settle matters amicably without recourse to litigation. It is also to encourage parties to shift grounds and avoid embarrassment, which would have ensued but for the protection. The immunity extends to admissions by words or conduct and to communications forming part of the same chain of communications made without prejudice.

Statement made "without prejudice" may be express. It may also be inferred, where not expressly made "without prejudice." It all depends on the relationship of the parties, the circumstances in which the statement is made, the contents of the statements or other relevant facts.

Examples are statements made by estranged spouses to conciliators or a probation officer. But statements or acts that are without proper connections or which are not reasonably incidental to the negotiations are not protected.

Self-Assessment Exercise

i. How valid is the rule: "Once privilege, always privilege".
ii. Members of the National or State Houses of Assembly
iii. This eminent class of people is immune from giving evidence in a Court of law as to what was said in the floor of the National or State House of Assembly.

The foundation of the rule is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for non-production. The general interest of the public is paramount to the interest of the plaintiff. (**ASIATIC PETROLEUM CO LTD v ANGLO-PERSIAN OIL COMPANY LTD (1916) 1 KB 822** per Swinfer –Eady L.J)

Sample Cases: At this juncture, let us review more cases.
DUNCAN v COMMELL LAIRD & COY LTD (1942) 1 ALL ER 587.
This action is one of negligence for damages arising from the construction of a submarine.

Appellants asked for an order for the production of a submarine. The first Lord of the Admiralty deposed to an affidavit that such production would be contrary to the public interest. Upholding the objection, the Court said:

(i) That documents, otherwise relevant and liable to production, need not be produced, if owing to their actual interest requires that they should be withheld.
(ii) That an objection to the production of documents duly taken by the head of a government department should be treated by the court as conclusive.

Viscount Simon LC put the matter plainly thus:
"The essential matter is that the decision to object should be taken by the minister, who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interests, they ought not to be produced, either because of their actual contents or because of the class of documents – e.g., departmental minutes – to which they belong. Instances may arise where it is not convenient or practicable for the political minister to act (e.g. he may be out of reach, or ill, or the department may be one where the effective head is a permanent official), and in such cases it would be reasonable for the objection to be taken, as it has often been taken in the past, by the

permanent head. If the question arises before trial, the objection would ordinarily be taken by affidavit, and a good example is provided by the affidavit of the First Lord of the Admiralty in the present case. If the question arises on subpoena at the hearing, it is not uncommon in modern practice for the minister's objection to be conveyed to the court, at any rate in the first instance, by an official of the department who produces a certificate which the minister has signed, stating what is necessary. I see no harm in the procedure, provided it is understood that this is only for convenience and that, if the court is not satisfied by this method, it can request the minister's personal attendance."

CONWAY v RIMMER (1968) AC 910. In this case, Lord Reid explained the rule further as follows:
It is universally recognized that there are two kinds of public interests which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of Justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private can be allowed to prevail over it.

Conclusion
A witness may claim privilege and be protected from answering certain questions or from tendering certain documents. A privilege relating to a document extends to its secondary evidence where it relates to the affairs of states, judge and magistrate. There is the controversy whether the view of the official or of the head of the Department (e.g. a Minister) that public interests would suffer from the disclosure in court is absolute or whether it can be heard in camera. **SEE DUNCAN'S CASE (1942) AND CONWAY v RIMMER (1968).** A witness is privileged from answering incriminating questions (Boyle V Wiseman) A statement made without prejudice does not apply to collateral facts that may be discovered during "without prejudice" negotiation.

3.6 Summary

Official and privileged communications exist among judges and magistrates as to their conduct in their courts and among jurors as to their conduct in the jury room. Privilege protects communications between legal practitioners and their clients, spouses, and among persons in fiduciary relationship. Documents relating to the affairs of state are, in the interest of the security and the welfare of state privileged (section 190-191), **ASIATIC PETROLEUM CO LTD v ANGLO PERSIAN OIL CO LTD (1916), ALI v JONATHAN CAPE LTD**

(1976). You may notice that a statement without prejudices is privileged only if it relates to negotiations towards the settlement of an issue. A client (whether a party or not cannot be compelled to disclose communications (oral or written) between him and his legal advisor. Clients and patent agents or party and non-professional agents have limited privilege. Matrimonial Causes Act protects spouses against disclose of evidence of marital intercourse as well as communication between them during marriage.

No witness is compellable to answer questions tending to expose him or her, or his spouse to a criminal charge, penalty or forfeiture. No privilege extends to communications between priest and penitent; doctor and patient, or a journalist against disclosing the name of his informant.

3.7 References/Further Reading/Web Sources

Afe, B (2001) Law and Practice in Nigeria

Nwadialo, F (1999) 2nd Ed. Modern Nigerian Law of Evidence, Lagos University Press, Lagos FGN – Evidence Act 2011.

3.8 Possible Answers to Self-Assessment Exercises

Privilege is a special legal right, exemptions, or immunity granted to a person or class of persons.

UNIT 4 CORROBORATION

Unit structure

4.1 Introduction

It is not obligatory that parties in a civil or criminal proceeding should call every witness and put in all documents in the case before the court. What is of essence is not the quantum of evidence but the quality and weight. Hence a court can convict upon the testimony of a single witness. An example is a positive, direct, voluntary and dogmatic confession. However, there are certain cases where the law demands a specified number of witnesses to sustain a conviction. This additional evidence in support is "corroboration" and it is the subject matter of this unit. You will learn to explain its meaning, its form, where it is required in Law or as a matter of practice and its application.

4.2 Learning Outcomes

In this unit, students must learn how to explain the term "Corroboration" and know its applicability under the Law of Evidence

4.3 What is Corroboration?

Confirmation or support by additional evidence as it is being put by the Black's Law Dictionary 7th edition) means Confirmation, ratification, verification, or validity of an existing evidence in some material particular from another independent witness or witnesses implicating the accused.

It is the evidence that differs from but strengthens or reinforces other evidence; especially that which needs support. It is a confirmatory or supporting proof of a matter on which evidence of the same fact has already been or will be given.

Functionally, corroboration is essentially confirmatory or supportive evidence in the sense that it proves:

1. That a crime has been committed
2. That the accused is implicated in it

Corroboration shows that the evidence of the witness is probably true and that it is reasonably safe to convict on it. Evidence in corroboration must be independent testimony, which affects the accused by connecting or tending to connect him with the crime: **R.v BASKERVILLE [1914] KB 658**.

It is not necessary that the independent witness should confirm everything that the accomplice has said or done. All that is required is some independent evidence connecting the accused with the crime.

No Self-Corroboration

A witness cannot corroborate him or herself; otherwise, it would suffice for one to repeat ones story a hundred times in order to get a hundred corroboration of it. (**R.v WHITEHEAD (1929) 1 KB 199**). In essence, the corroboration must be extraneous and independent of the testifying witness, and must connect the accused to the crime.

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. What is the meaning of corroboration?
2. "If there is corroboration but no warning, the prosecution fails". Justify this assertion and its impact on miscarriage of justice.

4.3.1 A complaint is no corroboration

The testimony of a witness as to a complaint made to him or her does not amount to a corroboration of the complaint. R. V. Christie, 1914. The evidence must corroborate the remainder of the evidence in some material particular.

When Corroboration is required

Generally, Corroboration is not of essence so long as the parties are able to adduce enough evidence to warrant a verdict.

However, the statute creating certain offences has demanded corroborative evidence as a precondition for a conviction. In some cases also, the court, as a matter of practice, makes corroboration necessary.

4.3.2 Corroboration as a matter of Law

The following are examples of instances where corroboration is required by Law:

1. Unsworn evidence of a child. Evidence Act Section 208 and 209
2. Treason; Criminal Code Section 37
3. Concealment of Treason. Section 40, Criminal Code and Evidence Act Section 200.
4. Treasonable felonies Section. 41. Criminal Code, and Evidence Act, section 200
5. Promoting: Inter-communal war Section 42, Criminal Code and Evidence Act Section 200
6. Perjury Evidence Act, Section 198
7. Traffic Offence of Exceeding Speed limit: Evidence Act Section 201
8. Sedition: Evidence Act Section 204, Criminal Code Section 51 (1)(b)
9. Action for Breach of promise for marriage: Section 197 Evidence Act

It should be noted that under the Evidence Act of 2004 Sexual offences were among instances where corroboration is required by law, however, Sexual Offences were omitted from the 2011 Evidence Act. Where corroboration may be required in practice.

Although corroboration may not be a requirement of the law, the court may in exceptional cases, demand some corroborative evidence as a matter of practice.

Such instances include:

1. *Evidence of an accomplice*
2. *Sworn evidence of a young child*
3. *Matrimonial causes*
4. *Claimants' evidence relating to a deceased person.*

4.3.3 Forms of corroboration

Corroboration may take any of the following forms:

(a) Confession or admission by an accused
(b) Evidence of a witness
(c) Scientific evidence
(d) Destruction of material evidence or exhibit
(e) The position of the complainant coupled with the nature of complaint as in sexual offences.
(f) Independent evidence or an earlier similar offence by the accused on the same person.

Corroborative evidence may be oral, written or documentary, real, behaviour or conduct or other. It may be direct or as in most cases circumstantial. It may also take the form of a confession, or a lie about a matter or an informal admission. It does not amount to corroboration that the party or witness gave false names or failed, refused, or neglected to give evidence. Unreliable evidence requires no corroboration.
In practice, the judge is required to:

- Examine the whole of the evidence, to see whether there is any corroboration from the witness of the prosecution.
- State what he finds to be corroboration
- Expressly caution him and exercise extreme care in determining whether or not to act on the suspect's evidence where there is no corroborative evidence.

The test is whether there is an independent testimony which affects the accused by connecting or tending to connect him or her with the crime **ODHIOERE v STATE (1996)**.

In **R. v CHRISTIE (1914) AC 545**, the accused was charged with indecently assaulting a child. The evidence was that after the act, the child went home and told the mother what happened. The mother took the child to the Police and the three of them went to Christie. On meeting Christie, the child pointed to him and said: "this is the man". He repeated the assault story.

Christie was silent. At the trial, it fell for determination whether the story of the child was corroborated by that of the mother. The House of Lords held as follows:

1. That the mother's evidence being a repetition of the children's story does not amount to corroboration in law.

2. The statement made by the child in the presence of the police and the accused could not be admitted as part of res gestae because there was a sufficient time lag between the act and the word.
3. The silence of the accused did not amount to an admission and a fortiori to corroboration.
4. However, the statement was admitted as evidence of complaint in that it showed lack of consent on the part of the complainant and consistency between the evidence he gave outside the court and in the witness box.

In **CREDLAND v KNOWLER (1951)**, the accused was charged with indecent assault on a girl aged10 years. The investigating police officer gave evidence that when the parties met, the accused first denied and later admitted association with the girl. The girl and another girl aged 9 gave unsworn evidence of indecency. The prosecution claimed and the defence denied that the lies told by the accused amounted to corroboration of the girls' story. The court held that the fact that the accused told a lie may be but is not necessarily corroboration. If a man tells a lie when he is spoken to about a certain offence, the fact that he told a lie at once throws grave doubt upon his evidence. If he afterwards gives evidence, it may be a good ground for rejecting the evidence.

However, the court found other strong corroborative statement including that of the accused which corroborated virtually all the children's evidence except the indecency. On this the court said, it was not necessary to corroborate the whole of the evidence but only some material particular.

4.4 Corroboration of evidence of young children

One of the thorny issues in law relating to corroboration is the evidence of young children.

A conviction based on the uncorroborated unsworn evidence of a child is bad. The question is whether or not an unsworn evidence of a child can be corroborated by another evidence of another child, sworn or unsworn.
It has been argued that evidence which requires corroboration cannot itself corroborate (**R. v MANSER, (1934**). This argument was overruled in **R v HESTER** which held that an unsworn statement can only be corroborated by a sworn statement. In essence the unsworn statement of a child may be corroborated by a sworn statement of another child.

Consistently with this trend of thought, the House of Lord also decided that a sworn evidence of a child can corroborate another sworn evidence of another child (**DPP v KILBOURNE [1973] AC 729**).

See **R. v CAMPBELL**, where the court dealt with the issue of sworn evidence of children and more specifically whether the evidence of children who were assaulted would be corroboration for the evidence of other children that were assaulted. As explained by Lord Goddard, CJ.

"The unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children, the judge must stop the case. It makes no difference whether the child's evidence relates to an assault on himself or herself or to any other charges. An example, would be where an unsworn child says that he saw the accused person steal an article''.

"The sworn evidence of a child need not, as a matter of law, be corroborated, but a jury should be warned (and where there is no jury the judge should warn himself) not that the jury (or the judge) must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls, though the jury (or the judge) may do so if convinced that the witness is telling the truth, and this warning should also be given, where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn or of an adult".

Activity

Subscribe to the argument whether or not the unsworn evidence of one child can corroborate the sworn evidence of another.

4.5 Evidence of an accomplice

An accomplice is a person who has been connected in the commission of a crime; a person who, on the evidence, may be convicted of the offence with which an accused is charged. He is involved in the crime but he is not charged; rather he is turned a prosecution witness. He is a principis criminis, neither a co-accused nor an agent provocateur.

An accomplice includes:

- A Participant in the actual crime charged
- A Receiver of property for which the accused is charged with stealing
- A Participant in other crimes alleged to have been committed by the accused, where evidence of such other crimes is admissible to prove system or intent or to negative accident.

The following persons may be directly or remotely connected with a crime but are not accomplices:

- An accused, who testifies on his own behalf in a joint trial, and who incriminates a coaccused: Ukut and others v the state (1968).
- A Bribe giver who meets the monetary demand of bribe taker: R v Usman Pategi (1957), Okeke v the Police (1948); Osidola v COP. (1968).
- A person, who takes no part in a crime but is merely an eye witness: Queen v Ukut (1960).

See **ENAHORO v THE QUEEN (1965) 1 NLR 125**
O. was charged with conspiracy with others to commit treason. O was assigned a responsibility. He subscribed to the oath, but declined his role. He did not report to the police. O was a prosecution witness and it was contended that he was an accomplice. The Supreme Court held that O might have been guilty of an offence under a different section of the code for failure to reveal the plot, but this offence is a separate and distinct offence from the conspiracy charged. Accordingly O is not an accomplice.

4.5.1 The Evidence Act Provision.

The Evidence Act, Section 198 provides that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Provided that in cases tried by a jury when the only proof against a person charged with a criminal offence is the evidence of an accomplice uncorroborated in any material particular implicating the accused, the judge shall warn the jury that it is unsafe to convict any person upon such evidence though they have a legal right to do so and in all other cases, the court shall direct itself.

The judge must warn himself of the danger of convicting on the uncorroborated evidence of an accomplice who testifies for the prosecution. Having warned himself the judge may convict upon uncorroborated testimony if he believes the evidence adduced by the accomplice.

Compare Odofin Bello v State (1967) and Malayi v State.
In Odofin Bello v the State, the Supreme Court on the requirement that the judge must warn himself said:
"The judge must ask himself whether or not he believed the evidence of the accomplice and if he believed it, he must warn himself that it was unsafe to convict on it. He must then look for additional statement or evidence not that of an accomplice rendering it probable, that the story of the accomplice is true and that it is reasonably safe to act on it".

In Malayi v State, the Supreme Court overruled itself and said that warning without more was sufficient.

In the case of **R. v OMISADE & ORS. [1964] 1 ALL NLR 233 AT 249**, the Supreme court decided that as regards an overt act, it is not necessary that each witness should give evidence as to each overt act. It is sufficient that a number of witnesses are able to give evidence of "snipers," which all taken together will amount to an overt act.

4.5.2 Nature of Warning

Where in practice, corroboration is required, the court must exercise extreme caution and must warn itself. The presence or absence of that warning is a determining factor.

If there is corroboration but no warning, the prosecution must fail.
If there is no corroboration but there is a warning, the prosecution succeeds all else being equal. There is no magic formula regarding the warning; and although it is required in practice, it has the force of law. The case of Davis v DPP (1954) gives you a guide as to the nature of warning. In the case, the House of Lords explained that the rule that where a person who was an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury (or himself in the absence of the jury) that, although they (or the judge) may convict on the evidence of the accomplice, it is dangerous to do so unless such evidence is corroborated.

This rule, although a rule of practice, has the force of law. Where the judge fails to warn in accordance with this rule, then, even though there is ample corroboration of the accomplice's evidence, the conviction will be quashed unless the appellate court is satisfied that no substantial miscarriage of justice has been caused by a breach of the rules.

The warning must be direct and precise. For this reason the court quashed the conviction in **R v PRICE (1968)**. The warning to the jury in that case was:
"When they (the jury) have to take the evidence of an accomplice, they ought to view it with particular care and they ought to look to see whether there is other evidence separate from that of the accomplice which implicates the accused in a material particular…..having had that warning they may accept the evidence of the accomplice and even without corroboration if they think it right"

Evidence does not constitute corroboration unless it clearly links the accused with the crime charged and also confirms the evidence of the accomplice as to the material circumstances of the crime. The prosecution must fail where the law requires corroboration and the court finds none or where the corroboration offered is irrelevant to the issue. The kind of corroboration required is not confirmation by independent evidence of everything the accomplice relates but some independent testimony which affects the accused. The uncorroborated evidence of an accomplice is admissible but where he is a prosecution witness, the judge must warn himself that although he may convict on his evidence, it is dangerous to do so unless it is corroborated. There is no magic formula for warning. Warning may advance justice but the effect of failure to warn appears to tilt to the contrary and therefore calls for a review of the law relating to corroboration.

4.4 Summary

Corroboration is evidence that differs from but strengthens or reinforces other evidence (especially that which needs support). It is a confirmatory or supporting proof of a matter on which evidence of the same fact has already been or will be given.

It may be required in law or in practice. Admission and confession among others are forms of corroboration, but lying may not be. You should be careful to dichotomise between "lying" or "mistaking" and whether the lie or mistake pertains to participation in the crime charged or his presence at the scene of crime. Read some of the cases referred to in the text.

4.5 References/Further Reading/Web Sources

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Cross, R & Wilkins, N. 1971) An Outline of the Law of Evidence 7th 3rd Ed. Butterworth. London.

The Evidence Act, 2011.

4.6 Possible Answers to Self-Assessment Exercises

Corroboration is the confirmation, ratification, verification, or validity of an existing evidence in some material particular from another independent witness or witnesses implicating the accused.

MODULE 4

UNIT 1 BURDEN AND STANDARD OF PROOF

Unit structure

1.1 Introduction

The theme of this unit is the burden and standard of proof, both of which jointly enhance the proof of cases in the court. They form the subject matter of Part IX of the Evidence Act and can be found also in several other legislations like the Matrimonial Causes Act, the Magistrates Act, the Criminal Code and Penal Code as well as the Constitution of Federal Republic of Nigeria, 1999. The basic principle is that the party on whom lies the burden of proof must persuade the court, in the best traditions of advocacy of the veracity of the facts in issue. In this discourse therefore, you should be critical about two questions: (1) Who has the burden of proving the fact or facts in issue? (2) What test can be applied to determine whether sufficiently weighty evidence has been adduced to discharge that burden?

1.2 Learning Outcomes

This unit will give the student the maximum understanding of the burden of proving a fact in issue. It will explain the test to be applied in determining the weight of evidence to be adduced. The unit will teach the student to distinguish between legal evidential burden and the different standards of proof.

1.3 Burden and Standard of Proof Contents

1.3.1 Definition

Proof
"Proof" is the establishment of a fact by proper legal means to the satisfaction of the court and in this sense includes "disproof".

A fact is proved when the court is satisfied as to its truth and the evidence by which that result is produced is called "proof". See Evidence Act, section 121

Burden
Burden signifies a duty or responsibility

Burden of Proof
A party's duty to prove a disputed assertion or charge: This expression connotes the carrying of the risk of non-persuasion in the sense that a party who has the burden stands to lose if his or her evidence fails to convince the judge. The burden of proof is sometimes referred to as onus probandi or loosely as a burden of persuasion. It includes:

- Burden of persuasion
- Burden of production

Statutory provision

a) The constitution, 1999
It is a constitutional as well as a fundamental human right that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. (Section 36 (5) Evidence Act, 2011.

b) Evidence Act

Part IX of the Evidence Act, 2011 provides for production and effect of evidence, and for burden of proof as follows:

I. Burden of Proof - Section 131
II. On whom burden of Proof lies - Section 132
III. Burden of Proof in civil case - Section 133
IV. Burden of Proof beyond reasonable doubt -Section 139
V. Burden of Proof as to particular fact - Section 136
VI. Burden of proving fact to be proved to make evidence admissible-
138
VII. Burden of proof in criminal cases - Section 139

VIII. Proof of facts especially within knowledge - Section 140
IX. Exception need not be proved by prosecution -Section 141

c) Some legal writers have used the term "burden of proof" in two senses, namely:
   1) The burden of proof on the pleadings (i.e. the burden of persuasion, or legal burden (also called persuasive burden).

   2) The evidential burden of proof (i.e. the provisional burden or a burden of production)

d) Put differently the two senses are:
   1) Particular duty of him who has the risk of any given proposition on which parties are at issue – who will lose the case if he does not make this proposition out, when all has been said and done.
   2) The duty of going forward in producing evidence whether at the beginning of a case or at any later moment, throughout the trial or discussion.

e) Different writers have used different nomenclature to describe the burden of proof: they mean essentially the same thing. For example, the burden of proof as a matter of law and pleadings is similar in content with:
   - legal burden or burden of proof simpliciter (Professor Cross)
   - legal burden (Lord Dennig)
   - persuasive burden (Glanville William) or
   - Burden of persuasion (Henry Black)

What is important is to distinguish two categories of burdens:
(1) Legal burden of Proof
(2) Evidential burden of Proof.

The first category – the legal burden of proof – is an obligation that rests on a party in relation to a particular fact in issue. The burden of such proof rests on only one party. It implies a party's duty to prove, by weight of evidence, the totality of the truth of some preposition of fact which is vital to the case and which is also in issue. Failure to discharge this burden certainly results in the failure of the whole or some part of the allegation or prosecution's case.

Conversely the second category – evidential burden of proof denotes an obligation on a party to adduce sufficient evidence on a particular fact so as to warrant a finding on that fact in favour of the party under the

obligation. A failure to discharge this burden does not lead to the certainty of failure of entire or part of the case. That risk, however, is present; the immediate effect of a successful discharge of the burden is to shift the evidential burden to the opponent.

In both categories, the standard of proof is different.
In **ELEMO AND OTHERS v OMOLADE AND OTHERS (1968)** the Supreme Court explained that the burden of proof has two common meanings:

a. The burden of proof as a matter of law and pleadings; This burden is one of establishing a case whether by preponderance of evidence or beyond reasonable doubt, and
b. The Evidence Act, Sections 131-132.

As a general rule of evidence, the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When the party adduces evidence, which is sufficient to raise a presumption that he or she asserts the truth, his or her allegation is presumed to be true unless the opponent adduces evidence to rebut the presumption.

All facts in issue are to be established by the party who, in law, has the burden of proving those facts. In essence, the claimant (Plaintiff) in a civil case must prove the facts of his claim in order to establish his or her claim if the defendant does not admit them expressly or by implication. In the same way the prosecution, in a criminal case, must prove his facts in order to secure a conviction.

In practical terms: suppose there is a suit where a party claims a right, alleges a breach and claims damages or where a prisoner at the dock is charged with a crime; The parties are in court; The case is called. Both parties and witnesses keep mute. No one gives evidence; the question you should now answer is what should be the court's verdict? Which party wins or loses; By reason of the constitutional provision and presumption of innocence the defendant or the accused wins, the claimant (Plaintiff) or the prosecution loses. If no evidence is given, the party who stands to lose has the right to begin. He bears the light burden, the burden of persuasion or burden of proof.

Self-Assessment Exercise 11

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. What is the meaning of proof?

1.3.2 Scope of Proof

The burden of proof refers to the party's duty to prove, by weight of evidence the totality of the truth or some proportion of fact, which is vital to the case and which is also in issue.

Thus in a tort of malicious prosecution, the substantive law demands that the claimant/Plaintiff must not only allege but also prove the following:

1) An unsuccessful prosecution instigated by the defendant
2) Absence of reasonable and probable cause
3) Damage

If Kodjo is charged with receiving stolen property, the prosecution bears the burden of proving his guilt by showing that:

1. The accused had the stolen article in his possession
2. At the time of receiving it, he knew the article was stolen
3. Kodjo had been convicted of an offence involving fraud or dishonesty within the five years preceding the date of the offence charged (and seven days' notice in writing has been given to him)
4. Other property stolen within twelve months preceding the date of the offence charged was found in the accused's possession.

   If the complainant/Plaintiff or the prosecutions in these two cases default in proving any of the elements as prescribed in the substantive law, the totality of the case or claim crumbles. See Evidence Act, Sections 132 and 135

In some cases however, the burden is shared; such that one party bears the burden of proof on some issues and another party on others. Examples of such cases are:

1) Action for negligence
2) Criminal trials where the accused acted under[provocation: (Mancini v DPP (1942), [self defence: R v Lobell (1957); [duress: R v Gill (1963), or [a state of automatism: Bratty v A-G for Northern Ireland (1996)

Strictly speaking the type of burden in these cases is evidential burden, not burden of proof. The failure of a party to discharge this burden of proof may not lead to the loss of the entire case. See Evidence Act, Section 132.

If the accused succeeds at discharging the burden, the prosecution must, in the discharge of his legal burden negative it. This burden of proof denotes the duty placed on the prosecution not only to prove the elements of the offence charged but also to disprove the defences. However, the standard of proof required in each case is different. A

legal burden must be discharged beyond all reasonable doubt whereas evidential burden is discharged upon a reasonable satisfaction or upon a balance of probabilities.

The statute, sometimes, imposes a burden of proving certain facts on the accused. See for example: Custom and Exercise Management Act, section 166(2) (b). But the constitutionality of this provision is being questioned. See the Constitution, 1999 section 36(5).

Civil Proceedings

The burden of proof operates in both civil and criminal proceedings, but it operates differently and each has its own rules. In either case, the burden of proof largely determines the right to begin also, that is to say that the burden of proof rests on:

- the Plaintiff or claimant
- the Claimant/Plaintiff who has the right to begin the proceeding
- the party that seeks to obtain judgment on the pleadings on which his or her legal rights and the other party's liability depend.
- "The party other than the party that would be successful if no evidence at all were given" see Evidence Act, section 133.

Pleadings are important; they determine the incidence of burden of proof in civil cases. It affords parties to state their case, support their claims, admit or deny each other's allegations.

Where parties deny the allegations, the burden is on the plaintiff. If the defendant admits the main allegation, no issues are joined in the dispute, the burden of proof is displaced and the court merely considers the quantum of damages. Even at that, where there are special circumstances which may affect the damage, the Plaintiff still has to prove (**HADLEY v BAXENDALE (1854**).

If the defendant admits to the main issues but sets up fresh facts by way of avoidance, he must prove those facts and sometimes this may constitute the whole of the general burden. The effect of a Traverse of allegations made in the statement of claim is to cast upon the Plaintiff the burden of proving the allegation denied (**M V K LTD v LAMIDI APENA (1969**).

Issues are often distributed in a civil proceeding. This arises often in a case, where parties admit some allegation, and deny others. In the circumstance, the general burden of proof lies on the plaintiff while the burden of proving each individual allegation is on the party making it.

In a civil proceeding, the burden of proof is discharged when the party carrying the burden has proved every material fact on which he or she bases his or her claim with the exception of those which require no proof (e.g. presumptions).

The doctrine of res ipsa loquitur ("the thing speaks for itself") also relieves the party of the burden of proving all material facts. This applies in circumstances where it may be impossible to prove the facts because they are not known. But upon proof of the happening of a particular event, it can with truth be said that the thing speaks for itself" **MOORE v R; FOX AND SONS LTD (1956)**.

Lord Maughan enunciated the rule in **CONSTANTINE LINE v IMPERIAL SMELTING CORPORATION (1942)** where the Learned Law Lord said.
The burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule which applies is Ei qui affirmat non ei qui negat incumbit probation. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reason.

This basic principle represents the law in Nigeria.
See also **OSAWARU v EZEIRUKA (1978) 6-7 SC 135**. Where the court said that the burden of proof is on the Plaintiff (Complainant) to prove his claim and not on the defendant to prove otherwise.
In R v Eka (1945) the West African Court of Appeal said:
It is fundamental that in a criminal trial, the onus is upon the prosecution to prove the elements which make up the offence charged. If it fails to prove any of them, the accused is entitled to an acquittal and if in spite of that he is convicted, he is entitled to have the conviction quashed on appeal.

Bairamnian SPJ (as he then was) confirmed this in Kannami v Bauchi NA (1951), saying:
"It is not the duty of the accused to prove his innocence; it is the duty of the prosecution to prove his guilt"
See also **IBEZIAKO v COP (1963) 1 ALL NLR 61**

Read the following:

- The Constitution, 1999, Section 36(5)
    - The Criminal Procedure Code (CPC) section 156-7, 160-161, 170, 172, 187- 188

Self-Assessment Exercise

It appears that the "golden thread of the Nigerian Criminal Justice, that it is for the prosecution to prove its case and not for the accused to prove his innocence, has been completely broken by the CPC, particularly in section 156 and 157". Comment critically.

Exception to the golden thread
If you read **WOOLMINGTON v DPP (1935) AC 462** which you must, you would have observed that Viscount Sankey highlighted certain exceptions to the rule in Woolmington v DPP. You need to note these exceptions in particular.

3.3 Criminal Proceeding

First read the Evidence Act Section 132-141
In Criminal matters, the prosecution bears the burden of proof. This burden is clearly stated in the case of **WOOLMINGTON v DPP (1935) AC 462**, where Viscount Sankey said:
"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the defence that the prisoner killed the deceased with a malicious intention, the prosecution has not made out his case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained".

Also see the following cases:
- Mancini v DPP (1942) on the defence of provocation
- R v Hodges (1962) on defence of accident
- Chan Ray v R (1955) on defence of self defence
- R. v Budd (1962) on defence of automatism

The burden of proof placed on the prosecution includes the burden of negativing the defences raised.

Also See Evidence Act Section 135, 139 and 140 which have relieved the prosecution of the burden of proof in certain cases.

Once you as a party, begin your case, you must call in all your evidence. You are not entitled to call prima facie evidence, hear your opponent's evidence and then call further evidence to confirm your prima facie evidence. However, in the following circumstance, you may call rebuttal evidence in order to nullify or qualify your opponents' evidence, but not to confirm your own case:

- As the party who begins a case, you may call witnesses to say that they would not believe certain of the opponents witnesses on oath and to contradict the answers of the opponents' witnesses during cross-examination as to credit.
- You may call evidence, with leave of the judge, in answer to that adduced by the opponent in support of an issue, the proof of which lay on the latter.
- When you are taken by surprise e.g. as the result of an inadequate cross- examination.

If the defence raises alibi, which the prosecution could not have anticipated or could not foresee, the judge has a discretion to allow the prosecutor's evidence in reply.

Scope of Burden of Proof

The general burden rests on the prosecution or complainant. Lord Denning describes it as a "legal burden" (61 LQR 379) and failure to discharge this burden inevitably leads to failure of the whole or some of its limits. This burden never shifts.

The substantive law prescribes the facts which are vital to the allegation of crime and which are also in issue. It also determines which particular burden shall form the essential part of the general burden.

For example, the substantive law requires that in a charge of murder (Criminal Code Section 316-319) or (culpable Homicide punishable with death, Penal Code sec 211) the prosecution must allege the following:

- That the death of a human being has actually occurred
- That such death was caused by the act or omission of the accused
- That the act or omission was done with the intention of causing death or grievous bodily harm
- That the accused knew that death would be the probable consequence of his act, (see Michael v the state (2008), compare), Ochemaje v the state (2008) compare Kada v the State (2008).

1.3.3 The evidential Burden of Proof or Particular Burden

Sometimes, the statute may relieve the prosecution or complainant of the burden to adduce sufficient evidence on a particular fact. What has

shifted is evidential burden of proof which Lord Denning has described as "a provisional burden". When discharged, the evidential burden shifts again to the opposite party.

For example, it is open to the defence to plead diminished responsibility or insanity. As you already know, it is a presumption that every man or woman is sane. Accordingly, the defence must not only allege the insanity or diminished responsibility but also must prove it. (M' Nghten's case, (1843).

The prosecution is not required to prove negative averments. (Section 141 Evidence Act, 2011)

The Rule in R v TURNER (1944) KB 463

If the accused is charged with possessing a firearm "without lawful excuse", it is for defence and not the prosecution to prove 'lawful excuse' this is what is referred to as the Rule in R. v Turner (1956) read up the full-Report on the case.

Licensing Cases

Where the law makes a general proscription of an act and then provides for an exception in favour of those who obtain licences to perform the act, it is prima facie an offence to do that act. To convict the offender, the prosecution only needs to prove that the accused did the act. It is not for him to prove that at the time of the act, the accused had no licence. The burden of proving that he or she had a licence is on the accused. **(JOHN v HUMPHREYS, 1955); AND A.G. EASTERN NIGERIA v ASIALA (1964).**

It is the same rule in driving licence cases or selling controlled essential commodities without licence. Thus when the statute makes it an offence for any person to do something unless that person is qualified, authorised, or licenced, all the prosecutor or complainant (plaintiff) needs to do is to adduce evidence in support of the proscribed act only. Neither of them is under any burden of adducing evidence to show that the accused had no prescribed qualification, authorization or licence.

Receiving Stolen Property

In receiving stolen property and the like, the possession of goods recently stolen calls for an explanation and if none is given, or one is given which is untrue, that entitles the court to convict.

Sometime, statutes may impose on the accused or the defence a duty to prove certain facts. For example, where the accused relies, for his her

defence, on any exception, exemption, proviso, excuse or qualification whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification lies on the defence. This is notwithstanding that the information or complaint contains an allegation negating the exception, exemption, proviso, excuse or qualification": (See Evidence Act S. 16) in these situations:

However, this evidential burden merely mitigates the general burden which still lies on the prosecution. Thus, if the accused does not discharge his or her burden and the prosecution also fails to discharge his or her .

Defence of Alibi
Where a defence of alibi is raised, the burden of proving it lies on the defence. The leave of court is required to adduce evidence in support of an alibi. The defence must also give notice of the particulars of the alibi within a prescribed period.

Shifting the Burden
Be careful not to confuse "shifting the burden" with "Burden of proving". "The burden of proof never changes. It remains to the end of the case with the party who has it" at the outset. When the Plaintiff has introduced enough evidence to make out a prima facie case, the defendant, unless he would see the verdict, introduce evidence to controvert or weaken the effect of that which the Plaintiff has introduced – This is the burden of going forward with the evidence, or the "burden of proceeding" as it may be called in order to distinguish it from the "burden of proof". It is therefore, the burden of proceeding which shifts from one party to another but not the burden of proof".

1.3.4 Standard of Proof

Read the Evidence Act, Section 134 and 135
The standard of proof is a matter of weight of evidence. It varies as between civil and criminal cases.

Civil actions other than matrimonial cases
The general rule in civil actions (other than matrimonial causes is that a party, who bears the legal burden of proof is entitled to a verdict if his or her evidence establishes in his or her favour, a "balance of probabilities", or a "preponderance of evidence". That should be the case, where at the end of the case, one can say the Plaintiff (Complainant's) case is more likely to be true than untrue.

Note Lord Denning's caveat in Hornal v Neuberger Products Ltd (1956) that:
"The more serious an allegation, the higher the degree of probability that is required".

This is suggestive that the standard is not absolute.
The preponderance of evidence or balance of probabilities means that the evidence adduced by the Plaintiff/Complainant should be put on one side of an imaginary scale and the evidence adduced by the defendant put on the other side of that scale and weighed together to see which side preponderates. See **MOGAGI v ODOFIN (1978), ALHAJI BALOGUN v ALHAJI LABIRAN (1988).**

Criminal Proceedings
In a criminal proceeding, the prosecution must prove the totality of his/her case or the Accused's guilt, "beyond all reasonable doubt".

There is some contention that the standard should be proportionate to the gravity of crime, that "as the crime is enormous so ought the proof to be clear".

However, where the fact in issue is to be proved by the defence as in a defence of insanity, the standard is a balance of probability as in a civil case.

The proof "beyond all reasonable doubt" does not mean that the judge must be absolutely certain of the accused's guilt. A reasonable doubt is that quality and kind of doubts which, when you are dealing with matters of importance in your own affairs, you allow to influence you one way or the other.

The term "beyond all reasonable doubt stands out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace this presumption, the evidence of the prosecution must prove beyond reasonable doubt, (not beyond all shadow of any doubt), that the person accused is guilty of the offence charged.
As Oputa JSC said in Bakare v the State, (1987):
Proof beyond reasonable doubt connotes such proof as precludes every reasonable hypothesis except that which it tends to support. It is a proof to a moral certainty, such that it satisfied the judgement and conscience of a judge as a reasonable man applying his reason to the evidence placed before him that the crime charged has been committed by the accused and so satisfied him as to leave no other reasonable conclusion possible.

Allegation of Crime in Civil Matters

The position of the law is not quite clear when crime is alleged in a civil proceeding. In **Lek v Matthews (1927) and Hornel v Neuberger Products Ltd (1956),** the court applied a civil standard.
Conversely, a criminal standard was applied in Issaias v Marine Insurance Co Ltd (1923)

The uncertainty of the situation is more complex where the criminal conduct alleged cannot be severed from the civil cause itself to which it is not merely incidental. See **OMOBORIOWO V AJASIN (1984) 1 SC NLR 108** AND **NWOBODO V ONOH (1984) 1 SC.**

By reason of Evidence Act, Section 135, if the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted to the accused to adduce or produce evidence of other facts. Okogbue v COP (1965). Where the prosecution fails to make at least a prima facie case against the accused at close of his case, the accused is entitled to a discharge without being called upon to enter any defence. The accused has no corresponding duty to establish his innocence: **OTEKI V A.G BENDEL STATE (1986) 2 NWLR (PT 24) 652**.

What Proof beyond reasonable doubt is not?

A proof beyond reasonable doubt does not:

- admit of plausible and fanciful possibilities
- Fanciful doubts, imaginary doubts, speculative doubt or facts not borne out by the facts and surrounding circumstances of the case.
- Extend to a proof beyond all possible.

Matrimonial Causes

Where the Matrimonial Causes Act requires the court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient if the court is "reasonably satisfied" of the existence of that ground or fact or as to that other matter. (MCA. S. 82). Cases have shown that the court has not been consistent in interpreting the standard of "reasonable satisfaction," See examples:

1. Lord Damond applied a standard applicable in a criminal matter – one beyond reasonable doubt.
2. In Blyth v Blyth (1966): Lord Denning rejected such a strict standard and applied a standard of proof on a balance of probabilities. (ie. The civil case standard)
3. Bastable v Bastable (1968), the standard applied was not as high as "beyond reasonable doubt" but higher than the civil requirement of proof on "the balance of probabilities.

In other words, proof that may satisfy the court in a civil matter may be insufficient for a matrimonial cause. The more serious the matrimonial offence, the clearer the proof required.

The standard probably lies between "proof beyond reasonable doubt" and a "preponderance of probabilities" – one of "reasonable satisfaction".

Burden of proof lies on the party that stands to lose in a civil matter. The standard is a balance between probability and improbability. Verdict is upon a preponderance of evidence or preponderance of probability. In matrimonial causes, the standard is one of "reasonable satisfaction". In a criminal case, the burden is on the prosecution. It does not shift and, unless otherwise directed by statute, the presumption of innocence casts on the prosecution the burden of proving every ingredient of the offence. If at the end of the evidence given by either party the prosecution has not made out the case, the prisoner is entitled to an acquittal.

It has to be remembered that it is an essential principle of law that a criminal act has to be established by the prosecution beyond reasonable doubt.

1.4 Summary

In this unit you learnt the burden and standard of proof. In doing so, we defined the terms used, and the senses in which they have been used. References have been made to the Constitution (1999), the Evidence Act Part IX and several other statutes as well as decided cases. The basic principle and gold thread was discussed. So also were the exceptions. The differences between burden of proof in both civil and criminal proceedings were highlighted. You noted the uncertainty of the standard of proof of allegations of crime in the course of civil proceedings. You also learnt how burdens of proofs are shared or distributed in some cases. You should now be conversant with the Rule in R v Turner and the difference between legal burden, evidential burdens and standards of proofs in criminal and civil proceedings (other than matrimonial causes) and in a matrimonial cause.

1.5 References/Further Reading/Web Sources

Nwadialo, F. (1999) Modern Nigerian Law of Evidence 2nd Ed. University of Lagos Press, Lagos. Chapter 12

Tobi Niki 'Burden and Standard of Proof' in Babalola, Afe: (2001) Law and Practice of Evidence in Nigeria, Intec Printers Ltd, Ibadan, Chapter 13.

LFN - The Evidence Act.

The Constitution, 1999.

The Penal and Criminal Procedure Code.

1.6 Possible Answers to Self-Assessment Exercises

Proof is the establishment of a fact by proper legal means to the satisfaction of the court.

UNIT 2 DOCUMENTARY EVIDENCE.

Unit Structure

2.1 Introduction

In Part I of Law of Evidence you learnt what a document is and about its different kinds. In this unit, we shall be dealing with documentary evidence. Documentary evidence is evidence supplied by writing, which must be authenticated before the evidence is admissible (Blacks Law Dictionary). In this context, writing includes books, maps, plans, drawings, photographs, matters expressed or described upon any substance by means of letters, papers or marks or by more than one of these means intended to be used or which may be used for that purpose of recording matter.

Evidence Act Section 258 (1) extensively interprets the terms: 'copy of a document', 'computer' and 'document' because of their importance in litigation today and Section 84 deals with the admissibility of statements in documents produced by computers. You may find it interesting to reconsider all the case law on admissibility. Essentially, a document is a statement made in a document which is offered to the Court in proof of any fact in issue (Aguda). In this unit, you shall learn how the statutory provisions on documentary evidence have been interpreted and applied, and rules and principles that have now emerged.

2.2 Learning Outcomes

This unit attempts the definition of documentary evidence. It will also examine the examples of circumstances when documentary evidence would or would not be excluded in law of Evidence.

2.3 Documentary Evidence

2.3.1 Statutory Provision

It is important that you understand the principles and rules relating to documentary evidence. To start with, you need a brief survey of the provisions of the Evidence Act relating to the subject:

Read section 85 – 92 to refresh your memory on the definition, classification and admissibility of documentary evidence.
Then Read section 83 - 84 relating to admissibility of documentary evidence.

The differences between Public and Private Documents are explained in section 102 – 106, while the circumstances of exclusion of oral documentary evidence are contained in sections 128 – 130.
You may gain an added advantage by reading in passing Sections 107 – 120 which deal with the contents and validity of Affidavit.

2.3.2 Proof of Execution of Documents – Section 93-98

Any document which is tendered as a proof of its content is a hearsay evidence. It is inadmissible in evidence unless it falls within one of the exceptions, e.g. dying declaration, a confession, or if it is a public document. On the other hand, it is not hearsay if the same document were tendered to prove its existence or the fact that it was made.

Some documents like the Acts of the National or State Assembly are judicially noticed and are admissible without any form of authentication. There are other documents which may necessarily be authenticated or classified, stamped, sealed or signed by designated public officials as the case may be.

The validity of a document determines its admissibility or the secondary evidence of the document.

2.3.2.1 Ancient documents

Some reference had been made to presumptions as to hand-writing on what needs to be added is that if a document is proved or purported to be 20 years old and is produced from the proper custody and otherwise free from suspicions, the court will presume the document's validity but not its veracity. The Court presumes that:

- The signature on the document is genuine
- The handwriting is that of the person who is supposed to have written it.
- The document was duly executed. These prescriptions arising by reason of the document are rebuttable.

In this context, proper custody implies the deposit of the document in a place, and under the care of persons, whose and with whom it might naturally and reasonable be expected to be found, if authentic, even though those may be some other custody more strictly proper. Generally, if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or, the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting (Section (93).

2.3.2.2 Proof of Signature and handwriting and Electronic Signature

Evidence that a document exists having the same name, address, business or occupation as the maker of a document purports to have, is admissible to show that such document was written or signed by that person.

Evidence that a document exists to which the document, the making of what is in issue purports to be a reply, together with evidence of the making and delivery to a person of such earlier document, is admissible to show the identity of the maker of the disputed document with the person to whom the earlier document was delivered (Evidence Act 2011, Section 93 and 94)

2.3.2.3 Handwriting

Evidence of handwriting may be required if a document other than an ancient document which a person is alleged to have signed or written. The evidence of hand writing may be given in the following ways:

- By comparing the disputed signature or handwriting with a sample which is either admitted or proved to have been written by the person named (i.e. the writer or signatory).
- By calling the alleged writer or signatory as a witness and inviting him to write any words or figures so that the Court can compare with the disputed document.
- By calling the alleged writer and signatory or person named as a witness to identify his or her own signature or writing.

- By calling any person who saw the writer or signatory write (where he or she is not available) to give a direct evidence of that fact.
- By calling a person who is familiar with the writing or who regularly receives or did receive documents signed or written by the signatory or writer of the disputed document to be called to make a comparison.
- By the opinion of hand writing expert witness.

The Evidence Act 2011 introduced for the first time the element electronic signature. In Section 93(2) (1) (3), it states:

Where a rule of evidence requires a signature, or provided for certain consequences if a document is not signed; an electronic signature satisfies that rule of law or avoids those consequences.

An electronic signature may be proved in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person.

2.3.2.4 Attestation

Some documents require attestation. Example is a Will or other testamentary disposition or other document required by law to be attested.
To prove due attestation, you need to call the attesting witnesses if they are alive or resort to proof of handwriting if the attesting witnesses are dead.

Ancient document is presumed to be valid. Accordingly the Court presumes that the signature is genuine; that the handwriting is that of the writer or signature and that the document is duly executed. In other words, these facts or matters need no proof in Court; they are presumed to exist.

Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, statutes, and statutory declarations of at least 20 years old are presumed to be correct.

Where the holder of a bill of exchange has a lien on it, by contract or in law, he is deemed to be holder for value to the extent of his lien.

Where value has at any time been given for a bill of exchange, the holder is prima facie deemed or presumed to be holder for value.

Alterations to deeds are presumed to have been made before or at the time of execution. The effect of material alterations made after execution of a deed without concurrence of the party to be charged is to render the whole deed void.

Alterations to Wills are presumed to have been made after the execution. Alterations to a Will made after executions are of no effect unless they amount to partial revocations.

A document which is required by law to be stamped is presumed to have been duly stamped if it is lost, or not provided upon notice.

These presumptions are examples only. They are not exhaustible.

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. How is signature in a document proved?

2.3.3 Proof of the Contents of documents

2.3.3.1 See sections 85 – 89 Evidence Act, 2011.

The contents of a document may be proved by primary or secondary evidence, depending on the requirement of the law and the nature of the document – whether it is public or private document. The contents of any document must be proved by primary evidence subject to certain exceptions.

Primary evidence is the production of the original document for the inspection of the Court. Where a document is executed in several parts, each part is primary evidence. Similarly, if in counterparts, each counterpart, or a copy of identical documents produced in a uniform process by means of printing, lithography, photograph, like the copy of any Newspaper of a particular date is original. Each of these documents is a primary evidence of the contents of a pertinent edition.

The original document sought to be produced must be identified on oath being what it purports to be, unless it has already been admitted or it is a public document admissible on production.

If the original document is in the hands of an opponent or a stranger, the following notices to produce must first be served:

- Notice to produce. –Here production is optional, commonly used in Criminal proceedings
- Subpoena duces tecum -Here, production is compulsory

In the case of banker's books, the judge's prior order is necessary
An Admission (oral, written or by conduct) of the contents of a document by a party is a primary evidence against him or her, who admits. Similarly a copy of document acknowledged as correct by an opposite party is regarded as an original document.

2.3.3.1 Copies of an Original Document

Sometimes, a copy of an original document made under a public authority is admissible as primary evidence. For example, Probate of a Will is a primary evidence of the words of the Will. A document which is sealed and certified by the Director of National Archives is treated as primary evidence (Public Archives Act. Section 7 and Evidence Act section 88); so also is a certified copy of entry in the Register of Marriage (Marriage Act).

2.3.3.2 Secondary Evidence:

See section 87, Evidence Act, 2011.
Secondary evidence of the contents of a document is any admissible evidence other than the primary evidence. The general rule is that the Secondary evidence of the contents of a document can never be admitted unless the original document itself would be admissible in evidence. It is of utmost importance that:

First, you lay a foundation for admissibility of the original document, giving account of the original document e.g. that it is a public or judicial document. Next is to lay the foundation for the admissibility of the secondary evidence of those documents.

2.3.3.3 Forms of Secondary Evidence

Secondary evidence may take any form; but where statute prescribes a particular type of secondary evidence, no substitute may be permissible admissible.
Examples of these forms of Secondary evidence are:

1. Office copies of judicial documents bearing official seal, and made by an officer of the Court having custody of the original document.

2. Examined Copies of documents produced by a writer who, has compared them with the originals or by oral evidence by a witness who has read the original document.
3. Photostat or certified copy of the original copy
   Oral testimony of private documents may be given by the testimony of the conduct of a person, acting in pursuance of the assumed terms of a document.

A public or judicial document and quasi-public document may be proved by oral or secondary evidence, depending on convenience. They may be proved in the following ways:

- By an examined copy
- Sealed and certified copy of records (public record or letters patent)
- Certificates or certified copies of public documents, proceedings of corporations or entries in Register.
- As statute may prescribe
- A copy of extracts of books, documents of public nature.

2.3.3.4 Private Documents

Private documents must be proved by primary evidence, except in those special circumstances in which the law allows secondary evidence of their contents.

Cases in Which Secondary Evidence of Private documents is admissible. See Section 89 Evidence Act, 2011.
A secondary evidence of the document may be admitted in the following cases:

- Where the original document is lost or destroyed
- undue delay or expense would be involved in providing the original
- Where the original is in the hands of a stranger
- Where the original is in the hand of an opponent
- Where it is inconvenient or physically impossible to provide the original.
  See for other cases, sub sections (a)-(h)

2.3.3.5 Bankers Book

An entry in the ordinary books of the Bank may be proved by secondary evidence provided that:

- The book in which the entry is made is at the time one of the ordinary books of the Bank, irrespective of whether it is used daily or occasionally.
- The entry is made in the usual and ordinary course of businesses.
- The book is in the custody and control of the Bank, which proof may be given orally or by affidavit by a partner or officer of the bank.
- The copy has been examined with the original entry and found to be correct, (not necessarily verbatim or precise language) but in substance. A Ledger card is not admissible **(YESUFU V ACB (1976); FADAH ALLAH v AREWA TEXILE LTD (1997)**.

Secondary evidence of previous conviction. There are several ways of proving a conviction. Examples of such ways are as follows:

a. By a certified copy of the record
b. By a certificate signed by a clerk or deputy clerk of the Court of trial
c. By a copy of the summary conviction signed by a Justice of the Peace
d. By a certified extract from the Court Register
e. By a certificate signed by or on behalf of the Inspector General of Police giving particulars of the conviction, and certifying that the finger print exhibited to the certificate are those of the person convicted and
f. A certificate signed by the person in authority certifying to the same effect.

A document which is admissible as evidence of conviction is admissible in any civil proceedings to prove the facts on which the conviction is based. The information, complaint, indictment in the charge – sheet may be used for this purpose

In sum, secondary evidence of the contents of the following documents may be given provided the originals themselves would be admissible:

- Public or judicial documents or a private one required to be registered or enrolled.
- Document that has been lost or destroyed provided that the existence and search (if lost) has first been proved.
- Document in the possession of a stranger or adversary who requires producing document of which production is physically impossible or highly inconvenient.
- In interlocutory proceedings

2.3.4 Extrinsic Evidence of Documents

Extrinsic evidence means evidence relating to a contract but not appearing on the face of the contract. It comes from other sources such as statements between the parties or the circumstances surrounding the agreement. It is extraneous evidence.

The general rule is that extrinsic evidence is inadmissible to add to, subtract from, vary, alter or contradict a written document that is not ambiguous.

A written document is deemed fit to be a complete and conclusive record of the transaction. No evidence therefore may be given to prove the terms of the transaction, except the document itself or where the laws direct otherwise.

Suppose A advertises his parcel of land for sale. The land comprises Black acre, Green acre and White acre. A and B enter into an agreement in writing for the sale of white acre and Green acre in Garki Abuja, B cannot be heard later to complain that there was complementary verbal agreement that Black acre was included in the original agreement that is in writing.

Where a judgment, contract, disposition of property or other transaction is in writing, such document or series of documents represents what was intended. An extraneous oral evidence to prove the contents is inadmissible.

Exceptions:
Extrinsic Evidence of a written instrument or documents may be admissible in the following cases:

i. To impeach the document for want or failure of consideration, incapacity of the parties, illegality, mistake, fraud, and innocent misrepresentation, undue influences, forgery etc. The ultimate purpose is to show that there is no valid transaction or any such matter as would entitle a party to the document to a judgment or order relating to it.
ii. To show that a deed appearing to be a sale is, in fact, a mortgage.
iii. To show that the written record has been wrongly dated.
iv. To show that the writing was not meant to be the record of the transaction, or the complete record of it.
v. To prove a condition precedent to any delegation under a contact or disposition of property.

vi. To add supplemental or collateral terms contained in separate agreement.
vii. To incorporate local or trade custom.
viii. To show a subsequent oral agreement, varying or rescinding the written instrument.
ix. To connect two or more written documents, which refer to each other in relation to the transaction.
x. To prove a legal relation created by a document when only the existence of such relationship is involved and not the terms of the document.
xi. To show that a document was executed with an intent, which is contrary to the presumption raised by the equitable doctrine of satisfaction. See Re-Tussand (1878),
xii. To prove a contract where proof of part performances is accepted in place of a statutory memorandum
xiii. To translate the document (e.g. a document in foreign language, signs, abbreviations, nicknames, illegible characters).
xiv. To explain the terms now obsolete but used in an ancient document.
xv. To explain scientific or technical terms
xvi. To explain common words (e.g. where parties use words in a particular sense with secondary meaning.
xvii. To explain where the words used have a special meaning (e.g. trade usages or not being contradictory to the document.
xviii. To show the circumstances of the parties or one of them. xix. To identify parties ,persons and things xx. To explain ambiguity – latent, patent or equivocation.

2.3.4.1 Rescission or variation of a written instrument:

An obligation under seal can only be varied or rescinded by a deed. The doctrine of equity holds a contrary view. See the case of Berry v Berry (1929). Since equity prevails, a contract in writing or evidence in writing may be varied by a later parol agreement.

However, if the law declares that "writing or a memorandum in writing" is a condition precedent to an agreement or contract, it can only be varied by a subsequent contact, which is itself in writing. For example, the Statute of Frauds states that a contract concerning land must be evidenced in writing. If then P agrees in writing to sell an acre of land to D, any subsequent oral contract between P and D would not suffice to confer on D any good title to any of the plots as such oral agreement would be offensive to the Statute and therefore inadmissible.

But then, specific performance of the contract as varied orally is permissible in three situations, namely:

- Where the absence of writing, is not specially pleaded
- When, through the defendants fraud, no memorandum was signed
- When the plaintiff proves acts of part performance or verbal variation which unequivocally refers to it.

In regard to rescission of a written instrument, a prior written contract can always be rescinded expressly by a subsequent oral agreement. But notice: that the subsequent contract itself cannot be sued upon by reason of want of writing or written evidence.

In an old case of Morris v Baron & Co (1918), an action for $800 was settled by oral agreement which both rescinded the original written contract and contained a new arrangement. At the time, the Sale of Goods Act 1893 had provided that a contract for the sale of goods of $10 and upwards had to be evidenced in writing. The House of Lords held that oral agreement was valid to rescind the former written agreement, but unenforceable as to the new arrangements made.

Extrinsic evidence inadmissible. Extrinsic evidence will not be admissible in the following:

- Of a party's direct declaration of intention
- Where there is no ambiguity in the language or merely grammatical ambiguity
- Where the language is so vague or imperfect that no extrinsic evidence would be mutually equivalent to making a new document.
- Where the interpretation sought to be given would conflict with some rule of law or construction.

2.3.5 Interpretation of Written Document

Only a summary of this topic is required here. Words used are taken in their "ordinary popular meaning" and as modified to produce sense and consistency, except where it is apparent that the words have been used in some other sense.

When extrinsic evidence is not admissible
The Court is concerned with the document itself. What the parties have expressly stated in the document is what they really intended. Hence, extrinsic evidence is not admissible if the words of a document are clear and unambiguous. A party cannot be heard therefore, to say that although the parties have expressed certain things in words, they really intended something different.

However, the Court may depart from the words used and receive extrinsic evidence in:

- Expressions which are contradictory, or
- Single expression, which is against the general term or of the document. When this situation arises, what does the Court do?
- It considers the document as a whole. It construes the meaning of terms from what has gone before and what follows (i.e. ex antecedentibus et consequentibus).

Remember that the court is always anxious to uphold a document, if possible, rather than that it should fail for uncertainty (i.e ut res magis valeat quam pereat: let it rather be valid than perish). Hence, whatever the intention of the parties which the Court so construes prevails over the words so expressed.

For that reason also, where a deed may be read in two ways – one reading of which makes its object unlawful and the other lawful, the latter is to be given effect. An example is the cypress doctrine which applies to charitable trusts.

Extrinsic evidence in aid of interpretation may also be admissible to prove the following:

- Knowledge and circumstances of this writer – his or her identify
- The extent of the objects referred to in a document;
- The particular sense in which certain words are used.
- Whether those words were not used in their primary or ordinary sense; the surrounding circumstances in which used – trade and habits of speech.
- Situation: falsa demonstration non nocet; i.e where words (are used correctly in one part and incorrectly in another part, or (apply partly to one subject matter and partly to another, or (have both ordinary and local or particular meaning, extrinsic evidence is admissible to show that which was intended.
- To resolve ambiguity or an equivocation. Equivocation refers to a situation where words used fit two persons or things, or where it fits one person accurately and another popularly or both equally and subject to common inaccuracy.
- To explain technical, local or foreign terms by references to dictionaries and expert evidence.

Any ambiguity which does not answer the above description may be incurably bad for uncertainty. See the case of The Union Bank of Nigeria Ltd v Professor Alvert Ojo Ozigi (1994), where Adio JSC expressed the following guiding principles:

1. The general rule is that where the parties have embodied the terms of their contract on a written document, extrinsic

evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument. See also section 131, Evidence Act, 2011; Olaoye v Balogun (1990), Eke v Odolofin (1961), Macaulay v Nal Merchant Bank (1990), Colonial Development Board v Kassisi (1955), Molade v Molade (1958).

2. The operation of the parol evidence rule is not limited to oral evidence. It extends to extrinsic evidence in writing, such as drafts of agreement, preliminary agreements and letters relating to previous negotiations.
3. Extrinsic evidence is not admissible as to what passed between the parties before the execution of a written agreement or during its preparation. For example, the court may refuse a document as inadmissible because it constitutes extrinsic evidence intended to be used to contradict a mortgage deed.
4. Where a document is clear, the operative words in it should be given their simple and ordinary grammatical meaning.
5. Where the words of any instrument are free from ambiguity in themselves and where the circumstances of the case have not created any doubt or difficulty as to the proper application of the words to claimants under the instrument or the subject matter to which the instrument relates, such an instrument is, as a general rule, always to be construed according to the strict, plain and common meaning of the words themselves. It is wrong to import into Mortgage deeds extraneous matters, such as the requirement that the party should obtain the prior consent or give prior notice of increase in the rate of interests on the loan to the other.

This doctrine has been applied and followed by the Apex Court in Nigeria.

Refreshing Memory from a Document.

Subject to certain conditions, a witness may refresh his memory from a written document while giving evidence. This type of evidence is oral, not documentary.

The written record must have been made:

i. By the witness or on his or her direction from his treaties e.g expert witness.
ii. Upon matters within his own knowledge
iii. Within such a time after the transaction as to still be fresh in his memory or read through while the matter was still fresh in case of records made at his direction.
iv. Before any controversy in the matter arose.

A witness, with the permission of Court, may validly refresh his memory from the document. The practice has the merit of:

- The writing reviving the witness's recollection of facts;
- Creating in his mind, a belief that when the writing was made, he knew it to be correct
- The witness being satisfied that it would not have been made if it was not true;

Examples of documents, which courts have permitted to be used to refresh oneself include:

- Entries made by a tradesman in the book of orders actually made
- Entries in a diary
- Tape recorder being replayed in court

Any document which is tendered as a proof of its contents is hearsay evidence and it is as a general rule inadmissible. However extrinsic evidence may be admitted to:

a. Vary, or contradict a public document, not being a judicial record e.g the Register of slips.
b. Vary, or contradict a private document – informal or inter alois e.g a receipt.
c. Modify or rescind at any time before breach and by oral agreement any written transactions which statute requires to be in writing show that the document or transaction is invalid.

Extrinsic evidence may be adduced to supplement, but not to contradict the terms of a private formal document for the purpose of proving terms that are omitted, proving collateral agreement or warranty or proving that the contract was subject to a custom (not inconsistent with its terms). Where a statutory Memorandum is required, any modification or rescission must be written. If the purpose is to rescind the contract as a whole, oral evidence suffices.

Extrinsic evidence is receivable to show that the document in question is not a valid record of a transaction (i.e. A forgery) or that the transaction as recorded is itself invalid, want of consideration, or by reason of fraud, mistake or illegality. On the other hand, extrinsic evidence may be admissible to prove the true nature of a transaction and relation of the parties such as evidence showing that a conveyance is in fact a mortgage or that an agency relationship exists between parties.

2.4 Summary

The Evidence Act defines document in section 258 and provides for documentary evidence in parts v and vi and more particularly in section 85 -107, and 108-130. You learnt of circumstances when documentary evidence may or may not be admitted and the

conditions precedent to admissibility where applicable. The contents of a document may be proved by primary or secondary evidence, depending on the requirement of the law and the nature of document (section 85 - 89, Evidence Act). As a general rule, extrinsic evidence is inadmissible. You should be able to enumerate exceptions to the rule. The Unit ended with a brief resume of how to interpret a document.

2.5 References/Further Reading/Web Sources

The Evidence Act, 2011

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

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

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

Glanville Williams: The Criminal Law Review, Sweet and Maxwell, London. March 1973, P 139 – 152. The New Proposals in Relation to Double Hearsay.

2.6 Possible Answers to Self-Assessment Exercises

This is done by evidence that a document exists having the same name, address, business or occupation as the maker of a document purports to have, is admissible to show that such document was written or signed by that person.

UNIT 3 CONFESSION

Unit structure

3.1 Introduction

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

3.2 Learning Outcomes

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

- Define or Explain the term "Confession"
- Distinguish Admission from Confession
- Gain knowledge of the conditions precedent to admissibility of a confession.
- Explain evidential implications of statements that are wholly or partly adverse to its maker.
- Recognize the safeguards and the added duties imposed on State Agencies to enhance the voluntariness of a confession.
- Critique the state of Law of Evidence on "confession"

3.3 Confession

3.3.1 Definition

A confession is:

- an admission tending to establish the guilt of a person charged with a crime . It is an acknowledgement in express words by an accused of the truth of the main fact charged or of some essential part of it.

- An admission made at any time by a person charged with a crime, stating or suggesting the inference that he or she committed that crime.- Section 28

- if voluntary, deemed to be a relevant fact as against the person who has made it only;

Where more persons than one are charged jointly with a criminal offence and a confession made by one of such persons in the presence of one or more of the other persons so charged is given in evidence, the court or a jury where the trial is one with a jury, shall not take such statement into consideration as against any of such other person(s) in whose presence it was made unless he/she adopted the said statement by words of conduct. Read: Evidence Act, 2011 Sections 28-29.

It is also an exception to the rule against hearsay.

3.3.1.1 Admissions and Confessions

Some writers and judicial opinions find no differences between admissions and confessions and sometimes use both terms interchangeably. See the case of *Commissioner of Customs and Excise V Harz (1967)* where the House of Lords expressed the view that there is no distinction between admission and confession
Others have found a distinction between an admission and a confession on the basis of facts from which guilt may be inferred and the express admission of guilt itself.

3.3.2 Voluntary Nature of a Confession

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

- It is not caused by any inducement, threat made by or in the presence of a person in authority.
- The promise or threat does not give the maker a reasonable ground for supposing that he or she will gain any advantage or avoid any disadvantage of a temporary nature as a result of making the statement. Under the Evidence Act, 2011,

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

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

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

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

See Sections 29 and 31, Evidence Act, 2011.
The often quoted principle is that:
"It has long been established as a positive rule of Criminal law that no statement by an accused is admissible in evidence against him or her unless it is shown by the prosecution to have been a Voluntary Statement, in the sense that it had not been obtained from him or her either by fear of prejudice or hope of advantage exercises or held out by a person in authority" Per *Lord Sumner in Ibrahim V R (1914)*

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

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

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

original threat or inducement has been dissipated then can the second statement be admitted as a voluntary statement.

The whole of the confession, if relevant, is admissible (if admissible at all), even though some parts are favourable and the other unfavourable. It needs to be emphasized that an accused can be affected only by his or her own confession. The confession by his or her agents, accomplices or strangers would bind the accused, if and only if, such confession was made in his presence or assented to by him or her. But a threat or promise made by a person in authority to a third party in the hope or expectation that it will eventually be communicated to the accused suffices to render the confession inadmissible.

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

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

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

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. What is confession?

3.3.2.1 A Person in authority

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

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

Examples of persons in authority are persons engaged in the arrest, detention, examination, prosecution, or punishment of the accused. That

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

3.3.3 Proof of Voluntariness

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

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

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

Some questions need to be asked:
What should be the proper concern of the Court?
Is it whether or not the statement was made voluntarily or as a result of fear of prejudice or hope of advantage for the purpose of determining its admissibility, or

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

The burden is on the prosecution to prove that;

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

3.3.3.1 Threat, Promises etc

The presence of a threat or promise that was operational and had not been nullified or had not spent its force or dissipated would render

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

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

3.3.3.2 Confession under the old and the new law of Evidence:

The comparative provisions for confession are shown below:-

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

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

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

Activity

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

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

Let us consider some statements and their voluntary nature.

1. Adigwe believes that Ikem was sexually abusing her ward, Juliana. Adigwe dragged her into her room, with a piece of wood in her hand and said:

"If you do not tell me all about it, I will send for the Police"

Julian, kept mute. Adigwe called Oforji, a Police Officer. At the sight of the Police, Julian got frightened and confessed.

2. In a rage, Okafor said, pointing a gun to the accused, "If it was not Assize time. I would chop off your head"

In the above two illustrations, would you say the statements were induced.

Obviously, neither of the statements can be said to be induced by operative threat or coercion. Look at the case of *R v Williams (1968)*

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

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

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

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

evidence of it might be given. Evidence Act, 2004 Section 31 and Evidence Act, 2011, Section 31.

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

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

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

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

R V Deokinanan v R 1968

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

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

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

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

Let us look at additional statements.

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

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

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

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

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

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

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

Acting upon her confession, the Police recovered the brain box from where it was buried in her flower bed behind her bedroom, and other components from the chimney in Paul's house.
At the trial, the persecution seeks to tender in evidence the following:
1. Chinyere's confession
2. The brain box
3. Other components
The defence has opposed vehemently, arguing that the confession is involuntary or oppressive. Furthermore, as a bad tree cannot bear good

fruits, the brain box and other components which are products of involuntary and inadmissible evidence are also prejudicial and therefore inadmissible.

Fine argument; is it not?
Clearly Chinyere was coerced to make her statement: Such a coercion amounts to oppressive behaviour or improper inducement and capable of rendering the confession involuntary and inadmissible.

Although a confession is inadmissible by reason of threat, evidence may be given that in consequence of what the accused has said, some property (to wit: the brain box and other components), was found or other facts discovered. (*Re v Gould, 1840. R v barker (1941) R V Jonkins, 1822)*
Thus the fact that the brain box was found in the flower bed beside Chinyere's bedroom may be incriminating but may not by itself be sufficient to justify its admissibility or inadmissibility. For one thing, there is no evidence that Chinyere hid it there after it was stolen. But when, in addition, it is known that she had disclosed the where-about of the property (even though in an involuntary statement), the probative value becomes sufficiently strong to justify its admissibility.

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

There has been a line of cases since the 18th century where confessions were held inadmissible because they were improperly induced whereas the evidence of the fact that as a result of the confession, stolen property were found with the accused: *(R V Richards, 1832, (R V Warwickshal – 1983)* or in a pond: *R V Gould; 1840).* These cases may preferably go the same way under the Evidence Act, 2011.

3.3.4 Valid Attacks on Confession

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

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

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

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

(a) You need not say anything to incriminate yourself; (b) It was better for you to speak the truth. (c) The Bank CEO said to his accountant:
"if you do not tell me all about it, I will send for the police.

The accountant said nothing until after the arrival of the police.
The investigating police officer (IPO) said to the suspect during interrogation: "If you fail to answer my question, you will be prosecuted, and he made certain admissions.

Read up *Deokinan v R (1968) and R v Williams (1968).*
Where an accused refuses to answer a question because it might tend to incriminate him and he is then improperly compelled to answer it, his answer is involuntary.

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

Adekanbi v AG (WN (1960).
Confessional Statement was tendered through the Accused during cross examination and was wrongly admitted. For this reason the conviction was quashed on appeal on the ground that the prosecution had not proved that it was made voluntarily.

Inusa Saidn v The State (1984)
The Confessional statement which was signed by its maker was held admissible unless it was obtained by force, trick, fraud, threat or inducement. In *R v Omokaro (1947)* in a free and voluntary confession of guilt by the accused, if it is direct and positive, duly made and satisfactorily proved, is sufficient to warrant a conviction, even if there is no corroborative evidence. In the current law, what may vitiate a confession is oppression or inability to prove beyond reasonable doubt

that the statement was obtained in a manner not inconsistent with the provisions of the Evidence Act. *Anthony Ejinima v The State (1991)*
E was charged with murder of 3 children, Admitted killing the 3 children, but denied at the trial and said armed robbers killed the children. The Supreme Court received the confession, dismissed the appeal and adopted the test laid down in R V. Sykes (1913), namely:

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

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

3.3.4.1 Limits of Improper Inducement

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

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

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

3.3.4.2 Other safe Guards

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

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

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

3.4 Summary

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

3.5 References/Further Reading/Web Sources

Aguda T. (2007) 14th Ed. The Law of Evidence Spectrum book Ltd; Ibadan

FGN. The Evidence Act, 2011.

3.5 Possible Answers to Self-Assessment Exercises

Confession is an admission tending to establish the guilt of a person charged with a crime . It is an acknowledgement in express words by an accused of the truth of the main fact charged or of some essential part of it.

UNIT 4 THE JUDGE RULES

Unit structure

4.1 Introduction

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

4.2 Learning Outcomes

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

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

4.3 The Judge Rules

4.3.1 Background

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

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

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

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

4.3.2 The Rules:

In Nigeria there are nine main rules, namely:

(a) Rule 1: What Questions may be asked

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

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

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

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

(b) Rule 2: When to caution.

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

(c) Rule 3: Persons in Custody

"Persons in custody should not be questioned without the usual caution being first administered."

(d) Rule 4: Voluntary Statement

"If the prisoner wishes to volunteer any statement, the usual caution should be administered."

(e) Rule 5:

(i) Formal Caution

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

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

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

(ii) Short Caution

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

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

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

(f) Rule 6: Statements Prior to Caution

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

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

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

(h) Rule 8: Persons Jointly Charged

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

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

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

(i) Rule 9: Statements

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

The judges rules do not apply to interrogation of members of the Armed and the Police.

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

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

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. State one of the Judge's rule?

4.3.3 Application of the Judges Rules

R v Payne (1963)
Following a car crash, P. was taken to the police station. He was asked and he agreed to be medically examined by the police doctor. Police informed P that it would be no part of the doctor's duty to examine him in order to give an opinion as to his unfitness to drive.

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

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

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

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

R.V. Stewart (1970)
A constable disguised as a prisoner and was put in the cell next to the accused person charged with breaking for purpose of eavesdropping. The prosecution sought to put in evidence, the evidence of over-hearing of a discourse about the concoction of an alibi and court held he was entitled.
In the same way, fingerprints obtained from the accused person with or without caution can be put in evidence, if it is relevant, unless it was obtained oppressively, by false representation, bribe or threat *(Callis v Gunn, 1963).*

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

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

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

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

As a matter of practice, the Police Officer accepting a confession is obliged to take the accused and the statement before a superior police

officer (i.e. an Assistant Superintendent or above) as early as possible. The Superior Police Officer is required to satisfy him or herself that the statement is free and voluntary. If the police officer is satisfied, he must ask the accused if he made the statement and whether it is true. If the accused admits, the superior police officer endorses and signs the confession to that effect.

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

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

4.4 Summary

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

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

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

4.5 References/Further Reading/Web Sources

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

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

4.6 Possible Answers to Self-Assessment Exercises

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

UNIT 5 EXAMINATION OF WITNESSES

Unit structure

5.1 Introduction

The provisions concerning the examination of witnesses can be found in Part XII of the Evidence Act. The Act as well as the law and practice in operation for the time being combine to regulate the order in which witnesses are produced and examined in a judicial proceeding. In this unit, you shall learn the order in which a witness is examined in the course of trial and the rules guiding the conduct of the different examinations.

5.2 Learning Outcomes

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

- Differentiate between Examination –in-chief, Cross-Examination and Re-Examination.
- Narrate the order of examinations Formulate what questions may be asked
- Distinguish what questions may not be asked?
- Give examples of circumstances when a party may discredit its own witness

5.3 Examination of Witnesses

5.3.1 Examinations

You are now about to learn the questioning of a witness under oaths or affirmation, the order in which witnesses are called and examined the rules

Procedure
To commence a criminal proceeding, a charge or information must have been filed and a copy served on the accused. At the trial date, the court is set, the accused is called into the dock; he is asked if he understands English language or language of the court and of the charge. If not, an interpreter is provided. The charge or information is read aloud to the accused and explained.

When the accused admits that he has understood the charge, he elects trial, (in appropriate case) and pleads, where he or she submits to court's jurisdiction, guilty or not guilty. He may keep mute to malice, and the court enters a plea of not guilty.

5.3.1.1 Examination in Chief:

The court is cleared out of sight and hearing of all the witnesses in the case-S212. The Prosecution opens his case; he may or may not make any opening address. He calls his first witness. The initial examination of a witness by the party who calls him is called "Examination – in – chief". Evidence Act 2011, Section 214.

The witness takes the oath by the Holy Bible, The Qur'an, or Iron or affirms as the case may be Ss 205-208 The Prosecutor examines the witness in chief, eliciting from the witness all such facts as tend to prove his case and which are within the personal knowledge of the witness; he guides the witness against irrelevancies or facts which are inadmissible.

5.3.1.2 Leading Questions
Leading questions are questions which suggest their own answers or assume the existence of disputed facts which have not yet been proved in evidence. They are not generally allowed in examination-in-chief. (Section 221, Evidence Act) Thus you do not ask:

- Was the Accused at Ibadan on the day in question?
- Was the Accused driving on the right side of the road?

Rather, you ask: By which side of the road was the accused driving?
You may ask where was the Accused on the day in question?.
Questions which require answers "Yes" or "No" are most likely to be leading question.

This is not to say that every leading question is bad. A Leading question may be permissible if:

- It relates merely to introductory matters or identification
- It is a fact which is not in dispute
- It is a fact/ which in the court's opinion, had already been proved or put in evidence by the other.

- It is necessary,
- If the witness is forgetful or hostile, the court may allow him to refresh his memory of the subject matter on which he is about to testify or give evidence by allowing him to look at a document made by the witness himself or by someone to the knowledge of the witness and while the matters recorded were fresh in the recollection of the witness (say within the week/ or two of the events).
- It is necessary to lead the mind of the witness to the subject matter on which he is called to give evidence. See section 220 (3)

Self-Assessment Exercise

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. What is a leading question?

5.3.1.3 Object of Examination- in-Chief

The object of Examination –in-chief is to adduce all the material facts as far as the witness can remember and in his own words to establish the party's case – not necessarily all that the witness knows.

Self-Assessment Exercise

What is a leading question? When is it permissible in a judicial proceeding, if at all?

5.3.2 A Hostile Witness

A party who calls a witness holds out that the witness he calls or intends to call is a person to be believed on oath or affirmation. It is thus contradictory in terms to adduce evidence to impeach or discredit a party's own witness, and hence give evidence of bad character. See Evidence Act section 230.

A situation may however arise, where the witness has been bought over or afflicted with malice or annoyance and in the judge‘s opinion shows animus against the party that called him. Accordingly, he may be induced to withhold facts, which are favourable to his party, give contradictory evidence of the party or show a reluctance to tell the truth. One who does this becomes a "hostile witness" If this behaviour

becomes apparent, the party that called him may ask for and the judge may grant leave to treat him as a hostile witness. The judge will refuse leave to treat the witness as hostile unless he is convinced that the witness is biased or poised to damage the party who called him or her. The party producing the witness may thereby be entitled to discredit or contradict the witness. To this end, the witness may be asked if he has made any statement at other times - a statement inconsistent with his present testimony. Before doing so, the party would have established the circumstances or occasion when the statement was made.

The witness must be asked whether or not he made such statement and if he denies, it may be proved that he did. The hostile witness may also be cross examined as to his previous statement in writing or give a contradictory proof. The judge may request the production of the statement for his inspection and use as he may think fit.

The evidence so adduced is not a proof of the facts contained in it. Its purpose is merely to discount the hostile witness.

Self-Assessment Exercise

1. What do you understand by the term 'hostile witness?
2. State the rules governing the examination of such witness.
3. Distinguish between a "hostile witness" from the witness, who is merely "unfavorable".

5.3.3 Cross Examination- Sections 216, 217, 219, 232, etc

On completion of the examination – in – chief, the witness is cross-examined by the other side. The examination of a witness, by a party other than the party who calls him is called: 'cross-examination'. The objectives of cross examinations are:

- To test the accuracy of the evidence-in-chief.
- To weaken or destroy examination-in-chief, if possible.
- To obtain evidence that will assist the party's own case by the testimony of the opponent's witness.
- To show that the witness is unreliable and for that purpose may attack his testimony or credibility.
- To obtain necessary facts that may be favourable to a party's case or to weaken or dilute the strength of evidence –in-chief.

The scope of cross-examination is wider than that of examination-in-chief. Cross examination is not limited to questions raised in examination-in-chief; leading questions are allowed as are questions designed to discredit the character of the witness. One may be cross

examined as to previous statement one has made relative to the subject matter

Who may be cross examined? By whom?
The witness who may be examined includes

- The witness who has been examined-in-chief
- A sworn witness, whether or not examined in chief
- Witness as to character
- Witness called by co-accused
- The accused where he testifies

Some witnesses may or may not be cross examined. Examples are witnesses who are:

- called by a genuine mistake
- unable to give any evidence material to the case.

The normal procedure is for the adverse party to cross-examine the witness called by the other party. Where there is more than one plaintiff, defendant or accused, each must be given opportunity to cross examine.
Each of the accused persons is allowed to cross-examine any witness called by co-accused. Where an accused gives evidence in chief, every co-accused has right to cross-examine him.

The witness under cross examination may be asked question to:

- Test his accuracy or veracity
- Discount his identify and position in life
- Test his qualification or any special ability which he claims in the case of witness Injure his credit as a truthful witness.

Where a question during cross examination is directed at a witness's credit; whatever answer the witness gives is final. No evidence in rebuttal is admissible. These are the following exceptions to this general rule, when rebuttable evidence may be allowed.

(a) Where a witness denies bias or partiality
(b) If the witness denies a previous inconsistent statement
(c) If the witness denies a previous conviction
(d) If the witness denies that he is a notorious liar or has such a generally bad reputation for veracity that he is not to be believed on oath

Activity
React to the Prosecution's proposal to call Adams to testify as to the charge before the court and the Accused's objection and intention to call witnesses to prove that Adam's statement on Oath is not to be believed.
In introducing Adams as a witness the prosecution represents to the Court that Adams is a witness to be believed on oaths or affirmation. According to Lord Goddard, CJ,:

"(The fact) that witnesses can be called to say that they would not believe a particular witness called by the other side, whether for the persecution in a criminal case or for a party in a court case, is in the opinion of the court, undoubted. "

That credit of the witness may be impeached by the opposite side, by the evidence of persons who swear that they, from that knowledge of the witness, believe him to be unworthy of credit upon his or her oath.
Such persons may not upon their examination –in-chief give reason for their belief but they may be asked that reason in cross examination and their answers cannot be contradicted"

Limitation on the scope of Cross-Examination
Cross examination is not a channel for:

(1) Questions which are intended to insult or annoy either the witness or any other person
(2) Questions put forward only to impugn the witness's character
(3) Affirmative evidence to contradict answers given in cross examination to questions directed only to credit.
(4) Questions which affect the credibility of a witness by attacking his character, but which are not otherwise relevant to the actual inquiry unless the imputation conveyed by the question is well founded or true.
(5) Questions relating to matters so remote in time or of such a character that they would not materially affect the credibility of the witness.

5.3.4 Re- Examination

When the cross examination is completed, the party who called the witness has the right to re-examine him. Where a witness has been cross-examined and is then examined by the party who called him, such examination is called 're-examination': Evidence Act, Section 214 (3).
A re-examination follows a cross-examination. The latter follows the examination–inchief. Re-examination is the right of the party that called the witness and it exists once there has been cross examination.

A re-examination is confined only to matters arising in cross-examination. New evidence may not be introduced without the leave of court. Leading questions are not also allowed.

The object of re-examination is to repair, as much as practicable, the damage done during cross examination and to clear up any misunderstandings of ambiguities that may have arisen during cross examination.

Part XII of the Evidence Act makes provision for examination of witness. There are three types of examination: Examination–in-chief, cross – examination and re-examination. You should remember the order in which they are called, their objectives and limitations.

5.4 Summary

In this unit, you learnt about examination of witnesses in proceedings, who a hostile witness is and the process of treating him as such. Certain questions may not be asked during examination in chief and if asked, need not be answered. No such restriction applies in cross examination. A re-examination is confined to issues arising from the cross-examination that precedes it. If new matters are introduced, the leave of court must first be obtained and the other party must be granted opportunity to cross examine on it.

5.5 References/Further Reading/Web Sources

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5.6 Possible Answers to Self-Assessment Exercises

Leading questions are questions which suggest their own answers or assume the existence of disputed facts which have not yet been proved in evidence.